No._____

IN THE

Supreme Court of the United States

ERNEST D. SUGGS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

*On Petition for a Writ of Certiorari to the Supreme Court of Florida*

# PETITION FOR A WRIT OF CERTIORARI

***THIS IS A CAPITAL CASE***


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## CAPITAL CASE

## QUESTION PRESENTED

Does a Florida death sentence imposed pursuant to the capital sentencing scheme overruled in *Hurst v. Florida*, 136 S. Ct. 616 (2016), in a case where (1) the jury was repeatedly instructed that its recommendation was merely advisory and the fact-finding required for a death sentence was the sole responsibility of the trial judge, and (2) the trial judge later acknowledged that she shifted her responsibility for a death sentence to the appellate court, violate the Eighth Amendment in light of *Caldwell v. Mississippi*, 472 U.S. 320 (1985)?

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## DECISION BELOW

The decision of the Florida Supreme Court is reported at *Suggs v. State*, 238 So. 3d 699 (Fla. 2017), and is also attached in the Appendix (App.) at 1.

## JURISDICTION

On November 9, 2017, the Florida Supreme Court affirmed the Walton County Circuit Court's denial of postconviction relief. On March 13, 2018, the Florida Supreme Court entered an order denying rehearing of this opinion. On June 6, 2018, Justice Thomas granted an extension of time to file a petition for certiorari to July 26, 2018. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." U.S. Const. amend. VI.

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

The Fourteenth Amendment provides, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV.

## STATEMENT OF THE CASE

### I. Introduction

In *Ring v. Arizona*, 536 U.S. 584 (2002), this Court held that fact-finding underlying a death sentence must be conducted by a jury, not a judge. After *Ring*, the Florida Supreme Court rejected every challenge to Florida's capital sentencing scheme based upon *Ring* or its precursor, *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Fourteen years after *Ring*, this Court held in *Hurst v. Florida*, 136 S. Ct. 616 (2016), that Florida's death penalty scheme violated the Sixth Amendment because judges, rather than juries, found the facts required to impose death under state law.

Under Florida's unconstitutional scheme, penalty-phase juries were instructed that their decisions were strictly "advisory" and that the ultimate responsibility for finding the facts required for a death sentence under Florida law rested with the judge alone. The advisory jury would merely make a general recommendation to the judge whether the death penalty should be imposed, without specifying any basis for the recommendation. Petitioner Ernest Suggs was sentenced to death pursuant to this unconstitutional scheme.

This petition explains why this Court should grant a writ of certiorari in Petitioner's case to review whether Florida's pre-*Hurst* jury instructions violated the Eighth Amendment under *Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985), because they "minimiz[ed] the jury's sense of responsibility for determining the appropriateness of death." *Caldwell*, 472 U.S. at 341. In the decades between *Caldwell* and *Hurst*, the Florida Supreme Court rejected numerous *Caldwell*-based

challenges to Florida's pre-*Hurst* jury instructions, but *Hurst* has eradicated the rationale underlying those decisions. The Florida Supreme Court's pre-*Hurst* decisions addressing *Caldwell* wrongly assumed that Florida's scheme was constitutional. In light of *Hurst*, it is now known that Florida's jurors were misinformed of their constitutional role in the death sentencing process. Nevertheless, the Florida Supreme Court continues to summarily reject *Caldwell* claims of death row defendants, like Petitioner, who were sentenced under the unconstitutional pre-*Hurst* capital sentencing scheme, where jurors who were told that their penalty phase decision was just a recommendation, and that the responsibility for the defendant's death sentence lay elsewhere.

The *Caldwell* error in Petitioner's specific case is exacerbated by his trial judge's misunderstanding of her sentencing role under Florida's pre-*Hurst* capital sentencing scheme. Petitioner's sentencing judge viewed herself as a small part of the process, and shifted her responsibility for Petitioner's death sentence to the appellate court. Petitioner's case highlights how *Caldwell* error infected every facet of Florida's pre-*Hurst* capital sentencing scheme. His advisory jury was told that its penalty phase verdict was just a recommendation, and that the jurors bore no responsibility for whether he lived or died. Petitioner's judge did not take responsibility either, for she assumed that the appellate court would determine Petitioner's fate.

This Court should address the *Caldwell* error in Florida's pre-*Hurst* capital sentencing scheme. If the Court does not intervene, dozens of Florida death row prisoners like Petitioner, who were sentenced to death in proceedings where juries

were systematically informed that they were not responsible for a death sentence, may be subjected to an unconstitutional execution.

## II. Factual and Procedural Background

### A. Conviction, Death Sentence, and Direct Appeal

Petitioner was convicted of murder and related crimes in a Florida court in 1992. Record on Appeal ("ROA") at 43-45. He was sentenced to death under the capital sentencing scheme this Court found unconstitutional in *Hurst v. Florida*, 136 S. Ct. 616, 619 (2016) ("We hold this sentencing scheme unconstitutional. The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a death sentence. A jury's mere recommendation is not enough."). Under Florida's capital sentencing scheme in place at the time Petitioner was sentenced to death, a penalty phase was held after a defendant was convicted of first-degree murder in which the jury was asked to render an "advisory" recommendation for life or death. A simple majority vote was all that was necessary to recommend death, and Petitioner's jury recommended death by a vote of 7-5. ROA at 37.

The trial judge—not the jury—found the facts necessary to impose Petitioner's death sentence. Petitioner's judge found that aggravating circumstances had been proven beyond a reasonable doubt during Petitioner's penalty phase, and that those aggravating circumstances were "sufficient" for the death penalty and not outweighed by the mitigation. ROA at 43.[1] The trial judge sentenced Petitioner to death. *Id.*

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[1] The trial court found the following aggravating factors: (1) a capital felony was committed by the Defendant while under sentence of imprisonment; (2) the Defendant was previously convicted of another capital felony and a felony involving

On direct appeal, Petitioner raised state and federal constitutional challenges to Florida's capital sentencing statutes. The Florida Supreme Court rejected those arguments and affirmed. *Suggs v. State*, 644 So. 2d 64 (Fla. 1994), *cert. denied*, 514 U.S. 1083 (1995).

### B. State and Federal Collateral Proceedings

In his state postconviction proceedings, Petitioner raised a number of claims, including state and federal constitutional challenges to Florida's death penalty sentencing scheme under *Espinosa v. Florida*, 505 U.S. 1079 (1993). The postconviction court denied relief on all claims. Petitioner appealed to the Florida Supreme Court. While his appeal was pending, this Court decided *Ring v. Arizona*, 536 U.S. 584 (2002). Petitioner filed a Petition for Writ of Habeas Corpus on February 16, 2004. The Florida Supreme Court issued its mandate on November 17, 2005,

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the use or threat of violence to the person; (3) the crime for which the Defendant is to be sentenced was committed while he was engaged in the commission of the crime of kidnapping; (4) the capital felony was committed for the purpose of avoiding or preventing lawful arrest; (5) the capital felony was committed for pecuniary gain; (6) the capital felony was especially heinous, atrocious or cruel; and (7) the capital felony was a homicide and it was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

The trial court found the following statutory mitigating factor: the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.

The trial court found the following nonstatutory mitigating factors: (1) Defendant's parents are hardworking, successful individuals who have earned respect in their Alabama community; (2) Defendant has one brother, twenty-nine years of age, who must live with his parents because of serious health problems; (3) Defendant has a good relationship with his parents and got along well with his younger brother; (4) Defendant is known as a very hard worker and dependable in the construction trade; and (5) Defendant was good about fixing things around the house.

affirming the circuit court's denial of postconviction relief and denying Petitioner's petition for habeas corpus relief. *Suggs v. Florida*, 923 So. 2d 419 (Fla. 2005).

In 2007, Petitioner filed a 28 U.S.C. § 2254 petition for federal habeas relief, arguing, among other things, that he is actually innocent. *Suggs v. McNeil*, No. 3:06-cv-111-RH, ECF No. 60 (N.D. Fla. Jun. 7, 2006). In particular, Petitioner argued that his conviction relied largely upon the incredible testimony of two jailhouse snitches. The United States District Court for the Northern District of Florida denied the petition, and the United States Court of Appeals for the Eleventh Circuit affirmed without granting a certificate of appealability on the actual innocence issue. *See Suggs v. McNeil*, 609 F.3d 1218 (11th Cir. 2010).

### C. *Hurst* Litigation

In 2016, Petitioner filed a petition for writ of habeas corpus in the Florida Supreme Court seeking relief under *Hurst*. In March 2017, the Florida Supreme Court denied his petition based on its decisions in *Asay v. State*, 210 So. 3d 1, 22 (Fla. 2016), and *Mosley v. State*, 29 So. 3d 1248, 1274 (Fla. 2016), which held that *Hurst* applies retroactively on collateral review, but only to prisoners whose death sentences became final on direct appeal after *Ring* was decided on June 24, 2002. The Florida Supreme Court did not address Petitioner's arguments that a *Ring*-based retroactivity cutoff violates the Eighth and Fourteenth Amendments. In April 2017, Petitioner filed a motion for rehearing in the state habeas proceeding.

While his state habeas proceeding was ongoing in the Florida Supreme Court, Petitioner filed a successive motion for postconviction relief in the state trial court

seeking relief under *Hurst*. In May 2017, the trial court denied relief based on the Florida Supreme Court's denial of his state habeas petition. The trial court did not address Petitioner's argument that a *Ring*-based retroactivity cutoff violates the Eighth and Fourteenth Amendments.

In June 2017, the Florida Supreme Court stayed Petitioner's appeal of the trial court's *Hurst* ruling, and his motion for rehearing in the state habeas proceeding pending the disposition of *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017), another appeal from the denial of *Hurst* relief in a "pre-*Ring* capital case.

The Florida Supreme Court thereafter ordered Petitioner to show cause why the denial of *Hurst* relief in his case should not be summarily affirmed in light of *Hitchcock* and the *Ring*-based retroactivity cutoff.

Petitioner responded to the show cause order, and, on January 22, 2018, the Florida Supreme Court issued an opinion summarily affirming the denial of *Hurst* relief. *Suggs v. State*, 234 So. 3d 546 (Fla. 2018). This opinion is the subject of a pending petition for writ of certiorari. *See Suggs v. State of Florida*, Docket No. 17-9173 (filed May 31, 2018) (distributed for Conference of September 24, 2018).

**D. Decision Below**

On October 27, 2016, prior to the instigation of Petitioner's *Hurst* litigation, Petitioner filed a successive motion for postconviction relief raising newly discovered evidence claims. Claim III raised a newly discovered evidence claim based on the trial judge's revelation that she believed she was required to impose death and that she shifted her responsibility to the appellate court, diminishing her own responsibility

in sentencing Petitioner contrary to *Caldwell v. Mississippi*, 472 U.S. 320 (1985). The trial court summarily denied Petitioner's successive motion for postconviction relief. App. at 21.

On November 9, 2017, the Florida Supreme Court issued an opinion affirming the denial of Petitioner's newly discovered evidence claims. *Suggs v. State*, 238 So. 3d 699 (Fla. 2017). App. at 1. The Florida Supreme Court's opinion contained the following analysis of Petitioner's claim that the trial judge abdicated responsibility for Petitioner's death sentence:

> This claim is meritless. Suggs's sentencing judge issued a detailed order showing the requisite findings, and her recent revelation of her thought process at the time is not the type of evidence that would probably change the outcome at a new sentencing proceeding, as it would not be admissible evidence. *See Marek v. State*, 14 So. 3d 985, 990 (Fla. 2009) (requiring that newly discovered evidence related to sentencing be of such a nature that it would "probably yield a less severe sentence"). Moreover, the sentencing judge's thought process inhered in her decision and is not subject to review. *Cf. Foster v. State*, 132 So. 3d 40, 64-65 (Fla. 2013) (explaining that jurors' private thoughts inhere in the verdict). For these reasons, Suggs's claim is distinguishable from cases where relief has been warranted due to postconviction revelations that prosecutors drafted sentencing orders imposing death without input from the sentencing judge or after ex parte communications. *See Roberts v. State*, 840 So. 2d 962, 972-73 (Fla. 2002) (ex parte communication); *Card v. State*, 652 So. 2d 344, 345-46 (Fla. 1995) (lack of input). Accordingly, this claim was properly denied.

*Id.* at 706. The opinion did not discuss any of Petitioner's federal constitutional arguments, including the *Caldwell v. Mississippi* violation. On November 22, 2017, Petitioner filed a Motion for Rehearing arguing, among other things, that the Florida Supreme Court's opinion overlooked and/or misapprehended Petitioner's sentencing

judge's disregard for her responsibilities under Florida's capital sentencing scheme. The Florida Supreme Court denied rehearing and issued its Mandate on March 29, 2018. App. at 19,

## REASONS FOR GRANTING THE WRIT

### I. The Florida Supreme Court's Refusal to Correct the *Caldwell* Error in Unconstitutional Pre-*Hurst* Death Sentences Violates the Standard of Reliability Required by the Eighth Amendment

#### A. Petitioner was Sentenced to Death Under an Unconstitutional Capital Sentencing Scheme That Minimized the Jury's Role in Sentencing

There is no dispute that Petitioner's death sentence was obtained in violation of the United States Constitution for the reasons described in *Hurst v. Florida*, 136 S. Ct. 616 (2016).[2] In *Hurst*, the United States Supreme Court held that Florida's capital sentencing scheme—the scheme under which Petitioner was sentenced to death—violated the Sixth Amendment because it required the judge, not the jury, to make the findings of fact required to impose the death penalty under Florida law. *Id.* at 620-22. Those findings included: (1) the aggravating factors that were proven beyond a reasonable doubt; (2) whether those aggravators were "sufficient" to justify the death penalty; and (3) whether those aggravators outweighed the mitigation.

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[2] The Florida Supreme Court's rejection of Petitioner's *Hurst* arguments have been challenged in a separate petition for writ of certiorari filed in this Court on May 31, 2018, Docket No. 17-9173. The Florida Supreme Court's refusal to grant retroactive *Hurst* relief for Petitioner's unconstitutional death sentence, combined with the *Caldwell* trial judge's shifting of responsibility to the appellate courts and the jury's knowledge that it had no responsibility for fact-finding at the sentencing phase, make Petitioner's cases particularly suitable vehicles for this Court to address the *Caldwell* issue in a *Hurst* case.

Because Petitioner was sentenced to death pursuant to that scheme, his sentence is unconstitutional under *Hurst*.

Petitioner's death sentence violates the Sixth Amendment because the trial judge, not the jury, made the findings of fact necessary for imposition of a death sentence (a sentence that was not authorized by Petitioner's murder conviction alone). Petitioner's jury was never asked to make findings of fact as to each of the required elements. Petitioner's jury was instructed that it could consider the seven aggravating circumstances that the State asserted it had established, and it was instructed it could consider the non-statutory mitigating circumstances argued by the defense. ROA at 4721-22. Petitioner's jury was also instructed that its penalty phase verdict was merely a "recommendation" or an "advisory verdict" to be returned by majority vote, and that "the final decision as to what punishment shall be imposed is the responsibility of the judge." ROA at 4720-21.

After being instructed that its decision was advisory, and that the ultimate responsibility for finding the sentencing factors and imposing a death sentence rested with the judge, the jury returned a recommendation for a death sentence on a form titled "Penalty Phase Jury Recommendation," which stated: "A majority of the Jury, but a vote of 7 to 5, advise and recommend to the court that it impose the death penalty upon Ernest Donald Suggs." ROA at 1756. The jury's recommendation failed to identify whether the jurors found that sufficient aggravating circumstances existed, whether they found any statutory mitigating circumstances, and whether the jury members found the mitigating circumstances insufficient to outweigh the

aggravating circumstances. The advisory jury's findings of fact do not exist because Petitioner's advisory jury did not make a single finding of fact.

In the unconstitutional capital sentencing scheme in place in Florida at the time Petitioner was sentenced to death, after the jury made a general recommendation to impose the death penalty without specifying the basis for its recommendation, the trial judge is *assumed* to have found as fact that (1) specific aggravating circumstances had been proven beyond a reasonable doubt, (2) those particular aggravating circumstances were sufficient in the context of Petitioner's case to impose the death penalty, and (3) the aggravating circumstances were not outweighed by the mitigating circumstances.

In Petitioner's case however, the jury did not make any findings of fact necessary to impose Petitioner's death sentence. Petitioner's jury was repeatedly instructed that its penalty phase verdict was merely "advisory" and a "recommendation" to the trial judge who held the ultimate responsibility for the life or death decision regarding Petitioner's sentence. However, as discussed later in this Petition, not only did Petitioner's jury not hold any responsibility for Petitioner's death sentence, but the trial judge was also heavily influenced by the *Caldwell* error that permeated Florida's capital sentencing scheme and shifted her responsibility for Petitioner's death sentence to the appellate court.

### B. The Florida Supreme Court Refuses to Address the *Caldwell* Error in Petitioner's Pre-*Hurst* Death Sentence

In *Caldwell v. Mississippi*, the U.S. Supreme Court held that "it is constitutionally impermissible to rest a death sentence on a determination made by

a sentencer who has been led to believe that responsibility for determining appropriateness of a defendant's death rests elsewhere." *Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985). At question in *Caldwell* was "whether a capital sentence is valid when the sentencing jury is led to believe that responsibility for determining the appropriateness of a death sentence rests not with the jury but with the appellate court which later reviews the case." *Id.* at 323. The Court held that it is not.

> [F]or a sentencer to impose a death sentence out of a desire to avoid responsibility for its decision presents the spectre of the imposition of death based on a factor wholly irrelevant to legitimate sentencing concerns. The death sentence that would emerge from such a sentencing proceeding would simply not represent a decision that the State had demonstrated the appropriateness of the defendant's death. This would thus also create the danger of a defendant being executed in the absence of any determination that death was the appropriate punishment.

*Id.* at 332.

The Florida Supreme Court has rejected numerous *Caldwell*-based challenges to Florida's pre-*Hurst* jury instructions. Beginning in *Pope v. Wainwright*, 496 So. 2d 798 (Fla. 1986), the Florida Supreme Court dismissed the relevance of *Caldwell* on the theory that, unlike the Mississippi scheme at issue in *Caldwell*, Florida's instructions accurately described the jury's "merely" advisory nature: "[I]n Florida it is the trial judge who is the ultimate sentence," and the jury "is merely advisory." *Id.* at 805. The Florida Supreme Court, finding "nothing erroneous about informing the jury of the limits of its sentencing responsibility," so as to "relieve some of the anxiety felt by jurors impaneled in a first-degree murder trial," held that its advisory jury instructions complied with *Caldwell* and accurately described a constitutionally valid scheme. *Id.*

In *Combs v. State*, 525 So. 2d 853, 856 (Fla. 1998), the Florida Supreme Court reaffirmed its holding in *Pope* that Florida's advisory jury scheme complied with *Caldwell*. The Florida Supreme Court further noted that it was "deeply disturbed" by decisions of the United States Court of Appeals for the Eleventh Circuit, in cases like *Adams v. Wainwright*, 804 F.2d 1526 (11th Cir. 1986), and *Mann v. Dugger*, 844 F.2d 1446 (11th Cir. 1988) (en banc), which expressed doubts as to whether Florida's scheme complied with *Caldwell*. For years after *Pope* and *Combs*, the Florida Supreme Court continued to reject *Caldwell* challenge to Florida's advisory jury instructions. *See, e.g., Davis v. State*, 136 So. 3d 1169, 1201 (Fla. 2014).

The jurors in Petitioner's case were repeatedly told by the trial court that their recommendation was advisory and that the final sentencing decision rested solely with the judge. From the very outset of the penalty phase, during the court's preliminary instructions, the advisory jurors were informed by the judge that "[t]he final decision as to what punishment shall be imposed rests solely with the judge of this court." ROA at 4616. During penalty phase opening statements, the prosecutor told the advisory jury that its "role in this penalty phase is one of advisory" and "[t]he Court ultimately imposes the sentence in this case." ROA at 4620. During his closing argument, the prosecutor repeatedly referred to the jury's penalty phase verdict as a "recommendation," a "recommended sentence," and an "advisory opinion." ROA at 4691, 4692, 4694, 4695, 4701, 4702. Before the advisory jury retired to deliberate, the judge instructed that "the final decision as to what punishment shall be imposed is the responsibility of the judge" and the jurors were asked only to "render to the Court

an advisory sentence." ROA at 4720. The judge repeatedly referred to the jury's "advisory sentence" and "recommendation." ROA at 4721, 4722, 4724, 4725. It was with those remarks and instructions in mind, which informed the advisory jury "that the responsibility for determining the appropriateness of the defendant's death sentence lies elsewhere," *Caldwell*, 472 U.S. 328-29, that Petitioner's jurors made a recommendation to impose death.

Empirical research supports the notion that Florida's advisory juries were imbued with a diminished sense of responsibility for the imposition of death sentences before *Hurst*. *See, e.g.*, William J. Bowers, *The Decision Maker Matters: An Empirical Examination of the Way the Role of the Judge and Jury Influence Death Penalty Decision-Making*, 63 Wash. & Lee L. Rev. 931, 954-62 (2006). Interviews with Florida jurors conducted through the Capital Jury Project ("CJP") yielded narrative accounts highlighting the detrimental impact of Florida's pre-*Hurst* instructions on jurors' sense of their sentencing role. *See id.* at 961-62. Florida jurors relayed to researchers their understanding that "[w]e don't really make the final decision . . . we would give our opinion but the choice would be up to the judge." *Id.* at 961. One Florida juror told CJP researches that "the fact that you could make a recommendation, that you didn't make a yes or no, that someone else would make the decision, I think that let us feel off the hook." *Id.* The same juror noted that he found the pre-*Hurst* sentencing process to be "not as traumatic as deciding [the defendant's] guilt because we would take the steps, make a recommendation, and the judge would make the final choice." *Id.* As another Florida juror said approvingly of Florida's pre-

*Hurst* advisory jury instructions, "I didn't want this on my conscience." *Id.*

*Hurst* overruled the Florida Supreme Court's *Caldwell* precedent. In light of *Hurst*, the rationale underlying the Florida Supreme Court's prior rejection of *Caldwell* challenges—that Florida's "advisory" jury scheme was constitutionally valid—has disappeared. That is because *Hurst* held that Florida's capital sentencing scheme was *not* constitutional and that juries in that scheme were *not* afforded their constitutionally required role as fact-finders. Given *Hurst*, it is now clear that advisory juries in Florida, like Petitioner's, were misinformed as to their constitutionally required role in determining a death sentence. The juries were unconstitutionally told that they need not make the critical findings of fact in order for a death sentence to be imposed. The pre-*Hurst* jury instructions thereby "improperly described the role assigned to the jury," in violation of *Caldwell*. *Dugger v. Adams*, 489 U.S. 401, 408 (1989).

The Florida Supreme Court has repeatedly refused to address Petitioner's argument that it should revisit the applicability of *Caldwell* to Florida's pre-*Hurst* scheme. *Cf. Truehill v. Florida*, 138 S. Ct. 3 (2017) (Sotomayor, J., dissenting from the denial of certiorari) ("Although the Florida Supreme Court has rejected a *Caldwell* challenge to its jury instructions in capital cases in the past, it did so in the context of its prior sentencing scheme, where the court was the final decision-maker and the sentence—not the jury."); *see also Middleton v. Florida*, 138 S. Ct. 829 (2018) (Breyer, J., dissenting from denial of certiorari) ("In my view, 'the Eighth Amendment requires individual jurors to make, and to take responsibility for, a decision to

sentence a person to death.'") (Sotomayor, J., dissenting from the denial of certiorari) ("This Court has unequivocally held 'that it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere.'"); *see also Guardado v. Jones*, 138 S. Ct. 1131 (2018) (Sotomayor, J., dissenting from denial of certiorari) ("Therefore, the Florida Supreme Court has (again) failed to address an important and substantial Eighth Amendment challenge to capital defendants' sentences post-*Hurst*. Nothing in its pre-*Hurst* precedent, nor in its opinions in *Truehill* and *Oliver*, addresses or resolves these substantial *Caldwell*-based challenges. This Court can and should intervene in the face of this troubling situation."); *see also Kaczmar v. Florida*, 138 S. Ct. 1973 (2018) (Sotomayor, J., dissenting from the denial of certiorari) ("Like a number of other capital defendants in Florida, petitioner Leo Louis Kaczmar has raised an important Eighth Amendment challenge to his death sentence that went unaddressed by the Florida Supreme Court.").

After affirming the denial of *Hurst* relief in Petitioner's case, the Florida Supreme Court decided *Reynolds v. State*, No. SC17-793, 2018 WL 1633075 (Fla. April 5, 2018), and attempted in that decision to discuss *Caldwell*, although the discussion was deeply flawed. In *Reynolds*, the Florida Supreme Court doubled-down on its pre-*Hurst* decisions regarding the applicability of *Caldwell* to Florida's capital sentencing scheme. The court wrote that, under *Romano v. Oklahoma*, 512 U.S. 1 (1994), *Hurst* has no bearing on whether *Caldwell* was violated in any case because

Florida's pre-*Hurst* jury instructions accurately described Florida's capital sentencing scheme at the time. *Reynolds*, 2018 WL 1633075, at *10-12. But Florida's prior scheme was *not* constitutional before *Hurst*, and this makes *Romano* inapplicable. Justice Pariente explained this in her dissent:

> If Florida's capital sentencing scheme was invalid form the point that the United States Supreme Court decided *Ring*, as the United States Supreme Court made clear in *Hurst v. Florida*, 136 S. Ct. at 622, and this Court's retroactivity analyses confirm, it is difficult to understand how Florida's standard jury instructions, following an unconstitutional statute, did not also create constitutional error.

*Id.* at *16.

The state court's decision in *Reynolds*—which represents an attempt to rebuke the concerns expressed by Justices Sotomayor, Ginsburg, and Breyer in *Guardado*, 138 S. Ct. 1131, *Middleton*, 138 S. Ct. 829, and *Truehill*, 138 S. Ct. 3—provides an additional justification for the grant of certiorari review in Petitioner's case on the question of *Caldwell*'s applicability to pre-Hurst death sentences. As noted by Justice Sotomayor in her dissent in *Kaczmar*, 138 S. Ct. at 1973, the *Reynolds* opinion "garnered the support only of a plurality, so the issue remains without definitive resolution by the Florida Supreme Court."

### C. Petitioner's Trial Judge Shifted Her Responsibility for Petitioner's Death Sentence to the Appellate Court

Judge Laura Melvin, who presided over Mr. Suggs' trial, recently published a book entitled *Public Secrets & Justice: A Journal of a Circuit Court Judge*.[3] In this

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[3] Laura Melvin, *Public Secrets & Justice—Journal of a Circuit Court Judge* (Shayna Publishing) (2013).

book, Judge Melvin described the case against Petitioner, the first person she sentenced to death.

In explaining the law in death penalty cases to her readers, she stated the following:

> The law in death penalty cases was complex and did not allow the State to kill everyone who kills another. Murders are committed for a variety of reasons, using a gamut of methods, and the Florida legislature developed a weighing process, a score sheet if you will, to be used by judges and juries when evaluating a specific murder for the death penalty. The judge and jury were to weigh aggravating factors (reasons to kill the defendant) against mitigating factors (reasons not to kill him). If the jury found the defendant guilty of 1st degree murder, there was a second trial, known as the penalty phase, and the same jury of 12 returned a recommendation to the Judge on whether the death penalty should be imposed. If the jury recommended death, the Judge remained the ultimate decision-maker and could sentence the defendant to life in prison without parole. On the other side of the equation, if the jury recommended life, there was a narrow set of facts and legal requirements under which a judge might override the jury's recommendation and impose the death penalty.

Melvin, *supra* note 3, at 57.

On August 16, 2013, Judge Melvin wrote a letter to Governor Rick Scott recommending that Mr. Suggs' death sentence be commuted to life. App. at 52.

In this letter, Judge Melvin insisted that she carefully followed the law when she sentenced Petitioner to death yet believes that life imprisonment is the appropriate sentence in Petitioner's case. Notably, she also mentioned the seven to five non-unanimous death recommendation given by the jury, as if even the jurors were not convinced of the sentence they had recommended.

> On July 15, 1992, I was the trial judge sitting in Walton County when I sentenced Ernest D. Suggs to death in the electric chair, carefully following the law. I did not impose the death penalty because I thought

> Suggs deserved it, or that the emotional stress of the victim's family would somehow be made lighter or because I thought it was the moral thing to do, or that society would be even a whit better off by killing Suggs in retribution. As a Judge, I understood that I did not have the right or authority to impose my personal convictions, and so I did my job, following the written mandates of the statutes as currently written.
>
> As the Governor of Florida, you have power and authority not granted to me or any other Circuit Judge. Unlike Circuit Judges who are bound by the statutes, you have the Constitutional power as set forth at Article IV, Section 8, to commute Suggs' death sentence to life in prison without parole, a sentence that would better serve all of the citizens of Florida. The vote of his jury – seven to five for death – demonstrates that even for a jury in the most conservative part of the state, Suggs' execution is by no means the unanimous choice. I urge you to commute Suggs' death sentence to life in prison.

App. at 52.

Although it is rare that a penalty phase judge enters a sentence which is different than the jury's recommendation, the judge presiding over the penalty phase proceeding ultimately determines the sentence and can override the jury's recommendation if she so determines. In Florida, the jury's sentencing recommendation in a capital case is only advisory. The trial court is to conduct its own weighing of the aggravating and mitigating circumstances and, "[n]otwithstanding the recommendation of a majority of the jury, is to enter a sentence of life imprisonment or death; in the latter case, specified written findings are required." *See* Fla. Stat. § 921.141 (2015).

In Petitioner's case, Judge Melvin chose not to override the jury's recommendation, despite not being convinced that it was the appropriate sentence, and instead, shifted her own responsibility as sentencer to the appellate courts:

> I took much comfort in the nitpicking appeal process that would follow

> – knowing it would be years before everybody finished reviewing this job I'd done. I took comfort in feeling I was only a small part of the process, hoping that somehow I would feel less than ultimately responsible, trying to ignore the fact that I had the choice to impose a life sentence and reject the jury's recommendation. I ignored the legal reality that the Supreme Court would not likely reverse a lower court's decision to impose a life sentence.

*Id.* at 60-61.

Judge Melvin recalled her reaction to the news that the Florida Supreme Court had affirmed Suggs' conviction and sentence on direct appeal:

> I was sitting as a Juvenile Judge in Pensacola when the Florida Supreme Court issued its ruling on Suggs, the man I had sentenced to death almost four years earlier. The conviction and sentence was affirmed; there was no error. Not even what they call harmless error. Nothing was wrong, legally wrong, yet the ruling really took the wind out of me. Suggs is now very likely to die because I'd been well trained and did a good job. Had I been sloppy or short tempered, Suggs would live.

*Id.* at 127-28.

Under Florida's capital sentencing scheme in effect at the time of Petitioner's trial, Judge Melvin had the ultimate responsibility for Petitioner's death sentence. His jury was repeatedly instructed that its penalty phase verdict was merely a "recommendation" to the trial judge who had the actual responsibility of determining if Petitioner lived or was executed by the State of Florida. Unfortunately, Judge Melvin believed that she could not override the jury's 7 to 5 death recommendation because she could not find any "legal error." Judge Melvin herself fell victim to the *Caldwell* error that infected Florida's pre-*Hurst* capital sentencing scheme. Even though she sentenced Petitioner to death when she thought a life sentence was appropriate, she took comfort in the appellate process and hoped that the appellate

courts would absolve her responsibility for Petitioner's death sentence.

### D. The Trial Judge's Belief That the Appellate Court was Ultimately Responsible for Petitioner's Death Sentence Exacerbated the *Caldwell* Error in Petitioner's Case

Following the jury's 7 to 5 death recommendation in Mr. Suggs' case, Judge Melvin sentenced him to die. Years later, she insists that death is not the appropriate sentence in this case. According to her recent revelations, she believed that she was unable to override the jury's less than unanimous recommendation because she could not find any "legal error." She also believed that the appellate court was ultimately responsible for whether Petitioner lived or died by execution.

Judge Melvin's confusion regarding Florida's pre-*Hurst* capital sentencing scheme actually goes straight to the heart of this Court's concern in *Caldwell* that the sentencer might "shift its sense of responsibility to an appellate court." *Caldwell*, 472 U.S. at 330. During his penalty phase closing argument, Caldwell's attorney asked for mercy and pressed upon the jurors the "awesome responsibility" they faced in the jury room to determine if Caldwell lived or died. *Id.* at 324. The prosecutor responded as follows:

> Ladies and gentlemen, I intend to be brief. I'm in complete disagreement with the approach the defense has taken. I don't think it's fair. I think it's unfair. I think the lawyers know better. Now, they would have you believe that you're going to kill this man and they know—they know that your decision is not the final decision. My God, how unfair can you be? Your job is reviewable. They know it."

*Id.* at 325. Defense counsel's objection was overruled by the trial court, and the prosecutor was allowed to inform the jury "the decision you render is ***automatically reviewable by the Supreme Court***." *Id.* at 325-26 (emphasis added).

This Court agreed with Caldwell's claim "that the prosecutor's argument rendered the capital sentencing proceeding inconsistent with the Eighth Amendment's heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case'" and vacated his death sentence. *Id.* at 323 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 205 (1976) (plurality opinion)). This Court feared that the abdication of sentencing responsibility to an appellate court would deprive a defendant of his "right to a fair determination of the appropriateness of his death" because "an appellate court, unlike a capital sentencing jury, is wholly ill-suited to evaluate the appropriateness of death in the first instance. Whatever intangibles a jury might consider in its sentencing determination, few can be gleaned from an appellate record." *Id.* at 332. This Court also noted that the "inability to confront and examine the individuality of the defendant would be particularly devastating to any argument for consideration of what this Court has termed '[those] compassionate or mitigating factors stemming from the diverse frailties of humankind.'" *Id.* at 330 (quoting *Woodson*, 428 U.S. at 304).

Judge Melvin's conduct in Petitioner's case is exactly what this Court feared would come to pass in a capital sentencing scheme where the sentencer believed that responsibility for the defendant's death sentence rested elsewhere. Petitioner's jury was led to believe that its sentencing role was merely advisory and was assured that the final decision as to what punishment would be imposed on Petitioner rested solely with trial judge. Tragically for Petitioner, the prospect of appellate review convinced Judge Melvin that she herself was only a small part of the process, when in reality

the ultimate decision of whether Petitioner was sentenced to life in prison or death by execution was solely her "truly awesome responsibility." *See id.* at 341.

This Court made it clear in *Caldwell* "that appellate review is available to a capital defendant sentenced to death is no valid basis for a jury to return such a sentence it otherwise it might not. It is simply a factor that in itself is wholly irrelevant to the determination of the appropriate sentence." *Id.* at 336. The jury sentenced Caldwell to death after the prosecutor reassured them with the prospect of appellate review, and Judge Melvin sentenced Petitioner to death with the same belief that the appellate court would take responsibility for Petitioner's fate. Judge Melvin's perception of her diminished role in Florida's capital sentencing scheme is "fundamentally incompatible with the Eighth Amendment's heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case.'" 472 U.S. at 350 (quoting *Woodson*, 428 U.S. at 305). Petitioner's death sentence does not meet the standard of reliability the Eighth Amendment demands and must be vacated.

## CONCLUSION

WHEREFORE, for the reasons set forth above, Petitioner Ernest D. Suggs, prays that this Court grant this Petition for a Writ of Certiorari and order further briefing or vacate and remand this case to the Florida Supreme Court.

Respectfully submitted,

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JULY 2018