ORIGINAL

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

ALLEN HAMPTON,

Respondent.

CASE NO. 89,055

JURISDICTIONAL BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the First District Court of Appeal and the prosecuting authority in the trial court, will be referenced in this brief as Petitioner, the prosecution, or the State. Respondent, Allen Hampton, the Appellant in the First District Court of Appeal and the defendant in the trial court, will be referenced in this brief as Respondent or his proper name.

A bold typeface will be used to add emphasis. Italics appeared in original quotations, unless otherwise indicated.

The identical issue presented is currently before the Court in State v. Woodley, Case No. 88,116.

STATEMENT OF THE CASE AND FACTS

The pertinent procedural history set out in the decision of the lower tribunal, attached in slip opinion form [hereinafter referenced as "slip op."], in Hampton v. State, Slip Op. Case No. 96-809 (Fla. 1st DCA September 24, 1996), establishes the following:

Hampton filed a successive rule 3.850 petition challenging his conviction for attempted felony murder. The trial court denied relief as the petition was successive. The district court

reversed, holding that Gray was retroactively applicable to convictions which had been final prior to the issuance of Gray; citing as authority the decisions in Woodley v. State, 673 So. 2d 127 (Fla. 3d DCA 1996) and Brown v. State, 21 Fla. L. Weekly D1318 (Fla. 3d DCA 1996) where the 3rd DCA retroactively applied Gray to convictions which were final prior to its issuance. This petition for discretionary review followed.

SUMMARY OF ARGUMENT

The summary is omitted because of the brevity of the argument.

ARGUMENT

ISSUE I

SHOULD THIS COURT EXERCISE DISCRETIONARY REVIEW BASED ON DIRECT AND EXPRESS CONFLICT WITH STATE V. GRAY, 654 SO. 2D 552 (FLA. 1995)?

Jurisdictional Criteria

This Court has jurisdiction pursuant to Fla. R. App. P. 9.030(a)(2)(A)(iv), which parallels Article V, § 3(b)(3), Fla. Const. The constitution provides:

> The supreme court ... [m]ay review any decision of a district court of appeal ... that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

The conflict between decisions "must be express and direct" and "must appear within the four corners of the majority decision." Reaves v. State, 485 So.2d 829, 830 (Fla. 1986). Accord Dept. of Health and Rehabilitative Services v. Nat'l Adoption Counseling Service, Inc., 498 So.2d 888, 889 (Fla. 1986). Jurisdiction thus rests upon whether the holding of the First District Court below applying Gray retroactively expressly and directly conflicts with Gray. This Court should accept jurisdiction of the instant case because it has already accepted

the identical issue in Woodley. The cases should be consolidated for consideration by the Court.

This Court in Gray receded from Amlotte v. State, 456 So. 2d 448, 554 (Fla. 1984) and held that there was no criminal offense of attempted felony murder. In doing so, however, the Court specifically held that this "decision must be applied to all cases pending on direct review or not yet final" Thus, Gray clearly announces that the decision is applicable to non-final decisions still under review and inapplicable to final decisions not under review. Nevertheless, the district court here and in Woodley and Brown applied the decision to convictions which had long been final in the approximate eleven years that Amlotte recognized the offense of attempted felony murder. See, this Court's recent decision in State v. Wilson, 21 Fla. L. Weekly S292 (Fla. July 3, 1996)("attempted felony murder was a statutorily defined offense ... for eleven years. It only became 'nonexistent' when we decided Gray. ... it was a valid offense before Gray.

This Court should accept discretionary review of this case and consolidate it with Woodley. It is clear that the case here directly and expressly conflicts with both Gray and Wilson. It is also clear that retroactive application of Gray would create

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing JURISDICTIONAL BRIEF OF PETITIONER has been furnished by U.S. Mail to Allen Hampton, Pro Se Respondent, DOC# 298053, Box 269, Cross City Correctional Institution, P.O. Box 1500, Cross City, Florida, 32628, this 10th day of October, 1996.

Giselle Lylen Rivera

Giselle Lylen Rivera
Assistant Attorney General

[A:\HAMPTON.JB --- 10/10/96,2:44 pm]

Appendix

96-110587 TCR

ALLEN HAMPTON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____/

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 96-809

Opinion filed September 24, 1996.

An appeal from Circuit Court for Duval County.
Hugh A. Carithers, Judge.

Allen Hampton, Cross City, Pro Se.

Robert A. Butterworth, Attorney General, and Giselle Lylen Rivera, Assistant Attorney General, Tallahassee, for Appellee.

ALLEN, J.

The appellant challenges the denial of a Florida Rule of Criminal Procedure 3.850 motion for postconviction relief in which he asserted that he should not have been convicted of attempted felony murder, as State v. Gray, 654 So. 2d 552 (Fla. 1995), establishes that there is no such criminal offense in Florida. Although the appellant had filed a prior motion under rule 3.850 raising a different claim, the supreme court's subsequent ruling in Gray could not then have been reasonably anticipated and the

present motion thus does not constitute an abuse of the procedure as delineated in rule 3.850(f). And while the opinion in Gray recites that the decision must be applied to all cases pending on direct review or not yet final, this does not necessarily preclude application of the decision in cases where collateral relief is sought under rule 3.850. Recognizing that a conviction and sentence should not be imposed for a purported offense which does not exist, the third district ruled in Woodley v. State, 673 So. 2d 127 (Fla. 3rd DCA 1996), that the decision in Gray will apply in connection with a rule 3.850 motion for postconviction relief. See also Brown v. State, 21 Fla. L. Weekly D1318 (Fla. 3d DCA June 5, 1996). Following Woodley, we conclude that the decision in Gray may thus apply in the present case. The challenged order is therefore reversed and the case is remanded.

MINER and MICKLE, JJ., CONCUR.