CAPITAL CASE

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MITCHELL WILLOUGHBY

Petitioner,

v.

DEEDRA HART, WARDEN**,**

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

"The uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role." *Caldwell v. Mississippi*, 472 U.S. 320, 333 (1985).

Did the Sixth Circuit panel misunderstand or frustrate the purpose behind this court's holding in *Caldwell v. Mississippi* of avoiding the imposition of the death penalty in an arbitrary manner when it held that *Caldwell* was not "so clearly established" such that the Kentucky Supreme Court unreasonably applied it to Petitioner's claim where:

1. Under local law, each juror has the responsibility of deciding whether the defendant will be executed;
2. The prosecutor repeatedly and unequivocally suggested (and expressly stated) in voir dire and in closing argument, without correction, that the final responsibility for deciding the appropriate sentence would *not* rest with the jurors;
3. One of the jurors who voted to sentence Petitioner to death stated her uncorrected belief during voir dire that it was her responsibility to recommend but not fix the Petitioner's sentence.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Mitchell Willoughby is a death-sentenced inmate. He respectfully petitions for a writ of certiorari to review the Opinion and Judgment of the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit").

OPINIONS BELOW

The opinion of the Sixth Circuit under review is unpublished but was reported at 786 Fed. Appx. 506 and is attached at Appendix A. The district court's unpublished memorandum opinion is attached at Appendix B. The Sixth Circuit's order denying rehearing en banc is attached at Appendix C. The opinion of the Supreme Court of Kentucky affirming the judgment and sentence on direct appeal is attached at Appendix D and is reported at *Willoughby v. Commonwealth*, 730 S.W.2d 921 (Ky. 1986). The unpublished opinion of the Supreme Court of Kentucky following post-conviction proceedings appears at Appendix E. The unpublished opinion of the Kentucky Supreme Court affirming the denial of a subsequent post-conviction action on procedural grounds appears at Appendix F.

STATEMENT OF JURISDICTION

The Sixth Circuit issued its decision on August 29, 2019. The court denied rehearing en banc on November 19, 2019. The time within which to file a petition for writ of certiorari was extended by Justice Sotomayor to April 17, 2019. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. CONST. amend. VIII.

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law[.]" U.S. CONST. amend. XIV, § 1.

STATEMENT OF THE CASE

A. The relevant state court proceedings

Petitioner, Mitchell Willoughby, and two co-defendants, Leif Halvorsen and Susan Hutchens, were indicted for the January 13, 1983 murders of Joe Norman, Joe Durrum, and Jacqueline Greene. 1TR 1, Vol. I, 2-4[1]. The bodies of Norman and Durrum were discovered beside a bridge. W*illoughby*, 730 S.W.2d at 922. Greene's body was found in the Kentucky River nearby. All of the victims had been shot to death. *Id*. Petitioner and Halvorsen were tried for the murders and on July 22, 1983, a jury convicted both defendants of the three murders. W*illoughby*, 730 S.W.2d at 922-23.

[1] 1TR 1, Vol. I, 2-4 refers to the first volume, pages 2-4 of the transcript record for the first appeal.

At the time of Willoughby's trial, Kentucky law placed the responsibility of deciding whether a defendant will be executed upon the individual jurors who "shall not be informed, either directly or by implication that this responsibility can be passed along to someone else." *Ward v. Commonwealth*, 695 S.W.2d 404, 407 (Ky. 1985). Yet, during the individual voir dire of Petitioner's trial, eight of the twelve jurors who fixed Petitioner's sentence were told by the prosecutor that the capital juror's sentencing role was only to "recommend" a sentence to the trial judge. See voir dire of Ann Gish (TT 2 278[2]); Nell Ferrell (TT 4 586, 587); Mack Hurt (TT 5 634, 636); Mable Smith (TT 5 715-17); Louise Maxey (TT 6 774-75); Margaret Barton (TT 7 905); Shirley Munro (TT 7 917) and Francis White (TT 7 1034-35). One of those jurors was asked if she understood she would "recommend a sentence to the judge and not set the sentence." (TT 4 587). Another juror was told by the prosecutor: "[Y]ou were told in jury orientation that in a criminal case the jury sets the penalty like on a theft case and that's true. But in a death penalty case, the jury recommends to the judge so in effect if you're the juror in this case you would be recommending a sentence to Judge Angelucci, you understand?" TT 7, 1035. Then, in the sentencing phase closing argument, the prosecutor pointedly told the jurors: "In these instructions it is very clear that your recommendation, your verdict, is a recommendation to Judge Angelucci in this case. You don't set the sentence in this case - you recommend it." (TT 18 2537). The prosecutor also continued to minimize the jurors' role in the

[2] TT 2 278 refers to the second volume of the trial transcript and the page number of the volume.

sentencing process by reiterating twenty times in the closing argument that the jury's verdict was a "recommendation."

The jury fixed the sentences for the murders of Durrum and Greene at death, and at life in prison for the murder of Norman. *Id.* On August 31, 1983, the trial court formally sentenced Willoughby and Halvorsen to death 1 TR 1, Vol. I, 421-24.

On direct appeal, the Supreme Court of Kentucky acknowledged that in *Caldwell v. Mississippi*, 472 U.S. 320 (1985), this Court held the Eighth Amendment was violated because "the prosecutor was found to have minimized the jury's sense of the importance of its role by stressing that its decision was not final since it was automatically reviewable." Nevertheless, the court held that "[n]o such minimizing of the jury's sense of responsibility occurred in this case." *Willoughby*, 730 S.W.2d at 924. Willoughby unsuccessfully sought state post-conviction relief (App. E, F), which has no bearing on this Petition.

B. The District Court ruling

Willoughby sought habeas relief in the Eastern District of Kentucky. Among other things, he argued that his capital sentence violated the Eighth and Fourteenth Amendments because "the jury was improperly led to believe that the ultimate determination on the appropriateness of the death sentence rested elsewhere," a clear violation of *Caldwell*. App. B at 51. The district court denied the writ in its entirety. The district court rejected the *Caldwell* claim because of precedent in the Sixth Circuit that the prosecutor's comments were consistent with Kentucky law,[3] which

[3] *Kordenbrock v. Scroggy,* 919 F.2d 1091, 1101 (6th Cir. 1990).

the district court determined "controls the fate of Willoughby's *Caldwell* claim." App. B at 56.

C. The divided Sixth Circuit panel opinion

The majority affirmed the district court. It held, "we cannot conclude that *Caldwell*, [decided on June 11, 1985] in its present formulation, was so clearly established in December 1986 that the Kentucky Supreme Court's careful application of it ... was necessarily unreasonable." (App. A, at 512).

The dissent, after reviewing both applicable Kentucky law and this Court's precedent, observed that the Supreme Court of Kentucky's application of *Caldwell*, included no analysis, and was neither careful nor a reasonable application of clearly established federal law:

> While use of the word "recommend" was not per se reversible error at the time, the state of the law in Kentucky in 1986 was still clear: use of the word "recommend" in describing the jury's role was permissible, as the Kentucky statute specified, as long as there was *no attempt* by prosecutors to *minimize* jurors' role in a way that led them to feel that they had a reduced role in the sentencing process. Failing to recognize that in this case, the Kentucky Supreme Court unreasonably applied clearly established law. And the majority incorrectly endorsed this approach."
>
> At base, the prosecutor's statements in this case are exactly what *Caldwell* aimed to protect against—a jury that did not feel the full weight of their "truly awesome responsibility" in recommending a death sentence. 472 U.S. at 341, 105 S.Ct. 2633. The Kentucky Supreme Court's one-sentence finding was an unreasonable application of *Caldwell*. Accordingly, I depart from the majority on this issue and would reverse and remand to the district court.
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> App. A, at 515-517 (emphasis in original)

REASON FOR GRANTING THE WRIT

This court repeatedly has held that state courts are the "ultimate expositors" of state law, yet the majority of the Sixth Circuit panel based its decision upon its own interpretation of Kentucky law which is in conflict with the relevant state law established by decisions of Kentucky's highest court.

In *Caldwell v. Mississippi,* 472 U.S. 320, 329 (1985), this Court held it constitutionally impermissible to rest a death sentence on a determination made by a jury led to believe that the responsibility for determining the appropriateness of the death sentence rested elsewhere. The majority and dissenting panel opinions of the Sixth Circuit part ways on the *Caldwell* claim over the state of Kentucky law at the time Petitioner's direct appeal was decided. A correct interpretation of Kentucky law is critical to the holding of Petitioner's claim because a *Caldwell* violation is measured in terms of "local law." *Dugger v. Adams,* 489 U.S. 401, 407 (1989) ("To establish a *Caldwell* violation, a [petitioner] necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." Conversely, "if the challenged [statements] accurately described the role of the jury under state law, there is no basis for a *Caldwell* claim.").

Contrary to the panel majority opinion, the relevant Kentucky law was clear at the time Petitioner's direct appeal was decided: it is the responsibility of each juror to decide whether the defendant will be executed; they shall not be informed, either directly or by implication, that this responsibility can be passed along to someone else.

The Sixth Circuit panel majority's conclusion that Kentucky law was "evolving" at the time of Willoughby's direct appeal conflicts with all of the decisions of Kentucky's highest court interpreting the relevant state law. As a result, the panel majority opinion conflicts with this Court's precedent regarding the influence of state court opinions upon federal court interpretation of state law.

State courts are the ultimate expositors of state law." *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975). If the relevant state law is established by a decision of "the State's highest court," that decision is "binding on the federal courts." *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co. Ltd.,* 138 S.Ct. 1865, 1874 (2018).

Both before and after *Caldwell* was decided, the Kentucky Supreme Court has consistently made clear that it is the jurors' awesome responsibility to decide the appropriate sentence of convicted capital defendants. See *Tamme v. Commonwealth*, 759 S.W.2d 51, 52-53 (Ky. 1988), in which the Kentucky Supreme Court explained the history of "recommend" in Kentucky death penalty sentencing – language that appears in a Kentucky statute – as it related to the Supreme Court's holding in *Caldwell*.

Ice v. Commonwealth, 667 S.W.2d 671, 676 (Ky. 1984), was decided eleven months before *Caldwell.* The *Ice* Court reversed the death sentence because the prosecutor's emphasis on "recommend" created the false impression that the jury's sentencing decision was not the final one. *Ice*, 667 S.W.2d at 676.

In 1985 – shortly after *Caldwell*, and one year before Willoughby's direct appeal was decided – the Kentucky Supreme Court decided *Ward v. Commonwealth*,

695 S.W.2d 404 (Ky. 1985). In *Ward*, the Kentucky Supreme Court acknowledged, "we are totally aware that the statute relating to capital offenses – KRS 532.025 (1)(b) – provides that the jury shall 'recommend a sentence for the defendant.'" *Ward*, 695 S.W.2d at 407. (Emphasis added). Nevertheless, "the death penalty cannot be assessed by any judge unless recommended by the jury, so the responsibility of the jury in such cases remains undiminished." *Id.* (Emphasis added.) "It is the responsibility of each juror to decide whether the defendant will be executed, and they shall not be informed, either directly or by implication, that this responsibility can be passed along by someone else. The fact that the statute provides for jury recommendation cannot be utilized as a license to induce the jury to disregard its responsibility." *Id.* at 408 (citation omitted.) When a jury votes for a death sentence it is much more than a recommendation because the trial judge is powerless to impose a death sentence unless the jury unanimously votes for it. *Id.* If the jury votes in favor of death, "almost without exception" the trial judge has imposed a death sentence. *Id.*

Also in 1985 – a year before the Kentucky Supreme Court decided Willoughby's direct appeal – the court was confronted with the prosecutor's use of the word "recommend" to describe the jury's sentencing responsibility. Without departing or backtracking in any way from what it had said only months previously in *Ward*, the court distinguished the case on its facts, noting "[w]e do not have a series of remarks such as occurred in *Ward*." *Kordenbrock v. Commonwealth*, 700 S.W.2d 384, 398 (Ky.

1985). Importantly, the court recognized that the word "recommend" could "denigrate the responsibility of the jury in imposing a death penalty." *Id.*

Subsequent to Willoughby's direct appeal, the Kentucky Supreme Court debated whether a prosecutor's use of "recommend" in the death-penalty context would constitute *reversible* error. But, the court never once suggested that the jury was no longer obligated to decide the sentence. See *Grooms v. Commonwealth*, 756 S.W.2d 131, 141-42 (Ky. 1988) (reversing and holding "if the appellant is found guilty on retrial, the instructions on the penalty phase should require the jury to fix the punishment."); *Sanborn v. Commonwealth*, 754 S.W.2d 534, 546 (Ky. 1988) ("use of the word 'recommend' is not per se reversible error. Since this case is being reversed on other grounds…[i]t is sufficient to say that…the court and prosecutor should exercise caution to stay well within the line next time."); *Tamme v. Commonwealth*, 759 S.W.2d 51, 52-53 (Ky. 1998) (reversing because there was a clear attempt by the prosecution to emphasize that the trial court may accept or reject the recommendation of the jury, thus transferring the responsibility of a man's life to another and holding "the word 'recommend' may not be used with reference to a jury's sentencing responsibilities in voir dire, instructions or closing argument.").

To the extent that the Kentucky law was ever "evolving," it was only on the question of whether a prosecutor's impermissible use of "recommend" would constitute *per se* reversible error. It has always been Kentucky law that the jurors must decide whether to impose a death sentence. "Whether before or after *Tamme*, the prosecutor may not present arguments which lead the jury to believe that the

awesome responsibility for determining the appropriateness of death rests elsewhere." *Clark v. Commonwealth*, 833 S.W.2d 793, 796 (Ky. 1991).

That the majority opinion of the Sixth Circuit ignored both this Court's precedent holding that decisions of a state's highest court are binding upon the federal courts, and multiple binding opinions of Kentucky's highest court, is unmistakable. Respectfully, this issue is worthy of this Court's attention because respect for local law as interpreted by the state court is critical to the reliability of all *Caldwell* claims brought by prisoners sentenced to death and decided by federal courts. Furthermore, this Court should accept review because for the jury to see itself as advisory when it is not, or to be comforted by a mistaken belief that its decision will not have effect unless the trial judge makes the same decision, violates the Eighth Amendment's "need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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