IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-806

RAFAEL RIVERO,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

BRIEF OF PETITIONER ON THE MERITS

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

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INTRODUCTION

Petitioner, Rafael Rivero, was the appellant in the district court of appeal and the defendant in the Circuit Court. Respondent, State of Florida, was the appellee in the district court of appeal, and the prosecution in the Circuit Court. In this brief, the symbol "R" will be used to designate the record on appeal, the symbol “TR” will be used to designate the transcripts of hearings, and the symbol “A” will be used to designate the appendix attached to this brief.

STATEMENT OF THE CASE AND FACTS

The State of Florida charged Rafael Rivero with two counts of attempted second-degree murder. (R. 1-3). The charges arose out of an incident in which two men, Rolando Mateo, Sr., 54, and his son, Rolando Mateo, Jr., 25, received bullet wounds. (TR. 252, 358, 389). At trial, Mr. Rivero took the stand and testified that the shootings occurred as he struggled to defend himself when Mateo Junior attacked him with a gun. (TR. 761-66). The jury returned a verdict of guilty on both counts of attempted second degree murder with a firearm. (TR. 1016-17). The court adjudicated Mr. Rivero guilty, and sentenced him to twelve years in state prison followed by five years probation. (R. 113-120).

Mr. Rivero appealed his conviction and sentence. On March 8, 2000, the Third District Court of Appeal reversed. *See Rivero v. State*, 752 So. 2d 1244 (Fla. 3d DCA 2000). (A-1). The district court reversed for a new trial due to the prosecutor's "litany of improper closing arguments." Relying on this Court's opinion in *Gentry v. State*, 437 So. 2d 1097 (Fla. 1983), the court rejected the Petitioner's claim that the

crime of attempted second degree murder does not exist. The district court certified the following question, noting the same question was pending before this Court in *Brown v. State*, No. SC95-844:

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

The Petitioner filed his Notice to Invoke Discretionary jurisdiction on April 5, 2000, and this Court ordered briefing on the merits.

SUMMARY OF ARGUMENT

The crime of attempted second degree murder defies logic, and it no longer exists in Florida under the logic of *State v. Gray*, 654 So. 2d 552 (Fla. 1995) and *Thomas v. State*, 531 So. 2d 708 (Fla. 1988). In *Gray* and *Thomas*, this Court has returned to the traditional, majority view that an attempt requires the specific intent to commit the underlying offense. The Court's opinion in *Gentry v. State*, 437 So. 2d 1097 (Fla. 1983), conflicts with *Gray* and *Thomas*, and this Court must recede from *Gentry.*

ARGUMENT

THE CRIME OF ATTEMPTED SECOND DEGREE MURDER NO LONGER EXISTS IN FLORIDA.

The crime of attempted second degree murder does not exist. *See Watkins v. State*, 705 So. 2d 938, 940-941 (Fla. 5th DCA 1998) (Cobb, J. concurring). The Supreme Court's recognition of attempted second degree murder in *Gentry v. State*, 437 So. 2d 1097 (Fla. 1983), has been superseded by its subsequent opinions in *State v. Gray*, 654 So. 2d 552 (Fla. 1995) and *Thomas v. State*, 531 So. 2d 708 (Fla. 1988). This issue is currently pending before this Court in *Brown v. State*, No. SC95-844. *See Brown v. State*, 733 So. 2d 598 (Fla. 5th DCA), *review granted* 744 So. 2d 452 (Fla. 1999).[1]

Traditionally, a conviction for attempt requires proof of the specific intent to commit the underlying crime. *See* 2 Wayne R. LaFave, Austin W. Scott, Substantive Criminal Law § 6.2(c), 24-28 (1986). This has long been the rule in Florida. *See Worthy v. State*, 395 So. 2d 1210, 1211 n. 3 (Fla. 3d DCA 1980) ("All attempts are

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[1]The Court's recent opinion in *State v. Brady*, 745 So. 2d 954 (Fla. 1999), has not resolved the issue. In *Brady*, the Court relied on *Gentry* in upholding the defendant's convictions for attempted second-degree murder. The issue of whether or not attempted second degree murder continues to exist after *Thomas* and *Gray* was not before the Court, however.

necessarily specific intent crimes, whether the relevant completed offense is or not."), *citing Gustine v. State,* 86 Fla. 24, 97 So. 207 (1923); *Hogan v. State*, 50 Fla. 86, 39 So. 464 (1905); *Hutchinson v. State*, 315 So.2d 546 (Fla. 2d DCA 1975); *Groneau v. State*, 201 So.2d 599 (Fla. 4th DCA 1967); R. Anderson, 1 WHARTON'S CRIMINAL LAW AND PROCEDURE, § 73 (1957).

In 1983, however, the Supreme Court of Florida departed from this well-established rule. In *Gentry v. State*, 437 So. 2d 1097 (Fla. 2d DCA. 1983), the defendant argued that he was entitled to assert voluntary intoxication as a defense in his prosecution for attempted second-degree murder since an attempt requires specific intent[2]. The Second District Court of Appeal concluded that attempted second-degree murder was not a specific-intent crime because second-degree murder itself requires no intent to kill, and certified conflict with *Worthy*. *Gentry v. State*, 422 So. 2d 1072 (Fla. 2d DCA. 1982). This Court held that some attempts do not requires specific intent and affirmed the Second District's decision, saying:

> The key to recognizing these crimes is to first determine whether the completed offense is a crime requiring specific intent or general intent. If 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

[2]The legislature has since eliminated the defense of voluntary intoxication for all crimes. § 775.051, Fla. Stat. (1999).

> legislative intent. Second-degree and third-degree murder under our statutes are crimes requiring only general intent.

437 So. 2d 1099. This decision took Florida well outside the mainstream of American law on attempts. "[A] very small minority of other jurisdictions have declined to require the intent to kill as an element of attempted murder." *State v. Dunbar*, 817 P.2d 1360, 1362 (Wash. 1991) (holding that there is no such crime as attempted murder by the creation of grave risk of death). *See also State v. Vigil*, 842 P.2d 843 (Utah 1992) (no crime of attempted depraved indifference homicide); *State v. Johnson*, 707 P.2d 1174 (N.M. App. 1985) (crime of attempted depraved mind murder does not exist); *but see*, *People v. Castro*, 657 P.2d 932 (Colo. 1983).

The following year, the Court extended this reasoning to hold that the crime of attempted felony murder exists, despite the absence of an intent to kill. *Amlotte v. State*, 456 So. 2d 448 (Fla. DCA. 1984), *reversed*, *Gray v. State*, 654 So. 2d 552 (Fla. 1995). The Court found support for this conclusion in the *Gentry* holding that attempts need not require proof of the intent to commit the completed crime. 456 So. 2d 450. Justice Overton dissented, noting that most jurisdictions had rejected the crime of attempted felony murder as logically impossible. 456 So. 2d 450-51. In his opinion, Justice Overton maintained that the court should apply the traditional specific-intent requirement.

The Court returned to the traditional definition of attempts in 1988. In *Thomas v. State*, 531 So. 2d 708 (Fla. 1988), the court wrote: "Essentially, we have required the state to prove two general elements to establish an attempt: a specific intent to commit a particular crime, and an overt act toward the its commission." 531 So. 2d at 710. And in 1995 the court finally ended its experiment with "intentless attempts" in *Gray v. State*, 654 So. 2d 552 (Fla. 1995). In *Gray* the court adopted the position Justice Overton had urged in his dissent to *Amlotte*, finding it to be "the more logical and correct position." 654 So. 2d 553. In so doing, the court recognized that, as Justice Overton had urged, an attempt requires the specific intent to commit the completed crime. *Id.*

In light of *Gray* and *Thomas*, it is clear that there can be no such crime as attempted second degree murder. *See Watkins v. State*, 705 So. 2d 938 (Fla. 5th DCA. 1998) (Cobb, J. concurring). So long as an attempt requires a specific intent to commit the underlying crime, *Gray*, 654 So. 2d at 553; *Thomas*, 531 So. 2d at 710, an attempt to commit a non-intentional crime is an absurdity. Though no court has yet directly held that *Gray* abolished attempted second degree murder, several decisions have questioned the continued validity of *Gentry*. *See Watkins*, 705 So. 2d 940-41, 941-43; *Brown v .State*, 733 So. 2d 598 (Fla. 5th DCA. 1999); *Quesenberry v. State*, 711 So. 2d 1359 (Fla. 2d DCA. 1998).

The defendant has reviewed the arguments made by the defense in *Brown*, including the oral argument before this Court on March 6, 2000, and has determined they are fully applicable to this case. In the interest of judicial economy, the defendant therefore fully adopts the arguments made in the petitioner's briefs on the merits in *Brown*. Copies of those briefs are attached as Appendices 2 and 3.

CONCLUSION

The crime of attempted second degree murder no longer exists in Florida. On remand, the State of Florida must be barred from pursuing a conviction for that offense.

Respectfully submitted,

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BY:_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to Regine Monestime, Assistant Attorney General, Office of the Attorney General, Criminal Division, 444 Brickell Avenue, Suite 950, Miami, Florida 33131, this 9th day of May, 2000.

_____

ANDREW STANTON
Assistant Public Defender

CERTIFICATE OF FONT

Undersigned counsel certifies that the type used in this brief is 14 point proportionately spaced Times Roman.

_____

Andrew Stanton
Assistant Public Defender

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APPENDIX

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