IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

BILL BRADY, JR.,

Respondent.

CASE NO. 91,951

RESPONDENT'S ANSWER BRIEF ON THE MERITS

JAMES B. GIBSON
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	)	
Respondent.	)	
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STATEMENT OF THE CASE AND FACTS

The respondent accepts the petitioner's statement of case and facts, with the exception of the assertion by petitioner that the district court believed that "the 'better view' is that both convictions should stand . . . ." (Petitioner's Initial Brief, p. 1) This is an incorrect interpretation of what the district court stated. The context of this statement is not regarding the ultimate issue here, as petitioner maintains, of whether the convictions should stand (since, if it were, the district court would have presumably followed this view if it thought it was the better view on the ultimate issue here). Rather, the specific matter that the district court said was the better view was regarding whether general intent could be "used up," which the district court indicated it could not be since it was not a commodity, but a frame of mind. ***Brady v. State***, 700 So.2d 471, 472 (Fla. 5th DCA 1997). This is a far cry from the ultimate issue here.

Regarding the ultimate issue - whether transferred intent could support the defendant's

two attempted murder convictions when only one shot was fired, the district court found the better answer to be that it could not:

> Can he, under Florida law, also be convicted of the attempted murder of Harrell when he unquestionably had no such intent to kill her?
>
> Justice Overton state in his dissent in *Amlotte v. State*, 456 So.2d 448, 450 (Fla. 1984), "A conviction for the offense of attempt has always required proof of the intent to commit the underlying crime." It seems inconsistent, therefore, that one can be convicted of the attempt to murder a bystander when, in fact, the state concedes, and pleads, that no such intent was present. Justice Overton's dissent was approved as the court's majority in *State v. Gray*, 654 So.2d 552 (Fla. 1995), albeit on the issue of attempted felony murder.
>
> While it appears that Brady's general intent to shoot Mack is susceptible of being transferred in order to satisfy the "intentionally causing bodily harm" requirement of aggravated battery as against Harrell, to find that Brady actually attempted to murder her, when the allegations of the information and the evidence at trial show that he did not, seems not only contrary to reason but also inconsistent with *Gray*. We agree with *[People v.] Chinchilla* [52 Cal.App.4th 683, 60 Cal.Rptr.2d 761 (1997)] that if the issue is whether the defendant attempted to murder multiple victims, then such specific intent should be independently evaluated as to each victim.

Brady v. State, ***supra*** at 472-473. The district court thus concluded that the doctrine of transferred intent should not apply, and the specific intent to kill Mack cannot be transferred to Harrell; the specific intent should be evaluate independently as to each victim.

SUMMARY OF ARGUMENT

The decision of the district court correctly held that the legal fiction of "transferred intent" is not needed and does not apply where an actual killing of the unintended victim does not occur. Rather, the defendant's intent must be independently evaluated as to each victim.

ARGUMENT

POINT I.

THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT, IN ***BRADY V. STATE***, 700 So.2d 471 (Fla. 5th DCA 1997), CORRECTLY REVERSED THE CONVICTION OF ATTEMPTED SECOND DEGREE MURDER OF THE UNINTENDED VICTIM WHERE THERE WAS NO INTENT TO MURDER THE UNINTENDED VICTIM AND THE DOCTRINE OF "TRANSFERRED INTENT" DOES NOT APPLY TO INCHOATE HOMICIDES.

The opinion of the Fifth District in the instant case correctly ruled that the doctrine of "transferred intent" does not apply to attempted homicides, but only completed ones. In the case of attempts, intent must, instead, be independently evaluated as to each victim. The legal fiction of transferred intent is unnecessary where the unintended victim is not killed. It should not be extended to inchoate homicides since the defendant can be punished for his actions, without reference to the legal fiction, by convicting him of the attempted murder of the intended victim and, as the district court ruled, aggravated battery of the unintended victim.

The respondent vehemently disagrees with the state that "this is a classic case of transferred intent." (Petitioner's Initial Brief, p. 2) **It is not.** The doctrine of transferred intent was a legal fiction created by common law to prevent a killer from escaping serious punishment for the *completed* killing of an unintended victim. "The usual case involving the doctrine of transferred intent is when a defendant aims and shoots at A intending to kill him but instead misses and *kills* B." ***Provenzano v. State***, 497 So.2d 1177, 1180 (Fla. 1986). It was therefore historically created for and limited to *completed* killings of the unintended

victim.

> The law, as well as reason, prevents (defendant) from taking advantage of his own wrong doing, or excusing himself when this unlawful act, if committed by (defendant), strikes down an unintended victim. The original malice as a matter of law is transferred from the one against whom it was entertained to the person who actually suffered the consequences of the unlawful act.

Provenzano v. State, ***supra*** at 1181, quoting ***Coston v. State***, 139 Fla. 250, 190 So. 520, 522 (1939) (both cases wherein a completed killing of the unintended victim did occur).

It is only with respect to consummated homicide that the law necessarily must concern itself with a notion like transferred intent. In the well-reasoned and historical analysis undertaken by the noted Judge Moylan of the Maryland Court of Special Appeals, which the respondent urges this Court to adopt, that court ruled that there is a necessity principle at work that is not present when no death has resulted. ***Harvey v. State***, 681 A.2d 628, 642 (Md. App. 1996).[1]

> In cases involving the actual consummated homicide of an unintended victim, the necessity is that the homicidal agent can only be convicted of the homicide if the law can attribute to him one of the murderous mentes reae. It is frequently impossible to do that without resort to the transferred intent doctrine.
>
> * * *
>
> In the homicide cases, where the transferred intent doctrine historically develpoed, it is frequently a choice between that

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[1] The ***Harvey*** court, 681 A.2d at 639-641 notes that the Maryland courts have receded from the holding in ***State v. Wilson***, 546 A.2d 1041 (Md. 1988), "a massive correction of course," as it is referred to in ***Harvey***. ***See also Ford v. State***, 625 A.2d 984 (Md. 1993); ***Poe v. State***, 671 A.2d 501 (Md. 1996). The petitioner's reliance on ***State v. Wilson*** (Petitioner's initial brief, p. 4) should thus be rejected as it is no longer good law.

> theory of guilt or nothing. In *Poe v. State*, 341 Md. 523, 529, 671 A.2d 501 (1996), Judge Chasanow referred to this necessity principle:
>
> > The obvious purpose behind this doctrine is to prevent a defendant from escaping liability for a murder in which every element has been committed, but there is an unintended victim.
> >
> > * * *
> >
> > Homicide law needs the transferred intent doctrine [to resolve this problem].
> >
> > There are, by contrast, no unsolvable problems in punishing the unintended battery of a chance or unintended victim.

Harvey v. State, ***supra*** at 642.

When the injury inflicted on the unintended victim is at the non-fatal level of a battery, one does not need a transferred intent doctrine to establish basic criminal responsibility. That is proved directly without any resort to the legal fiction of transferred intent. ***Brady v. State***, ***supra***. In ***Ford v. State***, 625 A.2d 984 (Md. App. 1993), the Maryland court noted that the non-application of the transferred intent doctrine to cases of inchoate criminal homicide does not create the punishment vacuum that might be present in cases of consummated criminal homicide:

> We note that refusal to apply transferred intent to attempted murder by no means relieves a defendant of criminal liability for the harm caused to unintended victims. The defendant clearly can be convicted of attempted murder as to the primary victim and some other crime, such as criminal battery, as to other victims.

Id. at 100, n.14.

Thus it is that Judge Cowart in his dissent in ***Amlotte v. State***, 435 So.2d 249, 254

(Fla. 5th DCA 1983), contended that "[a] death is essential to the application of this ancient legal fiction" of transferred intent. This legal fiction, he continued, "can be stretched only so far" and "the fiction breaks when an effort is made to stretch it further to include the specific intent essential to the crime of attempt."

That stretching and breaking is shown by the argument of the state. It is not necessary here to look at the issue raised by the state, the further complicated and useless fiction of whether the intent was capable of being used up or whether it travels with the bullet.[2] The state argues general versus specific intent and how one cannot be transferred and transformed into the other, which, the respondent submits, further compounds the legal fiction and need not be considered to resolve the issue. Any attempt, after all, is a specific intent crime. There is, therefore, no transformation of general intent to specific intent with regard to the unintended victim. The district court was correct when it refused to consider whether the intent could be used up. For other absurdities which would result from accepting the state's arguments, this Court is referred to those enumerated by Judge Moylan in ***Harvey v. State***, ***supra*** at 643-644.

This Court, it is urged, should follow the view of Judge Cowart in ***Amlotte***, and of the Maryland courts as recounted in ***Harvey v. State***, ***supra*** (attached hereto as an appendix for the Court's convenience), as well as the majority of other states that have ruled on the issue, to

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[2] ***See, e.g.***, the problem presented by the case of ***Shellman v. State***, 620 So.2d 1010, 1011 (Fla. 4th DCA 1993), wherein the court held that the intent was used up when the defendant actually kills the intended victim; "there was simply no 'intent' to transfer." The absurdity of determining whether the intent is "used up" or" follows" the bullet is aptly recorded by Judge Moylan in ***Harvey***, ***supra*** at 636-637, wherein the court concludes that intent "neither follows nor fails to follow the bullet, It does not go anywhere. It remains in the brain of the criminal actor and never moves." The mens rea should instead be considered independently as to each victim, intended and unintended.

hold that the doctrine of transferred intent does ***not*** apply to attempts.[3]

The more enlightened view, and that supported by reason rather than fiction, is that taken by the Fifth District here, that the intent in an attempt crime must be evaluated independently as to each victim. The respondent is not arguing, and the district court did not "conjure a 'hybrid' intent," as contended by the state. The district court simply held, in line with the majority of other jurisdictions ruling on the issue, that if the homicide is completed, the intent to kill will be transferred to the unintended victim (to prevent the defendant from getting away with murder); if the homicide is not completed (and the unintended victim is merely injured or not injured at all), the doctrinal fiction of transferred intent is not needed and

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[3] Counsel's research has revealed that the following states have rejected the doctrine of transferred intent being applied to attempted homicides:

Arkansas - ***See Jones v. State***, 251 S.W. 690 (Ark. 1923).

California - ***See People v. Chinchilla***, 52 Cal.App.4th 683, 60 Cal.Rptr.2d 761 (1997); ***People v. Calderon***, 232 Cal.App.3d 930, 283 Cal.Rptr. 833 (1991).

Connecticut - ***See State v. Torres***, 47 Conn.App. 205, ___ A.2d ___ (1997); ***State v. Hinton***, 630 A.2d 593, 601-610 (Conn. 1993) ("under the circumstances of this case, the rule of lenity leads us to conclude that the transferred intent doctrine should not be applied to the crime of attempted murder").

Maryland - ***See Harvey v. State***, ***supra***; ***Ford v. State***, ***supra***; ***Poe v. State***, ***supra***.

New York - ***See People v. Fernandez***, 673 N.E.2d 910 (N.Y. App. 1996).

Virginia - ***See Crawley v. Commonwealth***, 492 S.E.2d 503 (Va. App. 1997).

Vermont - ***See State v. Taylor***, 70 Vt. 1, 39 A. 447 (1898).

Counsel for the petitioner refers to "a myriad of other foreign cases" applying transferred intent to attempted homicide cases, yet only cites to two other states - Maryland (which, as noted above in footnote 1, has receded from this holding and now holds in respondent's favor on this issue), and New Mexico (which case followed a line of cases from California which have now been receded from). In the interest of fairness, counsel for respondent would also add to that list which rule in the petitioner's favor the states of Arizona - ***State v. Rodriquez-Gonzales***, 790 P.2d 287 (Ariz. App. 1990); and Illinois - ***People v. Hill***, 658 N.E.2d 1294 (Ill. App. 1995).

does not apply.

> Consummated criminal homicide is, in the last analysis, sui generis. Many of its complexities, such as the transferred intent doctrine, simply do not travel well to other criminal climes. Thereis, moreover, no reason of necessity for making the transferred intent doctrine travel to climes other than that of actual, consummated criminal homicides. For the rest, the actuality of the real mens rea properly combined with its precisely related actus reus is enough to establish guilt at the appropriate level without any necessary resort to an intention-shifting legal fiction.. The inchoate criminal homicides are in no need of such a device.

Harvey v. State, 681 A.2d at 644.

It is inconsistent, as held by the Fifth District in the instant case, "that one can be convicted of the attempt to murder a bystander when, in fact, the state concedes, and pleads, that no such intent was present." ***Brady v. State***, ***supra*** at 472-473. The legal fiction of transferred intent should not be expanded to produce this absurd inconsistency to attempted homicide.

This Court should affirm the decision of the Fifth District Court of Appeal and remand the case to the trial court for entry of a judgment of aggravated battery for the crime involving Ms. Harrell.

POINT II.

THE TRIAL COURT ERRED IN DEPARTING UPWARD FROM THE SENTENCING GUIDELINES.

This Court has held that once it has exercised jurisdiction to hear a case, it may consider the case as a whole and decide other issues in the case. ***See Savoie v. State***, 422 So.2d 308, 310 (Fla. 1982); ***Tingle v. State***, 536 So.2d 202 (Fla. 1988) (wherein the Court also ruled on the merits of an additional issue which was not the basis for conflict jurisdiction). This Court is asked to consider the guidelines departure issue which was presented below and was rejected without comment by the district court.

The defendant's sentencing guidelines scoresheet produced a total score of 146.9 points, resulting in a recommended guidelines sentencing range of 7.43 to 12.39 years. (R 177-80) The trial court sentenced the defendant to two concurrent terms of thirty (30) years in prison. The trial court erred in departing from the sentencing guidelines because the reasons for departure announced by the trial court were insufficient to reasonably justify a valid departure sentence.

The trial court listed one of its reasons for departure on the scoresheet as follows: "The defendant was involved in other conduct similar to this offense." (R 179) At the sentencing hearing, the trial court announced in support of this finding:

> Secondly, the court finds that the defendant's conduct is similar to other conduct that he has been involved in the past, and the court cites, in support for that, the shooting involving Deputy Appleby. Mr. Brady acknowledged in a previous trial that he was involved in that particular incident.

(R 69) This is a clear reference to a separate criminal allegation that the defendant shot a

deputy sheriff on January 7, 1995, one week after the instant offenses. In that case, the State later tried the defendant for attempted murder of the deputy and the jury returned with an erroneous verdict. Because of the erroneous verdict, the trial court granted the defendant a new trial. The trial court then dismissed the amended information on the defendant's motion. The fifth district reversed the trial court's order dismissing that case. (*See* DCA No. 96-627, Opinion issued January 3, 1997)

The trial court erred in using the defendant's alleged conduct that occurred one week after the instant offenses as a reason for departure because the defendant had no conviction stemming from the alleged conduct. Rule 3.702(d)(18) provides in part:

> Reasons for departing from the recommended guidelines sentence shall not include circumstances or factors relating to prior arrests without conviction or charged offenses for which convictions have not been obtained.

The conduct relied on by the trial court to support the reason for departure in question amounted to circumstances or factors relating to a prior arrest without conviction and amounted to charged offenses for which convictions had not been obtained. Under the clear dictates of the rule, this reason for departure was invalid.

Furthermore, the simple fact that a defendant was "involved in other conduct similar to" the offenses for which he is being sentenced is not a valid reason to depart from the sentencing guidelines. No such reason is listed in Section 921.0016, Florida Statutes (1995), as a valid basis for departure. *See* §921.0016(3), Fla. Stat. (1995) This factor relied on by the trial court does not reasonably justify a departure.

The trial court also listed as a reason for departure the following: "This offense created a substantial [risk] of death or great bodily harm to others" and "created substantial risk of

death or great bodily harm to many persons or to one or more small children." (R 179, 180) That a particular offense created a great risk of harm to others is a valid reason for departure "so long as the fact that [the defendant] endangered the lives of others is proven beyond a reasonable doubt." ***Welch v. State***, 639 So.2d 1068, 1069 (Fla.4th DCA 1994) (emphasis added); *See* ***Whitfield v. State***, 515 So.2d 360 (Fla. 4th DCA 1987); ***Ortagus v. State***, 500 So. 2d 1367 (Fla. 1st DCA 1987); ***State v. Mischler***, 488 So.2d 523 (Fla. 1986).

In the defendant's case, the record fails to establish beyond a reasonable doubt that the offense created substantial risk to others. While admittedly the evidence showed the club was crowded, there was no evidence as to the density of the crowd. In order to constitute a substantial risk of harm to others, there had to exist evidence *beyond a reasonable doubt* that there were many people close enough to the defendant to be at risk. While one could speculate or imagine such a scenario at a dance club, no evidence was produced to support such a finding beyond a reasonable doubt. The State's own witness Ricky Mack even testified that he approached the defendant only with his cousin and that the defendant was not "surrounded" by Mack's friends. (T 34) This testimony was corroborated by witness Haywood. (T 67) Absent a specific jury finding that the offense created a substantial risk to others, the trial court erred in departing for that reason.

The trial court listed as an additional reason for departure: "Offense [was] committed in order to prevent or avoid arrest, to impede or prevent prosecution for the conduct underlying the arrest, or to effect an escape from custody." (R 180) This reason for departure was not orally articulated at the defendant's sentencing hearing as required by Rule 3.702(d)(18)(A) of the Florida rules of Criminal Procedure. (R 65-72) Therefore, it cannot support the trial

court's decision to impose a departure sentence since when a written order conflicts with an oral pronouncement, the oral pronouncement prevails. *E.g.* ***Johnson v. State***, 627 So.2d 114 (Fla. 1st DCA 1993).

Furthermore, there existed no evidence to support this reason for departure. There was no evidence presented that, in committing the alleged offense, the defendant acted to prevent or avoid arrest. There was no evidence that an arrest was pending for any alleged criminal act. The defendant was certainly not in custody and so he could not have been acting to escape from custody. This purported reason for departure was not justified as the State argued at sentencing simply because Mack allegedly asked the defendant about an alleged prior incident involving a shooting and, after the instant conduct, the defendant fled the scene. (R 53, 192) It is a gross understatement to call this reason for departure, as the defendant's trial counsel did, a "complete stretch". (R 59)

The trial court also listed as a reason for departure that the defendant had been engaged in an escalating pattern of criminal conduct as defined in Section 921.001(8), Florida Statutes (1995). (R 71-2, 179-80) At the sentencing hearing, the trial court made the following findings in support of this finding:

> And finally, the court agrees with the state regarding the third reason for the departure sentence, and that is, that based upon Mr. Brady's criminal history as reflected in the pre-sentence investigation, that he has engaged in an escalating pattern of criminal conduct....
>
> The period of time we're talking about extends from May 19, 1994, through this case, which is dated January 1, 1995. And the offenses start with simple possession of cannabis charges, possession of a firearm by a minor, unauthorized use of license, and progresses up to robbery with a firearm, which that case was tried by a jury and jury returned a verdict of lesser

> included offense of petit theft. And in this case, the main offense charged was attempted first degree murder with a firearm. Of coarse, again, jury returned a verdict with a lesser included offense of attempted second degree murder with a firearm. Again, the court will find that these offenses have progressed, from my eyes, much more serious nature.

(R 71-2) Based upon this Court's interpretation of Section 921.001(8), the record failed to show by a preponderance of the evidence that the defendant engaged in an escalating pattern of criminal conduct.

The Supreme Court has made clear the fact that temporal proximity of crimes alone does not constitute a valid basis for departure. ***Taylor v. State***, 601 So.2d 540 (Fla. 1992); ***Barfield v. State***, 594 So.2d 259 (Fla. 1992). Prior offense committed withing a close proximity may be a basis for departure when found in conjunction with any of the following showings: l) a progression from nonviolent to violent crimes; 2) a progression of increasingly violent crimes; and 3) a pattern of increasingly serious criminal activity, as evidenced by an increase in either the degree of the crime charged or the sentence that may be imposed. ***Taylor; Barfield***. The trial court abused its discretion by departing based upon its finding that the defendant engaged in an escalating pattern of criminal activity because the defendant's criminal history evidences none of the above referenced criteria.

The offenses relied on by the trial court to support its finding can be categorized as follows:

Date	Offense	Degree	Maximum Sentence
5-19-94	simple possession of cannabis 893.13(6)(b)	M1	1 year
5-19-94	possession of a firearm by a minor 790.115	F3	5 years
9-27-94	petit theft 812.014	M2	60 days
11-7-94	unauthorized use of a driver's license 322.212	M2	60 days
1-1-95	attempted second degree murder with a firearm (two counts) 777.04, 782.04(3), 775.087	F1	30 years per count

(R 72, 176, 177) All offenses occurred between May 19, 1994, to January 1, 1995. (R 72)

A simple analysis of the defendant's criminal conduct as relied on by the trial court to justify the departure sentence reveals that there is no progression from nonviolent to violent crimes, no progression of increasingly violent crimes and no pattern of increasingly serious activity as evidenced by an increase in either the degree of the crime charged or the sentence that may be imposed. The only violent crimes in the defendant's history involve the instant offenses. A single violent criminal transaction (like the instant offenses) occurring subsequent to past nonviolent offenses does not amount to a "progression from non violent to violent crimes".

Secondly, clearly there is no "progression of increasingly violent crimes" because the defendant's only violent crimes are the instant offenses and thus there are no past violent crimes from which an increase could occur. Finally, there is no pattern of increasingly serious criminal activity as evidenced by an increase either in the degree of crimes or the sentence that

may be imposed. It can hardly be said that simply because the defendant's most recent prior offense (petit theft, a second degree felony punishable by up to 60 days) is less in both degree and possible punishment than the instant offenses, that there exist a "pattern" of increasingly serious criminal activity. In order to be considered a "pattern" the factor involved must be recurring. *See* ***State v. Darrisaw***, 660 So.2d 269, 271 (Fla. 1995) (The term "pattern" as used in section 921.001(8) speaks in terms of "some recurring feature".) There is no recurring increase in the defendant's offenses. For these reasons, the trial court erred in departing based upon a finding of escalating criminal activity.

The reasons given for the departure sentence and approved by the district court are invalid. This Court is asked to correct this error and remand for a guidelines sentence.

CONCLUSION

BASED UPON the cases, authorities, and policies cited herein, the respondent requests, as to Point I, that this Honorable Court approve the decision of the District Court of Appeal, Fifth District, and remand for the entry of a judgment of aggravated battery; and, as to Point II, that this Court reverse the trial court's guidelines departure and the district court's affirmance thereof, and remand for a guidelines sentence.

Respectfully submitted,

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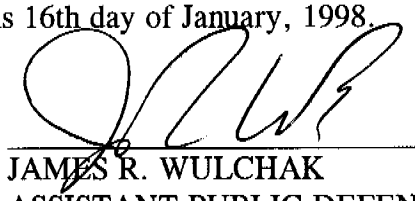
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to: The Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118, via his basket at the Fifth District Court of Appeal, and mailed to: Mr. Bill Brady, Jr., Inmate # 466944, Washington Correctional Institution, 4455 Sam Mitchell Drive, Chipley, FL 32428, this 16th day of January, 1998.



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