ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO. 88,116

STATE OF FLORIDA,

Petitioner,

vs.

DIANA WOODLEY,

Respondent.

ON PETITION FOR DISCRETIONARY JURISDICTION FROM
THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

Respondent, DIANA WOODLEY, was the defendant in the trial court and the Appellant in the District Court of Appeal of Florida, Third District. Petitioner, The State of Florida, was the Respondent in the trial court and the Appellee, in the District Court of Appeal. The parties shall be referred to as they stand before this Court. The symbol "R." designates the original record on appeal, and the symbol "T." designates the transcript of the trial court proceedings.

STATEMENT OF THE CASE AND FACTS

Defendant accepts the state's statement of the case and facts as being accurate.

POINT ON APPEAL

WHETHER THE DUE PROCESS CLAUSE OF THE FLORIDA AND UNITED STATES CONSTITUTIONS REQUIRE THAT *STATE V. GRAY*, 654 So. 2d 552 (Fla. 1995), WHICH HOLDS THAT ATTEMPTED FIRST DEGREE FELONY MURDER IS NOT A CRIME IN FLORIDA MUST BE APPLIED RETROACTIVELY.

SUMMARY OF ARGUMENT

The defendant was convicted of attempted first degree felony murder. Subsequent to defendant's conviction, this Court in *State v. Gray*, 654 So. 2d 552 (Fla. 1995), concluded that attempted felony murder was a nonexistent crime since it is logically and legally impossible to commit the crime of attempted first degree felony murder. Since the due process clause of both the Florida and United States constitutions prohibit a defendant from being convicted of a nonexistent crime this Court's decision in *Gray* which declared attempted first degree felony murder a nonexistent crime was constitutional in nature and had fundamental significance and, therefore, must be applied retroactively.

ARGUMENT

WHETHER THE DUE PROCESS CLAUSE OF THE FLORIDA AND UNITED STATES CONSTITUTIONS REQUIRE THAT *STATE V. GRAY*, 654 So. 2d 552 (Fla. 1995), WHICH HOLDS THAT ATTEMPTED FIRST DEGREE FELONY MURDER IS NOT A CRIME IN FLORIDA MUST BE APPLIED RETROACTIVELY.

Count three of the information charged defendant with first degree felony murder. (R. 7). When the judge instructed the jury on the elements of attempted first degree murder the court limited its instructions to the elements of attempted first degree felony murder. The court specifically instructed the jury that they did not have to find that defendant had a premeditated design or intent to kill in order to be convicted of attempted first degree murder. (T. 505-506).[1] After deliberations the jury convicted defendant of attempted first degree felony murder.

On direct appeal point one of defendant's brief raised the issue that her conviction for attempted first degree felony murder was invalid since the state failed to prove that defendant intended to commit first degree murder. The Third District Court of Appeal pursuant to this court's decision in *Amlotte v. State*, 456 So.2d 448 (Fla. 1984) entered a per curiam opinion affirming defendant's conviction for attempted first degree felony murder.

After defendant's appeal was final, this Court in *State v. Gray*, 654 So. 2d 552 (Fla. 1995), receded from its opinion in *Amlotte v. State*, *supra,* and concluded that there is no such crime as

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[1] The prosecutor in its closing argument to the jury also told the jury that in order to find defendant guilty of attempted murder all the jury had to do was find the defendant guilty of attempted felony murder. The prosecutor like the judge specifically told the jury that they did not have to find that defendant intended to kill the victim in order to find defendant guilty of attempted first degree murder. (T. 479).

attempted first degree felony murder. In reaching this conclusion, the Court recognized that it had previously interpreted Florida Statute 777.04(1), which creates the crime of attempt in Florida, to mean that an attempt to commit a specific intent crime requires (1) a specific intent to commit a particular crime and (2) an overt act toward its commission. See *Thomas v. State*, 531 So. 2d 708, 710 (Fla. 1988). The court went on to agree with Justice Overton's dissent in *Amlotte* wherein he stated "Further extension of the felony murder doctrine so as to make intent irrelevant for purposes of the attempt crime is illogical and without basis in law." The court concluded that since an attempt crime requires specific intent and the crime of attempted first degree felony murder eliminates the essential element of intent, it is logically and legally impossible to commit this crime. Based upon this legal reasoning the court receded from its previous holding in *Amlotte* and concluded that attempted first degree felony murder is a nonexistent crime.

After *Gray* was decided defendant filed a 3.850 motion to vacate her attempted felony murder conviction since attempted first degree felony murder is not a crime. The trial court denied the motion and defendant filed an appeal in the Third District Court of Appeal. The Third District Court of Appeal relying on the due process clauses of both the Florida and United States Constitutions concluded that this court's decision in *State v. Gray*, supra, had to be applied retroactively since "Established authority in Florida holds that one cannot be punished based on the judgement of guilt of a purported crime when the offense in question does not exist. Stated differently, it is a fundamental matter of due process that the state may only punish one who has committed an offense." *Woodley v. State*, 673 So.2d 127 (Fla. 3d DCA 1996).

THE DUE PROCESS CLAUSES OF THE FLORIDA AND UNITED STATES CONSTITUTIONS PROHIBIT A DEFENDANT FROM BEING CONVICTED OF A NONEXISTENT CRIME.

As the Third District Court of Appeal correctly recognized "Established authority in Florida holds that one cannot be punished based upon a judgement of guilt of a purported crime when the offense in question does not exist." In *State v. Sykes*, 434 So. 2d 325 (Fla. 1983), this Court recognized that "it is a fundamental matter of due process that the state may only punish one who has committed an offense and an offense is an act clearly prohibited by the lawful authority of the state, providing notice through published laws." See also *Mormon v. State*, 458 So. 2d 88 (Fla. 5th DCA 1984)(Conviction for a nonexistent crime is a due process violation); *Glanton v. State*, 415 So. 2d 909 (Fla. 2d DCA 1982)(Conviction for a nonexistent crime is a nullity.); *Watkins v. State*, 516 So. 2d 1043 (Fla. 1st DCA 1987)(defendant's conviction for attempted uttering of a forged instrument could not be used in calculating guidelines sentence for possession of firearm by convicted felon and failure to appear at jury trial since, subsequent to defendant's conviction for attempted uttering of a forged instrument, this Court held that attempted uttering of a forged instrument was a nonexistent crime.)

The federal courts have also recognized that a conviction for a nonexistent crime is a violation of the due process clause of the United States Constitution. In *Adams v. Murphy*, 653 F.2d 224 (5th Cir. 1981), the defendant was convicted of attempted perjury. Defendant's direct appeal was denied in a per curiam affirmed opinion. Defendant filed a federal habeas corpus petition, and the district court concluded that there was no such crime as attempted perjury in Florida and granted the writ on due process grounds. The former Fifth Circuit Court of Appeal questioned whether there was such a crime as attempted perjury in Florida and certified that question to this Court. This Court

in *Adams v. Murphy*, 394 So.2d 411 (Fla. 1981) agreed with the federal district court that there was no such crime as attempted perjury in the State of Florida. When the case returned to the Federal Court of Appeal, the state argued that, since defendant's conviction for a nonexistent crime was the result of defense counsel requesting that the jury be charged on this lesser offense, defendant's habeas petition should be denied. In rejecting this argument the court held the following:

> Even so, Adams must go free. Florida has told us that he went to prison for an act that is not and has never been a crime under Florida law. Counsel's tactical choices may, in many circumstances, effectively contribute to his client's conviction. Advantages foregone for ephemeral benefits do not necessarily eventuate in writs. But only a legislature can denounce crimes. In a more complex case, we might proceed upon a more limited rationale, might resort to the solace of prior authority. Here there is no need. **Nowhere in this country can any man be condemned for a nonexistent crime.**

The state in its brief initially argues that language from this Court's opinion in *State v. Wilson,* 21 Fla.L. Weekly S292 (Fla. July 3, 1996, motion for rehearing still pending) seems to support the proposition that attempted felony murder was a crime prior to *Gray*, supra, and that it only became a nonexistent crime after *Gray*. The state make this argument despite the fact that the defendant in *Gray* and the defendant in this case were charged under the exact same statute, Florida Statute 777.04(1). (Florida's attempt statute.)

Once this Court determined that it was legally impossible to commit the crime of attempted felony murder, its prior interpretation in *Amlotte* wherein the court concluded that attempted felony murder was a crime pursuant to Florida's attempt statute became invalid since this court's interpretation of the attempt statute was a declaration of what the statute meant from the date of its effectiveness onward. See, *Gates v. United States*, 515 F.2d 73 (7th Cir. 1975) (when a court interprets a statute the interpretation is a declaration of what the law meant from the day the statute

became effective.); *Strauss v. United States,* 516 F.2d 980,983 (7th Cir. 1975)("A statute does not mean one thing prior to the supreme court's interpretation and something entirely different afterwards. The prior interpretation is and always was invalid). If it was legally impossible for *Gray* to commit the crime of attempted felony murder then it was also legally impossible for defendant to commit this crime.

If the state were correct that this court's interpretation of the attempt statute in *Gray* only applied to cases following *Gray, supra,* then this court would be violating the long standing principle of separation of power. The lawmaking function is the chief legislative function and the judicial branch is constitutionally forbidden from exercising any powers appertaining to the legislative branch. Florida Constitution Article II Section 3. *State v. Hamilton,* 660 So.2d 1038 (Fla. 1995) (This court recognized that a court does not have the authority to judicially amend or repeal a statute.); *See also State v. Barquet*, 262 So.2d 431 (Fla. 1992).

In its brief the state correctly points out that when the legislature repeals a criminal statute defendants who have been convicted of the repealed statute do not have the right to have their convictions vacated. The reason for this is that the legislature has the right to determine what conduct is prohibited in society and if a defendant commits an act which is criminal at the time he committed the act it is irrelevant that at a later time the legislature has decided to legalize the act.

Whereas the legislative branch has the authority to create criminal laws and subsequently repeal those laws the judiciary has no such authority. The judiciary's function instead is to interpret statutes which were passed by the legislature. The situation in this case is similar to when a court declares that a statute is facially unconstitutional. The court's have consistently recognized that an unconstitutional penal statute is deemed void from the time of its enactment since a court

interpretation of a statute must be applied retroactively to the date of the enactment of the statute. *Bell v. State*, 585 So.2d 1125 (Fla. 2d DCA 1991)(when a court decides that a statute is unconstitutional the decision must apply retroactively since an unconstitutional statute is deemed void from the time of its enactment.); *Russo v. State*, 270 So. 2d 428 (Fla. 4th DCA 1972)(Penal statute declared unconstitutional is inoperative from the time of its enactment and not only and simply from the time of the decision.)

The exact same logic that requires a court's decision on the constitutionality of a statute to apply retroactively applies when a court interprets whether certain conduct is in fact of violation of a statute. The role of the judiciary is to say what the law is, not to prescribe what it should be. In *Gray* this court concluded that Florida's attempt statute requires specific intent and, therefore, there can be no such crime as attempted felony murder. This court's interpretation of the attempt statute must be applied retroactively otherwise this court would be creating the law rather than interpreting the law.

In *Vogel v. State*, 365 So. 2d 1079 (Fla. 1st DCA 1979) the defendant was convicted of attempted possession of burglary tools. While defendant's appeal was pending this court held in *State v. Thomas*, 362 So.2d 1348 (Fla. 1978) that there was no such crime as attempted possession of burglary tools. In ruling that this court's decision in *Thomas* must be applied retroactively the First District Court of Appeal held:

> Although the Supreme Court did not announce in *State v. Thomas*, supra, whether that decision should be given retrospective or prospective application, we apply it retrospectively. **Judicial conscience cannot allow a person to remain imprisoned for a crime which the Supreme Court has held does not exist.** Such is especially true where, as here, a timely appeal from adjudication of guilt was pending at the time the Supreme Court rendered its decision

determining that there was no such crime.

Numerous federal courts have also recognized that when the United States Supreme Court interprets a statute in such a way that it prohibits a conviction for certain conduct, due process requires that the decision be applied retroactively to the enactment of the statute since a statute can not mean one thing prior to a Supreme Court decision and something entirely different after the decision. *See Strauss v. United States*, 516 F.2d 980, 983 (7th Cir. 1975)("A statute does not mean one thing to the Supreme Court's interpretation and something entirely different afterwards . . . the prior interpretation is and always was invalid").[2]

In *United States v. Dashney*, 52 F. 3d 298 (11th Cir. 1995), the defendant was convicted of violating 31 U.S.C. sections 5322(a), 5324(3) and 18 U.S.C. section 2 by structuring cash transactions in order to evade currency reporting requirements. On direct appeal defendant's convictions were affirmed. Subsequent to defendant's appeal the United States Supreme court in *Ratzlaf v. United States*, 114 S.Ct. 655 (1994), held that under Sections 5322(a) and 5324(3) the jury had to find that defendant knew the structuring in which he engaged was unlawful. Defendant based on this decision filed a post conviction motion to have his conviction vacated. In ruling that the

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[2] In *Gates v. United States*, 515 F.D. 73 (7th Cir. 1975), the court recognized the following:

> "The decision of the Court in Warden v. Marrero, 417 U.S. 653, 94 S.C. 2532, 41 LADD 383] interpreting the 1970 Comprehensive Drug Abuse Prevention and Control Act was a declaration of what the law had meant from the date of its effectiveness onward. United States v. Estate of Donnell, 397 U.S. 286, 294-295, 90 S.C., 1033, 25 LADD 312 (1970). A statute does not mean one thing prior to the Supreme Court's interpretation and something entirely differently afterwards.")

Ratzlaf decision had to apply retroactively the court held the following:

> What Ratzlaf did was articulate the substantive elements which the government must prove to convict a person charged under sections 5322 and 5324. That is, it explained what conduct is criminalized. This is a substantive change in the law mandating retroactivity because "a statute cannot mean one thing prior to the Supreme Court's interpretation and something entirely different afterwards.

Similarly, in *United States v. Shelton*, 848 F.2d 1985 (10th Cir. 1988), the defendant was convicted of violating the mail fraud statute. Subsequent to defendant's conviction, the United States Supreme Court in *McNally v. United States,* 107 S.Ct 2875 (1987), interpreted the mail fraud statute to prohibit convictions for mail fraud unless the fraud involved money or property. Since defendant's alleged fraud did not involve money or property, the defendant filed a post conviction motion to have his conviction vacated since his conduct was not a violation of the mail fraud statute. In reaching the conclusion that the *McNally* decision had to be applied retroactively, the court relying on *Strauss v. United States, supra*, stated:

> The court in Strauss pointed out that a statute cannot "mean one thing prior to the Supreme Court's interpretation and something entirely different afterwards." 516 F.2d. at 983. (quoting Gates v. United States, 515 F. 2d. 73, 78 (11th Cir.1975). The court concluded accordingly that retroactivity was mandated because the Supreme Court decision had declared what the law meant from the date of its enactment, and that "the prior interpretation is, and always was, invalid." Id. (quoting *Brough v. United States*, 454 F.D.. 370, 372 (11th Cir.1971).

See also, United States v. Bownette, 781 F. 2d 357, 362-64 (4th Cir. 1986).

The facts in the above cited cases are almost identical to the facts in this case. In the above cited cases all the defendant's committed an act which at the time had been interpreted as a violation of a specific criminal statute. After the defendant's convictions the United States Supreme Court

entered an opinion which held that defendant's actions were not a violation of the statute in question and, therefore, defendant's actions were not criminal. Finally in all of the above cited cases defendant's filed post conviction motions to vacate their convictions since they were convicted of a nonexistent crime. The courts in all of the above cited cases rejected the position that a statute can mean one thing prior to a court's interpretation and something different after the court's interpretation. Instead the federal courts have recognized that a court can not create law but instead only can interpret the law. Therefore, if a court concludes that certain conduct is not a violation of a certain statute that interpretation applies back to the day the statute was passed and any other previous interpretation is void and invalid.

Since the attempt statute can not mean one thing prior to this court's decision in *Gray* and something different after the decision, this court's conclusion that Florida's attempt statute does not create the crime of attempted felony murder was a declaration that attempted felony murder could never have been a crime in the State of Florida. Therefore, the Third District Court of Appeal correctly concluded that *Gray* holds that a defendant convicted of attempted felony murder has been convicted of a nonexistent crime.

FLORIDA LAW ESTABLISHES THAT WHEN THIS COURT ENTERS AN OPINION HOLDING THAT A CHARGED OFFENSE IS A NONEXISTENT CRIME, THE OPINION MUST BE APPLIED RETROACTIVELY SINCE IT IS A DUE PROCESS VIOLATION TO KEEP SOMEONE IN PRISON FOR A NONEXISTENT CRIME.

To determine whether *Gray* should be retroactively applied, the fundamental consideration is the balancing of the need for decisional finality against the concern for fairness and uniformity in individual cases. In *Witt v. State*, 387 So. 2d at 929 (Fla. 1980) the Florida Supreme Court

articulated the proper standard for determining whether a change in the law should be retroactively applied to provide post conviction relief under rule 3.850. 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.

Applying the Witt criteria to this case leads to the inescapable conclusion that *Gray* must be applied retroactively. First the decision changing the law to recognize that attempted felony murder is not a crime was issued by the Florida Supreme Court. The first prong of the Witt test is therefore satisfied. Other cases requiring the retroactive application of Florida Supreme Court decisions establish that the opinion in *Gray, supra,* similarly satisfies the second and third prong of the Witt standard: it is constitutional in nature and has fundamental significance.

DECISION IN GRAY WAS CONSTITUTIONAL IN NATURE.

In *Palmer v. State*, 438 So. 2d 1 (Fla. 1983), this Court concluded that imposition of consecutive mandatory minimum sentences for possessing a firearm during the commission of a felony was not authorized by statute and, therefore, illegal. In *Bass v. State*, 530 So. 2d 282 (Fla. 1988), this Court concluded that it would be "manifestly unfair" not to apply retroactively the decision in Palmer to defendant's seeking collateral relief. See also *Cisnero v. State*, 458 So. 2d 377 (Fla. 2d DCA 1984)(This Court's decision in *Palmer*, which construed statute concerning mandatory prison sentence for use of a firearm to preclude the "stacking" of consecutive mandatory minimum sentences for crimes committed at the same time and place, applies retroactively); *Davis v. State*, 453 So. 2d 196 (Fla. 3d DCA 1984)(Palmer should applies retroactively to prisoners who file post conviction motions to vacate their illegal sentences)

In *Hale v. State*, 630 So. 2d 521 (Fla. 1993) this Court found that there is no statutory authority for trial courts to impose consecutive habitual felony offender sentences for multiple offenses arising out of the same criminal episode. The Second District Court of Appeal in *State v. Calloway*, 642 So. 2d 636 (Fla. 2d DCA 1994) concluded that *Hale* must apply retroactively. The court specifically found that this Court's decision in *Hale* was constitutional in nature:

> The second prong requires that the new rule be constitutional in nature. This requirement seems to overlap with the third requirement that the new rule be a development of fundamental significance. We rely to some extent upon the reasoning for the third prong in deciding that the new rule in Hale is constitutional in nature. Although the Supreme Court did not declare any law unconstitutional in Hale, it invalidated consecutive habitual offender sentences arising from the same criminal episode because no statute expressly authorized such punishment. **The punishment clearly could not withstand due process analysis in the absence of an empowering statute. Thus, while the decision is not directly a new rule of constitutional law, it is based primarily upon constitutional analysis, as compared to common law analysis or statutory interpretation. It is "constitutional in nature."**

This Court in *State v. Calloway*, 658 So. 2d 983 (Fla. 1995), agreed with the second district that under the guidelines in *Witt* the opinion in *Hale* must apply retroactively. The court also recognized that the opinion in *Hale* was constitutional in nature:

> Hale also satisfies the requirement that it be constitutional in nature. As the district court in the instant case recognized, in the absence of an empowering statute, the imposition of consecutive habitual felony offender sentences for offenses arising out of a single criminal episode could not withstand a due process analysis. Callaway, 642 So.2d at 640. **Furthermore, the decision in Hale significantly impacts a defendant's constitutional liberty interests.**

In *Flowers v. State*, 586 So. 2d 1058 (Fla. 1991), this Court held that legal constraint points could only be used once in calculating a guidelines sentence. In reaching this conclusion this Court

interpreted the sentencing guidelines statute and concluded that when a statute is susceptible of different interpretations it must be construed in favor of the defendant. In *Logan v. State,* 21 Fla. L. Weekly D191 (Fla. 4th DCA 1996), the Fourth District Court of Appeal concluded *Flowers* must apply retroactively. The court recognized that when the Florida Supreme Court interprets a criminal statute in a manner that affects whether a defendant can receive a certain punishment, the decision is constitutional in nature:

> Lenity, although codified by our legislature in section 775.021(1) is founded on the due process requirement that criminal statutes must apprise ordinary persons of common intelligence what is prohibited...Lenity applies "not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose...**because lenity involves due process, Flowers was constitutional in nature, and thus complies with the second requirement of Witt.** (Citations omitted)

In *Jenny v. State*, 447 So. 2d 1351 (Fla. 1984) this Court held that section 914.04, Florida Statutes (1979), was self executing and automatically grants use and transactional immunity to one who testifies against his will. In *Meeks v. State*, 605 So. 2d 1301 (Fla. 4th DCA 1992), the Court of Appeal concluded that Jenny must be applied retroactively because it constituted a fundamental constitutional change of law by concluding that section 914.04, Florida Statutes (1979), placed a defendant beyond the state's power to prosecute and impose penalties where the statute granted him immunity regardless of whether he invoked his privilege against self incrimination.

The theme that runs through all of the above cited cases dealing with retroactivity is that when this Court interprets a criminal statute to prohibit a conviction or a certain type of punishment that decision is constitutional in nature and due process requires that the decision by applied retroactively. In *Gray*, this Court construed Florida's attempt statute as rendering the crime of

attempted felony murder logically and legally impossible to commit, because in order to be convicted of an attempt crime a defendant must have the specific intent to commit the substantive crime and intent is not an element of attempted felony murder. As in *Palmer*, *Hall, Flowers*, and *Jenny*, this Court's decision in Gray which concluded that there is no statutory authority for the crime of attempted first degree felony murder was constitutional in nature since due process prohibits punishment for a nonexistent crime.[3] Therefore , the Third District Court of Appeal correctly concluded that "*Gray* is constitutional in nature because it affect's the defendant's due process rights and liberty interests since the crime with which she was convicted is nonexistent.

DECISION IN GRAY HAS FUNDAMENTAL SIGNIFICANCE.

According to Witt, decisions which have fundamental significance generally fall into two broad categories. The first are those changes of law which place beyond the authority of the state the power to regulate certain conduct or impose certain penalties. This category is exemplified by *Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977), which held that the imposition of the death penalty for the crime of rape of an adult woman is forbidden by the eighth amendment as cruel and unusual punishment. The second are those changes of law which are of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of

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[3] See also *Tafero v. State*, 459 So. 2d 1034 (Fla. 1984)(Supreme Court's rule that imposition of death penalty on accomplice who did not kill or intend to kill and did not participate in or facilitate killing is such a change in the law that it must be applied retroactively in post conviction proceedings.); *Phillips v. State*, 623 So. 2d 621 (Fla. 4th DCA 1993)(Holding in Williams case, that police manufacture of crack cocaine for sale as part of reverse sting, is governmental conduct so outrageous as to violate due process clause--should be applied retroactively and applies to cases on collateral review.

Stovall and *Linkletter*. *Gideon v. Wainwright*, of course, is the prime example of a law change included within this category.

In *Gray v. State*, supra, this Court held that there can be no such crime as attempted felony murder. Therefore, the decision in *Gray* comes within the first category of fundamental significant decisions which are those decisions which "place beyond the authority of the state the power to regulate certain conduct or impose certain penalties".

In *Meeks v. State,* 605 So. 2d 1301 (Fla.App. 4 Dist. 1992), the situation before the court was similar to the situation before this court. In *Meeks* the court concluded that the Florida Supreme Court's decision in *Jenny v. State, supra*, wherein the court held that a defendant automatically receives immunity when he is forced to testify should apply retroactively. The court concluded that *Jenny* should be applied retroactively and stated the following:

> Applying the test of Glenn to this case, we hold that Jenny II should be applied retroactively as it constituted a fundamental constitutional change of law by concluding that section 914.04, Florida Statutes (1979), placed a defendant beyond the state's power to prosecute and impose penalties where the statute granted him immunity regardless of whether he invoked his privilege against self-incrimination. Thus, it falls within the first category of cases denoted in Glenn and Witt, not in the second category of cases which must meet the three prong test of Stovall, as the trial court found.

In both *Jenny* and *Gray* this Court entered an opinion that prohibited the state from regulating or punishing certain conduct. In *Jenny* the court held that a defendant could not be prosecuted for a criminal offense once he has been forced to testify against himself. In *Gray* this Court held that a defendant can not be prosecuted for the crime of attempted first degree felony murder because it is logically impossible to commit this crime. Therefore, the Third District Court of Appeal correctly concluded that the third prong of the *Witt* test has been satisfied since "the *Gray* rule is of

fundamental significance because it places beyond the authority of the state the power to regulate certain conduct or impose certain penalties, namely attempted murder during the commission of a felony."

It is the state's position that attempted murder is still a crime in Florida and this court's opinion in *Gray* was just a technical refinement as to what the state must prove in order to convict a defendant of the crime of attempted murder and, therefore, the opinion was not constitutional in nature and did not have fundamental significance. This argument is without merit.

The fact *Gray* did not conclude that there is no such crime as attempted premeditated murder in Florida is irrelevant to the analysis in this case. In *Gray* this court specifically held that a defendant can not be convicted of attempted murder under an attempted felony murder theory. When a court holds that certain conduct is not a violation of a criminal statute a due process violation occurs when a trial judge instructs a jury that they can convict someone for conduct that is not a violation of the statute under which the defendant has been charged. The United Supreme Court has explicitly held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). *See Hennessy v. Goldsmith*, 929 F.2d 511, 514 (9th Cir.1991) ("Failure to properly instruct the jury regarding an element of the charged crime is a constitutional error that deprives the defendant of due process. . . .").

In *United States v. McClelland*, 941 F.2d 999 (C.A.9 1991), the defendant was convicted of Attempted Interference with Commerce by Extortion. At trial, over defense objection, the court instructed the jury that the government was not required to show that McClelland induced a

government agent to make an improper payment to him because of his official position. Defendant conviction was affirmed on direct appeal. Subsequent to his affirmance the Ninth Circuit issued an opinion that indicated that inducement was an essential element of extortion. In ruling that court's interpretation of the extortion statute had to be applied retroactively the court recognized that the decision of a court was constitutional in nature when the court held:

> The United Supreme Court has explicitly held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). See Hennessy v. Goldsmith, 929 F.2d 511, 514 (9th Cir.1991) ("Failure to properly instruct the jury regarding an element of the charged crime is a constitutional error that deprives the defendant of due process. . . ."). McClelland's case, the instruction by the court relieved the prosecution from its burden of proving an essential element of the offense; namely, the Government was relieved of its burden to prove inducement. **Clearly, the requirement that the Government prove beyond a reasonable doubt every element of the charged offense is of the most fundamental nature. If the Government is permitted to sidestep this requirement, the error is a fundamental one and justifies the collateral relief of coram nobis.**

Defendant in this case was charged with attempted felony murder. The information did not charge defendant with attempted premeditated murder. At the conclusion of the trial, the jury was instructed on the crime of attempted felony murder. The trial judge specifically instructed the jury that they did not have to find that the defendant intended to kill the victim in order to find the defendant guilty of attempted murder. Therefore, the jury in this case were instructed on none of the elements of attempted premeditated murder. Since the due process clause prohibits a conviction under these circumstances the Third District Court of Appeal correctly concluded that *Gray* was constitutional in nature.

The state also argues that since the Florida Legislature has subsequently enacted a statue making attempted felony murder a crime in the State of Florida the defendant in this case was not prejudice by the fact that he was convicted of a nonexistent crime. The state's argument that §782.051, Fla. Stat. has reinstated the crime of attempted felony murder is erroneous. Florida Statute §782.051 provides the following:

> (1) Any person who perpetrates or attempts to perpetrate any felony enumerated in 782.04(3) and who commits, aids or abets an act that causes bodily injury to another commits a felony of the first degree, punishable by imprisonment for a term of years not exceeding life, or as provided in 775.082, 775.083 or 775.084, which is an offense ranked in level nine of the sentencing guidelines. Victim injury points shall be scored under this subsection.

Florida Statute 782.051 creates the crime of "Felony Causing Bodily Injury". A review of the statute reveals that the legislature has decided to create a separate crime when an individual commits or attempts to commit a crime which causes bodily injury to another. This statute does not re-create the crime of attempted felony murder and, therefore, the state's reliance on this statute to support the position that the decision in *Gray* did not have fundamental significance is misplaced.

The final argument made by the state is that "If *State v. Gray* were to be applied retroactively to all cases in which a conviction for attempted felony murder was secured and final, the effect on the administration of justice would be catastrophic and would undermine the confidence in our system of justice." It is defendant's position that the **failure** to apply *Gray* retroactively would serve to undermine the confidence in our justice system. The failure to apply *Gray* retroactively would result in defendant who was charged with the exact same crime as *Gray* to remain incarcerated despite the fact that this court held that *Gray* could not be incarcerated for attempted felony murder since it was legally impossible to commit this crime. If it was legally impossible for Gray to commit

the crime of attempted first degree felony murder then it was legally impossible for defendant to commit this crime. To allow such a situation to exist would destroy the public's confidence in the criminal justice system because as the Fifth Circuit Court of Appeal has correctly recognized "Nowhere in this country can a man be condemned for a nonexistent crime." *Adams v. Murphy*, supra.

The state next argues that numerous convictions would have to be reversed if this court were to rule that *Gray* should apply retroactively. It is defendant's position that the state, like this Court, should have no interest in having people convicted of nonexistent crimes and, therefore, defendants who have been wrongfully convicted of attempted felony murder have the right to have these convictions vacated. As the First District Court of Appeal in *Vogel v. State*, *supra*, recognized "Judicial conscience cannot allow a person to remain imprisoned for a crime which the supreme court has held does not exist."

In *U.S.v. Dashney*, 52 F.3d 298 (10th Cir 1995), the government also argued that judicial finality should prohibit the court from applying a court's interpretation of a criminal statute retroactively. In rejecting this argument the court held :

> In this context, principles of judicial finality, which the government urges and the district court observed, are irrelevant. **Surely, if a defendant's "conviction and punishment are for an act that the law does not make criminal[,] [t]here can be no room for doubt that such a circumstance 'inherently results in a complete miscarriage of justice' and 'present[s] exceptional circumstances' that justify collateral relief under Sec. 2255."** Davis, 417 U.S. at 346, 94 S.Ct. at 2305 (quoting Hill v. United States, 368 U.S. 424, 82 S.Ct. 468, 7 L.Ed.2d 417 (1962)).

In conclusion, the Third District Court of Appeal correctly concluded that under this court's three pronged test announced in *Witt* and reaffirmed in *Calloway*, *Gray* must be applied

retroactively. First, *Gray* was decided by this Court. Second, *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. Third, the *Gray* rule is of fundamental significance because it places beyond the authority of the state the power to regulate certain conduct or impose certain penalties, namely attempted murder during the commission of a felony. Therefore, this court should affirm the Third District Court of Appeal's conclusion that the due process clause of both the Florida and United States Constitutions require that defendant's conviction for the nonexistent crime of attempted felony murder be vacated.

CONCLUSION

Based upon the foregoing Respondent respectfully requests this Court to affirm the opinion of the Third District Court of Appeal.

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to Consuelo Maingot, Assistant Attorney General, Department of Legal Affairs, The 110 Tower, Southeast 6th Street, Ft. Lauderdale, Florida 33301; and to BRUCE ROGOW & BEVERLY POHL, P.A. 2441 S.W. 28th Avenue, Fort Lauderdale, Florida 33312 this 10th day of September, 1996.

Respectfully submitted,

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