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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

CASE NO. 91,951

BILL BRADY, JR.,

Respondent.

\_\_\_\_\_ /

ON DISCRETIONARY REVIEW FROM  
THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S REPLY BRIEF ON THE MERITS

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POINT I

IN REPLY:        THE    DOCTRINE    OF  
TRANSFERRED INTENT IS APPLICABLE TO  
ATTEMPTED MURDER.

Respondent is incorrect in his answer brief when he claims that the district court was not discussing the ultimate issue in this cause when it used the phrase "better answer." (answer brief at 1, slip opinion at 2) Clearly, the district court asked whether there was "sufficient intent left over to transfer to justify the [attempted murder] conviction relating to [the unintended victim]." The district court concluded that the "better answer seems to be yes." (Id.)

If indeed there is sufficient intent to sustain the attempted murder conviction of Harrell, then there remains only the legal question of whether transferred intent is to be applied in attempted murder situations. While Respondent has pointed out that the Maryland courts have receded from their previous position that transferred intent applies to attempted murder cases, Maryland continues to struggle with that decision. In State v. Wilson, 546 A.2d 1041 (Md. 1988) the court interpreted the attempted murder statute as one requiring only the intent to kill *someone*, not any specific person. This reasoning is still used in other jurisdictions. See Gilreath v. State, 577 N.E.2d 997, 1000 (Ind. 1991). Using the same reasoning in this case, Respondent would have been convicted of murder if Harrell had died, so he is therefore still guilty of attempted murder where Harrell survives. The Wilson court aligned itself with the "numerous jurisdictions

which have applied the transferred intent doctrine to specific intent crimes including attempted murder." Id. at 1044. The Maryland court cited as authority People v. Humes, 397 N.E.2d 130 (Ill. 1979), Norris v. State, 419 N.E.2d 129 (Ind. 1981), State v. Thomas, 53 So. 868 (La. 1910), and State v. Gillette, 699 P.2d 626 (N.M. 1985) (intent to poison specific victim is transferred to each person who drank from the container).

In Harvey v. State, 681 A.2d 628, 639 (Md. 1995) the court reviewed the lengthy history of the transferred intent doctrine in Maryland, noting that a "fragmented" and "similarly fragmented" Court of Appeals were responsible for the "correction of course" found in Poe v. State, infra, and Ford v. State, 625 A.2d 984 (Md. 1993). Wilson, Poe, and Ford were all decided by a 4-3 split of the panel. In Harvey, supra, the court stated that they were "not bound...by a three judge dissent nor by the dicta of even a four-judge majority." (Id. at 642) Neither should this Court be bound by the ruling in Harvey.

Petitioner admits that there are differing views of the definition of a "classic" case of transferred intent. Petitioner used the term "classic" in its initial brief to describe the scenario where the intended victim is unharmed and an innocent bystander is either injured or killed. Nevertheless, the courts have termed the transference of intent "classic" in a case where the intended victim is only wounded and the unintended victim killed. See Poe v. State, 671 A.2d 501, (Md. 1996).

Respondent in this case had no more an intention to commit

aggravated battery on Harrell than attempted murder. If transferred intent fails to establish a conviction for attempted murder, there is no other "legal fiction" which could possibly justify a conviction for aggravated battery. Perhaps this is best left a question of fact for the jury. It is uncontroverted that Respondent did not intend to harm or injure Harrell in any way. What else but the doctrine of transferred intent could possibly sustain a conviction for the specific intent crime of aggravated battery? And if transferred intent does apply, then it would be a better policy to transfer the exact intent proven rather than invent a specified lesser included offense.

Respondent in this case fired a shot into a crowded nightclub. It was New Year's Eve and the club was, at the very least, more crowded than usual. Everyone knows that the "range" of any bullet listed on any ammunition box "exceeds" or is at least "one mile." Clearly, the jury in this cause believed that Respondent should be responsible for the attempted murder of anyone hit or harmed by the bullet. As noted by the "poisoned cup" cases, attempted murder requires the application of transferred intent. Otherwise, if Respondent had instead poisoned the intended victim's drink and others became severely ill after drinking from it, Respondent would be absolved from attempted murder charges because he simply did not intend anyone else be hurt. This result is unfair to the people and the State. Respondent, with murderous intent, put into play a dangerous instrument (whether it be poison or a bullet) which was capable of killing instantaneously. If he is fortunate enough to

only wound someone he should not be rewarded by being convicted only of aggravated battery. The same situation would arise where a defendant, intending to kill a specific person, deliberately shoots a gun into a building or at a moving train or bus, or into a disabled vehicle on the highway. Said defendant should not be able to escape the consequences of his highly dangerous act by the bald assertion that he did not know anyone else was in the building, train, bus, or car. See In re Tameka C., 71 Cal.Rptr.2d 471, 479 (1998) (defendant unaware of presence of victim in motel room behind intended targets nonetheless equally responsible where flying glass harmed unintended victim).

Perhaps the doctrine is best explained in People v. Scott, 59 Cal.Rptr.2d 178, 182-183 (1996) wherein the court stated:

The legal fiction of transferring a defendant's intent helps illustrate why, as a theoretical matter, a defendant can be convicted of murder when she did not intend to kill the person *actually killed*. The transferred intent doctrine does not, however, denote an actual "transfer" of "intent" from the intended victim to the unintended victim. [citation omitted] Rather, ...it connotes a *policy* -- **that a defendant who shoots at an intended victim with intent to kill but misses and hits a bystander instead should be subject to the same criminal liability that would have been imposed had he hit his intended mark.**

(bold emphasis supplied) The Scott case acknowledges that reliance on the transferred intent doctrine has yielded mixed results.

Nevertheless, Arizona has never appeared to have any difficulty applying transferred intent to attempted murder cases. In fact, Arizona's transferred intent statute is apparently taken directly from the Model Penal Code. See State v. Rodriguez-Gonzales, 790 P.2d 287, 288 (Ariz. 1990). The jury's conviction for the attempted murder of Harrell should be affirmed.



POINT II

THE TRIAL COURT PROPERLY DEPARTED  
FROM THE GUIDELINES.

As noted by Respondent, the trial court departed upward from the guidelines based upon at least four separate reasons. The district court found it unnecessary to comment upon the departure and simply affirmed the sentence. Clearly, only one reason for departure is sufficient to affirm the sentence, and it is uncontroverted that Respondent created a substantial risk of death or great bodily harm to others.

The mere fact that Respondent intended to kill one person but severely injured another is sufficient to sustain the departure and to prove the "substantial risk" beyond any reasonable doubt. Respondent admits that the nightclub was "crowded." But Respondent then suggests that evidence of the "density" of the crowd must be established before it can be shown that Respondent caused a substantial risk of death or great bodily harm to others. This is not the law. Respondent fired a weapon with a range of at least one mile which was capable of killing or injuring a number of people in the room and also capable of penetrating the interior (or perhaps the exterior) wall(s) of the room and structure.

This reason, together with Respondent's palpable escalating course of proximate criminal conduct, justifies the departure sentence.

CONCLUSION

Based on the foregoing argument and authority, Petitioner respectfully requests this honorable Court to affirm the judgment and sentence of the trial court in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing answer brief in case number 91,951 has been furnished by basket delivery to James R. Wolchak, Assistant Appellate Public Defender, 7th Judicial Circuit, this 13<sup>th</sup> day of April, 1998.



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CARMEN F. CORRENTE  
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