**CAPITAL CASE**
**No. 20-**

IN THE

# Supreme Court of the United States

ALAN EUGENE MILLER,

*Petitioner,*

v.

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,

*Respondent.*

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

## PETITION FOR A WRIT OF CERTIORARI


DANIEL J. NEPPL
KELLY HUGGINS
MEGAN COGGESHALL
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, IL 60603
(312) 853-7000

JEFFREY T. GREEN
TOBIAS S. LOSS-EATON*
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
tlosseaton@sidley.com

SUMMER A. WALL
SIDLEY AUSTIN LLP
555 W. Fifth Street
Los Angeles, CA 90013
(213) 896-6000

*Counsel for Petitioner*

* Counsel of Record


March 25, 2021

## QUESTIONS PRESENTED

After petitioner Alan Miller was convicted of murder, the trial judge instructed the jurors that their penalty-phase verdict was merely an advisory recommendation to the judge, who would ultimately decide the sentence. The jurors voted ten-to-two to recommend death. Their advisory verdict did not say they had unanimously found an aggravating factor, as state law required. The judge entered a death sentence based on his own findings.

This Court then held that the Sixth Amendment requires a jury, not a judge, to find an aggravating factor that triggers death eligibility. *Ring* v. *Arizona*, 536 U.S. 584, 609 (2002). The court below upheld Mr. Miller's sentence under *Ring* because, in its view, the split jury must have unanimously found an aggravating factor. It thus held that his sentence depends on the jury's advisory verdict, even though the jurors were told the opposite. And the court found this result compatible with the Eighth Amendment's rule that a capital sentencing jury must understand its "awesome responsibility," *Caldwell* v. *Mississippi*, 472 U.S. 320, 330 (1985), because the court construed *Caldwell* merely to bar misstatements of state law.

The questions presented are:

1. Whether the Eighth Amendment allows a jury's non-unanimous advisory verdict to serve as the predicate for a death sentence, when the jurors were told it was merely a recommendation.

2. Whether a jury's death sentence recommendation establishes that the jury unanimously found an aggravating factor, as the Sixth Amendment requires, where two jurors voted against death and the verdict stated no findings.

## PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Alan Eugene Miller. Respondent is the Commissioner of the Alabama Department of Corrections. No parties are corporations.

## RULE 14.1(b)(iii) STATEMENT

This case directly relates to these proceedings:

*State* v. *Miller*, Shelby Cnty. No. CC-99-792 (June 17, 2000);

*Miller* v. *State*, 913 So. 2d 1148 (Ala. Crim. App. 2004);

*Miller* v. *State*, 99 So. 3d 349 (Ala. Crim. App. 2011);

*Miller* v. *Thomas*, No. 2:13-00154-KOB, 2015 WL 4641070 (N.D. Ala. Aug. 4, 2015);

*Miller* v. *Dunn*, No. 2:13-00154-KOB, 2017 WL 1164811 (N.D. Ala. Mar. 29, 2017); and

*Miller* v. *Commissioner, Alabama Dep't of Corrections,* 826 F. App'x 743 (11th Cir. 2020).

No other proceedings in state or federal trial or appellate courts, or in this Court, directly relate to this case.

## TABLE OF CONTENTS

**TABLE OF CONTENTS—continued**

## TABLE OF AUTHORITIES

CASES Page

**TABLE OF AUTHORITIES—continued**

Page



CONSTITUTION



STATUTES AND REGULATIONS

**TABLE OF AUTHORITIES—continued**

## PETITION FOR A WRIT OF CERTIORARI

Petitioner Alan Miller respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Eleventh Circuit.

## OPINIONS BELOW

The Eleventh Circuit's unpublished opinion is available at 826 F. App'x 743 and reproduced at Pet. App. 1a–29a. The district court's order is available at 2017 WL 1164811 and reproduced at Pet. App. 31a–219a.

## JURISDICTION

The court of appeals entered judgment on August 27, 2020. Mr. Miller timely filed a petition for rehearing en banc, which was denied on November 10, 2020. Pet. App. 301a. On March 19, 2020, this Court extended the deadline to file any petition for a writ of certiorari due on or after that date to 150 days from the date of the lower court judgment. 28 U.S.C. § 1254(1) supplies jurisdiction.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides, as relevant: "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury." U.S. Const. Amend. VI.

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. Amend. VIII.

## INTRODUCTION

Alan Miller's death sentence rests on two constitutional errors, one of which continued a circuit split on an important constitutional question. By a vote of ten to two, the jury entered a general, advisory verdict recommending a death sentence. The verdict was general because it included no findings about any of the aggravating circumstances Alabama law required for death eligibility. The verdict was advisory because, under Alabama law at the time, the trial judge—not the jury—made capital sentencing decisions. And the jury was repeatedly told as much; the judge instructed the jurors that they were merely recommending a penalty, with the judge holding the ultimate sentencing authority.

Mr. Miller's death sentence thus violates the constitutional principles this Court recognized in *Ring* v. *Arizona*, 536 U.S. 584 (2002), and *Caldwell* v. *Mississippi*, 472 U.S. 320 (1985). *Ring* held that the Sixth Amendment requires the jury, not a judge, to "find an aggravating circumstance necessary for imposition of the death penalty." 536 U.S. at 609. And *Caldwell* held that, under the Eighth Amendment, "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. *Ring* thus required the jurors, not the judge, to find aggravating circumstances here. And *Caldwell* required the judge to instruct them that their verdict would determine whether Mr. Miller lives or dies. Neither of those things happened.

The Eleventh Circuit nevertheless upheld Mr. Miller's death sentence. As to *Ring*, the court agreed with the Alabama courts that the jury must have

unanimously found a statutory aggravating circumstance because it was instructed to make that finding before recommending a penalty. But it is unreasonable to infer that the jury, which split ten-to-two at the penalty phase, *unanimously* found a predicate for the penalty that two jurors refused to recommend. In any event, this Court has since made clear that courts "cannot . . . treat" this kind of "advisory recommendation by the jury as the necessary factual finding that *Ring* requires." *Hurst* v. *Florida*, 577 U.S. 92, 100 (2016).

But even if the Sixth Amendment allowed the jury's advisory verdict to serve as the predicate for Mr. Miller's death sentence, that would merely establish an Eighth Amendment violation. The Eighth Amendment requires that "a capital sentencing jury recognize[ ] the gravity of its task," and thus prohibits "minimiz[ing] the jury's sense of responsibility for determining the appropriateness of death." *Caldwell*, 472 U.S. at 330, 341. But here, the jury was instructed, directly and repeatedly, that it was *not* "determining the appropriateness of death." Instead, the judge told the jurors they were merely making a "recommendation" to him. *E.g.*, Pet. App. 307a. The jurors certainly were never told that their advisory verdict would later be treated as a finding of fact essential to whether Mr. Miller lives or dies.

Yet the Eleventh Circuit saw no Eighth Amendment problem. It did not dispute that the jurors were "led to believe that the responsibility for determining the appropriateness of the defendant's death rest[ed] elsewhere"—with the trial judge. *Caldwell*, 472 U.S. at 329. But it brushed aside this "interesting" problem "because the jury instructions accurately characterized the jury's role under Alabama law" at the time, and the Eleventh Circuit had previously nar-

rowed *Caldwell* to address only inaccurate descriptions of the jury's role under state law. Pet. App. 13a. But that cramped view conflicts with *Caldwell* itself and with other circuits' decisions.

The Constitution does not merely require a technically accurate description of state law; it requires a capital sentencing jury to "proceed[ ] with the appropriate awareness of its 'truly awesome responsibility.'" *Caldwell*, 472 U.S. at 341. Thus, "a *Caldwell* violation may be established where a technically accurate statement . . . nonetheless 'misled the jury to minimize its role in the sentencing process.'" *Riley* v. *Taylor*, 277 F.3d 261, 298 (3d Cir. 2001); *accord Driscoll* v. *Delo*, 71 F.3d 701, 713 (8th Cir. 1995) (finding that prosecutor's statements violated *Caldwell* "[d]espite their technical accuracy under Missouri law"). The Eleventh Circuit's contrary ruling continued the circuit split on this issue.

In short, the decision below creates a Catch-22: Mr. Miller's death sentence supposedly satisfies *Ring* because it rests on the jury's advisory verdict, and it supposedly satisfies *Caldwell* because the jury was "accurately" told precisely the opposite. Pet. App. 10a–13a. That makes no sense. Indeed, this same combination of issues arose in *Hurst*, but the Court did not need to resolve the *Caldwell* issue there because it held that Florida's advisory sentencing scheme violated *Ring*. See Br. for Pet'r at *35, *Hurst* v. *Florida*, No. 14-7505, 2015 WL 3523406 (May 18, 2015). And after *Hurst*, multiple Justices have urged that the *Caldwell* issue remains "important" and "potentially meritorious." *E.g.*, *Truehill* v. *Florida*, 138 S. Ct. 3, 4 (2017) (Sotomayor, J., joined by Ginsburg and Breyer, JJ., dissenting from the denial of certiorari). The Court should grant review here and either reach the same result as in *Hurst* or, failing that, reach the

*Caldwell* issue that *Hurst* left unresolved. Either way, the Court should grant the petition and reverse the judgment below.

## STATEMENT OF THE CASE

### A. State court proceedings.

1. In June 2000, a jury convicted Alan Miller of capital murder for killing three people. See Ala. Code § 13A-5-40(a)(10) ("Murder wherein two or more persons are murdered by the defendant by one act or pursuant to one scheme or course of conduct."). Mr. Miller, in the grip of a delusion, had shot two of his co-workers and another man at his former workplace. Pet. App. 286a–287a.

Immediately after the jury read its guilt-phase verdict, the trial moved to the penalty phase. The jury heard evidence from both parties and then received instructions from the trial judge on its role in sentencing. The judge explained that the jurors "must determine whether an aggravating circumstance exists, and if so, [it] must determine whether any mitigating circumstances exist." *Id.* at 308a. The judge also instructed them that *each juror* needed to be "convinced beyond a reasonable doubt based upon the evidence that an aggravating circumstance exists" before they could recommend a death sentence. *Id*. at 310a.

In urging a death sentence, the State relied on just one aggravating factor—that Mr. Miller's "capital offense was especially heinous, atrocious or cruel compared to other capital offenses." Ala. Code § 13A-5-49(8); see also Pet. App. 303a–304a. This aggravating circumstance was not an element of the underlying offense, and the guilt-phase verdict included no findings on this point.

Mr. Miller's counsel presented three statutory mitigating circumstances based on his lack of a criminal record and his mental state. See Pet. App. 305a–306a; see also Ala. Code § 13A-5-51(1)–(2), (6); Ala. Code § 13A-5-52. Trial counsel, however, gathered and presented minimal evidence to support these and other non-statutory mitigating circumstances. Counsel did not, for example, present evidence of the poverty and abuse Mr. Miller experienced as a child, his family history of mental illness, his close relationships with his siblings, or his commendable work performance. See Pet. App. 322a–351a, 513a–518a.

The court repeatedly emphasized to the jurors that their role in sentencing was merely to make a recommendation to the judge: "I'll state to you at the outset that your *recommendation* will take the form that you do *recommend to the Court*, and that is one form, that *you recommend that the Court* sentence the defendant to death by electrocution. The second one . . . would be that you *recommend to the Court* that the Court sentence [Mr. Miller] to life without parole . . . ." *Id.* at 307a (emphasis added); see also *id.* at 308a–309a ("The law of this state provides a list of aggravating circumstances which may be considered by a jury in recommending punishment, if you are convinced beyond a reasonable doubt from the evidence that one such aggravating circumstance exists in this case."); *id.* at 311a ("In reaching your findings concerning the aggravating and mitigating circumstances in a case and in determining what to recommend as punishment in a case, you must avoid any influence of passion, prejudice, or any other arbitrary factor."). Indeed, Alabama law at the time gave "ultimate sentencing authority to the trial judge." *Harris* v. *Alabama*, 513 U.S. 504, 508–09 (1995); see Ala. Code § 13A-5-47(e) ("While the jury's recommenda-

tion concerning sentence shall be given consideration, it is not binding upon the court.").

After deliberating for three hours, the jury recommended to the court by a vote of ten-to-two—the minimum required by Alabama law—that Mr. Miller be sentenced to death. Ala. Code § 13A-5-46(f). The court never asked the jurors to make any express factual findings, and they did not do so. Rather, the jury received two general verdict forms, one to recommend death and one to recommend life without parole. Neither included a space for the jury to note whether it found (unanimously or otherwise) that the State had proved the aggravating circumstance beyond a reasonable doubt. Pet. App. 312a–313a. When the jury reported its verdict, the trial judge did not poll the jurors on that question. The judge asked only if the split sentencing recommendation reflected each juror's vote. *Id.* at 314a–316a. After a separate sentencing hearing, the trial judge explained his own findings with respect to the aggravating and mitigating circumstances and sentenced Mr. Miller to death. *Id.* at 317a–319a.

2. Mr. Miller appealed his conviction and sentence to the Alabama Court of Criminal Appeals ("CCA"). Almost four years later, the CCA determined that it could not resolve Mr. Miller's arguments without first remanding to the trial court "to make specific findings of fact regarding its finding that the murders committed by [Mr. Miller] were especially heinous, atrocious, or cruel." *Id.* at 285a. The CCA explained that the trial court had "failed to make specific findings of fact as to why it believed that this aggravating circumstance existed." *Id.*

While Mr. Miller's appeal was pending on direct review, this Court decided *Ring*, holding that the existence of an aggravating factor is a finding of fact that

must be made by a jury. The CCA requested supplemental briefing on *Ring*'s application to Mr. Miller's case. *Id.* 296a. The State argued that his death sentence "complie[d] with *Ring*" because the jury, at the guilt phase, found that Mr. Miller "had committed a capital offense, thus making him eligible for the death sentence." *Id.* at 297a. In the State's view, "the circuit court had the discretion under *Ring* to impose either the death sentence or a lesser sentence, with or without the jury's approval." *Id.* After receiving the trial court's factual findings on the aggravating circumstance, the CCA affirmed Mr. Miller's sentence, concluding that "the jury's 10-2 vote recommending death established that the jury unanimously found the existence of the 'especially heinous, atrocious, or cruel' aggravating circumstance." *Id.* at 298a. Both the Alabama Supreme Court and this Court denied review. *Id.* at 353a; *Miller* v. *Alabama*, 546 U.S. 1097 (2006).

3. Mr. Miller sought state post-conviction relief. The state trial court issued a preliminary ruling summarily dismissing Mr. Miller's claim that his death sentence violated *Ring*. Pet. App. 354a. After an evidentiary hearing on the remaining claims, the court signed an order adopting the State's post-hearing brief. Pet. App. 354a–510a. The CCA denied his appeal, *Id.* at 221a, and the Alabama Supreme Court denied review. *Id.* at 511a.

### B. Federal habeas review.

1. Mr. Miller timely sought a writ of habeas corpus in federal district court. He again argued that Alabama's sentencing scheme violated the Sixth and Eighth Amendments. *Miller* v. *Thomas*, No. 2:13–00154–KOB, 2015 WL 4641070, at *13 (N.D. Ala. Aug. 4, 2015). He raised two arguments relevant here: first, the jury instructions improperly mini-

mized the jury's sense of responsibility for his sentence, in violation of *Caldwell*, by repeatedly instructing the jurors that their decision was a recommendation and merely advisory; and second, that his death sentence was unsupported by the factual findings *Ring* requires. *Id.* at *72.

Before the district court ruled, this Court decided *Hurst*. The Court applied *Ring* to hold that Florida's sentencing scheme—in which, as in *Ring* and here, a "jury renders an advisory verdict but the judge makes the ultimate sentencing determinations"—violated the Sixth Amendment. 577 U.S. at 95.

The district court denied relief. Pet. App. 31a. It determined that Mr. Miller's *Caldwell* claim had "no merit" because the jury had been correctly instructed on Alabama law. Under Alabama law, the jury's sentencing determination was advisory, so "the court's instruction informing the jury that they were making a recommendation as to [Mr.] Miller's sentence does not constitute a *Caldwell* violation." *Id.* at 181a.

The district court also rejected Mr. Miller's *Ring* argument. Finding that *Hurst* did not apply retroactively, the court did not address *Hurst* separately from *Ring*. On the merits of the *Ring* issue, the court "recognize[d] that a system in which the jury must explicitly indicate that it found the existence of an aggravating factor would be preferable." *Id.* at 217a. The court also acknowledged doubt about the unanimity of the jury's fact finding in Mr. Miller's case. During the course of jury deliberations, the jury sent the judge a note asking "can we have a sentence if we have the appropriate number of required votes but we have one juror undecided?" *Id.* at 216a. Even so, the district court rejected the Sixth Amendment argument, relying on pre-*Hurst* Eleventh Circuit decisions rejecting challenges to Florida's sentencing

scheme, *Evans* v. *Sec'y, Fla. Dep't of Corr.*, 699 F. 3d 1249, 1260 (11th Cir. 2012), and *United States* v. *Townsend*, 630 F.3d 1003, 1013–14 (11th Cir. 2011). Because the trial judge had instructed the jury that they "must first unanimously find" the existence of an aggravating factor beyond a reasonable doubt, the district court reasoned, "the fact that ten out of the twelve jurors recommended death supports the presumption that the jurors must have found the existence of the aggravating circumstance beyond a reasonable doubt." Pet. App. 217a.

2. On appeal, the Eleventh Circuit granted a certificate of appealability as to four questions, including the *Caldwell* and *Ring* issues. But the court denied relief in a per curiam opinion.

On the *Ring* issue, the court rejected Mr. Miller's argument on two grounds. First, the court concluded that the CCA "could have reasonably concluded that the jury, by recommending death in a 10-2 vote, found that the offenses were especially heinous, atrocious, or cruel." Pet. App. 9a. The court so held even though the CCA had originally remanded the case *for the trial judge* to make the findings of fact necessary to sentence Mr. Miller to death. *Id.* Second, the court recognized the similarities between Alabama's capital sentencing statute and the one invalidated in *Hurst*, but maintained that it must follow the "on point Supreme Court decision," *Harris* v. *Alabama*, 513 U.S. 504 (1995), which "upheld the Alabama capital scheme under which Mr. Miller was sentenced, including its use of a purely advisory jury." Pet. App. 10a. The court supplemented this point by asserting that *Hurst* is not retroactive on collateral review, having interpreted Mr. Miller's reliance "on the holding and rationale of *Hurst*" to be a retroactivity argument. *Id.* at 11a.

On the *Caldwell* issue, the Eleventh Circuit did not question that the jurors were "led to believe that the responsibility for determining the appropriateness of the defendant's death" rested with the trial judge, not with them. *Caldwell*, 472 U.S. at 329. And there was no dispute that the court's *Ring* holding meant that Mr. Miller's sentence in fact rested on the jury's advisory verdict. But the Court held that this "interesting" argument was ultimately unavailing because the jury instructions "accurately characterized the jury's role under Alabama law." Pet. App. 13a. The court thus relied on circuit precedent holding "that references to and descriptions of the jury's sentencing verdict as an advisory one or as a recommendation to the judge do not constitute *Caldwell* violations where they accurately characterize the jury's and judge's sentencing roles under state law." *Id.* (cleaned up). The court also said that "Mr. Miller cannot use *Caldwell* as an end run around federal retroactivity law to apply *Hurst* to the Alabama sentencing scheme." *Id.* It did not explain how Mr. Miller's Eighth Amendment claim under *Caldwell* could be an "end run" around any retroactivity limits on his separate Sixth Amendment claim.

The court denied Mr. Miller's timely petition for rehearing en banc.

## REASONS FOR GRANTING THE PETITION

Either Mr. Miller's death sentence complies with the Eighth Amendment under *Caldwell* because the jurors were correctly told they were not deciding his fate, or it complies with the Sixth Amendment under *Ring* because it rests on the jury's findings—but it cannot do both. The Eleventh Circuit's contrary ruling conflicts with decisions of this Court and other circuits.

## I. Mr. Miller's death sentence violates the Eighth Amendment under *Caldwell*.

The Eleventh Circuit rejected Mr. Miller's Sixth Amendment claim under *Ring* because the CCA "reasonably concluded that the jury did find the statutory aggravating circumstance necessary to make Mr. Miller death-eligible." Pet. App. 7a. But even if that conclusion were reasonable, but see *infra* § II, it would simply confirm that Mr. Miller's death sentence violates the Eighth Amendment under *Caldwell*. To avoid the *Ring* issue, the state courts and the Eleventh Circuit transformed the jury's advisory "recommendation" into a binding factual predicate for Mr. Miller's execution. In other words, the jurors were "led to believe that the responsibility for determining the appropriateness of the defendant's death rest[ed] elsewhere," *Caldwell*, 472 U.S. at 329, but the courts below concluded that responsibility in fact rested with the jury. That is a textbook *Caldwell* violation. The Eleventh Circuit avoided this inevitable conclusion only by limiting *Caldwell* to misstatements of the jury's role under state law, but neither this Court nor other circuits have cabined *Caldwell* that way.

### A. The Eleventh Circuit's narrow reading of *Caldwell* conflicts with decisions of this Court and other circuits.

The court below held that *Caldwell* merely "requires that a jury in a capital case be correctly instructed as to its role *under state law*." Pet. App. 12a (emphasis added). That holding relied on circuit precedent rejecting the view that "a prosecutorial or judicial comment or instruction could constitute *Caldwell* error even if it was a technically accurate description under state law of the jury's actual role in capital sentencing." *Davis* v. *Singletary*, 119 F.3d 1471, 1482 (11th Cir. 1997). This cramped interpretation con-

flicts with *Caldwell* itself and with other circuits' decision applying it.

1. *Caldwell* addressed "whether a capital sentence is valid when the sentencing jury is led to believe that responsibility for determining the appropriateness of a death sentence rests not with the jury but with the appellate court which later reviews the case." 472 U.S. at 323. There, the defendant's lawyer emphasized to the jury the "awesome responsibility" of deciding his fate. *Id.* at 324. In response, the prosecutor "sought to minimize the jury's sense of the importance of its role," telling the jury that their verdict was "not the final decision" because "the decision you render is automatically reviewable by the [state] Supreme Court." *Id.* at 325–26. The trial judge echoed the point, saying "I think it proper that the jury realizes that [the verdict] is reviewable automatically." *Id.*

This Court held that these statements rendered Mr. Caldwell's death sentence unlawful. "[I]t 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." *Id.* at 328–29. The capital sentencing process "should facilitate the responsible and reliable exercise of sentencing discretion." *Id.* at 329. And there are "specific reasons to fear substantial unreliability as well as bias in favor of death sentences when there are state-induced suggestions that the sentencing jury may shift its sense of responsibility" to a reviewing court. *Id.* at 330. Those reasons include misconceptions about the court's role; the desire to "send a message" in the belief that the court will not actually impose the ultimate penalty; mistaken assumptions about alternative punishments; and the simple hu-

man desire not to decide "whether another should die." See *id.* at 330–33. For all these reasons, "minimiz[ing] the jury's sense of responsibility for determining the appropriateness of death" violates "the standard of reliability that the Eighth Amendment requires." *Id.* at 341; see *id.* at 342 (O'Connor, J., concurring) (the Eighth Amendment prohibits information that is "inaccurate and misleading in a manner that diminished the jury's sense of responsibility").

The decision below conflicts with *Caldwell*. The statements at issue in *Caldwell* were technically correct as a matter of state law: A death sentence would indeed have been reviewed automatically by the state supreme court. Even so, the argument "was inaccurate" in part "because it depicted the jury's role in a way fundamentally at odds with the role that a capital sentencer must perform." *Id.* at 336. In other words, what mattered was not whether these statements "accurately characterize[d] the jury's and judge's sentencing roles under state law," Pet. App. 13a (cleaned up), but that they "sought to minimize the jury's sense of responsibility for determining the appropriateness of death," 472 U.S. at 341. *Caldwell* thus forecloses the Eleventh Circuit's approval of technically accurate state-law descriptions that imply the buck stops somewhere other than the jury box.

2. Other circuits have rejected the Eleventh Circuit's rule. The Eighth Circuit has held that a prosecutor's statements that "impermissibly misled the jury to minimize its role in the sentencing process" violated the Eighth Amendment "[d]espite their technical accuracy under Missouri law." *Driscoll*, 71 F.3d at 713; *cf. Roberts* v. *Bowersox*, 137 F.3d 1062, 1065 (8th Cir. 1998) (finding that the comments at issue "were not misstatements of Missouri law," and still

going on to analyze whether the jury was "misled about the significance of its role."). In *Driscoll*, as here, the jury was told repeatedly that its "sentence of death would be a mere recommendation to the judge," who could "veto" it. 71 F.3d at 711–12 & n.8. Although these statements correctly described state law—the jury's verdict was a recommendation, which the judge could override—they were still improper. In fact, the "judge could not have sentenced Driscoll to death absent the jury's recommendation to do so." *Id.* at 713.

The regime in *Driscoll* thus perfectly mirrored what happened here, at least as the courts below saw it: The jury's recommendation was a necessary condition for a death sentence (in *Driscoll* because state law said so, and here because *Ring* said so). And the jurors in both cases were told instead that they were just making a recommendation. Yet the Eighth Circuit held that this situation violated the Eighth Amendment, and the Eleventh Circuit below held the opposite.

The decision below likewise conflicts with *Riley*, 277 F.3d at 298. There, the Third Circuit found a constitutional violation based on the prosecutor's "pointed"—but technically accurate—"references to appellate review" of the jury's decision. *Id.* The Third Circuit agreed with the Eighth Circuit that "a *Caldwell* violation may be established where a technically accurate statement describing the state appellate review process nonetheless 'misled the jury to minimize its role in the sentencing process.'" *Id.* (quoting *Driscoll*, 71 F.3d at 713). That, of course, is the opposite of the rule the Eleventh Circuit applied below.

The court below held that it did not matter whether the jurors were told that Mr. Miller's death sentence depended on their advisory verdict, because the in-

structions correctly described state law at the time. In at least two other circuits, that same scenario would require vacating the sentence. This clear conflict warrants this Court's review.

### B. Mr. Miller's death sentence violates *Caldwell* because the jurors were never told their "recommendation" would determine whether he lives or dies.

Everyone agrees that when Mr. Miller's sentence became final, the Sixth Amendment required the jury to unanimously find a statutory aggravating circumstance before he could be sentenced to death. Although the trial judge's jury instructions accurately described state law at the time of the trial, they did not convey this essential, constitutional requirement. The jurors thus had no idea that their advisory verdict could dictate whether Mr. Miller could be sentenced to death or not. That violates the Eighth Amendment.

The jury instructions were unequivocal: The judge told the jury repeatedly that it should make a "recommendation": Either the jurors "recommend to the Court" that it "sentence the defendant to death," or they "recommend to the Court" a lesser sentence. Pet. App. 307a. These instructions faithfully described Alabama law at the time, which made clear that the jury's "recommendation" was "not binding upon the court." Ala. Code § 13A-5-47(e). Thus, as the judge told the jurors, their advisory verdict was simply a recommendation for him to "consider." *Id.* He was free to depart from it in either direction. So the "jurors knew that the final decision as to whether [Mr. Miller] would live or die did not rest with them." *Reynolds* v. *Florida*, 139 S. Ct. 27, 34 (2018) (Sotomayor, J., dissenting from denial of certiorari).

But according to the CCA's and the Eleventh Circuit's Sixth Amendment analysis, those instructions were wrong. The jury's advisory verdict was *not* merely a non-binding recommendation: It was the unanimous factual finding required to permit a death sentence under the Sixth Amendment. Pet. App. 7a–8a. In other words, had the jury not recommended death, Mr. Miller could not have been sentenced to death, no matter what the trial judge thought. But the jury was never told that.

This is a clear-cut *Caldwell* violation. The instructions effectively "urged the jurors to view themselves as taking only a preliminary step toward the actual determination of the appropriateness of death—a determination which would eventually be made by others and for which the jury was not responsible." *Caldwell*, 472 U.S. at 336. That is precisely what the Constitution prohibits, because it creates "substantial unreliability as well as bias in favor of death sentences." *Id.* at 330; see *Ring*, 536 U.S. at 619 (Breyer, J., concurring) ("[T]he Eighth Amendment requires individual jurors to make, and to take responsibility for, a decision to sentence a person to death.").

The Eleventh Circuit never suggested otherwise. It did not question that the jury instructions led the jurors to believe that sentencing responsibility rested elsewhere. *Caldwell*, 472 U.S. at 329. Nor did the court dispute that, given its *Ring* holding, responsibility did *not* rest elsewhere—it rested with the jury. The court's only basis for avoiding *Caldwell* was the notion that the Eighth Amendment prohibits only inaccurate descriptions of the jury's role *under state law*. As discussed above, *Caldwell* itself is not so limited. *Supra* § I.A. And as Justice Sotomayor has explained, the fact that jury "instructions accurately reflect[ed] the advisory nature of the jurors' role" un-

der state law at the time is not a basis to avoid "grappl[ing] with the Eighth Amendment implications" of a holding that "then-advisory jury findings are now binding" under the Sixth Amendment. *Guardado* v. *Jones*, 138 S. Ct. 1131, 1133 (2018) (Sotomayor, J., dissenting from denial of certiorari) (cleaned up).

The Eleventh Circuit's rule also fails on its own terms. *Caldwell*'s basic principle is that a prosecutor or judge cannot "minimize the jury's sense of responsibility for determining the appropriateness of death." 472 U.S. at 341. The Eleventh Circuit gave no reason why this principle would apply to a misstatement of the jurors' required role under state law, but *not* a misstatement of their required role under the Sixth Amendment. And no reason exists. Either way, the jurors deliberated without knowing that their decision was crucial to whether Mr. Miller would live or die. If the Eighth Amendment prohibits wrongly telling jurors that state law lets the judge impose a death sentence even if they do not recommend it, *e.g.*, *Driscoll*, 71 F.3d at 713, it equally prohibits wrongly telling them that the Constitution allows a death sentence regardless of what they do. The practical effect is the same.

Nor is there a material legal distinction that could support the Eleventh Circuit's narrow rule. After all, "the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature." *Howlett* v. *Rose*, 496 U.S. 356, 367 (1990). The Sixth Amendment's rules about the jury's role thus apply in Alabama's courts every bit as much as Alabama statutory law on that question—and it controls if the two conflict. There is thus no reason to exempt a misstatement of constitutional law from *Caldwell*'s reach. Put differently, the in-

structions here accurately described Alabama's statutory rules about the jury's role in sentencing, but they still were not an accurate description of the jury's role because those statutes conflicted with the Sixth Amendment.

Nor does the decision below track this Court's cases applying *Caldwell*. The Eleventh Circuit purported to draw its rule from *Romano* v. *Oklahoma*, 512 U.S. 1 (1994), but it misread that decision. *Romano* explained that *Caldwell* prohibits statements "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.'" *Id.* at 9 (quoting *Darden* v. *Wainwright*, 477 U.S. 168, 184 n.15 (1986)). An accurate description of state law can still lead "the jury to feel less responsible than it should," *id.*, as *Caldwell* itself shows. And while *Romano* also referred to misstatements of "the role assigned to the jury *by local law*," *id.* (emphasis added) (internal citation omitted), it had no occasion to limit *Caldwell*'s principle to such statements. The question in *Romano* was whether the state could introduce evidence of the defendant's prior death sentence. *Id.* The answer was yes: This evidence "did not contravene the principle established in *Caldwell*" because "the jury was not affirmatively misled regarding its role in the sentencing process." *Id.* at 9–10. That holding does nothing to insulate from Eighth Amendment scrutiny technically accurate descriptions of state law that nevertheless diminish the jury's role.

Likewise, in *Darden* v. *Wainwright*, from which *Romano* drew its statement of *Caldwell*'s rule, the prosecutor made various "improper" and inflammatory remarks. But none were about the jury's sentencing role, see 477 U.S. 168, 179–81 (1986), so "none of

the comments could have had the effect of misleading the jury into thinking that it had a reduced role in the sentencing process," *id.* at 183 n.15. And the Court did not suggest that only misstatements of state law are prohibited; rather, it said again that the Constitution bars comments "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." *Id.* And in *Dugger* v. *Adams*, the defendant *did* assert that the instructions at issue were erroneous under state law, so again the Court had no basis to limit *Caldwell*'s application in other circumstances. See 489 U.S. 401, 407 (1989); *id.* at 422 n.11 (Blackmun, J., dissenting).

In short, the Court's decisions confirm that "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." See *Sawyer* v. *Smith*, 497 U.S. 227, 233 (1990). Because an accurate description of state law can still have that effect—as in *Caldwell* itself—this constitutional rule is not limited to misstatements of that type.

This Court should grant review to determine whether the Eleventh Circuit erred in upholding Mr. Miller's death sentence under the Eighth Amendment.

## II. Mr. Miller's death sentence violates the Sixth Amendment under *Ring*.

The decision below also warrants review because the premise of the Eleventh Circuit's analysis—that the jury's general, advisory, non-unanimous verdict satisfied the Sixth Amendment—conflicts directly with *Ring*. *Ring* dictates, and *Hurst* confirms, that

Mr. Miller's death sentence cannot rest on the divided jury's sentencing recommendation.

1. *Ring* applied the principle of *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), to hold that "[c]apital defendants, no less than noncapital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." 536 U.S. at 589. That includes "an aggravating circumstance necessary for imposition of the death penalty." *Id.* at 609. The Arizona scheme in *Ring* did not allow a death sentence unless the judge made further findings, beyond the guilty verdict, at a separate sentencing hearing. *Id.*at 592, 597–98. That regime was thus unconstitutional, because "the Sixth Amendment's jury trial guarantee . . . requires that the aggravating factor determination be entrusted to the jury." *Id.* at 597.

So, as *Hurst* reiterated, the "Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." 577 U.S. at 94. *Hurst* applied this rule to Florida's "hybrid" death-penalty system, in which (as here) "a jury renders an advisory verdict but the judge makes the ultimate sentencing determinations." *Id.* at 95 (cleaned up). This regime, no less than the Arizona scheme in *Ring*, violated the Sixth Amendment by requiring the judge, not the jury, "to make the critical findings necessary to impose the death penalty." *Id.* at 98.

Indeed, *Hurst* was a straightforward application of *Ring*: "Although Florida incorporate[d] an advisory jury verdict that Arizona lacked," the Court "previously made clear that this distinction is immaterial," because a Florida jury also did "not make specific factual findings with regard to the existence of mitigating or aggravating circumstances." *Id.* at 98–99. And Florida could not escape this conclusion by arguing

that "when Hurst's sentencing jury recommended a death sentence, it 'necessarily included a finding of an aggravating circumstance'": Having given the trial judge the "central and singular role" in capital sentencing, the state "cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires." *Id.* at 100. Florida's hybrid scheme—which it shared with Alabama, see *Ring*, 536 U.S. at 608 n.6—was thus unconstitutional.

2. These decisions compel the same result here. Indeed, the Eleventh Circuit agreed that *Ring* "applies here because it was decided while Mr. Miller's direct appeal was pending." Pet. App. 7a. And it agreed that, under *Ring*, the Sixth Amendment required that "the jury . . . find the statutory aggravating circumstance necessary to make Mr. Miller death-eligible." *Id.* But it gave three reasons why it believed that requirement was met. None avoids the conflict with *Ring* or *Hurst*.

*First*, the court below upheld, as reasonable under the Antiterrorism and Effective Death Penalty Act, the CCA's conclusion that "[b]ecause the jury recommended a death sentence by a vote of 10-2, . . . the jury must have determined the existence of the 'heinous, atrocious, or cruel' aggravating circumstance." *Id.* The CCA explained the trial court "clearly instructed the jury that it could not proceed to a vote on whether to impose the death penalty unless it first found beyond a reasonable doubt the existence of at least one aggravating circumstance." *Id.* at 298a. Since the jurors did proceed to vote on a recommended sentence, the CCA inferred that they must have "unanimously found" the aggravating circumstance the state asserted. *Id.*

That inference was not reasonable. To start with the obvious, the jury was not unanimous. Two jurors

voted against the death-sentence recommendation. Pet. App. 7a. By itself, a non-unanimous advisory verdict cannot support a reasonable inference that the jury *unanimously* found the factual predicate for that recommendation. Even the Florida Supreme Court, which has rejected similar post-*Hurst* claims, recognizes that "there is a critical distinction between unanimous and nonunanimous jury recommendations" in this context. *Reynolds* v. *State*, 251 So. 3d 811, 815 (Fla. 2018). With a "nonunanimous jury recommendation," the court "cannot determine how many jurors may have found the aggravation sufficient for death." *Johnson* v. *State*, 205 So. 3d 1285, 1291 (Fla. 2016); *Glover* v. *State*, 226 So. 3d 795, 812 (Fla. 2017) (same, based on "ten-to-two jury recommendation"). Thus, whatever merit the CCA's inference might have had with a unanimous jury, it is unreasonable and unsupported here.

Unanimity aside, *Hurst* confirms the Eleventh Circuit's error. There, "Florida concede[d] that *Ring* required a jury to find every fact necessary to render Hurst eligible for the death penalty," but argued that "when Hurst's sentencing jury recommended a death sentence, it 'necessarily included a finding of an aggravating circumstance.'" 577 U.S. at 99. The Court made quick work of that argument, without even mentioning unanimity: Because Florida law required the judge to decide the sentence and gave the jury only an advisory role, the state "cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires." *Id.*

So too here. The advisory-verdict scheme that governed Mr. Miller's trial was no different from the Florida regime in *Hurst*. Mr. Miller's trial judge alone had the authority to impose the death sentence, based on the judge's findings of both aggravating and

mitigating factors. Ala. Code § 13A-5-47(e). Thus, there was "no requirement . . . that the jury make specific findings as to the existence of aggravating circumstances." *Bush* v. *State*, 431 So. 2d 555, 559 (Ala. Crim. App. 1982), *aff'd sum nom. Ex Parte Bush*, 431 So. 2d 563 (Ala. 1983). Rather, state law deemed it "sufficient that the trial court, which [was] in no way bound by the jury's recommendation concerning sentence, [was] required to enter specific written findings concerning the existence or nonexistence of each aggravating circumstance." *Id.*

Indeed, on direct appeal, almost four years after trial, the CCA remanded this case for *the trial judge* to "make specific findings of fact regarding the existence of the aggravating circumstance that this offense was especially heinous, atrocious, or cruel when compared to other capital offenses." Pet. App. 286a. It did not require impaneling a second jury to do so. See *id.* Thus, as in *Hurst*, the courts cannot now treat the jury's advisory verdict as the binding factual finding that *Ring* requires. 577 U.S. at 99–100.

*Second*, the Eleventh Circuit tried to duck *Hurst*'s obvious application here by deeming it nonretroactive. Pet. App. 11a. The Eleventh Circuit read this Court's opinion in *McKinney* v. *Arizona*, 140 S. Ct. 702 (2020), to hold that "*Hurst* announced a new rule of constitutional law that is not retroactive on collateral review." Pet. App. 11a. To be sure, *McKinney* said that "*Ring* and *Hurst* do not apply retroactively on collateral review." 140 S. Ct. at 708. But there, the defendant's conviction "became final on direct review in 1996, long before *Ring* and *Hurst*." *Id.* The Court thus addressed the retroactive effect of *Ring* and *Hurst* together. It had no reason to consider, and did not purport to decide, whether *Hurst* would apply on collateral review of a conviction *that*

*became final after Ring*. On the contrary, the Court reiterated that *Hurst* simply "applied *Ring*," *id.* at 707, to facts that *Hurst* itself said were different only in "immaterial" ways, 577 U.S. at 98. Indeed, the Eleventh Circuit itself has recognized that "*Hurst* made clear that it was applying *Ring*." See *Taylor* v. *Ala. Dep't of Corr.*, No. 18-11523-P, 2018 WL 8058904, at *4 (11th Cir. 2018); *Waldrop* v. *Comm'r, Ala. Dep't of Corr.*, 711 F. App'x 900, 923 n.6 (11th Cir. 2017) ("*Hurst* . . . reflects an application and explication of the Supreme Court's holding in *Ring*."). *Hurst* broke no new ground.

But even if that were not so, and *Hurst* did not apply directly here, it would not change the result. As just explained, *Hurst* simply applied *Ring*'s rule to materially indistinguishable facts: "The analysis the *Ring* Court applied to Arizona's sentencing scheme applies equally to Florida's." *Hurst*, 577 U.S. at 98. Because Florida's hybrid scheme is not materially different from Alabama's, *Ring* thus "applies equally" here too. *Id.* So even without *Hurst*, *Ring* itself would command that Mr. Miller's sentence be set aside.

*Third*, the Eleventh Circuit said it could not find a *Ring* violation here because this Court "upheld the Alabama capital scheme under which Mr. Miller was sentenced" in *Harris*. Pet. App. 10a. But *Harris* is not relevant here. *Harris* rejected an Eighth Amendment attack on the Alabama regime, which asserted "that Alabama's capital sentencing statute is unconstitutional because it does not specify the weight the judge must give to the jury's recommendation." 513 U.S. at 505. The Court did not even mention the Sixth Amendment. And it certainly did not purport to uphold every aspect of Alabama's death-penalty regime against every possible challenge. The Eleventh Circuit was thus wrong to invoke *Harris* here. A decision

rejecting one defendant's specific claim under a particular constitutional provision does not control another defendant's different claim under a different constitutional provision—especially when the later claim is based on an intervening decision of this Court. *Ring* is on point; *Harris* is not.

In sum, Mr. Miller was sentenced to death under precisely the circumstances *Ring* condemned: A judge, not the jury, found the aggravating circumstance required for a death sentence. Whether or not *Hurst* applies here directly, it simply underscores that his sentence cannot stand.

## III. These issues are important and recurring, and this case is an excellent vehicle.

These issues are vitally important. The Sixth Amendment's jury-trial guarantee is a bedrock constitutional protection, and the Eighth Amendment requires that jurors in death penalty cases do not merely decide the key issues, but also recognize "the gravity of [their] task." *Caldwell*, 472 U.S. at 341. Yet Mr. Miller was denied both protections here, and was thus sentenced to die under a regime materially indistinguishable from those this Court has already struck down.

These issues also arise often. Since *Hurst*, many petitions from Florida death-row prisoners have raised *Caldwell* issues (or analogous harmless-error issues) in cases where, as here, "the jury's death recommendation [was] treated as if it were decisive, despite the judge's instruction that the jury's recommendation was merely advisory." See *Reynolds*, 139 S. Ct. at 29 (Breyer, J., respecting the denial of certiorari); see also *Guardado*, 138 S. Ct. 1131; *Middleton* v. *Florida*, 138 S. Ct. 829 (2018) (Sotomayor, J., dissenting from denial of certiorari); *Truehill*, 138 S. Ct. 3 (So-

tomayor, J., joined by Ginsburg and Breyer, JJ., dissenting from the denial of certiorari). But unlike in many of those cases, this case cleanly presents the issue. Indeed, both the *Ring* and *Caldwell* arguments were pressed and passed upon in both the district court and the court of appeals. Also unlike many of those cases, this case presents the *Caldwell* issue directly, rather than by analogy or by way of a harmless-error analysis. And unlike in many of those cases, the jury here was *not* unanimous in recommending a death sentence. Cf. *Reynolds*, 139 S. Ct. at 33–35 (Sotomayor, J., dissenting from denial of certiorari). This case is thus an excellent vehicle to squarely resolve these questions.

## CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

DANIEL J. NEPPL
KELLY HUGGINS
MEGAN COGGESHALL
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, IL 60603
(312) 853-7000

JEFFREY T. GREEN
TOBIAS S. LOSS-EATON*
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
tlosseaton@sidley.com

SUMMER A. WALL
SIDLEY AUSTIN LLP
555 W. Fifth Street
Los Angeles, CA 90013
(213) 896-6000

*Counsel for Petitioner*

March 25, 2021

* Counsel of Record