IN THE SUPREME COURT OF FLORIDA

NO. 71404

HARRY PHILLIPS,

Petitioner,

vs.

RICHARD L. DUGGER, Secretary,
Department of Corrections, State of Florida,

Respondent.

PETITION FOR EXTRAORDINARY RELIEF, FOR A WRIT OF HABEAS CORPUS, REQUEST FOR STAY OF EXECUTION, AND APPLICATION FOR STAY OF EXECUTION PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

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I. INTRODUCTION

Mr. Phillps' petition is based upon Caldwell v. Mississippi, and requests that the Court pass on certain important questions concerning the scope of review that it will provide to Caldwell issues. Some important questions presented by this petition have not been spoken to by this Court's precedents, and the en banc Eleventh Circuit is presently considering similar issues. Mr. Phillips has presented an important constitutional claim.

The Caldwell errors in this case denied an individualized sentencing determination, and rendered this sentence of death unreliable, Mr. Phillips will therefore urge the Court stay his execution, and grant habeas corpus relief.

II. JURISDICTION TO ENTERTAIN PETITION, ENTER A STAY OF EXECUTION, AND GRANT HABEAS CORPUS RELIEF

A. JURISDICTION

This is an original action under Fla. R. App. P. 9.100(a). This Court has jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const. This Court has consistently maintained an especially vigilant control over capital cases, exercising a special scope of review. See Elledge v. State, 346 So. 2d 998, 1002 (Fla. 1977); Wilson v. Wainwright, 474 So. 2d 1163, 1165 (Fla. 1985). This Court has not hesitated in exercising its inherent authority to remedy errors which undermine confidence in the fairness and correctness of capital proceedings. See, e.g., Downs v. Dugger, 12 F.L.W. 473 (Fla. 1987); Riley v. Wainwright, 12 F.L.W. 457 (Fla. 1987).

The substantial constitutional issue presented herein goes to the heart of the fundamental fairness and reliability of Mr. Phillips' capital sentence and this Court's affirmance of a sentence which we now know to be wrongful. The claim involves fundamental constitutional error, and as such can be corrected on

habeas corpus review. See Dallas v. Wainwright, 175 So. 2d 785 (Fla. 1965); Palmes v. Wainwright, 460 So. 2d 362 (Fla. 1984). The claim involves substantial changes in the law announced after the presentation of Mr. Phillips' direct appeal. See, e.g., Downs v. Dugger, supra. As shown below, the ends of justice call on the Court to grant the relief sought in this case: the errors at issue deprived Mr. Phillips of the fundamental Eighth Amendment prerequisites to any valid sentence of death -- that the sentence be reliable and that the sentence be individualized.

B. REQUEST FOR STAY OF EXECUTION

Mr. Phillips' petition includes a request that the Court stay his execution (presently scheduled for December 10, 1987). As will be shown, the issues presented are substantial and warrant a stay. This Court has not hesitated to stay executions when warranted to ensure judicious consideration of the issues presented by petitioners litigating during the pendency of a death warrant. See Riley v. Wainwright (No. 69, 563, Fla. Nov. 3, 1986); Groover v. State (No. 68,845, Fla. June 3, 1986); Copeland v. State (Nos. 69,429 and 69,482, Fla., Oct. 16, 1986); Jones v. State, (No. 67,835, Fla., Nov. 4, 1985); Bush v. State (Nos. 68,617 and 68,619, Fla., April 21, 1986); Spaziano v. State (No. 67,929, Fla., May 22, 1986); Mason v. State (No. 67,101, Fla., June 12, 1986). See also, Downs v. Dugger, 12 F.L.W. 473 (Fla. 1987) (granting stay of execution and habeas corpus relief); Kennedy v. Wainwright, 483 So. 2d 426 (Fla.), cert. denied, 107 S. Ct. 291 (1986). Cf. State v. Sireci, 502 So. 2d 1221 (Fla. 1987).

The issues Mr. Phillips presents are no less substantial than those involved in the cases cited above. He therefore respectfully urges that the Court enter an order staying his execution, and, thereafter, that the Court grant habeas corpus relief.

III. CONSTITUTIONAL BASIS FOR RELIEF

By his petition for a writ of habeas corpus, Mr. Phillips asserts that his sentence of death was obtained and affirmed during the Court's appellate review process in violation of the Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

IV. MR. PHILLIPS' CLAIM: COMMENTS BY THE COURT AND PROSECUTOR THROUGHOUT THE COURSE OF THE PROCEEDINGS RESULTING IN MR. PHILLIPS' SENTENCE OF DEATH DIMINISHED THE JURORS' SENSE OF RESPONSIBILITY FOR THE CAPITAL SENTENCING TASK THAT THEY WERE TO PERFORM, AND HAD AN EFFECT ON THE JURY, IN VIOLATION OF CALDWELL V. MISSISSIPPI AND THE EIGHTH AND FOURTEENTH AMENDMENTS

A. INTRODUCTION

Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633 (1985), did not exist at the time of Mr. Phillips' trial, nor when Mr. Phillips' appeal was presented to this Court. Nor did there exist any precedent applying Caldwell's standards to Florida's trifurcated capital sentencing system then available. The first such case was Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), reh. denied with opinion sub. nom., Adams v. Dugger, 816 F.2d 1493 (11th Cir. 1987).

Caldwell represents a "substantial change" in Eighth Amendment law, far more substantial in fact than Hitchcock v. Dugger, 107 S. Ct. 1821 (1987). This is so because where Hitchcock changed the standard of review which this Court had been applying to a class of constitutional claims, see Thompson v. Dugger, 12 F.L.W. 469 (Fla. 1987) (Hitchcock rejected "mere presentation" standard of review applied to Lockett v. Ohio issues); Downs v. Dugger, 12 F.L.W. 473 (Fla. 1987) (same), the

Caldwell decision established a class of constitutional claims which did not previously exist:

> None of the [pre-Caldwell Eighth Amendment] cases indicated that prosecutorial comments or statements by a trial judge to the jury, other than those that limited the mitigating factors that could be considered, implicated the Eighth Amendment prohibition against cruel and unusual punishment.

Adams v. Dugger, 816 F.2d at 1499. Thus, Caldwell's holding that the Eighth Amendment is violated by the "fear [of] substantial unreliability as well as bias in favor of death sentences" resulting from "state-induced suggestions that the sentencing jury may shift its sense of responsibility . . .," 105 S. Ct. at 2640, clearly represented a substantial change in the law. As such, Caldwell falls squarely within the standards enunciated in Witt v. State, 387 So. 2d 922 (Fla. 1980) and Downs v. Dugger. In this regard, it is significant that every judge of the Eleventh Circuit who has passed on a Caldwell claim has recognized the novelty of the constitutional doctrine which Caldwell established. See, e.g., Adams v. Wainwright, supra, 804 F.2d 1526 (Roney, Fay and Johnson); Mann v. Dugger, 817 F.2d 1471 (11th Cir. 1987) (Johnson, Clark, and Fay); McCorquodale v. Kemp, No. 87-8724 (11th Cir., September 20, 1987) (Godbold, Kravitch, and Hatchett).

Caldwell involves the essential Eighth Amendment requirements to the validity of any death sentence: that such a sentence be individualized (i.e., not based on factors having nothing to do with the character of the offender or circumstances of the offense), and that such a sentence be reliable. Id., 105 S. Ct. at 2645-46. The opinion established, for the first time, that comments which diminish a capital jury's sense of responsibility render the resulting death sentence unreliable and therefore constitutionally invalid. In the past, however, this Court rejected the view that Caldwell was "novel" by citing its own, state law opinions which "recognized" the "importance of the

jury's sentencing recommendation." See, e.g., Copeland v. Wainwright, 505 So. 2d 425, 427 (Fla. 1987) ("The extreme importance of the jury's sentencing recommendation under our [Florida's] capital felony sentencing law has long been recognized, having emerged from early judicial construction of the statute." [emphasis supplied]), citing, inter alia, Tedder v. State, 322 So. 2d 908 (Fla. 1975) and McCaskill v. State, 344 So. 2d 1276 (Fla. 1977). But neither Copeland nor other similar cases asked the Court to consider that

> [t]he mere fact a practice may be condemned as a matter of state law, . . . does not indicate that the same practice constitutes an Eighth Amendment violation.

Adams v. Dugger, 816 F.2d at 1496 n.2. This Court's state law cases construing the capital sentencing statute did not establish that as a matter of federal constitutional law, statements such as those at issue in Mr. Phillips' case violated the Eighth Amendment. Caldwell is a substantial change in law because it established the Eight Amendment principle.

Caldwell also substantially changed the standard of review, cf. Thompson v. Dugger, 12 F.L.W. 469 (Fla. 1987), pursuant to which such issues must be analyzed: under Caldwell, the State must show that comments such as those provided to Mr. Phillips' sentencing jury had "no effect" on their verdict. Id. at 2646. No opinion from this or any other Court had so held before Caldwell was announced. Cf. Thompson, supra (Hitchcock changed standard of review); Downs v. Dugger, supra (same).

The Eleventh Circuit, en banc, is now considering the standards which should govern federal court review of Caldwell issues. Harich v. Wainwright, 813 F.2d 1082 (11th Cir. 1987), reh. granted, ___ F.2d ___ (11th Cir. 1987) (en banc); Mann v. Dugger, 817 F.2d 1471 (11th Cir. 1987), reh. granted, ___ F.2d ___ (11th Cir. 1987) (en banc). We submit that this Court should also now entertain the issue, and definitively present its views. To this end, we have attempted to present a careful analysis of

Mr. Phillips' claim. On the basis of that analysis, and because of the significance of the issues presented, we urge that the Court grant a stay of execution, and that the Court thereafter grant habeas corpus relief.

B. FACTUAL BASIS FOR RELIEF

At all trials there are only a few occasions when jurors learn of their proper role. At voir dire, the prospective jurors are informed by counsel and, on occasion, by the judge about what is expected of them. When lawyers address the jurors at the close of the trial or a segment of the trial, they are allowed to give insights into the jurors' responsibility. Finally, the judge's instructions inform the jury of its duty. In Mr. Phillips' case, at each of those stages, the jurors heard statements from the judge and/or prosecutor which diminished their sense of responsibility for the awesome capital sentencing task that the law would call on them to perform.

Throughout the proceedings, the court and prosecutor frequently made statements about the difference between the jurors' responsibility at the guilt-innocence phase of the trial and their non-responsibility at the sentencing phase. As to guilt or innocence, they were told they were the only ones who would determine the facts ("You listen to the evidence and you determine the guilt or innocence . . ." [R. 7]). As to sentencing, however, their job should be an "easy" one -- that decision was for the judge. Pertinent examples are reproduced immediately below.

1. Voir Dire

Every prospective juror sat in the courtroom during jury selection, and every juror heard the prosecutor explain, and

the judge instruct, that their role at the penalty phase would be essentially insignificant:

> . . . In most cases that are tried, that are not capital cases, the jury consists of six people. In a capital case, the jury consists of 12 people, plus one or two alternates. In most cases, other than capital cases, when a jury comes back with a verdict of guilty or not guilty, or they can't reach a verdict -- but setting aside the can't reach a verdict thing -- assuming they bring back a guilty verdict, their job is complete.
>
> It is up to the judge who -- we do many things. We order all kinds of reports and everything, and then we sentence the Defendant based upon what the Legislature puts down as to the minimum or maximum penalty we can give for the crime of which they have been convicted.
>
> But, the jury goes home, and unless they call my office to find out what happens, usually they don't even know what I sentenced that particular Defendant to.
>
> In capital cases, it doesn't work that way. The first job that you as jurors have in a capital case is the same as in any other jury, and that is to determine the guilt or innocence of the Defendant on a charge in which he is charged with. If you should find the Defendant guilty in a capital case, and this is a capital case, then the jury goes through another phase where more testimony is given to you. And, after you have received the testimony, you're asked to recommend to me, because once you convict a person -- you'll be explained this in greater detail.
>
> There are always lesser included offenses in every case, and there are lessers. But, assuming that you were to find the Defendant guilty of first-degree murder, which is premeditated murder, there are only two possible sentences that <u>I can give</u> that Defendant, no matter what. I am bound by the law, just like you are, and that is -- one sentence <u>I could give</u> would be life imprisonment with a minimum 25 years without the possibility of parole.
>
> That would be one sentence <u>I could give</u>. The other sentence <u>I could give</u> would be death in the electric chair.

(R. 36-37) (emphasis supplied) [Judicial instructions].

The judge was not the only authority reviewing their "recommendation"; there were higher authorities reviewing the judge:

> Although I told you this is the highest trial court in the State of Florida, there are two courts that are higher. One is the District Court of Appeals that sits in Coral Gables, and the other is the Supreme Court of Florida.
>
> And, since this is a death case, it's automatically reviewed by both of those courts under all circumstances . . .

(R. 42) (emphasis supplied) [Judicial instructions]. Cf. Caldwell, 105 S. Ct. at 2639.

The prosecutor made sure that they understood themselves to have little responsibility for deciding whether Mr. Phillips would live or die:

> [JUROR]: It's necessary. But, I personally would not like to be on a jury that has something to do with sending someone to their death.
>
> [PROSECUTOR]: Okay. You wouldn't like to be on the jury. But, let's say you are on the jury.
>
> You, as a juror, as a representative of the community, has to make a recommendation to the Judge. Do you think your feelings about capital punishment would interfere with your ability to make the right recommendation to the Judge?
>
> [JUROR]: No, it wouldn't.
>
> [PROSECUTOR]: Okay. Now, do you understand that if the jury recommends, by a majority vote, life imprisonment -- seven to five, or nine to three, or even 12 to zero, His Honor is not bound by that?
>
> [JUROR]: Yes, I understand.

(R. 55) (emphasis supplied).

2. Guilt-Innocence Phase

The trial judge's instructions to the jury made very strong statements about the jurors' duty to "disregard" the consequences of their verdict (e.g., R. 1200). The jurors again were reminded of the theme which judge and prosecutor had introduced in voir dire:

> I will now inform you of the maximum and minimum possible penalties in this case. The penalty is for the Court to decide. You are not responsible for the penalty in any way

> because of your verdict. The possible results of this case are to be disregarded as you discuss your verdict. Your duty is to discuss only the question of whether the State has proved the guilt of the Defendant in accordance with these instructions.

(R. 1199-1200) (emphasis supplied) [Judicial instructions].

Then, they were reminded:

> Your duty is to determine if the Defendant is guilty or not guilty, in accord with the law. It is the Judge's job to determine what a proper sentence would be if the Defendant is guilty.

(R. 1202) (emphasis supplied) [Judicial instructions].

3. Penalty Phase

When the jury first walked into the courtroom at sentencing, the judge instructed:

> Ladies and gentlemen of the jury, you have found the Defendant guilty of first-degree murder. Punishment for this crime is either death or life imprisonment without the possibility of parole for 25 years. Final decision as to what punishment shall be imposed rests solely with me. However, the law requires that you, the jury, render to the Court an advisory sentence as to what punishment should be imposed upon the Defendant.

(R. 1227) (emphasis supplied). The judge then turned over the "advisory hearing" (R. 1239) to the attorneys. The prosecutor took the theme further. He argued that sentencing would be "easy", if only they mechanistically left their conscience out of it. For example:

> But, if you follow the law, if you listen to Judge Snyder, your job is easy. You just look over the evidence, you do whatever you have to do, you sign the verdict. You say: Judge, this is what we have to do.

(R. 1248) (Prosecutor's summation). The Court's instructions then reminded them that the sentencing decision belonged solely to the judge:

> Ladies and gentlemen of the jury, it is now your duty to advise the Court as to what punishment should be imposed upon the Defendant for his crime of first-degree murder. 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 that will now be given you by the Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

(R. 1255) (emphasis supplied). They were then reminded that their sentence was only "advisory" and merely a "recommendation" throughout the instructions. The reminder was also the last thing that they heard (R. 1268-69) before retiring to their deliberations.

C. THE LEGAL ANALYSIS ATTENDANT TO MR. PHILLIPS' CLAIM

The genius of the jury system enables us to employ lay persons unacquainted with legal processes in an essential factfinding role. Jurors are drawn from their ordinary pursuits into a venire. If selected, they are placed in an environment where every aspect of their surroundings suggests deference to the judge. The judge is the lawgiver, specially clad in a black robe, elevated by the architecture of the courtroom, and elevated also by the conventions and protocol of our normal practice. There is a natural and proper tendency for the jurors to defer to the judge.

To grasp the essence of the central issue before the court, it is useful to mentally take the place of the lay person summoned from ordinary pursuits into this extraordinary setting, isolated from fellow citizens, dwelling in a domain where the judge has control.

Jurors summoned and selected in capital cases will feel special pressure. They do not know what lies in the realm of the jury and what responsibility rests with the judge. Jurors are told that they are to receive instructions on the law from the judge. Under these circumstances, lay persons listen closely as the lawyers and the judge tell them about the jurors' job.

In a capital case, the jurors are placed "in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice . . . Given such a situation, the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role." Caldwell v. Mississippi, 105 S.Ct. 2633, 2641-42 (1985) (emphasis supplied). When we understand these factors, we can appreciate why comments and instructions such as those provided to Mr. Phillips' jurors served to diminish their sense of responsibility, and why the State cannot show that the comments at issue had "no effect" on the deliberations. Caldwell, 105 S. Ct. at 2645-46.

The comments here at issue were not isolated, but were made by judge and prosecutor at every stage of the proceedings. They were heard throughout, and they formed a common theme: the judge had the final and sole responsibility ("I sentence him"), while the "critical" role of the jury, Adams v. Wainwright, 764 F.2d 1356, 1365 (11th Cir. 1985), was substantially minimized.

The gravamen of Mr. Phillips' claim is based on the fact that the prosecutor's and the judge's comments allowed the jury to attach less significance to their sentencing verdict, and therefore enhanced the risk of an unreliable death sentence. The key to why Mr. Phillips is entitled to relief is that the focus of a Caldwell inquiry should not be on how often the jury-minimizing comments were made, nor on the egregiousness of the jury-minimizing comment at issue -- Caldwell held that any comment which minimizes the jurors' sense of responsibility violates the Eighth Amendment. As in Caldwell itself the inquiry must focus on the question of whether the comments at issue could be reasonably said to have had "no effect" on the jury's verdict. In Mr. Phillips' case, as discussed below, the jury-minimizing comments cannot be said to have had "no effect": the jurors'

deliberations were substantial (as the questions they posed to the court during their deliberations make clear); they then reached a death verdict by the slimmest of margins -- 7-5. Under such circumstances, no jury-minimizing comment can reasonably be said to have had "no effect" on their verdict. The Eleventh Circuit's approach has focused its analysis on the type and number of comments made. See Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986). But the significance of Caldwell is that the focus is placed on the "effect" that any jury-minimizing comment could have on a capital juror. The federal Circuit Court, en banc, is now reconsidering the issue. We respectfully submit that this Court should now reconsider the Copeland opinion and, as it has recently done with Hitchcock issues, provide its views on an even more important (see Introduction, supra) Eighth Amendment issue. In this regard, we present a general discussion of Caldwell's application to a Florida capital sentencing proceeding.

Under Florida's capital statute, the jury has the primary responsibility for sentencing. At the sentencing phase of a Florida capital trial, the jury plays a critical role. See Adams v. Wainwright, 764 F.2d at 1365; Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975); Brookings v. State, 495 So. 2d 135 (Fla. 1986); Garcia v. State, 492 So. 2d 360 (Fla. 1986); Wasko v. State, 505 So. 2d 1314 (Fla. 1987); Ferry v. State, 507 So. 2d 1373 (Fla. 1987); Fead v. State, No. 68,341 (Fla. September 3, 1987). Thus, any intimation that a capital sentencing judge has the sole responsibility for the imposition of sentence, or is in any way free to impose whatever sentence he or she sees fit, irrespective of the sentencing jury's own decision, is inaccurate, and is a misstatement of the law. The judge's role, after all, is not that of the "sole" or "ultimate" sentencer. Rather, it is to serve as "buffer where the jury allows emotion to override the duty of a deliberate determination" of the appropriate sentence.

Cooper v. State, 336 So. 2d 1133, 1140 (Fla. 1976); see also Adams v. Wainwright, supra, 804 F.2d at 1529. While Florida requires the sentencing judge to independently weigh the aggravating and mitigating circumstances and render sentence, the jury's recommendation, which represents the judgment of the community, is entitled to great weight. McCampbell v. State, 421 So. 2d 1072, 1075 (Fla. 1982); Adams, 804 F.2d at 1529. The jury's sentencing verdict may be overturned by the judge only if the facts are "so clear and convincing that virtually no reasonable person could differ." Tedder, 322 So. 2d at 910. Mr. Phillips' jury, however, was led to believe that its determination meant very little, as the judge was free to impose whatever sentence he wished.

In Caldwell, 105 S. Ct. 2633, the Court held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death lies elsewhere," id., 105 S. Ct. at 2639, and that therefore prosecutorial arguments which tended to diminish the role and responsibility of a capital sentencing jury violated the Eighth Amendment. Because the "view of its role in the capital sentencing procedure" imparted to the jury by the improper and misleading argument was "fundamentally incompatible with the Eighth Amendment's heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case,'" the Court vacated Caldwell's death sentence. Caldwell, 105 S. Ct. at 2645, quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

The constitutional vice condemned by the Caldwell Court is not only the substantial unreliability comments such as the ones at issue in Mr. Phillips' case inject into the capital sentencing proceeding, but also the danger of bias in favor of the death penalty which such "state-induced suggestions that the sentencing

jury may shift its sense of responsibility" creates. Id. at 2640.

A jury which is unconvinced that death is the appropriate punishment might nevertheless vote to impose death as an expression of its "extreme disapproval of the defendant's acts" if it holds the mistaken belief that its deliberate error will be corrected by the 'ultimate' sentencer, and is thus more likely to impose death regardless of the presence of circumstances calling for a lesser sentence. See Caldwell, 105 S. Ct. at 2641. Moreover, a jury "confronted with the truly awesome responsibility of decreeing death for a fellow human," McGautha v. California, 402 U.S. 183, 208 (1971), might find a diminution of its role and responsibility for sentencing attractive. Caldwell, 105 S. Ct. at 2641-42. As the Caldwell Court explained:

> In evaluating the prejudicial effect of the prosecutor's argument, we must also recognize that the argument offers jurors a view of their role which might frequently be highly attractive. A capital sentencing jury is made up of individuals placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice. They are confronted with evidence and argument on the issue of whether another should die, and they are asked to decide that issue on behalf of the community. Moreover, they are given only partial guidance as to how their judgment should be exercised, leaving them with substantial discretion. Given such a situation, the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize its role. Indeed, one could easily imagine that in a case in which the jury is divided on the proper sentence, the presence of appellate review [or judge sentencing] could effectively be used as an argument for why those jurors who are reluctant to invoke the death sentence should nevertheless give in.

Id. at 2641-42 (emphasis supplied).

The comments and instructions here went a step further -- they were not isolated, as were those in Caldwell, but were heard by the jurors at each stage of the proceedings. In Mr. Phillips'

case the Court itself made many of the statements at issue -- the error is thus even more substantial:

> [B]ecause . . . the trial judge . . . made the misleading statements in this case, . . . the jury was even more likely to have . . . have minimized its role than the jury in Caldwell.

Adams v. Wainwright, 804 F.2d at 1531.

Caldwell teaches that, given comments such as those provided by the judge and prosecutor to Mr. Phillips' capital jury, the State must demonstrate that the statements at issue had "no effect" on the jury's sentencing verdict. Id. at 2646. This is the key to Mr. Phillips' claim, for the State simply cannot carry that burden in this case. Here, as in Adams, the significance of the jury's role was minimized, and the comments at issue thus "created a danger of bias in favor of the death penalty." Id. at 1532.

Mr. Phillips' jury recommended death by the slimmest of margins: seven to five. One additional vote would have resulted in a life recommendation. It is apparent from the record in this case that Mr. Phillips' jury was indeed very close to recommending life, even closer than their razor thin majority in favor of death independently indicates. Following completion of sentencing instructions, the jury deliberated for some time, then sent two questions to the judge -- one requested information concerning Mr. Phillips' conviction record; the other requested that they be reinstructed on mitigating circumstances (See R. 1268). The jury's questions indicate that they were seriously debating whether to return a life verdict. This case, therefore, presents the very danger discussed in Caldwell: that the jury may have voted for death because of the misinformation it had received. This case also presents a classic example of a case where no Caldwell error can be deemed to have had "no effect" on the verdict -- a jury so close to voting for life, obviously

could have turned to even the most minimal jury-minimizing comment in rendering a verdict of death.

Mr. Phillips has been denied his Eighth Amendment rights. His sentence of death is simply not "reliable". The Court should enter a stay, and thereafter grant habeas corpus relief.

CONCLUSION

Because his sentence of death is unreliable under Caldwell v. Mississippi, Mr. Phillips respectfully urges that the Court enter a stay of his execution (scheduled for December 10, 1987), and issue its writ of habeas corpus directing that the unreliable sentence at issue herein be vacated.

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 first class, postage prepaid, U.S. Mail to Michael Neimand, Assistant Attorney General, Ruth Bryan Owen Rhode Building, Suite 820, 401 NW Second Avenue, Miami, Florida 33128, this 4th day of November, 1987.

Attorney