IN THE SUPREME COURT OF FLORIDA

CASE NO. 88,473

THE STATE OF FLORIDA,

Petitioner,

vs.

MAURICE HARRIS,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

REPLY BRIEF OF PETITIONER ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The Petitioner relies upon the Statement of the Case and Facts as set forth in its Initial Brief of Petitioner on the Merits.

SUMMARY OF ARGUMENT

The Petitioner relies upon the Summary of Argument as set forth in its Initial Brief of Petitioner on the Merits.

ARGUMENT

THE VACATED CONVICTION FOR ATTEMPTED FELONY MURDER IS SUBJECT TO RETRIAL FOR OTHER DEGREES OF ATTEMPTED MURDER.

The principal contention of the Petitioner herein has been directly addressed by this Court's recent opinion in State v. Wilson, 21 Fla. L. Weekly S292 (Fla. July 3, 1996). Pursuant to Wilson, a retrial is permitted on any other offenses instructed on at trial. Pursuant to language included in State v. Alfonso, 21 Fla. L. Weekly S332 (Fla. July 18, 1996), this Court was apparently contemplating lesser included offenses. As to such lesser included offenses, there is no longer any viable issue and retrial is proper.

The instant case, in addition to the various lesser offenses which were instructed upon, and for which retrial is proper, included jury instructions on attempted premeditated murder, even though the information did not allege premeditation. The State has therefore sought clarification herein as to the propriety of retrial on that offense, insofar as it is consistent with the language in Wilson, which refers to a retrial on any "other offenses instructed on at trial." 21 Fla. L. Weekly at S292.

While the State had asserted, in its initial brief herein, that retrial on attempted premeditated murder was consistent with Wilson and raised no double jeopardy problems, insofar as the State, on remand could always seek to amend the original charging document to charge the element of premeditation, the Respondent herein has cursorily responded that the cases relied upon by the State, regarding the amendment of a charging document, involved "imperfections" in the charging document which could be corrected prior to trial, whereas the charging document herein charged a nonexistent offense and was a nullity. See, Brief of Respondent, pp. 3-4. Very simply, the "imperfections" in the charging documents in the other cases are no different; they all involve matters which could be remedied prior to a trial, and the State herein need only add the element of premeditation prior to a retrial herein. Indeed, if a conviction for attempted premeditated murder was permitted to stand, and not to constitute fundamental error in Garcia v. State, 492 So. 2d 360, 368-69 (Fla. 1986), notwithstanding that the charging document charged attempted felony murder and did not allege premeditation, the ability to retry the defendant, for attempted premeditated murder, in the instant case, is clearly a lesser matter than the upholding of the conviction in Garcia.

As to the Respondent's other assertion, that the charging document, having alleged attempted felony murder, is a "nullity," that proposition has clearly been repudiated by this Court's decision in Wilson; the offense of attempted felony murder clearly existed for some 11 or more years prior to this Court's recent decision in State v. Gray, 654 So. 2d 552 (Fla. 1995). Moreover, the charging document charged two counts - attempted murder and armed robbery. As the armed robbery is unaffected by any of the decisional law regarding attempted felony murder, the charging document herein is clearly not a "nullity."

The Respondent's primary argument herein has been to assert, pursuant to Woodley v. State, 673 So. 2d 127 (Fla. 3d DCA 1996), that this Court's decision in Gray must have retroactive effect.[1] Contrary to the Respondent's argument, however, the instant case does not present any retroactivity issue. In Gray, this Court receded from its decision in Amlotte v. State, 456 So. 2d 448 (Fla. 1984), and held that the decision of the Third District Court of Appeal, in Gray, reversing a conviction for attempted felony

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[1] Woodley is currently pending review on the merits in this Court in Case No. 88,116.

murder, should be affirmed. The instant case, pending on direct appeal when this Court's decision in Gray was issued, is entitled to the benefit of Gray. See, Gray ("This decision must be applied to all cases pending on direct review or not yet final." 654 So. 2d at 554).

Just as the defendant in Gray had his conviction for attempted felony murder reversed and vacated, so too, the defendant herein, Harris, has had his conviction for attempted felony murder vacated. Gray did not address any issue regarding the propriety of retrying a defendant, whose attempted-felony-murder conviction has been overturned, for any other forms of attempted homicide which had been recognized as lesser included offenses during the eleven years in which Amlotte was the controlling law in Florida. Since Gray did not address any such issue, there can not possibly be any question regarding the retroactivity of Gray with respect to the issue of offenses for which similarly situated defendants can be retried. As Harris and Gray, similarly situated defendants, both received identical benefits pursuant to Gray, the instant case satisfies the requirement that similarly situated defendants receive the same treatment. Smith v. State, 598 So. 2d 1063, 1066 (Fla. 1992). Lesser offenses were not at issue in Gray and Gray

therefore has no bearing, retroactively or otherwise, on the propriety of permitting retrials for the lesser offenses. The defendant herein as already received the full benefit of Gray as the attempted felony murder conviction has been vacated.

The federal case law upon which the Respondent relies herein is irrelevant for additional reasons as well. Those cases involve situations where the court of highest jurisdiction resolves question of statutory interpretation which had previously entailed either (1) different conclusions among the different federal circuit courts of appeal, or (2) the absence of any determination by a court of highest jurisdiction regarding the statutory question at issue. By contrast, the decision of this Court, in Gray, recedes from a previously existing decision, of finality, from the Court of final jurisdiction in this State. Very simply, none of the cases relied upon by the Respondent involve a situation, such as the instant one, where the court of highest jurisdiction was receding from its own prior decision which, in turn, had explicitly recognized the validity and existence of the offense at issue.

Lastly, with respect to the retroactivity issue, it should be noted that the Third District certified the retroactivity question,

in Woodley, prior to this Court's decision in Wilson. The Third District has, itself, acknowledged that Wilson appears to repudiate the retroactivity argument which the Respondent herein is advancing. Thus, in Miller v. State, 21 Fla. L. Weekly D1863 (Fla. 3d DCA Aug. 14, 1996), the Third District Court of Appeal referred to "the very dubious assumption" that its own initial decision in Woodley, holding Gray to be retroactive to previously final decisions, survived this Court's recent decision in Wilson. The Fourth District, in Freeman v. State, 21 Fla. L. Weekly D2056 (Fla. 4th DCA Sept. 18, 1996), has similarly concluded that the Respondent's retroactivity argument is no longer tenable in view of this Court's ruling in Wilson.

Accordingly, in view of the foregoing, the lesser offenses which were instructed upon herein are clearly subject to retrial pursuant to Wilson. Similarly, there is no double jeopardy bar to a retrial on the charge of attempted premeditated murder, for which offense there was a jury instruction in the trial court herein. Lastly, the retroactivity argument of the Respondent is irrelevant, since the defendant herein has already had the attempted felony murder conviction vacated.

CONCLUSION

Based on the foregoing, the decision of the lower Court, with respect to attempted felony murder, should be quashed in part, with directions to remand for retrial on both lesser included offenses of attempted felony murder, for which the jury had been instructed herein, and for retrial on the additional charge of attempted first degree premeditated murder.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Petitioner on the Merits was mailed this 28th day of October, 1996 to ROSA FIGAROLA, Assistant Public Defender, Office of the Public Defender, 1320 N.W. 14th Street, Miami, Florida 33125.

RICHARD L. POLIN