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IN THE SUPREME COURT OF THE STATE OF FLORIDA

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HOWARD ORR,)
)
Petitioner/Appellant,)
)
versus)
)
STATE OF FLORIDA,)
)
Respondent.)

S.C.T. CASE NO. 79,793

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON THE MERITS

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PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

The petitioner, Howard Orr, was found guilty of attempted first degree murder with a firearm and sentenced according to a Category 1 guidelines scoresheet. This procedure conflicts with that followed in *Tarawneh v. State*, 555 So.2d 1006 (Fla. 4th DCA 1991), where the defendant was sentenced according to a Category 9 scoresheet. On appeal, the Fifth District Court of Appeal issued a per curiam affirmance. On Motion for Rehearing, the District Court issued an opinion, which was the basis for Mr. Orr's Motion for Certification, denied on April 28, 1992. The Florida **Supreme** Court accepted jurisdiction.

SUMMARY OF THE ARGUMENT

The District Court erred in affirming Mr. Orr's Category 1 scoresheet sentence. Attempted first degree murder is a subclass of first degree murder, governed by section **782.04(1)** (a) of the Florida Statutes, as specifically set out and regularly republished in **the** Committee Notes under Rule of Criminal Procedure **3.701**, Sentencing Guidelines. The plain language of subsection (c) of this **rule** excludes from Category 1 all section **782.04(1)** (a) offenses. **Therefore**, the proper scoresheet for attempted first degree murder can only be that for Category **9**, "all other felony offenses."

ARGUMENT

THE TRIAL COURT ERRED IN USING A
CATEGORY 1 SENTENCING GUIDELINES
SCORESHEET FOR THE PRIMARY OFFENSE
OF ATTEMPTED FIRST DEGREE MURDER.

The petitioner, Howard Orr, was convicted of attempted first degree murder and sentenced according to a Category 1 scoresheet. However, **first** degree murder is expressly excluded from scoring under Category 1. Although attempted first degree murder is not, like a completed first degree murder, a capital crime, it should nevertheless be excluded from Category 1.

The exclusion is proper by virtue of the rule of strict construction. Committee Note (c) to Florida Rule of Criminal Procedure **3.701** states that a crime attempted belongs in the same category as the crime itself. Since first degree murder, defined in section **782.04(1)** (a), Florida **Statutes** (1989), falls outside the limits of Category 1, **so** also must an attempt of that crime.

The Fourth District has adopted this reasoning. Tarawneh v. State, 555 So.2d 1006 (Fla. 4th DCA 1992). This opinion relies upon Committee Note (c), Rule of Criminal Procedure **3.701**, whose "express exclusion of capital murder makes use of the [Category 1] scoresheet error." Tarawneh was found guilty of solicitation to commit first degree murder and was sentenced accordingly under a Category 9 scoresheet calculation.

Although the First District in Havles v. State, 17 F.L.W. 422 (Fla. 1st DCA Feb. 5, 1992), challenges Tarawneh's analysis as a conclusion stated without proof ("This analysis somewhat begs the question . . ."), indeed the challenge is not legally sound. The

Hayles court discusses the logic of punishing an attempted first degree murder as a felony of the first degree. There is a certain appeal here that must be resisted'.

The appeal is, of course, that an attempted first degree murder is a felony of the first degree. The logic is spurious, however, because it skips over the first level of analysis, and ignores legal logic for laymen's. The first question must be, what does the statute say? No court that has addressed the matter denies that the statutes state clearly and unambiguously that capital crimes do not fall within Category 1 and further that inchoate offenses follow the offense solicited, attempted, or conspired to. A court cannot amend a statute by construction. See State v. Wershow, 343 So.2d 605 (Fla. 1977), and cases cited therein; see also State v. Haves, 305 So.2d 822 (Fla. 1st DCA 1975). Amendment is precisely what has taken place in those cases where a court has allowed use of a Category 1 scoresheet to score a primary offense of attempted or solicited first degree murder.

Certain proponents of the Category 1 theory argue that the Category 9 theory would impose upon a person convicted of attempted second degree murder, who would in any event be scored on a Category 1 scoresheet, a lesser sentence than upon the person convicted of attempted first degree murder scored on a Category 9

¹ The Third District Court of Appeal did not resist. Roth v. State, 17 F.L.W. 1552 (Fla. 3d DCA June 23, 1992).

scoresheet.² But this analysis is incomplete: While the high end of the permitted range is greater for the attempted second degree murder, so also is the low end less.³

In point here is the reasoning in State v. Hutcheson, 501 So.2d 190 (Fla. 5th DCA 1987). Hutcheson was convicted of entering contraband **into** a correction facility, a crime not defined in chapter 893, Florida Statutes, and sentenced according to a Category 7, Drugs, calculation. The appellate court reversed and **remanded** for resentencing according to a Category 9 scoresheet, because Category 7 offenses included only those set out in Chapter 893. The confident conclusion rested upon the Category 7 scoresheet heading "**Drugs,**" later edited to read "Drugs: Chapter 893."

The First District employed this reasoning in Robertson v. State, 559 So.2d 352 (Fla. 1st DCA 1990), affirming the use of Category 9 for scoring inmate possession of contraband--a weapon. The weapons scoresheet would have been improper because its heading

² See Note 1, Hayles v. State, 17 F.L.W. 422 (Fla. 1st DCA Feb. 5, 1992). The subject of comment here is a comparison of the sentences for solicitation to commit first degree (premeditated) murder scored as a Category 9 offense and solicitation to commit **second** degree murder **as** a Category 1 offense.

³ Attempted first degree murder, a felony of the first degree, would assign 133 points as the primary offense on a Category 9 scoresheet. The greatest possible punishment is 4-1/2 years' incarceration, and the least is community control. Attempted second degree murder, a felony of the second degree, would assign 77 points as the primary offense on a Category 1 **scoresheet**. The greatest possible punishment **here** is 7 years' punishment, and the least, probation.

lists chapter 790 and section 944.40, whereas Robertson was convicted under section 944.47 (1)(c).

Similarly, in Vance v. State, 565 So.2d 915 (Fla. 4th DCA 1990), use of a Category 2 scoresheet, instead of a Category 9 scoresheet, was improper because Vance was not prosecuted under the sections listed in the Category 2 heading: chapters 794 and 800, and section 826.04.

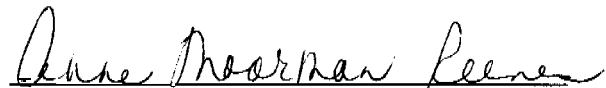
The decision affirming the petitioner's sentencing under a Category 1 calculation should be reversed and the opinion disapproved.

CONCLUSION

BASED UPON the reasons expressed herein, petitioner requests this court to disapprove the district court's opinion, to reverse the district court's decision, and to remand the matter for further proceedings.

Respectfully submitted,

**JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT**

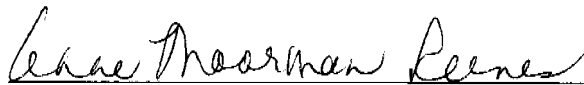


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the Honorable Robert E. Butterworth, Attorney General, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114, in his basket at the Fifth District Court of Appeal: and mailed to Howard Orr, Inmate No. 139666, #G-97, Walton Corr. Inst., P.O. Box 1386, DeFuniak Springs, Florida 32433-1386, on this 28th day of August, 1992.



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