No. 13–1227

In the Supreme Court of the United States

MICHAEL D. CREWS, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,

Petitioner,

v.

ANTHONY JOSEPH FARINA, JR.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

SUPPLEMENTAL BRIEF IN OPPOSITION

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SUPPLEMENTAL BRIEF IN OPPOSITION

This supplemental brief is submitted pursuant to Rule 15.8 to address this Court's decision in *Lopez v. Smith*, No. 13–946, 574 U.S. ___ (2014) (per curiam), which was issued after respondent filed his brief in opposition.

In *Smith*, this Court summarily reversed a grant of habeas relief because the Ninth Circuit had—contrary to this Court's frequent warnings—relied on its own precedents to conclude that a state court had violated "clearly established" federal law, within the meaning of 28 U.S.C. § 2254(d)(1).

The holding of *Smith* does not bear on the question presented here, which arises under § 2254(d)(2). But this Court's disposition of *Smith* underscores why one of the forms of relief that the petition seeks—summary reversal—is inappropriate here. In *Smith*, this Court intervened to correct an outcome-dispositive legal error that this Court has frequently identified in the decisions of the "lower courts—and the Ninth Circuit in particular." Slip op. 5. Here, by contrast, the Eleventh Circuit's decision comports with a long line of Supreme Court and Circuit precedents, and the only authority that petitioner can identify in supposed support of his legal theory is *Black's Law Dictionary*. See Pet. Reply Br. 7; see also Pet. for Cert. 14–16. The petition plainly fails to identify the sort of errors "so apparent as to warrant the bitter medicine of summary reversal." *Spears v. United States*, 555 U.S. 261, 268 (2009) (Roberts, C.J., dissenting).

Much of the petition and petitioner's reply brief address a subsidiary issue—whether the Constitution permits a prosecutor to threaten jurors that a vote for a

life sentence defies the Bible and the will of God. On that score, the egregiousness of the prosecutor's misconduct counsels against extraordinary intervention by this Court. Indeed, even the Secretary conceded, during the Eleventh Circuit's proceedings, that the prosecutor's conduct was "as improper as can be." CA11 Arg. Recording at 38:25.

Applying AEDPA and the Constitution, the appropriate result here is the one reached by the Eleventh Circuit: respondent should be sentenced by a jury whose awareness of its own responsibility for imposing or withholding a death sentence has not been clouded by threats of eternal damnation.

A. *Smith* Does Not Implicate The Availability Of Habeas Relief In This Case.

This case was unworthy of certiorari at the time the Secretary filed his petition and it remains so after *Smith*. In *Smith*, this Court granted certiorari and summarily reversed a judgment of the Ninth Circuit that affirmed a grant of habeas relief to a criminal defendant who contended that he had not received adequate notice of the prosecution's theory in his underlying murder trial. Slip op. 3-4.

This Court's reversal of relief in *Smith* was based exclusively on the Ninth Circuit's failure "to comply with [the] rule" that federal courts of appeals may not "rely[] on their own precedent to conclude that a particular constitutional principle is 'clearly established'" in granting relief pursuant to § 2254(d)(1). Slip op. 1. The Ninth Circuit twice violated this rule. The first violation occurred when the Ninth Circuit held that the respondent was entitled to relief under § 2254(d)(1) without pointing to any Supreme Court cases holding "that a defendant, once adequately

apprised of * * * a possibility [of conviction on one theory of liability], can nevertheless be deprived of adequate notice by a prosecutorial decision to focus on another theory of liability at trial." *Id.* at 4–5. The second violation was that the Ninth Circuit "cited only its own precedent" in "reject[ing] the state court's assessment that [the] respondent was adequately apprised of the possibility of conviction on an aiding-and-abetting theory." *Id.* at 8. Although the Ninth Circuit nominally presented this second assessment as a disagreement with the state court's "'determination of the facts'" (*id.* at 6 (quoting *Smith v. Lopez*, 731 F.3d 859, 871 (9th Cir. 2013)), there was no apparent dispute about what had *happened*, just about whether those facts constituted adequate notice—"a legal determination governed by § 2254(d)(1)" (*id.* at 8). And, as a legal determination, the Ninth Circuit's assessment was flawed: Without controlling Supreme Court precedent to guide it, the Ninth Circuit "had nothing against which it could assess, and deem lacking, the notice afforded [the] respondent." *Ibid.*

In marked contrast to *Smith*, the Eleventh Circuit's grant of habeas relief arose solely under § 2254(d)(2) and rested on determinations that are—both nominally and actually—determinations of fact. *Farina v. Sec'y, Fla. Dep't of Corr.*, 536 F. App'x 966, 976-77 (11th Cir. 2013) (invoking § 2254(d)(2)). The Eleventh Circuit identified four instances in which the Florida Supreme Court had misperceived or mischaracterized the factual record (*id.* at 977):

> (i) the finding that respondent "had 'fail[ed] to allege specific objectionable errors' regarding the jury selection portion of his claim," when, in fact, he had (*ibid.* (quoting *Farina v. State*, 937 So. 2d 612, 625 n.8 (Fla. 2006)));

> (ii) the finding that "'there was no * * * evidence about religion' during the proceedings" except for the testimony of Reverend Smith on respondent's religious beliefs and repentance, when, in fact, the proceedings were laced with such evidence (*ibid*. (quoting *Farina*, 937 So. 2d at 631));
>
> (iii) a finding that Reverend Smith's "'testimony on direct examination [and not the prosecutor's cross-examination] first introduced religion into the proceedings'" (*ibid*. (quoting *Farina*, 937 So. 2d at 631)), when, in fact, "the prosecutor introduced religion into the proceedings during jury selection and actively sprinkled religious allusions throughout" (*id*. at 978); and,
>
> (iv) a finding that "'[t]he prosecutor's questions were related to [Rev.] Davis'[] testimony on direct examination'" (*ibid*. (quoting *Farina*, 937 So. 2d at 632)), when, in fact, those questions were "focused on improper, theological matters such as the prosecutor's role as a vehicle of divine retribution and the propriety of the death penalty" (*ibid*.).

See Br. in Opp. 8. Each of these errors was glaring, and each was clearly of a factual nature. See *id*. at 11–14.

Petitioner's efforts to refute these four, independent findings simply reinforce the distinction between this case and *Smith*. For example, as to whether the Florida Supreme Court was wrong to rely on its perception that "there was no * * * evidence about religion during the proceedings," petitioner responds with the non sequitur that victim impact statements are constitutional. Pet. for Cert. 15–16. Be that as it may, those statements included "evidence about religion." The Florida Supreme Court acknowledged that the Constitution required it to assess the pervasiveness of religious references during respondent's trial. It was flat-out wrong in characterizing the facts to which that legal standard should be applied.

Likewise, as to the jury-selection issue, petitioner insists that the Florida Supreme Court's determination was legal, not factual, because that court refused to consider an argument in a footnote. Pet. for Cert. 15; Pet. Reply Br. 7; Supp. Pet. 6.

But the Florida Supreme Court said nothing about footnotes—it said that respondent had failed to "allege specific objectionable errors." *Farina*, 937 So. 2d at 625 n.8. And when pressed to identify how, as a matter of fact, respondent's claims lacked specificity, the State could not offer any explanation. See CA11 Arg. Recording at 46:15–47:35 (discussing the inconsistency between the State's argument and the Florida Supreme Court's decision).

In sum, unlike the Ninth Circuit's opinion in *Smith*—where this Court concluded that the appellate court's grant of relief was based on a legal determination veiled as a factual determination—the Eleventh Circuit's grant stemmed from factual errors in the state court opinion and thus properly arose under § 2254(d)(2). Consequently, *Smith* has no bearing on this case.

B. This Case Remains Unsuited For Further Review.

Just as *Smith* does not diminish the availability of habeas relief in this case, it has done nothing to transform a case unworthy of certiorari into one warranting further review. Indeed, this case does not satisfy this Court's criteria for certiorari.

1. There is no dispute among the Circuits on the question presented, and petitioner has identified no legitimate, relevant dispute. Br. in Opp. 9–10; Pet. Reply Br. 1–6. The decision below is consistent with relief granted by other courts of appeals in capital cases. See, *e.g.*, *Rolan v. Vaughn*, 445 F.3d 671 (3d Cir. 2006); *Simmons v. Luebbers*, 299 F.3d 929 (8th Cir. 2002).

2. Nor does the Eleventh Circuit's opinion—in either its grant of relief or its explication and application of the law controlling ineffective assistance of counsel

claims—conflict with the well-settled authority of this Court. See Br. in Opp. 9–10, 14–17.

3. At most, petitioner asks for error correction. But the decision below is embedded within a deeply complex record. Review of such a question would be an extraordinary departure from this Court's practices.

4. Moreover, there exists an alternative basis for affirmance under § 2254(d)(1). The Florida Supreme Court violated clearly established Supreme Court precedent in failing to recognize that the prosecutor violated the Constitution by telling the jury that the decision to impose a death sentence had been made by God as expressed in the Bible. See Br. in Opp. 19–22 (explaining how "the prosecutor used biblical doctrine to threaten the jury, diminish its sense of discretion and responsibility, and remove from its consideration constitutionally protected factors in sentencing"). On this matter of critical importance, respondent offered only the meek reply that this Court's holding in *Caldwell v. Mississippi*, 472 U.S. 320 (1985), does not apply. Not so. In *Caldwell*, this 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 the responsibility for determining the appropriateness of the defendant's death rests elsewhere." 472 U.S. at 328–29 (majority opinion). The Secretary's response is, essentially, that *Caldwell* prohibits a prosecutor from telling a jury that the decision rests with another *person* but *permits* the prosecutor to tell the jury that the decision rests with *God*. Such an outrageous claim merits no response.

Perhaps sensing the outrageousness of this claim, the Secretary has filed a Supplemental Petition raising additional arguments in response to *Caldwell*. These new arguments were not presented to the district court, the court of appeals, or in the petition or reply; they are plainly not properly before this Court. In any event, each argument is wrong.

First, the Secretary contends that *Caldwell* does not apply in Florida because, in that State, judges are free to ignore the jury's recommendation. Supp. Pet. 4. The Secretary's representation is highly misleading. It has long been settled in Florida that a jury's verdict is not merely advisory. A trial court is forbidden from "overrid[ing] a jury's recommendation of life imprisonment unless 'the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ.'" *Ramirez v. State*, 810 So. 2d 836, 852 (Fla. 2001) (quoting *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975)). And just two Terms ago, the Secretary assured this Court that Florida juries have final authority to adjudicate the existence of aggravating factors, as required by *Ring v. Arizona*, 536 U.S. 584, 588, 609 (2002). *See* Br. in Opp. 13, *Evans v. Sec'y, Fla. Dep't of Corr.*, No. 12–1134 (Apr. 18, 2013). In any event, the prosecutor violated *Caldwell* by diminishing the jury's role vis-à-vis God, not the judge, so this distinction is immaterial.

Second, the Secretary contends that the opinion of the *plurality* in *Caldwell* is not controlling. Supp. Pet. 5. But respondent's *Caldwell* claim is not based on the portion of *Caldwell* joined only by four Justices (Part IV-A); it is based on the

portions joined by a majority of the Court. In any event, Justice O'Connor concluded, in her concurring opinion, that a prosecutor violates the Constitution by providing information that is "inaccurate and misleading in a manner that diminishe[s] the jury's sense of responsibility." *Caldwell*, 472 U.S. at 342 (O'Connor, J., concurring in part and concurring in judgment). It is beyond dispute that the prosecutor's representations that he and God were responsible for determining the appropriate sentence satisfy Justice O'Connor's test. *See also, e.g.*, *Romano v. Oklahoma*, 512 U.S. 1, 10 (1994) (*Caldwell* means that a prosecutor may not "affirmatively misle[a]d the jury regarding its role in the sentencing process so as to diminish its sense of responsibility"); *Sawyer v. Smith*, 497 U.S. 227, 233 (1990) (under *Caldwell*, "the Eighth Amendment prohibits the imposition of a death sentence by a sentencer that has been led to the false belief that the responsibility for determining the appropriateness of the defendant's capital sentence rests elsewhere"); *Darden v. Wainwright*, 477 U.S. 168, 183 n.15 (1986) ("*Caldwell* is relevant only to certain types of comment—those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision").

Third, the Secretary contends that *Caldwell* does not apply here because it concerns the Eighth Amendment and this case concerns the Sixth Amendment. See Supp. Pet. 5–6. That argument fundamentally misperceives this case. The Eleventh Circuit granted habeas relief on Sixth Amendment grounds for ineffective assistance of counsel, because respondent's appellate counsel failed to challenge

prosecutorial misconduct that violated the Eighth Amendment. See *Farina*, 536 F. App'x at 983. *Caldwell*, as an Eighth Amendment opinion, creates a limit on constitutionally permissible prosecutorial conduct, and thus establishes a rule against which the conduct of respondent's counsel should be—and was properly—measured for Sixth Amendment purposes.

5. The Eleventh Circuit's decision elicited no dissent from within that court. *Farina* was a unanimous panel opinion. Petitioner's subsequent petition for rehearing *en banc* was denied outright, with not even a single eligible judge requesting a poll. Br. in Opp. 1. And the Eleventh Circuit unanimously rejected this poll notwithstanding its demonstrated willingness to convene *en banc* to affirm denials, or reverse grants, of habeas in capital cases (see, *e.g.*, *Evans v. Sec'y, Dep't of Corr.*, 703 F.3d 1316, 1319 (11th Cir. 2013); *Hill v. Humphrey*, 662 F.3d 1335, 1361 (11th Cir. 2011)), as well as its divided votes on habeas appeals (see, *e.g.*, *Evans*, 703 F.3d 1316 (two judges dissenting); *Childers v. Floyd*, 736 F.3d 1331 (11th Cir. 2013) (affirming denial of habeas with two judges dissenting); *Hill*, 662 F.3d 1335 (three judges dissenting); *Jones v. Walker*, 540 F.3d 1277 (11th Cir. 2008) (affirming denial of habeas with one judge dissenting)).

That court's well-considered decision should not be disturbed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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