No. _____

In the Supreme Court of the United States

DAVID BOBBY, Warden,

Petitioner,

v.

HARRY MITTS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE—NO EXECUTION DATE SET

QUESTIONS PRESENTED

1. Does the State of Ohio offend due process by using the same penalty-phase jury instruction affirmed by this Court in *Smith v. Spisak*, 130 S. Ct. 676 (2010)?

2. Does clearly established federal law extend the holding of *Beck v. Alabama*, 447 U.S. 625 (1980), to the penalty phase of a capital trial?

LIST OF PARTIES

The Petitioner is David Bobby, the Warden of the Ohio State Penitentiary. Bobby is substituted for his predecessor, Margaret Bagley. See Fed. R. Civ. P. 25(d).

The Respondent is Harry Mitts, an inmate at the Ohio State Penitentiary.

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PETITION FOR WRIT OF CERTIORARI

The Attorney General of Ohio, on behalf of David Bobby, Warden of the Ohio State Penitentiary, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Sixth Circuit's opinion, *Mitts v. Bagley*, 620 F.3d 650 (6th Cir. 2010), is reproduced at App. 15a. The Sixth Circuit's amended order denying the Warden's petition for rehearing en banc is reproduced at App. 1a. The United States District Court for the Northern District of Ohio's opinion is reproduced at App. 46a. The Ohio Supreme Court's opinion on direct appeal, *State v. Mitts*, 690 N.E.2d 522 (Ohio 1998), is reproduced at App. 350a.

JURISDICTIONAL STATEMENT

The Sixth Circuit issued its order denying the Warden's petition for rehearing en banc on December 3, 2010. The Warden now files this petition and invokes the Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

The Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Section 2254(d) of Title 28 of the United States Code, provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

INTRODUCTION

A gunman kills multiple victims, injures several others, and threatens to continue his rampage unless police "come down," "do [their] job and . . . kill [him]." App. 324a. At the close of his murder trial, the trial court directs the jury to weigh the aggravating circumstances against the mitigating factors. If all twelve jurors find beyond a reasonable doubt that the aggravators outweigh the mitigators, they are to recommend a death sentence. If not, they are to recommend a life sentence. The jury deliberates and returns a death sentence, which the court imposes. Years later, on federal habeas review, the Sixth Circuit finds the jury instructions unconstitutional and vacates the death sentence.

The Court has seen this story before. In *Smith v. Spisak*, 130 S. Ct. 676 (2010), the Sixth Circuit held the very same instructions unconstitutional because they "required the jury to unanimously reject a death sentence before considering other sentencing alternatives." *Id.* at 684 (alteration omitted). This Court reversed,

finding that it "ha[d] not . . . previously held jury instructions unconstitutional for this reason." *Id.* (Only Justice Stevens disagreed with that holding, asserting that the instructions violated *Beck v. Alabama*, 447 U.S. 625 (1980).)

All parties agree that the instant case is identical to *Spisak*, so the same outcome should logically follow. But the Sixth Circuit thought differently. The court adopted the lone view of Justice Stevens, found a *Beck* violation, and vacated the petitioner's death sentence.

That decision warrants this Court's attention for three reasons. First, the Court has already confirmed that the penalty-phase instructions here "were not contrary to 'clearly established Federal law.'" *Spisak*, 130 S. Ct. at 684. The Sixth Circuit impermissibly ignored that holding (and the dictates of AEDPA) when it announced the very opposite—that the instructions "w[ere] contrary to clearly established federal law." App. 30a.

Second, the decision enlarges a circuit split. The Eighth and Eleventh Circuits have found that *Beck* is not applicable to the penalty phase of a capital trial. The Sixth and Ninth Circuits, by contrast, have expanded the decision to that stage, and both courts have vacated death sentences after finding *Beck* error in penalty-phase instructions.

Third, the Sixth Circuit's decision throws Ohio's capital punishment system into turmoil. The State estimates that the decision will impact up to twenty-four capital habeas cases now pending in the federal courts. Moreover, the decision touches on the validity of Ohio's *current* sentencing procedures.

Indeed, the author of the opinion has elsewhere predicted that Justice Stevens's concurrence in *Spisak*, if adopted, would implicate "almost all of the large number of condemned prisoners on death row in Ohio." *Goff v. Bagley*, 601 F.3d 445, 459 (6th Cir. 2010) (Merritt, J., dissenting).

The Court saw fit to grant review in *Spisak*. Because this case presents an even greater need for intervention, the Court should again grant review. It should then summarily reverse the Sixth Circuit's judgment or, in the alterative, set this case for briefing on the merits.

STATEMENT OF THE CASE

A. Mitts killed a police officer and a neighbor, and seriously injured two other officers, during a six-hour standoff.

On August 14, 1994, between 7:00 p.m. and 8:00 p.m., Harry Mitts walked up to the second floor of his apartment complex, brandished a laser-sighted gun, and told neighbors to "get out" or "fucking die." App. 322a. He then exited to the parking lot, approached one of his neighbors, John Bryant, and complained, "Niggers, niggers, I'm just sick and tired of niggers." App. 323a (alteration omitted). Mitts aimed his gun at Bryant's chest and fired one shot. Bryant immediately fell to the ground. Mitts continued firing the gun sporadically, threatening people as they tried to aid Bryant. *Id.*

Within several minutes, three Garfield Heights police officers—Patrolman John Cermak, Lieutenant Thomas Kaiser, and Sergeant Dennis Glivar—arrived on the scene. Mitts then returned to his first floor apartment. Kaiser and Glivar entered

the building and approached Mitts's apartment. Mitts then flung open the door and, with a gun in each hand, shot Kaiser and Glivar repeatedly. Glivar fell to the ground, and Kaiser retreated to the second floor of the complex. App. 323a-324a.

For the next twenty to thirty minutes, Lieutenant Kaiser (now wounded) encouraged Mitts to surrender. Mitts refused, responding, "the only way we're going to end this is if you kill me." App. 324a. He also stated that he "ha[d] thousands of rounds of ammunition" and would "kill [the] whole police department." *Id.*

Mitts continued to yell threats from his first-floor apartment. During this time, Patrolman Cermak and other officers recovered Sergeant Glivar's body and evacuated Lieutenant Kaiser and other occupants from the building. *Id.*

Around 8:40 p.m., Officer John Mackey arrived at the scene and assumed the role of negotiator. For the next thirty minutes, he urged Mitts to surrender. Mitts refused, continuing to fire a shotgun and pistol. One shot pierced a wall, hitting Officer Mackey in the leg. Other officers returned fire and rescued Mackey. App. 325a.

Around 1:00 a.m. the following morning, the S.W.A.T. team injected tear gas into the apartment. An hour later, they subdued Mitts. *Id.*

Bryant and Sergeant Glivar died from their injuries. Bryant bled to death from a single gunshot wound to his chest, and Sergeant Glivar died from five gunshots that pierced his heart, lungs, and other major organs. App. 326a.

B. A jury convicted Mitts of murder and attempted murder, and it sentenced him to death.

A Cuyahoga County grand jury indicted Mitts on two counts of aggravated murder (for killing Bryant and Sergeant Glivar) and two counts of attempted murder (for shooting Lieutenant Kaiser and Officer Mackey). The aggravated murder counts included death penalty specifications. App. 326a-327a.

At trial, Mitts did not contest the facts of the murders. Rather, he claimed that he was too intoxicated to form the specific intent necessary for a conviction. The jury disagreed, finding Mitts guilty on all counts and the death specifications. App. 327a.

At the penalty phase, Mitts presented testimony from several family members. He also made an unsworn statement asking for mercy. App. 345a-346a. At the close of the evidence, the trial court issued the following instruction to the jury without objection from defense counsel:

> [Y]ou must determine beyond a reasonable doubt whether the aggravating circumstances, which the defendant, Harry D. Mitts, Jr., was found guilty of committing in the separate counts, are sufficient to outweigh the mitigating factors you find are present in this case.
>
> When all 12 members of the jury find by proof beyond a reasonable doubt that the aggravating circumstances in each

separate count with which Harry D. Mitts, Jr., has been found guilty of committing outweigh the mitigating factors, if any, then you must return such finding to the Court.

I instruct you as a matter of law that if you make such a finding, then you must recommend to the Court that the sentence of death be imposed on the defendant Harry D. Mitts, Jr.

***

On the other hand, after considering all the relevant evidence raised at trial, the evidence and testimony received at this hearing and the arguments of counsel, [if] you find that the state of Ohio failed to prove beyond a reasonable doubt that the aggravating circumstances with which the defendant Harry D. Mitts, Jr., was found guilty of committing outweigh the mitigating factors, you will then proceed to determine which of two possible life imprisonment sentences to recommend to the Court.

Your recommendation shall be one of the following: That the defendant, Harry D. Mitts, Jr., be sentenced to life imprisonment with parole eligibility after 30 full years of imprisonment or that the defendant, Harry D. Mitts, Jr., be sentenced to life imprisonment with parole eligibility after 20 full years of imprisonment.

App. 352a-353a. After its deliberations, the jury recommended, and the trial court imposed, a death sentence. App. 327a. The Ohio court of appeals affirmed Mitts's conviction and sentence. See *State v. Mitts*, No. 68612, 1996 Ohio App. Lexis 5790 (Ohio Ct. App. Dec. 19, 1996).

C. The Ohio Supreme Court affirmed Mitts's convictions and death sentence, and the district court denied habeas relief.

On appeal to the Ohio Supreme Court, Mitts claimed that the trial court gave an improper "acquittal first" instruction at the penalty phase. His argument was confined to a single sentence: "It is not necessary for the jury to reject the death option before considering the life option." App. 351a.

The Ohio Supreme Court disagreed. First, it observed that Mitts "failed to object or request additional instructions" from the trial court and, therefore, "waived all but plain error." App. 339a. The court also denied relief because the "instruction [was] consistent with [Ohio Rev. Code §] 2929.03(D)(2) and d[id] not constitute error" under existing law. App. 339a (citing *State v. Taylor*, 676 N.E.2d 82, 95 (Ohio 1997); *State v. Davis*, 666 N.E.2d 1099, 1108-09 (Ohio 1996)).

The Ohio Supreme Court rejected Mitts's other claims and, after independently reviewing the aggravating circumstances and mitigating factors, affirmed his death sentence. App. 347a.

Mitts again challenged his penalty-phase jury instructions on federal habeas review. For the first time, he alleged a specific violation of *Mills v. Maryland*, 486 U.S. 367 (1988). See Joint Appendix

at 38, *Mitts v. Bagley*, No. 05-4420 (6th Cir.) ("J.A.").

The district court concluded that the claim was procedurally defaulted because "Mitts failed to comply with the state procedural rule requiring contemporaneous objections to perceived trial errors," and "the state courts actually enforced the rule by reviewing this issue for plain error only." App. 219a. Consistent with Sixth Circuit precedent, the district court stated that "Ohio's contemporaneous-objection rule is an 'adequate and independent' state ground upon which federal habeas review is foreclosed." *Id.* (citing *Scott v. Mitchell*, 209 F.3d 854, 864-71 (6th Cir. 2000)). The court further held that Mitts had not established "cause and prejudice" to excuse the default, and it denied the claim. App. 220a, 224a.

D. Adopting Justice Stevens's concurrence in *Spisak*, the Sixth Circuit found error in Mitts's penalty-phase instructions and vacated his death sentence.

On appeal to the Sixth Circuit, Mitts again asserted that the state trial court's penalty-phase instructions violated *Mills*.

After the close of briefing, this Court issued its decision in *Smith v. Spisak*, 130 S. Ct. 676 (2010). The Court reviewed the same jury instructions, finding that they "were not contrary to 'clearly established Federal law.'" *Id.* at 684. Justice Stevens concurred separately, expressing his view that the instructions violated *Beck v. Alabama*, 477 U.S. 625 (1980), because they "deprived the jury of a meaningful opportunity to consider . . . a life sentence." *Id.* at 691. He nevertheless found "the

instructional error . . . harmless," and voted to deny habeas relief. *Id.* at 693.

The Sixth Circuit then issued a *sua sponte* order to the parties here, directing them to "analyz[e] this case in light of *Beck v. Alabama*, as described in Justice Stevens' concurrence in *Smith v. Spisak*." App. 45a (citations omitted).

In a subsequent opinion, the Sixth Circuit adopted Justice Stevens's position. It held that *Beck* requires capital jury instructions to "make clear that the jury does not have to complete its death deliberation before considering a life sentence." App. 29a. In the court's view, Mitts's instructions violated that command because they improperly informed the jury that it "could consider 'possible life sentences' only 'if all twelve members . . . found that the State had not proved that the aggravating circumstances' predominated." *Id.* (citation omitted). The court expressed no concern at Mitts's failure to raise *Beck* to the state courts or in his habeas pleadings. App. 29a, n.2. Finally, the court neglected to conduct any inquiry into harmless error.

The Sixth Circuit remanded the case to the district court with instructions to vacate Mitts's death sentence. App. 30a.

Judge Siler dissented. He argued that the court's *Beck* analysis was flawed because (1) Justice Stevens's concurrence in *Spisak* "does not constitute 'clearly established Federal law'" for purposes of AEDPA; and (2) "the Supreme Court has never extended *Beck* to cover penalty-phase jury instructions." App. 43a.

The State unsuccessfully petitioned for en banc review. Although concurring in the denial of the petition, Judge Sutton explained that the holding of *Beck* does not apply to the penalty phase of a capital trial. App. 4a. He expressed further concern that the panel's decision ignored not just AEDPA, but this Court's decision in *Spisak*. App. 6a-9a. Judge Sutton nevertheless found the case inappropriate for en banc review due to lack of an intra-circuit conflict. It was therefore best, he said, to "let[] the United States Supreme Court decide whether [the] decision is correct, and if not, whether it is worthy of correction." App. 12a.

REASONS FOR GRANTING THE WRIT

This case more than satisfies the well-worn criteria for certiorari. First, the Sixth Circuit ignored this Court's explicit holding in *Smith v. Spisak*, 130 S. Ct. 676 (2010), that these penalty-phase instructions "were not contrary to 'clearly established Federal law.'" *Id.* at 684. Moreover, there is a circuit split. The Sixth Circuit granted habeas relief by extending *Beck v. Alabama*, 447 U.S. 625 (1980), to the penalty phase of capital proceedings. In doing so, the court parted ways with the Eighth and Eleventh Circuits, which have refused to apply the holding of *Beck* beyond the guilt phase. Finally, the Sixth Circuit took these actions on federal habeas review. Instead of deferring to the Ohio Supreme Court's decision, as AEDPA mandates, the court issued new directives for penalty-phase instructions at capital trials.

The Sixth Circuit's ruling has cast a constitutional shadow over Ohio's entire capital sentencing scheme. Given the complete lack of support for the decision, this Court should grant review and reverse the judgment below.

A. The Sixth Circuit ignored this Court's decision in *Spisak*, which approved the same penalty-phase jury instructions.

The jury instructions at Mitts's trial reflect Ohio's long-standing statutory procedures for capital proceedings. This Court affirmed the constitutionality of those instructions in *Spisak*, and the Sixth Circuit was bound to follow that decision. Instead, the court openly (and improperly) ignored it.

1. In Ohio, the jury weighs the aggravating circumstances against the mitigating factors to fix a capital defendant's sentence.

Under Ohio law, a defendant's eligibility for the death penalty is determined at the guilt phase. See Ohio Rev. Code § 2929.03(B) (1995). The indictment must allege, and the jury must convict the defendant of, aggravated murder. *Id.* § 2903.01. The indictment must also allege, and the jury must also find beyond a reasonable doubt, a death specification—that the murder involved a statutory aggravating circumstance. *Id.* § 2929.04(A)(1)-(10). If the jury convicts the defendant of aggravated murder and finds an aggravating circumstance, the trial proceeds to the penalty phase. *Id.* § 2929.03(D).

At the penalty phase, the jury "weigh[s] against the aggravating circumstances . . . the nature and circumstances of the offense, the history,

character, and background of the offender," and any one of seven statutory mitigating factors. *Id.* § 2929.04(B). Those mitigating factors include the victim's provocation, the defendant's mental state, his age, his lack of prior criminal history, his degree of participation, and "[a]ny other factors that are relevant to the issue of whether the offender should be sentenced to death." *Id.* § 2929.04(B)(7). Ohio law gives defendants "great latitude" in presenting such evidence. *Id.* § 2929.04(C).

During deliberations, the jury "shall determine whether the aggravating circumstances . . . are sufficient to outweigh the mitigating factors." *Id.* § 2929.03(D)(2). "If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances . . . outweigh the mitigating factors, the jury shall recommend . . . the sentence of death." *Id.* Otherwise, the jury "shall recommend" one of two lesser options: either "life imprisonment with parole eligibility after serving twenty full years of imprisonment," or "life imprisonment with parole eligibility after serving thirty full years of imprisonment." *Id.*

In other words, the jury's balancing of the aggravating circumstances and the mitigating factors channels its sentencing decision under Ohio law. If the jury unanimously finds that the aggravating circumstances outweigh the mitigating factors, it "shall" recommend a death sentence. If the jury cannot make such a finding, it "shall" recommend a life sentence.

The Sixth Circuit has found the scheme constitutional. See *Coleman v. Mitchell*, 268 F.3d 417, 441-44 (6th Cir. 2001). The court has also

affirmed the constitutionality of Ohio Rev. Code § 2929.03(D)(2), which requires the jury to recommend a death sentence if it unanimously concludes that the aggravating circumstances outweigh the mitigating factors. See *Buell v. Mitchell*, 274 F.3d 337, 354 (6th Cir. 2001); accord *Kansas v. Marsh*, 548 U.S. 163, 173 (2006) ("[A] death penalty statute, consistent with the Constitution, may direct imposition of the death penalty when the State has proved beyond a reasonable doubt that mitigators do not outweigh aggravators.").

2. The trial court instructed Mitts's jury to follow this procedure.

The state trial court hewed to this statutory procedure. At the guilt phase, the jury convicted Mitts of aggravated murder. It also found two aggravating circumstances—Mitts knowingly murdered a peace officer in the line of duty, and Mitts committed his murders as part of a course of conduct to kill multiple victims. App. 326a-327a (citing Ohio Rev. Code § 2929.04(A)(5)-(6)).

At the penalty phase, the trial court allowed Mitts to present a host of mitigating evidence detailing his history, character, and background. App. 345a. The trial court then instructed the jury on its deliberations: The jury was first to "determine beyond a reasonable doubt whether the aggravating circumstances, which the defendant, Harry D. Mitts, Jr., was found guilty of committing in the separate counts, [were] sufficient to outweigh the mitigating factors . . . present in this case." App. 352a.

If "all 12 members of the jury f[ound] by proof beyond a reasonable doubt that the aggravating circumstances . . . outweigh[ed] the mitigating factors," the trial court instructed the jury to "recommend to the Court that the sentence of death be imposed." *Id.* But if the jury did not make such a finding, the court instructed it to "proceed to determine which of two possible life imprisonment sentences to recommend"—either "life imprisonment with parole eligibility after 30 full years of imprisonment or . . . life imprisonment with parole eligibility after 20 full years of imprisonment." App. 353a.

3. The *Spisak* Court held that this instruction did not violate clearly established federal law.

For years, the Sixth Circuit affirmed the constitutionality of similar penalty-phase instructions on habeas review. See, e.g., *Henderson v. Collins*, 262 F.3d 615, 621-22 (6th Cir. 2001); *Williams v. Coyle*, 260 F.3d 684, 700-02 (6th Cir. 2001); *Scott v. Mitchell*, 209 F.3d 854, 873-76 (6th Cir. 2000).

In 2003, the circuit abruptly reversed course. In *Davis v. Mitchell*, 318 F.3d 682 (6th Cir. 2003), the court found such instructions invalid under the Eighth Amendment: "Any instruction requiring that a jury must first unanimously reject the death penalty before it can consider a life sentence . . . precludes the individual juror from giving effect to mitigating evidence." *Id.* at 689. (To be clear, the State has never accepted this characterization. These instructions ask the jury to consider life and death *at the same time*—that is, recommend a death

sentence if the aggravating circumstances outweigh the mitigating factors; or recommend a life sentence if the aggravating circumstances do not outweigh the mitigating factors.)

The Sixth Circuit then issued a series of confusing rulings on the force of *Davis*, occasionally granting relief, and occasionally denying relief. Compare *Spisak v. Mitchell*, 465 F.3d 684, 708-11 (6th Cir. 2006); *Williams v. Anderson*, 460 F.3d 789, 810-13 (6th Cir. 2006), with *Hartman v. Bagley*, 492 F.3d 347, 362-65 (6th Cir. 2007). Those "contrary rulings" gave little guidance to district courts, which struggled to adjudicate these claims. App. 220a, n.13.

This Court agreed to resolve the confusion in *Spisak*. There, the habeas petitioner argued that these penalty-phase instructions were unconstitutional because they "command that the jury unanimously reject the death penalty before considering a life sentence." Br. of Resp. at 21, *Smith v. Spisak*, 130 S. Ct. 676 (2010), *available at* 2008 U.S. Briefs 724. This Court disagreed: "We have not . . . previously held jury instructions unconstitutional for this reason." *Spisak*, 130 S. Ct. at 684. Because the instructions "were not contrary to 'clearly established Federal law,'" the Court denied habeas relief. *Id.*

Justice Stevens disagreed with that analysis. In a separate concurrence joined by no other member of the Court, he articulated his view that *Beck* "clearly establish[es] that the instructions at issue were unconstitutional." *Id.* at 689. That argument did not, however, carry the day.

Spisak thus forecloses Mitts's present attack on his penalty-phase instructions. The state trial court used the same set of instructions and Mitts is pressing the same constitutional objection. See Sixth Cir. J.A. 38 (alleging that the trial court improperly "instructed the jury that it could consider life penalties only after finding that the state failed to prove the aggravating factors did not outweigh the mitigating factors"). The same outcome therefore must follow.

The Sixth Circuit held otherwise. But instead of looking to the *Spisak* majority's decision for the governing rule, the Sixth Circuit "agree[d] with Justice Stevens' conclusions" from his separate concurrence. App. 42a. That concurrence lacks any precedential or persuasive effect. The Court reviewed it, and rejected it. In no uncertain terms, the Court stated that the "the jury instructions at Spisak's trial "were not contrary to 'clearly established Federal law.'" *Spisak*, 130 S. Ct. at 684.

In granting habeas relief to Mitts, the Sixth Circuit disregarded the *Spisak* Court's clear holding, and, in doing so, deprived the State of Ohio of the certainty and finality of that decision. That error is reason enough for this Court to grant certiorari and reverse the judgment below.

B. Notwithstanding this Court's explicit directives, the lower courts are divided on *Beck*'s applicability to the penalty phase of a capital trial.

Even without the *Spisak* decision, this case would still be worthy of certiorari because the circuits have reached very different conclusions

about the scope of *Beck v. Alabama*. The Eighth and Eleventh Circuits have not extended *Beck* to the penalty phase of a capital trial, but the Ninth Circuit has. When the Sixth Circuit used *Beck* to invalidate Ohio's penalty-phase instructions in this case, it deepened that split. This Court should grant review and resolve the confusion.

1. This Court has explicitly confined *Beck* to the guilt phase.

In *Beck v. Alabama*, the Supreme Court addressed the constitutionality of Alabama's capital sentencing scheme. At the guilt phase, the jury was given two options: It was to "either convict[] the defendant of the capital crime, in which case it [was] required to impose the death penalty," or it could "acquit[] him, thus allowing him to escape all penalties for his alleged participation in the crime." 447 U.S. at 629. The jury did not have a middle "option of convicting the defendant of a lesser included offense," thereby avoiding a death sentence. *Id.* at 628.

The *Beck* Court held this guilt-phase procedure unconstitutional because it injected "uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case." *Id.* at 643. Alabama's all-or-nothing choice between death and acquittal "may encourage the jury to convict [the defendant of capital murder] for an impermissible reason—its belief that the defendant is guilty of some serious crime and should be punished." *Id.* at 642. In light of these concerns, the Court held that the jury in a capital case must be given an option of convicting the defendant of a "non-

capital offense . . . when the evidence would . . . support[] such a verdict." *Id.* at 627.

In his *Spisak* concurrence, Justice Stevens articulated his view that the disputed penalty-phase instructions were "every bit as pernicious as those at issue in *Beck*." 130 S. Ct. at 691. Asking the jury first to determine whether the aggravating circumstances outweighed the mitigating factors beyond a reasonable doubt, he said, "deprived the jury of a meaningful opportunity to consider . . . a life sentence," thus violating *Beck*. *Id.*

Justice Stevens's concurrence did not garner broader support, however, as the Court has repeatedly explained that *Beck* does not apply to the penalty phase of a capital trial.

Beck itself made that distinction. The Court expressly distinguished Alabama's capital sentencing scheme from Georgia's scheme, which it had affirmed just four years earlier. See *Gregg v. Georgia*, 428 U.S. 153 (1976). Georgia's scheme was constitutional, the *Beck* Court said, because the defendant's "guilt is determined *separately* from punishment." 447 U.S. at 641 n.17 (emphasis added). When a State separates the jury's determination of guilt from its determination of the appropriate penalty (as Ohio does), "there is little risk that the jury will use its power to decide guilt to make a *de facto* punishment decision." *Id.*

This Court's decision in *California v. Ramos*, 463 U.S. 992 (1983), confirms the irrelevance of *Beck* to penalty-phase jury instructions. In *Ramos*, the defendant attacked a penalty-phase instruction that informed the jury that, should it choose a life

sentence, the Governor had the power to "commute or modify [the] sentence." *Id.* at 996. He claimed that this instruction violated *Beck* because it "undermine[d] the jury's responsibility to make an individualized sentencing determination." *Id.* at 1006.

In rejecting that reading of *Beck*, this Court highlighted the "fundamental difference between the nature of the guilt/innocence determination at issue in *Beck* and the nature of the life/death choice at the penalty phase." *Id.* at 1007 At the guilt phase, a "failure to provide a lesser included offense option . . . deflect[s] the jury's attention from 'the central issue of whether the State has satisfied its burden of proving beyond a reasonable doubt that the defendant is guilty of a capital crime.'" *Id.* at 1007-08 (citation and emphasis omitted). But at the penalty phase, the Court explained, "there is no similar 'central issue' from which the jury's attention may be diverted." *Id.* at 1008. Thus, "the concern of *Beck* regarding the risk of an unwarranted conviction is *simply not directly translatable* to the deliberative process in which the capital jury engages in determining the appropriate penalty." *Id.* at 1009 (emphasis added).

Two later cases reinforce *Beck*'s narrow focus on the guilt phase of a capital trial. In *Spaziano v. Florida*, 468 U.S. 447 (1984), this Court emphasized that *Beck* "eliminate[d] the distortion of the factfinding process that is created when the jury is forced into an all-or-nothing choice between *capital murder and innocence*." *Id.* at 455 (emphasis added). In *Schad v. Arizona*, 501 U.S. 624 (1991), the Court echoed that refrain: "Our fundamental concern in

Beck was that a jury convinced that the defendant had committed some violent crime but not convinced that he was guilty of a capital crime might nonetheless vote for a capital conviction if the only alternative was to set the defendant free with no punishment at all." *Id.* at 646.

No such risk is present at the penalty phase. Because the jury has already convicted the defendant of capital murder at the guilt phase, there is no danger that the jury will vote for a death sentence at the penalty phase "simply to avoid setting the defendant free." *Spaziano*, 468 U.S. at 455. Or stated differently, *Beck* does not apply at the penalty phase because, at that point in the proceeding, the "jury [is] not faced with an all-or-nothing choice between the offense of conviction (capital murder) and innocence." *Schad*, 501 U.S. at 647.

Ramos, *Spaziano*, and *Schad* all confirm the limited scope of *Beck*. The decision governs only the guilt phase of a capital trial, and the Sixth Circuit was wrong to say otherwise.

2. The circuits are nevertheless divided on the applicability of *Beck* to the penalty phase.

Invoking that trilogy of cases, two circuits have rejected invitations to extend *Beck* to penalty-phase procedures and instructions.

In *United States v. Chandler*, 996 F.2d 1073 (11th Cir. 1993), the defendant objected to a penalty-phase instruction that informed "the jury that, in the event that it did not recommend a sentence of death, it should not be concerned with the question of what

sentence he might receive." *Id.* at 1084. This instruction, he said, violated *Beck*. *Id.*

The Eleventh Circuit disagreed, holding that "*Beck* is not directly applicable in capital sentencing hearings." *Id.* at 1085 (citing *Ramos*, 463 U.S. at 1007-09). The court observed that the jury had already convicted the defendant of murder. *Id.* Therefore, the jury did not face the same all-or-nothing predicament condemned in *Beck* when it reached the penalty phase—that is, the jury "was not choosing between guilt of a capital crime and acquittal." *Id.*

Similarly, in *Parker v. Norris*, 64 F.3d 1178, 1186-87 (8th Cir. 1995), the habeas petitioner challenged a state's penalty-phase instruction that discussed the process of identifying and balancing statutory aggravating circumstances. He invoked *Beck* to support this claim, asserting that it "should apply equally to the penalty phase of his capital murder case." *Id.* at 1186.

The Eighth Circuit disagreed. The court explained that "the jury had already convicted [the petitioner] of capital murder." *Id.* Thus, the penalty-phase instruction "did not contain the defect that was essential to the Supreme Court's decision in *Beck*"—"'the distortion of the factfinding process that is created when the jury is forced into an all-or-nothing choice between capital murder and innocence.'" *Id.* at 1187 (quoting *Spaziano*, 468 U.S. at 455).

That harmony did not last. The Ninth Circuit parted company with its sister circuits in *Murtishaw v. Woodford*, 255 F.3d 926 (9th Cir. 2001). There, the

habeas petitioner challenged a California law and penalty-phase instruction that directed the jury to return a death sentence "if aggravating circumstances even slightly outweighed mitigating circumstances." *Id.* at 961. The court agreed. It held the state law unconstitutional under the Ex Post Facto Clause (the law was not in effect at the time of the murder), and found the instruction erroneous (it misdirected jurors as to their responsibilities under the prior law in effect at the time of the murder). *Id.* at 964-69.

The Ninth Circuit also invalidated the penalty-phase instruction under *Beck*. It expressed concern that the petitioner's "jury might have believed it had no alternative to imposing the death penalty if it found aggravating circumstances even slightly outweighed mitigating circumstances." *Id.* at 972. "As in *Beck*," the Ninth Circuit stated, "such a mistaken ultimatum . . . constitutes a miscarriage of justice and violates due process." *Id.* at 972-73.

In this case, the Sixth Circuit followed the Ninth Circuit's lead. It held that the penalty-phase instructions at Mitts's trial violated *Beck*, App. 29a-30a, and it did so without ever mentioning any of this Court's precedents that confine *Beck*'s holding to the guilt phase. But the Sixth Circuit also went one step further. It said that *Beck*'s applicability to the penalty phase was "decided thirty years ago" and, thus, was "clearly established law" for purposes of AEDPA, 28 U.S.C. § 2254(d). App. 28a, n.2. But see *Carey v. Musladin*, 549 U.S. 70, 76 (2006) (state court adjudication is not an unreasonable application of clearly established federal law if "lower courts

have diverged widely in their treatment of [the] claims").

Simply put, the Sixth Circuit's decision hardened an already stark disagreement among the circuits about the scope of *Beck*. This Court should accept review and reaffirm what it said in *Ramos*—that the *Beck* rule is "not directly translatable" to the penalty phase of a capital trial. 463 U.S. at 1009.

C. Under the Sixth Circuit's decision, an untold number of death sentences in Ohio are now at risk of invalidation.

The clear force of the *Spisak* decision, the confusion among the circuits about *Beck*'s scope, and the deferential standards of AEDPA all provide ample justification for this Court to review the Sixth Circuit's judgment below. But one more reason exists: The decision destabilizes Ohio's entire capital punishment scheme.

1. The decision affects a significant number of pending cases.

The enormity of the Sixth Circuit's decision turns, in part, on its procedural analysis. Mitts did not object to the penalty-phase instructions at trial. App. 339a. On direct review, he did not cite *Beck* (or for that matter, any other federal authority) to the Ohio Supreme Court. App. 351a. And his district court pleadings and Sixth Circuit briefs did not mention *Beck*. Rather, Mitts attacked the penalty-phase instruction under *Mills v. Maryland*, 486 U.S. 367 (1988). See Sixth Cir. J.A. 38. As noted above, the first discussion of *Beck* in this case occurred when the Sixth Circuit invited the parties to submit supplemental briefing. App. 45a.

The Sixth Circuit nevertheless concluded that Mitts made "the same basic argument . . . below and on appeal, except in a slightly different dress made by the same dress-maker out of the same cloth." App. 28a-29a, n.2. Therefore, the court said it would "not be distracted from addressing a fundamental constitutional argument by the label in the back, especially in a death penalty case"—"We should not struggle to avoid deciding fundamental constitutional issues so that the prisoner can go to his death without our considering a claim that may allow him to live." *Id.* (That pronouncement, however, runs headlong into the *Spisak* decision, which rejected Justice Stevens's invitation to refashion the petitioner's *Mills* claim into a *Beck* claim. See 130 S. Ct. at 684.)

In other words, the Sixth Circuit set aside every procedural hurdle for a capital prisoner seeking to raise a *Beck* claim. That prisoner is now free to press a claim despite a failure to object to the disputed instruction at trial, present the error to the state courts, or include the claim in his federal habeas petition.

That loose approach will have serious repercussions. The State has identified twenty-four capital cases now on federal habeas review that are potentially impacted by the Sixth Circuit's decision.[1] In each, the jury received similar instructions at the penalty phase and the petitioner challenged them as improper under *Mills*. If this decision is allowed to

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[1] The actual number is probably higher. The survey does not include capital cases in the state courts on direct appeal or state post-conviction review. These cases are handled by the local prosecuting attorney, not by the Attorney General's Office.

stand, those capital prisoners will race to the courthouse and seek an order vacating their capital sentences.

Indeed, that has already come to pass in one case. In *Jackson v. Bradshaw*, No. 2:03-cv-983, 2007 U.S. Dist. Lexis 75523, at *269-78 (N.D. Ohio Sept. 28, 2007), the district court initially rejected the prisoner's claim that he received improper penalty-phase instructions. The Sixth Circuit remanded the case for further consideration in light of Justice Stevens's concurring opinion in *Spisak*. See Order, *Jackson v. Bradshaw*, No. 07-4326 (6th Cir. Mar. 3, 2010).

On remand in *Jackson*, the district court expressed bewilderment at the Sixth Circuit's decision to "g[ive] precedential force to Justice Stevens' rationale" in *Spisak*. *Jackson v. Bradshaw*, No. 2:03-cv-983, 2010 U.S. Dist. Lexis 137799, at *10 (N.D. Ohio Dec. 16, 2010). It noted "the unusual nature of applying a single concurring opinion's characterization of *Beck v. Alabama* to a context not expressly endorsed by any other Justices." *Id.* The district court nevertheless abided by circuit precedent: Because the penalty-phase instructions in *Jackson* were materially identical to the instructions in *Spisak* and the instructions in this case, *id.* at *19-23, the court found a violation of *Beck*, *id.* at *26.

In short, approximately one-fourth of the State's capital habeas cases are impacted by the Sixth Circuit's decision. All parties to those cases—the State, the prisoners, and the victims' families—would be best served by resolution of this issue now.

2. The decision undermines Ohio's capital punishment scheme.

The Sixth Circuit's decision is momentous in a second respect: It implicates the validity of Ohio's entire capital punishment system.

The court criticized two aspects of the penalty-phase instructions in this case: First, the state trial court used an instruction that required the jury to recommend a death sentence if it found beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating factors. App. 25a. Second, the trial court directed the jury to "weigh[] aggravators and mitigators" at the "first step" of its deliberations. *Id.* The Sixth Circuit concluded that these two instructions, when read together, will "caus[e] one or more jurors to neglect or omit the serious consideration of mercy and life imprisonment as a choice" in their deliberations. App. 26a.

Those same two instructions exist today. Ohio law still requires a similar capital instruction: "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." Ohio Rev. Code § 2929.03(D)(2) (2010) (emphasis added). And Ohio still directs capital juries to perform this weighing process first: Once the jury "find[s] that the State of Ohio has failed to prove beyond a reasonable doubt that the aggravating circumstance(s) . . . (are) sufficient to outweigh the mitigating factors," it can "then . . . decide which of the . . . life sentence

alternatives should be imposed." 2 Ohio Jury Instructions: Criminal § 503.011 (2009).[2]

In short, Ohio's penalty-phase instructions still contain these two features. The Sixth Circuit's decision therefore implicates an untold number of capital verdicts, and it seriously undermines the State's ability to enforce its criminal laws and implement final criminal judgments.

These fears are genuine. Shortly after this Court issued its decision in *Spisak*, the Sixth Circuit refused to consider a capital prisoner's eleventh-hour *Beck* claim. See *Goff v. Bagley*, 601 F.3d 445, 459 (6th Cir. 2010), *cert denied*, 562 U.S. __ (Jan. 24, 2011). In dissent, Judge Merritt indicated his desire to reach the merits of the *Beck* issue, follow Justice Stevens's concurrence, and vacate the prisoner's

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[2] One revision is worthy of mention. In 1996, the Ohio Supreme Court examined "the policy behind [state law]" and mandated an explicit "instruction which requires the jury, when it cannot unanimously agree on a death sentence, to move on in their deliberations to a consideration of which life sentence is appropriate." *State v. Brooks*, 661 N.E.2d 1030, 1042 (Ohio 1996). This clarifying instruction is not a constitutional command. A State may instruct the jury in a capital case to reach unanimity on the question whether the aggravating circumstances outweigh the mitigating factors. See *Jones v. United States*, 527 U.S. 373, 381-82 (1999).

Also, the absence of this clarifying instruction at Mitts's trial had no role in the Sixth Circuit's decision. The court made no mention of a unanimity requirement when declaring the penalty-phase instructions here unconstitutional. App. 25a-26a; accord *Goff v. Bagley*, 601 F.3d 445, 483 (6th Cir. 2010) (Merritt, J., dissenting) ("Justice Stevens was under the impression that the Ohio Supreme Court had changed its instructions in 1996 in *State v. Brooks* . . . [b]ut in fact there has been no significant change in Ohio law on this subject.").

death sentence. *Id.* at 483. He further articulated his view that "almost all of the large number of condemned prisoners on death row in Ohio are there as a result of the same basic set of instructions." *Id.*

Five months later, the Sixth Circuit issued its decision in this case. Following the lead of the dissenting opinion in *Goff*, the court looked beyond the petitioner's procedural mistakes, adopted Justice Stevens's *Spisak* concurrence, and found a *Beck* error. Given these developments, the State is rightfully concerned that the Sixth Circuit's decision here extends to "almost all of the . . . condemned prisoners on death row in Ohio." *Goff*, 601 F.3d at 483 (Merritt, J., dissenting).

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In all, the Sixth Circuit ignored this Court's commands, rejected established authority that narrows the scope of *Beck*, and deepened an existing circuit split. In addition, the court threw Ohio's capital punishment system into turmoil, making the need for certiorari even greater here than it was in *Spisak*. Just as in that case, the Court should accept review and reverse the Sixth Circuit.

CONCLUSION

The Court should grant the petition and summarily reverse the judgment below or, in the alterative, set this case for briefing on the merits.

Respectfully submitted,

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