IN THE SUPREME COURT OF FLORIDA

ALVIN BERNARD FORD,
or CONNIE FORD, individually
and as next friend on
behalf of ALVIN BERNARD FORD,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 70,467

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellee was the prosecution in the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida, and Appellant was the defendant, respectively. The parties will be referred to as the State and Defendant and/or Ford.

The following symbols will be used in this brief:

"R"	Record on Appeal in this case
"T"	Trial transcript--on file in Case No. 47,059

All emphasis is supplied by the State, unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Procedural History:

On July 21, 1974, the Defendant, Alvin Bernard Ford, murdered a police officer in the course of an attempted robbery. Many years of litigation followed. Ford v. State, 374 So.2d 496 (Fla. 1979), cert. denied, 445 U.S. 972 (1980) [direct appeal]; Ford v. State, 407 So.2d 907 (Fla. 1981) [a consolidated collateral appeal and original habeas corpus action]; Ford v. Strickland, 676 F.2d 434 (11th Cir. 1982) [panel decision] and Ford v. Strickland, 696 F.2d 804 (11th Cir.), cert. denied, 464 U.S. 865 (1983) [a federal habeas corpus denial which was affirmed by a panel and ultimately the en banc Eleventh Circuit Court of Appeals]. Ford was also a named party in Brown v. Wainwright, 392 So.2d 1327 (Fla.), cert. denied, 454 U.S. 1000 (1981).

In 1984, Ford's second death warrant was signed. Just days before his scheduled execution, counsel for Ford filed a motion in the trial court requesting a judicial determination of his competency to be executed. The motion was denied. Ford then sought the same relief in this Court, and also filed an original habeas corpus petition asserting there was an erroneous jury instruction in the sentencing phase of the trial and that the death penalty is applied in Florida in an arbitrary and discriminatory manner. This Court denied the petition and held the

governor's determination of Ford's competency to be executed was adequate. Ford v. Wainwright, 451 So.2d 471 (Fla. 1984).

Shortly thereafter, a divided panel of the United States Court of Appeals for the Eleventh Circuit granted Ford a stay of execution. Ford v. Strickland, 734 F.2d 538 (11th Cir. 1984). The United States Supreme Court denied the State's motion to vacate the stay. Wainwright v. Ford, 467 U.S. 1220 (1984).

Subsequently, the Eleventh Circuit affirmed the District Court's denial of relief. Ford v. Wainwright, 752 F.2d 526 (11th Cir. 1985). The United States Supreme Court granted certiorari and reversed. The court held a condemned prisoner has an Eighth Amendment right not to be executed while insane and the existing Florida procedure was inadequate to protect that right. The case was remanded to the District Court for further proceedings to determine Ford's competency to be executed. Ford v. Wainwright, ___ U.S. ____, 91 L.Ed.2d 335 (1986). It is still pending in that court.

The Defendant's motion for post-conviction relief which is the subject of the present appeal was filed in the trial court on December 30, 1986 (R 1-9). The State responded by filing a motion to dismiss on the grounds that the motion was successive, the Defendant

was pursuing federal remedies simultaneously, the oath was defective, and the claim lacked merit. The trial court entered an order summarily denying the motion because it was an abuse of procedure, federal proceedings were pending, and the oath was defective (R 12-13).

The instant appeal followed (R 14).

Material Facts:

During voir dire, the prospective jury members were advised:

> The imposition of punishment is the function of the court rather than the function of the jury. However, because such an advisory verdict could lead to a sentence of death, your qualification to serve as a juror in this case depends upon your attitude toward rendering a verdict that could result in the death penalty . . ."

(T 120). This instruction was repeated (T 207-208).

The comments quoted by the Defendant were remarks which informed the jury its sentencing recommendation was advisory to the court (Defendant's brief, pages 3-5).

SUMMARY OF THE ARGUMENT

The Defendant's third motion for post-conviction relief was correctly denied because it raised a new claim which could have been addressed in his prior litigation. Although the case cited as authority, Caldwell v. Mississippi, 472 U.S. 320 (1985), was decided in 1985, the claim was available earlier, as this Court has held in Copeland v. Wainwright, 505 So.2d 425 (Fla. 1987).

Pursuant to Pope v. Wainwright, 496 So.2d 798 (Fla. 1986), cert. denied, ___ U.S. ___, 94 L.Ed.2d 801 (1987), the Defendant's Caldwell claim must, in the alternative, fail on its merits. The comments complained of did no more than accurately inform the jury of its role in the capital sentencing process. There was thus no violation of the principles discussed in Caldwell.

ARGUMENT

I.

THE TRIAL COURT CORRECTLY DETERMINED THAT FORD'S SUCCESSIVE POST-CONVICTION RELIEF MOTION WAS PROCEDURALLY BARRED.

The Defendant contends the trial court erred by summarily denying his motion for post-conviction relief as procedurally barred. The State maintains the trial court's ruling was correct; the filing of this, Ford's third post-conviction relief motion, twelve years after his conviction, was a clear abuse of procedure.

The Defendant's motion alleged that certain comments to the jury which correctly and accurately advised it of its role in capital sentencing under Florida law, violated the principles expressed in the decision in Caldwell v. Mississippi, 472 U.S. 320 (1985). This issue was not raised in the Defendant's prior challenges to the validity of his conviction. The claim was thus appropriately barred under Rule 3.850, Fla. R. Crim. P. (1985), which states in relevant part:

> A second or successive motion may be dismissed . . . if new and different grounds are alleged, [and] 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.

The decisions cited by the trial court, Smith v. State,

453 So.2d 388 (Fla. 1984); Songer v. State, 463 So.2d 229 (Fla. 1985); and Francois v. State, 470 So.2d 687 (Fla. 1985), are all capital cases in which this Court approved application of the procedural bar of Rule 3.850 to successive motions.

Subsequent to the trial court's entry of its order in the instant case, this Court has, in two decisions, held the procedural bar applicable to capital defendants raising a Caldwell claim in a successive motion. In Aldridge v. State, 503 So.2d 1257, 1259 (Fla. 1987), this Court held that a Caldwell claim was procedurally barred because it could have been raised on direct appeal. Likewise, in Copeland v. Wainwright, 505 So.2d 425, 427-428 (Fla. 1987), this Court held that Caldwell is not a fundamental change in the law because Florida has long recognized the importance of the jury's role in capital sentencing so that the claim was available previously.

The correctness of this Court's reasoning in Copeland is confirmed by a reading of Caldwell. In the opinion, the Supreme Court cited two Florida decisions, Pait v. State, 112 So.2d 380 (Fla. 1959), and Blackwell v. State, 79 So. 731 (Fla. 1918), to confirm its observation that even before Furman v. Georgia, 408 U.S. 238 (1972), the sort of argument made by the prosecutor in Caldwell was viewed as clearly improper by most state courts.

Caldwell, supra, 86 L.Ed.2d at 242-243, 243, n. 5. Thus, the legal basis for the claim, according to the Caldwell opinion itself, was easily known or conceivably discoverable at the time of the direct appeal[1] or certainly when the prior post-conviction state litigation occurred in 1981 and 1984. As the United States Supreme Court has stated regarding the application and/or avoidance of procedural bars to collateral claims brought by criminal defendants:

> . . . the question is not whether subsequent legal developments have made counsel's task easier, but whether, at the time of the default, the claim was available at all.

Smith v. Murray, 477 U.S. ___, 106 S.Ct. 2661, 91 L.Ed.2d 434, 446 (1986). Therefore, this Court should continue to adhere to its decisions in Aldridge and Copeland that Caldwell is not a fundamental "clear break with the past," so as to fall within the exceptions to the procedural bar of Rule 3.850. Witt v. State, 387 So.2d 922 (Fla. 1980).

Although, as the Defendant points out, in Adams v. Dugger, 804 F.2d 1526 (11th Cir. 1986), on rehearing, 816 F.2d 1493 (11th Cir. 1987), the Eleventh Circuit held Caldwell is a significant change in the law

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[1] which was not decided until 1979, well after Tedder v. State, 322 So.2d 908 (Fla. 1975) and the other decisions cited in Copeland at 505 So.2d 427.

and therefore the court refused to honor application of the procedural bar, the State maintains Adams was wrongly decided.[2] The State will be filing a petition for certiorari seeking to have Adams overturned.

Moreover, this case is unlike Adams where the allowance of the Caldwell claim was based on the fact that Adams did not have the benefit of Caldwell at the time he engaged in the initial collateral attacks on his death sentence. Caldwell v. Mississippi, 472 U.S. 320 (1985) was decided on June 11, 1985. On October 1, 1985, counsel for the Defendant filed a petition for certiorari in the United States Supreme Court. In the petition, at page 3, it was stated:

> Alvin Bernard Ford is under sentence of death in the State of Florida. The validity of his conviction and death sentence has previously been litigated, [cite omitted], and is no longer in issue. The present proceedings are concerned solely with the constitutionality of Florida's effort to execute Mr. Ford despite the substantial evidence of his present insanity.

Subsequent to the case being accepted, the Defendant filed his brief on the merits on January 28, 1986. The brief

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[2]Part of the court's reasoning was that the Caldwell claim was the type for which Florida created the 3.850 rule. Adams at 816 F.2d 1497. This assumption was incorrect, for this Court has held otherwise in Aldridge v. State, 503 So.2d 1257 (Fla. 1987), and Copeland v. Wainwright, 505 So.2d 425 (Fla. 1987).

at page 1 repeats the assertion made in the petition:

> The validity of his [Ford's] conviction and death sentence has previously been litigated, see Ford v. Strickland, 696 F.2d 804 (11th Cir.), cert. denied, 464 U.S. 865 (1983), and is not at issue in these proceedings.

Thus, unlike Adams, in this case the Defendant was still before the courts after Caldwell was decided. He expressly informed the United States Supreme Court that the validity of his judgment and sentence was not at issue. The Defendant should be taken at his word.

Therefore, the procedural default bar of Rule 3.850 was properly held by the trial court to preclude the Defendant's third motion for post-conviction relief, filed twelve years after his conviction.[3] In this regard, a quotation from Witt v. State, 387 So.2d 922, 925 (Fla. 1980), is appropriate:

> The importance of finality in any justice system, including the criminal justice system, cannot be understated. It has long been recognized that, for several reasons, litigation must, at some point, come to an end. In terms of the availability of judicial resources, cases must eventually

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[3]The State agrees that pursuant to Francois v. Klein, 431 So.2d 165 (Fla. 1983), the pendency of the federal habeas corpus proceedings did not bar the filing of the Fla. R. Crim. P. 3.850 motion, particularly since the only issue in the federal proceedings concerns not whether, but when, Ford's sentence is to be carried out; i.e., his competency to be executed. Moreover, the State does not dispute the Defendant's position that the oath was in proper form.

become final simply to allow effective appellate review of other cases. There is no evidence that subsequent collateral review is generally better than contemporaneous appellate review for ensuring that a conviction or sentence is just. Moreover, an absence of finality casts a cloud of tentativeness over the criminal justice system, benefiting neither the person convicted nor society as a whole.

II.

THE MOTION FOR POST-CONVICTION RELIEF LACKED MERIT; THE ORDER DENYING IT SHOULD BE AFFIRMED.

The argument in Point I, supra, concerning the procedural bar of Fla. R. Crim. P. 3.850, is dispositive and compels affirmance of the trial court's order. In the alternative, however, the State will address the merits of the motion, for the trial court's ruling should be affirmed if it is correct for any reason. Rita v. State, 470 So.2d 80, 83 (Fla. 1st DCA), discr. rev. denied, 480 So.2d 1296 (Fla. 1985); Stuart v. State, 360 So.2d 406 (Fla. 1978).

Citing Pope v. Wainwright, 496 So.2d 798 (Fla. 1986), cert. denied, ___ U.S. ___, 94 L.Ed.2d 801 (1987), the State responded in the trial court that the Defendant's claim was without merit (R 11). The State relies on Pope as dispositive, for in that decision this Court noted the difference in the Mississippi capital sentencing scheme at issue in Caldwell where the jury is the sentencer and Florida's where the jury's role is advisory. The court found there is "nothing erroneous about informing the jury of the limits of its sentencing responsibility, as long as the significance of its recommendation is adequately stressed." Pope, 496 So.2d at 805.

In the present case, the prosecutor's statement

that the jury was to make "a recommendation" (T 1341), and the court's instructions referring to the jury's "advisory" role (T 1311, 1312, 1345, 1349) and its "recommendation" (T 1341, 1347), were entirely accurate comments concerning the scope of the jury's duty. See Fla. Stat. §921.141(2). The advisory role of the jury has been upheld as constitutional. Proffitt v. Florida, 428 U.S. 242 (1976); Spaziano v. Florida, 468 U.S. 447 (1984). Accordingly, it is reasonable to conclude that informing the jury of its advisory function is constitutionally permissible.

Moreover, the Defendant cannot point to any instance in the record where the importance of the jury's recommendation was downplayed or minimized. The remarks here are unlike the comments found violative of Caldwell in Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), where the jurors were specifically told that the sentence would not be on their "conscience" because the judge would make the decision. By contrast, in this case, the jurors were informed of the gravity of their recommendation, as they were told their decision "could lead to a sentence of death" and "could result in the death penalty" (T 120, 207-208).

In Harich v. Wainwright, 813 F.2d 1082 (11th Cir. 1987), the court found no Caldwell violation

where the statements complained of "went no further than explaining to the jury the respective functions of the judge and jury." Harich at 813 F.2d 1100. The present case is factually closer to Harich than Adams, and accordingly, there was no Caldwell violation.

The decision in Mann v. Dugger, 817 F.2d 1471 (11th Cir. 1987), is likewise distinguishable, for there, the prosecutor several times stated to the venire panel that imposing the death penalty was "not on your shoulders." Mann at 1482. By contrast, in this case the prosecutor accurately characterized the jury's function as making "a recommendation" (T 1341). In Mulligan v. Kemp, 1 FLW Fed. C 701 (11th Cir. May 14, 1987), the court held the use of the word "recommend" in capital sentencing instructions did not render them unconstitutional under Caldwell.

Therefore, this Court's decision in Pope v. Wainwright, 496 So.2d 798 (Fla. 1986), cert. denied, ___ U.S. ___, 94 L.Ed.2d 801 (1987), correctly held that statements to the jury such as those in the instant case which merely informed them of their role in the capital sentencing process are constitutionally permissible. Accordingly, pursuant to the controlling authority of Pope, even if the procedural bar argument is rejected, the trial court's order should be affirmed.

CONCLUSION

Wherefore, based on the foregoing reasons and authorities, the State respectfully requests that the order of the lower court denying the Defendant's successive motion for post-conviction relief be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail to Craig S. Barnard, Chief Assistant Public Defender, 301 North Olive Avenue, 9th Floor, West Palm Beach, FL 33401; Richard H. Burr, III, Esquire, 99 Hudson Street, 16th Floor, New York, NY 10013; and to Laurin A. Wollan, Jr., Esquire, 1515 Hickory Avenue, Tallahassee, FL 32303, this 10th day of July, 1987.

Of Counsel