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References to Appellate Review in Capital Sentencing Determinations--Eighth Amendment: Caldwell v. Mississippi, 105 S. Ct. 2633 (1985)

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EIGHTH AMENDMENT—REFERENCES TO APPELLATE REVIEW IN CAPITAL SENTENCING DETERMINATIONS

Caldwell v. Mississippi, 105 S. Ct. 2633 (1985).

I. BACKGROUND

In *Caldwell v. Mississippi*¹ the Supreme Court held that a capital sentence is invalid if a jury imposed it after a prosecutor told the jury that the ultimate responsibility for determining the appropriateness of the sentence rested with an appellate court and not with the jury.² *Caldwell* is thus an important chapter in the Court's eighth amendment jurisprudence because it provides guidance to the courts and the criminal bar as to the scope of information regarding appellate review which may be provided to a jury.

"The Eighth Amendment stands to assure that the State's power to punish is exercised within the limits of civilized standards."³ In recognition of this principle, the Supreme Court, in *Furman v. Georgia*,⁴ held that discretionary sentencing, unguided by legislatively defined standards, violated the eighth amendment. In *Furman*, the Court reasoned that such sentencing was "pregnant with discrimination,"⁵ because it permitted the death penalty to be "wantonly" and "freakishly" imposed,⁶ and because it imposed the death penalty with "great infrequency" and afforded "no meaningful basis for distinguishing the few cases in which it [was] imposed from the many cases in which it [was] not."⁷

Since *Furman*, however, the Court has not determined precisely which factors a sentencer should focus on and the scope of the information with which the sentencer should be provided when making a constitutionally proper sentencing determination.⁸

¹ 105 S. Ct. 2633 (1985).

² *Id.* at 2636.

³ *Woodson v. North Carolina*, 428 U.S. 280, 288 (1976) (quoting *Trop v. Dulles*, 356 U.S. 86, 100 (1958)).

⁴ 408 U.S. 238 (1972).

⁵ *Id.* at 257 (Douglas, J., concurring).

⁶ *Id.* at 310 (Stewart, J., concurring).

⁷ *Id.* at 313 (White, J., concurring).

⁸ As Justice Rehnquist observed in *Lockett v. Ohio*, 438 U.S. 586, 629 (1978)

Four years after *Furman*, the Court suggested that the concerns it expressed in that case could be met by giving the sentencing authority "adequate information and guidance."⁹ The goal of this guidance, the Court explained, is to focus the attention of the sentencing authority on the particularized circumstances of the crime and the defendant.¹⁰ The Court indicated that, with the exception of prejudicial evidence, the sentencer should have before it as much information as possible when making the sentencing decision.¹¹ Under the sentencing procedures approved by the Court in *Gregg v. Georgia*, the sentencer must find at least one statutory aggravating circumstance¹² in order for the defendant to be eligible for the death penalty.¹³ Once such eligibility is established, however, the sentencer is free to consider any factor it deems relevant in deciding which of the defendants eligible for capital punishment will actually be sentenced to death.¹⁴ Thus, the sentencer's discretion after *Gregg* remained as "unbridled" as the discretion that the Court condemned in *Furman*. All the Georgia legislature had done to correct its sentencing procedure was to narrow somewhat the class of individuals on whom the death penalty could be imposed.¹⁵ It is

(Rehnquist, J., concurring in part and dissenting in part), the Court "has . . . surely not cloven to a principled doctrine either holding the infliction of the death penalty to be unconstitutional per se or clearly and understandably stating the terms under which the Eighth and Fourteenth Amendments permit the death penalty to be imposed [It] has gone from pillar to post, with the result that the sort of reasonable predictability upon which legislatures, trial courts, and appellate courts must of necessity rely has been all but completely sacrificed."

⁹ *Gregg v. Georgia*, 428 U.S. 153, 195 (1976).

¹⁰ *Id.* at 206. See also *Profit v. Florida*, 428 U.S. 242, 258 (1976); *Jurek v. Texas*, 428 U.S. 262, 271 (1976).

¹¹ *Gregg*, 428 U.S. at 203-04.

¹² In order to meet the requirements of *Furman*, most states have specified that the jury must find certain factors to be present before a defendant is eligible for the death penalty. See e.g., TEX. PENAL CODE ANN. § 19.03 (Vernon 1974); TEX. CODE CRIM. PROC. ANN. art. 37.071 (Vernon 1975).

¹³ *Gregg*, 428 U.S. at 165 n.9.

¹⁴ *Id.*

¹⁵ The constitutionality of the Georgia sentencing procedure as a whole was reaffirmed by the Court in *Godfrey v. Georgia*, 446 U.S. 420 (1980), and again in *Zant v. Stephens*, 462 U.S. 862 (1983). In *Stephens*, the Court conceded that it had approved the sentencing procedure in *Gregg*, "even though it clearly did not channel the jury's discretion by enunciating specific standards to guide the jury's consideration of aggravating and mitigating circumstances." *Id.* at 875. This apparent inconsistency with the principles enunciated in *Furman* was sharply criticized by Justice Marshall in his dissenting opinion in *Stephens*. *Id.* at 910-11 (Marshall, J., dissenting).

A sentencing scheme similar to Georgia's was approved in *California v. Ramos*, 463 U.S. 992, 1008 (1983) ("Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty . . . [it] then is free to consider a myriad of factors to determine whether or not death is the appropriate punishment.").

therefore not clear how a reviewing court may discern a "meaningful basis for distinguishing"¹⁶ between cases in which the death penalty has and has not been imposed.

The Court again failed to formulate a means of distinguishing death penalty cases from non-death penalty cases in *Woodson v. North Carolina*.¹⁷ The *Woodson* Court acknowledged that *Furman* required courts to use "objective standards to guide [and] regularize . . . the process for imposing a sentence of death."¹⁸ Yet, the Court also wrote that "particularized consideration of relevant aspects of the character and record of each convicted defendant" is constitutionally required in the sentencing procedure.¹⁹ It is difficult to reconcile *Furman's* call for objective standards to assure consistency in capital sentencing with *Woodson's* mandate for a broad, subjective, individualized inquiry.²⁰

Two years later, in *Lockett v. Ohio*,²¹ the Court moved even further away from *Furman*, by establishing as a constitutional principle that a sentencer must be allowed to consider as a mitigating factor "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."²²

¹⁶ *Furman*, 408 U.S. at 313 (White, J., concurring).

¹⁷ 428 U.S. 280 (1976).

¹⁸ *Id.* at 303.

¹⁹ *Id.* See also, *id.* at 304 ("A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind.").

²⁰ In fact, at least one commentator has suggested that any attempt to satisfy both *Furman* and *Woodson* will only prove the inevitable incompetence of humans to administer a constitutional death penalty. Geimer, *Death at Any Cost: A Critique of the Supreme Court's Recent Retreat from Its Death Penalty Standards*, 12 FLA. ST. U.L. REV. 737, 742 (1985).

²¹ 438 U.S. 586 (1978).

²² *Lockett*, 438 U.S. at 604. See also *Eddings v. Oklahoma*, 455 U.S. 104 (1982). It should be noted that, even under *Lockett*, irrelevant factors may still be excluded from the sentencer's consideration. 438 U.S. at 604 n.12. Since *Lockett*, the Court has continued to emphasize the broad, subjective standard established in *Woodson*. For example, in *Barclay v. Florida*, 463 U.S. 939, 950 (1983), the Court noted the desirability of allowing the sentencer to bring its own personal experiences to bear in making its decision. (The trial judge in *Barclay* had referred to his experiences with World War II concentration camps as helpful in assessing the magnitude of the crime at issue. *Id.* at 948 n.6.) In fact, the Court explicitly approved of sentencers exercising discretion "in their own way," although it added that such discretion must be guided in "a constitutionally adequate way." *Id.* at 950. In *Barefoot v. Estelle*, 463 U.S. 880, 897 (1983) (allowed testimony from psychiatrists who, though they had not examined defendant, testified, based on hypothetical questions, as to defendant's future dangerousness), the Court declared that "the jury should be presented with all of the relevant information." See also *id.* at

In his concurring opinion in *Lockett*, Justice Marshall described the dilemma with which the Court has struggled since *Furman* as “[a]chieving the proper balance between clear guidelines that assure relative equality of treatment, and discretion to consider individual factors whose weight cannot always be preassigned.”²³ Although Justice Marshall admitted that this is “no easy task,” he went on to write that “[w]here life itself . . . hangs in the balance, a fine precision in the process must be insisted upon.”²⁴

Although the members of the Court have not agreed as to the scope of discretion to be afforded the jury in capital cases, it is clear that all agree that, in general, the goal is to avoid the imposition of the death penalty in an “arbitrary and capricious manner.”²⁵ Perfection in capital sentencing procedures may be unobtainable,²⁶ but the Court wants “to insure that every safeguard is observed.”²⁷ Because there is a difference between death and other forms of punishment, the Court has stressed the “need for reliability” in capital sentencing procedures.²⁸ The Court invoked this need for reliability

928 (Blackmun, J., dissenting); *Zant v. Stephens*, 462 U.S. 862, 902 (1983) (Rehnquist, J., concurring) (“Sentencing decisions rest on far-reaching inquiry into countless facts and circumstances . . .”).

This trend toward subjectivity, however, is not without its critics. Justice Rehnquist, despite the comment in *Stephens* quoted above, predicted in his opinion in *Lockett* that consideration of unlimited mitigating factors “will not eliminate arbitrariness or freakishness in the imposition of sentences, but will codify and institutionalize it. [Such consideration] will not guide sentencing discretion but will totally unleash it.” 438 U.S. at 631 (Rehnquist, J., concurring in part and dissenting in part). Justice Marshall expressed similar concerns in *Barclay* about the failure to limit the aggravating circumstances which may be considered. 463 U.S. at 986 (Marshall, J., dissenting) (“fairness and consistency cannot be achieved if nonstatutory aggravating circumstances are randomly introduced into the balance.”). Moreover, several empirical studies suggest that the concerns of Justices Rehnquist and Marshall are well-founded. See, e.g., Bower, *The Pervasive of Arbitrariness and Discrimination Under Post-Furman Capital Statutes*, 74 J. CRIM. L. & CRIMINOLOGY 1067 (1983). See also Riedel, *Discrimination in the Imposition of the Death Penalty: A Comparison of the Characteristics of Offenders Sentenced Pre-Furman and Post-Furman*, 49 TEMP. L.Q. 261 (1976).

²³ 438 U.S. at 620 (Marshall, J., concurring).

²⁴ *Id.*

²⁵ *Gregg*, 428 U.S. 153, 188 (1976).

²⁶ See *Lockett*, 438 U.S. at 605 (“There is no perfect procedure for deciding in which cases governmental authority should be used to impose death.”).

²⁷ *Gregg*, 428 U.S. at 187.

²⁸ See, e.g., *Woodson*, 428 U.S. at 305. Similar views were expressed in *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (decision to impose death must be, and appear to be, “based on reason rather than caprice or emotion”), *Eddings*, 455 U.S. at 117-18 (O’Connor, J., concurring) (“this Court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded the process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice or mistake”), and *Stephens*, 462 U.S. at 885 (“although not every imperfection in the deliberative process is sufficient, even in a capital case, to set aside a state-court

in vacating a death penalty that had been imposed, in part, on the basis of a confidential presentencing report.²⁹ The Court also vacated a death sentence imposed on the basis of unconstitutionally vague statutory aggravating circumstances.³⁰ Thus, it appears that the Court will tolerate little risk that a death sentence was imposed by a court in "an arbitrary and capricious manner." Accordingly, all but the most harmless procedural errors justify the Court in vacating the sentence. In *Zant v. Stephens*, for example, one of the statutory aggravating circumstances on which the jury was instructed was later invalidated by the state supreme court.³¹ The jury, however, found two separate aggravating circumstances, and the jury could legitimately have considered evidence of the invalidated factor as a nonstatutory factor.³² The Court thus found the error to be inconsequential.³³

II. THE FACTS OF *CALDWELL V. MISSISSIPPI*

Bobby Caldwell was convicted of murder and sentenced to death for shooting and killing the owner of a small grocery store while robbing it.³⁴ Caldwell's lawyers asked the jury to show mercy, presenting as mitigating evidence character references, and evi-

judgment, the severity of the sentence mandates careful scrutiny in the review of any colorable claim of error.").

²⁹ *Gardner*, 430 U.S. at 364 (White, J., concurring).

³⁰ *Godfrey*, 446 U.S. 420 (1980) (statute allowed jury to find, as an aggravating circumstance, that the offense was "outrageously or wantonly vile, horrible and inhuman"). In *Stephens*, the Court noted that "an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." 462 U.S. at 877.

³¹ *Stephens*, 462 U.S. at 864.

³² *Id.* at 887.

³³ *Id.* at 888-89. Even this level of risk, however, was unacceptable to Justices Marshall and Brennan. See *id.* at 912-15 (Marshall, J., dissenting). *Barefoot v. Estelle*, 463 U.S. 880 (1983), provides another example of the risk of unreliability the Court is willing to take in capital sentencing procedures. In *Barefoot*, the Court held that the requirement that a court of appeals issue a stay of execution if it is unable to resolve the merits of an appeal prior to the scheduled execution date does not prevent the courts from adopting "appropriate summary procedures." *Id.* at 888-89. Here again, the risk of unreliability actually assumed by the Court was quite low, as the defendant had been afforded an opportunity to address the underlying merits of his appeal, albeit at a proceeding that combined consideration of the appeal with that of the application for a stay. See *id.* at 889-90. Nonetheless, in *Barefoot*, four of the justices deemed the risk unacceptable. See *id.* at 906 (Stevens, J., concurring) (court of appeals made serious procedural error); *id.* at 913 (Marshall, J., dissenting) ("there is absolutely no justification for providing fewer procedural protections solely because a man's life is at stake."); *id.* at 916 (Blackmun, J., dissenting).

³⁴ *Caldwell*, 105 S. Ct. 2633, 2637 (1985).

dence of Caldwell's youth, family background and poverty.³⁵ They attempted to impress upon the jury the gravity of its decision, suggesting that Caldwell's life rested in its hands.³⁶

The prosecutor, in response, characterized the defense's approach as unfair, stating, "they would have you believe that you're going to kill this man and . . . they know that your decision is not the final decision. My God, how unfair can you be? Your job is reviewable."³⁷

Over objection by defense counsel, the trial judge allowed the prosecutor to continue, noting, "I think it proper that the jury realizes that it is reviewable automatically as the death penalty commands. I think that information is now needed by the Jury so they will not be confused."³⁸

The prosecutor then proceeded to complain that the defense had insinuated "that your [the jury's] decision is the final decision . . . and that is terribly, terribly unfair. For . . . the decision you render is automatically reviewable by the Supreme Court."³⁹ He then went on to present his view of the jury's proper role:⁴⁰ "you must decide the facts. That's your job. Not mine, not theirs, not the Judge's, not any body's—yours. You decide what those facts are. . . . [Y]ou take the rules of law . . . and you apply them, and you render a fair and impartial trial without passion, without prejudice, without sympathy."⁴¹ Finally, after recounting some of the recent history of capital punishment, the prosecutor concluded,

"our Mississippi legislature . . . said before the death penalty is arbitrarily automatically imposed, *the jury . . . the heart of the system, must determine . . . that the aggravating circumstances, those which tend to say that the death penalty is justified must outweigh the mitigating circumstances So that's how it all evolved, and that's why you're in the Jury Box to determine the punishment*"⁴²

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 2638.

³⁹ *Id.*

⁴⁰ The comments of the prosecutor regarding the jury's role are omitted from the opinion of Justice Marshall, writing for the majority, but are supplied by Justice Rehnquist's dissenting opinion. This omission helped the majority characterize the prosecutor's remarks as having led the jury to believe "that responsibility for determining the appropriateness of a death sentence rests not with [it] but with the appellate court. . . ." *Id.* at 2636. See also *id.* at 2648-49 (Rehnquist, J., dissenting) (Justice Rehnquist accuses the majority of supplying its own "sweeping" characterization of the prosecutor's remarks at several points in its opinion). As will be seen, the additional facts supplied by Justice Rehnquist cast some doubt upon the accuracy of the majority's characterization.

⁴¹ *Id.* at 2648.

⁴² *Id.* (emphasis in original).

Caldwell argued that the prosecutor's statements, in minimizing the jury's sense of responsibility, violated the eighth amendment's requirement of reliability in capital sentencing proceedings.⁴³ An equally divided Mississippi Supreme Court affirmed Caldwell's death sentence.⁴⁴

III. THE SUPREME COURT DECISION IN *CALDWELL*

After disposing of a jurisdictional argument advanced by the state,⁴⁵ the Court in *Caldwell* found that the prosecutor's argument undermined the "need for reliability" established by *Woodson*.⁴⁶ The Court also cited its historical recognition that death penalty cases require a "greater degree of scrutiny"⁴⁷ than non-capital cases. The Court further noted that its decision in *Caldwell* was not the first case in which it imposed limits on the imposition of capital punishment out of "concern that the sentencing process should facilitate the responsible and reliable exercise of sentencing discretion."⁴⁸

The Court identified three specific reasons why it feared substantial unreliability and bias could exist in cases such as Caldwell's. First, it suggested that appellate review is an inadequate safeguard. The Court reasoned that appellate courts are "wholly ill-suited to evaluate the appropriateness of death in the first instance" as such courts are able to consider few of the intangibles which a jury could take into account in its sentencing deliberations.⁴⁹ The Court con-

⁴³ *Id.* at 2636-37.

⁴⁴ *Caldwell v. State*, 443 So.2d 806 (Miss. 1983). The state court read the decision of the Supreme Court in *California v. Ramos*, 463 U.S. 992 (1983), as leaving the state "with the prerogative to determine whether juries should be informed of sentencing alternatives . . ." *Caldwell*, 443 So.2d at 813. The court suggested that "[b]y the same reasoning, states may decide whether it is error to mention to jurors the matter of appellate review . . ." *Id.* The court concluded that no error had occurred at Caldwell's trial because (1) the prosecutor's remarks were justified in response to defense counsel's pleas for mercy and his false suggestion that a sentence of life imprisonment would leave the defendant behind bars for the rest of his life, (2) the comments of the prosecutor and the trial judge regarding appellate review were both "truthful and accurate" And (3) the jury's finding of four aggravating circumstances with insufficient mitigating circumstances to outweigh them was supported by the evidence. *Id.* at 814.

⁴⁵ The state contended that the decision of the Mississippi Supreme Court rested on adequate and independent state grounds: specifically, that Caldwell had not initially assigned as error the prosecutor's argument. *Caldwell*, at 105 S. Ct. 2638-39.

⁴⁶ *See id.* at 2636-37, 2640 (citing *Woodson*, 428 U.S. at 305).

⁴⁷ *Id.* at 2639 (citing *California v. Ramos*, 463 U.S. 992, 998-99 (1983)). *See also supra* notes 37-42 and accompanying text.

⁴⁸ *Caldwell*, 105 S. Ct. at 2639 (citing *Eddings*, 455 U.S. 104; *Lockett*, 438 U.S. 586; *Gardner*, 430 U.S. 349; *Woodson*, 428 U.S. 280).

⁴⁹ *Id.* at 2640. The Court expressed particular concern about an appellate court's "inability to confront and examine the individuality of the defendant," rendering it diffi-

cluded that “[g]iven these limits, most appellate courts review sentencing determinations with a presumption of correctness.”⁵⁰

Second, the Court reasoned that an “intolerable danger” existed that a jury might wish merely to “send a message of extreme disapproval for the defendant’s acts,” confident that the death sentence, if appropriate, would be vacated on appeal.⁵¹ Thus, the Court noted, “[a] defendant might . . . be executed, although no sentencer had ever made a determination that death was the appropriate sentence.”⁵²

Finally, the Court suggested that given the difficulty of making a capital sentencing decision, the jury would be unduly tempted to delegate its responsibility, and thus vote for death because a death sentence is automatically reviewable.⁵³ The Court noted that such a delegation also could lead to the execution of a defendant without a determination as to the appropriateness of the death sentence.⁵⁴ In finding an undue bias in favor of death as a result of the prosecutor’s arguments, the Court further noted that its conclusions had the support of most of the state courts that had confronted similar cases.⁵⁵

The state argued that the Court’s decision in *California v. Ramos*⁵⁶ stood for the proposition that “each state may decide for itself the extent to which a capital sentencing jury should know of post-sentencing proceedings.”⁵⁷ The Court characterized the state’s reading of *Ramos* as “too broad,” and went on to distinguish *Ramos*, reasoning that the information presented to the jury by the court in that case was both accurate and relevant.⁵⁸ In the instant case, by contrast, the Court found that the prosecutor’s argument was misleading as to the nature of appellate review and irrelevant to the

cult for such a court to consider the “compassionate or mitigating factors stemming from the diverse frailties of humankind.” *Id.* (quoting *Woodson*, 428 U.S. at 304).

⁵⁰ *Id.* at 2641. *But see infra* note 81.

⁵¹ *Id.* (citing *Maggio v. Williams*, 464 U.S. 46, 54-55 (1983) (Stevens, J., concurring)). In *Williams*, however, the prosecutor clearly mischaracterized the scope of appellate review, stating that the state supreme court would “review everything that went on in [the] trial.” 464 U.S. at 54 (Stevens, J., concurring).

⁵² *Caldwell*, 105 S. Ct. at 2641.

⁵³ *Id.* at 2641-42.

⁵⁴ *Id.* at 2641.

⁵⁵ *Id.* at 2642 n.4, n.5. *See infra* notes 80-88 and accompanying text.

⁵⁶ 463 U.S. 992 (1983).

⁵⁷ *Caldwell*, 105 S. Ct. at 2642. This argument had been accepted by the state supreme court. *See supra* note 44. In *Ramos*, the Court upheld against constitutional attack the so-called “Briggs Instruction,” in which the jury was informed of the governor’s power to commute a life sentence without possibility of parole. *See Ramos*, 463 U.S. at 992.

⁵⁸ *Caldwell*, 105 S. Ct. at 2643.

sentencing decision.⁵⁹

The Court also distinguished *Donnelly v. DeChristoforo*,⁶⁰ in which it had upheld a death sentence despite certain improper remarks that had been made by the prosecutor. The Court noted that the trial judge in *Donnelly* had found the prosecutor's remarks to be improper and had given the jury a strong curative instruction.⁶¹ In *Caldwell*, the Court pointed out, the trial judge not only failed to give such a curative instruction, but openly agreed with the prosecutor's remarks.⁶² Moreover, the *Donnelly* Court had characterized the remarks of the prosecutor as "ambiguous," whereas the remarks at issue in *Caldwell* were, in the Court's view, "quite focused, unambiguous and strong."⁶³

Justice O'Connor filed a separate concurring opinion to emphasize that, in her view, *Ramos* would not preclude "the giving of *non-misleading* and *accurate* information regarding the jury's role in the sentencing scheme"⁶⁴ She noted that a state may reasonably conclude that the reliability of its sentencing procedure would be enhanced by providing such information, as jurors may harbor misconceptions regarding the nature of review undertaken by appellate courts.⁶⁵

Justice Rehnquist, in a dissent in which he was joined by Chief Justice Burger and Justice White, showed a greater tolerance for the risk of unreliability. Rehnquist wrote that "the Eighth Amendment is satisfied where the procedures ensure that the sentencer's discretion is 'suitably directed and limited so as to minimize the risk of *wholly* arbitrary and capricious action.'"⁶⁶ He went on to dispute the majority's characterization of the facts, arguing that the prosecutor had not told the jury they were not responsible, but rather had emphasized the jury's role.⁶⁷ Justice Rehnquist further contended that, viewed in their entirety, the prosecutor's remarks had not mischaracterized the nature of appellate review.⁶⁸ Finally, Justice Rehnquist reasoned that the trial proceedings themselves should have convinced the jurors of the importance of their role, pointing

⁵⁹ *But see infra* notes 64-65 and accompanying text.

⁶⁰ 416 U.S. 637 (1974).

⁶¹ *Caldwell*, 105 S. Ct. at 2645.

⁶² *Id.*

⁶³ *Id.* at 2645.

⁶⁴ *Id.* at 2646 (O'Connor, J., concurring).

⁶⁵ *Id.*

⁶⁶ *Id.* at 2649 (Rehnquist, J., dissenting) (quoting *Zant v. Stephens*, 462 U.S. 862, 874 (1983); *Barclay v. Florida*, 463 U.S. 939, 950 (1983)).

⁶⁷ *Id.* at 2649-50.

⁶⁸ *Id.* at 2650-51.

to the attention focused upon them in the charge, the impassioned plea for mercy from Caldwell's counsel, Caldwell, and Caldwell's mother, as well as the prosecutor's rebuttal.⁶⁹

Justice Rehnquist concluded with an interpretation of *Ramos* substantially the same as that of Justice O'Connor. He suggested that the eighth amendment does not prohibit the provision to a capital sentencing jury of accurate information regarding appellate review.⁷⁰ He wrote that "there is no constitutional requirement that all information received by a sentencing jury be relevant."⁷¹

IV. ANALYSIS

Given the need for reliability in capital sentencing procedures, a death penalty imposed by a jury that had been led to believe that ultimate sentencing responsibility belonged to someone else would be properly vacated by the Court. It is questionable, however, whether the prosecutor in *Caldwell* had led the jury to believe that it did not have the ultimate responsibility for sentencing.

In *Cupp v. Naughten*, the Court wrote that "a single instruction to a jury may not be judged in artificial isolation, but must be reviewed in the context of the overall charge."⁷² The Court recognized that not only is a jury instruction "but one of many such instructions, but the process of instruction itself is but one of several components of the trial . . ."⁷³ As a prosecutor's argument is "billed in advance . . . as a matter of opinion[,] not of evidence,"⁷⁴ this same reasoning would appear to apply at least equally well to a single remark made by a prosecutor. It is therefore not clear that the reference by the prosecutor in *Caldwell* to appellate review created a significant risk that the jury's sense of its responsibility was diminished.⁷⁵ Whatever risk may otherwise have existed was reduced by the prosecutor's subsequent emphasis on the importance of the jury in the Mississippi capital sentencing system.⁷⁶

Nonetheless, the Court's past insistence that every safeguard be observed⁷⁷ to insure reliability in capital sentencing,⁷⁸ as well as its

⁶⁹ *Id.* at 2650.

⁷⁰ *Id.* at 2651.

⁷¹ *Id.*

⁷² 414 U.S. 141, 146-47 (1973) (quoting *Boyd v. United States*, 271 U.S. 104, 107 (1926)).

⁷³ *Id.* at 147.

⁷⁴ *Donnelly v. DeChristoforo*, 416 U.S. 637, 646 (1974).

⁷⁵ See *Caldwell*, 105 S. Ct. at 2650 (Rehnquist, J., dissenting).

⁷⁶ See *supra* notes 40-42 and accompanying text.

⁷⁷ See *Gregg*, 428 U.S. at 187.

⁷⁸ See *Woodson*, 428 U.S. at 305.

decisions in *Zant v. Stephens*⁷⁹ and *Barefoot v. Estelle*,⁸⁰ provides some support for its decision to vacate Caldwell's sentence.⁸¹

The Court's decision in *Caldwell* is also supported by the decisions of most of the state courts that have addressed the issue of the propriety of references in a prosecutor's argument to appellate review. All of those courts have recognized that such references pose the danger of diminishing the jury's sense of its responsibility.⁸²

⁷⁹ See *supra* notes 31-33 and accompanying text.

⁸⁰ 463 U.S. 880 (1983); See also *supra* note 33.

⁸¹ Yet the *Caldwell* decision, illustrating as it does the Court's low tolerance of risk in capital cases, raises questions as to the costs of a constitutionally permissible capital sentencing systems. As the Court lowers the level of tolerable risk, particularly since its guidance on death penalty issues has been somewhat ambiguous, the number of capital sentences vacated by appellate courts will probably increase. See *supra* notes 8, 23-24 and accompanying text. Moreover, what empirical evidence exists suggests that courts are already spending a significant percentage of their time on capital cases. In Florida, for example, one study concluded that only 51.7% of death sentences imposed were affirmed by the state supreme court. Radelet & Vandiver, *The Florida Supreme Court and Death Penalty Appeals*, 74 J. CRIM. L. & CRIMINOLOGY 913, 919 (1983) (based on sample of 145 cases). Of those cases not affirmed, 25.71% were returned for resentencing, with 31.43% returned for new trials. *Id.* Thus, the study found, the Florida Supreme Court spent thirty-five to forty percent of its working time on death penalty cases alone. *Id.* at 914.

Several commentators have concluded, as did Professor Bedau, that "the costs of a criminal justice system in which the death penalty is authorized appear to be considerably greater, given present state and federal laws, than the costs of the same system without the death penalty." Bedau, *Bentham's Utilitarian Critique of the Death Penalty*, 74 J. CRIM. L. & CRIMINOLOGY 1033, 1049 (1983). See also Kaplan, *The Problem of Capital Punishment*, 1983 U. ILL. L.F. 555, 571; Nackell, *The Cost of the Death Penalty*, 14 CRIM. L. BULL. 69 (1978). What little empirical evidence exists suggests that the concerns of these scholars are well founded. In New York, for example, the cost of the trial alone in a death penalty cases has been found to be \$1.4 million. Bedau, *supra*, at 1049 (citing NEW YORK STATE DEFENDER'S ASSOCIATION, INC., CAPITAL LOSSES: THE PRICE OF THE DEATH PENALTY IN NEW YORK STATE (1982)). By contrast, the cost of imprisoning an individual for life is only about \$0.6 million. *Id.*

This growing body of literature has prompted the American Bar Association to establish a special committee to look into the costs of the death penalty. *Cheaper to Kill? A.B.A. Eyes Death Penalty Cost*, A.B.A. J. (Apr. 1985) at 17. The committee's chairman, North Carolina Supreme Court Associate Justice James Exum, Jr., observed, "If the sentence is appealed the courts can spend years on the same case," and added, "the question becomes, Are the benefits worth the costs?" *Id.*

⁸² See, e.g., *State v. Willie*, 410 So.2d 1019, 1035 (La. 1982) (mention of appellate review "improperly diminishes the jury's duty and responsibility . . ."); *People v. Johnson*, 284 N.Y. 182, 185 30 N.E.2d 465, 466 (1940) (remarks made it "doubtful whether the jury could thereafter render a verdict with full appreciation of its responsibility."); *Blackwell v. State*, 76 Fla. 124, 139, 79 So. 731, 736 (1918) ("tended to lessen [jury's] estimate of the weight of their responsibility."); *State v. Biggerstaff*, 17 Mont. 510, 514, 43 P. 709, 711 (1896) ("statement was calculated to cause the jury to be less careful . . . and mindful of their duties . . ."). Even those courts that failed to find reversible error agree that such remarks are improper. See, e.g., *State v. Monroe*, 397 So.2d 1258, 1270 (La. 1981) ("jury might be induced to disregard its responsibility"); *Pilley v. State*, 247 Ala. 523, 527, 25 So.2d 57, 60 (1946); *People v. Nolan*, 126 Cal. App. 623, 641, 14 P.2d

Although some of the decisions in which state courts vacated sentences were based in part on the fact that the prosecutor's remarks in those cases were inaccurate,⁸³ at least one state supreme court, that of North Carolina, has suggested that remarks concerning appellate review are always improper.⁸⁴ In most of the cases in which the death sentence was upheld, courts based their failure to find reversible error on the fact that the trial judge in those cases, unlike the judge in *Caldwell*, had given a curative instruction.⁸⁵ Other courts have suggested that the harmful effect of references to appellate review may be lessened because the availability of review is "common knowledge,"⁸⁶ or that reversal is not required where clear evidence of guilt exists.⁸⁷ Finally, the Louisiana Supreme Court has taken the position that the determination of whether or not a particular reference to appellate review induced a jury to disregard its responsibility depends on the context in which the remarks were made.⁸⁸ Thus, for example, the Louisiana court found no reversible error where the reference to appellate review had been "preceded by an explanation of the narrow circumstances under which the death penalty [had] been deemed appropriate by the legislature and the courts [and] [t]he prosecutor [had] stressed [the procedure the jury was to follow in determining the proper sentence]."⁸⁹

In *Caldwell*, the majority implicitly rejected the Louisiana facts and circumstances approach and appeared to adopt the per se rule espoused by the North Carolina Supreme Court, declaring that the availability of appellate review to a capital defendant "is wholly irrelevant to the determination of the appropriate sentence."⁹⁰ Four of

880, 888 (1932); *Vaughan v. State*, 58 Ark. 353, 368-69, 24 S.W. 885, 889 (1894) (remarks "improper and unwarranted").

⁸³ *E.g.*, *State v. Robinson*, 421 So.2d 229, 233 n.2 (La. 1982); *Pait v. State*, 112 So.2d 380, 384 (Fla. 1959); *Biggerstaff*, 17 Mont. at 513, 43 P. at 711.

⁸⁴ *See, e.g.*, *State v. Hawley*, 229 N.C. 167, 169-70, 48 S.E.2d 35, 36 (1948) ("What consequences the verdict on the facts may bring to defendant is of no concern to the jury."). The North Carolina Supreme Court has more recently reaffirmed its position in *State v. Jones*, 296 N.C. 495, 501, 251 S.E.2d 425, 429 (1979) ("A reference to appellate review has no relevance with regard to the jury's task . . .").

⁸⁵ *See, e.g.*, *Moore v. State*, 240 Ga. 807, 820, 243 S.E.2d 1, 10 (1978); *Pilley*, 247 Ala. at 528, 25 So.2d at 60; *Brothers v. State*, 236 Ala. 448, 453, 183 So. 433, 436 (1938); *Nolan*, 126 Cal. App. at 641-42, 14 P.2d at 888; *Vaughan*, 58 Ark. at 369, 24 S.W. at 889.

⁸⁶ *See Robinson*, 421 So.2d at 234; *Vaughan*, 58 Ark. at 368-69, 24 S.W. at 889.

⁸⁷ *See People v. Linden*, 52 Cal. 2d 1, 338 P.2d 397, 410 (1959), *cert. denied*, 364 U.S. 849 (1960); *People v. Sampsell*, 34 Cal.2d 757, 765, 214 P.2d 813, 818, *cert. denied*, 339 U.S. 990 (1950).

⁸⁸ *Robinson*, 421 So.2d at 234.

⁸⁹ *Monroe*, 397 So.2d at 1270.

⁹⁰ 105 S. Ct. at 2643.

the justices, however, suggested that accurate information regarding appellate review could be provided to a jury.⁹¹ Thus, although the issue is not entirely free from doubt, given the mixed views of the individual members of the Court, it appears that prosecutors will be prohibited from making any references to appellate review, no matter how accurate, in their closing arguments.

If jurors harbor misconceptions as to the nature of appellate review which could be corrected by providing accurate information regarding the role of appellate courts, the wisdom of the Court's apparent per se approach may be questioned. Apparently, no empirical studies have been made regarding the extent to which jurors are familiar with the appellate review process. Both the majority opinion in *Caldwell*, and the concurring opinion of Justice O'Connor, however, recognize the possibility of juror misconception.⁹²

The *Caldwell* Court did not clearly resolve the issue of whether or not improper references to appellate review are correctible by a curative instruction to the jury. As has been indicated, several state courts have held that, at least in some circumstances, reversible error may be avoided by a proper instruction from the trial judge.⁹³ The *Caldwell* Court suggested, in distinguishing *Donnelly v. DeChristoforo*, that it would adopt this position if directly confronted with the issue. The Court characterized the fact that the judge in *Donnelly* had given a curative instruction as the "[m]ost important" distinguishing factor between *Caldwell* and *Donnelly*.⁹⁴ Nonetheless, it appears that the Court will not definitely resolve this issue until it is squarely presented by another case.

⁹¹ See *supra* notes 64-65 and accompanying text. See also *Caldwell*, 105 S. Ct. at 2651 (Rehnquist, J., dissenting) ("the fact that the jury's determination is subject to appellate review, if not common knowledge, is . . . information one would think the jury is entitled to know.").

⁹² The majority, in discussing the limits of appellate review, recognized that "jurors often might not understand" these limits. *Caldwell*, 105 S. Ct. at 2640. See also *id.* at 2646 (O'Connor, J., concurring) ("Jurors may harbor misconceptions about the power of state appellate courts or, for that matter, this Court to override a jury's sentence of death."). Justice Rehnquist suggests that the availability of appellate review is "common knowledge," but makes no mention of the possibility that such knowledge may be incorrect. See *id.* at 2651 (Rehnquist, J., dissenting).

⁹³ See *supra* note 85. But see *State v. Little*, 228 N.C. 417, 421, 45 S.E.2d 542, 545 (1947) ("it may be doubted that the harmful effect of the improper remarks could have been removed from the minds of the jury even by full instructions."). See also *Hawley*, 229 N.C. at 169, 48 S.E.2d at 35.

⁹⁴ *Caldwell*, 105 S. Ct. at 2645. Further, it appears certain that the three dissenting justices would support the proposition that any prejudicial effect of reference to appellate review is correctible, as they would have affirmed *Caldwell*'s sentence even in the absence of a curative instruction. See *id.* at 2647-51 (Rehnquist, J., dissenting).

V. CONCLUSION

The principles announced by the Court in *Caldwell v. Mississippi* are amply supported by the Court's historical concern for reliability in capital sentencing procedures. The Court, however, may not have properly applied those principles in *Caldwell* because it is not clear that the prosecutor in *Caldwell* led the jury to believe that it did not have the ultimate responsibility for sentencing. The Court's decision in *Caldwell* is generally consistent with those of the various state courts that have confronted the issue. The Court appears to have gone beyond most of the state courts, however, in suggesting that even accurate references to appellate review during a capital sentencing proceeding are improper. The wisdom of the Court's apparent per se approach may be questioned if jurors harbor misconceptions as to the nature of appellate review. If such misconceptions are not widespread, however, the Court's decision in *Caldwell v. Mississippi* should enhance the reliability of capital sentencing determinations by reducing the risk that any reference to appellate review may diminish the jury's sense of responsibility.

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