IN THE SUPREME COURT OF FLORIDA

ANITA MARIE AMLOTTE,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

CASE NO. 64,107

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

Petitioner was the defendant in the Circuit Court of Seminole County, Florida, and the Appellant in the Fifth District Court of Appeal. The Respondent, the State of Florida, will be referred to as "the State."

The following symbols will be used:

"R"	Record on Appeal
"SR"	Supplemental Record on Appeal
"Appendix"	Attached copy of District Court decision and Order on Rehearing

STATEMENT OF THE CASE

Petitioner was charged by an information filed in the Circuit Court of Seminole County, Florida, with armed burglary, shooting at or into an occupied building, and attempted felony murder. (R 510A) She was tried by a jury on February 11 through 13, 1981, and found guilty as charged of all three counts. (R 504, 570-572) She was sentenced on June 11, 1981, to seven and a half years in prison as to each count, to be served concurrently, with the trial court's recommendation that Appellant be treated as a youthful offender. (R 583-584, SR 1, 2)

Petitioner timely appealed to the Fifth District Court of Appeal, and on May 12, 1983, the District Court affirmed her convictions en banc, vacating the sentence for armed burglary. (See Appendix) On August 4, 1983, the District Court certified the following questions to be of great public importance:

a) DOES THERE EXIST UNDER FLORIDA LAW A CRIMINAL OFFENSE OF ATTEMPTED FELONY MURDER?

b) IF SO, WHAT ARE ITS ESSENTIAL CONSTITUENT ELEMENTS?

STATEMENT OF THE FACTS

On October 31, 1980, Margaret Sumpter answered a knock at the door of her family's trailer in Geneva, Florida, and admitted a young lady whom she later identified as Petitioner, who asked to use the telephone because she was lost. (R 6, 8, 14) Mrs. Sumpter's husband, Alfred, told her to let the person into the house, while he took a .22 rifle from the master bedroom closet and loaded it. (R 16, 92, 93) After the young lady twice dialed a seven-digit number and said the line was busy, she left the trailer with Mrs. Sumpter's directions to the main road. (R 18-19)

As the front door opened, the young woman hopped out and Mrs. Sumpter saw two figures wearing sheets with jagged holes cut out of them, standing against the wall of the trailer and pointing guns at her. (R 19, 21, 22, 23, 28) There was no conversation among the three strangers. (R 21-22, 80) The two figures, who Mrs. Sumpter believed were black males, came into the trailer; Mrs. Sumpter screamed that her husband had a gun and said, "Shoot them, Al." (R 22, 76; 24, 94-95) There ensued a gun battle between Alfred Sumpter and the shorter of the two intruders, in which Mr. Sumpter fired first and which left bullet holes in the walls of the trailer. (R 22, 26, 27, 29, 37, 135, 196, 268-269) At the taller man's urging, the two men eventually left. (R 30)

There was no live lineup conducted, but Mrs. Sumpter later identified Petitioner as the young woman. (R 41, 42, 44, 83, 107) Near the Sumpter residence law enforcement officers had discovered an automobile leaning

against a tree in a ditch, with no one in the vicinity. (R 128, 133, 143, 144, 149, 150, 160, 167, 168, 172, 195, 235) Two white sheets with holes cut out of them were found near the car. (R 131, 144, 145, 147, 156) Officers found a pack of Benson and Hedges cigarettes and a black umbrella on the ground at the car. (R 175, 181, 184, 205) In the Sumpters' yard, they found a pack of Benson and Hedges cigarettes, not the Sumpters' brand, a black sash, and unfired 9mm ammunition. (R 136, 302-303, 137, 203, 204, 229, 244, 247)

Through its registration, officers located the owner of the car, who gave permission to search the vehicle, along with some items from her Casselberry residence which belonged to Petitioner. (R 149, 150, 167, 214, 217, 222) In the car were found Petitioner's driver's license, a baseball cap similar to the one Mrs. Sumpter had described her as wearing, and 9mm ammunition. (R 162, 225, 226, 284, 287, 295, 298)

A warrant division deputy testified at trial that he overheard Petitioner tell another inmate being transported to court: "They got me in here for armed burglary and armed robbery, but I didn't have a gun. It was the two guys with me that had the guns." (R 304, 308, 314, 315, 349)

ARGUMENT

THE CRIME OF ATTEMPTED FELONY MURDER DOES NOT EXIST

Petitioner was charged with and convicted of "attempted felony murder." Apparently the State's theory was that, since someone could have been killed in the shootout that took place in the trailer, and since she appeared to be the participants' companion, and since if someone had been killed she could be a principal to felony murder, then because no one was killed, she could be guilty of "attempted felony murder." Felony murder does not, however, include nor can it accommodate an attempt.

It is first degree murder if a human being is killed from a premeditated design or by a person engaged in the perpetration or attempted perpetration of an enumerated felony. §782.04(1)(a), Fla. Stat. (1979). If someone had been killed in the trailer, the State would not have to prove premeditation or even specific intent to commit murder, in order to convict the burglars of "felony murder." Fleming v. State, 374 So. 2d 954 (Fla. 1979).

An attempt. however, requires proof of the essential element of the accused's specific intent to commit the crime. Worthey v. State, 395 So. 2d 1210 (Fla. 3d DCA 1981); Hutchinson v. State, 315 So. 2d 546 (Fla. 2d DCA 1975). If the State could prove the burglars' specific intent to cause the killing of a human being, then the appropriate charge would have been attempted first degree murder. The State, of course, had no such proof, especially in the case of the unarmed Appellant, so the prosecutor charged

"attempted felony murder," ignoring that it is logically impossible to intend to commit an unintentional act, when, as Judge Cowart wrote in his dissent to the District Court's decision, "the very intention to commit it is contrary to its definition and destroys its purpose and existence." (Appendix, Page 12)

Judge Cowart's dissenting opinion presents not only the unassailably logical argument against the existence of "attempted felony murder," but the legal and very real distinctions, which Appellant would respectfully adopt, between this case and Fleming v. State, supra, which might otherwise control. In that case,

> . . . Fleming did not attack the charging document as failing to allege a crime nor did he go to trial and appeal from the refusal of the trial court to charge the jury that an essential element of the offense of attempted first degree murder is an intent to kill. Nor did he otherwise properly present the legal question presented in this case. Fleming pled guilty to attempted first degree murder then argued on appeal that there was no factual basis for that plea because there was no evidence of premeditation because the victim was shot accidentally. The supreme court upheld the plea saying "the offense of attempted first degree murder requires a premeditated design to effect death," which is entirely consistent with this dissent. In considering not the concept of an attempted murder without an intent to kill but whether there was a factual basis for Fleming's guilty plea, the court remarked that when an attempt occurs during the commission of a felony the law presumes the existence of premeditation

> and the accidental nature of the shooting is irrelevant. There was no discussion of specific intent as an essential element of every attempt. This is a much better view of the holding in Fleming than that of the majority opinion which sees it as a binding precedent for the proposition that there is a crime of attempted felony murder which requires no intent to kill. (Emphasis supplied.) (Footnote omitted.) (Appendix, Page 13)

Petitioner's case is an excellent example of why Fleming should be viewed only as upholding the the conviction in that case on the facts of that case. Otherwise, she has been convicted on the basis of what could have happened because of other people's actions. And otherwise, the existence of a host of fictional "attempts" may be rationalized. Vehicular manslaughter, for instance, is a similar "strict liability" crime which one may be convicted of if he operates a motor vehicle while intoxicated and someone is killed. §860.01(2), Fla. Stat. (1981). Contributing causes to the death are irrelevant. Everett v. State, Fla. 1st DCA Case No. AK-259 (August 5, 1983) [8 FLW 2016]. The mens rea of vehicular manslaughter is the driver's intoxication. Therefore, any time a driver in Florida takes the wheel of a car when his blood alcohol level exceeds .10%, and he points that car at a road, under the District Court's decision in this case, he could be charged with and convicted of attempted vehicular manslaughter. §§316.193, 322.262(2)(c), Fla. Stat. (1981). Someone could be killed.

For the same logical reasons which Petitioner would advance, the crime of attempted felony murder has been found not to exist in Indiana and Illinois. Head v. State, 443 N.E.2d 44 (Ind. 1982); People v. Viser,

343 N.E.2d 903 (Ill. 1975). Judicial conscience cannot allow a person to remain imprisoned for a crime which does not exist. Vogel v. State, 365 So. 2d 1079 (Fla. 1st DCA 1979).

CONCLUSION

For the reasons expressed herein, Petitioner respectfully requests that this Honorable Court reverse her conviction for attempted felony murder and remand this cause to the trial court with directions that she be discharged.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Honorable Jim Smith, Attorney General, 125 N. Ridgewood Avenue, Daytona Beach, Florida 32014, and to Ms. Anita M. Amlotte, P. O. Box 8540, Pembroke Pines, Florida 33024, by mail, this 6th day of September, 1983.

Brynn Newton
ATTORNEY