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SID J. WHITE
SEP 3 1991
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

ANTHONY ODELL McLENDON,
Petitioner,

Case No. 78,320

v.

STATE OF FLORIDA,
Respondent.

ON DISCRETIONARY REVIEW FROM THE
SECOND DISTRICT COURT OF APPEAL, STATE OF FLORIDA

BRIEF OF RESPONDENT ON THE MERITS

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SUMMARY OF THE ARGUMENT

The addition of a mere 15 points for victim injury does not supplant the reasons for departure based upon an unscorable capital felony. It is not the death of the victim that forms the basis for the departure. Rather, it is the magnitude larger horribleness of having committed a capital felony that gives rise to the reason for departing on the basis of a contemporaneous capital felony.

ARGUMENT

ISSUE

IN SENTENCING FOR A FELONY WHERE THERE IS A CONTEMPORANEOUS CONVICTION OF AN UNSCORED CAPITAL FELONY, IS IT PROPER TO DEPART BASED ON THE DEFENDANT'S CAPITAL CONVICTION WHEN THE APPLICABLE GUIDELINES PROVIDE THAT VICTIM INJURY IS SCORABLE? (Certified question)

Essentially, Petitioner has posited that the 15 points for victim injury is a sufficient substitute and punishment to supplant the traditional concept that departure can be had for a contemporaneous conviction for an unscorable capital felony under Hansbrough v. State, 565 so.2d 1288 (Fla. 1987) and Livingston v. State, 565 So.2d 1288 (Fla. 1988). This reasoning is not in keeping with the policy behind departing on the basis of an unscorable capital felony.

If one were to follow Petitioner's reasoning, a contemporaneous conviction for a capital felony would only be "worth" a mere 15 points on the guidelines unless the State was willing to forego assessing points for victim injury. Such is obviously not in keeping with the intent of the guidelines or the policy behind departing for a contemporaneous capital conviction.

The trial court did not depart because the victim was killed. Rather, Petitioner earned the departure because the heinous nature of an unscorable capital felony conviction is something this Court has deemed a sufficient reason for departure. The 15 points added for victim injury are attributable to the attendant felony convictions regardless of

the capital felony by virtue of Rule 3.701(d)(7), Florida Rules of Criminal Procedure, as amended. The reason for the departure was, thus, not the injury to the victim, but the dreadful and unscorable nature of the contemporaneous capital conviction.

One could consider a scenario where this Court approves a rule of criminal procedure whereby capital crimes not awarded the death penalty are thus "scored" on the guidelines. Is it at all reasonable to think that a mere 15 points would be assessed for such a crime? Of course not. It is equally unreasonable to think that the 15 points for victim injury scored by the attendant felony kidnapping convictions constitutes sufficient punishment so as not to warrant a departure sentence based upon the contemporaneous capital felony. Victim injury may well be already factored into the guidelines, but the contemporaneous conviction for a cruel capital felony is not. Accordingly, the policy behind departing based upon the contemporaneous conviction for a capital felony is still served regardless of the rule allowing for the scoring of victim injury in this case.

Furthermore, if the 15 points for victim injury were subtracted from the guidelines for, arguendo, the sake of not punishing Petitioner twice for factors already considered in the guidelines, it is undisputable that the trial court could still depart based upon the capital felony. Inasmuch as the extent of the departure is no longer reviewable, any range achieved absent the 15 points could be departed from, with impunity, all the way up to life in prison. Accordingly, regardless of the addition of victim injury points for the conviction of any felony committed

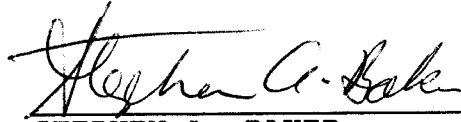
along with the capital crime, departure to the statutory maximum can always be achieved. Such was true before the change in the Rules, such is true after.

CONCLUSION

Based upon the foregoing reasons, arguments and citations of authority, the judgement and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Howard J. Shifke, Esquire, 701 N. Franklin Street, Tampa, Florida 33602 this 30th day of August, 1991.



COUNSEL FOR RESPONDENT