IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT COURT
IN AND FOR PALM BEACH COUNTY, FLORIDA
Criminal Justice Division

STATE OF FLORIDA **CASE NO.: 93-9019-CF**

v.

MARK A. KOHUT and, **DIVISION: U**
CHARLES P. ROURK,
Defendants.
_____/

ORDER DENYING DEFENDANTS' REFILED PETITIONS FOR WRIT OF HABEAS CORPUS AND DEFENDANT ROURK'S MOTION TO CORRECT ILLEGAL SENTENCE

This case began almost eighteen (18) years ago on January 1, 1993 with the commission of a crime that shocked the collective conscience of this community. The victim, Charles Wilson, was intentionally set on fire in a particularly heinous and racially motivated crime. Due to the pre-trial publicity this case garnered, the trial of this matter was transferred to Palm Beach County. The trial itself saw a fair share of drama, separate and apart from the gruesome nature of the case, with the mid-trial resignation of the lead prosecutor. Defendants Kohut and Rourk were convicted beyond a reasonable doubt by a jury of their peers as being the perpetrators of this atrocious act. This case then began its long-winding progression through both the state and federal courts for their respective reviews of the validity of this conviction. Approaching the 18-year anniversary of this offense, it is time for finality.

This current matter is before the Court on Defendant Kohut's Refiled Petition for Writ of Habeas Corpus filed, through counsel, on February 23, 2010[1]. On March 1, 2010, Defendant

[1] These pleadings were originally filed in the Thirteenth Judicial Circuit in case number 93-CF-000281, however, the Court found there was a potential jurisdictional issue, as the convictions the Defendants are moving to vacate were obtained in the Fifteenth Judicial Circuit. As a result of this jurisdictional concern, Chief Justice Peggy Quince of the Florida Supreme Court specially designated the Honorable Michelle Sisco as a Fifteenth Circuit Court judge for the purpose of hearing the pending postconviction motions. (*See,* November 9, 2009, Order of Chief

Rourk filed, through counsel, Defendant Rourk's Re-filed Petition for Writ of Habeas Corpus. On March 3, 2010, the State filed its Response to Order to Show Cause, ("State's Response"). On February 23, 2010, Defendant Kohut filed, through counsel, Refiled Defendant's Reply to the State's 'Response. On March 3, 2010, the State filed a Supplemental Response to Order to Show Cause, ("State's Supplemental Response"). On March 3, 2010, the State filed a Supplemental Exhibit to State's Supplemental Response. On February 23, 2010, Defendant Kohut filed, through counsel, a Motion to Strike, or in the Alternative, Defendant's Reply to the State's Supplemental Response ("Defendant Kohut's Motion to Strike"), and Exhibits to Defendant Kohut's Motion to Strike. On February 22, 2010, Defendant Kohut filed, through counsel, a Motion to Compel Ruling on Petition for Writ of Habeas Corpus, or in the Alternative, for Evidentiary Hearing ("Defendant Kohut's Motion to Compel Ruling"). On March 1, 2010, Defendant Rourk, through counsel, filed Defendant's Rourk's Motion to Correct Illegal Sentence.

On April 27, 2010, the Court denied Defendant Kohut's Motion to Strike and Motion to Compel Ruling, but granted Defendant Kohut's request for an evidentiary hearing and set both of the Defendants' Refiled Petitions for Writ of Habeas Corpus and Defendant Rourk's Motion to Correct Illegal Sentence for evidentiary hearing on July 29 and 30, 2010. After reviewing the petitions and motions, the testimony, evidence, and arguments presented on July 29, 2010, and July 30, 3010, the court file, and the record, the Court finds as follows:

Procedural History of Case at Trial

The trial of this matter was presided over by the Honorable Donald C. Evans. Due to pre-trial publicity, the case was transferred for trial to Palm Beach County in the Fifteenth

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Justice Quince, attached.) The Court subsequently ordered all parties to refile their pleadings in the Fifteenth Judicial Circuit in case number 93-0919-CF.

Judicial Circuit. In case 93-CF-000281 (Palm Beach County case 93-09019-CF), on September 7, 1993, a jury convicted Defendant Kohut of attempted murder in the first-degree with a deadly weapon (count one), kidnapping (count two), and robbery with a firearm (count three). (*See* verdict forms, attached). On October 22, 1993, the Court sentenced him to life imprisonment on count one, to twenty-seven (27) years' prison on count two, with count two to run consecutively to count one, and to twenty-seven (27) years' prison to be followed by life probation on count three, with count three to run concurrently with count two. (*See* amended judgment, sentence, attached). The Fourth District Court of Appeal affirmed the judgment and sentences, and the mandate issued May 26, 1995. *See Kohut v. State*, 654 So. 2d 932 (Fla. 4th DCA 1995).

In case 93-CF-000281 (Palm Beach County case 93-09019-CF), on September 7, 1993, a jury convicted Defendant Rourk of attempted murder in the first-degree with a deadly weapon (count one), armed kidnapping with a firearm (count two), and robbery with a firearm (count three). (*See* verdict forms, attached). On October 22, 1993, the Court sentenced him to life imprisonment on count one, to twenty-seven (27) years' prison with a three-year mandatory minimum to be followed by life probation on count two, with count two to run consecutively to count one, and to forty (40) years' prison with a three-year mandatory minimum to be followed by life probation on count three, with count three to run concurrently with count two. (*See* amended judgment, sentence, attached). The Fourth District Court of Appeal affirmed the judgment and sentences, and the mandate issued May 26, 1995. *See Rourk v. State*, 654 So. 2d 932 (Fla. 4th DCA 1995).

At the trial of this matter, the victim, Charles Wilson, identified Defendants Kohut and Rourk as being the perpetrators of a racially-motivated and particularly heinous crime. Both of the Defendants are white males. Mr. Wilson is a black male originally from Kingston, Jamaica. In late December of 1992, Mr. Wilson was visiting the Tampa area from his home in New York.

On the morning of January 1, 1993, Mr. Wilson drove his car to retrieve a newspaper from a newspaper stand about four blocks from his friend's home in Valrico, Florida. As he was attempting to leave the newspaper stand, a vehicle pulled up alongside his and Mr. Wilson felt a gun put to the back of his neck. Two individuals, whom Mr. Wilson later identified as Defendants Kohut and Rourk, then entered Mr. Wilson's car and ordered him to drive away from the newspaper stand. Mr. Wilson complied and during the drive to a deserted field, the Defendants took Mr. Wilson's wallet and other miscellaneous items from him. Upon arriving at the field, Defendants Kohut and Rourk then doused Mr. Wilson with gasoline, lit Mr. Wilson on fire and left him to die. Mr. Wilson miraculously survived the horrendous attack, but with severe scarring over large parts of his body.

A third co-defendant, Jeffrey Pellett, had also originally been charged for his participation in this offense. Mr. Pellett, however, negotiated a plea agreement with the State in exchange for his testimony. Mr. Pellett testified at trial that he was with Defendants Kohut and Rourk in Defendant Rourk's car when they initially drove up alongside Mr. Wilson's car at the newspaper stand. Mr. Pellett confirmed that the two Defendants got into Mr. Wilson's car, and that he followed behind them in Defendant Rourk's car as the Defendants ordered Mr. Wilson to drive to the deserted field. Mr. Pellett testified that he remained in the car while the Defendants poured gasoline on Mr. Wilson and then set him on fire. Mr. Pellett was also prosecuted by the United States government for his participation in this offense, and ultimately pled guilty to the offenses of aiding and abetting and armed carjacking in federal court.

Procedural History of Current Pleadings and Arguments

In their petitions and Defendant's Rourk's Motion to Correct Illegal Sentence, Defendants Kohut and Rourk allege they are entitled to habeas corpus relief because their

convictions and sentences for attempted first-degree murder were predicated on a non-existent crime of attempted felony murder. Defendants allege the State presented evidence and testimony at trial advancing both an attempted premeditated theory and an attempted felony murder theory for the crime of attempted first-degree murder. They further allege the State argued both theories in closing arguments, the Court instructed the jury on both theories, and the State asserted both theories in the charging Information. However, Defendants allege the jury verdict form does not indicate whether the jury found Defendants guilty of attempted first-degree murder based on a premeditated theory or a felony murder theory. Defendants rely on the Florida Supreme Court's decision in *State v. Gray,* 654 So. 2d 552 (Fla. 1995), to support their claim.

In the various responsive pleadings filed by the State prior to the evidentiary hearing of this matter, the State argues that the Defendants' motions should be denied on the basis of untimeliness, laches, lack of manifest injustice, failure to raise this as a claim of ineffective assistance of appellate counsel, and severe prejudice to the State due to the destruction of evidence during the intervening seventeen (17) years from the date of conviction. The Defendants in their responsive pleadings argue that conviction of a non-existent crime is fundamental error that can be raised at anytime, and as such untimeliness is not an appropriate consideration for the Court. Furthermore, the Defendants were incarcerated for most of this intervening time period in New Mexico and had no access to Florida statutes or case law[2]. Defendants also argue the State is not prejudiced by the destruction of most of the physical evidence in this case, as there was no physical evidence from the crime scene linking the Defendants to this crime. Furthermore, the Defendants submit that any argument by the State as to the potential unavailability of any of the witnesses is pure conjecture at this point.

[2] Both Defendants were transferred to correctional facilities in the state of New Mexico for their own safety. Defendant Kohut, however, has since been transferred back to a Florida prison while Defendant Rourk remains incarcerated in New Mexico. Defendant Rourk is temporarily being housed in the Hillsborough County Jail during the pendency of these proceedings.

In its April 27, 2010, order, the Court found it necessary to consider oral arguments from all parties and conduct an evidentiary hearing on the issues raised in the Refiled Petitions for Writ of Habeas Corpus and Motion to Correct Illegal Sentence. On July 29, 2010, and July 30, 2010, the Court conducted said hearing.

Historical Analysis of the Crime of Attempted Felony Murder in the State of Florida

The first appellate decision directly addressing the existence of the crime of attempted felony murder in the state of Florida was *Amlotte v. State*, 435 So.2d 249 (Fla. 5th DCA 1983). In an *en banc* opinion, the Fifth District Court of Appeal relied upon the Florida Supreme Court decision in *Fleming v. State,* 374 So.2d 954, 956 (Fla. 1979) in ruling that the crime of attempted felony murder exists in Florida. Specifically, the court reasoned:

> The evil to be punished under the felony murder statutes is that of killing a person while committing a felony where the proof of premeditated design is lacking. That is, if the robber, or burglar or rapist, etc., intends only to rob or burglarize or rape and another person gets killed by the robber's or burglar's or rapists's acts then the state need not prove either the specific intent to, or the premeditated design to kill. The statute calls for punishment even though intent to murder cannot be proved. By extension, attempted first degree murder done in the felony murder mode is a crime.

Id. at 251.

The Fifth District Court of Appeal's ruling was subsequently upheld by the Florida Supreme Court in *Amlotte v. State*, 456 So.2d 448 (Fla. 1984). In a 5-2 opinion in which Justices Boyd, Adkins, Alderman, Ehrlich and Shaw all concurred in affirming the Fifth District Court of Appeal's opinion (and Justices Overton and McDonald strenuously dissented), the majority of the court agreed " . . . with the district court that the crime of attempted felony murder exists in this state." *Id.* at 449. Again citing to *Fleming* and its own recent decision in *Gentry v. State*, 437 So.2d 1097 (Fla. 1983), the Florida Supreme Court held, " . . . there are

offenses that may be successfully prosecuted as an attempt without proof of a specific intent to commit the relevant completed offense. We determined that if the state is not required to show specific intent to successfully prosecute the completed crime, it will not be required to show specific intent to successfully prosecute an attempt to commit that crime." *Amlotte*, 456 So. 2d at 450 (internal quotations omitted), citing to *Gentry*, 437 So.2d at 1099. This remained the law of the land in the state of Florida for over a decade.

On May 4, 1995 the Florida Supreme Court, however, issued its opinion in *State v. Gray*, 654 So.2d 552 (Fla. 1995), receding from its holding in *Amlotte* and now declaring there was, in fact, no such crime of attempted felony murder in this state. Justices Harding[3], Grimes, Overton, Shaw, Kogan, Wells and Anstead, in a unanimous decision, stated as follows: "We now believe that the application of the majority's holding in *Amlotte* has proven more troublesome than beneficial and that Justice Overton's view is the more logical and correct position." *Id.* at 553.

In support of its position, the court noted that even though the Committee on Standard Jury Instructions in Criminal Cases (which was charged with recommending amendments to various criminal jury instructions) had been able to propose an amendment that incorporated *Amlotte*, and which was subsequently adopted by the Florida Supreme Court in *Standard Jury Instructions in Criminal Cases* (93-1), 636 So.2d 502, 504-05 (Fla. 1994) – nonetheless, the committee "reported difficulty in drafting an amendment that incorporated the language of *Amlotte*. In fact, a majority of the committee members believed that there could be no crime of attempted felony murder." *Gray*, 654 So.2d at 553, citing to *Standard Jury Instructions in*

[3] Only Justices Overton and Shaw had participated in the *Amlotte* decision, and remained on the Florida Supreme Court at the time *Gray* was decided.

Criminal Cases (93-1), 636 So.2d at 502 n. 1[4]. The court also noted certain concerns as to the viability of the crime of attempted felony murder raised by the Fifth District Court of Appeal in the more recent opinion of *Grinage v. State,* 641 So.2d 1362 (Fla. 5th DCA 1994). In an acknowledgement to the concept of *stare decisis,* the court additionally stated:

> In reaching this decision, we are mindful of the importance of the doctrine of *stare decisis*. *Stare decisis* provides stability to the law and to the society governed by that law. *State v. Schopp,* 653 So.2d 1016 (Fla. 1995) (Hardin, J., dissenting). Yet *stare decisis* does not command blind allegiance to 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, 1096 (Fla. 1987) (Ehrlich, J., concurring in part, dissenting in part).

Gray, 654 So.2d at 554. With that, the crime of attempted felony murder ceased to exist in this state, and the decision in *Gray* "must be applied to all cases pending on direct review or not yet final." *Id.,* (citations omitted and emphasis added). It is this final sentence in *Gray* that mandates this Court to readdress a conviction rendered over seventeen (17) years ago[5], as there is no dispute that the direct appeal of this case was pending before the Fourth District Court of Appeal when the *Gray* decision was entered on May 4, 1995.

Subsequent Application of Gray

After the Florida Supreme Court abolished the crime of attempted felony murder in this state, the Florida legislature in response, revived it via the creation of the offense of felony

[4] "The committee noted that it had great difficulty in drafting an instruction on attempted felony murder which incorporated the language in *Amlotte v. State,* 456 So.2d 448 (Fla. 1984). In fact, the committee observed that a majority of its members were persuaded by the dissenting opinion in that case that there could be no such crime as attempted felony murder. Recognizing, however, that its function was not to change existing law, the committee submitted a proposed instruction for that crime." *Id.* The Court notes that then and current State Attorney for the Sixth Judicial Circuit, Bernie McCabe, was on this committee, but the opinion does not identify the majority members of the committee that questioned the legality of the crime of attempted felony murder.

[5] *See, e.g., State v. Woodley,* 695 So.2d 297, 298 (Fla. 1997), "In *Gray* we abolished the crime of attempted felony murder in this state. We expressly defined the scope of application in that decision: This decision must be applied to all cases pending on direct review or not yet final," (internal citations and quotations omitted).

causing bodily injury, ch. 96-359, § 1, Laws of Fla. (codified as § 782.051, *Fla. Stat.*), which was thereafter renamed attempted felony murder, ch. 98-204, § 12, Laws of Fla., with said law becoming effective on October 1, 1996. This has resulted in a number of cases falling within the "*Gray* window", and a number of appellate opinions discussing them.

In *Valentine v. State*, 688 So.2d 313 (Fla. 1996), the defendant was convicted for a number of heinous offenses, including attempted first-degree murder, and had been sentenced to death. Just as in this case, the jury was instructed on two possible theories of attempted first-degree murder – attempted first-degree felony murder and attempted first-degree premeditated murder, and the verdict form failed to state which ground the jury relied upon in convicting the defendant. *Id.* at 317. In relying upon the United States Supreme Court opinion in *Griffin v. United States*, 502 U.S. 46, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991), the court held that "[b]ecause the jury may have relied on this legally unsupportable theory, the conviction for attempted first-degree murder must be reversed." *Valentine*, 688 So.2d at 317. Unlike this case, however, the defendant in *Valentine* was facing much greater sanctions (i.e. the death penalty) for his murder conviction, and even with the reversal of his attempted murder charge, there were remaining convictions for other violent felonies and, as such, the defendant's murder conviction and ensuing penalty of death were affirmed. *Id.* at 318.

In *Spencer v. State*, 693 So.2d 1001 (Fla. 4th DCA 1997), the defendant was convicted of numerous counts, including first-degree murder and attempted first-degree murder. As in this case, the jury was instructed on both attempted first-degree premeditated murder and attempted first-degree felony murder, the State argued both theories to the jury, and the verdict form did not require the jury to indicate which of the grounds they were relying upon in convicting the defendant. The State argued that any error was harmless, because the evidence supported a

conviction for attempted first-degree premeditated murder. *Id.* at 1002. The court found, however, that:

> [B]ecause the jury was instructed on both attempted first-degree felony murder and attempted first-degree premeditated murder and both theories were argued to the jury, it is not possible to determine with any certainty upon which of the two theories the jury relied in convicting appellant of attempted first-degree murder. Accordingly, the facts that the jury was instructed on attempted first-degree felony murder cannot be considered harmless error.

Id. The Fourth District Court of Appeal subsequently affirmed the defendant's murder convictions, but reversed and remanded for a new trial defendant's conviction of attempted first-degree murder. *Id.*

The Application of Gray to a Postconviction Proceeding

The appellate courts have also repeatedly addressed the applicability of the regular statutory deadlines and bars to successiveness in filing postconviction relief motions in cases where a defendant has been convicted of a non-existent crime. In *Brown v. Florida,* 914 So.2d 500, 501 (Fla. 3d DCA 2005), the appellate court reversed the trial court's denial of a defendant's postconviction motion as being successive, due to the fact the defendant had pled to the non-existent crime of attempted first-degree felony murder. The case was remanded to the trial court to permit the defendant to withdraw his plea to this charge. *Id.* In *Moore v. State,* 924 So.2d 840 (Fla. 2006), the Fourth District Court of Appeal held: "A conviction for a non-existent crime is fundamental error that can be raised at any time, even if the error was 'invited' by acceptance of a negotiated plea or by a request for jury instructions." *Id.* at 841, citing to *Mundell v. State,* 739 So.2d 1201 (Fla. 5th DCA 1999) and *Fredericks v. State,* 675 So.2d 989 (Fla. 1st DCA 1996). Similarly, "Rule 3.800, however, allows a court to correct an illegal sentence 'at any time.' Florida courts have held . . . that the phrase 'at any time' allows

defendants to file successive motions under rule 3.800." *State v. McBride,* 848 So.2d 287, 290 (Fla. 2003).

Similarly, in *Witherspoon v. State,* 40 So.3d, 810, 811 (Fla. 3d DCA 2010) the court concluded that even though the defendant's conviction for attempted first-degree murder fell within the *Gray* window and was not procedurally barred as a successive or untimely motion, the defendant's postconviction claim failed due to defendant's inability to establish "manifest injustice". Specifically, the defendant in *Witherspoon* was convicted of two (2) counts of attempted first-degree murder, one count of armed robbery and one count of shooting or throwing a deadly missile. *Id.* The defendant received concurrent life sentences on the attempted first-degree murder counts, a consecutive life sentence as a habitual violent felony offender (HVFO) with a fifteen (15)-year mandatory minimum sentence on the armed robbery count, and a thirty (30)-year sentence as an HVFO on the deadly missile count to run concurrent with the armed robbery count. *Id.* The defendant filed numerous postconviction motions, including timely and untimely Rule 3.850 motions. The defendant then filed a Rule 3.800(a) motion, raising the *Gray* issue. The State argued that a claim under *Gray* can only be raised in a timely Rule 3.850 motion or in a petition alleging ineffective assistance of appellate counsel, and that the defendant's claim was time-barred. *Id.* The appellate court confirmed "the case law holds that if the case went to the jury on both attempted premeditated murder and attempted first-degree felony murder, and there is no interrogatory verdict, and the defendant is in the *Gray* window, then the defendant is entitled to a new trial." *Id.* at n.3, citing to *Valentine v. State,* 688 So.2d 313, 317 (Fla. 1996). The court also confirmed that a *Gray* claim of conviction for a non-existent crime is fundamental error and can be raised at anytime. *Id.* at 812. The court held, however, that even though the defendant fell within the *Gray* window, and even though the defendant had been convicted of two counts of the non-existent crime of attempted felony

murder, the defendant had not established "manifest injustice" as he was still facing a life sentence as an HVFO on the armed robbery count, and as a result the defendant's postconviction claim in *Witherspoon* was denied. *Id.*

Federal Case Law

As previously discussed, the Florida Supreme Court decision in *Valentine* mandating the reversal of a conviction for attempted first-degree murder due to submission to the jury of the legally unsupportable theory of attempted felony murder, was based upon the United States Supreme Court decision in *Griffin. See*, *Valentine*, 688 So.2d at 317. *Griffin* was a direct appeal case where the court drew a distinction between cases involving a possible theory of conviction that is *legally inadequate* (i.e. - the *Yates* scenario) versus a possible theory of conviction that is supported by *inadequate evidence* (i.e. - the *Turner* scenario). Cases involving *legally inadequate* theories of conviction are identified in federal jurisprudence as the *Yates* scenario, pursuant to the principles articulated in *Yates v. United States*, 354 U.S. 298, 77 S.Ct. 1064, 1 L.Ed.2d 1356 (1957). *Yates* was a case on direct appeal in which the United States Supreme Court held " . . .a verdict should be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected." *Id.* at 311. The opposite scenario distinguished by the court in *Griffin* are those cases involving *inadequate evidence*, also known as the *Turner* scenario, pursuant to the principles articulated in *Turner v. United States*, 396 U.S. 398, 90 S.Ct. 642, 24 L.Ed.2d 610 (1970). *Turner* was also a direct appeal case, however, the general verdict was upheld when one of the possible theories of conviction was supported by only inadequate evidence. *Id.* at 420. The facts in *Valentine* clearly qualified as a *Yates* scenario, and as such, the Florida Supreme Court reversed the conviction for attempted first-degree murder.

As discussed previously, the appellate courts of this state have applied the "fundamental error" analysis of *Yates* in both direct appeal and postconviction or collateral review proceedings. *See, Brown* and *Moore, supra*. *See also Tricarico v. State*, 711 So.2d 624, 624 (Fla. 4th DCA 1998) (reversing conviction in a post-conviction Rule 3.850 motion pursuant to *Yates* due to possible conviction for a non-existent offense). The only quasi-exception to these cases is *Witherspoon,* where the Fourth DCA held that even though the defendant's conviction for a non-existent crime constituted fundamental error, postconviction relief would be denied due to the defendant's failure to establish "manifest injustice". *See Witherspoon*, 40 So.3d at 812.

Significantly, the United States Supreme Court has receded from its opinion in *Yates* that legally inadequate theories of conviction require automatic reversal, and instead the federal courts now analyze such error pursuant to a harmless-error standard. In *Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993), the United States Supreme Court denied the defendant's habeas petition collaterally attacking a conviction from the state of Wisconsin. In doing so, the court noted the federal habeas corpus statute is silent as to the appropriate standard of review. *Id.* at 631. The petitioner/defendant urged the court to adopt the "harmless error beyond a reasonable doubt" standard utilized in cases involving federal constitutional error and as articulated in *Chapman v. California*, 368 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967). The respondent argued for the higher threshold for relief articulated in *Kotteakos v. United States*, 328 U.S. 750, 776, 66 S.Ct. 1239, 1253, 90 L.Ed. 1557 (1946), requiring reversal only if the error "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 631. The court noted in finding the *Kotteakos* harmless error analysis as the appropriate one for federal review of habeas petitions:

> The principle that collateral review is different from direct review resounds throughout our habeas jurisprudence . . . In keeping with this distinction, the writ of habeas corpus has historically been regarded as an extraordinary remedy, a

> bulwark against convictions that violate fundamental fairness. Those few who are ultimately successful [in obtaining habeas relief] are persons whom society has grievously wronged and for whom belated liberation is little enough compensation. Accordingly, it hardly bears repeating that an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment.

Id. at 633, (internal citations and quotations omitted) (emphasis added).

The United States Supreme Court took this analysis one step further in *Hedgpeth v. Pulido*, 129 S.Ct. 530, 172 L.Ed.2d 388 (2008). In a case factually similar to the instant case, the defendants in *Hedgepeth* were convicted in California state court based on a general verdict where the jury was instructed on alternative theories of guilt and may have relied on a legally inadequate theory. *Id.* at 531. On direct appeal, the California Supreme Court upheld the conviction finding the defendant was not prejudiced by the error. *Id.* The defendant then sought habeas relief in the federal court. The Ninth Circuit Court of Appeals, relying upon *Yates* and *Stromberg v. California*, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931), held that instructing a jury on multiple theories of guilt, one of which is legally improper, was 'structural' error exempting the instructions as a whole from harmless-error review. Such error instead required setting aside the conviction on habeas unless the reviewing court could determine with 'absolute certainty' that the defendant was convicted under a proper theory." *Id. (*internal citations omitted).

In vacating the decision of the Ninth Circuit Court of Appeals, the United States Supreme Court held that both *Stromberg* and *Yates* were decided before the decision in *Chapman* finding that constitutional errors can be harmless. *Id.* at 532. The court additionally stated:

> In a series of post-*Chapman* cases, however, we concluded that various forms of instructional error are not structural but instead trial errors subject to harmless-error review. Although these cases did not arise in the context of a jury instructed on multiple theories of guilt, one of which is improper, nothing in them suggests that a different harmless-error analysis should govern in that particular context . . .

> and *Neder*[6] makes clear that harmless-error analysis applies to instructional errors so long as the error at issues does not categorically 'vitiat[e] *all* the jury's findings'. An instructional error arising in the context of multiple theories of guilt no more vitiates *all* the jury's findings than does omission or misstatement of an element of the offense when only one theory is submitted.

Id., (internal quotations omitted) (emphasis added). The court then remanded the case for a harmless error analysis consistent with *Brecht*, as to whether the flaw in the instructions "had substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 533. Additionally, confirmation of harmless-error analysis as the appropriate standard of review for *Yates* errors occurred most recently in the case of *Skilling v. United States*, 130 S.Ct. 2896, 2934 (2010).

Evidentiary Hearing of July 29 and 30, 2010

At the July 29, 2010, hearing, Defendant Kohut testified he is entitled to a new trial because it cannot be decided beyond a reasonable doubt if he was convicted of attempted premeditated murder or attempted felony murder. (*See* July 29, 2010, transcript, p. 25, attached). He testified the jury was instructed on both premeditated attempted murder and attempted felony murder. (*See* July 29, 2010, transcript, p. 26, attached). He also testified the State argued both during closing, but the verdict form read "guilty of attempted first-degree murder with a deadly weapon as charged in the information". (*See* July 29, 2010, transcript, pps. 25-26, attached).

Additionally, he testified his direct appeal was still pending before the Fourth District Court of Appeal when the *Gray* decision was issued and, therefore, his case falls within the pipeline of cases. (*See* July 29, 2010, transcript, pps. 27-28, attached). He testified he did not become aware of the Gray decision until August of 2006 when he returned to Florida from New Mexico. (*See* July 29, 2010, transcript, pps. 28-29, attached). When asked if he had access to

[6] *Neder v. United States*, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)

Florida legal materials or the Florida courts while he was incarcerated in New Mexico, he responded as follows:

> KOHUT: Well clearly, I had access to the Florida courts. I could write the courts. I filed the motion that I filed back in 1995. But as it comes to having access to Florida legal material, no, I did not have access to the Florida digest or the Florida reporter series. I did not have access to the Florida Law Weekly. In fact, I didn't even know the Florida Law Weekly existed. I was in a different section, or region of the country. West did not provide to that region the same reporter series it provides here.

(*See* July 29, 2010, transcript, pps. 29-30, attached). He testified he had actively tried to pursue any legal remedies that he was aware of, and further elaborated as follows:

> KOHUT: Well I filed a motion to vacate in 1995 using Miss Holt's argument from our sentencing. When that lost, I filed a pro se 2254 in the Southern District of - - well, I actually filed it in the United States District Court for the District of New Mexico, so sua sponte transferred it to the Southern District of Florida. When that lost - - well, about three years into that, I asked an attorney to come in pro bono so we could amend it and bring in all the issues that I though should've been brought up in the first place.
>
> …
> Approximately 1998-1999.
> …
> After that and I lost, we got the assistance of Robert Leavitt (ph) an attorney out of Denver, Colorado to file a appeal of the 2254 in the Eleventh Circuit. While on appeal, we got the information regarding Mr. Malone and his questionable testimony at my trial. Tried to bring that into that. They told us, no, it should be done as a newly discovered evidence claim in the Florida courts.

(*See* July 29, 2010, transcript, p. 30, attached).

Defendant Kohut's August 12, 2009 affidavit was admitted into evidence as exhibit #1. (*See* July 29, 2010, transcript, pps. 33-36, exhibit, attached). The postcard from the Fourth District Court of Appeal informing Defendant Kohut that case 4D961432 had been destroyed

was admitted into evidence as exhibit #2-B. (*See* July 29, 2010, transcript, pps. 45-48, exhibit, attached). Defendant Kohut's August 1995 memorandum was admitted into evidence as exhibit #3-A. (*See* July 29, 2010, transcript, pps. 37-39, exhibit, attached). The memorandum filed by Ms. Julianne Holt in Defendant Kohut's original trial was admitted as exhibit #3-B. (*See* July 29, 2010, transcript, pps. 38-39, exhibit, attached). The *DeSisto College, Inc. v. Town of Howey-in-the-Hills,* 706 F. Supp. 1479 (M.D. Fla. 1989), *aff'd* 888 F.2d 766 (11th Cir. 1989) was admitted into evidence as exhibit #4. (*See* July 29, 2010, transcript, pps. 40-43, exhibit, attached). The initial brief Defendant Kohut filed after the denial of his motion to vacate asserting not having access to Florida case law and other materials was admitted into evidence as exhibit #2-C. (*See* July 29, 2010, transcript, pps. 46-48, exhibit, attached). The motion to strike filed by the Attorney General's office was admitted into evidence as exhibit #2-D and the Fourth District Court of Appeal order striking the initial brief was admitted into evidence as exhibit #2-E. (*See* July 29, 2010, transcript, pps. 47-48, exhibits, attached).

Additionally, Defendant Kohut testified that during the entire time he was in New Mexico, he did not have any representation in the state of Florida in any state litigation. (*See* July 29, 2010, transcript, pps. 50-51, attached). He testified that Mr. Northcutt represented him on his direct appeal, but said representation ended in May of 1995. (*See* July 29, 2010, transcript, p. 52, attached). He further testified Mr. Northcutt sent Defendant Rourk and him a letter dated May 15, 1995 advising them they may have some federal issues, but as far as he was aware, their state issues were done. (*See* July 29, 2010, transcript, p. 52, attached). The letter that Mr. Northcutt wrote to Defendant Kohut was admitted into evidence as exhibit #5. (*See* July 29, 2010, transcript, p. 53, exhibit, attached).

He testified he did not know anything about the *Gray* case until June of 2008. (*See* July 29, 2010, transcript, p. 53, attached). Whereupon, he testified he immediately contacted his rule

3.850 counsel Mr. Hernandez, obtained a copy of the jury instructions, and filed a petition for writ of habeas corpus. (*See* July 29, 2010, transcript, pps. 53-54, attached). When asked what efforts he could offer the Court at this time period that shows he was acting with due diligence in not only pursuing this claim, but any other claim that he had been pursuing in this case, he responded as follows:

> KOHUT: Well if you look at my pleadings, you know, my -- I pursued everything I was capable of pursuing from New Mexico. The Florida cases that are cited in the original 2254 are cases directly from the brief that Mr. Northcutt filed, because we were bringing those issues back. The other issues there were federal cases, which we did have access to federal, you know, case law. But since I wasn't able to do anything else there, that's where that stopped.
>
> Luckily, in 2006, I was returned to Florida. Upon being put in general population -- well, I was back and forth to court and stuff -- but upon being put in general population, I started talking to people in the law libraries over at the institutions and I was explaining my case to somebody. They realized who I was and they said, you know, the court said there's no such thing as this. I said, what, you know, I don't know what you're talking about. They showed me the case. Upon, you know, at that time, I contacted you and requested that you provide me with those documents so I could check and see if I fell into that, you know that area there.
>
> You know, if you look, all my Florida case -- or all my Florida challenges based on Florida case law have been filed since I returned to Florida. I had no access to this stuff prior to coming here. Since being here, I've spent as much possible time as I can in the law library. You know, I got a life sentence. I'm not going to sit down and roll over when I know that they've done things that aren't correct.

(*See* July 29, 2010, transcript, pps. 54-55, attached).

On cross-examination, he admitted he has four prior felony convictions. (*See* July 29, 2010, transcript, p. 57, attached). He admitted he has had assistance from Mr. Levinson since his return to Florida. (*See* July 29, 2010, transcript, p. 62, attached). He admitted he never asked

either Mr. Ayala, Mr. Leavitt, or Mr. Hudenall to research any Florida law for him. (*See* July 29, 2010, transcript, pps. 66-69 and 81-82, attached). He admitted he and Defendant Rourk's direct appeal were consolidated. (*See* July 29, 2010, transcript, p. 76, attached).

On redirect examination, a February 1996 letter Defendant Kohut wrote to Judge Roger Colton in Palm Beach was admitted into evidence as exhibit #6-A and an August 30, 1995, motion to appoint counsel filed in the Fifteenth Circuit requesting counsel because they did not have access to the Florida Reporter series was admitted as exhibit #6-B. (*See* July 29, 2010, transcript, pps. 100-101, exhibits, attached).

Defendant Rourk testified Ms. McGucken represented him at trial. (*See* July 29, 2010, transcript, p. 193, attached). He testified after sentencing, he was transported to New Mexico where he remained until 2006, when he returned to Florida for a couple of weeks, and returned to New Mexico. (*See* July 29, 2010, transcript, p. 193-194, attached). He testified while he was in New Mexico, he was in the law library quite a bit, but did not have access to anything on Florida law. (*See* July 29, 2010, transcript, pps. 196-197, attached). He testified he was not aware of the *Gray* case until Mr. Mactavish, his current counsel, sent him a copy of the case. (*See* July 29, 2010, transcript, p. 197, attached).

On cross-examination, he admitted he filed a rule 3.850 motion in 1995 or 1996. (*See* July 29, 2010, transcript, pps. 203-204, attached). He admitted Mr. Ayala represented him on a petition for habeas corpus in federal court, but admitted he did not ask him for any help in researching Florida law. (*See* July 29, 2010, transcript, pps. 204-205, attached). He also admitted he was not trying to get anyone to help him research Florida law for him. (*See* July 29, 2010, transcript, pps. 205-206, attached). He further admitted he did not make any request for Florida materials from the Department of Corrections. (*See* July 29, 2010, transcript, p. 207, attached).

At the hearing, General Counsel for the New Mexico Corrections Department Mr. Jim Brewster testified Florida law books and access to Florida case law is not directly available in the New Mexico prison system. (*See* July 29, 2010, transcript, p. 89, attached). He further testified that to his knowledge, volumes, copies, or subscriptions of Florida law books have never been kept in the New Mexico Corrections Department. (*See* July 29, 2010, transcript, pps. 89-91, attached). However, he admitted he has no personal knowledge whether or not Defendant Kohut had ever requested Florida law books or legal materials while in custody of the New Mexico Corrections Department. (*See* July 29, 2010, transcript, p. 91, attached).

He testified inmates have access to libraries and computer access, but not legal research computer access or internet access. (*See* July 29, 2010, transcript, pps. 94 and 97, attached). However, he testified inmates can talk on the phone to relatives, friends, or attorneys. (*See* July 29, 2010, transcript, pps. 94-95, attached).

At the same hearing, Mr. Rick Levinson testified he and Ms. Julianne Holt represented Defendant Kohut at trial. (*See* July 29, 2010, transcript, pps. 108-109, attached). He testified he left during jury deliberations, moved out of state, and did not resume contact with Defendant Kohut until sometime in 2002. (*See* July 29, 2010, transcript, pps. 139-140, attached). He testified he referred Defendant Kohut to Mr. Leavitt, who filed Defendant Kohut's original pleading on the appeal from the federal habeas corpus. (*See* July 29, 2010, transcript, p. 140, attached). However, he testified he did not recall Defendant Kohut requesting him to assist him with any research. (*See* July 29, 2010, transcript, pps. 140, 142, and 143, attached).

Defendant's mother Ms. Shirley Kohut testified she sent Defendant Kohut two Florida books while he was in New Mexico. (*See* July 29, 2010, transcript, p. 171, attached). She testified she recalled hiring Mr. Northcutt to represent her son, but did not hire Mr. Leavitt to represent him. (*See* July 29, 2010, transcript, p. 172, attached).

At the same hearing, Second District Court of Appeal Judge Stevan Northcutt testified that he represented Defendant Kohut on the direct appeal of the attempted first-degree murder conviction. (*See* July 29, 2010, transcript, pps. 178-179, attached). However, he testified at the time he was representing Defendant Kohut, he was not aware of the *Gray* decision. (*See* July 29, 2010, transcript, p. 179, attached). He testified the *Gray* decision came out on May 4, 1995, and the Fourth District Court of Appeal affirmed Defendant Kohut's case on May 10, 1005. (*See* July 29, 2010, transcript, p. 179, attached). He further testified the *Gray* decision held there was no such crime in Florida of attempted felony murder. (*See* July 29, 2010, transcript, p. 180, attached).

When asked if he agreed that the jury instructions dealt with the jury being instructed on both theories of attempted first degree premeditated murder and attempted felony murder, he responded, "Yes." (*See* July 29, 2010, transcript, pps. 180-181, attached). He also admitted that the State argued during closing arguments both alternative theories consistent with the jury instructions. (*See* July 29, 2010, transcript, p. 181, attached). He further admitted that verdict form was a general verdict form in the sense that it did not ask the jury to determine under which theory they were finding Defendant Kohut guilty. (*See* July 29, 2010, transcript, pps. 181-182, attached).

Moreover, he admitted the same facts would apply to Defendant Rourk. (*See* July 29, 2010, transcript, p. 182, attached). When asked if had he been aware of the *Gray* decision at the time he was representing Defendant Kohut, if he would have brought the issue up in the form of some pleading, he responded, "There's not just strictly a yes or no answer to that, but most likely I would have." (*See* July 29, 2010, transcript, p. 182, attached). He admitted the letter he sent Mr. Kohut, (admitted as State's exhibit #5), informing Mr. Kohut that, to his knowledge, all of

Mr. Kohut's appellate remedies in the state of Florida had been exhausted, was sent after the *Gray* decision had been rendered. (*See* July 29, 2010, transcript, p. 183, exhibit, attached).

On cross-examination, Judge Northcutt recalled having a conversation with Defendant Kohut sometime after January 1997 about getting him the records concerning his trial and his appeal. (*See* July 29, 2010, transcript, p. 184, attached). He also admitted to informing Defendant Kohut at that time of the current publicity concerning the OIG report and the FBI, including that State Attorney Mark Ober was going to be looking into cases because of issues with the FBI. (*See* July 29, 2010, transcript, pps. 184-185, attached). He admitted the direct appeals of both Defendants were consolidated, he represented both on direct appeal, and he did one single oral argument. (*See* July 29, 2010, transcript, p. 185, attached). He testified the May 15, 1995 letter he sent to Mr. Kohut advising that all of the Defendants' appellate remedies had been exhausted was also sent to Mr. Rourk. (*See* July 29, 2010, transcript, p. 185, attached).

Synthesis of State's argument

The State argues that after seventeen (17) years, these Defendants are coming before the Court on an issue of procedural rectitude that is totally irrelevant to their guilt or innocence of the crime of attempted first-degree murder, and which has nothing to do with the misidentification issue in the case, which was the only defense raised at trial. The State argues Defendants are seeking to benefit from the propitious timing of the *Gray* ruling and are requesting the Court to vacate a conviction that was valid at the time it was entered and, therefore, not void, but only voidable. To do so, the State argues, would lead to the incongruous result of the Court vacating the attempted first-degree murder conviction on an issue that was irrelevant at trial (i.e. whether the crime of attempted first-degree murder had occurred), and leave intact the convictions for armed robbery and kidnapping where the jury determined beyond

and to the exclusion of every reasonable doubt that the Defendants were, in fact, the perpetrators of these crimes. The State argues, therefore, the only defense raised at trial of misidentification was determined, and will remain determined, and consequently no injustice is created by letting this conviction stand.

The State concedes that *Gray* rendered the crime of attempted felony murder a nonexistent crime. The State admits attempted first-degree murder where there are dual or alternative theories is a flawed conviction. The State also concedes that a *Gray* claim raised on direct appeal would constitute fundamental error. The State argues, however, that if the conviction in this case was a flawed conviction that in order to be voidable, it must be timely raised and brought to the Court's attention before it becomes final. The State argues if it is not brought to the Court's attention before it becomes final, then it is not a nonexistent crime, because on the face of the conviction attempted first-degree murder is still a crime and the sentences are still valid sentences. The State argues that the statute of limitations for a Rule 3.850 motion have passed, and the cases cited by the Defendants are direct appeal cases which are distinctive from a collateral attack, particularly when dealing with convictions based upon one of two theories.

The State notes the law in Florida prior to *Gray* permitted a conviction to stand if there were alternative theories of guilt, and there was ample evidence supporting the remaining valid theory. *See, Allen v. State*, 676 So. 2d 491 (Fla. 5th DCA 1996). The State readily concedes, however, that the law on this subject in Florida changed as a result of the decision in *Gray.* The State, citing to *Yates* and *Griffin,* notes the change in the case law was a direct result of long-standing precedent *at the time* in the federal courts that a "jury's verdict must be set aside if it could be supported on one ground but not on another, and the reviewing court was uncertain which of the two grounds was relied upon by the jury in reaching the verdict." *See, Mills v.*

Maryland, 486 U.S. 367, 376, 108 S.Ct. 1860, 1866, 100 L.Ed.2d 384 (1988), *Yates*, 354 U.S. at 311 and *Griffin*, 502 U.S. at 46.

Moreover, the State argues the United States Supreme Court has receded from its previous opinions in *Yates* and *Griffin*, and the federal courts now apply a harmless-error standard of review, on both direct appeal and collateral review, when analyzing claims of legally inadequate theories of conviction. The State argues, therefore, that the continued use of "fundamental error" as the appropriate standard of review for these types of cases in the state of Florida is error in light of the more recent United States Supreme Court decisions in *Hedgpeth* and *Skilling*.

The State submits that *Spencer* is not applicable because it is a direct appeal case and is distinguishable from the successive and untimely collateral attacks filed in this case, which are not available anyway unless manifest injustice is shown. The State also argues that the portion of the *Witherspoon* opinion which the Defendants rely upon is dicta, does not constitute binding precedent and does not prevent this Court from denying the Defendants motions.

The State also suggests that habeas corpus is an inappropriate remedy. The State concedes that conviction of a truly nonexistent crime could be raised at any time by a Rule 3.800 motion, however, this case does not truly involve conviction of a nonexistent crime, only a conviction which contains the possibility of error, including the possibility that the jury may have relied on the attempted felony murder theory. The State further argues there was overwhelming proof as to the crime of attempted premeditated murder, and more significantly the Defendants have never contested whether this crime was, in fact, committed; they have only contested that they were, in fact, the perpetrators. The State argues that in light of the facts of this case, the Defendants cannot establish manifest injustice.

Findings by the Court

After reviewing the allegations, the court file, and the record, the Court finds the Florida Supreme Court in *Gray* held there is no such criminal offense of attempted felony murder. *Gray*, 654 So.2d at 553. In *Valentine,* the Florida Supreme Court held a "a conviction for attempted first-degree murder must be reversed where the jury was instructed on attempted first-degree felony murder and attempted first-degree premeditated murder, and the verdict fails to state on which ground the jury relied." *Valentine,* 688 So. 2d at 317. The State concedes that the Defendants were charged with both theories of attempted first-degree murder – attempted premeditated murder and attempted felony murder, and at the trial of this matter the State argued for conviction as to both theories of guilt and the jury was instructed on both theories of guilt. The State also concedes that the verdict forms did not contain a special interrogatory for the jury to indicate whether they found Defendants guilty of attempted murder in the first-degree with a deadly weapon based on a premeditated theory, or an attempted felony murder theory or both. (*See* verdict forms, attached).

The Court further finds the *Gray* decision applied to all cases pending on direct review or not yet final. *See Gray*, 654 So. 2d at 553. The Florida Supreme Court issued its decision in *Gray* on May 4, 1995. *Id.* Defendants' direct appeals were affirmed on May 10, 1995. *See Kohut v. State*, 654 So. 2d 932 (Fla. 4th DCA 1995) (table); *see also Rourk v. State*, 654 So. 2d 932 (Fla. 4th DCA 1995) (table). On May 26, 1995, the mandates issued on Defendants' direct appeals and on *Gray*. Therefore, Defendants' cases were pending on direct review and were not yet final at the time the Florida Supreme Court issued its May 4, 1995, decision in *Gray,* thereby making the Florida Supreme Court's decision in *Gray* applicable to Defendants' cases.

Neither Defendants' appellate counsel nor the appellate court itself recognized that *Gray* applied to this case, and so the years went by until the oversight was, in fact, first detected by

Defendant Kohut. As to the timeliness of Defendants' motions, the State concedes and the clear language of Florida Rule of Criminal Procedure 3.800 clearly states that "[a] court may at any time correct an illegal sentence". This Court knows of no other way to interpret the phrase "at any time" other than to give it its clear and unambiguous meaning. Additionally, the appellate courts of this state have consistently held postconviction motions alleging conviction for a nonexistent offense will not be procedurally barred as untimely or successive. *See Brown ,* 914 So.2d at 501; *Moore,* 924 So.2d at 840; and *Witherspoon,* 40 So.3d at 811. The Court accordingly finds that Defendants' motions do not merit denial due to their lack of timeliness.

In the Court's opinion, the true issue in these motions is whether the Defendants have established a "manifest injustice", to warrant vacating a conviction that has been in place for over seventeen (17) years and which has already been subject to repeated scrutiny at the state and federal appellate levels. Related to this determination is an acknowledgment that the federal case law underpinning the Florida Supreme Court's decision in *Valentine* as to fundamental error has changed since *Valentine* was rendered in 1996. As previously discussed, in *Witherspoon,* the appellate court held that even though there was fundamental error, the conviction would not be vacated due to the defendant's failure to establish "manifest injustice". *Witherspoon,* 40 So.3d at 812. The appellate court reasoned that because the defendant was facing life sentences on his other convictions, he could not establish a "manifest injustice" warranting reversal of the attempted murder charge. *Id.* This Court notes that on the sentences imposed, this case is factually distinguishable from *Witherspoon.* The Defendants in this case each received a life sentence on the attempted murder charge and a term of years on the other two charges. At sentencing, the State asked Judge Evans to impose three (3) consecutive life sentences. For reasons that are unarticulated on the record, Judge Evans imposed a life sentence on the attempted murder charge but declined to do so on the kidnapping and armed robbery charges

and, instead, showed some lenity to the Defendants by giving them not only a term of years on the kidnapping and armed robbery counts but ran them concurrent to each other as well. This means the Defendants received the maximum sentence on the potentially flawed charge of attempted murder and concurrent lesser sentences on the kidnapping and armed robbery charges.

The State argues, however, there was an abundance of evidence for conviction on just the attempted premeditated theory of conviction and, therefore, the Defendants cannot establish a manifest injustice. This Court agrees with the State that there is overwhelming evidence for this theory of conviction, however, the appellate courts have repeatedly denied this sole argument by the State as a basis for denying relief to similarly situated defendants. *See, e.g. Spencer*, 693 So.2d at 1002. The Court does note one distinctive feature to this case that distinguishes it from the others that have gone before. In addition to their being overwhelming evidence that the crime of attempted premeditated murder was committed, this Court is unaware of the Defendants ever challenging at trial, on direct appeal or in any collateral proceeding whether the crime of attempted premeditated murder was, in fact, committed. The sole issue has always been the identity of the perpetrators, not whether the crime occurred. Whether sufficient proof was elicited at trial as to the identity of the perpetrators has been litigated repeatedly and exhaustively in the state and federal courts by these Defendants. Every reviewing court has affirmed the Defendants' convictions on that issue.

Even more significantly, counsel for the Defendants in their closing arguments to the jury conceded as much. Julianne Holt, attorney for Defendant Kohut at the trial of this matter, stated as follows in her closing statements to the jury:

> There is no doubt from the evidence that you have seen and from the questioning that has occurred in this courtroom, that Christopher Wilson, on January 1st, 1993, had the most horrendous act done to him. There is no doubt that Mr. Wilson was burned; there is no doubt that Mr. Wilson has suffered tremendously, and everyone's heart goes out to Mr. Wilson. And that is as it should be.

****

> I'm defending a man who is innocent. I'm defending a community – a person whom the community has vilified; defending a man who is falsely accused by a witness who lied to protect his own skin and there can be no doubt about that. Defending a man whose accuser, Mr. Wilson, is a victim himself of a hateful crime, but a victim who is unable to identify his true assailants. And only after suggestive review of photograph is able to identify Mr. Kohut. And defending a man who the press has already convicted.

See, Trial Transcript, September 6, 1993, pps. 3402 and 3539, attached (emphasis added).

Similarly, Kay McGucken, attorney for Defendant Rourk at the trial of this matter, argued as follows in her closing statement to the jury:

> So how, then, do we explain Christopher Wilson's testimony? All of us want to believe Christopher Wilson. We want to believe every single word that he says. But Christopher Wilson is under greater pressure than any other witness in this trial. He has been physically unwell and in pain. He has been kidnapped and set on fire and left to die. He has suffered excruciating pain from his burns and is unable to return to work; his body scarred by the flames that nearly killed him. He sits at home and he watches television and he reads to pass the hours. This man's life has been destroyed.

See Trial Transcript, September 6, 1993, pps. 3503-04, attached (emphasis added).

It is apparent from the trial record of this case that counsel for Defendants made a strategic decision to concede the commission of the charged crimes, while vigorously contesting their clients' identification as the actual perpetrators of those crimes. In fact, this Court is unsure how competent counsel could argue that the crime of attempted premeditated murder did not occur and hope to have any credibility left with the jury. The uncontroverted facts at trial were that Mr. Wilson was abducted at gunpoint, driven to a remote location and told to stand in a field while gasoline was poured over him. As Mr. Wilson shivered from the cold flammable liquid pouring down him, and while begging for his life, the Defendants then returned to Mr. Wilson's car to retrieve a lighter in order to set him on fire. This is a text-book example of attempted premeditated murder that any reasonable person could comprehend if asked to contemplate such

a gruesome topic. Once the identity of the Defendants was established by this jury beyond a reasonable doubt, their conviction for the crime of attempted premeditated murder was a foregone, and a just and true, conclusion.

The Court also agrees with the States's argument that a *per se* reversal would render an illogical and inherently contradictory outcome, where the identity of the perpetrators of the kidnapping and armed robbery charges would remain determined for eternity as to these counts, while at the same time vacating the conviction for the attempted murder charge on an issue of that has never been, and could not credibly ever be, challenged by these Defendants. It is this Court's opinion, therefore, that in light of the particular facts of this case the Defendant's have not established a "manifest injustice". The Court would remind the parties that this issue comes long after conviction, and in the "habeas process" courts sit to some extent as chancellors in equity. The ancient notion of habeas corpus is not to correct judicial error but to right wrong; to free prisoners whom the State holds unjustly. These defendants are not incarcerated unjustly. Had *Gray* been brought before their appellate panel on first direct appeal, perhaps they would have gotten the relief of a new trial, such as counseled by the Fourth District in *Spencer*. Here, however, our society is only concerned with righting factual, penal wrongs. These Defendants have not been wronged. They do not reside unjustly in prison for life; this is an absolute certainty. The *Witherspoon* manifest injustice standard is not met.

This case may also encapsulate why the federal courts have since modified their stance on the standard of review for these types of cases in the broader interests of justice. As noted previously in the Court's recitation of the governing case law, all of the appellate courts of this state have applied a standard of "fundamental error" when analyzing a claim of conviction on a legally inadequate theory. Fundamental error is considered structural in nature and results in a *per se* reversal of a conviction. The genesis of the fundamental error analysis for cases falling

within the "*Gray* window" is the Florida Supreme Court opinion in *Valentine*, 688 So.2d at 317. The Florida Supreme Court cited the United States Supreme Court opinion in *Griffin,* 502 U.S. at 46, as the authority for its fundamental error analysis. *Valentine,* 688 So.2d at 317. *Griffin*, in turn, relied upon long-standing precedent from the 1957 United States Supreme Court opinion in *Yates*, 354 U.S. at 311, mandating reversal for a verdict possibly obtained on a legally inadequate theory of conviction. *Griffin*, 502 U.S. at 46.

In a significant change to federal jurisprudence, however, as of December 2, 2008 and the United States Supreme Court decision in *Hedgpeth,* 129 S.Ct. at 532, the federal courts now utilize a "harmless-error" analysis when evaluating a claim of conviction due to a legally inadequate theory of conviction. Specifically, a petitioning defendant must establish that the an alleged flaw in the jury instructions "had substantial and injurious effect or influence in determining a jury's verdict." *Id.* The Court is unaware of any Florida appellate precedent adopting, or even discussing, the change in federal jurisprudence as articulated in *Hedgpeth.*

Numerous reasons can be articulated why the "harmless error" analysis articulated by the United States Supreme Court in *Hedgpeth* should be the appropriate standard of review, especially in a postconviction proceeding. First, while Florida Rule of Criminal Procedure 3.800 permits a motion to correct an illegal sentence to be filed at anytime, the rule is silent as to the standard of review to be utilized by the courts. Second, the appellate courts of this state have consistently agreed with the federal courts in drawing a distinction between direct appellate review and collateral review. "Once the case is final, however, the standard drastically changes. We have emphasized that once a conviction has been affirmed on direct appeal a presumption of finality and legality attaches to the conviction and sentence." *Sanders v. State*, 946 So.2d 953, 959 (Fla. 2006) (internal quotations and citations omitted).

> The principle that collateral review is different from direct review resounds throughout our habeas jurisprudence. . . Those few who are ultimately successful [in obtaining habeas relief] are persons whom society has grievously wronged and for whom belated liberation is little enough compensation. . . Accordingly, it hardly bears repeating that an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment.

Brecht, 507 U.S. at 633-34 (internal citations and quotations omitted. In this Court's opinion, the particular facts of this case do not present Defendants "whom society has grievously wronged and for whom belated liberation" is insufficient compensation.

Additionally, unlike fine wines, criminal prosecutions do not get better with age. As noted by the United States Supreme Court in explaining their reasoning for the harmless-error analysis in collateral proceedings:

> Moreover, granting habeas relief merely because there is a reasonable probability that trial error contributed to the verdict is at odds with the historic meaning of habeas corpus – to afford relief to those whom society has "grievously wronged". Retrying defendants whose convictions are set aside also imposes significant "social costs," including the expenditure of additional time and resources for all the parties involved, the "erosion of memory" and "dispersion of witnesses" that accompany the passage of time and make obtaining convictions on retrial more difficult, and the frustration of "society's interest in the prompt administration of justice."

Brecht, 507 U.S at 637. This reasoning is particularly acute in the instant case, as the physical evidence has been destroyed and the original witnesses who testified at trial would be doing so through the haze of seventeen (17) intervening years, assuming they can even be located. The prejudicial effect to the State is patently obvious.

The Court acknowledges, however, that pursuant to the current state of the law in Florida the standard of review is fundamental error. "Under the doctrine of stare decisis, lower courts are bound to adhere to the rulings of higher courts when considering similar issues even though the lower court might believe the law should be otherwise." *Putnam County School Board v. Debose*, 667 So.2d 447, 449 (Fla. 1st DCA 1996). The Court, therefore, treats the complained

of error as fundamental, but as noted previously, the Court finds the Defendants have not established a "manifest injustice". Furthermore, should the standard of review as articulated in *Hedgpeth* be adopted by any courts of superior jurisdiction in this State while this postconviction matter remains pending on appeal, the Court also makes a finding of fact consistent with *Brecht* that Defendants have not established the flaw in the jury instructions had substantial and injurious effect or influence in determining the jury's verdict.

Finally, the Court notes that these Defendants have received extensive representation, and scrupulous due process, throughout their numerous appellate and postconviction claims in both the state and federal courts. The Court does not find these Defendants to be individuals whom society has grievously wronged; as such this case should now end.

It is therefore **ORDERED AND ADJUDGED** that Defendants Kohut's and Rourk's Refiled Petitions for Writ of Habeas Corpus and Defendant Rourk's Motion to Correct Illegal Sentence are hereby **DENIED.** Defendant Rourk may be returned to the Department of Corrections in New Mexico to continue serving his sentence in that state. Defendants Kohut and Rourk have thirty (30) days to appeal this order.

DONE AND ORDERED in Chambers in Hillsborough County, Florida, this 17th day of Nov., 2010.

MICHELLE SISCO, Circuit Judge

Attachments:

Order of Chief Justice
verdict forms
amended judgments
sentences
refiled petition for writ of habeas corpus
Defendant Rourk's re-filed petition for writ of habeas corpus
response to order to show cause
supplemental response to order to show cause
supplemental exhibit to State's responsive pleading
Defendant Rourk's motion to correct illegal sentence
July 29, 2010, transcript
July 30, 2010, transcript
Exhibits
September 6, 1993, portions of transcript

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Order has been furnished to Daniel Hernandez, Attorney for Defendant Mark Kohut, 902 North Armenia Avenue, Tampa, Florida 33609, by regular U.S. Mail; Robert Mactavish, Assistant Public Defender, Attorney for Defendant Charles Rourk, 700 East Twiggs Street, Tampa, Florida 33602, by inter-office mail; James Hellickson and Kristen J. Mendoza, Assistant State Attorneys for the Sixth Judicial Circuit, Post Office Box 5028, Clearwater, Florida 33758, by regular U.S. Mail; on this 17th day of Nov, 2010.

Sandi Hecksher

Sandi Hecksher, Judicial Assistant