IN THE SUPREME COURT OF FLORIDA

CASE NO. **SC04-637**

BLEKLEY COICOU,

Petitioner/Cross-Respondent,

v.

THE STATE OF FLORIDA,

Respondent/Cross-Petitioner.

ON PETITION AND CROSS-PETITION FOR DISCRETIONARY REVIEW
FROM THE THIRD DISTRICT COURT OF APPEAL
L.T. No.: 3D03-271

ANSWER BRIEF OF RESPONDENT ON THE MERITS/ INITIAL BRIEF OF CROSS-PETITIONER

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STATEMENT OF THE CASE AND FACTS

The State charged Defendant by Information, stating that on or about April 6, 2002, Defendant "did unlawfully and feloniously perpetrate or attempt to perpetrate a felony, to wit: robbery and did commit, aid, or abet an intentional act that was not an essential element of the felony and that could have, but did not, cause the death of another, to wit: . . . SHOT VICTIM IN CHEST . . . ." (R. 5). The testimony at trial was summarized in the opinion below:

> The robbery and shooting occurred during a drug transaction between Coicou, the drug seller, and Artis, the drug buyer.
>
> The testimony at trial revealed that on April 6, 2002, through a man named Drexie James, Artis arranged to meet with Coicou and his friend, Lulu, to buy cocaine. They drove in Artis' red Pontiac to Lulu's house where they met with Coicou and Lulu in Coicou's Lexus.
>
> The deal was made, and Coicou left. Some time later, Coicou and Artis met again in front of Lulu's house. Artis was in his Pontiac with Drexie James. Artis removed a paper bag full of money from the trunk of his car and walked over to Coicou's car to get inside. Artis consensually handed Coicou the money, both men counted the money together, and Coicou put the money in his pocket. Artis testified that Coicou then showed him the bag of cocaine. When Artis stated he wanted to test the drugs, Coicou pulled out a gun and shot Artis in the chest, at the same time ordering him out of the Lexus. Coicou then left the scene with the $4,000.

Coicou v. State, 867 So. 2d 409, 410 (Fla. 3d DCA 2003). The district court noted that the trial court instructed the jury on the lesser included offenses of attempted second-degree murder, attempted manslaughter, attempted homicide and attempted

voluntary manslaughter, without objection. *Id*. at 411.

The district court held that the State had failed to prove the crime of attempted felony murder, reasoning that "[t]he use of force, the shooting, was itself an essential element of the underlying robbery and was not an independent act as required by *section 782.051(1).*" 867 So. 2d at 411-12. However, the court remanded with directions to enter a judgment of conviction for the offense of attempted second-degree murder, as a lesser included offense, under the authority of *Section 924.34, Florida Statutes*. *Id*. at 412. In its order issued March 10, 2004, the district court denied rehearing but granted certification to this court in light of the case of *Battle v. State*, 837 So. 2d 1063 (Fla. 2d DCA 2003).[1] The court also certified the following question:

> WHETHER ATTEMPTED SECOND-DEGREE MURDER IS A LESSER INCLUDED OFFENSE OF ATTEMPTED FELONY MURDER

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[1] In *Battle*, the district court found, as an "undisputed" fact, that a shooting during an attempted robbery was "an act that was not an essential element of the attempted robbery." 837 So. 2d at 1065. In 2005, this Court noted that finding, and went on to approve the holding: that failure to instruct the jury on the element of attempted felony murder that the act was not an essential element of the underlying felony was not fundamental error, because the omitted element was not in dispute at trial where the sole defense was misidentification. *Battle v. State*, 911 So. 2d 85, 87, 89-90. The majority declined to address a sufficiency of the evidence argument as beyond the conflict issue. *Id*. at 87. But Justice Quince, concurring in part and dissenting in part, with Justices Pariente and Anstead joining, specifically noted that an argument that the evidence was not sufficient to support a conviction for attempted felony murder was without merit. *Id*. at 90.

Defendant filed a Notice to Invoke Discretionary Jurisdiction in this Court on the certified questions and matter of great public importance, and the State filed a Cross-Notice to Invoke Discretionary Jurisdiction based upon an independently alleged express and direct conflict with decisions in other district courts of appeal.

This Court's order of February 1, 2006 stayed proceedings on the petitions now before the Court, pending disposition of *Sigler v. State*, 881 So. 2d 14 (Fla. 4th DCA 2004). After this Court affirmed in *State v. Sigler*, 967 So. 2d 835 (Fla. 2007), an order was issued November 14, 2007, directing the State to show cause why the instant case should not be remanded for reconsideration in light of the disposition in *Sigler*. The State responded with the principal argument that a decision from this Court on the cross-appeal, whether the lower court improperly held that shooting was an essential element of robbery, would render irrelevant the issue decided in *Sigler*, that an appellate court may not direct entry of judgment for a lesser-included offense under *Section 924.34, Florida Statutes* when all of the elements of the lesser-included offense have not been found by a jury beyond a reasonable doubt. This Court accepted jurisdiction in its order of June 24, 2008.

SUMMARY OF THE ARGUMENT

This Court should first decide the issue on cross-appeal, in which the State argues that the district court improperly vacated the conviction for attempted felony murder, because this should render the Defendant's issues moot. The district court improperly ruled that the intentional act, not an element of the underlying felony, which could but did not cause the death of the victim here, could not be proven by the same act of shooting the victim, but rather had to be proved by an independent act. This mistakes the proof for the elements of the offense. Because the shooting was not an element of the underlying robbery offense, it satisfied the requirements of the attempted felony murder statute, and this court should reverse and remand for affirmance of the conviction.

If this Court decides that the district court was correct when it vacated the conviction for insufficient evidence, it should then approve the decision below because the offense of attempted second degree depraved mind murder is a necessarily lesser included offense of attempted felony murder, under both the new and the old definitions, and thus *Section 924.34, Florida Statutes,* properly applied. Moreover, the application of the instant facts to the elements of attempted second degree murder show that all of the elements were properly found by the jury, and thus the statute was constitutional, as applied, under *State v. Sigler*.

ARGUMENT

I. *ARGUMENT ON STATE'S CROSS-PETITION:* THE DISTRICT COURT IMPROPERLY FOUND THAT A SHOOTING WAS AN ESSENTIAL ELEMENT OF A ROBBERY AND THUS IMPROPERLY RULED THAT THERE WAS INSUFFICIENT EVIDENCE HERE TO SUPPORT A CONVICTION OF ATTEMPTED FELONY MURDER.

The argument on the State's cross-petition is set forth first because a decision on this issue would render the Defendant's argument on the certified question academic.

a. Standard of Review

The district court found that "the State failed to prove the main charge against Coicou, the attempted felony murder charge." *Coicou v. State*, 867 So. 2d 409, 412 (Fla. 3d DCA 2003). The court held that "the trial court erred in denying Coicou's motion for judgment of acquittal." *Id*. "In reviewing a motion for judgment of acquittal, a *de novo* standard of review applies." *Pagan v. State*, 830 So. 2d 792, 803 (Fla. 2002).

b. The district court improperly held that there was insufficient evidence to support a conviction for attempted felony murder.

The lower court, in finding the "shooting" of a victim to be an essential element of robbery, confuses the evidence demonstrating the robbery for the statutory

elements of the offense. The court reasoned that because the "use of force, the shooting, was itself an essential element of the underlying robbery [it] was not an independent act as required by *section 782.051(1).*" *Coicou v. State*, 867 So. 2d 409, 412 (Fla. 3d DCA 2003). However, what is required by our felony murder statute is not an independent act, but merely an "act that is not an essential element of the felony." § 782.051(1), Fla. Stat.

Illumination of the legislature's purpose in inserting this limitation can be found in Professor Torcia's commentary on felony murder:

> The law is not attempting merely to deter the commission of dangerous or violent felonies; presumably, the punishment authorized by law for such felonies is sufficiently severe to accomplish that purpose. But rather, the law is attempting to deter the commission of such felonies in a dangerous or violent way. For example, a potential robber may be encouraged to use an unloaded gun . . . [or] no weapon at all[.]

4 Charles E. Torcia, *Wharton's Criminal Law* §147 at 300-01 (15th ed. 1994). If Professor Torcia's robber had used an unloaded gun in Florida, he would still have been guilty of robbery. *See, e.g., Akins v. State*, 838 So. 2d 637 (Fla. 5th DCA 2003)(evidence sufficient to sustain conviction of armed robbery, even though no proof that firearm was loaded or operational). However, that same robber armed only with an unloaded or non-operational gun could not be guilty of attempted felony murder because a necessary element of that crime is that the defendant "commits, aids, or abets an intentional act that . . . could, but does not, cause the

death of another[.]" § 782.051(1), Fla. Stat.

Under the terms of Florida's robbery statute, shooting is not an essential element of the offense. Under *Section 812.13, Florida Statutes*, robbery means the taking of property, "when in the course of the taking there is the use of force, violence, assault, or putting in fear." None of these alternatives even require a firearm, let alone shooting. A victim can be put in fear through verbal threats. Force or violence can be implemented through means which do not involve any firearm, let alone a shooting. Thus, it is noteworthy that convictions for armed robbery, above and beyond simple robbery, have been sustained absent evidence of a shooting, based solely on the possession, display or carrying of a firearm. *See, e.g.*, *Mitchell v. State*, 493 So. 2d 1058 (Fla. 1st DCA 1986), *approved*, 703 So. 2d 1062 (Fla. 1997)(defendant merely pulled an apparent gun from under his sweater); *Lynn v. State*, 567 So. 2d 1043 (Fla. 5th DCA 1990)(non-operational pellet pistol sufficed to establish offense of armed robbery absent any shooting).

Here, the shooting was not an essential element of robbery. It was more. It was the commission of robbery in a dangerous or violent way. Indeed, it was even more than that. It was the commission of robbery in a way that "could, but does not, cause the death of another[,]" and therefore qualifies for the enhanced punishment provided by the attempted felony murder statute. § 782.051(1), Fla. Stat. Certainly, the act of shooting could provide the element of "force, violence,

assault, or putting in fear" required for a robbery conviction. § 812.13(b), Fla. Stat. But just as with double jeopardy analysis, though "the act may be the same, the elements of the crimes differ." *State v. Florida*, 894 So. 2d 941, 946 (Fla. 2005)(noting analytical error in double jeopardy claim). For this reason, a defendant may be convicted of both felony murder and the qualifying felony. *Boler v. State*¸ 678 So. 2d 319, 322 (Fla. 1996)("the legislature intended multiple punishments when both a murder and a felony occur during a single criminal episode."); *see also*, *Lukehart v. State*, 776 So. 2d 906 (Fla. 2000)(noting continued validity of *Boler* analysis).

If it is now decided that the same act cannot provide the basis for the different elements of robbery and attempted felony murder, as held by the court below, the attempted felony murder statute will be eviscerated in nearly every robbery. Following this logic, once Professor Torcia's hypothetical robber committed to perpetrating a robbery, he might as well use the maximum deadly force allowed, short of causing death, for he could be confident that as long as he only employed one act, he could not be charged with the greater crime, only the robbery. This is clearly not what the legislature intended. In Professor Torcia's words, punishment for the underlying felony is sufficiently severe only if less force is employed than that which "could, but does not, cause the death" of the victim. § 782.051(1), Fla. Stat. It is the deadly force employed which the statute seeks to punish more

severely, not merely multiple acts.

The Fourth District has already struggled to distinguish the decision below in order to preserve the intent of the attempted felony murder statute in *Dallas v. State*, 898 So. 2d 163 (Fla. 4th DCA 2005). In *Dallas*, two co-defendants attempted to engage in a drug transaction with the victim. *Id*. at 164. An argument ensued in which Dallas' co-defendant pulled out a pistol and hit the victim over the head, demanding money. *Id*. Dallas then pulled out two pistols and also demanded money. *Id*. "The victim turned over everything from his pockets (wallet, money, papers), pushed his way out of the car, and took off running." *Id*. Dallas pursued, firing several shots, and the victim was left lying on the ground with two bullet wounds. *Id*.

Dallas was charged with attempted murder, attempted felony murder and robbery with a weapon. 898 So. 2d at 164. Before the case went to the jury, the robbery charge was reduced to an attempt, "apparently because it was not clear . . . whether there was money in the wallet." *Id*. The jury convicted on both attempted robbery with a weapon and attempted felony murder. *Id*. Dallas challenged on the ground that the firing of the weapon was an essential element of the robbery conviction that was precluded by statute from also forming the basis of an attempted felony murder conviction. *Id*.

The majority opinion in *Dallas* noted correctly that the shooting itself "was not

a part of the finding of guilt as to attempted robbery ***and is not an element of that crime***. . . ." 894 So. 2d at 165 (emphasis added). Indeed, the court conducted an analysis of the elements of both the initial robbery charge and the subsequent attempted robbery charge and found that "[n]one of the elements listed for either of the two statutes for which Dallas was convicted requires discharge of the firearm." *Id*.

The majority could have, and probably should have, ended their analysis at that point. However, faced with the decision in *Coicou*, the majority attempted to distinguish it on the facts, finding that the shooting in *Coicou* was committed in the course of the taking, while the shooting in *Dallas* occurred after the victim placed his wallet on the car seat and started running, and thus constituted a wholly separate act. 898 So. 2d at 165-66. The dissent disagreed, stating that "the shooting of the victim, was used to prove both the attempted felony murder and the underlying robbery offense." *Id*. at 166. Therefore, the dissent argued, *Coicou* was not distinguishable.

In *Dallas*, the dissent stated that the offense of attempted felony murder required proof of "an intentional act ***apart from*** one which was an essential element of the attempted robbery." 898 So. 2d at 166 (emphasis added). In *Coicou*, the court similarly stated that the statute required an "***independent*** act." 867 So. 2d at 412. (emphasis added). Neither is correct. All the statue requires is

a single act that is "not an ***essential*** element of the [underlying] felony . . . ." § 782.051(1), Fla. Stat. This Court should approve the reasoning of the majority in *Dallas*, which applied an analysis of the elements of the underlying felony to satisfy the requirements of the attempted felony murder statute, rather than an analysis of the facts adduced. Accordingly, the decision below should be quashed, and the conviction for attempted felony murder should be affirmed.

II. ***ARGUMENT ON DEFENDANT'S PETITION:***

THE DISTRICT COURT PROPERLY FOUND THAT ALL THE ELEMENTS OF THE LESSER INCLUDED OFFENSE OF SECOND DEGREE MURDER HAD BEEN FOUND BY THE JURY AND COULD PROPERLY DIRECT A VERDICT FOR SECOND DEGREE MURDER UPON FINDING THE EVIDENCE STATUTORILY INSUFFICIENT TO SUPPORT THE CHARGE OF ATTEMPTED FELONY MURDER.

a. Standard of Review.

Defendant makes two arguments against the district court's direction to the trial court to enter a judgment of conviction for the lesser included offense of second degree murder. In the first argument, Defendant asserts that, contrary to the district court's ruling, second degree murder is actually not a lesser included offense of attempted felony murder. This is solely a legal determination based on undisputed facts, which is reviewed *de novo*. *Williams v. State*, 957 So. 2d 595, 598 (Fla. 2007).

In the second argument, Defendant asserts that a conviction for the offense

of second degree murder requires findings of fact that were never presented to the jury. This, in essence, attacks the legal sufficiency of the evidence, and "a de novo standard of review applies." *Pagan v. State*, 830 So. 2d 792, 803 (Fla. 2002). Finally, "judicial interpretation of statutes and determinations concerning the constitutionality of statutes are pure questions of law subject to the *de novo* standard of review." *State v. Sigler*, 967 So. 2d 835, 841 (Fla. 2007).

b. The district court properly found that attempted second degree murder was a lesser included offense of attempted felony murder.

As a foundation to each of the foregoing arguments, it is helpful to begin with the history of the statutory crime of attempted felony murder, as recounted by this Court in *Battle v. State*, 911 So. 2d 85 (Fla. 2005):

> The statutory offense was created by the Legislature in response to this Court's decision in *State v. Gray*, 654 So. 2d 552 (Fla. 1995). In Gray, this Court abolished the common law crime of attempted felony murder because the "legal fictions required to support the intent for felony murder [were] simply too great" to extend to attempted felony murder. 654 So. 2d at 554. In the wake of Gray, the standard jury instructions for attempted felony murder were deleted. *See Standard Jury Instr. in Crim. Cases (95-2)*, 665 So. 2d 212, 213 (Fla. 1995).
>
> In 1996, the Legislature responded by enacting section 782.051, which created the offense of "Felony causing bodily injury." *See* ch. 96-359, § 1, at 2052, Laws of Fla. In 1998, the Legislature substantially rewrote this section and retitled it "Attempted felony murder." *See* ch. 98-204, § 12, at 1970, Laws of Fla. The 1998 amendment also added the element of an intentional act that is not an essential element of the underlying felony. As amended by the Legislature, *section 782.051(1)*

> provides: Any person who perpetrates or attempts to perpetrate any felony enumerated in *s. 782.04(3)* and who commits, aids, or abets an intentional act that is not an essential element of the felony and that could, but does not, cause the death of another commits a felony of the first degree . . . .

Id. at 88.

Defendant's first argument is that the *Schedule of Lesser Included Offenses* listing for *Section 782.051, Florida Statutes* contains no Category One or necessarily lesser included offenses, and the only Category Two or permissive lesser included offenses are the two lesser levels of the same offense. Defendant thus concludes that second degree murder is not a lesser included offense. But a more accurate conclusion would be that offered by *Florida Standard Jury Instruction (Criminal) 6.3*, which states merely that "[n]o lesser included offenses have been identified for this offense." *In re: Std. Jury Instructions in Crim. Cases--Report No. 2006-2,* 962 So. 2d 310, 312 (Fla. 2007). The *Schedule* itself is not sufficiently current, for it refers to the offense of attempted felony causing bodily injury, which has since been replaced by the offense of attempted felony murder, as noted above. *See, Standard Jury Instructions in Crim. Cases (97-2)*, 723 So. 2d 123, 125 (Fla. 1998)(amending the schedule of lesser included offenses).

The fact that the Legislature has responded to this Court's decision in *Gray* by, in essence, re-establishing the crime of attempted felony murder suggests that the district court was correct in looking to previous decisions regarding the lesser

included offenses of attempted felony murder as guidance in what would be a lesser included offense under the new statute. *See, e.g., Hayes v. State*, 564 So. 2d 161, 164 (Fla. 2d DCA 1990)(lesser included offenses of attempted first degree felony murder are attempted second degree murder and attempted manslaughter). After all, "attempted felony murder was a valid offense, with enumerated elements and identifiable lesser offenses, for approximately eleven years." *State v. Wilson*, 680 So. 2d 411, 412 (Fla. 1996).

The elements of that previous incarnation of attempted felony murder were: 1) an overt act, which could have caused the death of the victim, but did not; where 2) the act was committed as a consequence of and while the defendant was engaged in the commission of, was attempting to commit or, as an accomplice, was escaping from the immediate scene of, the crime alleged. *Std. Jury Instructions in Crim. Cases (93-1)*, 636 So. 2d 502, 503 (Fla. 1994). The elements of the current incarnation of attempted felony murder under the new statute are: 1) commission or attempt to commit the crime alleged; 2) commission, or aiding and abetting the commission, of an intentional act that is not an essential element of the crime alleged while engaged in the commission, attempted commission or escape from the immediate scene of the crime alleged; and 3) the intentional act could have but did not cause the death of the victim. *In re: Std. Jury Instructions in Crim. Cases--Report No. 2006-2*, 962 So. 2d 310, 312 (Fla. 2007). Both instructions include the

additional statement: “In order to convict Defendant of Attempted Felony Murder, it is not necessary for the State to prove that [he or she] had a premeditated design or intent to kill.” *Id*.

The statutory elements of attempted felony murder merely add the language about the intentional act not being an essential element of the crime alleged to the previous incarnation. For the purposes of argument, it can be stated that it is necessary to prove the two elements of the old offense, and then to also prove the added element in the new offense regarding the intentional act not being an essential element of the crime alleged, in order to prove the new offense. Or, in the words of this Court: “the burden of proof of the major [*new*] crime cannot be discharged, without proving the lesser [*old*] crime as an essential link in the chain of evidence.” *Brown v. State*, 206 So. 2d 377, 382 (Fla. 1968). This is the classic definition of what is now referred to as a Category One, or necessarily lesser included offense.

It follows that if the old offense is necessarily a lesser included of the new offense, whatever offense was necessarily a lesser included of the old offense is also necessarily a lesser included of the new offense. As already noted above, *see*, *Hayes*, 564 so. 2d at 164, and conceded by Defendant, attempted second degree murder was a lesser included offense. Defendant notes that attempt was listed as a Category Two lesser included offense of first degree felony murder in the 1990

Schedule of Lesser Offenses in Criminal Cases. This compares apples to oranges, however. The *Schedule* itself warns that if "the evidence conclusively shows that the charged crime was completed . . . attempt should not be instructed." *In re Std. Jury Instructions in Crim. Cases*, 543 So. 2d 1205, 1233 (Fla. 1989). This is why attempt is a Category Two, in which the very definition states: "Offenses which may or may not be included in the offense charged, depending on the accusatory pleading and the evidence, ***which will include all attempts*** and some lesser degrees of offenses." *Id*. at 1232.

The correct comparison is to follow the lesser included offenses in the *Schedule* of the completed crime in order to determine the lesser included offense of the respective inchoate crime. Second degree (depraved mind) murder and manslaughter were Category One, necessarily included, lesser offenses of first degree felony murder. 543 So. 2d 1233 (1990); *see also*, *Scurry v. State*, 521 So. 2d 1077, 1077 (Fla. 1988)("second-degree murder is a necessarily lesser included offense of first-degree felony murder"). Therefore, the respective inchoate crimes bear the same relation of major and lesser crime. And, as demonstrated above, what is a necessarily lesser included offense of the old attempted felony murder offense is also a necessarily lesser included offense of the new attempted felony murder offense. That being the case, the district court was unambiguously authorized by *Section 924.34, Florida Statutes*, to direct the entry of a conviction

for attempted second degree murder as a necessarily lesser included offense of attempted felony murder.[2]

c. The district court's application of Section 924.34, Florida Statutes, was not unconstitutional as applied.

Defendant's final argument is the direct parallel of the argument in *State v. Sigler*, 967 So. 2d 835 (Fla. 2007). As stated above, this Court need not reach this argument because there was sufficient evidence to affirm the conviction for attempted felony murder, or the directed verdict was proper under *Section 924.34, Florida Statutes*, because attempted second degree murder is a necessarily lesser included offense of attempted felony murder, and cases such as *Sigler* and *I.T. v. State*, 694 So. 2d 720 (Fla. 1997), which deal only with the application of the statute to permissive lesser included offenses, do not apply. Nevertheless, even when examining the allegations of the charging documents and the proof at trial, as required by *I.T.* and *Sigler*, the instant application of the statute is constitutional because each of the elements required for a conviction of second degree depraved mind murder were found by the jury.

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[2] Defendant argues that it was further error to direct the entry of conviction for a crime on which the jury was not instructed. *See, Carranza v. State*, 678 So. 2d 6 (Fla. 3d DCA 1996). But the issue in *Carranza* was whether double jeopardy precluded retrial on a lesser offense when the major offense was vacated on intervening authority. That issue is not present here.

In *Sigler*, the defendant was charged with first degree felony murder, but convicted of second degree murder as a lesser included offense. 967 So. 2d at 837-38. The district court held that there was insufficient evidence to support the conviction of second degree murder and, citing *I.T.*, directed the entry of a conviction for third degree felony murder as a permissive lesser included offense. *Id*. at 838-39. This Court reversed, finding that a conviction of third degree felony murder required the finding of a predicate felony that was not made by the jury. In its decision, this Court cited *Blakely v. Washington*, 542 U.S. 296 (2004), *Apprendi v. New Jersey*, 530 U.S. 446 (2000), and *Jones v. United States*, 526 U.S. 227 (1999), which all stand for the proposition that a court cannot enhance a sentence based upon facts that were not found by the jury. *Sigler* at 842-43.

The decision in *Sigler* applied the reasoning of *Franks v. Alford*, 820 F.2d 345 (10th Cir.1987), in which an Oklahoma appellate court had overturned a first degree felony murder conviction because it found insufficient evidence to support the predicate felonies, and then entered a judgment for second degree depraved mind murder. *Sigler*, 967 So. 2d at 843. The Tenth Circuit held that the jury's conviction for first degree felony murder did not include a determination on the issue of a depraved mind, thereby depriving him of his right to have a jury determine that issue under the *Sixth Amendment*. *Id*. at 843-44. The *Sigler* decision approved the application of this reasoning by the Florida district court,

where a general rule was reached that "an appellate court cannot direct a judgment for a permissive lesser-included offense if the jury verdict did not necessarily include a finding on every element of that offense." *Id*. at 844.

The instant case is distinguished, however, in that second degree depraved mind murder in Florida has been held by our supreme court to be a necessarily lesser included offense of first degree felony murder, unlike in Oklahoma. *See*, *Scurry v. State*, 521 So. 2d 1077 (Fla. 1988). This was held despite some logical and colorful dissent. One dissenting justice argued that each offense contained an element that was not present in the other. *Id*. at 1078. Another colorfully added: "One may call something a necessarily lesser included offense when it isn't, much as one may call a horse a cow. However, such a description will not make it so, any more than it will endow the horse with the ability to provide milk." *Id*. at 1079.

Nevertheless, by so holding, the majority in *Scurry* has in effect ruled that the element of malice in second degree depraved mind murder is proven as a matter of law by the jury finding of guilt on the first degree felony murder charge. This must be so, because the court determined that by proving every element of the higher charge, the lesser charge was necessarily included, and the defendant was entitled as a matter of law to have the jury instructed on the lesser charge without examination of the proof adduced at trial. 521 So. 2d at 1078. Although this rule

was temporarily invalidated by the decision in *State v. Gray*, 654 So. 2d 552 (Fla. 1995), the Legislature essentially revived it with the 1998 amendment to *Section 782.051(1), Florida Statutes*.

This rule is consistent with the historic purpose and doctrine of felony murder, sometimes referred to as constructive malice, where the malice implied by the commission of the underlying felony is transferred by legal presumption to the homicide. *See, e.g., Adams v. State*, 341 So. 2d 765, 767-768 (Fla. 1976)("Under the felony murder rule, . . . malice aforethought is supplied by the felony, and in this manner the rule is regarded as a constructive malice device"); *Commonwealth v. Balliro*, 209 N.E. 2d 308 (Mass. 1965)(felony murder rule renders it unnecessary to prove malice); *State v. Bradley*, 317 N.W. 2d 99, 101 (Neb. 1982)("The turpitude involved in the robbery takes the place of intent to kill or premeditated malice, and the purpose to kill is conclusively presumed from the criminal intention required for robbery"). The rule is also consistent with the standard jury instruction, both old and new: "In order to convict (defendant) of Attempted Felony Murder, it is not necessary for the State to prove that [he] [she] had a premeditated design or intent to kill." *In re: Std. Jury Instructions in Crim. Cases--Report No. 2006-2*, 962 So. 2d 310, 312 (Fla. 2007).

The elements of second degree, depraved mind murder are: 1) Defendant intentionally committed an act which would have resulted in death except that

someone prevented him from killing or he failed to do so; and 2) the act was imminently dangerous to another and demonstrating a depraved mind without regard for human life. *Standard Jury Instructions in Crim. Cases (97-1)*, 697 So. 2d 84, 90 (Fla. 1997). The first element is identical to that found by the jury under the felony murder charge. The malice of the second element is constructively supplied by the jury's finding of the commission or attempt to commit the underlying felony. When applied to the instant case, the jury has, by its finding on the elements of attempted felony murder, and by extension its finding on the elements of robbery, also found each of the elements of attempted second degree depraved mind murder beyond a reasonable doubt and consistent with the *Sixth Amendment* under *Sigler*.

For the same reasons that *Sigler* is distinguished in this argument, the other cases cited for the same principle by Defendant, *Carrin v. State*, 978 So. 2d 115 (Fla. 2008), and *Bummit v. State*, 971 So. 2d 205 (Fla. 4th DCA 2007), are inapposite, because they find the application of *Section 924.34, Florida Statutes*, unconstitutional only as applied to the specific facts on permissive lesser included offenses. In cases such as *Pratt v. State*, 668 So. 2d 1007 (Fla. 1st DCA 1996), *approved*, 682 So. 2d 1096 (Fla. 1996), and *Wilson v. State*, 680 So. 2d 411 (Fla. 1996), the conviction for attempted felony murder was overturned because of this Court's decision in *State v. Gray*, 654 So. 2d 552 (Fla. 1995), holding that

attempted felony murder was no longer an offense. Thus it was concluded, in *Pratt* for example:

> Like our sister court in *Wilson v. State*, we conclude that the appellant's conviction "is not being vacated due to insufficiency of evidence" as specified literally in *section 924.34*. Thus, we agree with the Third District Court that, under these circumstances, the provisions of *section 924.34* were not triggered.

668 So. 2d at 1008. In contrast, the instant case is based on a newly enacted statute, after the decision in *Gray*, and the conviction was vacated due to what the district court deemed was insufficiency of evidence, as specified literally in *Section 924.34*. Therefore, the reasoning in, and holdings of, *Pratt* and *Wilson* do not apply. As such, the district court's application of *Section 924.34, Florida Statutes*, to direct a verdict for the necessarily lesser included offense of attempted second degree murder was not unconstitutional, as applied. If this Court determines that the lower court was correct in deciding that there was insufficient evidence to convict on the charge of attempted felony murder, it is then proper for this Court to approve the decision of the district court.

CONCLUSION

Based upon the arguments and authorities cited herein, the State of Florida respectfully requests this Court quash the decision below and affirm the conviction for attempted felony murder. In the alternative, the State requests that the Court approve the decision of the court below.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Answer Brief of Appellee was mailed this 8th day of September, 2008, to Harvey J. Sepler, Assistant Public Defender, 1320 N.W. 14th Street, Miami, FL 33125.

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CERTIFICATE OF COMPLIANCE WITH TYPE AND FONT

I hereby certify that this brief is typed in compliance with the requirements set forth in Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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