IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-806

RAFAEL RIVERO,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

The Petitioner, RAFAEL RIVERO, was the Defendant in the trial court and the Appellant in the Third District Court of Appeal (hereafter, “Third District”). The State of Florida was the prosecution in the trial court and the Appellee in the Third District. In this brief, the parties will be referred to as they stood in the trial court. The symbols "R." and "T." will refer to the record on appeal and the transcripts of the proceedings, respectively. Additionally, the symbol “App.” will refer to the Appendix attached to the Defendant’s brief on the merits filed in this Court.

CERTIFICATE OF FONT AND TYPE SIZE

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STATEMENT OF THE CASE AND FACTS

The Defendant was charged by information with two counts of attempted second degree murder, and jointly tried with co-defendant Daniel Montes De Oca (Decoca). (R. 1-3)

The evidence presented at trial from several eyewitnesses established that the Defendant walked towards an automobile occupied by Rolando Mateo Sr. and his son, Rolando Mateo Jr. and told Mateo Jr. that he was going to shoot him. (T. 266, 397-398) The Defendant pulled out a gun from his waist aiming at Mateo Jr. as Mateo Jr. exited the automobile. (T. 266) Shortly thereafter, co-defendant Decoca began throwing rocks at both Mateos. (T. 269, 272, 399-400) The Defendant then shot Mateo Jr. in the waist area and shot Mateo Sr. in the knees. (T. 282-283) Mateo Jr. testified that he never threatened the Defendant or Mr. Decoca in any way. (T. 295-296, 396-397)

Dr. Stephen Cohn testified that he treated Mateo Jr. for a gunshot wound to the abdomen and Mateo Sr. for gunshot wounds to both of his knees and a fractured lower rib. (T. 358-361, 363)

Luis Perez testified that on the day of the incident, he observed the Defendant approach the automobile occupied by the Mateos. (T. 497-498) Within seconds, he observed both Mateos exit their automobile and after hearing shots observed Mateo Jr. fall to the ground. (T. 499-500) He also observed Mateo Sr. groan “as if he had been hit with a rock.” (T. 499) Mr. Perez testified that

he saw something in the Defendant's hand, but could not determine if it was a gun or a knife. (T. 524) After the Defendant and co-defendant left, Mr. Perez noticed that Mateo Sr. had been shot in the knees. (T. 501)

Detective Freddy Garcia testified that when he questioned co-defendant Decoca, Decoca corroborated the story that the Defendant approached the Mateos' automobile, Mateo Jr. exited the automobile, Decoca observed the Defendant with a gun and heard two shots. (T. 606-607)

The Defendant testified that Mateo Jr. approached him and pulled out a weapon. (T. 761) He attempted to wrestle the gun away from Mateo Jr. and during that struggle, shots were fired. (T. 763-764) The Defendant testified that he left the scene because he was nervous. (T. 766)

The jury returned a verdict of guilty as charged and the Defendant was adjudicated accordingly and sentenced to twelve years' incarceration followed by five years probation. (T. 1016-1017, R. 113-120)

The Defendant appealed his conviction and sentence and on March 8, 2000, the Third District affirmed in part finding that the offense of attempted second degree murder is a crime under Florida law on the authority of *Gentry v. State*, 437 So.2d 1097 (Fla. 1983), *Pitts v. State,* 710 So.2d 62 (Fla. 3d DCA 1998), and *Lopez v. State*, 742 So.2d 531 (Fla. 3d DCA 1999). (App. 1) *Rivero v.*

State, 25 Fla.L.Weekly D568 (Fla. 3d DCA Mar. 8, 2000). It however certified the following question since this Court had accepted jurisdiction in *Brown v. State*, 733 So.2d 598 (Fla. 5th DCA 1999), *rev. granted*, 744 So.2d 452 (Fla. 1999):

> DOES THE CRIME OF ATTEMPTED SECOND DEGREE MURDER IN EXIST IN FLORIDA?

(App. 1) *Id.* The Third District also reversed and remanded for a new trial on a separate issue presented to the court. (App. 1) *Id.*

POINT INVOLVED ON APPEAL

WHETHER THE LOWER COURT CORRECTLY RULED THAT THE OFFENSE OF SECOND DEGREE MURDER EXISTS IN THE STATE OF FLORIDA.

SUMMARY OF THE ARGUMENT

The offense of attempted second degree murder is an existent crime in Florida. The offense has been repeatedly recognized in this State. The Defendant has not presented authority to reverse the long-line of precedent, and he ignores the existence of clear legislative intent.

ARGUMENT

THE LOWER COURT CORRECTLY RULED THAT THE OFFENSE OF SECOND DEGREE MURDER EXISTS IN THE STATE OF FLORIDA.

The Defendant in this case was charged with two counts of attempted second degree murder. On appeal the Third District found that the offense of attempted second degree murder exists under Florida law but certified the following question based upon review granted in *Brown v. State*, 733 So.2d 598 (Fla. 5th DCA), *rev. granted*, 744 So.2d 452 (Fla. 1999):

> DOES THE CRIME OF ATTEMPTED SECOND DEGREE MURDER EXIST IN FLORIDA?[1]

The State would submit that case law as well as statutory authority clearly show that the offense exists, and the Defendant has submitted nothing to reverse both the holdings of many appellate courts including this Court as well as the clear intent shown in the laws passed by the legislature.

The Defendant bases part of his argument on this Court's case of *State v. Gray*, 654 So.2d 552 (Fla. 1995), in which the offense of attempted felony murder was found not to exist. This Court in *Gray* noted that the completed offense of felony murder was based upon a legal fiction that implied intent from the underlying

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[1] This issue is presently pending before this Court in *Brown*. Moreover, this same issue was raised in *Kenon v. State*, 744 So.2d 454 (Fla. 1999). However, that case actually came to this Court as a *Maddox v. State*, 708 So.2d 617 (Fla. 5th DCA), *rev. granted*, 718 So.2d 169 (Fla. 1998).

felony. *Id.* at 553. The *Gray* Court then held that further extending that fiction by maintaining that a defendant could then *attempt* some outcome whose intent element had been created only by implication had proven too difficult to apply. *Id*. at 553-554. The opinion also pointed out that although the offense of attempted felony murder had been recognized dating back to *Amlotte v. State*, 456 So. 2d 448 (Fla. 1984), it had proven impossible to adopt jury instructions which were understandable and usable. Again, this point illustrated the fact the extension of legal fictions was too great to be feasible.

The problem with using *Gray* to support his position is that attempted second degree murder does not depend upon a legal fiction. Instead, it is a general intent crime. As this Court held over fifteen years ago in the case of *Gentry v. State*, 437 So.2d 1097 (Fla. 1983):

> [I]f the state is not required to show specific intent to successfully prosecute the completed crime, it will not be required to show specific intent to successfully prosecute an attempt to commit that crime. We believe there is logic in this approach and *that it comports with legislative intent*....

Id. at 1099 (emphasis added), *see also Taylor v. State*, 444 So.2d 931 (Fla. 1983) (recognizing the long time existence of attempted manslaughter in Florida).

Unlike in *Gray* where the underlying offense (felony murder) completely lacked any intent element except that transferred from

the underlying felony, second degree murder is a general intent crime, and the attempt to commit a general attempt crime simply requires the same level of intent as the underlying offense. Unlike in *Gray*, the application of the offense has not proven difficult. Unlike in *Gray*, jury instructions exist and are quite usable.

In other words, the underlying offense of felony murder and second degree murder are quite distinct. This is the point recently recognized by the Second District Court of Appeal in rejecting the exact same challenge presented in the instant case to the offense of attempted arson in the case *Coston v. State*, 24 Fla.L.Weekly D1441 (Fla. 2d DCA June 11, 1999). To accept the Defendant's position in the instant case would eliminate attempts to commit all general intent crimes including offenses such as sexual battery.

The Defendant also claims that the language in *Thomas v. State*, 531 So.2d 708 (Fla. 1988), supports his contention that this Court has superseded its holding in *Gentry*. However, a closer examination of both opinions reveals that that is simply not the case.

The following is the language in *Thomas*, the Defendant directs this Court to:

> Essentially, we have required the state to prove two general elements to establish an attempt: a specific intent to commit a particular crimes, and an overt act towards its commission.

Thomas, 531 So.2d at 710. The Defendant claims that the use of this language shows that this Court "returned to the traditional definition of attempts." Defendant's brief at 8. However, this Court in *Gentry* in its discussion of the legality of attempted second degree murder recognized the commonly accepted definition of attempt as "a specific intent to commit the crime and an overt act beyond mere preparation done towards the commission" - essentially same language used in *Thomas* that the Defendant now points this Court to. *Gentry* 437 So.2d at 1098. With full recognition of the definition of attempt as well as the opposing views of whether there can be an attempt of both specific and general intent crimes, this Court in *Gentry* harmonized the opposing concepts in conformity with legislative intent. *Id.* The *Gentry* Court held that:

> We have previously determined that *despite the broad language of our attempt statute*, there are certain crimes of which it can be said that the attempt thereof simply does not exist as an offense. [citations omitted] We now hold that there are offenses that may be successfully prosecuted as an attempt without proof of a specific intent to commit the relevant completed offense.

Id. at 1098-1099 (emphasis added). By citing to this same definition recognized in *Gentry*, this Court in *Thomas* was clearly not overruling it holding in *Gentry*. Moreover, the Defendant in presenting this view fails to acknowledge the doctrine of stare decisis. *Perez v. State*, 620 So.2d 1256 (Fla. 1993) (J. Overton, concurring) (recognized the doctrine as set out in *Planned Parenthood v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674

(1992) where precedent recognizes that when the facts are the same, the law should be applied the same). The Defendant's argument should therefore be rejected.

All of Florida's appellate courts have recently reviewed challenges to the offense of attempted second degree murder, and all have rejected such arguments. *See Manka v. State*, 720 So.2d 1109 (Fla. 4th DCA 1998); *Gilyard v. State*, 718 So.2d 888 (Fla. 1st DCA 1998); *Quesenberry v. State*, 711 So.2d 1359 (Fla. 2d DCA 1998); *Pitts v. State*, 710 So.2d 62 (Fla. 3d DCA 1998); *Watkins v. State*, 705 So. 2d 938 (Fla. 5th DCA 1998).

In fact, recently this Court implicitly acknowledged the continued validity of the challenged offense in the case *State v. Brady*, 745 So.2d 954 (Fla. 1999). The defendant there was charged with two counts of attempted first degree murder, and the jury found him guilty of the lesser included offense of attempted second degree murder. The defendant shot at one person and instead hit another person standing nearby. The defendant was convicted of attempted second degree murder of both victims. While the lower court and the parties tried to sort out the parameters of transferred intent, this Court instead simply found that the actions of the defendant constituted attempted second degree murder citing to *Gentry*.

The Defendant has presented no valid reason for this Court to eliminate the offense of attempted second degree murder. The out-

of-state authority cited by the Defendant is inapplicable given the fact that it does not analyze the Florida statutes and case law which support attempted second degree murder.[2] Put simply - one can attempt a general intent crime in Florida (in this case attempted second degree murder) and such conviction is not unconstitutional, improper, or illegal.

Most of the case law reviewed from out-of-state have analyzed the offense of attempted voluntary manslaughter like this State did in the *Taylor* case. Most states seemed to go the same path and reject attempted negligent homicide, but allow attempted voluntary manslaughter. For example, the case *Curry v. Nevada*, 792 P.2d 396 (Nev. 1990), rejected the offense of attempted voluntary manslaughter in its jurisdiction. However, the opinion noted that as of 1990, 18 of the 24 states which had reviewed the offense had *upheld* its existence.

Of course the instant case is not addressing manslaughter, it is addressing attempted second degree *murder*. The State must prove that the defendant did an intentional act with a depraved mind. Given the ill will, hatred, spite, or evil intent requirement

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[2]The out-of-state cases cited by the Defendant are distinguishable because each seem dependent upon the wording of its own statutes and legacy of its own case law. *See State v. Dunbar*, 817 P.2d 1360 (Wash. 1991) (based ruling on Washington statutes and also recognized that Colorado which has similar statutory language concluded that no actual intent to kill was needed in *People v. Castro*, 657 P.2d 932 (Colo. 1983)); *State v. Vigil*, 842 P.2d 843 (Utah 1992) (issue is purely a matter of statutory interpretation).

needed for this act, it is quite logical to make such an act more culpable than the much less thought out act involved in voluntary manslaughter. If someone in the heat of passion just reacts and shoots his newly discovered cheating lover who does not die upon being shot, the defendant may meet the elements of attempted voluntary manslaughter, but he would not have committed attempted second degree murder. However, if someone with a depraved mind shoots at someone and hits another person (again who does not die), the defendant would have committed the more culpable act of attempted second degree murder - the intentional act evidencing a depraved mind. (This of course is the fact pattern from *Brady*).

Another example illustrating the void filled by attempted second degree murder is where a defendant is a pharmacist and with a depraved mind does the intentional act of switching all the prescriptions he is filling (but without a premeditated intent to kill). If someone dies, this would be second degree murder. However, the victim only goes into a coma in this example. There is no attempted voluntary manslaughter; there is no aggravated battery or even battery. What the defendant committed is attempted second degree murder. If a defendant with no premeditated intent to kill cuts the brake line on a racer’s car and the racer cannot stop his car and hits the wall of a track, there is no attempted voluntary manslaughter, there is no battery or aggravated battery. What was committed was attempted second degree murder.

Finally, the State adopt those arguments - to the extent they have not been contained herein - presented to this Court at oral argument and in the pleadings in *Brown* since they are applicable to the instant matter.

CONCLUSION

Based upon the foregoing, the State respectfully submits that this Court affirm the holding of the Third District Court of Appeal.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent was mailed this _____ day of June, 2000, to Andrew Stanton, Assistant Public Defender, 1320 N.W. 14th Street, Miami, Florida, 33125.

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