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**IN THE SUPREME COURT OF FLORIDA**

CASE NO. 89,358
(Fourth District Court of Appeal Case No. 96-2163)

**PRENTICE MATHIS**

Petitioner

vs.

**STATE OF FLORIDA**

Respondent



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**ON PETITION FOR DISCRETIONARY JURISDICTION FROM THE DISTRICT COURT OF APPEAL OF FLORIDA FOURTH DISTRICT**

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# PETITIONER'S REPLY BRIEF

ALAN H. SCHREIBER
Public Defender
17th Judicial Circuit

DONALD J. CANNAROZZI
Assistant Public Defender
Florida Bar No. 776830
Broward County Courthouse
Suite 3872, 3d Floor, N. Wing
(954) 831-8808
Attorney for Petitioner

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## STATEMENT OF THE CASE AND FACTS

The petitioner relies on the statement of the case and facts presented in the petitioner's initial brief on the merits which were accepted by the respondent in its brief on the merits. In this brief, the symbol "RB" will refer to the respondent's brief on the merits.

## ISSUE ON APPEAL

I. WHETHER THIS COURT'S DECISION IN STATE V. GRAY, 654 So.2d 552 (Fla. 1995), WHICH HOLDS THAT ATTEMPTED FELONY MURDER IS NOT A CRIME IN FLORIDA, MUST BE APPLIED RETROACTIVELY.

## SUMMARY OF ARGUMENT

This Court's holding that Gray must be applied to all cases not yet final or on direct review does not preclude a finding that Gray should be applied retroactively. This issue was never presented in Gray and, therefore, was not ripe for review.

This Court's decision in Gray removed the power from the State to prosecute and convict a person for the crime of attempted felony murder which makes Gray a decision of such fundamental significance that it must be applied retroactively. The fact that the state may still prosecute a person for attempted first degree murder or felony murder does nothing to support the argument that Gray should not be retroactively applied. Attempted felony murder is a crime distinct from attempted first degree murder or felony murder. Most importantly, these two crimes do not alleviate the State's burden to prove intent beyond and to the exclusion of every reasonable doubt. Furthermore, section 782.051, Florida Statutes, which became effective on October 1, 1996, created the crime of "felony causing bodily injury" and did not reenact the crime of attempted felony murder. The newly created crime of "felony causing bodily injury" simply enhances the penalties for a person convicted of an enumerated felony who actually causes bodily injury while engaged in the criminal episode. This section does nothing to extend the felony murder doctrine to the crime of attempt.

Also, article X, section 9 of the Florida Constitution which provides that repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed has no application to the case at bar because the Legislature neither created nor repealed the crime of attempted felony murder. The crime of attempted felony murder was created and abolished by this Court; therefore, this Court's interpretation of the attempt statute in Gray must

relate back to the enactment of the statute.

Finally, there is no showing that a retroactive application of Gray would be catastrophic to the administration of justice and would undermine the confidence in our system of justice. On the contrary, to not apply Gray retroactively and to allow those who have been convicted and sentenced for a nonexistent crime which has no basis in law would create a serious injustice by perpetuating an erroneous decision of law.

## ARGUMENT

THIS COURT'S DECISION IN STATE V. GRAY, 654 So.2d 552 (Fla. 1995), MUST BE RETROACTIVELY APPLIED.

The respondent begins by arguing that this Court's mandate that the decision in State v. Gray, 654 So.2d 552 (Fla. 1995), "must be applied to all cases pending on direct review or not yet final," necessarily precludes a finding that the Gray decision should be retroactively applied. The respondent first cites to Heilmann v. State, 310 So.2d 376 (Fla. 2d DCA 1975), to support the assertion that "had this Court remained silent as to the application of the rule, statutory construction would mandate that the new rule apply to all nonfinal cases." In Heilmann, the court held that the defendant should not be given the benefit of a newly enacted statute requiring the award of credit for time served in a county jail prior to sentencing where the defendant did not raise the issue in a direct appeal and the statute became effective after the defendant was sentenced but before his time for appeal had expired. The holding in Heilmann is completely inapposite to the case at bar because the Legislature neither enacted nor repealed a statute dealing with the crime of attempted felony murder. Notwithstanding the irrelevancy of Heilmann, the respondent then takes a rather bizarre leap in logic and concludes that because this Court did not remain silent as to the application of Gray, this Court conveyed an unspoken message that Gray should not be retroactively applied.

In the final analysis, the respondent fails to offer any relevant authority or logical explanation as to why this Court's mandate that Gray **must** be applied to all cases not yet final means that this Court has specifically limited Gray to cases in the "pipeline." Had this Court intended to limit Gray to cases not yet final, it would have done what it has done in every case where the issue of retroactivity is raised: perform a complete analysis using the three prong test enumerated in Witt v.

State, 387 So.2d 922 (Fla.), cert. denied, 449 U.S. 1067 (1980). Obviously, the issue presented in this appeal was never raised in Gray and, therefore, was not ripe for review by this Court. Wuornos v. State, 676 So.2d 972 (Fla. 1996). The respondent's assertion that "this Court **clearly stated** the limited application of Gray" when this Court never even addressed this issue exposes the flawed logic upon which the respondent's argument is based. (RB 5-6)(Emphasis added.)

The respondent next states that the "law announced in Gray does not place beyond the authority of the State the power to regulate certain conduct or impose certain penalties." ( RB 7). To support this assertion the respondent argues that the State may still charge and convict a person with attempted first degree murder or felony murder, and that the State is only precluded from charging attempted felony murder. This "argument" is nothing more than a restatement of the issue presented in the case at bar. Of course the State may still charge a person with attempted first degree murder if the State can prove intent beyond and to the exclusion of every reasonable doubt. Also, the State can charge a person with felony murder because the felony murder doctrine supplies the requisite intent if a person is killed while a defendant is perpetrating a felony enumerated in section 782.04, Florida Statutes. In both of these situations, the State is not relieved of its burden to prove intent beyond and to the exclusion of every reasonable doubt. Unlike attempted first degree murder and felony murder, the crime of attempted felony murder is illogical, has no basis in law, and is based on "an error in legal thinking." Gray, 654 So.2d 552. The State can only convict a person of attempted first degree murder if the evidence shows beyond a reasonable doubt that the perpetrator intended to kill the victim. Furthermore, the State can convict a person of felony murder if the evidence shows beyond a reasonable doubt that the accused committed or attempted to commit an enumerated felony and a person was killed in the course of the criminal episode. The crime of

attempted felony murder neither requires proof that the accused intended to kill nor does it require that a person actually be killed. The crime of attempted felony murder was a distinct crime which no longer exists.

Depending on the facts of each case, the State may or may not be able to prosecute a person who was convicted of attempted felony murder for another crime. If this Court applies Gray retroactively, the fate of those individuals presently under sentence for attempted felony murder will depend on the facts of each case. However, one thing is for certain: the State has no power to prosecute and convict any person for attempted felony murder. If the State chooses to prosecute the petitioner for attempted first degree murder and cannot prove the requisite intent, then the petitioner should go free. The State can no longer rely on the felony murder doctrine to supply an element that it may not otherwise be able to prove. This Court's decision in Gray took the power away from the State to punish a person for attempted first degree murder unless it can prove intent. Contrary to the respondent's unsupported assertion, the law announced in Gray did place beyond the authority of the state the power to regulate certain conduct or impose certain penalties.

The respondent next cites to article X, section 9 of the Florida Constitution for the proposition that even when the Legislature has repealed or amended a formerly valid criminal statute, that action cannot affect prosecution or punishment for any crime previously committed. (RB 9) While the petitioner does not dispute the accuracy this statement, it is clear that Article X, section 9 has no application in this case because the Legislature had nothing to do with enacting the crime of attempted felony murder or later declaring that no such crime exists. The judiciary is prohibited from exercising any powers appertaining to the legislative branch. Art. II, § 3, Fla. Const. State v. Hamilton, 660 So.2d 1038 (Fla. 1995). The Legislature alone is vested with the right to determine

what conduct is prohibited in society. If the Legislature later decides to repeal a duly enacted statute, a person convicted while the statute was in effect should not have their convictions vacated. Courts may only interpret statutes which were passed by the Legislature and a court's decision must apply retroactively to the time of the statute's enactment. Bell v. State, 585 So.2d 1125 (Fla. 2d DCA 1991).

The respondent places emphasis on the fact that the Legislature enacted section 782.051, Florida Statutes, which provides:

> (1) Any person who perpetrates or attempts to perpetrate any felony enumerated in s. 782.04(3) and who commits, aids or abets an act that causes bodily injury to another commits a felony of the first degree, punishable by imprisonment for a term of years not exceeding life. . .

Specifically, the respondent makes the absurd argument that this newly enacted statute reinstated the crime of attempted felony murder. The respondent further postulates that "[t]he new rule of Gray making attempted felony murder a nonexistent crime cannot be deemed a change of constitutional dimensions when the Legislature has followed up with the enactment of a law calculated to encompass the offense of attempted felony murder in less than two years." (RB 12)

Section 782.051, Florida Statutes, creates the crime of "Felony Causing Bodily Injury." This statute enhances penalties for anyone who commits or attempts to commit an enumerated felony and actually causes bodily injury or aids or abets in causing an actual injury to another. This statute does nothing to extend the felony murder doctrine fiction to the crime of attempt. For example, if a person is attempting to rob a convenience store and, without any intent to kill, shoots at but never strikes a person in the store at the time of the robbery, that person could not be charged under section 782.051 because he or she did not cause bodily injury to anyone. However, under the definition of

attempted felony murder as explained in Amlotte v. State, 456 So.2d 448 (Fla. 1984), the hypothetical defendant's acts would squarely fit into the definition of attempted felony murder. [1] Although some scenarios which would fit the definition of attempted felony murder may also be prosecuted under the newly enacted law, the elements of the two crimes are fundamentally different. Therefore, the respondent's reliance on this new statute to support the position that the decision in Gray did not have fundamental significance is completely misplaced.

Finally, the respondent argues that "[i]f Gray were to be applied retroactively to all cases in which a conviction for attempted felony murder was secured and final, the effect on the administration of justice would be catastrophic and would undermine the confidence in our system of justice." (RB 14) The respondent also makes the admittedly unsupported claim that "[a]lthough statistics would be difficult to obtain, it is conceivable that the relitigation of attempted felony murder convictions could number in the hundreds, if not thousands." (RB 15) Likewise, the petitioner could argue that it is conceivable that a retroactive application of Gray would cause nothing more than a minor inconvenience. However, these assumptions are completely irrelevant because people are presently in prison for a nonexistent crime. Whether it is one case or one thousand, "nowhere in this county can a man be condemned for a nonexistent crime." Adams v. Murphy 653 F.2d 224 (5th Cir. 1981).

Furthermore, it is astounding that after this Court admitted that it made an error in Amlotte

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[1]In Amlotte, this Court defined the elements of the crime of attempted felony murder as follows:

> [t]he perpetration of or the attempt to perpetrate an enumerated felony, together with an intentional overt act, or the aiding and abetting of such an act, which could, but does not, cause the death of another. Id. at 449.

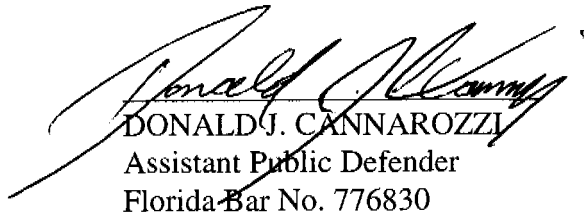
and reversed that error in Gray, that the respondent maintains the notion that reversing convictions based on a nonexistent crime that had no basis in law would somehow undermine the confidence in our system of justice. The crime of attempted felony murder is legally impossible to commit. If it was legally impossible for Gray to commit attempted felony murder, then it was also legally impossible for the petitioner to commit the very same crime. To look at the petitioner - and to all those similarly situated - and say in effect, "you are too late. A mistake has been made and we know you relied on that mistake, but you must remain in prison while others may go free," undermines any confidence in our criminal justice system. There is nothing wrong in making an error as long as the error it is rectified as soon as it is realized. It is gravely unjust, however, to afford relief to some and to deny it to others. Gray must be retroactively applied.

## CONCLUSION

WHEREFORE, based upon the foregoing, the petitioner respectfully requests this Court to reverse the decision of the district court and to answer the certified question in the affirmative and allow retroactive application of Gray to cases which were final when Gray was decided.

Respectfully submitted,

ALAN H. SCHREIBER
Public Defender
17th Judicial Circuit



DONALD J. CANNAROZZI
Assistant Public Defender
Florida Bar No. 776830
Broward County Courthouse
Suite 3872, 3d Floor, N. Wing
(954) 831-8808
Attorney for Petitioner

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by overnight mail to the Department of Legal Affairs, 1655 Palm Beach Lakes Blvd., Suite 300, West Palm Beach, Florida, this 4th day of February, 1997.

Donald J. Cannarozzi 776830