IN THE SUPREME COURT OF FLORIDA

Allen Hampton / Appellant **Case No. 89055**

vs.

State of Florida / Appellee

APPELLANTS REPLY BRIEF

Whether the holding in State v Gray, which held that Attempted Felony Murder would no longer be recognized as a crime in the State of Florida, be applied retroactively in Post Conviction Relief.

Respectfully Submitted,

Allen Hampton

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TABLE of CITATIONS

CONSTITUTIONAL PROVISIONS

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Statement Of Case History

Appellant avers that he was tried and found guilty by a jury of (Attempted First Degree Felony Murder) and Armed Burglary and sentenced to Twenty-Seven years in prison. Said conviction and sentence were affirmed on Direct Appeal, by the 1st DCA, State of Florida on November 17th, 1994.

Appellant timely filed a rule 3.850, FL Rule Crim. Procedure, Motion for Post Conviction Relief. Said Motion was denied on March 21, 1995, Appellant timely appealed to the 1st DCA, and was denied, with mandate issued on October 10, 1995.

(During the pendency of Appellant's direct appeal) (A Question Of Great Public Importance) was certified to this Honorable Court, which directly related to Appellant's conviction and sentence on the charged offense of Attempted Felony Murder.

Appellant's "Appellant Counsel", failed to move for certification of Appellants conviction for First Degree Attempted Felony Murder, despite two questions being certified to this Honorable Court concerning the charge of Attempted Felony Murder, while Appellant's direct appeal was pending in the 1st DCA of Florida. (See Gray v. State, 654 So. 2d 954 , (FL 3rd DCA May 10, 1994) and (Grinage v. State, 641 So. 2d 1362, FL 5th DCA, August 19, 1994).

Subsequently, to "Appellant's Direct Appeal" becoming final on November 17, 1994 (R. Vol. Pg. 36), the Florida Supreme Court ruled that there is "NO" crime of "Attempted Felony Murder". See: (State v. Gray) and (State v. Grinage) supra, appellant sought relief pursuant to, (Jones v. Singletary, 621 So. 2d 760 FL 3rd DCA 1993) and Rule 3.850, FL Crim. P. Said motion was denied without full review of the merits of Appellants standing to seek relief pursuant to Jones, supra and other improper reasons for denial.

Appellant appealed the lower courts denial to the 1st DCA of Florida and later amended, (Wooley v. State, 673 SO. 2d 127 FL 3rd DCA 1996), applying Gray retroactively.

On September 24, 1996, the 1st DCA of Florida, chose not to answer Appellants Pipe-Line argument, but reversed and amended Appellants case, following the 3rd DCA's decision in (Wooley v. State). See: (Hampton v. State, 21 FL L. Weekly D2114, FL 1st DCA Sept. 24, 1996.

Issue One(1)

Statement of Issues The Certified Question

Should State v. Gray, 654 So. 2d 552 FL 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.

Issue Two(2)

Does the continued incarceration of persons convicted of an abolished crime because of its logical "Fiction and Absurdity" violates due process of law and undermines public confidence in the administration of justice?

Summary of Argument

The logical underpinnings of the (State v. Gray) decision, abolished the crime of Attempted Felony Murder, and does compel its retroactivity to all those convicted of the purported crime. All arguments on the contrary must depend on legal fiction no less acceptable than those used to support the abolished Amlotte view. (Amlotte v. State, 456 So. 2d 448 FL 1984.

This Honorable Court abolished the crime of Attempted Felony Murder, and termed it a logical absurdity and indefensible.

To continue to incarcerate those convicted of Attempted Felony Murder before the decision in Gray would be a grievous injustice, especially to those who were on Direct Appeal when the question was certified, but their cases were final before the final decision was rendered. The proper vehicle to obtain the benefits of Gray is by way of rule 3.850, on retroactive change of law.

Argument

The State claims that non-retroactivity was compelled by decisions of This Honorable Court: Gray v. State, which stated that the decision must be applied to all cases " not yet final or pending on review". The decision in Wilson v. State, So. 2d 21, FL L. Weekly S. 292 FL 1996. Referring to lesser including offenses and whether lesser included offenses could be tried. Observing that Attempted Felony Murder was a statutory defined offense for eleven(11) years. Neither Gray or Wilson presented the Post Conviction Relief, retroactivity question presented in this case. The statement in Gray does not preclude a finding in this case, that the decision should not be retroactive. The issues of Rule 3.850 retroactivity was not before the court in Wilson. (C.F.) Bass v. State, 530 So. 2d 282 FL 1983, in Palmer v. State, 438 So. 2d FL 1983, in Palmer decision the court did not state that it was retroactive. Also, in Smith v. State, 598 So 2d 1063 FL 1992, the same language used in Gray simply confirmed the retroactivity of Smith v. State, and that it was to be applied to pre and post cases.

The Wilson court was not asked to decide whether a pre-Gray Attempted Felony Murder conviction should be set aside. The Wilson court only dealt with lesser offenses, therefore, it would be unfair to deem its "Valid Offense before Gray" language in this case. It simply states that there is a lesser offense.

The State also argues that Gray's retroactive application conflicts with Witt v. State, 387 So. 2d 922 FL 1980. Witt was also reaffirmed in State v. Callaway, 658 So 2d 983, 985, 986, FL 1995. Under Witt, a new rule of law may not be applied unless it meets three requirements. (1) It must originate in either the United States Supreme Court or the Florida Supreme Court. (2) It must be constitutional in nature. (3) It must have fundamental significance. See: Witt v. State.

Callaway, 659 So 2d at 986. "Fundamental significance" is determined in "Two broad categories" of cases: (1) Those decisions "which place beyond the authority of the state the power to regulate certain conduct or impose certain penalties", and (2) decisions which "are of sufficient magnitude to necessitate retroactive application under the threefold test of Stovall v. Denno, 388 U.S. 293 87 S. Ct. 1967, 18 L. Ed. 2d 1199, (1965). See also; Witt, 387 So. 2d at 929. Id 986, 987. For the second category of cases, Stovall, Linkletter, and Witt require analysis of three "essential considerations". (1) The purpose to be served by the new rule, (2) The extent of reliance on the old rule, (3) The effect on the administration of justice of a retroactive application of the new rule. **This is not mere law change; this is the Abolishment of a Crime.**

Appellant has serious liberty interests at stake as well as all of those convicted of this **Abolished Crime**.

In case at bar, one may never be convicted of a non-existent crime. Achin v. State, 436 So. 2d 30 FL 1982; Adams v. Murphy, 653 F. 2d 224 5th Cir. 1981. **(Nowhere in this country can a man be condemned for a non-existent crime).**

The crime Attempted Felony Murder was abolished because of its logical fallacies, those fallacies cannot exist in post Gray, and not exist in pre Gray. Retroactivity of Gray is compelled by common sense, due process, and the Witt analysis. (1) Gray's new law originated in the Florida Supreme Court. (2) Gray's new law is constitutional in nature, because of the Due Process clauses of the Florida Constitution (Art. 1, 9) and the Constitution of the United States (Amend. 14) does not continue conviction and incarceration for conduct which is not criminal. The State's claim that Gray is not constitutional, is abrogated, due to the fact that a crime has been abolished because of an intrinsic definition flaw permitted the State to establish intent to kill without proof of that intent. Surely the Constitutional "Liberty" interest at stake can not be hidden. There is no such crimes Felony Attempted Murder. The 1st DCA in Hampton v. State, just as the 3rd DCA in Wooley v. State, 673 So. at 128, recognized that one cannot remain incarcerated on a purported crime. This was not a mere creature statute; **This crime was abolished.**

The State now claims that the Legislature has newly reinstated the crime placing themselves over this Honorable Court, section

782.051 (Felony Causing Bodily Injury) does make criminal felonious attempts which cause injury to another, but it cannot be compared to Attempted Felony Murder, and even if it was, the "Attempted" and "Felony Murder" would make the statue invalid under the Authority of Gray. **Legislature cannot over-rule this Honorable Court.**

For the third element of Witt: whether Gray effected a change in law of "Fundamental Significance", 387 So. 2d at 930, when a realistic analysis is taken in the cases mentioned above, the answer is clearly "yes".

The case at bar falls in the first and most compelling of the two categories of changes of law in decisional law which have warranted retroactive application to conviction which are final. Those changes of law which place beyond the authority of the State the power to regulate certain conduct, Witt V. State, 387 So 2d 929. Gray held that there is no crime such as Felony Attempted Murder, because of its logical under-pinnings, which compelled Honorable Justice Overton in his Amlotte dissent, calling it "indefensible and a logical absurdity". This decision has fundamental significance to those convicted under Amlotte reasoning, and warrants retroactive application by way of 3.850.

In case at bar, where Appellant would have been in pipe-line, if pellet council would have, joined certified question to this Honorable Court, and pellet council cannot be held ineffective for

failure to anticipate the Supreme Courts Ruling the only vehicle to present Gray claim is by way of Rule 3.850, based on major change of law, and because the 1st DCA did finalize Appellant's direct during the time that both Gray and Grinage was pending in this Honorable Court, Appellant seeks relief on retroactive change of law.

The main purpose for Rule 3.850, was to provide a method of reviewing a conviction based on major change of law, where unfairness was so fundamental in either process or substance that the doctrine of finality had to be set aside.

Appellant furnished above information in hopes of making this Honorable Court aware of situations in which justice cannot be served without retroactive application of Gray. Without Gray's retroactive application, many will be caught in catch 22. This issue does not seem to concern the State. Justice requires Gray's retroactivity.

Witt v. State, 387 So. 2d at 927, see also Davis v. State, 417 U.S. 333, 346, 347, 94 S. Ct. 2298, 2305, (1974). (If the conviction and punishment are for an act that the law does not make criminal, such a circumstance inherently results in a complete "Miscarriage of Justice", and presents exceptional circumstances that justify collateral relief under 2255). The unfairness in case at bar meets Witt and Davis. Linkletter factors for cases of

"Fundamental Significance" also compels Gray's retroactivity.

The State also argues the Administration of Justice issue, claiming that retroactivity of Gray would open a flood gate for thousands. This is also fiction, recognizing that many of those convicted in the early Amlotte era have already served out their sentences and have been released. The retroactivity of Gray will actually effect less than 350 convictions at the most.

The State argues that Gray was a mere "evolutionary change" in law because the purpose of the rule announced in State v. Gray is to clarify the internal inconsistency of the charge of Attempted Felony Murder. Gray went far beyond "clarifying" an inconsistency; it compelled the inconsistency to be fatal to the crime.

In order to analyze the "purpose to be served by the new rule", the Stovall and Linkletter factor, (look at Amlotte, 456 So. 2d 448). The courts had to stretch credulity to justify finding the intent to kill in a person who only attempted to commit some other felony, which could, but did not cause the death of another, 456 So. 2d 449. Attempted Felony Murder as defined, transformed a different, more serious crimes that are not contemplated. The stated reason for over-ruling Anlotte in Gray v. State, 654 So. 2d 552, was to correct an "error in legal thinking", and to ensure "the integrity and credibility of the court".

The only way to achieve those goals of integrity is to vacate all convictions based on prior faulty reasoning (whether or not a crime exist), is not an "evolutionary refinement in criminal law". Either there is a logically definable crime of Attempted Felony Murder or there is not. Gray says that there is no such crime. Therefore no one can stand convicted of that "crime". Under the "purpose of the new rule" the Stovall / Linkletter test, Gray , is without controversy is retroactive because of the flawed reasoning of Amlotte, and the abolishment of a crime with serious penalties, constitutes a substantive "jurisprudential upheaval" meriting Rule 3.850 relief for those convicted of and incarcerated for non criminal conduct.

The Amlotte era survived for eleven years, therefore the reliance on the old rule was not long. How many people convicted of Attempted Felony Murder in the short history of Amlotte is unknown.

In Gray, this Honorable Court's respect for precedent was outweighed by the Court's loyal duty to correct "an error in legal thinking". Misguided reliance on erroneous ~~on prior statute or~~ LEGAL THINKING IS DISTINGUISHABLE From reliance ON prior statute or rule of procedure. The latter categories do not require retroactivity, when the rule is changed; the former does, as a matter of systemic "integrity and credibility".

The relatively short "Amlotte Era" was, in the temporal

spectrum of our State Law, it was a temporary lapse of good legal judgement. To continue convictions and incarceration for Attempted Felony Murder on the grounds that the courts thought that convictions were valid would be as illogical as Amlotte itself.

In Heflin v. State, CF. 595 So. 2d 1018, 1019, FL 2d DCA 1992, (the conviction must be vacated on motion to correct an illegal sentence where statute defining the crime was held unconstitutional).

In the instant case, Appellant was convicted of a crime which cannot be logically defined. Conviction and incarceration for a non-existent crime is contrary to the law in every state.

The 1st DCA of Florida recognized the purpose for use of the 3.850, understanding the reliance on Jones v. Singletary, 621 So. 2d 760, FL 1993, and Crystal v. State, 657 So. 2d 77 FL 1st DCA 1995. "Change of Law", that would apply retroactively to petitioner to guarantee State and Federal Constitutional Due Process Clause Rights, founded by this Honorable Courts decision in Gray, and recognizing that there was not an abuse of procedure as claimed by the State, also recognizing that one cannot stand convicted and incarcerated on a purported crime reversed and remanded the challenged order, following Wooley and Brown v. State, 21 FL L Weekly D 1318, FL 3rd DCA June 5, 1996.

The 1st DCA conclude that the decision in Gray does apply to this present case. The court also stated that the ruling in Gray, could not have been reasonably anticipated.

Appellant prays that this Honorable Court will look at the reasoning of the 1st DCA, and recognize the compelling elements that led to the 1st DCA decision in this present case.

Appellants prays that this Honorable Court will reaffirm the 1st DCA's opinion and grant retroactivity to the Gray decision, for this case and all cases similar.

Appellant prays that this Honorable Court will not be misguided by the States fictional argument on the administration of justice and the gravely exaggerated stats, but we pray that this Honorable Court will base its decision on law, justice, truth, and analysis of the Witt factors, finality verses fairness favors retroactive application of Gray.

CONCLUSION

For the foregoing reasons, Appellant prays this Honorable Court to affirm the 1st DCA's opinion in this present case, and hold to the finding that Gray v. State, will have retroactive application to those convicted of this non-existent crime. Due process of law and respect for administration of criminal justice demand that no person in this state or nation should be convicted of or incarcerated for a crime which cannot be logically defined. Hampton's 3.850 request to vacate an otherwise final conviction for the non-existent crime of Attempted Felony Murder should be granted, along with the 1st DCA's opinion, on the Authority of State v. Gray

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a copy hereof has been furnished to **Honorable Robert A. Butterworth, Attorney General's Office, State of Florida**, at the Capitol, Tallahassee, Florida 32399-1050, On this 4th day of March 1997.

Allen Hampton, Appellant/Pro Se

CERTIFICATE OF NOTARY

STATE OF FLORIDA

COUNTY OF DIXIE

The Foregoing Instrument, was acknowledged before me, the undersigned authority, by Allen Hampton, who is personally known to me, or who has produced his Florida Dept. of Correction Inmate I.D. with Picture as means of identification, on this 4th day of March, 1997 and who did or did not take an oath.

Melvin Ronald Chesnut
Notary Public, State of Florida

MELVIN RONALD CHESNUT
NOTARY PUBLIC, STATE OF FLORIDA
My commission expires Feb. 14, 2000
Commission, No. CC532896
My Commission Expires