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IN THE SUPREME COURT OF FLORIDA

DONALD RHUE HEIDBREDER,

Petitioner,

v.

CASE NO. 80,439

STATE OF FLORIDA,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

P. DOUGLAS BRINKMEYER
FLORIDA BAR #197890
ASSISTANT PUBLIC DEFENDER
CHIEF, APPELLATE DIVISION
LEON COUNTY COURTHOUSE
FOURTH FLOOR, NORTH
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR PETITIONER

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IN THE SUPREME COURT OF FLORIDA

DONALD RHUE HEIDBREDER,

Petitioner,

v. CASE NO. 80,439

STATE OF FLORIDA,

Respondent.

BRIEF OF PETITIONER ON THE MERITS

PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court, and will be referred to as petitioner in this brief. A three volume record on appeal, including a trial transcript, will be referred to as "R" followed by the appropriate page number in parentheses. Attached hereto as an appendix is the decision of the lower tribunal.

II STATEMENT OF THE CASE

By amended information filed February 11, 1991, petitioner was charged with attempted first degree murder with a firearm (R 229). The cause proceeded to jury trial on April 18, 1991, and at the conclusion thereof petitioner was found guilty as charged (R 232).

On May 22, 1991, petitioner was adjudicated guilty and sentenced under a category 1 sentencing guidelines scoresheet to 17 years in prison, with a 3 year mandatory, with credit for time served of 147 days, followed by 10 years probation (R 237-41; 248-49). On May 31, 1991, a timely notice of appeal was filed (R 242). On July 18, 1991, the Public Defender of the Second Judicial Circuit was designated to represent petitioner.

On appeal, petitioner argued he was entitled to present evidence of his mental state at the time of the crime. The lower tribunal affirmed on this issue, without comment. Appendix at 1. Petitioner also argued that he should have been sentenced under a category 9, rather than category 1, sentencing guidelines scoresheet. The lower tribunal affirmed on this issue as well, but certified direct conflict. Appendix at 1-2.

On September 3, 1992, a timely notice of discretionary review was filed.

III STATEMENT OF FACTS

HRS social worker Kathy Guy testified that she supervised the children of Julian Randy and Sandra Kay Murphy from April to November of 1990. At a pretrial conference regarding child support, she heard petitioner threaten Julian because Julian had beat up his ex-wife, who was petitioner's girlfriend (R 16-22).

Harvey Shelley, a resident of Fridinger Road, testified that on December 27, 1990, he was working on his car when a car drove by with its lights off. That car stopped at Mr. Murphy's home. Shelley then heard a shot and a scream. The car drove off at an extremely high rate of speed again with its lights off (R 22-26).

Teresa Ahlbrandt, Julian Randy Murphy's girlfriend, testified that she was in his trailer, lying on the couch, trying to shake a migraine headache so that she could go to work. Randy's 6 children were also present, two of whom were cleaning up. The door to the trailer opened, and a gunshot went off. Randy said he had been shot by petitioner (R 26-33).

Jennifer Murphy, age 11, testified that she was washing dishes when a car pulled up, containing her mother and petitioner. Petitioner opened the door, stuck his face in, and shot her father (R 33-40). Brandy Murphy, age 12, testified that she was sweeping the floor when the door opened and petitioner was standing with a gun. She said don't shoot, but he shot her father (R 41-49).

Julian Randy Murphy testified that he and his wife divorced in December of 1988, and he had custody of their 6 children. Petitioner opened the door to the trailer and shot him once in the chest. After he had recovered, he found the gun in a field (R 65-72). He had been arrested and placed on probation for aggravated battery against his former wife (R 92-93).

Deputy Greg Lancaster's perpetuated deposition was read into the record. He testified that he responded to the scene and then was notified that petitioner had been taken into custody. Petitioner had been drinking (R 95-102).

Deputy Tim Scherer testified that one month after the shooting, the victim called and said he had located the gun. Scherer recovered it from inside a pillowcase under a pile of leaves. The pillowcase came from Sandra Kay Murphy's apartment, where petitioner had been living (R 110-29).

Sandra Kay Murphy testified that petitioner called and said he had shot Randy. He got a pillowcase fram the apartment and disposed of the gun (R 139-41). The state rested (R 143), and petitioner's motion for acquittal was denied (R 144-45).

Sandra Kay Murphy testified as a defense witness that she met petitioner at a lounge at 6:00 p.m., and he was very drunk. They discussed how the children were being mistreated by their father. They went home, and petitioner said he had something to do and left. He was still very drunk (R 146-55).

Petitioner, age 26, testified that he went to the bar after lunch and began drinking beer. He switched to bloody Marys and then drank some shooters (R 157-62).

During a proffer, petitioner testified that he was upset with the victim because the victim had beaten the children in April; petitioner had seen the belt mark bruises, but HRS would not do anything about it. He had heard that Randy had been charged with having sexual relations with his sister in Alabama, and that one of his children had been taken from him in that state.

The court ruled petitioner could testify about his emotions toward the victim, but he could not relate the specific instances of misconduct. Petitioner's counsel argued the testimony was relevant to show petitioner's state of mind at the time of the crime (R 163-68).

Petitioner testified before the jury that he did not like the victim because of the way he had treated Sandra. He did not think the victim deserved to have custody of the children. He was angry and drunk that night, and he planned to open the door and shoot the gun to scare the victim. He did not intend to shoot anyone (R 169-77).

Deputy Richard Goodwin, a certified Breathalyzer operator, testified that petitioner was highly intoxicated after his arrest (R 180-83). Pharmacologist James Thomas O'Donnell testified that petitioner would have had a .35% blood alcohol level on that night, which would have affected his ability to form the intent to commit a crime (R 184-93).

IV SUMMARY OF ARGUMENT

The question here is one of statutory construction. Petitioner was convicted of attempted first-degree murder. Because they are, in effect, penal statutes, the rules governing the sentencing guidelines must be strictly construed. Because Rule 3.701(c), Florida Rules of Criminal Procedure, expressly excludes offenses under Section 782.04(1)(a), Florida Statutes, from Category 1, it was reversible error to sentence petitioner using a Category 1 scoresheet. The proper remedy is to remand for resentencing under a category 9 scoresheet.

Petitioner will also ask this Court, because it already has jurisdiction over the case due to the certified conflict, to reverse for a new trial. Petitioner will argue in this brief that he was denied the right to present evidence of his state of mind at the time of the shooting. During a proffer, petitioner testified that he was upset with the victim because the victim had beaten the children in April; petitioner had seen the belt mark bruises, but HRS would not do anything about it. He had heard that Randy had been charged with having sexual relations with his sister in Alabama, and that one of his children had been taken from him in that state.

The court ruled petitioner could testify about his emotions toward the victim, but he could not relate the specific instances of misconduct. This was error because the jury had no basis to evaluate petitioner's state of mind to determine if he could have formulated the specific intent and

premeditation necessary to support a charge of attempted first degree murder. The proper remedy is to remand for a new trial.

V ARGUMENT

ISSUE I

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

Petitioner was found guilty of the inchoate offense of attempted first-degree murder. This offense is defined in Section 782.04(1)(a), Florida Statutes (first-degree murder) and Section 777.04(1), Florida Statutes (attempts, solicitation, conspiracy, generally). Its penalty is the same as the other inchoate crimes. Section 777.04(4)(a), Florida Statutes. Petitioner was sentenced to the top of the recommended range, 17 years in prison (R 237-40), using a Category 1 scoresheet (R 241).

If petitioner had been sentenced under the category 9 scoresheet, he would be assessed 241 points for the primary offense, 5 points for two prior misdemeanors, and 24 points for severe victim injury, for a total of 270 points. This calls for a recommended range of 9-12 years.

Rule 3.701(c), Florida Rules of Criminal Procedure, provides in part:

> Offense Categories. Offenses have been grouped into nine (9) offense categories encompassing the following statutes:
>
> Category 1: Murder, manslaughter: Chapter 782 [except subsection 782.04-(1)(a)], and subsection 316.193(3)(c)3, and section 327.351(2)
>
> Category 9: All other felony offenses

The Committee Note to subsection *(c)* provides, without change since the inception of the guidelines:

> Only one category is proper in any particular case. Category 9, "All Other Felony Offenses,'' should be used only when the primary offense at conviction is not included in another, more specific category, The guidelines do not apply to capital felonies.
>
> Inchoate offenses are included within the category of the offense attempted, solicited, or conspired to, as modified by ch. 777.

In other words, as an offense under section 782.04(1)(a), attempted first-degree murder is expressly excluded from Category 1 of the guidelines by Rule 3.701(c), but as an attempt, it is arguably included in Category 1 by the committee note. So, which is it? That is the question here.

In Tarawneh v. State, 588 So.2d 1006 (Fla. 4th DCA 1991), review denied 598 So.2d 78 (Fla. 1992), the Fourth District Court of Appeal held that, because Rule 3.701(c) expressly excludes offenses under section 782.04(1)(a) from Category 1, it was improper to use a Category 1 scoresheet in sentencing Tarawneh, who was convicted of solicitation and conspiracy to commit first-degree murder. Instead, the Fourth District held, a Category 9 (the residual category) scoresheet should have been used. In the instant case, had a Category 9 scoresheet been used, petitioner's maximum recommended sentence would be reduced from 17 to 12 years.

The lower tribunal has reached a contrary result. Hayles v. State, 596 So.2d 1236 (Fla. 1st DCA 1992) (on motion for rehearing or to certify question), review pending, case no. 79,743. The Fifth District has agreed with the lower tribunal. See Orr v. State, 597 So.2d 833 (Fla. 5th DCA 1992) (on motion

for rehearing), review pending, case no. 79,793. So has the Third. See Roth v. State, 17 FLW D1552 (Fla. 3rd DCA June 23, 1992) (certifying conflict) and Hamilton v. State, 17 FLW D1813 (Fla. 3rd DCA July 28, 1992) (certifying conflict).

Petitioner concedes that Tarawneh is not as clear as it could be. Having said that, petitioner believes the Hayles opinion either misstates the holding of Tarawneh, or the holding of Tarawneh was not as narrow as it should have been. The lower tribunal said in Hayles:

> The Fourth District cited Committee Note (c), supra, as support for its conclusion that category 1 was not applicable, The note, however, on its face, seems to indicate that the guidelines would not apply at all to capital felonies.

596 So.2d at 1236-37. Petitioner believes the exclusion of capital felonies to which Tarawneh refers is not from the committee note, but rather, is actually the exclusion from Rule 3.701(c) itself. The rule itself lists the offenses included in the various categories and expressly excludes offenses under section 782.04(1)(a) from Category 1. The opinion in Tarawneh is not perfectly clear. If it relied on the committee note rather than the rule itself, it is in error on this point,

The Hayles court continued thus:

> The Tarawneh court concluded, in light of the requirement that inchoate offenses are included within the category of the offense attempted [sic], that solicitation to commit first degree murder would be excluded from category 1, since first degree murder is itself excluded from category 1.

Id. at 1237. According to the lower tribunal,

> [t]his analysis somewhat begs the question of how, if capital murder is excluded altogether from the guidelines, and therefore solicitation to commit capital murder is **also** excluded, the trial court can be required to sentence under a different category **of** the very guidelines from which the **defendant's** crime, according to Tarawneh, has been excluded.

Id.

Petitioner believes the lower tribunal's erroneous reasoning derives from failing to differentiate between the rule **and** the committee note, or to acknowledge the significance of express exclusion. The rule itself excludes offenses under section 782.04(1)(a) only from Category 1, not from the guidelines altogether. The committee note excludes capital murder from **the** guidelines altogether. But, **as** this **case** shows, there exist offenses under section 782.04(1)(a) - thus expressly excluded from Category 1 - which, because they are not capital felonies, are not excluded from the guidelines by the committee note. Under this circumstance, such an offense is reasonably sentenced under the residual category. There is of course another capital offense - capital sexual battery - which is necessarily excluded from the guidelines (by the committee note if nothing else), whose statute number is not excluded from the "offense categories'' by the text of Rule 3.701(c).

There is the further problem of the committee note pronouncement that inchoate offenses are within the category of the offense attempted, solicited, or conspired to. The answer to this purported dilemma is simply that this general "rule" cannot **defeat** the specific exclusion of all section

782.04(1)(a) offenses from Category 1. See, e.g., Fletcher v. Fletcher, 573 So.2d 941 (Fla. 1st DCA 1991) (where there is a general and a specific provision in the same statute, the particular provision will prevail).

The key to resolving the issue here is how to construe the rule, It is axiomatic that penal statutes must be strictly construed. Reino v. State, 352 So.2d 853 (Fla. 1977). See also State v. Waters, 436 So.2d 66 (Fla. 1983); Ferguson v. State, 377 So.2d 709 (Fla. 1979); Earnest v. State, 351 So.2d 957 (Fla. 1977). But, how are the sentencing guidelines to be construed? The rules of criminal procedure themselves provide that they "shall be construed to secure simplicity in procedure and fairness in administration.'' Rule 3.020, Fla.R.Crim.P. This pronouncement might be useful in a procedural context, but the guidelines are not merely a procedural matter. Further, either construction - included or excluded from Category 1 - is "simple," although both are not necessarily fair. So, Rule 3.020 does not answer the question here.

In Section 921.0015, Florida Statutes, the legislature adopted Rules 3.701 and 3.988 as substantive law. This means these rules must be construed in the same way a sentencing statute would be, that is, strictly construed. The U.S. Supreme Court has held, unanimously, that retroactive application of a disadvantageous change to the Florida sentencing guidelines violated the *ex* post facto clause of the U.S. Constitution. Miller v. Florida, 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987). The Supreme Court expressly rejected the

state's argument that a change to the sentencing guidelines was merely procedural. 482 U.S. at 433-35, 96 L.Ed.2d at 362-63.

A few years after Miller, the court squarely addressed the question whether the guidelines were procedural or substantive in holding the sentencing guidelines were invalid until they were adopted by the legislature July 1, 1984. Smith v. State, 537 So.2d 982 (Fla. 1989). This Court said:

> In the final analysis, we are compelled to conclude that the sentencing guidelines, insofar as they limit the length of sentences to be imposed, are substantive in nature. (footnote omitted)

537 So.2d at 986. See also Ray v. State, 556 So.2d 495, 497 (Fla. 1st DCA), review dism., 560 So.2d 234 (Fla. 1990):

> ...when the Legislature adopted the revisions to Rule 3.701(d)(13) and the committee note thereto...these changes acquired the force and effect of law.

As for the status of committee notes, in State ex rel. Evans v. Chappel, 308 So.2d 1, 3 (Fla. 1975), this Court said that "[a]lthough Committee Notes are generally a valuable aid in the application of the [criminal] rules, they are not binding." See also Putt v. State, 527 So.2d 914 (Fla. 3d DCA 1988). It is true that Chappel involved a rule in which the court had expressly declined to adopt the committee notes, but the committee notes in Putt had been adopted by this Court. On the other hand, this Court has also held that committee notes on the guidelines rules have the same force and effect as the rules themselves. The Florida Bar, Amendment to Rules of Criminal Procedure (3.701, 3.988 - Sentencing Guidelines), 451

So.2d 824 (Fla. 1984). Even if committee notes have the same force and effect as the rules, however, that principle cannot overcome the express exclusion of section 782.04(1)(a) offenses from Category 1. See Fletcher, supra.

The rule of lenity is an independent ground for reversal. In Lewis v. State, 574 So.2d 245 (Fla. 2d DCA 1991), aff'd on other grounds State v. Worley, 586 So.2d 338 (Fla. 1991), the Second District held that the rule of lenity applied to the guidelines. Lewis concerned the issue whether legal constraint could be scored more than once. This issue was the basis for jurisdiction in the supreme court, where this Court affirmed on the basis of its decision in Flowers v. State, 586 So.2d 1058 (Fla. 1991).

The Second District said:

> [Rules] 3.701 and 3.988, do not require the use of a multiplier. Nor do they contain language susceptible of a different construction. Even assuming ambiguity in the rules as to scoring legal constraint, the rule of lenity would bar the use of a multiplier. Section 775.021(1), Florida Statutes (1988), provides: "[t]he provisions of this code and offenses defined by other statute shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused." We construe this statute as applying to the sentencing guidelines rules.

Lewis, 574 So.2d at 246, citing Williams v. State, 528 So.2d 453, 454 (Fla. 5th DCA 1988) (adopting rules of lenity in resolving an ambiguity in the application of the guidelines to a true split sentence); Sections 921.001 and 921.0015, Florida Statutes. Even if there were an ambiguity here, the rule of

lenity requires that the construction most favorable to the accused be upheld.

The court in Hayles ruled to the effect that only completed offenses under section 782.04(1)(a) are excluded from the guidelines, and that is only because there is a mandatary sentence for completed capital crimes. (To remind the court, there is another capital offense - capital sexual battery - which is excluded from the guidelines, although its statute number is not expressly listed in rule 3.701(c) as excluded. This means that, while Category 1 excludes all section 782.04(1)(a) offenses, not all section 782.04(1)(a) offenses are capital, and while the committee note excludes capital offenses, the capital exclusion encompasses more than section 782.04(1)(a) offenses.)

Even though the scheme proposed by the lower tribunal, that only completed capital felonies are excluded from the guidelines, might make sense, and even though it may be what the guidelines commission intended, it is not, in fact, what the rule says,

Rather, the rule expressly excludes from Category 1 all offenses under section 782.04(1)(a). For any court to exclude only completed offenses under section 782.04(1)(a) would be adding something to the rule which it does not in fact contain. A rule concerning the guidelines must be strictly construed. Its committee note may be viewed as secondary, or the general provision of the committee note may be viewed as not overcoming a specific, express exclusion. The rule specifically excludes

section 782.04(1)(a) offenses. Section 782.04(1)(a) defines a substantive offense; the crime of attempt does not exist without an underlying substantive offense, thus the substantive offense takes precedence over an inchoate offense. By any route, section 782.04(1)(a) offenses are excluded from Category 1.

In Putt, the Third District reported the court as having held "that the guidelines must be read as they are written." 527 So.2d at 915, citing State v. Van Kooten, 522 So.2d 830 (Fla. 1988). The court did not actually say that in Van Kooten, although it was reasonably inferable. What the court did say was:

> The guideline clearly states that the appropriate sentence was community control or incarceration. Any change in that presumptive guideline must occur through appropriate legislative and court rule action, rather than by judicial construction. (emphasis added)

522 So.2d at 831.

This Court should reverse the decision in this case along with Hayles. Petitioner's sentence must be reversed.

ISSUE II

THE LOWER COURT ERRED IN DENYING PETITIONER THE RIGHT TO PRESENT EVIDENCE OF HIS STATE OF MIND AT THE TIME OF THE CRIME.

At trial, during the direct examination of petitioner, the following occurred:

> Q. Is Randy Murphy something that makes you get mad?
>
> A. Yes, sir
>
> Q. Why is that?
>
> A. I've been told so much about what the man does and what he has done and I have seen firsthand, you know, something that I don't know if I can even touch on this, but I'm going to go ahead and say it and may be if you all don't want me to. you'll stop me, but I remember when them little kids come over to my house --
>
> MR. RIMER: I will object, Your Honor.
>
> THE COURT: Approach the bench. Take the jury out, please.
>
> (Jury out)
>
> THE COURT: All right.
>
> MR. RIMMER: I object to this line of testimony. I don't think it's relevant. They have already established the fact that there's been prior difficulties between Mr. Murphy and his wife which upsets Heidbreder, but to go into all of the details I think is improper attack on character of Mr. Murphy, which is improper.
>
> THE COURT: Mr. Koran.
>
> MR. KORAN: Your honor, one of the theories of this case is that Mr. Heidbreder may be guilty of attempted second degree murder, which is where somebody essentially is evincing a depraved mind regardless of human life. In other

> words, he becomes so enraged over a particular situation that they kill. His state of mind, what he believes about Mr. Murphy, not for the truth, not saying that, in fact, Murphy is a whatever it is that the defendant feels, it's not really the issue, but for the jury to know how the defendant feels so they can understand his state of mind I think is an issue and I think it is relevant. (R 162-64).

During a proffer, petitioner testified that he was upset with the victim because the victim had beaten the children in April; petitioner had seen the belt mark bruises, but HRS would not do anything about it, He had heard that Randy had been charged with having sexual relations with his sister in Alabama, and that one of his children had been taken from him in that state (R 164-66).

The court ruled petitioner could testify about his emotions toward the victim, but he could not relate the specific instances of misconduct (R 166-68). This was error because the jury had no basis to evaluate petitioner's state of mind to determine if petitioner could have formulated the specific intent and premeditation necessary to support a charge of attempted first degree murder.

This Court has jurisdiction to address this issue and grant a new trial because it has accepted review. In both State v. Smith, 573 So.2d 306 (Fla. 1990) and Bunney v. State, 17 FLW S383 (Fla. July 2, 1992), this Court examined trial errors after it had disposed of the certified questions, and granted new trials.

First degree murder requires premeditation and the specific intent to kill. Section 782.04(1)(a), Florida Statutes. Second degree murder requires neither, only an imminently dangerous act evincing a depraved mind regardless of human life. Section 782.04(2), Florida Statutes. The jury must be able to look into the defendant's mind to determine what his intent was. Petitioner's defense was that he shot into the trailer to scare the victim, because he was tired of the way the victim had treated his children and his ex-wife. Surely shooting into an occupied trailer constitutes attempted second degree murder. Conyers v. State, **569 So.2d 1360 (Fla. 1st DCA 1991).**

But the jury did not know what beliefs motivated petitioner to take such drastic action. All the jury knew was that petitioner disliked the victim, but the jury did not know all of the reasons underlying such belief. Without that information, the jury could not make an informed judgment between attempted first and attempted second degree murder, because the jury did not know what petitioner's state of mind was at the time.

The defendant's mental state at the time of a shooting is relevant. In Shiver v. State, 564 So.2d 1158 (Fla. 1st DCA 1990), the defendant stabbed the victim in **a** bar. The state wanted witnesses to testify about their lay observations of the defendant's emotional state. The court held that such evidence of the defendant's mental state was relevant and admissible.

The same should be true of the defendant's reasons for his mental state.

In Araujo v. State, 452 So.2d 54 (Fla. 3rd DCA 1984), the defendant was convicted of trafficking in marijuana because he was at a house owned by Howard when the police conducted a raid. He wanted to present evidence that he was at the house not to deal in drugs, but rather to meet a body shop business associate, DiCamillo. DiCamillo had absconded and was not available to testify. The court allowed evidence of Araujo's motive for being at the house, over the prosecutor's abjection, The appellate court approved:

> Because this case must be retried, we note that the trial court correctly overruled the prosecutor's hearsay objections to Araujo recounting what DiCamillo said to him, Such testimony was not offered to Drove the truth of the matter asserted by DiCamillo, but to show its effect upon Araujo and is thus admissible as non-hearsay. See, e.g., United States v. Jackson, 621 F.2d 216 (5th Cir. 1980) (defendant's testimony concerning what he was told about purpose of bank loan offered to prove lack of knowledge in defense to making false entry); United States v. Herrera, 600 F.2d 502 (5th Cir. 1979) (defendant's testimony concerning threats received admissible to establish claim of duress); United States v. Rubin, 591 F.2d 278 (5th Cir.), cert. denied, 444 U.S. 864, 100 S.Ct. 133, 62 L.Ed.2d 87 (1979) (defendant's testimony that he had been told by present and past union presidents that union's constitutional procedures for obtaining salary increases did not have to be scrupulously followed admissible to establish defense to charge of taking unauthorized salary increases); United States v. Dunloy, 584 F.2d 6 (2nd Cir. 1978) (defendant's testimony as to what he was told as bearing on whether he believed

> package contained valuables or securities rather than narcotics); United States v. Wellendoxf, 574 F.2d 1289 (5th Cir. 1978) (defendant's testimony concerning tax advice he received admissible to establish good faith); United States v. Carter, 491 F.2d 625 (5th Cir. 1974) (defendant's testimony that cousin permitted him to use car and did not tell him it was stolen); United States v. Anost, 356 F.2d 413 (7th Cir. 1966) (defendant's testimony concerning contents of phone conversations with codefendant bore upon his explanation for possessing allegedly stolen goods).

452 So.2d at 56, footnote 4 (emphasis added). Each of the federal cases relied on by the Araujo court supports petitioner's contention that the proffered evidence was not hearsay and was admissible to show his state of mind.

A matter is not hearsay under Section 90.801(1)(c), Florida Statutes, if it not offered to prove the truth of the matter, but only to show the witness's state of mind. Peede v. State, 474 So.2d 808 (Fla. 1985).

In E.B. v. State, 531 So.2d 1053 (Fla. 3rd DCA 1988), the defendant juvenile was convicted of aggravated battery on another student. He wished to introduce evidence that school administrators had advised him to leave school early that day because of trouble with the victim. The court excluded the evidence and the appellate court reversed:

> Here, the purpose of the the statement was not to prove the truth of the matter asserted -- that E.B.'s life was in danger -- but to show its effect on E.B.'s state of mind, namely, that E.B. had reason to fear Randall. Thus, the statement was not hearsay. That testimony supports E.B.'s defense and is clearly relevant.

531 So.2d at 1054.

See also Campos v. State, 366 So.2d 782 (Fla. 3rd DCA 1978), in which the court held that evidence of the defendant's state of mind at the time of a second degree murder is relevant.

That petitioner believed the victim had beaten the children was not hearsay because petitioner saw the belt mark bruises, and because it was not introduced to prove the truth of the matter, only its effect on petitioner's state of mind. That petitioner believed the victim had sexually molested his sister in Alabama, and that petitioner believed a child had been removed from the victim's custody in Alabama were not hearsay because they were not meant to prove the truth, only the effect on petitioner's state of mind.

This Court must rule the proffered evidence admissible and reverse and remand for a new trial.

VI CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that his sentence be **vacated** and a category **9** scoresheet be ordered. In addition, petitioner requests that this Court reverse the judgment and sentence and remand for a new trial.

Respectfully submitted,

NANCY **A.** DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

P. DOUGLAS BRINKMEYER

Assistant Public Defender
Chief, Appellate Division
Leon County Courthouse
Fourth Floor North
301 South Monroe Street
Tallahassee, Florida 32301
(904)488-2458

Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the forgoing Initial Brief of Petitioner has been furnished by mail to Bradley R. Bischoff, Assistant Attorney General, 2020 Capital Circle Southeast, Alexander Building, Suite 211, Tallahassee, Florida 32301, and a copy has been mailed to petitioner, #925940, P.O. Box 248, Century, Florida 32535, this 15th day of September, 1992.

P. DOUGLAS BRINKMEYER

IN THE SUPREME **COURT OF FLORIDA**

DONALD **RHUE** HEIDBREDER,

Petitioner,

v. CASE NO. ***80,439***

STATE OF FLORIDA,

Respondent.

APPENDIX TO PETITIONER'S **BRIEF** ON THE **MERITS**

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

P. **DOUGLAS** BRINKMEYER
ASSISTANT **PUBLIC** DEFENDER
FLORIDA **BAR** #197890
LEON COUNTY COURTHOUSE
FOURTH FLOOR, NORTH
TALLAHASSEE, FLORIDA 32301
(904) ***488-2458***

ATTORNEY FOR PETITIONER

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

DONALD RHUE HEIDBREDER,

Appellant,

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

v.

CASE NO. 91-1930

STATE OF FLORIDA,

Appellee.

Opinion filed August 13, 1992.

An appeal from the circuit court for Escambia County, Kim Skievaski, Judge.

Nancy A. Daniels, Public Defender, and P. Douglas Brinkmeyer, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General, and Bradley R. Bischoff, Assistant Attorney General, Tallahassee, for Appellee.

AUG 13 1992
PUBLIC DEFENDER
2nd JUDICIAL CIRCUIT

PER CURIAM.

The judgment of conviction of attempted first degree murder is affirmed, there being no abuse of discretion by the trial court in excluding the specific testimony identified in Appellant's brief.

We likewise affirm Appellant's sentence. The trial court's decision to use the category 1 scoresheet rather than the

category 9 scoresheet when sentencing Appellant is consistent with this court's decision in Hayles v. State, 17 F.L.W. D960 (Fla. 1st DCA April 13, 1992). As in Hayles, we certify direct conflict with Tarawneh v. State, 588 So. 2d 1006 (Fla. 4th DCA 1991).

AFFIRMED.

ZEHMER, WOLF, and KAHN, JJ., CONCUR.