

ATTEMPTING THE UNINTENDED: THE PROBLEMS WITH RECOGNIZING AN ATTEMPTED HOMICIDE OFFENSE THAT DOES NOT REQUIRE PROOF OF AN INTENT-TO-KILL

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I. INTRODUCTION AND SUMMARY: THE ATTEMPT LOGIC

Start with a simple syllogism: (1) The mental element of the Florida “offense of criminal attempt”² is an “inten[t] to commit [an] offense”;³ (2) it is logically impossible to intend to do something that one does not intend to do, such as intend to cause an unintended harm; so therefore (3) “[t]here is no such criminal offense as an attempt to achieve an unintended [harm],”⁴ because *it is logically impossible to intend, and thus to attempt, to commit an offense that has an element of causing–unintended-harm*. Call this *the attempt logic*.

Most courts accept this logic as to homicide offenses, concluding that one cannot attempt to commit a homicide offense unless one intends to kill another.⁵ As one court put it, “An attempt, by nature, is a failure to accomplish what one *intended* to do. Attempt means to try; it means an effort to bring about a desired result.”⁶ “The concept of attempt seems necessarily to involve the notion of an intended consequence, for when one attempts to do something one is endeavoring or trying to do it. Hence, an attempt requires . . . an intended[] consequence.”⁷

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2. FLA. STAT. § 777.04(1) (2015).

3. *Brooks v. State*, 762 So. 2d 879, 897 (Fla. 2000).

4. *People v. Viser*, 343 N.E. 2d 903, 910 (1975).

5. See FLA. STAT. §§ 782.02 and 782.03 (2015). *Homicide* is not, in itself, illegal; it might be justifiable or excusable. This article will use *homicide* to refer to the forms of unlawful homicide. *Id.*

6. *Keys v. State*, 766 P.2d 270, 273 (Nev. 1988).

7. *State v. Kimbrough*, 924 S.W. 2d 888, 890 (Tenn. 1996); see *Braxton v. United States*, 500 U.S. 344, 351, n.* (1991) (“Although a murder may be committed without an intent to kill, an attempt to commit murder requires a specific intent to kill.”) (citations omitted); see generally *Brown v. State*, 790 So. 2d 389, 396–97 (Fla. 2001) (Harding, J., dissenting) (discussing the need for requisite intent in attempt cases); *Dominguez v. State*, 840 N.W. 2d 596, 601 (N.D. 2013) (discussing the position of a majority of courts regarding intent in attempt cases, including attempted murder). See generally Jeffrey F. Ghent, *What Constitutes Attempted Murder*, 54 A.L.R. 3d 612, §3 (1973) (“Most, if not all, of the cases . . . at least implicitly support the general

But in *Brown*, a sharply divided (4–3) Florida Supreme Court recognized an offense of attempted second-degree murder with no intent-to-kill element, which occurs when one “commit[s] an act which would have resulted in the death of another except that someone prevented [one] from killing . . . or [one] failed to do so”⁸ A few years later, a unanimous Florida Supreme Court recognized an attempted manslaughter offense with no intent-to-kill element, which also requires proof that one committed an act that would have resulted in death, except that someone prevented one from killing or one failed to do so.⁹ This article primarily addresses the logic of *Brown*, although essentially the same arguments apply to *Williams*.

The *Brown* Court did not consider two arguments that would compel the conclusion that the Florida attempt statute cannot be applied to second-degree murder. First, *Brown* conflicts with *State v. Gray*, 654 So. 2d 552 (Fla. 1995), and with *Knight v. State*, 28 So. 759 (Fla. 1900) and its

rule that the fundamental elements of the crime of attempted murder are a specific intent to commit murder and an overt act in furtherance of that object.”); WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 11.3(a) (2d ed. 2012) (explaining the requirement for intent to commit a crime when charged with the attempt of the crime).

Where a crime is defined in terms of acts causing a particular result, a defendant charged with attempt must have specifically intended to accomplish that criminal result Murder is a result-oriented crime which cannot be proven without first establishing the ‘result element’ that a person is dead [A] person cannot be convicted of attempted murder if that person did not intend the result of death.

Brown, 790 So. 2d at 396.

A majority of other jurisdictions [conclude] . . . that attempt requires an intent to complete the commission of the underlying offense or to attain the result of the underlying offense . . . and that the offense of attempted murder under circumstances manifesting an extreme indifference to the value of human life does not exist . . . [a] majority of courts . . . have also held the offense of attempted murder requires an intent to kill and the offense does not exist if the underlying murder offense does not require a specific intent to kill.

Dominguez, 840 N.E.2d at 601.

Some crimes, such as murder, are defined in terms of acts causing a particular result plus some mental state which need not be an intent to bring about that result [O]n a charge of attempted murder it is not sufficient to show that the defendant intended to do serious bodily harm, that he acted in reckless disregard for human life, or that he was committing a dangerous felony. . . . [B]ecause intent is needed for the crime of attempt, . . . attempted murder requires an intent to bring about that result described by the crime of murder (i.e., the death of another).

LAFAVE, *supra*.

8. *Brown*, 790 So. 2d at 390.

9. *Williams v. State*, 123 So. 3d 23, 27 (Fla. 2013); *In re Standard Jury Instructions—Instruction 6.6*, 132 So. 3d 1124, 1126 (Fla. 2014). Although the *Williams* Court did not list the elements of attempted manslaughter, the Court later approved standard jury instructions that adopted the same *would-have-resulted-in-death* element announced in *Brown*. *Id.*

progeny. Second, recognizing an offense of attempted second-degree murder with no intent-to-kill element causes serious problems, including the same problem that led the *Gray* Court to hold that Florida would no longer recognize an offense of attempted felony murder.

A. THE CONFLICT IN THE CASE LAW

The *Gray* Court accepted the attempt logic when it receded from *Amlotte v. State*¹⁰ and held that Florida would no longer recognize an offense of attempted felony murder. The problem in *Amlotte* was that it recognized an attempted homicide offense with no intent-to-kill element, which the *Gray* Court said is “troublesome” because that creates “difficulties with determining what constitutes an ‘overt act’ that could, but does not, cause [another’s death].”¹¹

But the *Brown* Court rejected the attempt logic and concluded that one *can* attempt to unintentionally kill another. *Brown* and *Gray* conflict.¹² *Brown* also conflicts with *Knight, et al.*, which adopted the attempt logic with regard to the Florida offense of assault-with-intent-to-commit-a-felony (“AWIC”).¹³ Beginning with *Knight*, many Florida cases held that the offense of AWIC-second-degree murder has an intent-to-kill element because it is logically impossible to assault another with the intent to unintentionally kill the other.

The AWIC offense is quite similar to the attempt offense. One can commit an attempt without also committing an assault, which means that all attempts-to-commit-a-felony are not necessarily also AWICs. But all AWICs are also attempts, because the assault element of an AWIC offense is the overt act that proves the attempt offense. In effect, an attempt is a type of lesser-included-offense of an AWIC; put another way, an AWIC is a specialized version of an attempt, in the way that a statute that expressly outlawed killing another with a firearm would be a specialized version of murder.

10. *Amlotte v. State*, 456 So. 2d 448, 449 (Fla. 1984), *receded from*, *Gray*, 654 So. 2d at 553.

11. *Id.* at 554.

12. As discussed in Section V.A. below, the *Amlotte could-have-caused-death* test and the *Gray would-have-resulted-in-death* test are essentially identical. This article will use the *would-have* test in its general discussion of the issues addressed here.

13. FLA. STAT. § 784.021(1)(b) (2015) (defining “aggravated assault” in part as an assault “[w]ith an intent to commit a felony.”); FLA. STAT. § 784.04 (1973); Ch. 74–383, § 18, Fla. Laws. The AWIC offense is currently codified as a form of aggravated assault. Before 1974, it was codified as its own separate offense. FLA. STAT. § 784.021(1)(b).

Given this, the mental elements for attempted-homicides and AWIC-homicides should be the same. But with second-degree murder (and manslaughter) in Florida, they are not; intent-to-kill is an element of the AWIC offense but not of the attempt offense. *Brown* conflicts with the AWIC cases.

B. THE PROBLEMS CREATED BY REJECTING THE ATTEMPT LOGIC

The main problem with rejecting the attempt logic for attempted (and AWIC) homicide offenses is that there is no principled way to determine what acts that *would-have-but-did-not-cause-death* prove the attempt offense. Without an intent-to-kill element, to determine whether an act proves an attempted homicide we must ask whether death *would-have-resulted if the facts were different both from what they actually were and from what the defendant intended*. We cannot consistently apply such a vague and hypothetical test.

Further, any set of facts that might prove attempted second-degree murder would, if they occurred during a qualifying felony, also prove the *Amlotte* offense of attempted felony murder. But the problem with *Amlotte* arose, not because the acts occurred during a felony, but because the attempted felony murder offense had no intent-to-kill element. The same problems that prompted *Gray* to recede from *Amlotte* will occur with attempted second-degree murder (because it also has no intent-to-kill element). The problems noted in *Gray* are not solved simply by renaming the offense from attempted felony murder to attempted second-degree murder.

Rejecting the attempt logic causes other problems as well. It affects the statutory abandonment defense to the Florida attempt offense, which allows one to “un-commit” an attempt offense already committed by abandoning the original intent to commit the completed offense.¹⁴ But with attempted homicide offenses with no intent-to-kill element, there is nothing to abandon. If one never intended to kill, then the commission of the *actus reus* element of the attempted homicide offense fulfills the original intent (which was to commit a different offense, such as aggravated battery). If

14. FLA. STAT. § 777.04(5)(a) (2015) (“It is a defense to a charge of criminal attempt . . . that, under circumstances manifesting a complete and voluntary renunciation of his or her criminal purpose, the defendant: (a) [a]bandoned his or her attempt to commit the offense or otherwise prevented its commission[.]”).

there is no intent to abandon once the attempt *actus reus* is committed, then the defense will not be available for attempted second-degree murder.¹⁵

Or we might say that the abandonment defense is *always* available for attempted second-degree murder, at least when it is clear that one voluntarily decided not to kill. In such cases, there *was* something left to do—kill—and one voluntarily decided not to do that. But now we are saying that the defense is established because one abandoned the intent to do something that one never intended to do; and the intent to do that something (that one never intended to do) is not an element of the crime that one allegedly attempted. How can this be considered an abandonment of the crime attempted?

There will also be problems if we try to apply the reasoning of *Brown* to attempts to commit other offenses with unintended-harm elements, such as DUI-manslaughter; or to the other inchoate offenses in section 777.04, Florida Statutes (conspiracy, solicitation), which have the same intent-to-commit-crime element as the attempt offense. If we say one can intend to cause an unintended harm for one offense, then there is no reason not to apply that same logic to other offenses with unintended harm elements. For instance, could one be charged with multiple counts of attempted DUI-manslaughter if one drove drunk and crashed the car (although causing no deaths, or even injuries) because the passengers in one's own car, or other motorists, passengers, or pedestrians in the area, would-have-been-killed if the crash had occurred in a different fashion?

Finally, the rejection of the attempt logic in these cases is a symptom of a larger problem in Florida law: The failure to properly analyze the elements of criminal offenses. Similar flawed reasoning caused three Florida trial courts to erroneously conclude that a 2002 amendment to the Florida drug statutes violated due process principles because it rendered all Florida drug offenses invalid “strict-liability offenses,” rulings which caused some mischief in the Florida legal system.¹⁶ Thus, this analytical flaw has caused, and may cause in the future, other problems in Florida criminal law.

15. FLA. STAT. § 782.04 (2015); *Brown v. State*, 790 So. 2d 389, 390 (Fla. 2001); FLA. STD. JURY INSTR. (Crim.) § 6.4. Indeed, as discussed in Section IV.B., below, the Florida offense of attempted second-degree murder has the same *actus reus* element as the completed offense: The commission of “any act imminently dangerous to another and evincing a depraved mind regardless of human life.” FLA. STAT. § 782.04. The only difference between the two offenses is whether someone is unintentionally killed by D’s acts. *Id.*

16. See Richard Sanders, *The Knowledge Element In Drug Cases: Some Final Thoughts On Shelton And Adkins*, 88 FLA. B. J. 40 (July/Aug. 2014).

C. OUTLINE OF THE ARTICLE

These problems arose in Florida because, to determine the mental element of an attempted homicide offense, courts analyzed the issues with offense analysis (including the perceived distinction between specific and general intent) rather than element analysis. Offense analysis, which assumes that all criminal offenses have a singular physical element and a singular mental element, cannot account for offenses with multiple physical and mental elements (which occurs with many offenses). Element analysis recognizes that each physical element of an offense has its own mental element, and the mental element may be different for each physical element (*e.g.*, intentionally committing an act while also recklessly ignoring the possible harm it might cause).

Section II of this article discusses these two forms of analysis in general and the problems with the specific-intent/general-intent distinction in particular. This distinction was judicially created in the nineteenth century to determine the availability of an intoxication defense. It was created for reasons of social policy rather than logic, and as a matter of logic, it is “an artificial irrationality”¹⁷ Unfortunately, Florida courts used this flawed distinction to determine the mental element of the attempt offense (a use unrelated to the use for which the distinction was originally created).

Section III discusses the elements of the Florida attempt offense. Section 777.04(1) creates a singular *offense of criminal attempt*, not multiple offenses of attempted robbery, attempted burglary, *etc.* The mental element(s) of the offense attempted will vary, but the mental element of the attempt offense itself (which is simply the intent-to-commit-an-offense) does not (or at least should not) vary.¹⁸

The Florida cases do not recognize this point. This will be seen in Section IV, which analyzes the cases that address the mental element of AWIC-homicides and attempted homicides. The problem in these cases is that, using offense analysis, the courts (1) combined the *actus reus* and caused-death elements of homicide offenses into a single physical element (called *act*) with a singular mental element; and then (2) called that singular

17. *Linehan v. State*, 476 So. 2d 1262, 1267 (Fla. 1985) (Shaw, J., dissenting).

18. This article will use the commonly used, but misleading phrases like “the offense of attempted second-degree murder” (or simply “attempted second-degree murder”), rather than the more accurate, but more cumbersome phrases like “the offense of criminal attempt, with second-degree murder being the offense attempted.”

mental element either general intent or specific intent, depending on whether or not one intended to kill.

The problem with this approach is that the binary concept of specific-general intent cannot account for offenses in which one intentionally commits an act and also recklessly or negligently ignores its unintended consequences. In the specific-general system, offenses with unintended-harm elements are classified as general-intent offenses, which implies that they have no mental element other than “the intent required to do the *actus reus*”¹⁹ But offenses with unintended-harm elements *do* have a second mental element, the one that applies to the caused-unintended-harm element. When we overlook this second mental element, we overlook the attempt logic. This is what happened in the Florida cases, when courts turned an offense (the attempt offense) that should have a singular mental element (intent-to-commit-offense) into an offense that has two possible mental elements (specific intent or general intent).

Section V discusses the problems caused by rejecting the attempt logic for homicide offenses, which were summarized above. The article concludes that the Florida Supreme Court should recede from *Brown* (and also from the attempted manslaughter case of *Williams*) and adopt the use of element analysis for future cases.

II. ELEMENT ANALYSIS, OFFENSE ANALYSIS, AND THE ARTIFICIALLY IRRATIONAL DISTINCTION BETWEEN SPECIFIC AND GENERAL INTENT

There are two basic ways to analyze the elements in criminal offenses, element analysis and offense analysis. Element analysis is as follows: Criminal offenses contain five generic elements: *actus reus* (*i.e.*, what the defendant actually did), mental element, harmful result, causation, and attendant circumstances (*e.g.*, the victim is a certain age; the building at issue is a dwelling). All offenses do not have all five elements; but each physical element has its own mental element, which “[may] be different for different [physical] elements”²⁰ There are five basic mental elements: intent, knowledge, recklessness, negligence, and *no element* (*i.e.*, strict liability as to that physical element).²¹

19. *Brown*, 790 So. 2d at 391 (Harding, J., dissenting).

20. *Staples v. United States*, 511 U.S. 600, 609 (1994); *accord*, *Liparota v. United States*, 471 U.S. 419, 423 n.5 (1985) (“different [physical] elements . . . can require different mental elements.”).

21. *E.g.*, FLA. STAT. § 827.03(2)(b) (2015) (stating other mental elements, such as willful,

The *actus reus* element of any offense has an inherent mental element of intent or knowledge. It is axiomatic in criminal law that we punish people only for their *intentional* volitional acts and not for physical movements that are coerced or uncontrollable.²² To commit any crime, one must intentionally or knowingly *do something*. “Intentionally committed an act” is redundant because an act, by definition in this context, is something intentionally done, something “arising from and performed pursuant to a single design or purpose.”²³ Even with offenses that punish omissions, it must be proven that one intentionally or knowingly did the predicate act that triggered the requirement to do the further act that one failed to do. With many omission-based offenses, it must also be proven that one knew of the mandatory duty that one failed to do.²⁴

The recklessness and negligence mental elements apply to either a caused-harm element or an attendant-circumstance element. If causing harm is an element of an offense, the State must prove one committed the act and either: (1) intentionally or knowingly caused the harm; or (2) recklessly or negligently ignored the possibility that the harm might occur. If the existence of an attendant circumstance is an element of the offense, the State must prove one either (1) intended or knew that the circumstance existed; or (2) recklessly or negligently ignored the possibility that the circumstance existed.

culpable negligence, etc.); see generally Paul H. Robinson & Jane Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 692–96 (1983); 1 WAYNE R. LAFAVE, SUBST. CRIM. L. § 5.1 (2d ed. 2014). Even if there are any real differences in such subtleties as “culpable negligence” vs. “recklessness” or “willful” vs. “intentional,” each physical element will still have its own mental element, regardless of how many potential mental elements there are.

22. See LAFAVE, *supra* note 21; SUBST. CRIM. L., at § 6.1(c).

23. Parrish v. State, 97 So. 2d 356, 359 (Fla. Dist. Ct. App. 1957); see also FLA. STD. JURY INSTR. (Crim.) §6.4.

24. E.g., FLA. STAT. § 943.0435 (2015); State v. Giorgetti, 868 So. 2d 512 (Fla. 2004). An example is a failure-to-register offense, which requires those convicted of certain crimes to register with authorities when certain events occur (e.g., change of address) and punishes those who fail to do so. See § 943.0435. In prosecutions under such statutes, due process requires that the State must prove defendants knew they had the duty to register. *Giorgetti*, 868 So. 2d. at 520. Also, it is implicit in such statutes that the omission be intentional, at least in the sense that one *could*, at some basic physical and mental level, have complied with the registration requirement, given the will and inclination. One who is spirited away to a foreign dungeon cannot be convicted of failing to register a new address when clearly one did not intend to relocate and could not have registered despite an honest desire to do so. A similar result would follow if one were taken to a hospital after a heart attack and remained there, unconsciously plugged into life-sustaining electronics, while a “violation” of the duty to register occurred.

The no-element (strict liability) mental element generally applies to an attendant-circumstance element.²⁵ An attendant-circumstance element is a strict-liability element if the State only needs to prove that the circumstance existed, and it is irrelevant, not only that one did not know it existed, but that one believed, in all good faith, that it did not exist. The obvious example here is the victim-age element in most child molestation offenses.²⁶

Under the offense analysis approach, “all crimes consist[] of an act or omission [and a] mental intent or *mens rea*.”²⁷ With this approach, (1) *all crimes consist of* only two generic elements; (2) the *act or omission* element includes, not only what one did (or failed to do), but also any harm caused and all attendant circumstances; and (3) this singular act-or-omission element has a singular mental element of *intent or mens rea*.²⁸ This conflation of the physical elements of an offense into a single act-or-omission element (with a singular mental element) leads to the most troublesome form of offense analysis: The use of the specific-intent/general-intent distinction as a singular mental element.

This distinction was conceived in the nineteenth century as a policy-based “judicial response to the problem of the intoxicated offender[,] to reconcile two competing theories of what is just in the treatment of those who commit crimes while intoxicated”:

On the one hand, the moral culpability of a drunken criminal is frequently less than that of a sober person effecting a like injury. On the other hand, it is commonly felt that a person who voluntarily gets drunk and while in that state commits a crime should not escape the consequences

. . . To limit the operation of the [intoxication defense] and achieve a compromise between the conflicting feelings of sympathy and

25. We could have a strict-liability caused-harm element. Causation includes both an actual-cause component and a proximate-cause component, and the latter has a *negligence* mental element, *i.e.*, it was reasonably foreseeable that one’s actions might cause the harm. *E.g.*, *Schuette v. State*, 822 So. 2d 1275, 1282 (Fla. 2002). If we eliminate the proximate-cause component and impose liability solely on the basis of actual cause, this would be a strict-liability caused-harm element.

26. *E.g.*, §800.04(3), FLA. STAT. (2014).

27. *Chicone v. State*, 684 So. 2d 736, 741 (Fla. 1996).

28. 1 WAYNE R. LAFAYE, SUBST. CRIM. L. § 6.1(c) (2012 ed.) (footnotes omitted). Florida is not alone in defining *act* to include more than just the basic *actus reus* element. “[A]ct’ has been defined in many different ways, often depending upon the purpose for which the word is used”; and in one common definition, “an act includes three constituent parts: (1) its origin, such as bodily activity; (2) certain surrounding circumstances; and (3) certain consequences.” *Id.* But, “the modern view [is that] acts are merely bodily movements.” *Id.*

reprobation for the intoxicated offender, [courts] drew a distinction between so-called specific intent and general intent crimes.²⁹

The specific-general distinction is now regarded as “an artificial irrationality widely condemned by the authorities.”³⁰ Collecting those authorities, one commentator said the distinction “is a device, conceived at common law, to achieve a certain result rather than reflecting a coherent theory,” and “irrational results follow” from its use because “it is in most respects conceptually bankrupt.”³¹

The basic problem with the distinction is that “neither common experience nor psychology knows any such actual phenomenon as ‘general intent’ that is distinguishable from ‘specific intent.’”³² “The adjective ‘specific’ [is] pointless, for the intent is no more specific than any other intent”³³ Thus, “[t]here is no intrinsic meaning to the terms ‘specific intent’ and ‘general intent’; they are merely the means through which states achieve the compromise of partial liability and partial mitigation [for intoxicated offenders].”³⁴

The more practical problems with the distinction are exposed by the definitions used by Florida courts. General intent is defined as “the intent required to do the *actus reus*”³⁵ Nothing controversial here, although the adjective *general* is superfluous. Again, the *actus reus* element of *any* offense has an inherent mental element of intent or knowledge. In effect, *intent* (or *general intent*) is part of the definition of *actus reus*.

29. *People v. Hood*, 1 Cal. 3d 444, 456, 82 Cal. Rptr. 618, 625, 462 P.2d 370, 377 (1969). The history of the intoxication defense is summarized in *Montana v. Egelhoff*, 518 U.S. 37, 44–48 (1996).

30. *Linehan v. State*, 476 So. 2d 1262, 1267 (Fla. 1985) (Shaw, J., dissenting); *see also* *Frey v. State*, 708 So. 2d 918, 921 (Fla. 1998) (Anstead, J., concurring in part and dissenting in part).

Th[is] artificial distinction . . . often leads to incongruous and harsh results
Countless commentators and courts have criticized the lack of a principled and useful basis for maintaining this distinction [T]he terms [are] confusing and of little value[; they] do not clearly delineate . . . what blameworthy state of mind must exist in any given situation

Linehan v. State, 442 So. 2d 244, 246–48 (Fla. Dist. Ct. App. 1983) (expressing similar sentiments), *result approved*, 476 So. 2d 1262 (Fla. 1985). Justices Shaw and Anstead, and Judge Lehan (in *Linehan*), collect a formidable array of authorities condemning this distinction. The present author cannot find anyone who defends this distinction as rational or useful.

31. Paul H. Robinson, 1 *Criminal Law Defenses*, § 65(e) (1984).

32. Jerome Hall, *Intoxication and Criminal Responsibility*, 57 HARV. L. REV. 1045, 1064 (1944).

33. William Roth, *General vs. Specific Intent: A Time for Terminological Understanding in California*, 7 PEPP. L. REV. 67, 71 (1980).

34. Mitchell Keiter, *Just Say No Excuse: The Rise and Fall of the Intoxication Defense*, 87 J. CRIM. L. & CRIMINOLOGY 482, 494 (1997) (footnotes omitted).

35. *Brown v. State*, 790 So. 2d 389, 391 (Fla. 2001) (Harding, J., dissenting).

Specific intent, the more troublesome concept, is defined as (1) an “intent other than to do the *actus reus*,”³⁶ or (2) “a special mental state . . . beyond any mental state with respect to the *actus reus* . . .”³⁷ Clearly, specific intent is a concept that includes more than the basic intent-or-knowledge mental element that is inherent in an *actus reus* element. Not so clear is what that additional mental element might, or must, be. Must it be an *intent* element, as the quote from *Brown* says? Or can it be any *mental state*, as the quote from *Frey* indicates? Some offenses have more than one *intent* element.³⁸ Many other offenses have more than one *mental state*. Offenses with unintended-harm elements have “a special mental state . . . beyond any mental state with respect to the *actus reus*,”³⁹ namely, the recklessness or negligence mental element that applies to the caused-unintended-harm element. Many offenses with an attendant-circumstance element also have a *special mental state* of knowledge, recklessness, or negligence.⁴⁰

Are all these offenses specific-intent offenses? Or is that term limited to offenses with additional *intent* elements? The Florida cases do not address these questions. We need not address them here. The position advocated here is that we should not use the specific-general distinction at all. The relevant point is that the very definition of specific intent is ambiguous.⁴¹

In sum, “the mental element in criminal law encompasses more than the two possibilities of ‘specific’ and ‘general’ intent,”⁴² and “clear analysis requires that the question of the kind of culpability required to [prove a crime] be faced separately with respect to each material element . . .”⁴³

36. *Id.*

37. *Frey v. State*, 708 So. 2d 918, 920 (Fla. 1998).

38. FLA. STAT. § 812.13 (2015). For instance, robbery is defined as the “taking of money or other property . . . from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear.” *Id.* There are three intent elements here: an intent to use force; an intent to take property; and an intent to deprive the other of the property.

39. *Frey*, 708 So. 2d at 919.

40. *E.g.*, *Thompson v. State*, 695 So. 2d 691 (Fla. 1997) (holding the offense of battery on a law enforcement officer requires proof that one knew victim was an officer); *Haugabrook v. State*, 827 So. 2d 1065, 1068 (Fla. Dist. Ct. App. 2002) (holding the offense of dealing in stolen property requires proof that one was negligent in failing to ascertain whether the property was stolen).

41. See 1 WAYNE R. LAFAVE, SUBST. CRIM. L. § 5.2(e); Robinson, *supra* note 31. The foregoing sources note the various definitions of specific intent that courts have used over the years.

42. *Liparota v. United States*, 471 U.S. 419, n.5. (1985).

43. *United States v. Bailey*, 444 U.S. 394, 406 (1980).

Offense analysis cannot do this because it:

[C]an accurately describe the culpability elements of an offense only if the same level of culpability (*e.g.*, intention) [applies to] each element of an offense. But where different culpability levels are appropriate for different elements, offense analysis . . . obscure[s] but do[es] not eliminate the confusion.⁴⁴

III. THE SINGULAR OFFENSE OF CRIMINAL ATTEMPT

The Florida “offense of criminal attempt” occurs when one “attempts to commit an offense [and] does any act toward the commission of such offense, but fails in the perpetration or is . . . prevented in the execution”⁴⁵ This offense has a mental element (intent to commit an offense) and an *actus reus* element (an overt act toward its commission).⁴⁶ Florida courts have had some problems determining the precise meaning of both elements of the attempt offense.

The problems regarding the overt-act element in attempted homicide offenses with no intent-to-kill element are discussed in Section V.A. below. The problem with the mental element in the Florida attempt offense is illustrated by the following quote:

[A]n attempt exists only when there is *an intent to commit a crime*, coupled with an overt act [T]he state [must] prove two general elements to establish an attempt: *a specific intent to commit a particular crime*, and an overt act.⁴⁷

Note the emphasized language: Does an attempt offense require proof of a *specific* intent to commit a crime or merely an *intent* to do so? Florida courts have “failed to consistently” answer this question, “classify[ing]

44. Robinson and Grall, *supra* note 35, at 689; *see also* Frey, 708 So. 2d at 920–26. In 2001, four Justices of the Florida Supreme Court questioned the wisdom of continuing to use the specific/general distinction. Frey, 708 So. 2d at 920 (Harding, J., concurring) (noting “the distinction between specific and general intent . . . is a very confusing area of the law” and suggesting the Court might “consider abolishing the distinction.”); *id.* at 920–21 (Grimes, J., concurring) (“There is much to be said for doing away with the distinction between specific and general intent crimes [and] either this Court or the legislature might wish to consider eliminating the defense of voluntary intoxication. However, neither of these propositions has been argued in this case”); *id.* at 921–26 (Anstead and Kogan, JJ., concurring in part and dissenting in part) (asserting this is an “artificial distinction” which “[c]ountless commentators and courts have criticized,” and suggesting the adoption of element analysis). These suggestions never went any further.

45. FLA. STAT. § 777.04(1) (2015).

46. Brooks v. State, 762 So. 2d 879, 897 (Fla. 2000).

47. Thomas v. State, 531 So. 2d 708, 709–10 (Fla. 1988).

attempt] as both a specific intent crime and a general intent crime”⁴⁸

The problem here is using the specific-general system in the first place. Whatever utility that distinction has in its intended field regarding the intoxication defense, it was not designed to—and should not be used to—determine the mental element of an attempt offense. “Why [some] Florida courts reached the conclusion that attempts were always specific intent crimes is not clear [because] section 777.04(1)] says nothing about intent.”⁴⁹ If the courts had simply asserted *an attempt offense requires proof of an intent to commit the offense attempted*, they would have adopted the generally accepted (and most logical) definition of attempt.⁵⁰ But in using the specific-general distinction, courts took an irrational system, which was created for one limited purpose, and applied it to the wholly unrelated context of determining the mental element of the attempt offense. This turned an offense that should have a singular, and constant, mental element into one that might have either of two mental elements, depending on the mental element of the offense attempted.

But section 777.04(1) creates a distinct and discrete *offense of criminal attempt*, not multiple offenses of *attempted X, attempted Y, etc.*⁵¹ The mental element(s) of the offense attempted will vary; the mental element of the attempt offense itself does not. There is no difference between *specifically* intending to commit an offense and only *generally* intending to do so. One either intends to commit that offense or one does not. If the offense has a

48. *Brown v. State*, 790 So. 2d 389, 391–92 (Fla. 2001) (Harding, J., dissenting).

49. *Gentry v. State*, 422 So. 2d 1072, 1072, n.2 (Fla. Dist. Ct. App. 1982), *approved*, 437 So. 2d 1097 (Fla. 1983).

50. 2 WAYNE R. LAFAVE, *SUBST. CRIM. L.* § 11.3 (2d ed. 2012).

The crime of attempt consists of (1) an intent to do an act or to bring about a certain consequence which would in law amount to a crime; and (2) an act in furtherance of that intent. Under the prevailing view, an attempt thus cannot be committed by recklessness or negligence or on a strict liability basis, even if the underlying crime can be so committed.

Id.

51. FLA. STAT. § 810.02(1)(a) (2015); FLA. STAT. § 777.04(2)–(3) (2015). This is similar to the offense of burglary, which is defined as unlawfully “entering or remaining in a dwelling, a structure, or a conveyance with the intent to commit an offense therein.” FLA. STAT. § 810.02(1)(a). Section 810.02 creates a singular offense, regardless of what offense was to be committed inside the location entered; it does not create multiple offenses of *entry with intent to commit theft, entry with intent to commit battery*, etc. *Id.* Similarly, the offenses of criminal solicitation and criminal conspiracy also have an intent-to-commit-offense element. FLA. STAT. § 777.04(2)–(3). Here too we have singular offenses, not multiple offenses based on what type of offense one solicited, or conspired with, another to commit.

caused-harm element but one does not intend to cause that harm, then one does not intend to commit that offense.

If we recognize that the attempt offense has a singular mental element (*intent-to-commit-an-offense*), then the attempt logic necessarily follows. One cannot intend to cause an unintended harm; thus, one cannot intend (and cannot attempt) to commit an offense with an unintended-harm element. Some offenses cannot be attempted.⁵² Offenses with unintended-harm elements cannot, logically, be attempted.⁵³ But, because Florida courts used offense analysis and the specific-general system, they failed to fully recognize this attempt logic with respect to attempted homicide offenses. We turn now to those cases.

IV. THE FLORIDA CASES ON AWIC- AND ATTEMPTED HOMICIDE OFFENSES

Florida courts began addressing the elements of attempted homicide offenses in the 1970s. Before then, cases that could have been charged as attempts seemed to generally be charged as AWICs. The reason for this may be that, before 1971, the maximum punishment for AWICs was higher than that for attempts.⁵⁴

A. THE AWIC CASES: THE FULL ADOPTION OF THE ATTEMPT LOGIC

The first relevant case here is the 1900 *Knight* case noted above, which reversed a conviction for AWIC-second-degree murder because the jury was not instructed that, to prove that offense, the State must prove the defendant had “an intent to kill”:

Upon indictments for assault with intent to commit *any . . . unlawful*

52. Several Florida cases recognize that some offenses cannot be attempted under section 777.04(1). In some statutes, the completed offense is defined to include attempts, *e.g.*, theft (*State v. Sykes*, 434 So. 2d 325 (Fla. 1983)) and obstructing an officer with violence (*Jordan v. State*, 438 So. 2d 825 (Fla. 1983)). In other statutes, the offense is defined in a way that makes it a specialized version of an attempt, *e.g.*, possession of burglary tools (*State v. Thomas*, 362 So. 2d 1348 (Fla. 1978)) and poisoning food or water (*Foster v. State*, 875 So. 2d 1253 (Fla. Dist. Ct. App. 2004)). The common thread in these latter cases is that the statute outlaws fairly specific acts “with the intent to” accomplish some harm, but with no need to prove that the intended harm was accomplished.

53. *See Grinage v. State*, 641 So. 2d 1362, 1365–66 (Fla. Dist. Ct. App. 1994) (“Some criminal offenses (and we urge that first degree felony murder is one) simply were not intended by the legislature to support a conviction for their attempted commission. Section 782.04(1)(a) 2, by its terms, contemplates a body[,] a completed act of homicide.”), *aff’d*, 656 So. 2d 457 (Fla. 1995).

54. *Cf.* FLA. STAT. § 776.04 (1969) *with* FLA. STAT. § 784.06 (1969).

homicide, it will not be sufficient to show that the killing, had it occurred, would have been unlawful [I]t must be found that the accused committed the assault with intent to take life, for, although an unintentional . . . killing may . . . be unlawful, . . . no man can intentionally do an unintentional act; and without the intent the assault cannot be punished under [the AWIC] statute, even though the killing, had it been committed, would have [been] a felony

[W]here one assaults another *with intent to kill*, and the assault is accompanied by an act which, if death had resulted . . . would have constituted murder in the second degree, [defendant] will be guilty of [AWIC]-murder; but, if there was *no intent to kill*, [defendant] cannot be punished for an [AWIC offense], even though the circumstances were such that, had [the victim] died, [defendant] would be guilty of murder in the second degree.⁵⁵

This case adopts the attempt logic, although the Court is using offense analysis and defining *act* to include both the *actus reus* and the caused-harm elements. Thus, *no man can intentionally do an unintentional act* means *no man can intentionally cause an unintended harm* (death, in this case). As in later cases (discussed below), the *Knight* Court fails to distinguish *intent-to-do-act* from *intent-to-cause-harm*; or, more precisely, the Court is defining *intent-to-do-act* to include *intent-to-cause-harm*. Either way, the holding in *Knight*—that AWIC-second-degree murder has an intent-to-kill element—adopts the attempt logic. This holding was reaffirmed in many cases over decades.⁵⁶

As to the relationship between AWICs and attempts, one Florida district court said they “are so similar as to be virtually synonymous.”⁵⁷ The Florida Supreme Court noted “there is considerable similarity between the two offenses, [but] they are not in all respects the same[;] in some cases the conduct . . . would [prove both offenses], while in other cases this would not be true.”⁵⁸

The crucial distinction between the two offenses is in the assault element of the AWIC offense. An assault “is an unlawful threat . . . to do violence . . . coupled with the apparent ability to do so, and doing some act which creates a well-founded fear . . . that such violence is imminent.”⁵⁹ The *well-founded*

55. *Knight v. State*, 28 So. 759, 761 (Fla. 1900).

56. *E.g.*, *Phillips v. State*, 162 So. 346, 346 (Fla. 1935); *Thomas v. State*, 95 So. 752, 754 (Fla. 1923); *Jones v. State*, 62 So. 899, 900 (Fla. 1913); *Littles v. State*, 384 So. 2d 744, 745 (Fla. Dist. Ct. App. 1980).

57. *Miller v. Dugger*, 565 So. 2d 846, 848 (Fla. Dist. Ct. App. 1990).

58. *Devoe v. Tucker*, 152 So. 624, 626 (Fla. 1934).

59. FLA. STAT. § 784.011(1) (2015); *State v. White*, 324 So. 2d 630, 631, n.1 (Fla. 1975); *Motley v. State*, 20 So. 2d 798, 800 (Fla. 1945). This statutory definition was first enacted in

fear element of an assault “require[s proof of] an awareness by the victim of imminent peril.”⁶⁰ But victim-awareness is not an element of attempted homicide; “it is possible to commit an attempted murder without committing an assault” (*e.g.*, surreptitious poisoning).⁶¹ Also, an assault requires proof of an *apparent ability to do violence*, but an attempt offense merely requires proof of the commission of an overt act without the need to prove the *apparent-ability* element.

This means that attempted homicides do not always also qualify as AWIC-homicides. But all AWIC-homicides also qualify as attempted homicides: Although an attempt does not require proof of an assault (but merely proof of an overt act), the assault will always be an overt act that proves the attempt. Thus, attempted homicide is a species of lesser-included offense of AWIC-homicide. Put another way, the AWIC offense is a specialized version of an attempt: It is an attempt offense in which the *actus reus* element is an assault (similar to the way that robbery is a specialized version of theft, in which the property-taking is accomplished by force rather than by stealth or fraud).⁶²

Given this, the mental elements of both offenses should be the same. The differences between the two offenses are that, unlike AWICs, attempts do not require proof of (1) victim-awareness of the commission of the overt act, and (2) the present ability to do violence. But these elements are irrelevant to

1975. *White*, 324 So. 2d at 631. Before then, Florida courts used a judicial definition that, for present purposes, was identical to this statutory definition: “An assault is any unlawful offer or attempt to injure another with apparent present ability to effectuate the attempt under circumstances creating a fear of imminent peril.” *Motley*, 20 So. 2d at 800.

60. *White*, 324 So. 2d at 631.

61. *Viveros v. State*, 699 So. 2d 822, 825 (Fla. Dist. Ct. App. 1997).

62. Other courts acknowledge the overlap between attempts and AWICs. *Cockrell v. State*, 890 So. 2d 168, 170 (Ala. Crim. App. 2003) (noting “the charge of assault with intent to murder . . . was superseded by our current Code and . . . is substantially the same charge as the current Code’s charge of attempted murder.”); *Free v. State*, 455 So. 2d 137, 147, n.1 (Ala. Crim. App. 1984) (“There is little substantial difference between the offenses of attempted murder and assault with attempt to murder.”) *abrogated on other grounds*, *McKinney v. State*, 511 So. 2d 220 (Ala. 1987); *Hardy v. State*, 482 A.2d 474, 477–78 (Md. 1984) (“Because the overt act necessary for an attempt is frequently an assault, the two crimes [attempt and AWIC] have a significant overlap. But the overlap is not complete, because an overt act can qualify as an attempt and yet not rise to the level of an [AWIC]”; “an [AWIC] is, in general, the same as an attempt to commit that crime except for two additional requirements,—(1) a greater degree of proximity, and (2) actual present ability to commit a battery”); *Commonwealth v. Hebert*, 368 N.E.2d 1204, 1206–07 (Mass. 1977) (holding that, although an offense of “attempt to commit voluntary manslaughter is logically possible,” “we do not think that recognition of [that] crime . . . would serve any useful purpose. We have been unable to hypothesize a case which might constitute attempted voluntary manslaughter which would not also constitute [an AWIC-manslaughter],” an offense already available to prosecutors).

determining the mental elements of the offenses. Both offenses are singular offenses with singular mental elements (intent-to-commit-offense and intent-to-commit-felony, respectively). Whether the victim is aware of one's acts, and whether one has the present ability to do violence, are both irrelevant to this mental element.

But in Florida, the mental elements of AWIC-second-degree murder and attempted second-degree murder are not the same. As noted above, the attempt logic is recognized in the AWIC cases but, as will be seen, not with the attempt offense.

B. *GENTRY*: REJECTING THE ATTEMPT LOGIC BY APPLYING THE ARTIFICIALLY IRRATIONAL SYSTEM OF SPECIFIC/GENERAL INTENT TO ATTEMPTED SECOND-DEGREE MURDER

Although the *Knight* Court used offense analysis, it did not use the specific-general system. That system was used in the first Florida case to consider whether there was an offense of attempted second-degree murder. There, a district court followed *Knight* and the AWIC cases, and held that there was such an offense and intent-to-kill was an element:

[T]he offense of [AWIC-second-degree murder] exist[s] under Florida law. . . . Since the [AWIC offense] involves specific intent, as does an attempt, the rationale of the [AWIC] cases clearly supports the conclusion that the crime of attempted second-degree murder exists in Florida.

[I]ntent is [not] synonymous with premeditated design[, which] is more than simply an intent to [kill] Thus, one could be convicted of attempted second-degree murder upon a showing of (1) intent to [kill], but without premeditation, and (2) an overt act in furtherance of that intent.⁶³

The Florida Supreme Court addressed the mental element of attempted second-degree murder in *Gentry v. State*.⁶⁴ Convicted of that offense, Gentry argued on appeal that he was entitled to an intoxication instruction. The district court held he was not and certified a conflict on the question of whether “all attempts are . . . specific intent crimes regardless of whether the specific intent is a[n] element of the completed offense.”⁶⁵

Answering that question with a no, the Florida Supreme Court first noted that the district courts had reached “diametrically opposed positions” on

63. *Little v. State*, 384 So. 2d 744, 745 (Fla. Dist. Ct. App. 1980).

64. *Gentry v. State*, 437 So. 2d 1097 (Fla. 1983).

65. *Id.*

the certified question.⁶⁶ The first position “rejects the notion that there can ever be an attempt without specific intent [because] one cannot attempt to do something without first forming the specific intent to accomplish that particular act.”⁶⁷ The Court said this position “is consistent with our most commonly-accepted definition of attempt: a specific *intent* to commit the crime and an overt act”⁶⁸

The second position adopted by the district courts on the certified question “emphasize[d] the illogic of requiring the state to prove an intent [in order to prove] an attempt . . . when no such proof is necessary [to prove] the completed crime.”⁶⁹ Rejecting “our most commonly-accepted definition of attempt,” the Court adopted this second position and held that some offenses can be attempted “without proof of a specific intent to commit the . . . completed offense [:] If the state is not required to show specific intent to [prove] the completed crime, it [need not] show specific intent to [prove] an attempt to commit that crime.”⁷⁰

This logic is flawed. To see why, start with the position the Court said was “consistent with our most commonly-accepted definition of attempt:” “there can [n]ever be an attempt without specific intent [because] one cannot attempt to do something without first forming the specific intent to accomplish that particular act.”⁷¹ Although awkwardly phrased, this is the attempt logic. Using offense analysis, the Court combines the *actus reus* and caused-harm elements into one element (called “act”) and then uses the term specific-intent to mean an intent to both do the act and cause the harm. This sentence means: “there can never be an attempt (*to commit an offense with a caused-harm element*) without specific intent (*to cause that harm*) because one cannot attempt to do something (*cause a harm*) without first forming the specific intent to accomplish that particular act (*to cause that particular harm, because ‘act’ is defined to include the caused-harm element*).” Thus, intent-to-kill must be an element of attempted homicide offenses.

But the Court rejected *our most commonly-accepted definition of attempt* (and the attempt logic) because it found it illogical to require a specific intent to prove an attempt offense when that intent is not needed to prove the completed offense. But this is illogical only if we assume that an attempt offense might require proof of a *specific* intent to commit the offense

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Gentry*, 437 So. 2d at 1098–99.

71. *Id.*

attempted. There is nothing illogical in saying an attempt offense merely requires proof of an *intent to commit an offense*, regardless of whether the offense attempted is considered to be a specific-intent offense.

Gentry concludes that some offenses can be “attempt[ed] without proof of a *specific* intent to commit the . . . completed offense.”⁷² But if there is no “actual phenomenon as [specific intent]”⁷³—if the “adjective ‘specific’ [is] pointless, for the intent is no more specific than any other intent”⁷⁴—then *Gentry* is saying that some offenses may be “attempt[ed] *without proof of a[n] intent to commit the . . . completed offense.*”⁷⁵ This in turn means that the “inten[t] to commit the offense”⁷⁶ is *not* an element of *some* Florida attempt offenses. As discussed below, the *Brown* dissenters recognized that this is what *Gentry* means.⁷⁷

Gentry rejected the attempt logic because, using offense analysis, the Court combined the *actus reus* and caused-harm elements into a single element and then divided attempts into two categories, specific-intent and general-intent. This combines into a single category offenses with no caused-harm element and offenses with an unintended-harm element, calling both general-intent offenses (distinguished from specific-intent offenses, which have an intended-harm element). However, the specific-general system cannot account for offenses with unintended-harm elements. We may call them general-intent offenses, which implies that they have a singular mental element of the “intent required to do the *actus reus*”⁷⁸ (and they do not have a second mental element “beyond any mental state required with respect to the *actus reus*”⁷⁹). But offenses with an unintended-harm element *do* have a second mental element *beyond any mental state with respect to the actus reus*: The negligence or recklessness mental element attached to the unintended-harm element. Failing to account for this second mental element causes us to overlook the attempt logic and recognize the irrational concept of an attempt

72. *Id.* (emphasis added).

73. Hall, *supra* note 32, at 1064.

74. William Roth, *General vs. Specific Intent: A Time for Terminological Understanding in California*, 7 PEPP. L. REV. 67, 71 (1980).

75. *Gentry*, 437 So. 2d at 1098–99 (emphasis added).

76. *Brooks v. State*, 762 So. 2d 879, 897 (Fla. 2000).

77. *Brown v. State*, 790 So. 2d 389, 391 (Fla. 2001) (Harding, J., dissenting) (stating that under *Gentry*, “[the] State is not required to establish a specific intent to kill in order to prove [attempted second-degree murder,]” and this means that “the State can prove an attempt of that crime without ever establishing that the defendant intended to commit the underlying offense, [which] is an absurd result.”).

78. *Id.*

79. *Frey v. State*, 708 So. 2d 918, 920 (Fla. 1998).

(intent) to cause an unintended harm.

The AWIC cases were not noted in *Gentry*. Although *Gentry* did not expressly consider whether intent-to-kill is an element of attempted second-degree murder, it implied that it was not, an implication later confirmed in *Brown*.⁸⁰ *Gentry* conflicts with the AWIC cases, which require proof of intent-to-kill to prove that specialized version of an attempt offense, the AWIC offense.⁸¹

C. AMLOTTE TO GRAY: THE SHORT UNHAPPY LIFE OF ATTEMPTED FELONY MURDER AND THE RECOGNITION OF THE PROBLEMS WITH REJECTING THE ATTEMPT LOGIC

Two years after *Gentry*, the Florida Supreme Court in *Amlotte* held that Florida recognizes an offense of attempted felony murder, which occurs when, “during the commission of the felony[, Defendant committed] *a specific overt act which could, but did not, cause the death of another . . .*”⁸² The Court reasoned as follows:

80. *Brown*, 790 So. 2d at 390 (Harding, J., dissenting).

81. *E.g.*, *Williams*, 123 So. 3d 27; *F.B. v. State*, 852 So. 2d 227 (Fla. 2002); *see Rodriguez v. State*, 443 So. 2d 286 (Fla Dist. Ct. App. 1983) (collecting cases); *Taylor v. State*, 444 So. 2d 931 (Fla. 1983); *Anderson v. State*, 276 So. 2d 17 (Fla. 1973); *Gentry*, 437 So. 2d 1098. The recognition of an offense of attempted manslaughter with no intent-to-kill element, *Williams*, 123 So. 3d at 27, also conflicts with the AWIC cases, which consistently held that intent-to-kill is an element of AWIC-manslaughter. *Rodriguez*, 443 So. 2d at 289–91. It might be argued that the AWIC cases have been implicitly overruled by *Gentry* and *Williams*. *Id.* But neither *Gentry* nor *Williams* noted, much less addressed, the AWIC cases; and the Florida Supreme Court “does not intentionally overrule itself *sub silentio*” *F.B.*, 852 So. 2d at 228. The AWIC cases did not address the issue of the propriety of imposing an intent-to-kill element on an AWIC offense when the underlying offense has no such element. Whether it is proper, or logical, to do that is a separate question from the one addressed in this article. Intent-to-kill killings are not *excluded* from the definition of second-degree murder or manslaughter. *See Taylor v. State*, 444 So. 2d at 933; *Anderson v. State*, 276 So. 2d at 18. Thus, we could recognize an AWIC (or attempted) homicide offense that has an intent-to-kill element even though the completed offense has no such element. Or we could say (as *Gentry* did) that it is illogical to impose an intent-to-kill element on an attempted (or AWIC) homicide offense if the completed offense has no such element. There is nothing illogical about this latter position. But if we adopt the latter position, the next logical step is to conclude that the completed offense cannot be attempted (because the attempt logic tells us that would be illogical). This latter issue was not addressed in *Gentry*. The precise issue in that case was whether all attempt offenses were specific intent offenses (for purposes of determining the intoxication defense). *Gentry*, 437 So. 2d at 1098. The question of whether there was such an offense as attempted second-degree murder (particularly one with no intent-to-kill element) was not raised; the Court essentially assumed that there was an offense of attempted second-degree murder and then asked whether specific intent was an element.

82. *Amlotte v. State*, 456 So. 2d 448, 449 (Fla. 1984), *receded from, Gray*, 654 So. 2d at 553.

[A] homicide committed during . . . a [qualifying] felony constitutes first degree murder. State of mind is immaterial for the felony . . . suppl[ies] the intent. Although the offense of attempted first-degree murder requires a premeditation, . . . where the alleged “attempt” occurs during . . . a [qualifying] felony . . . the law presumes the existence of premeditation Because the attempt occurs during . . . the felony, the law . . . presumes the existence of the specific intent required to prove attempt.⁸³

Two justices dissented, asserting:

By recognizing the crime of attempt[ed] . . . felony murder, a crime in which the intent to kill is presumed, the Court has created a crime which necessitates the finding of *an intent to commit a crime which requires no proof of intent [This] creates a crime requiring one to intend to do an unintended act* which is a logical absurdity⁸⁴

83. FLA. STAT. § 782.04 (2015); *Amlotte*, 456 So. 2d at 449–50, *abrogated by*, *Gray*, 654 So. 2d at 554; *Overfelt v. State*, 457 So. 2d 1385 (Fla. 1984), *superseded by* *Galindez v. State*, 955 So. 2d 517 (Fla. 2007); *Overfelt v. State*, 434 So. 2d 945, 947 (Fla. Dist. Ct. App. 983) *approved in part, quashed in part*, 457 So. 2d 1385 (Fla. 1984). *Amlotte* was convicted of attempted first-degree felony murder. *Amlotte*, 450 So.2d at 448. The certified question asked more broadly whether there was an offense of *attempted felony murder* in Florida, drawing no distinction between the three degrees of felony murder. *Amlotte*, 450 So.2d at 448. Shortly after *Amlotte*, the Court held that Florida recognizes an offense of attempted third-degree felony murder. *Overfelt*, 457 So. 2d 1387, *superseded by*, *Galindez*, 955 So. 2d 523. The *Overfelt* district court held there was no such offense because one of the elements of third-degree felony murder is that the defendant acted

‘without any design to effect death[,]’ which lead[s] to the conclusion that no intent is required to perpetrate this crime. An attempt involves a specific intent. We see no reason to depart from this basic logic However, our holding directly conflicts with the rationale expressed *Gentry v. State*, 422 So. 2d 1072 (Fla. Dist. Ct. App. 1982).

Overfelt, 457 So. 2d 287. After its own *Gentry* opinion issued, the Florida Supreme Court quashed in *Overfelt* and held there is an offense of attempted third-degree felony murder, following and quoting *Gentry* for the proposition that “there are offenses that may be successfully prosecuted as an attempt without proof of a specific intent to commit the relevant completed offense.” *Overfelt*, 457 So. 2d at 1386. *Overfelt* has never been directly overruled on this point but it is presumably no longer good law, post-*Gray*.

84. *Amlotte*, 456 So. 2d at 450 (Overton, J., dissenting) (emphasis added) (citation and internal quotes omitted); *Amlotte v. State*, 435 So. 2d 249 (Fla. Dist. Ct. App. 1983). The dissent uses offense analysis and combines the *actus reus* and caused-harm elements into a single *act* element. It is true that felony murder *requires no proof of intent to cause the harm of death*; but there still must be *proof of intent* to commit the *actus reus*, *i.e.*, to commit the underlying felony. Similarly, *intend to do an unintended act* means *intend to cause an unintended harm* (because *act* is being defined to include both the *actus reus* and the caused-harm elements). *Amlotte*, 456 So. 2d at 450.

Also worth noting in the dissent in the district court in *Amlotte*. The district court majority essentially agreed with what the Supreme Court majority later said. *See Amlotte*, 435 So. 2d at 250–51, *approved*, 456 So. 2d at 450. In a lengthy and thoughtful dissent, Judge Cowart argued there was no offense of attempted felony murder:

The *Amlotte* majority adopts the attempt logic but does so through a legal fiction: that first-degree felony murder is a constructive-intent offense. The logic here is: (1) There is only one type of first-degree murder, premeditated murder; (2) there are two types of premeditation, actual and constructive; and (3) with the latter, committing a felony constructively “proves” premeditation. Thus, the majority reasoned, if committing a felony constructively establishes an intent-to-kill for the completed offense, it can do so for the attempt offense as well.

This logic is flawed. We can adopt the fiction that committing a felony constructively establishes an intent-to-kill that does not exist in fact; but it is still logically impossible to *actually* intend to unintentionally kill. With attempted homicides, there is no practical difference between saying an offense has (1) a constructive intent-to-kill element, or (2) no intent-to-kill element at all. Either way, we have no *actual* intent-to-kill element and we have the same problem.⁸⁵

[T]he offense we are considering is that of attempt not that of murder [T]he offense of ‘attempt’ requires a specific intent to commit the crime attempted. If the crime ‘attempted’ can be accomplished without an intended act or result then you would have a *crime requiring one to intend to do an unintended act* which is a logical absurdity

Every crime of attempt requires . . . an intent to commit some particular crime. *Since the ‘act’ element in the crime of an ‘attempt’ is any overt act reasonably calculated to accomplish a crime, if the crime of attempt required only a general intent (to do the overt act) rather than the specific intent to commit some particular crime then every overt act would be a crime. It is because the ‘act’ element is so vague in the crime of attempt that the mental element must be specific* Even if a specific intent is not an essential element of the particular crime, an attempt to commit that crime requires a specific intent To commit the offense of attempt to murder, the specific intent to take life must be present [S]ince an attempted murder requires a specific intent to kill, it is logically impossible to intend to commit an unintentional crime

Amlotte, 435 So. 2d at 253–55 (Coward, J., dissenting) (emphasis added). Judge Cowart recognizes the problem created by rejecting the attempt logic in an attempted homicide offense. As discussed in Section V.A. below, without an intent-to-kill element, it is impossible to determine, with any consistency, whether a particular overt act proves an attempted homicide offense. But, Judge Cowart is still using offense analysis. Thus, when he says *a crime requiring one to intend to do an unintended act is a logical absurdity*, he means *a crime requiring one to intend to cause an unintended harm is a logical absurdity*. Similarly, *it is logically impossible to intend to commit an unintentional crime means it is logically impossible to intend to cause an unintended harm*.

85. As to felony murder being a constructive-intent offense, it is more accurate to say that there are *two* forms of first-degree murder; premeditated and felony. This eliminates all use of legal fictions and allows us to see that we do not classify the forms of unlawful homicide on the basis of some preexisting objective system (presumably based on the degree of “evilness” in one’s mind, *i.e.*, premeditation vs. depraved mind vs. heat-of-passion, *etc.*). Rather, we classify homicide offenses into varying degrees in order to serve the public policy function of proportioning punishment based on society’s view of the seriousness of the different forms of

The Court recognized this problem in *Gray*. Fleeing from an armed robbery, Gray ran a red light and hit another car, seriously injuring an occupant of that car.⁸⁶ The district court held the evidence did not prove attempted felony murder because the State “did not[, as required by *Amlotte*,] present proof of a separate overt act which could, but did not, cause another’s death”:

[D]uring the high-speed police chase defendant’s car [ran] . . . a red light and struck the victim’s car. The running of the red light and the resulting collision do not constitute overt acts reasonably understood to result in a person’s death. Thus, . . . there was insufficient evidence to [prove an act] . . . committed against the victim [that] could have caused his death.⁸⁷

The court certified the following question:

WHETHER THE ‘OVERT ACT’ REFERRED TO IN *AMLLOTTE* . . . INCLUDES ONE, SUCH AS FLEEING, WHICH IS INTENTIONALLY COMMITTED BUT IS NOT INTENDED TO KILL OR INJURE ANYONE?⁸⁸

homicide. There are two types of first-degree murder, not because committing certain felonies constructively proves an intent-to-kill that does not actually exist, but because we view the causing of death (even if accidental) during certain felonies to be as worthy of condemnation as premeditated killings. The two forms of first-degree murder are distinct; the existence of an attempt offense must be addressed separately as to each form.

86. *Gray v. State*, 654 So. 2d 934, 935 (Fla. Dist. Ct. App. 1994), *approved*, 654 So. 2d 552.

87. *Id.* at 935–36.

88. FLA. STAT. § 782.04(1)(a)2 (2015); *Jefferson v. State*, 128 So. 2d 132, 137 (Fla. 1961); *Gray*, 654 So. 2d. at 936. The certified question implicitly recognizes offense analysis, as it distinguishes between *intentionally committing* the *actus reus* element of an attempt (the overt act) and an *intent to kill or injure* (an intent to cause harm). The district court also recognized that, if the victim had died, Gray could have been convicted of felony murder. *Id.* at 936, n.2. The felony murder rule applies if the death occurs while one is “perpetrat[ing] . . . or . . . attempt[ing] to perpetrate” an enumerated felony. FLA. STAT. § 782.04(1)(a)2. This includes attempts to escape from the scene after the felony is committed. *Jefferson*, 128 So. 2d at 137. But, with all due respect to the district court, surely it is *reasonably understood* by all that, if one engaged in a high-speed flight from officers (whether fleeing from a felony or for any other reason), one could-have-caused the unintended deaths of many others, including any passengers in one’s car; the pursuing officers; and other drivers, passengers, or pedestrians in the area at the time.

The facts in *Gray* succinctly expose the problems with the *Amlotte* could-have-caused-death test. If Gray had engaged in this high-speed flight through crowded downtown streets, he could-have-caused the deaths of any one of dozens, perhaps hundreds, of persons in the area at the time. In addition to depending on how long the chase lasted, the size of the class of possible unintended-victims-that-could-have-been-killed that we could envision will depend on how wide we draw the “danger zone” created by Gray’s actions. Not only are persons in other cars or walking on sidewalks within that zone of danger, but we could also include persons located near ground floor doors or windows in buildings Gray sped past, any one of whom could-have-been-

The Florida Supreme Court did not address this question but rather said *Amlotte*'s recognition of an attempted felony murder offense "has proven more troublesome than beneficial and [the *Amlotte* dissent] is the more logical and correct position."⁸⁹ Noting the "difficulties with determining what constitutes an 'overt act' that could, but does not, cause . . . death," the Court receded from *Amlotte* because "[t]he legal fictions required to [prove attempted felony murder] are simply too great."⁹⁰

The Court did not say why the recognition of an offense of attempted felony murder had *proven troublesome*. When *Amlotte* was good law, three district court cases considered the sufficiency of the evidence to prove attempted felony murder; all three affirmed, without indicating any qualms about the existence of the offense.⁹¹ No other cases expressed any concerns about the existence of this offense, although "a majority of the committee members [for standard jury instructions] believed that there could be no crime of attempted felony murder."⁹²

Nor did the *Gray* court explain why *the legal fictions are too great* for the offense of attempted felony murder. The only legal fiction used in *Amlotte* was the one that views felony murder as a constructive-intent crime; and the use of this fiction is *troublesome* because it rejects the attempt logic and creates an attempted homicide offense with no actual-intent-to-kill element. Thus, *Gray* recognized that the problem with *Amlotte* was its failure to fully adopt the attempt logic. *Gray* also identified the primary problem with rejecting the attempt logic: The "difficulties with determining what constitutes an 'overt act' that could, but does not, cause [] death"⁹³

In sum, *Gray* adopts the attempt logic. Post-*Gray*, several district courts certified the question of whether, based on the logic of *Gray*, there was

killed if *Gray* lost control of his car, flipped up onto the sidewalk, and crashed into the building. And persons on higher floors could-have-been-killed if, when plowing into the ground floor, *Gray*'s car ignited a fire that engulfed the whole building; or weakened the structure of the building, causing it to collapse. As discussed below, the scope of this could-have-caused-death test is essentially limited only by one's ability to imagine scenarios of unintended death.

89. *Gray*, 654 So. 2d at 553.

90. *Id.* at 554.

91. *Diaz v. State*, 601 So. 2d 1269, 1269–70 (Fla. Dist. Ct. App. 1992); *Oropesa v. State*, 555 So. 2d 389, 390–91 (Fla. Dist. Ct. App. 1989); *Johnson v. State*, 486 So. 2d 657, 657–58 (Fla. Dist. Ct. App. 1986).

92. *Gray*, 654 So. 2d at 553 (citing FLA. STD. JURY INSTR. (Crim.) § 93-1), 636 So. 2d 502, 502 n.1 (Fla. 1994) ("The committee . . . had great difficulty in drafting an instruction on attempted felony murder which incorporated the language in *Amlotte* [A] majority of its members were persuaded by the [*Amlotte*] dissent[]").

93. *Gray*, 654 So. 2d at 553.

an offense of attempted second-degree murder.⁹⁴ In one case, two of the three judges concluded there was no such offense. In his concurrence, Judge Cobb reasoned that, if there is no crime of attempted felony murder, then there is no crime of attempted second-degree murder “for the same reasons”: “It is just as illogical to say that one can attempt (*i.e.*, intend) to commit an unintended homicide by a depraved act as to say that one can attempt to commit an unintended homicide by commi[tt]ing a] felony.”⁹⁵ Dissenting, Judge Harris argued there was no such offense because,

[O]ne need not intend to [kill] in order to commit second-degree murder Second degree murder . . . is caused by happenstance. How does one attempt happenstance? . . . [T]o prove an attempt, the State must prove *the intent to commit the underlying crime*. So how do you “attempt” second-degree murder? If intent to cause the death . . . is not an element of second-degree murder, what must the defendant have attempted (intended) to do which failed? It can only be that the attempt (intent) was to commit an act which is imminently dangerous to another evincing a depraved mind regardless of human life. Although the shooting at or near [the victim in the present case] would seem clearly to meet this test, this act was not attempted[–]it was spectacularly *achieved*. If you complete the act [you intended], what have you attempted?⁹⁶

The Florida Supreme Court came to the opposite conclusion, without addressing (or even acknowledging) the arguments of Judges Cobb and Harris.

D. *BRADY* AND *BROWN*: FOLLOWING *GENTRY*, IGNORING *GRAY* AND THE *AWIC* CASES, AND REJECTING THE ATTEMPT LOGIC FOR ATTEMPTED SECOND-DEGREE MURDER

While the district court cases certifying this question were pending, the Florida Supreme Court decided *State v. Brady*.⁹⁷ Brady was convicted of two counts of attempted second-degree murder based on his firing a single shot in

94. *E.g.*, *Manka v. State*, 720 So. 2d 1109, 1111 (Fla. Dist. Ct. App. 1998) (collecting cases).

95. *Watkins v. State*, 705 So. 2d 938, 941 (Fla. Dist. Ct. App. 1998) (Cobb, J., concurring).

96. *Id.* at 942–43 (Harris, J., dissenting); *see also State v. Florida*, 894 So. 2d 941, 946–48 (Fla. 2005) (per curiam), *receded from on other grounds*, *Valdes v. State*, 3 So. 3d 1067 (Fla. 2009); *but see Rosado v. State*, 766 So. 2d 1247, 1247 (Fla. 5th DCA 2000) (Harris, J., concurring) (per curiam) (arguing that “[no] meaningful difference exists between attempted second degree murder and aggravated battery in those cases in which there was a known victim [upon whom] defendant intentionally inflicted serious bodily injury”; and whether one offense or the other is charged “depends on the whim of the prosecutor.”). In fact, *both* offenses can be charged, because each has an element that the other does not. *State v. Florida*, 894 So. 2d at 946–48.

97. *State v. Brady*, 745 So. 2d 954, 958 (Fla. 1999) (per curiam).

a crowded bar that missed the intended victim and hit an unintended victim in the hand. Applying the doctrine of transferred intent, the district court reduced the charge regarding the unintended victim to aggravated battery and certified a question:

CAN A DEFENDANT BE CONVICTED OF ATTEMPTED MURDER OF BOTH the intended [and unintended victim] WHEN THE DEFENDANT HAD NO INTENT TO MURDER the [unintended victim] BUT the [unintended victim] IS INJURED DURING THE ATTEMPT ON the intended victim?⁹⁸

The Florida Supreme Court reinstated the attempted second-degree murder conviction on the unintended victim. The Court said it need not answer the certified question, or use the concept of transferred intent, because “the law of attempted second-degree murder . . . determine[s] whether the two convictions here may stand”:

[A]ttempted second-degree murder does not require proof of the specific intent to commit the underlying act (i.e., murder). [Citing *Gentry*]. To establish attempted second-degree of [the unintended victim], the state had to show (1) that Brady intentionally committed an act which would have resulted in the death of [the unintended victim] except that someone prevented him from killing [her] or he failed to do so, and (2) that the act was imminently dangerous to another and demonstrated a depraved mind without regard for human life.

. . . Brady intentionally committed an act imminently dangerous to others, including [both victims], . . . which would have resulted in death had the bullet fatally struck either [victim]. . . . [B]y intentionally firing a deadly weapon in close proximity to both [victims, Brady] intentionally committed an act that, had death resulted, would have constituted second-degree murder as to either [victim]. The attempt as to [the intended victim] appears clearer [because he] was the intended target. However, because [the unintended victim] was in close proximity . . . the “act imminently dangerous to others” requirement . . . would also be met [as to the unintended victim]. Hence, there is no need to [use] transferred intent[;] . . . the facts [prove] attempted second-degree murder of [both victims].⁹⁹

98. *Id.* at 955.

99. *Id.* at 956–58. With the phrase “attempted second degree murder does not require proof of the specific intent to commit the underlying act (i.e., murder),” the Court again used offense analysis to combine the *actus reus* and caused-harm elements into a single element. Clearly, the State must prove an *intent to commit the underlying act* of the *actus reus* element (the shooting, in this case). But, as the Court interpreted *Gentry*, the State need not prove an *intent to commit the underlying act of murder*, i.e., an intent to cause the harm of death.

Brady did not expressly consider whether there was an offense of attempted second-degree murder; *Brown* did. The *Brown* majority relied on the language just quoted from *Brady* and held that “the crime of attempted second-degree murder does exist,” and it is proven if one “intentionally committed an act which would have resulted in the death . . . except that someone prevented [one] from killing . . . or [one] failed to do so”¹⁰⁰

The three *Brown* dissenters “conclude[d] that the crime of attempted second-degree murder is logically impossible.”¹⁰¹ They found it “absurd” that, under *Gentry*, the State can prove an attempt “without ever establishing [an] inten[t] to commit the underlying offense.”¹⁰² They said all attempts are specific intent crimes, and one cannot specifically intend to commit second-degree murder because that offense “only requires a form of recklessness [and] it is illogical to have the crime of attempted second-degree murder because it is impossible to intend to commit an act of recklessness.”¹⁰³ Further,

Many . . . jurisdictions . . . define attempt [to mean] that the defendant must intend to engage in a particular combination of *conduct, results, and circumstances* that amount to the underlying crime. Where a crime is defined in terms of acts causing a particular result, a defendant charged with attempt must have specifically intended to accomplish that criminal result. Murder is a result-oriented crime which cannot be proven without first establishing the “result element” that a person is dead. . . . [I]t follows that a person cannot be convicted of attempted murder if that person did not intend the result of death.¹⁰⁴

Here we see the difference between offense analysis (used by the majority) and element analysis (used by the dissent), and how that difference reflects on the recognition of the attempt logic. The majority combines the *actus reus* and caused-harm elements into a single element; the dissent keeps these elements separate, recognizing that it is logically “impossible to intend to commit an act of recklessness.”¹⁰⁵

Brady and *Brown* reject the attempt logic, which means that they conflict with *Gray* and the AWIC cases, all of which adopted the attempt

100. *Brown v. State*, 790 So. 2d 389, 390 (Fla. 2001) (Harding, J., dissenting).

101. *Id.* at 390 (Harding, J., dissenting).

102. *Id.* at 391.

103. *Id.* at 395.

104. *Id.* at 395–96 (footnote omitted) (citations omitted).

105. *Id.* at 395. The phrase *intend to commit an act of recklessness* contains a whiff of offense analysis. Certainly, one can *intend to commit an act*; again, an *act—actus reus—is something intentionally done, by definition*. What one cannot logically do is *intend to recklessly cause another’s death*, even though one intentionally committed the death-causing act.

logic. Neither *Brady* nor *Brown* cited *Gray* or the AWIC cases. Nor did the court in *Brady* or *Brown* address the issue noted in footnote eighty-one (81) above. If (as *Gentry* says) it is illogical to require an intent-to-kill for an attempted homicide offense when the completed offense has no such element, it does not follow from this that there is an attempt offense with no intent-to-kill element. It is more logical to say that that offense cannot be attempted.

We turn now to the problems caused by rejecting the attempt logic.

V. THE PROBLEMS CAUSED BY REJECTING THE ATTEMPT LOGIC

A. THE COULD-HAVE-CAUSED-DEATH/WOULD-HAVE-RESULTED-IN-DEATH TEST IS TOO VAGUE TO BE RATIONALLY AND CONSISTENTLY APPLIED

In essence, *Brown* revived the *Amlotte* offense (and its problems) under a new name, attempted second-degree murder. The two offenses are identical, not in their technical elements, but in their practical effect. The same problems that arose under *Amlotte* will also arise under *Brown* and for the same reasons: Neither offense has an intent-to-kill element; it is logically impossible to attempt to unintentionally kill another; and, if we recognize an attempted homicide offense with no intent-to-kill element, we cannot rationally and consistently determine the *actus reus* element of the attempt offense.

As discussed in part one (1) below, the *Amlotte* and *Brown* offenses have the same essential elements, at least as a factual matter; any set of facts that would prove the *Brown* offense would also, if they occurred during a qualifying felony, prove the *Amlotte* offense. As discussed in part two (2), this is illustrated by the case law that holds the evidence to be sufficient to prove these two offenses. In part three (3), it will be seen that almost any act or threat of violence could, in the absence of an intent-to-kill element, be prosecuted as an attempted second-degree murder. Finally, in parts four (4) and five (5), we will see that the broad scope of the *actus reus* element of attempted second-degree murder will not be significantly restricted by either the depraved-mind element of the offense or the vague *proximity* limitation the *Brady* Court may have read into the offense.

1. THE TESTS OF COULD-HAVE-CAUSED-DEATH AND WOULD-HAVE-RESULTED-IN-DEATH ARE ESSENTIALLY IDENTICAL.

The *actus reus* element of the *Amlotte* offense was an “overt act which could, but does not, cause . . . death”¹⁰⁶ The *actus reus* element of the *Brown* offense is “an act which would have resulted in [death] except that someone prevented [the defendant] from killing . . . or he failed to do so”¹⁰⁷ The *Gray* Court said the problem with *Amlotte* was its failure to fully embrace the attempt logic, *i.e.*, it recognized an attempted homicide offense in which the intent-to-commit-offense element does not require proof of an *actual* intent-to-kill; and this makes it too “difficult[] [to] determin[e] what constitutes an ‘overt act’ that could, but does not, cause [] death”¹⁰⁸

Brown also rejects the attempt logic. As will be seen, the *Brown* would-have-resulted-in-death element is essentially identical to the *Amlotte* could-have-caused-death element. Thus, both offenses have the same basic elements: (1) an intent-to-commit-homicide element that does not require proof of an intent-to-kill; and (2) an amorphous overt-act *actus reus* element that, due to the lack of an intent-to-kill element, is too difficult to determine. The same problems that arose under *Amlotte* will arise under *Brown*.

The *Amlotte* *actus reus* element did not expressly contain the *failed-to-kill-or-was-prevented-from-killing* language found in *Brown*. But that language is in the *Amlotte* element, and for the same reason that it is in *Brown*: It is part of the statutory definition of the attempt offense.¹⁰⁹ Further, this failed-or-prevented language is irrelevant to the present issue. How can one *fail* to do, or be *prevented* from doing, something that one never intended to do? Consider *Brady*. There is no indication in either opinion that anyone *prevented* Brady from killing the unintended victim; presumably, he could have shot her again if he wished. And in what sense did he *fail* to kill her? He didn’t kill her, of course; but is this a *failure* on his part? If one does not do a thing (that one never intended to do), does this mean that one *failed* to do that thing? Would we say that all but a small handful of people have *failed* to play (or were *prevented* from playing) center for the Boston Celtics, even though only a slightly larger number ever tried to achieve that goal? Not-

106. *Amlotte v. State*, 456 So. 2d 448, 450 (Fla. 1984), *receded from*, *Gray*, 654 So. 2d at 553.

107. *Brown*, 790 So. 2d at 390.

108. *State v. Gray*, 654 So. 2d 552, 554 (Fla. 1995).

109. FLA. STAT. § 777.04(1) (2015) (“A person who attempts to commit an offense . . . and in such attempt does any act toward the commission of such offense, but fails in the perpetration or is intercepted or prevented in the execution thereof, commits the offense of criminal attempt . . .”).

doing something (that one never intended to do) is not the same as failing-to-do that something; were it otherwise, all lives would be an unending cascade of (unattempted) failures, both grand and petty.

This failed-or-prevented component is a necessary corollary of the intent-to-commit-offense element of an attempt offense. With an attempt, one does not commit the completed offense that one intended to commit for one of three reasons: (1) One failed to fulfill that intent despite making the effort; (2) an outside force (another person, unforeseen circumstances) prevented one from fulfilling that intent (despite one's making the effort); or (3) one voluntarily abandoned the intent. The argument made here is that it is illogical to say that one can intend to commit an offense that has an unintended-harm element. If this is true, then it is also illogical to say that one can fail to commit, or be prevented from committing, such an offense (and, as discussed in the next section, to say that one can abandon an intent to commit such an offense).

Thus, we cannot distinguish the *Brown would-have-resulted-in-death* element from the *Amlotte could-have-caused-death* element by noting the failed-or-prevented language in *Brown*; that language is also present (by implication) in *Amlotte*. And all other linguistic differences in these two elements are mere semantics. *Amlotte* used the phrase *could-have-caused*; *Brown* used *would-have-resulted-in*. *Caused* and *resulted-in* are mirror-image halves of a larger whole; one cannot exist without the other. As to *could-have* and *would-have*, the Florida Supreme Court sees no difference in these phrases. While *Brown* used the phrase *would-have-resulted-in-death*, in three later attempted second-degree murder cases, the Court used *could-have-resulted-in-death*.¹¹⁰

Relevant definitions of “would” include: (1) “used to talk about a *possible* situation that has not happened or that you are *imagining*[;] used with *have* to talk about *something that did not happen* or was not done”;¹¹¹ (2) “used for talking about the possible results of a situation that is unlikely to happen or that did not happen”;¹¹² and (3) “indicating the consequence of an imagined event or situation.”¹¹³ Relevant definitions of “could” include:

110. See *Milton v. State*, 161 So. 3d 1245, 1248–49 (Fla. 2014); *Coicou v. State*, 39 So. 3d 237, 241 (Fla. 2010); *State v. Florida*, 894 So. 2d 941, 945–46 (Fla. 2005).

111. *Would*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/would> (last visited Apr. 18, 2016) (emphasis added).

112. *Would*, MACMILLANDICTIONARY.COM, <http://www.macmillandictionary.com/dictionary/british/would> (last visited Apr. 18, 2016) (emphasis added).

113. *Would*, OXFORDDICTIONARIES.COM,

(1) “used to express *possibility* [or] to express conditional *possibility* or ability”;¹¹⁴ and (2) “used to say something is *possible*.”¹¹⁵ The common thread between these two words is the notion of “possible,” with *would* apparently giving one even freer rein to *imagine possible* results that, not only *did not happen*, but were *unlikely to happen*. But whether we use a could-have test or would-have test, the bottom line is this: Without an intent-to-kill element, an attempted homicide offense merely requires proof that it was *possible* that someone might have been unintentionally killed by one’s acts.

In sum, the could-have-caused-death and would-have-resulted-in-death elements are, in essence, identical, and both contain the same flaw. Both mean *could/would have caused/resulted-in an unintended death if the facts were different from both (1) what they actually were, and (2) what one intended*.¹¹⁶ Clearly, a death neither *could* nor *would* have occurred under the actual facts of any given case; this is proven by the fact that a death *did not occur*. Thus, to determine if this element is proven, we must imagine different facts that might possibly have occurred and then ask whether someone could/would have been *unintentionally* killed if those imagined facts had occurred. One cannot rationally apply such a hypothetical test.

For present purposes, there are no other differences between the *Brown* offense and the *Amlotte* offense. Each has an element the other does not (*depraved mind* and *committed during a felony*, respectively), which means that attempted second-degree murder is a permissive-lesser-included offense of the *Amlotte* offense.¹¹⁷ But any facts that would prove attempted second-degree murder would also prove the *Amlotte* offense, if those facts occurred during a qualifying felony. But the problems

<http://www.oxforddictionaries.com/definition/english/would> (last visited Apr. 18, 2016) (emphasis added).

114. *Could*, THEFREECTIONARY.COM, <http://www.thefreedictionary.com/could> (last visited Apr. 18, 2016) (emphasis added).

115. *Could*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/could> (last visited Apr. 18, 2016) (emphasis added).

116. With attempts to commit intent-to-kill homicides, we can also say that death would-have-resulted if the facts were different from what they actually were. But, the distinction here is that, with attempted intent-to-kill homicides, death would-have-resulted if the facts had been *what one intended*. With attempted no-intent-to-kill homicides, the State must prove that death would-have-resulted if the facts were different, not only from what they were, but from *what one intended*. With attempted intent-to-kill homicides, there was still something left to do (kill) that one originally intended to do but did not. With attempted no-intent-to-kill homicides, it is quite possible that there was nothing left to do from the original intent, that one did exactly what one intended to do all along (*e.g.*, commit a different offense, such as aggravated assault or battery).

117. See *Coicou v. State*, 39 So. 3d 237, 241 (Fla. 2010) (noting attempted second-degree murder is a permissive lesser included offense of the statutory offense of attempted felony murder).

identified in *Gray* were not caused by the fact that the acts occurred during a felony; there is nothing inherently illogical about an attempted felony murder offense, provided it has an intent-to-kill element. The problems noted in *Gray* were caused by *Amlotte's* rejection of the attempt logic. *Brown* also rejects the attempt logic, which means the problems noted in *Gray* will also occur with attempted second-degree murder. This conclusion is confirmed by a review of the Florida cases that have held that the evidence was sufficient to prove these offenses.

2. THE CASE LAW ON EVIDENCE SUFFICIENCY PROVES THAT THE TWO OFFENSES ARE ESSENTIALLY IDENTICAL

When *Amlotte* was good law, Florida district courts affirmed attempted felony murder convictions when the defendant: (1) bound and beat a victim;¹¹⁸ (2) ran over a victim with a car as he fled;¹¹⁹ and (3) “pointed a gun at [a victim, which] . . . alone could qualify as an overt act toward the attempted murder”¹²⁰ As to attempted second-degree murder, the *Brady* Court held that the evidence proved two counts of that offense when Brady fired a single shot that missed the intended victim but hit an unintended victim.¹²¹ Florida district courts have affirmed convictions for attempted second-degree murder on the following facts: (1) shooting a robbery victim in the leg;¹²² (2) beating and choking a burglary victim until she passed out;¹²³ (3) beating with a metal bar;¹²⁴ (4) kicking into unconsciousness;¹²⁵ (5) repeated stabbing;¹²⁶ (6) firing a shot at one person that hit the unintended victim of the attempt offense;¹²⁷ (7) hitting an unintended victim by shooting toward a crowd while fleeing;¹²⁸ (8) firing shots into a car that both killed an intended victim and injured the two unintended victims of attempt offenses;¹²⁹ (9) intentionally hitting a

118. *Diaz v. State*, 601 So. 2d 1269, 1269 (Fla. 3d DCA 1992) (per curiam).

119. *Oropesa v. State*, 555 So. 2d 389, 389–90 (Fla. 3d DCA 1989).

120. *Johnson v. State*, 486 So. 2d 657, 657–59 (Fla. 4th DCA 1986).

121. *State v. Brady*, 745 So. 2d 954, 958 (Fla. 1999) (per curiam).

122. *Pitts v. State*, 710 So. 2d 62, 62 (Fla. 3d DCA 1998) (per curiam) (relying on *Brown v. State*, 569 So. 2d 1320, 1321 (Fla. 1st DCA 1990)).

123. *Marti v. State*, 756 So. 2d 224, 227 (Fla. Dist. Ct. App. 2000).

124. *Thompson v. State*, 588 So. 2d 687, 688–89 (Fla. Dist. Ct. App. 1991).

125. *Warren v. State*, 724 So. 2d 607, 608 (Fla. Dist. Ct. App. 1998).

126. *K.B. v. State*, 594 So. 2d 825, 826 (Fla. Dist. Ct. App. 1992).

127. *Bell v. State*, 768 So. 2d 22, 28 (Fla. Dist. Ct. App. 2000).

128. *Id.* at 26.

129. *Shellman v. State*, 620 So. 2d 1010, 1011–12 (Fla. Dist. Ct. App. 1993).

pedestrian with a car;¹³⁰ (10) firing shots near a victim's feet, with bullets bouncing up into his legs;¹³¹ (11) shooting a fleeing victim in the back;¹³² and (12) pointing a firearm at another and unsuccessfully trying to pull the trigger.¹³³ In this last case the court said "pointing a handgun at someone is an act teeming with consequences and is reasonably understood as an act toward the commission of a murder."¹³⁴

In some of these attempted second-degree murder cases, the events occurred while D was committing a qualifying felony for first-degree felony murder. In those cases where this did not occur, it might have. Thus, any set of facts that prove attempted second-degree murder would, if they occurred during a qualifying felony, also prove the *Amlotte* offense of attempted felony murder. But if it is too "difficult[to] determin[e] what constitutes an 'overt act' that could, but does not, cause . . . death"¹³⁵ for the *Amlotte* offense, we do not solve that problem simply by renaming the offense attempted second-degree murder. "It is just as illogical to say that one can attempt (*i.e.*, intend) to commit an unintended homicide by a depraved act as to say that one can attempt to commit an unintended homicide by commission of [a] felony."¹³⁶

The victim was seriously injured in most of the attempted second-degree murder cases. But this is irrelevant for present purposes. Victim injury—indeed, "[v]ictim contact[—]is unnecessary [to prove] attempted second-degree murder."¹³⁷

In sum, the case law shows that these two offenses are essentially

130. *Black v. State*, 95 So. 3d 884 886 (Fla. Dist. Ct. App. 2012).

131. *Watkins v. State*, 705 So. 2d 938, 939 (Fla. Dist. Ct. App. 1998).

132. *Antoine v. State*, 138 So. 3d 1064, 1072 (Fla. Dist. Ct. App. 2014); *Barron v. State*, 990 So. 2d 1098, 1104–05 (Fla. Dist. Ct. App. 2007)

133. *Burns v. State*, 584 So. 2d 1073, 1074 (Fla. Dist. Ct. App. 1991).

134. *Id.* at 1076.

135. *State v. Gray*, 654 So. 2d 552, 554 (Fla. 1995).

136. *Watkins*, 705 So. 2d at 941 (Cobb, J., concurring).

137. *State v. Florida*, 894 So. 2d 941, 946 (Fla. 2005); *see also* *Knight v. State*, 32 So. 110, 112 (Fla. 1902) (citation omitted) ("[N]either a battery nor a wounding is an [element] of the [AWIC] offense The offense is complete where one person commits an assault on another with intent to commit a felony, and an assault may be committed without either a battery or a wounding."). The requirement of proof of injury would help eliminate the problem in recognizing an attempted homicide offense that does not require proof of an intent-to-kill; the injury requirement would significantly narrow the potential *actus reus* element of the offense. But, with an injury requirement, there would be no need to call the offense an attempted homicide offense. Further, such an offense would not be a version of the Florida statutory *offense of criminal attempt*. Rather, it would be a whole new offense (which we might call "committing an imminently dangerous act with a depraved mind that causes injury to another" or the like), which must be created by the legislature, not by a court.

identical, at least with regard to the basic facts needed to prove the *actus reus* elements of the two offenses.

3. WITHOUT AN INTENT-TO-KILL ELEMENT, ALMOST ANY ACT OR THREAT OF VIOLENCE COULD BE USED TO PROVE THE *ACTUS REUS* ELEMENT OF ATTEMPTED SECOND-DEGREE MURDER

As should be clear from the cases just discussed, without an intent-to-kill element, almost any act or threat of violence could prove the *actus reus* element of attempted second-degree murder. If “pointing a handgun at someone” proves that offense because it is “an act toward the commission of a murder,”¹³⁸ then all cases in which a firearm was pointed at another are attempted second-degree murders; the victim would-have-been-killed if the firearm accidentally discharged and the bullet hit the right spot.¹³⁹ Indeed, the firearm need not even be pointed *at* someone. A fired bullet could ricochet, or someone could change the point of aim by trying to disarm the gun wielder; either event would-have-caused the bullet to hit someone outside the range of where the firearm was aimed, and that person would-have-been-killed if the bullet hit the right spot.

Many other things that did not kill would-have-killed under different, and unintended-by-defendant, facts. A slashing wound or a swing of a blunt object would-have-killed if it hit the right spot, or if the wound gets infected,¹⁴⁰ or if malpractice occurs during treatment.¹⁴¹ A single punch,

138. *Burns v. State*, 584 So. 2d 1073, 1076 (Fla. 4th DCA 1991).

139. *See Hines v. State*, 227 So. 2d 334, 335–36 (Fla. Dist. Ct. App. 1969) (affirming second-degree murder conviction when D, who was “stupidly funning around,” pointed shotgun at [V’s] face and told her “to go out there and act like a squirrel and if he killed her then it wouldn’t be no accident,” and V is killed when shotgun fires); *see also Sapp v. State*, 913 So. 2d 1220, 1225–26 (Fla. Dist. Ct. App. 2005) (collecting cases addressing manslaughter convictions based on the unintended killings caused by reckless mishandling of firearms). Any reckless mishandling of a firearm could be prosecuted as attempted manslaughter, if not attempted second-degree murder, at least if someone else was present at the time. And if no one else *was* present, could we charge this as an attempted homicide on the theory that someone would-have-been-killed if that someone would-have-been present?

140. *See Adams v. State*, 310 So. 2d 782, 783–84 (Fla. Dist. Ct. App. 1975) (affirming felony murder conviction when victim falls and breaks hip during robbery and later dies of heart attack during hip surgery), *vacated in part on other grounds*, 335 So. 2d 801 (Fla. 1976). Can all offenses that result in treatment-requiring injuries be charged as attempted homicide on the theory that death would-have-resulted if the victim had suffered a heart attack during treatment; or would-have-died if the wound went untreated and became fatally infected? If there was no injury, can attempted homicide be charged on the theory that, if the victim would-have suffered a treatment-requiring injury, death would-have-resulted if these other things occurred?

141. *See Hampton v. State*, 542 So. 2d 458, 458 (Fla. 4th DCA 1989) (“[W]here the wound inflicted . . . is dangerous to life, mere erroneous treatment of it [is not a defense to] a charge of

slap, or shove can cause death, if the punch hits the right spot, or if the victim falls and becomes impaled, or hits her head, on something sharp or hard.¹⁴² Death can result from a minor injury—or with no direct injury at all—if the victim has a pre-existing condition that creates a peculiar vulnerability to stress.¹⁴³ Simple assaults would-cause-death if the victim runs into traffic to escape the threat and is hit by a car, or trips and hits her head, *etc.*; and “a person who by actual assault or threat of violence causes another person to do an act resulting in [the] other person’s death is criminally responsible for the [death].”¹⁴⁴

Thus, if we reject the attempt logic, almost any act or threat of

unlawful homicide.”). Can all offenses that result in treatment-requiring injuries be charged as attempted homicide on the theory that death *would-have-resulted* if malpractice had occurred during treatment? If there was no injury, can attempted homicide be charged on the theory that, if the victim *would-have-suffered* a treatment-requiring injury, death *would-have-resulted* if malpractice had occurred during treatment?

142. See *Hall v. State*, 951 So. 2d 92, 93 (Fla. Dist. Ct. App. 2007) (affirming manslaughter conviction based on a single punch and collecting cases); *Larsen v. State*, 485 So. 2d 1372, 1373 (Fla. Dist. Ct. App. 1986) (affirming second-degree murder conviction when D slaps wife during quarrel, causing her to fall and fracture skull on floor). Can some simple batteries be charged as attempted homicides because the victim would-have-died if a punch had caused his head to twist a certain way, or if the punch had knocked him down and he hit his head on something hard?

143. See *Swan v. State*, 322 So. 2d 485, 487 (Fla. 1975) (“Criminals take their victims as they find them . . . [and] can not be excused . . . because [the] victim was weak and could not survive the [attack].”); *Tyus v. State*, 845 So. 2d 318, 319–20 (Fla. Dist. Ct. App. 2003) (affirming manslaughter conviction when victim dies of heart attack when she sees D break glass on her front door and enter her home); *Maynard v. State*, 660 So. 2d 293, 297 (Fla. Dist. Ct. App. 1995) (affirming manslaughter conviction when victim dies of heart attack about an hour after D punches him several times); *Phillips v. State*, 289 So. 2d 447, 448 (Fla. Dist. Ct. App. 1974) (affirming second-degree murder conviction when victim dies of heart attack while trying to stop D’s attack on victim’s wife). Could these defendants be convicted of attempted homicides if the victims survived the heart attacks? What if the victims had no heart attacks but they might have had heart attacks because they had heart conditions and would-have-died if they had heart attacks? What if they had no pre-existing heart conditions but they would-have-had fatal heart attacks if they had such conditions?

144. *Parrish v. State*, 97 So. 2d 356, 359 (Fla. 1st DCA 1957) (affirming second-degree murder conviction when D’s ex-wife dies when she crashes while trying to escape his high-speed, jealousy-fueled pursuit of her car); *accord*, *Whaley v. State*, 26 So. 2d 656, 657 (Fla. 1946) (affirming manslaughter conviction when D’s ex-wife dies when she jumps from the moving car he is driving when he threatens to beat her again); *Wright v. State*, 363 So. 2d 617, 618–19 (Fla. Dist. Ct. App. 1978) (affirming manslaughter conviction when third person kills pedestrian with his car while escaping from D’s high-speed car pursuit of third person). Could Parrish be convicted of an attempt merely for chasing his ex, even if she never crashed (because she would-have-been-killed if she had crashed)? Could Whaley be convicted of an attempt merely for threatening his ex in the car (because she would-have-been-killed if she had reacted to his threat by jumping from the car)? Could Wright be convicted of an attempt for attacking and chasing Third Person (because Third Person would-have-killed the victim if Third Person had to drive recklessly to escape from Wright)?

violence can qualify as the *actus reus* element of attempted second-degree murder. And there is nothing in *Brady-Brown* that limits on this almost unlimited *actus reus* element.

4. THE DEPRAVED MIND ELEMENT DOES NOT SIGNIFICANTLY LIMIT THE RANGE OF THE ATTEMPTED SECOND-DEGREE MURDER OFFENSE

Of course, all the hypotheticals noted above will constitute attempted second-degree murder only if one has a depraved mind. But this depraved-mind element does little to restrict the almost unlimited scope of the would-have-resulted-in-death *actus reus* element. In most cases where violence is used or threatened, one will probably, at least arguably, have that depraved mind. Although the Florida Supreme Court has said that depraved mind refers to “‘malice’ in the popular or commonly understood sense of ill will, hatred, spite, an evil intent . . . [or] the malice of the evil motive,”¹⁴⁵ some district courts say, “malice is not limited in its meaning to hatred, ill will and malevolence, but ‘denotes a wicked and corrupt disregard of the lives and safety of others [or] a failure to appreciate social duty.’”¹⁴⁶

Further, it need not be shown that the depraved mind was directed at the actual victim. Second-degree murder requires proof that one, while acting with a depraved mind, killed “a human being” by committing an act that is “imminently dangerous to another.”¹⁴⁷ But the depraved mind need not be directed at the *human being* who was killed; indeed, it seems the depraved mind need not even be directed at *another* to whom the act was *imminently dangerous*. But certainly, it is enough that, acting with a depraved mind, one commits an act that is imminently dangerous to another and a human being is killed, even if one doesn’t even know the deceased human-being victim.

Brady illustrates this point. That incident occurred in a crowded nightclub when the intended victim (Mack)

approached Brady . . . to ask him about a prior incident. After tapping Brady on the shoulder, Mack asked him why he had shot at Mack several days earlier. Brady responded, “Yeah n, what about it?” and then pulled out his gun and shot at Mack. The bullet missed Mack but hit [the unintended victim] in the hand.¹⁴⁸

145. Ramsey v. State, 154 So. 855, 856 (Fla. 1934) (en banc).

146. Hines v. State, 227 So. 2d 334, 336 (Fla. 1st DCA 1969) (citation omitted); see also Antoine v. State, 138 So. 3d 1064, 1073 (Fla. 4th DCA 2014); Larsen, 485 So. 2d at 1374.

147. FLA. STAT. § 782.04(2) (2015).

148. State v. Brady, 745 So. 2d 954, 955 (Fla. 1999).

Brady had a depraved mind with regard to the intended victim. But there is no indication (in either *Brady* opinion) that Brady even knew the unintended victim, much less had any depraved mind toward her. Neither the district court nor the supreme court noted this issue. But the supreme court expressly rejected the use of transferred intent to affirm the conviction as to the unintended victim, asserting Brady's act of shooting was "imminently dangerous to others, including [both victims]" and this was sufficient to prove the offense.¹⁴⁹

But if Brady bore no actual malice toward the unintended victim, and the doctrine of transferred intent does not apply, then this depraved-mind element does not require proof of any malice (actual or transferred) for any unintended victims. There need be no direct nexus between (1) the depraved mind; (2) the *another* whom the *imminently dangerous act* was *dangerous to*; and (3) the *human being* who is killed (or would-have-been-killed, in an attempt offense) by the imminently dangerous act (other than, perhaps, that that act was also imminently dangerous as to that human-being-victim). It seems that, if one commits an imminently dangerous act with a depraved mind toward *someone*, then that depraved mind will be deemed to cover *anyone* within range of the imminently dangerous act.

The problem with trying to apply these rules to an attempted homicide offense with no intent-to-kill element is obvious. If we (1) say that the depraved-mind mental state applies to anyone (even strangers) within range of the imminently dangerous act, and then (2) couple that with the would-have-resulted-in-death test, then with regard to any act or threat of violence perpetrated by someone with a depraved mind, the number of attempted second-degree murder charges we can bring is limited only by the imagination. All we need is a *human being* that we can point to and say "that human being would-have-been-killed if *this* had happened instead of *that*" (regardless of whether the defendant ever intended for *this* to happen).

Note also that *Brady* did not say that the doctrine of transferred intent can *never* be used in attempted second-degree murder cases. Rather, the Court said, "there is no need to [use it *in that case* because] the facts . . . support a conviction of attempted second-degree murder of [both victims]."¹⁵⁰ In pre-*Brady* cases, one district court expressly applied the transferred-intent doctrine,¹⁵¹ and three other courts may have used that

149. *Id.* at 957–58 (emphasis added).

150. *Brady*, 745 So. 2d at 958.

151. *Pressley v. State*, 395 So. 2d 1175, 1177 (Fla. Dist. Ct. App. 1981) (affirming conviction when D, during family quarrel, shoots at brother-in-law but kills father-in-law, for whom he did

same doctrine, to affirm second-degree murder convictions of unintended victims.¹⁵² Using the logic of *Brady*, the convictions in these cases could be upheld on the theory that the defendants committed acts that were imminently dangerous to *others* (in addition to being dangerous to the persons towards whom they had a depraved mind). Presumably, under *Brady*, these defendants could also be convicted of multiple attempt offenses, even though they had no depraved mind toward all the others who were endangered by their acts.

Thus, even if we read *Brady* as meaning the doctrine of transferred intent can *never* be used with attempted second-degree murder, the point seems moot. Given the fact that it need not be shown that one had a depraved mind *towards the actual victim*, even if the doctrine of transferred intent applied, it would impose no significant limits on the open-ended *would-have-resulted-in-death* element. Put another way, there is no need to transfer any intent if the definition of depraved mind, in itself, already essentially does so. The depraved mind will cover any person within range of the imminently dangerous act, even though it was directed at a particular person (or maybe even not at any particular person at all, as in the shooting in *Hooker*).¹⁵³ In sum, the depraved-mind element will not significantly restrict the scope of the would-have-resulted-in-death element in attempted

not seem to bear a depraved mind; “Even though [D] has no intent to hit or kill anyone, firing a gun into a crowd of people constitutes second degree murder when a person is killed”; “moreover, [D] did intend to either kill or cause serious bodily injury to [intended victim and, as] a matter of law, this original malice is transferred . . . to [unintended victim]”). This court cited *Golding v. State*, 8 So. 311, 312 (1890), *limited on other grounds*, *McCoy v. State*, 24 So. 485, 489 (1898), where the Court said in *dicta*: “[A] killing is murder in the second degree [if] the discharge of the gun, or throwing a stone or brick into the crowd evinces a depraved mind, regardless of human life, although [D] has no intention of killing any particular individual.” Under the logic of these cases, read in light of *Brady*, it seems that *discharging a gun, or throwing a stone or brick into a crowd evinces a depraved mind* that would support an attempted second-degree murder charge with regard to essentially anyone in the crowd, *even though D had no intent to kill anyone* (indeed, even if D did not intend to hit anyone but was merely trying to scare or warn the crowd).

152. *Presley v. State*, 499 So. 2d 64, 64–65 (Fla. Dist. Ct. App. 1986) (affirming conviction when D shoots into a car containing six men, one of whom he had quarreled with earlier, and accidentally kills a girl, for whom he apparently had no malice); *Grissom v. State*, 237 So. 2d 57, 58 (Fla. Dist. Ct. App. 1970) (affirming conviction when D, who was a high school student, shot at, but did not kill, a teacher he quarreled with earlier and, as D was leaving, “he fired a shot . . . up a stairway[, which] killed [a] student[] on the stairs,” with no indication D had malice toward student-victim); *Hooker v. State*, 497 So. 2d 982, 983 (Fla. Dist. Ct. App. 1986) (affirming conviction when D joined “a group of men . . . look[ing] for Mexicans to run out of town” and D fired shots “into a trailer . . . he believed to be occupied, and which was occupied,” killing one, even though there was no indication D had malice toward victim).

153. *Hooker*, 497 So. 2d at 983.

second-degree murder.¹⁵⁴

5. THE *BRADY* “CLOSE-PROXIMITY” LIMITATION WILL NOT SIGNIFICANTLY LIMIT THE RANGE OF THE ATTEMPTED SECOND-DEGREE MURDER OFFENSE

The *Brady* Court indicated that there might be another limitation here, a physical “proximity” limitation. But both the legal source, and the scope, of this possible limitation are unclear. The Court noted that: (1) *Brady* “intentionally fir[ed] a deadly weapon *in close proximity* to both [victims]”; and (2) although “Mack was the intended target[, the unintended victim] was *in close proximity*,” which proved the “act imminently dangerous to others’ requirement [for] second-degree murder”¹⁵⁵ The significance of this close-proximity language is unclear. Is this an element needed to prove the offense? Or merely a fact the Court noted? If it is an element, does it apply to both victims?

And what does it mean? That, as to *both* victims, attempted second-degree murder is proven only if the shot was fired in close proximity to that victim? Does close proximity refer to the firearm’s muzzle? To where the intended victim was sitting? Or anywhere along the entire line of fire (from muzzle to intended victim), which was probably a few feet in *Brady*, but in other shooting cases, could be several hundred yards long?

As noted above, neither victim injury nor victim contact is required to prove attempted second-degree murder.¹⁵⁶ Thus, the fact that the errant shot actually hit *Brady*’s unintended victim is irrelevant to his guilt of the offense as to her. Presumably, regardless of where the bullet hit, attempted second-degree murder charges could be filed with regard to *anyone* who was in close proximity to . . . well, what exactly? The shooter? The intended victim? The intended line of fire?

If this means in-close-proximity to the imminently dangerous act itself, does these mean the act one intended to commit or the act actually committed (or both)? Suppose that, as *Brady* was about to shoot, someone grabbed his

154. See *Williams v. State*, 123 So. 3d 23, 27 (Fla. 2013). Even if there is no depraved mind, most acts or threats of violence would prove attempted manslaughter, which also has no intent-to-kill element. *Id.* The problems identified in *Gray* will also occur with the attempted manslaughter offense; indeed, they will occur even more readily, because the depraved-mind element need not be proven to prove attempted manslaughter.

155. *Brady*, 745 So. 2d at 958 (emphasis added).

156. *State v. Florida*, 894 So. 2d 941, 946 (Fla. 2005); *Knight v. State*, 32 So. 110, 112 (Fla. 1902).

arm, changing the trajectory of the shot. The original unintended victim was in close proximity to the intended victim and thus was in close proximity to the *intended* line of fire. But she is now not in the *actual* line of fire, and there will now be others who are in close proximity to the actual-but-unintended line of fire (which could be well away from where the intended victim was). Can attempted second degree murder counts be filed as to all these? What about all the others in the bar who were not in close proximity to either the intended, or the actual, line of fire but would-have-been in a line of fire that would-have-resulted if a different person had grabbed Brady's arm; or if the arm-grabber grabbed the arm a second sooner or later; or if Brady squeezed the trigger a second sooner or later? If the unintended victim had moved more quickly, or had leaned over to talk to someone right before Brady fired, someone behind her would-have-been hit (and possibly killed). If the bullet had missed the unintended victim (or if it went through her hand) and then ricocheted off a hard surface, people well outside the original line of fire would-have-been killed (perhaps several of them, if the bullet splintered on impact).

The would-have-resulted-in-death test requires us to determine whether any *human being* would-have-been-killed if the facts were different both from what they actually were and from what was intended. What does close-proximity have to do with this? Regardless of any close-proximity, the facts would still have to be different from what they actually were and from what was intended before the shot would-have-killed anyone. Regardless of any close proximity, Brady no more *failed* to kill, or was *prevented from* killing, this particular unintended victim than he failed-or-was-prevented from killing everyone else in the bar. He also failed to kill those who left the bar right before the shooting occurred and those who didn't arrive until right after it happened (any of whom would-have-been in the line of fire if Brady had confronted the intended victim a few minutes sooner or later; or if they, or Brady, or the intended victim, had arrived at the bar sooner or later).

Thus, it is not clear what *in close proximity* means or how it affects the would-have-resulted-in-death test. The interplay between these two concepts raises other questions as well. Must one be aware of the unintended victims' presence in order to be convicted of attempted second-degree murder? Or is it sufficient if others were in-close-proximity (and would-have-been-killed, under different facts) regardless of whether one knew they were there? Suppose D, intending to kill V, bombs her home, thinking she is the only one there at the time. In fact, a group of plumbers are working inside, and V isn't there. Under *Brady*, could D be convicted of attempted second-degree murder for each plumber, even though he did not know them, did not know

they were there, and had no malice towards them? D committed an act that was *imminently dangerous to others* (even if D did not know that *others* were present) and the plumbers were in-close-proximity to that act.

Or were they? What if it is a very large house, the bomb was set off at one end, and the plumbers were at the other end, some distance away? Or maybe they were working in the detached garage or mother-in-law suite in the back yard? Would close-proximity include such possibilities as the roof collapsing, or fire engulfing the home (and its out buildings), even though the plumbers were not in-close-proximity to the blast itself (in the sense that the blast itself caused them no direct physical harm)? Can D be convicted of attempted second-degree murder on V, the intended victim, who was not home, and thus *not* in-close-proximity to D's imminently dangerous act? What if D was only trying to send a message to V, bombing her home at a time when he thought it was entirely empty? If, under *Brady*, the unintended victim must be in-close-proximity to the intended victim, what if there is no intended victim?

What if the plumbers went to lunch right before the bombing? If they had left a few minutes later, or if the bombing had occurred a few minutes earlier, they would-have-been inside when the bomb went off (and thus would-have-been killed if the bomb exploded in close proximity to their location; or they had been crushed by a collapsing roof, *etc.*)? Can D be convicted of attempted second-degree murder on these facts? Would the close proximity test apply here and, if so, how?

Indeed, does there even need to be an actual victim, an actual *human being* (in close proximity or otherwise), before an attempted second degree murder conviction can be obtained? Florida does not recognize an impossibility defense to attempts.¹⁵⁷ One can be convicted of attempted child molestation even though there was no actual child involved (because one was dealing with an undercover officer posing as a child).¹⁵⁸ One can be convicted of an attempted drug offense even though there were no actual drugs.¹⁵⁹ Presumably, one could be convicted of attempted premeditated murder even though there was no actual victim, *e.g.*, an undercover officer hires D to kill the officer's fictitious "spouse" and, after taking the money, D is arrested as he approaches the "spouse's home," shotgun in hand, ready to do the deed.¹⁶⁰

157. See *Hudson v. State*, 745 So. 2d 997, 1000–01 (Fla. Dist. Ct. App. 1999).

158. *Id.*

159. *E.g.*, *Brooks v. State*, 762 So. 2d 879, 897 (Fla. 2000).

160. *Cf. Carlton v. State*, 103 So. 3d 937 (Fla. Dist. Ct. App. 2013) (affirming attempted premeditated murder conviction when defendant hired undercover officer as "hit man," even though there was never any real danger to victim).

If one can attempt to molest a non-existent child, or buy non-existent drugs, can one attempt to commit second-degree murder by committing an imminently dangerous act that would have-killed a non-existent victim, had one existed? Suppose D, enraged that his wife just left him for another man, fires a shot through the roof of his home, which would-have-killed a roofer, had one been up there working (as one was the day before; or would be, as scheduled, the day after; or would have been that day, had it not rained)?

Further, what is the basis for this close-proximity element? Neither section 777.04(1) nor the cases interpreting it contain such an element. If close-proximity is required to prove attempted second-degree murder, is it also required to prove attempts to commit other offenses under section 777.04(1)? Suppose D, intending to kill V, fires a shot at a silhouette on the pulled-down window shade of V's house, thinking that it is V. In fact, it is a dummy; V heard of D's plan and set up the dummy to induce D to fire at it. In fact, no one was in V's house when D fired. Must D be acquitted of attempted premeditated murder because no one was in-close-proximity to the shot D fired? If close-proximity is not required here, why is it required for attempted second-degree murder?

This close-proximity test does not significantly limit the would-have-resulted-in-death test. It seems that, when this test is coupled with the inapplicability of the doctrine of transferred intent, then one who "fired into [a large] crowd with no intent to kill . . . [can] be convicted of a separate attempt to murder every person in the crowd;"¹⁶¹ or at least everyone in the crowd who satisfies the *Brady* close-proximity test. This would seem to create another oddity: One (like *Brady*) who fires a single shot could be convicted of multiple attempted homicide offenses even though the act he actually committed could have killed only one person (barring something highly unusual, *e.g.*, a bullet that splinters or goes through one person and then hits another).

6. CONCLUSION

There is no rational and consistent way to apply a would-have-resulted-in-death test. Except for offenses like vehicular homicide and DUI-manslaughter, homicide offenses outlaw, not specific or particular acts, but rather *any* act that causes death. Severing the act committed from the intent to cause the death leaves us no principled way to determine

161. *Brown v. State*, 790 So. 2d 389, 396 (Fla. 2001) (Harding, J., dissenting) (alteration in original) (quoting *United States v. Roa*, 12 M.J. 210, 212 (C.M.A. 1982)).

which, of the many acts that would (if they cause death) prove the completed offense, also prove an attempt. Put another way,

Since the “act” element in . . . an “attempt” is *any overt act* reasonably calculated to accomplish a crime, if the crime of attempt required only a general intent (to do the overt act) rather than the specific intent to commit some particular crime then every overt act would be a crime. It is because the [overt act] element is so vague in the crime of attempt that the mental element must be specific otherwise the crime of attempt . . . would be unconstitutionally void for vagueness¹⁶²

In sum, with *all* attempted homicide offenses, the failure to apply the attempt logic creates “difficulties with determining what constitutes an ‘overt act’ that could, but does not, cause [death].”¹⁶³ The failure to recognize the attempt logic causes other problems as well.

B. THE DIFFICULTIES IN APPLYING THE ABANDONMENT DEFENSE

Brown did not consider the effect that a lack of an intent-to-kill element has on the statutory defense to an attempt, which is available if, “under circumstances manifesting a complete and voluntary renunciation of [the] criminal purpose, [one] abandoned [the] attempt to commit the offense or otherwise prevented its commission”¹⁶⁴ The problem here is similar to the one noted above: Just as one cannot fail to do, or be prevented from doing, something that one never intended to do, one also cannot *renounce the purpose to do, or abandon an attempt to commit, or otherwise prevent the commission of*, something one never intended to do.¹⁶⁵

162. *Amlotte v. State*, 435 So. 2d 249, 254 (Fla. Dist. Ct. App. 1983) (Coward, J., dissenting).

163. *State v. Gray*, 654 So. 2d 552, 554 (Fla. 1995).

164. FLA. STAT. § 777.04(5) (2015); *see Carroll v. State*, 680 So. 2d 1065, 1066 (Fla. 3d DCA 1996); MODEL PENAL CODE § 5.01 cmt. (1985). The law distinguishes between a voluntary and involuntary abandonment. FLA. STAT. § 777.04(5). An involuntary abandonment occurs when one:

fails because of unanticipated difficulties in carrying out the criminal plan at the precise time and place intended and then decides not to pursue the victim under these less advantageous circumstances, [or] . . . when [one] withdraws because of a belief that the intended victim has become aware of his plans, or because he thinks that his scheme has been discovered or would be thwarted by police. . . .

Carroll, 680 So. 2d at 1066 (first alteration in original). A voluntary abandonment refers to a “change in the actor’s purpose not influenced by outside circumstances, what may be termed repentance or change of heart [or] lack of resolution or timidity,” including a “reappraisal by the actor of the criminal sanctions hanging over his conduct” MODEL PENAL CODE §5.01 cmt.

165. This point is addressed in greater depth in Richard Sanders, *Abandoning an Attempt to do the Unintended: Applying the Abandonment Defense to Attempted Homicide Offenses with no Intent-to-Kill Element*, 89 Fla.B.J. 44 (July 2015).

The abandonment defense is a way of “un-committing” a crime already committed.¹⁶⁶ With this defense, we discourage the commission of the not-yet-completed crime by granting “official absolution for guilt” for the attempt offense already committed.¹⁶⁷ The policy promoted here is that, although one has already committed the attempt, one has not yet committed the more serious crime that one intends to commit; and the law discourages the commission of the greater offense by forgiving the commission of the lesser offense. But the abandonment must occur when there is still something left to do *that one both originally intended to do and can now voluntarily desist from doing*. This logic does not apply to attempted homicide offenses with no intent-to-kill element. If one did not originally intend to kill, there is no intent-to-kill to abandon.

Consider *Brady*. Neither the district court nor the supreme court noted what Brady did after firing the single shot. Assume that the other patrons in the bar all scattered and Brady simply left. He fires no more shots, although he could have if he wanted to. What unfulfilled intent could he *renounce* with respect to the two attempt crimes he just committed? It seems he did exactly what he intended to do, which was fire a single shot at an enemy (perhaps merely to frighten or send a message). Of course, he did not intend to do *anything* to the unintended victim. How can he abandon his attempt to commit second-degree murder as to her? Or did he abandon that, by walking away without killing her?

Consider the other cases noted above that affirmed attempted second-degree murder convictions. In two of these cases, the defendants may have stopped the attack because a third party came on the scene.¹⁶⁸ In most of the others, it seems the defendants did exactly what they intended and they voluntarily desisted from further attack, intentionally leaving a live victim;

166. See *O’Shaughnessy v. People*, 269 P.3d 1233, 1235 (Col. 2012) (“[Although] the crime of attempt is complete once the actor takes a substantial step towards the commission of the crime, the affirmative defense of abandonment applies if the actor completely and voluntarily renounces his criminal intent thereafter.”); *Woodford v. State*, 488 N.E.2d 1121, 1124 (Ind. 1986) (“[I]t [is] possible for a person to technically commit the elements of the crime of attempt . . . but nevertheless to still avail himself of the defense of abandonment”); *Ramirez v. State*, 739 P.2d 1214, 1216 (Wyo. 1987) (“The defense . . . may be available even after the defendant has taken a substantial step toward commission of the crime.”).

167. Daniel G. Moriarty, *Extending the Defense of Renunciation*, 62 *TEMPLE L.R.* 1, 2, 4 (1989) (“Renunciation is a defense that allows a person who has committed a crime to abandon or renounce his or her criminal enterprise and thereby extinguish any previously incurred criminal liability.”). Indeed, if an attempt offense has not yet been committed, there is no need for any defense.

168. *Marti v. State*, 756 So. 2d 224 (Fla. 3d DCA 2000); *Thompson v. State*, 588 So. 2d 687 (Fla. 1st DCA 1991).

there was nothing further for them to do to fulfill the original intent.¹⁶⁹ But if there is nothing for these defendants to abandon, then the defense was not available to them. And it will never be available, even though it is clear that the attack on the victim ended because the defendant voluntarily ended it.

Of course, one may intend to kill even though that is not an element of the completed homicide offense. We might say that the abandonment defense is available in attempted second-degree murder cases where one intended to kill and voluntarily abandoned that intent. But now we are saying the defense is available if one abandons an intent to do something that is not an element of the offense attempted. How can that be considered an abandonment of an attempt to commit the offense attempted?

Or we might say the defense will *always* be available in these cases, at least if it is clear that one could have (if one chose) killed the victim but voluntarily decided not to. There *was* something left to do and that was not done. But now we are saying the defense is available because one abandoned the intent to do something that one never intended to do; and the intent that was abandoned (that one never intended to do) is not an element of the offense attempted.

In sum, *Brown* has, in effect, “semi-repealed” a valid statutory provision, the abandonment defense. This defense cannot properly be applied in cases of attempted homicide offenses that have no intent-to-kill element. This, in turn, exposes another anomaly worth noting.

It is hard to apply the abandonment defense to the attempted second-degree murder offense because that offense does not contain the same generic elements as the Florida statutory *offense of criminal attempt*. This is seen in the standard jury instruction on attempted second-degree murder, which (following the language in *Brady-Brown*) requires proof of two elements:

1. [D] intentionally committed an act which would have resulted in the death of (victim) except that someone prevented [D] from killing (victim) or [D] failed to do so.
2. The act was imminently dangerous to another and demonstrating a depraved mind without regard for human life.¹⁷⁰

Again, the Florida *offense of criminal attempt* generally requires proof

169. See *Watkins v. State*, 705 So. 2d 938, 943 (Fla. 5th DCA 1998) (Harris, J., dissenting) (noting *Watkins*’ “act [of firing shots at the feet of his victim, the *actus reus* of attempted second-degree murder conviction] was not attempted-it was spectacularly *achieved*.”).

170. FLA. STD. JURY INSTR. (Crim.) § 6.4.

that one “intended to commit [the offense] and committed an overt act toward completion of that offense.”¹⁷¹ The overt act required to prove an attempt is one that is “apparently adapted to effect that intent, carried beyond mere preparation, but *falling short of execution of the ultimate design*.”¹⁷² Although “[s]ome appreciable fragment of the crime must be committed” by the overt act, that “act *need not be . . . the ultimate, the last proximate, or the last possible act toward consummation of the crime*”;¹⁷³ indeed, if the overt act *was the ultimate, the last proximate, or the last possible act toward consummation of the crime*, then the completed crime would, in many cases, have actually been committed.

But the attempted second-degree murder offense created in *Brady-Brown* does *not* require proof that one *intended to commit* second-degree murder (and again, what can that mean, if intent-to-kill is not an element). And the *Brady-Brown* offense *does* require proof that one *actually committed the completed actus reus element* of second-degree murder (as opposed to merely *committing an overt act toward its completion that falls short of execution of the ultimate design*). In effect, attempted second-degree murder is committed when one (1) does something that would (if death resulted) prove the *actus reus* element of a completed offense of second-degree murder but (2) fails to (unintentionally) kill anyone.

To illustrate the point, suppose D, intending to kill V, walks into a bar where V is and, as D is starting to pull a pistol from under his shirt, officers tackle and arrest D. Suppose further that, unbeknownst to D, his pistol was unloaded; officers, aware of D’s plan, secretly unloaded it right before D entered the bar. Suppose also that the arrest occurs when D is several hundred feet away from V (it’s a large bar) and V is not even aware of what happened until he is told of it later. Surely, D could be convicted of attempted premeditated murder on these facts.

But could D be convicted of attempted second-degree murder? Even if he didn’t intend to kill V (but rather only intended to fire a shot over V’s head, to scare him), D nonetheless did *intend* to commit an “act [that] was imminently dangerous to another and [that] demonstrate[d] a depraved mind without regard for human life.”¹⁷⁴ But he did not *actually* commit such an act, although he did commit an *overt act* that was “apparently adapted to effect that intent [to commit an imminently dangerous act,

171. *Brooks v. State*, 762 So. 2d 879, 897 (Fla. 2000) (emphasis added).

172. *Thomas v. State*, 531 So. 2d 708, 709–10 (Fla. 1988) (emphasis added).

173. *State v. Coker*, 452 So. 2d 1135, 1136–37 (Fla. Dist. Ct. App. 1984) (emphasis added).

174. FLA. STD. JURY INSTR. (Crim.) § 6.4.

which D] carried beyond mere preparation [but that fell] short of execution of the ultimate design.”¹⁷⁵ But to prove attempted second-degree murder, it must be proven that D actually committed an “act [that] was imminently dangerous to another,”¹⁷⁶ and D did not actually do that.

With attempted premeditated murder, the failed-or-was-prevented language of the attempt offense can apply to both the *actus reus* element and the caused-harm element. In our hypothetical, D was *prevented* from committing the *actus reus* element when the officers arrested him. D could also be convicted of attempted premeditated murder if he actually fired a shot at V but missed because V ducked. On such facts, D *failed* to commit the caused-harm element of the offense, even though he fully succeeded in committing his intended *actus reus* element. But with attempted second-degree murder, if D failed-or-was-prevented from committing the *actus reus* element, then the attempt offense is not proven. Here, again, we see that the attempted second-degree murder offense differs from the *offense of criminal attempt* created by section 777.04(1).

It may be reasonable to argue that it should be a crime to commit “any act imminently dangerous to another and evincing a depraved mind regardless of human life,”¹⁷⁷ even though no one is actually killed; after all, “culpable negligence” is itself a crime, even though it is also an element of culpable-negligence manslaughter.¹⁷⁸ But it is elementary that the creation of new criminal offenses is for the legislature, not courts. The *Brown* court essentially usurped that legislative function by creating a whole new offense that is supposed to be an offense under section 777.04(1), but in fact does not require proof of the generic elements of that *offense of criminal attempt* (and to which the statutory abandonment defense cannot be properly applied).

These problems are also caused by recognizing an attempted homicide offense with no intent-to-kill element. There are still others.

C. PROBLEMS WITH EXTENDING THE LOGIC OF *BROWN*

If second-degree murder can be attempted without proof of intent-to-kill, what about other offenses with unintended-harm elements? Florida

175. *Thomas*, 531 So. 2d at 709–10.

176. FLA. STD. JURY INSTR. (Crim.) § 6.4.

177. FLA. STAT. § 782.04(2) (2015).

178. See FLA. STAT. § 784.05(1), (2) (2015) (providing that “(1) Whoever, through culpable negligence, exposes another person to personal injury [or] through culpable negligence, inflicts actual personal injury on another commits a misdemeanor”); FLA. STAT. § 782.07(1) (2015) (defining manslaughter in part as the killing of another by one’s “culpable negligence”).

recognizes several other forms of unintended homicide, including: vehicular homicide and vessel homicide, defined as causing the death of another “by the operation of a motor vehicle [or water vessel] in a reckless manner likely to cause the death of, or great bodily harm to, another”;¹⁷⁹ DUI-manslaughter, defined as causing the death of another while driving under the influence to the extent that “normal faculties are impaired”;¹⁸⁰ and driving without a license or while license is suspended, revoked, or canceled and causing another’s death by “careless or negligent operation of the motor vehicle.”¹⁸¹ Florida also recognizes other offenses with unintended-harm elements, including DUI-bodily injury, defined as causing serious bodily injury to another while driving under the influence;¹⁸² and felony battery, defined as a battery that unintentionally causes “great bodily harm, permanent disability, or permanent disfigurement.”¹⁸³ If attempted second degree murder requires no proof of intent to cause the statutorily required harm, can these offenses also be attempted? Florida courts have not addressed such questions.

In a pre-*Brown* case, a district court held that vehicular homicide cannot be attempted because there “can be no intent to commit an unlawful act which requires only recklessness[;] an attempt must involve at least some type of intent to commit the offense.”¹⁸⁴ But this is the same logic advanced by the *Brown* dissenters, who argued that (1) it is “absurd” that, under *Gentry*, the State can prove an attempt “without ever establishing [an] inten[t] to commit the underlying offense”; and (2) recognizing an offense of attempted second-degree murder is “illogical . . . because it is impossible to intend to commit an act of recklessness.”¹⁸⁵ The *Brown* majority rejected this reasoning. Post-*Brown*, *Williamson* may no longer be good law.

What about the other inchoate offenses in section 777.04, solicitation and conspiracy?¹⁸⁶ The elements of solicitation are “(1) commanding, hiring, [etc.] . . . another person to commit a crime and (2) the intent that the other person commit the crime.”¹⁸⁷ With conspiracy, “[b]oth an agreement and an intent to commit the offense are essential elements”¹⁸⁸ Both offenses have the same intent-to-commit-offense

179. FLA. STAT. §§ 782.071–.072 (2015).

180. FLA. STAT. § 316.193(1), (3)(c)(3) (2015).

181. FLA. STAT. § 322.34(6) (2015).

182. FLA. STAT. § 316.193(1), (3)(c)(2).

183. FLA. STAT. § 784.041(1) (2015).

184. *Williamson v. State*, 510 So. 2d 335, 337 (Fla. Dist. Ct. App. 1987).

185. *Brown v. State*, 790 So. 2d 389, 391, 395 (Fla. 2000) (Harding, J., dissenting).

186. See FLA. STAT. § 777.04(2), (3) (2015).

187. *The Florida Bar v. Marable*, 645 So. 2d 438, 442 (Fla. 1994).

188. *Spera v. State*, 656 So. 2d 550, 551 (Fla. Dist. Ct. App. 1995).

element found in the attempt offense. If one can attempt to commit a crime with an unintended-harm element, can one solicit or conspire with another to commit such an offense? In a pre-*Brown* case, a district court held there is no offense of solicitation to commit third-degree felony murder because “under third degree, the death is *accidental* and while one can solicit the commission of a felony or solicit to kill anyone, there cannot be a solicitation to kill someone without any design to effect death because one cannot solicit an unintentional death, [which] is an oxymoron.”¹⁸⁹ Is this still good law, post-*Brown*? If so, if one *cannot* solicit another to commit an offense with an unintended-harm element, then how can one attempt to commit such an offense? And what can it mean to say one solicited another, or conspired (agreed) with another, to commit an offense with an unintended harm element?

Some might suggest that some of these questions are answered in the *Williams* attempted manslaughter case noted in footnote nine (9) above. But this case raises more questions than it answers.

In *Williams*, the Court clarified its decision in the 1983 *Taylor* case, which responded to a certified question that asked whether Florida recognized an offense of attempted manslaughter.¹⁹⁰ By way of background, from 1899 until the 1970s (when the last opinion on point issued), both the Florida Supreme Court and the district courts consistently held that, as to the offense of AWIC-manslaughter, (1) the attempt logic compels the conclusion that intent-to-kill is a required element of the offense, which in turn (2) mandates that we distinguish between act-manslaughter (which has an intent-to-kill element and thus can be the underlying felony in an AWIC case) and culpable-negligence-manslaughter (which has no intent-to-kill element and thus cannot be the underlying felony in an AWIC case).¹⁹¹ In *Taylor*, the Court: (1) First quotes at length the *Williams* AWIC case and asserts “[t]he crime of [AWIC-]manslaughter was premised upon the fact that in Florida the crime of *manslaughter* includes certain types of intentional killings”; (2) then asserts that, “[b]y

189. *Hieke v. State*, 605 So. 2d 983, 983 (Fla. Dist. Ct. App. 1992).

190. *Taylor v. State*, 444 So. 2d 931 (Fla. 1983).

191. The first case in this series is *Williams v. State*, 26 So. 184, 186 (1899). Later cases reaffirming these rules are collected in *Rodriguez v. State*, 443 So. 2d 286, 290 (Fla. Dist. Ct. App. 1983) and *Wood v. State*, 251 So. 2d 556, 557 (Fla. Dist. Ct. App. 1971). The author assumes that the reasons why the AWIC offense is rarely charged any more is that (1) it is easier to prove an attempt offense than it is to prove an AWIC offense (because the State need only prove *any* overt act, and not the precise overt act of an assault), and (2) the maximum penalty for an attempt offense is now generally higher than the maximum sentence for an AWIC offense. *Cf.* FLA. STAT. §§ 777.04(4) with 784.021(2) (2015).

the same reasoning, . . . the crime of attempted manslaughter [can] exist in situations where, if death had resulted, the defendant could have been found guilty of voluntary [*i.e.*, ‘act’] manslaughter”; and (3) then finds “there was sufficient evidence to [prove] that [Taylor] had attempted manslaughter” because there was “sufficient proof that he *intended to kill* [the victim].”¹⁹² At this point, the Court seems to be leading to the conclusion that the AWIC cases provide the answer to the certified question. But the Court went on to “hold that there may be a crime of attempted manslaughter” and it requires

proof that [one] had the requisite *intent to commit an unlawful act*. This holding necessitates that a distinction be made between the crimes of “manslaughter by act or procurement” and “manslaughter by culpable negligence.” For the latter there can be no corresponding attempt crime. This conclusion is mandated by the fact that there can be *no intent to commit an unlawful act when the underlying conduct constitutes culpable negligence*. On the other hand, when the underlying conduct constitutes an act or procurement, such as an aggravated assault, there is an *intent to commit the act* and, thus, there exists the requisite intent to support attempted manslaughter.¹⁹³

“[This] language from *Taylor* . . . created some confusion [in the district courts] about the elements of attempted manslaughter . . .”¹⁹⁴ Some courts read *Taylor* as meaning that, consistent with the AWIC cases, “intent to kill is an element of attempted manslaughter ‘because no person can attempt to cause an unintentional death.’”¹⁹⁵ Other district courts disagreed, reading *Taylor* as having held that intent-to-kill was not an element of attempted-act-manslaughter.¹⁹⁶ Resolving the conflict, the *Williams* Court clarified *Taylor* and held that (1) “the crime of attempted manslaughter by act does not require an intent to kill,” and (2) “there can be no crime of attempted manslaughter by culpable negligence.”¹⁹⁷

Taylor and *Williams* contain the same analytical flaws, caused by the use of offense analysis, seen in the attempted second-degree murder cases. In the phrase *intent to commit an unlawful act*, the Court is defining “act” to include both the *actus reus* and the caused-harm elements. When the

192. *Taylor*, 444 So. 2d at 933–34 (emphasis added).

193. *Id.* at 935.

194. *Williams v. State*, 40 So. 3d 72, 75 (Fla. Dist. Ct. App. 2010), *quashed*, 123 So. 3d at 23.

195. *Id.* (quoting *Hall v. State*, 951 So. 2d 91, 96–97 (Fla. Dist. Ct. App. 2007)); *accord*, *Barton v. State*, 507 So. 2d 638, 641 (Fla. Dist. Ct. App. 1987), *aff’d in part, quashed in part*, 523 So. 2d 152 (Fla. 1988).

196. *E.g.*, *Montgomery v. State*, 70 So. 3d 603, 605 (Fla. Dist. Ct. App. 2009), *approved on other grounds*, 39 So. 3d 252 (Fla. 2010).

197. *Williams*, 123 So. 3d at 30.

Court notes that, *with an aggravated assault, there is an intent to commit the act*, the Court is presumably referring to the AWIC version of aggravated assault. In other words, with the AWIC-manslaughter offense, it must be proven that one *intended to commit the act [of killing another, i.e., intended to kill]*, because “act” is defined as including the caused-harm element of death. But there is *no intent to commit an unlawful act [of killing another] when the underlying conduct constitutes culpable negligence* because culpable-negligence-manslaughter has no intent-to-kill element; thus, applying the attempt logic, this offense cannot be attempted.

But element analysis tells us that, even with culpable-negligence-manslaughter, the State must prove one *intended to commit the act* (i.e., the *actus reus*) that caused the death. And without an intent-to-kill element, we cannot distinguish the two forms of manslaughter for purposes of an attempt offense. Both forms of manslaughter require proof that one *did something* (committed an “act” or engaged in a “course of conduct”¹⁹⁸) that caused another’s death. Culpable-negligence-manslaughter has an additional element of culpably negligently ignoring the possibility that one’s act might cause death.¹⁹⁹ Without an intent-to-kill element, act-manslaughter has a mental element of simple negligence as to the caused-death element of the offense. This is found in the proximate-cause component of the basic definition of causation, which means the result was reasonably foreseeable.²⁰⁰ This, in turn, would mean that act-manslaughter is a necessary-lesser-included offense of culpable-negligence-manslaughter.

Perhaps sensing this, recent Florida cases (from both the supreme court and the district courts, discussed below) seem to distinguish the two forms of manslaughter as follows: Act-manslaughter occurs when one intentionally does something *to* the victim, intending to harm or frighten but not kill. Culpable-negligence-manslaughter occurs when one intentionally commits an act (or omission) that recklessly creates a risk to others, but without intent to do inflict some physical harm *directly to* any particular person.

The cases have implicitly adopted this distinction for some time. For decades, the cases that expressly held that the evidence proved culpable-negligence-manslaughter invariably involve behavior that was not intended to directly harm anyone in particular. Prime examples are the two most

198. FLA. STD. JURY INSTR. (Crim.) § 7.7.

199. *Id.*

200. *E.g.*, Schuette v. State, 822 So. 2d 1275, 1282 (Fla. 2002).

common types of culpable-negligence-manslaughter cases, reckless driving cases,²⁰¹ and the cases involving the reckless mishandling of a firearm.²⁰² Other common fact patterns deemed to prove culpable-negligence-manslaughter include failures to properly provide for, or supervise, victims to whom one owns a duty of care.²⁰³

The most recent manslaughter cases clearly indicate that, if one directly attacks—*i.e.*, *intentionally does something to*—the victim, this not only proves act-manslaughter, it *conclusively disproves* culpable-negligence-manslaughter. Courts have found culpable-negligence-manslaughter was disproven when:

- (1) D killed V by “head-butt[ing] her, kick[ing] her legs out from under her, chok[ing] her, and elbow[ing] her in the chest”,²⁰⁴
- (2) D told a witness that “he was planning to kill [V]” and, a few days later, V said to D “‘Whenever you saw me, you would fight with me,’ and [D] responded by stabbing [V] with a broken bottle”,²⁰⁵
- (3) after “a heated telephone conversation with his former boss, [D] brought a firearm to [the] jobsite and shot in the direction of [V] after [V] put himself in between [D] and his former boss”,²⁰⁶
- 4) D claimed he killed V when D’s gun accidentally discharged when D, fearing for his life, intentionally struck V with his gun;²⁰⁷
- 5) D claimed “his gun discharged by accident after he armed himself in response to [V] pulling a gun on him first,” and “the evidence indicates that [D] either purposefully fired the gun [or it] accidentally discharged while [D] was wielding it in self-defense”,²⁰⁸
- 6) D “admitted throwing the knife at [V] but claimed he acted in self-defense during a fight with [V]” and the State “contended that [D] stabbed [V] in anger because he believed [V] was having an affair with his wife”,²⁰⁹ and

201. *E.g.*, Phillips v. State, 289 So. 2d 769 (Fla. Dist. Ct. App. 1974).

202. *E.g.*, Tillman v. State, 842 So. 2d 922 (Fla. Dist. Ct. App. 2000).

203. *E.g.*, Tongay v. State, 79 So. 2d 673 (Fla. 1955); Cornell v. State, 32 So. 2d 610 (1947); Nozza v. State, 288 So. 2d 560 (Fla. Dist. Ct. App. 1974); Gian-Cursio v. State, 180 So. 2d 396 (Fla. Dist. Ct. App. 1965).

204. Haygood v. State, 109 So. 3d 735, 737, 741–42 (Fla. 2013).

205. Simon v. State, 162 So. 3d 216, 217 (Fla. Dist. Ct. App. 2015).

206. Salonko v. State, 162 So. 3d 40, 41 (Fla. Dist. Ct. App. 2014).

207. Dowe v. State, 162 So. 3d 35, 36 (Fla. Dist. Ct. App. 2014) (facts in Dowe v. State, 39 So. 3d 407, 408 (Fla. Dist. Ct. App. 2010)).

208. Smith v. State, 145 So. 3d 972, 973–74 (Fla. Dist. Ct. App. 2014).

209. Lopez v. State, 136 So. 3d 1265, 1266 (Fla. Dist. Ct. App. 2014).

7) D claimed self defense after he shot V during a fight.²¹⁰

However, in another recent district court case, the court asserted in dictum, and without citation of authority on point, that act-manslaughter does not require proof of an “inten[t to] injure [V].”²¹¹ The reason for this conclusion, and its relevance to the issues in that case, are unclear.

Regardless of how we eventually decide to distinguish act-manslaughter from culpable-negligence-manslaughter, if neither offense has an intent-to-kill element, then there is no basis for concluding that one offense can be attempted but not the other. Without an intent-to-kill element, both offenses require proof that one committed an act or omission that unintentionally caused another’s death. Thus, *Taylor-Williams* do not answer any of the questions raised above regarding the limits of the *actus reus* element of an attempted homicide offense with no intent-to-kill element.

VI. CONCLUSION

Failing to recognize the attempt logic in attempted homicide cases causes serious problems, both practical and theoretical. It is true that “[t]he life of the law has not been logic; it has been experience[,] and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.”²¹² But still, while the law may not always be logical, “[j]udicial decisions are [supposed to be] reasoned decisions. Confidence in a judge’s use of reason underlies the public’s trust in the judicial institution.”²¹³ If the law becomes too illogical, people lose respect for it. Consider the jurors who will struggle with the notion that they should convict of attempted murder even though they believe D did not intend to kill anyone. Or who ask, “would-have-resulted-in-death *under what circumstances?*” Or who try to determine what it means to say one *failed to do*, or was *prevented from doing*, or *abandoned the intent to do*, something one never intended to do in the first place? Consider the trial judges who must answer jurors’ questions about these matters; “please rely on the instructions I gave you” seems like an unhelpful response.

But finally, the most troubling aspect about all this is that the

210. De La Hoz v. Crews, 123 So. 3d 101, 103 (Fla. Dist. Ct. App. 2013) (facts in De La Hoz v. State, 997 So. 2d 1198, 1200 (Fla. Dist. Ct. App. 2008)).

211. Pethtel v. State, 177 So. 3d 631, 635 (Fla. Dist. Ct. App. 2015).

212. Oliver Wendell Holmes, *The Common Law*, 1 (1881).

213. Rita v. United States, 551 U.S. 338, 356, 127 S. Ct. 2456, 2468, 168 L. Ed. 2d 203 (2007).

problems caused by failing to properly analyze this type of issue are not limited to attempted homicide offenses. The use of offense analysis led three Florida trial courts to erroneously conclude that a 2002 amendment of Chapter 893 rendered all Florida drug offenses unconstitutional (because it rendered those offenses *strict-liability offenses*).²¹⁴ This caused much mischief in the Florida court system. The continued use of offense analysis, and the artificially irrational system of specific-general intent, has the potential to cause similar mischief in the future. Given that Florida eliminated the intoxication defense in 1999,²¹⁵ it is time to relegate the specific-general system, and offense analysis itself, to the ash heap of history. The Florida Supreme Court should recede from *Brown* (and the attempted manslaughter case, *Williams*) and adopt element analysis for future cases.

214. See Richard Sanders, *The Knowledge Element In Drug Cases: Some Final Thoughts On Shelton And Adkins*, 88 Fla.B.J. 40 (July/August 2014).

215. FLA. STAT. §775.051 (1999).