IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA

MARK A. KOHUT,

Appellant,

v. CASE NO. 4D10-5263

STATE OF FLORIDA,

Appellee.
_____/

MOTION TO RECALL MANDATE

COMES NOW Appellant, Mark A. Kohut, through counsel, and files this Motion to Recall Mandate and as grounds therefore would show:

1. This Court issued its mandate on June 28, 2013, finalizing its *per curiam* decision without a written opinion.

2. A motion to recall mandate is timely if filed before the conclusion of the term of court in which the mandate issued. *State Farm Mut. Auto. Ins. Co. v. Judges of Dist. Court of Appeal, Fifth Dist.*, 405 So. 2d 980 (Fla. 1981). In this case, the relevant term of court expires Monday, July 8, 2013. Fla. Stat. § 35.10.

3. Good cause exists for the Court to recall the mandate in this case and to consider the two contemporaneously-filed motions: the Belated Motion to Certify a Question of Great Public Importance; and, the Motion for Rehearing, Rehearing *En Banc,* and to Issue an Opinion.

4. The legal issues upon which the Court's decision appears to be based are not settled, and further review would contribute to the administration of justice. Mr. Kohut therefore respectfully requests that the Court withdraw its mandate to consider the accompanying counseled motions. Mr. Kohut hopes that the Court will grant rehearing and reconsider its decision; however, in the alternative, Mr. Kohut seeks an opinion from which he can request *certiorari* through the conflict jurisdiction of the Supreme Court. *See Pinecrest Lakes, Inc. v. Shidel*, 802 So. 2d 486 (Fla. 4th Dist. 2001) (finding grounds for withholding, recalling, or staying the mandate is to allow a party to seek review in the Supreme Court). Additionally, he respectfully requests belated certification on these important questions of the due process rights of the citizens of the State of Florida and on the proper interpretation of the frequently-used enhancements in Fla. Stat. § 775.087.

5. Mr. Kohut submits that he should not be held responsible for the procedural irregularities in his case that led him to raise his claim in such a tortured procedural posture. Mr. Kohut has served the majority of his incarceration in the custody of another jurisdiction, without access to Florida courts. *Demps v. State*, 696 So. 2d 1296 (Fla. 3d Dist. 1997); *see also Piggott v. State*, 14 So. 3d 298, 299 (Fla. 4th DCA 2009) (reversing for consideration of whether prisoner held out-of-state was entitled to tolling under *Demps*). Mr. Kohut also lacked the assistance of counsel with respect to these claims even when counsel assisted him with other claims. *See* Appellant's Amended Initial

Brief at page 27.

6. Although Mr. Kohut's counsel on his 28 U.S.C. § 2254 petition, Robert Levitt, filed a motion pursuant to Rule 3.850, the only issue within the scope of his representation was the claim of newly discovered evidence which arose in connection with the federal proceedings. Mr. Kohut's counsel was not licensed to practice law in Florida, and failed to raise the *Gray* claim. Even after he returned to Florida, Mr. Kohut's access to legal materials was insufficient because he was often housed in local facilities rather than Department of Corrections facilities.

7. In addition to the claims currently before the Court, these circumstances mitigate or even negate any culpability for Mr. Kohut's failure to identify and raise what counsel considers his best claim, that appellate counsel Stevan Northcut rendered ineffective assistance by failing to raise Mr. Kohut's claim of entitlement to relief under the decision entered in *State v. Gray*, 654 So. 2d 552 (Fla. 1995). *See Clark v. Crosby*, 135 Fed. Appx. 347 (11th. Cir. 2005) (affirming district court's finding that appellate counsel rendered ineffective assistance in failing to raise *Gray* claim on direct appeal). Now Mr. Kohut's claim is probably procedurally defaulted in Florida courts as time-barred and as second or successive. Moreover, because Mr. Kohut filed a timely *pro se* 28 U.S.C. § 2254 motion while he was incarcerated in New Mexico, without counsel or access to Florida legal materials, federal relief is precluded by 28 U.S.C. § 2244(b), which

prohibits second or successive petitions absent either a showing of actual innocence or a newly-decided, retroactive Supreme Court opinion.

8. Mr. Kohut has at least two meritorious claims that, if otherwise procedurally forfeited, are not forfeited through wrongdoing by Mr. Kohut. He deserves full consideration during this appeal, including an opportunity to raise his claims in the Supreme Court.

9. Again acting without the benefit of counsel, Mr. Kohut has failed to identify what counsel considers the best argument for granting further review: whether the Due Process Clause of the Florida Constitution requires that his conviction for attempted murder be reviewed under the *per se* reversal standard articulated in *Gray* or under the harmless error standard adopted by the Supreme Court of the United States in *Hedgpeth v. Pulido*, 555 U.S. 57 (2008) and *Skilling v. United States*, —— U.S. ——, 130 S.Ct. 2896 (2010). Depending on the answer to this question, the finding that no manifest injustice has occurred is also worthy of further review.

10. If *Gray* is still good law, it appears that the reviewing courts have departed from well-settled precedent to find that Mr. Kohut's case presented a fundamental error, but that that fundamental error was not sufficient to constitute a manifest injustice warranting relief on habeas corpus. The Supreme Court deserves a chance to speak on whether the courts were permitted to expand its earlier, limited holdings on manifest

injustice to deny relief to Mr. Kohut. If this Court has found that *Gray* is not still good law, the Supreme Court deserves a chance to affirm or deny this proposition as a matter of great public importance.

11. This Court has said that "[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." *Moore v. State*, 924 So.2d 840, 841 (Fla. 4th Dist. 2006) (granting belated and successive motion for relief under Rule 3.850; reversing with directions to vacate conviction for non-existing offense of attempted aggravated assault on a law enforcement officer). In *White v. State*, 973 So.2d 638, 640-41 (Fla. 4th DCA 2008), this Court relied on *Moore* to grant relief to an appellant who was convicted of the nonexistent crime of attempted felony murder. Nevertheless, the Circuit Court denied relief by relying on the opinion in *Witherspoon v. State*, which held that a Rule 3.800 movant was not exempt from the rule against *res judicata* because even if relief were granted, the movant would still be serving a life sentence. 40 So. 3d 810 (Fla. 3d DCA 2010).

Witherspoon itself is an unremarkable application of *State v. McBride*, 848 So.2d 287 (Fla. 2003), and not objectionable. Unlike the movants in *Witherspoon* and *McBride*, Mr. Kohut does not seek to bring a claim that has already been decided on the merits. These cases may not even apply to habeas relief. But even if *Witherspoon* does

inform the manifest injustice inquiry for the purposes of a petition for a writ of habeas corpus, the circuit court applied it improperly by extending it to situations like Mr. Kohut's, where a defendant convicted of a nonexistent crime would be entitled to release if the claim were granted. Contrary to the findings of the circuit court, no "*Witherspoon* test" exists - *McBride* and *Witherspoon* are simply limited exception to the general rule that *Gray* error may be raised at any time. Thus, if this Court denied relief by expanding *McBride*, the Supreme Court deserves an opportunity to speak on the proper application of that fact-bound case.

On the other hand, if this Court has found that *Gray* itself is no longer good law because Florida courts have adopted *Skilling*,[1] the Supreme Court deserves an opportunity to speak on this vital issue of criminal procedure.

12. This Court should also recall the mandate to consider issues relating to whether the evidence presented at trial, which tended to show only that Mr. Kohut retrieved a can of gasoline for his co-defendant who then doused the victim and set him alight, is sufficient to sustain an enhancement under Fla. Stat. 775.087 and, if not, whether Mr. Kohut's illegally enhanced life sentence is a manifest injustice that warrants relief in *habeas corpus*. Mr Kohut's enhancement upon conviction "as charged" for "us[ing] a

1 Unlike the provisions of the Florida Constitution which mirror the Fourth and Eighth Amendments to the Constitution of the United States, Florida's Due Process Clause does not require Florida courts to defer to federal cases in interpreting the scope of the due process guarantees enjoyed by Florida citizens.

deadly weapon to-wit: a flammable liquid" would probably be invalid under *Thompson v. State*, 862 So. 2d 955, 958-59 (Fla. App. 2d DCA 2004) (holding that where indictment did not specify which defendant used the weapon and jury was instructed on theory of principal liability, application of enhancement violated rule that jury must find that defendant used the weapon personally as mandated in *State v. Overfelt*, 457 So. 2d 1385, 1387 (Fla. 1984). To the extent that *Thompson* is not in conflict because this Court has distinguished the case based on use of gasoline, an opinion explaining the court's reasoning would further the administration of justice by providing guidance for other courts in similar situations and illustrating the proper application of *Overfelt* in this thankfully rare context.

CONCLUSION

Based on the foregoing, the undersigned respectfully request that the Court recall its mandate and entertain the contemporaneously filed motions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 8, 2013, a true and correct copy of the foregoing Motion to Recall Mandate has been furnished by email to counsel for Appellee via the Attorney General's e-filing account to CRIMAPPWPB@MyFloridaLegal.com.

CERTIFICATE OF COMPLIANCE

I certify that this Motion to Recall Mandate complies with the font requirements of Florida Rule of Appellate Procedure 9.100(l). The brief has been prepared using Times New Roman, 14-point font.

DESIGNATION OF EMAIL ADDRESS

I designate my email address as gray@appealsandhabeas.com.

Respectfully submitted,

/s/_____
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