IN THE SUPREME COURT OF THE STATE OF FLORIDA

DARNELL L. BROWN ,	)	
	)	
Petitioner,	)	
	)	Case No. 95,844
vs.	)	
	)	
STATE OF FLORIDA,	)	5th D.C.A. Case No. 99-262
	)	
Respondent.	)	
_____	)	

APPEAL FROM THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT

PETITIONER'S REPLY BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

NOEL A. PELELLA
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0396664
112 Orange Ave., Suite A
Daytona Beach, FL 32114
(904) 252-3367

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

IN THE SUPREME COURT OF THE STATE OF FLORIDA

DARNELL L. BROWN ,	)	
	)	
Petitioner,	)	
	)	Case No. 95,844
vs.	)	
	)	
STATE OF FLORIDA,	)	5th D.C.A. Case No. 99-262
	)	
Respondent.	)	
_____	)	

SUMMARY OF ARGUMENT

In addition to the argument presented in the Petitioner's Brief on the Merits, Petitioner offers the following argument in response to the Respondent's Brief on the Merits:

Petitioner respectfully disputes the State's argument that the district courts of appeal in Florida have rejected the argument Petitioner has offered in the district courts and in this Court.

Petitioner also refutes the State's claim that a decision abolishing attempted second degree murder will mean the end of all attempt crimes for which the completed felony is a general intent crime. In the alternative, and in the event it is found that there can be no attempt to commit a general intent crime, there would be no "prejudice" to the State, since all other necessarily and permissive lesser included

offenses would remain viable and unaffected; and because those offenses previously called attempted second degree murder could still be punished severely.

ARGUMENT

CAN THE CRIME OF ATTEMPTED SECOND DEGREE MURDER EXIST IN FLORIDA?

The State has argued that "each of Florida's appellate courts has recently [...] rejected [...] arguments" like those offered by the Petitioner in this Court. See, Respondent's Brief, Pg. 4. Petitioner differs with the State on this particular point; as an examination of the cases cited by the State does not reflect the sweeping rejection the State has indicated. For example, in Quesenberry v. State, 711 So. 2d 1359 (Fla. 2d DCA 1998), the viability of the crime of attempted second degree murder was never raised as an issue in the trial court, or in the briefs of the parties in the district court. The *per curiam* opinion in Quesenberry indicates the issue was first raised at oral argument in the district court. The Quesenberry court relied on Watkins v. State, 705 So. 2d 938 (Fla. 5th DCA 1998), regarding the viability of attempted second degree murder. But just as in Quesenberry, that question was not presented to the trial court or the district court of appeal. The Watkins court raised the issue *sue sponte*. Watkins, at 939. Thus, it is not entirely accurate to say that the Second and Fifth District Courts have rejected the argument now made by the Petitioner, as that argument has never been squarely presented to those courts. Moreover, it would be fair to say that the Fifth District Court found the Petitioner's

argument is meritorious. That is, if the Fifth District Court, after their decision in Watkins, found the question had been resolved in favor of the State, the court would not have certified the question now before this Court to be one that requires resolution.

The Fourth District Court, in Manka v. State, 720 So. 2d 1109 (Fla. 4th DCA 1998), did reject the argument now proffered by the Petitioner, as did the First District Court in Gilyard v. State, 718 So. 2d 888 (Fla. 1st DCA 1998); and the Third District Court in Pitts v. State, 710 So. 2d 62 (Fla. 3d DCA 1998). However, the Manka, Pitts, and Gilyard courts all cited Watkins as controlling. However, as Petitioner has shown, the issue now before this Court was not raised by the parties in Watkins, and the Fifth District Court, by certifying a question in the instant case, has demonstrated that the Petitioner's argument is at least worthy of consideration.

There remains, however, the State's assertion that with its' recent decision in State v. Brady, (Fla. S. Ct. Case # 91,951), this Court has "implicitly acknowledged the [...] validity" of the attempted second degree murder. (Respondent's Brief, Pg. 4)

Petitioner submits that this Court's Brady Opinion does not resolve the conflict between Gentry and Gray[1] with respect to attempted second degree murder, because

[1] State v. Gray, 654 So. 2d 552 (Fla. 1995); Gentry v. State, 437 So. 2d 1097 (Fla. 1983)

that question was not addressed by the parties or the district court in the Brady case. And, the Petitioner in Brady has filed a motion for rehearing in this Court, which is grounded in part upon the pendency of the instant case, where the viability of attempted second degree murder was thoroughly preserved and addressed in the lower courts. Reliance upon the presumed or implied holdings of this Court is the very problem that precipitated the certified question in the instant case. There would be no controversy about the conflict between Gentry and Gray, if this Court had expressly accepted or rejected the argument Petitioner has raised. Indeed, all of the district courts agree there is a conflict between Gray and Gentry. The Brady decision does not resolve that conflict, because Brady is not yet final, and does not involve the precise question before this Court in the instant case. The Fifth District court certified a question in the instant case in order to end the confusion and speculation surrounding this issue; not to prolong it. The State's answer is to avoid a succinct resolution. Petitioner submits that the better course would be to answer the certified question directly; and therefore asks this Court to adopt the majority view[2], which is to abolish attempt as a lesser included offense of "depraved mind" homicides. Doing away with attempted second degree murder need not result in the dire consequences predicted by the Respondent.

---

[2] State v. Kimbrough, 924 S.W. 2d 888,891,892 (Tenn. 1996)

The State has argued that if the crime of attempted second degree murder is declared non-existent, "attempts to commit all general intent crimes" will likewise be eliminated in Florida. (Respondent's Brief, Pg. 4). Petitioner will show that this argument is infirm, and that abolishing attempt as a lesser offense of second degree murder will enhance the credibility of the criminal justice system, not diminish it.

One very narrow question is before this Court: can the crime of attempted second degree murder logically exist? Thus, if this Court answers that question in the negative, only prosecutions for that offense would be barred, and all other prosecutions for attempt as a lesser included offense would remain viable. However, if we assume for argument's sake that there are other crimes (whether general or specific intent crimes), for which attempt cannot be logically upheld as a lesser offense, what harm would befall? The Petitioner would answer that there is no harm in having the law comport with logic; in having the law proscribe and punish only actual conduct and proven intent; or in clarifying jury instructions to eliminate contrived and incongruous legal fictions. This was the view was expressed eloquently by a member of the Watkins court, in which Judge Harris wrote:

> Second degree murder [...] is caused by happenstance. How does one attempt happenstance? The court in Gentry described second degree murder as a general intent crime (without stating what that intent was) and held that one could be convicted of

> attempted second degree murder even if there is no specific intent to kill. Indeed, a specific intent to kill is not an element of second degree murder. However, State v. Gray, supra, makes it clear that in order to prove an attempt, the State must prove the intent to commit the underlying crime. So how do you "attempt" second degree murder? If intent to cause the death of another is not an element of second degree murder, what must the defendant have attempted (intended) to do which failed? It can only be that the attempt (intent) was to commit an act which is imminently dangerous to another evincing a depraved mind regardless of human life. Although the shooting at or near [the victim] would seem clearly to meet this test, this act was not attempted--it was spectacularly achieved. If you complete the act prohibited by the statute, what have you attempted? More importantly, what crime have you committed? I believe the answer is second degree murder if the victim dies; perhaps aggravated battery or aggravated assault (depending on the pleadings and the facts) if the victim lives. Since proof of a completed crime will not permit instructing the jury on an attempt to commit that crime--see Wilson v. State, 635 So.2d 16 (Fla.1994); Rule 3.510, Fla. R. Crim. P.--proof of a completed act should prevent sending to the jury the issue of whether the defendant attempted to commit that act when such proof is essential to establish the crime charged.
>
> Watkins, supra, at 943

As indicated by Watkins, it appears that the plain meaning of the word "attempt" is synonymous with that of the word "intent". Jurors must therefore be

totally confused when they are told that the defendant can be found guilty of attempted murder because he intended, unintentionally, to kill the victim. No one could make sense of such an instruction; and yet, that is the "logic" upon which the State relies in securing convictions for attempted second degree murder. The logic of punishing attempt as a lesser included offense; i.e., intending but failing to accomplish a greater offense; is not always as strained as it is in the case where second degree murder is alleged as the greater, uncompleted offense. That is, for most crimes, the act giving rise to the attempt charge, (the completed lesser offense), is clear evidence of the intent to commit the greater offense. For example, a completed assault can constitute attempted robbery; but only if the assault demonstrates the intent to deprive the victim of his property. If the perpetrator made no attempt to take the victim's property, there was no attempted robbery. The assault does not give rise to the assumption that the perpetrator attempted to *unintentionally* take victim's property. Rather, the intent to accomplish a robbery is inferred from the perpetrator's actions[3].

Similarly, the charge of attempted sexual battery is viable only when intent is apparent from the perpetrator's actions. Depending on the facts, it may be reasonable to assume that the act of attempting to achieve union or penetration is

---

[3] Curiously, the attempt to commit theft is, by statute, punished the same as a completed theft. § 812.014(1) Fla. Stat. (1999). Nevertheless, the intent to commit what would ordinarily be the greater offense is apparent from the attempt.

evidence of the intent to have sex with the victim. It is *not* reasonable to assume, from the completion of the lesser offense, that the perpetrator intended to *unintentionally* have sex with the victim. Thus, where the charge is attempted robbery or attempted sexual battery, it would seem absurd to tell the jurors that by committing a an assault or battery, the defendant evinced his intent to unintentionally take the victim's property, or to unintentionally have sex with the victim. It is no less absurd then, to instruct the jury that an assault or battery constitutes evidence that the accused intended to unintentionally kill the victim. It is only for charge of attempted second degree murder that absurdity is built into the jury instructions, in order to manufacture intent where otherwise, none could be proven. Therefore, eliminating this fiction will have no sweeping, undesirable consequences, and the credibility of the judicial system will no longer be strained.

One final point: there is now no reason to believe that abolishing the crime of attempted second degree murder will allow the perpetrators of grievous acts to avoid a punishment befitting their crimes. Florida now penalizes violent felons with the "10 - 20 - life" statute. See, § 775.087 Fla. Stat. (1999), as amended by Ch. 99-12 § 1 Fla. Session Laws. Henceforth, shooting at someone and missing carries a mandatory twenty year sentence; or, if the victim is struck by a bullet and survives, a 25 year to life term. And, acts constituting aggravated assault and aggravated battery can,

depending on the pleading and proof, result in a conviction for attempted first degree murder. Therefore, even if attempted second degree murder is eliminated, punishment for the crimes formerly known as attempted second degree murder would be no less severe.

In closing, Petitioner once again calls the Court's attention to Watkins, supra, where the argument against abolishing the crime of attempted second degree murder is stated as follows:

> [... it would require the State to] prove an intent for successful prosecution of an attempt to commit a crime when no such degree of proof is necessary for successful prosecution of the completed crime. Watkins at 940.

The Petitioner respectfully submits this argument is flawed, because the completed offense, (attempted unintentional homicide), is a logical impossibility. There is no reason to continue to allow convictions for attempted murder in cases where the requisite scienter can never be proved, because there was no attempt to kill.. If the State can prove attempted first degree murder, so be it. But if the evidence supports a conviction for aggravated battery, or aggravated assault, any effort to secure a conviction for attempted second degree murder is a burden the State brings upon itself, a burden the State would not have if it simply abandoned the twisted logic

which it now seeks vehemently to employ. Prosecutions for attempted second degree murder are potentially detrimental to the credibility of the prosecution in other, legitimate cases; and thus potentially damaging to the credibility of the justice system as a whole. That is a burden that all would do well to renounce.

CONCLUSION

Based upon the foregoing arguments, and the authorities cited therein, Petitioner respectfully requests that the Florida Supreme Court answer the certified question in this case in the negative, and vacate the Petitioner's conviction for attempted second degree murder.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

_____
NOEL A. PELELLA
ASSISTANT PUBLIC DEFENDER
Florida Bar # 0396664
112 Orange Avenue, Suite A
Daytona Beach, FL 32114
Phone: 904/252-3367

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been delivered to the Honorable Robert Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118, and mailed to: Darnell L. Brown, DOC # X13524, Polk Correctional Institution, 10800 Evans Road, Polk City, FL 33868-9213, on this _____ day of _____, 1999.

_____
NOEL A. PELELLA
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced Times New Roman, 14 pt.

_____

NOEL A. PELELLA
ASSISTANT PUBLIC DEFENDER