NO. 18-5359

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 FLORIDA SUPREME COURT

BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI

PAMELA JO BONDI
ATTORNEY GENERAL OF FLORIDA

CAROLYN M. SNURKOWSKI*
Associate Deputy Attorney General
*Counsel of Record

Lisa A. Hopkins
Assistant Attorney General
Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
Carolyn.Snurkowski@myfloridalegal.com
capapp@myfloridalegal.com
(850) 414-3300

COUNSEL FOR RESPONDENT

Capital Case

Question Presented

Whether this Court should grant certiorari review of a question not properly presented to the state court below where: 1) the jury was properly instructed on its role under state law at the time this case was tried; 2) the retroactive application of *Hurst v. Florida* and *Hurst v. State* is based on adequate independent state grounds; 3) there was no underlying federal constitutional error as Petitioner was eligible for a death sentence by virtue of his prior and contemporaneous violent felony convictions; and 4) the case presents no conflict between the decisions of this Court, federal courts of appeal, or other state courts of last resort.

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Opinion Below

The decision of the Florida Supreme Court appears as *Suggs v. State*, 238 So. 3d 699 (Fla. 2017).

Jurisdiction

This Court's jurisdiction to review the final judgment of the Florida Supreme Court is authorized by 28 U.S.C. § 1257. However, because the Florida Supreme Court's decision in this case is based on adequate and independent state grounds, this Court should decline to exercise jurisdiction as no federal question is raised. Sup. Ct. R. 14(g)(i). Additionally, the Florida Supreme Court's decision does not implicate an important or unsettled question of federal law, does not conflict with another state

court of last resort or a United States court of appeals, and does not conflict with relevant decisions of this Court. Sup. Ct. R. 10. No compelling reasons exist in this case and this Petition for a writ of certiorari should be denied. Sup. Ct. R. 10.

This Court's jurisdiction is limited to only those federal constitutional issues which were presented and considered by the court below. *Illinois v. Gates*, 462 U.S. 213, 218 (1983); *see also Howell v. Mississippi*, 543 U.S. 440, 443 (2005).

> With "very rare exceptions," *Yee v. Escondido*, 503 U.S. 519, 533[ ] (1992), we have adhered to the rule in reviewing state court judgements under 28 U.S.C. § 1257 that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review. *See Heath v. Alabama*, 474 U.S. 82, 87[ ] (1985); *Illinois v. Gates*, 462 U.S. 213, 217-219[ ] (1983); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434[ ] (1940).
>
> . . .
>
> When the highest state court is silent on a federal question before us, we assume the issue was not properly presented, *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550[ ] (1987), and the aggrieved party bears the burden of defeating this assumption, *ibid*, by demonstrating that the state court had "a fair opportunity to address the federal question that is sought to be presented here," *Webb v. Webb*, 451 U.S. 493, 501[ ] (1981).

Adams v. Robertson, 520 U.S. 83, 86-87 (1997); *see also Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212-13 (1998) (This Court does not ordinarily review a claim not presented to the court below.); *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (This Court sits as a "court of final review and not first view."). Petitioner's first claim was not raised in the Florida Supreme Court on appeal. As such, this claim is barred and must be denied. Petitioner raised a claim under *Hurst* in a different appeal, and ~~with~~ his petition for a writ of certiorari is currently pending

in this Court under case number 17-9173.

Statement of the Case and Facts

Petitioner, Ernest D. Suggs, was convicted of the first-degree murder, kidnapping, and robbery of Pauline Casey, and sentenced to death. *Suggs v. State*, 644 So. 2d 64 (Fla. 1994). The facts demonstrate that

> Pauline Casey, the victim, worked at the Teddy Bear Bar in Walton County. On the evening of August 6, 1990, the bar was found abandoned, the door to the bar was ajar, cash was missing from the bar, and the victim's car, purse, and keys were found at the bar. The victim was missing. Ray Hamilton, the victim's neighbor, told police that he last saw the victim shooting pool with an unidentified customer when he left the bar earlier that night. Based on Hamilton's description of the customer and the customer's vehicle, police issued a BOLO for the customer. Subsequently, a police officer stopped a vehicle after determining that it matched the BOLO description.
>
> The driver of the vehicle was identified as the appellant, Ernest Suggs. Although he was not then under arrest, Suggs allowed the police to search his vehicle and his home. While searching Suggs' home, the police found, in a bathroom sink, approximately $170 cash in wet bills, consisting of a few twenty-, ten-, and five-dollar bills and fifty-five one-dollar bills.
>
> Meanwhile, police obtained an imprint of the tires on Suggs' vehicle and began looking for similar tire tracks on local dirt roads. Similar tire tracks were found on a dirt road located four to five miles from the Teddy Bear Bar. The tracks turned near a power line, and the victim's body was found about twenty to twenty-five feet from the road. The victim had been stabbed twice in the neck and once in the back; the cause of death was loss of blood caused by these stab wounds. After the victim was found, Suggs was arrested for her murder.
>
> In addition to the cash and tire tracks, police obtained the following evidence connecting Suggs to the murder: one of the three known keys to the bar and a beer glass similar to those used at the bar were found in the bay behind Suggs' home; the victim's palm and fingerprints were found in Suggs' vehicle; and a serologist found a bloodstain on Suggs'

> shirt that matched the victim's blood. Additionally, after his arrest, Suggs told two cellmates that he killed the victim.

Id. at 65-66. At the sentencing phase, the jury recommended death by a vote of seven to five. The trial court, in following the recommendation, found seven aggravating factors and three mitigating factors. *Id.* at 66. The aggravators that the trial court found were

> (1) A capital felony was committed by Suggs while under sentence of imprisonment; (2) Suggs was previously convicted of another capital felony and a felony involving the use or threat of violence to the person; (3) the crime for which Suggs 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 a lawful arrest; (5) the capital felony was committed for pecuniary gain; (6) the capital felony was especially heinous, atrocious, or cruel; (7) the capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

Id. at 66 n.1. The mitigators that the trial court found were "(1) [t]he capacity of Suggs to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired (he had been drinking at the time of the incident); (2) Suggs' family background (he came from a good family); and (3) Suggs' employment background (he was a hard worker)." *Id.* at 66 n.2. The Florida Supreme Court denied Petitioner's claims on direct appeal and affirmed the convictions and sentence of death. *Id.* at 70.

After the Florida Supreme Court denied his claims on direct appeal, Petitioner filed a petition for a writ of certiorari to this Court, which was denied in 1995. *Suggs v. Florida*, 514 U.S. 1083 (1995). Under Florida law, Petitioner's judgment and

sentence became final upon this Court's disposition of the petition for a writ of certiorari, which occurred in 1995. Fla. R. Crim. P. 3.851(d)(1)(B).

In his postconviction proceedings, Petitioner raised multiple claims including that Florida's capital sentencing procedures were unconstitutional pursuant to *Ring*. *Suggs v. State*, 923 So. 2d 419, 442 (Fla. 2005); *Ring v. Arizona*, 536 U.S. 584 (2002). The Florida Supreme Court denied Petitioner's *Ring* claim because Petitioner's conviction and sentence were final before *Ring*, which the Court held was not retroactive. *Suggs*, 923 So. 2d at 442; *Johnson v. State*, 904 So. 2d 400, 412 (Fla. 2005). The Court also denied Petitioner's other postconviction claims. *Suggs*, 923 So. 2d at 442.

On October 27, 2015, Petitioner filed a successive motion for postconviction relief, raising five claims:

> (1) allegations that the victim's husband, whom Suggs argued at trial may have murdered her, sexually abused the victim's daughter; (2) activities and statements of law enforcement officers involved in the search of the bay; (3) recent statements by Suggs's sentencing judge; (4) the involvement in Suggs's case of FBI analyst Michael Malone, whose work has been discredited in other cases; and (5) an investigation of the Walton County Sheriff's Department by the Florida Department of Law Enforcement (FDLE) during the period when Suggs was being investigated, along with evidence of misconduct by the Sheriff and Suggs's prosecutor in a contemporaneous case.

Suggs, 238 So. 3d at 703. The Florida Supreme Court affirmed the summary denial of relief by the postconviction court. *Id.* at 707. This appeal followed.

Reasons for Denying the Writ

The Jury Instructions Properly Advised the Jury of Its Role Under Florida Law and Did Not Diminish the Importance of the Jury's Responsibility in Violation of *Caldwell*.

Petitioner did not raise a claim under *Hurst* in his appeal to the Florida Supreme Court. Since this claim was not presented to, or ruled upon by the Florida Supreme Court below, certiorari should be denied. *Adarand Constructors, Inc. v. Mineta*, 534 U.S. at 110 (This Court sits as a "court of final review and not first view."). Indeed, Petitioner currently has a separate certiorari petiton pending before this Court addressing the retroactive application of *Hurst*. In addition to not being properly presented below, the claims he seeks to present here are meritless. Certiorari should be denied.

Petitioner seeks certiorari review of the Florida Supreme Court's decision holding that *Hurst* is not retroactive to Petitioner because his case became final pre-*Ring* in 1995. *Suggs v. State*, 234 So. 3d 546 (Fla. 2018). Petitioner argues that there was a *Caldwell* violation in his case because the jury was instructed that it was recommending the imposition of the death penalty to the judge. *See Caldwell v. Mississippi*, 472 U.S. 320 (1985). The Florida Supreme Court has repeatedly rejected challenges to the standard jury instructions in death penalty cases pursuant to *Caldwell*. *Hall v. State*, 212 So. 3d 1001, 1032-33 (Fla. 2017). These claims are rejected because the jury was properly instructed on its role as defined by local law. Further, the seriousness of the jury's role is no way diminished by these instructions. This Court has consistently denied certiorari review of petitions raising violations of

Caldwell in light of Hurst. *See Truehill v. Florida*, 138 S.Ct. 3 (2017); *Middleton v. Florida*, 138 S.Ct. 829 (2018); *Guardado v. Jones*, 138 S.Ct. 1131 (2018); *Kaczmar v. Florida*, 138 S.Ct. 1973 (2018).

"To establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." *Dugger v. Adams*, 489 U.S. 401, 407 (1989); *see also Romano v. Oklahoma*, 512 U.S. 1, 9 (1994). In *Caldwell*, the prosecutor made "focused, unambiguous, and strong" remarks which misled the jury into believing the responsibility for sentencing lay elsewhere. *Caldwell*, 472 U.S. at 340. The comments included "your decision is not the final decision" and "[y]our job is reviewable" and that defense was "insinuating that your decision is the final decision." *Id.* at 325-26.

"This Court has repeatedly said that under the Eighth Amendment, 'the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.'" *Caldwell*, 472 U.S. at 329 (quoting *California v. Ramos*, 463 U.S. 992, 998-99 (1983)). The problem with the argument by the prosecutor in *Caldwell* was that it presented "an intolerable danger that the jury will in fact choose to minimize the importance of its role" and thus be in contravention of the requirements of the Eighth Amendment. *Caldwell*, 472 U.S. at 333. However, "'the infirmity identified in *Caldwell* is simply absent' in a case where 'the jury was not affirmatively misled regarding its role in the sentencing process.'" *Davis v. Singletary*, 119 F.3d 1471, 1482 (11th Cir. 1997) (quoting *Romano*, 512 U.S. at 9).

In Petitioner's case, the jury was not affirmatively misled. The jury was instructed of its role as assigned by local law. *Davis*, 119 F.3d at 1482. The jury was told that its role was advisory in nature. (Record at XXVIII:158-59). Since under Florida law, the judge remains the final sentencing authority, a jury's recommendation of death is in fact "advisory." Thus, characterizing the jury's recommendation as "advisory" is an accurate description of the role assigned to the jury by Florida law. Additionally, Petitioner's jury was specifically instructed about the "gravity" of its decision and that "human life is at stake." (Record at XXVIII:162). There was no diminishment of the jury's sense of responsibility in recommending a death sentence in Petitioner's case. Thus, there was no *Caldwell* violation.

Additionally, the Florida Supreme Court has explicitly rejected *Caldwell* attacks on Florida's standard penalty phase jury instructions in the wake of *Hurst*. *See Reynolds v. State*, No. SC17-793, 2018 WL 1633075 (Fla. Apr. 5, 2018); *Johnston v. State*, 246 So. 3d 266 (Fla. 2018) (citing *Reynolds* in rejecting *Caldwell* claim). The Florida Supreme Court pointed out the absurdity of the "*Hurst*-induced *Caldwell*" claims:

> as the argument goes, even pre-*Ring* juries were being misled as to their responsibility in sentencing notwithstanding the fact that such a responsibility did not exist then and does not exist retroactively. This is the exact unwieldiness of *Caldwell* that *Romano* averts. Either juries were being misled or they were not. We conclude that they were not.

Reynolds, 2018 WL 1633075 at *12.

Further, this Court has never held that the Eighth Amendment requires the jury to impose a death sentence. *Proffitt v. Florida*, 428 U.S. 242, 252 (1976). While a

plurality of this Court acknowledged "jury sentencing in a capital case can perform an important societal function," this Court "has never suggested that jury sentencing is constitutionally required" in such cases. *Id.* The Eighth Amendment requires capital punishment to be limited "to those who commit a 'narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (quoting *Atkins v. Virginia*, 536 U.S. 304, 319 (2002)). As such, the Eighth Amendment requires the death penalty to be limited to a specific category of crimes and "States must give narrow and precise definition to the aggravating factors that can result in a capital sentence." *Id.* However, the Eighth Amendment does not require that a jury be the final sentencing authority. Petitioner's argument that his Eighth Amendment rights were violated by his jury's recommendation is not supported by this Court's precedent.

Petitioner's jury was properly instructed of its role under Florida law. The instructions in Petitioner's case in no way diminished the jury's actual responsibilities in the sentencing process. Because Petitioner's jury was properly instructed of its role in sentencing according to Florida law, the jury instructions in Petitioner's case did not violate *Caldwell* and certiorari review should be denied.

The Petition Should Be Denied as It Does Not Allege a Federal Constitutional Violation or Raise a Claim of Error That is Retroactive Under Federal Law.

The Florida Supreme Court's affirmance of Petitioner's sentence does not present a federal constitutional question as the requirements of *Hurst v. Florida* were satisfied in his case. The Florida Supreme Court's vast expansion of the holding in

Hurst v. Florida was not required or even suggested by this Court's holding. For example, *Hurst v. Florida* requires the jury to find one aggravating circumstance existed, not that every aggravating circumstance must be found to exist, before rendering a defendant eligible for the death penalty. Likewise, *Hurst v. Florida* did not establish a new Sixth Amendment right to have a jury determine whether mitigating circumstances exist and determine whether mitigation is sufficiently substantial to warrant leniency.[1] Additionally, *Hurst v. Florida* did not hold that there is a constitutional right to jury sentencing.

The Florida Supreme Court, however, interpreted *Hurst v. Florida*, the Florida Constitution, and Florida jurisprudence as requiring, before the imposition of the death penalty, that a jury

> unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death.

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[1] *See Jenkins v. Hutton*, 137 S.Ct. 1769, 1772 (2017) (noting that the jury's findings that defendant engaged in a course of conduct designed to kill multiple people and that he committed kidnapping in the course of aggravated murder rendered him eligible for the death penalty); *Kansas v. Carr*, 136 S.Ct. 633, 642 (2016) (rejecting a claim that the constitution requires a burden of proof on whether or not mitigating circumstances outweigh aggravating circumstances, noting that such a question is "mostly a question of mercy"). *See also State v. Mason*, 2018 WL 1872180, *5-6 (Ohio Apr. 18, 2018) ("Nearly every court that has considered the issue has held that the Sixth Amendment is applicable to only the fact-bound eligibility decision concerning an offender's guilt of the principle offense and any aggravating circumstances" and that "weighing is not a factfinding process subject to the Sixth Amendment."); *United States v. Sampson*, 486 F.3d 13, 32 (1st Cir. 2007) ("As other courts have recognized, the requisite weighing constitutes a process, not a fact to be found.").

Hurst v. Florida, 202 So. 3d 40, 57 (Fla. 2016). This was a vast expansion from the holding in *Hurst v. Florida*, which focused solely on concerns over the imposition of a death sentence based on judicial rather than jury factfinding related to the aggravating factors. To explain this expansion, the Florida Supreme Court reasoned that the jury "recommendation is tantamount to the jury's verdict in the sentencing phase of trial" and under Florida law, jury verdicts are required to be unanimous. *Id.* at 54. Additionally, the Florida Supreme Court held that unanimity "serves th[e] narrowing function required by the Eighth Amendment"[2] to ensure that death is not "arbitrarily imposed, but . . . reserved only for defendants convicted of the most aggravated and least mitigated murders." *Id.* at 60 (citing *Gregg v. Georgia*, 428 U.S. 153, 199 (1976); *McClesky v. Kemp*, 481 U.S. 279, 303 (1987)). Since the Florida Supreme Court's holding in *Hurst v. State* was a product of state law, and does not present a federal question, this Petition should be denied.

Further, in contrast to *Hurst*, here, Petitioner was found guilty of first-degree murder, kidnapping, and robbery. The kidnapping and robbery were the source of a well established aggravator under Florida law.[3] The jury found him guilty of those

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[2] The Eighth Amendment requires states to "give narrow and precise definition to the aggravating factors that can result in a capital sentence" in order to limit the death penalty to a "narrow category of the most serious crimes" and to defendants who are "more deserving of execution." *Roper*, 543 U.S. at 568 (citing *Atkins*, 536 U.S. at 319). This Court has never held that the Eighth Amendment requires the jury's final recommendation in a capital case to be unanimous. *See, e.g.*, *Apodaca v. Oregon*, 406 U.S. 404 (1972); *Johnson v. Louisiana*, 406 U.S. 356 (1972).

[3] § 921.141(6)(d) (listing murder committed in the course of enumerated felonies as an aggravator).

crimes beyond a reasonable doubt.

Additionally, Petitioner had two prior felony convictions.[4] *See Alleyne v. United States*, 570 U.S. 99, 111 n.1 (2013) (citing *Almendarez-Torres v. United States*, 523 U.S. 224 (1998)) (prior convictions are "a narrow exception" to the Sixth Amendment requirement that defendants have a right to have a jury find facts which expose a defendant to a greater punishment). Thus, at least one aggravating factor was found by the jury to be proven beyond a reasonable doubt by virtue of the guilty verdict and another was exempted from this requirement by virtue of the prior convictions. Based on these two factors in Petitioner's case, there was no *Hurst v. Florida* error.

Further, *Hurst v. Florida* is only retroactive to Petitioner based on an independent state ground. Petitioner may not ask this Court to enforce a retroactivity ruling based on state law. In *Asay*, the Florida Supreme Court held that any case in which the death sentence was final before June 24, 2002, the date *Ring* was decided, would not receive relief based on *Hurst v. Florida*. *Asay v. State*, 210 So. 3d 1, 15 (Fla. 2016); *Ring*, 536 U.S. 584. In making its decision, the Court recognized that its retroactivity test in *Witt* "provides *more expansive retroactivity standards* than those adopted in *Teague*." *Asay*, 210 So. 3d at 15 (citing *Johnson*, 904 So. 2d at 409); *Witt*

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[4] The State presented the testimony of Danny Myrick, Petitioner's parole officer in Alabama, who testified that Petitioner had been convicted of first-degree murder and assault with the intent to murder in Alabama. He was able to certify the prior conviction records and they were entered as Exhibits 40 and 41. (Record XXVIII:76-80).

v. State, 387 So. 2d 922 (Fla. 1980); *Teague v. Lane*, 489 U.S. 288 (1989). Subsequently, the Florida Supreme Court issued an opinion in which it granted retroactive application of *Hurst v. State*, under a state retroactivity analysis, to those cases that were decided post-*Ring*. *See Mosley v. State*, 209 So. 3d 1248, 1276 (Fla. 2016) ("We conclude that under a standard *Witt* analysis, *Hurst* should be applied to Mosley and other defendants whose sentences became final after the United States Supreme Court issued its opinion in *Ring*."). This state law decision does not create a constitutional right to retroactive application of any decision of this Court.

This Court has held that, in general, a state court's retroactivity determination is a matter of state law, not federal constitutional law. *Danforth v. Minnesota*, 552 U.S. 264, 280-81 (2008) (allowing states to adopt a retroactivity test that is broader than *Teague*). Petitioner cannot petition this Court to review a finding of harmless error based purely on a violation of state law. That the Florida Supreme Court held that *Hurst* was retroactive to his case does not mean that he can enforce that retroactivity ruling in federal court. When a constitutional rule is announced, its requirements apply to defendants whose convictions or sentences are pending on direct review or not otherwise final. *Griffith v. Kentucky*, 479 U.S. 314, 323 (1987). However, once a criminal conviction has been upheld on appeal, the application of a new rule of constitutional criminal procedure is limited. This Court has held that new rules of criminal procedure will apply retroactively only if they fit within one of two narrow exceptions. *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004). *See also Lambrix v. Sec'y, Dep't of Corr.*, 872 F.3d 1170, 1182 (11th Cir. 2017), *cert. denied*, *Lambrix v.*

Jones, 138 S.Ct. 312 (2017) ("[n]o U.S. Supreme Court decision holds that its *Hurst* decision is retroactively applicable").

The error complained of in the instant petition is the violation of the expanded sentencing requirements created in *Hurst v. State*, not the federal constitutional requirements set forth in *Hurst v. Florida*. Thus, any violation of that state holding in Petitioner's case would not be reviewed under federal law. No question of federal law has been presented for this Court's review.

Petitioner's Trial Judge Did Not Shift Her Responsibility for Petitioner's Death Sentence to the Appellate Court.

Petitioner argues the Florida Supreme Court erred in affirming the summary denial of his claim that based on the contents of a 2013 memoir, that the trial judge Laura Melvin believed she was required to sentence Petitioner to death in line with the jury's death recommendation. This claim was properly denied because Petitioner provided no information that was of a nature that would probably produce an acquittal on retrial. Additionally, an opinion published in a memoir is not newly discovered evidence. *Schlup v. Delo*, 513 U.S. 298, 324 (1995).

In order to obtain a new trial based on newly discovered evidence in Florida, a defendant must show that the evidence was not known by the trial court, the party, or counsel, and it must appear that the defendant or defense counsel could not have known of it by the use of due diligence. *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998). Also, the evidence "must be of such nature that it would probably produce an acquittal on retrial." *Id.*

The trial court noted in the sentencing order that, "the personal reflections of a sentencing judge written many years after the defendant's sentencing do not automatically weaken the case against the defendant so as to give rise to a reasonable doubt as to his culpability." (PCR 2 574-75). The trial court determined that the contents of such memoir and a letter Judge Melvin had sent to the governor seeking to commute Petitioner's sentence to life would not "probably produce an acquittal on retrial." (PCR 2 574-75) (quoting *Jones*, 709 So. 2d at 521). The trial court properly found that the contents of the memoir do not satisfy the prongs of *Jones* and therefore do not qualify as newly discovered evidence.

The personal opinion of a judge, written in a book for sale to the general public, is not newly discovered evidence. *Davis v. State*, 142 So. 3d 867, 875 (Fla. 2014) (*citing Schwab v. State*, 969 So. 2d 318, 325 (Fla. 2007) (stating that "this Court has not recognized 'new opinions' or 'new research studies' as newly discovered evidence)). In addition to failing to meet the due diligence requirement of *Jones*, Petitioner was unable to show that this evidence, even if it were not time barred and was otherwise admissible, would result in an acquittal on retrial.

Petitioner had to show that the evidence would probably produce a different result on retrial. *See Johnston v. State*, 27 So. 3d 11, 18 (Fla. 2010) (quoting *Jones*, 709 So. 2d at 521). The judge's personal opinion, provided years after the trial, does not constitute "evidence."

The Florida Supreme Court has determined that a claim that information learned from a book is newly discovered evidence entitling the Petitioner to a new

trial is properly summarily denied if refuted by the record. *See Foster v. State*, 132 So. 3d 40, 65 (Fla. 2013) (finding that a claim that information learned from a book where a juror indicated she saw photos in the newspaper and they were not as detailed as the photos in court did not show that the juror compared in court and out of court evidence, or negated her statement that she could remain fair and impartial). Even if Judge Melvin's personal concerns regarding the death penalty are explained in a book, there are no facts alleged to suggest that she did not make an independent judgment of whether the death penalty should be imposed in Petitioner's case.

Judge Melvin found seven aggravating factors and only three mitigating factors in the case. As one of the aggravators, Judge Melvin found the murder to be heinous, atrocious and cruel and she noted that "[t]he Defendant acted with utter indifference to the suffering of this victim. The murder was accompanied by such additional acts which sets this crime apart from normal capital felonies. It was a conscienceless, pitiless crime which was unnecessarily torturous to the victim." *Suggs*, 644 So. 2d at 70. She also found the murder was cold, calculated and premeditated and noted that "the entire criminal episode reflects the Defendant's careful plan to rob [the victim], kidnap her, kill her, and hide her body, all with the aim of avoiding detection." *Id.* Suggs' convictions and sentence were upheld on direct appeal. *Id.* at 66. Even if tried today, Melvin would have to follow the law and analyze the aggravating and mitigating circumstances in making a determination to depart downwards after a jury finding of death, rather than impose some sort of judge nullification based on a personal opinion.

In the letter to the Governor, Judge Melvin explained that she thinks a life sentence better serves the citizens of Florida, as defendants remain on death row for a lengthy period of time and as well as other "realities of imposing the death penalty." (PCR 2 177-79). At no point did she state that she failed to make an independent judgment of whether the death penalty should be imposed in Petitioner's case. Judge Melvin's opinion on the realities of the death penalty based on her time on the bench, is simply her opinion. Personal opinions are just that, opinions, not facts. Claims of newly discovered evidence must be premised on facts, not opinions. *Schlup*, 513 U.S. at 324 (defining newly discovered evidence as exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence). A memoir is none of these things.

Judge Melvin's opinion in no way negates her conclusion that the death penalty was appropriate here based on analysis of the factors of the case. In fact, in the excerpt from the book listed on page 52 in Petitioner's Initial Brief on appeal from the denial of the claim, Melvin said, "I have no question of Suggs' guilt, or that if anyone legally qualifies for the death penalty, it's him." (IB: 52). This is in direct contradiction to Petitioner's argument that Melvin believed the wrong sentence had been imposed and acted in violation of *Caldwell*, 472 U.S. at 329 (vacating a sentence of death where the prosecutor's comments in closing sought to minimize the jury's sense of responsibility for determining the appropriateness of death). Her next sentence, "[B]ut will killing Suggs make the world a better place," illustrates Judge Melvin's

issue is with the death penalty not a finding that the sentence was inappropriate in this case. (IB: 52).

Petitioner argues that *Caldwell* is relevant to this case because Judge Melvin believes a life sentence is appropriate and therefore she denied Suggs his right to a fair determination of the appropriateness of his death. (Petition at 21). However, *Caldwell* holds that it is, "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*, 472 U.S. at 329. Judge Melvin's statements do not show that she believed the responsibility rested elsewhere. She notes that as to the ruling she wrote that, "nothing was wrong, legally wrong," and also "I'd been well trained and did a good job." (Petition at 20). This is not indication that Judge Melvin believed the appropriateness of a death sentence rested with the jury. As such, *Caldwell* is inapplicable to this case.

Petitioner also argues this case is akin to *Roberts v. State*, 840 So. 2d 962 (Fla. 2002), and *Card v. State*, 652 So. 2d 344 (Fla. 1995) where sentencing orders were improperly drafted. (Petition at 8). There is no claim that the sentencing order was improperly drafted, and the *Roberts* case is not relevant to the issue alleged in this claim.

Because *Caldwell* is inapplicable to this case, there is no claim under Federal law and this claim must be denied.

Conclusion

Respondent respectfully submits that the Petition for a writ of certiorari should be denied.

Respectfully submitted,
PAMELA JO BONDI
ATTORNEY GENERAL

CAROLYN M. SNURKOWSKI*
Associate Deputy Attorney General
Florida Bar No. 158541
*Counsel of Record

Lisa A. Hopkins
Assistant Attorney General

Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
Carolyn.Snurkowski@myfloridalegal.com
capapp@myfloridalegal.com
(850) 414-3300

COUNSEL FOR RESPONDENT