IN THE SUPREME COURT OF FLORIDA

LEE ROBERTSON HAYLES,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

_____/

REPLY BRIEF OF PETITIONER ON THE MERITS

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REPLY BRIEF OF PETITIONER ON THE MERITS

1 SUMMARY OF ARGUMENT

The sentencing guidelines are substantive law. As such, they must be strictly construed. Section 782.04(1)(a) offenses are expressly excluded from Category 1 of the guidelines, but not from the guidelines as a whole. Since Hayles' conviction, solicitation to first-degree murder, is a section 782.04(1)(a) offense, it is expressly excluded from Category 1, but not from the guidelines. Therefore, petitioner's sentence must be calculated under Category 9, the residual category.

The state argued that no appellate court has jurisdiction of this case. This is the state's way of trying, most inappropriately, to get this court to reconsider its denial of review in Ford, infra. Under section 924.06, Florida Statutes, and Robinson, infra, a defendant is permitted to appeal a de facto guidelines-departure sentence. Thus the district court and this court have jurisdiction to decide the appeal.

II ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN SENTENCING PETITIONER USING A CATEGORY 1, RATHER THAN A CATEGORY 9, SCORESHEET,

The state argues that, because solicitation to commit first-degree murder is not a capital crime, it is not excluded from the guidelines. § 921.001(4)(a), Fla.Stat. This is a correct statement of the law, but it is not the issue here. The state argues that the Tarawneh reading of Rule 3.701(c) creates an "entirely unnecessary and absurd conflict with sections 782.04(1)(a) and 921.141" (State's Brief (SB), *8).* Tarawneh v. State, 588 So.2d 1006 (Fla. 4th DCA 1991), review denied 598 So.2d 78 (Fla. 1992). No, it does not.

First, it is not clear what the state means by conflict with section 921.141. Section 921.141 sets out the procedure for the penalty phase of a capital trial. That is not at issue here. While not clear, petitioner assumes the state meant to argue there was a conflict with section 921.001(4)(a). Section 921.001(4)(a) provides that the sentencing guidelines apply to all felonies except capital felonies. If this is the state's argument, it is incorrect. Rule 3.701(c) expressly excludes offenses under section 782.04(1)(a) from Category 1, not from guidelines sentencing entirely. So, inchoate offenses under section 782.04(1)(a), excluded from Category 1, may be sentenced under Category 9. They are not excluded from the guidelines, and thus, there is no conflict with 921.001(4)(a).

The state argues that excluding solicitation to murder from Category 1 means a defendant might get a more severe sentence for a solicitation or attempt to commit lesser degrees of murder or manslaughter than for solicitation to commit first-degree murder, and this is an absurd result (SB-8). First of all, there is no such thing as solicitation of a lesser degree of murder or manslaughter. By definition, if a murder is solicited, it must be premeditated, that is, it must be first-degree murder. It is not possible, for example, to "solicit" a crime of negligence, such as manslaughter.

Second, the state's argument has more than a little irony in it, since the state frequently defends other anomalous (in the state's word, "absurd") sentences as legal. For example, a defendant convicted of second-degree murder and sentenced as an habitual offender can receive a sentence of life without parole. This is worse than the sentence for first-degree murder. Yet, the state does not argue that the second-degree murderer should at least be eligible for parole, because otherwise the sentencing scheme is absurd. It would be an improvement, if there were no odd anomalies in the law, but the mere existence of anomalous results is not sufficient in and of itself to reverse a sentence. The state cites no authority that says otherwise.

The state makes a series of wholly unsupported and unsupportable policy arguments. The state argues: "the legislature has mandated that sentencing statutes be applied *so* as to impose the most severe punishment available" (SB-9). This sounds

like every sentence imposed must be the maximum available, but of course, this is not true. The state argues the guidelines are exempt from principles of strict construction. According to the state, "real or imagined ambiguity no longer favors the defendant/criminal, it now favors the state" (SB-9). The state cites no authority for this position, and this court has held to the contrary. All penal statutes, including sentencing schemes, must continue to be strictly construed. The state argues "the primary purpose of sentencing is to punish the offender" (SB-9), as though that answers the question here.

The sentencing guidelines are substantive law. § 921.-0015; Miller v. Florida, 482 U.S. 423, 107 S.Ct. 2446, 96 L.-Ed.2d 351 (1987); Smith v. State, 537 So.2d 982 (Fla. 1989). Penal statutes must be strictly construed, the guidelines are penal statutes, thus they must be strictly construed. Section 782.04(1)(a) offenses, such as Hayles', are expressly excluded from Category 1 of the guidelines, but not from the guidelines as a whole. This exclusion is neither completely rational nor completely irrational. Because the rule expressly excludes his offense from Category 1, and the rule must be strictly con-strued, Hayles' sentence must be calculated under Category 9 of the scoresheet.

STATE'S ISSUE II

IS THERE ANY JURISDICTIONAL BASIS FOR APPEALING A SENTENCE WHICH DEPARTS FROM THE GUIDELINES (restated)

The state seriously misrepresents the jurisdictional issue in a misguided attempt to get this court to address the state's disagreement with the First District's opinion in Ford v. State. This court long ago declined to review Ford itself. Ford v. State, 575 So.2d 1335 (Fla. 1st DCA), review denied 581 So.2d 1318 (Fla. 1991). The state, however, is on a mission, and raises this issue whenever the least opportunity presents itself. Only by the state's misrepresentation does this case present any reason to go over Ford's territory.

In Ford, the state moved to dismiss an appeal on the ground that, since the defendant had entered a plea of no contest without reserving the right to appeal, he had no right of appeal under section 924.06(3), Florida Statutes. Section 924.06(3) contains a general proscription against appeals after plea. The state moved to dismiss the day after the district court received the record, and before defense counsel had filed any brief on behalf of Ford.

The First District Court held that section 924.06(3) had been interpreted by Robinson to be constitutional, but only as "directed to pretrial rulings and not to matters which may occur contemporaneously with a plea of guilty of a plea of nolo contendere." Ford, 575 So.2d at 1337, quoting Robinson v. State, 373 So.2d 898, 900 (Fla. 1979). In Robinson, the Florida Supreme Court found the following matters could be appealed

even after entry of a plea: 1) subject matter jurisdiction; 2) illegality of the sentence; 3) failure of the state to abide by the plea agreement; and 4) voluntariness of the plea. Robinson, 373 So.2d at 902.

The First District held that, where there is the right to an appeal, there is a right to appointed counsel, and appointed counsel must comply with the requirements of Anders, even where there is a plea of guilty or no contest. Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). First of all, because some appealable issues may exist, even where the defendant has entered a plea, some cases involving pleas will have meritorious appellate issues. In the experience of undersigned counsel, this occurs quite regularly, that there is a defect in a sentence or probation order, for example, which is appealable.

Even when the case does not, in the opinion of defense counsel, contain reversible error, Anders requires counsel to file a brief, pointing to anything that arguably could be reversible error; it then gives the defendant an opportunity to file a pro se brief. The First District held that only after the opportunity to file briefs, and the court's review of the briefs, could the court consider dismissing an appeal under section 924.06(3). Ford.

Ford is not applicable here, however, because 924.06(1)(e) specifically permits the defendant to appeal a guidelines departure sentence. Nevertheless, the state argues that, where

the defendant enters a plea, he loses the right to appeal a departure from the guidelines. This is not the law of Florida.

Robinson could not have mentioned guidelines departures, since it was decided some years before Florida adopted sentencing guidelines. Nevertheless, a guidelines departure, without the mandatory predicates, may be viewed as a form of illegal sentence, a type of issue Robinson expressly found to remain appealable even after a plea. Further, a guidelines departure occurs after entry of a plea, and Robinson recognized that the proscription against appeal went to pretrial rulings, not matters which occur contemporaneously with or after entry of the plea. 373 So.2d at 900. On this general basis also, contrary to the state's arguments, a departure from the guidelines remains appealable after a plea.

The state's citation to Robinson's pronouncement that there is "no authority to seek appellate review upon unknown or unidentified grounds" is doublespeak. 373 So.2d at 903. The state wants the fact of the plea to be the end of any appellate reviewing process by anyone, rather than the beginning. The state's position is that the mere fact the defendant pleaded necessarily means there are no appealable issues. While it is the function of defense counsel to identify appealable issues, the state would reach the conclusion that no appealable issues exist based solely on the fact the defendant entered a plea, without any review by an appellate defense attorney.

The state does not explain how or by whom, in its scheme, those issues expressly identified in Robinson as appealable

after a plea will ever be identified. Rather, as the First District recognized, once a notice of appeal is filed, indigent defendants have the right to have appointed counsel review the record, even of a plea, for error. If error exists, a merit brief is filed; if no error is found, an Anders brief is filed. In this case, a meritorious issue was identified; thus, the appeal can go forward. The state's method would preclude review of anything on direct appeal once a plea was entered. Robinson held to the contrary.

The state's argument is full of twisted logic. Citing Steinhorst, the state argues the scoresheet error here is not reviewable because it was not raised in the trial court (SB-15). Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982). To the contrary, this court has held that contemporaneous objections are not essential for the review of sentencing errors. State v. Rhoden, 448 So.2d 1013, 1016 (Fla. 1984), see also Taylor v. State, ____ So.2d ____, 17 FLW S369 (Fla. June 25, 1992); Forehand v. State, 537 So.2d 103, 104 (Fla. 1989). This court has also held that facially-apparent scoresheet errors can be raised at any time. Taylor; Forehand; State v. Whitfield, 487 So.2d 1045 (Fla. 1986); Rule 3.800(a), Fla.R.Crim.P.

The state argues the sentence is valid, even though it is a departure, because it was imposed pursuant to a plea bargain. The bargain was based, however, on whatever the guidelines were, not on a particular length of sentence. In other words, this case is not like, for example, Holland v. State, 508 So.2d

5 (Fla. 1987), in which the defendant agreed to a guidelines-departure sentence as part of a plea agreement.

Rather, this case is like Poppell v. State, 509 So.2d 390 (Fla. 1st DCA 1987). Poppell agreed to a 10-year sentence, a departure from the guidelines, in exchange for the state's promise not to seek an habitual offender sentence. While Poppell's appeal was pending, the Florida Supreme Court decided Whitehead v. State, 498 So.2d 863 (Fla. 1986), in which it held that habitual offender status was not a valid reason for departing from the guidelines. This effectively deprived Poppell of any benefit from the purported bargain.

Judge Nimmons said in his concurring opinion:

> Ordinarily, I would not feel that a defendant should be permitted on direct appeal to make the kind of attack which this defendant has made on his negotiated sentence. However, it is abundantly clear from the record in this case that the sole inducement for the defendant's agreement to the ten year sentence was the threat of a greater term via the habitual offender law which, unbeknownst to the defendant, was legally impossible.

Poppell, 509 So.2d at 391.

Similarly, here, it is abundantly clear from the record that Hayles agreed to the plea bargain based on the mistaken belief – a mistake shared by all parties – that the offenses should be scored using a Category 1 scoresheet. No other explanation for his agreement to a greater sentence appears in the record. This factor alone distinguishes the instant case from Holland, in which the defendant received some benefit - dropped charges, for example - from his plea bargain.

Here, Hayles pleaded as charged to two counts of solicitation to first-degree murder. No counts were nol-prossed or reduced as part of the purported plea agreement. The state made no concessions in terms of counts or sentence. Unless the trial court were to find a valid reason for departure, the guidelines sentence is the only one Hayles could get. He had no prior record, and no one was injured as a result of the solicitation to murder. The facts included by the state are not outside the norm for solicitation to murder, and do not suggest a basis for departure. There is no apparent factor which would justify departure. Hence, there is no apparent reason for Hayles to plead to a guidelines-departure sentence to avoid going to trial.

On the facts of this case, there is no need for Hayles to have moved to withdraw his plea to preserve the issue. The voluntariness of the plea is not a "fact-bound" issue in this case (SB-14). It is not a case where the defendant obtained some benefit in exchange for agreeing to a departure sentence, for Hayles received no benefit from the purported "bargain." Rather, it is a case of a facially-apparent scoresheet error. This court has held numerous times that a facially-apparent scoresheet error may be raised at any time, even without a contemporaneous objection. A motion to withdraw has never been required to preserve this issue, which the courts are bound to address whenever raised, even without an objection.

Inasmuch as he may have agreed to the sentence imposed, Hayles did so only because he believed the state to have used

the correct scoresheet. Since it now appears the state used a wrong-category scoresheet, which resulted in a much higher presumptive sentence than the correct one, this cause must be reversed for resentencing. As he otherwise received no benefit of the purported bargain, unlike Holland, there is no showing that Hayles would have agreed to the sentence imposed but for his belief that the correct-category scoresheet was used. Since this was not the case, this cause must be reversed for resentencing.

III CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this court reverse his sentence and remand for resentencing using a Category 9 score-sheet.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand-delivery to James W. **Rogers**, Assistant Attorney General, The Capitol, Tallahassee, Florida; and by U.S. mail to Mr. Lee Robertson Hayles, inmate no. 122021, Walton Correctional Institution, P.O. Box 5280, Defuniak Springs, Florida 32433, on this 13 day of July, 1992.

KATHL STOVER