No. 10-1000

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2010

HARRY D. MITTS,

Petitioner

-vs-

DAVID BOBBY, Warden,

Respondent

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

RESPONDENT MITTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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REASONS WHY THE PETITION SHOULD BE DENIED

1. Contrary to Petitioner's argument, the circuits are not divided on the applicability of *Beck* to the penalty phase of capital trials.

The Warden's statement that there is a circuit split on the applicability of *Beck v. Alabama*, 447 U.S. 625 (1980), to the penalty phase of capital trials is overstated and it is misleading. *See* Pet. at 21-23. The Warden argues that with its holding in *Murtishaw v. Woodford*, 255 F.3d 926, 971-74 (9th Cir. 2001), *cert. denied*, 535 U.S. 935 (2002), "[t]he Ninth Circuit parted company with its sister circuits," Pet. at 22, because *Murtishaw* conflicts with *United States v. Chandler*, 996 F.2d 1073, 1083-89 (11th Cir. 1993), *cert. denied*, 512 U.S. 1227 (1994); and *Parker v. Norris*, 64 F.3d 1178, 1185-88 (8th Cir. 1995), *cert. denied*, 516 U.S. 1095 (1996).

Murtishaw did nothing of the sort, it does not conflict with either *Chandler* or *Parker*. The *Murtishaw* court granted relief on an *Ex Post Facto* claim, as the Warden acknowledges, Pet. at 23. The citation to *Beck* was for the unremarkable principle that when a court reviews jury instruction claims in death penalty cases, there should be heightened concern to ensure the condemned was not subjected to a miscarriage of justice and denied due process. 255 F.3d at 972-73. The court did not hold that *Beck* applies to capital jury instructions. Moreover, the vast majority of courts citing *Murtishaw* are in California because it was a California statute that was in question; *Murtishaw* is seldom, if ever cited for its brief discussion of *Beck.*

The Warden's contention that the Sixth Circuit "followed the Ninth Circuit's lead" is patently untrue. The majority below did not cite to *Murtishaw* -- or, for that mater, any other Ninth

Circuit decision. Rather, *Murtishaw* was cited only in the dissent's critique of Mitts' argument. *Mitts v. Bagley*, 620 F.3d 650, 664 (Siler, J., dissenting).

Finally, the Warden has omitted the fact that none of the three cases it cites to demonstrate a circuit split were decided under the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-122, 100 Stat. 1214 ("AEDPA").

The Warden's claim that the decision below "hardened an already stark disagreement among the circuits about the scope of *Beck*." Pet. at 24, is unsubstantiated hyperbole. The purported circuit split is a phantom.

2. The decision below does not place "an untold number of death sentences ... at risk of invalidation."

The Warden claims that "[t]he State has identified twenty-four capital cases now on federal habeas review that are potentially impacted" by the decision below. Pet. at 25, but does not identify these cases and fails to explain what it means by "potentially impacted." The Warden inaccurately claims that the jury instructions at issue continue to "exist today," *id.,* and incorrectly argues that Ohio's capital sentencing statute "requires," and that a pattern jury instruction "directs" trial judges to instruct juries in the same manner that Mitts' jury was instructed. Pet. at 27-28.

The Warden retreats a few steps from his inaccuracy by acknowledging in a footnote the decision of the Ohio Supreme Court in *State v. Brooks*, 75 Ohio St.3d 148, 661 N.E.2d 1030, 1996-Ohio-134 (Ohio 1996), Pet. at 28, fn.2. But the Warden continues to offer misleading justifications for certiorari by omitting the fact that *Brooks* found that the sentencing statute the Warden says still requires Mitts' instructions, Ohio Rev. Code § 2929.03(D)(2), "contains no

limiting language as to when a jury may contemplate a life sentence," *id*, 661 N.E.2d at 1041, and *Brooks*' watershed holding: "In Ohio, a solitary juror may prevent a death penalty recommendation by finding that the aggravating circumstances in the case do not outweigh the mitigating factors. *Jurors from this point forward should be so instructed*." *Id*. at 1042 (emphasis added).

The Warden contends that Ohio Jury Instructions "direct" judges to instruct their juries in a manner contrary to *Brooks*, *see* Pet. at 27-28. This is incorrect because it ignores that it is well-settled in Ohio that these pattern instructions, while often helpful, are not the binding legal authority the Warden suggests. *See, e.g., State v. Gardner*, 118 Ohio St.3d 420, 442, 889 N.E.2d 995, 1016, 2008-Ohio-2787 (Ohio 2008) (Lanziger, J., dissenting).

The Warden's citation in Footnote 2 to Judge Merrit's dissent in *Goff v. Bagley*, 601 F.3d 445, 483 (6th Cir. 2010), *cert. denied*, 562 U.S., 131 S.Ct. 1045 (2011), is baffling. To say that "there has been no significant change in Ohio law" on the subject of penalty phase jury instructions is tantamount to saying that the supreme court of the state cannot be relied upon to enforce its own judgments. Is that what the Attorney General of the state is pressing upon this Court?

3. The decision below should affect, at most, a small number of cases, all tried before March 4, 1996.

In his petition for en banc rehearing, the Warden warned that the *Mitts* panel's analysis of *Beck* "purportedly applies to 'almost all of the large number of condemned prisoners in Ohio,'" citing Judge Merrit's dissent in *Goff*. 601 F.3d at 483 (Merritt, J., dissenting). Mitts estimates There are between 160 and 170 inmates on Ohio's Death Row.

Now, in his Petition for Writ of Certiorari, the Warden wavers between twenty-four condemned inmates and "an untold number" of them, *see* Pet. at 24, 25, and sounds the alarm that they may clog the courts with *Beck*-based, sentencing phase jury instruction claims upon which some may actually obtain sentencing relief.

This is a continuation of the flawed argument, discussed above, that suggests we cannot trust our state and lower federal courts. The decision below did not strip the State of available defenses to habeas claims, it did not modify AEDPA and it most certainly did not curtail the powers of any state or federal court.

A handful of un-defaulted, fully exhausted *Beck*-based, sentencing phase instruction claims may reach the Sixth Circuit from the Ohio courts. But the number will be small and become even smaller as the pool of capital cases tried before March 4, 1996, when *Brooks* was decided, and that are still pending in post-conviction litigation, is resolved.

4. The decision below does not conflict with *Spisak* because the jury instruction claim in that case differs significantly from the claim addressed below.

The Sixth Circuit's decision, below, was based on the panel's interpretation of *Beck* in the context of a capital sentencing proceeding after ordering supplemental briefing from the parties on the issue. Mitts' panel did not reject this Court's holding in *Smith v. Spisak*, 558 U.S. __, 130 S.Ct. 676 (2010); rather, it decided Mitts' claim on a different basis. Although it is true that *Spisak* and Mitts' case involve similar jury instructions on the jurors' choice between life and death, Mitts claim has consistently been limited to the acquittal-first issue. The Court in *Spisak* focused on Spisak's claim that his instructions "unconstitutionally required [his] jury to consider in mitigation

only those factors that it *unanimously* found to be mitigating." 130 S.Ct. at 680 (emphasis by the Court). This Court summarily rejected Spisak's acquittal-first claim: "We have not . . . previously held jury instructions unconstitutional for this reason. *Mills*[*v. Maryland,* 486 U.S. 367 (1988)] says nothing about the matter. Neither the parties nor the courts below referred to *Beck* . . ." *Id*., at 684.

In addition, the majority below found that *Beck* was adequately invoked in the State Court proceedings because on direct appeal to the Ohio Supreme Court, Mitts grounded his acquittal-first claim upon *State v. Thomas*, 40 Ohio St. 3d 213, 533 N.E.2d 286 (Ohio 1988), *cert. denied*, 443 U.S. 826 (1989) (discussing *Beck*). *Mitts*, 620 F.3d at 655-56. There is no record that Spisak did likewise.

There is a third feature that distinguishes Mitts' case from *Spisak*. After delivering the basic penalty phase instructions, akin to those in *Spisak*, Mitts' trial judge explained how the jury should choose between the available life sentences: "If you find that 30 full years is not the appropriate sentence or if you are unable to unanimously agree, then you will proceed to consider the third [20 full years to life] verdict." (J.A. at 2439.) If this language had been included in Mitts' life vs. death instruction, his claim that the instruction violated the Constitution would be completely obviated. Instead, because Mitts' jury heard two distinct formats under which they were to consider their choices, one for life vs. death, the other for life options, it was logical for the jurors to apply the acquittal-first instruction to the death penalty, i.e. to conclude that they had unanimously to acquit Mitts' of death before considering any the life options. Mitts has consistently cited the disparity between these two facets of his sentencing phase instructions in support of his habeas claim.

5. There is an open question whether AEDPA will apply if certiorari is granted, or whether the *Beck* issue will have to be reviewed *de novo*.

If this Court were to conclude, as the Warden argues, that Mitts "fail[ed] to raise *Beck* to the State courts or in his habeas proceedings," Pet. at 10, the manner in which the *Beck* issue is reviewed comes into play. The Warden has opted to forego the defenses of procedural default and exhaustion. Thus, if the Warden is correct, the *Beck* question is before this Court without having been presented to or adjudicated on the merits by the highest court of the State.

Should this Court grant certiorari to review the applicability of *Beck* to Ohio's sentencing phase jury instructions, the review will have to proceed *de novo*, for AEDPA provides no framework for such review. The Court cannot decide whether the State adjudication did or did not "result[] in a decision on this question that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by" this Court, *see* 18 U.S.C. § 2254(d)(1), where there is no decision to examine under the statute, and this case will have to be decided after a *de novo* merits review.

CONCLUSION

For the foregoing reasons, the Court should deny the Warden's Petition for a Writ of Certiorari.

Respectfully submitted,

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