No. _____

IN THE SUPREME COURT OF THE UNITED STATES

STANLEY JALOWIEC,

Petitioner,

v.

STATE OF OHIO,

Respondent.

On Petition for Writ of Certiorari
To the Supreme Court of Ohio

PETITION FOR WRIT OF CERTIORARI

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Capital Case

QUESTION PRESENTED

> THE COURT: You could recommend an individual be put to death?
> THE JUROR: But you would be the final –
> THE COURT: This is why I get the big bucks.
> Tr. 153.

This brief exchange between the trial court and a juror on Jalowiec's capital case exemplifies the constitutional error in Jalowiec's case – an error first identified in *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985), and later solidified in *Hurst v. Florida*, 577 U.S. 92 (2016). For the past twenty-five years, Jalowiec has asserted that his death sentence violates the Constitution because the jury selection process systematically undermined the jury's appreciation of the gravity and responsibility of its decision whether Jalowiec lives or dies.

Because *Hurst* held that all facts necessary to impose a death sentence must be found in accordance with the right to trial by jury, and because *Caldwell* requires the jury bear the entire responsibility in imposing sentence, the following question is presented:

> Is telling the jury that their decision is only a mere recommendation unconstitutional under *Hurst v. Florida*?

LIST OF PARTIES

The petitioner is Stanley Jalowiec.

The respondent is the State of Ohio.

LIST OF RELATED PROCEEDINGS

All proceedings directly related to this petition include:

1. Lorain County Common Pleas Court decision sentencing Jalowiec to death: *State of Ohio v. Stanley Jalowiec*, Case No. 95CR046840, Sentencing Opinion (Apr. 29, 1996).

2. Intermediate Court of Appeals affirming conviction and sentence: *State v. Jalowiec,* 9th Dist. Lorain No. 96CA006445, 1998 WL 178554 (Apr. 15, 1998).

3. Ohio Supreme Court affirming conviction and sentence: *State v. Jalowiec*, 744 N.E.2d 163 (Ohio 2001).

4. United States Supreme Court declining certiorari: *Jalowiec v. Ohio,* 534 U.S. 964 (2001).

5. Intermediate Court of Appeals denying delayed motion to file application to reopen appeal: *State v. Jalowiec*, 96CA006445, unreported, journal entry (Aug. 18, 1999).

6. Ohio Supreme Court affirming denial of application to reopen appeal: *State v. Jalowiec*, 751 N.E.2d 467 (Ohio 2001).

7. Intermediate Court of Appeals affirming the trial court's denial of Jalowiec's post-conviction petition and amendments: *State v. Jalowiec*, 9th Dist. Lorain No. 01CA0078454, 01CA007847, 2002 WL 358637 (Mar. 6, 2002).

8. Ohio Supreme Court declining jurisdiction: *State v. Jalowiec*, 770 N.E.2d 1049 (2002).

9. Lorain County Common Pleas Court denying Jalowiec's *pro se* Second Petition for Postconviction Relief (fourth amended): *State v. Jalowiec,* Lorain Common Pleas Court No. 95CR046840, journal entry (Aug. 15, 2002).

10. Intermediate Court of Appeals affirming denial of postconviction petition as untimely or successive: *State v. Jalowiec*, 9th Dist. Lorain No. 02CA008130, 2003-Ohio-3152, 2003 WL 21396681.

11. Ohio Supreme Court declining jurisdiction: *State v. Jalowiec*, 797 N.E.2d 511 (Table) (Ohio 2003).

12. United States District Court for the Northern District of Ohio denial of habeas petition: *Jalowiec v. Bradshaw*, 2008 WL 312655 (N.D. Ohio, E.D. Jan. 31, 2008).

13. Sixth Circuit affirming District Court's denial: *Jalowiec v. Bradshaw*, 657 F.3d 293, 296 (6th Cir. 2011).

14. United States Supreme Court declining certiorari: *Jalowiec v. Robinson*, 568 U.S. 828 (2012).

15. Intermediate Appellate Court remanding back to trial court on *Hurst* New Trial Motion: *State v. Jalowiec,* 9th Dist. Lorain No. 17CA011166, 2019-Ohio-2059, 2019 WL 2262867.

16. Trial court opinion granting leave to file but denying the motion for new trial: *State v. Jalowiec*, Case No. 95CR046840, Journal Entry (July 26, 2019).

17. Intermediate Appellate Court affirming trial court's second ruling on *Hurst*: *State v. Jalowiec*, 9th Dist. Lorain 19CA011548, 2020-Ohio-4177, 2020 WL 4933561.

18. Ohio Supreme Court declining jurisdiction: *State v. Jalowiec*, 159 N.E.3d 1157 (Table) (Ohio 2020).

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PETITION FOR WRIT OF CERTIORARI

Based on the new rule announced in *Hurst v. Florida*, 577 U.S. 92 (2016), Stanley Jalowiec respectfully asks that a writ of certiorari issue to review the denial of his motion for new mitigation trial and an order to remand to the trial court for a new sentencing hearing.

OPINIONS BELOW

The Ohio Supreme Court decision declining jurisdiction is attached as Appendix A. *See State v. Jalowiec*, 159 N.E.3d 1157 (Table) (Ohio 2020). The Ninth District Court of Appeals second decision, which affirmed the trial court's second ruling, is attached as Appendix B. *See State v. Jalowiec*, 9th Dist. Lorain

19CA011548, 2020-Ohio-4177, 2020 WL 4933561. The trial court's second opinion granting Jalowiec leave to file his motion for a new mitigation trial but denying the motion for a new mitigation trial is attached as Appendix C. *See* July 26, 2019 Judgment Entry granting Jalowiec's Motion for Leave to File A Motion for A New Mitigation Trial and denying Jalowiec's Motion for A New Mitigation Trial.

The Ninth District Court of Appeals first opinion sustaining Jalowiec's assignment of error that he was unavoidably delayed in filing his motion for a new mitigation trial and remanding to the trial court is attached as Appendix D. *See State v. Jalowiec,* 9th Dist. Lorain No. 17CA011166, 2019-Ohio-2059, 2019 WL 2262867. The trial court's first opinion denying Jalowiec's motion seeking leave to file a motion for a new mitigation trial and proposed motion for a new mitigation trial is attached as Appendix E. *See* Judgment Entry denying Jalowiec's Motion for a New Mitigation Trial.

JURISDICTION

On December 29, 2020, the Supreme Court of Ohio declined jurisdiction to hear Jalowiec's appeal to that Court. *State v. Jalowiec,* 159 N.E.3d 1157 (Table) (Ohio 2020). A-1. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment 6 of the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

Amendment 8 of the United States Constitution prohibits, in relevant

part, the infliction of "cruel and unusual punishments."

Amendment 14 of the United States Constitution provides, in relevant part: "No state . . . shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Ohio statutory provisions that are relevant to this petition, Ohio Rev. Code Ann. § 2929.03 (1981), are reprinted in Appendix F.

STATEMENT OF THE CASE AND RELEVANT FACTS

On March 8, 1995, a grand jury in Lorain County returned an indictment against Jalowiec for aggravated murder, with a death-penalty specification for committing the offense with the purpose of preventing witness testimony in another criminal proceeding. The case proceeded to trial, where the jury was repeatedly reminded by the trial court, the State, and defense counsel, that their verdict was only a mere recommendation.

Beginning in voir dire, the trial court was quite specific when it told jurors that the jury's role was merely to recommend whether to impose a death sentence, but that the ultimate decision of whether to impose a death sentence resided solely with the judge.

THE COURT: You could recommend an individual be put to death?

THE JUROR: But you would be the final –

THE COURT: That is why I get the big bucks.

TR 153.

Trial counsel also reinforced the concept that the jury's sentencing verdict is merely a recommendation during voir dire.

> MR. GRUNDA: The legal test is, a substantial impairment and I guess I am asking you if you could be a fair juror, listen to all of this, even if we get to that, because that is only a recommendation to the Judge, okay?
>
> He still has to determine whether or not a jury would recommend a death penalty. It is a recommendation to the Judge. He may or may not do it, and I am asking you, knowing that, do you think you could be a fair juror, listen to the law and follow it, recognizing that one of the potential penalties is the recommendation to the Judge?

TR 42.

> MR. CLEARY: Okay. The Judge asked you earlier – the Judge asked you whether or not your ability to set aside your personal beliefs would substantially impair your ability to impose a certain sentence.
>
> Do you understand that you will not be imposing a sentence, do you understand that?
>
> THE JUROR: Well, the jury –
>
> MR. CLEARY: The juror, you would not be imposing a sentence on anyone.
>
> Do you understand that?
>
> THE JUROR: We would be recommending.
>
> MR. CLEARY: That is correct.
>
> THE JUROR: Okay.
>
> MR. CLEARY: You would be making recommendations.

TR 72.

MR. CLEARY: You were just asked whether or not you could impose the death penalty. Could you set aside your personal beliefs in a manner which would allow you to give some kind of recommendation?

THE JUROR: What do you mean by a recommendation?

MR. CLEARY: Let's say there was a nonbinding recommendation that the jury would have to make.

Would you then be able to give consideration to set aside your personal feelings to consider whether or not to make a recommendation as to the death penalty?

THE JUROR: Other options to the death penalty?

MR. CLEARY: To make a recommendation for it, the death penalty.

Would you be able to set aside your personal feelings enough to issue a nonbinding recommendation to the Judge?

TR 80.

MR. CLEARY: Now, with that in mind, if I were to tell you that you would not be imposing death on someone, all right, would that make you reconsider your approach here?

TR 99-100.

MR. GRUNDA: The next question is, I already know your views on the two lifes, we know about that, now on the death penalty, okay, that is an option and suppose – can you say that you would never consider that, make a recommendation to the Judge for him to either follow it or not follow it?

TR 123.

MR. GRUNDA: You understand that if you do [recommend a death sentence], that is a recommendation the Judge may or may not do that?

TR 143.

> MR. CLEARY: Now, if things were a little different, such as if you found that you were just making a recommendation, but that you, yourself, would not be imposing or carrying out the sentence in any manner –
>
> THE JUROR: That is totally different.
>
> MR. CLEARY: Okay. My question to you then is, if you were put into a position to where you would be making a recommendation to the Judge but that it would be nonbinding on the Judge, all right, you would be making a recommendation only as to whether or not a death sentence should be carried out, could you put aside your personal feelings or distaste for the death penalty and do that?

TR. 153.

In its instructions to the jury at the close of the mitigation hearing, the trial court again made plain that the jury's role was to render an advisory verdict.

> Ladies and Gentlemen of the Jury, we have gotten to the point in the mitigation phase in which you have heard all of the evidence. You have heard the arguments of counsel and now you are going to have an opportunity to hear my instructions dealing with this phase of the proceedings. It is going to be your responsibility at this point to decide which sentence to recommend to the Court regarding the alternative charges of Aggravated Murder with the specification.

Mitigation TR, 335-336. Despite repeatedly referring to the jury's role as merely to provide a recommended sentence, the trial court issued a contradictory instruction that the jury should "take seriously" its recommendation:

> I have used the word recommend many times and the attorneys have used it, and I want to make sure that you understand that you are not to construe that word to diminish your responsibility in this matter. It is an awesome task, and the fact that the word

> recommend is used should not be considered by you to lessen your task.

Mitigation TR., 336. Albeit well intended, this instruction could not cure the harm of jurors already indoctrinated to believe that their decision was only a mere recommendation and that the judge would ultimately decide Jalowiec's fate.

Finally, the verdict form clearly states that the jury's determination of sentence is nothing more than an advisory recommendation. The Court read the jury's sentencing verdict into the record, which again used the word recommendation:

> State of Ohio versus Stanley E. Jalowiec, Case No. 95CR046840, jury recommendation.
>
> We, the jury, do hereby find that the aggravating circumstances that the Defendant, Stanley E. Jalowiec, was found guilty of committing in this is sufficient to outweigh any mitigating factors presented by proof beyond a reasonable doubt.
>
> We therefore recommend that the sentence of death be imposed upon this Defendant.
>
> Dated April 10, 1996 and signed by twelve jurors.

Mitigation TR, 345.

Ultimately, on April 10, 1996, the jury found beyond a reasonable doubt that the specified aggravating circumstances of the aggravated murder outweighed the mitigating factors and recommended the imposition of the death penalty.

As directed by Ohio's statute, the trial court then conducted its independent sentence review, made the findings necessary to impose a sentence of death, and actually imposed that sentence upon Jalowiec.

In Jalowiec's appeal as of right, he raised an error pursuant to *Caldwell v. Mississippi*, where he argued that telling the jury that their verdict was a mere recommendation was unacceptable because it diminished their sense of responsibility. But to no avail, the court affirmed his conviction and sentence. Then, following this Court's watershed ruling in *Hurst v. Florida*, Jalowiec filed a Motion for Leave to File a Motion for a New Mitigation Trial in the trial court. In the attached Motion for a New Mitigation Trial, Jalowiec argued that *Hurst* invalidated Ohio's statutory scheme both on its face and as applied to Jalowiec because Ohio's scheme mirrors Florida's, which this Court invalidated. The Ohio courts all denied relief to Jalowiec.

REASON FOR GRANTING THE WRIT

Because a jury's mere recommendation is not enough for imposing a capital sentence, statements to the jury that diminish their sense of responsibility, even if they are an accurate statement of the law, are unconstitutional.

Under the Eighth Amendment, it is capital jurors who must decide whether a "specific human being should die at the hands of the State." *Caldwell,* 472 U.S. at 329. The law assumes "that jurors confronted with the truly awesome responsibility of decreeing death for a fellow human being will act with due regard for the consequences of their decision …" *McGautha v. California*, 402 U.S. 183, 208 (1971). Jalowiec is a human being. The Constitution requires that the jurors who decided

whether Jalowiec lives or dies appreciate the "truly awesome responsibility" entrusted to them; that the Court in no way diminishes a juror's sense of personal responsibility for a death verdict. Yet, that is exactly what happened in Jalowiec's case. These jurors sentenced Jalowiec – a fellow human being, flesh and blood, a person with a family and friends who love him – to die only after repeatedly being told that their death verdict is a mere recommendation. Human decency demands more of our system of justice.

From voir dire to jury deliberations, Jalowiec's jury was told that its sentencing verdict was a recommendation – that the trial judge "made the big bucks" to ultimately decide what sentence to impose. *Hurst* teaches that advisory jury verdicts are insufficient to support a death sentence. Jalowiec's case exemplifies the problems announced in *Hurst*.

After this Court's decision is *Hurst*, it is now clear that both the Sixth Amendment right to a jury determination of a capital sentence and the Eighth Amendment right to be free from cruel and unusual punishments apply to Ohio's capital sentencing scheme. *Hurst* 577 U.S. at 94; *Caldwell*, 472 U.S. at 328-29. When the jury is repeatedly told that their sentence determination is a mere recommendation, it undermines the Sixth Amendment right to a jury determination of sentence and, therefore, the resulting sentence is both cruel and unusual, in violation of the Eighth Amendment. This Court should grant the writ.

Hurst represented a tectonic shift in capital sentencing, recognizing Sixth Amendment protections not previously provided to capital defendants. In *Hurst*, this

Court broadly proclaimed that a jury is required to make specific findings of fact as to the sufficiency of the aggravating circumstances needed to authorize the imposition of a death sentence. 577 U.S. at 94. The jury's fact-finding duties under the Sixth Amendment do not end at the culpability phase but in fact extend throughout the penalty phase. Thus, a mere recommendation as to sentence from the jury is not enough to meet this requirement. *Id.* And a trial court violates the Sixth Amendment when it, and not the jury (regardless of whether the state statutory scheme is facially valid), makes the requisite findings to impose the death sentence.

A trial court, likewise, violates a defendant's constitutional protections, specifically the Eighth Amendment, when it diminishes the jury's sense of personal responsibility for the consequences of its verdict — a verdict that, under Ohio law, is a precondition to any death sentence. *Caldwell v. Mississippi*, 472 U.S. 320 (1985); O.R.C. § 2929.03(D)(3) (Trial judge may not impose death sentence absent jury recommendation of death in its weighing verdict.). As this Court found: "[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." *Caldwell*, 472 U.S. at 328-29.

Because of the grave position that capital sentencing jurors are put in, "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." *Id.* at 321. "Even when a jury is unconvinced that death is appropriate, their desire to 'send a message' of disapproval

for the defendant's acts… [makes] the jury especially receptive to a prosecutor's reassurances that they can more freely 'err because the error may be corrected on appeal.'" *Caldwell,* 472 U.S. at 331 (citing *Maggio v. Williams*, 464 U.S. 46, 54-55 (1983) (Stevens, J., concurring in judgment)). "A defendant might thus be executed, although no sentencer had ever made a determination that death was the appropriate sentence." *Caldwell*, 472 U.S. at 331-32.

In Jalowiec's trial, the jury heard repeated messages that its role in determining whether Jalowiec would live, or die, was merely to make a recommendation. At one point, the trial judge expressly told the jurors that the ultimate decision on whether to sentence Jalowiec to death rested with the judge alone by telling the jury "that's why I get the big bucks." Tr. 153.

It is permissible for the trial court to make accurate statements of the law regarding the jury's role, *Dugger v. Adams*, 489 U.S. 401, 407 (1989), and the Ohio Supreme Court has a long history of upholding the practice of telling jurors their verdict is a mere "recommendation" because that was an accurate statement of Ohio law before *Hurst*. *See e.g., State v. Keith*, 684 N.E.2d 47 (Ohio 1997); *State v. Carter*, 651 N.E.2d 965 (Ohio 1995). However, as this Court found, "State-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court," presents the danger that "the jury will choose to minimize the importance of its role," especially where they are told that the finality of their sentence rests with the court. *Caldwell*, 472 U.S. at 330, 333. The consequences of making minute so cumbrous a task are assaults on inviolable Eighth Amendment requirements.

Moreover, the Ohio Supreme Court's determinations in those cases predated this Court's *Hurst* holding that "[a] jury's mere recommendation is not enough." *Hurst*, 577 U.S. at 94. Jalowiec's case presents a circumstance where there was never an appropriate jury verdict – free from taint – to determine a "fact on which the legislature condition[ed]" Jalowiec's death sentence. *Hurst*, 577 U.S. at 97 (quoting *Ring v. Arizona*, 536 U.S. 584, 589 (2002)). The jury was improperly admonished that their sentencing verdict was merely advisory – a *Caldwell* violation that diminished the jury's sense of personal responsibility for its verdict and unfairly influenced the jury to return a death verdict. Jalowiec was deprived of a fair jury determination of that issue because of errors that occurred during the penalty phase of the trial that affected his substantial rights.

Caldwell established the legal principle that jurors tasked to decide whether to impose a death sentence must fully understand the gravity of their decision. Neither the Court nor the Prosecutor may diminish the importance of the jury's role. *Caldwell*, 472 U.S. at 333. Until *Hurst*, however, there was no constitutional requirement that a jury make the factual and legal findings necessary for a death sentence.

Indeed, courts routinely rejected the notion that capital punishment somehow implicated a defendant's Sixth Amendment right to a jury trial – until *Hurst*. *See Hildwin v. Florida*, 490 U.S. 638, 640-641 (1984) (The Sixth Amendment "does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury."); *State v. Dunlap*, 652 N.E.2d 988 (Ohio 1995) (citing *Hildwin*)

and *State v. Jenkins*, 473 N.E.2d 264 (Ohio 1984) ([T]he Constitution does not require a jury in a capital case to render a special verdict or special findings.")); *State v. Rogers*, 504 N.E.2d 52 (Ohio 1986) ("[T]he Sixth Amendment provides no right to a jury determination of the punishment to be imposed; nor does the Ohio system impugn the Eighth Amendment.").

After *Hurst*, the Ohio Supreme Court held that the weighing process resulting in the jury's mitigation phase verdict is "a determination of *the sentence itself*, within a range for which the defendant is already eligible." *State v. Mason*, 108 N.E.3d 56, 64 (Ohio 2018) (emphasis in opinion). Indeed, that finding was essential if Ohio's capital punishment scheme is to survive *Hurst.* The Sixth Amendment guarantee of a jury determination of the sentence of death is hollow – and violates the Eighth Amendment ban on cruel and unusual punishment – if the jury is repeatedly instructed that its determination is merely a recommendation.

Though this Court has stated that *Hurst* does not apply retroactively on collateral review, Jalowiec should still receive its benefit. *McKinney v. Arizona*, 589 U.S. __, 140 S.Ct. 702, 708 (2020). Jalowiec raised a straightforward *Caldwell* challenge in his direct review. Now that *Hurst* has been decided, Jalowiec argues this *Hurst* based *Caldwell* challenge that he was previously unable to make. Jalowiec asserted and preserved the *Caldwell* error on direct appeal, but now asks this Court to apply the *Hurst* decision to inform the viability of the *Caldwell* challenge. Before *Hurst,* Courts rejected *Caldwell* challenges to Ohio's capital sentencing scheme. In part, that rejection rested on the legal premise that there is no constitutional right to

a jury verdict imposing capital punishment. *State v. Durr*, 568 N.E.2d 674, 682-82 (Ohio 1991). After *Hurst,* that premise is no longer viable. The *Hurst* holding breathes new life into Jalowiec's *Caldwell* claim and distinguishes Jalowiec's case from *McKinney*.

Taking *Hurst* and *Caldwell* together and applying them to the case at bar, this Court should find that Jalowiec's constitutional rights were violated. *Caldwell* made clear that the jury must bear the entire burden of the decision whether the defendant lives or dies when the jury reaches its sentencing verdict. *Caldwell*, 472 U.S. at 333. *Hurst* made clear that a jury recommendation is not enough for death to be imposed. *Hurst*, 577 U.S. at 94.

Yet, the jurors in Jalowiec's trial were told repeatedly that the sentence they were imposing was only a recommendation and the judge was the ultimate decision maker because he "made the big bucks." Tr. 153. The continuous references to the jury's advisory role were not cured by the judge's final instruction. This Court should make clear that, after *Hurst*, courts may no longer avoid the plain meaning of *Caldwell* by relying on state law to say that a jury's death sentence is a mere recommendation. *Caldwell* identified the problem, *Hurst* declared that death sentences based on mere jury recommendations violate the Constitution, and Jalowiec's case exemplifies the intersection of the two.

In the alternative, if this Court does not believe that *Hurst* and *Caldwell*, read together, already demand such a finding, Jalowiec would ask this Court to take that next step in deeming all statements unconstitutional that diminish the jury's role in

the capital sentencing process. This is a clear progression in the Eighth Amendment's evolving standards of decency requirement. That requirement is in line with a reading of *Hurst* and *Caldwell* together to conclude that the practice of using language to diminish the seriousness of the jury's verdict by reminding them that their verdict is only a recommendation is unconstitutional.

Jalowiec's case is this Court's opportunity to continue evolving its Sixth Amendment jurisprudence in alignment with the Eighth Amendment's evolving standards of decency requirement. Accordingly, all statements, such as the ones made in this case, describing the jury's verdict as only a recommendation should be unconstitutional after *Hurst*.

CONCLUSION

The trial court sentenced Jalowiec to die based on a fatally flawed process that allowed the jurors to disavow any personal responsibility for the death sentence they authorized against a fellow human being. That process violates both the Sixth Amendment right to have jurors determine the facts necessary to impose a death sentence and the Eighth Amendment's evolving standards of decency requirement.

For the foregoing reasons, Petitioner Stanley Jalowiec respectfully requests that this Court grant this petition for certiorari.

Respectfully submitted,

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