Electronically Filed 09/13/2013 04:50:46 PM ET

RECEIVED, 9/13/2013 16:53:40, Thomas D. Hall, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-1338

AHMAD MILTON,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL, THIRD DISTRICT

ANSWER BRIEF OF RESPONDENT ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

On April 12, 2006, there was a series of confrontations between two groups of young men, which culminated in Defendant's involvement in the commission of the charged offenses. Defendant and two co-defendants were charged with the Second Degree Murder With A Deadly Weapon of Marcus Allen Thomas (Count I); Attempted Felony Murder With A Deadly Weapon of Fellon Halloway and/or Brandon Harris and/or Sylvester Fisher and/or Randall Campbell and/or Arturo Vargas and/or Bryant Pitts and/or Abdul Hall (Count II); Attempted Felony Murder With A Deadly Weapon of Trenard Chaney, and/or T.C. (a minor) and/or M.T. (a minor); (Count III); Attempted Felony Murder With A Deadly Weapon of Jaime Chaney (Count IV) and Shooting Or Throwing A Deadly Missile (Count V). (R. 230 – 232).

Fellon Holloway, Patrick Terry, and Randall Campbell identified Defendant in a photo line-up as the person that discharged 8-20 gunshots at a crowd of people who were standing in front of a house. (T. 373 – 374, 379, 383, 431, 531, 605 - 607). Defendant also shot at the windshield of a car driven by Marcus Allen Thomas which bumped the Defendant while he was shooting at the crowd and toward the house. In addition to the three eye witnesses who identified Defendant in the photo line-up, Arturo Vargas, Abdul Hall, Randall Campbell, Jamie Chaney,

Patrick Terry, Sylvester Fisher, and Isiah Clements all testified in a consistent manner as to the description of the shooter and the fact that he discharged multiple gunshots in the direction of a crowd of people. (T. 502-504, 508, 513-514, 531-536, 571-574, 605, 616-617, 683-684, 731-732).

As stated in the lower court's opinion upon rehearing:

> The State charged Milton with second-degree murder, attempted felony murder with a predicate felony of attempted second-degree murder, and shooting at a dwelling. Before jury selection, Milton moved to dismiss counts two, three, and four regarding attempted felony murder with a predicate felony of attempted second-degree murder based on the argument that the information did not track the language of the attempted felony murder statute. The trial court denied the motion. After the State's final amendments to the information, Milton renewed the objection, arguing that there was no independent essential element as the attempted felony murder statute requires. The trial court denied the motion.
>
> The jury acquitted Milton of second-degree murder but found him guilty as charged on the remaining counts. Milton was sentenced as a habitual violent felony offender to three concurrent life sentences with a twenty-year minimum mandatory for counts two, three, and four, and a concurrent sentence of thirty years for count five. At the sentencing hearing, Milton argued that the convictions of attempted felony murder and shooting into a dwelling violate the rules against double jeopardy. The trial court denied all motions.

Milton v. State, 2011 WL 2138161 (Fla.App. 3 Dist.).

Defendant appealed the judgment and sentences to the Third District Court of Appeal, case no. 3D09-122, and raised the following three issues:

> I. THE TRIAL COURT FUNDAMENTALLY ERRED IN CONVICTING AHMAD MILTON OF ATTEMPTED FELONY MURDER WHERE THE CRIME WAS NEITHER ALLEGED IN THE INDICTMENT NOR PROVEN AT TRIAL.
>
> II. THE FUNDAMENTALLY DEFECTIVE INFORMATION VIOLATED MR. MILTON'S DUE PROCESS RIGHTS UNDER THE FLORIDA AND UNITED STATES CONSTITUTIONS.
>
> III. SHOULD THIS COURT AFFIRM THE CONVICTIONS FOR ATTEMPTED FELONY MURDER, THE PROHIBITIONS AGAINST DOUBLE JEOPARDY REQUIRE THAT THE CONVICTION FOR SHOOTING INTO A DWELLING BE VACATED.

On September 8, 2010, the lower court entered an opinion affirming Defendant's convictions. Defendant filed a motion for rehearing, and the State filed a Response thereto. On June 1, 2011, the lower court denied Defendant's motion for rehearing, and issued a substituted opinion which stated, inter alia, as follows:

> We affirm the trial court's decision because the convictions were in compliance with sections 777.04(1) and 782.04(2), Florida Statutes (2006), which state that attempted felony murder has two elements: "(1) the defendant intentionally committed an act that would have resulted, but did not result, in the death of someone, and (2) the act was imminently dangerous to another and demonstrated a depraved mind without regard for human life."
>
> Milton relies on Coicou v. State, 867 So.2d 409 (Fla. 3d DCA 2003), quashed on other grounds, 39 So.3d 237 (Fla.2010), in support of his position. However,

> in Coicou, multiple offenses were alleged to have been committed on a single victim. In the case before us, we know that there were multiple victims involved. Similarly, in Tucker v. State, 857 So.2d 978 (Fla. 4th DCA 2003), the Fourth District Court of Appeal held that double jeopardy was violated because the charges were directed at the same victim. Id. at 979. This is not the case here, as the facts indicated there were multiple victims, and Milton was not shooting specifically at one person.
>
> The State directs our attention to Brinson v. State, 18 So.3d 1075 (Fla. 2d DCA 2009), which we agree is applicable here. In Brinson, the defendant was charged with first-degree murder and a predicate felony of attempted first-degree murder and attempted second-degree murder. Id. at 1076. The Second District Court of Appeal stated that the defendant's convictions for attempted second-degree murder and felony murder did not violate protection against double jeopardy because the convictions did not doubly punish the defendant for a single homicide. Id. at 1078.

Id. at 1.

Defendant then sought this Court's discretionary review. In his pro se amended jurisdictional brief, Defendant sought the Court's jurisdiction based on the following two claims of alleged direct and express conflict.

> I. THE THIRD JUDICIAL CIRCUIT COURT OF APPEAL'S DECISION IN ITS OPINION AFFIRMING THE DEFENDANT'S CONVICTION PURSUANT TO THE ATTORNEY GENERAL'S RESPONSE THAT THE TRIAL COURT DID NOT FUNDAMENTALLY ERROR IN CONVICTING THE DEFENDANT OF ATTEMPTED FELONY MURDER WHERE THE SINGLE ACT OF SHOOTING INVOLVED IN THE CHARGES OF ATTEMPTED SECOND-DEGREE MURDER AND ATTEMPTED FELONY MURDER WHERE PERMISSIBLE BECAUSE THEY DID NOT INVOLVE THE SAME VICTIM PURSUANT TO, BRINSON V. STATE, 18 SO. 3D 1075, CONFLICTS EXPRESSLY AND DIRECTLY WITH THE DECISIONS

> MADE IN, COICOU V. STATE, 867 SO.2D 409 AND TUCKER V. STATE 857 SO.2D 978,
>
> II. THE THIRD JUDICIAL CIRCUIT COURT OF APPEAL DECISION IN ITS OPINION STATING "THE TRIAL COURT DID NOT FUNDAMENTALLY ERROR" AFFIRMING THE DEFENDANT'S CONVICTION PURSUANT TO THE ATTORNEY GENERAL'S RESPONSE, THAT THE INFORMATION WAS NOT FUNDAMENTALLY DEFECTIVE, CONFLICTS EXPRESSLY AN DIRECTLY WITH THE FOLLOWING CONSTITUTIONAL AND STATUTORY PROVISIONS, ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION, SECTION 782.05(1) FLA.STAT. AND FLA.R.CRIM.P. 3.140(D)(1), IT ALSO CONFLICTS EXPRESSLY AND DIRECTLY WITH THE DECISIONS IN, ROSIN V. ANDERSON, 155 FLA. 673, 21 SO.2D 143; FERRELL V. STATE, 358 SO.2D 843; STATE V. BEASLEY, 317 SO.2D 750; SINCLAIR V. STATE, 46 SO.2D 453.

In its Answer Brief on Jurisdiction, the State argued that the Court was without jurisdiction, based on a lack of express and direct conflict. As to the first issue, the State argued that the subject case contains a significant distinction from Tucker and Coicou in that they both contained multiple offenses and a single victim. In contrast, the subject case contains multiple victims. As to the second issue, the State argued that there was no jurisdiction due to the fact that the lower court's opinion did not address the issue and Defendant's brief improperly contained and argued facts that were not contained within the four corners of the lower court's opinion and could not be the basis for conflict jurisdiction. On April 12, 2013,

the Court granted jurisdiction and appointed counsel to represent Defendant.

SUMMARY OF ARGUMENT

The Third District's opinion in the case at bar properly affirmed Defendant's judgment and sentences.

I. The lower court's opinion does not expressly and directly conflict with this Court's opinion in Coicou. In Coicou, the trial court committed fundamental error by convicting the defendant of attempted felony murder where the State used the same act, the singular act of shooting the single victim, to prove both the attempted felony murder and the underlying felony offense of robbery. The subject case is distinguishable from Coicou because the facts of the case at bar make it clear that Defendant discharged multiple gunshots at the various victims. The only essential element of the underlying felony was one single shot. The multitude of bullets which followed after the single shot were in no way essential to the underlying felony and were properly considered an intentional act of the attempted felony murder which was not essential to the underlying felony. The act of attempting to shoot certain victims constituted attempted second degree murder, and then continuing to shoot constituted attempted felony murder as to other victims who were not the intended target of the attempted

second degree murder, but were in the immediate vicinity and thus in danger for their life.

II. The Court is without jurisdiction on the issue of alleged fundamental error as to jury instructions, where the issue was not objected to at trial, was not raised by Defendant on direct appeal, was not addressed by the lower court, and was not raised in Defendant's jurisdictional brief to this Court. Nevertheless, the issue is without merit.

III. The trial court did not abuse its discretion in denying Defendant's motion to dismiss the Information based on the alleged lack of an intentional act that was not essential to the underlying felony. The allegations which were the basis of Defendant's convictions for attempted felony murder, where the predicate felony was attempted second degree murder, were properly charged because although both charges stemmed from the shooting of a gun, there were multiple gunshots. The act of attempting to shoot certain victims constituted attempted second degree murder, and the act of continuing to shoot constituted attempted felony murder as to other victims who were not the intended target of the attempted second degree murder, but were in the immediate vicinity and thus in danger for their life.

IV. The State's amendments to the information during trial did not impact Defendant's ability to dispute the State's requirement to prove an act that is not an essential element of

the felony in connection with the felony murder charge. Even though general "murder" was indicated in the information, every form of the information included the act of shooting a firearm as the act and it was always known that multiple gunshots were fired at the crowed of people. Accordingly, the Information was not defective as the underlying felony was not required to be specifically alleged, but was clearly and sufficiently alleged nonetheless, and the amendments to the Information regarding the degree of the murder which was the underlying felony and the handwritten notations as to the victims of the underlying felony did not prejudice Defendant.

V. The convictions for attempted felony murder and shooting into an occupied dwelling were properly upheld, as each of the two offenses clearly contain statutory elements that the other does not, the offenses are found in separate statutory provisions, are not aggravated forms of the other, and are not mere degree variants of the same offense.

ARGUMENT

I. THE LOWER COURT'S OPINION DOES NOT EXRESSLY AND DIRECTLY CONFLICT WITH THIS COURT'S DECISION IN COICOU v. STATE, 39 So.3d 237 (Fla. 2010) WHERE THE SUBJECT CASE IS SIGNIFICANTLY DISTINGUISHABLE BASED ON THE FACT THAT DEFENDANT IN THE CASE AT BAR DISCHARGED MULTIPLE GUNSHOTS AT THE CROWD OF VICTIMS. (REPHRASED).

Defendant alleges that the lower court's opinion affirming his convictions for attempted felony murder is in direct and express conflict with this Court's decision in Coicou v. State, 39 So.3d 237 (Fla. 2010). Defendant's argument is without merit.

Attempted felony murder, as set forth in Florida Statute section 782.051 (2006), provides as follows:

> (1) 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 …

Defendant was convicted of attempted felony murder with attempted second degree murder as the predicate felony. (R. 230 – 232, 493 - 495). Attempted second-degree murder, as set forth in Florida Statute section 777.04(1) (2006) which defines attempt and Florida Statute section 782.04(2)(2006) has two elements: "(1) the defendant intentionally committed an act that

could have resulted, but did not result, in the death of someone, and (2) the act was imminently dangerous to another and demonstrated a depraved mind without regard for human life." State v. Florida, 894 So.2d 941 (Fla.2005), overruled in part by Valdes v. State, 3 So.3d 1067 (Fla.2009). The use of a firearm is a third element that increases the penalty for the crime. Id. at 946.

In Coicou, the defendant was charged with attempted first-degree felony murder for committing or attempting to commit a robbery against the victim and, as a separate act not an essential element of the robbery, shooting the victim in the chest. Twice during the trial, defense counsel moved for a judgment of acquittal based on the argument that there was no proof of the underlying felony, the robbery, and that the State did not prove the essential elements of attempted felony murder. Both motions were denied. The jury convicted Coicou of attempted first-degree felony murder with a firearm and specifically found that he committed a robbery and used a firearm. Defense counsel moved for a new trial, which the trial court denied. Id.

On direct appeal, Coicou argued that the trial court committed fundamental error by convicting him of attempted felony murder because the State used the same act, the shooting of the victim, to prove both the attempted felony murder and the underlying felony offense. Thus, Coicou argued that Florida law

prohibits a conviction for attempted felony murder using proof of an element essential to the underlying felony. The Third District Court of Appeal agreed and held that the trial court erred in denying Coicou's motion for judgment of acquittal.[1]

In Coicou, the Court held that the evidence was insufficient to support the conviction for attempted felony murder because the State was improperly permitted to use the same act, the shooting of the alleged victim, which was an essential element of the underlying robbery, to prove both the attempted felony murder and the underlying robbery offense. Thus, the same singular act of shooting the victim, which was an

[1] Additionally, Coicou argued that his conviction and sentence must be reversed and that he should be discharged due to the State's failure to prove one of the elements of attempted felony murder under section 782.051(1), Florida Statutes (2001). The Court agreed that the conviction and sentence for attempted felony murder should be reversed, but did not agree that Coicou should be discharged. Instead, the Court held that Coicou's conviction should be reduced to the permissive lesser-included offense of attempted second-degree murder. In doing so, the Court reasoned that the record evidence supported a finding that Coicou acted in a manner that was imminently dangerous to the victim and therefore supported a conviction for the lesser-included offense of attempted second-degree murder. Upon review, the Florida Supreme Court answered the question of whether the jury's verdict of guilt for attempted first degree felony murder was sufficient to allow this Court to enter a conviction for attempted second degree murder. The Supreme Court held that because the charging document and proof at trial did not support the element of a depraved mind and the jury did not find the depraved mind element of the lesser offense of attempted second degree murder, this Court was not permitted to direct entry for conviction of attempted second degree murder. Coicou v. State, 39 So.3d 237 (Fla. 2010).

essential element of the underlying robbery, could not also be considered an independent act as required by section 782.05(1) for attempted felony murder.

The subject case is distinguishable from Coicou because it does not involve the same act, i.e. the same single shot against the same victim, to prove both the attempted felony murder and the underlying felony of attempted second degree murder. Instead, there were multiple shots, and multiple victims as well. This is supported by the testimony of the many witnesses who were present in the crowd when Defendant opened fire on the victims in the crowd.

Fellon Holloway, Patrick Terry, and Randall Campbell all identified Defendant from a photo lineup as the shooter. (T. 373-74, 379, 383, 431, 531, 605-607). Fellon Holloway, who was seventeen years old and a tenth grader at the time of the offenses, said that Defendant started shooting at everybody. Everyone started to run and Defendant was shooting in the same direction that Brandon Harris (B-Dog), Sylvester Fisher (Sweet), Patrick Terry, and others were running. Holloway went a different way. He went through a path on the side of Patrick's house then turned around to watch. Holloway said Defendant shot more than twelve rounds. (T. 428-430).

Arturo Vargas testified that when the shooter obtained the gun, approximately ten shots were fired back to back and the

shooter was aiming the gun towards Patrick's house, where everybody was standing. (T. 502-504). Abdul Hall testified that he was hanging out in front of Patrick's house with Patrick, Brandon Harris, Fellon Holloway, Randall Campbell, Arturo Vargas and Keon Harris at the time of the shooting. He testified that the shooter was shooting at random, aiming directly at the crowd. He believes between ten to twenty shots were fired.(T. 508, 513-514). Randall Campell (Cambone) testified that Defendant was shooting towards the house where all the guys had run to and then one bullet went close by him. He also observed Defendant shoot at the windshield of Marcus Thomas's Monte Carlo when the car bumped into Defendant, causing him to stumble. The car lost control and went into a tree. Campbell believed Defendant fired approximately fourteen shots. (T. 531 – 536).

Jamie Chaney, testified that she has two sons, Trenard Chaney and Patrick Terry, who both live with her. She testified that as they were getting ready to have dinner, a fight occurred right in front of her house. She looked out of her house and saw someone who looked like they were aiming something and getting ready to shoot. She then heard a set of gunshots and dropped to the ground. When she heard the second set of gunshots she fell at the threshold of her doorway, where she received a graze on her right shoulder which felt like a burning sensation. Chaney

was in fear for her grandchildren, Macia and Tierra, who were Patrick and Trenard's children. Approximately three bullets entered her home. (T. 571–574).

Patrick Terry, Jamie Chaney's son, testified that he was in front of his house with a group of his friends and witnessed Defendant shooting the gun at the crowd. (T. 605, 616 – 617). Sylvester Fisher (Sweet) testified that the shooter was shooting wildly at the crowd. (T. 683–684). Isaiah Clements testified that when the shooter got the gun, he started shooting at everybody. (T. 731–732).

There can be no dispute that the subject case involves the firing of multiple gunshots. The firing of those multiple shots in an attempt to shoot certain victims constituted attempted second degree murder, and also constituted attempted felony murder as to other victims who were not the intended target of the attempted second degree murder, but were in the immediate vicinity and thus in danger for their life. The only essential element of the underlying felony was one single shot. The multitude of bullets which followed after the first single shot were in no way essential to the underlying felony and were properly considered an intentional act of the attempted felony which was not essential to the underlying felony. Accordingly, there was no error in the attempted felony murder convictions.

Thus, in contrast to Coicou, the attempted felony murders in the case at bar are permissible because they all contained an intentional act not essential to the underlying felony. Accordingly, the subject case is not in direct and express conflict with this Court's decision in Coicou.

Further, Defendant attempts to establish direct and express conflict with Coicou by pointing out a scrivener's error in the following portion of the lower court's opinion on rehearing.

> We affirm the trial court's decision because the convictions were in compliance with sections 777.04(1) and 782.04(2), Florida Statutes (2006), which state that **attempted felony murder** has two elements: "(1) the defendant intentionally committed an act that would have resulted, but did not result, in the death of someone, and (2) the act was imminently dangerous to another and demonstrated a depraved mind without regard for human life."

Id. at 1. (Emphasis added). In the above paragraph, the lower court referred to the offense of attempted felony murder by name, but then cited to the statutory sections and elements of *attempted second degree murder*, as set forth 777.04(1) and 782.04(2), Florida Statutes (2006), as opposed to the attempted felony murder statute, which is set forth in section 782.051, and the elements contained therein.

It is quite obvious that this error was in response to Defendant's motion for rehearing, which argued that the lower court's *original* opinion erroneously referred to attempted second degree murder when Defendant was in fact convicted of

attempted felony murder. It seems that the lower court attempted to correct this in its opinion on rehearing, but only corrected the reference to the *name* of the offense by changing "attempted second degree murder" to "attempted felony murder", and failed to change the corresponding statutory citations and elements to those applicable to attempted felony murder.

This scrivener's error does not cause a direct and express conflict, as it is clear from a complete reading of the opinion that the court was well aware of the fact that Defendant's convictions were for attempted felony murder and found that such convictions were proper based on the facts of the case.

II. THE COURT IS WITHOUT JURISDICTION TO ADDRESS THE ISSUE OF THE JURY INSTRUCTIONS AS IT WAS NOT RAISED OR ADDRESSED BELOW, MUCH LESS WAS IT THE BASIS OF THE COURT'S GRANTING OF JURISDICTION AND THE ISSUE IS ALSO WITHOUT MERIT. (REPHRASED).

Defendant alleges that the trial court committed fundamental error by providing jury instructions which allegedly did not comport with the State's determination of attempted second degree murder as the predicate felony for the attempted felony murder charges and allegedly did not track the language of the standard jury instruction on attempted felony murder or the attempted felony murder statute. There is no authority for the Court to address this issue, as it was not raised by Defendant in his direct appeal or addressed by the lower court.

The State recognizes that once the Court has accepted jurisdiction, it may consider other issues which have been decided by the court below and are properly raised and argued before this Court. Savoie v. State, 422 So.2d 308 (Fla.1982). However, the subject jury instructions were not objected to by Defendant at trial and the issue was not raised by Defendant in the lower court, was not addressed by the lower court, and was not raised in Defendant's brief on jurisdiction. Although this Court does have ancillary jurisdiction to entertain claims which go beyond those which provide the initial basis for jurisdiction, this Court has also routinely stated that it will

not review claims which go beyond the conflict issue which brought the case to the Court in the first place. See, e.g., Asbell v. State, 715 So. 2d 258, 258 (Fla. 1998) ("We also decline to review petitioner's second point on review as it is beyond the scope of the conflict issue."); Williams v. State, 863 So.2d 1189 (Fla. 2003); Gaines v. Sayne, 764 So.2d 578, 586 (Fla.2000) (declining to address an issue outside the scope of the conflict); Major League Baseball v. Morsani, 790 So.2d 1071, 1080 n. 26 (Fla.2001) (declining to address a claim outside the scope of the certified question in recognition that "[a]s a rule, we eschew addressing a claim that was not first subjected to the crucible of the jurisdictional process set forth in article V, section 3, Florida Constitution").

As the Court routinely declines review of issues that were not the basis for its acceptance for jurisdiction, it is even more likely to decline issues "that were either not directly addressed by the district court ... or were merely implied or cursory, at best". McEnderfer v. Keefe, 921 So.2d 597, 597 n. 1 (Fla.2006). Thus, the Court should decline to address the subject issue, which was not raised at trial or on direct appeal, was not addressed whatsoever by the lower court, and was not the basis for this Court's granting of jurisdiction.

Moreover, in the alternative, even if jurisdiction did exist, the issue is without merit, as the jury instructions did

in fact indentify *attempted* second degree murder as the predicate felony and properly tracked the applicable statutory language. The jury instructions stated as follows in connection with Count 2, and were adjusted accordingly to reflect different victims in Count 3 and 4:

ATTEMPTED FELONY MURDER

To prove the crime of attempted felony murder by Ahmad Milton, as charged in Count 2 of the Information, the State must prove the following four elements beyond a reasonable doubt:

1. Ahmad Milton **committed or attempted to commit a second degree murder** of Fellon Halloway and/or Brandon Harris and/or Sylvester Fisher and/or Randall Campbell and/or Arturo Vargas and/or Bryant Pitts and/or Abdul Hall.

2. While engaged in the **commission or attempted commission of a second degree murder**, the defendant committed, aided or abetted an intentional act that is not an essential element of the second degree murder.

3. This intentional act of shooting a firearm could have but did not cause the death of Fellon Halloway and/or Brandon Harris and/or Sylvester Fisher and/or Randall Campbell and/or Arturo Vargas and/or Bryant Pitts and/or Abdul Hall.

4. The act would have resulted in the death of Fellon Halloway and/or Brandon Harris and/or Sylvester Fisher and/or Randall Campbell and/or Arturo Vargas and/or Bryant Pitts and/or Abdul Hall except that someone prevented Ahmad Milton from killing Fellon Halloway and/or Brandon Harris and/or Sylvester Fisher and/or Randall Campbell

> and/or Arturo Vargas and/or Bryant Pitts and/or Abdul Hall or he failed to do so.

(R.462, 464, 466). (emphasis added). The defense did not pose any objection to the instructions. The instructions on count 2 – 4 were then followed by instructions for second degree murder. (R.462, 464, 466).

The attempted felony murder instruction clearly provided that the underlying felony was second degree murder *or attempted second degree murder.* The State explained at trial that, if the Defendant was found not guilty on the count one charge of second degree murder, it wanted to make clear that the attempted felony murder charges could still stand based on *attempted* second degree murder. (T. 666–667, 671).

The provided definition of second degree felony was sufficient. This Court has held that "[i]t is not necessary … to instruct on the elements of the underlying felony with the same particularity as would be required if the defendant were charged with the underlying felony." Brumbley v. State, 453 So.2d 691, 695 (Fla. 1983). The attempted felony murder instruction clearly stated that the predicate felony was second degree murder *or* attempted second degree murder. Thus, the trial court properly provided the instruction on second degree murder, and the jury could effortlessly adapt it to attempt, if that was what they so determined.

Defendant also takes issue with the fact that the instruction provides an instruction on the definition of firearm, because Defendant was not charged with the crime of attempted second degree, instead it was intended to serve solely as the predicate felony for the attempted felony murder. However, if the attempted felony murder charge alleged that Defendant committed an intentional act that is not an essential element of the second degree murder or attempted second degree murder, and that act is shooting a firearm, it is perfectly logical to give the definition of a firearm.

Lastly, Defendant argues that the attempted felony murder instruction provided to the jury failed to track the language of section 782.051(2), the attempted felony murder statute for *non-enumerated* felonies. However, Defendant was at all times charged with and convicted of attempted felony murder pursuant to section 782.051(1) (2006), which provides as follows:

> (1) 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 …

(emphasis added). Florida statute section 782.04 sets forth the various types of murder and subsection (3) defines felony murder as "[w]hen a human being is killed during the perpetration of, or during the attempt to perpetrate" any of a list of enumerated

felonies, which are set forth in a list from (a) to (r). The "murder of another human being" is designated as "(o)" on the list of enumerated felonies. Thus, the instruction did properly track the language of the applicable section of the attempted felony murder statute.

Accordingly, there is no merit to the issue, as the jury instructions adequately charged the jury on the elements of the charged offense.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRECTION IN DENYING DEFENDANT'S MOTION TO DISMISS THE ATTEMPTED FELONY MURDER COUNTS WHERE DEFENDANT COMMITTED THE INTENTIONAL ACT OF SHOOTING, WHICH WAS NOT AN ESSENTIAL ELEMENT OF THE PREDICATE FELONY OF ATTEMPTED SECOND DEGREE MURDER, WHERE HE FIRED MULTIPLE GUNSHOTS IN CONNECTION WITH EACH OF COUNTS II - IV. (REPHRASED).

Defendant argues that the trial court abused its discretion in denying his motion to dismiss the attempted felony murder counts for allegedly failing to contain an intentional act that is not an essential element of the underlying felony, attempted second degree murder. Defendant's argument is without merit.

In his oral motion to dismiss, Defendant requested that the court strike the attempted felony murder charges set forth in Counts II – IV, arguing that the reference to the predicate felony "discharging a destructive device and/or murder of another human being" was improper for being set forth in the alternative and for failing to track the language of the attempted felony murder statute because an attempted murder could not be the predicate. (R. 231–233, T. 8–9). The State responded that the information did track the language of the attempted felony murder statute, as set forth in section 782.051. The attempted felony murder statute refers to the

statute for actual felony murder, which sets forth the enumerated felonies in section 782.04. "[M]urder of another human being" is enumerated in subsection (o) of section 782.04(3). Accordingly, the motion was denied. (T. 12).

The State subsequently moved to amend the Information by striking the "discharging a destructive device" portions of Counts II – IV, to which defense counsel had no objection. (T. 583 – 584). However, the defense again objected to attempted murder as a predicate to attempted felony murder and argued that there was "no additional act that is not an essential element" of the attempted felony murder. (T. 584–586). The trial court responded that "[t]here are many ways of committing the murder. They are mentioned in the Information, shooting with a firearm. That is not an essential element of the second degree murder." (T. 585).

Attempted felony murder, as set forth in Florida Statute section 782.051 (2006), provides as follows:

> (1) 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 …

(emphasis added). Defendant was convicted of attempted felony murder with attempted second degree murder as the predicate felony. Attempted second-degree murder, as set forth in Florida

Statute section 777.04(1) (2006), which defines attempt, and Florida Statute section 782.04(2)(2006) has two elements: "(1) the defendant intentionally committed an act that could have resulted, but did not result, in the death of someone, and (2) the act was imminently dangerous to another and demonstrated a depraved mind without regard for human life." State v. Florida, 894 So.2d 941 (Fla.2005), overruled in part by Valdes v. State, 3 So.3d 1067 (Fla.2009). The use of a firearm is a third element that increases the penalty for the crime. Id. at 946.

Clearly, the intentional act is shooting. Defendant argues that the act of shooting is an essential element of the predicate felony of attempted second degree murder and therefore cannot constitute an intentional act that is not an essential element of the underlying felony, as required by F.S. section 782.051(1), the attempted felony murder statute. However, as explained supra, as opposed to Coicou, Defendant in the case at bar shot more than one bullet. This, and not the named victims of the charged offense and the underlying felony, is the dispositive fact. The can be no dispute that the crowded area and nearby house were sprayed with multiple bullets, as testified to by the many witnesses present, as also set forth supra. Accordingly, after a single bullet was discharged at a victim of each of the attempted second degree murders, the remaining bullets discharged by Defendant were not essential to

attempted second degree murder. and thus satisfied the requirement of an intentional act that is not an essential element of the underlying felony.

Furthermore, based on the depositions and the testimony at the January 30, 2007, Arthur Hearing, the defense was fully aware of the fact that Defendant shot multiple bullets at a crowd of people and a nearby home. (R. 37–119, T. 668). The allegations and proof requirements of this intentional act that is not an essential element of the underlying felony were supported by the facts of the case and established as to every charge of attempted felony murder. Based on the most recent amendment to the information, Count II of the Information alleged as follows:

> Defendant did unlawfully and feloniously perpetrate or attempt to perpetrate a felony, to wit: murder of another human being, to wit: Fellon Holloway and/or Brandon Harris and/or Sylvester Fisher and/or Randall Campbell and/or Arturo Vargas and/or Bryant Pitts aka "Dooney" and did commit, aid or abet an intentional act that is not an essential element of the felony and that could, but does not cause the death of another, to wit: Fellon Holloway and/or Brandon Harris also known as "B-Dog" and/or Sylvester Fisher also known as "Sweet" and/or Randall Campbell also known as "Cam Bone" and/or Arturo Vargas also known as "Forrest" and/or Bryant Pitts also known as "Dooney" and/or Abdul Hall, by SHOOTING WITH A FIREARM, and during the course of the commission of the offense, said defendant discharged a firearm or destructive device, in violation of 782.051 and 775.087 and s. 777.011, ...

(R. 230, T. 666-670).

Consistent with the agreed to amendment, each of the remaining counts and the jury instructions thereon also indicated that the applicable victims of the attempted felony murder were the same as the victims for the predicate felony of attempted second degree murder. (666-669). While Defendant was attempting to shoot at people outside of the home, several bullets approached the house and even entered the house, and caused the occupants to become victims as well. Thus, for Counts III and IV, the names of the victims of the attempted felony murder are adjusted accordingly in order to reflect the names of the people inside the house who were victims of the attempted felony murder as result of the extraneous shots fired by Defendant. (R. 231-232, R. 464, 466, T. 1125-1128, 1130-1132).

For each of the potential victims listed as a victim of the predicate felony of attempted second degree murder, no more than one shot could be an essential element of attempted second degree murder. Thus, the numerous shots which followed subsequent to the first shot were intentional acts that were not essential for the attempted second degree murder of any of the listed victims of attempted second degree murder in counts II - IV. This applies to Count IV as well, even though it indicates that Jamie Chaney was the sole victim of the attempted felony

murder and also the only victim of the predicate felony of attempted second degree murder.

As set forth in the following issue, in cases of felony murder charges, this Court has held that "[i]t is not necessary … to instruct on the elements of the underlying felony with the same particularity as would be required if the defendant were charged with the underlying felony." Brumbley v. State, 453 So.2d 691, 695 (Fla. 1983). Likewise, the Court has repeatedly rejected claims that it is error for a trial court to allow the State to pursue a theory of felony murder where the indictment gave no notice of the theory or the underlying felony. Gudinas v. State, 693 So.2d 953, 964 (Fla. 1997). With regard to the underlying felony of a felony murder charge, the Court has held that instead of the charging document providing the notice required by due process of law, such notice is provided by the reciprocal rules of discovery and the enumeration of felonies is section 782.04(1)(a)(2). Kearse v. State, 662 So.2d 677, 682 (Fla. 1995). Thus, the State was not legally required to provide the names of the victims of the underlying felony, attempted second degree murder. Even though the State did provide the same name of Jamie Chaney as the victim of the underlying attempted second murder in Count IV, the jury was not precluded from considering any of the many other victims as the potential victim of the underlying felony in Count IV. For the same

reason, Defendant's similar arguments regarding confusion over the same victims for the underlying felony as well as the attempted felony murder in Counts II and III and that the insertion of "and/or" between the names are likewise without merit. The propriety of the subject charges is not impacted by the various arguments as to the listing of the victims. Instead, the propriety of the charges is established by the multiple gunshots.

Additionally, because murder is an act that results in the victim's death, it can logically only be committed once against a single victim. However, because the victim of an *attempted* murder does not die, attempted murder can be committed more than once against the same victim. Thus, because the instant case involves *multiple* gunshots, even if Jamie Chaney was the only victim considered by the jury, Count IV also contains an intentional act that is not an essential element of the attempted murder. This logic applies to the other counts as well.

Tucker v. State, 857 So.2d 978 (Fla. 4th DCA 2003) and Coicou stand for the proposition that an attempted felony cannot be the predicate felony for attempted felony murder where the same act is committed on the same victim. Based on the undisputed fact that Defendant discharged multiple gunshots at the crowd, the instant case is distinguishable from Tucker and

Coicou. (R. 231-232, R. 464, 466, T. 1125-1128, 1130-1132). Instead, the theory recognized in Dallas v. State, 898 So.2d 163 (Fla. 4th DCA 2005), is more appropriate. In Dallas, the defendant was charged with attempted felony murder with robbery or murder, or the attempts thereof, as the underlying felony, and had discharged a firearm as an act that was not an essential element of the underlying felony. On appeal, defendant argued that discharge of the firearm was an essential element of the underlying crime of attempted robbery with a firearm because the information and the verdict indicated that the firearm was discharged during the commission of the crime. The fourth district's opinion pointed out that discharge of a firearm was not an element listed in the statute of either underlying felony, i.e. attempted robbery with a firearm or attempted murder. Furthermore, the defendant shot and wounded the victim *after* the victim placed the wallet on the car seat and ran. At the point in time when the shots were fired, the attempted robbery was completed. The court found that the subsequent weapon discharge constituted a wholly separate act. Accordingly, the court concluded that the act of shooting the victim was not an element of the attempted robbery and affirmed the judgment and sentence for attempted felony murder.

In reaching its holding, the court in Dallas distinguished Coicou v. State, 867 So.2d 409 (Fla. 3d DCA 2003), which also

involved attempted felony murder with robbery as the underlying felony. In Coicou, the Court held that the State failed to prove attempted felony murder because the same acts of shooting were essential to both the robbery charge and the attempted felony murder charge, as the force used in Coicou to effect the robbery was the shooting. Thus, the act was committed in the course of the taking. However, in Dallas, the victim gave up his property in response to the *display* of the weapon, a blow to his face, and the forceful demands on the victim. Accordingly, the subsequent weapon discharge constituted a wholly separate act.

Pursuant to the rationale of Dallas, the first shot in the case at bar constituted an essential element of the underlying felony of attempted second degree murder, but the subsequent acts of shooting were not essential to the underlying felony because the attempted second degree murder was completed with only one shot. The information clearly alleged all of the elements of attempted felony murder. The information alleged that the particular act of shooting was not an essential to the underlying felony. (R. 230-232). The fact that there were multiple shots fired by Defendant was clearly proven at trial as Arturo Vegas (T. 500-505); Abdul Hall (T. 513-514); Randall Campbell (T. 531-536);Patrick Terry (T. 606); Sylvester Fisher (T. 682-683); Isaih Clements (T. 731-734) and Jaime Chaney (T.

571-574) all testified that multiple shots were fired. The elements of attempted felony murder were properly alleged and proven for Counts II - IV. Thus, the convictions were properly affirmed, as the intentional act that is not an essential element of the underlying felony was properly alleged and established as to every charge of attempted felony murder.

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING THE STATE'S FINAL AMENDMENT TO THE INFORMATION, OVER DEFENSE COUNSEL'S OBJECTION, WHERE THE INFORMATION WAS NOT DEFECTIVE AS IT ALLEGED THE ESSENTIAL ELEMENTS AND FACTS OF ATTEMPTED FELONY MURDER IN COUNTS TWO THROUGH FOUR. (REPHRASED).

Defendant argues that the information was defective because the degree of attempted murder, which was the predicate felony, was never specified in writing and the hand written notations on the final amended versions of Counts III and IV referred to the names of alleged victims who, according to the jury instructions, were pertinent solely to Count II. Defendant's argument is without merit.

Defendant argued that knowledge of the essential elements of the underlying felony was necessary to the defense because in order to prove attempted felony murder, the State is required to prove an act that is not an essential element of that felony. It is true that the information was amended several times right up to and during trial. However, at all times, "murder" was listed as the predicate felony in connection with the felony murder charge. Moreover, this Court has held that in cases of felony murder charges, "[i]t is not necessary … to instruct on the elements of the underlying felony with the same particularity as would be required if the defendant were charged with the

underlying felony." Brumbley v. State, 453 So.2d 691, 695 (Fla. 1983). Likewise, the Court has repeatedly rejected claims that it is error for a trial court to allow the State to pursue a theory of felony murder where the indictment gave no notice of the theory or the underlying felony. Gudinas v. State, 693 So.2d 953, 964 (Fla. 1997). With regard to the underlying felony of a felony murder charge, the Court has held that instead of the charging document providing the notice required by due process of law, such notice is provided by the reciprocal rules of discovery and the enumeration of felonies is section 782.04(1)(a)(2). Kearse v. State, 662 So.2d 677, 682 (Fla. 1995).

Nevertheless, the argument set forth in Defendant's third issue with regard to the State being required to prove an act that is not an essential element of the felony would not be impacted by the alleged defect, because every form of the information included the act of shooting a firearm. The degree of the murder in no way impacted on the act that was the basis of the attempted murder, i.e. the shooting of a firearm.

The State may substantively amend an Information during trial, even over the objection of the defendant, unless the defendant is able to show prejudice. State v. Anderson, 537 So.2d 1373, 1375 (Fla. 1989). Defendant alleges that his trial preparation and questioning of witnesses would have been

different if he knew the predicate charge was attempted second degree murder as opposed to some other form of murder. However, he cites to no specific examples of how such a different would have been crucial to his defense. If the predicate charge was murder, but then changed to robbery, then the trial preparation would have been detrimentally impacted. However, the variation in the case at bar did not cause the information to be defective, nor did it prejudice Defendant in his defense.

At the time of defense counsel's October 29, 2008, objections to the final amendments to the Information, defense counsel acknowledged being fully aware of the contents of the depositions. (T. 668). Additionally, a thorough overview of the facts was set forth at the January 30, 2007, Arthur Hearing. (R. 37 – 119). Thus, Defendant was clearly on notice of the charges, facts, and theories of the case for a substantial time prior to the amendments. The State's amendments to the information during trial did not impact Defendant's ability to dispute the State's requirement to prove an act that is not an essential element of the felony in connection with the felony murder charges. Even though general "murder" was indicated in the information, every form of the information included the act of shooting a firearm as the act and it was always known that multiple gunshots were fired at the crowed of people.

Defendant further alleges that the handwritten notations on Counts III and IV of the final amended information referred to the names of the victims who, according to the jury instructions, were only listed as victims in Count II. (R. 462, 464, 466). This issue was never raised by Defendant below, was not addressed in the lower court's opinion and was not raised as the basis for this Court's jurisdiction. The State recognizes that once the Court has accepted jurisdiction, it may consider other issues which have been decided by the court below and are properly raised and argued before this Court. Savoie v. State, 422 So.2d 308 (Fla.1982). Although this Court does have ancillary jurisdiction to entertain claims which go beyond those which provide the initial basis for jurisdiction, this Court has also routinely stated that it will not review claims which go beyond the conflict issue which brought the case to the Court in the first place. See, e.g., Asbell v. State, 715 So. 2d 258, 258 (Fla. 1998) ("We also decline to review petitioner's second point on review as it is beyond the scope of the conflict issue."); Williams v. State, 863 So.2d 1189 (Fla. 2003); Gaines v. Sayne, 764 So.2d 578, 586 (Fla.2000) (declining to address an issue outside the scope of the conflict); Major League Baseball v. Morsani, 790 So.2d 1071, 1080 n. 26 (Fla.2001) (declining to address a claim outside the scope of the certified question in recognition that "[a]s a rule, we eschew addressing a claim that

was not first subjected to the crucible of the jurisdictional process set forth in article V, section 3, Florida Constitution").

As the Court routinely declines review of issues that were not the basis for its acceptance for jurisdiction, it is even more likely to decline issues "that were either not directly addressed by the district court ... or were merely implied or cursory, at best". McEnderfer v. Keefe, 921 So.2d 597, 597 n. 1 (Fla.2006). Thus, the Court should decline to address the subject issue, which was not raised at trial or on direct appeal, was not addressed whatsoever by the lower court, and was not the basis for this Court's granting of jurisdiction.

In the alternative, even if the Court did consider the subject issue, it is without merit. For one, the Information does not go to the jury. Therefore, the handwritten names of victims in counts III and IV would not even have been seen or considered by the jury. Furthermore, the handwritten addition of these names was nothing more than harmless surplusage. Lastly, because the jury heard evidence that those victims of the underlying felony for Count II were in the same crowded area where the bullets were aimed in Counts III and IV, the jury could have considered them victims in the underlying felony for Count III and IV as well.

Accordingly, the Information was not defective as the underlying felony was not required to be specifically alleged, but was clearly and sufficiently alleged nonetheless, and the amendments to the Information regarding the degree of the murder which was the underlying felony and the handwritten notations as to the victims of the underlying felony did not prejudice Defendant.

V. THE CONVICTIONS FOR ATTEMPTED FELONY MURDER AND SHOOTING INTO A DWELLING DO NOT VIOLATE DOUBLE JEOPARDY AS EACH OF THE TWO OFFENSES CLEARLY CONTAIN STATUTORY ELEMENTS THAT THE OTHER DOES NOT, THE OFFENSES ARE FOUND IN SEPARATE STATUTORY PROVISIONS, ARE NOT AGGRAVATED FORMS OF THE OTHER, AND ARE NOT MERE DEGREE VARIANTS OF THE SAME OFFENSE. (REPHRASED).

Defendant alleges that his convictions for attempted felony murder and shooting into a dwelling violate double jeopardy. Defendant's argument is without merit.

The State recognizes that once the Court has accepted jurisdiction, it may consider other issues which have been decided by the court below and are properly raised and argued before this Court. Savoie v. State, 422 So.2d 308 (Fla.1982). Although this Court does have ancillary jurisdiction to entertain claims which go beyond those which provide the initial basis for jurisdiction, this Court has also routinely stated that it will not review claims which go beyond the conflict issue which brought the case to the Court in the first place. See, e.g., Asbell v. State, 715 So. 2d 258, 258 (Fla. 1998) ("We also decline to review petitioner's second point on review as it is beyond the scope of the conflict issue."); Williams v. State, 863 So.2d 1189 (Fla. 2003); Gaines v. Sayne, 764 So.2d 578, 586 (Fla.2000) (declining to address an issue outside the scope of the conflict); Major League Baseball v. Morsani, 790 So.2d 1071,

1080 n. 26 (Fla.2001) (declining to address a claim outside the scope of the certified question in recognition that "[a]s a rule, we eschew addressing a claim that was not first subjected to the crucible of the jurisdictional process set forth in article V, section 3, Florida Constitution"). Thus, the Court should decline to address the subject issue, as it was not the basis for this Court's granting of jurisdiction.

In the alternative, even if jurisdiction did exist, the issue is without merit. Attempted felony murder, as set forth in Florida Statute section 782.051 (2006), provides as follows:

> (1) 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 …

The offense of shooting into a dwelling, as set forth in Florida Statute section 790.19 (2006), ... has three elements: (1) the defendant shot a firearm, (2) at, within, or into a public or private building, (3) wantonly or maliciously.

In State v. Smith, 547 So.2d 613, 616 (Fla.1989), the Court recognized the legislature's intent to impose multiple punishments for separate offenses even if the offenses are based on only one act. The court relied on section 775.021(4)(b),

Florida Statutes (1991),[2] which provides that Florida's legislature intends to punish each offense committed during one criminal episode, unless the offenses require identical elements of proof, are degrees of the same offense, or if the elements of the lesser offense are subsumed within the greater offense. Id. at 615-16.

In State v. Reddick, 568 So.2d 902 (Fla. 1990) the Court held that separate convictions for homicide and shooting into an occupied dwelling were proper where defendant fired shots into a house that was occupied by six people, killing one occupant with one shot and wounding another with another shot. Similarly, in Valdes v. State, 3 So.3d 1067 (Fla. 2009), the Florida Supreme Court held that defendant's convictions for discharging a firearm from a vehicle within 1000 feet of a person and for shooting into an occupied vehicle, which arose out of the same criminal transaction, were not double jeopardy violations where the offenses were found in separate statutory provisions, were not aggravated forms of the other or degree variants of the same offense.

Thus, pursuant to section 775.021(4)(b), Defendant's convictions for attempted felony murder and shooting into a

[2] The test set out in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932) and commonly referred to as "the Blockburger test" is codified in section 775.021(4)(b).

dwelling do not violate double jeopardy, as each of the two offenses clearly contain statutory elements that the other does not, the offenses are found in separate statutory provisions, are not aggravated forms of the other, and are not mere degree variants of the same offense. Accordingly, the lower court correctly held that there was no double jeopardy violation.

CONCLUSION

Based on the foregoing, the Third District's opinion should be affirmed, as the issue is clearly without merit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Respondent On The Merits was furnished electronically to Donna Greenspan at Solomon at Donna@SolomonAppeals.com on this 13th day of September, 2013.

_____/s/_____
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CERTIFICATE REGARDING FONT SIZE AND TYPE

I hereby certify that the foregoing Brief has been typed in Courier New, 12-point type, in compliance with the Florida Rules of Appellate Procedure.

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