IN THE SUPREME COURT OF FLORIDA

ANITA MARIE AMLOTTE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 64,107

RESPONDENT'S BRIEF ON THE MERITS

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ARGUMENT

I. ATTEMPTED FELONY MURDER IS A PUNISHABLE OFFENSE IN THE STATE OF FLORIDA.

The petitioner seeks to overturn her conviction for "attempted felony murder," and urges that this Court decide that the crime of attempted felony murder does not exist in the State of Florida.

There is no crime of "felony murder"in Florida, but there is a crime of murder in the first degree, which includes what lawyers commonly call "felony murder." It is described as the killing of a human being while the killer is engaged in the commission or the attempt to commit certain listed felonies. The statute is set out below:

> Florida Statutes §782.04 Murder--
> (1)(a) - The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in the perpetration of, or in the attempt to perpetrate any arson, sexual battery, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of opium or any synthetic or natural salt, compound, derivative, or preparation of opium by a person 18 years or older, when such drug is proven to be the proximate cause of the death of the user, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in s.775.082.

Pursuant to section 777.04(1) which says whoever attempts to commit a crime and fails is also guilty of a crime and the above

statute, the petitioner was charged with attempted felony murder.

The petitioner entered a mobile home for the purpose of using a telephone (R 6,8,14). As she exited the home two armed men wearing white sheets entered (R 19,21-22). The female occupant of the mobile home told her husband who was armed and hiding behind a door because they were suspicious, "Shoot them, Al." (R 22,24,76,94-95). The husband shot and the gunmen returned the fire and retreated along with the petitioner (R 22,26-27,29-30,37, 135,196,268-269).

These events resulted in the petitioner being charged with and convicted of armed burglary as well, because as a principal in the first degree, (section 777.011, Florida Statutes), she aided those armed men to commit the burglary. She was also convicted of shooting at or into an occupied building (R 510A).

The sole issue to be decided on review is whether attempted felony murder is a crime. The Fifth District Court of Appeal decided this issue affirmatively. It found by extending the felony murder doctrine that attempted first degree murder done in the felony murder mode is a crime. Judge Dauksch, writing for the majority stated:

> . . Here the facts fit well into the mold - the gunman while committing a burglary shot at the victims. If the bullet had hit the right spot and the victim had died then first degree murder would be the crime. Since the bullet failed to hit the right spot and the victim did not die, the burglar can be charged only with the attempt. (App. 4)

The majority relied on Fleming v. State, 374 So.2d 954, 956 (Fla. 1979) in determining that attempted felony murder is a

crime:

> . . .Our Supreme Court answered the question in this case in Fleming v. State, 374 So.2d 954,956 (Fla. 1979), when it said, "the offense of attempted first degree murder requires a premeditated design to effect death. In cases where the alleged 'attempt' occurs during the commission of a felony, however, the law presumes the existence of premeditation, just as it does under the felony murder rule. However it is reasoned, there is a crime of attempted first degree murder, or attempted "felony murder," and this appellant was guilty under section 777.011 because she aided in the commission of it. (citations omitted)(App. 4).

Judge Cobb, specially concurring, noted that the language of this Court in Fleming "leaves no room for artificial construction as to its meaning. It is an unequivocal recognition by the Florida Supreme Court of the existence of attempted 'felony murder'." (App. 6)

The language in Fleming, indeed, leaves little doubt that the existence of the crime of attempted felony murder was acknowledged. In Fleming, the defendant and a companion were engaged in an armed robbery, when interrupted by the police. A gun battle ensued, resulting in two deaths and several injuries. At one point the defendant struggled with an officer for control of a pistol, which discharged and wounded the officer. The defendant was charged with attempted first degree murder and pled guilty, then appealed, contending that there was no factual basis to support the plea since the officer was accidentally shot. This Court disagreed, specifically holding:

> The offense of attempted first degree murder requires a premeditated design

> to effect death. In cases where the alleged "attempt" occurs during the commission of a felony, however, the law presumes the existence of premeditation, just as it does under the felony murder rule. Adams v. State, 341 So.2d 765 (Fla. 1976); Knight v. State, 338 So.2d 201 (Fla. 1976). Because the appellant was engaged in the commission of a felony when Lt. Spurlin was shot, the accidental nature of the shooting is irrelevant. We find no error.

Id. at 956.

Judge Cowart, dissenting, pointed out that in Fleming this Court considered not the concept of an attempted murder without an intent to kill but whether there was a factual basis for the guilty plea (App. 13). This reasoning, however, overlooks the fact that one can never be convicted of a non-existent crime. It is not likely that a court would uphold a plea predicated on a factual basis that points to a non-existent crime.

The Supreme Court Committee on Standard Jury Instructions in Criminal Cases and the Florida Bar Criminal Rules Committee list of category IV lesser-included offenses published in the Florida Bar News, May 15, 1981, volume 8, number 9, page 7, sets out "attempt"as a category IV lesser-included offense of both first degree (felony) murder, second degree (felony) murder, third degree (felony) murder and manslaughter. See In Re: Florida Rules of Criminal Procedure, 403 So.2d 979 (Fla. 1981).

The petitioner, relying on Worthey v. State, 395 So.2d 1210 (Fla. 3d DCA 1981) contends that an attempt requires proof of the essential element of the accused's specific intent to commit the crime, concluding that, it is logically impossible to intend

to commit an unintentional act.

The case of Gentry v. State, 422 So.2d 1072 (Fla. 2d DCA 1982) was certified to this Court as being in direct conflict with Worthey. Pursuant to its decision in Gentry v. State [8 FLW 315] (Fla. 1983), this Court now holds that there are offenses that may be successfully prosecuted as an attempt without proof of a specific intent to commit the relevant completed offense. This Court stated:

> . . .The key to recognizing these crimes is to first determine whether the completed offense is a crime requiring specific intent or general intent. 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. We believe there is logic in this approach and that it comports with legislative intent. Id. at 315 . (emphasis added)

The "completed crime" as the term is used in Gentry II is, in the case sub judice, that of murder in the first degree committed while the killer is engaged in the commission or the attempt to commit certain enumerated felonies. In order to sustain a conviction for any of the degrees of felony murder, it is unneccessary for the State to prove that anyone had an intent to kill the deceased. See State v. Williams, 254 So.2d 548 (Fla. 2d DCA 1971). See also Adams v. State, 341 So.2d 765 (Fla. 1977); Wheeler v. State, 362 So.2d 377 (Fla. 1st DCA 1978); Christian v. State, 272 So.2d 852,855 (Fla. 4th DCA 1973). The State, therefore, is not required to show specific intent to successfully prosecute the completed crime referred to as felony murder and is not

required to show specific intent to successfully prosecute an attempt to commit that crime.

The petitioner's argument, if accepted, would also lead to logical absurdities in terms of holding persons responsible for their crimes. Florida courts have recognized that felony murder provisions supply constructive malice. See, Adams v. State, 341 So.2d 765,768 (Fla. 1977). See also Robles v. State, 188 So. 2d 789 (Fla. 1966); Wheeler v. State, 362 So.2d 377 (Fla. 1st DCA 1978); State v. Williams, 254 So.2d 548 (Fla. 2d DCA 1971). The commission of an underlying enumerated felony is deemed so hazardous and dangerous that it can be said that the perpetrator of the crime has the intent to kill beforehand and will kill if the situation requires it. The petitioner asks us to believe that, on the one hand an accused who undertakes an enumerated felony should be held to know that death is a likely consequence, but on the other hand, believe that the accused had no reason to know that an injury or shoot-out would be a likely consequence. Labels such as "general" and "specific" cannot be employed to defeat logic if law is to be anything to the common man other than a maze of confusion. We have already surpassed ourselves in the creation of technicalities. The common man has every right to expect that the laws governing him are based on logic.

Having accepted the doctrine of felony murder, we must necessarily recognize that such a crime can be attempted as well as completed. Every act is originally an attempt, and if successful, becomes a fait accompli, if not, is regarded as an unsuccessful attempt. If the felon is prepared to do the ultimate act to

insure his own survival or is willing to have such act occur or is willing to accept loss of life as a consequence of the felony, then he is also aware that such acts may be attempted or that the ultimate act may not be successful. To decide otherwise is to fly in the face of logic.

The petitioner's basic premise that felony murder involves a negligent or unintentional act is faulty. A fair reading of the statute, does not show this to be the case. The evil to be punished under the felony murder statutes is the killing of a person while committing a felony where the proof of premeditated design is lacking. Under the statute, the State need not prove either the specific intent to, or the premeditated design to kill and the statute calls for punishment even though intent to murder cannot be proved. The felony murder provisions supply constructive malice, as previously stated.

Felony murder, cannot, in logic, ever be deemed a crime of negligence or inadvertence. Just as the gunfighter knew when he strapped on his holster and walked down the street, that the likely consequence of his actions would be death, so too does the would-be felon know that the result of his criminal venture may be the killing of a human being, regardless of whether he or his cohort control the means of violence. The would-be felon is, so to speak, held accountable for strapping on his holster, and properly so, for that act is not an act of inadvertence. Like the gunfighter, his very presence on the scene creates an atmosphere of fear, panic and violence and he is rightfully held to have knowledge of this fact. As previously stated, in the felony murder

situation, commission of an underlying enumerated felony is so hazardous and dangerous that it can be said that the perpetrator of the crime has the intent to kill before hand and will kill if the situation requires it.

Just as the gunfighter knew, when he strapped on his holster, that the likely consequence of his action, if not death, is the wounding of another, so too does the felon know that the result of his criminal venture may be, if not the killing of a human being, the wounding or maiming of him or an act which may nearly cause him to lose his life.

Regardless of the result, the mind-set of the gunfighter and would-be felon is the same when they set upon their dangerous course. Neither of them intends their <u>own</u> death in the atmosphere of violence they create. They are aware that their survival may be at the expense of another, although they may "hope" that those in their path accede to their demands out of fear or that their dangerous act does not result in the loss of life. Whether the felon kills or wounds another, his "intent" has always been the same, to complete his act and insure his own survival by the most efficient and expedient offensive or retaliatory act possible, whatever its result. The result is often death.

The petitioner has not been convicted on the basis of what could have happened because of other people's actions. The petitioner's conviction is based on what actually happened because the petitioner chose to engage in a dangerous underlying felony, fully aware that the likely consequence of her action would be the attempted murder of another.

It is rash to hypothesize the existence of a host of fictional attempts that may be rationalized as a result of this case. Every case rests upon its own facts. It is highly speculative to extend this case to cover the case of a driver taking the wheel of a car when his blood alcohol level exceeds .10 percent and charging and convicting him of attempted vehicular manslaughter for the mere act of pointing the car at the road. Such speculation borders on fantasy. The crime of vehicular manslaughter can be clearly distinguished from that of felony murder. There is no underlying felony, enumerated by the legislature, as being so serious as to imply malice in the commission of vehicular homocide.

Perhaps, it is the last vestiges of our frontier spirit that makes us hesitant to extend the felony murder doctrine to its next logical step. Because the parties may seem evenly matched or the acts involved may seem "consciously" uncontemplated, we may conclude that the shoot-out seemed fair or that the less active cohort did not intend such dire consequences. Yet because we rightfully abhor violence, we do accept the doctrine of felony murder. The State would submit that this doctrine has even more vitality <u>today</u>, as we come to realize that the concept of giving the criminal a sporting chance, is neither morally required, nor constitutionally mandated. If we are a civilized people, we can and <u>must</u> abhor violence and hold those who nearly commit murder as accountable for their actions as we hold those who are successful in directly or indirectly causing the death of another in the process of committing of a felony.

Judge Cowart, dissenting, stated, "Although it would be murder if one unintentionally kills another while committing a felony, yet if the felon 'merely' wounds another, having no specific intent to murder he cannot be convicted of an attempt to murder." (App. 11). Yet, how does one explain to the crippled victim, because he was "merely" wounded the felon cannot be convicted? What if that 'mere' wound is only centimeters from a vital organ? In a just society solicitousness must be shown to the victim as well as the accused.

Not only precedent, but logic and morality as well cry out for this Court to confirm that the crime of attempted felony murder exists in the State of Florida.

CONCLUSION

Based upon the argument and authorities cited herein, this Honorable Court is asked to approve the instant decision of the district court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to BRYNN NEWTON, Assistant Public Defender, by delivery this 23rd day of September, 1983.

MARGENE A. ROPER