IN THE SUPREME COURT OF FLORIDA

88,473

CASE NO. 88,~~416~~

THE STATE OF FLORIDA,
Petitioner,

-vs-

MAURICE HARRIS,
Respondent.

BRIEF OF RESPONDENT ON MERITS

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

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IN THE SUPREME COURT OF FLORIDA

CASE NO. 88,116

THE STATE OF FLORIDA,
Petitioner,

-vs-

MAURICE HARRIS,
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ON PETITION FOR DISCRETIONARY REVIEW
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RESPONDENT'S BRIEF ON MERITS

INTRODUCTION

This a petition for discretionary review on the grounds of express and direct conflict of decisions. In this brief the symbol "A" will be used to refer to the petitioner's appendix.

STATEMENT OF THE CASE AND FACTS

The respondent accepts petitioner's recitation of the Statement of the Case and Facts as a generally accurate depiction of the lower court proceedings. Any additional facts deemed pertinent to this appeal will be included in the Argument.

SUMMARY OF THE ARGUMENT

The defendant in the instant case was charged and convicted of attempted first degree felony murder. The information did not charge the defendant with attempted premeditated murder. This court has held that the proper remedy for cases reversed pursuant to *State v. Gray*, 654 So. 2d 552 (Fla. 1995), is remand to the lower court for retrial for all lesser instructed offenses. Upon remand, the state should not be allowed to amend the information to charge the defendant with attempted premeditated murder. The information in the instant case never charged the defendant with a viable crime pursuant to the laws of Florida and the prosecution cannot amend a meaningless document.

ARGUMENT

ALTHOUGH *WILSON v. STATE*, 21 FLA. LAW WEEKLY S292 (Fla. July 3, 1996), REQUIRES THE APPELLANT'S RETRIAL ON ALL LESSER INSTRUCTED OFFENSES, THE STATE IS PRECLUDED FROM AMENDING THE INFORMATION UPON REMAND SINCE THE INFORMATION FAILS TO CHARGE A VIABLE CRIME AND IS THEREFORE A NULLITY.

This court has held that the proper remedy for cases reversed pursuant to *State v. Gray*, 654 So. 2d 552 (Fla. 1995) is remand for retrial for lesser included offenses. *Wilson v. State*, 21 Fla. L. Weekly S292 (Fla. July 3, 1996); *State v. Lee*, 21 Fla. L. Weekly S332 (Fla. July 18, 1996); *State v. Alfonso,* 21 Fla. L. Weekly S332 (Fla. July 18, 1996). Accordingly, the state takes the position that the issue presented in the instant appeal is not whether the defendant will be granted a retrial, but rather whether the state can amend the previously filed information and charge the defendant with

attempted premeditated murder. The state argues that an amendment "would be fully consistent with the principles governing the amendment of charging documents. As a general rule, the State is free to amend a charging document, prior to trial, without leave of court." *Petitioner's brief page 15.*

The state's argument is incorrect. The cases cited by the state are cases in which imperfections in the charging document, which did not prejudice the defendant's ability to prepare for trial, were corrected before commencement of the trial. *Hoffman v. State*, 397 So. 2d 288 (Fla. 1981) (amendment by state of date alleged in statement of particulars should be allowed if defendant will not be prejudiced thereby); *Lackos v. State*, 339 So. 2d 217 (Fla. 1976) (absent prejudice to defendant, state should be permitted to amend indictment which charged accused with buying, receiving or aiding in concealment of stolen property, to reflect name of corporate owner of stolen property); *State v. Anderson*, 537 So. 2d 1373 (Fla. 1989) (oral amendment charging lesser offense in return for defendant's agreement not to seek continuance where both parties understood judge urged immediate trial not error); *Rosser v. State*, 658 So. 2d 175 (Fla. 3d DCA 1995) (probation affidavit could be amended during probation violation hearing to reflect correct date defendant was placed on probation); *State v. Conte*, 516 So. 2d 1115 (Fla. 2d DCA 1987) (defendant not show prejudice from state's delay in adding conspiracy count to information charging trafficking, where conspiracy count would have been proven with same witnesses who had been listed for trafficking charge).

In the instant case, the defendant was charged with attempted felony murder.

This court has held that the crime of attempted felony murder is not a cognizable crime under the laws of Florida. An information which does not allege a crime is a nullity as it does not place an accused in jeopardy. *State v. Gray*, 435 So. 2d 816 (Fla. 1993). Thus the prosecution does not merely wish to correct a minor imperfection in the information, the prosecution wishes to charge the defendant with a viable crime by amending a meaningless information. It is axiomatic that the prosecution cannot amend a meaningless document. Therefore, the proper remedy for the state is not to amend the information.

Respondent is cognizant of this court's opinion in *Wilson* which seems to hold that the crime of attempted felony murder existed as a valid offense for approximately eleven years and had ascertainable lesser offenses. *Wilson v. State*, 21 Fla. Law Weekly at S292. If *Wilson* indicates that *Gray* is not retroactive, *see Miller v. State*, 21 Fla. Law Weekly D1863 (Fla. 3d DCA August 23, 1996) (third district notes that *Wilson* casts doubt on retroactivity of *Gray*), it would seem that an argument can be made that because the information was filed before *Gray* and charged a valid crime at the time, it can now be amended. Respondent respectfully asserts that *Gray* must be retroactive, thus precluding an amendment to a nonexistent charge in the information.

In *Woodley v. State*, 673 So. 2d 127 (Fla. 3d DCA 1996), the third district correctly recognized that "[e]stablished 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 due process violation); *Glanton v. State*, 415 So. 2d 909 (Fla. 2d DCA 1982) (conviction for 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 cannot be used to calculate guideline sentence where subsequent to defendant's conviction, this court held attempted uttering of a forged instrument was a nonexistent crime).

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. The defendant's conviction was affirmed on direct appeal and the defendant filed a federal habeas corpus petition. The district court concluded that the crime of attempted perjury did not exist in Florida. The court granted the writ on the basis that conviction of a non-existent crime violated due process. The court then certified the question of whether the crime of attempted perjury existed in Florida to this court. In *Adams v. Murphy*, 394 So.2d 411 (Fla. 1981), this court agreed with the federal court and held there was no such crime in Florida. When the case returned to the federal court, the state argued that the habeas petition should be denied because the defendant's conviction for the nonexistent crime was the result of defense counsel's request that the jury be charged on this offense. The court rejected this argument and

held that:

> 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.**

Once this court determined that it was legally impossible to commit the crime of attempted felony murder, its prior interpretation in *Amlotte* became invalid. This court's interpretation of the attempt statute was a declaration of the statute's meaning from the date of its effectiveness. *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 means 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). If it was legally impossible for *Gray* to commit the crime of attempted felony murder, it is also legally impossible for the defendant in this case to commit the crime.

Any other interpretation of this court's holding in *Gray* would violate the long standing principle of separation of power. The formulation of the law is a function of the legislature. 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).

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 is limited to interpreting statutes which are passed by the legislature. The situation in this case is similar to the situation where a court declares that a statute is facially unconstitutional. Court's have consistently recognized that an unconstitutional penal statute is deemed void from the time of its enactment since a court's 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 simply from the time of the decision).

This situation should be contrasted to the situation where the legislature repeals a criminal statute. In the latter, defendants who have been convicted of the repealed statute do not have the right to have their convictions vacated. The reasoning being that the legislature has the right to determine what conduct is prohibited in a society. If a defendant engages in conduct which is criminal at the time he committed the act, it is irrelevant that the legislature decided to legalize the act at a later time.

The same logic that requires a court's decision on the constitutionality of a

The 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 a 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 interpreted the attempt statute and concluded that 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 law rather than interpreting 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 that the crime of attempted possession of burglary tools did not exist. *State v. Thomas*, 362 So.2d 1348 (Fla. 1978). The First District Court of Appeal held that *Thomas* must be applied retroactively:

> 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 precluding certain conduct from constituting criminal conduct, due process requires that the decision be applied retroactively to the enactment of the statute because a statute cannot mean one thing before the Supreme Court's 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").[1]

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. The defendant's convictions were affirmed on direct appeal. Subsequent to defendant's appeal, the United States Supreme court held that Sections 5322(a) and 5324(3) required the jury to find that the defendant knew the structuring in which he engaged was unlawful. *Ratzlaf v. United States*, 114 S.Ct. 655 (1994). Based upon this decision, the defendant filed a motion for post-conviction relief to vacate his conviction. Ruling that *Ratzlaf* 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

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[1] 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.")

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 the defendant's conviction, the United States Supreme Court interpreted the mail fraud statute to prohibit convictions for mail fraud unless the fraud involved money or property. *McNally v. United States,* 107 S.Ct 2875 (1987). Since the defendant's alleged fraud did not involve money or property, the defendant filed a post-conviction motion to vacate his conviction because his conduct was not a violation of the mail fraud statute. In reaching the conclusion that *McNally* had to be applied retroactively, the court relied on *Strauss v. United States, supra*, and 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 aforementioned cases are similar 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 defendants were convicted, the United States Supreme Court entered an opinion which held that the defendants' actions were not a violation of the statute in question and thus not

criminal. In all of the aforementioned cases, the courts unanimously rejected the position that a statute can mean one thing prior to a court's interpretation and something different after the court's interpretation. The federal courts have recognized that a court cannot create law but rather merely interpret the law. Therefore, if a court concludes that certain conduct is not a violation of a certain statute, that interpretation applies to the day the statute was passed and any previous interpretation of the statute is void and invalid.

Since the attempt statute cannot 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.

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.

The fundamental consideration to determine whether *Gray* should be retroactive is the balance between 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), this court articulated the proper standard for determining whether a change in the law should be retroactively applied to provide post conviction relief under Fla.R.Crim.P. 3.850. Pursuant to *Witt*, a new rule of law may not be applied retroactively unless it

satisfies three requirements. The new rule must originate in either the United States Supreme Court or the Florida Supreme Court; be constitutional in nature; and have fundamental significance. *Witt v. State*, 387 So. 2d at 929, 930.

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

1. THE 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 possession of 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 the decision in *Palmer* retroactively to defendants seeking collateral relief. *See also Cisnero v. State*, 458 So. 2d 377 (Fla. 2d DCA 1984) (this court's decision in *Palmer* construing 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* 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 concluded that *Hale* must apply retroactively. *State v. Calloway*, 642 So. 2d 636 (Fla. 2d DCA 1994). 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."**

In *State v. Calloway*, 658 So. 2d 983 (Fla. 1995), this court agreed with the second district that pursuant to *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 that *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 anyone who testifies against his will. In *Meeks v. State*, 605 So. 2d 1301 (Fla. 4th DCA 1992), the fourth district concluded that *Jenny* must be applied retroactively because it constituted a fundamental constitutional change of

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. As in *Palmer*, *Hall*, *Flowers*, and *Jenny*, this court's decision in *Gray* was constitutional in nature since the crime with which the defendant was convicted is nonexistent and due process prohibits punishment for a nonexistent crime.[2]

2. THE DECISION IN GRAY HAS FUNDAMENTAL SIGNIFICANCE.

Pursuant to *Witt*, decisions which have fundamental significance generally fall into two broad categories. The first are changes in the law which place the power to regulate certain conduct or impose certain penalties beyond the authority of the state. 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 category consists of changes in the law which are of sufficient magnitude to necessitate retroactive application ascertained by the three-fold

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[2]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).

sufficient magnitude to necessitate retroactive application ascertained by the three-fold test of *Stovall* and *Linkletter*. *Gideon v. Wainwright*, of course, is the prime example of a change in the law included within this category.

In *Gray v. State, supra*, this court held that the crime of attempted felony murder does not exist. Therefore, the decision in *Gray* comes within the first category of fundamentally significant decisions, those 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 present in this case. In *Meeks,* the court concluded that this 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 cannot be prosecuted for a criminal offense once he has been forced to testify against

himself. In *Gray*, this court held that a defendant cannot be prosecuted for the crime of attempted first degree felony murder because it is logically impossible to commit this crime. Therefore 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 thus clear that pursuant to the three prong test enunciated in *Witt*, *Gray* must be applied retroactively: *Gray* was decided by this court; *Gray* is constitutional in nature because it affects the defendant's due process and liberty interests since the crime he was convicted of does not exist; the *Gray* rule is fundamentally significant 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. Accordingly, this court should hold that the *Gray* decision is retroactive. Moreover, as the charging document in the instant case charged a nonexistent crime and is therefore a nullity, the prosecution must be precluded from amending the document at this time.

Respondent notes that the issue of *Gray's* retroactivity is before the court in *State v. Woodley*, Supreme Court Case No. 88,116. Additionally, the First District has followed *Woodley* and ruled that *Gray* is retroactive in *Hampton v. State*, 21 Fla. Law Weekly D2114c (Fla. 1st DCA September 24, 1996). In *Freeman v. State*, 21 Fla. Law Weekly D2056a (Fla. 4th DCA September 18, 1996), the Fourth District expressed agreement with *Woodley* and certified the question of *Gray's* retroactivity

to this court. Respondent respectfully requests that this court not determine the issue of the prosecution's ability to amend the information in the instant case until the issue of *Gray's* retroactivity has been decided. If *Gray* is retroactive and the defendant was never charged with a viable crime under the laws of Florida, the prosecution should not be permitted to amend the information. If *Gray* is not retroactive, an argument can be made that amendment is the proper remedy for the prosecution at this time.

CONCLUSION

Based on the foregoing facts, authorities and arguments, appellant respectfully requests that this court enter an order precluding the state from filing an amended information.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Office of the Attorney General, 401 N.W. Second Avenue, Miami, Florida 33128, this 3rd day of October, 1996.

Rosa C. Figarola

ROSA C. FIGAROLA
Assistant Public Defender