IN THE

SUPREME COURT OF FLORIDA

No. 70,184

CHARLES KENNETH FOSTER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Appeal from the Summary Denial of Motion for Post-Conviction Relief by the Circuit Court of the Fourteenth Judicial Circuit (Bay County)

BRIEF FOR APPELLANT

Respectfully submitted,

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STATEMENT OF THE CASE

Mr. Foster was convicted by a jury of first degree murder and robbery on October 3, 1975; the jury returned a death sentence the next day. Immediately thereafter, the trial judge imposed the death sentence for the murder conviction and a life sentence for the robbery. During the sentencing phase of the trial, the judge and prosecutors made several remarks to the jury which, considered together, drastically diminished the jury's sense of responsibility for imposing the death sentence.

(a) In the preliminary charge to the jury at the beginning of the sentencing phase of Mr. Foster's trial, the trial court explained the sentencing responsibilities of the jury and the court as follows:

> 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 on the defendant.

T 597 (emphasis added).

(b) Thereafter, when the prosecutor made his closing penalty phase argument to the jury, he emphasized the advisory nature of the jury's sentencing recommendation and the lack of deference that could be given to it by the judge:

> Now to begin with this recommendation that you make is advisory and notwithstanding what you recommend the court would have to impose the sentence that it sees fit .... Your decision is not binding on the court; it's advisory.

T 629, 643 (emphasis added).

(c) Finally, in its charge to the jury at the close of the sentencing phase, the Court again reminded the jury of the

relative responsibilities for determining Mr. Foster's sentence:

> As you have been told the final decision as to what punishment shall be imposed is the responsibility of the judge. However, it is your duty to follow the law which will now be given to you by the Court and render to the Court an advisory sentence....

T 645. The Judge further instructed the jury:

> Based on these considerations you should advise the Court whether the Defendant should be sentenced to life imprisonment or to death.
>
> In these proceedings it is not necessary that the verdict of the jury be unanimous but a verdict may be rendered upon a finding of a majority of the jury. Should a majority of the jury determine that the Defendant should be sentenced to death you should recommend an advisory sentence as follows:
>
> "A majority of the jury advise and recommend to the Court that it impose the death penalty upon the Defendant Charles Kenneth Foster."

T 651. No objections to these statements, instructions, or argument were made by Mr. Foster's trial counsel.

Direct appeal of Mr. Foster's conviction sentences was taken to this Court which affirmed on February 22, 1979. Foster v. Florida 369 So. 2d 928 (Fla. 1979). The United States Supreme Court denied certiorari. Foster v. Florida 444 U.S. 885 (1979). In May, 1981, Mr. Foster filed a motion for post-conviction relief under Rule 3.850 in the Fourteenth Circuit Court for Bay County. The circuit court denied relief summarily, and this Court affirmed. Foster v. State, 400 So.2d 1 (Fla. 1981).

Following the exhaustion of his then existing state remedies, Mr. Foster pursued federal collateral remedies. On May 26, 1981 he filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of

Florida, and on July 2, 1981, judgment was entered denying his petition. Foster v. Strickland, 517 F. Supp. 597 (N.D. Fla. 1981). Thereafter, Mr. Foster appealed to United States Court of Appeals, and on June 27, 1983, a panel of the court issued an opinion affirming in part, and reversing in part, the district court's judgment, and remanding for further proceedings. Foster v. Strickland, 707 F.2d 1339, 1347-51 (11th Cir. 1983). On November 3, 1983, however, the court amended its opinion and judgment to strike that portion which had reversed the district court's judgment and then re-entered its judgment, affirming the district court. 707 F.2d at 1352. Certiorari was denied thereafter on May 14, 1984. Foster v. Strickland, 466 U.S. 993. On October 22, 1984, Mr. Foster filed a second petition for writ of habeas corpus in the United States District Court. The district court denied the writ on June 5, 1986, and denied a motion for a new trial on July 14, 1986. An appeal was thereafter taken to the United States Court of Appeals, and that appeal is still pending. Foster v. Wainwright (No. 86-3539).

In none of these post-trial proceedings has Mr. Foster raised the issue discussed herein. On December 23, 1986, however, Mr. Foster filed a second motion raising this issue under Rule 3.850 in the Fourteenth Circuit. Judge Don Sirmons summarily denied the motion on January 14, 1987; rehearing was requested on January 28 and denied February 5, 1987. A Notice of Appeal was timely filed thereafter.

SUMMARY OF THE ARGUMENT

Mr. Foster is not barred from raising the claim he presents herein because the United States Supreme Court in Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633 (1985) made a fundamental change in constitutional law which is a proper basis for a successor motion under rule 3.850. See Witt v. State, 387 So.2d 922 (Fla. 1980). This Court in Copeland v. Wainwright, ~~12~~ 505 So.2d ~~178~~ 415 F.L.W. (Fla. April 9, 1987) ruled that Caldwell violations occurring before Caldwell was decided are precluded in post-conviction relief because a basis for challenge at trial to the comments existed under state law under Tedder v. State, 322 So.2d 908 (Fla. 1975). In Copeland, the Court noted that Tedder allowed counsel to argue for corrective action by the trial court and on direct appeal and held that the failure to make the Tedder argument waived the Caldwell claim.

Copeland should not control Mr. Foster's claim for three reasons. First, Copeland is inconsistent with the Eleventh Circuit rulings on the same issue in Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), modified slip op. Apr. 23, 1987, attached as Appendix A and Mann v. Dugger, slip opinion No. 86-3182 (11th Cir. May 14, 1987), attached as Appendix B. This Court should reconsider its Copeland ruling in light of these decisions by the Eleventh Circuit. Second, the judge's and prosecutor's comments in Mr. Foster's case occurred at sentencing, not during voir dire, as did the comments of the judge and prosecutor in Copeland. Third, state law was not well

settled at the time of Mr. Foster's trial and provided no basis for objection at trial.

The comments of the judge and prosecutor to the jury during the sentencing phase unconstitutionally shifted the "truly awesome responsibility of decreeing death for a fellow human," Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 2639 (1985), from the jury and rendered their sentence of death unreliable. Caldwell requires that a sentence of death be set aside when rendered unreliable by inaccurate statements by the court or prosecutor which relieve the jury of its sense of responsiblity. In Adams v. Wainwright, supra, the Eleventh Circuit ruled that Caldwell applies to Florida and Florida's sentencing scheme as well.

ARGUMENT

I. Mr. Foster is Not Procedurally Barred From Being Heard on His Caldwell Claim By Failure To Raise It Before the Caldwell Decision.

Mr. Foster's claim that the judge and prosecutor rendered his death sentence unreliable by unconstitutionally relieving the jury of its burden to decide if Mr. Foster should be executed is not properly barred because of procedural default, despite this Court's recent decision in Copeland v. Wainwright, 12 F.L.W. 178 (Apr. 9, 1987). In Copeland, the Court rejected the defendant's contention that he could raise his Caldwell claim in post-conviction because Caldwell was such a marked change in constitutional law that it gave the defendant a new constitutional right. The Court held that a series of cases,

especially Tedder v. State, 322 So.2d 908 (Fla. 1975), which emphasized the importance of the jury recommendation in Florida law, provided Copeland's trial counsel with a reasonable ground to object to comments tending to denigrate the role of the jury. Failure to do so waived the objection.

A. The Copeland Decision was an Incorrect Application of Procedural Bar Rules in Rule 3.850 Motions.

Mr. Foster contends that the decision of the Eleventh Circuit in Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), modified sub nom. Adams v. Dugger, slip op. April 23, 1987, requires reconsideration of Copeland. In considering whether Adams had procedurally defaulted his Caldwell claim, the Eleventh Circuit explained that the constitutional tools for constructing this claim were unavailable before Caldwell and were not supplied by state law:

> The state argues that pre-Furman cases in Florida holding that remarks by the trial judge and the prosecutor regarding appellate review constituted reversible error as a matter state law provided a reasonable basis for Adams' Eighth Amendment claim. As we indicated in connection with our discussion of abuse of the writ, see note 2 supra, the mere fact a practice may be condemned as a matter of state law does not indicate that it also constitutes an Eighth Amendment violation. Similarly, despite the state's argument to the contrary, the Tedder decision itself clearly did not provide a reasonable basis for raising this claim, as Tedder dealt only with the weight to be given the jury's recommended sentence and not with the Eighth Amendment implications of statements that diminish the jury's sense of reponsibility for its sentence.

Slip op. at 14, n.6.

An examination of the cases cited by this Court in Copeland shows that the Eleventh Circuit is correct in its assessment of

Florida law regarding objections to comments from the court and prosecutor denigrating the role of the jury. None of the cases cited involved such an objection. All of them concerned a judge overriding jury recommendations for life. See McCaskill v. State 344 So.2d 1276, 1280 (Fla. 1977); Chambers v. State 339 So.2d 204, 207-8 (Fla. 1976); Thompson v. State, 328 So.2d 1,5 (Fla. 1976); Tedder v. State 322 So.2d 908, 910 (Fla. 1975); Taylor v. State, 294 So.2d 648, 651 (Fla. 1974). As the Eleventh Circuit noted,

> [T]he state has not cited to, nor have we found, any decisions indicating that this type of Eighth Amendment claim was being raised at that time.

Slip op. at 14. In fact, no objections to these sorts of comments were being made based on Tedder.

In light of the absence of cases in which defendants objected to Caldwell-type violations before Caldwell was issued, Caldwell must be seen as a change of law sufficient to allow raising the issue in post-convictions proceedings despite the lack of objection at trial. Under Rule 3.850, defendants are allowed to be heard in these circumstances. Witt v. State, 387 So.2d 922, 929 (Fla.), cert. denied, 449 U.S. 1067 (1980); Tafero v. State, 459 So.2d 1034, 1035 (Fla. 1984).

Rule 3.850 provides that a second 3.850 motion may be dismissed if it

> fails to allege new or different grounds for relief and the prior determination was on the merits, or, if new and different grounds are alleged, the judge finds that the failure of the movant or his attorney to assert those grounds in a prior motion constituted an abuse of the

procedure governed by these rules.

To avoid an abuse determination, the Petitioner must allege grounds which were not known and could not have been known to the movant when the first petition was filed. Christopher v. State, 489 So.2d 24 (Fla. 1986). A change in the law after the first petition was filed is sufficient to avoid abuse. Witt v. State, 465 So.2d 512 (Fla. 1985). The change in the law announced by Caldwell avoids the abuse determination.

Furthermore, the error described in Caldwell v. Mississippi is fundamental error because it affects the reliability of the death sentence. 105 S.Ct. at 2640. At its core, the Eighth Amendment requires "reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280, 305 (1976). Fundamental error such as this is cognizable in proceedings under Rule 3.850. Palmes v. Wainwright 460 So.2d 362, 365 (Fla. 1984). At the very least, since Copeland did not specifically address this issue as fundamental error, the Court should do so in Mr. Foster's case.

For these reasons, this Court should overrule Copeland's holding that a lack of objection to comments denigrating the role of a jury later procedurally bars the claim in post-conviction proceedings.

B. Copeland Is Restricted to Cases Where Objectionable Comments Do Not Occur During Sentencing and Which Were Tried After State Law on the Importance of Jury Recommendations Was Settled.

Copeland should not control Mr. Foster's claim for two additional reasons. First, the comments in Copeland occurred

during the jury selection in explaining the role of the jury. 12 F.L.W. at 179. In Mr. Foster's case, the comments were made during sentencing; indeed, some occurred in the judge's instructions to the jury. All of Mr. Foster's jurors were exposed to the objectionable statements.

Second, even if state law could have provided a basis for objection -- though plainly not a constitutional basis -- state law was not well settled at the time of Mr. Foster's trial. Tedder itself was not handed down until November, 1975; Mr. Foster's trial was held in October. To the extent that interpretations of the statute in Tedder and the cases following Tedder changed the law, that change was not the kind that provided Mr. Foster grounds for raising the issue on appeal or in post-conviction proceedings.

Under the retroactivity principles of Witt v. State, 387 So.2d 922 (Fla. 1980), this Court noted that three factors are used to determine the retroactive effects of a change in law: "(a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (c) the effect on the administration of justice of a retroactive application of the new rule." Id. (citing cases). However, these factors are not of equal weight in all circumstances. As the United States Supreme Court has consistently held, if the purpose to be served by the new rule is to enhance the reliability and accuracy of the determinations made in criminal proceedings, the change in law must be applied retroactively. See, e.g., Brown v. Louisiana,

447 U.S. 323, 328 (1980); Ivan V. v. City of New York, 407 U.S. 203, 204 (1972); Williams v. United States, 401 U.S. 646, 653 (1971). The change in state law wrought by Tedder was not so drastic or important as to warrant retroactive application. Tedder did not concern comments to the jury that affected the jury's sentence recommendation; rather, it was concerned only with the circumstances in which a judge could override a jury recommendation. Its purpose was to fulfill legislative intent in providing the judge with an oversight role in the capital sentencing process; little reliance on the recently enacted statute could have occurred. For these reasons, no decision by this Court has ever held that Tedder applies retroactively.

The Supreme Court decision in Caldwell v. Mississippi, however, has given Mr. Foster a cognizable constitutional ground on which to object. Retroactivity is mandated under the Witt analysis because Caldwell redresses unreliability in the sentencing proceedings. As the Court explained in Caldwell, its decision was necessary to eliminate the risk of unreliability interjected into capital sentencing decisions by prosecutorial argument which relieved jurors of their sense of responsibility for imposing the death sentence. When the jury has been relieved of "'the truly awesome responsibility of decreeing death for a fellow human,'" 105 S.Ct. at 2640, "there are specific reasons to fear substantial unreliability as well as bias in favor of death sentences. . . ." Id. In these circumstances, the Eighth Amendment's "'need for reliability in the determination that

death is the appropriate punishment in a specific case,'" id. (quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976)), is not met. Accordingly, Caldwell's paramount concern was to make the capital sentencing decision more reliable. For this reason, retroactive application of its rule is fully warranted.

It was thus reasonable for Mr. Foster's attorney not to object when the state law grounds for objection were unclear. It was reasonable for Mr. Foster not to have raised the issue in the direct appeal of his sentence and in his first Rule 3.850 motion, because Tedder was not applied retroactively. It was only when the Supreme Court held in Caldwell that such error violated the Eighth Amendment and threw the reliability of the sentencing in doubt that Mr. Foster's claim became timely. Copeland differs because the defendant there could have objected at least on a state law basis at trial. The defendant could have had a judicial determination of the comments denigrating the jury's role. Mr. Foster has not had such an opportunity.

II. Mr. Foster was Deprived of a Fair and Reliable Sentencing Determination, in Violation of the Eighth and Fourteenth Amendments, Because the Trial Judge Diminished the Jury's Sense of Responsibility for Imposing the Death Sentence.

The death sentence imposed upon Mr. Foster is constitutionally unreliable because the jurors were repeatedly told by the trial judge and prosecutor during the sentencing phase that the sentencing decision was not their responsibility but was instead the sole responsibility of the court. This inaccurate statement of the jury's role in a Florida capital

sentencing trial increased the likelihood that the jury would recommend death, and in turn, increased the likelihood that Mr. Foster would be sentenced to death because of the judge's duty to give great weight to the jury's sentencing recommendation. As the Supreme Court held in Caldwell v. Mississippi, the Eighth Amendment requires that a death sentence be set aside when it is imposed under these circumstances.

In Caldwell the Supreme Court reviewed the propriety of the prosecutor's closing argument informing the jury in the penalty phase of a capital trial that its decision was not final because it was subject to automatic review by the state supreme court. Id. at 2638. The Court held that such an argument constituted a "suggestion[] that the sentencing jury ... shift its sense of responsibility to an appellate court," id. at 2640, and

> it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsiblity for determining the appropriateness of the defendant's death rests elsewhere.

Id. at 2639. When a jury has been so relieved of "'the truly awesome responsibility of decreeing death for a fellow human," id. at 2640, "there are specific reasons to fear substantial unreliability as well as bias in favor of death sentences...." Id. Accordingly, the Eighth Amendment's "'need for reliability in the determination that death is the appropriate punishment in a specific case,'" id. (quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976)), is violated when a death sentence is imposed under these circumstances.

While Caldwell dealt specifically with an argument that diminished the jury's sense of responsiblity because of the availability of appellate review, it is plain that any comment to the jury "that mislead[s] 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," Darden v. Wainwright, ___U.S.___, 106 S.Ct. 2464, 2473 n.15 (1986), is equally violative of the Eighth Amendment. Id

In Adams v. Wainwright, the Eleventh Circuit found a Caldwell error because the trial judge made comments to the jury members minimizing their role in the sentencing process. "As in Caldwell, the real danger exists that the judge's statements caused Adams' jury to abdicate its 'awesome responsibility' for determining whether death was the appropriate punishment in the first instance." Adams, 804 F.2d at 1533. The Adams case is on point with the issue raised here. The reasoning in Adams is sound; even in a state like Florida -- where the jury is not solely responsible for sentencing -- Caldwell error can occur if the jury is made "to feel less responsible than it should for the sentencing decision". 804 F.2d at 1582-1533. As a settled matter of law in Florida, "[b]ecause it represent[s] the judgment of the community as to whether the death sentence is appropriate, the jury's recommendation is entitled to great weight." McCampbell v. State, 421 So.2d 1072, 1075 (Fla. 1982). It may be rejected by the trial judge only if the facts are "so clear and convincing that virtually no reasonable person could differ."

Tedder v. State, 322 So.2d at 910. Thus if the jury is not informed of the substantial deference which must be given by the judge to its sentencing recommendation, it is necessarily made "to feel less responsible than it should for the sentencing decision," Darden v. Wainwright, 106 S.Ct. at 2473 n.15, and Caldwell error can occur.

The Adams decision was followed in Mann v. Dugger, slip op. No 86-3182 (11th Cir. May 14, 1987). The majority opinion in Mann stresses that the coments of the trial judge and prosecutor failed to inform the jury that its sentence would be given great weight, and the court never corrected that misimpression. Mann, opinion of Johnson at 22. This misimpression of their role rendered the jurors' decision unreliable. Id at 23. The comments of the judge and prosecutor in Mr. Foster's case similarly informed the jury that their verdict was advisory without telling them it would be given great weight. This error throws the reliability of the jury decision for death into doubt since the jurors might well have not considered their responsibility as seriously as does the law of Florida.

On the basis of the comments by the trial judge and the prosecutor, a reasonable juror in Mr. Foster's trial could well have believed that he or she had very little responsibility for the sentence that would be imposed upon Mr. Foster. Having been repeatedly told that the jury's sentencing recommendation was advisory only, that the trial court was not obligated to give any deference to that recommendation, and that the responsibility for

sentencing was solely with the Court, such a juror was allowed to feel less responsibility for the sentencing decision than he or she should have under Florida law.

Finally, the Court "cannot say that [the efforts to minimize the jury's sense of responsibility for Mr. Foster's sentence] had no effect on the sentencing decision ...." Caldwell, 105 S.Ct. at 2646. Mr. Foster's case is not one in which the only reasonable sentence would have been death. While two statutory aggravating circumstances were present, substantial mitigating factors were present. See Petition for Writ of Habeas Corpus, No. _____, filed herewith by Mr. Foster, at 11-12. On just such a record, this Court has emphasized that "[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). This is so because

> 'the procedure to be followed by trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present....'

Id. (quoting State v. Dixon, 283 So.2d 1, 10 (Fla. 1973)). Accordingly, this Court "cannot say" that the judge's efforts to minimize the jury's sense of responsibility for Mr. Foster's sentence had no effect on the jury's sentencing recommendation or, in light of the deference that must be given to such recommendations, on the judge's sentencing decision.

CONCLUSION

For these reasons, the Court should reverse the order of the Circuit Court and remand, with directions to the court to enter an order granting Mr. Foster's motion to vacate his sentence of death.

Respectfully submitted,

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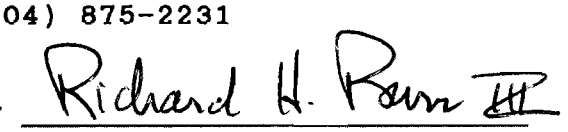
By 

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CERTIFICATE OF SERVICE

I hereby certify that a copy this brief, with the appendices attached, has been furnished by mail to Mark C. Menser, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida, 32301, this 26th day of May, 1987.

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