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 Supreme Court of Florida

REPLY BRIEF FOR PETITIONER

THIS IS A CAPITAL CASE

BILLY H. NOLAS
Chief, Capital Habeas Unit
Office of the Federal Public Defender
Northern District of Florida
227 North Bronough Street, Ste. 4200
Tallahassee, Florida 32301-1300
(850) 942-8818
billy_nolas@fd.org

ROBERT S. FRIEDMAN
Counsel of Record
DAWN B. MACREADY
STACY R. BIGGART
Office of the Capital Collateral
Regional Counsel – Northern Region
1004 DeSoto Park Drive
Tallahassee, Florida 32301
(850) 487-0922
Robert.Friedman@ccrc-north.org
Dawn.Macready@ccrc-north.org
Stacy.Biggart@ccrc-north.org

I. Petitioner's claim is not a *Hurst* claim, so Respondent's retroactivity arguments are irrelevant.

Respondent contends that Petitioner's claim is procedurally barred because it is a *Hurst* claim that was not raised in the Florida Supreme Court on appeal. BIO at 2. Respondent argues that this Court does not have jurisdiction because "[t]his Court's jurisdiction is limited to only those federal constitutional issues which were presented and considered by the court below." BIO at 2.

Petitioner's discussion of the *Hurst* issue is important background discussion for his *Caldwell* claim, but the subject of Petitioner's petition for writ of certiorari in this case is not a *Hurst* claim. Petitioner argues that this Court should grant certiorari review and address whether Florida's pre-*Hurst* jury instructions violated the Eighth Amendment—an issue that was compounded when Petitioner's trial judge revealed that she believed it was the appellate court who was ultimately responsible for whether Petitioner lived or died by execution and that she, the sentencing judge, did not have such responsibility.

Contrary to the State's assertion, Petitioner is not requesting—and the Court need not—examine the retroactivity of *Hurst* in this claim. Petitioner's *Caldwell* claim regarding his jury and his trial judge were raised on appeal to the Florida Supreme Court and are properly presented to this Court.

II. Respondent's Arguments Regarding Newly Discovered Evidence are Irrelevant Because the Florida Supreme Court's Ruling was On the Merits.

Respondent argues that this Court should deny certiorari review of Petitioner's *Caldwell* claim because Judge Melvin's book and letter to Governor Scott are not

newly discovered evidence. *See* BIO at 14. However, the Florida Supreme Court's ruling on Petitioner's *Caldwell* claim was on the merits and Respondent's discussion of the state-law newly discovered evidence standard is beside the point for this Court's review of Petitioner's *Caldwell* claim.

III. Respondent's Arguments Under the Florida Supreme Court's Recent Plurality Decision in *Reynolds* Underscore the Need for this Court's *Caldwell* Scrutiny.

Respondent's dismissal of Petitioner's *Caldwell* arguments as "absurd" relies in part on the Florida Supreme Court's recent decision in *Reynolds v. State*, No. SC17-793, 2018 WL 1633075 (Fla. Apr. 5, 2018). BIO at 10. Respondent's *Reynolds* arguments only underscore the need for this Court to grant certiorari to review whether Florida's pre-*Hurst* jury instructions violated the Eighth Amendment under *Caldwell*. *See, e.g.*, *Kaczmar v. Florida*, 138 S. Ct. 1973, 1973-74 (2018) (Sotomayor, J., dissenting from the denial of certiorari); *Guardado v. Jones*, 138 S. Ct. 1131 (2018) (Sotomayor, J., dissenting from the denial of certiorari); *Middleton v. Florida*, 138 S. Ct. 829 (2018) (Ginsburg, Breyer, and Sotomayor, JJ., dissenting from the denial of certiorari); *Truehill v. Florida*, 138 S. Ct. 3 (2017) (Ginsburg, Breyer, and Sotomayor, JJ., dissenting from the denial of certiorari).

Justice Sotomayor observed in a recent dissent from the denial of certiorari in *Kaczmar* that *Reynolds* "gathered the support only of a plurality," so the issue of whether the Florida Supreme Court's pre-*Hurst* jury instructions violate *Caldwell* "remains without definitive resolution by the Florida Supreme Court." *Kaczmar*, 138 S. Ct. at 1973. Respondent's brief ignores Justice Sotomayor's dissent in *Kaczmar*

and instead erroneously suggests that *Reynolds* is a majority opinion of the Florida Supreme Court. *See* BIO at 8. It is not. Justice Sotomayor was correct that the Florida Supreme Court has still not sufficiently analyzed in a majority opinion how a defendant's pre-*Hurst* advisory jury recommendation passes constitutional muster when the advisory jury's sense of responsibility for a death sentence was systematically diminished by the design and operation of Florida's prior scheme.

The plurality's reasoning in *Reynolds* provides little hope that the Florida Supreme Court will ever sufficiently address the *Caldwell* matter unless this Court steps in. In *Reynolds*, the plurality doubled-down on its pre-*Hurst* decisions summarily rejecting the applicability of *Caldwell* to Florida's capital sentencing scheme, but for the first time attempted to provide an explanation. The court held 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 there is a critical flaw in the Florida Supreme Court's analysis: Florida's prior scheme was unconstitutional before *Hurst*, making *Romano* inapplicable.

Rather than addressing the concerns of Justice Sotomayor and the other dissenting Justices of this Court, the Florida Supreme Court's decision in *Reynolds* represents an attempt to rebuke those concerns. Mr. Reynolds's petition for a writ of certiorari seeking review of the Florida Supreme Court's opinion in his case is pending in this Court. *See Reynolds v. Florida*, No. 18-5158. The pending petition in

Reynolds, combined with Respondent's reliance on *Reynolds* in this case, provide additional justification for this Court to grant certiorari review.

CONCLUSION

This Court should grant a writ of certiorari and review the decision of the Florida Supreme Court.

Respectfully submitted,

BILLY H. NOLAS
Chief, Capital Habeas Unit
Office of the Federal Public Defender
Northern District of Florida
227 North Bronough Street, Ste. 4200
Tallahassee, Florida 32301-1300
(850) 942-8818
billy_nolas@fd.org

ROBERT S. FRIEDMAN
Counsel of Record
DAWN B. MACREADY
STACY R. BIGGART
Office of the Capital Collateral
Regional Counsel – Northern Region
1004 DeSoto Park Drive
Tallahassee, Florida 32301
(850) 487-0922
Robert.Friedman@ccrc-north.org
Dawn.Macready@ccrc-north.org
Stacy.Biggart@ccrc-north.org

SEPTEMBER 2018