IN THE SUPREME COURT OF FLORIDA

Case No. 71404

HARRY PHILLIPS,

Petitioner,

v.

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

Respondent.

PETITIONER'S REPLY AND CONSOLIDATED MOTION FOR LEAVE TO WITHDRAW PETITION WITHOUT PREJUDICE

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I. REPLY

This is an original action pursuant to Fla. R. App. P. 9.100(a). Mr. Phillips' reply is submitted pursuant to Fla. R. App. P. 9.100(i).

The State's response essentially makes four points. Mr. Phillips will herein briefly reply to each.

First, the State relies on Card v. Dugger, 12 F.L.W. 475 (Fla. 1987), to argue that the Court should not pass on Mr. Phillips' claim. However, the Respondent's reliance on Card is misplaced. Card merely condemned an attempt to raise a Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633 (1985), claim in a second petition for habeas corpus relief where no such issue was presented in the first petition:

> [A] second petition filed after Caldwell which raises the issue for the first time constitutes an abuse of the writ. See Raulerson v. Wainwright, 753 F.2d 869 (11th Cir. 1985).

Card, 12 F.L.W. at 476. That holding is inapplicable to Mr. Phillips' case-- this is his first habeas petition.

Second, the Respondent asserts that since Caldwell was decided on June 11, 1985, while the direct appeal opinion in this case issued on August 30, 1985, Mr. Phillips' claim should not be heard. The Respondent's facile chronological argument would make sense but for the fact that the case was submitted well before Caldwell. The Appellant's brief on direct appeal was filed on August 1, 1984. The Appellee's brief was filed in October of 1984. Oral argument was conducted on February 8, 1985. At that point, the case was submitted and before the Court. Raising a new issue (Caldwell) after that point would have been improper. See Price Wise Buying Group v. Nuzum, 343 So. 2d 113, 117 (Fla. 2d DCA 1977) (Court will not consider issue not addressed in briefs or oral argument, and raised for the first time in

petition for rehearing).[1] Once the briefs were filed and the case argued, under well-established rules of appellate procedure counsel could not properly raise the claim, cf. Hargrave v. Wainwright, 804 F.2d 1182, 1184 (11th Cir. 1986) (upholding procedural default on that ground); see also Delmonico v. State, 155 So. 2d 368 (Fla. 1963). The only proper way to initially present the issue would have been by an original action, and Mr. Phillips has so presented the issue here. Moreover, since there was no objection below, the claim was not cognizable under normal appellate procedure; its presentation had to be made through an original collateral action, such as the instant. See Witt v. State, 387 So. 2d 922 (Fla. 1980).

Third, the Respondent disputes the merits of Mr. Phillips' claim by citing to four pages of the record where the prosecutor and the judge suggested to the jury that their penalty recommendation was important. However, the theme established throughout the proceedings did diminish the jurors' sense of responsibility for their sentencing task-- as Mr. Phillips' habeas petition explained. The jury in Caldwell was also told (after the prosecutor's responsibility-diminishing comments) that their role was important, and was specifically provided with accurate statements on their proper role. 105 S.Ct. at 2645 n.7; see also id. at 2650 (Rehnquist, J., dissenting). The correct statements there, as here, were insufficient to cure the error.

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1. No case holds that an appellant must follow procedures which are not authorized by the rules or pertinent caselaw in order to present a claim based on a significant change in the law, and the Respondent has cited no authority to support that contention. In fact, Respondent's inability to explain how the issue could have been raised after briefing and argument is not surprising-- there is no prescribed procedure to follow under such circumstances. Under established rules, the proper procedure is an original action-- such as this one. In this regard, the Respondent has relied on City of Coral Gables v. Puiggros, 376 So. 2d 281 (Fla. 3d DCA 1979), as its sole authority. Such reliance is misplaced: Puiggros held that it is proper for the prevailing party to rely on alternative theories during an appeal in order to support a favorable ruling below. Puiggros does not answer the question before this Court.

105 S.Ct. at 2645. Here, many of the improper comments were included in the Court's instructions, and were far more numerous than any suggestions regarding the jury's importance. Cf. Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986). The jurors were told by the prosecutor that their sentencing task would be "easy" if they put their "consciences" aside; they were told by the prosecutor and judge that their sentencing verdict was of little importance; the judge even informed them that there would be appellate review. Such comments and instructions were substantial and numerous, and could not but have driven the point home. The harm was not cured.[2]

Finally, the Respondent argues harmless error by asserting that had this jury recommended life, the court could have overruled such a recommendation. The Respondent's argument fails because it ignores the deference which this Court's express holdings attach to a jury's recommendation. See Ferry v. State, 507 So. 2d 1373 (Fla. 1987); Wasko v. State, 505 So. 2d 1314 (Fla. 1987); Fead v. State, No. 68, 341 (Fla. Sup. Ct. September 3, 1987); see also Adams v. Wainwright, supra, 804 F.2d at 1529. This jury struggled greatly during its penalty phase deliberations, returned to court with requests to be reinstructed on mitigating circumstances and on Mr. Phillips' previous record, and ultimately voted for death by the slimmest of margins-- 7-5. As Mr. Phillips' petition explained, under no view can the diminishing comments at issue in this proceeding be said to have had "no effect," Caldwell, supra on the jury's sentencing verdict-- i.e., the errors were not harmless.

Had the jurors not been misled by the improper comments, had their sense of responsibility not been diminished, they may have

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2. In this regard, it is noteworthy that inconsistent and misleading instructions are constitutionally considered more harmful than the failure to instruct altogether. Cf. Franklin v. Francis, 105 S.Ct. 1965 (1985); Sandstrom v. Montana, 442 U.S. 521 (1979).

voted for life. Had they voted for life, their verdict would have stood-- there were a number of eminently reasonable factors on which the life verdict could have been based. See Wasko, supra; Ferry, supra. Such factors included, inter alia, the testimony of Mr. Phillips' mother at sentencing, the fact that the State's case was based entirely on the testimony of jailhouse informants while the alibi defense was not fully disproven by the State, the good parole record Mr. Phillips had established prior to the events at issue in this case, etc.

Mr. Phillips' petition explained that the key to review of a Caldwell issue is whether any jury-minimizing comment could be said to have had no effect on the jury's sentencing verdict. The State simply cannot make such a showing in this case. The error is not harmless.

II. MOTION FOR LEAVE TO WITHDRAW PETITION WITHOUT PREJUDICE

The State's response also suggests that Mr. Phillips' claim is more appropriately raised under "Rule 3.850 [because] fundamental change in the law is asserted." Id. at p. 1, citing Witt v. State, 387 So. 2d 922 (Fla. 1980) cert. denied, 449 U.S. 1067 (1980), and White v. Dugger, 511 So. 2d 544 (Fla. 1987). Mr. Phillips, as he has explained, has presented his claim under Caldwell, a substantial, fundamental change in law. Witt v. State, supra.

This Court's opinions, see Downs v. Dugger, 12 F.L.W. 473 (Fla. 1987); Thompson v. Dugger, 12 F.L.W. 469 (Fla. 1987); Riley v. Wainwright, 12 F.L.W. 457 (Fla. 1987), indicate that a claim based on a substantial change in the law-- such as Mr. Phillips' instant claim-- may be brought in either a state habeas action or a Rule 3.850 proceeding. Obviously, because trial counsel did not have the Caldwell opinion, there was no objection below -- the claim was therefore not subject to the Court's normal appellate review process.

Given the stakes at issue, out of an abundance of caution, and because of counsel's desire not to waive any of Mr. Phillips' rights, undersigned counsel presented this claim in both Mr. Phillips' habeas petition, see Downs, supra, and in the Rule 3.850 motion filed below. See Witt, supra. However, if the Court determines that the claim properly should be brought pursuant to Rule 3.850 (as the Respondent states) and not on habeas (e.g., because of the absence of a trial level objection), Mr. Phillips respectfully requests that the Court permit him to withdraw the petition without prejudice and allow him to pursue the claim in the Fla. R. Crim. P. 3.850 proceedings.

WHEREFORE, we respectfully urge that the Court grant the relief requested above, and in Mr. Phillips' petition, and grant any further relief which the Court may deem just, proper and equitable.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been furnished by U.S. Mail/Hand Delivery, to Michael Neimand, Assistant Attorney General, Department of Legal Affairs, 401 NW Second Avenue, Suite 820, Miami, FL 33128, this 16th day of November, 1987.

Attorney