OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: RICHARD L. DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, AND ROBERT A. BUTTERWORTH, ATTORNEY GENERAL OF FLORIDA, Petitioners V. AUBREY DENNIS ADAMS, JR.

CASE NO: 87-121

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PAGES: 1 - 44

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IN THE SUPREME COURT OF THE UNITED STATES

RICHARD L. DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, AND ROBERT A. BUTTERWORTH, ATTORNEY GENERAL OF FLORIDA,

Petitioners

v. No. 87-121

AUBREY DENNIS ADAMS, JR.

Washington, D.C.

Tuesday, November 1, 1988

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:00 o'clock a.m.

APPEARANCES:

MARGENE A. ROPER, ESQ., Assistant Attorney General of Florida, Daytona Beach, Florida; on behalf of the Petitioners.

RONALD J. TABAK, ESQ., New York, New York; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(11:00 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 87-121, Richard L. Dugger v. Aubrey Dennis Adams.

You may proceed whenever you're ready, Ms. Roper.

ORAL ARGUMENT OF MARGENE A. ROPER

ON BEHALF OF THE PETITIONERS

MS. ROPER: Thank you, Mr. Chief Justice, and may it please the Court:

Aubrey Dennis Adams, Jr. was convicted of the first degree strangulation murder of an eight-year old child in 1978. Eight years later, the Eleventh Circuit Court of Appeals, applying the principles enunciated by this Court in Caldwell v. Mississippi, vacated Adams' sentence of death. We are before the Court today asking it to reverse the decision of the Eleventh Circuit Court of Appeals.

Our position in the case and at issue in the case is our contention that the merits of the alleged Caldwell claim should never have been reached because of the abuse of the writ doctrine and because Adams had procedurally defaulted upon this claim in state court. I would submit to the Court that the issue of abuse of

the writ is before the Court and is fairly comprised within the question presented to the Court.

QUESTION: Where was that raised in the cert petition? Would you tell me please?

MS. ROPER: The thrust of the entire cert petition, Your Honor, I would submit is that there was no significant change of law to excuse the application of all procedural barriers, and by that we meant not only the doctrine of procedural default, but abuse of the writ as well. And we would submit that the issue is fairly subsumed because any analysis this Court takes in regard to a change in law would have necessary applicability to the doctrine of abuse of the writ.

QUESTION: Well, that's a pretty specific question. And I frankly have trouble seeing how it was raised in your cert petition.

MS. ROPER: It was raised on the basis, I would submit, of a misapplication of the court below of the principles enunciated in Reed v. Ross which does deal with a change in law which is significant enough to constitute cause for procedural default. And necessarily any such change in law analysis would have application as well under the abuse of the writ doctrine as the advisory committee note indicates that a change in the law can excuse a failure to submit an issue in a

first habeas petition as well. So, I think it could be argued in subsequent cases that this Court's rationale in this very case in both contexts. So, I think it is subsumed.

Also, I think that the Court does have jurisdiction in this case to notice plain error. And if the Court does find error in regard to there not being a change in law to excuse procedural default, I think it would apply as well across the board to the issue of abuse of the writ so that plain error could be noticed there.

The procedural history of the case reflects that Adams did not object to the trial judge's statements at the time of the actual trial in 1978 or on direct appeal in 1979. The governor signed his first death warrant on Adams in 1984, and at that point in time Adams did not raise the instant claim in his state court attack collaterally on his judgment and sentence and he did not raise it in his first habeas petition.

The issue was first raised for the first time in 1986 upon the signing of a second death warrant, and it was at that time presented to state and federal courts for the first time.

According to the principles enunciated in Reed v. Ross, I think it's clear that where the

constitutional basis of a claim is not available to an attorney, then there is cause for his failure to not raise the claim in accordance with state procedural rules. And there is a concomitant advisory committee note in the area of habeas corpus litigation to Rule 9(b) which indicates that a change in law will also excuse the failure to present an issue in the first habeas petition.

We -- we would submit to the Court, however, that where there are tools available to construct a claim, that a court should not find that there is cause for a procedural default. Our position is that at the time of trial and on direct appeal there were necessary building blocks by which Aubrey Dennis Adams, Jr. could have fashioned and presented this claim to the state courts. And those building blocks grew as time progressed until there was quite a monumental stack of them at the time of Adams' first habeas petition in 1984.

We have chronicled the progression of the law in this area, and I don't want to dwell in length at it. But I think a few comments are in order.

I would first note that if the comments are misleading, Adams needn't have awaited this Court's decision in Caldwell to set a principle that misleading comments should be objected to or are erroneous. If it

was misleading, then at that point in time, Adams had a basis to frame an objection at trial.

Moreover, if it can be argued or held that the comments were misleading on the basis of the Florida Supreme Court's decision in Tedder v. State, which indicates that a jury's recommendations should be given great weight by the trial judge, then at the time of trial Adams again had a basis to raise this objection because the Tedder decision was in existence at that time.

I think it's clear that at the time of trial any competent litigator would have objected to statements which indicated that the jury needn't be considered -- needn't consider or ruminate over the consequences of their verdict. I think that proposition would be clear to any attorney.

QUESTION: Ms. Roper, do you think it's clear at the time of trial that if the objection had been made, the trial should -- the trial court should have sustained the objection?

MS. ROPER: Under Florida case law, that would be clear at the time of trial, yes, Your Honor.

QUESTION: So, this is a case of clear error by the trial judge, in other words, in your view.

MS. ROPER: I don't believe that it's a case

of error at all on the part of the trial judge. I'm saying that if error could arguably be found, then there was a basis for bringing that error to the attention of the court. My contention is that there was no error in the trial judge's statements in the first instance.

QUESTION: So, it would have been a futile objection that would have been made then.

MS. ROPER: Well, I don't think --

QUESTION: I mean, you're saying the building blocks were there. Were there -- were there enough building blocks to advise the trial judge as to how to rule on such an objection?

MS. ROPER: Yes.

QUESTION: But then what should the trial judge have done if an objection had been made in 1978?

MS. ROPER: I think the trial judge would have declared a mistrial as far as sentencing goes and had a resentencing if error was established, but our position is --

QUESTION: Well, we know what the facts are, but what is your view? At that -- at that time would you say the trial judge should have sustained the objection?

MS. ROPER: Not under the circumstances of this case, no, but the basis for the objection was there

and that's our position.

QUESTION: What you're saying is that the basis for a true Caldwell claim was there, but this did not qualify under Caldwell.

MS. ROPER: Yes, that's exactly, Your Honor -- that's exactly what I'm saying.

QUESTION: So, then your position on procedural default really depends on the merits of the Caldwell claim.

MS. ROPER: There is a interplay of concepts in this case, and I --

QUESTION: So, bottom line you don't think there's a valid Caldwell claim here anyway. So, we really don't have to go through all this procedural --

MS. ROPER: That's correct. And I'm not going to dwell at length on it.

This Court has noted the strong state law basis for it, and from a defendant's perspective, it doesn't matter to him whether his reversal is gained in a state or a federal court on state law grounds or federal grounds.

So, I think that the fact that if there was a state law basis provides a basis for raising the claim in any context and there's no less potential for sandbagging by failing to raise a state law ground. You

can still hold that in abeyance, and the real issue is still delay just as in the case where a federal ground was not submitted to a state court. So, I think that the state law basis is also a compelling consideration.

But, more importantly, I think there was an Eighth Amendment basis, a clear Eighth Amendment basis, for this claim at the time of trial and even progressively more so at the time of his habeas petition. At the time of the habeas petition, in fact, Justice Stevens had indicated in a concurring opinion in Maggio the danger of a prosecutor advising a jury that an appellate court could correct any error.

And at that point in time the decision in California v. Ramos was out and all the other prior Eighth Amendment jurisprudence of this Court. And as I pointed out in the brief, Caldwell himself was able to raise this claim based upon Ramos and other prior cases of this Court.

Another issue in the case is whether the Florida Supreme Court in regard to the procedural default actually found a third layer of default. I -- I think an examination of their opinion reflects that no other construction can be given to it. The language in the opinion indicated that further, we find the presentation of these claims an abuse of the

post-conviction procedure. Rule 3.850 was then set out and it was described as barring new claims as well as successive claims. And the Florida Supreme Court then concluded and held that the new claims were barred as an abuse of procedure as well as by case law. And the new Rule 3.850 is a -- a codification of prior existing case law barring such new claims.

And I would also submit to the Court that contrary to the Respondent's position, Florida has regularly and consistently applied its procedural bars in the context of Caldwell claims being raised on collateral attack. The court has discussed in its opinions the inapplicability of Caldwell only to demonstrate that no relief can be granted in this area on a 3.850, and it cannot be entertained because Caldwell is not a significant change of law, which is one of the criteria under our post-conviction relief procedure.

Caldwell was discussed in the case of Garcia -- excuse me -- only to demonstrate the absence of error. In that case it was contended by the Defendant that the trial judge gave too much weight to the jury's advisory sentence. So, in conclusion, the Florida Supreme Court has regularly and consistently applied its procedural bar.

Our contention is that even if the merits of the claim could be reached, Adams is still entitled to no relief because the claim is an adequate description of Florida sentencing procedure.

During voir dire in this case, each time new prospective jurors were seated, the trial judge explained our capital sentencing system to them. He advised them of the advisory nature of their sentencing recommendation and the fact that he could disregard it and sentence them to either life or death. In elaborating upon this, he indicated verbally to the jurors, distilled to its essence, the ultimate decision is on my conscience and rests upon my shoulders, not the jury's.

During voir dire, however, he also instructed the jury as to the finding and the weighing of aggravating circumstances.

Proceeding to the penalty phase, the jury was similarly again instructed under our standard instruction -- excuse me -- that their recommendation is advisory in the final -- the sole responsibility for the final determination rests upon the trial judge. At that point in time, however, they were also instructed that they must find sufficient aggravating circumstances not outweighed by the mitigating circumstances and that

their verdict should be based on the evidence.

More than that and most important to this case also is the fact that the trial judge drove home to them the importance and the gravity of their undertaking at that particular time in the proceeding.

He stated to them that they should not act hastily or without due regard to the gravity of these proceedings, and he instructed them to carefully weigh, sift and consider the evidence, and all of it, realizing that human life is at stake. I don't think the jury could have any notion at all but their -- their recommendation may have the possibility of sealing Adams' fate. I think that that was driven home to them.

Moreover, the prosecutor admonished the jurors to be fair to the defendant and the people of the State of Florida, and that any way they decide will satisfy the people of the State of Florida.

These statements were an accurate description of Florida law. Under our death penalty statute, Florida statutes 921.141, a jury is directed to return an advisory recommendation, but the statute proceeds to state beyond that notwithstanding the recommendation, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death. Under our statute then, the

judge is the sentencer and not the jury. What the judge looks for from the jury is essentially in the nature of guidance alone.

And I think that his independent nature as the sentencer is reflected most aptly in a scenario where if the jury recommends death and the trial judge, applying the statutory criteria, cannot find an aggravating circumstance, he's constrained to impose a sentence of life. I think that reflects that he is, indeed, an independent and ultimate sentencer. Excuse me.

I would further submit to the Court that these statements are not made inaccurate by the Florida Supreme Court decision in Tedder v. State. The Florida Supreme Court has recently indicated in the case of Combs v. State that in so holding in Tedder, it never meant to alter the clear statutory directive that the jury's recommendation is advisory only.

And they had, in fact, promulgated the standard jury instructions in question in this case after the Tedder decision. So, at best Tedder is either an appellate standard or simply an admonition to trial judges to carefully consider the jury's recommendation prior to their own independent findings.

I think the case would fall squarely within the ambit of California v. Ramos which does not prohibit

the jury from being given accurate instructions rather than within the ambit of Caldwell v. Mississippi. And I think the distinguishing factor is that in Caldwell v. Mississippi, this Court found the instructions to be misleading. There is no danger of that in this case.

I think the State of Florida has a valid penalogical interest in having such information imparted to the jury because the state does not want its citizens' faith and the integrity of judicial and criminal proceedings destroyed by having them later find out, after they had served on a jury, that indeed they weren't true sentencers at all, they were simply advisors. And I think that that would go a long way toward the people of our state losing faith in the criminal justice system.

And it has to be remembered also that the community voice that participates in the trial is also the community voice that's heard in the legislature as well when the legislature enacts and implements a death penalty statute. So, we can't assume that the jury is ignorant of our statutory scheme in the first instance, and I don't think that we should be required to mislead them in any way as to their role in sentencing when they are, in fact, not sentencers.

I think another valid state penalogical

interest in having the jury learn or understand their role in our sentencing procedure is that it actually enhances the reliability of their deliberations because they understand their true role. And not only that, but I think the questioning and such knowledge, even if it's imparted to them at the penalty phase, but most particularly during voir dire, would go toward including within a jury those -- those jurors who may be death-scrupled to the degree that they could not impose a sentence of death if theirs was the final verdict.

If they realized that their sentence -- or advisory sentence was simply a recommendation, then they could impose a sentence of death and would be included on the jury. That's another valid state interest and an interest that really accrues to the benefit of the defendant is the goal of achieving a cross section of the community and having life-prone, as well as jurors who are more retributive, make a final determination as to a defendant's fate.

And I don't think such an instruction would cause any sort of bias under the four-prong bias analysis of this Court in the Caldwell decision. There is no danger that the jury might not understand the limited nature of appellate review because, in fact, the judge is the ultimate sentencer. The jury can't send a

message of disapproval to the community or a higher authority because of the fact that the jury is not in the first place a recognized sentencer. And even if it had a desire to send such a message of disapproval, that message can't get past the trial judge because he is the sentencer and he makes his own independent determination.

The judge in Florida can overrule a life sentence, not only a death sentence. So, there would be no urge on the part of the jury at all to delegate its duty by returning a death sentence because it could delegate its duty by returning a life sentence as well and there would, further, be no reasons for a juror who was reluctant to vote for death in a deadlock situation to capitulate to demands because of this same fact.

I think the real issue in this case -- and it has been made clear in subsequent Eleventh Circuit opinions -- is the contention that it is the voir dire statements alone which are erroneous. The Eleventh Circuit in Harich v. Wainwright has indicated that there is no Caldwell claim presented at all in regard to the penalty phase instructions that the jury can be told of the advisory nature of its sentencing recommendations. So, that would not implicate our sentencing -- or penalty phase instructions. And other cases in the Eleventh Circuit have indicated that the error they

perceive in this case is the trial judge's statements at voir dire.

Now, I would submit to the Court that if it is correct, which the lower court is even now in agreement with, state and federal, that the judge is the ultimate sentencer, then as a matter of logic, the decision is on his conscience and it is on his shoulders, and that even these voir dire statements were a correct statement of Florida law as a matter of logic.

It's our further position that if these statements could be seen to fit within the prohibition enunciated in Caldwell by this Court, that any such error would be harmless. And for the same reasons such error would be harmless, prejudice was not demonstrated by Adams below to overcome a procedural default.

In the first place in this case, voir dire took place on October 12 through October 16. The penalty phase did not occur until October 27. Thus, there was a -- a lapse between voir dire and sentencing of almost 11 days. I think this Court noted in its recent case of Darden v. Wainwright in a footnote that the fact that these comments occurred during the guilt-innocent stage lessened any chance at all that they had an effect on sentencing. In this case --

QUESTION: Ms. Roper, isn't -- isn't it true

that the Florida Supreme Court has -- has reversed a trial judge who doesn't accept the jury's recommendation?

MS. ROPER: Yes.

QUESTION: And does so with some regularity.

MS. ROPER: Yes, it does.

QUESTION: So, it's -- it's not just a recommendation then. I mean, that must mean --

MS. ROPER: I --

QUESTION: That must mean that it's not just a recommendation, mustn't it?

MS. ROPER: I don't think that's correct, Your Honor. I think when the Florida Supreme Court reverses a jury override, it's reversing the trial judge. The court will find that aggravating circumstances have been improperly found and that there are obvious, very obvious, mitigating circumstances that should have been found. And it will make a statutory analysis. And I submit that any error in a jury override situation is error on the part of the trial judge.

QUESTION: Well, what about -- what about Ferry v. State? The statement of the Florida Supreme Court is quoted in -- in Respondent's brief where the Florida Supreme Court in reversing the trial judge's sentence which ignored the recommendation said under the state's theory, there would be little or no need for a

jury's advisory recommendation. This is not the law. Sub judice, the jury's recommendation of life was reasonably based on valid mitigating factors. The fact that reasonable could differ renders the override improper.

That sounds to me like more than a recommendation. It sounds to me he has to accept it if a reasonable person could -- could make that recommendation.

MS. ROPER: Again, that's extraneous appellate language, and as I said before, if Tedder represents anything at all, it's either an admonition to trial judges or an appellate standard. It's not a direction to trial judges in the least. They're compelled under our statute to independently find whether death is a appropriate sentence.

The Ferry case I think stands out because Ferry walked into a grocery store. He threw gasoline on numbers of people and set them on fire. I think mental illness has always been considered by all courts to be an extremely strong mitigating factor. And the Florida Supreme Court stated in Ferry that he was extremely mental ill, and I -- mentally ill, and I think that that was the overriding consideration in that case, that it was just so obvious, although they may chastise the

judge, it should have been obvious to him, aside from what the jury recommended.

I would also submit to the Court that the error in this case is harmless, and prejudice hasn't been demonstrated for the further reason that the subsequent instructions to the jury drove home to them quite clearly the gravity of their undertaking, particularly the later statement by the trial judge to carefully weigh, sift and consider the evidence, and all of it, considering that human life is at stake. So, I think that aside from any voir dire statements, the jury certainly had driven home to them the gravity of their undertaking.

Also, Adams has not demonstrated and cannot demonstrate that he's innocent of any aggravating factor in this case. The murder under Florida law is clearly heinous, atrocious and cruel. It was committed during an attempted rape by Adams' own confession and during a kidnapping and to avoid lawful arrest, as his confession also indicated, that the child was screaming, and he put his hand over her mouth to silence her.

The lower court found it compelling that there was a balance of aggravating and mitigating factors, but I would submit to the Court that that's not the case at all. This jury deliberated for only one-half hour

before recommending that Adams be sentenced to death. I think the heinousness of this crime just leaps out from -- from the sentencing order aside from any mere numerical balance. And I would submit that that's all it is is a numerical balance.

QUESTION: Ms. -- Ms. Roper, I hate to come back to it, but I -- I -- I've been thinking about it some more and I still don't know what you say the -- what is the Florida Supreme Court's -- what was the Florida Supreme Court saying in Ferry when it said the fact that reasonable people could differ renders the override of the jury's recommendation improper? What -- and that's a recent case. That's an 1987 case.

MS. ROPER: I think what the Florida Supreme Court is saying is -- again, the answer I have for it is that it's an appellate standard. It's the same sort of standard that was set forth in Tedder.

I think you have to consider the Florida Supreme Court's other statements, especially in Combs, that they didn't mean to detract from the clear statutory directive. I think when the Florida Supreme Court finds error, it's judicial error.

And I don't think anything bespeaks of this more than the actual Tedder decision itself. In Tedder, the court later went on to indicate that two of the

aggravating factors were invalid in Tedder and that they would have been constrained to reverse under a proportionality analysis in any event.

So, I think the Florida Supreme Court basically determines whether it is the trial judge who has erred or not and the other language is extraneous. It's a appellate standard or an admonition to the judges to -- to more carefully consider the guidance offered by the jury, but that doesn't mean that the jury's recommendation, as this Court recognized in Spaziano, rises to the level of a judgment or makes the jury a presumptive sentencer.

(Inaudible).

QUESTION: Thank you, Ms. Roper.

We'll hear now from you, Mr. Tabak -- Tabak.

ORAL ARGUMENT OF RONALD J. TABAK

ON BEHALF OF THE RESPONDENT

MR. TABAK: Thank you, Mr. Chief Justice, and may it please the Court:

I think that one preliminary matter that has really been overlooked in the State's argument is when they talk about a procedural bar here, is there simply was no independent or adequate State ground in this case.

As unanimously held by the Eleventh Circuit, based on its special familiarity with Florida

jurisprudence, Florida's rule is not one of strict forfeiture of claims not raised at trial or on appeal. There is a provision for new constitutional holdings of either this Court or the Florida Supreme Court and for fundamental constitutional error to be considered even if not raised at trial or on direct appeal.

The Eleventh Circuit's opinion gives examples of that, this Court's holding in Enmund, a situation where the state had withheld evidence helpful to the defendant.

And this exception also applies here to allow consideration of Mr. Adams' Caldwell claim. The problem is that the Florida Supreme Court, because of its erroneous view of the merits, has not recognized that the exception applies.

That this is, in fact, the reason why they have not applied the exception here is illustrated by the Florida Supreme Court's treatment of Lockett claims before and after this Court's decision last year in Hitchcock. Before Hitchcock, the Florida Supreme Court applied the procedural bar to stop claims of people whose trials had occurred after 1978 saying you had -- if this claim had any basis, which we don't think it does, but if it did have any merit, you had basis under our state law decision in a case called Songer and

under Lockett to make this claim. But we're going to not consider the claim. And they so held in a case called Copeland, 505 So.2d 425(1987).

Then shortly after that this Court unanimously informed the Florida Supreme Court and the rest of the world in the Hitchcock decision that the Florida Supreme Court's view of the merits of that claim were wrong, and that in fact there had been a constitutional violation under Hitchcock.

Then what did the Florida Supreme Court do after that? Very interesting. They have now gone and considered the merits of all Hitchcock claims, including ones for trials after 1978. In fact, the Combs case which Ms. Roper cited for its discussion of the Caldwell issue, is an example of a trial that occurred after 1978 in which the Florida Supreme Court, following this Court's decision in Hitchcock, said, Hitchcock is a sufficient change in law. Therefore, we will now consider the merits and rule in favor of your Lockett claim.

QUESTION: Mr. Tabak, do you think the doctrine of the Caldwell case should be applied to trials which took place before it was announced?

MR. TABAK: I do believe so, but I also believe --

QUESTION: Why? Why is that?

MR. TABAK: First I should note that is not a question before the Court. It has never been raised below. I don't think the Court should decide that now.

But the reason why, if the Court somehow were to decide that, is that it goes to the heart of the decision making process and is a misleading of the decision maker which goes to the core of the Court's Eighth Amendment Jurisprudence.

QUESTION: And why does the -- why should that make it retroactive?

MR. TABAK: It should make it retroactive the same way that Lockett has been applied retroactively and all of the Court's other Eighth Amendment cases have been applied retroactively because when life is at stake and we know before the person is put to death that a core principle under the Eighth Amendment, namely, the reliability of the jury's verdict, has been undermined by a judge who has deliberately undermined the jury's sense of responsibility by repeatedly telling them that their decision would have no weight, that it would not be their responsibility, that it was not on their conscience, that when that which goes to the heart of what this Court --

QUESTION: Is there any capital -- capital

punishment decision from this Court involving the Eighth Amendment that it shouldn't be applied retroactively under that standard?

MR. TABAK: That it should not be --

QUESTION: Yes.

MR. TABAK: -- applied retroactively? I am not aware of it, and --

QUESTION: So, all -- all capital punishment decisions turning on the Eighth Amendment based on that are to be applied retroactively?

MR. TABAK: I don't think that I am prepared, since we did not brief the subject, nor did the state, nor was it raised below, nor was it decided below -- am prepared to make such a sweeping pronouncement.

What I am prepared to say is that if, contrary to the usual practice of this Court, it were somehow to leap out and decide that issue in this case, that in this case, under the circumstances here, it should be applied retroactively. But I don't think that's necessary to a decision of this case just as the other side stated in their brief.

I also think that, to finish my analysis, that the real problem here, as is pointed out by what they have done in the Hitchcock situation is that the Florida Supreme Court does not recognize the applicability of

Caldwell to this case. They criticize the decision of the Eleventh Circuit in Combs. If they do realize, based on a decision today by this Court on the merits, that as they were wrong in Hitchcock, they are also wrong here, then to be consistent with what they have done in the Hitchcock situation, they would also have to apply their new law exception here.

In fact, they have pretty much hinted as much in a case called Card v. State. They said, well, we're not going to consider your Caldwell claim because the Eleventh Circuit's decision in Adams and in Mann is not come under our new law exception because only decisions of the United States Supreme Court or the Florida Supreme Court would come under that exception.

Well, that all but says that if this Court now reaches the merits and tells them again that they were wrong, as I believe they clearly are wrong, on the merits, then they will apply their exception and they will consider such claims. And it would be anomalous were only Mr. Adams not to get the benefit of the holding established in his case.

Thus, as the Eleventh Circuit concluded, the Florida Supreme Court is either relying on its mistaken view of the federal constitutional law or is inconsistently applying its procedural bar, and either

way, there is no independent and adequate state ground in this case.

Now, I'd also like to point out that, as was suggested in Justice O'Connor's questioning, there is no abuse of the writ issue presented in the cert petition and, in fact, even the amicus curiae who favored the State of Florida in this case, when they purported to rearticulate the two issues in this case, said that the two issues were the merits of the Caldwell claim and procedural default. So, even they did not perceive what isn't there.

Now, turning back to the merits, as you may well know from reading the brief, the judge in this case instructed the jury no less than 11 times that the sentencing decision was in no way whatsoever the jury's responsibility, did not fall on its shoulders, and that the imposition of the death sentence would not be on its conscience, but solely on his. He said I don't want you to feel that you determine whether he lives or dies because you don't. And he repeatedly said that I can disregard your recommendation.

QUESTION: I -- I take it your position is going to be that's a violation of state law or it misstates the state law?

MR. TABAK: It misstates state law.

QUESTION: Why is it that the defendant should not be held to have objected? What difference does it make that the violation depends on state law or that it's an Eighth Amendment violation?

MR. TABAK: I think that's so for one important reason, that the objection, in order to be pertinent to the cause and prejudice standard, must be -- with respect to this claim, the claim that we are now raising here is not a state law objection.

QUESTION: But why should that be that because the -- the purposes of -- of the two rules are -- are the same? I -- I assume if the state rule is as you say it is, it is so that the jury is aware of its responsibility and of its role in the process.

MR. TABAK: Well --

QUESTION: And it's exactly the Eighth Amendment question.

MR. TABAK: Justice --

QUESTION: And the defendant did not object.

MR. TABAK: Justice Kennedy, the State of Florida has never recognized even to this day when it gets cases like Combs that what has occurred in cases like Adams is a state law violation --

QUESTION: Well, we'll --

MR. TABAK: -- and nobody --

QUESTION: We'll get that -- to that in a minute. But on the premise that this was a -- a misstatement, an egregious misstatement I think you'll probably tell us, of Florida law, why is it, as a matter of policy, that we should suddenly allow an Eighth Amendment claim when the state law violation, the state law error, was not objected to and serves exactly the same purposes?

MR. TABAK: The fact of the matter is I would state, Mr. Justice Kennedy, is that the state law was not clearly applied and has not been clearly applied to the undermining of a jury's sense of responsibility under the current capital sentencing scheme. The Florida Supreme Court does not -- the -- the -- the key part that was a misstatement was a misstatement of what the jury's role is. The Florida Supreme Court, under its current death penalty system, has never recognized that to undermine the jury's sense of responsibility under the current death penalty system in Florida violates Florida law. If they did realize that, they would have ruled in favor of these claims in situations like Combs where they're not applying a procedural bar.

The fact also is that nobody in Florida perceived this claim, no one objected on the basis of the state law claim, and it is important that when the

Eighth Amendment provides an independent basis, regardless of whether under Florida law there is a view about undermining juries' sense of responsibility under their current death penalty system, which there is no such principle that they've recognized -- it is, nevertheless, important under Eighth Amendment law that when the Eighth Amendment is violated, that relief be granted.

QUESTION: But it really doesn't -- it really doesn't supply an independent basis as you've said. Doesn't the Eighth Amendment claim require you to establish that state law was improperly described to the jury?

MR. TABAK: It does require that, but it --

QUESTION: So, what you have is -- is -- is a federal claim that has within it the state -- the state claim that could have been objected to. To be sure, it was not a claim under the Eighth Amendment, but -- but surely the jury must be instructed properly concerning state law. Surely that could have been objected to.

MR. TABAK: That could have been objected to but, Your Honor, it would not have established the basis for this claim if he had gone to any court, including federal court, having not been granted relief, as he would not have been granted relief, in the state courts.

what this reminds me of, Your Honor --

QUESTION: That is true. That is true.

MR. TABAK: -- is some day there will be a cure discovered for AIDS, a drug will be developed, and undoubtedly that drug will include a variety of chemicals that are now available. The problem is that there will have to have been developed a formula to figure out how to make that into a successful solution for AIDS.

Now, here the fact that there was a violation of Florida's accurate sentencing description is an element of the Eighth Amendment claim. But it is not enough to win on the Eighth Amendment claim, which is the claim we're making here, without Caldwell which for the first time established that it is a key Eighth Amendment concept that the jury's sense of its awesome responsibility not be undermined. Now, once you have that, then you have the claim.

QUESTION: But it still amounts to it was not objected to at that time and could have gotten corrected at that time. He could have -- his counsel could have jumped up and said that is not the state law. The jury should be instructed correctly, and had he said that, the trial judge would have done it. He didn't do that.

MR. TABAK: This trial judge, I submit, would

not have done it based on every indication that he gave in his 11 different times when he said the most important thing you should understand is that the jury does not have any responsibility. And I submit that the Florida Supreme Court, based on its recent jurisprudence, would also not have ruled in favor of such a claim. And if Adams before Caldwell had tried to raise the claim in federal court, he also would have not gotten any relief.

QUESTION: Now, wait a minute. Based on its recent jurisprudence, would have said that the instruction was correct? I thought you say --

MR. TABAK: No. It would have said the instruction is not correct, but --

QUESTION: But that's okay.

MR. TABAK: -- that it is okay because their view of what is undermining the jury's actual sense of responsibility suggests to them that relief should not be granted. The fact is the only place where Mr. Adams can get relief is in the federal court based on the Eighth Amendment claim.

And that is why the development of Caldwell is so crucial to this case and why, if this Court were, as I submit it should not, get into a cause and prejudice analysis, since there is no independent and adequate

state ground -- but if the Court were to get into such analysis, it should conclude that there is cause because this claim could not have been raised prior to the decision in Caldwell. And it is only this claim that Mr. Adams could possibly have succeeded on.

QUESTION: Well, counsel, it seems to me the question is whether as a practical matter, as a pragmatic matter, as a realistic matter, this instruction actually misled the jury. And I see nothing to indicate that counsel shouldn't have made that objection under state law. And you simply speculate that the trial judge would have overruled the objection, but that's sheer speculation. And that's the whole purpose for the rule that requires us to make objections in a timely fashion.

MR. TABAK: But, Your Honor, the rule, as I understand the rule of Engle v. Isaac, Reed v. Ross, Smith v. Murray, is all in the context of federal constitutional violations and its principles of federalism. The Court has not granted and won't grant claims -- no federal court will grant a claim merely because a state law has been violated. There must be a federal constitutional violation, and the issue then is whether there were the tools to make the federal constitutional claim.

There were many states in which before Reed v. Ross -- what there might not have been proper, but the fact is that what's at issue is whether the elements of -- all of the elements of the federal constitutional claim were available and the were not available here. The fact that he could have made some other claim for which there were perhaps more tools available does not make the Eighth Amendment claim available, and it wasn't available.

QUESTION: What if the Florida Supreme Court had repeatedly held that instructions exactly like this correctly express state law?

MR. TABAK: Well, if --

QUESTION: Would you think Caldwell would have anything to do with the case then?

MR. TABAK: I think in that circumstance, the Florida Supreme Court on direct appeal would probably have noticed this on its own.

QUESTION: I just -- I want to know. Suppose that repeatedly the Florida Supreme Court had approved instructions like this. The -- the instruction was a correct statement of Florida law. Let's just assume that it was. Would Caldwell have anything to do with it?

MR. TABAK: If this were a correct statement of state law, then Caldwell would not have anything to

do with it. That's a necessary --

QUESTION: Well, then -- then as it has been pressed before, you do -- there is a -- if -- for Caldwell to be applicable, this instruction had to misstate state law.

MR. TABAK: That is true, Your Honor.

QUESTION: And there was no objection to that.

MR. TABAK: And there was no objection just like there has been no objection in any of these other cases in Florida at the time. The fact of the matter is that for them to have perceived that this would be improper would have taken a combination --

QUESTION: Well, would it have taken any magician to -- to -- to recognize that this was a misstatement of Florida law?

MR. TABAK: Apparently there is no such magician under -- in the Florida bar because no one objected under this ground in the numerous cases that such statements were made, although there are none where it's quite as bad as in this case. I think --

QUESTION: So, you think that -- you think -- your evidence of Florida law is just recent jurisprudence of the Florida Supreme Court?

MR. TABAK: No, Your Honor.

QUESTION: Is it old?

MR. TABAK: Justice White --

QUESTION: Is it old?

MR. TABAK: It is old too.

QUESTION: Well, then somebody should have known about it and objected.

MR. TABAK: I fully agree that a good, astute lawyer might well --

QUESTION: Or even one that reads these Florida Supreme Court reports.

MR. TABAK: They might well have objected to this, but the fact is that that would not have given them a -- this claim, this Eighth Amendment claim, prior to Caldwell, and the fact is that none of them did --

QUESTION: Well, I know, but part of the --

MR. TABAK: -- assert this claim.

QUESTION: -- Eighth Amendment claim is the state law claim.

MR. TABAK: I understand that it's part of the claim, but it is not all of the tools to make the Eighth Amendment claim, Your Honor, and those -- so that not all the tools were available to make this claim. And the claim they could have made -- there's no indication would have gone anywhere even though there was a misstatement of state law.

I also would suggest that when you -- and I

think that the same, exact thing was said by the Florida Supreme Court in this case I talked about before, in the case of Copeland. They said as to the Lockett claim, you had a perfect basis for objecting under state law. We said in 1978 in Songer that the jury must be allowed to consider non-statutory mitigating circumstances. And you also had Lockett which said that it's an Eighth Amendment violation to deprive the jury of the right not to consider these circumstances. You had everything you needed. Therefore, if this claim did have merit, you should have raised it.

But then, that's exactly what they are now saying about the Caldwell claims. In fact, they said the very same thing immediately following that in the Copeland decision.

But once they found out that their interpretation of the Eighth Amendment was wrong, they have allowed people like Combs to go back and raise the same claim under their procedure even though they have just finished saying the year earlier in Copeland that you should have objected at trial.

So, I submit that all of this questioning, although intellectually interesting, is not pertinent to the proper outcome of this case because there is no independent and adequate state ground here.

QUESTION: Mr. Tabak, do you cite the Copeland case in your brief?

MR. TABAK: No, we do not.

QUESTION: Do you have the citation?

MR. TABAK: Yes, I do, Your Honor, Justice Stevens. It is 505 So.2d 425.

What then occurred in that case was this Court vacated and remanded in light of Hitchcock, and they are now having rebriefing of that case on the harmless error question, the state having conceded a Hitchcock violation.

The Combs case where they do consider the claim in a 1980 trial is 525 So.2d 853 at page 855.

So, I submit that when you take what they have done with the Hitchcock claims before and after Caldwell -- and before and after Hitchcock, I should say, you will see an exact parallel to this situation. And there simply is no independent and adequate state ground here.

I would also submit that on the record of this case, it is one in which a reasonable juror who accurately understood what the jury's important role is in capital sentencing where in reality most of the time where there is an override by the judge, the judge is himself overridden, a jury that had this on its conscience could reasonably have voted a life sentence.

And if they had done so, and even if it -- that had been overridden, the override would itself have been overridden by the Florida Supreme Court because as it was, the trial judge found that there were three mitigating circumstances, as well as three aggravating circumstances.

And in the Florida Supreme Court even without an override, there were two justices who dissented on the ground that in similar Florida cases, where hopefully the juries did understand their responsibility, life was the sentence that was usually granted on facts like these.

In this kind of circumstance, I submit the violation is even worse than in Caldwell because the person who was repeatedly undermining the jury's responsibility was the trial judge, and he was telling them that the fact that it was not on their conscience is the most important thing that they should remember. Yet, under Florida law, the jury is given such great weight because it is the conscience of the community. And nobody stepped in to stress the importance of the jury's role.

I also submit that there is prejudice in this case because of what I have just stated about what would have occurred had the misstatement not occurred.

On the rest of the subject of cause, I should also note briefly that, as stated in our brief, there simply was no court anywhere -- that we have found anywhere in the country that came up with an Eighth Amendment decision anything like Caldwell at the time of the trial or appeal in this case, unlike the situation in Smith v. Murray or in Engle v. Isaac. And in fact, there isn't one rejecting such a claim because we have not seen any indication that anybody anywhere in the country at that time had formulated such a claim. And I submit that in that kind of circumstance, the cause is not present.

I have explained again why I believe abuse of the writ is not before the Court.

If there are questions further at this point, I'd be happy to answer them. Otherwise, I'd like to thank the Court for its attention.

QUESTION: Thank you, Mr. Tabak.

Ms. Roper, you have four minutes remaining.

REBUTTAL ARGUMENT OF MARGENE A. ROPER

MS. ROPER: I would just like to briefly respond.

I would submit to the Court that consideration of cases raising claims other than Caldwell claims in the context of determining whether there's independent

and adequate state ground is of no moment to this Court. Engle v. Isaac indicated that federal courts should honor state procedural rules as well as rulings. And I think Florida's post-conviction rule, Florida Rule of Criminal Procedure 3.850, has to be honored.

In the same context, I think the Florida Supreme Court, like a federal court, has the right to develop its own evolving notions of what constitutes fundamental error and what they can and cannot entertain on collateral review.

In regard to these cases, however, particularly the Hitchcock cases, I would point out to the Court that the Florida Supreme Court did regularly and consistently bar Hitchcock claims until it perceived that a change of law was imposed upon it by this Court.

In the actual Copeland case, Copeland was taken before this Court and this Court reversed and stated that Florida should look at Copeland again for a Hitchcock violation.

In regard to a basis for raising the claim counsel just most recently discussed, I think that California v. Ramos stands out first and foremost at the time of his filing his first habeas petition as authority for raising this claim and even discussed hypothetically a Eighth Amendment situation whereby the

jury could be instructed that the governor had the power to commute a death sentence.

And I don't think there's a requirement that a claim have to be -- a claim has to be meritorious or there has to be an assured victory in order to raise it. That doesn't comport with the idea that a basis for a claim is there.

And Caldwell had the basis himself on -- to raise this claim and brought it before the Court on the basis of Ramos and other existing Eighth Amendment cases.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Ms. Roper.

The case is submitted.

(Whereupon, at 11:50 o'clock a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

No. 87-121 - RICHARD L. DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, AND ROBERT A. BUTTERWORTH, ATTORNEY GENERAL OF FLORIDA, Petitioners V.

AUBREY DENNIS ADAMS, JR.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY alan friedman

(REPORTER)