

No. 21-5094

IN THE SUPREME COURT OF THE UNITED STATES

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STANLEY JALOWIEC,

*Petitioner,*

v.

STATE OF OHIO,

*Respondent.*

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ON PETITION FOR WRIT OF CERTIORARI  
TO THE SUPREME COURT OF OHIO

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**BRIEF IN OPPOSITION**

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## Capital Case

### RESPONSE TO QUESTION PRESENTED

Stanley Jalowiec's claim that it is unconstitutional to inform a jury in a capital case that their decision regarding sentencing is a recommendation has been previously raised and rejected, however, he now asks this Court to determine the constitutionality of doing so in the light of its ruling in *Hurst v. Florida*, 577 U.S. 92 (2016).

Jalowiec indicates that the Ohio statutory provision relevant to his petition is O.R.C. 2929.03 but fails to note that the Ohio Supreme Court upheld the constitutionality of Ohio's death penalty scheme in *State v. Mason*, 153 Ohio St. 3d 476 (2018), cert. denied 139 S.Ct 456, 202 L.Ed.2d 351 (2018), and determined that it differs from the death penalty scheme of Florida, which was found to be unconstitutional in *Hurst*.

Nevertheless, Jalowiec claims that telling a jury that their decision regarding sentencing is a mere recommendation is unconstitutional, *even if it is an accurate statement of law*, because it diminishes their sense of responsibility under *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

To the extent that Jalowiec's argument relies on the holding and rationale of *Hurst*, this Court has stated that *Hurst* does not apply retroactively on collateral review. *McKinney v. Arizona*, 589 U.S. \_\_\_, 140 S. Ct. 702, 708 (2020). The State of Ohio submits that Jalowiec's assertion of a *Caldwell* violation is simply an attempt to circumvent *McKinney* to apply *Hurst* to Ohio's capital sentencing scheme, a statutory scheme under which the jury was properly advised as to their role. Thus, no compelling reason exists to grant this petition as required by Supreme Court Rule 10.

On the basis of the question presented, Jalowiec's petition should be denied.

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**BRIEF IN OPPOSITION**

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Respondent, State of Ohio, by and through the Office of the Lorain County Prosecuting Attorney, respectfully requests that this Honorable Court deny Petitioner, Stanley Jalowiec (“Jalowiec”), a Writ of Certiorari to review the judgment of the Ohio Supreme Court, entered December 29, 2020, denying him leave to appeal.

**CONSTITUTIONAL PROVISIONS NOT INVOLVED**

Jalowiec asserts that he has suffered violations to his Sixth Amendment Constitutional rights in light of this Court’s decision in *Hurst v. Florida*, 577 U.S. 92 (2016). However, Jalowiec continuously fails to appreciate the material differences between Ohio’s capital sentencing scheme and Florida’s capital sentencing scheme,

which was struck down as unconstitutional in *Hurst*, by not acknowledging the Ohio Supreme Court's decision in *State v. Mason*, 153 Ohio St. 3d 476 (2018), cert. denied 139 S.Ct. 456, 202 L.Ed.2d 351 (2018), which upheld the constitutionality of Ohio's statutory capital sentencing scheme. In *Mason*, the Ohio Supreme Court stated, "Ohio law requires the critical jury findings that were not required by the laws at issue in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed. 556 (2002)] and *Hurst*. See. R.C. 2929.03(C)(2). Ohio's death-penalty scheme, therefore, does not violate the Sixth Amendment." *Id.* at 482.

#### **STATEMENT OF THE CASE AND RELEVANT FACTS**

Following Jalowiec's conviction at trial for his role in the aggravated murder of Ronald Lally, and an ensuing penalty phase hearing, the jury recommended a sentence of death. The trial court conducted its own independent sentencing review, agreed with the jury's recommendation, and sentenced Jalowiec to death on April 11, 1996. The Ninth District Court of Appeals affirmed the judgment and sentence on direct appeal. *State v. Jalowiec*, 9th Dist. Lorain No. 96CA006445, 1998 WL 178554 (Apr. 15, 1998). Notably, the Ninth District Court of Appeals rejected Jalowiec's argument that any reference to the jury that their decision was a recommendation impermissibly diminished their sense of responsibility, since the term "recommendation" accurately reflected Ohio law. *Id.* at \* 38-39.

The Ohio Supreme Court subsequently affirmed as well. *State v. Jalowiec*, 91 Ohio St.3d 220, 220-224, 2001-Ohio-26, 744 N.E.2d 163 (2001). This Court denied Jalowiec's petition for a writ of certiorari. *Jalowiec v. Ohio*, 534 U.S. 964 (2001).

While his direct appeal was pending, Jalowiec filed a petition for post-conviction relief followed by three amended petitions. On April 9, 2001, the trial court dismissed Jalowiec's Third Amended Petition for Post Conviction Relief. The Ninth District affirmed the denial. *State v. Jalowiec*, 9th Dist. Lorain Nos. 01CA007844 & 01CA007847, 2002 Ohio App. LEXIS 914 (Mar. 6, 2002). The Ohio Supreme Court declined jurisdiction. *State v. Jalowiec*, 96 Ohio St. 3d 1439, 2002-Ohio-3344.

Jalowiec also sought federal habeas review. Even considering the merits of Jalowiec's grounds for relief, despite his procedural default and failure to exhaust claims, the federal court found that the grounds for relief were without merit. *Jalowiec v. Bradshaw*, N.D. Ohio No. 1:03CV0645, 2008 U.S. Dist. LEXIS 18855 (Jan. 31, 2008). The Sixth Circuit ruled that Jalowiec was not prejudiced and affirmed the denial of his habeas petition. *Jalowiec v. Bradshaw*, 657 F.3d 293 (6th Cir. 2011).

On May 28, 2008, while his habeas appeal was pending, Jalowiec filed a pro se motion for leave to file a delayed motion for new trial based on newly discovered evidence. Following the affirmance of the habeas denial, Jalowiec moved for leave to file an amended motion for new trial. The trial court granted leave and Jalowiec filed a new motion on June 28, 2012. Following a hearing, the trial court denied Jalowiec's motion for new trial on January 29, 2014. The Ninth District affirmed that denial. *State v. Jalowiec*, 9th Dist. Lorain No. 14CA010548, 2015-Ohio-5042, 52 N.E.3d 244. The Ohio Supreme Court declined jurisdiction on May 17, 2017. *State v. Jalowiec*, 149 Ohio St. 3d 1405, 2017-Ohio-2822.

On January 12, 2016, this Court overturned Florida's death penalty statute as violating the Sixth Amendment in *Hurst v. Florida*, 577 U.S. 92 (2016). While his

jurisdictional appeal of the denial of his earlier motion for leave to file delayed motion for new trial was pending, Jalowiec filed a Motion for Leave to File a Motion for New Mitigation Trial based on *Hurst* on January 12, 2017, exactly one year after *Hurst* was decided. The trial court denied Jalowiec's motion on June 7, 2017, and he timely appealed to the Ninth District.

The appellate proceedings were subsequently stayed pending the Ohio Supreme Court's determination of *State v. Mason*, Ohio Supreme Court No. 2017-0200.

On April 18, 2018, the Ohio Supreme Court issued its decision in *Mason* wherein it upheld the constitutionality of Ohio's statutory death penalty scheme despite a challenge based on *Hurst*. *State v. Mason*, 153 Ohio St. 3d 476 (2018), cert. denied 139 S.Ct. 456, 202 L.Ed.2d 351 (2018). After the decision in *Mason* was announced, the Ninth District reactivated Jalowiec's appeal.

On May 28, 2019, the Ninth District determined that the trial court erred when it denied Jalowiec's motion for leave to file a motion for new mitigation trial on the merits without first addressing whether he was unavoidably prevented from filing his motion within the time allowed by Crim. R. 33(B). Thus, Jalowiec's first assignment of error was sustained and the matter was reversed and remanded to the trial court. *State v. Jalowiec*, 9th Dist. Lorain No. 17CA011166, 2019-Ohio-2059.

The Ninth District declined to address Jalowiec's second assignment of error wherein he asserted that Ohio's capital sentencing statutes are unconstitutional and violate the Sixth Amendment right to trial by jury because they require the judge, not a jury, to make the factual determinations of the elements necessary to support a sentence of death

and that the capital-sentencing scheme as applied in his case was unconstitutional due to the specific instructions given by the trial court to the jury.

Following remand, on July 26, 2019, the trial court granted Jalowiec's Motion for Leave to File a Motion for New Mitigation Trial. After considering the Motion for a New Mitigation Trial on its merits, the motion was denied the same day.

Jalowiec's timely appeal followed. On August 24, 2020, the Ninth District Court of Appeals affirmed the decision of the trial court. *State v. Jalowiec*, 9th Dist. Lorain No. 19CA011548, 2020-Ohio-4177. On December 29, 2020, the Ohio Supreme Court declined jurisdiction in *State v. Jalowiec*, 159 N.E. 3d 1157 (Table) (Ohio 2020).

Jalowiec now seeks a Writ of Certiorari. The State hereby responds and urges this Honorable Court to deny the Petition.

#### **REASONS FOR DENYING THE WRIT**

**Because it is constitutionally permissible to inform an Ohio death sentence jury that their decision regarding sentencing is a recommendation and their sense of responsibility is not improperly diminished in terms of their role as jurors by doing so, further review by this Court is unwarranted.**

Jalowiec's argument in support of a writ primarily relies on the holding and rationale of *Hurst*. However, this Court recently held that *Hurst* announced a new rule of constitutional law that is not retroactive on collateral review. *McKinney v. Arizona*, 140 S.Ct. 702, 708, 206 L.Ed.2d 69 (2020). Nevertheless, Jalowiec requests that this Honorable Court grant a writ so that he can now litigate a “*Hurst* based *Caldwell* challenge” to Ohio’s capital sentencing scheme that he maintains could not have been previously raised. Jalowiec’s argument lacks merit and is simply an attempt to bootstrap a *Caldwell* claim which was, in fact, previously raised and rejected on direct appeal, to a *Hurst* claim that is now barred from collateral review.

Taking *Hurst* and *Caldwell* together, in their proper context, and applying them to the case at bar, this Court should determine that no constitutional violation exists in the instant matter as the jury was properly advised as to their role under Ohio law. More importantly, this Court should not permit Jalowiec to use *Caldwell* to bypass existing retroactivity law to apply *Hurst* to Ohio's capital sentencing scheme, and then argue that, because of *Hurst*, the jury was improperly instructed that their sentencing verdict was a mere recommendation. *Miller v. Comm'r, Ala. Dep't of Corr.*, 826 Fed. Appx. 743, 750 (11<sup>th</sup> Cir. 2020) (“Mr. Miller cannot use *Caldwell* as an end run around federal retroactivity law to apply *Hurst* to the Alabama capital sentencing scheme and then argue that, because of *Hurst*, the instructions were incorrect.”)

Jalowiec cites to *Caldwell v. Mississippi*, 472 U.S. 320 (1985) for the proposition that the responsibility of the jurors in his case was unconstitutionally diminished by the trial court's reference to their decision as a “recommendation.” In *Caldwell*, this Court stated “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.” *Caldwell*, 472 U.S. at 328-329.

Jalowiec further cites to *Hurst*, decided approximately thirty-one years later, for the proposition that the “Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough.” *Hurst*, 577 U.S. at 94. Taken together, Jalowiec argues that these two cases intersect to illustrate that jury recommendations violate the Constitution.

Even though the Ohio Supreme Court already determined that *Hurst* does not apply to Ohio’s capital sentencing scheme, *Mason*, 2018-Ohio-1462 at ¶ 19-21, and this Court declined further review of *Mason*, Jalowiec continues to focus on the phrase “mere recommendation” to insist that the holding of *Hurst* is implicated by the fact that the jury in his case was told that the sentence that they were imposing was a recommendation, and that the trial judge would ultimately decide what sentence to impose. In doing so, Jalowiec misconstrues the statement in *Hurst* that a “jury’s mere recommendation is not enough[,]” and asks this Court to consider the statement out of context.

In analyzing the *Hurst* decision, the Ohio Supreme Court noted that in *Hurst*, this Court deemed the Florida statute under review unconstitutional because it “required the jury to render an ‘advisory sentence’ after hearing the evidence in a sentencing-phase proceeding[.]” *Mason* at ¶ 31. Specifically, this Court found that the Florida scheme “violated the Sixth Amendment because it did not require the jury to find that [a defendant] was guilty of committing a specific aggravating circumstance.” *Id.*

Ohio’s death penalty statutory scheme differs from that which was struck down in Florida. In contrast to the Florida statute, Ohio “requires a jury to find the defendant guilty beyond a reasonable doubt of at least one aggravating circumstance, O.R.C. 2929.03(B), before the matter proceeds to the penalty phase, when the jury can recommend a death sentence.” *Mason* at ¶ 32. *Hurst* simply made clear that the Sixth Amendment requires that a jury must make the specific and critical finding that the defendant is eligible for the death penalty *before the jury can recommend* that the defendant be sentenced to death. *See Id.* at ¶ 32.

After the jury makes their sentencing recommendation, Ohio judges are then required to determine, independent of the jury's recommendation, whether a death sentence should be imposed. This step operates as a "safeguard" because a judge cannot find additional aggravating circumstances or increase the sentence beyond the jury's recommendation. *Id.* at ¶ 40. The authority of Ohio trial judges to weigh aggravating circumstances with mitigating factors is derived "wholly from the jury's verdict" and, therefore, Ohio's process is appropriate within the framework of the Sixth Amendment. *Mason* at ¶ 42.

Further, *Hurst* did not create a requirement under the Sixth Amendment that the jury alone must decide whether a sentence of death will be imposed. Rather, as this Court explained in *McKinney*, under *Hurst*, a jury must find the *fact* that an *aggravating circumstance* existed in order to make the defendant death eligible. *McKinney*, 140 S.Ct. at 707. (Emphasis added.) Therefore, this Court reinforced that "[s]tates that leave the ultimate life-or-death decision to the judge may continue to do so." *Id.* at 708.

Moreover, *Hurst* did not touch on the issue Jalowiec raises here: whether it is constitutionally problematic to inform a jury that their decision regarding sentencing is a recommendation.

Because a reading of *Hurst* does not support Jalowiec's argument that *Hurst* declared it unconstitutional to inform the jury that their sentencing decision was a recommendation, Jalowiec now asks this Court to apply *Hurst* to inform the viability of a *Caldwell* challenge.

*Caldwell* requires that a jury in a capital case be correctly instructed as to its role under state law. "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.”” *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994) (quoting *Dugger v. Adams*, 489 U.S. 401, 407 (1989)). Under the Eighth Amendment, the jury cannot be led to believe that it is less responsible for the sentencing decision than the law requires it to be. This can result from statements or instructions to the jurors that give an inaccurate depiction of the jury's role in the sentencing process. *Romano*, 512 U.S. at 8.

Here, the remarks to the jury accurately described their role in Ohio's capital sentencing scheme. As Jalowiec points out, the jurors were informed that the ultimate decision for determining whether a death sentence would be imposed rested with the trial court. Under Ohio law, that is, in fact where the final decision has been placed.

Indeed, Ohio law provides that once the jury finds the defendant guilty of aggravated murder and at least one aggravating circumstance specification, he will be sentenced either to death or to life imprisonment. O.R.C. 2929.03(C)(2). When the defendant is tried by a jury, the penalty “shall be determined \* \* \* [b]y the trial jury and the trial judge.” O.R.C. 2929.03(C)(2)(b).

In the sentencing phase, the court and trial jury shall consider: (1) any presentence-investigation or mental examination report (if the defendant requested an investigation or examination), (2) the trial evidence relevant to the aggravating circumstances the offender was found guilty of committing and to any mitigating factors, (3) additional testimony and evidence relevant to the nature and circumstances of the aggravating circumstances and any mitigating factors, (4) any statement of the offender, and (5) the arguments of counsel. O.R.C. 2929.03(D)(1). In this proceeding, the State must prove beyond a reasonable doubt that “the aggravating circumstances the defendant

was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death.” *Id.*

Under Ohio law, the *jury* finds and then recommends the sentence: “If the *trial jury* unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances \* \* \* outweigh the mitigating factors, the *trial jury* shall *recommend* to the court that the sentence of death be imposed on the offender.” (Emphasis added.) O.R.C. 2929.03(D)(2). But “[a]bsent such a finding” by the jury, the jury shall recommend one of the life sentences set forth in R.C. 2929.03(D)(2), and the trial court “shall impose the [life] sentence recommended.” *Id.* Also, if the jury fails to reach a verdict unanimously recommending a sentence, the trial court must impose a life sentence. *Id.*

Finally, if the trial jury recommends a death sentence, and if “the court *finds*, by proof beyond a reasonable doubt, \* \* \* that the aggravating circumstances \* \* \* outweigh the mitigating factors, [the court] shall *impose* sentence of death on the offender.” (Emphasis added.) O.R.C. 2929.03(D)(3). Then, the court must state in a separate opinion “the reasons why the aggravating circumstances \* \* \* were sufficient to outweigh the mitigating factors.” O.R.C. 2929.03(F).

Here, the jury was not misled as to their function since one of the primary dangers identified in *Caldwell* – that the entity to which the jury ceded responsibility could not adequately exercise that responsibility – is absent. See *Mapes v. Coyle*, 171 F.3d 408, 415 (6th Cir. 1999) (informing jurors that their recommendation is only a recommendation “is an accurate statement of Ohio law”). Because the jury was given an accurate, rather than a misleading statement of the allocation of their ultimate responsibility, no error resulted from the statements regarding such allocation. *Scott v.*

*Mitchell*, 209 F.3d 854, 877 (6th Cir. 2000) (“*Caldwell* is limited to situations in which the jury is misled as to its role”); *Spirko v. Anderson*, 2000 U.S. Dist. LEXIS 13182 (N.D. Ohio, July 11, 2000) (informing the jurors, in conformity with Ohio law, during preliminary instructions that its “recommendation is only a recommendation, and the final decision on sentencing is made by the Court” was not a *Caldwell* violation).

Ultimately, the remarks made to the jury regarding their responsibility in sentencing were in conformity with Ohio law. Jalowiec’s *Caldwell* argument was previously raised and rejected on his direct appeal. *State v. Jalowiec*, 1998 WL 178554 at \*38-39. Jalowiec’s efforts to take *Hurst* and *Caldwell* together, apply them to his case, and find that his constitutional rights were violated fails to present an issue worthy of further review.

Just as importantly, Jalowiec should not be permitted to utilize *Caldwell* to bypass the retroactivity bar of *McKinney* to apply *Hurst* to the Ohio capital sentencing scheme and then argue that, because of *Hurst*, the jury was improperly advised. See *Miller*, *supra*.

Moreover, since a reading of *Hurst* and *Caldwell* do not sustain Jalowiec’s argument that it is unconstitutional to inform a jury that their sentencing decision is a recommendation, Jalowiec’s even broader request to deem unconstitutional *all* statements that diminish a jury’s role in capital sentencing is unsupported, undeveloped, and should be rejected.

## CONCLUSION

Ohio's death penalty scheme does not run afoul of this Court's decisions in *Hurst* and *Caldwell*, nor does Jalowiec's death sentence violate any constitutional provision at issue. Jalowiec's assertion of a *Caldwell* violation is a claim previously made and rejected. Moreover, the use of *Caldwell* is simply an attempt to avoid the bar of retroactivity set forth in *McKinney* to apply *Hurst* to Ohio's capital sentencing scheme, a statutory scheme under which the jury was properly advised as to its role.

The State of Ohio submits that Jalowiec has failed to present any compelling reason to merit review by this Court as required by U.S. Supreme Court Rule 10. Accordingly, the State of Ohio respectfully requests that this Honorable Court deny Stanley Jalowiec's Petition for Writ of Certiorari.

Respectfully Submitted,

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