

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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**PETITIONER'S REPLY BRIEF**

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**Capital Case**

**TABLE OF CONTENTS**

**TABLE OF CONTENTS** ..... i  
**TABLE OF AUTHORITIES** ..... ii  
**REPLY BRIEF** ..... 1  
**CONCLUSION** ..... 7

## TABLE OF AUTHORITIES

### CASES

<i>Caldwell v. Mississippi</i> , 472 U.S. 320 (1985) .....	passim
<i>Driscoll v. Delo</i> , 71 F.3d 701 (8th Cir. 1995) .....	3, 4, 6
<i>Guardado v. Jones</i> , 138 S.Ct. 1131 (2018) .....	5, 7
<i>Hurst v. Florida</i> , 577 U.S. 92 (2016).....	1, 2, 3, 6
<i>McGautha v. California</i> , 402 U.S. 183 (1971) .....	2
<i>Miller v. Comm’r, Ala. Dep’t of Corr.</i> , 826 F. App’x 743 (11th Cir. 2020) .....	3
<i>Riley v. Taylor</i> , 277 F.3d 261 (3rd Cir. 2001) .....	3
<i>Timbs v. Indiana</i> , -- U.S. --, 139 S.Ct. 682 (2019).....	3
U.S. Const., amend XIV .....	3

### CONSTITUTIONAL PROVISIONS

U.S. Const., amend VI.....	passim
U.S. Const., amend VIII.....	passim

### STATUTES

R.C. § 2929.03.....	4
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## REPLY BRIEF

The state disputes none of the grounds for Jalowiec’s Caldwell and *Hurst* argument, saying only that “the jury was properly advised as to their role under Ohio law.” *Brief in Opp.*, p. 6. It concedes that the trial judge, and counsel, repeatedly told the jury that its sentencing decision was merely a recommendation. *Brief in Opp.*, p. 7. It concedes that the trial judge explicitly told the jury that whether Jalowiec lives, or dies, is a decision for the trial judge and the trial judge alone – “that’s why [he] gets the big bucks.” *Cert.* p. 9. Nor does the state deny that these statements to the jury diminish the jury’s sense of personal responsibility for Jalowiec’s death sentence but claims that no constitutional violation could occur because the statements are accurate under Ohio law. *Brief in Opp.*, p. 10. Instead, the state argues that the trial judge’s authority “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.” *Brief in Opp.*, p. 6. But that argument ignores the fact that this jury was never told that the judge’s death sentence was wholly dependent upon a jury verdict recommending death.

The state’s argument also ignores the fact that telling a jury its verdict is a recommendation diminishes the importance of that verdict – a fact the prosecutor recognized as so problematic that he stopped doing it.

CILLO [Prosecutor]: I’m more comfortable doing the voir dire without using [recommendation], because I find people who are more serious at that point, so I like it because I am finding more serious jurors who can actually do what’s necessary, and I think it helps me not to use [recommendation].

See Transcript of May 18, 2018, Argument before trial court regarding Jalowiec’s

Motion for Leave to File New Trial Motion and Motion for New Mitigation Trial, p. 38. Jurors who are “more serious” about their task are jurors who understand both the importance and the gravity of the sentencing verdict the court is asking them to render. By his own words, the prosecutor acknowledges the harm Jalowiec suffered – and thus the Eighth Amendment violation – when Jalowiec’s jury was repeatedly told that their sentencing role was merely to advise the trial court. Jalowiec was deprived of “jurors confronted with the truly awesome responsibility of decreeing death for a fellow human being [who] will act with due regard from the consequences of their decision ...” *McGautha v. California*, 402 U.S. 183, 208 (1971).

The jury instructions in Jalowiec’s case – although accurate under Ohio law – misstated the jury’s Sixth Amendment role under *Hurst v. Florida*, 577 U.S. 92 (2016). *Cert.*, p. 7. Because the jury that recommended Jalowiec’s death sentence was never properly advised of its constitutional duties as required by the Sixth Amendment, the resulting death sentence violates the Eighth Amendment under *Caldwell v. Mississippi*, 472 U.S. 320 (1985). *Id.*

The state never engages with Jalowiec’s constitutional argument. Instead, the state argues that the only limitation on what the court and counsel can tell a jury is what is written in state law – that the Sixth and Eighth Amendments place no limits on the court or counsel beyond compliance with state law. *Brief in Opp.*, p. 10. (“Because the jury was given an accurate, rather than a misleading statement of the allocation of their ultimate responsibility [under Ohio law], no error resulted from the statements regarding such allocation.”). That cannot be the law. States cannot

undermine federal constitutional rights merely by enacting state statutes. To the contrary, state statutes that violate the Sixth and Eighth Amendments to the United States Constitution must yield. *See Timbs v. Indiana*, -- U.S. --, 139 S.Ct. 682, 687 (2019) (“With only ‘a handful’ of exceptions, this Court has held that the Fourteenth Amendment’s Due Process Clause incorporates the protections contained in the Bill of Rights, rendering them applicable to the States.”)(citations omitted). “Thus, if a Bill of Rights protection is incorporated, there is no daylight between the federal right and state conduct it prohibits or requires.” *Id.*

This case presents the intersection between the Sixth and Eighth Amendment protections announced in *Hurst* and *Caldwell*. The Circuit Courts of Appeal are split regarding the scope of a *Caldwell* claim. The Eleventh Circuit holds that *Caldwell* is limited to inaccurate descriptions of the jury’s role under state law. *Miller v. Comm’r, Ala. Dep’t of Corr.*, 826 F. App’x 743 (11th Cir. 2020). The Third and Eight Circuits, however, have both granted relief because “a technically accurate statement” of state law can still mislead the jury about its sentencing role in a capital case. *Riley v. Taylor*, 277 F.3d 261, 298 (3rd Cir. 2001); *Driscoll v. Delo*, 71 F.3d 701, 713 (8th Cir. 1995). Respectfully, the Third and Eighth Circuits have the better argument.

*Riley* and *Driscoll* are instructive, because the factual predicates for relief presented in those cases was even less than that presented in Jalowiec’s case. *Riley* and *Driscoll* merely involved a *prosecutor’s* misleading statements about the constitutional role of a jury. In Jalowiec’s case, counsel *and the judge* misled the jury about their constitutional role in sentencing. *Cert.*, p. 3 – 7. If the Eighth Amendment

prohibits a *prosecutor* from misleading a jury “to believe that the responsibility for determining the appropriateness of the defendant’s death rests elsewhere,” then certainly it must also prohibit a *judge* from joining in that effort to mislead the jury. *See Caldwell*, 472 U.S. at 329.

In Jalowiec’s case, counsel *and* the court misstated the central role an Ohio jury plays in capital case. *Driscoll* is a close analog. Like the jury here, the *Driscoll* jury was told that its “sentence of death would be a mere recommendation to the judge.” 71 F.3d at 711-12 & n. 8. Like here, the misstatement of the jury’s role was technically accurate under state law. 71 F.3d at 713. And, like here, the misstatement of the jury’s role “fundamentally misrepresented the significance of the jury’s role and responsibility as a capital sentencer and misled the jury as to the nature of the judge’s review of its sentencing determination.” *Id.*

The *Driscoll* jury was *not* told that the trial court was powerless to impose a death sentence unless the jury first returned a recommendation of death.” At the time of Driscoll’s offense, Missouri law “permitted imposition of a death sentence *only if* the jury unanimously voted for death.” *Driscoll*, 71 F.3d at 713. At the time of Jalowiec’s trial, Ohio law limited the trial court’s ability to consider a death sentence to arise *only if* “the trial jury’s recommendation [was] that the sentence of death be imposed.” R.C. § 2929.03(D)(3). Like in *Driscoll*, the Jalowiec jury was told that their verdict was a mere recommendation when it was actually a necessary condition for a death sentence.

All agree that the instructions telling the jury that its verdict was merely a

recommendation was at least in part, an accurate statement of Ohio law. The instructions were misleading in that they failed to accurately describe the essential role the jury's verdict played to authorize the judge to impose Jalowiec's death sentence. And the jury instructions were *not* an accurate statement of what the Sixth Amendment requires of capital jurors. Merely because the instructions accurately described the jury's verdict as a "recommendation" is no reason to avoid "grappl[ing] with the Eighth Amendment implications" of a Sixth Amendment holding that "then-advisory jury findings are now binding." *Guardado v. Jones*, 138 S.Ct. 1131, 1133 (2018) (Sotomayor, J., dissenting from denial of certiorari) (cleaned up).

Likewise, there is no doubt that the judge's role in failing to fully explain what the Constitution requires of jurors impacted the jury's deliberations. The judge is the ultimate authority on what the law requires of jurors. *See* Ohio Jury Instructions, 2 OJI-CR 101.69, Comment ("A failure of the judge to instruct the jury on the law *and to require the jury to accept the law* is a denial of a fundamental right to due process." (emphasis added)). The judge instructed the jury that it must accept the judge's instructions on the law:

THE COURT: [T]he Court will furnish you with the law and you will apply that to the facts and it is your sworn duty to accept the law as given to you by the Court.

March 13, 1996, Transcript, p. 461, lines 20-23.

The prosecutor stressed the judge's role as final arbiter of what the law requires:

MR. ROSENBAUM: Do you all understand if you are selected as jurors that you have a responsibility to obey the law that the Court gives to you, right?

And if you decided that say Ms. Jordan, you did not agree with the law, can you fix that as a juror?

THE JUROR: Can I fix it?

MR. ROSENBAUM: Could you do anything about it? Say the Judge gives you the law and you say it is not fair.

THE JUROR: I will have to go by his instructions.  
Tx. March 13, 1996, p. 427-28.

Like the jury in *Driscoll*, Jalowiec's jury received instructions from the trial judge – the final arbiter of what the law requires – but the judge's instructions failed to advise the jury of their constitutional duty to regard their sentencing verdict of death as a necessary precondition to the judge's consideration of a death verdict. Instead, Jalowiec's jury was told that their verdict was a mere recommendation; that the judge “gets the big bucks” to decide whether Jalowiec lives or dies.

The state's argument against certiorari rests on the premise that only statements that mislead the jury as to its role under state law matter under *Caldwell*. *Brief in Opp.*, p. 6. (“[T]his Court should determine that no constitutional violation exists . . . as the jury was properly advised as to their role *under Ohio law*.” (emphasis added)). But *Caldwell* addressed an Eighth Amendment violation – not a violation of state law. The state does not explain why the Eighth Amendment would prohibit misleading a jury about its role under state law but not prohibit misleading a jury about its role under the Constitution. The state offers no meaningful response to the petition's showing that the counsel and the court misled the jury as to its essential role in Ohio's capital sentencing process – a role we now know, after *Hurst*, the Sixth Amendment requires. The Court should grant review to address the Eighth

Amendment implications of a Sixth Amendment holding that “then-advisory jury findings are now binding.” *Guardado*, 138 S.Ct. at 1133 (2018) (Sotomayor, J., dissenting from denial of certiorari).

## 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. Even though Ohio’s statutes permit this process, it 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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