IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA

MARK KOHUT,

Case No.: _____

Movant,

v.

STATE OF FLORIDA,

Respondent.

MOTION FOR RELIEF PURSUANT TO RULE 9.141(d) OF THE FLORIDA RULES OF APPELLATE PROCEDURE, OR IN THE ALTERNATIVE PETITION FOR A WRIT OF HABEAS CORPUS TO CORRECT MANIFEST INJUSTICE

MOVANT, Mark Kohut, files this motion pursuant to Rule 9.141(d) of the Florida Rules of Appellate Procedure to vacate his conviction and life sentence for attempted murder in case No. 93-9019-CF (Fifteenth Circuit, Palm Beach). Appellate counsel rendered ineffective assistance by failing to raise two claims: (1) that Mr. Kohut had been convicted of a nonexistent crime; and, (2) that Mr. Kohut was not eligible for a life sentence enhancement under Section 775.087, Fla. Statutes, because no jury finding existed that he had personally used, carried, or possessed a deadly weapon during the attempted murder.

In the alternative, Mr. Kohut requests habeas relief to correct the manifest injustices arising from appellate counsel's ineffective assistance: his conviction for

a nonexistent crime, disparity in treatment relative to similarly situated defendants, his sentence in excess of the statutory maximum, and the illegal extension of his incarceration.

In support thereof, petitioner would show:

1. In Amlotte v. State, the Supreme Court of Florida held that there exists in Florida the crime of attempted first degree felony murder, finding that "whenever an individual perpetrates or attempts to perpetrate an enumerated felony, and . . . commits, aids, or abets a specific overt act which could, but does not, cause the death of another, that individual will have committed the crime of attempted felony murder.... [T]he law, as under the felony murder doctrine, presumes the existence of the specific intent required to prove attempt." 456 So. 2d 448, 449-50 (Fla. 1984).

2. On January 18, 1993, Mr. Kohut and co-defendants Charles Rourk and Jeffrey Pellett were charged as principals with attempted first-degree murder, armed robbery, and armed kidnapping. The most serious charge was "Murder in the first degree, that is to say the unlawful killing of a human being when perpetrated from a premeditated design to effect the death of any human being, by setting him on fire, and in the course or commission of the attempted murder used

a deadly weapon to-wit: a flammable liquid....” The other two charges specified that the weapon was a firearm. (Att. A).

3. At trial in the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County,[1] the victim testified that Mr. Kohut’s co-defendant Rourk left his presence to retrieve a container of gasoline, returned, and then splashed him with gasoline. (Tr. 2790-94, 2823, 2993) The victim testified that Rourk then made him get inside his vehicle before setting him alight. (Tr. 3000-01). Co-Defendant Pellet also testified that Rourk actually splashed the victim with gasoline and lit it. (Tr. 1484-85). In closing arguments, however, the state described the evidence relying solely on Mr. Pellet’s testimony that Mr. Kohut had fetched the gasoline for Mr. Rourk:

> Mr. Kohut returns for the gas . . . . and goes up and gives it to Mr. Rourk and Mr. Rourk, at arm’s length from Mr. Wilson, starts splashing him on the rear, on the back, on the head, into his eyes, and he hears Mr. Wilson cry out, “Please stop.”

(Tr. 3463-64).

1 Venue was changed from the Thirteenth Circuit (Hillsborough County) due to the publicity associated with the incident.

4. The jury was informed it could convict Mr. Kohut as a principal for the criminal acts of his co-defendants:

> If two or more persons help each other commit and/or attempt to commit a crime and the defendant is one of them, the defendant is a principal and must be treated as if he had done all of the things the other person or persons did if the defendant:
>
> 1. Knew what was going to happen.
>
> 2. Intended to participate actively or by sharing in an expected benefit.
>
> 3. Actually did something by which he intended to help commit and/or attempt to commit the crime.
>
> "Help" means to aid, plan, or assist.

(Tr. 3563-64 (emphasis added)).

The state argued:

> Mr. Rourk has the gun and the rag and under the principal theory, Mr. Kohut is guilty because he knew what was going to happen. Mr. Pellett testified, "You stay behind and you drive. We are going over to rob that person getting the newspaper." It doesn't matter who said it. Both knew what was going to happen, an intent to participate by sharing an expected benefit. . . . Mr. Kohut makes it two on one, he's assisting and planning and helping in this offense.

(Tr. 3467-68).

5. The trial court instructed the jury on two theories of criminal liability for the attempted murder: premeditation and attempted felony murder.

> There are two ways in which a person may be convicted of attempted murder, first degree. One is known as attempted premeditated murder and the other is known as attempted felony murder.
>
> Before you can find the defendant guilty of Attempted First Degree Premeditated Murder, the State must prove the following three elements beyond a reasonable doubt . . . .
>
> . . . .
>
> Before you can find the defendant guilty of attempted first degree felony murder, the state must prove the following three elements beyond a reasonable doubt:
>
> 1. There was an injury which could have resulted in the death of [the victim].
>
> 2. The injury occurred as a consequence of and while the defendant or an accomplice was engaged in the commission of robbery or kidnaping, or engaged in the attempt of a commission of robbery or kidnaping.
>
> 3. The defendant was the person who actually injured [the victim], or [the victim] was injured by a person other than the defendant, but the defendant and the person who injured [the victim] were principals in the commission of robbery or kidnaping.
>
> In order to convict of Attempted First Degree Felony Murder, it is not necessary that the State prove that the defendant had a premeditated design or intent to kill.

(Tr. 3548-50).

With respect to the charge of attempted first-degree murder, the state argued in closing that:

> [T]here are two theories under which you may find one or both, and you must consider them separately.... One theory is if there was a premeditated design to commit this crime.... [T]he second theory . . . is what we call in law, Felony Murder, which says that some crimes are so bad, or so horrible that if, in fact, you commit one or both of these crimes - - in this case, kidnaping, or armed kidnaping, or robbery . . . if you commit either one of those and in the course of committing either one of those, you commit another crime . . . you can be found guilty of attempted murder in the first degree, even though there is no premeditation.

(Tr. 3451-52).

6. The judge also gave the following instructions regarding weapons:

> If you find that the Defendant Kohut or Defendant Rourk committed Attempted Murder in the First Degree, Attempted Murder in the Second Degree, Attempted Manslaughter or Aggravated Battery, and you also find that during the commission of the crime he carried displayed, used, threatened to us [sic] or attempted to use a weapon, you should find him guilty of Attempted Murder in the First Degree, Attempted Murder in the Second Degree, Attempted Manslaughter or Aggravated Battery With a Weapon.
>
> A weapon is legally defined to mean any object that could be used to cause death or inflict serious bodily harm.
>
> If you find only that Defendant Kohut or Defendant Rourk committed Attempted Murder in the First Degree, Attempted Murder in the Second Degree, Attempted Manslaughter or Aggravated Battery, but did

> not carry, display, use, threaten to use or attempt to use a weapon, then you should find him guilty only of Attempted Murder in the First Degree, Attempted Manslaughter or Aggravated Battery.

(Tr. 3559-60).

7. On September 7, 1993, the jury found Mr. Kohut "Guilty of Attempted Murder in the First Degree with a Deadly Weapon as charged in the Information," using a general verdict form that did not specify whether Mr. Kohut had actually used or possessed a deadly weapon. The jury also found Mr. Kohut guilty of the lesser included offense of kidnapping, as well as "robbery with a firearm as charged in the Information." (Att. B). On October 22, 1993, the Court imposed a life sentence, departing upwards from the recommended sentence after finding that the crime was racially motivated and caused the victim extensive physical trauma. (Tr. 3989-3900; 4713). Mr. Kohut filed a notice of appeal.

8. On May 10, 1994, the Third District Court of Appeal in Gray v. State certified the following question of great public importance:

"WHETHER THE 'OVERT ACT' REFERRED TO IN ***AMLOTTE v. STATE***, 456 So. 2d 448, 449 (Fla. 1984), INCLUDES ONE, SUCH AS FLEEING, WHICH IS INTENTIONALLY COMMITTED BUT IS NOT INTENDED TO KILL OR INJURE ANOTHER?" 654 So. 2d 934, 936 (1994).

9. On July 7, 1994, the Supreme Court of Florida decided State v. Tripp, 642 So. 2d 728 (Fla. 1994). In Tripp, the Supreme Court ordered resentencing where the jury's verdict form did not include a special finding that the defendant had used a weapon during attempted first degree murder. Id. at 730. Although the jury found the defendant "guilty of 'charges made against him in the Information,'" which charged use of a weapon, the "trial court invaded the province of the jury when it reclassified the felony based on use of a weapon." Id. (explaining that "[t]he special verdict form – not allegations in an information – indicates when a jury finds a weapon has been used"). Tripp applied State v. Overfelt, which established that "To allow a judge to find that an accused actually possessed a firearm when committing a felony in order to apply the enhancement [] provisions of section 775.087 would be an invasion of the jury's historical function." 487 So. 2d 1385, 1387 (Fla. 1984).

10. On July 29, 1994, appellate counsel Stevan T. Northcutt filed a consolidated brief for both Rourk and Kohut, raising five claims: (1) the trial judge erred by refusing to strike a juror who expressed dismay over the cross-examination of co-defendant Pellett; (2) the trial judge erred by failing to grant a mistrial based on the prosecutor's repeated miscues and the judge's own prejudicial comment before the jury; (3) the trial judge erred by failing to exclude a pretrial identification of Kohut,

and by permitting Mr. Wilson's identification at trial; (4) the trial judge should have stricken Pellett's testimony and granted a mistrial; and, (5) reversal was warranted due to the cumulative effect of trial errors, prosecutorial misconduct, and the circumstances surrounding the trial.

11. On May 4, 1995, the Supreme Court of Florida rendered its decision in State v. Gray, 654 So. 2d 552 (Fla. 1995). The Court held that "we recede from the holding in Amlotte that there is a crime of attempted felony murder in Florida. This decision must be applied to all cases pending on direct review or not yet final. [Citation omitted]. Having reached this decision, we do not need to answer the certified question in Gray." Id. at 554.

12. State and federal law clearly established that a conviction based on a general verdict was invalid if the jury was instructed on alternative theories of guilt, one of which was invalid as a matter of law. Yates v. United States, 354 U.S. 298, 312 (1957); see, e.g., Fitzpatrick v. State, 859 So. 2d 486, 490 (Fla. 2003); Mackerly v. State, 777 So. 2d 969 (Fla. 2001); Valentine v. State, 688 So. 2d 313, 317 (Fla. 1996) (citing Griffin v. United States, 502 U.S. 46 (1991)).

13. On May 10, 1995, the Court of Appeals affirmed Mr. Kohut's conviction in a per curiam decision without an opinion. Kohut v. State, 654 So. 2d 932, 932 (Fla. 4th DCA 1995).

14. Counsel's failure to raise claims under Gray and Overfelt/Tripp constituted deficient performance because the issues were clearly meritorious and no viable strategic reason existed to omit the claims. Additionally, appellate counsel has testified under oath that he was not aware of the Gray decision during the course of his representation of Mr. Kohut. (July 29, 2010 hearing transcript at 179). Thus, there can be no element of strategy on counsel's part with respect to the Gray claim. Counsel's deficient failure to raise claims under Gray and Tripp prejudiced Mr. Kohut because the District Court would have vacated Mr. Kohut's conviction. Clark v. Crosby, 135 F. App'x 347 (11th Cir. 2005) (affirming reversal of conviction where appellate counsel failed to raise viable Gray claim and Gray was decided after briefing on appeal but before decision was rendered). Mr. Kohut's guarantee of effective assistance of appellate counsel under the fourteenth amendment of the United States Constitution was thereby violated.

15. On November 1, 1995, the Fourth District Court of Appeal decided Tape v. State, 661 So. 2d 1287 (Fla. 4th DCA 1995), reversing a conviction *sua sponte* based on the decision in Gray. Mr. Tape's case was indistinguishable in all relevant respects from Mr. Kohut's:

> In Gray, the supreme court held that there is no crime of attempted felony murder. In this case the defendant was convicted of attempted first degree murder, but the state argued both felony murder and premeditated murder to

> the jury. In Mills v. Maryland, 486 U.S. 367, 376 [] (1988), the United States Supreme Court articulated the well-settled rule that a criminal jury verdict must be set aside if it could be supported on one ground but not on another and the reviewing court is uncertain which of the two grounds was relied upon by the jury in reaching its verdict. It is not possible with the evidence and argument in this case to determine which theory the jury used as its basis for the conviction. Therefore, we are compelled to reverse the conviction.

Id. at 1289.

15. Mr. Kohut has brought the underlying substantive issues in postconviction motions, but not as claims of ineffective assistance of appellate counsel. The Fifteenth Circuit denied claims relating to the Gray issue on November 17, 2010. The Tripp and Overfelt arguments were summarily denied on February 24, 2011. His appeals were consolidated into case 4D10-5263, and the Fourth District Court of Appeals affirmed in a per curiam opinion on May 22, 2013, with the mandate issuing on June 28, 2013.

ANALYSIS

I. Mr. Kohut's Claims are Cognizable in a Timely Rule 9.141 Motion.

At the time of Mr. Kohut's conviction, claims of ineffective assistance of appellate counsel were to be brought in a petition for a

writ of habeas corpus. Currently Rule 9.141(d)(5) of the Florida Rules of Criminal Procedure provides that:

> A petition alleging ineffective assistance of counsel on direct review shall not be filed more than 2 years after the judgment and sentence become final on direct review unless it alleges with a specific factual basis that the petitioner was affirmatively misled about the results of the appeal by counsel. In no case shall a petition alleging ineffective assistance of appellate counsel on direct review be filed more than 4 years after the judgment and sentence become final on direct review.

Mr. Kohut asks this Court to run the four-year period from the date it was added in the 2011 amendments, after Mr. Kohut's conviction became final. Wilcox v. Florida Dep't of Corr., 158 F.3d 1209, 1211 (11th Cir. 1998); Goodman v. United States, 151 F.3d 1335 (11th Cir. 1998) (recognizing that one-year limitations period for federal habeas would begin to run on April 24, 1996, the effective date of the statute); McCray v. State, 669 So. 2d 1366 (Fla. 1997).

Moreover, appellate counsel affirmatively misled Mr. Kohut about the results of his direct appeal. On May 15, 1995, Mr. Kohut received a letter from appellate counsel explaining:

> The nature of the order . . . precludes further review in the Florida Supreme Court. Also, although you technically have the right to seek rehearing, Florida's appellate courts have declared that motions for rehearing of PCAs should not be filed, and some have taken to

> imposing sanctions against attorneys who file them anyway.
> **The bottom line is that there are no further state appellate remedies in your case.** There are potentially some federal collateral avenues, as well as some trial court motions that might be filed. I will look into these and send you a letter about them in the next few days.

(Att. C) (emphasis added). Appellate counsel thereby led Mr. Kohut to believe he could not proceed any further in state court.

Mr. Kohut could not have brought his claims in the circuit court within four years of his conviction and sentence because he was incarcerated outside of Florida and had no access to legal materials. Piggot v. State, 14 So. 3d 298, 299 (Fla. 4th DCA 2009); see generally November 22, 2010 Order Denying Postconviction Motions (summarizing evidence adduced at hearing). The complete factual basis for his claim was not apparent until July 29, 2010 that Mr. Kohut learned at the evidentiary hearing that counsel never even considered whether Gray could apply to his case, and probably would have raised the issue if he had been aware of the decision. (July 29, 2010 hearing transcript at 179-82). It was only then that Mr. Kohut knew that counsel had not omitted the potential Gray claim in the exercise of his strategic discretion.

Additionally, Mr. Kohut pursued relief on these substantive claims in proceedings in the circuit court, only to be denied relief on procedural grounds.

Mr. Kohut should not be punished for attempting to manage his litigation efficiently by raising the issue in only one court. Strict adherence to the time limitations would perpetuate the manifest injustice Mr. Kohut's conviction and life sentence represent.

II. Mr. Kohut's Conviction and Sentence Constitutes a Manifest Injustice that may be Corrected through Habeas Corpus.

If the Court finds this motion untimely under Rule 9.141, Mr. Kohut requests the Court treat it as a petition for habeas corpus based upon the manifest injustices that his conviction and life sentence impose.

A. Conviction of a Nonexistent Crime

Mr. Kohut is entitled to the benefit of Gray because his direct appeal was a "pipeline" case. Williamson v. State, 994 So. 2d 1000, 1016-17 (Fla. 2008) (reversing where Gray was decided during direct appeal and appellate counsel filed to raise the claim even though an alternative basis for his convictions was attempted first-degree felony murder). Although his Gray claim was not raised at trial or on appeal, Mr. Kohut's conviction is based on fundamental error because the erroneous instruction goes to the foundation of the case – the elements of the charges against him. Jackson v. State, 983 So. 2d 562, 568 (Fla. 2008); see Campbell v. State, 671 So. 2d 876, 877 (Florida 4th DCA 1996) (reversing where the Court could not "conclude beyond a reasonable doubt that the jury did not find

Campbell guilty of attempted first degree murder based on the attempted felony murder instruction given by the trial court" and finding that error, although not preserved, was fundamental). Habeas relief is appropriate where a jury was instructed on a nonexistent crime and may have relied on the invalid theory to convict. White v. State, 973 So. 2d 638, 640-41 (Fla. 4th DCA 2008); see also Erlsten v. State, 78 So. 3d 60, 61-62 (Fla. 4th DCA 2012); Moore v. State, 924 So. 2d 840, 841 (Fla. 4th DCA 2006) (conviction of a nonexistent crime warrants relaxation of procedural rules to correct manifest injustice).

Even if Gray does not require automatic reversal (which Mr. Kohut does not concede),[2] Florida's harmless error test requires the state to prove "beyond a reasonable doubt that the error did not contribute to the outcome." Shavers v. State, 86 So. 3d 1218, 1222 (Fla 2d DCA 2012) (internal quotation marks omitted). Because in this case it was much easier to show that another felony occurred than to show that Mr. Kohut intended to cause injury or death to the victim, the State

2 Subsequent to Yates, the Supreme Court of the United States has held that instruction on multiple theories, one of which is legally insufficient, can be harmless error. Skilling v. United States, --- U.S. ----, 130 S. Ct. 2896 (2010). This Court is not required to follow its lead and narrow the scope of protection afforded defendants like Mr. Kohut. Rigterink v. State, 66 So. 3d 866, 888 (Fla. 2011) (explaining that state courts are free to afford greater protection to individual rights than the federally mandated minimum); see also Cuevas v. State, 741 So. 2d 1234, 1239 (Fla. 5th DCA 1995) (Harris, J., concurring) (explaining that ambiguous jury instructions should be interpreted in the manner "most favorable to the defendant).

cannot show beyond a reasonable doubt that it would have obtained a conviction under the premeditated theory of attempted murder alone. Harris v. State, 658 So. 2d 1226, 1227 (Fla. 4th DCA 1995).

B. Failure to Afford the Same Treatment as Identically Situated Defendants

Another reason Mr. Kohut's conviction works a manifest injustice is that other similarly situated defendants have received the benefit of Gray. This Court has held before that "the anomalous position of defendant 'A' getting a new trial from one panel of this court for the very same reason that this defendant was denied relief by a different panel" creates "diametrically opposite results [that are] 'manifestly unjust, unfair and confound[ing to] our search for uniformity.'" Wright v. State, 604 So. 2d 1248, 1249 (Fla. 4th DCA 1992) (quoting Bourgalt v. State, 515 So. 2d 1287 (Fla. 4th DCA 1987)). This court has also found a manifest injustice where "two cases presenting the identical sentencing issue were decided differently by the same court within two days of each other." Bell v. State, 876 So. 2d 712 (Fla. 4th DCA 2004). Other defendants in the Gray pipeline received its benefit; indeed, this Court reversed a materially identical case *sua sponte* to carry out the Supreme Court's instructions, even though the claim was never raised on appeal. Tape v. State, 661 So. 2d 1287 (Fla. 4th DCA 1995). Thus, Mr. Kohut is eligible for habeas corpus relief to correct the manifest injustice caused by the

uneven application of law. Johnson v. State, 9 So. 3d 640, 641 (Florida 4th DCA 2009) (agreeing that it is "a manifest injustice to deny [] the same relief afforded other defendants identically situated").[3]

C. Sentence in Excess of Statutory Maximum

As for Mr. Kohut's life sentence, attempted first degree murder is not punishable by life unless an enhancement applies. Bailey v. State, 877 So. 2d 836, 837 (Fla. 4th DCA 2004). Here, Mr. Kohut's conviction may not be enhanced because the jury did not clearly find that he, as opposed to Mr. Rourk, personally used the deadly weapon specified in the indictment – flammable liquid – during the commission of the crime. Fla. Stat. Section 775.087(1); State v. Rodriguez, 602 So. 2d 1270, 1272 (Fla. 1992); Clark v. State, 701 So. 2d 912, 912 (Fla. 4th DCA 1997). The jury could have relied on the Court's instruction that Mr. Kohut "must be treated as if he had done all of the things the other person or persons did" as a principal, because the Court did not sufficiently distinguish between principal

3 See also Ross v. State, 901 So. 2d 252, 253-54 (Fla. 4th DCA 2005) (applying manifest injustice exception and granting relief on substantive grounds where prison releasee reoffender designation was invalid according to subsequently-decided law and petitioner had raised claim only in the context of a claim of ineffective assistance of counsel, where three subsequent postconviction motions under both Rule 3.800 and Rule 3.850 raising substantive issue were denied as successive and denials were affirmed *per curiam* by panels; court explained that "it would be a denial of due process to fail to apply the same [substantive law pursuant to which the court had granted relief in properly-filed applications by other defendants], notwithstanding our prior opinions affirming [the] sentence.").

liability for another's weapon and the personal use required to reclassify the offense. See also Tr. 3449-50 (closing argument by prosecutor explaining that principal liability "makes everybody who falls under this law equally responsible"). By applying the sentencing enhancement in Section 775.087, the Court engaged in factfinding that only the jury may conduct, determining without evidentiary support that Mr. Kohut had personally "used" the flammable liquid in connection with the crime. Hargrove v. State, 694 So. 2d 729, 730 (Fla. 1997).

In State v. Tripp, the Court held that an attempted first-degree murder conviction could not not be enhanced absent a specific finding on the jury's verdict that the weapon was used during the commission of the offense, despite the jury's finding that he was guilty as charged and the information alleged that he used a weapon during the offense. 642 So. 2d 728, 730 (Fla. 1994). Courts have since held that an "as charged" verdict will not support the imposition of an enhancement when the verdict fails to reflect that the defendant was in actual possession of a weapon, as opposed to constructive possession, at the time of the offense. Thompson v. Florida, 862 So. 2d 955, 958-59 (Fla. 2d DCA 2004). A limited exception for cases with one perpetrator and one defendant does not apply here. Id.; Cosme v. Florida, 89 So. 3d 1096, 1098 (Fla. 4th DCA 2012); Blanc v. State, 899 So. 2d 455, 456-57 (Fla. 4th DCA 2005); cf. Tucker v. State, 726 So. 2d

768, 772 (Fla. 1999) (allowing conviction as charged to stand where there was only one defendant and assailant). In fact, section 775.087 cannot apply to a conviction unless the defendant is directly liable because he committed the criminal act; if a defendant is liable for the criminal acts of another as a principal, the enhancement is illegal.

Where, as here, "[t]he jury verdict does not state whether the jury convicted [] on a theory of attempted murder with premeditation or attempted felony murder," it is "erroneous for the trial judge to determine that the jury convicted of [premeditated murder] rather than attempted felony murder, for which there could be no reclassification." Traylor v. State, 785 So. 2d 1179, 1181-82 (Fla. 2000)[4]; see also Hernandez v. State, 30 So. 3d 610, 612-13 (Fla. 3d DCA 2010) (reversing where defendant's sentence was enhanced for use of a deadly weapon, and it was not clear whether the jury had found use of a deadly weapon as element of the charge). Mr. Kohut was sentenced in violation of this principle, resulting in a

4 As in Traylor, the jury could have convicted Mr. Kohut of felony attempted murder with a deadly weapon based on the weapon used in the underlying felony. If the armed robbery was the underlying felony, the Court's expansive instructions on first-degree principal liability and failure to limit the "weapon" inquiry to flammable liquid could have mislead the jury into relying on the firearm as the "weapon" to which it referred in the conviction for attempted murder. See also Phillips v. State, 99 So. 3d 615, 616-17 (Fla. 1st DCA 2012) (reversing where, due to failure to specify underlying offense, it was unclear whether offenses occurred during the same criminal episode).

manifestly unjust, illegal conviction and sentence that may be corrected even if this Court finds Mr. Kohut's Rule 9.141 motion untimely. Eason v. State, 932 So. 2d 465, 467 (Fla. 4th DCA 2006); Zolache v. State, 946 So. 2d 298, 300 (Fla. 4th DCA 1997) (fundamental unfairness occurs when a defendant is required to serve a sentence in excess of that legally authorized); Davis v. State, 963 So. 2d 350 (Fla. 4th DCA 2007); Smith v. State, 946 So. 2d 1078, 1079 (Fla. 1st DCA 2006) (holding that an illegal sentence resulted in manifest injustice; declining to apply procedural bar).

The jury instructions in this case illustrate why the verdict does not reliably support reclassification. The Court instructed the jury that it could find Mr. Kohut guilty of attempted murder if "[t]he defendant was the person who actually injured [the victim], or [the victim] was injured by a person other than the defendant, but the defendant and the person who injured [the victim] were principals in the commission of robbery or kidnaping." Here, the only evidence presented shows that the gasoline was not a weapon until was poured on Mr. Wilson and ignited **by co-defendant Rourk**. The jury did not find that Mr. Kohut personally injured the victim or used, carried, or possessed a deadly weapon in the course of the offense, and his sentence should not have been enhanced based on the actions of his co-defendant. Willingham v. State, 541 So. 2d 1240, 1241-42 (Fla 2d DCA 1989)

(where defendant had not used a gun during commission of the offense, but only after the drugs had been sold, only basis for finding that he had used gun must have been under principal theory, rendering enhanced sentence illegal); see also Demps v. State, 649 So. 2d 938, (Fla. 5th DCA 1995). Under these circumstances, the "as charged" verdict "does not clearly reflect that [Kohut], as opposed to [Rourk], used or possessed" a deadly weapon. Thompson, 862 So. 2d at 958. Where, as here, "the jury's verdict does not necessarily reflect" that the jury found beyond a reasonable doubt that Mr. Kohut was in actual possession of a deadly weapon at the time of the attempted murder, the enhancement is illegal. Alusma v. State, 939 So. 2d 1081, 1081 (Fla. 4th DCA 2006).

This Court does not appear to have addressed whether this kind of error is "fundamental." Brown v. State, 727 So. 2d 337 (Fla. 4th DCA 1999). Because enhancement makes a defendant eligible for a much longer period of incarceration, the erroneous finding should be considered a fundamental error. Mr. Kohut submits that this error is a manifest injustice as well, because his sentence exceeds the statutory maximum and he would otherwise be eligible for release. Zolache v. State, 687 So. 2d at 300.

D. Illegal Extension of Incarceration

Because Mr. Kohut has served his other sentences and would be entitled to immediate release, his continued incarceration works a manifest injustice. Witherspoon v. State, 40 So. 3d 810, 812 (Fla. 3d DCA 2010); Zolache, 946 So. 2d at 300.

Conclusion

The jury that convicted Mr. Kohut was instructed that it could convict based on the theories of attempted felony or premeditated murder, as a perpetrator or as a principal in the first degree. The jury's verdict of guilty "as charged" to attempted murder with a deadly weapon was ambiguous and legally insufficient to sustain a sentencing enhancement, because the jury could have found Mr. Kohut vicariously responsible for Mr. Rourk's use of the gasoline and lighter as a deadly weapon, or of the firearm, either as a principal or as a component of felony murder. Under the evidence, Mr. Kohut did not possess any flammable liquid when it was poured on the victim, and did not set him on fire.

Additionally, the jury was instructed that it could find Mr. Kohut guilty of the nonexistent crime of attempted felony murder. There is no premeditation element to felony murder, making it much easier to secure a conviction; therefore,

the state cannot show beyond a reasonable doubt that the error is harmless (assuming *arguendo* that the erroneous instruction was not *per se* reversible error). Because Mr. Kohut may have been convicted of a nonexistent crime, his conviction is illegal and may be reversed in habeas proceedings.

Appellate counsel rendered constitutionally ineffective assistance by failing to bring these defects to the attention of this Court. Counsel's ineffective assistance resulted in manifest injustices which this Court has the power to correct.

RELIEF

WHEREFORE, Mr. Kohut requests this honorable Court to vacate his conviction and sentence for attempted murder.

DATED: October 29, 2013

Respectfully Submitted,

/s/ Gray R. Proctor
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 29, 2013, a true and correct copy of the foregoing motion has been furnished by email to the Attorney General's e-filing account at CrimAppWPB@MyFloridaLegal.com.

CERTIFICATE OF COMPLIANCE

I certify that this Reply Brief of Appellant 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.

/s/ Gray Proctor