IN THE SUPREME COURT OF FLORIDA

ROBERT IKE COMBS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 68,477

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

SUPPLEMENTAL BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

ROBERT IKE COMBS will be referred to as the "Appellant" in this brief and the STATE OF FLORIDA will be referred to as the "Appellee". The record on appeal will be referenced by the symbol "R" followed by the appropriate page number.

SUMMARY OF THE ARGUMENT

Issue I: Appellant argues that the prosecutor and the trial judge improperly attempted to diminish the jury's sentencing responsibility, citing Caldwell v. Mississippi, 472 U.S. ___, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). A close reading of the remarks complained of demonstrates the jury was not misled in its role, nor was there an incorrect statement of Florida Law. (R.1120-1121; 1131-1136) California v. Ramos, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1981). References by the prosecutor to the judge's responsibility to impose sentence is an accurate reflection of Florida's capital sentencing scheme. See Section 921.141, Florida Statutes.

Issue II: The jury instructions at sentencing stated Florida law at the time of the trial, but did not comment upon the result of an even division of jurors. While Appellant contends that he was prejudiced by the trial court's failure to advise the jury that a 6-6 split would constitute a recommendation of life imprisonment, there is nothing in the record before this Court that would show that the jury was ever divided equally. Clearly, Appellant's claim is based on pure speculation and should be denied.

ARGUMENT

ISSUE I

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

The State would first argue that this issue is not properly before this Court. This issue could and should have been raised on Appellant's direct appeal. This Court has held on several occasions that a ground for relief which is known at the conclusion of the trial should be raised on direct appeal. If that ground is not raised on direct appeal, a motion for post conviction relief, pursuant to Rule 3.850 Fla. R. Crim. P. is not an appropriate remedy. See Ford v. State, 407 So.2d 907 (Fla. 1981) and Hargrove v. State, 396 So.2d 1127 (Fla. 1981). Even in federal courts, collateral relief is unavailable for a remedy not pursued on appeal. See Causey v. Civiletti, 621 F.2d 691, 694 (5th Cir. 1980); United States v. Tinnock, 441 U.S. 780, 60 L.Ed.2d 634 (1979). The matter now before this Court was certainly known at the trial's conclusion, therefore, the issue should have been raised at both trial and on direct appeal.

A motion made under Rule 3.850 cannot substitute for an appeal, however, even if this Court were to excuse Appellant's failure to present this issue at trial and on appeal, there is certainly no reason why he could not raise this issue before the trial court during the pendency of his motion for post conviction relief. While Combs' 3.850 motion was filed in 1983, the trial

court's order denying relief was not issued until February 17, 1986, after the United States Supreme Court's decision in Caldwell v. Mississippi, 472 U.S. ___, 105 S.Ct. 2633, 86 L.Ed.2d 231, (1985). Appellant could have filed an amended petition raising this claim, however, he never saw fit to do so. Clearly, Appellant's lack of action constitutes a procedural default. See State v. Sireci, ____ So.2d ____, (Case No. 69,386 and 69,380, opinion rendered January 5, 1987) (12 F.L.W. 57).[1]

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[1] Appellant refers this Court to the Eleventh Circuit Court of Appeals' decision in Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), for the proposition that Caldwell v. Mississippi, supra, is such a substantial change in the law that any procedural default should be excused. This is certainly not what the United States Supreme Court held in Caldwell:

> ". . . The mere existence of a basis for a state procedural bar does not deprive this Court of jurisdiction; the state court must actually have relied on the procedural bar as an independent basis for its disposition of the case. See **Ulster County Court v. Allen,** 442 U.S. 140, 152-154, 60 L.Ed.2d 777, 99 S.Ct. 2213 (1979). Moreover we will not assume that a state court decision rests on adequate and independent state grounds when the "state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion." **Michigan v. Long,** 463 U.S. 1032, 1040-1041, 77 L.Ed.2d 1201, 103 S.Ct. 3469 (1983). "If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision." **Id.** at 1041, 77 L.Ed.2d 1201, 103 S.Ct. 3469.
>
> 86 L.Ed.2d at 238.

Even if this Court were to reach the merits of this claim, Appellant's argument is without merit. Appellant argues that the prosecutor and the trial judge improperly attempted to diminish the jury's sentencing responsibility, citing Caldwell v. Mississippi, 472 U.S. _____, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). A close reading of the remarks complained of, demonstrates the jury was not misled in its role nor was there an incorrect statement of Florida Law. (R.1120-1121; 1131-1136) California v. Ramos, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1981). References by the prosecutor to the judge's responsibility to impose sentence is an accurate reflection of Florida's capital sentencing scheme. See Section 921.141, Florida Statutes, the Florida Standard Jury Instructions in Criminal Cases provides as follows:

> **PENALTY PROCEEDINGS - CAPITAL CASES**
>
> **F.S. 921.141**
>
> Give law at the beginning of penalty proceeding before a jury that did not try the issue of guilt. In addition, give the jury other appropriate general instructions.
>
> 1. (b) Ladies and gentlemen of the jury, you have found the defendant guilty of (crime charged).
>
> 2. The punishment for this crime is either death or life imprisonment without the possibility of parole for 25 years. Final decision as to what punishment shall be imposed rests solely with the judge of this court; however, the law requires that you, the jury, render to the court an advisory sentence as to what punishment should be imposed upon the defendant. (emphasis added)

Thus, under State law, the jury has a right to know it is the judge who actually determines the sentence.

The court in Caldwell v. Mississippi, supra, was concerned with the giving of erroneous or misleading information to the sentencer concerning their responsibility:

> ". . . This case presents the issue whether a capital sentence is valid when the sentencing jury is led to believe that responsibility for determining the appropriateness of a death sentence rests not with the jury but with the appellate court which later reviews the case. In this case, a prosecutor urged the jury not to view itself as determining whether the defendant would die, because a death sentence would be reviewed for correctness by the State Supreme Court. We granted certiorari, 469 U.S. ____, 83 L.Ed.2d 182, 105 S.Ct. 243 (1984), to consider petitioner's contention that the prosecutor's argument rendered the capital sentencing proceeding inconsistent with the Eighth Amendment's heightened "need for reliability in the determination that death is the appropriate punishment in a specific case." **Woodson v. North Carolina**, 428 U.S. 280, 305, 49 L.Ed.2d 944, 96 S.Ct. 2978 (1976) (plurality opinion). Agreeing with the contention, we vacate the sentence . . ."
>
> (86 L.Ed.2d 235-236)

In Mississippi, the capital punishment statute vests in the jury the ultimate decision of life or death. Darden v. State, 475 So.2d 217, 221 (Fla. 1985). This is not the case in Florida. In Caldwell, the Court interpreted the comments by the state to have misled the jury to believe that it was not the final sentencing authority because its decision was subject to appellate review. In the present case there was no such egregious misinformation in the record of this trial.

In Darden v. Wainwright, 477 U.S. ___, 91 L.Ed.2d 144, 158, 106 S.Ct. ____ (1986), (fn. 30), the United States Supreme Court addressed this issue as follows:

> Petitioner also maintains that the comments violated the requirement of reliability in the sentencing process articulated in **Caldwell v. Mississippi**, 472 U.S. _____ (1985). The principles of **Caldwell** are not applicable to this case. **Caldwell** involved comments by a prosecutor during the sentencing phase of trial to the effect that the jury's decision as to life or death was not final, that it would automatically be reviewed by the state supreme court, and that the jury should not be made to feel that the entire burden of the defendant's life was on them. This Court held that such comments "present[] an intolerable danger that the jury will in fact choose to minimize the importance of its role," a view that would be fundamentally incompatible with the Eighth Amendment requirement that the jury make an individualized decision that death is the appropriate punishment in a specific case. **Id.**, at ___.
>
> There are several factual reasons for distinguishing **Caldwell** from the present case. The comments in **Caldwell** were made at the sentencing phase of trial and were approved by the trial judge. In this case, the comments were made at the guilt-innocence stage of trial, greatly reducing the chance that they had any effect at all on sentencing. The trial judge did not approve of the comments, and several times instructed the jurors that the arguments were not evidence and that their decision was to be based only on the evidence. But petitioner's reliance on **Caldwell** is even more fundamentally mistaken than these factual differences indicate. **Caldwell** is relevant only to certain types of comment - those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision. In this case, none of the comments could have had the effect of misleading the jury into thinking that it had a reduced role in the sentencing

> process. If anything, the prosecutors' comments would have had the tendency to increase the jury's perception of its role. We therefore find petitioner's Eighth Amendment argument unconvincing.

Here, the jury instructions given presented a clear and accurate explanation as to the juror's responsibility in the sentencing process (R.1131-1136). The jury was never instructed that their recommendation would be lightly cast aside, as Appellant suggests.

Appellant maintains that the jury might have reached a different outcome on their recommendation for Appellant's sentence had they been advised that their recommendation carried great weight. This is pure speculation on Appellant's part and totally defies any logic.

No error is present here.

ISSUE II

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

Appellant contends that the jury instruction at the sentencing phase of the trial prejudiced him, because the jury was instructed that "seven or more of you must agree upon the recommendation you submit to the Court." Appellant's contention is totally lacking in merit. Combs failed to object to this instruction at trial. In fact, defense counsel instructed the jury that their decision at the sentencing phase would be made by a majority of the jurors (R.163). Appellee would, therefore, submit that Appellant's actions or lack of action constitutes a procedural default.

Florida Rule of Criminal Procedure 3.390(2), reads as follows:

> (d) No party may assign as error grounds of appeal the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the presence of the jury.

See also: Dorminey v. State, 314 So.2d 134 (Fla. 1975); Turner v. State, 212 So.2d 801 (Fla. 1968); Grace v. State, 206 So.2d 225 (Fla. 4th DCA 1968); Porter v. State, 301 So.2d 808 (Fla. 3d DCA 1974); Williams v. State, 346 So.2d 554 (Fla. 3d DCA 1977);

Rayner v. State, 286 So.2d 604 (Fla. 2d DCA 1973); Henry v. State, 277 So.2d 78 (Fla. 1973).

In Castor v. State, 365 So.2d 701 (Fla. 1978), the Florida Supreme Court held:

> (4) To meet the objections of any contemporaneous objection rule, an objection must be sufficiently specific to apprise the trial judge of the putative error and to preserve the issue for intelligent review on appeal. See **Rivers v. State**, 307 So.2d 826 (Fla. 1st DCA, **cert. denied** 316 So.2d 285 (Fla. 1975); **York v. State**, 232 So.2d 767 (Fla. 4th DCA 1969).
>
> (emphasis added)

See also: Williams v. State, 378 So.2d 837 (Fla. 1st DCA 1979) and Clark v. State, 363 So.2d 331 (Fla. 1978).

The record before this Court clearly demonstrates that no objection was voiced by Appellant concerning the Court's instruction on the jury's recommendation. In addition, this issue was never raised on direct appeal. Under the circumstances, Appellee would submit that Appellant has procedurally defaulted on this issue. See Engle v. Isaac, 456 U.S. 107, 71 L.Ed.2d 7823, 102 S.Ct. 1558 (1982), reh. denied, 73 L.Ed.2d 1296 (1982); Ray v. State, 403 So.2d 956 (Fla. 1981); Kelly v. State, 389 So.2d 250 (Fla. 2d DCA 1980); James v. State, 393 So.2d 1138 (Fla. 3d DCA 1981); Clark v. State, supra.

In Henry v. Wainwright, 743 F.2d 761 (11th Cir. 1984), the Court was faced with a situation almost identical to our own. The Court rejected Henry's argument as follows:

". . . Henry claims that the jury instruction at his sentencing trial prejudiced him because the jury was instructed that "seven or more of you must agree upon the recommendation you submit to the court." Henry failed to object to this instruction at trial. Florida case law requires a contemporaneous objection **Ford v. Wainwright**, 451 So.2d 471, 475 (Fla. 1984); **Rembert v. State**, 445 So.2d 337, 340 (Fla. 1984); **Jackson v. State**, 438 So.2d 4, 6 (Fla. 1983). The instructions stated Florida law at the time of the trial but did not comment upon the result of an even division between the jurors. That eventuality was not addressed by the Florida Supreme Court until **Rose v. State**, 425 So.2d 521 (Fla. 1983), when the Florida Supreme Court declared that upon such an even division the trial court should take the result as a recommendation for a sentence of life imprisonment. Though petitioner contends that he was prejudiced by the failure of the trial judge to have advised the jury that a 6-6 split would constitute a recommendation of life imprisonment, nothing is proffered to show, and the record does not show, that the jury was ever divided equally in his case. Shortly before the jury returned, by 7-5 majority, a recommendation of the death sentence, the foreperson of the jury had transmitted a question to the trial judge. While there is no record to disclose the reason for the asking of the question, the question itself evidences a concern by some one or more jurors that should the defendant be sentenced to life imprisonment, he might be set free earlier than after the expiration of 25 years. The court's answer made it clear that upon such a sentence, the defendant would not be eligible for parole within 25 years. Thus the concerns which may have inhibited some jurors from voting for a life sentence were set at rest. Absent any evidence, the inference to be drawn is that jurors inclined towards the death sentence, to prevent the danger of the early release would be, thereafter, more likely to vote for the life sentence. Nevertheless, those voting for the death penalty were not reduced below seven. Under **Wainwright v. Sykes**, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), Henry must show cause and prejudice for failing to object at trial. **See also, Engle v. Isaac**, 456 U.S.

> 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982). Pretermitting the cause issue, we conclude that Henry has proffered nothing upon which a finding of prejudice could be based. There is at best only a possibility of prejudice which would not carry petitioner's burden, and we in any event deem such a possibility to be remote.
>
> (743 F.2d at 763)

See also: Adams v. Wainwright, 764 F.2d 1356, 1369 (11th Cir. 1985).

Here, as in Henry, the jury instruction stated Florida law at the time of the trial but did not comment upon the result of an even division of jurors. While Appellant contends that he was prejudiced by the trial court's failure to have advised the jury that a 6-6 split would constitute a recommendation of life imprisonment, there is nothing in the record before this Court that would show that the jury was ever divided equally. Clearly, Appellant's claim is based on pure speculation and should be denied.

CONCLUSION

Based upon the foregoing argument and citations of authority, the judgment and sentence of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Marvin R. Lange, Asa D. Sokolow, Richard L. Claman, Attorneys for Appellant, 575 Madison Ave., New York, New York, 10022, this 3rd day of February, 1987.

OF COUNSEL FOR APPELLEE