IN THE SUPREME COURT OF FLORIDA

CHARLES KENNETH FOSTER,

Appellant,

v. CASE NO. 70,184

STATE OF FLORIDA,

Appellee.

_____/

BRIEF OF APPELLEE

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OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

The State accepts only the chronological history of the case set forth by Mr. Foster. The advisory jury did not "sentence" Foster as stated at page (1), but rather just recommended that the Court sentence Foster to death. Also rejected is the statement that the court and prosecutor "drastically diminished the jury's sense of responsibility". The Court, in an instruction not quoted by Foster, advised the jury:

> "The fact that a determination of whether or not a majority of you recommend a sentence of life imprisonment in this case can be reached by a simple ballot should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you ballot you should carefully weigh and sift and consider the evidence and order, realizing that human life is at stake".

(Tr 650).

The trial judge and the prosecutor, without objection, also correctly advised the jury of its advisory role. The jury was not told that its role was unimportant or that any error would be cured on appeal.

No appeal was taken from these correct instructions.

Foster's successive motion for post-conviction relief was properly (summarily) denied on procedural grounds. No ruling on the merits was rendered.

SUMMARY OF ARGUMENT

Foster's claim regarding improper jury instructions is procedurally barred. The case upon which Foster relies, Caldwell v. Mississippi, 472 U.S. 320 (1985), openly recognizes that the legal principal it upholds is not new law, thus defeating Foster's argument that Caldwell changed the law so as to waive his otherwise admitted procedural bar.

ARGUMENT

THE TRIAL COURT DID NOT ERR IN SUMMARILY DENYING RELIEF

The Appellant contends that the trial court erred in summarily denying his successive motion for post-conviction relief on the grounds that the United States Supreme Court's decision in Caldwell v. Mississippi, 472 U.S. 320 (1985) fundamentally changed constitutional law, thus legitimizing his petition. Foster then proceeds to cite the cases of Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986) modified sub nom Adams v. Dugger, and Mann v. Dugger, slip opinion No. 86-3182 (11th Cir. 1987) for the proposition that the Eleventh Circuit has correctly applied Fla.R.Crim.P. 3.850 and this Court has not.

Both propositions are incorrect.

(A) THE CALDWELL DECISION DID NOT FUNDAMENTALLY CHANGE FLORIDA LAW SO AS TO EXCUSE ANY PROCEDURAL BAR

The Caldwell case upheld the time tested principal that juries could not be told to rely upon an appellate court to correct any error they might make. The Caldwell majority contended that arguments or instructions of this kind are so obviously wrong, and had been for so long, that no new principal of law was involved. (Indeed, in dissent Chief Justice Rhenquist noted the majority's reliance upon "string cites").

Mr. Foster argues that Caldwell changed the law by expanding the true holding in Caldwell in a manner similar to the Eleventh Circuit's decision in Adams v. Dugger, supra, and then declaring that this change in the law justifies his latest successive petition for post-conviction relief.

Foster's argument ignores this Court's decision in Witt v. State, 387 So.2d 922 (Fla. 1980), defining that which constitutes a "change in the law" sufficient to permit collateral attack. Witt alleged that six different appellate decisions; to wit: Hall v. State, 381 So.2d 683 (Fla. 1979); Lockett v. Ohio, 438 U.S. 586 (1978); Smith v. Estelle, 602 F.2d 694 (5th Cir. 1979); Shue v. State, 366 So.2d 387 (Fla. 1978); Brewer v. Williams, 430 U.S. 387 (1977) and Elledge v. State, 346 So.2d 998 (Fla. 1977) "changed the law" sufficiently to permit him to seek relief. In rejecting this argument, this Court held:

> "We start by noting that we are not obligated to construe our rule concerning post-conviction relief in the same manner as its federal counterpart, at least where fundamental federal constitutional rights are not involved. First, the concept of federalism clearly dictates that we retain the authority to determine which "changes of law" will be cognizable under this state's post-conviction relief machinery. Second, we know of no constitutional requirement that the scope of Rule 3.850 be fully congruent with that of the analogous federal statute".

Id., at 928.

> "We emphasize at this point that only major constitutional changes of law will be cognizable in capital cases under Rule 3.850 . . . most major constitutional changes are likely to fall within two broad categories. The first are those changes of law which place beyond the authority of the state the power to regulate certain conduct or impose certain penalties. This category is exemplified by Coker v. Georgia . . . The second are those changes of law which are of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of Stovall and Linkletter".

Id., at 929.

> "Incidental to the motion of what constitutes a law change for post-conviction relief purposes is the problem of what courts bring about such changes . . . Consequently, we hold that only this Court and the United States Supreme Court can adopt a change of law sufficient to precipitate a post-conviction challenge . . ."

Id., at 930.

Caldwell was a decision of the United States Supreme Court, but on its face it is not a "change" of constitutional law and certainly not a "major" change of law. Caldwell is of little or no relevance under Florida law because:

(1) It does not forbid correct instructions on the law.

(2) It does not encompass instructions to non-sentencers.

The Caldwell opinion carefully notes that it does not overrule or reverse California v. Ramos, 463 U.S. 992 (1983), which upheld the giving of a jury instruction on the possibility that the Governor could commute a death sentence. The reason for this was simple, Ramos correctly stated the law, while Caldwell (by overstating the power of the reviewing court to resentence the defendant) did not.

Aside from the major fact that Foster's judge did not address the sentencer, Foster's argument fails to take into account the fact that the advice of the judge (that the jury's sentencing recommendation was advisory only) was correct. Spaziano v. Florida, 468 U.S. 447 (1984). Foster, like Spaziano, has overstated the standard of Tedder v. State, 322 So.2d 908 (Fla. 1975) to equate a jury recommendation with a "verdict".[1]

The propriety of such an instruction as a correct statement of Florida law has been recognized in both Copeland v. State, 12 F.L.W. 178 (Fla. 1978) and Pope v. Wainwright, 496 So.2d 798 (Fla. 1986) , see also Funchess v. Wainwright, 788 F.2d 1443 (11th Cir. 1986). This, again, removes this case from the ambit of Caldwell.

[1] Spaziano also notes that a judge is not required to tell a jury that it has the power to do something that, in truth, it cannot do just because such an instruction could help the defendant. Thus, Foster's judge was not obliged to mislead the advisory jury.

Finally, and perhaps most damaging to Foster, is the fact that Caldwell refers to some Florida caselaw in ruling that it is improper to misinform a jury about appellate review, thus establishing the existence of "Caldwell" arguments in Florida since 1918. See Blackwell v. State, 76 Fla. 124, 79 So. 731 (1918) and Pait v. State, 112 So.2d 380 (Fla. 1959). In the federal system, "Caldwell" claims had been similarly resolved in United States v. Fiorito, 300 F.2d 424 (2nd Cir. 1962); United States v. Greenberg, 445 F.2d 1158 (2nd Cir. 1971); and Corn v. Zant, 708 F.2d 549 (11th Cir. 1983).

As we can see, the claim that it is improper for a judge or prosecutor to tell an actual sentencer "not to worry" because any error will be cured "on appeal" is an ancient one. Caldwell, as the most recent reaffirmation of this rule, is not "new law".[2]

We can also see that a "Caldwell" claim, involving misrepresentations to an actual sentencer, is totally irrelevant to cases in Florida involving truthful representations (per Spaziano) to non-sentencers.

[2]Note that in Linkletter v. Walker, 381 U.S. 618 (1965), the Supreme Court, after agreeing that Mapp v. Ohio, 367 U.S. 643 (1961) had changed the law, held that the change was not so fundamental as to justify collateral review. Evolutionary changes in the law or decisions that simply make counsel's job "easier" are not "changes" in the law. Witt, supra.

Thus, Caldwell is neither relevant to, nor a fundamental change in Florida law. Any Caldwell claim not preserved at trial or raised on appeal is thus procedurally barred and is not saved under any "change in the law" exception recognized under Witt v. State, supra.

(B) THE ELEVENTH CIRCUIT'S DECISIONS IN ADAMS AND MANN REGARDING RULE 3.850 ARE NOT BINDING ON THIS COURT

The federal Eleventh Circuit Court of Appeal is not a superior (or supervisory) court to the Florida Supreme Court, particularly on issues of state law. As noted in Witt v. State, supra, our Rule 3.850 is not, and is not required to be, an exact replica of 28 USC 2254 or 2255, despite being closely akin. For Foster to suggest that the Florida Supreme Court is required, or even obliged, to modify its interpretation of Rule 3.850 based upon the dicta of a mere federal court completely ignores the totally inferior position held by the federal courts on issues of state law.[3]

Copeland[4] correctly holds that a Caldwell claim may be procedurally barred, as, in fact, Caldwell itself does. Mr.

[3]Indeed, since there is no federal constitutional right to collateral review, the States may restrict their local rules, such as 3.850, any way they choose.

[4]Foster erroneously states that Copeland only involved comments made during jury selection. Copeland in fact also challenged instructions and arguments such as those at bar.

Foster has overlooked the historical fact that Mr. Caldwell's claim regarding the jury instructions was itself recognized as procedurally barred by the United States Supreme Court. The court only reviewed the case because Mississippi's Supreme Court waived the procedural bar.

Any effort by the Eleventh Circuit to interpret Rule 3.850 is irrelevant and assuredly not binding. The working tools for Foster's claim existed at least from the year 1918 forward. If Foster did not raise a "Caldwell" claim, it is not because it was somehow novel, but rather because no "Caldwell" error existed to be appealed.

(C) MERITS

The Circuit Court did not rule on the merits of Foster's claim. Recently, in Mann v. Dugger, ____ F.2d ____ (11th Cir. 1987) slip opinion No. 86-3182, the federal court declared that it would inject itself into any Florida case it desired if this Court failed to expressly invoke or uphold a relevant procedural bar. The federal court opines that Florida's procedural bar, upheld in Wainwright v. Sykes, 433 U.S. 72 (1977) does not bind it unless specifically enforced.

Just as in Copeland, counsel for the State will not address the alleged merits of Foster's case given the fact that the only order on appeal in this Court is an order regarding a procedural bar. Since the Circuit Court has not addressed

the merits, "review" of said merits would be premature, and could warrant additional improper federal intrusion.

CONCLUSION

Foster's 3.850 petition was properly denied as procedurally barred.

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 Mr. Richard H. Burr, III, 99 Hudson Street, 16th Floor, New York, New York 10013 and to Mr. Steven L. Seliger, 229 East Washington Street, Quincy, Florida 32351 this 11th day of June, 1987.

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