IN THE SUPREME COURT OF FLORIDA

89475

CASE NO. ~~89,026~~

THEODORE FREEMAN,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

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

BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

Respondent, THE STATE OF FLORIDA, was the prosecution in the trial court and Appellee in the District Court of Appeal of Florida, Fourth District. Petitioner, Theodore Freeman, was the Respondent in the trial court and the Appellant in the District Court of Appeal. The parties shall be referred to as they stand before this Court. The symbol "R." designates the original record on appeal, and the symbol "T." designates the transcript of the trial court proceedings.

STATEMENT OF THE CASE AND FACTS

Respondent generally accepts Petitioner's Statement of the Case and Facts.

QUESTION PRESENTED

WHETHER THIS COURT'S HOLDING 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 THE ARGUMENT

The rule announced by this Court in Gray, abrogating the crime of attempted felony murder in Florida from May 4, 1995 forward and for all cases in the "pipeline" or not yet final, is not applicable retroactively on collateral attack. Hence, where the Legislature specifically provided that attempted felony murder was a crime in Florida, and it remained so for over eleven years, the trial court had full authority during that tenure to convict and punish a criminal defendant for the crime of attempted felony murder.

ARGUMENT

WHETHER THIS COURT'S HOLDING 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?

This case is before the Court for review of the question certified by the Fourth District Court of Appeal on the issue of whether the rule in State v. Grav, 654 So. 2d 552 (Fla. 1995), holding that attempted felony murder is not a crime in Florida, may be applied retroactively to overturn a conviction of attempted felony murder on collateral attack of a judgment and sentence already final.

This Court clearly and expressly limited application of Gray's new rule, holding that "[t]his decision must be applied to all cases pending on direct review or not yet final." Gray, 654 So. 2d at 554. 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. Heilmann v. State, 310 So. 2d 376 (Fla. 2d DCA 1975). By specifically limiting the application of the new rule thusly, this Court meant that it would not apply to cases already final.

Notwithstanding the fact that this Court clearly stated the

limited application of Gray, the question then becomes whether the change in the law should be retroactively applied to provide post-conviction relief under Rule 3.850, Fla.R.Crim.P. Whether or not it should be applied depends upon whether the change in the law passes the test of retroactive application as set out in Witt v. State, 387 So. 2d 922, 925-927 (Fla. 1980), and reiterated in State v. Callaway, 658 So. 2d 983 (Fla. 1995).

The standard in Witt requires that 1) the new rule must originate in the United States Supreme Court or in this Court, 2) it must be constitutional in nature; and 3) it **must** have fundamental significance. Witt, 387 So. 2d at 931. The first prong of the Witt test is met since the rule under scrutiny here originated in this Court. So the examination revolves around the second and third prongs of the test as to the constitutional nature of the change in the law and its fundamental significance.

To determine whether the change in law is of "major" constitutional proportions satisfying the second prong of the analysis such that it overcomes the doctrine of finality and **may** be made applicable on collateral attack of a conviction, the change must fall within one of two broad categories:

> The first are those **changes of law which place beyond the authority of the state the**

> **power to regulate certain conduct or impose certain penalties.** 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 are those **changes of law which are of sufficient magnitude to necessitate retroactive application** as ascertained by the three-fold test of *Stovall* and ***Linkletter. Gideon v. Wainwright,*** of course, is the prime example of a law change included within this category.

Witt, 387 So. 2d at 929. Thus, to determine whether a change in the law is **a** major constitutional change, it must either be 1) a change in the law which rescinds the State's power to regulate certain conduct or impose certain penalites, or 2) it must be of sufficient magnitude to necessitate retroactive application, under the three-fold test of Stovall v. Denno, 388 U.S. 293, 297, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967) and Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965).

First, the change in the law announced in Gray does not place beyond the authority of the State the power to regulate certain conduct or impose certain penalties, for it is axiomatic that the State may still charge a defendant with the crimes of attempted first degree murder or felony murder, and is only precluded from charging attempted felony murder. See Thompson v. State, 667 So.

2d 470 (Fla. 3d DCA 1996), (reversing conviction of attempted felony murder and remanding for retrial on the charge of attempted premeditated murder where the evidence supported such a charge); Callaway, 658 So. 2d at 986-987; Stovall, 388 U.S. at 297.

The rule in Gray did not eliminate the existence of the crime of attempted murder or of felony murder, it merely clarified the reasoning underlying the element of intent which is a factual issue in each individual case. Such a change likens it to a change in procedure or an evolutionary refinement in the law providing new or different standards for the admissibility of evidence or procedural fairness in the law. It does not constitute a constitutionally fundamental change in the law as was the case in Coker v. Georgia, 433 U. S. 584, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1977) finding the death penalty to be an impermissible sentence in rape cases.

Likewise, it is not the kind of jurisprudential upheaval in the law represented by changes in sentencing provisions which benefit future prisoners and which could benefit current inmates where minimum mandatory sentences are impermissibly stacked or otherwise enhanced in violation of double jeopardy garauntees. Coker, 433 U.S. 584. Under this prong of the analysis, the change does not qualify as a major constitutional change.

Furthermore, it cannot be considered a change of

constitutional dimensions, when the offense of attempted felony murder was a valid crime prior to the rule in Gray. The contrary, this conviction was based on an expressly valid offense which was confirmed under Amlotte v. State, 456 So. 2d 488 (Fla. 1984), and remained valid up to this Court's recession from Amlotte in Gray. See also Gentry v. State, 437 So. 2d 1097 (Fla. 1983); Fleming v. State, 374 So. 2d 954 (Fla. 1979). Even when the Legislature has repealed or amended a formerly valid criminal statute, the Florida Constitution provides that such action shall not affect prosecution or punishment for any crime previously committed. Art. X, sec. 9, Fla. Const.

So, as a general rule, unless the Legislature has expressed to the contrary, prior convictions are not invalidated by amendment or repeal of a criminal statute. Skinner v. State, 383 So. 2d 767 (Fla. 3d DCA 1980). It is logical that if a once valid repealed criminal statute is not constitutionally defective, by analogy, the amendment to the formerly valid crime of attempted felony murder by judicial clarification of the underlying elements of the offense does not render it constitutionally defective either.

This Court in State v. Wilson, 680 So. 2d 411 (Fla. 1996) stated in relevant part that:

> We hold that the proper remedy is remand to the trial court for retrial on **any** of the other offenses instructed on at trial.
>
> We have previously considered nonexistent offenses in slightly different circumstances. . . . .
>
> Wilson is correct in his assertion that those cases involved nonexistent offenses which were lesser included offenses of the principal charge in the charging document, as opposed to the instant case, where the grincisal charge was a nonexistent offense. However, we do not agree that this mandates dismissal of the charges in the instant case. In the earlier cases, 'nonexistent" had a slightly different connotation. There, the offenses in question were never valid statutory offenses in Florida; they were simply the product of erroneous instruction. Here, **attempted felony murder was a statutorily defined offense, with enumerated elements and identifiable lesser offenses, for approximately eleven years. It only became 'nonexistent" when we decided Grav. Because it was** a **valid offense before Gray, and because it had ascertainable lesser offenses, retrial on any lesser offense which was instructed on at trial is appropriate,**

The State submits that the decision articulated by this Court in Wilson confirms that attempted felony murder was a statutorily defined offense prior to the decision in Grav, and that there is no constitutional bar to petitioner having plead guilty to the crime.

This Court in Wilson rejected the contention that such retrial on lesser offenses was improper. The district court had reasoned

that there could be no lesser included offenses of a nonexistent offense. Moreover, this Court stated, 'attempted felony murder was a statutorily defined offense, with enumerated elements and identifiable lesser offenses, for approximately eleven years. "It only became 'nonexistent' when we decided Gray." Wilson, 680 So. 2d at 412. 'Because it was a valid offense before Gray, and because it had ascertainable lesser offenses, retrial on any lesser offense which was instructed on at trial is appropriate." Id. Since petitioner plead guilty in the present case there is no need for this court to address the required remedy.

Notably, attempted felony murder has subsequently been reinstated by the Legislature in a newly enacted statute, sec. 782,051, Fla. Stat., 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, or as provided in s. 775.082, s. 775.083 or s. 775.084, which is an offense ranked in level nine of the sentencing guidelines. Victim injury points shall be scored under this subsection.

Section 782.051, Fla. Stat. This statute is became effective October 1, 1996. The 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.

Analysis of the change in the law establishes that it is not of sufficient magnitude to necessitate retroactive application. The three-fold test of Stovall and Linkletter requires that the doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring fairness and uniformity in individual adjudications. The test sets out factors to be considered in the analysis: (i) the purpose to be served by the new rule, (ii) the extent of reliance on the old rule, and (iii) the effect on the administration of justice that would be the result of a retroactive application of the new rule. Stovall, 388 U.S. 297; Linkletter, 381 U.S. 618; Callaway, 658 So. 2d 986-987; Witt, 387 so. 2d 929.

The purpose of the rule announced in Gray, is to clarify the internal inconsistency of the charge of attempted felony murder. Specifically, the Court reasoned that any "attempted" crime requires proof of the element of specific intent, while conversely, "felony murder" requires that no intent need be shown in order to obtain a conviction. Gray, 654 So. 2d at 553. This reasoning was

diametrically opposite to the original reasoning expounded in Amlotte in which this Court opined that "[B]ecause the attempt occurs during the commission of a felony, the law, as under the felony murder doctrine, presumes the existence of the specific intent required to prove attempt." Amlotte, 456 So. 2d at 450. Based on that inconsistency, a growing number of cases have emerged in which juries have convicted on the charge of attempted felony murder as a lesser included offense of attempted premeditated murder or as an alternately charged offense.

The Court recognized this conundrum in Gray and reversed its reasoning in Amlotte, determining that attempted felony murder could not be a crime in Florida. Therefore, this "change" in the law is decisional. It is an evolutionary refinement in the law, which defines the parameters of attempt and felony murder such that in the future the State may charge defendants with more specificity with regard to the evidence available to support the charges.

The extent of the reliance of Florida's trial courts and prosecuting attorneys on the old rule that attempted felony murder is a criminal offense in the state is immeasurable. Attempted felony murder was a chargeable offense in Florida prior to this Court's confirmation in Amlotte in 1984 and for eleven years following that decision until overruled by Gray in May 1995. t

can be assumed by the length of that tenure as well as by the number of cases already presented for litigation as a result of the new rule that the reliance on the old rule was extensive.

Moreover, the Legislature's enactment of a law which effectively reinstates attempted felony murder as a crime in Florida would indicate that the criminal justice system will continue to rely on that crime for prosecution. In Bundy v. State, 471 So. 2d 9, 18 (Fla. 1985), this Court decided not to apply its decision to exclude hypnotically refreshed testimony retroactively because of the extent of police reliance on hypnosis.

If Grav 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. Stovall, 388 U.S. at 297. Such a broadening of the application of the rule in Grav would open a Pandora's Box of relitigation of formerly sound plea bargains as involuntary, and of convictions in which the jury was instructed on alternative theories of attempted first degree premeditated and felony murder, not to mention all those convictions clearly founded on charges of attempted felony murder. Although 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.

Retroactive application of the rule in Gray is not necessitated by the principles of fairness and uniformity, especially in light of the fact that even if the attempted felony murder charge in each individual case is vacated, the State would be permitted to retry on the lesser included offenses or on the alternative charge of attempted first degree murder, evidence permitting. Callaway, 658 So. 2d at 986-987; Stovall, 388 U.S. at 297. Wilson, 21 Fla. L. Weekly S292.

Thus it is clear that the change in the law was not of fundamental significance, where for eleven years prior to the new rule, the authority of the State to regulate conduct and impose penalties for attempted felony murder remained valid. Thus, analysis here fails to meet the second prong of the retroactivity test as to whether the change in law is constitutional in nature.

The analysis also fails the third prong of the test requiring that the change be of fundamental significance, where the state was empowered by the Legislature to regulate the subject conduct - attempted murder during the commission of a felony - and was authorized to impose penalties for convictions on such charges. The change in the law of Gray consisted of this Court's clarification of the internal inconsistency in which the element of

an "attempt" requiring specific intent was contradictory to the elements of felony murder requiring no specific intent, constituting a decisional change amounting to an evolutionary refinement in the law, There is no change in the State's ability to charge a defendant with attempted murder or felony murder, or with any of the lesser included offenses that would be sustained by the evidence.

Not only was this Court's decision specifically intended to apply prospectively, including only those cases not yet final, the change in the law is not of sufficient constitutional magnitude to overcome the doctrine of finality and necessitate retroactive application on collateral attack of the conviction. Grav, 654 So. 2d at 554; Callawav, 658 So. 2d at 986-987; Stovall, 388 U.S. at 297; Witt, 387 So. 2d 931.

CONCLUSION

WHEREFORE, based upon the foregoing, the decision of the District Court of Appeal should be affirmed and the certified question answered in the negative denying retroactive application to cases that were final prior to the rule of Grav.

Respectfully submitted,

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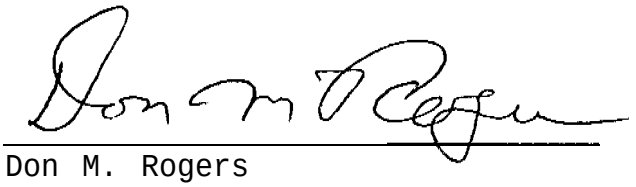
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail to Theodore Freeman, DC no. 782192, 1150 S.W. Allapattah Road, Indiatown, Florida, 34956 on this 19th day of February, 1997.



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