IN THE SUPREME COURT OF FLORIDA

CASE NO. 84,727

DCA NO. 93-2075

THE STATE OF FLORIDA,

Petitioner,

-vs-

JONATHAN HILL,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

RESPONDENT'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES **PAGES**

-continued-

OTHER AUTHORITIES

UNITED STATES CONSTITUTION

FLORIDA CONSTITUTION

FLORIDA STATUTES (1991)

FLORIDA RULES OF CRIMINAL PROCEDURE

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INTRODUCTION

Petitioner, The State of Florida, was the prosecution in the trial court and the Appellee before the Third District Court of Appeal. The Respondent, Jonathan Hill, was the Defendant in the trial court and the Appellant before the Third District Court of Appeal. The parties are referred to in this brief as Petitioner and Respondent or by proper name where appropriate. References to the Record transmitted to this Court by the Clerk of the Third District Court of Appeal on January 11, 1995, are designated "R.". References to the appendix to this brief are marked "A." for references to the opinion of the lower court, and "AT." for references to the transcript of the void dire proceedings. As to the latter, the Respondent has filed contemporaneously with this brief a motion to direct the clerk of the Third District Court of Appeal to transmit to this Court the actual Volume of transcript from the record below for inclusion in the record before this Court.

STATEMENT OF THE CASE AND FACTS

This cause began in the Circuit Court of the Eleventh Judicial Circuit of Florida in and for Dade County when Respondent Jonathan Hill was charged with theft of an automobile, burglary to that automobile, and possession of burglary tools, each a third-degree felony (R. 1-5).

The case came on for jury trial before the Honorable Martin Kahn, judge of the Eleventh Judicial Circuit (A. 1). During voir dire, the State sought to exercise a peremptory challenge to venireperson Juanita Leggett (AT. 84). Ms. Leggett, a twenty-two year resident of Miami who works as a cook at a daycare and is married to a worker at Doral Country club, had previously served on a jury but the jury had not undertaken deliberations (AT. 21-22). During questioning by the State, she indicated that she had been "upset" to receive her summons for jury duty and that her doctor told her that her blood pressure had gone up (AT. 36). However, she stated regarding actual service, that "I don't mind it." (AT. 37). Defense counsel, during his opportunity to question her, engaged in the following discussion with her:

> [DEFENSE COUNSEL]: Ms. Leggett, how are you? you are not so fine, your car is at a gas station, you had to walk up here. You are not so fine. You were with the people that responded you wanted to be here and yet, later you said you didn't want to be here. Help me make it clear.
>
> MS. LEGGETT: It was my Christian duty to be here. As a citizen, I am supposed to be here when I get the subpoena, the summons. But when I got it and opened it up, my pressure went up.
>
> [DEFENSE COUNSEL]: Is your pressure up right now or do you feel okay?
>
> MS. LEGGETT: I feel okay now. I didn't feel it was up then, until I went to the doctor Thursday and he told me it was up.
>
> [DEFENSE COUNSEL]: Is this trial going to raise your blood pressure? Is it going to be bad for you?
>
> MS. LEGGETT: I hope not.
>
> [DEFENSE COUNSEL]: Well, I hope not too, but I am seriously asking, do you think this is the type of thing that would upset you?

MS. LEGGETT: I don't believe it will interfere with my blood pressure.

[DEFENSE COUNSEL]: Has your car ever been stolen?

MS. LEGGETT: No.

[DEFENSE COUNSEL]: Have you ever been the victim of a crime?

MS. LEGGETT: Three times they broke into my residence, but as I look at life, these are material things. I came into this world with nothing and I will carry nothing out of this world. It hurts, but there is nothing I can do about it.

[DEFENSE COUNSEL]: You strike me as a woman of some faith.

MS. LEGGETT: I am a Christian.

[DEFENSE COUNSEL]: Sanctified?

MS. LEGGETT: I am a Protestant.

[DEFENSE COUNSEL]: Is there any problem with your believes [sic] and what goes on in this courtroom? Do you see any conflict between your personal believes [sic] and what we do here?

MS. LEGGETT? So far, no.

[DEFENSE COUNSEL]: Finally, can you give everyone a fair trial here?

MS. LEGGETT: Yes.

(AT. 65-67). During jury selection, the State moved to strike her peremptorily and the following occurred:

[PROSECUTOR]: Judge, I would strike Ms. Leggett.

[DEFENSE COUNSEL]: I will make a Neil/Slappy objection.

THE COURT: What's your objection [sic]?

[PROSECUTOR]: I have a few, but the one most compelling is when Ms. Leggett stated -- in response to Mr. Ferster's inquiry about whether she had her car stolen, she stated these are material things, that we come into this world with nothing and leave with nothing. Ms. Leggett will not put that much importance on the fact this was a stolen car.

[DEFENSE COUNSEL]: I will object. May I have an opportunity to respond? She stated that she is a Christian woman

> and it was a Christian statement. I asked whether or not her believes [sic] would get in the way of being fair and impartial and she said she had no doubt she would be fair and impartial.
>
> THE COURT: I find it is a racially neutral reason. I am concerned because of her health. I am allowing it.
>
> [DEFENSE COUNSEL]: Over defense objection.
>
> [PROSECUTOR]: That was one of my reasons, health concerns.
>
> THE COURT: Through Plotkin. Defense?

(AT. 84-85). Following additional selections, when tendering the jury panel, defense counsel renewed his objection:

> [DEFENSE COUNSEL]: I would like to renote -- before accepting this panel, I would like to renote my objection to the striking of Ms. Leggett as a Neil/Slappy.
>
> THE COURT: I will note, for the Record, that Mr. Pierce has been accepted and he is black, and it has nothing to do with that. I find that Leggett was racially neutral. Once again, thank you.
>
> [DEFENSE COUNSEL]: Noting my objection.

(AT. 87-88).

A jury then was seated, which ultimately found Hill guilty of the three third-degree felonies as charged, and the court so adjudicated him (R. 27-32). Hill's calculated recommended guidelines range was 22 to 27 years (R. 62). The court then found Hill to be an habitual violent felony offender, and sentenced him on each count to the maximum sentence of ten years' imprisonment (R. 34-35). The court ordered the sentences to run consecutively (R. 36).

Hill appealed to the District Court of Appeal of Florida, Third District. The Third District affirmed his convictions,[1] rejecting the issue he raised under *State v. Neil* by simply

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[1]The judgment form erroneously listed section 775.087 as one of the statutes violated in this case; however, as the State agreed and the Third District ruled, there had been neither an allegation nor any proof that a weapon was involved in this case. The Third District ruled that the judgment form must be corrected to delete reference to section 775.087. That portion of the district court's ruling is not disputed before this Court.

noting in a footnote that:

> The defendant claims he is entitled to a new trial because the prosecution improperly used a peremptory strike on an African-American potetnial juror. After reviewing the record, we find no merit in this argument.

(A. 2). The court did agree that under this Court's decision in *State v. Hale*, his sentences on these three third-degree felonies had to be made to run concurrently (A. 1-4). The Third District, however, certified the following question to this Court, citing it as one of great public importance:

> Whether Hale v. State, 630 So. 2d 521 (Fla. 1993), cert. denied, Case No. 94-5612 (U.S. Oct. 3, 1994), precludes under all circumstances the imposition of consecutive sentences for crimes arising from a single criminal episode for habitual felony or habitual violent felony offenders?

(A. 3). The State filed a notice to invoke this Court's discretionary jurisdiction to address the certified question. This Court has postponed its decision on whether to exercise its discretionary jurisdiction to hear this case pending briefing on the merits. Accordingly, Respondent now presents this, his brief on the merits.[2]

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[2]Respondent has raised as an additional issue (Issue II) in this brief the question of whether the trial court's *Neil* inquiry was proper. Because the Third District rejected the issue without discussion, there does not exist a separate and independent basis for Respondent to raise this issue before this Court on his own petition for discretionary review. Nevertheless, this Court possesses jurisdiction to review any and every issue in a case that is properly before the Court on some other ground, *Freund v. State*, 520 So. 2d 556, 557 n.2 (Fla. 1988) (citing *Trushin v. State*, 425 So. 2d 1126, 1130 (Fla. 1982); *Bould v. Touchette*, 349 So. 2d 1181, 1183 (Fla. 1977)). Therefore, were this Court to grant review on the certified question, then Respondent would respectfully request this Court to address the *Neil* issue as the argument presented herein in Issue II identifies a prejudicial error that materially affects Respondent's convictions and for which he has no other available remedy.

QUESTION PRESENTED

I. WHETHER THE STATE HAS PROVIDED ANY COMPELLING OR EVEN CREDIBLE JUSTIFICATION FOR ITS PLEA FOR THIS COURT TO OVERRULE ITS DECISION IN *HALE V. STATE*? **(restated)**

ADDITIONAL QUESTION PRESENTED

II. WHETHER THE TRIAL COURT DEPRIVED RESPONDENT OF HIS RIGHT TO A FAIR AND IMPARTIAL TRIAL UNDER THE STATE AND FEDERAL CONSTITUTIONS BY FAILING TO CONDUCT A PROPER *NEIL* INQUIRY?

SUMMARY OF ARGUMENT

The State's position functionally amounts to nothing more than a belated motion for rehearing of this Court's well-reasoned unanimous decision in *Hale v. State*, and at that, the State has not provided compelling or even credible reason for overruling *Hale*.

The district court below incorrectly affirmed the trial court's ruling allowing the State to exercise a peremptory challenge to an African-American venireperson. The trial court failed to conduct a proper *Neil* inquiry in that the court not only failed to engage in a thoughtful analysis of the reasonableness and neutrality of the State's proffered reason for striking the person, but also in failing entirely to address the question of whether the State's reason, if reasonable and neutral, was nevertheless a pretext.

ARGUMENT

I. THE STATE HAS PROVIDED NO COMPELLING OR EVEN CREDIBLE JUSTIFICATION FOR ITS PLEA FOR THIS COURT TO OVERRULE ITS DECISION IN *HALE V. STATE*. **(restated)**

The Third District certified the following question, which it regarded as question of great public importance:

> Whether Hale v. State, 630 So. 2d 521 (Fla. 1993), cert. denied, Case No. 94-5612 (U.S. Oct. 3, 1994), precludes under all circumstances the imposition of consecutive sentences for crimes arising from a single criminal episode for habitual felony or habitual violent felony offenders?

Bluntly stated, the essence of this question is whether this Court really meant what it said in its unanimous opinion in *Hale*. The State has offered no more compelling issue in its Brief, which upon reading is revealed essentially to be nothing more than an out-of-time motion for rehearing taking issue with the wisdom of this Court's nearly two-year-old decision in *Hale*.

In response, as to the former -- that is, the question of whether this Court meant what it said in *Hale* -- Respondent simply points out that since announcing *Hale*, this Court has affirmed the rule of *Hale* in no fewer than three other cases, ordering defendants' sentences restyled to run concurrently on the authority of *Hale*.[3] Moreover, since this Court announced *Hale*, the district courts also have found *Hale* clear, applying it without difficulty on at least some fifty occasions.[4]

In response to the latter -- that is, the issues raised by the State functionally questioning the word and wisdom of *Hale* on its face, Respondent offers the following responses. First, the State actually suggests that *Hale* did not say that habitual offender *sentences* as distinct from *mandatory minimum components* of the sentences had to be run consecutively where they arose out of a single criminal episode (Brief of Petitioner at 6). The language of *Hale* could

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[3]*Edler v. State*, 630 So. 2d 528 (Fla. 1993); *Brooks v. State*, 630 So. 2d 527 (Fla. 1993); *Penton v. State*, 630 So. 2d 526 (Fla. 1993).

[4]As of the date of this writing.

not have been more clear:

> We find nothing in the language of the habitual offender statute which suggests that the legislature also intended that, once the sentences from multiple crimes committed during a single criminal episode have been enhanced through the habitual offender statutes, the *total penalty* should then be further increased by ordering that the *sentences* run consecutively.
>
> * * *
>
> [T]he trial court is not authorized, in our view, to both enhance Hale's sentence as a habitual offender and make each of the *enhanced habitual offender sentences* for the possession and the sale of the same identical piece of cocaine consecutive, without specific legislative authorization in the habitual offender statute.

630 So. 2d at 524, 525 (emphasis added).[5] The Petitioner's argument is without textual support in the decision.

Next, the State points out that Mr. Hill's sentence here after application of *Hale* actually will be less than his permitted guidelines sentence of seventeen to forty years, and his actual maximum allowable sentence of a total of fifteen years under the statutory maximum of five years each for these offenses.[6] *See* § 775.082, Fla. Stat. (1991). The State then attempts to invoke the notion of the proverbial parade of horribles, suggesting that in every case such as this, defendants will receive a windfall - a downward departure from the guidelines and the rendering of the habitual offender statute as meaningless.

Much of the State's difficulty with this case flows from the fact that *Hale* had not yet been announced at the time Respondent was sentenced.[7] The State's concern is alleviated by the very fact of *Hale*'s announcement -- that is, in all cases now, trial judges are aware of *Hale*

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[5]Interestingly, this is the very language quoted by the Petitioner in its brief. The import of this language, however, seems to have been lost.

[6]One must keep in mind that had Mr. Hill been sentenced under the guidelines, the maximum sentence he could have gotten was fifteen years because these offenses at issue were third-degree felonies carrying a statutory maximum of five years. As a result, then, even a guidelines sentence necessarily would have been a downward departure sentence in any case.

[7]Respondent was sentenced in July 1993; this Court did not announce *Hale* until October 1993.

and can discern, and choose from among, the various options available to them and fashion the most appropriate sentence in a given case. Thus, there will not be a case where the trial court's hands are "bound" as the State asserts.[8]

Critically important also is that in every case, it always is at the instance *of the State* that a trial court is asked to declare a defendant to be an habitual offender and to so sentence that defendant. With a full awareness of *Hale,* the State can simply take stock of its implications in a given case and act accordingly. If the State finds the results will be more favorable to it under the guidelines, it simply can choose not ask for an habitual offender sentence. Thus, as the answer truly rests in the State's own hands, there is no reason for this Court to step in and fashion some other rule which necessarily only will be redundant of what the State already has available to it. Respondent submits that that would not be a fitting exercise of this Court's jurisdiction and scarce judicial resources.

As to the State's claim that there has been a dramatic increase in the past few months in the prison bed space available and so defendants will be spending more time in prison -- a contention whose source is a simple newspaper article -- Respondent offers two points. First, this would seem to be an argument militating *for* the application of the guidelines in any given case and *not* for the overruling of *Hale* which is what the State asks. After all, if the State can incarcerate defendants longer under the guidelines, there is less need to habitualize them. It seems that once again, the remedy lies in the State's own hands.

Second, the opinion in *Hale* is not grounded at all on a statistical analysis of how much prison bed space is available; rather, it rests entirely on statutory construction and legislative history. Thus, there is no basis for this court to change this precedent on a question of law based on such statistical evidence, particularly when that statistic comes from a mere newspaper article and more importantly, is a statistic inherently subject to fluctuation based on State

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[8]Moreover, as a matter of common sense as well, it is highly unlikely that the trial courts of this state would make a practice of using the habitual offender statute to circumvent the guidelines to give more *lenient* sentences.

budget availability, which itself is subject to the currents of political winds. Emotionally provocative though the State's argument may be, it simply does not warrant the exercise of this Court's discretionary jurisdiction and the overruling of *Hale*.

Finally, Respondent notes that as to the notion that the habitual offender statute has been made meaningless by *Hale* in cases such as this, one cannot overlook that Mr. Hill is going to serve fully twice what the law otherwise would allow on each of his individual convictions, and the five-year mandatory minimum that the trial court imposed means that Mr. Hill will serve on each conviction the entirety of what he could have received on each count individually under section 775.082. Similarly, the State has attempted to distinguish Mr. Hill from the defendants in *Daniels* and *Hale* by showing that Daniels's and Hale's sentences "were significantly increased as a result of their being made to run consecutively." Brief of Petitioner at 7. The implication obviously is that Mr. Hill would not have experienced a similar fate, but in fact he did. His guidelines may have run from seventeen to forty years, but again he only could have received a maximum of fifteen years under the guidelines; his consecutive habitual offender sentences would have resulted in a thirty-year sentence. The State's argued distinction thus fails.

In short, the State's argument is nothing more than a plea for rehearing of *Hale*, and a plea made without sound and compelling reasoning. The exercise of this court's jurisdiction is not warranted, and in any case even if this Court chooses to take this case and write an opinion, because the State has failed to prove, as it must, any credible reason for overruling *Hale*, this Court should affirm the result below.

II. THE TRIAL COURT DEPRIVED RESPONDENT OF HIS RIGHT TO A FAIR AND IMPARTIAL TRIAL UNDER THE STATE AND FEDERAL CONSTITUTIONS BY FAILING TO CONDUCT A PROPER *NEIL* INQUIRY.

The state and federal constitutions guarantee all defendants in criminal cases the right to a fair and impartial trial. Art. I §§ 9, 16, Fla. Const.; U.S. Const. arts. VI, XIV. During voir dire, the trial court improperly permitted the State to exercise a peremptory challenge to venireperson Juanita Leggett over defense objection, depriving Respondent, Mr. Hill, of his right to a fair trial under the state and federal constitutions.

Respondent brought this violation to the attention of the Third District Court of Appeal on appeal. However, the Third District dismissed the issue in a footnote, saying only:

> The defendant claims he is entitled to a new trial because the prosecution improperly used a peremptory strike on an African-American potetnial juror. After reviewing the record, we find no merit in this argument.

(A. 2). For the reasons that follow, this ruling was plainly incorrect and Respondent urges this Court to act rectify this violation of his rights.

The right to exercise a peremptory challenge is, at present, firmly embedded in Florida law. *See e.g.*, Fla. R. Crim. P. 3.350 (providing for peremptory challenges). The right applies both to the State and to the defense. However, where defense counsel makes a timely objection and demonstrates on the record that the person the State seeks to challenge is a member of distinct racial group and that there is a strong likelihood that he is being challenged solely on the basis of his race, the state must provide clear and reasonably specific racially-neutral reasons for the strike.[9] *State v. Neil*, 457 So. 2d 481 (Fla. 1984), *clarified, State v. Castillo*, 486 So. 2d 565 (Fla. 1986); *State v. Slappy*, 522 So. 2d 18 (Fla.), *cert. denied*, 487 U.S. 1219, 108 S. Ct. 2873, 101 L.Ed.2d 909 (Fla. 1988).[10] The State's reason must be

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[9]The rule is the same when it is the defense moving to strike a venireperson peremptorily.

[10] [T]he nature of the peremptory challenge makes it uniquely suited to masking discriminatory motives. . . . Traditionally, a peremptory challenge permits dismissal of a juror based on no

supported by the record. *Slappy*, 522 So. 2d at 23.

In the instant case, during questioning by defense counsel, the following exchange occurred:

> [DEFENSE COUNSEL]: Have you ever been the victim of a crime?
>
> MS. LEGGETT: Three times they broke into my residence, but as I look at life, these are material things. I came into this world with nothing and I will carry nothing out of this world. It hurts, but there is nothing I can do about it.
>
> [DEFENSE COUNSEL]: You strike me as a woman of some faith.
>
> MS. LEGGETT: I am a Christian.
>
> [DEFENSE COUNSEL]: Sanctified?
>
> MS. LEGGETT: I am a Protestant.
>
> [DEFENSE COUNSEL]: *Is there any problem with your believes [sic] and what goes on in this courtroom? Do you see any conflict between your personal believes [sic] and what we do here?*
>
> MS. LEGGETT? ***So far, no.***
>
> [DEFENSE COUNSEL]: *Finally, can you give everyone a fair trial here*?
>
> MS. LEGGETT: ***Yes.***

The State sought to exercise a peremptory challenge to Ms. Leggett. Defense counsel objected and asked for a *Neil* inquiry. The court asked the State for its reason:

> more than "sudden impression and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another." 4 W. Blackstone, Commentaries 353 (1807). This ancient tradition, however, is to some degree inconsistent with the requirements of the Florida and federal constitutions. *We thus cannot permit the peremptory's use when it results in the exclusion of persons from jury service due to constitutionally impermissible prejudice*. To the extent of the inconsistency, the constitutional principles must prevail, notwithstanding the traditionally unlimited scope of the peremptory.

Slappy, 522 So.2d at 20 (emphasis added). Where a party attempts to exercise a peremptory challenge in violation of these principles, the fashioning of a remedy is at the discretion of the trial court. *Jefferson v. State*, 595 So.2d 38 (Fla. 1992).

> [PROSECUTOR]: I have a few, but the one most compelling is when Ms. Leggett stated -- in response to Mr. Ferster's inquiry about whether she had her car stolen, she stated these are material things, that we come into this world with nothing and leave with nothing. Ms. Leggett will not put that much importance on the fact this was a stolen car.
>
> [DEFENSE COUNSEL]: **I will object.** May I have an opportunity to respond? She stated that she is a Christian woman and it was a Christian statement. **I asked whether or not her believes [sic] would get in the way of being fair and impartial and she said she had no doubt she would be fair and impartial.**
>
> THE COURT: **I find it is a racially neutral reason. I am concerned because of her health. I am allowing it.**
>
> [DEFENSE COUNSEL]: Over defense objection.
>
> [PROSECUTOR]: That was one of my reasons, health concerns.

The court then proceeded with additional selection. Defense counsel renewed his objection to the State's strike before the jury panel was sworn.[11]

The trial court plainly erred here under *Slappy*, which requires the court to weigh the credibility of the explanation given and to "determine 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); *Smith v. State*, 574 So. 2d 1195, 1196 (Fla. 3d DCA 1991).

> Under the case law, the trial judge may not merely accept the reasons proffered at face value, but must evaluate those reasons as he would weigh any disputed fact. As the supreme court indicated in *Slappy*, an explanation offered by the state may appear reasonable, but may still be found upon critical examination to be a pretext.

Mansell v. State, 609 So. 2d 679, 682 (Fla. 1st DCA 1992). "It is not sufficient that the state's explanations for its peremptory challenges are facially race neutral. The state's explanations must be critically evaluated by the trial court to assure they are not pretexts for

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[11]The issue, therefore, was properly preserved. *E.g., Mitchell v. State*, 620 So. 2d 1008 (Fla. 1993) (to preserve *Neil* error, complaining party must renew objection before jury sworn); *State v. Fox*, 587 So. 2d 464 (Fla. 1991) (complaining party must dispute incorrect factual assertion made by striking party to preserve error).

racial discrimination." *Id.* at 683 (quoting *Roundtree v. State*, 546 So. 2d 1042, 1044-45 (Fla. 1989)).

The rule also is articulated in *Gooch v. State*, 605 So. 2d 570 (Fla. 1st DCA 1992), where the First District reversed for a new trial because, after the defendant objected that the State's reason was not race-neutral, the court declined to conduct further inquiry on the basis that no explanation was required. The First District held:

> As in *Barwick v. State*, 547 So.2d 612 (Fla.1989), we find no indication in the instant record that the trial judge made a conscientious evaluation of appellant's *Neil* claim by critically considering the reason given by the state for the strike. Therefore, pursuant to *Neil* and *Barwick*, we are compelled to **reverse** appellant's conviction and remand for a new trial.

Id. at 571.

And finally there is *Jones v. State*, 640 So. 2d 1161 (Fla. 1st DCA 1994), which applies the rule on factual circumstances similar to the instant case. In *id.*, three African-American venirepersons all revealed during voir dire that they had some connection to the defendant, Jones. Yet, upon further questioning, they all indicated they could reach a fair decision based on the facts and the law. After its challenges for cause were denied as to each of these persons, the State then sought to exercise peremptory challenges to each. Defense counsel raised a *Neil* objection, and the court required the State to give its reasoning. The State offered that in each case, it was the same reason as the State had tried to strike them for cause -- their perceived partiality. The trial court accepted this reason.

The First District, however, did not, and reversed for a new trial, in the process noting that "[t]he state's reasons cannot be accepted merely at face value by the trial court," and the inquiry must be not only whether the proffered reasons are neutral and reasonable but also whether they are not merely a pretext. *Id.* at 1163 (citing *Slappy*, 522 So. 2d at 22). The trial court had inquired as to reasonableness and neutrality but had made no finding at all on the question of pretext. The district court held:

> [T]he trial court failed to conduct a full and critical evaluation of

> the state's reasons. Although the trial court's determination as to the sufficiency of the state's reasons ordinarily would be accorded deference on appeal, *Hall v. Daee*, 602 So. 2d 512 (Fla. 1992), such deference cannot be shown where the finding was never made. *Reynolds [v. State]*, 576 So. 2d [1300 (Fla. 1991)] at 1302. For that reason, we are constrained to hold that the trial court's erroneous application of the law set forth in *Neil*, and developed further in *Slappy*, *Johans*, and *Mansell*, compels reversal and remand for a new trial.

Id. at 1163.

Under these decisions, it is plain that the trial court failed to comply with the applicable procedure in the instant case and that reversal is warranted here as it was in *Jones*. When defense counsel took issue with the State's assertion that Ms. Leggett "will not put much importance on the fact this was a stolen car," by objecting that she had affirmed that she "had no doubt she would be fair and impartial" in response to his very question of whether her religious beliefs would affect her ability to decide this case, the court merely responded, "I find it is a racially neutral reason. I am concerned because of her health. I am allowing it." This is not sufficient under the case law. This bare statement hardly can be characterized as a critical evaluation testing the reasonableness and neutrality of the State's asserted reason, and separate and apart from this, there was no absolutely no finding by the trial court on the issue of whether the State's reason was nevertheless a pretext. As a result, the district court below incorrectly denied Respondent's claim that the trial court had failed to comply with the requirements of *Neil* and its progeny.

Further, had the trial court engaged in the requisite analysis here, there can be no doubt that reasonable persons could not differ that the strike would have been disallowed; Ms. Leggett affirmatively stated with no equivocation at all that she could give both sides a fair and impartial trial and she saw no conflict between her beliefs and her prospective duties as a juror. It also is worth noting that if the State truly had a genuine concern about her ability to be fair after her unequivocal affirmation that she could be fair, the State certainly could have asked for

an opportunity to question Ms. Leggett further.[12] The State, however, did not do so and on appeal is bound by her unassailed affirmation that she could be fair and impartial, as the State was in *Jones*.

The State's strike also was not saved by its after-the-fact adoption of the trial court's offering that it was concerned about Ms. Leggett's health.[13,14] This simply was not the reason the State offered when the court demanded an explanation.

Finally, the trial court's "note, for the Record, that Mr. Pierce has been accepted and he is black," is irrelevant and unavailing.

> 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).

Smith, 574 So. 2d at 1196.

The trial court erred in allowing the State to exercise the peremptory challenge in the first instance, and the Third District Court of Appeal incorrectly affirmed this ruling.

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[12]*See, e.g., Gibson v. State*, 603 So. 2d 711, 712 (Fla. 4th DCA 1992) (noting that one of the factors to be considered according to *Slappy* is whether the striking party failed to examine the juror or makes a perfunctory examination; reversing for new trial under *Slappy* where "rejected juror here was simply not questioned in any way about the alleged" facts that made him unacceptable to the State).

[13]In the instant case, Ms. Leggett had explained during questioning by the State that her blood pressure had gone up when she received her summons, but also said she didn't mind serving; upon questioning by defense counsel, she also affirmed that it was her "Christian duty" and duty "[a]s a citizen" to serve. She said she did not believe that the trial would interfere with her blood pressure.

[14]While at first glance one could mistake this statement standing alone as a *sua sponte* strike for cause, careful reading shows this is not the case. The court expressly said, "I find it is a racially neutral reason. . . . I am allowing it." Were the court striking for cause, there would have been no need to evaluate the racial balance of the reason, and as there was no pending motion to strike for cause, the phrase "I am allowing it," could refer only to the State's peremptory strike.

Respondent's state and federal constitutional rights were violated and must be redressed by the order of a new trial.

CONCLUSION

Based on the foregoing arguments and authorities, Respondent respectfully requests that this Court decline to exercise its discretionary authority to review the certified question.

However, should the Court elect to exercise its discretionary jurisdiction to review this case, then Respondent would respectfully request that this Court affirm the decision of the Third District Court of Appeal insofar as it held that this Court's decision in *Hale* requires that Respondent's habitual offender sentences cannot be twice enhanced so that they run consecutive, but respectfully requests that this Court reverse the decision of the Third District Court of Appeal insofar as it rejected Respondent's argument that he is entitled to a new trial because of the obvious violation of this Court's decisions in *Neil*, *Slappy*, and their progeny.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Office of the Attorney General, Criminal Division, Post Office Box 013241, Miami, Florida, 33128, this 28th day of February, 1995.

JULIE M. LEVITT
Assistant Public Defender