IN THE SUPREME COURT OF FLORIDA

CASE NO. 77626

THE STATE OF FLORIDA,

Petitioner,

vs.

LEM ADAM WASHINGTON,

Respondent.

****

ON APPLICATION FOR DISCRETIONARY REVIEW

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JURISDICTIONAL BRIEF OF PETITIONER

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INTRODUCTION

In this Brief, the Petitioner THE STATE OF FLORIDA will be referred to as the State or the Petitioner. The Respondent LEM ADAM WASHINGTON will be referred to as the Defendant or the Respondent. The symbol "App." will refer to the Appendix attached to this Brief.

STATEMENT OF THE CASE AND FACTS

The Respondent was tried and convicted of an armed robbery of a Farm Store (App.1). At the sentencing hearing, the trial court made a finding that the Respondent was an habitual violent felony offender (App.5). Thereafter, the Respondent was sentenced to life imprisonment on the armed robbery charge with no eligibility for release for fifteen (15) years, in accordance with Section 775.084(4)(b)(1) (App.5).

On appeal, the Third District found that various comments made by the trial judge indicated his reluctance to sentence the Respondent to life imprisonment. The Third District then vacated the sentence, stating that it was unclear that the trial judge knew that the sentence was not mandatory: "it is clear, as the use of the term 'may' demands, that such a sentence is not mandatory" (App.5-6).

Subsequently, the State filed the instant Notice to Invoke Discretionary Jurisdiction.

QUESTION PRESENTED

WHETHER THERE EXISTS DIRECT CONFLICT BETWEEN OPINIONS OF THE THIRD DISTRICT COURT OF APPEAL AND THE FIRST DISTRICT COURT OF APPEAL ON THE ISSUE OF WHETHER THE SENTENCING OF HABITUAL VIOLENT FELONY OFFENDERS IS MANDATORY OR PERMISSIVE.

SUMMARY OF ARGUMENT

The First District Court cases of Donald v. State, infra, and Pittman v. State, infra, have held that once a determination is made to sentence a defendant as a habitual violent felony offender, the trial court is obligated to sentence said defendant as set forth in Section 775.084(4)(b). Notwithstanding the aforementioned two decisions, the Third District Court, in the instant case, has held that sentencing for a habitual violent felony offender is permissive, not mandatory. Thus, there exists conflict between the district courts of appeal and discretionary review should be granted to establish uniformity therein.

ARGUMENT

THERE EXISTS DIRECT CONFLICT BETWEEN OPINIONS OF THE THIRD DISTRICT COURT OF APPEAL AND THE FIRST DISTRICT COURT OF APPEAL ON THE ISSUE OF WHETHER THE SENTENCING OF HABITUAL VIOLENT FELONY OFFENDERS IS MANDATORY OR PERMISSIVE.

In State v. Brown, 530 So.2d 51 (Fla. 1988), the Florida Supreme Court addressed the issue of whether the sentencing of habitual felony offenders is permissive or mandatory (subsection (4)(a) of Section 775.084, Florida Statutes (1989)). However, this Court has yet to address the permissive or mandatory nature of the sentencing for habitual violent felony offenders, which sentencing language contains different wording than the sentencing language of habitual felony offenders.

Specifically, Section 775.084(4)(b), Florida Statutes (1989), governing the sentencing of habitual violent felony offenders, provides as follows:

> "The court, in conformity with the procedure established in subsection (3), may sentence the habitual violent felony offender as follows: ... "

The wording of this subsection is in contrast with Section 775.084(4)(a), which governs the sentencing of habitual felony offenders, and pursuant to which the court "shall sentence the habitual felony offender as follows..."

The First District Court of Appeal and the Third District Court of Appeal have taken diametrically opposed positions in their interpretation of the word "may" contained in Section 775.084(4)(b).

In Donald v. State, 562 So.2d 792 (Fla. 1st DCA 1990), the First District Court of Appeal found that the word "may" must be construed as mandatory:

> "Once the court decides, however, to sentence a defendant as an habitual felony offender, then the court is required to impose sentence in conformity with sections 775.084(4)(a) or 775.084(4)(b)."

In making this determination, the First District looked to the context in which the word was used and the legislative intent: "'May' has been deemed to be obligatory where a statute directs the doing of a thing for the sake of justice (citations omitted), or where a statute says a thing 'may' be done by a public official for the public benefit." Id. at 794.

The Donald position has been cited as authority in the recent case of Pittman v. State, 15 F.L.W. 2870 (Fla. 1st DCA, November 27, 1990), where the First District Court of Appeals faced the defendant's contention that the habitual offender statute was fatally vague because of the discrepancy between "shall" and "may" in subsection (4):

> "This court previously construed these provisions in Donald v. State, 562 So.2d 792 (Fla. 1st DCA 1990). A trial court initially has the discretion to determine whether to

> sentence a defendant under the statute. If the court decides that such a sentence is proper, regardless of whether a defendant is a habitual felony offender or a habitual violent felony offender, "then the court is required to impose sentence in conformity with sections 775.084(4)(a) or 775.084(4)(b)." Id. at 795 (emphasis added). In the context of the entire statute, "may" must be given an obligatory meaning. Id. at 794.

Both the Donald and the Pittman cases were decided subsequent to the Brown decision; nevertheless, neither one of the two First District Court decisions applied the Brown rationale in making its finding.

In sharp contrast, the Third District Court of Appeal in the instant case found that the "may" language of the habitual violent felony offender statute translated into a permissive-type of sentencing:

> "While section 775.084(4)(b)(1) provides that such a penalty "may" be imposed under the instant circumstances, it is clear, as the use of the term "may" demands, that such a sentence is not mandatory."

The Third District Court based its holding on the Brown case, essentially reasoning that if "shall" means permissive for habitual felony offenders, then "may" also means permissive for habitual violent felony offenders.

In light of the foregoing, it is clear that the First District Court's and the Third District Court's interpretation of the word "may" in Section 775.084(4)(b) are in conflict with each other and

this Court should accept discretionary review in order to establish uniformity within the district courts.

CONCLUSION

Wherefore, based on the foregoing reasons and authorities cited herein, the Petitioner THE STATE OF FLORIDA respectfully requests that this Court grant discretionary review in this cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing JURISDICTIONAL BRIEF OF PETITIONER was furnished by United States mail to Ronald S. Lowy, Esq., 407 Lincoln Road, Suite 12-D, Miami Beach, Florida 33139 on this 21st th day of March, 1991.

Monique T. Befeler

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/mtb

APPENDIX

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IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1991

ROBERT SMITH and
LEM ADAM WASHINGTON

Appellants,

vs.

THE STATE OF FLORIDA,

Appellee.

CASE NOS. 89-1954
89-1818

Opinion filed February 12, 1991.

Appeals from the Circuit Court for Dade County, Sidney B. Shapiro, Judge.

Bennett H. Brummer, Public Defender and Robert Kalter, Assistant Public Defender, and Ronald S. Lowy, Special Assistant Public Defender, for appellants.

Robert A. Butterworth, Attorney General and Monique T. Befeler, Assistant Attorney General, for appellee.

Before SCHWARTZ, C.J., and HUBBART and BASKIN, JJ.

Revised Opinion

SCHWARTZ, Chief Judge.

Smith and Washington were tried together and convicted of the armed robbery of a Farm Store. We reverse Smith's conviction for a new trial because of a Neil-Slappy violation; affirm Washington's conviction because he did not raise the pertinent objections below, but order his resentencing after remand.

Smith

During the voir dire, the state exercised three peremptory challenges to exclude three blacks from the prospective jury. Counsel for Smith--pointedly not joined by Washington's attorney--raised the now familiar Neil objection that the challenge had been exercised on the basis of the jurors' race. The trial court apparently, and no doubt correctly, agreed that a prima facie showing to that effect had been made and, pursuant to Neil, ordered the prosecutor to explain the grounds upon which the black jurors had been stricken. Accordingly, the prosecutor then propounded supposedly race-neutral reasons for the challenges.[1] The trial judge, however, on the ground that other black jurors remained on the panel, then specifically declined to rule, as Smith requested, upon the sufficiency of the explanation. He said:

> 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.

This refusal to rule was clearly reversible error.

It is entirely established Florida law that, once a Neil inquiry has been, as it was here, appropriately initiated, it is incumbent upon the trial judge to evaluate the credibility of the explanation for the peremptory challenges and "to determine

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[1] While we need not reach the issue in the light of our disposition of the case, it seems highly unlikely that the reasons given would have survived the tests devised in Slappy to determine the neutrality question.

whether the proffered reasons, if they are neutral and reasonable, are indeed supported by the record." Tillman v. State, 522 So.2d 14, 16-17 (Fla. 1988). Moreover, because even the exercise of a single racially-motivated prosecution strike is constitutionally forbidden, 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), it does not matter for these purposes whether other black jurors actually serve on the defendant's jury. Slappy, 522 So.2d at 21; see also Stubbs v. State, 540 So.2d 255 (Fla. 2d DCA 1989); Moriyon v. State, 543 So.2d 379 (Fla. 3d DCA 1989), review dismissed, 549 So.2d 1014 (Fla. 1989). Hence there can be no question of the reversible incorrectness of a lower court's declination to rule, one way or the other, as to the Slappworthyness of the proffered explanation. Thompson v. State, 548 So.2d 198, 202 (Fla. 1989), which is procedurally almost identical to this situation,[2] squarely so holds. For this reason, Smith's conviction is reversed for a new trial.[3]

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[2] In reversing the defendant's conviction because the trial court did not analyze or rule upon the sufficiency of the state's reasons for excluding black jurors, the court noted:

> ...[t]he present record reflects a grave possibility that the trial court below relied upon the state's erroneous statement that Neil only comes into play if there is a "systematic" exclusion of blacks. This is the only reasonable conclusion based on the record. Indeed, the trial court first began to conduct a Neil inquiry but then reversed itself after hearing the state's erroneous statement of the law. Moreover, every relevant statement by the trial court incorrectly characterized Neil as applying only to "systematic" uses of the peremptory.

Thompson, 548 So.2d at 202.

Washington

We cannot afford similar relief to Washington. This is because, exactly contrary to the circumstances in Charles v. State, 565 So.2d 871 (Fla. 4th DCA 1990), the Neil-Slappy objection was raised solely by defendant Smith and was not also raised, joined or adopted in any way by Washington, who, to the contrary, made a personal statement that he was satisfied with the result of the jury selection process. Johnson v. State, 348 So.2d 646 (Fla. 3d DCA 1977); Wright v. State, 318 So.2d 477 (Fla. 4th DCA 1975), cert. denied, 334 So.2d 609 (Fla. 1976); accord Barnes v. State, 168 Ga.App. 925, 310 S.E.2d 777 (1983); People v. Foster, 100 A.D. 2d 200, 473 N.Y.S.2d 978 (1984), cert. denied, 474 U.S. 857, 106 S.Ct. 166, 88 L.Ed.2d 137 (1985); see Charles, 565 So.2d at 872; 4 C.J.S. Appeal & Error § 251 (1957). In the light of the strict requirements imposed upon a complaining defendant by Neil and its progeny to assert and press the exclusion issue during the jury selection process itself, it is entirely clear that Washington's failure to do so[4] both

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[3] Smith is to be allowed at the new trial to display his tattooed arms to the jury--for the purpose of impeaching the testimony of an eyewitness who noticed no such tattoos--without requiring him to take the witness stand and subject himself to cross-examination. Contrary to the ruling below, it is clear that such a display is non-testimonial in nature which does not implicate the defendant's privilege against self-incrimination. See Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966); United States v. Bay, 762 F.2d 1314 (9th Cir. 1984); Macias v. State, 515 So.2d 206 (Fla. 1987).

[4] It has not escaped us that this set of circumstances may well give rise to a claim of ineffective assistance of Washington's trial counsel (who is not the attorney now representing him on appeal). We therefore determine the present issue specifically without regard to a subsequent proceeding under Fla.R.Crim.P.

precludes reversal in his favor and any holding that the issue could constitute fundamental error which is cognizable without that preservation. See Castor v. State, 365 So.2d 701 (Fla. 1978). Washington's conviction is therefore[5] affirmed.

The lower court, after (concededly appropriately) finding that Washington was an habitual violent felony offender, see section 775.084(1)(b), Florida Statutes (1989), sentenced him to an extended term of life imprisonment without eligibility for release for fifteen years. While section 775.084(4)(b)(1) provides that such a penalty "may" be imposed under the instant circumstances, it is clear, as the use of the term "may" demands, and as the state expressly conceded both in its brief and at oral argument, that such a sentence is not mandatory. State v. Brown, 530 So.2d 51, 53 (Fla. 1988)(a fortiori holding that section 775.084(4)(a), providing that life sentence "shall"

3.850 (1990).

Because, however, serious issues are presented, among other things, as to whether counsel's failure to object may serve to obviate the preservation requirement through the medium of relief under 3.850, see Anderson v. State, 467 So.2d 781 (Fla. 3d DCA 1985), pet. for review dismissed, 475 So.2d 693 (Fla. 1985), and whether the lack of objection may have stemmed--as it is deemed to have done--from a deliberate strategic determination of counsel to go forward with a jury with which he was pleased, State v. Stirrup, 469 So.2d 845 (Fla. 3d DCA 1985), review denied, 480 So.2d 1296 (Fla. 1985); Anderson, 467 So.2d at 785, we deem it entirely inappropriate--and Washington does not contend otherwise--to invoke any exception to the rule that ineffective assistance claims may not be raised on direct appeal and should be relegated to post-conviction proceedings under 3.850. Kelley v. State, 486 So.2d 578, 585 (Fla. 1986), cert. denied, 479 U.S. 871, 107 S.Ct. 244, 93 L.Ed.2d 169 (1986); State v. Barber, 301 So.2d 7 (Fla. 1974); Hammer v. State, 543 So.2d 437 (Fla. 2d DCA 1989).

[5] We find no merit in Washington's other claims of trial error.

be imposed upon habitual felony offender, is not mandatory); State v. Padron, _____ So.2d _____ (Fla. 3d DCA Case no. 90-66, opinion filed, December 18, 1990) [16 FLW D11])(same); McNair v. State, 563 So.2d 804 (Fla. 3d DCA 1990)(same). But see Donald v. State, 562 So.2d 792 (Fla. 1st DCA 1990)(opposite result as to § 775.084(4)(b); State v. Brown, 530 So.2d 51, not cited). Various comments of the trial judge, however, made prior to and during sentencing which, for example, indicated his reluctance to sentence Washington, as a drug addict susceptible to rehabilitation, to such a term and stated his understanding that the statute indicated that the defendant "should" be sentenced to life--leave us, at best, uncertain as to whether the court believed that it could in fact decline to impose that sentence. We therefore believe that the interests of justice require us to vacate the sentence so that the trial judge may consider the matter as one within his discretion.[6]

As to case no. 89-1954 reversed, as to case no. 89-1818, affirmed in part, vacated in part and remanded.

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[6] Washington's other challenge to the sentence, which claims that an habitual offender sentence remains subject to the guidelines, is totally baseless. § 775.084(4)(e), Fla.Stat. (1989); § 921.001(4)(c)(2), Fla.Stat. (1989); see Roberts v. State, 559 So.2d 289 (Fla. 2d DCA 1990), cause dismissed, 564 So.2d 488 (Fla. 1990).