Chapter 7: Attempt, Conspiracy, and Solicitation

Chapter Overview:

Statutes on inchoate crimes provide that individuals may be held criminally responsible for the intent to commit a crime, even if the crime is not actually committed. Inchoate crimes require that an individual have the intent to commit the criminal act and that they take some step to achieve the goal. Attempt, conspiracy, and solicitation are all inchoate crimes.

Attempt includes complete, incomplete, and impossible attempts. Complete attempts occur when the perpetrator takes every necessary step in the commission of a crime and yet is unable to commit it. An incomplete attempt occurs when the perpetrator takes some steps towards committing the crime but is stopped by some intervening force outside of their control before they are able to complete the attempt. An impossible attempt occurs when a perpetrator takes steps towards committing a crime, only to realize that there is something in the way making it impossible for the crime to be completed. This would include something like trying to commit murder when the target is already dead.

There are three tests that are used in trying to determine whether a person truly carried out an attempt. In the first, the perpetrator must have the physical proximity necessary to have completed the crime, with the emphasis being on what steps remain to be taken. In the second it is considered whether any ordinary person witnessing the acts of the perpetrator would undoubtedly conclude that the perpetrator was intending to commit the crime in question. Finally, under the standard of the Model Penal Code it must be examined whether the perpetrator has taken significant steps that clearly indicate intent to commit the crime.

Conspiracy is an agreement between parties to commit a crime. Most jurisdictions now also require for conspiracy that some overt act be committed to further the criminal conspiracy. Any act, however small, can satisfy this requirement so long as the act is done with the intention of furthering the commission of the crime. Conspiracy is considered a separate and distinct crime and a perpetrator who carries out and is charged for the crime they conspired to commit can still also be charged with conspiracy.

Solicitation occurs when a perpetrator encourages another person to commit a crime. This includes but is not limited to commands or requests that the person commit the crime, an offer of money to the person for committing the crime, or counseling or advising the person to commit the crime. Examples of solicitation include things like hiring someone to commit a murder or offering someone money for prostitution. In this chapter of the supplement you will find Florida statutes regarding inchoate crimes as well as Florida case law exemplifying the application of those statutes.

I. Attempt, Conspiracy, and Solicitation:

Section Introduction: Florida law includes all three of these crimes in one statute. Examine this statute before reading the example Florida cases below on each separate offense.

Florida Statute, section 777.04 - Attempts, solicitation, and conspiracy

(1) A person who attempts to commit an offense prohibited by law 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, ranked for purposes of sentencing as provided in subsection (4). Criminal attempt includes the act of an adult who, with intent to commit an offense prohibited by law, allures, seduces, coaxes, or induces a child under the age of 12 to engage in an offense prohibited by law.

(2) A person who solicits another to commit an offense prohibited by law and in the course of such solicitation commands, encourages, hires, or requests another person to engage in specific conduct which would constitute such offense or an attempt to commit such offense commits the offense of criminal solicitation, ranked for purposes of sentencing as provided in subsection (4).

(3) A person who agrees, conspires, combines, or confederates with another person or persons to commit any offense commits the offense of criminal conspiracy, ranked for purposes of sentencing as provided in subsection (4).

(4) (a) Except as otherwise provided in ss. 104.091(2), 379.2431(1), 828.125(2), 849.25(4), 893.135(5), and 921.0022, the offense of criminal attempt, criminal solicitation, or criminal conspiracy is ranked for purposes of sentencing under chapter 921 and determining incentive gain-time eligibility under chapter 944 one level below the ranking under s. 921.0022 or s. 921.0023 of the offense attempted, solicited, or conspired to. If the criminal attempt, criminal solicitation, or criminal conspiracy is of an offense ranked in level 1 or level 2 under s. 921.0022 or s. 921.0023, such offense is a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(b) If the offense attempted, solicited, or conspired to is a capital felony, the offense of criminal attempt, criminal solicitation, or criminal conspiracy is a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Except as otherwise provided in s. 893.135(5), if the offense attempted, solicited, or conspired to is a life felony or a felony of the first degree, the offense of criminal attempt, criminal solicitation, or criminal conspiracy is a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(d) Except as otherwise provided in s. 104.091(2), s. 370.12(1), s. 828.125(2), or s. 849.25(4), if the offense attempted, solicited, or conspired to is a:

1. Felony of the second degree;
2. Burglary that is a felony of the third degree; or

3. Felony of the third degree ranked in level 3, 4, 5, 6, 7, 8, 9, or 10 under s. 921.0022 or s. 921.0023,

the offense of criminal attempt, criminal solicitation, or criminal conspiracy is a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(e) Except as otherwise provided in s. 104.091(2), s. 379.2431(1), s. 849.25(4), or paragraph (d), if the offense attempted, solicited, or conspired to is a felony of the third degree, the offense of criminal attempt, criminal solicitation, or criminal conspiracy is a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(f) Except as otherwise provided in s. 104.091(2), if the offense attempted, solicited, or conspired to is a misdemeanor of the first or second degree, the offense of criminal attempt, criminal solicitation, or criminal conspiracy is a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

(5) It is a defense to a charge of criminal attempt, criminal solicitation, or criminal conspiracy that, under circumstances manifesting a complete and voluntary renunciation of his or her criminal purpose, the defendant:

(a) Abandoned his or her attempt to commit the offense or otherwise prevented its commission;

(b) After soliciting another person to commit an offense, persuaded such other person not to do so or otherwise prevented commission of the offense; or

(c) After conspiring with one or more persons to commit an offense, persuaded such persons not to do so or otherwise prevented commission of the offense.

II. Attempt:

Section Introduction: An attempt to commit a crime can be prosecuted as a crime itself in some cases, as you read in the Florida statute above. Consider the following case in which the defendant is charged with attempting to commit a crime that he did not successfully commit.

Brown v. State, **790 So.2d 389 (2001)**

Procedural History: Defendant was convicted in the Circuit Court, Orange County, of attempted second-degree murder, and he appealed. The District Court of Appeal, 744 So.2d 452, affirmed conviction and certified question of whether crime of attempted second-degree murder existed. On denial of motion for rehearing, the Supreme Court held that: (1) Court had jurisdiction over certified question, and (2) crime of attempted second-degree murder exists.

Issue(s): Does the crime of attempted second degree murder exist in Florida?

Facts: Brown was convicted of attempted second-degree murder. On appeal, Brown argued that the crime of attempted second-degree murder is a nonexistent crime. The district court affirmed the conviction but certified the above question to our Court.

Holding: The Court answered the certified question in the affirmative.

Opinion: PER CURIAM.

We have for review a decision ruling upon the following question certified to be of great public importance:

> DOES THE CRIME OF ATTEMPTED SECOND DEGREE MURDER EXIST IN FLORIDA? *[Brown v. State,* 733 So.2d 598, 599 (Fla. 5th DCA 1999)]

We have jurisdiction pursuant to article V, section 3(b)(4) of the Florida Constitution. We answer the certified question in the affirmative.

We recently addressed the crime of attempted second-degree murder in *State v. Brady:*

> The offense of attempted second-degree murder does not require proof of the specific intent to commit the underlying act (i.e., murder). [See *Gentry v. State,* 437 So.2d 1097 (Fla.1983)] In *Gentry,* we held that the crime of attempted second-degree murder does not require proof of the specific intent to kill. Although the crime of attempt generally requires proof of a specific intent to commit the crime plus an overt act in furtherance of that intent, we reasoned: "If the state is not required to show specific intent to successfully prosecute the completed crime, it will not be required to show specific intent to successfully prosecute an attempt to commit that crime." [Id. at 1099] To establish attempted second-degree murder of Harrell, the state had to show (1) that Brady intentionally committed an act which would have resulted in the death of Harrell except that someone prevented him from killing Harrell 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. [See Standard Jury Instructions in Criminal Cases, 697 So.2d 84, 90 (Fla.1997)] [745 So.2d 954, 957 (Fla.1999)]

Accordingly, as explained in Brady, we conclude that the crime of attempted second degree murder does exist in Florida. We approve the district court's decision in this case.

Dissent: HARDING, J.

I respectfully dissent. At least one appellate court has struggled over the issue of whether the crime of attempted second-degree murder exists in Florida. [See *Watkins v. State,* 705 So.2d 938 (Fla. 5th DCA 1998)] Two of the judges on that court wrote wellreasoned opinions arguing that both precedent and common sense require the judiciary to abolish the crime of attempted second-degree murder in Florida. After reviewing these opinions and considering the history of attempt

law in this state, I believe the time has come to clarify the elements of the crime of attempt and conclude that the crime of attempted second-degree murder is logically impossible.

Florida's attempt statute provides:

> A person who attempts to commit an offense prohibited by law 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, ranked for purposes of sentencing as provided in subsection (4). [§ 777.04(1), Fla. Stat. (1999)]

The jury instructions on attempt provide:

> In order to prove that the defendant attempted to commit the crime of (crime charged), the State must prove the following beyond a reasonable doubt:
>
> 1. (Defendant) did some act toward committing the crime of (attempted crime) that went beyond just thinking or talking about it.
> 2. [He][She] would have committed the crime except that [someone prevented [him] [her] from committing the crime of (crime charged) or [[he] [she] failed.] [Fla. Std. Jury Instr. (Crim.) 77]

In *Gentry v. State*, this Court stated:

> We have previously determined that despite the broad language of our attempt statute, there are certain crimes of which it can be said that the attempt thereof simply does not exist as an offense. *[Adams v. Murphy*, 394 So.2d 411 (Fla.1981); State v. Thomas, 362 So.2d 1348 (Fla.1978] [See also *King v. State*, 317 So.2d 852 (Fla. 1st DCA 1975)] We now hold that there are offenses that may be successfully prosecuted as an attempt without proof of a specific intent to commit the relevant completed offense. The key to recognizing these crimes is to first determine whether the completed offense is a crime requiring specific intent or general intent. If the state is not required to show specific intent to successfully prosecute the completed crime, it will not be required to show specific intent to successfully prosecute an attempt to commit that crime. We believe there is logic in this approach and that it comports with legislative intent. Second-degree and third-degree murder under our statutes are crimes requiring only general intent. [437 So.2d 1097, 1098-99 (Fla.1983)]

I believe that the application of *Gentry* has proven more troublesome than beneficial. "A specific intent, when an element of the mens rea of a particular offense, is some intent other than to do the actus reus thereof which is specifically required for guilt." [Rollin M. Perkins & Ronald N. Boyce, Criminal Law 851 (3d ed.1982)] In contrast, "general intent" would simply be the intent required to do the actus reus of a particular offense. [See id.] Perkins cites to common law larceny and burglary as examples to illustrate specific intent. In addition to the intent to take and carry away the property of another, conviction for larceny required proof of an additional specific intent to steal. Similarly, conviction of common law burglary required not only an intentional breaking and entering, but also a specific intent to commit a felony therein.

According to the guidelines of *Gentry,* the crime of attempted second-degree murder is a general intent crime because the underlying crime, second-degree murder, is a general intent crime. Thus, under the current law, the State is not required to establish a specific intent to kill in order to prove the crime of attempted second-degree murder. In fact, if the underlying crime is a general intent crime, the State can prove an attempt of that crime without ever establishing that the defendant intended to commit the underlying offense. This is an absurd result. Further, an examination of our opinions subsequent to Gentry reveals that this Court has failed to consistently apply the Gentry test in cases involving attempts.

In *Thomas v. State,* this Court provided the following definition of attempt:

> Essentially, we have required the state to prove two general elements to establish an attempt: a specific intent to commit a particular crime, and an overt act toward its commission. That is, the overt act must manifest the specific intent. [531 So.2d 708, 710 (Fla.1988)]

It would appear that this definition of attempt would make the crime a specific intent crime because the State would be required to establish that the defendant had a specific intent to commit the underlying offense. The *Thomas* court relied on the definition of attempt that was articulated by this Court in *Gustine v. State,* [86 Fla. 24, 26, 97 So. 207, 208 (1923)] The *Gustine* definition of attempt had been the standard prior to *Gentry.* Arguably, *Thomas* can be reconciled with *Gentry* because the underlying offense in *Thomas* was burglary. Because burglary is a specific intent crime, [see *Richardson v. State, 723* So.2d 910, 911 (Fla. 1st DCA 1999)], then, under *Gentry,* attempted burglary would also be classified as a specific intent crime, and the *Thomas* court relied on the proper definition of attempt.

However, in *Rogers v. State,* this Court again relied on the same definition of attempt: "To establish attempt, the State must prove a specific intent to commit a particular crime and an overt act toward the commission of that crime." [660 So.2d 237, 241 (Fla.1995)] In *Rogers,* the underlying offense was sexual battery, which has been declared a general intent crime. [See *Buford v. State,* 492 So.2d 355, 359 (Fla.1986)] Thus, the *Rogers* court classified attempted sexual battery as a specific intent crime, but according to the *Gentry* analysis, it should have been a general intent crime. In 1991 and again in 1993, this Court stated that attempted sexual battery was a general intent crime. [See *Sochor v. State,* 580 So.2d 595, 601 (Fla.1991), vacated on other grounds, 504 U.S. 527, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992); *Sochor v. State,* 619 So.2d 285, 290 (Fla.1993)] But in 1997, this Court again cited to *Rogers* and stated that in order to prove attempted sexual battery, the State must prove "a specific intent to commit a particular crime." [See *Gudinas v. State,* 693 So.2d 953, 962 (Fla.1997)]

Finally, in *State v. Gray,* [654 So.2d 552 (Fla.1995)], this Court adopted Justice Overton's dissent in *Amlotte v. State,* [456 So.2d 448 (Fla.1984) (Overton, J., dissenting)], wherein he argued that the crime of attempted felony murder was logically impossible. The *Gray* court quoted the following language from Justice Overton's dissent: "[A] conviction for the offense of attempt requires proof of the specific intent to commit the underlying crime." *[Gray,* 654 So.2d at 553]

Clearly, there is confusion in this area of the law. This Court has taken the Jekyll and Hyde approach to defining the crime of attempt: it has been classified as both a specific intent crime and a general intent crime, regardless of the guidelines set by *Gentry.* If the *Gentry* test is still valid, then this Court has failed to uniformly adhere to it. Most of the jurisdictions in this country classify the crime of attempt as a specific intent crime. Generally, these jurisdictions require that two elements be established before a defendant can be found guilty of an attempt: (1) intent to commit the underlying offense and (2) an overt act in furtherance of the underlying offense but failing to effect its commission. [See *United States v. Pierce,* 16 F.3d 1223 (6th Cir. Dec.9, 1993) (unpublished opinion); *United States v. Inigo,* 925 F.2d 641, 651 (3d Cir.1991); *United States v. Sneezer,* 900 F.2d 177, 179-180 (9th Cir.1990); *United States v. Martin,* 747 F.2d 1404, 1410 (11th Cir.1984); *United States v. Rivera-Sola,* 713 F.2d 866, 869 (1st Cir.1983)]

My research has revealed only one state that has endorsed the *Gentry* test for determining whether attempt is a specific intent or general intent crime. [See *Palmer v. People,* 964 P.2d 524, 528 (Colo.1998) ("It is possible to be convicted of attempt without the specific intent to obtain the forbidden result.")] The *Palmer* court acknowledged in a footnote that "Colorado's attempt jurisprudence differs from the majority of jurisdictions, which hold that attempt liability cannot attach when the substantive crime involved is an unintentional crime." [964 P.2d at 528 n. 4]

Webster's Dictionary provides the following definition for attempt: "to make an effort to do, accomplish, solve, or effect." [Merriam Webster's Collegiate Dictionary 74 (10th ed.1993)] In *State v. Kimbrough,* the Tennessee Supreme Court stated:

> 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. *[Keys v. State,* 104 Nev. 736, 766 P.2d 270, 273 (1988)] 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 a desired, or at least an intended, consequence. [Paul H. Robinson & Jane A. Grall, Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond, 35 Stan. L.Rev. 681, 747 n. 290 (1983)] The nature of an attempt, then, is that it requires a specific intent. [924 S.W.2d at 890]

In light of the fact that this State's classification of the crime of attempt is contrary to the overwhelming majority of jurisdictions in this country, I question the reasons that this Court initially relied upon to formulate the *Gentry* test. The *Gentry* court argued that the State should not be required to prove an intent for a successful prosecution of an attempt to commit a crime when no such degree of proof is necessary for successful prosecution of the completed crime. However, there is a substantial distinction between a completed crime and an attempt. In a case involving a completed crime, the State is punishing a defendant for conduct which was carried out to completion. In contrast, in a case involving an attempt, an inchoate crime, there is no completed offense, so the State is punishing a defendant for conduct preparatory to the offense coupled with the intent to commit such an offense. Unlike the completed offense, mere

preparatory conduct without any intent should not be enough to establish an attempt.

Therefore, based on the reasons stated above, I would recede from *Gentry* and conclude that all attempt crimes require a specific intent to commit the underlying offense, consistent with *Gudinas, Thomas, Rogers, Gustine,* and *Gray.* I am mindful of the importance of the doctrine of stare decisis. [See *State v. Schopp,* 653 So.2d 1016, 1023 (Fla.1995) (Harding, J., dissenting) ("[S]tare decisis provides stability to the law and to the society governed by that law.")] Yet, as this Court stated in *Gray,* "stare decisis does not command blind allegiance to precedent." [654 So.2d at 554] Hindsight has revealed that the *Gentry* test has proven unworkable, as even this Court has been unable to consistently apply it. "Perpetuating an error in legal thinking under the guise of stare decisis serves no one well and only undermines the integrity and credibility of the Court." *[Smith v. Dep't. of Ins.,* 507 So.2d 1080, 1096 (Fla.1987) (Ehrlich, J., concurring in part, dissenting in part)]

Receding from *Gentry* would not eliminate the crime of attempt for general intent crimes. Rather, it would simply require the State to establish that the defendant specifically intended to commit the underlying offense which the defendant is accused of attempting. [See *Guertin,* 854 P.2d at 1132 ("To be guilty of attempt under this statute, the defendant must intend to commit the target crime; however, [the attempt statute] does not purport to limit target crimes to offenses that require an intended result.")

The main effect of concluding that all attempts are specific intent crimes is that the defense of voluntary intoxication would be applicable to attempts. [See *Linehan v. State,* 476 So.2d 1262, 1264 (Fla.1985) ("[T]he intoxication defense applies only to specific intent crimes.") This does not seem unreasonable because if a defendant is so intoxicated that he or she cannot form a specific intent, then it would be illogical to conclude that the defendant had the mental capacity to attempt a crime. Although it is quite possible that a voluntary intoxication instruction would be read to the jury on the attempt charge but not on the completed offense, it appears that other courts have followed this procedure, apparently without problems. For example, in *Guertin v. State,* [854 P.2d 1130, 1133 (Alaska Ct.App.1993)], the Alaska court stated:

> Guertin complains that the jury instructions were confusing because they asked the jury to apply two different culpable mental states to "sexual contact". Guertin points out that, when describing the completed crime of second-degree sexual assault, the instructions refer to "sexual contact" as the proscribed conduct (to which the culpable mental state of "knowingly" applies), but when describing attempted second-degree sexual assault, the instructions refer to "sexual contact" as the result (to which the culpable mental state of "intentionally" applies).

This is not a confusion; it is correct. The completed crime of second-degree sexual assault requires proof of conduct (sexual contact) and a circumstance (the victim's lack of consent). Because sexual contact is the "conduct" element of the completed crime, the culpable mental state that applies to sexual contact is "knowingly". On the other hand, attempted second-degree sexual assault is an inchoate crime: by definition, the prohibited non-consensual sexual contact has not occurred, and the issue is whether the defendant's conduct constituted a substantial step

toward accomplishing the goal of sexual contact. [AS 11.31.100(a)] In the context of an attempt, sexual contact is a "result" - the conscious goal of a defendant's actions - and the applicable culpable mental state is "intentionally". See also *United States v. Roa,* 12 M.J. 210, 213 & n. 3 (C.M.A.1982)

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"[A] general intent will suffice to prove rape; but a specific intent to rape is requisite to establish guilt of attempt to rape or assault with intent to rape. [Note 3:] Thus, intoxication may relieve of culpability for an attempt to commit an offense such as rape or assault with intent to commit rape when it would not be a defense in a prosecution for commission of the principle offense.").

After concluding that attempt is a specific intent crime, the next question becomes whether a defendant can specifically intend to commit second-degree murder. Seconddegree murder does not require intent; it only requires a form of recklessness: "a depraved mind without regard for human life." In *Watkins,* Judge Cobb and Judge Harris both argued that it is illogical to have the crime of attempted second-degree murder because it is impossible to intend to commit an act of recklessness. I am convinced by their reasoning. In a concurring opinion in *Watkins,* Judge Cobb offered some compelling reasons for abolishing the crime of attempted second-degree murder:

> In *State v. Gray,* [654 So.2d 552 (Fla.1995)], the Court unanimously receded from its prior holding in *Amlotte v. State,* [456 So.2d 448 (Fla.1984)], and held, contrary to *Gentry[v. State,* [437 So.2d 1097 (Fla.1983)], that the crime of felony murder does not exist in Florida. In doing so, the Court approved Justice Overton's dissenting view in *Amlotte* as reflecting the more logical and correct position. That dissent by Justice Overton stated:
>
> > A conviction for the offense of attempt has always required proof of the intent to commit the underlying crime. By recognizing the crime of attempt with regard to 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. As stated by Judge Cowart in his dissenting opinion to the district court decision, this holding creates a "crime requiring one to intend to do an unintended act which is a logical absurdity and certainly an inadequate conceptual basis for something that needs to be as clear and understandable as do the elements of a felony crime." [Amlotte v. State, 435 So.2d 249, 254 (Fla. 5th DCA 1983) (Cowart, J., dissenting).

If the crime of attempted felony murder does not exist, then neither, it would seem, could the crime of attempted second-degree murder-and 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 commission of the underlying felony. [See, e.g., *Williams v. State,* 41 Fla. 295, 26 So. 184 (1899) (no man can intentionally do an unintentional act)] Id. at 940-41 (Cobb, J., concurring) (citations omitted).

Murder is divided into degrees based on the mental state of the defendant: if the defendant intended to murder, then the crime is first-degree murder; if the defendant did not intend to murder, but still displayed reckless indifference to human life, then the crime is second-degree murder. The question in this case is not whether the crime of attempted murder exists. If the State can establish that the defendant intended to kill, then the crime is attempted first-degree murder. But if the State cannot demonstrate that the defendant intended to kill, it cannot be said that the defendant committed the crime of attempted murder. The crime may be aggravated battery or aggravated assault, but not attempted murder. The jury instructions for attempted second-degree murder provide:

> Before you can find the defendant guilty of Attempted Second Degree Murder, the State must prove the following two elements beyond a reasonable doubt:
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> 1. (Defendant) intentionally committed an act which would have resulted in the death of (victim) except that someone prevented (defendant) from killing (victim) or [he][she] failed to do so.
> 2. The act was imminently dangerous to another and demonstrating a depraved mind without regard for human life.
>
> In order to convict of attempted second-degree murder, it is not necessary for the State to prove the defendant had an intent to cause death. [Fla. Std. Jury Instr. (Crim.) 87]

Many of the jurisdictions that define attempt as a specific intent crime conclude 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. [See Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law § 6.2(c), at 500 (2d ed.1986)] Murder is a result-oriented crime which cannot be proven without first establishing the "result element" that a person is dead. In light of the conclusion that attempt is a specific intent crime, it follows that a person cannot be convicted of attempted murder if that person did not intend the result of death. It is not enough that the defendant simply intended certain conduct without also intending the result (i.e., although a defendant may have intended to fire a gun at a house, if the defendant did not intend to kill, this should not amount to an attempted murder). [See, e.g., *Roa,* 12 M.J. at 212 ("Appellate defense counsel have suggested that the government's theory would produce some anomalous results.... [A]n accused who had fired into [a large] crowd with no intent to kill anyone but with a wanton disregard for human life and had injured no one could, under the government's theory, be convicted of a separate attempt to murder every person in the crowd.")]

The case *of Braxton v. United States,* [500 U.S. 344, 111 S.Ct. 1854, 114 L.Ed.2d 385 (1991)], supports this argument. In *Braxton,* the United States Supreme Court stated the following in a footnote:

> Since the statute does not specify the elements of "attempt to kill," they are those required for an "attempt" at common law, [see *Morissette v. United States,* 342 U.S. 246, 263, 72 S.Ct. 240, 96 L.Ed. 288 (1952)], which include a specific intent to commit the unlawful act. "Although a murder may be committed without an intent to kill, an

> attempt to commit murder requires a specific intent to kill." [4 C. Torcia, Wharton's Criminal Law § 743, p. 572 (14th ed.1981)] [See also R. Perkins & R. Boyce, Criminal Law 637 (3d ed.1982); W. LaFave & A. Scott, Criminal Law 428-429 (1972)] [Id. at 351 n. 1, 111 S.Ct. 1854 (1991)] (emphasis added).

Most of the jurisdictions that have considered the issue have concluded that the crime of attempted depraved mind or reckless murder does not exist. [See *Chaney v. State,* 417 So.2d 625, 626-27 (Ala.Crim.App.1982); *Huitt v. State,* 678 P.2d 415 (Alaska Ct.App.1984); *State v. Mandel,* 78 Ariz. 226, 278 P.2d 413 (Ariz.1954); *People v. Miller,* 2 Cal.2d 527, 42 P.2d 308 (1935); *State v. Trinkle,* 68 Ill.2d 198, 12 Ill.Dec. 181, 369 N.E.2d 888, 892 (1977); *State v. Roberts,* 213 La. 559, 35 So.2d 216 (1948)] Since Colorado is the only state that adopts the *Gentry* test, it is also the only state that recognizes attempted depraved-mind murder without requiring the state to prove an intent to murder. [See *People v. Castro,* 657 P.2d 932 (Colo.1983)]

For all of these reasons, I find that it is logically impossible to commit the crime of attempted second-degree murder. This does not mean that the defendant in the present case has not committed a crime; the defendant may still be guilty of aggravated battery, a second-degree felony. The defendant should not, however, be convicted of attempted murder without first establishing that he intended to commit murder.

Critical Thinking Question(s): Do you agree with the Dissent's logic or that of the Court's Opinion? Explain in your own terms how the Court overcomes the "illogic" pointed out in the dissent. If it was ruled that attempted second-degree murder did not exist, with what crime(s) would you charge the defendant?

III. Conspiracy:

Section Introduction: When multiple parties enter into an agreement and take steps toward the commission of a crime they can be held accountable for the crime of conspiracy. Conspiracy to commit a crime is charged separately from the commission of the crime itself, which mean that someone may be charged with conspiracy to commit a crime they did not actually commit. It also means that if an individual does commit the crime they conspire to commit, they can be charged with both the crime and the conspiracy. The following Florida case examines the crime of conspiracy in a case where the ultimate crime was not committed.

State v. Brandon, 399 So.2d 459 (1981)

Procedural History: State appealed from decision of the Circuit Court, Pinellas County, Harry W. Fogle, J., granting defendant's motion to dismiss charge of conspiracy to commit crime of possession of in excess of 100 pounds of cannabis. The District Court of Appeal, Hobson, Acting C. J., held that: (1) in view of fact that defendant was not only aware of the details of the proposed transaction between undercover police officer, third party, and himself, but indicated that he would go along with whatever third party wanted to do, the evidence presented a prima facie case of guilt, and (2) conviction of defendant was not prohibited by fact that he and third party conspired with undercover police officer, as the police officer's offer to supply the funds

for the trip to Columbia to procure the marijuana was not an essential element of the crime charged.

Issue(s): Can a conviction for conspiracy be sustained when the defendants collude with a police agent without whose actions the crime cannot be carried out?

Facts: Appellee's amended motion alleged the following facts:

> (a) In late March 1979, Detective Cavaliere was introduced to Lawrence Smith by a confidential informant for the purpose of attempting to purchase a quantity of quaaludes.
> (b) After it was determined that Smith would be unable to supply the quaaludes, Smith proposed to Cavaliere that Smith would arrange for the importation of a quantity of marijuana.
> (c) Cavaliere, at that point, realizing that at most Smith had committed solicitation to commit a crime, informed Smith that he wanted to meet all of the persons who would be involved in the importation scheme.
> (d) On April 5, 1979, Smith introduced the defendant, ROBERT L. BRANDON, III, to Detective Cavaliere at the Ramada Inn-Countryside, Clearwater, Pinellas County, Florida, in a room which had been obtained by Cavaliere and had been wired for the interception of communications.
>
> (e) After meeting Cavaliere, BRANDON left the room and a conversation took place between Smith and Cavaliere as to the particulars of the proposed importation. It was agreed that Cavaliere would give Smith the sum of $10,000.00 as front money since neither Smith nor BRANDON had the funds to facilitate the proposed importation.
> (f) The proposed importation would have been impossible without the participation of Detective Eugene Cavaliere by his supplying of the funds to carry off the importation scheme.
>
> 3. Where two or more persons conspire with another who is, unknown to them, a government agent acting in the line of duty, to commit an offense under an agreement and an intention that an essential ingredient of the offense is performed by and only by, the government agent, such persons may not legally be convicted of a conspiracy. [See, *King v. State,* 104 So.2d 730 (Fla.1958)]
>
> 4. There are no disputed facts and the undisputed facts do not present a prima facie case of guilt against the accused.

The State's demurrer added the following additional facts:

> Prior to Det. Cavaliere meeting the Defendant at the Ramada Inn, Smith had advised Cavaliere that Brandon's participation in the transaction would be in the procurement of a plane and being present at the landing site where the marijuana was to be delivered. While Brandon was out of the motel room at the Ramada Inn, Smith and Cavaliere discussed in detail the transaction with the aid of a map of Columbia provided by Smith and Smith's handwritten notes. When Brandon returned to the room, the map was still

clearly visible and discussions continued about the transaction, Brandon indicating he would go long with whatever Smith wanted to do. Brandon and Smith both asked how much tonnage Cavaliere could handle a month and Brandon stated he could dispose of approximately four or five tons a month for Cavaliere. The initial trip was to be for 1,000 pounds of marijuana. Cavaliere was to supply the funds for the trip to Columbia. All other aspects of the importation were to be carried out by Smith and/or Brandon.

Opinion: HOBSON, Acting Chief Judge.

Appellee Brandon was charged by information with conspiracy to commit the crime of possession of in excess of 100 pounds of cannabis. Appellee filed a motion to dismiss pursuant to Florida Rule of Criminal Procedure 3.190(c)(4). The trial court granted appellee's motion and discharged him. We reverse.

The bases for appellee's motion to dismiss are: 1) that the undisputed facts do not present a prima facie case of guilt, and 2) that the rule of *King v. State,* [104 So.2d 730 (Fla.1958)], precludes his conviction for conspiracy to possess cannabis. As to appellee's first point, we hold that the facts contained in the motion in conjunction with the State's demurrer are more than sufficient to set out a prima facie case of guilt against appellee.

The elements of conspiracy require an agreement and an intent to commit the offense charged. *[Ramirez v. State*, 371 So.2d 1063 (Fla. 3d DCA 1979)] Appellee was not only aware of the details of the proposed transaction, but indicated that he would "go along with whatever Smith wanted to do." He inquired as to how much tonnage Detective Cavaliere could handle a month and stated that he could dispose of approximately four or five tons a month. If appellee's first point were the only one before us, this appeal could be disposed of easily; however, appellee's second point forces us to confront a difficult question in light of the Florida Supreme Court's rule in *King v. State.*

It was obviously on the basis of the *King* decision that the trial court granted appellee's motion to dismiss. The portion of *King* at issue is the holding that where two or more persons conspire with another who is, unknown to them, a government agent acting in the line of duty, to commit an offense under an agreement and an intention that an essential ingredient of the offense is to be performed by, and only by, such government agent, such persons may not legally be convicted of a conspiracy. [King v. State at 733]

In *King*, the facts reveal that almost all of the criminal activity was performed by the police agent. The agent agreed to commit the offense of gambling and bookmaking; to keep and maintain the hotel room with public funds; and to provide protection money for the corrupt police with public funds. The court noted that although the information charged that the defendants conspired with each other as well as with the police agent to commit the offenses, the evidence did not support that charge. Rather, the agreement and the intention proved by the State was that the police agent would commit the offenses. Since the agent's participation was an integral part of the plan, without his complicity the conspiracy was not proven. The court cited with approval the case of *Woo Wai v. United States,* 223 F. 412 (9th Cir. 1915), in which a conviction of two persons who conspired with a government agent was reversed. That court

stated:

> If no violation of the law was to be accomplished by the act of the defendants, it follows that they could not be held for conspiracy to do that act.

Thus, the *King* court set out the rule that a conspiracy conviction against two or more persons cannot result where the proof shows that some essential ingredient of the substantive crime was performed by, and only by, a government agent acting in the line of duty. We agree with the Fifth Circuit Court that "The *King* approach is inconsistent with the basic principle that a conspiracy is proved when it is established that two or more persons agreed to commit an offense and one of them engaged in an overt act in furtherance of the agreement." [United *States v. Seelig*, 498 F.2d 109 (5th Cir. 1974)]

The instant case, as well as *Seelig*, deals with situations where there are two or more co-conspirators involved, excluding the government agent. We do not address the rule which prohibits conviction for conspiracy where only two persons are involved and one of them is a government agent. The question before us is not whether a conspiracy occurred, since the facts in the motion to dismiss and the State's demurrer set out a prima facie case, but whether appellee can be convicted of the conspiracy in view of the police officer's participation.

We believe that the King court used the phrase "essential ingredient of the offense" to mean "essential element of the offense." Appellee was charged with conspiracy to commit the substantive offense of possession of cannabis. The essential elements of the offense of possession are the knowledge of the presence of the contraband and the ability to maintain control over it or reduce it to possession. *[Dixon v. State,* 343 So.2d 1345 (Fla. 2d DCA 1977] . We do not believe that the police officer's offer to supply the funds for the trip to Columbia is an essential element of the crime of possession. As the State argued, the act of supplying the money may be a necessary ingredient to the success of the criminal enterprise but is not one of the two essential elements of the crime (knowledge and ability to control) which the State is required to prove.

In summary, we construe the rule in the *King* case to mean that a conspiracy conviction is prohibited under the factual circumstances of this case, where the government agent, by himself, commits one or more of the legally recognized elements of the crime charged. The rule does not apply to situations where the government agent's participation is tangential to the gravamen of the substantive offense. Therefore, we reverse the trial court's granting of appellee's motion to dismiss pursuant to Florida Rule of Criminal Procedure 1.190(c)(4) and remand the cause for further action not inconsistent with this opinion.

Since we have concluded that there was sufficient evidence from which the trier of fact could have found that the defendant conspired with Tommy as well as with the agent, we are satisfied that the instant case is distinguishable from *King v. State,* supra. Accordingly, the conspiracy conviction is affirmed.

Critical Thinking Question(s): Do you agree with the Court’s decision, even in light of the King case? Is it more appropriate to look at the potential for completion of the crime or the suspects’

intent to commit the crime when addressing the issue of conspiracy? Could the defendant's argue factual impossibility under such circumstances? Would they be successful?

IV. Solicitation:

Section Introduction: Solicitation occurs when an individual makes a request for or encourages the commission of another crime. As in conspiracy and attempt, the ultimate crime need not be carried out for the initial crime of solicitation to be committed. Examine the following Florida case regarding the issue of solicitation.

***Kobel v. State, 745* So.2d 979 (1999)**

Procedural History: Defendant was convicted in the Circuit Court, Broward County, Joel T. Lazarus, J., of attempted procurement of minor for prostitution and attempted indecent assault, and he appealed. The District Court of Appeal held: (1) defendant, who tried unsuccessfully to induce minor boy to perform oral sex on him committed offense of solicitation, not attempted procurement, and (2) defendant's driving into alley after requesting to engage in sexual activity was overt act sufficient to support conviction for attempted indecent assault.

Issue(s): Did the defendant's actions constitute "attempted procurement" as defined in the relevant statute and case law?

Facts: A.L., a ten year old boy, and his friend, J.T., were walking together to the store when they observed appellant driving a red car and gesturing to them. Appellant appeared to be pointing at them and then pointing back down to his genital area. He stopped the car and asked them, "Do you want a blow job?" J.T., who did not understand what appellant meant, told appellant to meet them in the alley. Appellant drove into the alley and the two boys walked in behind him. Once there, appellant asked the boys who was older. A.L. said that J.T. was. Appellant then asked them if they wanted to make some money by doing a blow job. J.T. asked, "What's that?" and appellant responded, "Play with your dick." The two boys ran to A.L.'s house. Two weeks later, upon seeing the appellant in the neighborhood, the boys called the police. Appellant was apprehended and charged with two counts of procurement of a minor for prostitution and two counts of attempted indecent assault. At trial, the judge granted appellant's motion for judgment of acquittal as to counts I and III relating to J.T., and reduced the procurement count to attempted procurement as to A.L. The jury returned a guilty verdict on attempted procurement and attempted indecent assault.

Holding: Affirmed in part, reversed in part.

Opinion: PER CURIAM.

James Kobel appeals his convictions for attempted procurement of a minor for prostitution and attempted indecent assault. We affirm appellant's conviction for attempted indecent assault but reverse his conviction for attempted procurement because we find that the appellant's acts constituted the lesser crime of solicitation of a minor. In so ruling, we recede from our holding in *McCann v. State,* [711 So.2d 1290 (Fla. 4th DCA 1998)].

Appellant argues that the trial court erred in failing to grant his motion to reduce the charge of procurement to solicitation. According to appellant, the facts presented by the state constituted solicitation rather than attempted procurement because the procurement statute proscribes the hiring of a minor for sexual activity with a third person. We agree. Section 796.03, Florida Statutes (1997) defines the crime of procuring a person under the age of 18 for prostitution as follows:

> A person who procures for prostitution, or causes to be prostituted, any person who is under the age of 18 years commits a felony of the second degree, punishable as provided in §§ 775.082, 775.083, or 775.084.

In *Register v. State,* [715 So.2d 274 (Fla. 1st DCA 1998)], the defendant was convicted of unlawfully procuring for prostitution a person under the age of 18, pursuant to section 796.03, Florida Statutes (1995). Register offered a twelve-year-old girl money to have sex with him; she refused and immediately reported the incident. The first district reversed Register's conviction for procurement and held that "the mere offer of money to a person under 18 to have sex with the offeror is solicitation, rather than procurement for prostitution." [Id. at 275] That court noted that the pertinent statutes do not define either "procure" or "solicit." After analyzing and defining the two words, the first district found that "solicitation is the attempt to induce one to have sex;" while "procurement contemplates the attaining, bringing about, or effecting the result sought by the initial solicitation, such as obtaining someone as a prostitute for a third party." [Id. at 276]

In *Register,* the defense relied on *Barber v. State,* [397 So.2d 741 (Fla. 5th DCA 1981)], which held that "the underlying purpose of section 769.03 ... appears to be to protect children from sexual exploitation for commercial purposes." *[Register,* 715 So.2d at 277] "Defense counsel asserted that the 'procurement' statute is directed toward persons (such as pimps) who seek to profit financially from engaging minors in prostitution with third parties." [Id.] In finding that Register's acts constituted solicitation, not procurement, the first district stated:

> The Florida Legislature has classified as a felony the act of procuring for prostitution anyone under age 18. This designation is consistent with the intent to proscribe the commercial exploitation of children induced to engage in sexual activity with others for the financial benefit of the procurer pimp.... Procuring for prostitution anyone 18 years of age or older is a misdemeanor under section 796.07. Soliciting anyone (irrespective of age) for prostitution likewise is a misdemeanor under section 796.07. The appellant tried to induce the minor victim to have sex with him, but she refused his offer. This was mere solicitation, not procurement. We find nothing in either statute that would support the State's argument that offering money while soliciting someone to have sex with the offeror was intended to have the same criminal consequences as inducing a victim to engage in sexual activity with a third party to the financial benefit of the pimp. A person who offers money to a minor to have sex with him commits a crime. The Florida Legislature has designated such an act of solicitation as a less severe crime than exploiting a minor to engage in sexual activity with a third party, to the procurer's financial advantage. This distinction is a matter within the exclusive prerogative of the legislative branch. If it had intended to classify the act of solicitation of a minor as a

> felony, the Florida Legislature easily could have done so. [Id. at 278]

In *McCann* we affirmed McCann's conviction of attempting to procure a person under the age of eighteen for prostitution. McCann, however, challenged section 796.03 as unconstitutionally vague, arguing that the statute failed to describe the prohibited conduct and did not define the word "procure." In that case, McCann drove up to four girls and offered one of them $50 "to be [his] sex toy." McCann was unsuccessful in his attempt to force the girl into his car and drove off. We stated that:

> While it is true that 'procure' may mean to act as a 'pimp' and not necessarily procure the person for oneself, it is also clear that 'procure' may mean persuading, inducing, or prevailing upon the person to do something sexual for oneself. A reading of the statute reflects both definitions as being criminal conduct. This is especially true in light of the fact that the intent behind the statute is the state's compelling interest in protecting underage people from being sexually abused or exploited. [711 So.2d at 1292-1293]

In a dissenting opinion, Judge Gross disagreed with the majority's construction of section 796.03, stating:

> If section 796.03, Florida Statutes (1993) applies to this case, it is because the defendant 'procured' the juvenile victim for prostitution within the meaning of the statute. Historically, the term 'procure' has a specific meaning when used in a statute dealing with prostitution; in the dictionary definitions cited by the majority, a procurer of a prostitute is a pimp, one who obtains a prostitute for another. Although the majority broadly construes the term 'procure,' this is contrary to the rule of construction of section 775.021(1), Florida Statutes (1993), which requires that criminal offenses 'be strictly construed,' so that when the language of a criminal offense 'is susceptible of differing constructions, it shall be construed most favorably to the accused.' In my view, section 796.03 is directed at those who procure juvenile prostitutes for others. In the argot of prostitution law, the defendant's conduct amounted to 'solicitation,' contrary to section 796.07(2)(f), Florida Statutes (1993). The case might also have been charged as child abuse under section 827.04(3), Florida Statutes (1993). [Id. at 1293]

The trial judge was bound to follow the language in *McCann,* and, accordingly, denied the motion for judgment of acquittal on the procurement count. Upon further review, however, we are persuaded by the reasoning outlined in *Register* and Judge Gross' dissent in *McCann,* and now recede from *McCann.* The term "procurement" connotes a pecuniary gain from the exploitation of another. In a general sense, "procure" could mean to "obtain," which is the interpretation given it in *McCann.* However, in the context of prostitution, the word "procure" must be given its specialized meaning, which is "to obtain as a prostitute for another," connoting a commercial motive. Although the solicitation of a minor for sex and the procurement of a minor for prostitution are both evil deeds, the use of a minor for the "commercial enterprise" of prostitution is a greater evil. The Legislature's proscribed punishment for solicitation reflects its view that a onetime criminal act upon a minor differs in degree from introduction of a minor into a "life of prostitution." [See *Register,* 715 So.2d at 278]

Moreover, as *Register* explains, the rule of lenity compels us to strictly construe the statutory language in appellant's favor:

> To the extent that penal statutory language is indefinite or 'is susceptible of differing constructions,' due process requires a strict construction of the language in the defendant's favor under the rule of lenity. Construing sections 796.03 and 796.07 together, we conclude that the trial court should have granted the motion for judgment of acquittal. Section 796.03 addresses only procurement for prostitution, not solicitation. Section 796.07(2)(f) makes it unlawful '[t]o solicit ... or procure another to commit prostitution ...' Although neither statute defines either 'solicit' or 'procure' the context in which the two terms are used in section 796.07 indicates a legislative intent to distinguish between the two acts. [Id.; § 775.021(1), Fla. Stat. (1997)]

Appellant next argues that the evidence was insufficient to support his conviction for attempted indecent assault. He contends that the only act committed in furtherance of an indecent assault was appellant's verbal request for handling or fondling. We disagree and find that appellant's conduct in driving into the alley as directed, after a specific request to engage in sexual activity, can properly be viewed as an overt act toward perpetration of the crime charged. [See *Smith v. State,* 632 So.2d 644 (Fla. 1st DCA 1994)]

Accordingly, we affirm appellant's conviction for attempted indecent assault and reverse his conviction for attempted procurement of a minor for prostitution.

Dissent: SHAHOOD, J.

I agree with the reasoning of the majority in *McCann v. State,* [711 So.2d 1290 (Fla. 4th DCA 1998)], and, therefore, dissent from the majority in this case. Like the majority in *McCann,* I agree that "procure" may mean to act as a "pimp" and not necessarily procure a person for oneself; however, I think that it is equally clear that "procure" also means "persuading, inducing, or prevailing upon the person to do something sexual for oneself." [Id. at 1292]

ON MOTION FOR REHEARING OR CLARIFICATION - EN BANC

Decision: PER CURIAM.

We hereby grant appellant's motion for clarification. On remand Count 2, attempted procurement of a minor, shall be reduced to solicitation, a second degree misdemeanor, under section 796.07, Florida Statutes. Appellant shall be resentenced on Count 2 and on Count 4, attempted indecent assault, upon recalculation of his score sheet.

Critical Thinking Question(s): Do you agree with the Court’s narrow interpretation of “procure”? It is not strictly limited to financial gain, nor for prostitution, in the dictionary and perhaps should not be so narrowly construed. What is the difference between “attempted procurement” and solicitation? Explain.

Essay Questions:

1. Explain the difference between legal and factual impossibility in the law of criminal attempt.

2. Identify and describe the objectives that satisfy the requirements of criminal conspiracy.

3. Define the *actus reus* and *mens rea* of solicitation.