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CLERK, SUPREME COURT

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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

ANTHONY ODELL McLENDON,

PETITIONER,

v.

CASE NO. 78,320

STATE OF FLORIDA,

RESPONDENT.

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PETITIONER'S REPLY BRIEF

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PRELIMINARY STATEMENT

Petitioner was the Defendant in the trial court and will be referred to as "Petitioner" or "Mr. McLendon." Respondent was the State of Florida in the trial court and will be referred to as "the State." The record is contained in eight volumes and references to the record will be designated by an "R" followed by the appropriate page number.

## ARGUMENT

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 SCOREABLE

The trial court erred when it departed upward from the sentencing guidelines by writing that the scoresheet did not take into consideration the contemporaneous first degree murder conviction. This Court should answer the certified question in the negative, and should reverse and remand with instructions to impose a guideline sentence on the burglary with an assault.

In Livingston v. State, 565 So.2d 1288, 1292 (Fla. 1988), this Court cited Hansbrough v. State, 509 So.2d 1081 (Fla. 1987) for the holding that a trial court could depart upwards from the sentencing guidelines based upon a "contemporaneous conviction of an unscored capital felony."

In Hansbrough v. State, 509 So.2d 1081, 1087 (Fla. 1987), this Court upheld a contemporaneous conviction of an unscored capital felony as a valid reason for a guidelines departure on the armed robbery conviction. However, this Court noted that the first-degree murder conviction "could not be scored on the armed robbery scoresheet." Id.

Additionally, this Court held that "[a]s a reason for departure, Hansbrough's conviction and sentence for first-degree murder are not prohibited by the guidelines, have not already been taken into account by the guidelines, and are not inherent

components of armed robbery. See State v. Mischler, 488 So.2d 523 (Fla. 1986)." Id.

In State v. Mischler, 488 So.2d 523, 525, this Court held:

A reason which is prohibited by the guidelines themselves can never be used to justify a departure. (Citation omitted). Factors already taken into account in calculating the guidelines score can never support departure. (Citation omitted). A court cannot use an inherent component of the crime in question to justify departure. (Citation omitted). If any of the reasons given by the trial court to justify departure fall into any of the three above-mentioned categories, an appellate court is obligated to find that departure is improper.

State v. Mischler, 488 So.2d 523, 525 (Fla. 1986).

Hansbrough and Livingston predate the amendment to Rule 3.701(d)(7), Florida Rules of Criminal Procedure, which now states that the contemporaneous capital felony conviction is scoreable under victim injury. This brings us to Mischler's conclusion that the Court is obligated to find the departure in this case to be improper -- the departure is based upon a factor already taken into account in calculating the guidelines score.

In its Answer Brief, the State argues that Mr. McLendon received the departure not because of the contemporaneous capital felony conviction itself, but because of the "heinous nature of an unscorable capital felony conviction" and because of the "dreadful and unscorable nature of the contemporaneous capital conviction." (State's Answer Brief, pp. 2-3). These assertions simply are not correct.

The reason for departure is written on the guidelines scoresheet as follows: "'Defendants (sic) scoresheet does not take into consideration that defendant also stands convicted for murder in the first degree.' M. Wm. Graybill 12/13/88." (R. 1118). This reason for departure is invalid.

Therefore, this Court should reverse and remand with instructions to resentence Petitioner to a guideline sentence on the charge of burglary with an assault.

CONCLUSION

Based upon the foregoing arguments and authorities, this Court should answer the certified question in the negative and should reverse and remand with instructions to resentence Petitioner to a guideline sentence on the charge of burglary with an assault.

Respectfully submitted,



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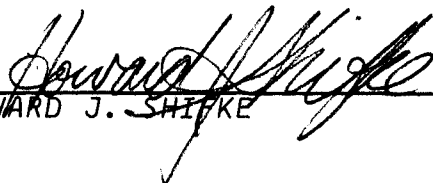
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petitioner's Reply Brief has been furnished to Stephen A. Baker, Esquire, Assistant Attorney General, and to Peggy A. Quince, Esquire, Assistant Attorney General, 2002 N. Lois Avenue, Suite 700, Tampa, Florida 33607-2366, by United States Mail, this 4th day of September, 1991.

  
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HOWARD J. SHIFKE