

IN THE SUPREME COURT OF OHIO

State of Ohio, :
 :
 Plaintiff-Appellant, : Case No. 13-1290
 :
 v. : On Appeal from the Portage
 : County Court of Appeals
 Bobby Nolan, : Eleventh Appellate District
 : Case No. 2012-P-0047
 Defendant-Appellee. :

**MEMORANDUM IN OPPOSITION TO JURISDICTION OF DEFENDANT-
APPELLEE BOBBY NOLAN**

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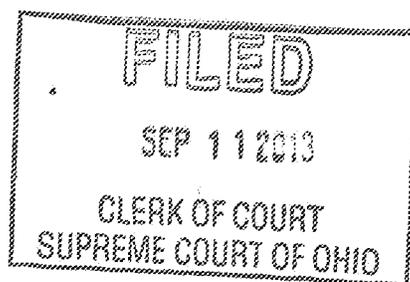


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THERE IS NO QUESTION OF LAW

Bobby Nolan's conviction for "attempted felony murder" was reversed on appeal because there was no murder. Simply put, the felony murder statute has no application in situations where the victim survives the incident. This is because the *mentes reae* of attempt and felony murder are inconsistent, which makes it legally impossible to attempt to commit felony murder. And like most other states, Ohio does not recognize attempted felony murder as a crime. *State v. Nolan*, 11th Dist. No. 2012-P-0047, 2013-Ohio-2829, ¶ 15, 50-52. See *People v. Patterson*, 257 Cal. Rptr. 407, 409 (Cal. App. Dep't Super. Ct. 1989); *State v. Gray*, 654 So.2d 552 (Fla. 1995); *State v. Pratt*, 873 P.2d 800, 812 (Idaho 1993) ("*Attempted* felony murder is not a crime in Idaho. Instead, there is either the crime of murder, or the crime of attempt to commit a crime, in which case the state bears the burden of proving that the defendant *intended* to commit the crime."); *People v. Viser*, 343 N.E.2d 903, 910 (1975) ("[T]he offense of attempt requires an 'intent to commit a specific offense,' while the distinct characteristic of felony murder is that it does not involve an intention to kill. There is no such criminal offense as an attempt to achieve an unintended result.") (Citations Omitted); *Head v. State*, 443 N.E.2d 44, 50 (Ind. 1982); *State v. Robinson*, 883 P.2d 764, 767 (Kan. 1994); *Bruce v. State*, 566 A.2d 103, 105 (Md. 1989) ("Because a conviction for felony murder requires no specific intent to kill, it follows that because a criminal attempt is a specific intent crime, attempted felony murder is not a crime in Maryland."); *State v. Dahlstrom*, 150 N.W.2d 53 (Minn.

1967); *State v. Darby*, 491 A.2d 733, 736 (N.J. Super. Ct. App. Div. 1984) (“‘Attempted felony murder’ is a self-contradiction, for one does not ‘attempt’ an unintended result.”); *State v. Price*, 726 P.2d 857, 860 (N.M. Ct. App. 1986) (“Thus, the result-oriented nature of the doctrine and the unpopularity of felony murder are among the concerns which persuade us not to recognize the crime of attempted felony murder.”); *State v. Kimbrough*, 924 S.W.2d 888 (Tenn. 1996); *Goodson v. Virginia*, 467 S.E.2d 848, 853-56 (Va. Ct. App. 1996) (“We join the majority of states and hold that, in order for a felony murder analysis to be applicable, a homicide must occur.”); *In re Richey*, 175 P.3d 585, 587 (Wash. 2008). *But see White v. State*, 266 Ark. 499, 585 S.W.2d 952 (Ark. 1979) (finding that attempted felony murder is a cognizable offense in Arkansas).

The State fails to identify any cases in which a court has ruled that attempted felony murder is a viable offense other than the Portage County Court of Common Pleas in this case. And that court was promptly reversed by the Eleventh District Court of Appeals. Thus, if this Court were to accept this case, it is unlikely to affect any pending or future litigation.

The State further maintains that the Eleventh District Court of Appeals’ decision is inconsistent with this Court’s decision in *State v. Williams*, 124 Ohio St.3d 381, 2010-Ohio-147, 922 N.E.2d 937. Crucially, *Williams* neither addressed attempted felony murder nor the mental state necessary for felony murder. *Williams* addressed whether felonious assault and attempted murder were allied offenses of similar import that were

subject to merger, that analysis has no bearing on whether the crime of attempted felony murder is recognized in Ohio. Because this case does not present an open, important question of law or present a conflict in the law, this Court should decline jurisdiction.

ARGUMENT

Proposition of Law

The mentes reae of attempt found in 2923.02(A) and felony murder found in R.C. 2903.02(B) are inconsistent, rendering it legally impossible to attempt to commit felony murder.

A. It is legally impossible to commit attempted felony murder.

Revised Code 2923.02(A), the attempt statute, and R.C. 2903.02(B), the felony murder statute, have conflicting mental states making it impossible to convict a person of “attempted felony murder.” Correctly, the Eleventh District Court of Appeals held that the felony murder statute could not be reconciled with the attempt statute to create such an offense.

The felony murder statute provides, “[n]o person shall cause the death of another as a proximate result of the offender’s committing or attempting to commit an offense of violence that is a felony.” R.C. 2903.02(B). It is well settled that a defendant need not purposely intend to kill another to be convicted of felony murder. Rather, the mens rea to uphold a conviction exists if the defendant “proximately caus[ed] another’s death while possessing the mens rea elements set forth in the underlying felony offense.

In other words, the predicate offense contains the mens rea element for felony murder.”

State v. Fry, 125 Ohio St.3d 163, 2010-Ohio-1017, 926 N.E.2d 1239, ¶ 43.

Attempt requires a person to act purposely or knowingly in trying to commit an uncompleted felony offense: “[n]o person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense.” R.C. 2923.02(A). These statutes are inconsistent with each other. Felony murder requires the defendant to cause an inadvertent death; while attempt requires that a defendant not yet complete a felony offense. These provisions cannot be reconciled into to create a single offense.

If the State’s position were accepted, attempted felony murder would occur every time a person commits a dangerous felony, such as felonious assault, robbery, or burglary. But it does not. Instead, the legislature logically chose to punish more harshly those who caused the death of another during the commission of felony, than those who did not. *See* R.C. 2929.02(B)(1) (stating that a person shall be sentenced to fifteen years to life for murder unless certain circumstances warrant a harsher sentence).

B. There is no conflict in the law.

The Eleventh District’s decision does not conflict with this Court’s ruling in *Williams*. As the Eleventh District properly recognized, *Williams* did not address the issue of whether attempted felony murder was a viable criminal offense in Ohio. And this Court did not address that question when determining whether “felonious assault

as defined in R.C. 2903.11(A)(1) and attempted murder as defined in R.C. 2903.02(B) and 2923.02 are allied offenses of similar import.” *Williams*, 124 Ohio St.3d 381, ¶ 2. While the State argues that *Williams* implicitly recognized attempted felony murder as a viable offense, it did not. Rather, as stated in the syllabus of *Williams*, this Court only decided whether felonious assault and attempted murder were allied offenses of similar import. *Id.* at ¶ 28. This Court was not asked to address whether attempted felony murder was a viable offense, and it did not implicitly recognize that it was a viable offense by passing on that question. There is no conflict in the law.

CONCLUSION

Attempted felony murder is not a viable offense in Ohio, and the State's argument does not present an important, open question on this point. Moreover, the Eleventh District's decision is not in conflict with the holding of any Ohio court. Therefore, Mr. Nolan asks that this Court decline jurisdiction.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER

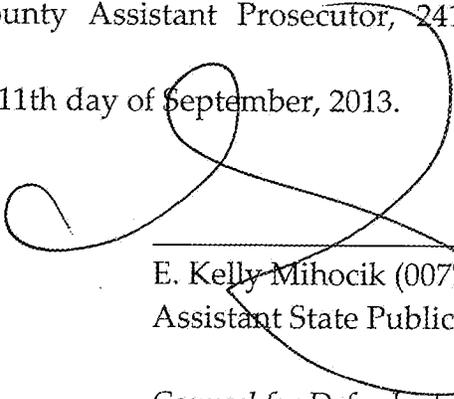
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent by regular U.S. Mail, to the Office
Pamela Holder, Portage County Assistant Prosecutor, 241 South Chestnut Street,
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