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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# REPLY BRIEF OF PETITIONER

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## 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?

It is the State's position that the rule pronounced by this Court in State v. Gray, 654 So. 2d 552 (Fla. 1995) represented a refinement in decisional law, not a change in the law of constitutional dimensions which would warrant retroactive application to judgments and sentences already final.

The Respondent contends that this case is governed by the principles followed in Gates v. United States, 515 F.2d 73 (7 Cir. 1975) and Strauss v. United States, 516 F.2d 980 (7 Cir. 1975). These cases advance the legal proposition that when federal circuit appeals courts are in conflict with respect to the constitutionality of a statute and the United States Supreme Court rules for the first time that the statute is unconstitutional, all circuits are bound, and the ruling is applied retroactively in those circuits that previously held that the statute was constitutional.

This principle of law is inapplicable in the instant case because this Court, in Amlotte v. State, 456 So. 2d 488 (Fla. 1984), held the felony murder statute to be constitutional, only receding from that position eleven years later in *Gray*. The Respondent's conviction, therefore, was based on an expressly valid offense which was confirmed under *Amlotte* and which remained valid up to this Court's opinion in *Gray*. See State v. Wilson, 21 Fla. L. Weekly S292 (Fla. July 3, 1996), where this Court held that attempted felony murder was a valid, existent offense up to its holding in *Gray*. This Court rejected the Third District Court's contention that where an attempted felony murder conviction is vacated, retrial on lesser offenses was improper. The district court had reasoned that there could be no lesser included offenses of a nonexistent offense. Id.; Wilson v. State, 660 So. 2d 1067 (Fla. 3d DCA 1995). 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." "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 at S292.

The situation here is more comparable to the way that retroactivity of a change in decisional law is handled in federal habeas corpus proceedings which, as here, are collateral proceedings. A case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final. Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 109 L.Ed.2d 334 (1989). In *Teague*, where the issue related to the evidentiary showing necessary to make out a *prima facie* case of racial discrimination in the use of peremptory challenges under the equal protection clause, the United States Supreme Court held that new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced unless they fall within the exceptions to the general rule. That is, a new rule should be applied retroactively (1) if it places "'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe,'. . . or (2) if it requires the observance of 'those procedures that. . .are 'implicit in the concept of ordered liberty,'". Teague v. Lane, 109 S.Ct. at 1064.

As long as the trial court applied the prevailing law at the time of trial and conviction, the new rule should not be applied

after the defendant's conviction became final. Butler v. McKeller, 494 U.S. 407, 110 S.Ct. 1212, 108 L.Ed.2d 347 (1990). The principle that a "new rule" will not be applied to cases on collateral review unless the rule falls into one of two exceptions, validates reasonable, good-faith interpretations of existing precedent made by state courts, even though those interpretations are shown to be contrary to later decisions. In *Butler* the petitioner challenged the denial of a Fifth Amendment claim on grounds that while the denial was proper pursuant to Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), he was entitled to retroactive application of the rule pronounced in Arizona v. Roberson, 486 U.S. 675, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988). The United States Supreme Court found that *Roberson* was an extension of law, a "new rule" not dictated by precedent existing at the time and therefore, not applicable on collateral review where it did not fall within either of the two narrow exceptions to the general rule of nonapplicability of new rules to cases on collateral review. Thus, the Court reasoned, Butler was not entitled to the benefit of the rule in *Roberson* where the courts properly applied the law as it existed at the time. Butler v. McKeller, 110 S.Ct. at 1216.

Based on the foregoing analysis, this Court should adopt the retroactivity principle of *Teague* and reject -- as did the United States Supreme Court -- the Stovall v. Denno analysis requiring a three-fold test for retroactive application. Teague v. Lane, 109 S.Ct. 1060, 1073-1075, 1078. In *Stovall* the Supreme Court held, with reference to cases both on direct review and in collateral proceedings, that the doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring fairness and uniformity in individual adjudications, and that such objectives are subject to analysis based on (1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule and (3) 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. 293, 297, 87 S.Ct. 1967, 1970, 18 L.Ed.2d 1199 (1967).

*Teague* is a more rational rule of law because it narrows the focus of exception to the applicability of "new rules" on collateral review to those changes which place certain kinds of primary private conduct beyond the state's authority to proscribe, and to the faithful adherence to procedures held to be implicit in the concept of ordered liberty. In a word, *Teague* would deny

application of new rules to cases which are final, except in those instances where issues of fundamental constitutional protection of the individual are at stake, in contrast to the focus of exceptions in *Stovall* which pertain to more general ministerial functions of a new rule and its potential effect on the administration of justice. In view of the fact that the federal courts have already adopted the retroactivity principle of *Teague* as set out in *Butler*, it would appear to be more appropriate for this Court to apply *Teague* in its analysis of the retroactive application of *Gray* to collateral attacks on attempted felony murder convictions which are final.

Thus, application of the *Teague* principle in the instant case, to the crime of felony murder where this Court found internal inconsistency in the elements of proof, and where this Court specifically announced that the rule would be applicable to all cases pending on appeal or not yet final, was a refinement in the law which cannot qualify within the exceptions to the rule. Butler v. McKeller, 110 S.Ct. at 1217; Teague v. Lane, 109 S.Ct. At 1074-1075. This Court specifically addressed issues in *Gray* regarding the determination of what constitutes an "overt act" that could, but does not, cause the death of another. Under that

analysis the element of intent required for felony murder was found to be in conflict with the element of intent necessary for an "attempted" felony murder. State v. Gray, 654 So. 2d at 554. Prevailing precedent held attempted felony murder to be a valid offense at the time Respondent's judgment and sentence became final, and this Court, in receding from *Amlotte*, specifically determined that the new rule was a result of the difficulty in reconciling the internal inconsistency posed by the element of intent necessary to one and not to the other. This case does not fall within the first *Teague* exception where the new rule of *Gray* is a refinement of the charging procedure and does not proscribe primary or private individual conduct, since both attempted murder and felony murder are still chargeable offenses. Moreover, Florida courts have returned attempted felony murder cases for retrial on charges of attempted premeditated murder where the evidence warrants it, Thompson v. State, 667 So. 2d 470 (Fla. 3d DCA 1996). And this Court returned a case of attempted felony murder for retrial on lesser included offenses where charged and in which jury instructions were given, State v. Wilson, 21 Fla. L. Weekly at S292. Nor does this case fall within the second exception where the State charged Respondent with a valid offense and the trial court conducted a fair and impartial trial in accordance with

precedent.

Where neither *Teague* exception applies -- given that the rule in *Gray* represents a refinement in decisional law, a rearrangement of the crimes and does not provide additional fundamental rights to defendants -- 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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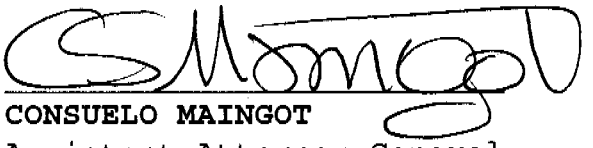

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## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that a true and correct copy of the foregoing **REPLY BRIEF OF PETITIONER** 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 and to **BRUCE S. ROGOW & BEVERLY A. POHL, P.A.,** 2441 S.W. 28th Avenue, Ft. Lauderdale, Florida 33312 on this 12 day of November 1996.

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Assistant Attorney General