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IN THE SUPREME COURT OF FLORIDA

CASE NO. 80,298

DOUGLAS C. HAMILTON,
Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

**ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT**

PETITIONER'S BRIEF ON THE MERITS

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INTRODUCTION

Petitioner, Douglas C. Hamilton, was the appellant in the district court of appeal and the defendant in the Circuit Court. Respondent, the State of Florida, was the appellee in the district court of appeal, and the prosecutor in the Circuit Court. An Appendix has been prepared in conformity with Rule 9.220 of the Rules of Appellate Procedure. The symbol "A" will be used to designate references to the appendix and the symbol "R" will be used to designate the record on appeal.

STATEMENT OF THE CASE AND FACTS

Douglas Hamilton was charged and convicted of attempted first degree murder. (A. 1-3). **Mr.** Hamilton was adjudicated guilty and sentenced to a term of fifteen years imprisonment. (A. 4-7). A Category 1 scoresheet was used to determine Mr. Hamilton's presumptive Sentence pursuant to the sentencing guidelines. (A. 8).

On December 12, 1989, the Third District Court of Appeal affirmed Mr. Hamilton's conviction and sentence. *Hamilton v. State*, 554 So.2d 15 (Fla. 3d DCA 1989). On October 21, 1991 Mr. Hamilton filed a Motion for Correction of Illegal Sentence pursuant to Fla.R.Crim.P 3.800(a). (R. 1-7). The motion alleged that the trial court should have used a Category 9 scoresheet in determining the presumptive guideline sentence rather than a Category 1 scoresheet. The trial court denied the motion ruling that "[t]he exclusion as to subsection 782.04(1)(a) [in the definition of Category 1] applies to the offense of murder - not to 'attempted' murder." (R. 13).

Mr. Hamilton appealed the circuit court's ruling contending that Fla.R.Crim.P. 3.701(c) specifically excluded first degree murder from the Category 1 scoresheet. Thus specifically excluding all inchoate crimes of premeditated murder from Category 1 and requiring that attempted murder be scored using a Category 9 scoresheet. The District Court of Appeal, Third District, affirmed Mr. Hamilton's conviction. *Hamilton v. State*, 17 FLWD1813 (Fla. 3d DCA July 28, 1992). The court reasoned that the phrase excluding section 782.04(1)(a) from the Category 1 scoresheet simply meant that "first degree murder is not to be scored at all" and certified conflict with *Tarawneh v. State*, 588 So.2d 1006 (Fla. 4th DCA 1991), review denied, No. 79,195 (Fla. Feb. 17, 1992) in which the Fourth District ruled that the exclusion of premeditated murder from Category 1 required that attempted first degree murder be scored using a Category 9 scoresheet, Based on the District Court's certification of conflict, a Notice to Invoke Discretionary Jurisdiction was filed on August 3, 1992.

SUMMARY OF THE ARGUMENT

Rule 3.701c Fla.R.Crim.P. specifies that offenses are grouped into offense categories encompassing certain enumerated statutes. Offenses specifically enumerated in one of the named categories must be scored within the named category. All other offenses must be scored using a Category 9 scoresheet.

Premeditated murder is specifically excluded from Category 1, As all inchoate crimes are included within the category of the crime attempted, attempted murder is similarly excluded from Category 1. Thus attempted premeditated murder must be scored using a Category 9 scoresheet.

ARGUMENT

THE TRIAL COURT INCORRECTLY USED A CATEGORY 1 GUIDELINE SCORESHEET TO DETERMINE THE PRESUMPTIVE GUIDELINE SENTENCE FOR ATTEMPTED FIRST DEGREE MURDER WHERE FIRST DEGREE MURDER IS SPECIFICALLY EXCLUDED FROM CATEGORY 1.

In order for a trial judge to determine the appropriate sentence for a crime punishable by a term of **years**, the judge must resort to the sentencing guidelines. *Fla.R. Crim.P. 3.701(b)*. A critical issue thus becomes what category the offense sought to be punished falls into. In *Hamilton v. State*, Case No. **91-3057** (Fla. 3d DCA July 28, **1992**) [17 FLW D1813] and *Roth v. State*, Case No. 91-1793 (Fla. 3d DCA June 23, **1992**) [17 FLW D1552] the Third District Court of Appeal aligned itself with the First¹ and Fifth² Districts by ruling that inchoate crimes of first degree premeditated murder should be scored using a **category 1** scoresheet. Douglas Hamilton, *the* Petitioner in the instant **case**, urges this Court that the underlying premise of these cases is faulty and that the decision in *Tarawneh v. State*, 588 So.2d **1006** (Fla. 4th DCA 1991), *review denied*, No. **79,195** (Fla. Feb. 17, 1992), ruling that inchoate crimes of premeditated murder must be scored using a category 9 scoresheet is more sound.

In *Hamilton* the Third District **took** issue with *Tarawneh* by focusing on the interpretation of language excluding first degree murder from *category 1*:

The question, however, is how **to** interpret the phrase, '(except subsection 782.04(1)(a))', **as** used in Rule 3.701(c). The purpose of that phrase is not to shift first degree murder from **Category 1** to **Category 9**; instead that phrase signifies that first degree murder is not to be scored at all. *Roth*. This **court** held in *Roth* that the intent of the rule is **to** exclude **the** unscorable offense only, and to retain all scorable chapter **782 offenses**, including attempted first degree murder, in Category **1**,

Hamilton v. State, 17 FLW at D1813.

To suggest that **the** phrase "except subsection **782.04(1)(a)**" was included within the

¹*Hayles v. State*, 596 So.2d 1236 (Fla. 1st DCA 1992).

²*Orr v. State*, 597 So.2d 833 (Fla. 5th DCA 1992).

enumeration of statutes encompassed by **Category 1** to "exclude the unscorable offenses only" is irreconcilable with a cohesive reading of the sentencing guidelines.

The guidelines require that offenses be scored pursuant to offense categories which encompass specific statute violations. *Fla.R.Crim.P. 3.701 c.* When an offense is not enumerated in one of the offense categories, the guidelines require that the offense be scored using a Category 9 scoresheet. *Fla.R.Crim.P. 3.701, Committee Note c; State v. Bohannon*, 538 So.2d 1384 (Fla. 5th DCA 1989). Thus a defendant charged with a sexual battery offense pursuant to a statute not enumerated in Category 2, dealing with sexual battery, must be sentenced using a Category 9 scoresheet. *Vance v. State*, 565 So.2d 915 (Fla. 4th DCA 1990). Similarly, a defendant charged with a weapons' violation pursuant to a statute not enumerated in **Category 8**, titled "Weapons", must be sentenced using a Category 9 scoresheet. *Robertson v. State*, 559 So.2d 352 (Fla. 1st DCA 1990). See also, *State v. Hutcheson*, 501 So.2d 190 (Fla. 5th DCA 1987) (marijuana related violation of section 944.47 must be scored using Category 9 scoresheet where 944.47 not enumerated category 7 offense).

Rule 3.701c defines category 1 in the following manner:

Category 1: Murder, manslaughter: Chapter 782 (except subsection 782.04(1)(a)), and subsection 316.193(3)(c)3, and 327.351(2).

(Emphasis added). *Fla.R.Crim.P. 3.701, Committee Note c* provides that all "[i]nchoate offenses are included within the category of the offense attempted, solicited, or conspired to." Consequently an inchoate offense of premeditated murder, specifically excluded from Category 1, is not an enumerated offense in Category 1. This requires that attempted murder be scored using a Category 9 scoresheet just as any other offense not enumerated in a more specific category must be scored using a Category 9 scoresheet.

The Third District attempts to fashion an exception to the rules governing the sentencing guidelines by virtue of the fact that premeditated murder is a capital felony. This position is untenable in light of the manner in which capital sexual battery is treated by the guidelines.

Section 794.011(2) Fla.Stat. (1991) prohibits sexual battery upon a child less than 12 years old and defines that crime as a "capital felony", yet there is no language excluding a violation of this section from the statutes encompassed within Category 2. This does not mean however that a defendant convicted of capital sexual battery is sentenced pursuant to the guidelines. Moreover because it is already specified that "[t]he guidelines do not apply to capital felonies", Rule 3.701, Committee Note c, a scoresheet is not prepared and the defendant is sentenced according to the mandates of section 775.082 Fla. Stat, (1991) providing for life imprisonment. Roth v. State, supra.

Due process requires that words be given their plain and literal meaning when construing penal statutes. Perkins v. State, 576 So.2d 1310, 1312. (Fla. 1991). The plain and literal meaning of the language in Rule 3.701c excludes premeditated murder from Category 1. As all inchoate crimes are included within the category of the crime attempted, attempted premeditated murder is similarly excluded from Category 1. Thus the Petitioner's offense should have been scored using a Category 9 scoresheet.

CONCLUSION

Based on the foregoing facts, authorities and arguments, appellant respectfully requests this Court to reverse Petitioner's sentence and ~~remand the case to the trial court~~ for resentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ~~was~~ delivered by mail to the ~~Office~~ of the Attorney General, 401 N.W. Second Avenue, Miami, Florida 33128, this 14th day of September, 1992.

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