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 FOR THE STATES OF PENNSYLVANIA, ALABAMA, ARIZONA, CALIFORNIA, COLORADO, DELAWARE, IDAHO, ILLINOIS, KANSAS, KENTUCKY, MONTANA, NEVADA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, VIRGINIA AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Did the Sixth Circuit contravene the directives of the Antiterrorism 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 arguments instead of deferring to the Ohio Supreme Court's reasonable rejection of the claim under *Strickland v. Washington*, 466 U.S. 668 (1984)?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

INTEREST OF *AMICI CURIAE*

Amici, the Commonwealth of Pennsylvania and 18 other States, are vitally interested in the proper construction and application of the standard for habeas corpus relief prescribed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which gives practical effect to principles of federal-state comity, and permits habeas relief only where a state court's ruling is contrary to, or an unreasonable application of, extant clearly-established controlling precedent of this Court. 28 U.S.C. § 2254(d)(1). Rigorous enforcement of AEDPA's deferential standard is important to the *amici* States because it promotes finality and the preservation of properly-rendered state court adjudications as well as other interests important to one of their most basic responsibilities: the administration of criminal justice.

Where, as here, AEDPA's standard is not given its rightful effect, either because there has been an incorrect assessment of this Court's controlling precedent at the time of the state court ruling, or because, contrary to this Court's teachings, the reviewing federal court has chosen to substitute its evaluation of the factual record for that of the state court, the States are adversely affected by the unjustified realignment of the state-federal relationship AEDPA ordains. Whenever relief is granted because of erroneous habeas review, the States are burdened with the unnecessary obligation to retry cases, either in whole or in part, which unduly taxes already-strained public resources. As in this case, where the state court criminal trial took

place decades earlier, this burden is especially acute, because a State's presentation of its case is often hampered by the passage of time. Witnesses become unavailable due to death or incapacity, and those who do testify find that their memories have dimmed. It also means that, for no legitimate reason, victims, or their surviving family members, are forced to endure the anguish associated with a retrial or new sentencing proceeding. There is no finality, legally or practically speaking.

Incorrect habeas review also undermines the efforts of the many state jurists who take seriously the responsibilities they share with their federal colleagues to interpret the Constitution and to safeguard the rights of citizens. *Miller v. Fenton*, 474 U.S. 104, 111 (1985)(noting the "coequal" authority of the state courts to interpret the Constitution). The States have an interest in avoiding these unacceptable consequences of an improper application of the AEDPA standard.

Finally, those *amici* States whose laws provide for capital punishment have an enhanced interest in the proper disposition of the jury instruction claim. This Court's ruling in *Mills v. Maryland*, 486 U.S. 367 (1988), has been understood to prohibit those States from instructing a sentencing jury that it must be unanimous in the determination of mitigating factors, or using a verdict slip reflecting such a requirement. In the two decades since *Mills*, the States have established procedural rules based on that understanding. Approval of the Sixth Circuit's more expansive interpretation of the rule of *Mills* will likely raise questions about the continuing validity of the States' procedures and create confusion about what

revisions might be required, which will interfere with the smooth functioning of their criminal justice systems.

SUMMARY OF ARGUMENT

This Court should reverse the Sixth Circuit's misapplication of AEDPA in reviewing jury instruction and ineffectiveness claims.

In deeming the state court's decision contrary to what was "clearly established" in *Mills v. Maryland*, the court of appeals applied a rule that is not there.

Mills' holding was narrow: do not require juror unanimity to find mitigation. Many federal appellate courts have interpreted what *Mills* established in this very way. But the court of appeals here was not concerned with that narrow rule. It decided that the instructions in this case violated *Mills* because they did not affirmatively tell jurors that they *need not be* unanimous to find mitigation; and because they included a supposed "acquittal first" instruction (*i.e.*, jurors must "acquit" the defendant of death before imposing life imprisonment). *Mills* did not address either question.

The state court's decision rejecting Spisak's jury instruction claim was fully consistent with the holding in *Mills*. By faulting the state court for not finding in *Mills* more than was there, the Sixth Circuit turned AEDPA on its head.

The circuit court likewise erred in applying *United States v. Cronic* to a garden-variety ineffectiveness claim. There is no presumption of prejudice for an inadequate closing argument. Habeas relief was unwarranted.

ARGUMENT

I. The State Court's Decision Is Entirely Consistent with *Mills*.

A. The circuit court expanded *Mills* to find non-existent requirements.

Federal habeas relief "shall not be granted" under §2254(d)(1) unless the state court ruled contrary to, or unreasonably applied, "clearly established Federal law as determined by the Supreme Court of the United States." The words "clearly established" refer "to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003)(citation omitted).

The "clearly established" limitation looks to the law as it stood at the time the state court ruled. If this Court's jurisprudence as it existed at the time of the state court's ruling provided no "clear answer" to the legal question involved, the ruling must stand. State court criminal convictions, vetted by rounds of state appellate proceedings, are not to be cast aside because lower federal courts later expanded upon rulings of this Court in unexpected ways.

In three recent cases, *Carey v. Musladin*, 549 U.S. 70 (2006); *Schriro v. Landrigan*, 550 U.S. 465 (2007); and *Wright v. Van Patten*, 128 S.Ct. 743 (2008)(per curiam), this Court had occasion to supply concrete examples of the "clearly established" requirement.

The facts of these cases vary,[1] but in each the Court followed the same legal analysis under AEDPA. First, it identified its decisions that dealt in some way with the legal right asserted by the defendant. Next, it considered the precise issue addressed and what those decisions had specifically held. *See Carey*, 549 U.S. at 74-75; *Schriro*, 550 U.S. at 477-478; *Van Patten*, 128 S.Ct. at 746-747. It then looked to see if these sources furnished a "clear answer to the question presented." *See, e.g., Van Patten*, 128 S.Ct. at 747. Where no clear answer was provided, the Court concluded that there was no basis for declaring the state court decision an unreasonable application of "clearly established Federal Law" under 28 U.S.C. § 2254(d)(1).

Here, although the court of appeals described the governing standard, it failed to follow that standard. It noted *Mills v. Maryland* 486 U.S. 367 (1988), as the controlling case, but expanded upon it, creating new obligations not mentioned there. *Mills* did not consider, let alone resolve, the question of whether the Eighth Amendment requires a court to affirmatively instruct jurors that they need not unanimously agree on mitigating factors. Nor did *Mills* speak to so-called "acquittal first" instructions, *i.e.*, requiring jurors to "acquit" a defendant of the death penalty before life imprisonment be imposed.

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[1] *Carey* dealt with whether there was prejudice to a defendant where courtroom spectators wore buttons bearing the murder victim's picture. *Schriro* asked whether counsel was ineffective when he obeyed his client's order not to present mitigating evidence during capital sentencing. *Van Patten* involved whether an attorney's participation in a plea hearing by speakerphone required a review under the *Cronic* standard for complete denial of the right to counsel.

Rather, it only resolved that jurors may not be instructed that a mitigating circumstance can be considered only if they unanimously find it. *Mills*, 486 U.S. at 371 (jurors were instructed "to require the imposition of the death sentence if [they] unanimously found an aggravating circumstance, but could not agree unanimously as to the existence of any particular mitigating circumstance").

Mills did not rule on other issues and therefore "clearly established" no other rules of law. In particular, it provides no comment at all about, let alone an answer to, the question of whether states must affirmatively instruct jurors against unanimity in deciding mitigation, or whether states may not issue an "acquittal first" instruction.

It is troubling that the Sixth Circuit was given the opportunity to correct its error after it had been pointed out by this Court itself, which remanded for further consideration in light of *Carey*, *Schriro* and *Van Patten*. It did not reconsider its assessment of what was "clearly established Federal law" using the approach taken in those cases. *See Spisak v. Hudson*, 512 F.3d 852, 853-854 (6th Cir. 2008) (denying rehearing and rehearing *en banc*).

B. The Sixth Circuit's own precedent, as well as that of other circuits, demonstrates that the state court's decision was reasonable.

Had the Sixth Circuit looked even to its own prior jurisprudence, it would have been confronted with the fact that is it at least *reasonable* to read *Mills* narrowly rather than expansively. Under

AEDPA the question is not whether the state court's decision was *incorrect*. The question is whether it was *unreasonable*. *Woodford v. Viscotti*, 537 U.S. 19, 24 (2002) (per curiam). Because federal appellate courts have repeatedly rejected expansive readings of *Mills* similar to that of the circuit court here, the decision of the state court in this case certainly was, at the very least, reasonable.

For example, in *Zettlemoyer v. Fulcomer*, 923 F.2d 284 (3d Cir.) *cert. denied*, 502 U.S. 902 (1991), the Third Circuit held that instructions which failed to affirmatively provide a non-unanimity instruction did not violate *Mills*. 923 F.2d at 308 ("Neither the court nor the verdict sheet stated that the jury must unanimously find the existence of particular mitigating circumstances . . . *Mills* is clearly distinguishable").[2]

In *LaFevers v. Gibson*, 182 F.3d 705, 719 (10th Cir. 1999), the tenth Circuit ruled 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"); *accord Duvall v. Reynolds*, 139 F.3d 768, 791 (10th Cir.), *cert. denied*, 525 U.S.933 (1998) (same). The

[2] As is well known, the Third Circuit, like the Sixth Circuit, later changed its mind and decided to read *Mills* much more expansively. This is an equivalent violation of AEDPA. A petition for certiorari seeking review of the Third Circuit's latest decision in this vein is currently pending. *Beard v. Abu-Jamal*, No. 08-622, filed Nov. 18, 2008. The same issues involving the deference AEDPA requires were before the Court in *Banks v. Beard*, 542 U.S. 406 (2004), but were not addressed because *Teague v. Lane*, 489 U.S. 288 (1989), barred review of the *Mills* claim.

Fourth and Eighth Circuits similarly have read *Mills* as narrowly. *Arnold v. Evatt*, 113 F.3d 1352, 1363 (4th Cir. 1997), *cert. denied*, 522 U.S. 1058 (1998) ("Arnold now claims a "substantial possibility" existed that the jury could have thought it must also unanimously agree as to the existence of any mitigating circumstances. Unlike in *McKoy* or *Mills*, however, the jury instructions never required the jury to find any mitigating factor unanimously"); *Smith v. Dixon*, 14 F.3d 956, 982 n.15 (4th Cir.) (*en banc*), *cert. denied*, 513 U.S. 841 (1994) (no *Mills* error where the jury was required to write "Yes" on the verdict form beside each mitigating circumstance "for which the defendant has satisfied you," and the instructions required unanimity as to aggravating circumstances and the outcome of the weighing stage).[3]

But what is most striking about the Sixth Circuit's expansive reading of *Mills* in this case is that it contradicts former decisions of the Sixth Circuit itself. These decisions speak for themselves in

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[3] *Accord Parker v. Norris*, 64 F.3d 1178, 1187 (8th Cir. 1995), *cert. denied*, 516 U.S. 1095 (1996) (that verdict form "failed to inform jurors that they could consider non-unanimous mitigating circumstances" did not violate *Mills*); *Griffin v. Delo* 33 F.3d 895, 905-906 (8th Cir. 1994), *cert. denied*, 514 U.S. 1119 (1995) (instruction that jurors must impose life if they unanimously found that any mitigating circumstances outweighed aggravating circumstances did not imply that they must be unanimous to find mitigating circumstances); *Lawson v. Dixon*, 3 F.3d 743, 754 (4th Cir. 1993), *cert. denied*, 471 U.S. 1120 (1994) (*Mills* not violated where jurors told to "find unanimously" whether aggravating circumstances outweigh mitigating ones; "such an instruction does not run afoul of *Mills/McKoy* because it does not state that jurors must agree unanimously on the existence of a mitigating factor") (citation and internal quotation marks omitted).

testifying to the irrefutable reasonableness of the state court decision in this case. *Henley v. Bell*, 487 F.3d 379, 391 (6th Cir. 2007) ("the plain language of both the instructions and the verdict form require unanimity as to the weighing of aggravating and mitigating circumstances -- not the existence of a mitigating circumstance"); *Scott v. Mitchell*, 209 F.3d 854, 874 (6th Cir.), *cert. denied*, 531 U.S. 1021 (2000) (no *Mills* issue where jurors told "all 12 of you must sign [the verdict form] . . . [i]t must be unanimous"); *Abdur'rahman v. Bell*, 226 F.3d 696, 712 (6th Cir. 2000), *cert. denied*, 534 U.S. 970 (2001) (rejecting claim that *Mills* required relief because the proximity of the terms "unanimous" and "mitigating circumstances" implied that mitigating circumstances must be found unanimously); *Kordenbrock v. Scroggy*, 919 F.2d 1091, 1120 (6th Cir. 1990) (*en banc*), *cert. denied*, 499 U.S. 970 (1991) (while jurors were told that unanimity was necessary to find an aggravating circumstance, "it cannot be reasonably inferred that silence as to finding a mitigating factor would likely cause the jury to assume that unanimity was also a requirement").

C. There are continuing problems with the proper interpretation of what constitutes "clearly established" federal law.

For the *amici* States, such an improper application of AEDPA imposes burdens they should not have to bear. The public resources required to mount a retrial or new sentencing proceeding are needed elsewhere. Victims or their surviving family members should not be distressed needlessly. Defendants whose cases have been conducted in conformity with the Constitution should not be given

a "do-over;" they have had their proverbial "day in court." The decisions of state jurists who have faithfully discharged their obligations to interpret and apply the Constitution should not be disregarded or discarded, especially not based on a fanciful view of the contours of this Court's rulings. Only rigorous enforcement of AEDPA's provisions can avoid these unpalatable consequences and restore the state-federal balance that that AEDPA is intended to achieve.

The Sixth Circuit's failure to give § 2254(d)(1)'s "clearly established" requirement its proper effect in this case is, by no means, a singular aberration. Though it is now over thirteen years since AEDPA went into effect, the requirement still has not been fully assimilated and some courts persist in interpreting the statute in ways that discern constitutional requirements that did not exist at the time of a state court decision under review. Cases like *Carey*, *Schriro* and *Van Patten* show that lower federal courts are wont to stray from the seemingly uncomplicated task of the ascertaining whether this Court's rulings *circa* the date of the state court's decision provided a clear answer with respect to the issue that the state court had to resolve. Instead, they have sometimes extrapolated from or amplified the Court's actual holdings, and then have faulted the state courts for not traveling down the same road.

The Sixth Circuit is not alone in incorrectly assessing what legal rule *Mills* clearly established. In *Abu-Jamal v. Horn*, 520 F.3d 272 (3d Cir. 2008), the Third Circuit likewise read more into *Mills*. Though the jury in *Abu-Jamal* was never instructed that mitigating circumstances had to be found

unanimously, nor given a verdict slip that so restricted their deliberations, the court of appeals held that habeas relief was warranted. The Third Circuit explained that, because of the presence of the word "unanimity," (which was used in connection with the determination of aggravating circumstances), "in close relation to . . . [the trial court's] discussion of mitigating circumstances," the jury instructions in the penalty phase had caused it to have an "impression" that there was a "risk of confusion." *Id.* at 520 F.3d 303. It found the state court's decision to be an unreasonable application of *Mills* for not intuiting this and upheld issuance of the writ. The Third Circuit which, like the court of appeals here, had the benefit of the Court's decisions in *Carey*, *Schriro* and *Van Patten*, dodged what, for purposes of AEDPA, is the essential question when it comes to determining what constitutes "clearly established Federal law": Did *Mills* supply a "clear answer" to the question of whether the jury instructions were unconstitutional because they did not include some more explicit discussion on the determination of mitigating circumstances? Decisions like *Abu-Jamal* underscore the need for this Court's clarification that the type of analysis used there, and here, simply does not accord with AEDPA and the purposes for which it was enacted.

D. The improper interpretation of *Mills* potentially raises questions about the validity of the States' jury instructions and procedures in capital cases.

Apart from the practical burdens previously discussed, the incorrect articulation of what legal principle(s) is/are clearly established in *Mills* gives

rise to another potential problem: the continuing validity of state jury instructions and sentencing procedures. As one would expect, this Court's Eighth Amendment jurisprudence informs procedural practices and rules in States whose laws provide for capital punishment, an integral portion of which govern a sentencing jury's consideration and determination of aggravating and mitigating circumstances.

The interpretation given *Mills* by the court of appeals in this case, and that of the Third Circuit in *Abu-Jamal*, if approved, potentially implicate the continuing validity of the States' jury instructions and procedures related to capital sentencing. The notion that *Mills* can continually be mined for new "clearly established" constitutional requirements in the way the courts in these two cases have done, essentially leaves this area of the law unsettled and makes the promulgation of state procedural rules a precarious venture. For this further reason, the *amici* states have an interest is the proper construction of the words "clearly established" and in seeing that they are given their plain meaning.

II. Because The Ohio Supreme Court's Ruling On Spisak's Ineffectiveness Claim Was Not Contrary To, Nor An Unreasonable Application Of *Strickland*, Habeas Relief Should Not Have Been Granted.

The Sixth Circuit's second basis for granting habeas relief is even more indefensible than its first. The court wholly failed to evaluate the state court's decision "through the lens of § 2254(d)(1)." *Price v. Vincent*, 538 U.S. 634, 639 (2003). A federal court

"may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must be unreasonable." *Williams*, 529 U.S. at 411. Here, the circuit court's decision is both unreasonable and wrong.

When a criminal defendant contends that his attorney was ineffective in representing him, the controlling case is ordinarily *Strickland v. Washington*, 466 U.S. 668 (1984). *See Van Patten*, 128 S.Ct. at 746; *Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003). *Strickland* requires a court to determine two things: whether counsel's performance was professionally deficient and whether the defendant was prejudiced by counsel's deficient performance. 466 U.S. at 687. A court may take up these questions in any order, *id.* at 697. Failure to satisfy either element requires rejection of the claim. *Id.* at 687.

The Sixth Circuit, however, did not review the Ohio Supreme Court's decision under *Strickland*, but rather undertook a subjective assessment of defense counsel's closing argument under *United v. Cronic*, 466 U.S. 648 (1984).[4] *Cronic* recognized "a narrow exception" to *Strickland's* two-step "performance and prejudice" analysis. *See Florida v. Nixon*, 543 U.S. 175, 190 (2004). This exception applies only where the circumstances are so fundamentally improper

[4] The court of appeals' discussion of the issue did not cite *Cronic* directly, but referred instead to *Rickman v. Bell*, 131 F.3d 1150 (6th Cir. 1997), a Sixth Circuit ruling that employed the *Cronic* analysis.

"that a presumption of prejudice is appropriate without actual inquiry into the conduct of the trial." *Id.* at 659-660. Thus, *Cronic* applies where counsel is totally absent, or is prevented from providing assistance at a critical stage of the proceeding, or where there has been such a breakdown in the adversarial process as to result in a complete—not partial—failure by counsel to test the state's case. *Id.* at 659-697.

Cronic does not apply to this case and it is mystifying that the Sixth Circuit thought it did. The record does not show that that counsel was absent or unable to render assistance at any point. There was no breakdown in the adversarial process. Even if it could be said that counsel did not advance the best case he could for his client—and *amici* do not believe that to be true given the very difficult circumstances of this case—the record indisputably shows that defense counsel devised, and put into effect, a strategy designed to defeat the state's case for a capital penalty. There was no failure to test the state's case, let alone the complete failure *Cronic* requires.

In short, there was no circumstance that could have justified applying *Cronic*. *Strickland* obviously was the controlling precedent for a claim of the sort involved here, that disputes the quality, not the existence, of counsel's assistance.

Under a *Strickland*-based review there is no basis for relief at all, let alone under the stringent AEDPA standard. The Ohio Supreme Court's rejection of Spisak's ineffectiveness claim was neither contrary to, nor an unreasonable application of *Strickland*—to the contrary. *Strickland* instructs that

> [j]udicial scrutiny of counsel's performance must be highly deferential . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct and to evaluate counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . .

466 U.S. at 689-690. There is no checklist, no "one-size-fits-all" set of rules for measuring counsel's performance. There are a vast number of different approaches that professionally responsible counsel may elect to take in defending an accused. *Id.* at 689-690 ("There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way"). *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000). Whether counsel's performance was within the broad spectrum of professionally responsible representation is a case-specific assessment which must take into account the circumstances in which the representation took place as well as the client's statements and instructions.

A state court reviewing counsel's performance as part of an ineffectiveness claim must follow *Strickland*'s directions about how to conduct that review, and these very directions invest the state court

with a great deal of discretion. A federal habeas court reviewing a state court's decision on collateral attack must be all the more mindful of this when evaluating whether the ruling was contrary to or an unreasonable application of *Strickland,* and must take particular care not to improperly disturb the result when the state court has properly discharged its responsibilities thereunder. There must be an appreciation that a state court's exercise of discretion under *Strickland* may lead to outcomes that are valid even if the reviewing court, considering the claim *de novo*, would not have reached the same outcome. See *Knowles v. Mirzayance*, 129 S.Ct. 1411, 1420 (2009)(explaining that "doubly differential judicial review" applies to *Strickland* claims evaluated under §2254(d)(1)). "[B]ecause the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard." *Id.* "The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004).

Affording deference to a state court's ruling is especially important in that state courts are co-equal interpreters of the Constitution. There is no reason to think that the state courts take this responsibility less seriously, or that they are less vigilant in protecting the rights of an accused, than a federal court—to the contrary. *See Sawyer v. Smith*, 497 U.S. 227, 241 (1990)("State courts are coequal parts of our national judicial system and give serious attention to their responsibilities for enforcing the commands of the Constitution.")

Indeed, in the first instance of appellate review in this case, the Ohio Court of Appeals for the Eighth District overturned two of the counts of aggravated murder and vacated one of the two convictions. *See* 465 F.3d 684. The state appellate courts do not rubber-stamp state criminal convictions. *See, e.g.*, *Commonwealth v. Williams*, 950 A.2d 294 (Pa. 2008)(finding defense counsel ineffective for failing to adequately investigate evidence of mitigation and remanding for new penalty proceeding); *Commonwealth v. Gorby*, 909 A.2d 775 (Pa. 2006)(same).

Given its fundamentally erroneous application of *Cronic*, the Sixth Circuit never addressed whether the Ohio Supreme Court's decision was contrary to or an unreasonable application of *Strickland*. Given the record, that question can only be answered in the negative. As petitioner's brief sets out in detail, *see* Br. for Petitioner at 31-36, Spisak's attorney faced an extremely difficult situation in the wake of his client's testimony and the absence of evidence of insanity or some other form of mental defect. Despite having little to work with and an unsympathetic client, counsel devised a plausible plan to avoid a death sentence by appealing to the jurors' humanity. In carrying it out, he made tactical judgments, consistent with sound litigation practice, to concede certain points to enhance his credibility in service of his ultimate goal.

The Ohio Supreme Court understood and effectuated *Strickland*'s direction for evaluating attorney performance, and conducted a context-based review which found no basis for relief under either of *Strickland's* prongs. That ruling was consistent with,

not contrary to, *Strickland*. It involved a reasonable application of *Strickland*'s holding. As a result, on habeas review, the state court decision should have been upheld.

By contrast, the Sixth Circuit's examination of this issue, wrongly oriented to *Cronic*, does not take into consideration that sound professional performance must be evaluated contextually; that "Monday morning quarterbacking" is not permitted; and that there is a presumption that counsel was professionally competent. The court of appeals did the very thing that this Court said in *Williams* was prohibited by AEDPA: it substituted its judgment for that of the state court.

Not only was it wrong for the court of appeals to re-evaluate counsel's performance and to use that re-evaluation as the basis for granting relief, but the manner in which it did so cannot be reconciled with the type of scrutiny *Strickland* prescribes. The court of appeals' discussion gives virtually no attention to reconstructing the circumstances that Spisak's counsel faced and reflects little understanding of the actual constraints on counsel's performance or the very few options he had.[5] *See* 465 F.3d at 703-706.

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[5] Not only did counsel have to contend with overwhelming evidence of Spisak's guilt, including his unrepentant confession, but he had to find a way to deal with his client's testimony in the guilt phase which, with its vehement endorsement of Nazism and many racist, anti-Semitic and homophobic remarks, did nothing to make Spisak appear sympathetic. *See* Br. for Petitioner at 31-36. In devising a strategy, counsel, too, had to adhere to his ethical obligations, including that of candor to the tribunal. *See*, e.g., Ohio Rule of Professional Responsibility 3.3.

(*Footnote continued on next page*)

Instead of evaluating the whole of counsel's performance, the court parsed his closing argument and focused on certain statements, which it termed deficient. *Id.* The court appears not to have considered the possibility that, in the larger context, there may have been a valid strategic reason for those statements, but instead simply presumed they were *per se* prejudicial to the defendant.

This is especially troubling when one remembers that the court of appeals based its criticism of counsel's performance strictly on the cold record which did not supply information about the tone or inflection of the comments as they were actually delivered. As the trial practice treatises cited by petitioner point out, *see* Br. for Petitioner at 39-40, the manner in which something is said, can be extremely important. Plainly, by evaluating counsel's argument so narrowly, the court of appeals did not approach its review of the record with the presumption that counsel was competent, as *Strickland* dictates. But even more important, it failed to appreciate that the Ohio Supreme Court's ruling did not apply *Strickland* unreasonably when it did not undertake a similarly narrow critique of counsel's performance.

Issuance of the writ cannot be justified on this basis either.

(*Footnote continued from preceding page*)

The court of appeals' decision does not reflect a true appreciation of the treacherous waters defense counsel had to navigate in this case.

CONCLUSION

The Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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