017

IN THE SUPREME COURT OF FLORIDA

CASE NO. 88,116

STATE OF FLORIDA,

Petitioner,

vs.

DIANA WOODLEY,

Respondent.

AMICUS CURIAE BRIEF OF THE FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

On review from a certified question
from the Third District Court of Appeal
and a judgment granting Rule 3.850 relief

BEVERLY A. POHL
Suite 900
100 Northeast Third Ave.
Fort Lauderdale, FL 33301
(954) 767-8909

BRUCE S. ROGOW
BRUCE S. ROGOW, P.A.
2441 S.W. 28th Avenue
Fort Lauderdale, FL 33312
(954) 767-8909

Counsel for Florida Association of
Criminal Defense Lawyers

STATEMENT OF THE INTEREST OF THE *AMICUS CURIAE*

On June 7, 1996, with the consent of all parties, this Court granted the motion of the Florida Association of Criminal Defense Lawyers (FACDL) to file an *amicus curiae* brief in support of respondent.

The FACDL is a not-for-profit corporation formed to assist in the reasoned development of the criminal justice system in our state. The founding purposes of the FACDL include the promotion of study and research in criminal law and related disciplines, the promotion of the administration of criminal justice, fostering and maintaining the independence and expertise of the criminal defense lawyer, and furthering the education of the criminal defense community through meetings, forums, and seminars. Approximately 1,000 FACDL members provide legal representation to those facing criminal prosecution.

This FACDL brief is submitted in the interest of those persons who were convicted of attempted felony murder before State v. Gray, 654 So. 2d 552 (Fla. 1995), held that the marriage of "attempt" and "felony murder" is a logical impossibility due to conflicting "intent" requirements. The FACDL's interest in the *reasoned* development of the criminal law leads to support of respondent's argument that Gray be applied retroactively.

TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

TABLE OF AUTHORITIES

CASES **PAGE**

TABLE OF AUTHORITIES (continued)

CASES **PAGE**

CONSTITUTIONAL PROVISIONS

STATUTES / RULES

STATEMENT OF THE CASE

Respondent Diana Woodley was convicted of, *inter alia*, attempted felony murder. The conviction was affirmed on direct appeal. Woodley v. State, 638 So. 2d 956 (Fla. 3d DCA 1994). Following this Court's decision in State v. Gray, 654 So. 2d 552 (Fla. 1995), which abolished the crime of attempted felony murder, Woodley sought to have her conviction vacated in a Rule 3.850 proceeding. Relief was denied, and on appeal the Third District Court of Appeal reversed, holding that Gray should be retroactively applied and that Woodley's attempted felony murder conviction should be set aside. Woodley v. State, 673 So. 2d 127 (Fla. 3d DCA 1996). The district court certified a question of great public importance: whether Gray should be applied retroactively to those whose convictions were final when Gray was decided? The case is before this Court on the State's petition for discretionary review.

STATEMENT OF THE FACTS

Amicus curiae the Florida Association of Criminal Defense Lawyers adopts the Statement of the Facts as presented in Respondent's Answer Brief.

STATEMENT OF THE ISSUES

I.

[THE CERTIFIED QUESTION]: SHOULD STATE V. GRAY, 654 SO. 2D 552 (FLA. 1995), HOLDING THAT ATTEMPTED FELONY MURDER IS NOT A CRIME, BE APPLIED RETROACTIVELY TO OVERTURN THE CONVICTION OF A PERSON CONVICTED OF THAT CRIME, AFTER THE CASE HAS BECOME FINAL ON APPEAL?

II.

DOES THE CONTINUED INCARCERATION OF PERSONS CONVICTED OF A CRIME ABOLISHED BECAUSE IT IS A "LOGICAL ABSURDITY" VIOLATE DUE PROCESS OF LAW AND UNDERMINE PUBLIC CONFIDENCE IN THE ADMINISTRATION OF JUSTICE?

SUMMARY OF THE ARGUMENT

The logical underpinnings of the State v. Gray decision, abolishing the crime of attempted felony murder, compel its retroactive application to all those convicted of that crime. Any arguments to the contrary must depend on legal fictions no less acceptable than those used to support the now-rejected (pre-Gray) Amlotte view. Amlotte v. State, 456 So. 2d 448 (Fla. 1984). When, as here, a substantive crime has been exposed as "indefensible" and a "logical absurdity," and therefore abolished, there can be no principled basis for the continued incarceration of persons convicted of that crime.

The retroactivity decision we urge places due process of law and integrity in judicial decisionmaking above the State's asserted concern for the administrative difficulty in conducting retrials on lesser offenses. In this instance, with substantial liberty interests at stake, administrative inconvenience to the State should be irrelevant to the balancing of competing interests.

The decision below was correct, whether viewed through the prism of common sense, or through the step-by-step retroactivity analysis described in Witt v. State, 387 So. 2d 922 (Fla. 1980). Diana Woodley and others similarly situated should have their convictions for attempted felony murder vacated, with remand proceedings to follow in accordance with this Court's decision in State v. Wilson, ___ So. 2d ___, 21 Fla. L. Weekly S292 (Fla. 1996).

ARGUMENT

I.

ANY CONVICTION FOR ATTEMPTED FELONY MURDER MUST BE SET ASIDE, WHETHER PRE- OR POST-*STATE V. GRAY*

This case, as did State v. Gray, 654 So. 2d 552 (Fla. 1995), requires this Court to confront the question of whether a logically insupportable legal fiction (*i.e.*, that one can attempt, and therefore intend, to commit a crime -- felony murder -- which is defined by its very *lack* of intent) can support a felony conviction and the continued incarceration of those convicted of that "crime." The unanimous answer in Gray, involving a direct appeal of such a conviction, was "no." Any contrary outcome in this case (involving a Rule 3.850 petitioner whose attempted felony murder conviction was final when Gray was decided) would, ironically, require the Court to fashion yet another fiction to escape the force of the Gray logic which compelled that Amlotte v. State, 456 So. 2d 448 (Fla. 1984) (approving the crime of attempted felony murder), be overruled. Because Gray was an analytically principled substantive criminal law decision (not merely a new rule of procedure, or Legislative repeal of a statute), one cannot constitutionally draw a line dividing pre- and post-Gray attempted felony murder convictions and conclude that Gray's sound principles apply to one group, and not to the other.[1]

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[1] Compare Article X, § 9, Fla. Const., cited by the State (Petitioner's Brief at 9-10), which provides that "[r]epeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed." That provision

The State claims (Petitioner's Initial Brief, pp. 8, 11-12, 21) that non-retroactivity is compelled by two decisions of this Court: first, by Gray itself, which announced that "[t]his decision must be applied to all cases pending on direct review or not yet final," 654 So. 2d at 554; and also by the recent decision in State v. Wilson, ___ So. 2d ___, 21 Fla. L. Weekly S292 (Fla. 1996), which in discussing whether lesser included offenses could be retried after a remand from a reversal of an attempted felony murder conviction observed that "attempted felony murder was a statutorily defined offense . . . for approximately eleven years. It only became 'nonexistent' when we decided Gray. [I]t was a valid offense before Gray . . ."). But neither Gray nor Wilson presented the post-conviction retroactivity question in this case, and the quoted portions do not carry the weight assigned them by the State.

Gray's quoted statement confirming its application to "pipeline" cases does not preclude a finding, in the proper case, that the decision is entitled to full retroactive

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does not answer the question of how the law treats an invalid criminal statute. The Legislature may repeal criminal statutes at its whim, making yesterday's (valid) crime permissible conduct today. The Legislature cannot, however, create crimes which violate constitutional guarantees; nor does Article X, § 9 sustain convictions, if *invalid* criminal statutes are repealed. Here, we address a crime whose logical (and thus constitutional) underpinnings are invalid. Thus, Article X, § 9 has no application where the judiciary has abolished a crime because its purported definition makes no sense. The State's Article X, § 9 "repealed statute" analogy is flawed because unlike Legislative repeal which may reflect nothing more than a political choice about what conduct should henceforth be criminal, when a *court* invalidates a statute the statute is necessarily deemed invalid from its inception. See Martinez v. Scanlon, 582 So. 2d 1167, 1174 (Fla. 1991) ("a penal statute declared unconstitutional is inoperative from the time of its enactment, not only and simply from the time of the court's decision").

application. The issue of Rule 3.850 retroactivity was simply not before the Court in Gray. Cf. Bass v. State, 530 So. 2d 282 (Fla. 1988) (holding prior decision in Palmer v. State, 438 So. 2d 1 (Fla. 1983), retroactive on policy grounds, despite the fact that in the original Palmer decision the Court did not state whether it would be retroactively applied). Gray's "all cases pending on direct review or not yet final" language does nothing more than confirm that the general retroactivity rule of Smith v. State, 598 So. 2d 1063 (Fla. 1992), is to be applied, *vis a vis* "pipeline" cases.[2]

Wilson's seeming acquiescence to the notion of the pre-Gray validity of attempted felony murder is more troubling, but not fatal to respondent's position in this case.[3] Most significantly, in Wilson the Court was not required to decide whether a pre-Gray attempted felony murder conviction should be set aside. The only issue was whether, when an attempted felony murder conviction is vacated, the State could re-try the defendant on lesser offenses. Thus, it would be an unfair application of Wilson to

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[2] In Smith v. State, 598 So. 2d 1063, 1066 and n. 4 (Fla. 1992), this Court adopted, on State constitutional grounds, the federal retroactivity rule of Griffith v. Kentucky, 479 U.S. 314, 107 S.Ct.708, 93 L.Ed.2d 649 (1987). Thus, ordinarily, as stated in Gray, changes in the criminal law are applied prospectively, and to those cases pending on direct review or not yet final at the time of the decision announcing the new rule. See also Wuornos v. State, 644 So. 2d 1000, 1008 n. 4 (Fla. 1994) ("We read Smith to mean that new points of law established by this Court shall be deemed retrospective with respect to all non-final cases unless this Court says otherwise.").

[3] Indeed, Chief Judge Schwartz' reading of State v. Wilson is not unlike the State's, in that he called Woodley's survival a "very dubious assumption" in light of Wilson. Miller v. State, ___ So. 2d ___, 21 Fla. L. Weekly D1863, D1864 (Fla. 3d DCA 1996).

deem it's "valid offense before Gray" language dispositive in this case. Assuming that neither Gray itself nor Wilson ends the analysis, we move on to the application of the agreed-upon standard for retroactivity analysis, from Witt v. State, 387 So. 2d 922 (Fla. 1980).

The three-part Witt test was recently reaffirmed in State v. Callaway, 658 So. 2d 983, 985-986 (Fla. 1995):

> [T]he fundamental consideration is the balancing of the need for decisional finality against the concern for fairness and uniformity in individual cases. Witt, 387 So. 2d at 929. Under Witt, a new rule of law may not be retroactively applied unless it satisfies three requirements. The new rule must (1) originate in either the United States Supreme Court or the Florida Supreme Court; (2) be constitutional in nature; and (3) have fundamental significance. Witt, 387 So. 2d at 929, 930.

Callaway, 658 So. 2d at 986. "Fundamental significance" is typically found in "two broad categories" of cases:

> (a) those decisions . . . "which place beyond the authority of the state the power to regulate certain conduct or impose certain penalties;" and (b) decisions . . . which "are of sufficient magnitude to necessitate retroactive application" under the threefold test of Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967), and Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965). Witt, 387 So. 2d at 929.

Id. at 986-987.[4] For the second category of cases, Stovall, Linkletter, and Witt require analysis of three "essential considerations":

> (a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (c) the effect on the administration of justice of a retroactive application of the new rule.

Witt, 387 So. 2d at 926.

In view of those factors, the Witt Court acknowledged that principled exceptions to the general rule of non-retroactivity must be permitted:

> The doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring fairness and uniformity in individual adjudications. Thus, society recognizes that a sweeping change of law can so drastically alter the substantive or procedural underpinnings of a final conviction and sentence that the machinery of post-conviction relief is necessary to avoid individual instances of obvious injustice. Considerations of fairness and uniformity make it very "difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases."

Id. (internal citation and footnote omitted) (emphasis supplied). This case, and the serious

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[4] Witt contrasted "jurisprudential upheavals" warranting retroactive application with "evolutionary refinements in the criminal law, affording new or different standards for the admissibility of evidence, for procedural fairness, for proportionality review of capital cases, and for other like matters." 387 So. 2d at 929. Such "refinements" in the law are not applied retroactively, because a desire for uniformity in those areas does not outweigh the need for finality of judgments. Id.

liberty interests at stake for all those who stand convicted of attempted felony murder, make State v. Gray a candidate for retroactivity, under either of the categories of cases of "fundamental significance." *Supra*, p. 7.

A guiding premise in this case must be that "one may never be convicted of a nonexistent crime . . . ." Achin v. State, 436 So. 2d 30 (Fla. 1982); accord Adams v. Murphy, 653 F.2d 224 (5th Cir. 1981) ("Nowhere in this country can any man be condemned for a nonexistent crime"). The logical fallacies which make attempted felony murder untenable today are equally applicable to pre-Gray convictions. Retroactivity is compelled both by common sense, a sense of fairness, and the Witt analysis.

This case easily satisfies the first two elements of the Witt test. 387 So. 2d at 929-930. (1) Respondent seeks retroactive application of new law originating in the Supreme Court of Florida; and (2) Gray's new law is constitutional in nature, because the Due Process clauses of the Florida Constitution (Art. I, § 9) and of the Constitution of the United States (Amend. 14), do not countenance conviction and incarceration for conduct which is not criminal. The State denies that Gray has constitutional significance (Brief of Petitioner, pp. 9, 15, 20), but where a substantive crime has been abolished because an intrinsic definition flaw permitted the State to establish intent to kill without proof of that intent, the constitutional "liberty" interests at stake are obvious. The Third District was correct in its decision below, concluding that "Gray is constitutional in nature because it affects the defendant's due process rights and liberty interests since the crime with which

she was convicted is nonexistent." Woodley, 673 So. 2d at 128.[5] The State's attempt to frame attempted felony murder as a mere creature of statute, and to claim that the crime was "reinstated by the Legislature in a newly enacted statute, sec. 782.051, Fla. Stat.," (Brief of Petitioner, p. 15) is disingenuous and erroneous. Section 782.051 (Felony causing bodily injury) does criminalize felonious attempts which cause injury to another, but it cannot fairly be read to encompass attempted felony murder. And, if it did, the admixture of "attempt" and "felony murder" would simply invalidate the statute, under the authority of Gray.

That leaves the third remaining Witt element: (3) whether Gray effected a change in the law of "fundamental significance." 387 So. 2d at 930. Under either category of fundamentally significant cases described above, *supra* p. 7, the answer is "yes."

The FACDL submits that this case falls within the first and most compelling of the two broad categories of changes in decisional law which have warranted retroactive application to convictions which are otherwise final, *i.e.,* "those changes of law which

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[5] Although it was not discussed in Gray, Amlotte's "presumed intent" for attempted felony murder also violated the well-established constitutional prohibition against irrebuttable presumptions in the criminal law. Cf., State v. Smith, 638 So. 2d 509, 511-513 (Fla. 1994) (Kogan, J., concurring) (discussing when "reduced intent" crimes violate due process); see also Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979) (jury instruction with conclusive presumption as to an essential element of a crime is reversible error); Morissette v. United States, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1951) ("A conclusive presumption which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense."). Clearly, Gray implicates constitutional concerns.

place beyond the authority of the state the power to regulate certain conduct. . . ." Witt, 387 So. 2d at 929. Because Gray held that attempted felony murder is no longer a crime -- because the logical underpinnings of the "crime" are, as Justice Overton said in his Amlotte dissent, "indefensible" and a "logical absurdity," 456 So. 2d at 450 (Overton, J., dissenting) the decision has fundamental significance to *all* defendants convicted under the Amlotte reasoning, and warrants retroactive application on a motion brought under Rule 3.850.

> Quite clearly, the main purpose for Rule 3.850 was to provide a method of reviewing a conviction based on a major change of law, where unfairness was so fundamental in either process or substance that the doctrine of finality had to be set aside.

Witt v. State, 387 So. 2d at 927 (emphasis supplied); compare, Davis v. United States, 417 U.S. 333, 346-347, 94 S.Ct. 2298, 2305 (1974) (if "conviction and punishment are for an act that the law does not make criminal. . . such a circumstance 'inherently results in a complete miscarriage of justice' and 'present(s) exceptional circumstances' that justify collateral relief under § 2255.") (internal citation omitted).[6] The substantive unfairness of Woodley's conviction satisfies both Witt and Davis.

Alternatively, an analysis of Gray under the three interrelated Stovall /

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[6] In Witt, the Supreme Court disapproved of the aspect of Davis which permitted federal post-conviction review of a "non-constitutional change of law resulting from an inconsistent opinion by another panel of the same court of appeals." 387 So. 2d at 928. We cite Davis only for its often-quoted "miscarriage of justice" passage.

Linkletter factors for cases of "fundamental significance" also compels its retroactive application. The State argues that Gray was a mere "evolutionary change" in the law, because the "purpose of the rule announced in State v. Gray is to clarify the internal inconsistency of the charge of attempted felony murder." Brief of Petitioner, p. 17. But Gray went beyond "clarifying" the inconsistency; it declared the inconsistency to be fatal to the crime. In order to know the real "purpose to be served by the new rule," the first Stovall / Linkletter factor, we begin by looking at the old rule under Amlotte, 456 So. 2d 448. There, courts had to stretch credulity to justify finding the intent to kill in a person who only attempted to commit some other felony "which could, but does not, cause the death of another." 456 So. 2d at 449. Attempted felony murder, as defined, transformed the intent and attempt to commit one crime to the intent and attempt to commit murder -- a different, more serious, and uncontemplated crime. The stated reason for overruling Amlotte in State v. Gray, 654 So. 2d 552, and for rejecting that unwarranted leap of logic and law was to correct an "error in legal thinking," and thus to ensure "the integrity and credibility of the court." 654 So. 2d at 554.

Those laudable goals of integrity and credibility can only be achieved if all convictions based on the prior faulty reasoning are vacated. To correct an error in the fundamental aspect of criminal law (*i.e.*, whether a crime exists), is not an "evolutionary refinement in the criminal law," Witt, 387 So. 2d at 929, as claimed by the State. Brief of Petitioner, p. 18. Either there is a logically definable crime of attempted felony murder, or there is not. Gray says there is no such crime. Therefore, no one clearly

convicted of that "crime" should stand convicted.[7] Thus, under the "purpose of the new rule" prong of the Stovall / Linkletter test, the balancing clearly favors retroactive application of Gray, because its rejection of flawed prior reasoning, and its abolition of a crime with serious penalties, constitutes a substantive "jurisprudential upheaval" meriting Rule 3.850 relief for one convicted of and incarcerated for now-recognized non-criminal conduct.

The next factor to be considered is the extent to which courts have relied on the old rule. The law under Amlotte survived eleven years. In the continuum of the law, that span, and thus the extent of reliance on the old rule, was not long. See Callaway, *supra*, 658 So. 2d at 987 (calling a six-year period of reliance on a prior rule "only a short period of time"). We do not know how many defendants were convicted of attempted felony murder during that eleven-year period, but given the nature of the Gray analysis -- acknowledging that the old rule was analytically dishonest -- the number of those affected is irrelevant to the retroactivity question presented in this case. In Gray, respect for precedent was outweighed by the Court's self-imposed duty to correct "an error in legal thinking." *Supra*, p. 11. Misguided reliance on erroneous legal thinking is distinguishable from reliance on a prior statute or rule of procedure. The latter categories do not require retroactive application when the rule is changed; the former does, as a

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[7] Cf. Heflin v. State, 595 So. 2d 1018, 1019 (Fla. 2d DCA 1992) (conviction must be vacated on motion to correct illegal sentence where statute defining the crime was held unconstitutional).

matter of systemic "integrity" and "credibility." The relatively brief "Amlotte era" was, in the temporal spectrum of our State law, a momentary lapse of legal good judgment. Holding on to a pre-Gray conviction for attempted felony murder, solely on the basis that courts then *thought* the conviction was valid, would be as illogical as Amlotte itself.

Finally, this Court must consider what effect a finding of retroactivity would have on the "administration of justice." Witt, 387 So. 2d at 926. This factor looks to the impact on the court system -- whether convictions will have to be reversed, whether re-trials will be required, whether the State will be forced to marshall stale evidence in an attempt to correct the newly recognized error. See Callaway, 658 So. 2d at 987. In this case, the Court is asked only one question: should convictions for attempted felony murder, such as Woodley's, which became final before Gray, receive the benefit of retroactive application of Gray? Since no inference or judgment is required to determine that the jury convicted Woodley (and others similarly situated) of a crime which cannot be logically defined, no amount of administrative inconvenience can justify allowing those convictions to stand.[8]

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[8] We acknowledge that there is a heirarchy of persons who might claim that Gray requires post-conviction relief, for whom the issues of reversal, remand, and scope of retrial are not identical. For example,

► those, like Woodley, charged with and convicted of only attempted felony murder; jury was instructed on "lessers";

► those charged with murder or attempted murder, but explicitly convicted of attempted felony murder;

In sum, balancing the Witt factors -- finality vs. fairness -- favors retroactive application of Gray.

CONCLUSION

For the foregoing reasons, the Florida Association of Criminal Defense Lawyers urges this Court to affirm the decision below, and to hold that State v. Gray will have retroactive application to those convicted of attempted felony murder, whenever that conviction was obtained. Due process of law and respect for the administration of criminal justice demand that no person in this state should be convicted of or incarcerated for a crime which cannot logically be defined. Diana Woodley's Rule 3.850 request to vacate an otherwise final conviction for attempted felony murder should be granted, on the authority of State v. Gray.

► those convicted (generally) of attempted murder, but the jury was instructed on attempted felony murder;

► those who plead guilty to either attempted felony murder or to attempted murder.

Only the first scenario (Woodley's) need be resolved in this case. Other scenarios will undoubtedly be presented in other cases, but those issues are not squarely presented here, and need not be resolved in order to find in Woodley's favor.

Respectfully submitted,

BEVERLY A. POHL
Florida Bar No. 907250
100 N.E. Third Ave.
Suite 900
Ft. Lauderdale, FL 33301
Ph: (954) 767-8909
Fax: (954) 764-1530
and

BRUCE S. ROGOW
BRUCE S. ROGOW, P.A.
Florida Bar No. 067999
2441 S.W. 28th Ave.
Ft. Lauderdale, FL 33312
Ph: (954) 767-8909
Fax: (954) 764-1530

Counsel for Florida Association of Criminal Defense Lawyers
in support of Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to (1) CONSUELO MAINGOT, Office of Attorney General, Dept. of Legal Affairs, The 110 Tower, 110 S.E. 6th Street, Fort Lauderdale, FL 33301, and (2) ROBERT KALTER, Assistant Public Defender, 1320 N.W. 14th St., Miami, FL 33125-1626, by U.S. Mail this 10th day of September, 1996.

BEVERLY A. POHL

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