

MONDAY, MAY 2, 2011

CERTIORARI -- SUMMARY DISPOSITIONS

09-1521 UNITED STATES V. EASTERN SHAWNEE TRIBE OF OK

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Federal Circuit for further consideration in light of *United States v. Tohono O'odham Nation*, 563 U.S. \_\_\_\_ (2011). Justice Kagan took no part in the consideration or decision of this petition.

10-315 SONIC AUTOMOTIVE V. WATTS, CHRISTINE, ET AL.

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the Supreme Court of South Carolina for further consideration in light of *AT&T Mobility LLC v. Concepcion*, 563 U.S. \_\_\_\_ (2011).

10-398 ) CELLCO PARTNERSHIP V. LITMAN, KEITH, ET AL.

10-551 ) LITMAN, KEITH, ET AL. V. CELLCO PARTNERSHIP

The petitions for writs of certiorari are granted. The judgment is vacated, and the cases are remanded to the United States Court of Appeals for the Third Circuit for further consideration in light of *AT&T Mobility LLC v. Concepcion*, 563 U.S. \_\_\_\_ (2011).

10-1027 MISSOURI TITLE LOANS, INC. V. BREWER, BEVERLY

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the Supreme Court of Missouri for further consideration in light of *AT&T*

*Mobility LLC v. Concepcion*, 563 U.S. \_\_\_\_ (2011).

**ORDERS IN PENDING CASES**

10A887 WELLS, THEODORE W. V. UNITED STATES

The application for a certificate of appealability addressed to Justice Thomas and referred to the Court is denied.

10M106 MOORE, EUGENE H. V. TERRELL, WARDEN

10M107 ANDERSEN, KELVIN D. V. YOUNG & RUBICAM

The motions to direct the Clerk to file petitions for writs of certiorari out of time are denied.

09-1233 BROWN, GOV. OF CA, ET AL. V. PLATA, MARCIANO, ET AL.

The motion of appellants for leave to file a supplemental brief after argument is granted. The motion of appellees for leave to file a supplemental brief after argument is granted.

10-209 LAFLE, BLAINE V. COOPER, ANTHONY

The motion of petitioner to dispense with printing the joint appendix is granted.

10-5443 FOWLER, CHARLES A. V. UNITED STATES

The motion of petitioner for appointment of counsel is granted. Stephen M. Crawford, Esquire, of Tampa, Florida, is appointed to serve as counsel for the petitioner in this case.

10-8020 SPATARO, MICHAEL V. UNITED STATES

The motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* is denied. Justice Kagan took no part in the consideration or decision of this motion.

10-8444 THROCKMORTON, THOMAS E. V. UNITED STATES

10-8833 GILLARD, LISA J. V. NORTHWESTERN UNIVERSITY

The motions of petitioners for reconsideration of orders denying leave to proceed *in forma pauperis* are denied.

10-9209 PURVIS, GINA V. OEST, DANIEL, ET AL.

10-9470 BARRY, BOUBACAR V. HOLDER, ATT'Y GEN.

10-9617 LUKASIEWICZ-KRUK, MONIKA V. GREENPOINT YMCA, ET AL.

The motions of petitioners for leave to proceed *in forma pauperis* are denied. Petitioners are allowed until May 23, 2011, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

**CERTIORARI GRANTED**

10-699 M. B. Z. V. CLINTON, SEC. OF STATE

The petition for a writ of certiorari is granted. In addition to the question presented by the petition, the parties are directed to brief and argue the following question: "Whether Section 214 of the Foreign Relations Authorization Act, Fiscal Year 2003, impermissibly infringes the President's power to recognize foreign sovereigns."

10-948 COMPUCREDIT CORP., ET AL. V. GREENWOOD, WANDA, ET AL.

The petition for a writ of certiorari is granted.

**CERTIORARI DENIED**

10-425 BAUER, TORREY, ET AL. V. SHEPARD, RANDALL T., ET AL.

10-836 TIEN, PAUL V. TIEN, MING, ET AL.

10-865 WYNNE, SCOTT V. RENICO, WARDEN

10-962 ALASKA AIRLINES, INC. V. EID, AZZA, ET AL.

10-963 PROGRESSIVE CASUALTY INS. CO. V. ESTATE OF PALOMERA-RUIZ, ET AL.

10-965 LOVELAND, OH V. BD. OF COMM'RS OF HAMILTON CTY.  
10-975 BONDS, SUZANNE D. V. 143 NENUE HOLDINGS, LLC, ET AL.  
10-979 FL DEPT. OF AGRICULTURE, ET AL. V. BOGORFF, TOBY, ET AL.  
10-1034 CATHOLIC LEAGUE FOR RELIGIOUS V. SAN FRANCISCO, CA, ET AL.  
10-1053 PICON, ISOLINA V. BENSON, PETER A., ET AL.  
10-1054 CINCINNATI, OH, ET AL. V. MILLER, MARK, ET AL.  
10-1056 DOE, JOHN, ET AL. V. SILSBEE INDEPENDENT SCHOOL DIST.  
10-1065 O.K. INDUSTRIES, INC., ET AL. V. BEEN, CHARLES, ET AL.  
10-1069 McDONALD, JESSIE D. V. OVERNIGHT EXPRESS, INC., ET AL.  
10-1086 LIBERTY APPAREL CO., ET AL. V. ZHENG, LING N., ET AL.  
10-1101 LOCKWOOD, CLABURN V. ASTRUE, COMM'R, SOCIAL SEC.  
10-1103 ROSALES, WALTER, ET AL. V. UNITED STATES  
10-1112 ISMAIL, MOHAMMED S. V. HOLDER, ATT'Y GEN.  
10-1116 BURLEIGH, WILLIAM B. V. MONTEREY COUNTY, CA, ET AL.  
10-1118 LEWIS, ELVIS D. V. HOLDER, ATT'Y GEN.  
10-1127 RODNEY, DEXTER L. V. HOLDER, ATT'Y GEN.  
10-1142 SELIG, MICHAEL V. ROESHMAN, ROBERT  
10-1159 GARCIA-LAWSON, KATHY A. V. LAWSON, JEFFREY P.  
10-1180 KRAL, DENNIS G., ET AL. V. CHICAGO, IL  
10-1188 ADAIR, NORMAN W., ET AL. V. CIR  
10-1190 CINTRON, NELSON V. UNITED STATES  
10-1205 ARIAS, ANTONIO M. V. UNITED STATES  
10-1216 MONAHAN, WILLIAM P. V. ROMNEY, WILLARD M., ET AL.  
10-8178 PETHTEL, SHAWN V. BALLARD, WARDEN  
10-8276 VIGIL, MANUEL V. UNITED STATES  
10-8676 BRADY, ROGER H. V. CALIFORNIA  
10-9162 C. M. V. WV DEPT. OF HEALTH, ET AL.  
10-9185 ROSAS, ABEL V. LEE, SUPT., GREEN HAVEN

10-9186 BROOKS, DONALD G. V. TENNESSEE  
10-9188 CALHOUN-EL, JAMES A. V. MAYNARD, SEC., MD DOC, ET AL.  
10-9196 SHIVERS, MICHAEL V. THALER, DIR., TX DCJ  
10-9198 PHONGBOUPHA, GERRY V. CALIFORNIA  
10-9202 ALLEN, LLOYD C. V. BUSS, SEC., FL DOC  
10-9205 EVANS, MICHAEL A. V. TIFFIN, WAYNE  
10-9210 MOSHER, PHILLIP L. V. MICHIGAN  
10-9213 LeCLAIRE, WALTER V. PALLITO, COMM'R, VT DOC  
10-9215 MATSUDA, ALISON N. V. HAWAII, ET AL.  
10-9217 NORWOOD, STEPHEN W. V. O'HARE, WARDEN, ET AL.  
10-9219 SPAN, MARIO V. BUSS, SEC., FL DOC, ET AL.  
10-9230 COLEMAN, RICHARD V. BONVILLE & HOWARD, ET AL.  
10-9232 EICHER, MICHELL D. V. DIODATI, ANDREW  
10-9235 SMITH, BENNIE E. V. BUSS, SEC., FL DOC  
10-9241 VINING, JOHN B. V. BUSS, SEC., FL DOC  
10-9247 BROOM, ROMELL V. BOBBY, WARDEN  
10-9252 TAFARI, INJAH V. WEINSTOCK, DANIEL, ET AL.  
10-9264 HOUCK, LAFOND J. V. LOCKETT, SUPT., PITTSBURGH  
10-9266 HUNTLEY, JIMMY V. FRANKE, SUPT., TWO RIVERS  
10-9268 HARRIS, ARTIS V. ILLINOIS  
10-9270 HARMON, ERNEST V. CALIFORNIA  
10-9277 HAMMER, NANCY V. FOREST HIGHLANDS  
10-9279 LiFRIERI, DEMETRIO V. LaVALLEY, SUPT., GREAT MEADOW  
10-9281 BAILEY, STEVEN V. CALIFORNIA  
10-9284 CHANDLER, ANTHONY B. V. STINE, SUPT., NEW CASTLE  
10-9285 DAWSON, CHRISTOPHER V. ILLINOIS  
10-9287 SAMUEL, ALEXANDER V. BROWN, GORDON, ET AL.  
10-9289 RITTER, MARTHA V. RITTER, E. KERFOOT, ET AL.

10-9293 LANE, RAYMOND V. VALONE, A., ET AL.

10-9294 JOHNSON, ANTHONY W. V. HEDGPETH, WARDEN

10-9297 AMIGON, RENE V. ILLINOIS

10-9298 BROOKS, JOE R. V. THALER, DIR., TX DCJ

10-9305 LY, BINH V. MCKUNE, WARDEN, ET AL.

10-9307 RIDENOUR, WILLIAM L. V. COLLINS, WARDEN, ET AL.

10-9315 GILBERT-MITCHELL, WALLACE V. PATTERSON, MARLA, ET AL.

10-9339 WATERS, CHARLIE V. CAIN, WARDEN

10-9376 TISDALE, ANTONIO V. SOUTH CAROLINA

10-9378 TIDWELL, HELEN K. V. FLORIDA

10-9382 AVILA-CANCHOLA, FORTINO V. HOLDER, ATT'Y GEN.

10-9398 SURGICK, ZACHARIAH A. V. MARTINEZ, DEPUTY WARDEN, ET AL.

10-9443 FRANZEN, BRUCE L. V. MCDANIEL, WARDEN, ET AL.

10-9452 CLARK, HERMAN T. V. WILSON, LEON

10-9480 KOWAL, MICHAEL A. V. RHODE ISLAND

10-9496 CONSTIEN, VIRGINIA K. V. UNITED STATES, ET AL.

10-9498 ABULKHAIR, ASSEM V. BUSH, FORMER PRESIDENT OF U.S.

10-9499 ROBINSON, ADAM R. V. MARSHALL, WARDEN

10-9504 ARROZAL, PRESCILLA M. V. SHINSEKI, SEC. OF VA

10-9510 MADISON, DONALD V. ARTUS, SUPT., CLINTON

10-9518 BELL, JAMEL V. NEW YORK

10-9521 TAPIA, JESUS V. ARKANSAS

10-9525 SMITH, JOHN V. ARKANSAS

10-9532 ALLEN, JACK E. V. NAJI, MOHAMMAD, ET AL.

10-9551 WILKIN, ROBERT E. V. DENNEY, WARDEN

10-9568 LaVALLE, STEPHEN V. ARTUS, SUPT., CLINTON

10-9598 EDWIN, MELVIN G. V. WILLIAMS, ACTING WARDEN

10-9645 MCGOWAN, RANDY V. MERRILL, WARDEN

10-9649 BENSON, MICHAEL D. V. MINNESOTA  
10-9658 TATE, CHRISTINE V. DISTRICT OF COLUMBIA  
10-9676 CHAMBERS, ROBERT E. V. HATHAWAY, JUDGE, ETC., ET AL.  
10-9701 SANDOVAL, MANUEL V. TOLEDO CORRECTIONAL INST.  
10-9704 LEWIS, LEON V. TENNIS, SUPT., ROCKVIEW, ET AL.  
10-9713 STEPHENS, MARK A. V. THURMER, WARDEN  
10-9728 BURGESS, REGINALD P. V. HARTFORD LIFE INS. CO.  
10-9756 MILLS, TYLER N. V. WISCONSIN  
10-9773 BELL, MARTHA V. UNITED STATES  
10-9790 PETERS, STEVEN P. V. UNITED STATES  
10-9798 COCKERHAM, JOHN V. UNITED STATES  
10-9800 SESERE, O'BENSON V. UNITED STATES  
10-9804 FIGUEROA-MONTES, FRANKLIN A. V. UNITED STATES  
10-9805 ORR, DANNY W. V. UNITED STATES  
10-9810 GROTE, BENJAMIN V. UNITED STATES  
10-9814 FERMIN, JUAN V. UNITED STATES  
10-9816 HAMILTON, LESLIE J. V. UNITED STATES  
10-9818 GUZMAN, JESSE V. UNITED STATES  
10-9821 GYAMFI, DANIEL V. UNITED STATES  
10-9827 SUAREZ FLORES, JOAQUIN V. UNITED STATES  
10-9828 HAYNES, WILLIS M. V. UNITED STATES  
10-9830 HERVIS, OMAR V. UNITED STATES  
10-9831 GOMEZ, SANTIAGO V. UNITED STATES  
10-9834 RAMIREZ-ACOLTZI, MOISES V. UNITED STATES  
10-9835 PEACOCK, MICAH V. UNITED STATES  
10-9836 SANDERS, SHAUN V. UNITED STATES  
10-9839 GONZALEZ, SALVADOR V. UNITED STATES  
10-9840 HINES, SIDNEY G. V. UNITED STATES

10-9841 HAMES, WILLIAM S. V. UNITED STATES  
10-9842 GRIFFITHS, CHESTER V. UNITED STATES  
10-9845 CLARK, MYLEKE D. V. UNITED STATES  
10-9848 SMITH, TYRONE J. V. UNITED STATES  
10-9850 CRUZ, JUAN G. V. UNITED STATES  
10-9851 ESQUIVEL, RAQUEL V. UNITED STATES  
10-9854 PATTERSON, JONATHON T., ET AL. V. UNITED STATES  
10-9856 ARRELLANO-DePAZ, CONRADO V. UNITED STATES  
10-9857 BAILEY, LUKE A. V. UNITED STATES  
10-9859 BALDWIN, LYNN B. V. UNITED STATES  
10-9863 VEYTIA, ISAIH V. UNITED STATES  
10-9864 URENA-GONZALEZ, LUIS A. V. UNITED STATES  
10-9875 ARMSTRONG, DONALD T. V. UNITED STATES  
10-9878 BELL, RANDALL K. V. UNITED STATES  
10-9894 BLOUNT, BENJAMIN V. UNITED STATES

The petitions for writs of certiorari are denied.

10-405 SIEFERT, JUDGE, ETC. V. ALEXANDER, JAMES C., ET AL.

The motion of Center for Constitutional Jurisprudence for leave to file a brief as *amicus curiae* is granted. The petition for a writ of certiorari is denied.

10-9228 MOORE, WARDELL V. THALER, DIR., TX DCJ

The motion of petitioner for leave to proceed *in forma pauperis* is denied, and the petition for a writ of certiorari is dismissed. See Rule 39.8.

10-9797 DOUGLAS, CORBIN V. UNITED STATES

The petition for a writ of certiorari is denied. Justice Sotomayor took no part in the consideration or decision of this petition.



10-9807 BAZEMORE, LEVON V. UNITED STATES

The motion of petitioner for leave to proceed *in forma pauperis* is denied, and the petition for a writ of certiorari is dismissed. See Rule 39.8. As the petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin v. District of Columbia Court of Appeals*, 506 U.S. 1 (1992) (*per curiam*). Justice Kagan took no part in the consideration or decision of this motion and this petition.

10-9832 KOSACK, ANDREW M. V. UNITED STATES

The petition for a writ of certiorari is denied. Justice Kagan took no part in the consideration or decision of this petition.

10-9844 TRAN, DUONG-CAM V. UNITED STATES

The petition for a writ of certiorari is denied. Justice Sotomayor took no part in the consideration or decision of this petition.

10-9849 SMITH, RICHARD A. V. UNITED STATES

10-9882 TURPIN, RHONDA J. V. UNITED STATES

The petitions for writs of certiorari are denied. Justice Kagan took no part in the consideration or decision of these petitions.

**MANDAMUS DENIED**

10-1057 IN RE ARTHUR O. ARMSTRONG

The petition for a writ of mandamus is denied.

**REHEARINGS DENIED**

10-7797      ANDERSON, JESSE R. V. CLINE, WARDEN, ET AL.  
10-7920      LARSON, ANDREW J. V. WILSON, WARDEN  
10-8100      FREE, PAUL V. UNITED STATES  
10-8281      ALLEN, ANTHONY V. ILLINOIS  
10-8309      STUDY, JOHN O. V. UNITED STATES, ET AL.  
10-8500      REYNOLDS, MICHAEL C. V. WHITEHEAD, LARRY, ET AL.  
10-8828      HOWARD, WILLARD V. UNITED STATES  
10-9075      OESBY, ANTONIO D. V. UNITED STATES

The petitions for rehearing are denied.

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**SUPREME COURT OF THE UNITED STATES**

DAVID BOBBY, WARDEN, PETITIONER *v.*  
HARRY MITTS

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

No. 10–1000. Decided May 2, 2011

PER CURIAM.

An Ohio jury convicted respondent Harry Mitts on two counts of aggravated murder and two counts of attempted murder. He was sentenced to death. At issue here is part of the jury instructions given during the penalty phase of Mitts’s trial. The instructions, in pertinent part, were as follows:

“[Y]ou must determine beyond a reasonable doubt whether the aggravating circumstances, which [Mitts] 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 [Mitts] 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 [Mitts].

“On the other hand, [if] after considering all 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

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beyond a reasonable doubt that the aggravating circumstances with which [Mitts] 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.” App. to Pet. for Cert. 352a–353a.

We considered virtually the same Ohio jury instructions last Term in *Smith v. Spisak*, 558 U. S. \_\_\_, \_\_\_ (2010) (slip op., at 7). See *Mitts v. Bagley*, 620 F. 3d 650, 652 (CA6 2010) (noting that the “instructions in this case are the same Ohio instructions that were given in” *Spisak*). That case, like this one, involved review of a federal habeas petition under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). AEDPA provides, as relevant here, that relief may not be granted unless the state court adjudication “resulted in a decision that was contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States.” 28 U. S. C. §2254(d)(1).

In *Spisak*, we reversed a Court of Appeals decision that had found these instructions invalid under our decision in *Mills v. Maryland*, 486 U. S. 367 (1988). See 558 U. S., at \_\_\_ (slip op., at 8–9). Up until our decision in *Spisak*, Mitts had also pressed the claim that the instructions were invalid under *Mills*. After *Spisak* rejected that claim, the Court of Appeals in this case determined that the instructions were contrary to our decision in *Beck v. Alabama*, 447 U. S. 625 (1980), and accordingly vacated Mitts’s death sentence. See 620 F. 3d, at 658.

In *Beck*, we held that the death penalty may not be imposed “when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense, and when the evidence would have supported such a verdict.” 447 U. S., at 627 (internal quotation marks omitted). We explained that such a scheme intolerably enhances the

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“risk of an unwarranted conviction” because it “interjects irrelevant considerations into the factfinding 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.” *Id.*, at 638, 642. “[F]orcing the jury to choose between conviction on the capital offense and acquittal,” we observed, “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,” even when there is “some doubt with respect to an element” of the capital offense. *Id.*, at 632, 642, 637. Because the scheme in *Beck* created a danger that the jury would resolve any doubts in favor of conviction, we concluded that it violated due process. See *id.*, at 638, 643.

According to the Court of Appeals below, the penalty phase instructions given at Mitts’s trial—and the Supreme Court of Ohio decision upholding their use—were “contrary to” *Beck*, because they “interposed before the jury the same false choice” that our holding in *Beck* prohibits. 620 F. 3d, at 658, 657 (internal quotation marks omitted). Referring to the instructions as “acquittal-first,” the Court of Appeals stated that they impermissibly required the jury to first decide whether to “acquit” Mitts of the death penalty before considering “mercy and some form of life imprisonment.” *Id.*, at 656–657. Interpreting *Beck* to stand for the proposition that “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 Court of Appeals concluded that the instructions given during the penalty phase of Mitts’s trial unconstitutionally “deprived the jury of a meaningful opportunity to consider” a life sentence. 620 F. 3d, at 658, 657 (internal quotation marks omitted).

The instructions here are surely not invalid under our

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decision in *Beck*. The concern addressed in *Beck* was “the risk of an unwarranted *conviction*” created when the jury is forced to choose between finding the defendant guilty of a capital offense and declaring him innocent of any wrongdoing. 447 U. S., at 637 (emphasis added); *id.*, at 638; see also *Spaziano v. Florida*, 468 U. S. 447, 455 (1984) (explaining that the “goal of the *Beck* rule” is “to eliminate 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”); *Schad v. Arizona*, 501 U. S. 624, 646 (1991) (“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”).

The question here, however, concerns the penalty phase, not the guilt phase, and we have already concluded that the logic of *Beck* is not directly applicable to penalty phase proceedings. In *California v. Ramos*, 463 U. S. 992 (1983), we rejected an argument that *Beck* prohibited an instruction to “a capital sentencing jury regarding the Governor’s power to commute a sentence of life without possibility of parole.” 463 U. S., at 994, 1006–1009. In so doing, we noted 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. In light of that critical distinction, we observed that “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; see also *Schad, supra*, at 647 (stating that the “central concern of *Beck* simply is not implicated” when the “jury was not faced with an all-or-nothing choice between the offense of conviction (capital murder) and innocence”).

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The jurors in Mitts’s case could not have plausibly thought that if they declined to recommend the death penalty Mitts would “escape all penalties for his alleged participation in the crime.” *Beck, supra*, at 629. They had just convicted him on two counts of aggravated murder and two counts of attempted murder. They were specifically instructed that if they did not find that the aggravating factors outweighed the mitigating factors—and therefore did not recommend the death penalty—they would choose from two life sentence options. There is accordingly no reason to believe that the jurors in this case, unlike the jurors in *Beck*, could have been improperly influenced by a fear that a decision short of death would have resulted in Mitts walking free.

We all but decided the question presented here in *Spisak* itself. After rejecting the contention that the Ohio instructions were contrary to *Mills*, we noted that “the Court of Appeals found the jury instructions unconstitutional for an additional reason, that the instructions ‘require[d] the jury to unanimously reject a death sentence before considering other sentencing alternatives.’” 558 U. S., at \_\_\_\_ (slip op., at 9) (quoting *Spisak v. Mitchell*, 465 F. 3d 684, 709 (CA6 2006)). That is essentially the *Beck* claim presented here. See 620 F. 3d, at 658 (holding that 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”). We rejected that claim in *Spisak* under AEDPA, noting that “[w]e have not . . . previously held jury instructions unconstitutional for this reason.” 558 U. S., at \_\_\_\_ (slip op., at 9). Although neither the parties nor the courts below in *Spisak* had cited *Beck*, a separate concurrence in *Spisak* would have struck down the instructions in reliance on that decision. See 558 U. S., at \_\_\_\_ (Stevens, J., concurring in part and concurring in judgment) (slip op., at 3–6). The Court nonetheless

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concluded that whatever the merits of that argument on direct review, “the jury instructions at Spisak’s trial were not contrary to ‘clearly established Federal law’” under AEDPA. *Id.*, at \_\_\_ (slip op., at 9). The same conclusion applies here.

The petition for certiorari and the motion for leave to proceed *in forma pauperis* are granted. The judgment of the Court of Appeals for the Sixth Circuit is

*Reversed.*