No. 19-8335
CAPITAL CASE

IN THE SUPREME COURT
OF THE UNITED STATES

MITCHELL WILLOUGHBY **PETITIONER**

v.

DEEDRA HART, Warden **RESPONDENT**
Kentucky State Penitentiary

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

DANIEL CAMERON
Attorney General of Kentucky

MATTHEW R. KRYGIEL
Assistant Attorney General
Counsel of Record
Office of the Solicitor General
Criminal Appeals Unit
1024 Capital Center Drive
Frankfort, KY 40601
(502) 696-5342
matthew.krygiel@ky.gov

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FACTS AND OPINIONS BELOW

The facts of the offense conduct in this case are not in dispute and can be found in full detail at *Willoughby v. Commonwealth*, 730 S.W.2d 921, 922-923 (Ky. 1986). In short, on January 13, 1983 in Fayette County (Lexington), Kentucky, with criminal intentions, Mitchell Willoughby and his co-defendant, Leif Halvorsen, entered a residence and executed three people.

Mitchell Willoughby worked with one of his victims, Joe Norman, as a part of Norman's home renovation business. The men had a contentious relationship, including an ongoing dispute regarding medical bills incurred by Willoughby related to an on-the-job injury. Willoughby and Halvorsen visited Norman's residence on multiple occasions the day of the murders.[1] That morning the pair had also asked Willoughby's girlfriend, Susan Hutchens, to purchase ammunition for the gun that each man carried. The men followed Hutchens and retrieved their ammunition in the gun store parking lot.

A short time later, Hutchens went to Joe Norman's home to visit with Norman's girlfriend, Jacqueline Greene. When she arrived, she found Willoughby and Halvorsen outside the house talking to Norman. Greene motioned Hutchens to come in, and once inside she was introduced to an acquaintance of Greene's, Joey

[1] In one of Willoughby's pre-trial statements, he claimed that he and Norman argued upon his first visit to Norman's house that day. At that point, Willoughby stated that he went and got Halvorsen and arranged to have his girlfriend, Susan Hutchens, buy ammunition for guns the men carried because there might be some trouble when they went back to Norman's home. During his trial testimony, Willoughby claimed he and Halvorsen stopped by Norman's house the first time after the ammunition was purchased (because they were going target shooting), and came back the second time after they had arranged to do so with Norman in order to do (and trade) drugs.

Durrum. Willoughby and Halvorsen eventually also came inside with Norman. Hutchens continued to converse with Greene when suddenly gunfire erupted. By the time the shooting stopped, Norman and Durrum were on the floor. Hutchens had covered her face when the shooting started, and when she finally looked up she saw Willoughby and Halvorsen both wielding their guns. Greene was still showing signs of life and Hutchens watched as Willoughby shot Greene twice more.

Ballistics and medical evidence showed that Durrum and Greene were both hit with fatal shots fired by each gun. Norman had three wounds–two of which could be attributed to Willoughby's gun and a third that was unidentifiable.

Willoughby ordered Hutchens to clean up the shell casings while Halvorsen and Willoughby removed each body, separately wrapped them in sheets, tied a heavy rock to each victim, and loaded them into Halvorsen's van. Later that evening, Willoughby and Halvorsen attempted to dump the bodies in the Kentucky River (only Greene's body was found on the riverbed-Durrum and Norman were left on a bridge at the Jessamine-Mercer County line). A myriad of physical evidence, including Halvorsen's van, linked Willoughby and Halvorsen to the crime and led to their capture.

After his arrest Willoughby gave multiple statements claiming that he had killed all three victims while firing with a gun in each hand. Hutchens, who was charged but not tried with Willoughby and Halvorsen, also confessed to her role and became a witness for the prosecution. During the guilt phase of the trial, Willoughby testified on his own behalf and although he admitted killing Norman, he alleged it

was self-defense (claiming that he and Norman were in a heated argument when Norman threatened him with a bayonet). As for Durrum and Greene, Willoughby stated he could not remember anything after shooting Norman except the convenient fact that he thought Durrum had a bar or other weapon of some type in his hand. Willoughby's behavior and lack of memory were linked primarily to excessive drug and alcohol use prior to going to Norman's home.

Halvorsen testified during the sentencing phase of the trial and admitted his guilt. The majority of Halvorsen's self-serving testimony minimized his participation and placed the blame for his actions on his fear of Willoughby and substance abuse.

A fourth victim, Halvorsen's housemate James Murray, had been murdered the night before the triple murder. Police found Murray's corpse in a shallow grave on Furnace Mountain in nearby Estill County. There was no mention of the Murray murder to the jury in the Fayette County case. Murray's murder was prosecuted separately and Willoughby eventually pled guilty.[2]

Willoughby was convicted of three counts of capital murder. On July 26, 1983, a jury sentenced Willoughby to life in prison for the murder of Norman, and two death sentences for the murders of Durrum and Greene. The jury's recommendations were adopted by the trial court at final sentencing. Willoughby's convictions were affirmed by the Kentucky Supreme Court in *Willoughby v. Commonwealth*, 730 S.W.2d 921

[2] Halvorsen and Willoughby were indicted for the murder of James Murray in Estill County. After the trial for the murders of Greene, Durrum, and Norman, Willoughby entered a conditional guilty plea to the amended charge of first-degree manslaughter and was sentenced to 20 years imprisonment (to run concurrently with the charges for which he had been convicted in Fayette County). Willoughby's plea was affirmed on appeal. *See Willoughby v. Commonwealth*, 89-SC-84 (rendered April 26, 1990).

(Ky. 1986) (*cert. denied Willoughby v. Kentucky*, 484 U.S. 982 (1987)). Willoughby raised multiple collateral attacks which were also denied and affirmed on appeal. *See Willoughby v. Commonwealth*, 2006 WL 3751392, 2005-SC-00115-MR (Ky. December 21, 2006) and *Willoughby v. Commonwealth*, 2007 WL 2404461, 2006-SC-00071-MR (Ky. August 23, 2007).

Willoughby filed a petition for writ of habeas corpus that was extensively litigated before being denied by the United States District Court for Eastern District of Kentucky (at Lexington). *Willoughby v. Simpson*, 5:08-cv-179-DLB, 2014 WL 4269115 (E.D.Ky August 29, 2014). An appeal followed and on August 29, 2019, a panel of the United States Sixth Circuit Court of Appeals (in a 2-1 decision) affirmed the denial of Willoughby's habeas petition. *Willoughby v. White*, 786 Fed.Appx. 506 (6th Cir. 2019). The issue which caused division amongst the panel, whether the prosecutor improperly minimized the jury's role in sentencing by using the term "recommend" during individual *voir dire* and closing argument, was the subject of a failed petition for *en banc* and/or panel rehearing.

On April 22, 2020, Willoughby's petition for a writ of certiorari was placed on the docket in this Court.

REASONS TO DENY WILLOUGHBY'S PETITION

The Sixth Circuit Court of Appeals correctly affirmed that the Kentucky Supreme Court reasonably applied federal law to Willoughby's claim that the prosecutor improperly diminished the jury's role during sentencing.

Willoughby asserts that the United States Sixth Circuit Court of Appeals has failed to remedy a constitutional infirmity arising from his 1983 capital conviction, to wit, the Kentucky Supreme Court's direct appeal opinion unreasonably applied this Court's holding in *Caldwell v. Mississippi*, 472 U.S. 320 (1985). Willoughby is incorrect.

As found by the panel's majority and the district court below, at the time of Willoughby's trial (1983) and appeal (1986), Kentucky law allowed the use of the term "recommendation" to describe the role and function of the jury when deliberating punishment in a capital case.[3] This terminology was consistent with statutory language in the Kentucky Revised Statutes (KRS 532.025) and was parroted in capital jury instructions. Pursuant to *Skaggs v. Commonwealth*, 694 S.W.2d 672 (Ky. 1985) *rev'd on other grounds sub nom Skaggs v. Parker*, 230 F.3d 876 (6th Cir.2000) and *Matthews v. Commonwealth*, 709 S.W.2d 414 (1985), factual references to the jury's sentence as a recommendation, unaccompanied by any message that the

[3] Eventually, after repeatedly having to address this issue, the Kentucky Supreme Court changed the law. See *Grooms v. Commonwealth*, 756 S.W.2d 131, 141 (Ky. 1988)("the instructions in the penalty phase should require the jury to 'fix' the punishment"); and *Tamme v. Commonwealth*, 759 S.W.2d 51 (Ky. 1988)(after effective date of this opinion – the prosecutor should refer to jury's function as "fixing" punishment and not use the word "recommend" in voir dire, instructions, or closing argument).

responsibility of the jury was lessened in any degree, was not reversible error. It is not incorrect as long as the context in which it is used does not mislead the jury as to its role in the process or its responsibility in exercising its sentencing function. *Id.*

In *Caldwell v. Mississippi*, 472 U.S. 320, 328-329 (1985), 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." Likewise, in *Romano v. Oklahoma*, 512 U.S. 1, 8-9 (1994), it was stated that:

> "[W]e have since read *Caldwell* as '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.' *Darden v. Wainwright*, 477 U.S. 168, 184, n. 15, 106 S.Ct. 2464, 2473, n. 15, 91 L.Ed.2d 144 (1986). Thus, '[t]o 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, 109 S.Ct. 1211, 1215, 103 L.Ed.2d 435 (1989); see also *Sawyer v. Smith*, 497 U.S. 227, 233, 110 S.Ct. 2822, 2826-2827, 111 L.Ed.2d 193 (1990).

See, e.g., Ward v. Commonwealth, 695 S.W.2d 404 (Ky. 1985); *Kordenbrock v. Commonwealth*, 700 S.W.2d 384 (Ky. 1985); *McClellan v. Commonwealth*, 715 S.W.2d 464, 472 (Ky. 1986) ("[w]e have concluded that use of the word recommend in the instructions, *voir dire*, or otherwise is not a sufficient ground to require reversal of a death sentence unless the idea of a jury recommendation is so prevalent that it conveys the message that the jurors' awesome responsibility is lessened by the fact that their decision is not final but is only a recommendation").

In Willoughby's case, the Kentucky Supreme Court identified *Caldwell* and

found that the use of the term "recommendation" did not "in any fashion, diminish or lessen the responsibility of the jury in imposing the death penalty." *Willoughby v. Commonwealth*, 730 S.W.2d 921, 924-925 (Ky. 1986). In making this determination, the Kentucky Supreme Court analyzed the individual *voir dire* of each juror that heard the term and found nothing that would suggest to that juror that the jury's role was minimized.[4] On the contrary, the court concluded that nothing was said that would have otherwise qualified or given the jurors the impression that they did not have full responsibility for rendering Willoughby's sentence. Similarly, the court found that after reading the entirety of the closing argument it was equally benign as it was filled with language impressing upon the jury the gravity of their decision. The Sixth Circuit found both of these determinations to be reasonable. *Willoughby v. White*, 786 Fed.Appx. 506, 511-512 (6th Cir. 2019).

Willoughby has taken portions of the majority's opinion out of context to attempt to gain review by this Court. In particular, Willoughby has argued that the Sixth Circuit misconstrued Kentucky law and portrayed it as fluctuating when it was

[4] In its analysis, the Kentucky Supreme Court noted that, of the 8 serving jurors where the term "recommend" was used during individual *voir dire*, which occurred 3 weeks before actual deliberations, they each answered clearly and unequivocally that they could consider all options necessary for punishment including the death penalty and that they had no moral or religious ideologies that would prevent imposition of the death penalty. *Willoughby v. Commonwealth*, 730 S.W.2d 921, 923-924 (Ky. 1986). This line of questioning was emphasized and clearly put forth the awesome responsibility that was ahead for the jurors when deciding whether to sentence the defendants to death. In each instance, whether the term recommend was used as part of the example or not, it was obvious that the questioning was geared to getting a constitutionally qualified jury and that in no way was the terminology presented in a fashion that would have diminished the jurors' responsibility with regard to their sentencing determination. No qualifying language was used that would have given the jurors the impression that their sentence was "only", "just" or "merely" a recommendation. On the contrary, Willoughby's characterization of the questioning inaccurately portrays the true nature of the *voir dire* process – and would likely explain why no objection was lodged. Because the jurors were questioned properly in a manner consistent with the law, no error occurred.

actually well-settled. Petition, pgs. 5-9. On the contrary, the Sixth Circuit's opinion merely reflected the evolution of the law from the point of Willoughby's trial until a few years after in order to give "temporal context." *See Willoughby v. White*, 786 Fed.Appx. at 512. The opinion correctly reflected that the use of the term "recommend" was permitted during Willoughby's trial and direct appeal and *Caldwell* violations were analyzed on a case-by-case basis. The panel's majority also noted that in 1988 the Kentucky Supreme Court delineated that the term "fix" should replace "recommend" as a way to remedy this perpetually-raised issue. *Id.* *See also Willoughby v. Commonwealth*, 730 S.W.2d at 925 ("the drum beat of complaint about the use of 'recommend,' which is in the statute and necessarily the instructions, seems to arise in every case."). The opinion did not in any way misconstrue Kentucky law or find it to be evolving in a manner that left it unclear at the time of Willoughby's appeal.

CONCLUSION

The holding of the Kentucky Supreme Court was not an unreasonable application of federal law. At the time of Willoughby's trial in 1983, the Kentucky death penalty statute, and consequently the proposed jury instructions, included the term "recommend." The isolated uses during individual *voir dire* and explanation of the jury instructions during the penalty phase closing argument were not a *Caldwell* violation.

Willoughby does not present compelling reasons for this Court to grant his petition. None of the considerations highlighted in Rule 10 exist or create a legal basis for review by this Court.

Based on the foregoing, Willoughby's petition should be denied.

Respectfully submitted,

DANIEL CAMERON
Attorney General of Kentucky

s/ Matthew R. Krygiel
MATTHEW R. KRYGIEL
Counsel of Record
Assistant Attorney General
Office of the Attorney General
1024 Capital Center Drive
Frankfort, Kentucky 40601-8204
(502) 696-5342
matthew.krygiel@ky.gov

Counsel for Respondent

FILING/PROOF OF SERVICE

The foregoing Brief in opposition was filed electronically this day (May 22, 2020) and also was mailed to the Clerk of this Court.

Further, I, Matthew R. Krygiel, a member of the Bar of this Court, hereby certify that on the 22nd day of May, 2020, a copy of this Brief was mailed via United States Postal Service, postage prepaid, and emailed to Hon. Dennis Burke (dennis.burke@ky.gov), Assistant Public Advocate, 5 Mill Creek Park. Section 101, Frankfort, Kentucky 40601 and Hon. Jamesa J. Drake (Jamesa_Drake@hotmail.com), Drake Law LLC, P.O. Box 56, Auburn, Maine 04212, - Counsel for Petitioner.

/s/Matthew R. Krygiel

MATTHEW R. KRYGIEL
Counsel of Record
ASSISTANT ATTORNEY GENERAL
1024 CAPITAL CENTER DRIVE
FRANKFORT, KY 40601
(502) 696-5342
COUNSEL FOR RESPONDENT