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IN THE SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT

By _____
Chief Deputy Ckrk

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

RESPONDENT'S BRIEF ON THE MERITS

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INTRODUCTION

This is a petition for discretionary review of a decision of the District Court of Appeal of Florida, Third District, in Hamilton v. State, 17 FLW D1813 (Fla. **3d DCA** July 28, 1992), in which the district court certified conflict with a decision of the Fourth District in Tarawneh v. State, 588 So.2d 1006 (Fla. 4th **DCA** 1991). "R" refers to the record on appeal, "T" to the transcript of proceedings, and for this Court's convenience, "A" will refer to the appendix to the brief of the petitioner. All emphasis is added unless otherwise noted.

STATEMENT OF THE CASE AND FACTS

The petitioner was convicted of attempted first-degree murder and sentenced to a term of fifteen years' imprisonment. (A. 1-7). In sentencing, the trial court used a Category 1 scoresheet to determine the presumptive penalty under the guidelines. (A. 8).

The Third District Court of Appeal affirmed the petitioner's conviction and sentence on direct appeal. Hamilton v. State, 554 So.2d 15 (Fla. 3d DCA 1989). Subsequently, the petitioner challenged his sentence by way of a motion to correct illegal sentence, alleging that the proper scoresheet for his offense was Category 9 and not the Category 1 scoresheet used. (R. 1-7). Following the trial court's denial of his motion, the petitioner appealed once again to the Third District, contending that Florida Rule of Criminal Procedure 3.701(c), specifically excluding first-degree murder from scoring under Category 1, similarly excluded all inchoate offenses such as his attempted first-degree murder.

The Third District once again affirmed the conviction and sentence. Hamilton v. State, 17 FLW D1813 (Fla. 3d DCA July 28, 1992). The affirmance was based on the authority of its decision of a few days before in Roth v. State, 17 FLW D1552 (Fla. 3d DCA June 23, 1992). Because a Category 1 scoresheet specifically

excludes first-degree murder, subsection 782.04(1)(a), from scoring thereunder, the Third District reasoned in Hamilton, as it had in Roth, as follows:

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.

Based on the Third District's certification of conflict with Tarawneh, the petitioner timely filed his notice to **invoke** discretionary jurisdiction on August 3, 1992.

SUMMARY OF THE ARGUMENT

On the authority of Hayles v. State, No.79,743 (Fla. Oct. 1, 1992), an affirmance of the petitioner's sentence for attempted first-degree murder calculated by use of a Category 1 guidelines scoresheet is required.

ARGUMENT

THE TRIAL COURT CORRECTLY USED A CATEGORY 1
GUIDELINE SCORESHEET TO DETERMINE THE
PRESUMPTIVE GUIDELINE SENTENCE FOR ATTEMPTED
FIRST-DEGREE MURDER.

This **case** is controlled by this Court's very recent holding in Hayles v. State, No. 79,743 (Fla. Oct. 1, 1992). In Hayles, the identical issue was presented by way of conflict between the First District's Hayles decision and that of the Fourth District in Tarawneh v. State, 588 So.2d 1006 (Fla. 4th DCA 1991). This Court held that the inchoate crime of solicitation of first-degree murder was to be scored using a Category 1 scoresheet. This was so, the Court reasoned, because only the unscorable offense of first-degree murder was intended to be excluded from Category 1, not the inchoate included crimes, which themselves do not, **as** does first-degree murder, carry a penalty only of life imprisonment or death.

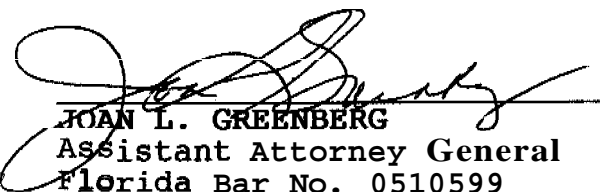
On the authority of Hayles, the conviction and sentence below must be affirmed.

CONCLUSION

Based on the foregoing analysis and citation of authority, the State respectfully submits that the conviction and sentence below must be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S BRIEF ON THE MERITS was furnished by mail to ROSA C. FIGAROLA, OFFICE OF THE PUBLIC DEFENDER, 1351 N.W. 12th Street, Miami, Florida 33125 on this 2nd day of October 1992.



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