OA 11-4-91

047

IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,626

THE STATE OF FLORIDA,

Petitioner,

vs.

LEM ADAM WASHINGTON,

Respondent.

****

ON APPLICATION FOR DISCRETIONARY REVIEW

****

ANSWER BRIEF OF RESPONDENT

Ronald S. Lowy, Esquire
Florida Bar No. 501069
LAW OFFICES OF RONALD S. LOWY
Attorneys for Respondent
Barnett Bank Building
420 Lincoln Road, PH/7th Floor
Miami Beach, FL 33139
(305) 673-5699

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES

INTRODUCTION

The Petitioner, the State of Florida, was the Appellee in the District Court of Appeal, Third District. The Respondent, Lem Adam Washington, was the Appellant below. The parties will be referred to as they stand before this Court. The symbol "R" will designate the record on appeal and the symbol "T" will designate the transcript of proceedings.

STATEMENT OF THE CASE AND FACTS

The Respondent, Lem Adam Washington, and a co-defendant Robert Smith, were tried and convicted of armed robbery which is a first degree felony punishable by life imprisonment (R. 42, 44-46). At trial, during the voir dire, the State exercised three peremptory challenges to exclude three blacks from the prospective jury. (T. 103, 104, 106). Counsel for the co-Defendant, Robert Smith, raised the objection that the challenges had been exercised on the basis of the jurors' race and requested an inquiry based upon State v. Neil, 457 So.2d 481 (Fla. 1984). Respondent did not voice an objection (T. 106). The trial court, apparently agreeing that a *prima facie* showing had been made, ordered the prosecutor to explain the grounds upon which the black jurors had been stricken (T. 106). The prosecutor responded with supposedly race-neutral reasons (T. 107-108). The trial court specifically declined to rule upon the sufficiency of the explanation stating:

> At this point, there are three blacks on the jury, okay? They are not entitled to a jury of all black people. There are three black people on the jury and I am going to leave it at that. I am not going to rule with regard to whether these other strikes are correct or not at this time. (T. 109).

The trial continued and resulted in the conviction of the Respondent and the co-defendant. At the Respondent's sentencing hearing, Respondent's sentencing guidelines scoresheet reflected a recommended sentence of 22 to 27 years (R. 50). The trial court, finding that Respondent was an habitual violent felony offender,

sentenced him to an extended term of life imprisonment without eligibility for release for fifteen (15) years (R. 48-50a). On appeal before the Third District Court of Appeal, Respondent argued that the trial court had committed reversible error by not ruling on the reasons proffered by the State for striking three black jurors and that the trial judge misapprehended the permissive nature of Section 775.084(4)(b)(1), Fla. Stat. (1989) and failed to consider the matter as within his discretion. Petitioner expressly conceded the permissive nature of the statute both in its brief and at oral argument. (R. 81). The Third District Court of Appeal held that the trial court had committed reversible error by failing to rule on the reasons tendered by the State for excluding the stricken jurors and reversed the co-defendant's conviction but affirmed Respondent's conviction based on his failure to join in the co-defendant's objection at trial. The Third District further held that the sentence imposed by the trial judge was not mandatory under Section 775.084(4)(b)(1) and vacated the sentence and remanded the matter so the trial judge could consider the sentence within his discretion. (R. 82). Petitioner filed a Petition for Discretionary Review before the Supreme Court of Florida reversing its position with regard to the permissive nature of Section 775.084(4)(b)(1). This Reply Brief follows.

QUESTIONS PRESENTED

ISSUE ONE

WHETHER A LIFE SENTENCE IS PERMISSIVE OR MANDATORY PURSUANT TO THE HABITUAL OFFENDER STATUTE, SECTION 775.084(4)(b)(1) FLORIDA STATUTES (1988).

ISSUE TWO

WHETHER A DEFENDANT WHO FAILS TO EXPRESSLY JOIN IN A NEIL OBJECTION MAY BE DENIED RELIEF WHERE A CO-DEFENDANT RAISING THE NEIL OBJECTION IS GRANTED A NEW TRIAL BASED UPON THE GROUND THAT THE TRIAL JUDGE CONDUCTED A NEIL INQUIRY BUT DECLINED TO RULE ON THE SUFFICIENCY OF THE EXPLANATION.

ISSUE THREE

WHETHER A DEFENDANT CONVICTED OF A FIRST DEGREE FELONY PUNISHABLE BY LIFE IMPRISONMENT IS SUBJECT TO AN ENHANCED SENTENCE OF LIFE IMPRISONMENT UNDER SECTION 775.084(4)(b)(1), FLORIDA STATUTES.

SUMMARY OF ARGUMENTS

ARGUMENT I:

The Third District Court of Appeal was correct in attributing a permissive, rather than mandatory, interpretation to the sentencing provision of the violent habitual felony offender statute, Section 775.084(4)(b)(1), Fla. Stat. The Legislative intent of Section 775.084(4)(a)(1), although the statute contains the word "shall", has been construed to be permissive in nature by the Florida Supreme Court. Sections 775.084(4)(a)(1) and (4)(b)(1) have not been amended by the Legislature, although the Legislature amended other Sections of the statute in 1988 and 1989. In the absence of clear and unambiguous action by the Legislature amending the statute or abrogating the Court's construction that the statute is permissive, Section (4)(a) must continue to be interpreted as permissive rather than mandatory. Since Section 4(a), which reads "shall", is permissive, it follows that the following Section, 4(b), which reads "may", is permissive. This interpretation is statutorily correct as well as logically correct. It is logical and consistent that trial court judges are given powers to impose enhanced sentences for habitual offenders outside the guidelines yet retain long-standing discretion in sentencing matters.

ARGUMENT II:

The Third District erroneously failed to grant Respondent a new trial when it granted the co-defendant a new trial based on the trial judge committing reversible Neil error. While the Respondent

did not expressly join in the co-defendant's Neil objection, the purpose and objective of the Contemporaneous Objection Rule were fully met when the trial judge conducted a Neil inquiry and refused to rule. The trial court was on proper notice of the alleged error and had a full opportunity to correct the putative error.

The Respondent's expression of approval of the final jury panel cannot be considered a waiver of his right to raise the Neil error as the three black jurors, who were allegedly improperly stricken, were already gone from the panel.

The Third District erred in implying that Respondent's failure to join in the objection could be a deliberate trial strategy as Respondent's failure to object could not have altered the outcome of the trial judge's ruling whatsoever.

ARGUMENT III:

The trial court erred in classifying Respondent as a violent habitual felony offender as Respondent was convicted of armed robbery, which is a first degree felony punishable by life, and the violent habitual felony offender statute, Section 775.084(4)(b)(1) does not apply to first degree felonies punishable by life imprisonment.

The violent habitual felony offender statute states that it applies to first, second and third degree felonies but makes no provision for application to first degree felonies punishable by life imprisonment, life felonies or capital felonies. The Florida Appellate Courts have held that life and capital felonies are

excluded from "habitualization" and it follows that the same holding should apply to first degree felonies punishable by life imprisonment.

It is illogical to assume, without clear legislative intent to the contrary, that the Legislature intended for trial judges to impose an enhanced sentence of life on a Defendant already subject to a maximum sentence of life imprisonment.

ARGUMENT I

A LIFE SENTENCE IS PERMISSIVE, AND NOT MANDATORY, PURSUANT TO THE VIOLENT HABITUAL OFFENDER STATUTE, SECTION 775.084(4)(b)(1) FLORIDA STATUTES (1988).

The Respondent was convicted of armed robbery (with a weapon) and sentenced to a term of life imprisonment under the violent habitual offender statute, Section 775.084(4)(b), Florida Statute (1987). The trial judge, at Respondent's sentencing hearing, indicated his reluctance in sentencing the Respondent to life in prison based on Respondent's status as a drug addict susceptible to rehabilitation. Smith v. State, 574 So.2d 1195, 1197 (Fla. 3d DCA 1991). The trial judge further expressed his understanding that the life sentence penalty indicated under the violent habitual offender statute was directed or mandated. Smith at 1197.

The Third District Court of Appeal reversed the sentence and remanded it so the trial judge may consider the sentence as within his discretion. Smith at 1197. The Petitioner has sought the discretionary review of this Court and contends that the sentences enumerated under Section 775.084 are mandatory and obligatory and not discretionary as held by the Third District Court of Appeal in Smith.

A) The State conceded before the Third District Court of Appeal that the sentencing provision of Section 775.084(4)(b)(1) was not mandatory.

It is interesting that the Petitioner's brief fails to mention that the State conceded, before the Third District Court of Appeal, that the sentencing provisions of Section 775.084 are

discretionary. Specifically, the State's answer brief, filed in the Third District Court of Appeal agreed that Section 775.084(4)(b)(1) is permissive and not mandatory. The State's brief stated:

> "Florida Statute Section 775.084(4)(b)(1) defines habitual violent felony offenders as Defendants for whom the Court 'may' impose an extended term of imprisonment. Section (4)(b) of that same statute relates how the court 'may' sentence the habitual violent felony offender. Clearly, the wording indicates the permissive nature of this portion of the statute."

Further, the express opinion of the Third District points out that the State clearly conceded, [1] both in its brief and again at oral argument, that a life sentence under Section 775.084(4)(b)(1) is not mandatory. Smith at 1197. The State's inconsistent positions in this cause as to the mandatory or permissive nature of the habitual offender sentencing provision, was additionally noted in Burdick v. State, 16 FLW D1963, D1966 (Fla. 1st DCA July 25, 1991) (Ervin concurring and dissenting).

The State's change of heart as to the mandatory versus permissive nature of the sentencing provision of the habitual violent offender act goes unexplained in its brief before this court as any attempt at explanation would constitute an admission that even the Petitioner itself had reasonably interpreted Section 775.084(4)(b)(1) to be permissive and discretionary.

---

[1] This concession was made despite the fact that the opinion in Donald v. State, 562 So.2d 792 (Fla. 1st DCA 1990), which the State relies on for its argument, was already rendered and final prior to the filing of the State's answer brief with the Third District Court of Appeal in the present cause on August 20, 1990.

B) The Legislature clearly intended sentencing under the habitual offender statute to be within the trial judge's discretion by including language in the Statute which allows trial judges to decide whether a habitual offender sentence is necessary for the protection of the public.

A trial court initially has the discretion to determine whether to sentence a defendant under the habitual felony offender provisions of 775.084 Fla. Stat. Section 775.084(4)(c) states:

> If the Court decides that imposition of sentence under this Section is not necessary for the protection of the public, sentence shall be imposed without regard to this Section.

The trial court can opt out of the habitual offender statute "if the court decides that imposition of sentence under this Section is not necessary for the protection of the public." 775.084(4)(c) Fla. Stat. Had the Legislature not intended such discretion, the Legislature would not have included such a broad and nebulous standard or test for the Judge to apply.

When the court has determined that a defendant should be sentenced as an habitual offender, the court, no longer bound by the sentencing guidelines, is directed to apply the penalty guidelines set forth in 775.084(4)(a) for habitual felony offenders and in 775.084(4)(b) for habitual violent felony offenders. The relevant portions of Section 775.084 state:

> 4(a) The Court, in conformity with the procedure established in subsection (3), shall sentence the habitual felony offender as follows:
> 1. In the case of a felony of the first degree, for life. (Emphasis supplied).

> 4(b) The Court, in conformity with the procedure established in subsection (3), may sentence the habitual violent felony offender as follows:
> 1. In the case of a felony of the first degree, for life, and such offender shall not be eligible for release for 15 years. (Emphasis supplied).

That the two provisions, 4(a) and 4(b), differ in form with regard to the use of the words "shall" and "may" has been the subject of controversy centering around the permissive versus mandatory nature of these sentencing provisions. This Court addressed the issue squarely in State v. Brown, 530 So.2d 51 (Fla. 1988). This Court in Brown examined the legislative intent behind 4(a) and found that the Legislature never intended this Section, although it used the word "shall", to be mandatory. This Court concluded, after examining the legislative history of the statute:

> "We are further persuaded that the Legislature never intended Section 775.084(4)(a)1 to be mandatory. The word "shall" as used in Section 775.084(4)(a)1, first appeared in the 1975 addition of Florida Statutes and has remained in all subsequent editions. After researching relevant session laws from the Laws of Florida (1975), we conclude that the Legislature itself never inserted the word in the Statute. "Shall" either was an editorial error or a misapprehension of actual legislative intent by the editors. Both Chapter 75-116 and 75-298, Laws of Florida, the only two laws amending Section 775.084 during the 1975 Session, clearly used the world "may". This expresses an unequivocal legislative intent that the life sentence should be permissive, not mandatory,"
>
> Id. at 53.

The Court further held that the legislative intent clearly was only to make the life sentence a permissive maximum penalty. Id. at 53. Although Brown was decided before the habitual offender statute was made independent from the sentencing guidelines, nothing in that or any other subsequent legislation repudiates the legislative intent as such was examined and construed by the Court in Brown.

In Henry v. State, 16 FLW D1545 (Fla. 3d DCA, June 11, 1991) the Third District Court of Appeal carefully articulated its reasoning for holding that the habitual offender sentencing provisions are discretionary and not mandatory. The Henry Court follows this Court's decision in Brown and its legislative history reasoning. While the State argued in Henry that the 1988 and 1989 amendments to the habitual offender statute undercut Brown on the issue of the permissive nature of the statute, the Third District Court of Appeal disagreed. The Henry Court noted that Brown was announced after adjournment of the 1988 Legislature and further observed that while the 1988 legislation made several substantive changes in the habitual offender statute, the new legislation did not address or modify the "shall sentence" provision of the habitual offender statute. In 1989, after Brown had been announced, the Legislature amended another Section of the habitual offender statute but reenacted Section 775.084(4)(a) - the "shall sentence" provision - without change. Under ordinary principles of statutory construction, this is an indication that the Legislature approved of the Brown court's construction of the unchanged part of the statute. Henry at D1545. See Davies v. Bossert, 449 So.2d 418 (Fla. 3d DCA 1984).

Petitioner's argument that the Third District's analysis of Brown and the habitual offender statute amendments as set forth in Henry "completely misses the point" (Petitioner's Brief p. 10) is misplaced. The failure of the Legislature in either 1988 or 1989 to amend 4(b) to replace "may" with "shall" to express a clear rejection of Brown and the unequivocal mandatory nature of the statute, if so intended, is noteworthy. In Barnes v. State, 16 FLW D562 (Fla. 1st DCA, February 22, 1991), the First District, in reviewing the "sequential conviction requirement" of the habitual offender statute, stated that "had the Legislature intended to overturn long-standing precedent and the construction that the courts had placed on the statute, then it was obliged to use unmistakable language to achieve its objective." Barnes at D563. The court further stated that "absent clear and unambiguous language evidencing legislative intent to change or abrogate those long-standing legal principles governing the application of the habitual offender statute, the courts should refrain from reinterpreting and repudiating those long-standing principles Barnes at D565.

In view of the precedent established by State v. Brown, 530 So.2d 51 (Fla. 1988), clearly establishing that Section 775.084(4)(a)(1) is permissive rather than mandatory, and in the absence of any legislative action which clearly and unambiguously amends that provision of the statute or overturns the construction the courts have placed on that statute, 4(a) must be deemed to be permissive in nature. Since 4(a) must be read so that "shall"

means "may", it follows that 4(b) must be read so that "may" means "may". To accept Petitioner's argument here would require that this court overturn the interpretation that has already been judicially given to Section 4(a), ascribe a legislative intent which has not been done clearly and unambiguously by the Legislature itself, and rewrite the provision of Section 4(b) so that "may" will read "shall".

C) Ascribing a permissive interpretation to the habitual offender statute results in a harmonious construction of the Statute and allows extended sentences where a life sentence is unwarranted.

The interpretation of the habitual offender statute as permissive is not only correct as a matter of proper statutory construction but, contrary to Petitioner's assertions, is the most logical interpretation. The Third District in Henry v. State 16 FLW D1545 (Fla. 3d DCA, June 11, 1991), describes the harmonious reading of the provisions of 4(a) and 4(b) with the permissive interpretation and suggests that there is no reasonable or discernible basis for eliminating sentencing discretion solely for habitual violent felony offenders convicted of first degree felonies. Id. There is also no basis to suggest that the State's desire to enhance penalties outside of the sentencing guidelines, where an extended sentence is necessary for protection of the public, is inconsistent with a trial judge's long-standing wide latitude in sentencing matters. It is logical to believe, as the Third District did in Henry, that the Legislature empowered judges to enhance sentences for habitual offenders without stripping them of all discretion and subjecting them to a painful all or nothing,

life or guidelines, choice in a situation where an extended sentence is appropriate yet a life sentence is unwarranted. This scenario has already occurred in State v. Eason, 16 FLW D2221 (Fla. 3d DCA, August 30, 1991) in which the trial court declared the Defendant a violent habitual offender pursuant to Section 775.084(4)(b) and sentenced the Defendant to twenty-five years in prison as opposed to a life sentence. The District Court upheld this sentence on appeal. Had the trial judge been forced to choose between a sentencing guidelines sentence or a life sentence, which he clearly rejected as too harsh, it is likely that the Defendant would have received the guidelines sentence despite the Legislative intent to punish repeat offenders more severely than authorized under the guidelines.

D) The decision of the First District in Donald v. State, 562 So.2d 792 (Fla. 1st DCA 1990) is contrary to this Court's reasoning and holding in Brown v. State, 530 So.2d 51 (Fla. 1988), fails to make specific reference to or application of the legislative history and is based on an inapplicable rule of statutory construction.

Petitioner relies on Donald v. State, 562 So.2d 792 (Fla. 1st DCA 1990), where the First District held that "may" in Section 775.084 must be construed as "shall". The court in Donald fails to follow or even acknowledge this Court's decision in State v. Brown, 530 So.2d 51 (Fla. 1988), which, in the view of the Respondent and of the Third District (see Henry), is in conflict. Respondent respectfully requests this Court to closely examine the analysis of the legislative intent which was the basis of this Court's decision in Brown. In Brown, this Court scrutinized the words of the habitual offender statute, the various editions of the Florida

Statutes containing Section 775.084(4)(a)(1), the session laws from 1975, and the laws amending Section 775.084 during the 1975 Section. After a thorough study of the history of Section 775.084 and after determining that no prior or subsequent legislation contained in the Laws of Florida has purported to change the word "may" to "shall", this Court held Section 775.084(4)(a)(1) to be permissive. Brown v. State, at 53. In contrast, the court in Donald, although basing its holding on "legislative intent", made no study of or reference to the legislative history of the habitual offender statute. Rather, the Donald court relied on principles of statutory interpretation for statutes wholly unrelated to the criminal statutes or habitual offender statute. *See* Allied Fidelity Insurance Co., v. State, 415 So.2d 109 (Fla. 3d DCA 1982), and Seaboard Airline Railway Co., v. Wells, 130 So. 587 (Fla. 1930). Allied Fidelity, and the other cases relied on by the Donald court, are all civil cases which involved property or monetary interests which were protected in one part of a statute by mandatory directions (by use of the word "shall"), but were left unprotected by another Section which used permissive language (by use of the word "may"). These cases held that "may" could mean "shall" if a statute directs the doing of a thing or act for the sake of justice. The use of this civil doctrine/standard in Donald was incorrect as the proper and appropriate standard for review of criminal statutes is the strict construction standard.

E) Florida's statutory rules of construction require that criminal statutes be strictly construed and if any reasonable doubt exists as to its meaning, it should be construed in favor of the accused.

It is well established that in construing a criminal statute, the intention of the legislature is the guiding consideration. The construction must give effect to every portion of the Statute. Atlantic Coast Line R. Co. v. State, 73 Fla. 609, 74 So. 595 (1917). The general rule is that criminal statutes shall be strictly construed, State ex rel Lee v. Buchanan, 191 So.2d 33 (Fla. 1966) and if any reasonable doubt exists as to the meaning of a Statute, it should be construed in favor of the accused. Whalen v. United States, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715, (1980). This rule of statutory construction is so fundamental that the Legislature has enacted it in Fla. Stat. 775.021(1) applicable to the total Florida Criminal Code:

> The provisions of this Code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.

Should this court find any ambiguity in the application of the sentence authorized by Fla. Stat. 775.084, it should be resolved in favor of the Defendant.

There is obvious doubt about whether the word "may" in Section 775.084(4)(b) meant may or shall. If there had been no doubt, then the case at bar would never have reached this Court based on conflict among the District Courts. Further, had there been no doubt, the Petitioner would not have conceded the permissive nature of the statute before the lower court.

Construing "may" to mean "may" would also be consistent with another basic rule of statutory construction, that words should be given their plain meaning, absent direct legislative intent to the contrary. State v. Cormier, 375 So.2d 852 (Fla. 1979).

In considering the complete wording of 775.084 Fla. Stat., determining legislative intent, resolving conflicts, giving each Section of the statute a field of operation and applying the proper rules of strict construction, Respondent urges that the only appropriate and reasonable conclusion is to attribute a permissive interpretation to the sentencing statute under review.

Respondent asserts that had the First District in Donald examined the habitual offender statute to the same degree as was done by this Court in Brown, Donald and its progeny would have resulted in an entirely different outcome.

ARGUMENT II:

[2]A DEFENDANT WHO FAILS TO EXPRESSLY JOIN IN A NEIL OBJECTION IS ENTITLED TO RELIEF WHERE A CO-DEFENDANT RAISES THE NEIL OBJECTION AND IS GRANTED A NEW TRIAL BASED UPON NEIL ERROR WHERE THE TRIAL JUDGE CONDUCTED A NEIL INQUIRY BUT DECLINED TO RULE ON THE SUFFICIENCY OF THE EXPLANATION.

At trial, during the voir dire, the State exercised three preemptory challenges to exclude three blacks from the prospective jury. (T. 103, 104, 106). Counsel for the co-defendant, Robert Smith, raised the objection that the challenges had been exercised on the basis of the jurors' race and requested an inquiry based upon State v. Neil, 457 So.2d 481 (Fla. 1984). Respondent did not voice an objection (T. 106). The trial court, apparently agreeing that a *prima facie* showing had been made, ordered the prosecutor to explain the grounds upon which the black jurors had been stricken (T. 106). The prosecutor responded with supposedly race-neutral reasons (T. 107-108).[3] The trial court specifically declined to rule upon the sufficiency of the explanation stating:

---

[2]The Respondent raises the above issue and subsequent third issue pursuant to Fla.R.App.P. 9.040(a) which grants this court, once discretionary review has been granted, such jurisdiction as may be necessary for a complete determination of the cause. This court has held that in acquiring jurisdiction of a case, the Supreme Court has authority to review entire record, opinion, judgment and contested issues in case. Kennedy v. Kennedy, 303 So.2d 629 (Fla. 1974); Florida Real Estate Commission v. Williams, 240 So.2d 304 (Fla. 1970); and Rupp v. Jackson, 238 So.2d 86 (Fla. 1970).

[3]The Third District Court of Appeal subsequently noted that it is highly unlikely that the proffered reasons would have survived the tests devised in Slappy to determine the neutrality question. Smith v. State, 574 So.2d 1195 (Fla. 3d DCA 1991) at 1196.

> At this point, there are three blacks on the jury, okay? They are not entitled to a jury of all black people. There are three black people on the jury and I am going to leave it at that. I am not going to rule with regard to whether these other strikes are correct or not at this time. (T. 109).

On appeal before the Third District Court of Appeal, one issued raised by both Respondent and the co-defendant was whether the trial judge's failure to rule on the sufficiency of the explanation in response to a Neil injury is reversible error. As to the co-defendant, who raised the Neil objection that peremptory challenges had been exercised on the basis of the jurors' race, the Third District Court of Appeal held that once the Neil inquiry has been appropriately initiated it is incumbent upon the trial judge to evaluate the credibility of the explanation for the preemptory challenges and to "determine whether the proffered reasons, if they are neutral and reasonable, are indeed supported by the record." Smith v. State, 574 So.2d 1195 (Fla. 3d DCA 1991), at 1196. The Third District recited the rule in State v. Slappy, 522 So.2d 18 (Fla. 1988), *cert. denied,* 487 U.S. 1219, 108 S.Ct. 2873, 101 L.Ed.2d 909 (1988), "that because even the exercise of a single racially-motivated prosecution strike is constitutionally forbidden, it does not matter for these purposes whether other black jurors actually serve on the defendant's jury." Smith, at 1196. The Third District held that where the trial judge found a *prima facie* showing of improper racially-based challenges and ordered the prosecution to explain the grounds upon which the black jurors had been stricken, the trial judge's refusal to rule on the

Neil objection because three blacks were on the jury was reversible error. Smith, at 1196.

As to the Respondent, however, the Third District refused to offer similar relief because the Neil-Slappy objection was raised solely by co-defendant Smith and was not also raised, joined or adopted by Respondent. Smith, at 1197.

Relying on Castor v. State, 365 So.2d 701 (Fla. 1978), the Third District held in Smith that Respondent's failure to assert and press the exclusion issue during the jury selection process itself precluded reversal in his favor. Smith, at 1197. The Third District also noted, and seemed persuaded by, the Respondent's personal statement that he was satisfied with the result of the jury selection process. Id.

A) The purpose of the Contemporaneous Objection Rule, Castor v. State, 365 So.2d 701 (Fla. 1978), is to place a trial judge on notice that an error may have been committed and provide him an opportunity to correct it at an early stage of the proceeding.

The Third District relied on the "contemporaneous objection" rule set forth in Castor v. State, 365 So.2d 701 (Fla. 1978), in denying Respondent relief and granting relief for the co-defendant. In Castor, the trial judge failed to re-instruct the jury on justifiable and excusable homicide. Trial counsel for Castor failed to object, before or after re-instruction, to the trial court's failure to follow the rule regarding the procedure for submitting to counsel all responses to a jury's questions. Id. at 703. The Florida Supreme Court affirmed the district court's holding that the point was not properly preserved for appeal. Id.

at 703. The Florida Supreme Court in explaining the purposes behind the contemporaneous objection rule said:

> The requirement of a contemporaneous objection is based on practical necessity and basic fairness in the operation of a judicial system. It places the trial judge on notice that error may have been committed, and provides him an opportunity to correct it at an early stage of the proceedings.

Castor, at 703.

This Court further held in Castor that "to meet the objectives of any contemporaneous objection rule, an objection must be sufficiently specific both to apprise the trial judge of the putative error and to preserve the issue for intelligent review on appeal." Id. at 703. The crucial question presented in Castor, then, was whether the trial judge was given notice that error may have been committed and an opportunity to correct it at an early stage. This Court found in Castor that the trial court was not presented with an opportunity to cure the legal, but nonfundamental error. Id, at 704.

Unlike Castor, in the case at bar the trial judge, when presented with the Neil/Slappy objection by the co-defendant, was given notice of the putative constitutional/legal error and had full opportunity to address and correct the error, thus fully satisfying the objectives and purpose of the contemporaneous objection rule. The Third District misplaced its reliance on the Castor "rule" rather than the Castor principles. The facts of the case at bar do not require a blind application of the Castor rule, but rather an analysis of whether the contemporaneous objection

objectives were met. Respondent submits that the Neil/Slappy objection made by the co-defendant fully satisfied the objectives of the contemporaneous objection rule.

B) Florida Courts have recognized that issues may be preserved for appeal, absent an objection from the Defendant, where the trial judge is on notice of the putative error.

The Florida courts have declined to enforce a strict contemporaneous objection rule as long as the underlying principles described in Castor have been met. Most recently, in Richardson v. State, 575 So.2d 294 (Fla. 4th DCA 1991), the Fourth District recognized the validity of a Neil/Slappy inquiry where the trial judge initiated the inquiry rather than by a specific defense objection. The Fourth District was satisfied that the trial judge's own raising of the issue was sufficient to preserve the point on appeal. The Richardson decision demonstrates that the courts look to substance over form and, where the principles of the contemporaneous objection rule have been met, substance will prevail. As in Richardson, this Court should inquire into whether the trial court was given sufficient notice and opportunity to correct, and not who made the objection and in what form it was made.

The Florida Supreme Court also addressed the contemporaneous objection rule in State v. Rhoden, 448 So.2d 1013 (Fla. 1984), and found that substance prevailed over form. Also see Simpson v. State, 418 So.2d 984 (Fla. 1982). In Rhoden, the trial court failed to follow the mandates of the youthful offender statute in sentencing a child defendant. Trial counsel did not object to the

trial court's failure to follow the statute, yet the Florida Supreme Court upheld the district court's reversal of the sentencing. This Court reasoned that:

> The contemporaneous objection rule, which the State seeks to apply here to prevent Respondent from seeking review of his sentence, was fashioned primarily for use in trial proceedings. The rule is intended to give trial judges an opportunity to address objections made by counsel in trial proceedings and correct error.

Rhoden, at 1016.

The Rhoden court held that the purpose for the contemporaneous objection rule is not present in the sentencing process because any error can be corrected by a simple remand to the sentencing judge. Id. at 1016. The court did not find it dispositive that the trial counsel did not expressly object, but rather examined whether the purposes of the contemporaneous objection rule had been met. In Rhoden, the defendant's counsel requested that the trial court give his client youthful offender status thus giving the trial judge sufficient notice of the possible error. The trial judge, upon notice that the defendant should be sentenced under the youthful offender statute, was charged with the knowledge of and duty to apply the strict provisions of the youthful offender statute. In the case at bar, once the trial judge was placed on notice by the co-defendant that possible racially motivated peremptory challenges occurred during voir dire infringing on the defendants' constitutional right to an impartial trial, the judge had a duty to correct the error, if any, notwithstanding that the Respondent failed to join the co-defendant in explicitly objecting to the error.

C) The failure of the Respondent to expressly join in the co-defendant's Neil/Slappy objection below cannot be deemed a deliberate trial tactic as Respondent's failure to object could not have altered the outcome of the trial judge's ruling.

As stated in State v. Rhoden, 448. So.2d 1017 (Fla. 1984), in addition to giving trial judges an opportunity to address objections and correct errors, a further purpose of the contemporaneous objection rule is to "prohibit trial counsel from deliberately allowing known errors to go uncorrected as a defense tactic and as a hedge to provide a defendant with a second trial if the first trial decision is adverse to the defendant." Id. at 1016. The Third District, in the case below, implied that the Respondent's lack of objection may have stemmed from a deliberate strategic determination of counsel to go forward with a jury with which he was pleased.[4] Smith v. State, 574 So.2d 1195 (Fla. 3d DCA 1991), n.4 at 1197. This assertion by the Third District is incorrect and a legal impossibility. Upon the trial judge being given notice of the Neil/Slappy violation by the co-defendant, the Respondent lost control of any strategic decisions with respect to

---

[4]The Third District opinion below notes that Respondent was satisfied with his final jury panel. Smith at 1197 (T. 113). At the time Respondent expressed approval of the jury, the three black jurors had already been excused. In Richardson v. State, 575 So.2d 294 (Fla. 4th DCA 1991), the Fourth District was confronted with an identical fact pattern to that of the Respondent. In Richardson, the trial court, absent a defendant objection, conducted a Neil inquiry into the State's reasons for excusing a black juror, but failed to examine or rule on the reasons given. In reviewing Richardson's conviction, the Fourth District opinion in Richardson states that the defendant affirmatively expressed approval of his jury panel after the trial court's inquiry occurred and that such approval cannot constitute a waiver to a subsequent attack on Neil grounds. Richardson at 295.

the jury selection. After notice, it became incumbent upon the trial judge to evaluate, rule on, and correct the putative error. The Respondent's additional objection or, as here, failure to object, could not have contributed to or changed in any way the outcome of the trial judge's ruling. Had the trial judge ruled with respect to the co-defendant's objection that the peremptory challenges were not racially motivated, the jury selection process would appropriately have continued and the ruling would have been applicable to both the co-defendant and the Respondent. Had Respondent contemporaneously or subsequently made the identical objection, the ruling would have remained the same. On the other hand, had the trial judge ruled that the peremptory challenges were racially motivated the outcome would still remain identical for both the co-defendant and the Respondent even though the Respondent failed to object. It is absurd to suggest that the trial judge could have empaneled a new jury for the co-defendant who objected, yet required the Respondent, who failed to object, to go forward with the constitutionally defective jury. The obvious result had the original jury been found to be tainted would have been a new jury for both the co-defendant and the Respondent. Any argument, therefore, that Respondent's failure to join in the objection by the co-defendant was a strategic ploy is without merit.

The Respondent is, therefore, entitled to have his conviction vacated and case remanded for a new trial based on the trial judge's failure to rule on the reasons given by the State for excusing three blacks from the jury.

ARGUMENT III

[5]A DEFENDANT CONVICTED OF A FIRST DEGREE FELONY PUNISHABLE BY LIFE IMPRISONMENT IS NOT SUBJECT TO AN ENHANCED SENTENCE OF LIFE IMPRISONMENT UNDER SECTION 775.084(4)(b)(1) FLA STAT.

In the case at bar, the Respondent was convicted of the armed robbery (with a deadly weapon) of a Farm Store. Florida's robbery statute, Section 812.13(2)(a), Fla. Stat., provides that:

> "if in the course of committing the robbery the offender carried a firearm or other deadly weapon, then the robbery is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment."

The Legislature has, therefore, declared that armed robbery (with a deadly weapon) is a first degree felony punishable by life imprisonment.

The trial judge sentenced the Respondent to an enhanced sentence of life imprisonment without eligibility for release for fifteen (15) years under Section 775.084(4)(b)(1) Fla. Stat. Florida's Habitual Violent Felony Offender Act, Fla. Stat. 775.084(4)(b), provides that the court may sentence an habitual violent felony offender as follows:

> "(1) in the case of a felony of the first degree, for life, and such offender shall not be eligible for release for fifteen (15) years.

---

[5]The above issue is identical to the issue presented in Tucker v. State, 576 So.2d 931 (Fla. 5th DCA 1991), Supreme Court Case No. 77,854 which this Court granted review of on August 13, 1991.

(2) in the case of a felony of the second degree, for a term of years not exceeding thirty (30), and such offender shall not be eligible for release for ten (10) years.

(3) in the case of a felony of the third degree, for a term of years not exceeding ten (10), and such offender shall not be eligible for release for five (5) years."

The habitual violent felony offender statute does not specifically provide for an enhanced sentence in the case of a felony of the first degree punishable by life imprisonment.

A) The Florida Legislature did not intend for a first degree felony punishable by life imprisonment to be subject to an enhanced sentence under Section 775.084(4)(b) Fla. Stat.

Florida's penalties statute, Fla. Stat. 775.082(3), provides that a person convicted of a felony may be punished as follows:

"(a) for a life felony committed prior to October 1, 1983, by a term of imprisonment for life or for a term of years not less than thirty (30) and, for a life felony committed on or after October 1, 1983, by a term of imprisonment for life or by a term of imprisonment not exceeding forty (40) years;

(b) for a felony of the first degree, by a term of imprisonment not exceeding thirty (30) years or, when specifically provided by statute, by imprisonment for a term of years not exceeding life imprisonment;

(c) for a felony of the second degree, by a term of imprisonment not exceeding fifteen (15) years;

(d) for a felony of the third degree, by a term of imprisonment not exceeding five (5) years."

A term of years not exceeding life imprisonment (the penalty for a first degree felony punishable by life imprisonment) is the

functional equivalent of a term of imprisonment for life (the penalty for a life felony). Since it is well established that a life felony is not subject to an enhanced sentence under Section 775.084(4)(b), Fla. Stat., Johnson v. State, 568 So.2d 519 (Fla. 1st DCA 1990); Power v. State, 568 So.2d 511 (Fla. 5th DCA 1990), it follows that the Florida Legislature did not intend for a first degree felony punishable by life imprisonment to be subject to an enhanced sentence under Section 775.084(4)(b) Fla. Stat.

B) The statutory rules of construction do not allow for a first degree felony punishable by life imprisonment to be subject to an enhanced sentence under Section 775.084(4)(b) Fla. Stat.

Florida's rules of construction statute, Section 775.021(1), Fla. Stat. provides that:

> "the provisions of this code and offenses defined by other statutes shall be strictly construed (and) when the language is susceptible of differing constructions, it shall be construed most favorably to the accused."

Strictly construing the provisions of Section 775.084(4)(b), Fla. Stat., which specifically provides for an enhanced sentence in the case of a felony of the first degree but fails to mention a felony of the first degree punishable by life imprisonment, a defendant convicted of a first degree felony punishable by life imprisonment is not subject to an enhanced sentence of life imprisonment. Moreover, construing the language of Section 775.084(4)(b) Fla. Stat. most favorably to the accused, a defendant convicted of a first degree felony punishable by life imprisonment is not subject to an enhanced sentence of life imprisonment.

C) The First District Court of Appeal erroneously receded from its previous holding that a defendant convicted of a first degree felony punishable by life imprisonment is not subject to an enhanced sentence of life imprisonment under Section 775.084(4)(b)(1) Fla. Stat.

In Gholston v. State, 16 FLW D46 (Fla. 1st DCA, December 17, 1990), the defendant was convicted of numerous felonies including one count of burglary while armed with a dangerous weapon which is a first degree felony punishable by life imprisonment under Section 810.02(2)(b) Fla. Stat. The trial judge sentenced the defendant on that count to an enhanced sentence of life imprisonment under Section 775.084(4)(b) Fla. Stat. In vacating the defendant's sentence on that count and remanding the cause for resentencing, the First District correctly recognized that Section 775.084 Fla. Stat. "makes no provision for enhancing penalties for first degree felonies punishable by life, life felonies, or capital felonies."

The First District Court of Appeal apparently receded from its holding in Gholston, seven months later in Burdick v. State, 16 FLW D1963 (Fla. 1st DCA, July 25, 1991). In Burdick, the defendant was convicted of several felonies including armed burglary of a dwelling and was sentenced as an habitual felony offender to an enhanced sentence of life imprisonment. In affirming the enhanced sentence, the Court erroneously concluded that "a first degree felony, no matter what the punishment imposed by the substantive law that condemns the particular criminal conduct involved, is still a first degree felony and subject to enhancement." As Judge Ervin pointed out in his well-reasoned dissent in Burdick:

> "it is illogical to assume that the Legislature intended for a trial judge to have the authority to impose an enhanced sentence of life upon one who was already subject to a maximum sentence of life imprisonment for the offense for which he or she was convicted. (This) conclusion is supported by the legislative history of both Sections 775.082 and 775.084, Florida Statutes."

In 1972, the Florida Legislature created the classification of life felonies; however, the Florida Legislature has never amended the habitual felony offender statute to include enhanced sentencing for defendants convicted of life felonies. Similarly, in 1971 the Florida Legislature created the classification of first degree felonies punishable by life imprisonment. Yet the Florida Legislature has never amended the habitual felony offender statute to include enhanced sentencing for defendants convicted of first degree felonies punishable by life imprisonment.

The Burdick Court also failed to take into consideration the rules of construction of criminal statutes described in Fla. Stat. 775.021(1). As Judge Ervin further pointed out:

> (A)t the very minimum, because Section 775.084 is a penal statute and the provisions of subsections (4)(a)(1) and (4)(b)(1), enhancing a sentence to life, are so drawn as to leave the legislative intent in doubt, the courts are obligated to resolve such doubt in favor of the person who is so penalized.

In Westbrook v. State, 574 So.2d 1187 (Fla. 3rd DCA, 1991), the defendant was convicted of robbery with a deadly weapon and was sentenced as an habitual offender to an enhanced sentence of life imprisonment. In affirming the enhanced sentence, the Third District reasoned that "the robbery statute on its face permits sentencing under the habitual offender statute." Westbrook at

1187. The fact that the Armed Robbery Statute, Section 812.13(2)(a), Fla. Stat., refers to Section 775.084, Fla. Stat., should not be controlling as it is not a clear reflection of legislative intent. As pointed out by the dissent in Burdick, the legislature has made wholesale indiscriminate reference to the habitual offender statute throughout the Florida Statutes. Burdick, at D1965. A review of the legislature history by Judge Ervin in the Burdick dissent found that reference to the habitual offender statute appears in all noncapital felony and misdemeanor statutes listed under the Title XLVI of the Florida Statutes, thus:

> (E)ven though offenses which are designated life felonies were never made subject to enhanced sentencing under the habitual felony statute, reference to such statute is nonetheless made within each statute prescribing the penalty for life felonies. *See, e.g.*, Section 787.01(3)(a)5., Fla. Stat. (1980) (kidnapping); Section 794.011(3), Fla. Stat. (1989) (sexual battery). Additionally, although Section 775.084 had formerly provided enhanced sentencing for habitual misdemeanant, the legislature, effective October 1, 1988, deleted the provisions relating to habitual misdemeanants. See Ch. 88-131 § § 6,9, Laws of Fla. In the 1989 Florida Statutes, however, the legislature failed to delete references to Section 775.084 in providing punishments for specified misdemeanors. *See, e.g.*, Section 784.011(2), Fla. Stat. (1989) (assault), Section 784.03(2), Fla. Stat. (1989) (battery).

Respondent concurs with Judge Ervin's conclusion that:

> (T)he legislature has never intended for a substantive offense which carries a maximum penalty of life imprisonment to be included within the classification of felonies that are subject to an enhanced life sentence under the habitual felony offender statute, and that it intended only for first degree felonies which are punishable for a term of years to be so enhanced. At the very minimum, because

> Section 775.084 is a penal statute and the provisions of subsections (4)(a)1. and (4)(b)1., enhancing a sentence to life, are so drawn as to leave the legislative intent in doubt, the courts are obligated to resolve such doubt in favor of the person who is so penalized. Dotty v. State, 197 So.2d 315 (Fla. 4th DCA 1967); 49 Fla. Jur.2d Statutes § 195 (1984).

Based on the plain language of Section 775.084(4)(b) Fla. Stat., the legislative intent, the legislative histories of both Section 775.082 and 775.084 Fla. Stat., and the rules of construction under Section 775.021 Fla. Stat., a defendant convicted of a first degree felony punishable by life imprisonment is clearly not subject to an enhanced sentence of life imprisonment under Section 775.084(4)(b)(1) Fla. Stat.

CONCLUSION

Based upon the trial transcript, record on appeal, foregoing argument and citations of authority, Respondent prays this Honorable Court reverse Respondent's conviction based on the trial court's failure to rule after conducting a Neil inquiry and remand this cause for a new trial.

In the alternative, Respondent prays this Honorable Court determine that first degree felonies punishable by life imprisonment are not subject to enhancement pursuant to Florida's Habitual Offender Statute, and/or that the habitual offender statute, Section 775.084(4)(b)(1) Fla. Stat., sets forth the permissive penalty rather than the mandatory penalty to be applied to violent habitual offenders.

Respectfully submitted,

LAW OFFICES OF RONALD S. LOWY
Attorneys for Respondent
Barnett Bank Building
420 Lincoln Road, PH/7th Floor
Miami Beach, FL 33139
(305) 673-5699

By: _____
RONALD S. LOWY, ESQUIRE
Florida Bar No. 501069

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing REPLY BRIEF OF RESPONDENT was furnished by United States mail to Michael Neimand, Assistant Attorney General, Department of Legal Affairs, 401 N.W. Second Avenue, Suite N921, Miami, Florida 33128, this 6th day of September 1991.

LAW OFFICES OF RONALD S. LOWY
Attorneys for Respondent
Barnett Bank Building
420 Lincoln Road, PH/7th Floor
Miami Beach, FL 33139
(305) 673-5699

By: _____
RONALD S. LOWY, ESQUIRE
Florida Bar No. 501069

RSL:ggv
Briefs/washington.rpy