No. 10-1000

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

MICHAEL DEWINE
Attorney General of Ohio

ALEXANDRA T. SCHIMMER*
Solicitor General
**Counsel of Record*
DAVID M. LIEBERMAN
Deputy Solicitor
CHARLES L. WILLE
Assistant Attorney General
30 East Broad St., 17th Floor
Columbus, Ohio 43215
614-466-8980
alexandra.schimmer@
ohioattorneygeneral.gov

Counsel for Petitioner
David Bobby, Warden

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REPLY BRIEF OF THE PETITIONER

In his Opposition, Respondent Harry Mitts offers no substantive defense of the Sixth Circuit's decision to extend *Beck v. Alabama*, 447 U.S. 625 (1980), to penalty-phase jury instructions. Nor could he. This Court has already stated that the *Beck* rule regarding guilt-phase instructions in capital cases is "not directly translatable" to capital sentencing proceedings. *California v. Ramos*, 463 U.S. 992, 1009 (1983).

Instead, Mitts claims that the panel's decision is insignificant and unworthy of this Court's attention. That is wrong. As the Warden's Petition explained, the Sixth Circuit's decision presents three independent grounds for certiorari—and indeed, summary reversal: (1) it ignored controlling precedent from this Court; (2) it deepened a circuit split on the scope of the *Beck* rule; and (3) it cast a cloud of unconstitutionality over Ohio's death penalty system. Mitts does not and cannot dispel any of these concerns.

A. The *Spisak* Court already rejected the claim that identical jury instructions violate clearly established federal law.

The Sixth Circuit stated that the penalty-phase jury instructions at Mitts's trial "w[ere] contrary to clearly established federal law." App. 30a. In denying relief to the habeas petitioner in *Smith v. Spisak*, 130 S. Ct. 676 (2010), this Court concluded that identical instructions "were not contrary to 'clearly established Federal law.'" *Id.* at 684 (citation omitted).

Mitts finds no conflict in these seemingly inconsistent outcomes because, he says, *Spisak*

"differs significantly" from this case. Opp. at 4. That is wrong.

The penalty-phase jury instructions in the two cases were identical. Mitts himself made that observation below: "The Petitioner in *Spisak* was tried and convicted in 1983" and "the same instruction was used in Mr. Mitts' trial in 1994." Apt. Br. at 57, *Mitts v. Bagley*, No. 05-4420 (6th Cir. Oct. 21, 2008). Likewise, the Sixth Circuit recognized that "[t]he jury instructions at issue in *Spisak* are the same as those given by the *Mitts* Court." App. 29a.

Not only were the instructions identical, but the claims in the two cases are also identical. In *Spisak*, the habeas petitioner argued that the penalty-phase instructions were unconstitutional because they "command[ed] 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. Mitts advances the very same objection here: He argues that his penalty-phase jury instructions were unconstitutional because they directed the jury to "unanimously . . . acquit Mitts of death before considering any life options." Opp. at 5.

In short, both cases implicate the same jury instruction and the same constitutional argument. Logically, they should arrive at the same outcome.

The Sixth Circuit concluded otherwise. But the court justified its grant of habeas relief to Mitts by referencing Justice Stevens's *Spisak* concurrence. In an opinion joined by no other member of the Court, Justice Stevens articulated his belief that Ohio's

penalty-phase instructions violated *Beck*. The Sixth Circuit said that it was free to adopt that viewpoint because "[n]o other justice" in *Spisak* "reached th[e] *Beck* issue." App. 17a.

Not so. After rejecting the petitioner's *Mills v. Maryland*, 486 U.S. 367 (1988), claim, the eight-member majority in *Spisak* observed that the Sixth Circuit "found the jury instructions unconstitutional for an additional reason"—they "required the jury to unanimously reject a death sentence before considering other sentencing alternatives." 130 S. Ct. at 684 (alteration and citation omitted).

The Court acknowledged Justice Stevens's endorsement of that proposition. *Id.* But it then indicated that the Court "ha[d] not . . . previously held jury instructions unconstitutional for this reason," and that Justice Stevens's reading of *Beck* did not provide grounds for habeas relief: "Whatever the legal merits of the rule . . . were we to consider them on direct appeal, the jury instructions at Spisak's trial were not contrary to 'clearly established Federal law.'" *Id.* (citation omitted). In short, the *Spisak* majority *did* address whether a *Beck* claim merited habeas relief, and it rejected such a proposition.

That holding resolved the habeas inquiry in *Spisak*, and it should have resolved the inquiry here. Instead, the Sixth Circuit ignored the Court's directive and gave precedential force to a concurring opinion. And it did all this despite the deferential standards of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254, and its focus on the clearly-established-law line of inquiry. That highly irregular deviation warrants

immediate correction—indeed, summary reversal—by this Court.

B. The Sixth Circuit parted company from two other circuits when it extended *Beck* to capital sentencing proceedings.

A second reason for certiorari exists: There is now a disagreement among the circuits about *Beck*'s applicability to the penalty phase of a capital trial.

Mitts argues that the Warden's "purported circuit split is a phantom," but he is wrong. Opp. at 2. The Eighth and Eleventh Circuits have concluded that "*Beck* is not directly applicable in capital sentencing hearings." *United States v. Chandler*, 996 F.2d 1073, 1084 (11th Cir. 1993) (citation omitted); accord *Parker v. Norris*, 64 F.3d 1178, 1186-87 (8th Cir. 1995). In this case, the Sixth Circuit reached the opposite conclusion—that *Beck* does apply to the penalty-phase proceedings. App. 29a-30a. Therefore, the disagreement among the circuit courts is genuine and stark.

The Ninth Circuit also took an expansive view of *Beck* in a case that pre-dated *Spisak*. In *Murtishaw v. Woodford*, 255 F.3d 926 (9th Cir. 2001), the court invalidated a California penalty-phase instruction because the "jury might have believed it had no alterative to imposing the death penalty if it found aggravating circumstances even slightly outweighed mitigating circumstances." *Id.* at 972. The court justified its decision by reference to *Beck*: *Id.* at 972-93 ("As in *Beck*, such a mistaken ultimatum constitutes a miscarriage of justice and violates due process.").

Mitts objects to the Warden's invocation of *Murtishaw*. The Ninth Circuit, he contends, "did not hold that *Beck* applies to capital jury instructions." Opp. at 1. That objection is unfounded. In his Sixth Circuit pleadings, Mitts noted that one circuit "has applied *Beck* to penalty phase instructions." Supp. Apt. Br. at 17, *Mitts v. Bagley*, No. 05-4420 (6th Cir. Apr. 26, 2010). He then cited *Murtishaw* and urged the Sixth Circuit to follow the Ninth Circuit's lead. *Id.* at 17, 21.

In any event, the dispute about *Murtishaw* is unimportant. Even if that case were excluded from the sample, the panel's decision here creates a two-to-one circuit split about the applicability of *Beck* to the penalty phase of capital proceedings.

C. The Sixth Circuit's decision destabilizes Ohio's capital punishment scheme.

Contrary to Mitts's view, the Sixth Circuit's decision is of tremendous importance to the State of Ohio.

1. The decision applies to twenty-four similarly-situated prisoners.

The Sixth Circuit's opinion affects a significant number of pending cases. After the Sixth Circuit denied en banc rehearing, the Ohio Attorney General reviewed every Ohio capital case now pending in federal district court and the Sixth Circuit. He identified twenty-four cases that mirror the facts and posture of this case. In each, the state trial court issued similar penalty-phase jury instructions, and the petitioner challenged them as improper under *Mills* (but not *Beck*). The Sixth Circuit's decision, if allowed to stand, will control those cases.

Mitts says there is no reason for concern because "[t]he decision below did not strip the State of available defenses to habeas claims." Opp. at 4. But the decision does just that. Any invocation of the contemporaneous objection rule by the State will now be fruitless. Although Mitts failed to object to the jury instructions at trial (subjecting the claim to plain-error review on direct appeal), the Sixth Circuit refused to find waiver. App. 24a-25a.

Any attempt by the State to highlight a procedural default will also fail. Although Mitts failed to raise a *Beck* claim on direct appeal or in his habeas petition, the Sixth Circuit found that Mitts preserved a *Beck* claim because he advanced the same basic theory "in a slightly different dress made by the same dress-maker out of the same cloth." App. 29a, n.2.

Nor does the State have a viable defense under 28 U.S.C. § 2254(d). The Sixth Circuit adopted Justice Stevens's *Spisak* concurrence as a correct statement of law. Notwithstanding the *Spisak* majority's explicit rejection of Justice Stevens's position, see 130 S. Ct. at 684, the panel then concluded that Justice Stevens's position was "clearly established law" because it was "decided thirty years ago" in *Beck*. App. 28a, n.2. Thus, any capital prisoner sentenced after 1980 stands to benefit from the Sixth Circuit's decision.

Simply put, the Sixth Circuit demolished every procedural roadblock for a capital prisoner seeking relief under *Beck*.

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

Mitts also suggests that the Sixth Circuit's decision is confined to "a small number of cases . . . tried before March 4, 1996." Opp. at 3. Again, he is wrong. Despite being tried in 1997, another capital prisoner recently prevailed on a claim that his penalty-phase instructions violated the Sixth Circuit's "unusual" interpretation of *Beck*. *Jackson v. Bradshaw*, No. 2:03-cv-983, 2010 U.S. Dist. Lexis 137799, at *10 (N.D. Ohio Dec. 16, 2010). Additional cases will presumably follow.

The ramifications of the Sixth Circuit's decision are tied to the expansive nature of its analysis. The court invalidated Mitts's penalty-phase instructions because (1) they required imposition of the death penalty if the jury found beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating factors; and (2) they directed the jury to perform this weighing task at the "first step" of its deliberations. App. 25a.

As the Warden's Petition explained, Ohio still uses these procedures.[1] See Pet. at 27-28. Thus, the Warden is concerned that the Sixth Circuit's decision

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[1] Such procedures are hardly unique to Ohio. For instance, Pennsylvania instructs a capital jury (1) that it "must" return "a sentence of death" if the aggravating circumstances outweigh the mitigating factors, 42 Pa. Const. Stat. § 9711(c)(1)(iv); and (2) that its sentencing decision depends entirely "upon what [it] finds about aggravating and mitigating circumstances," Pa. Sugg. Stand. Crim. Jury Instructions 15.2502F(1) (2010). In *Blystone v. Pennsylvania*, 494 U.S. 299 (1990), the Court rejected an Eighth Amendment challenge to this scheme.

applies to an untold number of capital prisoners, not just the twenty-four mentioned above.

Attempting to downplay the State's concerns, Mitts observes that the Ohio Supreme Court amended the capital jury instructions in 1996. Opp. at 3. But he misjudges the import of those revisions.

In 1996, the Ohio Supreme Court directed trial courts to inform capital juries that "a solitary juror may prevent a death penalty recommendation" if she individually "find[s] that the aggravating circumstances in the case do not outweigh the mitigating factors." *State v. Brooks*, 661 N.E.2d 1030, 1042 (Ohio 1996). The court undertook no constitutional analysis; its holding rested entirely on "the policy behind the [capital punishment] statute." *Id.*

In any event, this supplemental instruction does not address the two deficiencies identified by the Sixth Circuit in this case—the "mandatory" nature of Ohio's instructions, and the fact that Ohio directs the jury to balance the aggravators and the mitigators at the first step of its deliberations. Thus, the 1996 revisions do not cabin the scope of the Sixth Circuit's decision.

And the Court need not take the Warden's word for it. The author of the Sixth Circuit's decision has elsewhere observed 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*." *Goff v. Bagley*, 601 F.3d 445, 483 (6th Cir. 2010) (Merritt, J., dissenting) (emphasis added). Given that assessment, the State is justifiably alarmed that the Sixth Circuit's application of

Beck—in plain disregard of *Spisak*—effectively vacates the death sentences for "almost all" of its capital prisoners. *Id.*

If such significant consequences are to be imposed on the State and its citizens, they should occur only after careful deliberation from this Court.

D. AEDPA applies to this case.

As a final matter, Mitts contends that "if certiorari is granted," the applicability of AEDPA is "an open question." Opp. at 6. He then urges this Court to undertake a de novo review of his *Beck* claim.

Mitts's position has no merit. Six federal judges have issued opinions in this case and all six have concluded that AEDPA applies. See App. 6a (Sutton, J., & Kethledge, J., concurring); App. 19a (panel op.); App. 43a (Siler, J., dissenting); App. 180a (dist. ct. op.).

Under AEDPA, only two outcomes are possible: If Mitts failed to raise a *Beck* claim to the state courts, then the claim is defaulted and federal habeas review is barred. See 28 U.S.C. § 2254(b)(1)(A); *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). But if Mitts did press the claim in state court (by raising the same basic theory "in a slightly different dress made by the same dress-maker," App. 29a, n.2), then he loses on the merits because the penalty-phase instructions "were not contrary to 'clearly established Federal law.'" *Spisak*, 130 S. Ct. at 684 (quoting 28 U.S.C. § 2254(d)(1)).

Finally, even if this Court were to accept Mitts's invitation and undertake a de novo review of the

Beck claim, the result would not change. As the Warden noted previously, see Pet. at 18-21, this Court has already confined *Beck* to the guilt phase of a capital trial. In *Ramos*, it stated that the rationale of *Beck* "is *simply not directly translatable* to the deliberative process in which the capital jury engages in determining the appropriate penalty." 463 U.S. at 1009 (emphasis added).

Mitts offers no authority for his contrary position that *Beck* does extend to the penalty phase, and no such authority exists.

CONCLUSION

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

Respectfully submitted,

MICHAEL DEWINE
Attorney General of Ohio

ALEXANDRA T. SCHIMMER*
Solicitor General
**Counsel of Record*
DAVID M. LIEBERMAN
Deputy Solicitor
CHARLES L. WILLE
Assistant Attorney General
30 East Broad St., 17th Floor
Columbus, Ohio 43215
614-466-8980
alexandra.schimmer@
ohioattorneygeneral.gov

Counsel for Petitioner
David Bobby, Warden

March 18, 2011

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