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IN THE SUPREME COURT OF FLORIDA

CASE NO.: 89, 479
(Fourth District Court of Appeal Case No. 96-1437)

THEODORE FREEMAN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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

PETITIONER'S BRIEF ON THE MERITS

Theodore Freeman #782192
Martin Correctional Institution
1150 S.W. Allapattah Road
Indiantown, Florida 34956
Petitioner, pro se.

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STATEMENT OF THE CASE AND FACTS

The petitioner, THEODORE FREEMAN, was the defendant in the circuit court of the Seventeenth Judicial Circuit in and for Broward County Florida, in case number 93-1437. The State of Florida, was the Respondent/Plaintiff in the Circuit Court and appellee in the Fourth District Court of Appeal. In this brief, the parties shall be referred to as they appear before this Honorable court .

On June 21, 1993, the petitioner entered a plea of guilty in Broward County Circuit Court to One (1) count of attempted Felony murder in the first degree and one (1) count of Armed Robbery with a firearm. In exchange for his guilty plea, the trial court sentenced petitioner to ten (IO) years with a three (3) year mandatory Florida State Prison for the crime of attempted Felony Murder. Petitioner Freeman did not file a direct appeal.

On May 4, 1995, this court issued it's decision in Gray v. State, 654 So.2d 552 ((Fla. 1995), Wherein this court held that the crime of attempted felony murder did not exist and that the extenaion of the felony murder doctrine to make intent irrelevant for the purposes of this attempted crime was illogical and without basis in law. As a result of the GRAY decision, on _____ the petitioner filed a motion for post conviction relief pursuant to rule 3.850, Florida Rule of Criminal Procedure. Petitioner requested the trial court to apply GRAY retroactively and to vacate his conviction and ten(10) year sentence for attempted felony murder- On February 23, 1996, the Honorable Judge Zeidwig (trial court) entered an order denying petitioner's motion for post conviction relief.

As a result of the trial court's order, petitioner Freeman timely filed an appeal to the Fourth District Court of Appeal. On September 18, 1996, the Fourth

District Court of appeal entered an opinion affirming the trial court's order denying petitioner's 3.850 motion. Freeman v. State, 21 Fla. L. Weekly D2056 (Fla. 4th dca Sept. 18, 3.996). (copy of the district court's opinion is attached to this brief.). In the opinion the Fourth District Court of Appeal certified the following question to this Court as one of great public importance:

IS STATE V. GRAY, 654 So.2d 552(Fla.1995) RETROACTIVE?

On 11-25-96, the petitioner filed a notice to invoke Discretionary Jurisdiction of this court and on December 9, 1996, this court entered an order Postponing decision on Jurisdiction and briefing schedule. Pursuant to this Court's order, the petitioner respectfully files this brief.

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

Petitioner entered a plea of guilty to the crime of attempted felony murder- A year and a half later after petitioner's conviction became final, this Court held that the crime of attempted felony murder did not exist because the crime is legally impossible to commit. Because petitioner is serving a sentence for a nonexistent crime, this Court's decision in Gray implicates the due process clause of the Florida and United States Constitutions and the decision is therefore, constitutional in nature. Furthermore, the change of law announced in Gray is fundamentally significant because it completely abolished the crime of felony murder and has removed the power from the state to charge, convict and punish an individual for this crime. Therefore, the Gray decision must be applied retroactively to cases which are already final.

ARGUMENT

I.

THIS COURT'S DECISION IN STATE V. GRAY, 654 SO.2D 552 (FLA. 1995) MEETS THE THREE-PRONG TEST ENUMERATED IN WITT V. STATE, 387 SO.2D 922 (FLA. 1980), AND, THEREFORE, MUST BE RETROACTIVELY APPLIED.

In Amlotte v. State, 456 So.2d 448 (Fla. 1984), this Court responded to two questions certified by the Fifth District Court of Appeal and ultimately held that the crime of attempted felony murder did exist in Florida- This court defined the essential elements of attempted felony murder as"the perpetration of or the attempt to perpetrate an enumerated felony, together with an intentional act, or the aiding and abetting of such an act, which could, but does not, cause the death of another-" Id at 449. Recognizing that the attempt to commit a crime necessarily requires proof of the intent to commit the underlying offense, this Court reasoned that the law presumes the existence of premeditation where the "attempt" occurred during the commission of a felony and that "state of mind is immaterial for the felony is said to supply the intent. Id at 449 (See Flemming v. State, 374 So.2d 54-956 (Fla. 1979).

In the dissenting opinion in Amlotte, Justice Overton criticized the logic on which the majority base its conclusion that attempted felony murder was a crime in Florida. Specifically, the dissenting opinion recognized that the crime of felony murder is based upon a legal fiction which imputes malice aforethought from the person's intent to commit the underlying felony. Furthermore, this legal fiction has been extended to impute intent for deaths caused by the acts of co-felons and police. The dissent, however, concluded that the even further extension of the felony murder doctrine to the crime of attempted felony murder was "illogical and without basis in law." Id at 451.

Justice Overton based this conclusion on the fact that a conviction for the offense of attempt must always require proof to commit the underlying crime- In applying the felony murder doctrine - which presumes an intent to kill - to the crime of attempt, "the Court has created a crime which necessitates the finding of an intent to commit a crime which requires no proof of intent." Id at 450.

Eleven years later; this Court abolished the crime of attempted felony murder by receding from the holding in Almotte, State v. Gray, 654 So.2d 552 (Fla. 1995). Candidly recognizing that the majority's holding in Amlotte was based on "an error in legal thinking," this Court refused to swear blind allegiance to precedent" and found that the "application of the majority's holding in Amlotte has proven more troublesome than beneficial and that Justice Overton's view is more logical and correct position." 564 So.2d 552.

In the present case, on June 21, 1993, the petitioner plead guilty to one count of attempted first degree felony murder and armed robbery with a firearm and was sentenced to ten (10) years in the Florida State Prison with a three (3) year mandatory. Thus relying on this Court's decision in Amlotte, defense counsel made no argument that the crime of attempted felony murder did not exist. Therefore, petitioner did not file an appeal to the district court. After petitioner began his sentence and his case had become final, this Court issued its decision in Gray. The issue resent in the instant case is whether this Court's decision in Gray should be retroactively applied to petitioner's case which became final before Gray was decided.

Gray must be applied retroactively if the change in Florida law brought about by this decision satisfies the three-prong teat set forth in Witt v. State, 387 So.2d 922 (Fla.), cert. denied, 449 U.S. 1067, 101 S.Ct. 796, 66 L-Ed 2d 2(1980). Under Witt, a new rule of law may be applied retroactively if the new rule (1) originates in either the United States Supreme Court or the Florida Supreme Court; (2) is Constitutional in nature; and (3) has fundamental

significance. Witt, 387 So.2d at 929, 30!

Petitioner requests this Court to find that the change of law in Gray which abolished the crime for which petitioner is serving a ten year sentence satisfies the three-prong test announced in Witt. Your petitioner further urges this Court to find that Gray, must be applied retroactively and to quash the decision of the district court and vacate the petitioner's conviction of attempted felony murder.

[1]A. THIS COURT'S DECISION IN GRAY IS CONSTITUTIONAL IN NATURE AND SHOULD BE APPLIED RETROACTIVELY.

In the dissenting opinion in Amlotte, which this Court subsequently adopted as a correct analysis in Gray, Justice Overton noted that the creation of the crime of attempted felony murder is a "logical absurdity and certainly an inadequate conceptual basis for something that needs to be as clear and understandable as do the elements of a felony crime." See Amlotte at 456 .2d 450 (Overton, J., dissenting)(quoting Amlotte v. State, 435 So.2d 249 (Fla. 5th DCA 1983)(Cowart, J., dissenting)). A fundamental precept of our criminal justice system is that everyone must be given sufficient notice of those matters which may result in a deprivation of life, liberty, or property. Perkins v. State, 576 So.2d 1310 (Fla. 1991). Due process requires that criminal statutes must apprise ordinary persons of common intelligence as to what the statute prohibits. See Logan v. State, 666 So.2d 260 (Fla. 4th DCA 1996). In Logan, the Fourth District Court of Appeal held that this Court's decision in Flowers v.State, 586 So.2d

[1] Clearly thia Court" decision in Gray satisfies this first prong of the Witt test. It must be noted, however, that this Court's directive that "this decision must be applied to all cases pending on direct review or not yet final [citation omitted]" does not preclude the argument that the decision in Gray should be applied retroactively. If this Court intended to limit the application in Gray to only those cases on direct review or not yet final, this Court would have surely undertaken a complete analysis utilizing the three-prong test announced in Witt-

1058 (Fla. 1991), which concluded that legal constraint points should only be used once in calculating a guideline sentence, was constitutional in nature and, therefore, satisfied the second prong of the Witt test. In reaching this conclusion the Logan court found that the decision in Flowers was based on the concept of lenity which is founded on the due process requirement that criminal statutes must apprise ordinary person of common intelligence as to what is prohibited.2 Logan v. State, 666 So.2d 261. As a result, the decision in Flowers attained constitutional significance and had to be retroactively applied to the defendant in Logan v. State.

If this Court's decision in Plowers v. State, 586 So.2d 1058 (Fla. 1991), should be given retroactively application because it was based on the concept of due process, then surely the same rationale must be extended to Gray. However the decision in Gray went far beyond resolving conflicting interpretations of an existing statute- When adopting the dissent in Amlotte, this Court explicitly held that its initial decision which defined the crime of attempted felony murder was a "logical absurdity" and provided an "inadequate conceptual basis" to create a clear and understandable definition of this extremely serious felony crime. See 456 So.2d 450 (Overton, J. dissenting). From this realm of logical absurdity and legal function flows the crystalline clear consequence that the ordinary person of common intelligence could not have been expected to understand what conduct was proscribed by this Court's definitions or attempted felony murder.

This consequence is make particularly evident through this Court's straight forward admission that the definition of this crime had no "basis law."

Further, this Court's conclusion that the definition of attempted felony murder was illogical and without basis in law is analogous to a situation ere this Court's declared that a statute violates the due process clause because the statute is void for vagueness.

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2 In Flowers, this Court resorted to the lenity statute, section 775.021(1) Florida Statutes (Supp. 1988), and held that when susceptible of different interpretation, the sentencing guidelines must be construed in favor of the defendant.

If this Court found that a statute did not provide ordinary citizens with proper notice as to what the statute proscribed and declared the statute unconstitutional, the court's decision would render the statutes void from the date of its enactment, not from the date the court declared the statute to be unconstitutional. Bell v. State, 585 So.2d 1125 (Fla. 2d DCA 1991); Russo v. State, 70 So.2d 428 (Fla. 4th DCA 1972). The same rationale which requires a retroactive application of a decision declaring a statute unconstitutionally vague must be extended to this instant case (Freeman v. State), where petitioner is imprisoned for a crime which this Court has conceded is a logical absurdity based on nothing more than a legal fiction. Ordinary people of common intelligence could not have understood how attempted felony murder which requires no proof of intent was a crime where the attempt statue always requires proof of an intent to commit the underlying felony-

& is also constitutional in nature because the petitioner is imprisoned for a nonexistent crime. In State v. Sykes, 434 So.2d 325 (Fla. 1983), the defendant was convicted of attempted second degree grand theft- Even though there was no objection when the trial court instructed the jury that it could find the defendant guilty of attempted second degree grand theft as a lesser included offense of a second degree grand theft , this Court reversed Sykes' conviction because the crime of attempted second degree grand theft simply does not exist- In Sykes', this Court stated:

> [A]uthority in Florida holds that one cannot be punished base on a judgment of guilt of a purported crime when the "offense" in question does not exist. Stated differently, it is a fundamental matter of due process that the state may only punish one who has committed an offense; and an "offense" is an act clearly prohibited by the lawful authority of the state, providing notice through published laws.

Federal courts have arrived at the same conclusion. In Adams v. Murphy, 653 F.2d 224 (5th Cir, 1981), the defendant sought postconvtion relief because he was convicted under Florida law for the nonexistent crime of attempted perjury.[3] In Adams the court stated:

> Florida has told us that [Adams] went to prison for an act that is not and never has been a crime under Florida Law...[only] a legislature can denounce crime. In a more complex case, we might proceed upon a more limited rationale, might resort to solace of prior authority. Here there is no need. No where in this country can nay man be condemned for a nonexistent crime. Id at 225.

The United States Supreme Court has likewise held that a law must be applied retroactively when a trial court lacked authority to convict and punish a criminal defendant in the first place. United States v. Johnson, 457 U.S. 537, (1982); Teague v. Lane, 489 U.S. 289,(1989). applying the rationale of Johnson and Lane, the Third District Court of Appeal held that this Court's decision in Gray must be applied retroactively. Woodley v. State, 673 So-2d 127 (Fla. 3rd DCA 1996)[4]. Furthermore, the court in Woodly found that the Gray decision satisfied the three-prong test enumerated in Witt, supra. Specifically the Court stated:

> The Gray decision meets these factors as well. First, Gray was decided by the Florida Supreme Court. Second, Gray is constitutional in nature because it affected the defendant's due process rights and liberty interest since the crime with which she was convicted is nonexistent. Third, the Gray rule is of fundamental significance because it places beyond the authority of the state the power to regulate certain conduct or impose certain penalties, namely attempted murder during the commission of a felony. Therefore, the Gray decision is retroactive, even to cases which are final. Id at 128.

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[3] In Adams v. Murphy, 394 So.2d 41, (Fla. 1981), this Court answered a question certified by the United States Court of Appeals for the Fifth Circuit and held that there was no such crime as attempted perjury in Florida.

[4] In Woodley the Court certified the following question to this Court: Should State v. Gray, 654 So.2d 552 (Fla. 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?

In Hale v. State, 630 So.2d 521 (Fla.1993), this Court held that it is impermissible to impose consecutive habitual sentence for multiple offenses arising out of the same criminal episode. Subsequently, in State v. Callaway, 658 So.2d 983 (Fla. 1995), this Court further found that the decision in Hale was constitutional in nature and must be applied retroactively- This Court reasoned that, due process would prohibit the imposition of consecutive habitual felony offender sentences for offenses arising out of a single criminal episode where there was no statute to authorize such an enhanced punishment, Specifically this Court stated:

> Hale also satisfies the requirement that it be constitutional in nature. As the district court in the instant case recognized, in the absence of an empowering statute, the imposition of consecutive habitual felony offender sentences for offenses arising out of a single criminal episode could not withstand a due process analysis. [citation omitted]- 658 So.2d at 986

In the present case at bar, this Court recognized that the attempt statute could not provide authority to sustain a conviction for attempted felony murder because the offense or attempt must require proof f the intent to commit the underlying crime and the crime of attempted felony murder requires no proof of intent. In Callaway, this Court found that Hale was constitutional in nature because the enhanced punishment was not predicated on any statute. Similarly, petitioner is serving a ten year sentence for an "attempt" crime which is not predicated on the attempt statute. The anomaly created by the facts of this case raises serious due process concerns.

Had petitioner moved to have count I of the information dismissed and argued that attempted felony murder was not a crime, and appealed in the District Court of Appeal, the petitioner-s case would have been in the pipeline and petitioner would be entitled to relief-

Clearly, for eleven year3 Amlotte dictated that the attempt statute encompassed the crime of attempted felony murder a petitioner thus relied on this law when he accepted his ten year prison sentence. To now recognize that attempted felony murder cannot logically exist and to deny petitioner relief because he did not advance an objection which was not supported by any controlling precedent raise3 the same due process concerns that were evident in Hale- The attempt statute provides no authority to support petitioner's conviction and sentence. Without an empowering statute, petitioner"3 conviction should be vacated even though his case was final when Gray wa3 decided.

The focal point of this Court"3 reasoning in Gray was that the attempt statute must always include proof of intent to commit the underling crime, when the state charged petitioner with attempted felony murder the state never had to allege, much less prove, the necessary element of intent- It appear3 the state was relieved of the burden to prove an element of the attempt statute. Any conviction baaed on a charge which exempt3 the state from proving an essential element of a crime violate3 the fundamental meaning of due process and is clearly of constitutional significance. In re Winship, 397 U.S. 58 (1970); Francis v. Franklin, 471 U.S. 307 (1985).

B. THIS COURT'S INTERPRETATION OF THE ATTEMPT STATUTE IN GRAY MUST RELATE BACK TO THE TIME THE ATTEMPT STATUTE WAS ENACTED.

The undeniably unique factor in this case is that between 1984 and 1995, this Court interpreted the attempt statute to include the crime of attempted felony murder- In Svkes and Adams, supra, the defendants were granted relief because they were convicted of crime3 that never existed.

Obviously, when petitioner pleaded guilty to the crime of attempted felony murder, he relied on this Court-3 decision in Amlotte which was the law in Florida in February 1995. Petitioner could have never predicted that after he

pleaded guilty and sentenced to ten years in prison, and after his case became final, this Court would reverse its decision in Amlotte. Although this exact situationhas not occurredbefore in Florida, several federal cases instruct that the petitioner should be afforded postconviction relief because the decision in Gray must relate back to the time the attempt statute was enacted- As a result, Gray MUST be applied to all cases which relied on Amlotte, not just those which were not final or in the pipeline when Gray was announced.

In United States v. Shelton, 848 F.2d 1485 (10 Cir. 1988), the defendant was convicted the mail fraud statute. Specifically, the defendant was charged with defrauding the citizens of his county of their right to honest government by taking kickbacks from suppliers who sold goods to the county. The government never charged that the county lost money on the kickbacks.

After Shelton's conviction became final, the United States Supreme Court in McNally v. United States, 483 U.S. 350 (1987), interpreted the mail fraud statute to encompass only those fraudulent acts which involved money or property- The Court found that the Supreme Court's decision had declared what the law meant from the date of its enactment, and that the prior interpretation of the mail fraud statute is and always was invalid. See Shelton, 848 F.2d 1490. (emphasis added)

The Court in Shelton primarily based its decision on the Seventh Circuit's decision in Strauss v. United States, 516 F.2d 980 (7th Cir. 1975), which held that a "statute does not mean one thing prior to the Supreme Court's interpretation and something entirely different afterwards...[A] statute, under our system of separate powers of government, can ave only one meaning-" Id at 983

These federal cases clearly instruct that the due process clause of the United States Constitution mandates that once the Supreme Court's interprets a statute, that interpretation relates back to the statute's enactment. The United States Supreme Court as well as this Court cannot create laws. Only the legislators can prohibit certain acts.

The Court can only interpret statutes duly enacted by the legislature and may not exercise any powers which are solely delegated to the legislative branch of government. The creation of a crime is completely within the power of the legislature and not within the purview of the judiciary. State v. Buchanan, 189 So.2d 270 (Fla. 3d DCA 1966); State v. Hamilton, 660 So.2d 1038 (Fla. 1995). When this Court issued its decision in Amlotte, the interpretation this Court gave to the attempt statute allowed a conviction for felony murder. This interpretation related back to the creation of the attempt statute,

This Court did not create a new law, it simply defined the crime of attempted felony murder in relation to the attempt statute. As in Gray this Court did not repeal a statute, it simply recognized that its pervious interpretation of the attempt statute was flawed and held that the attempt statute could never be used to support a conviction for attempted felony murder. Therefore, the interpretation of the attempt statute found in Gray must relate back to the date the attempt statute was created- The decision in Amlotte has been superseded and is void. Petitioner's case, which relied on Amlotte, must now be afforded relief through a retroactive application of Gray-

Any interpretation of a statute by this Court must be applied retroactively otherwise this Court would be creating and repealing laws. The attempt statute can have only o meaning. In 1984 the attempt statute encompassed the crime of attempted felony murder. this crime, thus existed since creation of the attempt statute. Eleven years after this Court recognized that it had made an error and modified the boundaries of the attempt statute to exclude the crime of attempted felony murder.

The corrected interpretation announced in Gray declared what the law meant from the date of the attempt statute's enactment and any prior interpretation is, and always was, invalid. Therefore, Gray must be applied retroactively.

C. THE GRAY DECISION MUST BE RETROACTIVELY APPLIED BECAUSE IT IS A FUNDAMENTALLY SIGNIFICANT CHANGE IN FLORIDA LAW.

The third portion of the Witt test mandates that the change of law have fundamental significance. 387 So.2d at 929. Cases which have fundamental significance fall into two categories: first, those cases which place beyond the authority of the state the power to regulate certain conduct or impose certain penalties. Coker v. Georgia, 433 U.S. 584 (1977), which held that the Eighth Amendment forbids the imposition of the death penalty for rape, is an example of a case falling into this first category. Second, are those cases which "are of significant magnitude to necessitate retroactive application" under the threefold test of Stovall v. Denno, 388 U.S. 293 (1967), and Likeletter v. Walker, 318 U.S. 618 (1965). 387 So.2d 929[5].

This Court's decision in Gray concisely fits into the first of the two above categories- In the present case at bar, petitioner Freeman was convicted and sentenced for a crime that no longer exists in this state. The major change in law has removed the power from the state to punish a person for the crime of attempted felony murder. Yet, the petitioner is serving a sentence for this nonexistent crime. The obvious injustice cries for an application of the first of the two categories enumerated in Witt and is a fundamental significant as the facts presented in Coker v. Georgia.

The facts in Meeks v. State, 605 So.2d 1301 (Fla. 4th DCA 1992), reversed on other grounds, 636 So.2d 543 (Fla. 4th DCA 1994), are strikingly similar to the facts presented in the case at bar. In Meek, the district court held that this Court's decision in Jenny v. State, 447 So.2d 1351 (Fla. 1984), wherein this Court held that one who testifies pursuant to 91404, Florida Statutes (1979), automatically receives immunity and does not need to first assert his or her privilege against self-incrimination.

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[5] Stovall requires that consideration be given to (1) the purpose to be served by the new rules; (2) the extent of reliance on the old rule; and (3) the effect that retroactive application of the rule will have on the administration of justice-

The Court in Meek found that this Court's decision in Jenny "constituted a fundamental constitutional change of law by concluding that Section 914.04, Florida Statutes (1979), laced a defendant beyond the state's power to prosecute and impose penalties where the statute granted him immunity regardless of whether he invoked his privilege against self-incrimination-" 605 So.2d at 1320. If this Court's interpretation of the immunity statute in Jenny should be given retroactive application then surely the same logic mandates retroactive application of Gray. In Jenny, this Court simply found that the immunity statute was unambiguous and clear upon its face and that immunity automatically attaches when a person is compelled to testify. In Gray, this Court went beyond using axioms of statutory construction to narrowly construe a statute: this Court completely abolished the crime of attempted felony murder. Both cases represent a situation where the authority to punish a person for a certain crime is placed beyond the power of the state. The government has no power to imprison a person for the crime of attempted felony murder. The crime simply does not exist. The Gray decision, therefore, meets the "fundamental significance" of the Witt test and mandates retroactive application.

The case at bar presents a navel issue. The petitioner has been unable to find a case where thin Court interpreted a statute to encompass a crime, then later recognized that the initial interpretation was founded on faulty logic and abolish the crime defined several years later.

However, court of this state have required retroactive application of changes in law when the new law either serves to enhance punishment or when the new rule is based un an egregious violation of due process right. Crisnero v. State, 458 So.2d 377 (Fla. 2d DCA 1984)(the new rules announced in Palmer v. State, 438 So.2d 1 (Fla. 1983), which precluded the "stacking of consecutive minimum sentences must apply retroactively);

Callaway, supra, (the rule prohibiting consecutive habitual felony sentences is retroactive); Logan v. State, 666 So.2d 260 (Fla. 4th DCA 1996)(the rule announced in Flowers v. State, 586 So.2d 1058 (Fla. 1991), wherein this Court held that legal constrain points should only be used once in calculating a guideline sentence should be retroactive applied); Cook v. State, 553 So.2d 1292 (Fla. 1st DCA 1989)(allowing retroactive application of this Court's holding in State v. Green, 547 So.2d 925 (Fla. 1989), which mandated that atria1 court must give credit for gain time earned when sentencing a defendant after a violation of probation); and Phillips v. State:, 623 So.2d 621 (Fla. 4th DCA 1993)(this Court's finding in State v. Williams, 623 So.2d 462 (Fla. 1993), that the manufacture of crack cocaine by the Broward Sheriff's Office for use in reverse stings is outrageous governmental conductwhichviolates the due process clause). These cases certainly instruct that Gray is of such fundamental significance that it should be retroactively applied. Imprisoning a person for a nonexistent crime is certainly more significant than stacking minimum mandatory sentences or increasing points on a guideline scoresheet because of victim injury points. Furthermore, allowing petitioner to remain in prison for a nonexistent crime offends any concept of due process and is far more egregious than outrageous police conduct in Williams. This Court made an error eleven years ago and valiantly rectified its mistake. The petitioner-s plea of guilty was predicated on this Court's ruling that attempted felony murder was a crime in the State of Florida. It defies logic to admit that an error had been made and to correct that error but then to deny the petitioner relief even though petitioner relied on the law created by this Honorable Court- In his specially concurring opinion in Meek v. Dugger, 576 So.2d 713 (Fla. 1991), Justice Kogan opined that in the 1970's, this Court had erroneously interpreted federal case law and barred capital defendants from presenting any mitigating evidence other than that described in the narrow list contained at that time in

Section 921.141(7), Florida Statutes (1975). To support this assertion, Judge Kogan cited this Court's opinion in Cooper v. State, 336 So.2d 1133 (Fla. 1976), cert. denied, 431 U.S. 925 (1977), which defense lawyers and trial judges had interpreted to mean that nonstatutory mitigating evidence could not be admitted, Then in Songer v. State, 365 So.2d 696 (Fla. 1978)(on rehearing), cert. denied, 441 U.S. 956 (1979), this Court unequivocally held that the statutory list of mitigating factors is not exhaustive and that defendants always has had the ability to present nonstatutory mitigating evidence. Justice Kogan believed that the Songer decision crested confusion about what the law actually required prior to Songer and stated:

> As a result, some defendants face the denial of rights clearly guaranteed by Lockett and Hitchcock. They potentially are subject to procedural bar for failing to introduce mitigating evidence that, at the time, could not lawfully have been admitted in Florida. At other times, this court has simply found "no merit" to what essentially are Hitchcock claims because there was no substantial mitigating evidence to be found anywhere in the record. In effect, this Court sometime has held that attorneys who honored the spirit and letter of Cooper and thus failed to introduce nonstatutory mitigating evidence in the 1970's simply waived their clients' rights under Lockett and Hitchcock.

576 So.2d at 718 (Kogan, J., specially concurring).

In the final analysis, Justice Kogan felt that in order to correct a "serious injustice" if a defendant did not present any mitigating evidence because of reliance on this Court's opinion in Cooper, the trial court could be ordered to resentence the defendant.

In the present case at bar there is no dispute that this Court had erroneously interpreted the attempt statute to include the crime of attempted felony murder. Petitioner relied on this Court's decision in Amlotte when he entered his plea believing that attempted felony murder was a crime- Similarly, some capital defendants lied on Cooper and did not present nonstatutory mitigating evidence during the penalty phase of their murder trials. This Court afforded those capital defendants postconviction relief.

To not apply Gray retroactively would be a grave injustice to all defendants whose case are final and whose convictions are predicated on this Court's admitted faulty interpretation of the attempt statute. Confidence in our court system is renewed when a court seeks to reverse a decision which hindsight has proven to be wrongly decided. That confidence, however, erodes unless all of the ramifications of the faulty decision have been rectified Gray is of fundamental significance as defined by Witt and must be retroactively applied.

There is always a concern over what affect a retroactive application of Gray would have on the administration of justice. Finality of a conviction is an important concept in our criminal justice system. Also important is the concept of stare decisis. Regarding this fundamental concept, this Honorable Court stated in Gray:

> Stare decisis does provide stability to the law and to the society governed by that law. State v. Schoop, 653 So.2d 1016(Fla. 1995)(Harding, J., dissenting). Yet Stare decisis does not command blind allegiance to the precedent. "Perpetrating an error in legal thinking under the guise of stare decisis serves no one well and only undermines the integrity and credibility of the court." Smith v Department of Ins., 507 So.2d 1080, 1086 (Fla. 1987)(Ehrlich, J.,Concurring in part, dissenting in part).

654 So.2d at 554.

When this Court made exception to the concept of stare decisis, it was indicating that the decision in Gray was truly significant. In no case which applied a new law retroactively did any court have to make exoeption to the fundamental concept of stare decisis or have to explain that perpetration of an error undermines the integrity of the court. In this respect, Gray represents one of the strongest examples of a case which urges retroactive application. Allowing the petitioner to remain in prison because of an error in legal thinking would only serve to perpetuate a mistake.

This Court made an error in 1984 and corrected the mistake in 1995. All

w relied on this Court's interpretation of law and who under sentence because of this Court's decision in Amlotte deserve to be afforded relief through a motion for postconviction relief- This is perhaps the only way the error can be completely erased- Applying Gray retroactively would not only serve the interests of Justice but will assure credibility and integrity to a system which not be perfect but will recognize mistakes and do whatever necessary to insure that no one suffers because of them.

CONCLUSION

WHEREFORE, based upon the foregoing, the petitioner respectfully prays this Honorable Court to quash the decision of the Fourth District Court of Appeal and to vacate petitioner's conviction and sentence for attempted felony murder.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished the Department of Legal Affairs, 1655 Palm Beach Lakes Blvd., Suite 300, West Palm beach, Florida 33401-2299 on this 27 day of January 1997.

Respectfully submitted,

Theodore Freeman

Theodore Freeman #782192
Martin Correctional Institution
1150 S.W. Allapattah Road
Indiantown, Fl. 34956
Petitioner, pro se.