No. 24-695

In the Supreme Court of the United States

BILL COOL, WARDEN,

Petitioner,

v.

NATHANIEL JACKSON,

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

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CAPITAL CASE – NO EXECUTION DATE

QUESTION PRESENTED

This Court's precedent in *Lockett*, *Eddings*, and *Skipper* require that state courts admit and consider all relevant mitigating evidence that a death-eligible convict wants to present. And when the state courts fail to do so, this Court has remanded for them to fix the error. The question is:

Has this Court clearly required state courts to reopen the mitigation evidence in every death-penalty remand, even if the error did not affect the defendant's opportunity to submit mitigation evidence?

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REPLY

The Warden asks this Court to answer an important question about the scope of the remand in this case and others like it. Ohio's Warden questions whether the Constitution really does require it to reopen the mitigation evidence during a remand to correct errors unrelated to the original mitigation evidence phase. The Warden reads this Court's precedents to provide one full and fair chance to introduce mitigation evidence. But if those precedents clearly establish a constitutional right to update mitigation evidence on every remand, Ohio and the rest of the States need to know.

In essence, Jackson's arguments in opposition amount to three main grounds to deny cert, but none have merit.

I. This Court has jurisdiction.

First, there is no Article III defect in the Warden's petition. Jackson claims that the Sixth Circuit's ruling on his bias claim alone grants him all the relief he wants because it automatically entitles him to a new jury-deliberation phase with updated evidence. That, he argues, means any relief this Court might grant the Warden would not benefit the State. But he already disavowed that claim. At oral argument, Jackson's counsel told the Sixth Circuit that he wanted a new jury-deliberation phase but that the decision would be in the state court's hands unless the circuit court gave explicit instructions. Oral Arg. at 50:42–51:30, *Jackson v. Cool*, Nos. 21-3207/3280. One judge asked if "it would be up to the State court to decide whether the sentencing would be before a judge only or … before a jury," as determined "under Ohio law." *Id.* Jackson's counsel responded that the Court could permit that,

or it could "give more guidance in its order if it were to grant relief." *Id.* When asked what the result would be under Ohio law, counsel did not know, since he "recognize[d] that there may be arguments" on either side. *Id.* at 52:45–53:04.

That uncertainty was well-grounded. The "bias" of which Jackson complained arose only at the tail end of the case, *after* the close of the jury-deliberation phase. Pet.App.11a–18a. And the Sixth Circuit understood his claim (or at least any properly exhausted claim) to be that he "was denied a fair and impartial trial judge *on resentencing*," which involved only the judge, not a jury-deliberation phase. Pet.App.11a (emphasis added) (quoting *State v. Jackson*, 149 Ohio St. 3d 55, 61 (2016)).

The Sixth Circuit ultimately left the scope of relief to the state court by "remand[ing] for further proceedings consistent with this opinion" without providing further guidance. Pet.App.4a. Following counsel's prior statements, that means he believes that the state court must determine whether a new jury-deliberation phase is necessary. The simple finding of bias cannot do that work for Jackson, nor can the court's general recital that "[b]ecause a finding of judicial bias is a structural defect that affects the entire proceeding, it is not subject to harmless-error analysis." *Compare* Pet.App.11a *with* BIO.12. Were it otherwise, there would be no reason that the writ would stop at the sentencing phase rather than undoing the guilt phase, too. And even Jackson has not argued for that. So the core question presented is not moot, nor is there any question of jurisdiction. This Court can grant relief if it grants review.

II. This case is a good vehicle.

Second, there are no vehicle issues that inhibit this Court's review. Jackson is wrong that the claims pretermitted by the Sixth Circuit make this case a bad vehicle. This Court has accepted at least one habeas case with a pretermitted claim so that it could reverse an incorrect reading of its precedent. *See Hill v. Anderson*, 881 F.3d 483, 487 (6th Cir. 2018), cert. granted, judgment vacated sub nom. *Shoop v. Hill*, 586 U.S. 45 (2019). And if pretermitting claims is a way to avoid this Court's review, lower courts would have every incentive to do so, increasing piecemeal litigation. Further, Jackson's claim that he "would" obtain relief on the pretermitted claims is too speculative to warrant weight in deciding whether to grant certiorari. BIO.23–24.

III. The courts are split.

Third and finally, there is a real split on this question, and it causes real problems in administering justice. The Sixth Circuit, Ninth Circuit, and Idaho require courts to reopen the mitigation evidence when a death-penalty case is remanded for any reason. Pet.8–11. This means reopening the mitigation phase even if the error was as unrelated as failing to announce the sentence in the defendant's presence. *Sivak v. State*, 112 Idaho 197, 199–200 (1986). Ohio and South Dakota disagree, and they would reopen the mitigation evidence phase only if the original mitigation evidence phase suffered from a defect. Pet.5–8. Jackson's response on this front assumes that his judicial bias claim undermines the jury-deliberation phase as well. BIO.15–18. As mentioned above, he has already admitted that question is up for debate later.

The question presented is not a mere misapplication of a correctly stated rule of law. *See* Sup. Ct. R. 10. Jackson seeks to avoid the core question by focusing on the broad AEDPA standard, as if to claim that reciting the "contrary to" and "unreasonable application" frameworks wards off any cert-worthy errors. *See* BIO.14–15. But the core issue here is not the framework; it is the inconsistent interpretation of this Court's substantive precedent.

* * *

The question presented boils down to a crisp query that the Court can answer clearly: what triggers a reopening of the mitigation evidence? Ohio says that only an error that deprived the defendant of a full and fair mitigation hearing triggers reopening. Jackson says that trial courts must reopen the evidence any time a capital case is remanded—since the court will formally re-enter the sentencing documents—even if no error deprived the defendant of his full and fair mitigation in the first place.

Uncertainty in this area burdens the States. Even when their courts conduct an untainted mitigation hearing, they risk lengthy delays in habeas relief if they do not reopen the mitigation hearing on remand for any reason. That gives a windfall to defendants eager to try a new mitigation strategy—or to simply delay their cases as much as possible.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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