IN THE SUPREME COURT OF FLORIDA



**CASE NO. 88,116**

**STATE OF FLORIDA,**

Petitioner,

-vs-

**DIANA WOODLEY,**

Respondent.

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

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# BRIEF OF PETITIONER ON THE MERITS

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## INTRODUCTION

Petitioner, THE STATE OF FLORIDA, was the prosecution in the trial court and Appellee in the District Court of Appeal of Florida, Third District. Respondent, DIANA WOODLEY, was the Respondent in the trial court and the Appellant 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

The Respondent was charged by Amended Information in Case Number 92-34578 with attempted first degree murder and was convicted by a jury as charged.[1]

Respondent filed an appeal in the Third District Court of Appeal, DCA Case No. 93-1615 challenging among other issues the

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[1] The Respondent was also charged and convicted of other crimes which are not pertinent to the legal issues herein.

trial court's denial of her motion for judgment of acquittal on the charge of attempted felony murder. Following the State's Answer, the Third District Court *per curiam* affirmed the judgment and sentence of the lower court, on May 24, 1994, DCA Case No. 93-1615. The Mandate issued and Respondent's case became final on June 9, 1994. Woodley v. State, 638 So. 2d 956 (Fla. 3d DCA 1994).

Respondent filed a first motion for post-conviction relief pursuant to Florida Rule of Criminal Procedure 3.850, on July 11, 1995. (*See* Motion in DCA Case No. 95-2749), challenging among other claims, the effectiveness of her trial counsel for not objecting to the charge of attempted first degree murder. The trial court denied post-conviction relief without an evidentiary hearing as legally insufficient and procedurally barred claims, specifically finding that trial counsel was not ineffective, having objected in a timely manner to the amended information.

Respondent appealed the denial of the her motion for post-conviction relief on September 14, 1995. The State responded on December 12, 1995. On December 15, 1995, the Third District Court appointed the Public Defender to brief the issue for the Respondent, and ordered the State to answer on the sole issue of

the retroactive effect, if any, of State v. Gray, 654 So. 2d 552 (Fla. 1995). On May 8, 1996, the Third District Court of Appeal filed its opinion holding:

> The conviction and sentence for attempted first-degree felony murder must be set aside since, pursuant to Gray, the Supreme Court has held that the aforementioned charge is not a crime in the State of Florida. Gray, 654 So. 2d at 554. "Established authority in Florida holds that one cannot be punished based on a judgment 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."

(App. A:3). The Third District continued its analysis by applying the test for retroactivity as articulated by this Court in State v. Callaway, 658 So. 2d 983 (Fla. 1995). (App. A:4). Reasoning that the three prongs of the Callaway test were met, the Third District opined that "the Gray decision is retroactive, even to cases which are final." (App. A:5). The Third District Court certified the following question to this Court:

> 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?

Woodley v. State, 21 Fla. L. Weekly D1083 (Fla. 3d DCA May 8, 1996).

This petition for discretionary review followed.

## QUESTION PRESENTED

WHETHER THE HOLDING OF *STATE V. GRAY*, 654 So. 2d 552 (Fla. 1995), THAT ATTEMPTED FELONY MURDER IS NOT A CRIME, IS TO BE APPLIED RETROACTIVELY TO CASES WHICH WERE FINAL BEFORE *GRAY* WAS DECIDED?

## SUMMARY OF THE ARGUMENT

The rule announced by this Court in State v. Gray, abrogating the crime of attempted felony murder in Florida from May 4, 1995 forward and for all cases in the "pipeline" or not yet final, is not applicable retroactively on collateral attack, as in the Respondent's case, where the judgment and sentence became final. Furthermore, where the Legislature specifically provided that attempted felony murder was a crime in Florida, and it remained so for over eleven years, the trial court had full authority during that tenure to convict and punish a criminal defendant for the crime of attempted felony murder.

## ARGUMENT

WHETHER THE HOLDING OF *STATE V. GRAY*, 654 So. 2d 552 (Fla. 1995), THAT ATTEMPTED FELONY MURDER IS NOT A CRIME, IS TO BE APPLIED RETROACTIVELY TO CASES WHICH WERE FINAL BEFORE *GRAY* WAS DECIDED?

This case is before the Court for review of the question certified by the Third District Court of Appeal on the issue of whether the rule in State v. Gray, 654 So. 2d 552 (Fla. 1995), holding that attempted felony murder is not a crime in Florida, may be applied retroactively to overturn a conviction of attempted felony murder on collateral attack of a judgment and sentence already final.

The Third District Court opines that the rule of State v. Gray should be applied retroactively in the Respondent's case, which indisputably was final prior to Gray, because no one can be punished based on a judgment of guilt for a crime that does not exist. The district court held further that this Court did not discuss retroactivity and did not expressly rule that State v. Gray does not apply retroactively, and that because the decision in Gray meets this Court's test for retroactive application as articulated in State v. Callaway, 658 So. 2d at 986, it is applicable here.

This Court clearly and expressly limited application of Gray's new rule, holding that "[t]his decision **must** be applied to all cases pending on direct review or not yet final." State v. Gray, 654 So. 2d at 554. Had this Court remained silent as to the application of the rule, statutory construction would mandate that the new rule apply to all nonfinal cases. Heilmann v. State, 310 So. 2d 376 (Fla. 2d DCA 1975). By specifically limiting the application of the new rule thusly, this Court meant that it would not apply to cases already final. The Third District Court's rejection of this language as to collateral claims is tantamount to saying that this Court made a meaningless statement.

Notwithstanding the fact that this Court clearly stated the limited application of Gray, the question then becomes whether the change in the law should be retroactively applied to provide post-conviction relief under Rule 3.850, Fla.R.Crim.P. Whether or not it should be applied depends upon whether the change in the law passes the test of retroactive application as set out in Witt v. State, 387 So. 2d 922, 925-927 (Fla. 1980), and reiterated in State v. Callaway.

## The Standard For Retroactive Application of Changes In The Law

The standard in Witt v. State requires that 1) the new rule must originate in the United States Supreme Court or in this Court, 2) it must be constitutional in nature; and 3) it must have fundamental significance. Witt v. State, 387 So. 2d at 931.

Initially, the Petitioner submits that the issue is not constitutional in nature. The Third District Court of Appeal opined that Respondent was entitled to relief on collateral attack of her judgment and sentence because it was based upon a conviction for a nonexistent crime, presuming this to be a due process violation of constitutional proportions. On the contrary, this conviction was based on an expressly valid offense which was confirmed under Amlotte v. State, 456 So. 2d 488 (Fla. 1984), and remained valid up to this Court's recession from Amlotte in State v. Gray. Even when the Legislature has repealed or amended a formerly valid criminal statute, the Florida Constitution provides that such action shall not affect prosecution or punishment for any crime previously committed. Art. X, sec. 9, Fla. Const. So, as a general rule, unless the Legislature has expressed to the contrary, prior convictions are not invalidated by amendment or repeal of a

criminal statute. Skinner v. State, 383 So. 2d 767 (Fla. 3d DCA 1980). It is logical that if a once valid repealed criminal statute is not constitutionally defective, by analogy, the amendment to the formerly valid crime of attempted felony murder by judicial clarification of the underlying elements of the offense does not render it constitutionally defective either.

It is incontrovertible that attempted felony murder was expressly recognized as a valid statutory offense in Florida, by virtue of this Court's ruling in Amlotte v. State, 456 So. 2d 448. That decision, issued in 1984, was valid at the time of Respondent's offenses and convictions in this case. On July 3, 1996, this Court answered the certified question posed by the Third District Court in Wilson v. State, 660 So. 2d 1067, 1069 (Fla. 3d DCA 1995), asking when a conviction for attempted first degree felony murder must be vacated on authority of State v. Gray, do lesser included offenses remain viable for a new trial or reduction of the offense? This Court stated in relevant part that:

> We hold that the proper remedy is remand to the trial court for retrial on any of the other offenses instructed on at trial.
>
> We have previously considered nonexistent

> offenses in slightly different circumstances. . . . .
>
> Wilson is correct in his assertion that those cases involved nonexistent offenses which were lesser included offenses of the principal charge in the charging document, as opposed to the instant case, where the principal charge was a nonexistent offense. However, we do not agree that this mandates dismissal of the charges in the instant case. In the earlier cases, "nonexistent" had a slightly different connotation. There, the offenses in question were never valid statutory offenses in Florida; they were simply the product of erroneous instruction. **Here, attempted felony murder was a statutorily defined offense, with enumerated elements and identifiable lesser offenses, for approximately eleven years. It only became "nonexistent" when we decided Gray. Because it was a valid offense before Gray, and because it had ascertainable lesser offenses, retrial on any lesser offense which was instructed on at trial is appropriate.**

State v. Wilson, 21 Fla. L. Weekly S292 (Fla. July 3, 1996).

The State submits that the decision articulated by this Court in State v. Wilson, confirms that attempted felony murder was a statutorily defined offense prior to the decision in Gray, and that there is no constitutional bar to retrial on the attempted first degree murder charge where the jury was instructed in the alternative and the facts of the case could support a guilty

verdict on that charge. State v. Wilson, 21 Fla. L. Weekly at S292 (holding that attempted felony murder convictions, which were vacated pursuant to Gray, could properly be remanded to the trial court for retrial on other lesser included offenses which had been instructed on at trial).

This Court rejected the Third District Court's contention that such retrial on lesser offenses was improper. The district court had reasoned that there could be no lesser included offenses of a nonexistent offense. Wilson v. State, 660 So. 2d 1067. Furthermore, this Court stated, "attempted felony murder was a statutorily defined offense, with enumerated elements and identifiable lesser offenses, for approximately eleven years. It only became 'nonexistent' when we decided Gray." Wilson, 21 Fla. L. Weekly at S292. "Because it was a valid offense before Gray, and because it had ascertainable lesser offenses, retrial on any lesser offense which was instructed on at trial is appropriate." Id. As such, the district court's basis in Woodley for holding that Gray is constitutional in nature and applies retroactively no longer exists.

**I Origin of the Change In The Law**

Initially, the first prong of the Witt test is met since the rule under scrutiny here originated in this Court. So the examination revolves around the second and third prongs of the test as to the constitutional nature of the change in the law and its fundamental significance.

**II Constitutional Nature of the Change In The Law**

To determine whether the change in law is of "major" constitutional proportions satisfying the second prong of the analysis such that it overcomes the doctrine of finality and may be made applicable on collateral attack of a conviction, the change must fall within one of 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 *Stovall* and *Linkletter*. *Gideon v. Wainwright*, of course, is the prime example of a law change included within this category.

Witt v. State, 387 So. 2d at 929. Thus, to determine whether a change in the law is a major constitutional change, it must either be 1) a change in the law which rescinds the State's power to regulate certain conduct or impose certain penalites, or 2) it must be of sufficient magnitude to necessitate retroactive application under the three-fold test of Stovall v. Denno and Linkletter v. Walker. Stovall v. Denno, 388 U.S. 293, 297, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967); Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965).

First, the change in the law announced in State v. Gray does not place beyond the authority of the State the power to regulate certain conduct or impose certain penalties, for it is axiomatic that the State may still charge a defendant with the crimes of attempted first degree murder or felony murder, and is only precluded from charging attempted felony murder. *See* Thompson v. State, 667 So. 2d 470 (Fla. 3d DCA 1996), (reversing conviction of attempted felony murder and remanding for retrial on the charge of attempted premeditated murder where the evidence supported such a charge); State v. Callaway, 658 So. 2d at 986-987; Stovall v. Denno, 388 U.S. at 297.

The rule in Gray did not eliminate the existence of the crime of attempted murder or of felony murder, it merely clarified the reasoning underlying the element of intent which is a factual issue in each individual case. Such a change likens it to a change in procedure or an evolutionary refinement in the law providing new or different standards for the admissibility of evidence or procedural fairness in the law. It does not constitute a constitutionally fundamental change in the law as was the case in Coker v. Georgia, finding the death penalty to be an impermissible sentence in rape cases. Likewise, it is not the kind of jurisprudential upheaval in the law represented by changes in sentencing provisions which benefit future prisoners and which could benefit current inmates where minimum mandatory sentences are impermissibly stacked or otherwise enhanced in violation of double jeopardy garauntees. Coker v. Georgia, 433 U.S. 584. Under this prong of the analysis, the change does not qualify as a major constitutional change.

Furthermore, it cannot be considered a change of constitutional dimensions, when the offense of attempted felony murder was a valid crime prior to the rule in Gray, and has subsequently been reinstated by the Legislature in a newly enacted statute, sec. 782.051, Fla. Stat. which provides:

> (1) Any person who perpetrates or attempts to perpetrate any felony enumerated in s. 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 s. 775.082, s. 775.083 or s. 775.084, which is an offense ranked in level nine of the sentencing guidelines. Victim injury points shall be scored under this subsection.

Section 782.051, Fla. Stat. This statute is scheduled to take effect October 1, 1996. The new rule of Gray making attempted felony murder a nonexistent crime cannot be deemed a change of constitutional dimensions when the Legislature has followed up with the enactment of a law calculated to encompass the offense of attempted felony murder in less than two years.

Secondly, analysis of the change in the law establishes that it is not of sufficient magnitude to necessitate retroactive application under the three-fold test of Stovall v. Denno and Linkletter v. Walker. That test requires that the doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring fairness and uniformity in individual adjudications. The test sets out factors to be considered in the analysis: (i) the purpose to be served by the new rule, (ii) the

extent of reliance on the old rule, and (iii) the effect on the administration of justice that would be the result of a retroactive application of the new rule. Stovall v. Denno, 388 U.S. 297; Linkletter v. Walker, 381 U.S. 618; State v. Callaway, 658 So. 2d 986-987; Witt v. State, 387 So. 2d 929.

**A. Purpose of the new rule**

The purpose of the rule announced in State v. Gray, is to clarify the internal inconsistency of the charge of attempted felony murder. Specifically, the Court reasoned that any "attempted" crime requires proof of the element of specific intent, while conversely, "felony murder" requires that no intent need be shown in order to obtain a conviction. State v. Gray, 654 So. 2d at 553. This reasoning was diametrically opposite to the original reasoning expounded in Amlotte in which this Court opined that "[B]ecause the attempt occurs during the commission of a felony, the law, as under the felony murder doctrine, presumes the existence of the specific intent required to prove attempt." Amlotte v. State, 456 So. 2d at 450. Based on that inconsistency, a growing number of cases have emerged in which juries have convicted on the charge of attempted felony murder as a lesser included offense of attempted premeditated murder or as an

alternately charged offense. The Court recognized this conundrum in State v. Gray and reversed its reasoning in Amlotte, determining that attempted felony murder could not be a crime in Florida. Therefore, this "change" in the law is decisional. It is an evolutionary refinement in the law, which defines the parameters of attempt and felony murder such that in the future the State may charge defendants with more specificity with regard to the evidence available to support the charges.

**B. Extent of the Reliance On The Old Rule**

The extent of the reliance of Florida's trial courts and prosecuting attorneys on the old rule that attempted felony murder is a criminal offense in the state, is immeasurable. Attempted felony murder was a chargeable offense in Florida prior to this Court's confirmation in Amlotte in 1984 and for eleven years following that decision until overruled by State v. Gray in May 1995. It can be assumed by the length of that tenure as well as by the number of cases already presented for litigation as a result of the new rule that the reliance on the old rule was extensive. A cursory computer search of cases since 1984 in which attempted felony murder convictions have been appealed and an opinion issued turned up more than sixty, including this case below, and 75

percent of those arose after Gray. Moreover, the Legislature's enactment of a law which effectively reinstates attempted felony murder as a crime in Florida would indicate that the criminal justice system will continue to rely on that crime for prosecution.

**C. Effect of Administration of Justice**

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. Stovall v. Denno, 388 U.S. at 297. Such a broadening of the application of the rule in Gray would open a Pandora's Box of relitigation of formerly sound plea bargains as involuntary, of convictions in which the jury was instructed on alternative theories of attempted first degree premeditated and felony murder, not to mention all those convictions clearly founded on charges of attempted felony murder. Although statistics would be difficult to obtain, it is conceivable that the relitigation of attempted felony murder convictions could number in the hundreds, if not thousands.

Retroactive application of the rule in Gray is not necessitated by the principles of fairness and uniformity,

especially in light of the fact that even if the attempted felony murder charge in each individual case is vacated, the State would be permitted to retry on the lesser included offenses or on the alternative charge of attempted first degree murder, evidence permitting. State v. Callaway, 658 So. 2d at 986-987; Stovall v. Denno, 388 U.S. at 297. State v. Wilson, 21 Fla. L. Weekly S292.

Thus it is clear that the change in the law was not of fundamental significance, where for eleven years prior to the new rule, the authority of the State to regulate conduct and impose penalties for attempted felony murder remained valid. Therefore, The decision of the Third District Court fails the third prong of the test enunciated in Witt and confirmed in Callaway. State v. Callaway, 658 So. 2d at 986-987; Stovall v. Denno, 388 U.S. at 297; Witt v. State, 387 So. 2d at 925-927. Thus, the analysis here, and in general in cases on collateral attack of judgments and sentences which are final, fails to meet the second prong of the retroactivity test of being constitutional in nature because the Respondent had no liberty interests at the time she was convicted of the statutorily valid offense.

**III Change in the Law Must Have Fundamental Significance**

The analysis also fails the third prong of the test requiring that the change be of fundamental significance, where the state was empowered by the Legislature to regulate the subject conduct -- attempted murder during the commission of a felony -- and was authorized to impose penalties for convictions on such charges. The change in the law of State v. Gray consisted of this Court's clarification of the internal inconsistency in which the element of an "attempt" requiring specific intent was contradictory to the elements of felony murder requiring no specific intent, constituting a decisional change amounting to an evolutionary refinement in the law. There is no change in the State's ability to charge a defendant with attempted murder or felony murder, or any of the lesser included offenses that would be sustained by the evidence.

Not only was this Court's decision specifically intended to apply prospectively, including only those cases not yet final, the change in the law is not of sufficient constitutional magnitude to overcome the doctrine of finality and necessitate retroactive application on collateral attack of the conviction. State v. Gray, 654 So. 2d at 554; State v. Callaway, 658 So. 2d at 986-987;

Stovall v. Denno, 388 U.S. at 297; Witt v. State, 387 So. 2d 931. The decision of the Third District Court should be reversed and the certified question should be answered in the negative, making the rule in Gray applicable only in those cases not yet final or in the "pipeline."

## CONCLUSION

WHEREFORE, based upon the foregoing, the decision of the District Court of Appeal should be reversed and the certified question answered in the negative denying retroactive application to cases that were final prior to the rule of Gray.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that a true and correct copy of the foregoing **BRIEF OF Respondent ON THE MERITS** was furnished by mail to **ROBERT KALTER, Esq.,** Assistant Public Defender, OFFICE OF THE PUBLIC DEFENDER, Eleventh Judicial Circuit Court, 1320 N.W. 14th Street, Miami, Florida 33125 on this 26 day of July 1996.

**CONSUELO MAINGOT**
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

**CASE NO. 88,116**

**THE STATE OF FLORIDA,**

Respondent,

-vs-

**DIANA WOODLEY,**

Respondent.

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**ON PETITION FOR DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT**

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# APPENDIX TO BRIEF OF Respondent ON THE MERITS


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|---|---|
| App. A | Slip Opinion, Case 95-2749, May 8, 1996<br><br>Woodley v. State, 21 Fla. L. Weekly D1083 (Fla. 3d DCA May 8, 1996). |

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**I HEREBY CERTIFY** that a true and correct copy of the foregoing **APPENDIX TO BRIEF OF Respondent ON THE MERITS** was furnished by mail to **ROBERT KALTER, Esq.,** Assistant Public Defender, OFFICE OF THE PUBLIC DEFENDER, Eleventh Judicial Circuit Court, 1320 N.W. 14th Street, Miami, Florida 33125 on this 26 day of July 1996.

**CONSUELO MAINGOT**
Assistant Attorney General

95-13/937-CV

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION AND,
IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, 1996



DIANA WOODLEY,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

CASE NO. 95-2749

LOWER TRIBUNAL NO. 92-34578



Opinion filed May 8, 1996.

An Appeal from the Circuit Court for Dade County, Michael B. Chavies, Judge.

Bennett H. Brummer, Public Defender, and Robert Kalter, Assistant Public Defender, for appellant.

Robert A. Butterworth, Attorney General, and Consuelo Maingot, Assistant Attorney General, for appellee.

Before SCHWARTZ, C.J., and LEVY and GODERICH, JJ.

PER CURIAM.

On October 9, 1992, the defendant approached the victim, who had just gotten into her car in a shopping center parking lot and

asked her for directions. Suddenly, the defendant drew a knife and demanded the victim's purse and keys. As the defendant fought with the victim, she cut the victim's arm with the knife. The defendant pulled the purse and keys from the victim and ran towards the defendant's car. The victim chased the defendant to her car and tried to reclaim her purse and keys as the defendant drove away, striking the victim with her car. Police later apprehended the defendant, and the State charged her with armed robbery, armed burglary, attempted first-degree felony murder, and escape. After a trial, a jury found the defendant guilty on all four counts. On direct appeal, this court affirmed the decision of the trial court. Woodley v. State, 638 So. 2d 956 (Fla. 3d DCA 1994).

In State v. Gray, the Florida Supreme Court held that attempted felony murder is not a crime in the State of Florida. As a consequence, the defendant filed a Rule 3.850 motion alleging that her attempted first-degree felony murder conviction should be vacated. 654 So. 2d 552 (Fla. 1995)(overruling Amlotte v. State, 456 So. 2d 448 (Fla. 1984)). The trial court denied this motion. The defendant now appeals the denial of her motion.

The conviction and sentence for attempted first-degree felony murder must be set aside since, pursuant to Gray, the Supreme Court has held that the aforementioned charge is not a crime in the State of Florida. Gray, 654 So. 2d at 554. "[E]stablished authority in Florida holds that one cannot be punished based on a judgment 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." State v. Sykes, 434 So. 2d 325, 328 (Fla. 1983); see Thompson v. State, 667 So. 2d 470 (Fla. 3d DCA 1996)(reversing a conviction for attempted felony murder that was pending on direct review because one cannot be convicted of a nonexistent crime); Hilare v. State, 669 So. 2d 1135 (Fla. 3d DCA 1996)(reversing attempted murder conviction "[b]ecause the state...argued to the jury both attempted felony murder and attempted premeditated murder, [and] it is impossible to determine upon which theory the jury based its convictions.")

The question posed by this case is whether Gray applies retroactively to cases already final. The United States Supreme Court has held that cases are non-retroactive when (1) the court "has applied settled precedents to new and different factual situations...," or (2) the court "has expressly declared a rule of criminal procedure to be 'a clear break with the past'," but are retroactive when (3) "[the] trial court lacked authority to convict or punish a criminal defendant in the first place." United States v. Johnson, 457 U.S. 537, 548-50, 102 S. Ct. 2579, 2586-87, 73 L. Ed. 2d 202 (1982); see also Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed 2d 334 (1989). Since Gray holds that attempted felony murder is not a crime in Florida, the trial court lacked the authority to convict the defendant or punish her. Therefore, Gray applies retroactively.

Although this opinion would reach the same result, it is important to apply the facts of this case to the Florida Supreme

Court's test for retroactivity as articulated in State v. Callaway, 658 So. 2d 983 (Fla. 1995). To be retroactive in Florida, "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." State v. Callaway, 658 So. 2d at 986.[1] In Callaway, the defendant sought the retroactive application of the Hale decision which held that "consecutive habitual felony sentences for multiple offenses arising out of the same criminal episode" are invalid. Callaway, 658 So. 2d at 986; see Hale v. State, 630 So. 2d 521 (Fla. 1993), cert. denied, ___ U.S. ___, 115 S. Ct. 278, 130 L. Ed. 2d 195 (1994). The court held that the decision could be applied retroactively, reasoning that the rule was constitutional in nature because, without an empowering statute, it violated due process. Callaway, 658 So. 2d at 986-87. In addition, the Hale decision affected the defendant's liberty interests. Id. Similarly, in Meek v. State, the Fourth District held a decision to be retroactive, determining that it had fundamental significance because it "placed a defendant beyond the state's power to prosecute and impose penalties where the statute granted him [use and transactional] immunity [where he testifies

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[1] In Callaway, 658 So. 2d at 986-87, the court held that for a decision to be of fundamental significance it must: (1) "place beyond the authority of the state the power to regulate certain conduct or impose certain penalties" or (2) be "'of sufficient magnitude to necessitate retroactive application' under the test of Stovall v. Denno, 388 U.S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967)." The Stovall test requires consideration of the following factors: "(i) the purpose to be served by the new rule; (ii) the extent of reliance on the old rule; and (iii) the effect that retroactive application of the rule will have on the administration of justice." Callaway, 658 So. 2d at 987.

against his will] regardless of whether he invoked his privilege against self-incrimination." 605 So. 2d 1301, 1302 (Fla. 4th DCA 1992).

The Gray decision meets these factors as well. First, Gray was decided by the Florida Supreme 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, the Gray decision is retroactive, even to cases which are final.

Although the appellee argues that the Gray case should not be given retroactive application because it only speaks of being applied to cases presently "in the pipeline" and future cases, clearly nothing in the Gray opinion prohibits the case from being applied retroactively. Gray, 654 So. 2d at 554. "Ordinarily, a decision of a court of last resort overruling a former decision is retrospective as well as prospective in its operation, unless specifically declared by the opinion to have a prospective effect only." Florida Forest and Park Serv. v. Strickland, 154 Fla. 472, 18 So. 2d 251, 253 (Fla. 1944); City of Daytona Beach v. Amsel, 585 So. 2d 1044 (Fla. 1st DCA 1991); Hampton v. A. Duda & Sons, Inc., 511 So. 2d 1104 (Fla. 5th DCA 1987); see also Vogel v. State, 365 So. 2d 1079, 1080 (Fla. 1st DCA 1979)("Judicial conscience cannot

allow a person to remain imprisoned for a crime which the Supreme Court has held does not exist."). It should also be noted that the appellant has not challenged her convictions or sentences for the other two crimes for which she was convicted, to-wit: armed robbery and armed burglary. Accordingly, we are only setting aside the conviction for attempted first-degree felony murder.

We certify the following 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?