-TPK Jackson v. Bradshaw Doc. 80

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

KAREEM JACKSON,

Petitioner,

v.

MARGARET BRADSHAW, Warden,

Respondent.

Case No. 2:03-cv-983
JUDGE GREGORY L. FROST
Magistrate Judge Terence P. Kemp

OPINION AND ORDER

The Court issued final judgment on September 28, 2007 dismissing Petitioner's death penalty habeas corpus action. (Doc. # 56.) This matter is before the Court on the Sixth Circuit's March 4, 2010, remand to consider a question that arose while the case was pending on appeal (Doc. # 71). Also before the Court are the Brief of Petitioner-Appellant Kareem Jackson (Doc. # 76), the Brief of Respondent-Appellee Warden Bradshaw, the Reply Brief of Petitioner-Appellant Kareem Jackson (Doc. # 78), and Petitioner's Motion for Leave to File Additional Authority (Doc. # 79).

The Sixth Circuit has remanded this case pursuant to 28 U.S.C. § 2106 for this Court to consider a narrow issue: whether the mitigation-phase jury instructions in Petitioner's case violate *Beck v. Alabama*, 447 U.S. 625 (1980), as explained by Justice Stevens' recent concurring opinion in *Smith v. Spisak*, 558 U.S. ___, 130 S.Ct. 676, 688 (Jan. 12, 2010). (Doc. # 71, at 1-2.) The issue arises, according to the Sixth Circuit, from the following questions:

> Does any instruction in this case put the jury on notice concerning (1) which party has the burden of proof in establishing the existence of one or more mitigating factors or whether collectively the mitigators outweigh the aggravators, or (2) whether unanimity is required as to the existence of one or all of the mitigators, or, finally (3) what effect it would have on the verdict if a single juror believes, without agreement from other jurors, that a particular mitigator should reduce the penalty to life imprisonment without parole?

(Doc. # 71, at 1-2.)

The issue also arises in part from the reality that although the Ohio Supreme Court made a change to capital jury instructions in *State v. Brooks*, 75 Ohio St. 3d 148, 162 (1996), requiring

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thereafter that capital juries be instructed that "[i]n 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," it appears that not all juries in capital cases in Ohio are receiving this instruction. The Sixth Circuit accordingly recognized the following additional questions: "In this case, which was tried after *Brooks*, was there any such instruction? If not, why not? If not, did the instructions given in this case violate the rule of Due Process set out in *Beck v. Alabama*, as explained by Justice Stevens' opinion in the *Spisak* case?" (Doc. # 71, at 3.)

Compliance with the Sixth Circuit's instructions compels this Court to examine the concurring opinion by Justice Stevens underlying the remand. In *Mills v. Maryland*, 486 U.S. 367, 384 (1988), the Supreme Court required a new sentencing hearing in a case where the jury instructions and verdict forms had the effect of telling the jury that it could not find a particular circumstance to be mitigating unless all twelve jurors agreed that the defendant had proven the mitigating circumstance. The Supreme Court's decision was in keeping with the well-established principles (1) that the sentencer in a capital case may not be precluded from considering as a mitigating factor any aspect of the accused's character or background or the circumstances of the offense; and (2) that the sentencer in a capital case may not refuse to consider or be precluded from giving effect to any relevant mitigating evidence. *Id*. at 374-75 (citing *Eddings v. Oklahoma*, 455 U.S. 104, 110, 114 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality); *Skipper v. South Carolina*, 476 U.S. 1, 4, (1986)).

In *Smith v. Spisak*, 130 S. Ct. 676 (2010), the Supreme Court rejected a petitioner's contention that the "acquittal-first" instructions from the mitigation phase of his capital trial violated *Mills v. Maryland*. The flawed jury instructions and verdict forms in *Mills* required the jury to make three distinct determinations. First, the jury had to determine whether the aggravating circumstance had been proven to exist. Second, the jury had to mark a "yes" or "no" on a line next to each and every mitigating factor offered to indicate whether the jury

believed that the defendant had proven the mitigating factor to exist. Finally, the jury had to determine whether the aggravating circumstance it found to exist outweighed the mitigating factor(s) it found to exist; in so doing, the jury could consider only those mitigating factors next to which the jury had written "yes" during the second part of the deliberations. In rejecting the petitioner's *Mills* claim in *Spisak*, the Supreme Court explained that the jury instructions and verdict forms at issue differed significantly from those in *Mills*:

> The instructions and forms made clear that, to recommend a death sentence, the jury had to find, unanimously and beyond a reasonable doubt, that each of the aggravating factors outweighed any mitigating circumstances. But the instructions did not say that the jury must determine the existence of each individual mitigating factor unanimously. Neither the instructions nor the forms said anything about how–or even whether–the jury should make individual determinations that each particular mitigating circumstance existed. They focused only on the overall balancing question. And the instructions repeatedly told the jury to "conside[r] all of the relevant evidence." *Id*., at 2974. In our view the instructions and verdict forms did not clearly bring about, either through what they said or what they implied, the circumstances that *Mills* found critical . . . .

Spisak, 130 S.Ct. at 684.

In a concurring decision, Justice Stevens agreed that the jury instructions did not violate *Mills*; the instructions did, however, in his view, violate *Beck v. Alabama*, 447 U.S. 625 (1980). *Spisak*, 130 S. Ct. at 689. Justice Stevens explained that the *Beck* Court held that the imposition of the death penalty was improper where the jury was not permitted to consider a verdict of guilt on a lesser included non-capital offense because

> "the difficulty with the Alabama statute is that it interjects irrelevant considerations into the fact-finding process, diverting 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. Thus, on the one hand, the unavailability of the third option of convicting on a lesser included offense may encourage the jury to convict for an impermissible reason–its belief that the defendant is guilty of some serious crime and should be punished. On the other hand, the apparently mandatory nature of the death penalty may encourage it to acquit for an equally impermissible reason–that, whatever his crime, the defendant does not deserve death."

Id. at 690 (quoting *Beck*, 447 U.S. at 642-43). Justice Stevens reasoned that the "acquittal-first" jury instructions at issue in *Spisak* "interposed before the jury the same false choice that our holding in *Beck* prohibits." *Id.* Justice Stevens explained:

> By requiring Spisak's jury to decide first whether the State had met its burden with respect to the death sentence, and to reach that decision unanimously, the instructions deprived the jury of a meaningful opportunity to consider the third option that was before it, namely, a life sentence. Indeed, these instructions are every bit as pernicious as those at issue in *Beck* because they would have led individual jurors (falsely) to believe that their failure to agree might have resulted in a new trial and that, in any event, they could not give effect to their determination that a life sentence was appropriate unless and until they had first convinced each of their peers on the jury to reject the death sentence.

Id. at 690-91 (Stevens, J., concurring). Justice Stevens concluded that "Spisak and the Court of Appeals both correctly assailed the jury instructions at issue in this case, but in my view *Beck* provides the proper basis in clearly established federal law to conclude the instructions were unconstitutional."[1] *Id.* at 691.

In light of Justice Stevens' foregoing concurring opinion and his interpretation of *Beck*, the Sixth Circuit has directed this Court to make new findings of fact and conclusions of law regarding the constitutionality of the penalty-phase jury instructions that Petitioner challenged in his eighth and ninth grounds for relief. In his eighth ground for relief, Petitioner argued that his jury was required to unanimously rule out the death penalty before it could consider the life sentence options, contrary to the Sixth, Eighth, and Fourteenth Amendments. Petitioner complained that the instruction at issue constituted an "acquittal-first" instruction that was in violation of *Mills v. Maryland* by telling the jurors in this case that they could not consider mitigating factors unless they first agreed that the death penalty was inappropriate. Petitioner then argued in his ninth ground for relief that his jury was required to unanimously recommend a life sentence in violation of Petitioner's Fourteenth Amendment rights to a fair trial and due process. Such instructions are unconstitutional, Petitioner reasoned, because they left the jury unaware that a life sentence could result from a single juror finding that the aggravating

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[1] Justice Stevens ultimately concluded, however, that the error did not entitle Spisak to relief because "in light of Spisak's conduct before the jury and the gravity of the aggravating circumstances of the offense, the instructional error was . . . harmless because it did not have a substantial and injurious effect on this record, *Brecht v. Abrahamson*, 507 U.S. 619, 623, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993)." *Spisak*, 130 S. Ct. at 693 (Stevens, J., concurring).

circumstances did not outweigh the mitigating factors beyond a reasonable doubt or, in other words, the failure of the jury to achieve unanimity on a finding that a death sentence was appropriate.

This Court rejected Petitioner's claims, concluding first that his eighth ground for relief was without merit because the challenged instruction was not an "acquittal-first" instruction in violation of *Mills* and its progeny. (Doc. # 56, at 161-62.) The Court explained that "nowhere did those instructions suggest to the jury that it was required to unanimously find that the aggravating circumstances did not outweigh the mitigating factors before it could consider the life sentence options." (*Id*. at 162.) This Court rejected the unanimity argument at the heart of Petitioner's ninth ground for relief, explaining:

> It is true that a jury need not be unanimous in order to consider the various life sentence options (by finding that death is not an appropriate sentence). But once a jury reaches the point where it has rejected a death sentence, even if only because of the jury's inability to agree that the aggravating circumstances outweighed the mitigating factors, whatever life sentence option the jury eventually recommends must be unanimous. (Citations omitted.) That is all that the verdict forms and instructions that Petitioner challenges herein required and that was an accurate description of Ohio law.

(*Id*. at 163.)

Despite 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, the Sixth Circuit adopted and consequently gave precedential force to Justice Stevens' rationale via *Mitts v. Bagley*, 620 F.3d 650, 653 (6th Cir. 2010). In *Mitts*, the Sixth Circuit struck down as unconstitutional penalty-phase instructions that "require[d] the jury to first determine whether the aggravating elements necessary for a mandatory death penalty are present and to impose the death penalty if the aggravating elements predominate. . . . Only if the jury first acquits the defendant of the death penalty may the jury consider life imprisonment or any lesser-included offense." *Id*. The Sixth Circuit began its analysis by describing the problem created by the challenged instructions:

> The Ohio jury instructions in this case impose two rules on the jury. The first

> is a mandatory death penalty instruction that was recently upheld by the Supreme Court in a 5-4 decision in *Kansas v. March*, 548 U.S. 163, 126 S.Ct. 2516, 165 L.Ed.2d 429 (2006) (overruling Kansas Supreme Court invalidation of Kansas' mandatory death sentence), combined with an acquittal-first rule that tells the jury that, before they can consider mercy and some form of life imprisonment, they must determine whether the factors are present requiring imposition of the mandatory death penalty. Under this rule, the jurors may not extend mercy to the defendant until after they have weighed aggravators and mitigators and have acquitted the defendant of the elements that automatically impose the death penalty. The issue on the merits is the constitutionality of the combined effect of two rules that together require the jury as a first step, before considering mercy, to make a decision to acquit the defendant of the mandatory death sentence. Does this first step process requiring a decision on the mandatory death penalty interfere with the jury's ability to give independent weight to factors that could lead one or more jurors to prefer life imprisonment? Does the combined effect of the two rules run the risk of causing one or more jurors to neglect or omit the serious consideration of mercy and life imprisonment as a choice? Justice Stevens in *Spisak* explains the answer to these questions: the Ohio set of jury instructions, both by their literal language and their purpose, only allows for consideration of a sentence of life after consideration of the mandatory death penalty is completed by a verdict of acquittal.

Mitts, 620 F.3d at 656-57. Ultimately, the Sixth Circuit granted relief on the *Mitts* petitioner's claim challenging the instructions, explaining:

> The jury instructions at issue in *Spisak* are the same as those given by the *Mitts* Court. The Ohio Supreme Court held in *Mitts* that under Ohio law the jury could consider "possible life sentences" only "if all twelve members of the jury found that the State had not proved that the aggravating circumstances" predominated. 690 N.E.2d at 531. The *Mitts* Court cited Ohio Revised Code § 2929.03(D)(2) for its interpretation that the jury must look first to the mandatory death penalty requirement. Because *Beck* compels that proper instructions must make clear that the jury does not have to complete its death deliberation before considering a life sentence, Mitts' due process rights were violated. Under *Beck*, a jury instruction violates due process if it requires a mandatory death penalty sentence that can only be avoided by an acquittal before the jury has an opportunity to consider life imprisonment. 447 U.S. at 645, 100 S.Ct. 2382. Accordingly, the holding of the Supreme Court of Ohio was contrary to clearly established federal law as determined by the Supreme Court of the United States in *Beck v. Alabama*; and we hereby remand the case to the district court with instructions to issue a writ of habeas corpus vacating Mitts' death sentence unless the State conducts a new penalty phase proceeding within 180 days of remand.

Id. at 658. *Mitts* thus teaches that if the jury instructions and verdict forms at issue in the instant case are of the same effect as the instructions in *Spisak* and *Mitts*, then unless the instructional error was harmless (as in *Spisak*), Petitioner is entitled to vacation of his death sentence if the State does not instead conduct a new mitigation hearing within 180 days of a court order to that effect.

The instructions at the heart of Petitioner's challenge were as follows:

> The prosecution has the burden to prove beyond a reasonable doubt that the aggravating circumstances of which the defendant was found guilty outweigh the factors in mitigation before the death sentence may be signed. To outweigh means to weigh more than, to be more important than. The existence of mitigating factors does not preclude or prevent the death sentence, if you find beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating factors. However, if you are not unanimously convinced by proof beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating factors, then you must choose one of the life sentences.
>
> If you find the aggravating circumstances and the mitigating factors to be of equal weight, then you must choose one of the life sentences.
>
> You shall sentence the defendant to death only if you unanimously find by proof beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating factors.
>
> If you do not so find, you shall consider either a sentence of life without parole eligibility, a life sentence with parole eligibility after serving 30 full years of imprisonment, or a sentence of life without parole eligibility after serving 25 full years of imprisonment. Verdict forms with these four options as to each count will be furnished to you. There will be a total of 16 verdict forms.
>
> * * *
>
> When all 12 agree on the verdict, all of you should sign the appropriate forms in ink and advise my bailiff, you will then be returned to the courtroom.
>
> Let me go over the verdict forms. As I say, there are 16. As I indicated, there are four sentencing options. All of the forms have the same heading. All of the forms have 12 signature spaces, one for the foreperson and the other eleven regular jurors, to sign in this case.
>
> With respect to this form, it reads verdict, Terrance Walker, prior calculation. It reads, "We, the jury in this case, being duly impaneled and sworn, having found the defendant guilty, do unanimously find beyond a reasonable doubt that the aggravated circumstances of which the defendant was found guilty outweigh the mitigating factors, and we recommend that the sentence of death be imposed.
>
> Signed by each and every juror this blank day of January, 1998." There's sufficient signature spaces.
>
> The next one in this is [sic] set is, "We, the jury in this case, being duly impaneled and sworn, having found the defendant guilty do not unanimously find beyond a reasonable doubt that the aggravating circumstances of which the defendant was found guilty outweigh the mitigating factors, and we further unanimously find that the sentence to be imposed is a term of life imprisonment without parole eligibility." There's sufficient signature spaces.
>
> The next one reads in a similar fashion but finds life imprisonment with

> parole eligibility after serving 30 years. Again, with sufficient signature spaces.
>
> The next one reads a similar finding, unanimously finds that sentence to be imposed at a term of life imprisonment with parole eligibility after serving 25 full years, signed by each and every juror.
>
> There are four similar forms for Antorio Hunter on prior calculation. Death, life without parole, and life with 30 full years and life with 25 full years. Okay.

(Tr. Vol. XI, at 199-211.) As the trial judge indicated, immediately following the language on each and every verdict form were twelve lines for the signature of each of the twelve jurors.

The jury instructions in *Spisak* and *Mitts* were identical. For ease of reference, the Court will focus on just the instructions in *Mitts*. They were as follows:

> 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 of the relevant evidence raised at trial, the evidence and testimony received at this hearing and the arguments of counsel, 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.

Mitts, 620 F.3d at 657. Although *Mitts* did not set forth or address the wording of the verdict forms, *Spisak* did. As the Supreme Court explained:

> The judge gave the jury two verdict forms for each aggravating factor. The first one of the two forms said:
>
>> " 'We the jury in this case ... do find beyond a reasonable doubt that the aggravating circumstance ... was sufficient to outweigh the mitigating factors present in this case.
>>
>> " ' We the jury recommend that the sentence of death be imposed ....' "
>
> The other verdict form read:
>
>> " 'We the jury ... do find that the aggravating circumstances ... are not sufficient to outweigh the mitigation factors present in this case.

> “ ‘We the jury recommend that the defendant ... be sentenced to life imprisonment . . . .’ ”

Spisak, 130 S. Ct. at 684 (citations to record omitted).

The instructions in the instant case are not word-for-word identical to the instructions in *Mitts* and *Spisak*. But the wording that differentiates the instructions in the instant case makes them no less egregious than the instructions in *Mitts* and *Spisak*. Everything about the jury instructions and verdict forms, whether read as a whole or parsed, told the jury exactly what Justice Stevens in *Spisak* and the Sixth Circuit in *Mitts* said violate *Beck v. Alabama*. The instructions told the jury that it must *first* consider whether the State had met its burden with respect to the death sentence and answer in the negative *unanimously*. The instructions failed to provide the jury with a clear understanding what its failure to achieve unanimity on death might mean, thereby depriving the jury of a meaningful opportunity to consider the “third” option available to it of one of the life sentence options. As Justice Stevens explained, such acquittal-first instructions violate the Constitution

> because they would have led individual jurors (falsely) to believe that their failure to agree might have resulted in a new trial and that, in any event, they could not give effect to their determination that a life sentence was appropriate unless and until they had first convinced each of their peers on the jury to reject the death sentence.

Spisak, 130 S. Ct. at 691 (Stevens, J., concurring.) Seizing upon Justice Stevens’ reasoning, the Sixth Circuit in *Mitts* found the acquittal-first instructions unconstitutional “[b]ecause *Beck* compels that proper instructions must make clear that the jury does not have to complete its death deliberation before considering a life sentence . . . .” *Mitts*, 620 F.3d at 658. The jury instructions and verdict forms in the instant case suffer from the same failing that the instructions in *Spisak* and *Mitts* did.

Both by their wording and presentation, the jury instructions and verdict forms reasonably would have led individual jurors to believe that they had to complete their deliberations on the death sentence before they could consider a life sentence. And nothing from the jury instructions or verdict forms reasonably would have led a juror to understand that a

failure to agree unanimously would have resulted in one of the life-sentence options, as opposed to a result such as a new trial. Under *Mitts*, these two conditions violate *Beck v. Alabama*.

In the instant case, after explaining to the jury what findings would require the jury to recommend a death sentence, the trial court stated: "If you do not so find, you shall consider either a sentence of life without parole eligibility, a life sentence with parole eligibility after serving 30 full years of imprisonment, or a sentence of life without parole eligibility after serving 25 full years of imprisonment." (Tr. Vol. XI, at 200.) The introductory clause of that sentence–if you do not so find (that death is appropriate)–serves as a precondition to the jury considering one of the life sentence options. According to the Sixth Circuit in *Mitts*, conveying the jury's consideration (and rejection) of a death sentence as a precondition to the jury considering a life sentence–rather than indicating what it really is, which is merely one of four choices for the jury to consider– violates *Beck v. Alabama*. *Mitts*, 620 F.3d at 658 ("Under *Beck*, a jury instruction violates due process if it requires a mandatory death penalty sentence that can only be avoided by an acquittal before the jury has an opportunity to consider life imprisonment.") The improper representation of the jury's consideration (and rejection) of death as a precondition to the jury being able to consider the life sentence options likely was only reinforced by the order in which the trial court each time listed the possible verdicts and verdict forms: death, *then* the three life sentence options.

Also problematic to the jury instructions, per Justice Stevens' concurring opinion in *Spisak* and the Sixth Circuit's decision in *Mitts*, is not just the requirement that the jury consider (and reject) death first, but also the implicit requirement in the jury instructions that the jury *unanimously* acquit Petitioner of death before considering life. To be clear, the jury in Petitioner's case was not explicitly told that it had to unanimously acquit Petitioner of the death penalty before considering the life sentence options, as was the case in *Spisak* and *Mitts*. The instructions nevertheless present an intolerable risk that the jurors reasonably believed that such unanimous action was required. Between the emphasis throughout the jury instructions on the

need for any verdict to be unanimous and the implicit apparent premise that jurors had to consider and reject death before even considering any of the life sentence options, it is reasonably likely that the jurors were left with the belief that it was necessary for them to first consider and unanimously reject the death penalty before they could consider the life sentence options. This in and of itself would appear to present a *Beck* violation under Justice Stevens' concurring opinion in *Spisak* and the Sixth Circuit's decision in *Mitts*.

The verdict forms compounded the problem. The verdict form for each life-sentence options began as follows: "We, the jury in this case, being duly impaneled and sworn, having found the defendant guilty *do not unanimously find beyond a reasonable doubt that the aggravating circumstances of which the defendant was found guilty outweigh the mitigating factors*, and we further unanimously find that the sentence to be imposed is a term of life imprisonment without parole eligibility." (Tr. Vol. XI, at 210 (emphasis added).) The bottom of each life-sentence verdict form contained twelve signature spaces requiring each juror to affix his or her name. It strikes this Court as unlikely that a reasonable juror who *did* find beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating factors would understand that he or she should nonetheless sign his or her name to such a verdict form as an acknowledgment that one or more of the other jurors did *not* find beyond a reasonable doubt that the aggravators outweighed the mitigators. Rather, the only logical interpretation that reasonable jurors could give to the life-sentence verdict forms is that in order to recommend one of the life-sentence options, each and every juror had to find that that the aggravators did not outweigh the mitigators. This surely constitutes a *Beck* violation as defined in Justice Stevens' concurring opinion in *Spisak* and the Sixth Circuit's decision in *Mitts*.

What additionally makes the "acquittal-first" instructions given in Petitioner's case constitutionally infirm is the fact that the jury was never clearly instructed that its failure to reach unanimous agreement on a death verdict would result in one of the life sentence options, as opposed to something such as a new trial. As noted above, the emphasis on the need for the

verdict to be unanimous, along with the improper premise that the jury had to consider and reject death before even considering any of the life sentence options, may have led the jurors to believe that it was necessary for them to first consider and unanimously reject the death penalty before they could consider the life sentence options. Even assuming that the jurors were not misled in that manner, there remains the possibility that the jurors were left with a level of uncertainty about what their failure to achieve unanimity on the death verdict might mean that is constitutionally intolerable. In other words, a juror unpersuaded that the aggravators outweighed the mitigators might nevertheless have been persuaded to go along with his or her peers and recommend death if uncertain what his or her lone dissent might spawn–a new trial, for instance. It is such uncertainty that Justice Stevens feared would undermine the reliability of a capital jury's sentencing deliberations. Such uncertainty taints the jury's sentencing deliberations in Petitioner's case.

In sum, the jury instructions at issue herein conveyed to Petitioner's jurors that the only way they could consider life imprisonment was if they first unanimously acquitted Petitioner of the death penalty. Because a death sentenced rendered in such a manner violates *Beck v. Alabama* under Justice Stevens' concurring opinion in *Spisak* and the Sixth Circuit's decision in *Mitts*, it should not stand. It is not clear to this Court, however, that the Court of Appeals empowered this Court to order relief on any error found. The remand directs this Court only to make findings of fact and conclusions of law as specific actions by this trial court concurrent to the appellate court retaining jurisdiction of the case. Accordingly, this Court properly confines today's adjudication of the issues to the express terms of the remand so as to avoid erroneously overstepping this Court's limited role. This Court has simply found the jury instructions invalid in light of *Beck*.

For the foregoing reasons, the Court must conclude that the instructions given in this case violate the rule of Due Process set out in *Beck v. Alabama*, as explained by Justice Stevens' concurring opinion in *Spisak* and as endorsed by *Mitts*. In response to the Sixth Circuit's March

3, 2010 remand, this Court issues the foregoing findings of fact and conclusions of law and advises the Court of Appeals that unless the identified error is deemed harmless,[2] Petitioner should be entitled to a writ vacating his death sentence unless the State of Ohio, within one hundred eighty (180) days from the date of an order providing for such relief, conducts a new mitigation hearing.[3]

IT IS SO ORDERED.

/s/ Gregory L. Frost
GREGORY L. FROST
UNITED STATES DISTRICT JUDGE

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[2] The Court recognizes that Justice Stevens' concurring opinion in *Spisak* ultimately concluded that the instructional error was harmless. That said, the Court of Appeals did not expressly direct this Court to consider whether the instructional error in the instant case was harmless and the Court notes that the Sixth Circuit in *Mitts* did not even discuss or conduct such harmless error review.

[3] Although not dispositive, this Court, out of an abundance of caution, addresses the questions posed by the Court of Appeals in its remand as follows. The Court finds that no jury instruction in this case put the jury on notice as to which party has the burden of proof in establishing the existence of one or more mitigating factors. The Court further finds, upon review of the entire penalty-phase jury charge, that no instructions suggested to the jury that either party bears the burden of proving that collectively the mitigators outweigh the aggravators. Rather, the instructions fairly put the jury on notice that the state bears the burden of proving that the aggravating circumstances outweigh the mitigating factors. (Tr. Vol. XI, at 199-200.) The Court also finds that no instruction expressly or directly put the jury on notice that unanimity was required as to the existence of one or all of the mitigators. The Court further finds, as discussed more fully above, that no jury instruction in this case put the jury on notice as to what effect it would have on the verdict if a single juror believed, without agreement from other jurors, that a particular mitigator should have reduced the penalty to life imprisonment without parole. In other words, there was no clear instruction in the instant case that one of the life-sentence verdicts could result not just from the unanimous verdict of the jury that that was the appropriate sentence but also from the failure of the jury to reach unanimity, even due to the recalcitrance of a single juror, that death was the appropriate sentence. The Court also finds that no "solitary juror" instruction, as set forth in *Brooks*, was given in this case. Finally, for the reasons discussed more fully above in Part II of this Opinion and Order, the Court makes the following finding: The instructions given in this case violate the rule of Due Process set out in *Beck v. Alabama*, as explained by Justice Stevens' opinion in *Spisak* and by the Sixth Circuit in *Mitts*.