IN THE SUPREME COURT OF FLORIDA

ROBERT IKE COMBS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 68,477

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APPEAL FROM THE CIRCUIT COURT OF
THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR LEE COUNTY, FLORIDA

SUPPLEMENTAL BRIEF OF APPELLANT

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SUPPLEMENTAL BRIEF OF DEFENDANT-APPELLANT ROBERT IKE COMBS

Defendant-appellant Robert Ike Combs ("defendant") submits this supplemental brief in support of his appeal from the denial of his motion, pursuant to Fla. R. Crim. P. 3.850, to vacate, set aside, or correct his conviction and sentence ("3.850 motion").

PROCEDURAL HISTORY

On November 25, 1986, defendant filed in this Court a brief ("Deft. Brief") in support of his appeal from the denial of his 3.850 motion. Prior to that date, on November 19, 1986, defendant moved this Court (a) to relinquish jurisdiction over his appeal and to remand it to the trial court in order to permit him to amend his 3.850 motion to add certain additional claims, or (b) in the alternative, to permit

him to raise these claims in a supplemental brief in support of his appeal. Defendant's motion was based on Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) ("Caldwell") and on Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986) ("Adams"), in which the Eleventh Circuit squarely held that Caldwell is applicable to death penalty cases in Florida. This Court, by an Order dated December 18, 1986, granted defendant's motion to file a supplemental brief discussing these claims.

STATEMENT OF FACTS RELEVANT TO DEFENDANT'S CALDWELL CLAIMS[1]

The jury in defendant's trial was repeatedly told -- during the voir dire, in the closing arguments at the sentencing phase, and in the instructions given by the trial judge at the sentencing phase -- that its decision concerning sentencing was merely a recommendation.

During voir dire, the prosecutor told the jury panel repeatedly that they would "recommend" a sentence or that their decision as to sentence was merely a "recommendation" (e.g., CR. 115, 116, 117, 119, 194, 195, 196, 230, 231, 232, 253, 278, 279, 322).[2] On one occasion, when the prosecutor

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1 A fuller statement of the facts is contained in Deft. Brief at 2-8.

2 References to "CR. _____" are to the record on appeal (footnote continued)

was questioning prospective jurors about their views on the death penalty and he asked whether any of the prospective jurors felt that there was no way that they could "impose" the death penalty, he quickly corrected himself and inserted the word "recommend" (CR. 195-196). Finally, the prosecutor impressed upon the jury panel that the jury's decision as to the sentence was "not controlling on the Judge," concluding that "really the sentence would be outside your hands, so to speak, you'd only be making a recommendation" (CR. 117). He stated:

> Now, if you found the Defendant guilty of first degree murder and then we got to the second part of the trial and you made a recommendation to the Court of whether it should be the death penalty or whether punishment should be life imprisonment, that is not -- <u>the Judge does not have to follow your recommendation</u>. You could all say, "I think he should be given life in prison instead of the death penalty." <u>It would still be up to the Judge as to what sentence he imposed</u>. He could still -- if you all said, "Give him life in prison," <u>the Judge could turn around and give him the death penalty or vice versa</u>. You might all say, "We feel he deserves the death penalty," and <u>a Judge could turn around</u> and say, "I sentence you to life in prison." <u>So your recommendation</u>, the second part of the trial, <u>would only be a recommendation on your part</u>. It is not your recommendation [sic]. <u>Your recommendation is not controlling upon the Judge</u>.
>
> Now, all that leads me up to some questions. Considering what I've just told you, that if you return a first degree murder conviction -- in other words, if you say, "He's guilty of first degree murder," and knowing the second phase of the trial

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from defendant's conviction and sentence, case number 59,425 in this Court.

> would only be a recommendation on your part and the actual sentence would be up to the Judge, knowing that, would that affect your being fair and impartial in the first phase, that is, finding him guilty, either guilty or not guilty? In other words, knowing what could happen, if you found him guilty, and that really the sentence would be outside of your hands, so to speak, you'd only be making a recommendation, would that influence you in doing your first duty, that is, finding him guilty or not guilty? (CR. 116-117; emphases added).

During the argument at the sentencing phase, the prosecutor again stressed to the jurors that their decision was no more than a matter of advising the Judge and that actually sentencing defendant was the Judge's role, not theirs. The very first thing, after wishing the jurors good morning, that the prosecutor said to the jury was:

> We are at the stage of the proceedings where you are called upon to make an advisory recommendation to the judge as to what the penalty should be in this case. It obviously is not a pleasant situation to be in. Obviously, it is one you've never been in before and it is not an easy thing to do. Again, your recommendation this morning is advisory only. The final sentence is completely up to His Honor, Judge Reese. (CR. 1121-1122).

Defendant's attorney did nothing to challenge the impression that the prosecutor's statements created, but instead himself referred to the jury's decision on a number of occasions as merely a "recommendation" (CR. 1126, 1127, 1131).

Finally, the Judge reinforced the prosecutor's statements by telling the jury on several occasions that its role was merely advisory, and that it would "recommend" a sentence (CR. 985, 1120, 1131, 1132, 1134, 1135), and by instructing the jury that "the final decision as to what punishment shall be imposed rests solely with the Judge of this court." (CR. 1120; emphasis added). See also similar language at CR. 985, 1131.

The jury was never once told that its sentencing recommendation carried substantial weight, and that it could be overridden by the trial court only in extreme circumstances.

In addition, the jury was also informed, both by the defense attorney (CR. 163, 1126) and the Judge (CR. 1134, 1135), that its sentencing decision must be agreed to by a majority.

SUMMARY OF ARGUMENT

Defendant's sentence of death violates the Eighth Amendment to the United States Constitution, as applied in *Caldwell*, because (1) the jury was improperly advised by both the prosecutor and the court as to its responsibility in determining the sentence, and was repeatedly given the erroneous impression that its decision would carry very little weight; the jury's sense of responsibility was thereby improperly

diminished, in violation of Caldwell; and (2) the jury was improperly instructed on the number of jurors who must agree upon a life sentence, and the misinstructions "might [have] so affect[ed] the fundamental fairness of the sentencing proceeding as to violate the Eighth Amendment," Caldwell, 472 U.S. at ____, 105 S. Ct. at 2645, 86 L. Ed. 2d at 246.

ARGUMENT

I. THE SENTENCE OF DEATH IS UNCONSTITUTIONAL BECAUSE THE PROSECUTOR AND THE JUDGE MISLED THE JURY ABOUT THE WEIGHT ACCORDED ITS SENTENCING VERDICT

The imposition of the death penalty in this case violates the Eighth Amendment to the United States Constitution because the prosecutor and Judge misled the jury about the weight accorded to the jury's sentencing verdict, in violation of Caldwell and Adams. In Caldwell, the United States Supreme Court held that the Eighth Amendment is violated if the sentencing jury's sense of responsibility is diminished because it has been led to believe that the responsibility for determining the appropriateness of the sentence rests elsewhere. Thus, the Court found that an uncorrected misleading suggestion made to a capital jury that it is not the jury's responsibility to determine the sentence presents an "intolerable danger" that the jury, facing an enormously difficult and uncomfortable task, will choose to minimize its

role. 472 U.S. at ___, 105 S. Ct. at 2642, 86 L. Ed. 2d at 242.

The jury in this case was led to believe that its decision whether the defendant should be sentenced to life imprisonment or to death would carry very little weight and could simply be disregarded by the judge.

First, the prosecutor minimized the jury's role and misstated Florida law by repeatedly assuring the jurors that their decision was merely advisory and that they would not be responsible for the ultimate decision whether defendant would be sentenced to death. Rather, according to the prosecutor, "the sentence would be outside [the jurors'] hands" (CR. 117). For a fuller compilation of the prosecutor's remarks, see pp. 2-4, supra.

This misimpression was never corrected, but was instead adopted, by the Court. Without ever explaining that a jury recommendation of a life sentence carries substantial weight, or that a jury recommendation of life could be overridden only if virtually no reasonable person could differ, the Judge told the jury several times that its determination of sentence would not be final -- indeed, that "the final decision as to what punishment shall be imposed rests solely with the Judge of this court" (CR. 1120; emphasis added). Thus,

the Judge "not only failed to correct the prosecutor's remarks, but in fact openly agreed with them . . ." Caldwell, 472 U.S. at ___, 105 S.Ct. at 2645, 86 L.Ed. 2d at 246.

These statements diminished the jury's sense of responsibility and misled the jury about its critical role in the sentencing procedure. This Court has emphasized that "[u]nder our capital sentencing statute, a defendant has the right to an advisory opinion from a jury." Floyd v. State, 11 F.L.W. 594 (Fla. 1986). The law in Florida is clear that this advisory opinion is entitled to great weight, McCampbell v. State, 421 So.2d 1072, 1075 (Fla. 1982), and that a jury's recommendation of life can be overturned by the trial judge only under extreme circumstances. This Court, in Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), held that "a jury recommendation under our trifurcated death penalty statute should be given great weight" and only where "the facts suggesting a sentence of death are so clear and convincing that virtually no reasonable person could differ" may a judge impose a death sentence following a jury's recommendation of life. The Supreme Court of the United States has held that this limitation on the judge's exercise of the jury override provides a crucial protection for the defendant. Dobbert v. Florida, 432 U.S. 282, 295 (1977).[3]

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3 The Eleventh Circuit also noted that it had "found no-
(footnote continued)

This Court recently has recognized that the concerns expressed in Caldwell apply to the Florida sentencing scheme, stating that "[i]t is appropriate to stress to the jury the seriousness which it should attached to its recommendation" and that "[t]o do otherwise would be contrary to Caldwell v. Mississippi and Tedder v. State." Garcia v. State, 492 So.2d 360, 367 (Fla. 1986) (citations omitted). Any possible argument that Caldwell does not apply fully to the Florida sentencing scheme was laid to rest by the clear holding of the Eleventh Circuit in Adams, 804 F.2d at 1530, where the court said, "[c]learly, then, the jury's role in the Florida sentencing process is so crucial that dilution of its sense of responsibility for its recommended sentence constitutes a violation of Caldwell."[4]

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thing in Florida law to indicate that only jury recommendations of life imprisonment are entitled to great weight." Adams, 804 F.2d at 1530 n.3. If a recommendation of death is entitled to similar weight, the impression given the jury in this case -- that the judge was free to ignore the jury recommendation -- is misleading for this additional reason.

4 In Pope v. State, 496 So.2d 798 (Fla. 1986), this Court held that Caldwell is not violated when the jury is given "not misleading and accurate information" as to its role. In Pope, however, this Court found that the trial judge, in his final instructions to the jury, stressed the significance of the jury's recommendation and the seriousness of the decision the jury was being asked to make. In Adams and in this case, the jury was not informed of the weight that would be given to its decision, and the jury was impressed at length with the fact that its decision could be disregarded by the judge, thus misleading the jury and diminishing its (footnote continued)

In this case, where the prosecutor and Judge made statements that indicated that the Judge "was free to ignore the jury's recommendation," Adams, 804 F.2d at 1532, a "real danger exists that the . . . [prosecutor and] judge's statements caused . . . [the] jury to abdicate its 'awesome responsibility' for determining whether death was the appropriate punishment in the first instance." Adams, id. at 1533. This is not a case where the only reasonable sentence would have been death. The balance between aggravating and mitigating circumstances was very close,[5] and if the role of the jury had not been minimized and the jury had recommended life -- as a jury that appreciated the true significance of its

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sense of responsibility. In this case, as in Adams, "nothing [the trial judge said] corrected the jury's misunderstanding of the significance of its recommendation." Adams, 804 F.2d at 1531 n.7.

To the extent that Pope may differ from the Eleventh Circuit's recent decision in Adams by suggesting that Caldwell is not violated even if misinformation given to the jury leads the jury to shift its sense of responsibility to the trial court because the trial court, unlike an appellate court, is well-suited to make the initial determination on the appropriateness of the death sentence, defendant respectfully urges this Court to reconsider its decision in Pope.

5 The trial court found three aggravating and two mitigating circumstances to be present (CR. 1178-80). Additionally, evidence of defendant's intoxication was before the jury (Deft. Brief 41-42); if the jury had not been improperly instructed, it could have considered this evidence in mitigation (see id. 56). Moreover, if trial counsel had acted effectively, far more mitigating evidence would have been before the jury (see id. 48-55).

deliberations might well have done -- its sentence would certainly have fallen within the Tedder presumption of correctness, precluding a judicial override of the jury's vote, Adams, id. See, e.g., Tedder v. State, supra; Neary v. State, 384 So.2d 881 (Fla. 1980); McCampbell v. State, supra.

On this record, "[w]e cannot know" whether "the result of the weighing process by . . . the jury . . . [would] have been different" in the absence of factors unconstitutionally skewing the jury's sentencing deliberations. Elledge v. State, 346 So.2d 998, 1003 (Fla. 1977). The improper diminution of the jury's sense of responsibility that occurred here deprived defendant of his constitutional rights, and requires his sentence to be set aside.[6]

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6 That defendant's attorneys did not object to these statements at trial or raise this claim on direct appeal does not prevent defendant from raising it now. Caldwell, which was not decided until after defendant's conviction and its affirmance, represents a significant change in the law. Adams, 804 F.2d at 1530. Prior to Caldwell, this Court held that even if a jury in a capital sentencing proceeding was improperly misled so as to diminish its sense of responsibility because it was told that its decision was only advisory and that the final decision would be made by the judge, there was no fundamental error requiring reversal. Middleton v. State, 465 So.2d 1218 (Fla. 1985). Caldwell, however, held that when the jury was so misled, an impermissible and unconstitutional likelihood that the jury would be biased in favor of rendering a death sentence was created.

A claim based on a change of constitutional law of such magnitude that it warrants retroactive application is cognizable in a Rule 3.850 proceeding, Witt v. State,

(footnote continued)

II. THE SENTENCE OF DEATH IS UNCONSTITUTIONAL BECAUSE THE JURY WAS TOLD, INACCURATELY, THAT SEVEN OR MORE JURORS WERE REQUIRED TO RETURN A SENTENCING RECOMMENDATION

The imposition of the death penalty in this case violates the Eighth Amendment of the United States Constitution for the additional reason that the jury was wrongly told that seven or more of its number was required to return a sentencing recommendation. In fact, under Florida law, a majority vote is _not_ required for a life recommendation. A tie vote would have constituted a recommendation of a life sentence. _Rose_ v. _State_, 425 So.2d 521 (Fla. 1982), _cert. denied_, 461 U.S. 909 (1983).

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387 So.2d 922, 929 (Fla.), _cert. denied_, 449 U.S. 1067 (1980), as is a claim involving fundamental errors. _See Palmes_ v. _Wainwright_, 460 So.2d 362, 365 (Fla. 1984). In fact, _Caldwell_ is the very type of claim for which the Rule 3.850 procedure was created. _Adams_, 804 F.2d at 1531 n.6. Defendant did not waive his _Caldwell_ claim by failing to object at trial because the law has changed significantly and because the statements that diminished the jury's sense of responsibility created a constitutional error of such dimension as to constitute fundamental error.

To the extent that _State_ v. _Sireci_, Nos. 69,386 and 69,380 (Fla. Jan. 5, 1987), holds that the failure of a defendant to object at trial to statements that impermissibly diminish the jury's sense of responsibility for sentencing constitutes waiver of that claim, defendant respectfully urges this Court to reconsider that decision. This holding in _Sireci_ is based on _Middleton_ v. _State_, _supra_. As set forth above, however, _Middleton_ was decided before _Caldwell_ (_Middleton_ was decided on March 4, 1985 and _Caldwell_ on June 11, 1985) and thus, when _Middleton_ was decided, the law did not recognize the unconstitutionality of statements that tend to diminish the jury's sense of responsibility.

The jury was misinformed about the law by both the defense attorney and the judge. The defense attorney asked the jury panel during voir dire, "Are you aware that with regard to the sentencing phase, at which time there will be a recommendation made by this jury, that that is not a situation wherein the entire panel must be unanimous. That's simply a majority situation. That any seven can recommend one way or the other" (CR. 163). The Judge instructed the jury that "[t]he law requires that seven or more members of the jury agree upon any recommendation advising either the death penalty or life imprisonment" (CR. 1135).

Caldwell requires reversal of a death sentence when the jury is misinformed about its task in the penalty phase, unless it can be said that the misinformation had "no effect" on the sentencing decision. 472 U.S. at ___, 105 S.Ct. at 2646, 86 L.Ed. 2d at 247. This is particularly true when the erroneous instructions decreased the likelihood that the jury would return a life sentence. Adams, 804 F.2d at 1530 & n.3.

The misstatement of law at issue here made it less likely that the jury would recommend life because, although the law requires only six jurors for a life sentence, seven jurors were required in this case. Thus, "an impermissible likelihood the jury [would] be biased in favor of rendering a sentence of death [was] created." Adams, 804 F.2d at 1529-

30. These misinstructions on the law "might [have] so affect[ed] the fundamental fairness of the sentencing proceeding as to violate the Eighth Amendment." Caldwell, 472 U.S. at ______, 105 S.Ct. at 2645, 86 L.Ed.2d at 246. The ultimate jury vote is unknown (CR. 1115, 1138-40), but the jury's decision clearly could have been influenced by the misinstructions about the law and the likelihood that the jury would return a life sentence certainly was diminished. No one can know that the vote at one point was not 6 to 6 -- a vote that should have constituted a life recommendation, but which the jury would only have understood, incorrectly, as a deadlock. Therefore, the reliability of the jury's verdict of the death penalty was unconstitutionally undermined, the sentence of death violates the Eighth Amendment, and accordingly the sentence must be vacated and a new sentencing hearing held.[7]

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7 This claim is cognizable in a Rule 3.850 motion because it is based on a significant change of law of constitutional magnitude. Pre-Caldwell law required a defendant to show that a misinstruction regarding the number of votes needed for a sentence of life imprisonment resulted in actual prejudice. Compare Rose v. State, supra (new sentencing hearing ordered after jury returned a verdict of death, when jury was told that seven votes were required for a life sentence and was given an Allen instruction when it reported to the Court that it was deadlocked), with Harich v. State, 437 So.2d 1082 (Fla. 1983), cert. denied, 465 U.S. 1051 (1984) (although jury was misinstructed on number of votes required for a life sentence the error was harmless because the jury vote in favor of the death penalty was nine to three). Caldwell established, however, that a (footnote continued)

CONCLUSION

For the foregoing reasons, defendant's sentence of death violates the Eight Amendment to the United States Constitution and this Court should set aside defendant's sentence and order that a new sentencing hearing be held.

Respectfully submitted,

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death sentence is unconstitutionally unreliable if the jury has been misinformed about its task in such a way that the likelihood it would return a life sentence is decreased. Adams, 804 F.2d at 1529-30 and n.3. Clearly, by increasing the number of jurors required to vote in favor of a life sentence, the likelihood that the jury will return a life sentence is diminished.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have served a true and correct copy of the attached Supplemental Brief on the State of Florida by causing a copy to be sent by express mail to the office of Michael J. Kotler, Esq., Assistant Attorney General, Park Trammell Building, Suite 804, 1313 Tampa, Florida 33602, and John W. Dommerich, Esq., Assistant State Attorney, Twentieth Judicial Circuit, Post Office Drawer 399, Fort Myers, Florida 33902, this 14th day of January, 1987.

MARVIN R. LANGE