IN THE SUPREME COURT OF FLORIDA

CASE NO. 71404

HARRY PHILLIPS,

Petitioner,

vs.

RICHARD L. DUGGER, Secretary, Department of Corrections,

Respondent.

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW Respondent, **RICHARD L. DUGGER,** by and through undersigned counsel and states that the Petition for Writ of Habeas Corpus should be denied on the following grounds:

Petitioner raises only one issue in the instant petition and that is his death sentence was unreliable because it was secured in violation of Caldwell v. Mississippi, 472 U.S. 320 105 S.Ct. 2633, 80 L.Ed.2d 231 (1985). The State submits that this is an issue which could have or should have been raised on direct appeal or Rule 3.850 proceedings when fundamental change in the law is asserted. White v. Dugger, 511 So.2d 544 (Fla. 1987); Witt v. State, 387 So.2d 922 (Fla. 1980); cert. denied, 449 U.S. 1067 (1980). Petitioner has acknowledged this proposition since he has filed the exact claim in his Rule 3.850 Motion, which is presently pending in trial court. Therefore, the Petition should be denied.

In the event that the appeal from the Rule 3.850 is not heard at the same time this petition is heard, Respondent will reproduce its Rule 3.850 Caldwell argument herein.

CLAIM V

> SYSTEMATIC COMMENTS BY THE COURT AND PROSECUTOR THROUGHOUT THE COURSE OF THE PROCEEDINGS RESULTING IN MR. MANN'S (sic) SENTENCE OF DEATH DIMINISHED THE JUROR'S SENSE OF RESPONSIBILITY FOR THE CAPITAL SENTENCING TASK THAT THEY WERE TO PERFORM IN VIOLATION OF CALDWELL V. MISSISSIPPI AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

Defendant contends that his death sentence was unconstitutionally imposed since the proceedings were violative of Caldwell v. Mississippi, 472 U.S. 320 105 S.Ct. 2633, 86 L.Ed.2d 231 (1987). Specifically he alleges that comments by both the trial court and prosecutor diminished the juror's sentencing responsibility. Although, Defendant acknowledges that this issue was not preserved nor brought forward on direct appeal, he seeks review on the misfounded assumption that Caldwell represented a significant change in the law. In support thereof he relies on Adams v. Wainwright, 804 So.2d 1526 (11th Cir. 1986), where the court excused a state procedural default on the ground that Caldwell represented a change in the law.

The Florida Supreme Court has recently expressly and directly rejected this analysis in Card v. Dugger, 12 F.L.W. 475 (Fla. Sept. 15, 1987).

> Card argues that the prosecutor and trial judge misinformed the jury as to the weight to be accorded their sentencing verdict and diminished the jury's sense of responsibility in violation of Caldwell as requiring two Florida death sentences to be set aside because of comments by the court and the prosecutor said to have misled the jury with respect to its sentencing responsiblity. Some of the judge's statements to Card's jury were similar to those criticized in Mann v. Dugger, 817 F.2d 1471 (11th Cir. 1987), and Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), although the prosecution did tell the jury that in his experience the judge "will most probably place a great

> deal of weight on your advisory opinion." However, we do not reach the merits of this issue. Mann; Adams.
>
> In Mann and Adams the court permitted the point to be raised for the first time by petition for habeas corpus on the premise that Caldwell represented a significant change in the law. However, Card filed his first petition for habeas corpus on June 2, 1986, and Caldwell was decided by the United States Supreme Court in 1985. The Eleventh Circuit's holdings in Mann and Adams cannot constitute a change of law because only this Court or the United States Supreme Court can effect a sufficient change of law to merit a subsequent post-conviction challenge to a final conviction and sentence. Witt v. State, 387 So.2d 922 (Fla.), cert. denied, 449 U.S. 1067 (1980). Therefore, a second petition filed after Caldwell which raises this issue for the first time constitutes an abuse of the writ. See Raulerson v. Wainwright, 753 F.2d 869 (11th Cir. 1985).

Id. at 476.

Accordingly, it is clear that the failure to raise this claim on direct appeal was a waiver of said claim since said claim does not constitute fundamental error. Middleton v. State, 465 So..2d 1218, 1226 (Fla. 1985).

Even if this Caldwell is eventually decided by the United States Supreme Court to represent a significant change in the law, the Defendant should have raised the claim during his direct appeal. Delap v. State, 12 F.L.W. 532 (Fla. October 13, 1987). Defendant's trial occurred in September 1983. His appeal was pending February 9, 1984 until the decision was rendered on August 30, 1985. Caldwell was decided by the United States Supreme Court on June 11, 1985. Defendant could have raised said claim, on direct appeal, via supplemental brief, before the decision was rendered. City of Coral Gables v. Puiggros, 376 So.2d 281, 284 n.3 (Fla. 3 DCA 1979).

Assuming arguendo, that the Caldwell claim is properly before this Court then the State submits that Defendant is still not entitled to relief since Caldwell was not violated. The State Court record reflects everything Defendant represents. However, what he leaves out are those portions of the record which negates any possibility that responsibility shifting may have occurred.

After the trial judges comments quoted on page 48 and 49 of Defendant's motion, the trial judge continued:

> In this second phase of the trial, after you hear the testimony of aggravating and mitigating circumstances involved in this case, you are asked to retire and vote your recommendation as to which of the two penalties you think I should give.
>
> I will tell you this: I am not bound by your decision. If you recommend life imprisonment, I can either give life imprisonment or the death penalty. If you recommend the death penalty, I can give life imprisonment or the death penalty.
>
> However, let me say that most judges, of which I consider myself one, really take into consideration the jury's recommendation. It's only in rare cases that a judge would vary from the jury's recommendation.
>
> (Emphasis Added). (R.38)

Prior to turning the panel over to the lawyers, the trial judge once again reminded the jury of the gravity of their responsibility by reminding the potential jurors that "somebody's life [was] on the line." (R.47).

The prosecutor, during his voire dire, re-emphasized the sentencing responsibility of the jury.

> . . .And then, the Judge has to give great weight to your recommendation. He's not bound by it. And, this Judge told you he gives it very great weight, but he's still not bound by it.
>
> (R.51).

During the prosecutor's closing argument in the penalty phase, he once again impressed up the jury the seriousness of their sentencing task.

> Justice requires that his sentence reflect a fair and impartial weighing of the aggravating and mitigating factors, and nothing else; nothing else. If somebody in that room says: You know, he's a bum, I never liked him, say: Be quiet, talk to me about aggravating factors and mitigating factors, don't talk to me about anything else.
>
> And then, your recommendation, to which Judge Snyder is obligated to give great weight, will be the recommendation that speaks the truth, the recommendation that is the most appropriate, and the recommendation to which Harry Phillips has earned, and the recommendation that Harry Phillips is entitled to, and then he will walk out of this court-room knowing that he got due process of law, the system works. He got what he was entitled to. That's what you have to do.
>
> (1249-1250).

The foregoing clearly evinces that the jury was advised of its proper role in the proceeding. The jury clearly was advised of the importance of their decision and that a human life was at stake. This language clearly told the jury that their recommendation, in line with both the prosecutor and defense counsel's comments, would be given great weight.

Lastly, it can be said that any mischaracterization had no effect on Defendant's sentence. This is so because there were four valid aggravating circumstances and no mitigating circumstances present. Thereby, it making it likely that the court would reject a life recommendation as one no reasonable person can support. Since, the only reasonable sentence could be death, Defendant's case did not fall within the area of deference to the jury's recommended sentence which makes the need for reliability in that recommended sentence of critical importance. Adams v. Wainwright, 804 F.2d 1526, 1533 (11th Cir. 1987).

CONCLUSION

Based on the foregoing points and authorities, the State respectfully urges this Court to deny all relief requested.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS** was furnished by mail to **BILLY H. NOLAS**, Office of the Capital Collateral Representative, 225 West Jefferson Street, Tallahassee, Florida 32301 on this 10th day of November, 1987.

MICHAEL J. NEIMAND
Assistant Attorney General

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