No. 08-724

In the Supreme Court of the United States

KEITH SMITH, Warden,
Petitioner,

v.

FRANK G. SPISAK, JR.,
Respondent.

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

BRIEF OF PETITIONER

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CAPITAL CASE—NO EXECUTION DATE SET

QUESTIONS PRESENTED

1. Did the Sixth Circuit contravene the directives of the Anti-terrorism and Effective Death Penalty Act of 1996 ("AEDPA") and *Carey v. Musladin*, 127 S. Ct. 649 (2006), when it applied *Mills v. Maryland*, 486 U.S. 367 (1988), to resolve in a habeas petitioner's favor questions that were not decided or addressed in *Mills*?

2. Did the Sixth Circuit exceed its authority under AEDPA when it applied *United States v. Cronic*, 466 U.S. 648 (1984), to presume that a habeas petitioner suffered prejudice from several allegedly deficient statements made by his trial counsel during closing argument instead of deferring to the Ohio Supreme Court's reasonable rejection of the claim under *Strickland v. Washington*, 466 U.S. 668 (1984)?

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JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Sixth Circuit issued its order denying the State's petition for rehearing on July 28, 2008. Pet. App. 1a. Justice Stevens extended the time period to file a petition for writ of certiorari. The Warden filed his petition on December 1, 2008, invoking the Court's jurisdiction under 28 U.S.C. § 1254(1). This Court granted the Warden's petition on February 23, 2009. *Smith v. Spisak*, 129 S. Ct. 1319 (2009) (No. 08-724).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

The Eighth Amendment to the United States Constitution provides, in relevant part: "[N]or [shall] cruel and unusual punishments [be] inflicted."

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

Section 2254 of Title 28 of the United States Code provides in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . .

INTRODUCTION

At trial for a series of murders on a college campus, Respondent Frank G. Spisak, Jr., proudly testified at length as to his neo-Nazi beliefs and told the jury that those beliefs had motivated the murders. The jury convicted him and recommended a sentence of death, which the Ohio trial court imposed.

The Sixth Circuit held that Spisak's death sentence is invalid for two reasons: (1) because the jury instructions at the penalty phase violated *Mills v. Maryland*, 486 U.S. 367 (1988); and (2) because the penalty-phase closing argument delivered by Spisak's counsel was constitutionally ineffective. Neither ground, however, supports habeas relief in this case. The jury instructions at issue are nothing like the defective instructions in *Mills*, because the jury was told to consider all relevant mitigating factors. It was never instructed to make specific findings as to mitigators, let alone to exclude any mitigating factors on which it could not agree. And counsel's closing argument at the penalty phase was neither deficient (because he reasonably advanced a theme of mental illness) nor prejudicial (because any error he might have made could not have affected the outcome).

Spisak's claims for relief have even less merit when viewed through the deferential lens of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 110 Stat. 1214. Because the Ohio Supreme Court reasonably rejected Spisak's jury-instruction and ineffective-assistance theories, this Court should reverse the Sixth Circuit's grant of the writ and reinstate Spisak's sentence.

STATEMENT OF THE CASE

A. A jury convicted Spisak of murder and recommended a sentence of death, which the trial court accepted.

Respondent Frank G. Spisak, Jr. killed Horace T. Rickerson, Timothy Sheehan, and Brian Warford in a series of shootings at Cleveland State University in 1982. Pet. App. 29a-31a. During the same spree, Spisak also shot at John Hardaway and Coletta Dartt. Hardaway was shot seven times but survived and identified Spisak as the shooter. Pet. App. 29a.

After his arrest, Spisak confessed to the five shootings. Pet. App. 364a-370a. He said that his actions were motivated by his hatred of gay people, blacks, and Jews, and he specifically targeted the campus of Cleveland State University. Pet. App. 365a-370a. Ballistics tests later confirmed Spisak's role in the murders. Pet. App. 303a.

At trial, instead of contesting Spisak's guilt, the defense attempted to demonstrate that he was legally insane. Spisak took the stand for several days, explaining the origins and scope of his Nazi beliefs; his pride in the murders of Rickerson, Sheehan, and Warford; and his desire to continue his homicidal conduct. J.A. 3-453. The defense also offered the testimony of Dr. Oscar Markey, who gave contradictory testimony concerning whether Spisak was mentally ill at the time of the crimes. The trial court ultimately struck Dr. Markey's testimony, Pet. App. 43a, and refused to instruct the jury on insanity, Pet. App. 53a-54a. The jury returned a guilty verdict on, among other charges, four counts of

aggravated murder with nineteen death specifications. Pet. App. 26a-27a; J.A. 643.

At the penalty phase, the defense presented expert testimony that Spisak was suffering from a mental illness—a condition that mitigated his culpability. A clinical psychologist, Sandra B. McPherson, testified that Spisak suffered from schizotypal and borderline personality disorders characterized by bizarre and paranoid thinking, gender identification conflict, and emotional instability, and that these defects substantially impaired Spisak's capacity to conform his conduct to the law. J.A. 460-86. A psychiatrist, Kurt A. Bertschinger, similarly testified that Spisak suffered from schizotypal personality disorder, which impaired his ability to adhere to the requirements of the law. J.A. 487-551. Finally, Dr. Markey again testified, stating that he essentially agreed with the psychiatric diagnosis. J.A. 552-624.

After the close of the evidence, Spisak's counsel acknowledged the brutality of Spisak's murders in vivid detail in his closing argument. See, e.g., Pet. App. 335a ("And we could smell the latrine smells, and we could feel the cold floor. And we can see a relatively young man cut down with so many years to live . . . ."). He also referred to Spisak's Nazi allegiance and bigoted views as "misguided," "sick," and "twisted." Pet. App. 336a-337a. Counsel then conceded that Spisak was not deserving of sympathy because he had no "good deeds" or "good thoughts," and that his beliefs are "never going to be any different." Pet. App. 338a-339a. He nevertheless argued that Spisak's mental illness was a mitigating factor that the jury should consider. Pet. App. 341a-

354a. While "not insane," counsel asserted, Spisak was sufficiently "sick and demented so that the ability to intend is substantially reduced," Pet. App. 341a—an argument that he supported with references to the experts' testimony, Pet. App. 342a-343a, 353a-354a. Counsel concluded by telling the jurors that he was proud of them for doing their duty, whatever they decided. Pet. App. 359a-360a.

In its sentencing instructions, the trial court explained to the jury that the State had "the burden of proving by proof beyond a reasonable doubt that the aggravating circumstances which the defendant, Frank G. Spisak, Jr. was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the [sentence] of death." Pet. App. 318a. The court further instructed that "to outweigh means to weigh more than, to be more important than," and that "[t]he existence of mitigating factors does not preclude or prevent the death sentence if the aggravating circumstances outweigh the mitigating factors." *Id.* The aggravating circumstances, the court explained, were the death specifications on which the jury convicted Spisak during the guilt phase. Pet. App. 319a-323a.

The court then stated that "[m]itigating factors are those which, while not excusing or justifying the offense, or offenses, may in fairness and mercy, be considered by you, as extenuating or reducing the degree of the defendant's responsibility or punishment." Pet. App. 323a. It added that mental illness was a mitigating factor: "[A]t the time of committing the offense the defendant because of mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to

conform his conduct to the requirements of the law." *Id.* The court also instructed the jury that it could find other mitigating factors—"the history, character and background of the offender," as well as "any other factors[] that are relevant to the issue of whether the defendant should be sentenced to death." *Id.* The court did not instruct the jurors that they needed to reach a unanimous conclusion as to the presence or absence of any particular mitigating factor.

The court then summarized the jury's duty under Ohio law:

> [Y]ou, the trial jury, must consider all of the relevant evidence raised at trial, the evidence and testimony received in this hearing and the arguments of counsel. From this you must determine whether, beyond a reasonable doubt, the aggravating circumstances which the defendant, Frank G. Spisak, Jr., has been found guilty of committing in the separate counts are sufficient to outweigh the mitigating factors present in this case.
>
> If all twelve members of the jury find by proof beyond a reasonable doubt that the aggravating circumstance in each separate count outweighs the mitigating factors, then you must return that 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 a sentence

> of death be imposed upon the defendant, Frank G. Spisak, Jr.
>
> A jury recommendation to the Court that the death penalty be imposed is just that, a recommendation. The final decision is placed by law upon the Court.
>
> On the other hand, if after considering all of the relevant evidence raised at trial, the evidence and the testimony received at this hearing and the arguments of counsel, you find that the State failed to prove beyond a reasonable doubt that the aggravating circumstances which the defendant, Frank G. Spisak, Jr., has been found guilty of committing in the separate counts outweigh the mitigating factors, you will then proceed to determine which of two possible life imprisonment sentences to recommend to the Court.

Pet. App. 323a-324a.

The trial court then discussed in detail the verdict forms that would be given to the jury. The first form stated,

> We the jury in this case, being duly impaneled and sworn, do find beyond a reasonable doubt that the aggravating circumstances which the defendant, Frank G. Spisak, Jr., was found guilty of committing was sufficient to outweigh the mitigating factors present in this case.

> We the jury recommend that the sentence of death be imposed . . . .

Pet. App. 325a. The court noted that "there [wa]s a spot for twelve signatures" at the bottom of the form, and that "[a]ll twelve of [the jurors would] sign it if that [wa]s [their] verdict." *Id.*

The second form similarly stated,

> We the jury, being duly impaneled and sworn, do find that the aggravating circumstances which the defendant, Frank G. Spisak, Jr., was found guilty of committing are not sufficient to outweigh the mitigating factors present in this case.
>
> We the jury recommend that the defendant Frank G. Spisak be sentenced to life imprisonment with parole eligibility after serving [the life sentence selected by the jury].

Pet. App. 325a-326a. The trial court noted that "again, all twelve of [the jurors] must sign whatever verdict it is you arrive at." Pet. App. 326a.

After deliberations, the jury recommended a sentence of death, J.A. 643, which the trial court accepted, J.A. 648-49.

B. The Ohio Supreme Court rejected Spisak's jury instruction and ineffective assistance of counsel claims on their merits.

On direct review, the Ohio court of appeals vacated one of the four aggravated murder convictions and the accompanying specifications, and

it affirmed the remainder of Spisak's convictions. Pet. App. 97a. Spisak obtained new counsel and moved for a second round of review before the Ohio court of appeals, which the Ohio Supreme Court granted. The Ohio appeals court again affirmed Spisak's convictions. Pet. App. 98a-99a.

On appeal, the Ohio Supreme Court reviewed and rejected all of Spisak's sixty-four errors, including his claim that "[j]ury instructions requiring unanimity for a life verdict at the penalty phase deny the accused his right to a fair trial and freedom from cruel and unusual punishment" under the United States and Ohio Constitutions, and his claim that he was denied effective assistance of counsel at the penalty phase of his trial. Pet. App. 113a-114a, 306a. The court noted that it had rejected the same jury-instruction claim in other cases. Pet. App. 306a. It further concluded that Spisak's ineffective assistance claim was not well taken in light of numerous authorities, including *Strickland v. Washington*, 466 U.S. 668 (1984). Pet. App. 307a.

This Court denied review of the Ohio Supreme Court's decision. *Spisak v. Ohio*, 489 U.S. 1071 (1989).

C. The federal district court denied Spisak's habeas petition.

After unsuccessfully petitioning the Ohio courts for post-conviction relief, Pet. App. 116a, 130a, Spisak sought habeas relief in federal court. The district court denied Spisak petition on all thirty-three grounds. Pet. App. 299a. It specifically rejected a challenge to the trial court's sentencing-phase instructions. Spisak had argued that the trial

court erred by instructing the jury that its sentence must be unanimous without also explaining the consequences of the jury's inability to reach unanimity. Pet. App. 183a-188a. The district court rejected that claim under *Jones v. United States*, 527 U.S. 373, 381-82 (1999), which held that the failure to instruct on the consequence of jury deadlock does not give rise to a cognizable constitutional claim. Pet. App. 187a.

The district court then noted the possible applicability of the Sixth Circuit's decision in *Davis v. Mitchell*, 318 F.3d 682 (6th Cir. 2003). In *Davis*, the Sixth Circuit held that an instruction requiring a capital jury to "first unanimously reject the death penalty before it can consider a life sentence . . . precludes the individual juror from giving effect to mitigating evidence and runs afoul of *Mills* [*v. Maryland*, 486 U.S. 367 (1988)]." 318 F.3d at 689. Observing that *Davis* conflicted with other Sixth Circuit jury-instruction decisions, the district court declined to address whether Spisak's sentence was unconstitutional under *Davis*. The court specifically noted that Spisak failed to allege that the instructions in his case precluded the jury from considering mitigating evidence, and that his pleadings did not even cite *Mills*. Pet. App. 188a-189a.

The district court next rejected Spisak's claim that defense counsel's closing argument was constitutionally ineffective, finding that the alleged errors "can easily be attributed to a trial strategy." Pet. App. 199a. Specifically, the court found that defense counsel's remarks were part of a strategy to ingratiate himself with the jury, to blunt the

prosecutor's depiction of the murders, and to show that Spisak's mental defect was a mitigating factor. Pet. App. 199a-201a. Finally, the district court concluded that "[e]ven assuming counsel's performance was deficient, Spisak cannot claim that he was prejudiced by counsel's behavior," because there is no reasonable probability that the jury would have voted for a life sentence had counsel portrayed Spisak with more sympathy, given the "heinous nature of the murders, Spisak's self-admitted lack of remorse, and the totality of the evidence." Pet. App. 203a-204a.

D. The Sixth Circuit reversed the district court and granted habeas relief as to Spisak's sentence.

The Sixth Circuit reversed the district court and vacated Spisak's death sentence. The court first concluded that the jury's sentencing instructions were improper under *Mills v. Maryland* (as interpreted in *Davis*, 318 F.3d at 689-90), because (1) they did not explicitly tell jurors that they need not unanimously find mitigating factors; (2) they required all twelve jurors to sign the verdict form indicating that the aggravating circumstances outweighed the mitigating factors beyond a reasonable doubt; and (3) they did not inform the jurors that they need not unanimously reject a death sentence before imposing a life sentence. Pet. App. 71a-76a.

The Sixth Circuit also found that counsel breached his duty of loyalty to Spisak by making only a "limited effort" to argue for a life sentence during his closing argument, by "rambling" on about irrelevant matters, by suggesting that a verdict of

death would be acceptable, and by going "so far as to tell the jury that [Spisak] was undeserving of mitigation." Pet. App. 62a-65a. The Sixth Circuit concluded: "Absent trial counsel's behavior during the closing argument of the mitigation phase of the trial, we find that a reasonable probability exists that at least one juror would have reached a different conclusion about the appropriateness of death . . . ." Pet. App. 67a.

E. On this Court's remand, the Sixth Circuit reinstated its original opinion.

The Warden filed a petition for writ of certiorari. The Court granted the petition, vacated the Sixth Circuit's judgment, and remanded the case for further consideration in light of *Carey v. Musladin*, 549 U.S. 70 (2006), and *Schriro v. Landrigan*, 550 U.S. 465 (2007). *Hudson v. Spisak*, 128 S. Ct. 373 (2007), reproduced at Pet. App. 21a. Without further briefing by the parties, the Sixth Circuit issued a four-page order reinstating its original opinion. Pet. App. 12a. After the Warden filed a petition for rehearing and suggestion for rehearing en banc, the court issued an amended order that again reinstated its original opinion. Pet. App. 2a. The Sixth Circuit later denied en banc review. Pet. App. 1a.

SUMMARY OF ARGUMENT

Spisak is not entitled to the habeas writ under either of his theories—that the penalty-phase jury instructions violated *Mills v. Maryland*, 486 U.S. 367 (1988), or that trial counsel's closing argument was constitutionally ineffective.

First, the instructions in this case were fully consistent with the Eighth Amendment. Unlike in *Mills*, where the jury was instructed to find unanimously the presence or absence of each mitigating factor, the jury here was not directed to enter any findings as to particular mitigating factors. Instead, the trial court told the jury to consider all relevant mitigating evidence and to balance the mitigating factors against the aggravating circumstances. The instructions therefore provided the individualized sentencing determination that the Eighth Amendment demands.

The Sixth Circuit identified no sound basis for invalidating the instructions under *Mills*. Nothing about either the instructions or the verdict form implied that unanimous agreement was required as to mitigating factors. Reasonable jurors would have understood that the instructions' silence on that point meant that the jury need not reach unanimity on the mitigating factors. And the Sixth Circuit's prohibition on so-called "acquittal-first" instructions—that is, instructions that require the jury to determine unanimously whether a death sentence is appropriate before it may consider a life sentence—is misplaced both because these instructions did not require an "acquittal first," and because such an instruction would not run afoul of *Mills*.

Second, trial counsel's penalty-phase closing argument was neither deficient nor prejudicial under the two-pronged analysis of *Strickland v. Washington*, 466 U.S. 668 (1984). It was not deficient because counsel reasonably emphasized Spisak's mental defects as a mitigating factor and bolstered his own credibility with the jurors by acknowledging his client's offensive views. And it was not prejudicial because nothing defense counsel said in summation could have affected the minds of jurors who had sat through a lengthy trial and heard Spisak's own chilling, hate-filled testimony.

It was not without reason that this Court two years ago remanded this case to the Sixth Circuit in light of two recent AEDPA decisions—*Schriro v. Landrigan*, 550 U.S. 465 (2007), and *Carey v. Musladin*, 549 U.S. 70 (2006). But the Sixth Circuit's readings of *Landrigan* and *Musladin* on remand were as parsimonious as its readings of *Mills* and *Strickland* were capacious. As should have been clear from this Court's remand order, AEDPA required a different approach: deference to the Ohio Supreme Court's reasonable judgment in rejecting Spisak's jury-instruction and ineffective-assistance claims on direct review. This Court accordingly should reverse the Sixth Circuit's grant of the writ.

ARGUMENT

A. The jury instructions in this case were consistent with the Eighth Amendment.

The point of *Mills v. Maryland*, 486 U.S. 367 (1988), is to allow the jury to give effect to all relevant mitigating evidence. The Eighth Amendment requires that the sentencer in a capital case undertake an individualized assessment of the particular case. See *Blystone v. Pennsylvania*, 494 U.S. 299, 307 (1990); *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986). Specifically, the sentencer must be permitted to give "independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation." *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion). To that end, *Mills* invalidated penalty-phase jury instructions that suggested that the jury was required unanimously to agree on particular mitigating factors before it could give any effect to those factors. 486 U.S. at 384. Put simply, *Mills* requires that each juror be able to make his or her own decision regarding mitigating circumstances.

The penalty-phase instructions in this case did everything that *Mills* requires: They allowed each juror to consider and give effect to all relevant mitigating evidence. To be sure, the instructions required juror unanimity on the ultimate question—whether aggravating circumstances outweighed any mitigating factors by proof beyond a reasonable doubt—but this type of unanimity, unlike the mitigating-factor unanimity at issue in *Mills*, is constitutionally permissible. None of the Sixth Circuit's theories for invalidating the instructions

finds support in this Court's Eighth Amendment jurisprudence. And none of those theories was clearly established law when the Ohio Supreme Court affirmed Spisak's conviction. See 28 U.S.C. § 2254(d)(1). AEDPA therefore required the Sixth Circuit to defer to the state court's reasonable adjudication of Spisak's jury-instruction claim.

1. The instructions were valid under *Mills v. Maryland*.

This Court's decision in *Mills* followed from the Eighth Amendment's requirement that capital sentencers be able to consider and give effect to all relevant mitigating evidence. See *Mills*, 486 U.S. at 374-75; see also *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982). That requirement was satisfied in Spisak's case: Spisak was fully able to present his case for mitigation, and the instructions gave the jurors ample opportunity to consider his evidence.

To begin with, the jury instructions in this case were invalid only if a "reasonable likelihood" existed that the jury applied them "in a way that prevents the consideration of constitutionally relevant evidence." *Boyde v. California*, 494 U.S. 370, 380 (1990). "[A] capital sentencing proceeding is not inconsistent with the Eighth Amendment if there is only a possibility" that the instruction "impermissibly inhibited" the jury's deliberation. *Id.* More specifically, because Spisak's objection arises under *Mills*, the instructions here were invalid only if it was reasonably probable that they produced the

same misapprehension that was likely in *Mills*.[1] And they did not.

The problem in *Mills* was a product of both the jury instructions and the verdict form. The trial court's instructions told the jurors to answer "no" to a mitigating factor whenever they did not unanimously answer "yes," while the verdict form required the jury to write a collective "yes" or "no" next to each mitigating factor. 486 U.S. at 378. Under a likely reading of the instructions and verdict form, the jurors were "not free . . . to consider *all* relevant evidence in mitigation as they balanced aggravating and mitigating circumstances." *Id*. at 380. Instead, they could "weigh only those mitigating circumstances marked 'yes.' Any mitigating circumstance not so marked, even if not unanimously rejected, could not be considered by any juror." *Id*. The Court concluded that a substantial probability existed that "reasonable jurors, upon receiving the judge's instructions in this case, and in

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[1] The Sixth Circuit looked not only to *Mills* but also to *McKoy v. North Carolina*, 494 U.S. 433 (1990). Pet. App. 72a. Under AEDPA, however, a court sitting in federal habeas may consider only law that was clearly established when the state-court conviction became final. See *Musladin*, 549 U.S. at 74 ("'[C]learly established Federal law' in § 2254(d)(1) 'refers to the holdings . . . of this Court's decisions as of the time of the relevant state-court decision.'" (citing *Williams v. Taylor*, 529 U.S. 362, 412 (2000))). *McCoy* was decided after Spisak's conviction became final. *Spisak v. Ohio*, 489 U.S. 1071 (1989) (denying direct review on March 6, 1989). What is more, "it is arguable that the '*Mills* rule' did not fully emerge until the Court issued *McCoy v. North Carolina*." *Beard v. Banks*, 542 U.S. 406, 413 n.4 (2004). This observation further supports the Warden's position that the Ohio Supreme Court in 1988 did not unreasonably apply clearly established federal law.

attempting to complete the verdict form as instructed, may well have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance." *Id.* at 384.

In sharp contrast to *Mills*, the trial court's instructions in this case gave the jurors a full opportunity to consider and give effect to all of Spisak's mitigating evidence, without requiring unanimous agreement—or any finding at all—as to particular mitigating factors. The trial court explained that the State bore "the burden of proving by proof beyond a reasonable doubt that the aggravating circumstances which the defendant . . . was found guilty of committing [were] sufficient to outweigh the factors in mitigation." Pet. App. 318a. Then, after listing the possible aggravating and mitigating circumstances, the court reiterated that the question for the jury was "whether, beyond a reasonable doubt, the aggravating circumstances which the defendant . . . ha[d] been found guilty of committing in the separate counts [were] sufficient to outweigh the mitigating factors present in this case." Pet. App. 324a. The trial court instructed that if "all twelve members of the jury [found] by proof beyond a reasonable doubt that the aggravating circumstances in each separate count outweigh[ed] the mitigating factors," then the jury was required to "recommend to the Court that a sentence of death be imposed upon the defendant." Pet. App. 324a. If, on the other hand, the jury found "that the State failed to prove beyond a reasonable doubt that the aggravating circumstances which [Spisak] ha[d] been found guilty of committing in the

separate counts outweigh[ed] the mitigating factors," then it should impose one of two life sentences. *Id.*

These instructions differed from the *Mills* instructions in at least three critical respects. First, the instructions did not ask the jury to consider seriatim and vote up or down on each individual mitigating factor. Compare Pet. App. 323a-326a with *Mills*, 486 U.S. at 387. In fact, the jury was not told to make a specific *finding* on any of the mitigators; it was simply told to "consider[]" the mitigating factors, Pet. App. 323a, and to balance "the aggravating circumstances which . . . Spisak . . . has been found guilty of committing" against "the mitigating factors present in the case," Pet. App. 324a. Second, the trial court never suggested, either explicitly or implicitly, that the jury could consider only those mitigating factors on which the jurors agreed, unanimously or otherwise. Compare Pet. App. 323a-326a with *Mills*, 486 U.S. at 378-79 & n.12. Third, the instructions made clear that the jury could consider *all* relevant mitigating evidence. Compare Pet. App. 323a with *Mills*, 486 U.S. at 380. It is therefore not reasonably likely that the jurors misunderstood these instructions as requiring unanimity before they could consider a particular mitigating circumstance.

The instructions here were also fully consistent with—and in fact derived from—the Eighth Amendment principles that animated *Mills*. The *Mills* rule followed from the requirement, articulated in *Lockett*, that the sentencer be permitted to consider any relevant mitigating evidence. *Mills*, 486 U.S. at 374-75 (citing *Lockett*). Ohio's capital-sentencing statute had the same

origin. After *Lockett* invalidated Ohio's earlier capital-sentencing statute because it did "not permit the type of individualized consideration of mitigating factors" that the Constitution requires, 438 U.S. at 606, Ohio revised its law to allow the jury to consider all relevant mitigating factors. See *State v. Watson*, 572 N.E.2d 97, 113 (Ohio 1991) (Resnick, J., dissenting) ("[F]ollowing the United States Supreme Court in *Lockett v. Ohio*, the General Assembly amended [Ohio Rev. Code §] 2929.04(B) and added additional mitigating factors." (citation omitted)).

Spisak's mitigation evidence—which consisted of testimony from three experts who agreed that Spisak suffers from mental defects, J.A. 460-624—was relevant under two different prongs of Ohio's revised capital-sentencing law: factor (3), relating to "mental disease or defect," and factor (7), the catch-all category. See Ohio Rev. Code § 2929.04(B)(3), (7) (LexisNexis 1983).[2] The catch-all permitted the jury to consider a wide range of mitigating evidence, including "the defendant's character and record, and the circumstances of the particular offense." *State v. Holloway*, 527 N.E.2d 831, 834 (Ohio 1988) (citing *Lockett*). The jury charge regarding mitigating evidence carefully tracked these statutory provisions, Pet. App. 323a, and therefore satisfied "[t]he requirement of individualized sentencing . . . by allowing the jury to consider all relevant mitigating evidence." *Blystone*, 494 U.S. at 307.

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[2] These provisions remain materially the same today as they were when Spisak was convicted. See Ohio Rev. Code § 2929.04(B)(3), (7) (LexisNexis 2008).

The analysis should stop there. AEDPA permits federal habeas relief only when "the adjudication of the claim" in state court "resulted in a decision that was contrary to, or involved an unreasonable application of," the holdings of this Court. 28 U.S.C. § 2254(d)(1); *Williams v. Taylor*, 529 U.S. 362, 412 (2000). Because the instructions here complied with *Mills*, it cannot be said that the Ohio Supreme Court, in upholding them under the Eighth Amendment, "arrive[d] at a conclusion opposite to that reached by this Court on a question of law or . . . decide[d the] case differently than this Court has on a set of materially indistinguishable facts." *Williams*, 529 U.S. at 413; see also *Musladin*, 549 U.S. at 76. The habeas writ therefore should not have issued on Spisak's *Mills* claim.

2. The Sixth Circuit offered no sound reasons for invalidating the instructions in this case.

Despite the material differences between the instructions here and those in *Mills*, the Sixth Circuit attempted to squeeze this case into the *Mills* box based, it seems, on two theories. First, the court found that the instructions in Spisak's case improperly implied that unanimity as to mitigating factors was required because the trial court never said otherwise, and because the verdict form required twelve signatures. Second, the court held that so-called "acquittal-first" instructions run afoul of the Eighth Amendment. Neither rationale, however, is correct.

a. The instructions here did not imply that unanimity was required as to mitigating factors.

The sentencing instructions in this case required unanimity on one question only: whether the aggravating circumstances outweighed the mitigating factors beyond a reasonable doubt. According to the Sixth Circuit, however, the instructions unconstitutionally *implied* a unanimity requirement in two different ways: (1) by failing affirmatively to instruct the jury that unanimous agreement was not required as to mitigators, Pet. App. 76a; and (2) by requiring twelve signatures on the verdict form stating that the aggravators outweighed the mitigators, Pet. App. 74a. But neither of these features is a problem under *Mills*.

First, the Sixth Circuit found that "the silence on the lack of unanimity required to find mitigating circumstances . . . would have led a jury to apply an unconstitutional unanimity standard at all stages of the deliberative process." Pet. App. 76a. In this regard, the court followed an earlier Sixth Circuit decision that similarly used *Mills* to invalidate jury instructions because of, among other things, the instructions' "silence . . . on the lack of unanimity required for mitigating circumstances." *Davis v. Mitchell*, 318 F.3d 682, 690 (6th Cir. 2003). In the Sixth Circuit, in other words, penalty-phase instructions must include an express, affirmative statement that unanimity is not required as to mitigating factors.

Two problems inhere in the Sixth Circuit's rule. For one thing, the Sixth Circuit's affirmative-

instruction requirement gives jurors too little credit. The jurors were instructed that they had to be unanimous as to the balancing of aggravators and mitigators, but they were not told the same as to the presence or absence of mitigating factors, on which no specific finding was required. Pet. App. 323a-324a. Reasonable jurors would have understood the difference and acted accordingly. See *Boyde*, 494 U.S. at 381 (explaining that "commonsense understanding of the instructions" is likely to prevail in the jury room). At the very least, given "[t]he rule that juries are presumed to follow their instructions," *Richardson v. Marsh*, 481 U.S. 200, 211 (1987), the Sixth Circuit was wrong to presume that the jurors would infer a unanimity requirement where none was instructed.

More to the point, the Sixth Circuit's affirmative-instruction requirement finds no basis in *Mills*, as other circuits have concluded. The Tenth Circuit, for instance, examined a claim nearly identical to Spisak's and held that "[a] trial court need not . . . expressly instruct a capital sentencing jury that unanimity is not required before each juror can consider a particular mitigating circumstance." *LaFevers v. Gibson*, 182 F.3d 705, 719 (10th Cir. 1999); accord *Duvall v. Reynolds*, 139 F.3d 768, 791-92 (10th Cir. 1998). Other courts have reached the same conclusion as the Tenth Circuit. See *Powell v. Bowersox*, 112 F.3d 966, 971 (8th Cir. 1997) (finding no *Mills* violation where "challenged instructions deal with balancing mitigating circumstances against aggravating factors, not with determining what mitigating circumstances exist"); *Arnold v. Evatt*, 113 F.3d 1352, 1363 (4th Cir. 1997) (finding no *Mills* violation where instruction required

unanimous finding on aggravators but no unanimity instruction on mitigators); *Gacy v. Welborn*, 994 F.2d 305, 307-08 (7th Cir. 1993) (same); *James v. Whitley*, 926 F.2d 1433, 1448-49 (5th Cir. 1991) (same); *Zettlemoyer v. Fulcomer*, 923 F.2d 284, 307-08 (3d Cir. 1991) (same). But see *Abu-Jamal v. Horn*, 520 F.3d 272, 303 (3d Cir. 2008) (finding *Mills* error), *cert. petition pending sub nom.*, *Beard v. Abu-Jamal*, No. 08-652. In fact, other Sixth Circuit panels likewise have found no affirmative-instruction requirement. See, e.g., *Coe v. Bell*, 161 F.3d 320, 337-38 (6th Cir. 1998).

Given that the circuits are divided (in a lopsided way) on this point, one of two things must be true: either (1) the Sixth Circuit is wrong, and *Mills* does not require an affirmative instruction that unanimity is not required as to mitigators, or (2) the affirmative-instruction requirement is not clearly established by *Mills*. In either event, AEDPA does not permit relief. See *Musladin*, 549 U.S. at 76.

The Sixth Circuit cited a second reason for concluding that the instructions here implied a unanimity requirement as to mitigating factors: Both the instructions and "the verdict form . . . reflected a unanimity requirement for a finding that the mitigating factors outweighed the aggravating factors." Pet. App. 74a. But the verdict form in this case did not resemble the problematic verdict form in *Mills*. The jurors in *Mills* were required to render a yes-or-no answer as to each potential mitigating factor, and all twelve jurors were then required to sign the form. *Mills*, 486 U.S. at 378-79. Here, by contrast, the jurors were simply required to indicate by signature whether, in the end, the aggravating

circumstances outweighed any mitigating factors beyond a reasonable doubt. Pet. App. 325a. That is to say, the verdict form merely replicated the unanimity-in-balancing instruction, and *Mills* permits that form of unanimity requirement. See *Arnold*, 113 F.3d at 1363; *Powell*, 112 F.3d at 970-71; *James*, 926 F.2d at 1448-49. States may, after all, impose the death penalty upon "a determination that the aggravating circumstances outweigh the mitigating circumstances present in the particular crime committed by the particular defendant," *Blystone*, 494 U.S. at 305. Habeas relief is therefore not appropriate on this theory. See *Waddington v. Sarausad*, 129 S. Ct. 823, 833 (2009).

b. So-called "acquittal-first" instructions—even if present here—are consistent with the Eighth Amendment.

The Sixth Circuit offered a final rationale for invalidating the instructions in this case: It held that so-called "acquittal-first" sentencing instructions—that is, instructions that suggest that a jury must unanimously acquit the defendant of the death penalty before it may consider a life sentence—violate *Mills v. Maryland*. Pet. App. 74a-76a. But this reasoning attempts to insert a square peg into a round hole, for even assuming the instructions here required an "acquittal first" (and they did not), such an instruction does not run afoul of *Mills*.

The Sixth Circuit's "acquittal-first" reasoning again rested heavily on the court's earlier decision in *Davis v. Mitchell*, 318 F.3d 682. In that case, the Sixth Circuit correctly observed that, under Ohio

law, a deadlocked jury need not reach unanimity on the death penalty, but instead may proceed to return a unanimous noncapital sentence. *Id.* at 689 (citing *State v. Brooks*, 661 N.E.2d 1030 (Ohio 1996)). But the court then stated, without citation, that such a "non-unanimous mechanism" for preventing a death sentence was "constitutionally required." *Davis*, 318 F.3d at 689. The *Davis* court went on to assert, again without citation or explanation, that an "instruction requiring that a jury must first unanimously reject the death penalty before it can consider a life sentence . . . precludes the individual juror from giving effect to mitigating evidence and runs afoul of *Mills*." *Id.* The Sixth Circuit panel in this case echoed *Davis*'s unsupported conclusion, stating that Spisak's so-called "acquittal-first" instruction "impermissibly imposed a unanimity requirement on the jury's ability to find mitigating factors in violation of . . . *Mills* and *McKoy*." Pet. App. 4a.

As an initial matter, the Sixth Circuit's conclusion rests on the premise that the instructions here violated Ohio law by requiring an "acquittal first," but that premise contains three flaws. First, "the fact that [an] instruction was allegedly incorrect under state law is not a basis for habeas relief." *Estelle v. McGuire*, 502 U.S. 62, 71-72 (1991). Second, Ohio law neither requires nor permits what the Sixth Circuit calls "acquittal-first" instructions. See Ohio Rev. Code § 2929.03(D)(2); *Brooks*, 661 N.E.2d at 1040 (invalidating an instruction that required the jury "'to determine unanimously that the death penalty is inappropriate before [it could] consider a life sentence'" (quoting instruction)). And third, the instructions in this case were not

"acquittal-first" instructions. In fact, the Ohio Supreme Court has held that instructions virtually identical to those at issue here are consistent with Ohio law. See *State v. Davis*, 666 N.E.2d 1099, 1109-10 (Ohio 1996) (upholding instructions essentially verbatim of those here because, "unlike the instructions given in *Brooks*, the jury was not instructed that it was required to *unanimously* determine that the death penalty was inappropriate before it could consider the life sentence alternatives").

Even assuming, however, that the instructions here did what the Sixth Circuit suggests and were inconsistent with Ohio law, a so-called "acquittal-first" instruction does not fall within the contours of *Mills*. The defect in *Mills* was not that the jurors had to render an up-or-down verdict on death before they could deliberate on alternative life sentences; it was that they essentially had to make unanimous special findings on each mitigating factor before they weighed, in a second stage, the aggravating factors against those mitigating factors that they had found present. *Mills*, 486 U.S. at 379-80. The problem, in other words, was that the weighing process was incomplete, not that it was required in the first place.

The Sixth Circuit's concern appears to be different. The court's rule is that the Constitution requires a "non-unanimous mechanism that will prevent a recommendation of death," *Davis*, 318 F.3d at 689—namely, an instruction that "'clearly informs the jurors that a life verdict can be rendered by a jury that has not first unanimously rejected the death penalty.'" Pet. App. 76a (quoting *Davis*, 318

F.3d at 689-90). Put differently, the Sixth Circuit's view seems to be that the Eighth Amendment requires a mechanism by which the jury can bypass a decision on the death penalty and move straight to a verdict on a life sentence. But the Constitution requires no such thing.

This Court has "long been of the view that 'the very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves.'" *Jones v. United States*, 527 U.S. 373, 382 (1999) (quoting *Allen v. United States*, 164 U.S. 492, 501 (1896)). Moreover, "[t]he State has in a capital sentencing proceeding a strong interest in having the jury 'express the conscience of the community on the ultimate question of life or death.'" *Lowenfield v. Phelps*, 484 U.S. 231, 238 (1988) (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968)). Given these strong governmental interests, this Court has held that "the Eighth Amendment does not require that the jury be instructed as to the consequences of their failure to agree." *Jones*, 527 U.S. at 381; see also *Lyons v. Lee*, 316 F.3d 528, 534 n.8 (4th Cir. 2003) (applying *Jones* to reject a habeas plea based on the absence of a juror-deadlock instruction).

Instead, the Eighth Amendment is satisfied so long as the jury instructions permit an individualized sentencing determination that takes into account all relevant mitigating evidence. See *Blystone*, 494 U.S. at 307. An "acquittal-first" instruction does not restrict "*what* mitigating evidence the jury must be permitted to consider in making its sentencing decision"; it simply structures "*how* [the jury] must consider the mitigating

evidence." *Saffle v. Parks*, 494 U.S. 484, 490 (1990); see also *Buchanan v. Angelone*, 522 U.S. 269, 277 (1998) ("[W]e have never . . . held that the state must affirmatively structure in a particular way the manner in which juries consider mitigating evidence."). Neither the Eighth Amendment generally nor *Mills* specifically precludes the State from structuring the deliberative process this way.

Even if the Sixth Circuit's "acquittal-first" rule has merit—and the Warden maintains that it does not—Spisak is entitled to habeas relief on that theory only if it was clearly established law at the time the Ohio Supreme Court rejected his Eighth Amendment claim. As shown above, the Sixth Circuit's rule does not follow from *Mills*. It is a creature of the Sixth Circuit's own devise in *Davis*, and one that no other circuit has followed. Indeed, the only federal courts outside the Sixth Circuit to use the phrase "acquittal first" have applied it to guilt-phase instructions that require rejection of a greater offense before consideration of a lesser-included offense. And those courts have found that an acquittal-first guilt-phase instruction is constitutionally permissible, particularly if the defendant does not request a different instruction. See *United States v. Jackson*, 726 F.2d 1466, 1469 (9th Cir. 1984) (per curiam); *Catches v. United States*, 582 F.2d 453, 459 (8th Cir. 1978); *United States v. Tsanas*, 572 F.2d 340, 346 (2d Cir. 1978). Thus, the Sixth Circuit's penalty-phase "acquittal-first" rule is not clearly established, and AEDPA bars relief.

B. Trial counsel's closing argument was not constitutionally ineffective under *Strickland*.

Spisak cannot prevail on either prong of the two-step analysis for ineffective-assistance claims under *Strickland v. Washington*, 466 U.S. 668 (1984): The first question is whether "counsel's performance was deficient," and, if so, the second is whether "the deficient performance prejudiced the defense." *Id.* at 687. Because the Ohio Supreme Court rejected Spisak's ineffective-assistance claim on direct review, Spisak must show under AEDPA not "that he would have satisfied *Strickland*'s test if his claim were being analyzed in the first instance," but rather that the state court "applied *Strickland* to the facts of his case in an objectively unreasonable manner." *Bell v. Cone*, 535 U.S. 685, 699 (2002). The state court's rejection of the claim was reasonable, however, because counsel's penalty-phase summation was neither deficient nor prejudicial.

1. The closing argument was objectively reasonable.

Spisak fails on the first step of the *Strickland* inquiry because his trial counsel's performance did not fall "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. To "eliminate the distorting effects of hindsight," the deficiency inquiry affords "a strong presumption" of reasonableness to counsel's decisions, and the conduct at issue is evaluated "from counsel's perspective at the time." *Id.* at 689. In erroneously concluding that trial counsel's performance was deficient, the Sixth Circuit disregarded both the

presumption of reasonableness and the context of the closing argument in this case.

Strickland's presumption of reasonableness is strongest when the claim of ineffective assistance centers on counsel's strategic decisions, such as how to conduct a closing argument. "[C]ounsel has wide latitude in deciding how best to represent a client, and deference to counsel's tactical decisions in his closing presentation is particularly important because of the broad range of legitimate defense strategy at that stage." *Yarborough v. Gentry*, 540 U.S. 1, 5-6 (2003) (per curiam). "Judicial review of a defense attorney's summation is therefore highly deferential . . . ." *Id.*

In this case, counsel's strategy at the penalty-phase closing argument was shaped by the lengthy guilt-stage proceedings that preceded it. Spisak's guilt of the underlying crimes was not (and could not be) contested. Two of the victims survived, and they identified Spisak as the assailant. Pet. App. 301a-302a. Ballistic tests linked Spisak's guns to the murders. Pet. App. 303a. Spisak also confessed his involvement in the crimes, Pet. App. 364a-370a, even signing a congratulatory note to the investigating detectives on a "White Power" t-shirt, J.A. 221-23. The message said, "For another job well done, good luck, Sieg Heil." J.A. 223. As in *Bell*, "[t]he State had near conclusive proof of guilt on the murder charges as well as extensive evidence demonstrating the cruelty of the killings." 535 U.S. at 699.

Faced with this overwhelming evidence of guilt, Spisak's counsel frankly admitted in a sidebar that he was left with a defense of insanity or mental disease. J.A. 140-41. To buttress that defense,

Spisak himself took the stand at trial on his guilt. That testimony proved to be a double-edged sword: It demonstrated that Spisak is mentally disturbed, but it also cast him in an unsympathetic light.

During his days-long testimony, Spisak explained that he had a normal upbringing: He performed well in school, J.A. 9, and his parents properly cared for him, J.A. 252-53. But he also explained that he began studying Hitler and Nazism in junior high school because he "wanted to know the truth," J.A. 40, and that he joined the American Nazi Party in 1970, J.A. 41. He identified Hitler as his spiritual leader, likening the dictator both to this country's founding fathers, J.A. 48, and to Jesus Christ, J.A. 63. He referred to Hitler as God's disciple, J.A. 74, and "the greatest man in the last two thousand years of man's history," J.A. 63.

Spisak then indicted the Jewish people as "the one world leaders," J.A. 48, who were programming "the masses" through the news media, J.A. 51, and "brainwashing the youth" on university campuses, J.A. 121. He claimed that the Jewish people—specifically Jewish psychiatrists—were "trying to encourage the youth in homosexuality." J.A. 203. Spisak also "decide[d] to take up arms against" African Americans because they were "breeding at a rate that will soon make the white people extinct." J.A. 52-53. He wanted to kill "as many as [he] could get before [he] got caught, one thousand, a million, the more the better." J.A. 68. Spisak viewed himself as a soldier: "I am fighting against the forces of darkness which are represented by Satan and his children, the Jews and Satan creation which is the dark races." J.A. 144. He therefore sought to "inflict

the maximum amount of damage and casualties on the enemies." J.A. 147.

Spisak explained that the shooting spree and murders followed from his belief system. He sought to "create terror [at Cleveland State University] and make the conditions such that they could no longer insure the safety of the students and they would have to close the university down." J.A. 122. He admitted that he shot Reverend Horace Rickerson in a campus bathroom, J.A. 88-89, saying that he "felt like [he] might have accomplished something meaningful, something good," by shooting a black man, J.A. 97-98. He also expressed pride in his method of execution, saying it was "pretty nice," "pretty slick." J.A. 323. After that murder, Spisak said, "I realized that I had picked up a cross, that I would have to go all the way with it to the bitter end," J.A. 92, to "give my life for the survival of my people and my race," J.A. 93. Spisak offered a similar explanation for his shooting of John Hardaway. He followed Hardaway, also a black man, into a transit station one evening to seek "blood atonement." J.A. 112. After "inflict[ing] casualty on the enemy," J.A. 118, Spisak celebrated with "a pizza and a couple of Cokes," J.A. 120.

Spisak openly admitted to murdering Brian Warford—a young black man who had fallen asleep in a bus stop near campus. J.A. 166-71. Spisak told the jury that "it's always best to attack at the point of least resistance or at the point where you can catch the enemy unaware." J.A. 169. Emphasizing Warford's youth, he further explained that "[i]t's best to get them when they're young." J.A. 169-70. The "set-up" to Warford's murder, according to Spisak,

"was so perfect" that it must have involved "help from God." J.A. 172. Finally, Spisak reported that he targeted Timothy Sheehan in a campus restroom because he "thought this man was a Jewish professor." J.A. 192. He "[a]imed right between [Sheehan's] eyes and shot him" multiple times. J.A. 194.

During this presentation, Spisak was remorseless. He stated that he "felt bad" only when he learned that Sheehan was not Jewish. J.A. 196. Spisak also expressed pride in his willingness to testify: "We need somebody to get up here and take the stand and give a reasonable logical concise explanation for those things which must be done." J.A. 125; see also J.A. 361-62 (same). Finally, Spisak left no ambiguity as to his intentions if he were ever released: "I would go out and continue the war I started. . . . I would continue to inflict the maximum amount of damage on the enemies as I am able to do." J.A. 416.

Other cues during the trial reinforced the depravity of Spisak's beliefs. Before trial, Spisak grew a moustache and shaved it to resemble Hitler's. See J.A. 289, 391, 437. And on cross examination, after the prosecutor read into evidence a violent letter from Spisak that was laced with racist epithets, see, e.g., J.A. 372-74, Spisak declared "Heil Hitler" and performed the corresponding salute. J.A. 374.

Spisak's testimony presented trial counsel with a formidable task at the penalty phase. Counsel had to focus his mitigation efforts on the one theory that still had currency—that Spisak's mental illness entitled him to leniency. Counsel introduced

that theme during his penalty-phase opening argument: "Our contention is, has been and will continue to be, that Frank Spisak is sick, very sick. We think that we will be able to show you that." J.A. 455. Then, as the Sixth Circuit recognized, counsel presented "extensive evidence of [Spisak's] severe personality disorder, flirtation with the idea of having a sex change, sexual confusion, and social isolation." Pet. App. 69a. Counsel called three experts in mitigation to testify as to Spisak's mental disease. This evidence was relevant to two statutory mitigating factors under Ohio law. Ohio Rev. Code § 2929.04(B)(3), (7).

Counsel returned to the mental-illness theme in his closing argument. See Pet. App. 339a-344a; 353a-354a. He argued that "humane people . . . are proud to be different" in their belief that offenders are less culpable if they lack "the mental ability to commit the sin." Pet. App. 340a. In that vein, he submitted that Spisak, while "not insane enough to be criminally insane," is "sick and demented so that the ability to intend is substantially reduced." Pet. App. 341a. Counsel identified with the jurors as "kind of a layman," just "a lawyer from Buckeye Road," and said that it "didn't take" an expert to tell him that "we have got just a guy that's just crazier than hell." Pet. App. 347a-348a. He ended by again appealing to the jurors' oath and to their nature as "humane people." Pet. App. 358a.

In concluding that trial counsel's performance was deficient, the Sixth Circuit identified four specific shortcomings. All of the factors to which the court pointed, however, are reasonable when viewed from counsel's perspective at the time. First, the

Sixth Circuit cited counsel's "extremely graphic and overly descriptive recounting" of Spisak's crimes. Pet. App. 64a (citing Pet. App. 334a-336a). As described above, the gruesome details of the murders were not contested at trial, nor could they be, given that Spisak proudly admitted to them. These damaging facts were already before the jury, and the prosecutor undoubtedly would highlight them in his closing argument (and did, see J.A. 632-35). Given that reality, Spisak "cannot overcome the presumption that his counsel's decision to concede the aggravator's existence was 'sound trial strategy.'" *Palmer v. Clarke*, 408 F.3d 423, 444 (8th Cir. 2005) (citation omitted); accord *Hooker v. Mullin*, 293 F.3d 1232, 1246-47 (10th Cir. 2002). Counsel might reasonably have calculated that it was better to draw the sting out of the prosecution's argument and gain credibility with the jury by conceding the weaknesses of his own case. Such a trial tactic is not only common, but advisable. See Roger Haydock & John Sonsteng, *Advocacy: Opening and Closing: How to Present a Case* § 3.51, at 106 (1994) ("If the advocate cannot think of any mitigating explanation, then the weakness should be conceded in a candid and forthright manner."); Thomas A. Mauet, *Trial Techniques* 413 (5th ed. 1999) ("[T]he jury will respect your honesty and candor when openly and candidly discussing [your] weaknesses."). By comparison, "[h]ad counsel attempted to pass the crimes off as anything other than the atrocities that they were, his credibility with the jury would most certainly [have] become suspect." *Clozza v. Murray*, 913 F.2d 1092, 1099 (4th Cir. 1990).

Second, the Sixth Circuit condemned counsel for highlighting Spisak's "association with the Third

Reich and the Nazis." Pet. App. 64a. But a closing argument, like any effort at persuasion, "should indicate to the audience that the speaker shares the attitudes of the listener." Peter C. Lagarias, *Effective Closing Argument* § 2.06, at 100-01 (1989). Any reasonable observer of the trial would have recalled Spisak's vivid proclamations of support for Hitler and viewed those declarations as "sick," "twisted," and "distorted." Pet. App. 337a. Such characterizations were all the more likely in this case because several members of the jury—four African Americans, a Jewish person, and two World War II veterans, see Trial Tr. at 145 (June 20, 1983)—might have taken particular offense to Spisak's testimony. Under these circumstances, counsel's decision to bolster his own sincerity by criticizing his client's indefensible views was reasonable. See *Yarborough*, 540 U.S. at 9 ("By candidly acknowledging his client's shortcomings, counsel might have built credibility with the jury and persuaded it to focus on the relevant issues in the case."); Jacob A. Stein, *Closing Argument: The Art and the Law* § 204, at 10 (1990) ("The effect of sincerity is heightened if it appears that your code of morality and judgment of what is right and wrong coincide with the code of morality of the jury.").

Third, the Sixth Circuit criticized counsel's decision to discount particular mitigation leads by saying, "don't look to him for sympathy, because he demands none"; "don't look for good deeds, because he has done none"; and "[d]on't look to him for good thoughts, because he has none." Pet. App. 65a (quoting Pet. App. 338a). But the jurors had already heard Spisak's testimony, seen his Hitler moustache, and watched him perform a Nazi salute. There was

no chance that they harbored any sympathy for Spisak, and no reason for counsel to spend "time in trying to paint a weed as a lily." Frank M. Coffin, *A Lexicon of Oral Advocacy* 29 (1984). Instead, counsel pivoted from Spisak's depravity to the humanity within the jurors, appealing to their better nature not to sentence to death a "sick and demented" person. Pet. App. 339a-341a.

Fourth, the Sixth Circuit called "[m]ost shocking of all" trial counsel's "suggest[ion] to the jury that either outcome, death or life, would be a valid conclusion." Pet. App. 65a. But counsel's point in this passage was not, as the Sixth Circuit suggested, to say that a death sentence would be a desirable outcome. Rather, counsel's object was to appeal to the jurors' sense of duty: "We can be proud because we are a humane people. . . . [W]hatever you do, we can be proud because we lived up to the oath that we took." Pet. App. 359a-360a. That appeal echoed counsel's main theme: that humane people do not execute the mentally disturbed. Pet. App. 339a-342a. Counsel's approach also stressed the jury's autonomy—a "low-key strategy that . . . is not unreasonable." *Yarborough*, 540 U.S. at 10; accord *Carter v. Johnson*, 131 F.3d 452, 466 (5th Cir. 1997) ("[C]ounsel may make strategic decisions to . . . concede that the jury would be justified in imposing the death penalty, in order to establish credibility with the jury."). In fact, several treatises commend that approach. See Stein, *Closing Argument*, § 206, at 15 ("Avoid challenging the jury to find for your client, or phrasing your argument in terms suggesting what their finding must be. . . . The better policy is to indicate by voice, manner, and words that you know the jury will do its duty under

the law and under the evidence in the case."); Fred Lane, *Goldstein Trial Technique* § 23:102 (3d ed. 2000) (same).

Simply put, Spisak's counsel was in a difficult bind. The jurors could not forget or ignore Spisak's proud declarations of guilt, idolization of Hitler, and promise to "continue the war." Counsel accordingly told the one story left open to him—mental illness. See Pet. App. 339a-344a; 353a-354a. He reasonably made that story the "unifying theme" and "centerpiece of his case." *Yarborough*, 540 U.S. at 6, 9.

For Spisak to receive federal habeas relief on the basis of that summation, he must show not just that his counsel's performance was deficient, but that the state courts were "objectively unreasonable" in finding the opposite. *Id.* at 5; see 28 U.S.C. § 2254(d)(1). "Judicial review of a defense attorney's summation is . . . doubly deferential when it is conducted through the lens of federal habeas." *Yarborough*, 540 U.S. at 6. The Ohio courts were not objectively unreasonable in finding that counsel's performance was adequate, particularly when the performance is judged—as it must be under *Strickland*—"from counsel's perspective at the time." 466 U.S. at 689. Given trial counsel's difficult position, his closing was not deficient. Under AEDPA's deferential standard of review, Spisak is not entitled to habeas relief.

2. The closing argument did not affect the outcome.

Even assuming Spisak can show that counsel's summation was professionally unreasonable, he

cannot demonstrate that those shortcomings affected the outcome. That is to say, he cannot establish, based on "the totality of the evidence," that "there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695; see also *Wiggins v. Smith*, 539 U.S. 510, 534 (2003).

Although Spisak accepts *Strickland* as "the proper legal standard" for assessing prejudice in this case, Opp. to Cert. at 16, the Sixth Circuit did not. The court's entire prejudice analysis was confined to one conclusory sentence: "Absent trial counsel's behavior during the closing argument of the mitigating phase of the trial, we find that a reasonable probability exists that at least one juror would have reached a different conclusion about the appropriateness of death . . . ." Pet. App. 67a. The court did not articulate why a reasonable probability existed that, but for counsel's closing argument, the jury would have elected a life sentence. Instead, the Sixth Circuit relied on an earlier decision, *Rickman v. Bell*, 131 F.3d 1150 (6th Cir. 1997), in which the court afforded a presumption of prejudice to a habeas petitioner claiming ineffective assistance of counsel. *Id.* at 1156-60 (citing *United States v. Cronic*, 466 U.S. 648 (1984)).

The Sixth Circuit was wrong to apply the *Cronic* presumption instead of the standard *Strickland* prejudice analysis. Prejudice is presumed only when "'counsel *entirely* fails to subject the prosecution's case to meaningful adversarial testing.'" *Bell v. Cone*, 535 U.S. 685, 696 (2002) (quoting *Cronic*, 466 U.S. at 659) (emphasis added).

The courts of appeals agree that *Cronic* applies only to extreme cases of non-representation, not to poor representation or discrete acts of ineffectiveness. See, e.g., *Miller v. Martin*, 481 F.3d 468, 473-74 (7th Cir. 2007); *Benge v. Johnson*, 474 F.3d 236, 247 (6th Cir. 2007); *United States v. Theodore*, 468 F.3d 52, 57 (1st Cir. 2006); *Freeman v. Graves*, 317 F.3d 898, 900-01 (8th Cir. 2003); *Haynes v. Cain*, 298 F.3d 375, 381 (5th Cir. 2002). Spisak now argues only that his counsel's performance fell short at a specific point of the trial, not that counsel was ineffective throughout the course of the proceedings. In fact, the Sixth Circuit rejected Spisak's argument that counsel performed an inadequate mitigation investigation, finding that counsel had collected "an extensive social history." Pet. App. 68a. Given the narrow scope of Spisak's ineffectiveness claim, *Strickland* supplies the proper inquiry, and Spisak must demonstrate actual prejudice to prevail. See *Strickland*, 466 U.S. at 687.

Spisak cannot show prejudice for three reasons. First, nothing that counsel said during closing argument undermined Spisak's case for mitigation. As the Sixth Circuit itself recognized, "[t]he best chance of mitigation available was in fact the evidence that [Spisak] was, to some degree, mentally ill." Pet. App. 69a. Counsel pressed the mental-illness theme in his closing. See Pet. App. 339a-344a; 353a-354a. His disputed comments about the depravity of the murders, Spisak's "misguided philosophy," Pet. App. 336a, and Spisak's "sick twisted mind," Pet. App. 337a, were consistent with, and arguably even advanced, that theme. At the very least, the comments did not undercut counsel's principal theme of mental illness. The jurors

therefore had in mind Spisak's mitigation case and considered evidence supporting that argument.

Second, the closing argument was only a minor piece of the lengthy trial proceedings in this case, and its effect on the jury's sentencing verdict should not be overstated. By the time Spisak's counsel rose for his penalty-phase summation, the jurors had lived with the case for a month. They visited the crime scene, heard dozens of witnesses, and examined all the physical evidence. They also deliberated together over Spisak's guilt. It is unrealistic to suppose that that the penalty-phase closing argument, which lasted several minutes, overshadowed what the jurors heard and saw during the guilt- and penalty-phase proceedings, which together lasted several weeks. On the contrary, "empirical evidence [suggests] that jurors do not change their tentative verdict preferences at the close of the evidence as a result of closing arguments." Albert J. Moore, et al., *Trial Advocacy: Inferences, Arguments and Techniques* 214 (1996); accord Herbert J. Stern, *Trying Cases to Win: Summation* 27 (1995) ("After many days or weeks of trial, the jurors are not sitting in their box in open-minded expectation, waiting to hear our summations before making up their minds."). In any event, before the jurors deliberated on Spisak's sentence, the trial court instructed them that counsel's arguments "are not evidence," Pet App. 316a, and the jury is presumed to have followed that directive, see *Richardson*, 481 U.S. at 211.

Third, well before counsel stood to close, the damage to Spisak's mitigation case had already been done—by Spisak himself. The disputed subjects to

which counsel referred in summation were all placed in evidence during Spisak's trial testimony. Spisak had expressed pride about the shootings, stated his desire to emulate Hitler, and insisted that he would "continue the war." J.A. 416. The wisdom of counsel's decision to refer back to that evidence might be debatable, but the jury's sentencing verdict would not "reasonably likely have been different" absent counsel's closing argument. *Strickland*, 466 U.S. at 696.

What is more, the Sixth Circuit did not cite, nor has Spisak ever offered, an example of a successful ineffective assistance claim based solely on a penalty-phase closing argument. A survey of the lower federal courts shows that habeas petitioners succeed in establishing *Strickland* prejudice when they can demonstrate *other* errors by counsel—an unreasonable mitigation investigation or an inadequate penalty-phase presentation—alongside a lackluster closing argument. See, e.g., *Belmontes v. Ayers*, 529 F.3d 834, 864-68 (9th Cir. 2008); *Coleman v. Mitchell*, 268 F.3d 417, 452-53 (6th Cir. 2001); *Hall v. Washington*, 106 F.3d 742, 749, 752 (7th Cir. 1997); *Horton v. Zant*, 941 F.2d 1449, 1463 (11th Cir. 1991). In sharp contrast to those cases, trial counsel here adequately investigated and presented Spisak's "best chance of mitigation" to the jury—the "extensive evidence" of his "severe personality disorder, flirtation with . . . a sex change, sexual confusion, and social isolation." Pet. App. 69a.

On federal habeas review, the question is not whether counsel's allegedly deficient closing remarks affected the outcome, but rather whether the Ohio

Supreme Court's determination to the contrary was "unreasonable." *Landrigan*, 550 U.S. at 473. Given the uncontested nature and heinousness of the murders, the length of the trial, and Spisak's own performance on the witness stand, it is unlikely, to say the least, that trial counsel's remarks affected the jury's final verdict. At minimum, this record shows that the Ohio Supreme Court acted reasonably when it rejected the claim.

CONCLUSION

The Court should reverse the Sixth Circuit's grant of the habeas writ.

Respectfully submitted,

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