IN THE

SUPREME COURT OF FLORIDA

No. 70,467

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

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Appeal from the Summary Denial
of Motion for Post-Conviction
Relief by the Circuit Court
of the Seventeenth Judicial
Circuit for Broward County

INITIAL BRIEF FOR APPELLANT

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STATEMENT OF THE CASE AND FACTS

Procedural History:

This case is an appeal from the dismissal of a motion to vacate Mr. Ford's sentence of death, filed under authority of Florida Rule of Criminal Procedure 3.850. The motion prayed that the Circuit Court vacate Mr. Ford's sentence because his sentencing proceeding violated the Eighth Amendment principles announced in Caldwell v. Mississippi, 472 U.S. 320 (1985). Judge Cail Lee, Circuit Judge of the Seventeenth Judicial Circuit in Broward County dismissed the motion on February 17, 1987; he based his dismissal on three grounds:

1) the motion was successive, and the grounds raised in it could have been raised in earlier post-conviction motions;

2) pending, federal, collateral proceedings prohibited the motion under authority of State v. Meneses, 392 So.2d 905 (Fla. 1981); and

3) the oath verifying the motion was not that required by Rule 3.850 and Scott v. State, 464 So.2d 1171 (Fla. 1985).

Mr. Ford was convicted of first-degree murder on December 17, 1974. The following day, after a sentencing proceeding, the trial jury recommended a death sentence, and, on January 6, 1975, the judge followed the recommendation and sentenced the defendant to die. Judgment and sentence were affirmed by this Court on July 18, 1979. Ford v. State, 374 So.2d 496 (Fla. 1979). The United States Supreme Court denied a petition for certiorari on

April 14, 1980. Ford v. Florida, 445 U.S. 972 (1980).

In 1981, this Court denied relief in a petition for habeas corpus joined by the Mr. Ford and all other inmates then on death row. Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981), cert. denied 454 U.S. 1000 (1981). Also in 1981, Mr. Ford filed a 3.850 motion to vacate his conviction and sentence; the Circuit Court denied relief and this Court affirmed. Ford v. State, 407 So.2d 907 (Fla. 1981). In April, 1982, the United States District Court for the Southern District of Florida denied a petition for the writ of habeas corpus in an unreported opinion. A divided panel of the Eleventh Circuit affirmed the dismissal. Ford v. Strickland, 676 F.2d 434 (11th Cir. 1982); the opinion was vacated, and the Eleventh Circuit sitting en banc again affirmed the District Court. Ford v. Strickland, 696 F.2d 804 (11th Cir. 1982). A petition for certiorari was denied. Ford v. Strickland, 464 U.S. 865 (1983).

A sanity commission, appointed pursuant to Florida Statute chapter 922.07 (1983), examined the Mr. Ford and reported to the Governor who signed his Death Warrant in April, 1984. On May 21, 1984, the Florida Circuit Court dismissed Mr. Ford's Motion for a Hearing and Appointment of Experts for Determination of Competency to be Executed and a request for a stay of execution. The Supreme Court of Florida affirmed the dismissal and rejected an original petition for a writ of habeas corpus on May 25. Ford v. State, 451 So.2d 471 (Fla. 1984).

On May 29, 1984, the United States District Court for the

Southern District of Florida denied a petition for habeas corpus based in part upon Mr. Ford's competency to be executed. The Eleventh Circuit later affirmed the denial of the petition on January 7, 1985. Ford v. Wainwright, 752 F.2d 526 (11th Cir. 1985). The United States Supreme Court accepted certiorari, reversed and remanded the case to the United States District Court for an evidentiary hearing on Mr. Ford's competency to be executed. Ford v. Wainwright, 91 L.Ed.2d 335 (1986). That proceeding is currently pending before the United States District Court.

Prior to the Rule 3.850 proceeding from which he now appeals, Mr. Ford had not raised his claim that the jury was unconstitutionally relieved of its sense of responsibility for imposing the death sentence by a misdescription of its role.

Material Facts:

The following comments and instructions to the jury by the judge and prosecutor are the material facts relevant to the Mr. Ford's Caldwell claim.[1]

(a) Immediately after the jury was seated on the day of the sentencing proceeding, the Court explained to them what was about to happen as follows:

> "Ladies and Gentlemen of the jury, you are reconvened in the case of State of Florida vs. Alvin Bernard Ford for the purpose of deliberating and rendering to the Court an advisory sentence to be imposed in this cause.

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[1] This brief will use the following notations: T.T. - trial transcript; ROA - record on appeal.

> You are again advised, and you will be formally advised at the close of the proceedings before your deliberations, that your sentence is advisory only, and it is not binding on the Court." T.T. at 1311 (emphasis added).

(b) The Judge kept his promise and several times told the jury that they would be giving only advice or a recommendation to the judge who would actually sentence the Mr. Ford. Continuing with his explanation, the Judge stated:

> "Thereafter, the Court will charge you on the law with reference to the advisory sentence which you will render to the Court." T.T. at 1312.

(c) After the jury heard evidence and arguments, the Court stated:

> "Ladies and Gentlemen, you have heard the evidence and argument of counsel necessary to enable you to render an advisory sentence to the Court as to whether the defendant should be sentenced to death or to life imprisonment." T.T. at 1345 (emphasis added).

(d) Again, the Court emphasized that the sentence was merely advisory:

> "Your advisory sentence will have three parts." T.T. at 1345.
>
> "I will now read you the advisory sentence. We, a majority of the jury rendering an advisory sentence to the Court . . . ." T.T. at 1346.

(e) Most strikingly, the Court stated:

> "Your advisory sentence may be made by a majority of the jury. It does not have to be unanimous. The Court is not required to follow your recommendation." T.T. at 1347 (emphasis added).

(f) The Court concluded its charge to the jury in the same manner as it started the proceeding:

> "You may retire and consider your advisory verdict and sentence." T.T. at 1349.

(g) The prosecutor also pointed out to the jury that this decision was but a mere opinion on their part:

> "The Court is going to instruct you as to what you can consider in making a recommendation . . . ." T.T. at 1341.

(h) In short, the jury was clearly and unmistakably told that it had little or no responsibility in the sentencing process of the Defendant, and was assured that the Court would make the actual decision on whether the Defendant received the death sentence.

SUMMARY OF THE ARGUMENT

The Circuit Court erred in dismissing the motion on the ground that State v. Meneses, 392 So.2d 905 (Fla. 1981) prohibits consideration of the motion because a separate, collateral proceeding in federal court divests the Circuit Court of jurisdiction over the cause. This Court has refused to extend Meneses to state habeas proceedings. Francois v. Klein, 431 So.2d 165 (Fla. 1983). Similar to state habeas proceedings, the federal proceedings for Mr. Ford do not impinge on trial court jurisdiction or present the risk of conflicting rulings; to hold that Mr. Ford must wait until his federal proceedings are finished will thus cause needless delay. If Meneses nevertheless is deemed controlling, the remainder of the order is void because the trial court was without power to rule. Mr. Ford may refile the motion without prejudice after the federal habeas proceeding is done.

A proper oath under Scott v. State, 464 So.2d 1171 (Fla. 1985) verifying the motion was submitted. It was signed by the defendant's mother as next friend. This Court has accepted next friend petitions for common law habeas; as a statutory form of habeas, 3.850 motions should be treated the same way. If they are treated differently and the Defendant required to verify the motion, then the 3.850 motion would be inadequate to provide relief since Mr. Ford is incapable of signing any such oath. Rule 3.850 specifies it does not replace the writ of common law habeas and provides that Florida courts may entertain such writs when the Rule provides inadequate relief. Therefore, the motion should be considered as a petition for a writ of common law habeas. Fla.R.App.P. 9.040(c). If this Court refuses to allow Mr. Ford to pursue post-conviction relief because of his incompetence to sign an oath, the resulting unreasonable restriction of access to habeas corpus and arbitrary abrogation of state-created procedures would entitle Mr. Ford and others similarly situated to pursue their collateral claims in federal habeas corpus without the predicate exhaustion of state remedies.

Mr. Ford is not barred from raising the claim he presents herein as a successive motion, because the United States Supreme Court in Caldwell v. Mississippi, 472 U.S. 320, 86 L.Ed2d 231 (1985) announced a fundamental change in constitutional law which is a proper basis for a successive motion under rule 3.850. See Witt v. State, 387 So.2d 922 (Fla. 1980). None of the cases cited by the Circuit Court for prohibiting successive Rule 3.850

motions address the Caldwell issue or conflict with the Witt analysis. However, this Court in Copeland v. Wainwright, 505 So.2d 425 (Fla. 1987) ruled on the matter after the Circuit Court dismissed the motion. This Court held 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). Copeland, however, should not control Mr. Ford's claim, because Tedder provided no constitutional or state law theory for the claim, and Copeland was thus wrongly decided.

Mr. Ford deserves to have his sentencing reversed because 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, 86 L.Ed.2d at 240, from the jury and rendered their sentence of death unreliable.

ARGUMENT

I. MR. FORD'S CALDWELL CLAIM SHOULD NOT BE DISMISSED ON PROCEDURAL GROUNDS.

A. THE CIRCUIT COURT ERRED IN HOLDING THAT MENESES REQUIRES DISMISSAL OF THIS MOTION AND, IF MENESES WERE CONTROLLING, IN CONSIDERING OTHER REASONS TO DISMISS.

The Order Denying Post-Conviction Relief issued by the Circuit Court for the Seventeenth Judicial Circuit in Broward County based its denial, in part, on the ground that Mr. Ford has a pending collateral proceeding in the federal courts, citing State v. Meneses, 392 So.2d 905 (Fla. 1981) as authority for

denying relief on this ground. ROA at 12. In Meneses, this Court held that a circuit court was without jurisdiction to consider a motion to vacate under Rule 3.850 when the case was pending before the Florida Supreme Court on a petition for certiorari to the district court of appeal. Meneses is inapplicable to the circumstances of Mr. Ford's case for two reasons. First, Meneses does not prohibit consideration of a 3.850 motion when there is a pending collateral proceeding in federal court. Second, if Meneses were deemed to prohibit a 3.850 motion in this circumstance, then the prohibition would be jurisdictional: the portion of the order below dismissing the motion for other reasons would be void, and Mr. Ford would be able to refile the motion without prejudice once the federal proceedings were complete.

1. FEDERAL COURT CONSIDERATION IN A COLLATERAL PROCEEDING OF AN ISSUE NOT RAISED IN A MOTION TO VACATE THE SENTENCE DOES NOT DEPRIVE THE FLORIDA CIRCUIT COURT OF JURISDICTION TO HEAR SUCH A MOTION UNDER MENESES OR ANY RATIONAL RULE OF JURISDICTION OR JUDICIAL ADMINISTRATION.

Meneses' holding does not apply by its terms to collateral proceedings in federal court; rather it concerns certiorari proceedings before the Florida Supreme Court. Meneses extends the rule that a direct appeal to a district court of appeal transfers jurisdiction over the cause to the appellate court. See, e.g., Davis v. 20th Judicial Circuit, 491 So.2d 1232 (Fla. 2d DCA 1986); Huntley v. State, 267 So.2d 374 (Fla. 4th DCA 1972). However, no Florida cases extend the rule further to

federal collateral proceedings. The rationale of the Court in Meneses, as explained there and in Francois v. Klein, 431 So.2d 165 (Fla. 1983), forecloses the applicability of Meneses to a case where there is a pending federal habeas proceeding involving an issue different from that considered in the state proceeding.

Meneses was based partly on jurisdictional questions and partly on considerations of judicial efficiency. Meneses, 392 So.2d at 906-7. This Court desired to protect its power to hear a case. It also feared that allowing simultaneous consideration of a direct appeal and motion to vacate might result in conflicting rulings and wasted judicial resources.

The explanation of Meneses in Francois teaches that Meneses should not be extended to the instant case for two reasons. First, in Francois, this Court held that the filing of a habeas petition in the Florida Supreme Court does not prevent a circuit court from hearing a motion to vacate. Meneses was distinguished because it involved a review of a decision on direct appeal while the state habeas petition was a collateral attack. Francois, 431 So.2d at 166. No jurisdictional problems arise when a trial court considers a motion to vacate while the appellate court entertains a habeas petition, because habeas corpus is a proceeding conceptually distinct from the original criminal case. See Crane v. Hayes, 253 So.2d 435, 439 (Fla. 1971); Jamason v. State, 447 So.2d 892, 895 (Fla. 4th DCA 1983), affirmed 455 So.2d 380 (Fla. 1984), cert. denied 469 U.S. 1100 (1985); Green v. State, 280 So.2d 701, 702 (Fla. 4th DCA

1973). The Meneses rule, insofar as it is designed to protect the power of the appellate court to review trial court's decision, is inapplicable.

Similarly, a federal habeas petition is a proceeding separate from the original cause. Barefoot v. Estelle, 463 U.S. 880, 887 (1983). It cannot oust the trial court of jurisdiction the way an appeal to a district court of appeal can. As in the case of a petition for habeas to the Florida Supreme Court in Francois, a petition for habeas to a United States District Court presents no jurisdictional conflict over the cause, and, for this reason, Meneses does not apply to Mr. Ford's motion to vacate.

Second, Francois rejected extending the Meneses rule because the considerations of judicial economy present in Meneses were not present in Francois. The allegations in Francois' habeas petition - that his appellate counsel was ineffective - cannot be raised in a motion to vacate. Francois, 431 So.2d at 166.

> Since the two judicial attacks on petitioner's convictions and sentences of death were thus separate and distinct, there was no danger, as there was in Meneses, of conflicting and confusing rulings by different courts on the same issues . . . We do not perceive so substantial a problem of confusion as to require us to hold that the pendency of one kind of proceeding deprives the other court of jurisdiction to proceed.

Id. See also Graham v. Vann, 394 So.2d 176 (Fla. 1st DCA 1981)(different issues in federal class action habeas which was brought to challenge prison conditions did not prevent a state suit challenging other prison conditions).

Federal courts generally require exhaustion of state

remedies before accepting a federal habeas petition. See, e.g., Rose v. Lundy, 455 U.S. 509 (1982). So, it is unlikely that federal courts will be considering claims currently before the state courts. In this situation, Mr. Ford is asking the federal courts to judge him incompetent to be executed. There are no other claims presented in his pending federal habeas proceeding. His claim in the present 3.850 motion is that he was sentenced by a jury whose instructions violated the principles announced in Caldwell v. Mississippi. As in Francois, there is thus no chance that the courts will give conflicting rulings on the same issue.

There is a final, practical reason not to extend Meneses to the circumstances presented here. Mr. Ford, through his next friend, is trying to litigate his claims as they accrue. Both Florida and federal courts have expressed their impatience with the pace of capital litigation. To require Mr. Ford and those in like situations to wait until their federal proceedings are finished before bringing their newly accrued claims would extend capital litigation even further. For their part, those bringing the suit on Mr. Ford's behalf desire to have the claim heard as soon as possible. In the absence of jurisdictional problems or strong reasons of judicial administration, the extension of the Meneses rule would be bad policy because of the delays it would cause.

2. IF MENESES APPLIES TO THIS MOTION, THE PROHIBITION IS JURISDICTIONAL; THE CIRCUIT COURT ORDER, ASIDE FROM ITS DISMISSAL ON MENESES GROUNDS, IS VOID; AND THE DEFENDANT MAY REFILE THE MOTION WITHOUT PREJUDICE.

Case law is clear that state court appellate consideration of appeals deprives the circuit court of jurisdiction to hear motions on the case. See Meneses, 392 So.2d at 907; Harrell v. State, 197 So.2d 505, 506 (Fla. 1967); State ex rel. Faircloth v. District Court of Appeal, Third District, 187 So.2d 890, 891 (Fla. 1966); Davis v. Twentieth Judicial Circuit, 491 So.2d 1232 (Fla. 2d DCA 1986)(appeal of one 3.850 divests circuit court of jurisdiction to hear another); State v. Powell, 460 So.2d 421, 422 (Fla. 5th DCA 1984). Thus, an order made by a trial court on a post-conviction motion while direct appeal is pending is void and may not be reviewed. See Bryan v. State, 470 So.2d 864, 865 (Fla. 2d DCA 1985); see also Huntley v. State 267 So.2d 374 (Fla. 4th DCA 1972)(new trial order a nullity when issued while appeal pending).

In light of these cases, if the Court should hold that Meneses forecloses consideration of Mr. Ford's 3.850 motion, it should also hold that the order dismissing the motion is void insofar as it rules on matters other than the jurisdictional issue, because the Circuit Court was without power to rule on these other matters. In keeping with this rule, this Court could not review the remainder of the order. Bryan, 470 So.2d at 865. Since the order would be void, Mr. Ford would be allowed to refile the motion without prejudice once the federal proceedings

have been completed. See Meneses, 392 So.2d at 907; Matheny v. State, 429 So.2d 1341 (Fla. 2d DCA 1983).

B. THE MOTHER OF AN INCOMPETENT DEFENDANT IS NOT BARRED FROM FILING A MOTION TO VACATE HER SON'S SENTENCE BY RULE 3.850'S OATH REQUIREMENT WHEN THE MOTHER SIGNS A PROPER OATH.

The mother of Alvin Ford, Mrs. Connie Ford, signed a verification of this motion before a notary, and this verification was submitted with the motion to vacate Mr. Ford's sentence. ROA at 9. The oath sworn to by Mrs. Ford comports, in all substantial respects with the oath set forth by this Court in Scott v. State, 464 So.2d 1171, 1172 (Fla. 1985). In Scott, the Court held that the defendant's oath was defective because Scott qualified his statement with the words "to the best of his knowledge." Id. The Court feared that these words would allow the defendant to avoid a perjury charge even if a factual allegation in the motion was false. Id.; see also Gorham v. State, 494 So.2d 211, 212 (Fla. 1986). Mrs. Ford's oath contains no such qualifiers.

Nonetheless, the Circuit Court below dismissed the motion, citing Scott, apparently because Mr. Ford did not personally sign the oath. Such a ruling is not in keeping with the purpose of the verification requirement or with the interest of the State in providing a meaningful post-conviction remedy.

1. STATE LAW DOES NOT REQUIRE THAT THE DEFENDANT HIMSELF VERIFY A MOTION FOR POST-CONVICTION RELIEF.

The Circuit Court has misapprehended Scott to prohibit next friend applications under Rule 3.850. Nothing in Rule 3.850,

Scott, or any other Florida case explicitly prohibits motions to vacate made by next friends. This Court has permitted next friend petitions for the common law writ of habeas corpus. State ex rel. Deeb v. Fabisinski, 152 So. 207, 209 (Fla. 1933); see also Jamason v. State, 447 So.2d 892 (Fla. 4th DCA 1983), affirmed 455 So.2d 380 (Fla. 1984), cert. denied 469 U.S. 1100 (1985)(oral petition for habeas by attorney gave court jurisdiction). The First District Court of Appeal recently approved this practice for a petition filed by a fellow inmate. Seccia v. Wainwright, 487 So.2d 1156 (Fla. 1st DCA 1986). These cases should apply to motions to vacate under Rule 3.850 because Rule 3.850 is simply a special procedural form of the writ of habeas corpus. State v. Wooden, 246 So.2d 755, 756 (Fla. 1971); Roy v. Wainwright, 151 So.2d 825, 826-7 (Fla. 1963). For this reason "the procedure and remedy so prescribed must be such that a prisoner may be afforded every procedural benefit available under habeas corpus . . . ." Ashley v. State, 158 So.2d 530, 531 (Fla. 1963).

Moreover, no good reason exists to foreclose next friend verifications in Rule 3.850 proceedings. A next friend should be allowed to file for an incompetent prisoner so long as the next friend signs an oath which complies with the form mandated in Scott. When the signer of the verification is a next friend, the threat of perjury prosection to the signer is actually a stronger deterrent to false allegations than when the signer is a prisoner, especially when the prisoner is death-sentenced. The

next friend faces a choice between prison or freedom; the prisoner chooses between death and more jail time.

The State expresses the fear that allowing this next friend motion could be contrary to Mr. Ford's wishes. ROA at 10. However, the State makes no allegation that Mr. Ford desires to stop this proceeding. Thus, the State's fear was not at issue in this case and should not have been entertained. This potential for abuse has not stopped this Court from allowing next friend petitions for a common law writ of habeas; it should not stop it from applying the same rule to statutory post-conviction relief.

2. IF A 3.850 MOTION NEEDS TO BE VERIFIED BY A DEFENDANT PERSONALLY, THEN THIS MOTION SHOULD BE TREATED AS A PETITION FOR COMMON LAW HABEAS CORPUS.

If this Court should limit next friend applications to common law habeas petitions, then Mr. Ford's Rule 3.850 motion should be treated as a petition for habeas corpus. See Florida Rule of Appellate Procedure 9.040(c). Rule 3.850 specifically provides that the remedy of habeas corpus is available where "the remedy by motion is inadequate or ineffective to test the legality of . . . detention." Fla. R. Crim. P. 3.850; see Mitchell v. Wainwright, 155 So.2d 868, 870 (Fla. 1963); Dickens v. State, 165 So.2d 811, 814 (Fla. 2d DCA 1964). If this Court declares that the defendant himself must verify 3.850 motions, then the motion is inadequate to test the legality of Mr. Ford's sentence; he is not capable of voluntarily or knowingly signing such an oath because he is mentally ill. Mr. Ford's specific allegations in that regard are contained in Ford v. Wainwright,

91 L.Ed.2d 335 (1986) and are incorporated in this brief by reference. Mr. Ford is entitled to relief by habeas corpus since a 3.850 motion would be inadequate.

3. CHANGING STATE LAW TO REQUIRE THE DEFENDANT HIMSELF TO VERIFY ALL ATTEMPTS AT POST-CONVICTION RELIEF WOULD UNWISELY RESTRICT THE USE OF STATE COLLATERAL REMEDIES AND VIOLATE DUE PROCESS GURANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION.

To hold that Mr. Ford cannot use either Rule 3.850 or common law habeas because he is not competent to sign an oath would violate the basic principle that the writ of habeas corpus is a cornerstone of liberty, open to all who claim to be restrained illegally. See Anglin v. Mayo, 88 So.2d 918 (Fla. 1956). Such a ruling would also run afoul of the Due Process Clause of the Fourteenth Amendment to the United States Constitution which precludes the arbitrary denial of access to state-created procedural and substantive rights. See Hicks v. Oklahoma, 447 U.S. 343 (1980). While Mr. Ford has no right to a grant of post-conviction relief, he does have the right to be considered for that relief which Florida has made available to prisoners generally. The denial of any opportunity for consideration in proceeding which might give Mr. Ford his freedom or his life because he is not mentally healthy would thus, at a minimum, serve as a basis for bypassing state remedies and proceeding directly into federal habeas corpus. See generally Wilwording v. Swenson, 407 U.S. 249 (1971).

C. MR. FORD IS NOT BARRED BY SUCCESSIVE MOTION RULES FROM PRESENTING HIS CALDWELL CLAIM IN THIS MOTION.

1. CASES CITED IN THE CIRCUIT COURT ORDER DO NOT BAR CALDWELL CLAIMS SINCE CALDWELL IS BASED ON A FUNDAMENTAL CHANGE IN CONSTITUTIONAL LAW.

The Circuit Court dismissed Mr. Ford's motion partly because it held that the grounds raised by him could have been raised in earlier post-conviction proceedings and so the attempt to raise it in this motion was abusive. The Circuit Court order cited Rule 3.850; 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) as authority for its holding. None of these cases concern the particular situation here. In Francois, the Florida Supreme Court rejected using a 3.850 motion as a redetermination of a prior ruling on the merits of Francois' claim that his jury had been restricted to considering statutory mitigating factors. The Songer opinion is identical to Francois. In Smith, this Court affirmed the denial of Smith's 3.850 motion as abusive. The Court simply stated that all of the grounds Smith raised were or could have been raised previously.

Mr. Ford is now raising a claim which he could not have raised before because it is based on a change in law which occurred after his last post-conviction motion and which concerns his fundamental constitutional right to a reliable sentencing proceeding. See Caldwell v. Mississippi, 472 U.S. 320, 86 L.Ed.2d 231 (1985). 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). This Court allows successive motions when the change in law affects a fundamental right. See Witt v. State, 387 So.2d 922 (Fla.), cert. denied 449 U.S. 1067 (1980). A serious danger exists that Mr. Ford's jurors would not have sentenced him to death had they been instructed under the constitutional principles announced after Mr. Ford's prior motions for post-conviction relief; this Court should hear Mr. Ford's newly acquired claim.

Mr. Ford realizes that after the dismissal order was entered, this Court addressed the procedural issue on which the Circuit Court based its dismissal. Copeland v. Wainwright, 505 So.2d 425 (Fla. 1987). The remainder of this section discusses Copeland.

2. THE COPELAND DECISION WAS AN INCORRECT APPLICATION OF SUCCESSIVE 3.850 MOTION RULES.

Mr. Ford's claim that the judge and prosecutor rendered his death sentence unreliable by unconstitutionally relieving the jury of its burden to decide if he should be executed should not be barred by procedural default, despite this Court's recent decision in Copeland v. Wainwright, 505 So.2d 425 (Fla. 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.

Mr. Ford contends that the decision of the Eleventh Circuit in Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), modified 816 F.2d 1493 (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.

816 F.2d at 1499, n.6. The Tenth Circuit, sitting en banc, has agreed with the Eleventh Circuit's analysis that Caldwell is indeed new law. see Dutton v. Brown, 812 F.2d 593, 596 (10th Cir. 1987).

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.

816 F.2d at 1499. In fact, no objections to these sorts of comments were being made based on Tedder.

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.

Fla.R.Crim.P. 3.850. 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.

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 when the trial was had before Caldwell.

3. COPELAND DOES NOT APPLY TO CASES WHERE THE OBJECTIONABLE COMMENTS PRIMARILY OCCUR AT THE SENTENCING PROCEEDINGS AND WHICH WERE TRIED BEFORE STATE LAW ON THE IMPORTANCE OF THE JURY DECISION WAS SETTLED.

Copeland should not control Mr. Ford's claim for two additional reasons. First, the comments in Copeland by and large occurred during the jury selection in explaining the role of the jury. Copeland, 505 So.2d at 427. In Mr. Ford's case, the comments were made during sentencing; indeed, some occurred in the judge's instructions to the jury. All of Mr. Ford'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. Ford's trial. Tedder itself was not handed down until November, 1975; Mr. Ford's death sentence was imposed in January, 1975. 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. Ford 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 [citing cases]." Id. at 926. 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, 472 U.S. 320, 86 L.Ed.2d 231 (1985), however, has given Mr. Ford 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,'" 86 L.Ed.2d at 240, "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. Ford's attorney not to object when the state law grounds for objection were unclear. It was reasonable for Mr. Ford not to have raised the issue in the direct appeal of his sentence and his earlier attempts at post-conviction relief, 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. Ford'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. Ford has not had such an opportunity.

II. MR. FORD WAS DEPRIVED OF A FAIR AND RELIABLE SENTENCING DETERMINATION, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS, BECAUSE THE TRIAL JUDGE AND PROSECUTOR DIMINISHED THE JURY'S SENSE OF RESPONSIBILITY FOR IMPOSING THE DEATH SENTENCE.

The death sentence imposed upon Mr. Ford 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. Ford 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. The Court held that such an argument constituted a "suggestion that the sentencing jury . . . shift its sense of responsibility to an appellate court," Caldwell, 86 L.Ed.2d at 240, 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 239. When a jury has been so relieved of "'the truly awesome responsibility of decreeing death for a fellow human," id. at 240, "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.___, 91 L.Ed.2d 144, 158-9, n.15 (1986), is equally violative of the Eighth Amendment.

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. Accord, Frye v. Commonwealth, 345 S.E.2d 267, 284-87 (Va. 1986). 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," and Caldwell error can occur. Darden v. Wainwright, 91 L.Ed.2d 144, 159-9, n.15. See also Frye v. Commonwealth, 345 S.E.2d at 286-87.

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 comments 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. Ford's case similarly informed the jury that their verdict was advisory without telling them it would be given great weight.

On the basis of the comments by the trial judge and the prosecutor, a reasonable juror in Mr. Ford's trial could well have believed that he or she had very little responsibility for the sentence that would be imposed upon Mr. Ford. Indeed, a juror would have been unreasonable to think that their decision would be given any serious weight at all. 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. Ford's sentence] had no effect on the sentencing decision ...." Caldwell, 86 L.Ed.2d at 247. Mr. Ford's case is not one in which the only reasonable sentence would have been death. Substantial mitigating factors were present which a jury could reasonably have found to outweigh any aggravating factors. See Petition for Writ of Habeas Corpus, No. _____, filed herewith by Mr. Ford, at 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. Ford'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. Ford's motion to vacate his sentence of death.

Respectfully submitted,

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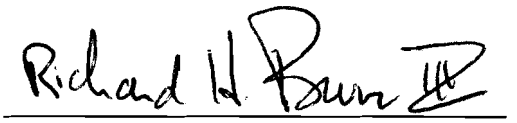
By 

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CERTIFICATE OF SERVICE

I hereby certify that a copy hereof has been furnished by mail to Joy B. Shearer, Assistant Attorney General, Department of Legal Affairs, 111 Georgia Avenue, Room 204, West Palm Beach, Florida 33401, this 1st day of July, 1987.

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OF COUNSEL