IN THE SUPREME COURT OF FLORIDA

CASE NO. 83,116

LEONARDO FRANQUI,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

AN APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA CRIMINAL DIVISION

SECOND SUPPLEMENTAL BRIEF OF APPELLEE

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SUPPLEMENTAL STATEMENT OF THE FACTS

The State readopts its statement of the case and facts set forth in the original and (first) supplemental briefs of appellee.

SUMMARY OF THE ARGUMENT

Any alleged error under State v. Gray as to defendant's convictions for the attempted murder of Danilo Cabanas, Sr., and Danilo Cabanas, Jr., is not preserved for review, in that Defendant did not object to the instruction on attempted felony murder below. Furthermore, any error would be harmless where defendant was also charged with attempted premeditated murder, the jury was instructed thereon, the prosecution relied almost exclusively on the premeditation theory, and the evidence amply supported such a conviction. Even if the convictions are to be reversed, Defendant may be retried on attempted premeditated murder. Finally, any alleged infirmity of those convictions does not affect the validity of his sentence, where Defendant has several other prior, unrelated violent felonies.

ARGUMENT

ANY ALLEGED ERROR UNDER STATE V. GRAY AS TO DEFENDANT'S CONVICTIONS FOR THE ATTEMPTED MURDER OF DANILO CABANAS, SR., AND DANILO CABANAS, JR., IS NOT PRESERVED FOR REVIEW, AND WOULD NEVERTHELESS BE HARMLESS WHERE DEFENDANT WAS ALSO CHARGED **WITH** ATTEMPTED PREMEDITATED MURDER, THE JURY WAS INSTRUCTED THEREON, AND THE EVIDENCE AMPLY SUPPORTED SUCH A CONVICTION, AND MOREOVER, *ANY* ALLEGED INFIRMITY OF THOSE CONVICTIONS DOES NOT AFFECT THE VALIDITY OF HIS SENTENCE.

In his second supplemental brief, Defendant contends that under State v. Grav, 654 So. 2d 52 (Fla. 1995), his convictions for the attempted murder of the Cabanases, **Jr.** and **Sr.**, cannot stand because the jury **was** instructed on an attempted felony murder theory. However, in the context of this case, this claim essentially presents an instructional issue, which was not raised below, and thus may not now be considered on appeal. Even assuming that the issue were properly before the court, because Defendant was also indicted for, and the jury was instructed on, attempted premeditated murder, the State submits that any error is harmless. Moreover, even assuming, arguendo, that reversal is necessary, Defendant may be retried for attempted murder on remand for the same reason. Finally, under the facts of this case, any infirmity of these convictions should not affect the validity of Defendant's death sentence.

In Gray, this court abolished the offense of attempted felony murder. Id. at 553. Although in Valentine v. State, 688 So. 2d 313 (Fla. 1996), the Court held that where the jury was instructed alternatively on both attempted premeditated and attempted felony murder, the conviction must be vacated, that opinion does not set forth whether the issue was preserved for review, or what evidence, if any, was presented in support of an attempted premeditated murder conviction.

The post-Gray cases that have thus far reached this court appear to only have involved the conviction of attempted felony murder standing alone. Thus the appropriate remedy was remand for discharge or trial on any lesser included offense on which the jury was instructed. E.g., State v. Wilson, 680 So. 2d 411 (Fla. 1996). Here, however, a fundamentally different situation exists. Defendant was charged and convicted of attempted first-degree murder. The verdict did not specify whether the conviction was based upon a felony or premeditation theory. This court has long held that first-degree murder constitutes a single offense, which may be proved by two different means. Brown v. State, 473 So. 2d 1260 (Fla. 1985).

An analogous situation has previously arisen in the context of attempted manslaughter. Manslaughter may be proven in two ways: by "act or procurement," or by "culpable negligence," §782.07, Fla. Stat. In Taylor v. State, 444 So. 2d 931, 934 (Fla. 1983), the Court determined that attempted manslaughter could only be proven **by** act or procurement, but not by culpable negligence. Thus, as with first-degree murder, manslaughter may be proven in two ways, but the corresponding attempt crime may only be proven in one.

Subsequent to Taylor, in Tillman v. State, **471** So. 2d 32 (Fla. 1985), the Court was presented with an issue much like that presented to the court now. Tillman was tried and convicted *of* attempted manslaughter prior to the Taylor decision, and his case came before this court subsequent thereto. Tillman avered that he was entitled to a new trial because it was not clear whether the jury had convicted him based upon culpable negligence or upon act or procurement. The Court rejected Tillman's Taylor claim, however, because his counsel had not objected to the giving of the attempted manslaughter instruction at trial.

Here, the only objection to the attempted murder instruction went to the wording *of* the instruction, not to the giving of an

attempted felony murder instruction, per se. (T. 2300-02). In Gray, as in Taylor, the Court held that although a particular species of homicide had two modes of **proof,** only one such mode was viable for the corresponding attempt crime, As Tillman held that Taylor was unavailable to a "pipeline" Defendant tried before Taylor who did not raise the issue at trial, so should Gray **be** unavailable to Defendant, who was tried before Gray, and who did not challenge the instruction given at his trial.

Nothing in Griffin v. United States, 502 **U.S.** 46 (1991), compels **a** different result.[1] The United States Supreme Court has acknowledged as much itself. In Sochor v. Florida, 504 U.S. 527 (1992), the Court invoked Griffin for the proposition that a factually incorrect instruction was not reversible. Id., 504 U.S. at 538. Notably, the same opinion held that the claim that an instruction was constitutionally inadequate was barred by failure to raise the issue at trial. Id., 504 **U.S.** at 534 n. *.

Even assuming, arsuendo, that the issue were preserved, the

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[1] In Valentine, 688 So. 2d at **316** the Court remanded for retrial because it concluded that the jury may have relied upon the "legally unsupportable" theory of attempted felony murder, citing to Griffin.

evidence **of** premeditation was so strong that any error in instructing the jury on attempted felony murder is harmless beyond a reasonable doubt. In Valentine, 688 So. 2d at **316**, the Court remanded for retrial because it concluded that the jury may have relied upon the "legally unsupportable" theory of attempted felony murder, citing to Griffin. Griffin, however, does not compel that result here. As Justice Scalia observed in his lengthy analysis of the case law on the issue of whether a conviction based upon alternate grounds, where one of the two grounds was inadequate, must be reversed, the high court has never required reversal absent a Constitutional impediment to the invalid ground. Griffin, 502 U.S. at 52. On the contrary, in most situations, where the evidence is sufficient to support any one of the acts charged, the conviction will stand, Griffin, 502 U.S. at 56, citing Turner v. United States, 396 U.S. 398, 420 (1970). See also, Zant v. Stephens, 462 U.S. 862, 883-85 (1983)(rejecting the application of the rule of Stromberg v. California, 283 U.S. 359 (1931), to cases where the alternative grounds **for** conviction was not constitutionally invalid). Gray was not premised upon any constitutional flaw in the offense of attempted felony murder. Rather, the Court determined that attempted felony murder, which had its genesis in judicial statutory construction in Amlotte v.

State, 456 So. 2d 448 (Fla. 1984), created a logically unwieldy doctrine:

> We now believe that the application of the majority's holding in Amlotte has proven more troublesome than beneficial and that Justice Overton's [dissenting] view [in Amlotte] is the more logical and correct position.

Gray, 654 So. 2d at 553. The abolition of the offense was in no way based upon constitutional considerations, but rather on the unforeseen difficulties the courts had experienced in logically applying the "legal fiction" upon which the doctrine was based. Id. at 554.

Again, Taylor and Tillman are instructive here. In both those cases, the jury was given the cuplable negligence instruction, The Court nevertheless found no infirmity in the convictions "because there was sufficient evidence to support the jury's verdict" under the proper "act or procurement" standard. Taylor, 444 So. 2d at 934.

Here, as in the attempted manslaughter cases, the evidence presented was more that sufficient to support attempted premeditated murder convictions. Indeed, the prosecution argued **almost** exclusively that these attempted murders, like the

"successful" murder of Raul Lopez, were premeditated and intentional:

> What happened there that day was nothing short of an ambush. That is right. Detective Nabut had to wonder was it a robbery or was it just an attempted killing, in a killing, that is, that it was because these guys didn't even ask for anything. There was **no** demand made ...
>
> Because that shows you what was in the minds of these two men. **As Mr.** DeAguero said in opening statement, they, the people who **do** this are gonna have it their way. Shoot first and ask questions later. It was an ambush. A First Degree Murder and two attempted first degree murders of those people.

(T. 2346).

> These people were going to take down and rob people. This is not some robbery ***of*** an old lady out in Biscayne Boulevard of her purse and they know nothing really is going to happen except the taking of the purse, these are, these are [sic] men who armed themselves to the teeth, a 9 millimeter, a Tec 9 and a .357 to take twenty-five grand away from men who they know have a bodyguard. They were prepared for anything.
>
> Now is when it makes some sense, that no one made a demand. Of course they don't make a demand. You know why? Because they had no intention of asking for anything, because what they planned to do was to take them all down and the only reason that the Cabanas's [sic] are alive to tell you what happened is because of the grace of God and not of this defendant.
>
> An attempt to kill, well, you heard from

Mr. Cabanas, there was a bullet that entered right through the passenger door, right through where his head would be, right through where his head would be.

Doesn't that tell you a little **bit?** Does that give you a little information about the intent to kill? If it weren't for the fact that Mr. Cabanas ducked he wouldn't have been here to testify. Because that's exactly where his head would have been. An intent to kill. Kill, look at this. Look at this shot.

Had Raul Lopez still been there, he would have been shot right here ... What does this tell you about intent to kill, shoot first and ask questions later. What does this tell you?

(T. 2358-59).

Intent to kill. Let's look at Pablo Abreu and Pablo San Martin's position. ... Pablo San Martin came out the pasenger side. Pablo Abreu came out the driver's side, Pablo San Martin was carrying a 9 millimeter Pablo Abreu was carrying a Tec 9, and the two of them came out, guns drawn, no questions asked shooting and not shooting once, shooting several times, and look at their position, would [sic] a perfect cross fire position, each of them on each side, shooting in a triangulation, to the right to the victims.

Is's perfect. It is amazing that these men are alive to testify about this.

(T. 2360-61).

Intent to kill, premeditation. How many times did they fire, well, let's talk about that. ... We have Leonardo Franqui shooting at least ... four times, not a shot. Four times. An intent to kill on Pablo San

> Martin's part. ... Pablo San Martin is standing out there shooting to kill and a bullet, and it jammed, he can't get it out so he has to take the slide, pull it back, so that the cartridge will fall out, that is how the live round comes out, pull it back front. Pull it back, okay, because there is two down, he still can't get the trigger right. Pull it back, get the cartridge to fall out, pull it front. ... He is trying to kill, he is having, the bullet is jammed, so he keeps cramming this thing back so it will work ...

(T. *2362-65).*

> **All** of those reasons that we discussed for the last half hour that prove that these guys went out there to **kill,** hold true as well for counts 2 and 3, the attempted First Degree Murder counts against Danilo Cabanas Junior, and Senior because just as we talked about a few moments ago, it's only aim that kept them alive and the fact that they ducked, that's it. Because those bullets that went right through that windshield were meant to **kill** them.

(T. *2367).* The only argument presented on attempted felony murder then followed, but was limited to an enumeration of the elements. (T. *2367).* After discussing the other charges, the prosecutor then returned to her theme of premeditation in her final words:

> Now, it's like the defendants said in their opening statements, There was no demand in this case, It's like Mr. DeAguero said. That people who did this were going to have it their way. You couldn't be more right. Absolutely right. They opened fire without asking questions. Because they intended to kill these people. They opened fire so that

> they could successfully commit the robbery that they were trying to commit. ... And if you have listened carefully to all of the physical evidence then you can only come to the inecapable conclusion that what happened out there was a deliberate ambush and a planned, a planned [sic] take down. Because no one came out and said put your hands up, give us the money, just don't make any sudden moves, they just came out shooting over and over and over again.
>
> And that shows you what truly malicious killers these men are. They have worked very very hard for this conviction. They have earned this conviction and on behalf of the people of the state of Florida I urge you to convict them as charged of each and every count. Thank you.

(T. 2387-88). The defense closings did not address attempted felony murder, either, instead emphasizing the defense theory that there were no eyewitness identifications, and that the defendants' confessions were unreliable, The State's argument was wholly consistent with the evidence presented. (See Brief of Appellee at 2-17). Given that the evidence overwhelmingly **supports** a conviction for attempted premeditated murder and given the State's near-exclusive reliance upon this theory in its presentation, there is no reasonable possibility that the jury relied upon an attempted felony murder theory in returning its verdict. The convictions should **be** affirmed. Even if they must be overturned however, Defendant may be retried for attempted premeditated murder

Wilson; State v. Ellis, 685 So. 2d 1289 (Fla. 1996)(applying Wilson to any equal or lesser offense on which the jury had been instructed).

Finally, Defendant submits, (at p. 3, n.2), without elucidation, that the alleged infirmity of the attempted murder convictions compels the reversal of his death sentence as well. This claim is unfounded as the prior violent felony aggravator was fully supported by two other violent attempted armed robberies and a kidnapping which were wholly unrelated to the crimes in this case. Moreover, the aggravation was overwhelming,[2] and clearly outweighed the minimal mitigation[3] found to exist. As such any claim as to his sentence raised in his second supplemental brief must be rejected.

At the penalty phase, the State showed that Defendant had proposed and participated in an unrelated armed robbery in which

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[2] Of the four aggravators found, Defendant challenged only the CCP finding in his initial brief, See Point IV(A) & (B) of the original brief of appellee.

[3] The propriety of the trial court's findings as to the mitigation is thoroughly discussed at Point IV(C) of the original brief of appellee.

Van Nest, who was driving an auto parts van, was pursued and kidnapped by Defendant, San Martin, and a third individual by the name of Vasquez. (T. 2535-45, 2558-59). The defendants first tried to get Van Nest to pull over by flashing a police badge. (T. 2536-37). Van Nest eluded them, proceeded to an auto-parts store and went inside to make a delivery. Upon returning, he found Defendant and the others pilfering his van. (T. 2540-41). Vasquez hit Van Nest on the head, one of the perpetrators stole the van, and, during the ensuing flight, the gun, which Vasquez had given to Defendant, went off. (T. 2562-65, 2560-61). The prosecution introduced into evidence certified copies of Franqui's convictions for armed kidnapping and armed robbery in the Van Nest Case. (T. 2579).

The State also presented evidence regarding another unrelated attempted robbery and aggravated assault which Defendant had participated in and had previously been convicted for. Defendant, San Martin, and a third companion decided to rob an elderly security guard they had observed a security guard carrying a cash bag near the Republic National Bank. (T. 2595-96, 2605-08). First, as with the instant case, the three men stole a car. (T. 2609, 2596-99). After doing that, two of the men returned to the bank

and waited for the guard to make his appearance, while Defendant remained nearby in a separate getaway vehicle. (T. 2598-2600, 2609-10). According to the guard, after the cash bag was demanded, he was threatened and shots were fired. (T. 2586). The guard, Santos, was not hit, and held onto the bag. (T. 2587). He reached for his own gun, and several more shots were fired at him, when the offenders fled. (T. 2588-89). Copies of the judgments of conviction for aggravated assault and attempted robbery with a firearm were introduced into evidence. (T. 2617-21).

The jury recommended a sentence of death by a vote of nine to three. (T. 3501). The trial court imposed the death sentence for the offense of first degree murder. (R. 1183, et seq.). The court found that four aggravating factors existed: (1) that the defendant was previously convicted of other felonies involving violence: in addition to the attempted first degree murders of the Cabanases, the aggravated assault and attempted armed robbery in the Republic Bank case and the armed kidnapping and armed robbery in the Van **Nest** case, (R. **1184);** (2) that the murder was committed during the course of an attempted robbery (R. 1184); (3) that the murder was committed for pecuniary gain (R. 1185); and (4) that the murder was committed in a cold, calculated and premeditated manner

without any pretense of moral or legal justification. (R. 1185). The second and third factors were merged and treated as one aggravating factor. (R. 1185).

The trial court found that no statutory mitigating circumstances existed, finding that the defense proffered only one statutory mitigating circumstance, that the defendant was under the influence of extreme mental or emotional disturbance. (R. 1188-94). As to that factor, the trial court explicitly rejected Dr. Toomer's testimony as unbeleivable, and concluded that Dr. Mutter's opinion, rejecting the existence of the factor, was well-reasoned. (R. 1190).

The trial court's order also extensively reviewed the nonstatutory mitigating circumstances asserted by the defense. The court accepted, as nonstatutory mitigation, that the defendant suffered hardships during his youth, including the abandonment by the mother, the death of the brother, and the father's resort to drugs and alcohol. (R. 1198-99). The court also accepted that the defendant was a caring husband, father, brother and provider, although it noted that there was "very little objective proof of this assertion." (R. 1200).

All other alleged nonstatutory mitigation was found not to exist. The court extensively detailed its reasons for rejecting the claim of mental retardation, (R. 1195-96), the claim of a borderline personality disorder, (R. 1196), the claim of organic brain damage, (R. 1197), the claim of mental or emotional problems which did not reach the level **of** statutory mitigation, (R. 1200-1201), as well as several other alleged categories *of* nonstatutory mitigation. The sentencing judge then concluded:

> [t]he aggravating circumstances in this case far outweigh the mitigating circumstances. The aggravating circumstances in this case are appalling, the defendant's previous convictions **for** violent crimes, the fact that the murder herein was committed during the commission of an attempted robbery and for pecuniary gain and the cold, calculated and premeditated manner in which the murder was committed, greatly outweigh the relatively insignificant non-statutory Circumstances established by this record, Even in the absence of the cold, calculated and premeditated aggravator the court would still feel that the remaining two aggravators seriously outweighed the existing mitigators.

(R. 1202-1203).

In view of the foregoing, it is plain that the absence of Defendant's attempted murder convictions would not have affected the outcome of the sentencing proceedings. See, Valentine, 688 So.

2d at 316 (invalid conviction of felony supporting **aggravator** not affect sentence where several other valid convictions of prior violent felonies remained).

CONCLUSION

Based on the foregoing, and the arguments presented in the original and first supplemental answer brief, Defendant's convictions and sentence of death should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **SUPPLEMENTAL BRIEF OF APPELLEE** was furnished **by** mail to **ERIC M. COHEN,** Counsel for Appellant, Two Datran Center -- Suite 1504, 9130 South Dadeland Boulevard, Miami, Florida 33156 this **30th** day of May, 1997.

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