No. 08-724

In The Supreme Court of the United States

KEVIN SMITH, Warden,

Petitioner,

vs.

FRANK J. SPISAK, JR.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED

I. 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*?

II. 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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STATEMENT OF THE CASE

A. Pre-trial Court Clinic assessments of Spisak's mental health indicated Spisak was mentally ill.

On 3-29-83, the Cuyahoga County Grand Jury indicted Spisak on four counts of aggravated murder with capital specifications in violation of Ohio Rev. Code § 2903.01, 2929.04(A); three counts of aggravated robbery in violation of Ohio Rev. Code § 2911.01; one count of attempted murder in violation of Ohio Rev. Code § 2903.02, and one count of receiving stolen property in violation of Ohio Rev. Code § 2913.51.

Spisak entered a plea of not guilty by reason of insanity. Prior to trial, the court ordered Spisak evaluated for competency and sanity by Court Clinic psychiatrist, Dr. Phillip Resnick.

1. The social history.

The social history generated by the Court Psychiatric Clinic revealed that Spisak had childhood fantasies of being a woman. JA 657-658. As a child Spisak experienced repeated nightmares, reported he saw rooms change shape and heard people laughing at him. JA 653-654. At fourteen, Spisak became interested in Hitler, indicating "the literature he read made him feel superior." JA 658.

Because his parents would not give him money for college he worked two jobs and was admitted in

fall, 1969, to Cleveland State University. JA 658. When, after one year, Spisak's mother decided he could no longer live at home, Spisak was unable to attend school and took on more permanent jobs to be able to afford an apartment. JA 658.

In 1973, Spisak married Laverne, the first woman with whom he had sexual relations. They had a child the following year. In 1977, Spisak began to wear women's clothing and received estrogen treatment from the Gender Dysphoria clinic at Cleveland Metropolitan Hospital. JA 658-659. Spisak and Laverne divorced in 1978, when Spisak began dressing like a woman. JA 660. The same year Spisak also lost his manufacturing job of five years when he began to go to work dressed as a woman. Spisak subsequently, dressed as a woman, found new employment with a maker of eyeglasses. He was fired when the company discovered Spisak was not a female. JA 658.

After being fired, Spisak, dressed as a woman, began to prostitute himself on the Cleveland streets until he was arrested and charged with soliciting. Spisak found brief employment at Kelly Girls, a temporary job agency, until Spisak, looking "more like a man," was again fired. JA 659.

Spisak returned again to dressing like a man and found another machinist job. JA 659. He tried to be "overly macho" in his dress, wearing boots and chains. JA 659.

In early 1979, "shortly after he began to dress like a man," Spisak became involved with the National Socialist Party of America. JA 659. Spisak remarried Laverne in 1980, but the re-marriage lasted only four months. In part, Laverne became "repulsed" by all the Nazi memorabilia that Spisak "would not sell because he considered it to be a symbol of virility and manhood." JA 661.

2. The psychological testing by Court Clinic psychologist Dr. Althof.

Dr. Althof, a psychologist employed by the Cuyahoga County Court Clinic, administered a full battery of testing to Spisak for the purposes of pre-trial competency and sanity assessments. JA 677.

Dr. Althof's Psychological Evaluation indicated that test results "revealed multiple ego impairments" and assessed that, "[g]iven his poor judgment, thought disorders, tenuous reality testing and impaired affective regulation, Mr. Spisak seems prone to impulsive psychotic rages." JA 681-682. Dr. Althof's evaluation addressed a relationship between Spisak's mental illness, his sexual identity confusion, and his professed Naziism and racial issues.

> Paranoid obsessions were noted, focusing on hatred of Blacks, sadistic morbid fantasies of dead babies and identifications with powerful Nazi figures. Emotionally ladden [sic] stimuli resulted in the disruption of logical thinking and the intrusion of fused primitive

> highly charged sexual and aggressive impulses.
>
> * * *
>
> Mr. Spisak projects his unacceptable sexual and aggressive impulses onto Blacks. . . . His quasi political identifications serve as an obsessive-paranoid defense mechanism, whereby he wards off, albeit unsuccessfully, his projected aggression, inadequacy and sexual confusion.

JA 681-682. Dr. Althof noted that Spisak's personality disorder diagnosis "does not do justice to the severity of the patient's psychological condition." JA 682.

3. Dr. Resnick's competency assessment.

In finding Spisak competent to stand trial, Dr. Resnick's report noted how Spisak became "obsessed" both with Nazi ideology and "with the idea of becoming a woman." It reported how Spisak received estrogen treatment from the Gender Dysphoria clinic at Cleveland Metropolitan Hospital so he could develop breasts and presented himself as a candidate for surgical transition to being a woman. Spisak dropped out of the program but continued to dress as a woman. JA 671. Resnick's diagnosis of schizotypal personality was "manifested in Mr. Spisak by evidence of bizarre fantasies and preoccupations, ideas of reference, social isolation, recurrent illusions, vague metaphorical speech, suspiciousness and paranoid ideas, and hypersensitivity to criticism." JA

675. Resnick's psychological testing demonstrated a disturbance in Spisak's thinking process, but not classical signs for schizophrenia. JA 676.

Resnick indicated Spisak's demonstration of disturbed thinking and psychiatric symptoms "ha[d] improved substantially since he has been incarcerated." The Competency Report concluded that Spisak's current thought processes and "mild paranoid thinking" did not render him incompetent to stand trial. JA 676.

4. Dr. Resnick's sanity assessment.

In assessing Spisak's sanity, Dr. Resnick did not find Spisak to suffer from a mental disease or defect because Spisak's schizotypal personality disorder "is not considered a psychosis and does not cause him to be out of touch with reality." JA 694. Dr. Resnick detailed Spisak's own extensive admissions concerning the offenses and concluded that even if mentally ill, no mental diseases interfered with his appreciation of the wrongfulness of his acts or his ability to refrain. JA 695-698.

B. The trial court denied presentation of an insanity defense because defense experts recognized Spisak as seriously mentally ill but no one expert found Spisak legally insane.

Upon Spisak's request, the court ordered evaluations by Dr. Oscar Markey, Dr. Sandra

McPherson, Dr. Kurt Bertschinger, and Drs. S.M. Samy and Koerner.

1. Dr. Markey testified during a *voir dire* examination that Spisak had a mental disease or defect, that Spisak was unable to control his actions during the homicides, and that Spisak did not know right from wrong.

The Sixth Circuit noted that Dr. Markey acknowledged that Spisak suffered from an atypical schizophrenia and a schizotypal personality disorder. Pet. App. 38a. Markey explained that Spisak's underlying psychotic potential was not in a full blown psychotic state at that moment. Pet. App. 38a; JA 738.

Markey's report stated Spisak was unable to control his impulses to assault even though he was aware that killing was "socially wrong." JA 738. Markey noted that "[t]hese impulses had been chronically present for years, at least from the onset of puberty." JA 738. Markey also told the judge that from our society's way of thinking Spisak did not know the difference between right and wrong. Pet. App. 38a. The trial court permitted Markey to testify at trial. Pet. App. 40a-41a.

2. Dr. Markey's testimony was subsequently stricken at trial.

As the Sixth Circuit noted, Markey testified that Spisak's schizotypal personality disorder was subject

to the possibility of a breakdown which would equate with mental illness. Pet. App. 41a. Markey repeatedly referenced that "potential" for a breakdown but conceded that at trial Spisak did not "have an active mental disease." Pet. App. 41a.

Markey's written report reflected schizotypal delusions indicating that Spisak believed that Hitler was alive and could be elected president and that there are "evil forces which he designates "the System" that are presently evidenced in the Soviet threat and resemble what happened in the beginnings of Christianity and Christ's death and resurrection." JA 735.

The Circuit detailed how on cross-examination the prosecutor undermined Markey's testimony relating to the elements of an insanity defense. Pet. App. 42a. The prosecutor moved to strike Markey's testimony in its entirety as not relevant to the insanity defense. The trial court agreed and struck the testimony.

3. The trial court excluded all other experts from testifying at the culpability phase of trial. Their reports detailing Spisak's mental illness were proffered by defense counsel.

Defense counsel's requests to permit the testimony of other medical experts was summarily denied. The prosecutor argued that none of Spisak's other experts' reports concluded that Spisak was

legally insane. Without *voir dire*, the trial court excluded those experts from testifying during the culpability phase of trial. The partial dissent in the Sixth Circuit's opinion argued that Spisak had a right to present his sanity defense cumulatively, given that there were favorable portions from these psychiatric experts' reports that cumulatively supported a sanity defense. The Circuit majority rejected this approach. Pet. App. 49a.

The defense proffered the following experts' reports.

a. Dr. Bertschinger:

Dr. Bertschinger's proffered report concluded that Spisak's "personality deficits are of such severity that he can be considered to have a mental illness or disease." JA 719. During his mitigation phase testimony, he testified to this effect. JA 521, 532, 544. Bertschinger concluded that, in his opinion, Spisak was mentally ill, and "that mental illness does impair his reason to the extent that he has substantial inability to know wrongfulness, or substantial inability to refrain." JA 524.

Bertschinger's report noted the relationship between Spisak's mental health, his sexual identity, and his idolization of Hitler. Noting that Spisak demonstrated "severe defects in his personality structure," and that Spisak "has always felt abused and hated by people," "as a consequence [he] has identified with powerful figures, such as Hitler, in an

attempt to increase his self worth." JA 719. He also observed that Spisak suffered "severe conflicts regarding his sexual identity and his sexual impulses are fused and intermingled with aggressive impulses." JA 719.

b. Dr. McPherson:

During her mitigation phase trial testimony Dr. McPherson also indicated that Spisak had a mental defect which substantially impaired his ability to conform his conduct to the law. JA 462-463. She diagnosed Spisak with both Schizotypal and Borderline Personality Disorders. JA 463. McPherson wrote in her proffered report that "Mr. Spisak acknowledges the presence of delusions, hallucinations, depression and agitation in an extreme degree." JA 702.

Psychological testing indicated Spisak's "potential for decompensation into loss of control is high" and "the deviations of his thinking and functioning are more the product of longstanding defect of his mental condition rather than being reactive to stress." Dr. McPherson further indicated that Spisak "lacks any clear sense of himself and lacks internal control systems," and that Spisak "is a significantly disturbed individual whose defect of mental state is pervasive, and was the general cause of his acts." JA 704.

Dr. McPherson also detailed Spisak's sexual confusion and identity, JA 702, and assessed that the

lack of personality integration, "is in many ways no different than his attempt to find himself in the Nazi movement. . . . He seeks definition and structure from the outside." JA 704.

Dr. McPherson testified in mitigation that Spisak's talk about being identified with Naziism and his talks about a war against Blacks or Jews were "very paranoid ideations" involving "forces [that] are going to overwhelm him." JA 468. Naziism was used like a prop in his distorted reality. JA 480. Dr. McPherson indicated Spisak was a "social isolate," and "was never really a member of the [Nazi] group. In fact, he was early drawn into the Naziism and so forth, because he really didn't fit with other systems of identification." JA 469.

c. Drs. Samy and Koerner:

The psychological report of Drs. Koerner and Samy linked Spisak's emotional and psychological shortcomings and his identity disorders to delusional fantasies and violence. The report diagnosed an Axis I Identity Disorder and Gender Identity Disorder, as well as an Axis II, Atypical Personality Disorder with grandiose and aggressive features. JA 729.

The report placed in context Spisak's outward displays of his Nazi "beliefs" that dominated his trial.

> . . . Mr. Spisak appears to be an emotionally stunted individual with a high need to feel in control and [sic] fear of inadequacy and vulnerability. He tends to view the world in

> an over simplistic manner and he aligns himself with ideologies that legitimize his feelings of alienation and fear. He vacillates between identifying with groups that espouse these socially deviant beliefs and with being a loner. He has a very poorly formed concept of his identity as an adult.

JA 725.

Similarly, the Report concluded that

> Mr. Spisak developed Identity Disorders which affected his way of life and resulted in the development of social, occupational and marital problems. He was aware of that and he stopped wearing female clothing to get his wife back. He was also affected by his mother's strong personality and wanted to be like her, but was unable to achieve a "boss" position as she did. He tried to gain some strength by joining the Nazi Party, but this did not help him in his attempt. This failure aggravated him and he blamed others for his problems . . .

JA 732.

4. Spisak's trial testimony demonstrated these irrational beliefs and sexual identity concerns.

In his trial testimony Spisak consistently demonstrated his irrational thinking consistent with the proffered psychological and psychiatric reports. Spisak testified that he was an agent of God, and that

God had given him the force or power to kill. JA 64; 95. Spisak was able to shoot a gun straight because he had the force of God guiding his hand. JA 62. As an agent of God, Spisak had to bear the cross placed upon him by God. JA 93. Spisak believed that "my immediate superior is God." JA 146.

In Spisak's rambling testimony he stated he was now "a prisoner of war . . . that is being fought between the forces of light and the forces of darkness, which I am temporarily a triumph over my material body." JA 143. Spisak stated that he was fighting the forces of darkness "which are represented by Satan and his children." JA 144. Spisak indicated that in killing he was helped by God because the set up was so perfect. JA 172. Finally, Spisak believed "It's the Holy Spirit in me talking . . . And the Holy Spirit is giving me the words to answer your questions." JA 248-249.

Spisak admitted that prior to his Nazi involvement, in 1978, he dressed as a woman, wore eyeliner and frizzed his hair, spoke to a psychiatrist about seeking a sex change operation, changed his name to the woman's name, Frankie Ann Spisak, and secured a driver's license in that name. JA 202-205.

5. The trial court denied a sanity instruction.

The trial court refused to give a requested insanity instruction. Spisak was found guilty on all counts and capital specifications.

C. In counsel's mitigation phase closing argument he erroneously told the jury that the aggravated circumstances to be weighed included the nature and circumstances of all the killings, indicated Spisak was not worthy of mitigation, and failed to address the link between Spisak's gender identity issues, his mental illness and his involvement with Naziism.

As the mitigation phase commenced, trial counsel began by telling the jury the issue at mitigation was limited to a "very, very narrow question . . . [that] is how sick, if he is sick, and the mental illness, the mental defect, if any, that Frank Spisak may have." JA 455. Counsel concluded his opening argument by abandoning any advocacy with the comment, "If you agree with us, fine. If you don't agree with us, you are the jurors." JA 455.

Counsel called Drs. Bertschinger, McPherson and Markey to the stand to reiterate their trial phase testimony. These witnesses testified to Spisak's mental illnesses, his horrible childhood marked by social isolation, and his gender identity issues. No other witnesses were called on behalf of Spisak at mitigation.

D. Spisak was sentenced to death.

The jury returned a verdict of death which was accepted by the trial court.

E. Direct Appeal and the Ohio Supreme Court's summary rulings.

On direct review, following the vacation of one of the aggravated murder convictions that duplicated a death sentence for one of the victims, Pet. App. 97a, Spisak filed a merit brief with the Ohio Supreme Court raising sixty-four propositions of law. The Ohio Supreme Court affirmed Spisak's conviction and death sentence in a four page opinion. Pet. App. 301a-311a.

1. The summary merit review of the *Mills* Claim.

Spisak raised his jury instruction claim as his 54th Proposition of Law. The Ohio Supreme Court summarily denied this claim together with six other separate claims, string-citing five state cases as authority. Pet. App. 306a.

2. The summary merits review of the Ineffective Assistance of Counsel Claim.

Spisak raised his ineffective assistance of counsel claim as his 57th Proposition of Law. The Ohio Supreme Court summarily denied this claim together with 48 other separate claims, string-citing 38 federal and state cases as authority. Pet. App. 307-308a.

3. Denial of certiorari.

Spisak petitioned the United States Supreme Court for a writ of certiorari, which was denied. *Spisak v. Ohio*, 489 U.S. 1071 (1989).

F. State post-conviction.

Not germane to this litigation, Spisak completed a full round of state post-conviction litigation. Pet. App. 116a, 130a.

G. Federal habeas litigation.

The federal district court denied Spisak's habeas petition. Pet App. 299a.

The Sixth Circuit reversed the district court, upheld his aggravated murder convictions, but vacated Spisak's death sentence on two grounds, both of which are the subject of this litigation. The court concluded that the jury's sentencing instructions were improper under *Mills v. Maryland,* Pet. App. 71a-76a, and that trial counsel had rendered ineffective assistance pursuant to *Strickland v. Washington*, during the mitigation phase closing argument. Pet. App. 67a.

Upon the Warden's filing a petition for certiorari, this 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). Pet. App. 21a.

The Sixth Circuit reinstated its decision. Pet. App. 12a, and then filed an amended order and opinion. Pet. App. 2a. *En banc* review was declined. Pet. App. 1a.

SUMMARY OF ARGUMENT

The Sixth Circuit properly reviewed the merits and the underlying state court decision in determining that Spisak was entitled to *habeas* relief on two independent grounds. The Circuit specifically identified that the two claims were subject to the AEDPA standard of review in 28 U.S.C. § 2254(d)(1) and that the summary state court decision denying Spisak's claims *en masse* were contrary to or an unreasonable application of this Court's clearly established federal law.

The Circuit determined that Ohio's mitigation phase jury instructions violated this Court's directives in *Mills v. Maryland*, 486 U.S. 367 (1988). The Circuit reviewed the totality of the instructions and verdict forms: including the instruction that the jury had to unanimously vote against the death sentence before any consideration could be given to a life sentence; the repeated admonitions that all decisions had to be unanimous; and the absence of any instruction that a finding of a mitigating circumstance did not have to be unanimous, and concluded that under the circumstances, there was a reasonable probability that a juror would have been

foreclosed from considering and giving effect to the mitigation evidence presented. The court concluded that it was possible and reasonable that one juror voting for a death sentence would prevent the remaining eleven jurors from voting for a life sentence because only after unanimously rejecting death could the jury consider life. Permitting one juror to force a death sentence on the remaining jurors is the essence of a *Mills* error.

The Circuit also determined that Spisak's trial counsel was constitutionally ineffective in the closing argument he delivered in the mitigation phase of the case. In reviewing this claim the Circuit repeatedly and expressly applied the test announced in *Strickland v. Washington*, 466 U.S. 668 (1984). At no point did the Circuit cite to or rely on the presumption of prejudice standard announced in *United States v. Cronic*, 466 U.S. 648 (1984). The Court stated that it grounded its decision in *Strickland*. A court is presumed to apply the law it asserts is being applied. There is no evidence that the Circuit applied *Cronic* rather than *Strickland*.

The Circuit determined that counsel's improper emphasis of non-statutory aggravating circumstances, his overt attacks on Spisak, his incoherent ramblings on the justice system, his failure to argue the mitigating factors present in the case, added up to telling the jurors that, contrary to the evidence no mitigating factors existed contrary to the evidence, or even failing to ask the jury to return a life sentence was deficient. The Circuit concluded that counsel's

closing argument reads like a prosecutor's closing argument and that had the same argument been made by the prosecutor, relief would be warranted because of prosecutorial misconduct. Counsel utterly failed to advocate for Spisak and went so far as to tell the jurors they could be proud if they sentenced Spisak to death.

Given the wealth of mental health and other evidence available and present in the case, the Circuit determined that there was a reasonable probability that one juror would have been persuaded to return a life sentence had counsel competently presented a closing argument. There was significant evidence that not only explained the crimes but also Spisak's affiliation with Nazis, his gender confusion, and the positive adaptability to prison in ways that juries regularly rely on to return life sentences. The Circuit specifically found that counsel was not deficient in developing and presenting a case for life. It was counsel's inexplicable closing argument, filled with contempt and hate for Spisak, that destroyed the mitigation presentation and insured that the jury would return a death verdict.

Therefore, the Court should affirm the Circuit's granting of the Writ.

ARGUMENT

I. 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*?

The constitutional question is "whether a reasonable jury would have interpreted the instructions in a way that is constitutionally impermissible." *Mills v. Maryland*, 486 U.S. 367, 375-376 (1988). "The question, however, is not what the State Supreme Court declares the meaning of the charge to be, but rather what a reasonable juror could have understood the charge as meaning. *Sandstrom [v. Montana]*, 442 U.S. [510], at 516-517 [1979] (state court 'is not the final authority on the interpretation which a jury could have given the instruction')." *Francis v. Franklin*, 471 U.S. 307, 315-316 (1985). The core holding of *Mills* is that jury instructions and/or verdict forms that prevent a single juror from giving effect to mitigating evidence violate *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982). As such it is critical to address the reasonable interpretations of the instructions, not what the Warden, or even the courts, think the instructions mean. *Mills v. Maryland*, 486 U.S. at 375-376.

In reviewing a mitigation phase jury instruction it is necessary to review the instruction actually given as well as the totality of the instructions. At Spisak's trial the jury was instructed:

> If all twelve members of the jury find by proof beyond a reasonable doubt that the aggravating circumstances in each separate count outweigh 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. 324a; Pet. App. 73a-74a (*Spisak*, 465 F.3d at 709-710). Throughout the proceedings the jury was repeatedly addressed in the collective "you" and instructed that every decision was to be the decision of the "jury." The jury was also specifically instructed that each of the two sets of verdict forms, whether for death or life, had to be unanimous. Pet. App. 325a (" . . . there is a spot for twelve signatures. All twelve of you will sign it if that is your verdict in this case.") -326a ("And again, all twelve of you must sign whatever verdict it is you arrive at [sic] must be signed in ink"); Pet. App. 74a-75a (*Spisak*, 465 F.3d at 710). Every instruction advised the jury that it had to be unanimous on decisions. At no point were the jurors instructed that a decision as to the existence of a mitigating factor was an individual, non-unanimous decision.

The primary concern with Ohio's instruction is the command that the jury unanimously reject the death penalty before considering a life sentence. The instruction is quite clear that the jury must first unanimously find that the state failed to prove that the aggravating circumstances outweighed the mitigating factors before the jury could consider a life sentence.[1] Under this instruction a single juror in favor of a death sentence would make it impossible

[1] This type of instruction, which appears to be unique to Ohio, was subsequently declared unconstitutional under *Mills*. *State v. Brooks*, 75 Ohio St.3d 148, 161, 661 N.E.2d 1030, 1041-1042 (1996).

for the remaining, eleven individual jurors to give effect to the mitigating factors each of them determined to exist. This is especially problematic in this case as Spisak's counsel not only conceded the existence of the statutory aggravating circumstances, but argued extensively about non-statutory aggravators and told the jury this case had "all the aggravating circumstances you ever want" while at the same time diminishing the existence of the mitigating factors. Pet. App. 337a.

The impact of this instruction cannot be understated. A reasonable interpretation would result in one juror refusing to permit any discussion of life sentences and mitigation evidence because that juror was in favor of a death sentence. Any effort to discuss mitigation evidence would be rebuffed because that would entail a discussion of life sentences which is not permissible until the death penalty was unanimously rejected. As in *Mills*, "the possibility that a single juror could block such consideration, and consequently require the jury to impose the death penalty, is one we dare not risk." *Mills*, 486 U.S. at 384.

While it is possible that the jurors understood and applied the instructions in a manner that is constitutionally acceptable, it is just as possible that one or more of the jurors was mislead and misapplied the law. Given the high degree of certainty required in capital cases, *Mills*, 486 U.S. at 376; see also *Andres v. United States*, 333 U.S. 740, 752 (1948), there is a substantial probability that a juror in this

case was prevented from independently considering and giving weight to mitigation evidence as required by *Lockett* and *Eddings*. The Ohio Supreme Court's subsequent treatment of the acquittal-first instruction clearly demonstrates that Ohio's "acquittal-first" instruction violates *Mills*. *State v. Brooks*, 75 Ohio St.3d 148, 161, 661 N.E.2d 1030, 1041-1042 (1996). In *Brooks*, the Court invalidated this same instruction relying directly and explicitly on *Mills*.[2] See also *State v. Diar*, 120 Ohio St.3d 460, 491-92, 900 N.E.2d 565, 600-01 (2008) (state's concession that jury instruction violated *Mills* and required reversal). In *Brooks*, the Ohio Supreme Court ordered that future capital juries be affirmatively instructed that a single juror's vote for life prevents a death sentence. *Brooks*, 75 Ohio St.3d at 162, 661 N.E.2d at 1042.

Added to this concern is the fact that every instruction referring to the jury's determinations was couched in terms of unanimity: "Members of the jury, you have heard the evidence"; "The Court and jury have separate functions. You decided the disputed facts"; "Now, credibility. You are the sole judges of the acts"; "In this case the aggravating circumstance are the specifications upon which you returned guilty verdict"; "Mitigating factors are those which, while not excusing or justifying the offense, or offenses, may in fairness and mercy, be considered by you, as

[2] *Brooks* is the first case in which the Ohio Supreme Court even cited *Mills* in a death penalty case.

extenuating or reducing the degree of the defendant's responsibility or punishment"; "You must state your finding as to each count uninfluenced by your verdict as to any other count"; "A summary of that section provides that you, 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." Pet. App. 313a-329a. It must be presumed that the jury understand the unanimity requirement to apply to every decision since there was never a contrary instruction. *Mills*, 486 U.S. at 378-379. There is simply nothing in these jury instructions or verdict forms that would have suggested to any juror that the unanimity instruction did not apply to every single jury determination, including the existence of mitigating factors or the impact of that evidence. The totality of the jury instructions were such that a reasonable juror would have understood the instruction to mean that a death sentence had to be unanimously rejected before a life sentence could be considered. As in *Mills*, the impact of this instruction is to preclude each individual juror from individually giving effect to the mitigation evidence.

Contrary to the Warden's assertion, the Sixth Circuit did not hold that states must give a specific instruction that the jury need not be unanimous as to the existence of mitigating factors. How states choose to structure jury instructions is typically left to the states. *Buchanan v. Angelone*, 522 U.S. 269, 277 (1998) ("The State may shape and structure the jury's consideration of mitigation so long as it does not

preclude the jury from giving effect to any relevant mitigating evidence."). Requiring a specific non-unanimity instruction would run counter to the Court's directive. *Jones v. United States*, 527 U.S. 373, 381 (1999). See *LaFevers v. Gibson*, 182 F.3d 705, 719 (10th Cir. 1999); *Duvall v. Reynolds*, 139 F.3d 768, 791-792 (10th Cir. 1998). The Circuit held, consistent with *Mills*, *Jones*, and *Buchanan*, that the jury instructions in their entirety were such that a reasonable juror could have improperly understood the instructions to require unanimity as to the existence of a mitigating factor before the factor could be considered in favor of a life sentence. This is a straight-forward application of *Mills*. Had Spisak's jury instructions included, as Ohio's model jury instructions now do, a specific instruction that one juror's vote against the death penalty would prevent a death sentence, the jurors understanding of his/her role would have been entirely different. It was the absence of this instruction, coupled with the instructions and verdict forms given, that created the reasonable probability that the jurors misapplied the law.

The Warden asserts that because the *Mills* jury instructions were not identical to Spisak's jury instructions the Ohio court decision is immune from review under AEDPA. *E.g.,* Pet. Br. 20 ("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. . . ."). This argument is the equivalent of saying that habeas relief could be

granted under *Strickland* only if the facts of the ineffectiveness claim were identical to those in *Strickland* itself. The Court's post-AEDPA jurisprudence demonstrates that the Warden misstates the standard. *Wiggins v. Smith*, 539 U.S. 510 (2003); *Rompilla v. Beard*, 545 U.S. 374 (2005); *Banks v. Dretke*, 540 U.S. 668 (2004); *Lockyer v. Andrade*, 538 U.S. 63 (2003). The general *Strickland* test applies to all ineffective assistance of counsel claims unless there is another precedent directly on point. *Knowles v. Mirzayance*, 129 S. Ct. 1411, 1419, 173 L. Ed. 2d 251, 262 (2009). Similarly, *Mills* applies to all jury instruction and/or verdict form cases unless a different precedent is directly on point.

AEDPA constrained, but did not eliminate, federal *habeas* review. The Court continues to recognize the importance of the Great Writ and the duty of the federal courts to give substantive review to *habeas* petitions. See *Miller-El v. Dretke*, 545 U.S. 231 (2005); *Williams v. Taylor*, 529 U.S. 362 (2000). Even under the AEDPA changes to the Great Writ, "the province of the court is, solely, to decide on the rights of individuals." *Marbury v. Madison*, 5 U.S. 137 (1803). The Court specifically recognized that ceding federal review to the states would render AEDPA unconstitutional. *Williams*, 529 U.S. at 378-79. See also *Hamdi v. Rumsfeld*, 542 U.S. 507, 575 (2004) (Scalia, J., dissenting) ("The Suspension Clause of the Constitution, which carefully circumscribes the conditions under which the writ can be withheld, would be a sham if it could be

evaded by congressional prescription of requirements *other than the common-law requirement of committal for criminal prosecution* that render the writ, though available, unavailing.") (emphasis in original).

"Clearly established Federal law" is defined as "the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000). In *Musladin*, this Court addressed how some legal holdings are categorically defined by a narrow and conceptually limited number of factual distinctions while other broader and more general legal holdings allow for more numerous factual variations. For analytical purposes, defendants forced to wear prison garb and uniformed state troopers sitting collectively immediately behind the defendant reflected both a factually and legally distinct category from individual courtroom spectators wearing buttons carrying the likeness of the victim. The Court denied relief under § 2254(d)(1) because the former fact patterns characterized a clearly established legal holding about a defendant's right to a fair trial in the context of "state sponsored courtroom practices," unlike the button-wearing spectators, whose actions bore no relation to any official state action. As the Court noted, clearly established federal law "has never addressed a claim that such private-actor courtroom conduct was so inherently prejudicial that it deprived a defendant of a fair trial." *Musladin*, 549 U.S. at 76.

On the other hand, in the context of a broad and general legal holding such as *Strickland, Musladin* would obviously not prevent relief being granted except upon a showing that the facts of the ineffectiveness claim were near-identical to those in *Strickland* itself. *Accord*, *Musladin*, 549 U.S. at 80-81 (Kennedy, J., concurring) (notwithstanding the majority's conclusion that no prior Supreme Court holdings have addressed the constitutional implications of trial spectators wearing such buttons, "relief under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) would likely be available even in absence of a Supreme Court case addressing the wearing of buttons" if spectator conduct amounted to "intimidation" in violation of the well-established general "rule against a coercive or intimidating atmosphere at trial.").

This distinction recognizes the need to consider the categorical or conceptual limits of a Court's holding and was reiterated in *Panetti v. Quarterman*, 551 U.S. 930 (2007). "AEDPA does not 'require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied.'" *Id.*, at 953 (quoting *Musladin*, 549 U.S. at 81 (Kennedy, J., concurring in judgment). The Court's long history of reviewing capital jury instructions demonstrates that it applies to the panoply of instructions crafted by the states rather than the discrete instruction before the Court.

> As an overview of the cases both preceding and following *Penry I* demonstrates, we have

> long recognized that a sentencing jury must be able to give a "'reasoned moral response'" to a defendant's mitigating evidence – particularly that evidence which tends to diminish his culpability – when deciding whether to sentence him to death. *Id.*, at 323, 109 S. Ct. 2934, 106 L. Ed. 2d 256; see also *Abdul-Kabir*, ante, at ___-___, ___-___, 127 S. Ct. 1654, 167 L. Ed. 2d 585, 2007 U.S. LEXIS 4536. This principle first originated in *Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982), in which we held that sentencing juries in capital cases "must be permitted to consider any relevant mitigating factor," *id.*, at 112, 102 S. Ct. 869, 71 L. Ed. 2d 1 (emphasis added). In more recent years, we have repeatedly emphasized that a *Penry* violation exists whenever a statute, or a judicial gloss on a statute, prevents a jury from giving meaningful effect to mitigating evidence that may justify the imposition of a life sentence rather than a death sentence. See *Abdul-Kabir*, ante, at ___-___, 127 S. Ct. ___, 167 L. Ed. 2d 585, 2007 U.S. LEXIS 4536.

Brewer v. Quarterman, 550 U.S. 286, 289 (2007); see also *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 246 (2007).

In *Mills*, as in *Strickland*, the Court specifically crafted a holding where the broad legal principles that defined the holding were clearly articulated so as

to encompass a myriad of factual situations which would fall under those clearly established broad legal principles. After making clear that in a capital case the sentencer may not be precluded from considering and giving effect to mitigation evidence, and that the issue under consideration was that a jury that does not unanimously agree on the existence of any mitigating circumstance may not give mitigating evidence any effect whatsoever, the Court enunciated that its holding was expressing a broad legal principle meant to be applied to the myriad of factual scenarios and contexts in which capital mitigation is considered throughout the country:

> Under our decisions, *it is not relevant whether the barrier to the sentencer's consideration of all mitigating evidence is interposed by statute, (citations omitted), by the sentencing court, (citations omitted), or by an evidentiary ruling. (Citations omitted).* The same must be true with respect to a single juror's holdout vote against finding the presence of a mitigating circumstance. *Whatever the cause,* if petitioner's interpretation of the sentencing process [that a jury that does not unanimously agree on the existence of any mitigating circumstance results in a situation in which the jury or jurors may not give mitigating evidence effect], is correct, the conclusion would necessarily be the same: "Because the [sentencer's] failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence, in plain

> violation of Lockett it is our duty to remand this case for resentencing. (Citations omitted).

Mills, 486 U.S. at 375. (Emphasis added). *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Penry v. Johnson*, 532 U.S. 782 (2001); *Smith v. Texas*, 543 U.S. 37 (2004); *Smith v. Texas*, 550 U.S. 297 (2007); *Abdul-Kabir*; *Brewer*.

In a related context interpreting the phrase "clearly established law" the Court has consistently held that "[T]o be established clearly, however, there is no need that 'the very action in question [have] previously been held unlawful.'" *Safford Unified School District #1 v. Redding*, 129 S. Ct. 2633, 174 L. Ed. 2d 354, 366 (2009) quoting *Wilson v. Lane*, 526 U.S. 603, 615 (1999) (addressing the question of qualified immunity of state actors). Rather, the issue is whether the Court's statements were sufficiently clear to put officials on notice. *Hope v. Pelzer*, 536 U.S. 730, 41 (2002). Even the fact that there are "disuniform views of the law" does not render the law unclear. *Redding*, 174 L. Ed. 2d at 366.

The law of *Mills* as applied by the Sixth Circuit is clearly established. In fact, if Spisak's trial were conducted today and these instructions were given, the Ohio courts would reverse the death sentence as unconstitutional pursuant to *Mills*, and remand for resentencing. *Brooks*, *supra*. A reasonable interpretation of the jury instructions and verdict forms, considered in the totality, would prevent any

individual juror from giving effect to mitigating factors he or she determined to exist. In fact, a single juror in favor of death would prevent the remaining eleven jurors from giving effect to the mitigating evidence since a unanimous decision against death was required before a life sentence could be discussed. The judgment of the Sixth Circuit must be affirmed.

II. 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)?

A. The Sixth Circuit did not apply *Cronic*'s presumption of prejudice to Spisak's ineffective assistance of counsel claim.

The Warden presents a different issue for this Court's review than that he presented in the petition. In his petition for a writ of certiorari the Warden asserted that the Sixth Circuit improperly applied *United States v. Cronic*, 466 U.S. 648 (1984), rather than *Strickland v. Washington*, 466 U.S. 668 (1984), to Spisak's ineffective assistance of counsel claim.

Petition at 23. The Court granted certiorari to review this question.[3] Rather than address the question upon which certiorari was granted, the Warden presents a bare plea that this Court correct a claimed incorrect application of *Strickland* to the facts of Spisak's case. The Warden's only citation to *Cronic* merely asserts that the Circuit applied it. Pet. Br. at 41-42. The Sixth Circuit did not improperly apply *Cronic* to Spisak's case but rather correctly reviewed the ineffective assistance of counsel claim through the lenses of *Strickland* and AEDPA.

It is clear that the Sixth Circuit did not apply *Cronic*. In *Bell v. Cone*, 535 U.S. 685 (2002), the Court made it clear that *Strickland* and not *Cronic* controls judicial review of the performance of counsel in closing argument. *Bell*, 535 U.S. at 697-98. The Sixth Circuit followed the dictate of *Bell* and applied *Strickland*'s two prong test. Throughout the Circuit's opinion reference is made directly to the *Strickland* standards. The very first sentence of the Circuit's opinion on this issue identifies *Strickland* as the controlling law. Pet. App. 60a (*Spisak*, 465 F.3d at 703). In each of the three opinions issued by the Circuit, the Court repeatedly referred to *Strickland* as the controlling authority. *Id.*; Pet. App. 16a (*Spisak v. Hudson*, 512 F.3d 852, 854 (6th Cir. 2008)) ("does not preclude this Court's finding that the state court

[3] The caption for this issue now reads "Trial counsel's closing argument was not constitutionally ineffective under *Strickland*." Pet. Br. at 31.

unreasonably applied federal law as announced in *Strickland*."); Pet. App. 6a (*Spisak v. Hudson*, 2008 U.S. App. Lexis 7760, *6-7 (6th Cir. 2008)) ("this Court's holdings partially granting habeas relief relied on well-settled Supreme Court precedent regarding ineffective assistance of counsel at the sentencing phase of trials, i.e. *Strickland v. Washington*.").

When a court cites the correct legal standard it is presumed that the court actually applied that standard. "There is no principle of law better settled, than that every act of a court of competent jurisdiction shall be presumed to have been rightly done, till the contrary appears." *Harvey v. Tyler*, 69 U.S. 328, 344 (1864). *Moragne v. States Marine Lines*, 398 U.S. 375, 378 n.1 (1970). See also *Bell v. Cone*, 543 U.S. 447, 455-456 (2005); *Parker v. Dugger*, 498 U.S. 308 (1991); *Walton v. Arizona*, 497 U.S. 639, 653 (1990), *overruled on other grounds*, *Ring v. Arizona*, 536 U.S. 584 (2002); *LaVallee v. Delle Rose*, 410 U.S. 690, 694-695 (1973) (per curiam). There is no evidence that the Circuit did not do what it said it did – correctly apply the well-settled *Strickland* standards to this case.

The Warden concedes that the Circuit applied *Strickland* to the performance aspect of this case. Pet. Br. at 31 (beginning discussion with *Strickland*). The Warden only claims that the Circuit improperly applied *Cronic*'s presumption of prejudice. Pet. Br. at 41-42. The Circuit, however, did not presume prejudice but applied *Strickland*'s prejudice standard.

Pet. App. 67a (*Spisak*, 465 F.3d at 706) ("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"). This is precisely the standard enunciated by this Court in *Strickland. Wiggins v. Smith*, 539 U.S. 510, 537 (2003).

Although the Circuit did cite its earlier case, *Rickman v. Bell*, 131 F.3d 1150 (6th Cir. 1997), which referenced *Cronic*, the Circuit did so solely in discussing the performance prong of *Strickland*. Pet. App. 66a (*Spisak*, 365 F.3d at 706).[4] The use of *Rickman* simply demonstrated how poorly Spisak's counsel's performance really was. ("Here, as in *Rickman*, trial counsel's hostility toward Defendant aligned counsel with the prosecution against his own

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[4] As the Circuit noted:

> In *Rickman*, counsel pursued a similar strategy of attempting to portray his client as a "sick" and "twisted" individual which should mitigate the death sentence. Trial counsel's strategy in *Rickman* involved repeated attacks on his client's character, eliciting damaging character evidence about his client, making disparaging comments to any witness who spoke favorably about his client, and apologizing to the prosecutors for his client's crime. [citation omitted]. The court concluded that counsel's performance was "outrageous" because his attacks on Rickman equaled or exceeded those of the prosecution. [citation omitted].

Pet. App. 65a-66a.

client. Much of Defendant's counsel's argument during closing of mitigation could have been made by the prosecution, and if it had, would likely have been grounds for a successful prosecutorial misconduct claim." Pet. App. 66a). Since the performance prong of *Cronic* and *Strickland* are the same, the reference to *Rickman* is perfectly appropriate. The Circuit concluded its performance prong analysis citing *Strickland*, and indicating that "[i]n light of all the circumstances of this case, and even conceding that counsel faced some unique challenges, we still find that Defendant has rebutted the 'strong presumption' that counsel's actions constituted 'sound trial strategy.' " Pet. App. 66a. *Id.*[5]

[5] Prior to *Spisak*, the Sixth Circuit repudiated the application of *Cronic* it applied in *Rickman*, while still recognizing the validity of the performance-prong analysis. In *Cone v. Bell*, 243 F.3d 961, 977 (6th Cir. 2001), the Circuit had cited authoritatively to *Rickman*'s application of *Cronic.* Two years later, in *Johnson v. Bell*, 344 F.3d 567 (6th Cir. 2003), reh'g and sugg. for reh'g en banc denied 11-25-2003, the Circuit noted that whereas in *Cone* the court considered the "complete abdication" of counsel's penalty phase advocacy "we are mindful of the Supreme Court's opinion in *Bell v. Cone,* [535 U.S. 685 (2002)]," which reversed a grant of the writ by the Circuit court and applied *Strickland*. The *Johnson* court specifically noted that the Supreme Court "reminded us that 'a court must indulge a "strong presumption" that counsel's conduct falls within the wide range of reasonable professional assistance because it is all too easy to conclude that a particular act or omission of counsel was unreasonable in the harsh light of hindsight.' " *Johnson*, 344 F.3d at 573 (citing to *Cone,* 122 S. Ct. at 1854 (citing *Strickland*)).

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At no point in any of the three opinions did the Circuit cite to *Cronic*. The Circuit repeatedly and specifically stated it was reviewing the claim under *Strickland*, identified the two-prong test of *Strickland*, never cited *Cronic*, and did not presume prejudice. The Warden concedes that the Circuit applied *Strickland* to Spisak's other ineffective assistance claim. Pet. Br. at 42. It cannot be presumed that the Circuit would apply the *Cronic* standard (without citation and while citing *Strickland*) in one paragraph and then switch to the *Strickland* standard (with express citation to *Strickland*) in the very next paragraph. Pet. App. 66a (*Spisak*, 465 F.3d at 706). Since the Circuit applied the proper test to the specifics of this case the judgment should be affirmed.

B. The Circuit properly reviewed this claim under *Strickland* and AEDPA standards.

1. State Court Decision

Spisak's challenge to the closing argument of counsel was raised on direct appeal to the Ohio courts. Spisak raised this claim in his 57th Proposition of Law to the Ohio Supreme Court. The

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There is no reason to assume that the Circuit reapplied *Cronic* in *Spisak* and forgot the lesson it acknowledged three years earlier.

Ohio Supreme Court summarily rejected this claim together with 48 other Propositions without analysis:

> In propositions of law two through eight, ten through fifteen, seventeen, eighteen, twenty-one, twenty-two, twenty-four through thirty-six, thirty-eight through forty-one, forty-three through forty-seven, forty-nine, fifty-one through fifty-three, fifty-seven through sixty-one, and sixty-three, appellant raises arguments which we find to be not well-taken on the basis of our review of the record in light of the following authorities: *Maurer*, *supra*; *Donnelly v. DeChristoforo* (1974), 416 8 U.S. 637; *Darden v. Wainwright* (1986), 477 U.S. 168; *Strickland v. Washington* (1984), 466 U.S. 668; *Evitts v. Lucey* (1985), 469 U.S. 387; *State v. Smith* (1985), 17 Ohio St.3d 98, 17 OBR 219, 477 N.E.2d 1128; *State v. Lytle* (1976), 48 Ohio St.2d 391, 2 O.O.3d 495, 358 N.E.2d 623; *State v. Staten* (1969), 18 Ohio St.2d 13, 47 O.O.2d 82, 247 N.E.2d 293; *State v. Pi Kappa Alpha Fraternity* (1986), 23 Ohio St.3d 141, 23 OBR 295, 491 N.E.2d 1129 (distinguished); *Payton v. New York* (1980), 445 U.S. 573 (distinguished); *Rawlings v. Kentucky* (1980), 448 U.S. 98; *State v. Rogers* (1986), 28 Ohio St.3d 427, 28 OBR 480, 504 N.E.2d 52, paragraph one of the syllabus (*Rogers* II), reversed on other grounds (1987), 32 Ohio St.3d 70, 512 N.E.2d 581; *Buell*, *supra*; *Wainwright v. Witt* (1985), 469 U.S. 412; *State v. Rogers* (1985), 17 Ohio St.3d 174, 17 OBR 414, 478 N.E.2d 984, paragraph three of the syllabus (*Rogers* I),

reversed on other grounds (1987), 32 Ohio St.3d 70, 512 N.E.2d 581; *State v. Williams* (1983), 6 Ohio St.3d 281, 6 OBR 345, 452 N.E.2d 1323; *State v. Williams* (1986), *supra*; *State v. Byrd* (1987), 32 Ohio St.3d 79, 512 N.E.2d 611; *State v. Kidder* (1987), 32 Ohio St.3d 279, 513 N.E.2d 311; *Illinois v. Allen* (1970), 397 U.S. 337; *State v. White* (1968), 15 Ohio St.2d 146, 44 O.O. 2d 132, 239 N.E.2d 65, paragraph two of the syllabus (distinguished); Evid. R. 404(B); *State v. Spikes* (1981), 67 Ohio St. 2d 405, 21 O.O. 3d 254, 423 N.E. 2d 1123; *Schade v. Carnegie Body Co.* (1982), 70 Ohio St. 2d 207, 24 O.O.3d 316, 436 N.E.2d 1001; *State v. Morales* (1987), 32 Ohio St. 3d 252, 513 N.E.2d 267; *Maurer*, *supra*, paragraph seven of the syllabus; *State v. Graven* (1977), 52 Ohio St.2d 112, 6 O.O.3d 334, 369 N.E.2d 1205; *State v. Adams* (1980), 62 Ohio St.2d 151, 16 O.O.3d 169, 404 N.E.2d 144; *State v. Thompson* (1981), 66 Ohio St.2d 496, 20 O.O.3d 411, 422 N.E.2d 855 (distinguished); *State v. Mann* (1985), 19 Ohio St.3d 34, 19 OBR 28, 482 N.E.2d 592; *State v. Ferguson* (1983), 5 Ohio St.3d 160, 5 OBR 380, 450 N.E.2d 265; *Estelle v. Smith* (1981), 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359; *Steffen*, *supra*; R.C. 2945.39(D); *Doyle v. Ohio* (1976), 426 U.S. 610 (distinguished); *Wainwright v. Greenfield* (1986), 474 U.S. 284 (distinguished); *State v. Fanning* (1982), 1 Ohio St.3d 19, 1 OBR 57, 437 N.E.2d 583; *Carter v. Kentucky* (1980), 450 U.S. 288 (distinguished); *State v. Price* (1979), 60 Ohio

> St.2d 136, 14 O.O. 3d 379, 398 N.E.2d 772, paragraph four of the syllabus; *State v. DeMarco* (1987), 31 Ohio St.3d 191, 31 OBR 390, 509 N.E.2d 1257 (distinguished); *Chapman v. California* (1967), 386 U.S. 18.
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> . . .
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> In summary, we find no merit in the propositions of law raised by appellant relevant to the proceedings below or to the constitutionality of this state's death penalty scheme.

Pet. App. at 306a-309a. The court included *Strickland* in that string-cite, but it provided no explanation or analysis justifying its conclusion.

Despite this complete lack of analysis, the Warden asserts the "state court's treatment of the claim was reasonable," Pet. Br. at 31. This bare assertion ignores the court's summary dismissal of forty-nine claims, including the ineffective assistance claim, in one paragraph of string citations, and ignores the complexity of review required under *Strickland*. The Ohio Supreme Court did not explain how or why it denied relief and it is impossible to know which of five possible scenarios might reflect the court's reasoning:

> Spisak failed to demonstrate both deficient performance and prejudice;
>
> Spisak demonstrated deficient performance but not prejudice;

> Spisak demonstrated prejudice but not deficient performance;
>
> Spisak did not demonstrate deficient performance so there was no need for prejudice review; or
>
> Spisak did not demonstrate prejudice so there was no need for deficient performance review.

These separate and distinct rationales are important for addressing whether the Sixth Circuit exceeded its authority under AEDPA. Each separate rationale implicates AEDPA review in a different way. Only the first scenario, assuming a full review on the merits of the claim, would subject the state court's denial to full AEDPA constraints. However, the second and third possible rationales would necessitate different implications for *habeas* review as the federal court would be obligated under AEDPA to accept the state court determination that counsel was either deficient as in the second scenario, or that prejudice resulted as in the third scenario. See *Rompilla v. Beard*, 545 U.S. 374, 390 (2005). Similarly, the fourth and fifth rationales remove AEDPA constraints for those prongs of *Strickland* the state courts failed to review. *Wiggins v. Smith*, 539 U.S. 510, 534 (2003); *Rompilla v. Beard*, 545 U.S. 374, 390 (2005).[6] Given the complexity and

[6] The uncertainty as to which AEDPA analysis is mandated as a result of the Ohio court's summary treatment of Spisak's claim undermines Amici's admonition that the federal habeas

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multi-level analysis necessary to review an ineffective assistance of counsel claim the state court's cursory and unexplained treatment of this claim is not entitled to the AEDPA standards of review. Instead, Spisak's claim should be subjected to *de novo* review. See *Knowles v. Mirzayance*, 129 S. Ct. 1411, 173 L. Ed. 2d 251 (2009). The Sixth Circuit's analysis of the merits of this claim demonstrate that Spisak is entitled to the Writ.

Alternatively, the Circuit applied AEDPA deference in spite of the analytical deficiency of the state court opinion and concluded that Spisak had been denied the effective assistance of counsel at the penalty phase.[7] Pet. App. 32a (*Spisak*, 465 F.3d at

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court "must take particular care not to improperly disturb the result [of a state court's decision] when the state court has properly discharged it responsibilities." Brief for the States of Pennsylvania *et al.* as *Amici Curiae* 17. Earlier, discussing the *Mills* claim, (which was similarly decided in summary fashion), *Amici* argued for a "rigorous enforcement of AEDPA's provisions," arguing that "[t]he 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." Brief for the States of Pennsylvania *et al.* as *Amici Curiae* 11. Certainly, the summary manner in which the Ohio Supreme Court disposed of all of Spisak's claims was not what AEDPA envisioned for a state court that conscientiously seeks to discharge its responsibilities under the federal Constitution.

[7] Similarly, in its Amended Order subsequent to this Court's initial remand, the Circuit noted that Spisak's sentence resulted from an unreasonable application of federal law as announced by the Supreme Court, and that he had "therefore overc[o]me

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690-91). Because the Circuit applied the most restrictive standard of review to this claim and determined that the summary state court decision was an unreasonable application of *Strickland,* the judgment of the Circuit must be affirmed.

2. Closing Argument

Trial counsel faced an admittedly difficult case in closing argument in the penalty phase. Spisak had been convicted of terrible crimes and during the culpability phase had repeatedly expressed outrageous social and political views. Nevertheless, the Eighth Amendment requires individualized sentencing in capital cases, when the jury must assess whether the death penalty is appropriate under the individual circumstances of the particular case. *Lockett v. Ohio*, 438 U.S. 586 (1978). The death penalty is reserved for "the worst of the worst." Defense counsel in a capital case is going to face difficult facts, emotions, and pressures. Rather than diminishing counsel's obligations, this enhances the need for competent and effective counsel. *Powell v. Alabama*, 287 U.S. 45 (1932); *McFarland v. Scott*, 512 U.S. 849, 855 (1994); American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra Law Review 913, 922 (2003) ("Today, it is universally

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the high bar for habeas relief" established by AEDPA. Pet. App. 4a-5a.

accepted that the responsibilities of defense counsel in a death penalty case are uniquely demanding, both in the knowledge that counsel must possess and in the skills he or she must master."). Counsel's attacks on his client in closing argument constituted an abandonment of competent and effective advocacy.

The unique role of counsel in closing argument was recognized long before *Strickland*. *Herring v. New York*, 422 U.S. 853 (1975). The need and power of closing argument in a capital case cannot be understated. "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free. In a criminal trial, which is in the end basically a fact-finding process, *no aspect of such advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment*." *Id.*, at 862 (emphasis added). Closing argument in a criminal trial is so important that the Sixth and Fourteenth Amendments prohibit states from denying closing argument by counsel. *Id.*

It is undisputed that the right to effective assistance of counsel attaches to the closing argument in a capital case. *Herring*; *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003); *Cone v. Bell*, 535 U.S. 685 (2002). Under *Strickland*, the first focus must be on the argument actually made and whether the performance of counsel fell below professional norms. A substantive review of the closing argument

demonstrates that the Circuit's analysis under the Sixth Amendment is correct.

3. Deficient Performance

The Warden conflates "strategy" with "goal". "Goal" is "the end toward which effort or ambition is directed." Webster's Third New International Dictionary 927 (1966). "Strategy" is "the art of devising or employing plans or stratagems toward a goal." Webster's Third New International Dictionary 2256 (1966). In the mitigation phase of a capital case the "goal" is to save the client's life. The "strategy" is the tactic, argument, evidence, and case presented to the jury to convince it to return a life sentence. It is not enough to assert that closing arguments involve strategic decisions as this is axiomatic. Just as a reviewing court must consider the "reasonableness of the investigation said to support that strategy", *Wiggins*, 539 U.S. at 527, the court must consider the reasonableness of the closing argument actually made in support of the strategy.[8] *Yarborough v. Gentry*, 540 U.S. 1, 6-10 (2003).

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[8] Any conclusion on counsel's "strategy" is pure speculation. Spisak sought an evidentiary hearing and factual development of this claim in state post-conviction and was denied. This claim was dismissed on the state's motion on the grounds that it had been litigated on direct appeal and therefore was *res judicata* in post-conviction. *State v. Spisak*, Case No. 67229, 1995 Ohio App. Lexis 1567, *10-12 (8th Dist. April 13, 1995).

Simply because counsel made the strategic decision to present a closing argument does not end counsel's Constitutional obligation. *Wiggins*. The question raised is whether counsel was ineffective in delivering the closing argument. *Wiggins*. Counsel must present a closing argument that advances his client's cause rather than supporting the state's case. Counsel must effectively develop and present the closing argument. *Yarborough*, 540 U.S. at 6 ("Closing arguments should 'sharpen and clarify the issues for resolution by the trier of fact.'") "Final argument is the advocate's only opportunity to tell the story of the case in its entirety, without interruption, free from most constraining formalities." Steven Lubet, *Modern Trial Advocacy: Analysis and Practice*, 385 (1993). It is the implementation of the strategy that is at issue and counsel's argument denigrated his client, his history, his psychological background. *Wiggins*.

The effectiveness of a closing argument is measured through two questions:

1. "Does it make the jury *want* to find for your client?" and,

2. "Does it tell the jury *how* to find for your client?"

Keeton, *Trial Tactics and Methods*, 273 (2nd ed. 1973). The argument delivered in this case did neither.

In his closing argument, counsel suggested to the jury there might be no mitigation:

> You are here, and the issue is to weigh the aggravating circumstances and the mitigating factors, and before the prosecution rushes to point out, if any, let me add a comma, and say, if any. That's probably the first thing you have to find. Let's talk first about the aggravating factors. I suppose so much could be said, but so little really needs to be said about the degree of the aggravating factors, clearly horrendous. Pet. App. 333a.

During the closing argument Spisak's counsel made comments that focused the jury upon the sheer brutality of the crimes.

> a) . . . And we can feel that, or see the cold marble, and will forever, and undoubtedly we are going to see the photographs, we are going to see Horace Rickerson dead on the cold floor. Aggravating circumstances, indeed it is . . . And, ladies and gentlemen, the reality of what happened on February 1st, such that you can smell almost the blood. You can smell, if you will the urine. You are in the bathroom, and it is death, and you can smell the death. Pet. App. 334a.

> b) . . . And we can all know the terror that John Hardaway felt when he turned and looked into those thick glasses [worn by Spisak] and looked into the muzzle of a gun that kept spitting out bullets. . . . And we all went through the surgery, and we were all kind of with John Hardaway when he came in here and he's still got some physical

problems, and we can all feel those, and we are not going to forget. Pet. App. 334a- 335a.

c) . . . and we all know the terror [of Coletta Dartt], or we can feel that right in the pit of our stomach. . . . But we were there and we know how she feels. And it is an aggravating circumstance, indeed it is, ladies and gentlemen. Pet. App. 335a.

d) . . . on the 27th of August we were in another lavatory, and we were all there because we could smell the death. 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, and we could remember his widow, and we certainly can remember looking at his children, and we certainly can feel all of the things that they felt, because ladies and gentlemen we participated, and we were there. Pet. App. 335a.

e) . . . on the 30th of August, nearly a year ago, you and I and everyone of us, we were sitting in that bus shelter, and you can see the kid, the kid that was asleep, the kid that never knew what hit him, and we can feel that bullet hitting, and that's an aggravating circumstance. And we were there. Pet. App. 335a.

f) . . . We were with [the Petitioner] when he stalked this kid that never got any older than 17. And we were with him when he fired the gun six times, shot him through the head. And we were there when that straw

> hat fell off. And, ladies and gentlemen, would you ever want any more aggravating circumstances? I don't think that you would. Pet. App. 336a.
>
> g) . . . There are too many family albums. There are too many family portraits dated 1982 that have too many empty spaces. And there is too much terror left in the hearts of those that we call lucky. Coletta Dartt and John Hardaway. We call them lucky [because they survived] Lucky, if you have a nightmare that will never go away. That's lucky, it may be, but it's an aggravating circumstance. Pet. App. 336a.

During this closing argument counsel also made the following comments about his client:

> a) . . . And, ladies and gentlemen, that's what you have got to weigh, the aggravating circumstances against the mitigating factors. And you heard the hate, and you heard the misguided philosophy, and if you live another ten years, or twenty years, or fifteen years or fifty years, you are always going to be another Spisak juror . . . Isn't what you heard just a microcosm of a twelve year reign of terror that was unparalleled in history, the Third Reich. . . . Pet. App. 336a-337a.
>
> b) . . . And listen to this sick distorted mind, and you will hear once again kind of a muffled dissent, but those hobnail boots on the cobblestone streets, but ladies and gentlemen, one thing you won't hear, and one thing even the sick distorted minds don't

admit, you won't hear the gas at Buchenwald, and you won't hear the gas in Auschwitz, because ladies and gentlemen, it never made any noise in killing six million. Aggravating circumstances, all the aggravating circumstances you ever want. Pet. App. 337a.

c) . . . Turn and look at [Spisak]. And let me suggest to you, and we are talking about aggravating circumstances, if each drop of blood in this sick demented body were full of atonement for the anguish, the terror, the aggravating circumstances that we have seen here, ladies and gentlemen, it wouldn't be enough. It wouldn't be enough to repay. It wouldn't be enough because there are too many empty places in those 1983 family portraits. And there was too much life left to live for Timothy Sheehan, Horace Rickerson and Brian Warford. Pet. App. 338a.

d) . . . Sympathy, of course, is not a part of your consideration. And even if it was, certainly, don't look to [Spisak] for sympathy, because he demands none. And ladies and gentlemen, when you turn and look at Frank Spisak, don't look for good deeds, because he has done none. Don't look for good thoughts, because he has none. Pet. App. 338a.

e) . . . And ladies and gentlemen, don't look to [the Spisak] with the hope that he can be rehabilitated, because he can't be. He is sick, he is twisted. He is demented, and he is

> never going to be any different. Pet. App. 339a.

Counsel limited consideration of any mitigating factors to one:

> a) The question then comes up, ladies and gentlemen, is there any mitigation . . . Well, there is only one reason, ladies and gentlemen, pride. It is not within Frank Spisak, it lies not within Frank Spisak, but within ourselves . . . If there is any reason, if there is any reason, ladies and gentlemen, for you to go back and not come back immediately and say, "Judge, we recommend to you that you electrocute Frank Spisak," it is going to be that which is within ourselves, that's that which makes us different. Pet. App. 339a.
>
> So if we find a mitigating factor, ladies and gentlemen, it is nothing from within this sick tormented body, it is within ours. Pet. App. 339a.

Counsel ended telling the jury that he, the prosecutors, the Judge, and the policemen involved would all be proud of the jury, "whatever you do." Pet. App. 360a.

The only reference to Spisak's severe gender identity issues was a passing reference whereby counsel demeaned Spisak's ability to get along with his neighbors, "not knowing if [Spisak was] a fag or a transvestite." Pet. App. 354a.

The only portion of counsel's thirty page closing argument dedicated in any way to a discussion of mitigation evidence amounted to three pages on the "pride within ourselves," that the jurors could take as a result of our being a humane people, (Pet. App. 339a-341a), and four pages on the "smaller jar" of mental illness. (Pet. App. 342a-344a).[9] Counsel graphically detailed for six pages statutory and non-statutory aggravating circumstances, (Pet. App. 333a-338a), and argued over two pages that specific mitigating factors (sympathy, good deeds, good thoughts, ability to be rehabilitated), did not exist in Spisak. (Pet. App. 338a-339a). The bulk of the argument, twenty pages, was dedicated to thanking the players, (Pet. App. 331a-333a), and a rambling and disconnected final seventeen pages, (Pet. App. 344a-361a), which included identifying the victims' families sitting in the back of the courtroom, indicating how "torn up" they all were, and telling the jury in that context it was "awfully important" what they did. (Pet. App. 359a).

Not once did counsel request a life sentence for Spisak.

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[9] As counsel explained, the big jar that the defense did not fill up was Spisak's incompetence to stand trial, the middle jar, which the defense also could not fill up was an insanity defense, and the "smaller jar" the defense was seeking to fill up was the mitigating factor of Spisak's mental illness and whether it substantially impaired his ability to know wrongfulness or refrain from acting. Pet. App. 342a.

Under Ohio law aggravating circumstances are strictly controlled by statute. Only the specifically identified and indicted circumstances in O.R.C. § 2929.04(A) are before the jury for consideration in favor of death. The nature and circumstances of the killings themselves may not be considered as aggravating circumstances. *State v. Williams*, 99 Ohio St.3d 493, 515 (2003), citing *State v. Wogenstahl*, 75 Ohio St.3d 344, 356 (1996). The prosecutor is not permitted to argue non-statutory aggravating circumstances. There could never be a strategic reason for defense counsel to argue that inflammatory non-statutory aggravating factors should also be weighed on death's side of the equation. Counsel's role is to remove or rebut aggravating circumstances, *Rompilla*, not add to them.

Nonetheless, counsel spent significant time arguing and explaining to the jury that it should consider non-statutory aggravating circumstances such as the nature and circumstances of where and how the victims died, Pet. App. 334a; the feelings the deceased victims must have felt being shot, Pet. App. 335a;[10] the fear the victims who survived surely felt, Pet. App. 334a-336a; the impact the killings had on

[10] Ohio courts have long held that it is improper for prosecutors to speculate about what the victim was thinking when killed. *State v. Combs*, 62 Ohio St.3d 278, 283, 581 N.E.2d 1071 (1991); *Wogenstahl*, *supra,* 75 Ohio St.3d at 357-758.

the victims' families, Pet. App. 335a-336a,[11] and Spisak's outrageous and inflammatory political and social views including graphic references to the Nazi regime, "Crystal Night," and the death camps. Pet. App. 336a-337a. Counsel concluded with the comment, "Aggravating circumstances, all the aggravating circumstances you ever want." Pet. App. 337a.

In support of his argument that there was a legitimate strategy to this oratory the Warden relies on *Cone v. Bell,* suggesting a contextual similarity because "[t]he State had near conclusive proof of guilt on the murder charges as well as extensive evidence demonstrating the cruelty of the killings." Pet. Br. 32 (citation omitted). However, *Cone v. Bell* was a Tennessee case and Tennessee law includes a statutory aggravator that the murder was "especially heinous, atrocious, or cruel [HAC] in that it involved torture or depravity of mind." Tenn. Code Ann. § 39-2404(I). In *Cone*, the nature and circumstances of the homicides were legitimate arguments for consideration in the sentencing decision. Ohio does not have a HAC statutory aggravator. Under Ohio law the nature and circumstances of the homicide can only be considered mitigating or not at all, *Wogenstahl*, and Spisak's counsel's argument was egregious and erroneous under Ohio law. It directly placed the

[11] The suffering inflicted upon the families of the homicide victims was improper. *Williams*, *supra*, citing generally to *State v. White*, 85 Ohio St.3d 433, 445-446 (1999); *State v. Reynolds*, 80 Ohio St.3d 670, 679 (1998).

nature and circumstances before the jury as non-statutory aggravators in a way that the prosecution never could.

Because Ohio is a weighing state counsel must present and assert the existence of some substantive mitigation to be weighed or the scales automatically tip in favor of death. Immediately prior to beginning his discussion of mitigating factors to be considered counsel admonished the jury:

> Turn and look at Frank Spisak. He has been here for six weeks now. And you probably haven't really looked at him. Turn and look at him. And let me suggest to you, and we are talking about aggravating circumstances, if each drop of blood in this sick demented body were full of atonement for the anguish, the terror, the aggravating circumstances that we have seen here, ladies and gentlemen, it wouldn't be enough. It wouldn't be enough to repay.

Pet. App. 338a. Rather than assert the many mitigating factors that were present counsel told the jury that there could never be enough mitigating factors to justify a sentence less than death. Counsel abdicated his role as defense counsel and assumed the role of a prosecutor.

Counsel began his discussion of mitigating factors by defining mitigation as "anything that the defense might consider to be mitigating, good deeds

that a person might have done, and otherwise good life."[12] Pet. App. 338a. But Counsel then proceeded to tell the jury *not* to consider those specific factors by arguing "don't look for good deeds, because he has done none. Don't look for good thoughts, because he has none." Pet. App. 338a. Counsel further told the jury "don't look to him for sympathy, because he demands none." Pet. App. 338a. Counsel summed up his description of Spisak: "He is sick, he is twisted. He is demented, and he is never going to be any different." Pet. App. 339a.[13] Rather than humanizing and giving the jurors a reason to spare Spisak's life, counsel demonized Spisak and heaped non-statutory aggravators on death's side of the equation.

In the one instance counsel did advocate for mitigation he told the jury it had nothing to do with Spisak, explaining that there "is only one reason, ladies and gentlemen, pride." Pet. App. 339a. Counsel told the jury that the only reason not to kill Frank Spisak was because "[W]e are a humane society." Pet. App. 339a. In his argument counsel did not reference

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[12] This demonstrates counsel's basic misunderstanding of mitigation evidence as it often entails things that are not "good" including childhood abuse, mental illness, mental retardation, and adaptability to jail (often demonstrated by prior incarcerations). *Wiggins*; *Penry*; *Skipper v. South Carolina*, 476 U.S. 1 (1986).

[13] To the contrary, the Court Clinic expert Dr. Phillip Resnick had concluded in his pre-trial competency report that Spisak's disturbed thinking and psychiatric symptoms had "improved substantially since he has been incarcerated." JA 676.

a single fact about Spisak's severe personality and gender identity disorders, (beyond suggesting the confusion caused to Spisak's neighbors "not knowing if [he was] a fag or a transvestite," Pet. App. 354a). Counsel only restated in passing one doctor's conclusion that Spisak was mentally ill and was substantially impaired. Pet. App. 343a. Counsel gave no explanation of the nature of Spisak's significant mental illnesses, how those illnesses related to either his social and family background or the crimes, or how the jurors should weigh those illnesses against the aggravating circumstances. In fact, counsel suggested the only reason the jury could consider the mental illness was not because Spisak deserved the consideration but because it was legislatively mandated: "You are allowed to make that consideration, not because of anything nice he did, not because of anything good he did, and not because he has a nice mother, or a nice wife, or a nice sister, and not because maybe he used to feed the pigeons on Public Square, or some other good deed, but because from within ourselves as a people we have instructed our General Assembly to make that inability, that substantial inability a mitigating circumstance." Pet. App. 343a-344a.[14]

[14] Under Ohio law, one statutory mitigator is that the defendant lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. Ohio Rev. Code § 2929.04(B)(3).

As noted, this passing reference to mental illness was placed into a context of filling the "smaller jar," which was itself couched in terms of defeat. Counsel told the jury that it had to first find it mitigating, then find it was "in that small jar" and then find it "outweigh[ed] the aggravating circumstances that have been so graphically and so three-dimensionally brought out before us." Pet. App. 342a.

Counsel closed his argument with an extensive, and unusual discussion of his acknowledged failure to meet with the defense experts, the extraneous factors that may or may not be aggravating, and an extensive statement about counsel's pride in being a lawyer. Pet. App. 344a-361a.

Counsel's closing argument was neither reasonably conceived nor competently and effectively delivered. Counsel failed to advance any of Spisak's compelling mitigation themes, provide the jury with any coherent reason to even consider a life sentence, and argued additional reasons to impose a death sentence: "a good argument *argues*! An argument takes your themes, your theory of the case, the supporting evidence, and the law and molds them into a persuasive whole. It is logic and emotion brought together. An effective argument makes the jurors want to do what you want and to feel good about it afterwards." Mauet, *Trial Techniques*, 391 (7th Ed. 2007). The role of defense counsel is to stand with the defendant when no one else does. Defense counsel sacrifices his most basic duty when he joins the outcry against the defendant and that is exactly

what Spisak's counsel did in this case. By using the pronoun "we" to describe the emotions and reactions to the case he repeatedly aligned himself with the victims and the state against Spisak.

Counsel presented Spisak to the jury as a crazy, twisted, sick, demented, Nazi, "fag or transvestite." Counsel had evidence readily at hand to present Spisak as significantly mentally ill. Even the state's experts recognized Spisak suffered from significant psychological problems. Abandoning arguments based on compelling and well-recognized mitigating factors in favor of demonizing Spisak with degrading and derogatory epithets could only have harmed Spisak's case. It is difficult to imagine a more effective presentation and argument being made by the prosecution to assure that a sentence of death *would* be imposed. Counsel's conduct fell well below the prevailing professional norms requiring loyalty and advocacy on behalf of the client, not on behalf of the state. Such conduct violated Spisak's Sixth Amendment right to loyal counsel and undermined the reliability of Spisak's sentencing process.

By any reasonable interpretation of counsel's performance it was deficient, and assuming *arguendo* the Ohio Supreme Court's summary and unexplained denial of this claim was based upon an analysis that Spisak failed *Strickland*'s first prong, the decision was an unreasonable application of *Strickland*.

4. Prejudice

Eighth Amendment jurisprudence has long held that individualized sentencing in capital cases is necessary because not every person who commits a murder is deserving of the death penalty. *Lockett v. Ohio*, 438 U.S. 586 (1978); *Eddings v. Oklahoma*, 455 U.S. 104 (1982). Regardless of the circumstances, it is never acceptable to abandon individualized sentencing in favor of a mandatory death penalty. *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 431 U.S. 633 (1977); *Sumner v. Shuman*, 483 U.S. 66 (1987). No capital defendant, no matter how terrible the facts or unsympathetic the defendant, is automatically subjected to a death sentence. The Warden's argument that nothing counsel did could be prejudicial once Spisak testified ignores both the clear dictates of *Woodson* and *Lockett* and the compelling mitigation evidence presented in this case. There was significant social history and mental health evidence available, much of it rendered by state employees of the Court Clinic, that, properly argued, would have explained Spisak's bizarre and outrageous behavior in the courtroom as well as the crimes.

Every mental health professional involved in this case diagnosed Spisak with a mental illness and severe personality disorders including schizotypal personality disorder, JA 463, 675, 719, 738; Identity Disorder and Gender Identity Disorder, JA 729; Atypical Personality Disorder with grandiose and aggressive features, JA 729; Atypical Psychotic

Disorder, JA 738; and Borderline Personality Disorder. JA 463. Schizotypal disorder, a forerunner to schizophrenia, "describes one who has profound disturbances in his thought process, in their perception, in their behaviors. It describes one who, much like Mr. Spisak, has a rather withdrawn and isolated lifestyle, has eccentric, or has been in eccentric thinking, or has severe difficulties in interrelationships, and with dealing with day-to-day living." JA 530.

Spisak's Naziism and his troubling belief system towards minorities was directly attributed to his mental illnesses. JA 681-682 (Dr. Althof); 719 (Dr. Bertschinger); 469, 480, 704 (Dr. McPherson); 725, 732 (Drs. Samy and Koerner). Had counsel's closing argument focused on the diagnoses of schizotypal and sexual dysphoria and how these mental illnesses impacted Spisak's troubled thought processes instead of focusing on statutory and non-statutory aggravating circumstances, calling his client names, and completely marginalizing the mental health evidence, there is a reasonable probability that one juror would have voted for a life sentence.

The closing argument was not a minor piece of the case the Warden attempts to portray. Rather, the closing argument "should sharpen and clarify the issues." *Herring*, 422 U.S. at 862. Especially in a case like this one, "no aspect of such advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment." *Id.* Not once could counsel

bring himself to ask the jury to return a life sentence. Not once did counsel speak sympathetically about his client's tremendous struggles throughout his entire life with his sexual identity. Not once did counsel attempt to explain the relationship between these stresses and the awful Nazi persona that Spisak displayed when given the opportunity. As the Circuit analyzed, the final moments of the closing argument "were not devoted to a discussion of the reasons why Defendant's mental illness made him deserving of mitigation," but rather "focused on the importance of the jury's decision to [all the other participants in the trial] instead of arguing how and why the mitigating factors outweighed the aggravating factors." Pet. App. 65a.

Counsel concluded with "whatever you do, we are going to be proud of you." Pet. App. 360. Nothing could be more prejudicial to a capital defendant than his own counsel standing before the jury having heaped hate and vitriol on him. This is especially so because the jurors were instructed specifically "that you, 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*." Pet. App. 323a (emphasis added).

Counsel's argument had no relationship to the compelling mitigation evidence presented: "This evidence adds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury and although we suppose it is possible that a jury could have heard it all and still have decided on the death penalty, that is not the test. It goes without saying that the undiscovered [i.e.,

unexplained] 'mitigation evidence, taken as a whole, "might well have influenced the jury's appraisal" of [Spisak's] culpability.'" *Rompilla*, 545 U.S. at 393.

The Warden argues that the Circuit's entire prejudice analysis was confined to one conclusory sentence. Pet. Br. 41. In actuality, the Circuit clearly explained why counsel's conclusory remarks were prejudicial and not strategic in nature. The Circuit fully accepted the viable strategic possibility that "once counsel identified with [the jury's] emotions towards Defendant, he could then explain to them that their feelings were misplaced because Defendant was mentally ill." Pet. App. 64a. (*Spisak*, 465 F.3d at 705.) The Circuit acknowledged this could have been a "permissible trial strategy" *had counsel actually done that*, and if, in the course of argument, counsel had "spent a substantial amount of time humanizing and rehabilitating Defendant in the eyes of the jury by arguing that Defendant was misguided or mentally ill and deserved to have his life spared." *Id.*

But counsel did not do any of that prejudicing Spisak:

> The record reveals, however, that trial counsel did very little to offset the negative feelings that his own hostility and disgust for Defendant may have evoked in the jury. Instead . . . trial counsel further denigrated Defendant and even went so far as to tell the jury that Defendant was undeserving of mitigation.

Pet. App. 64a. (*Spisak*, 465 F.3d at 705.)

Had counsel presented a competent closing argument explaining the nature of the mental illness, their direct relationship to the crimes and Spisak's beliefs, and advocating directly for a life sentence, there is a reasonable probability that at least one juror would have been swayed to spare his life. Assuming *arguendo* that the state's summary and unexplained decision denied the ineffectiveness claim upon a merits review of *Strickland*'s second prong, the inflammatory and derogatory comments of counsel along with the existence of substantive mitigation evidence neither referenced nor argued renders the state court determination an unreasonable application of *Strickland*.

5. Conclusion.

An axiom of argument is that rarely is a case won at argument but many cases are lost there. This is clearly what happened in this case. Counsel's argument not only gave the jury no reason not to sentence Spisak to death, but affirmatively drove the jury to impose a death sentence. For the above stated reasons, Spisak requests the Court affirm the ruling of the Sixth Circuit and order the Writ as to the death sentence because counsel rendered ineffective assistance of counsel during the closing argument of the mitigation phase of the case and Spisak was prejudiced by counsel's deficient performance.

CONCLUSION

As outlined above, the Sixth Circuit fully, properly, and thoroughly reviewed Spisak's claims. The Circuit applied the standards of § 2254(d)(1) and determined that the state court decision denying sentencing relief as to the jury instructions and the deficient and prejudicial performance of counsel were contrary to or an unreasonable application of Constitutional law. Spisak is entitled to *de novo* review of his ineffective assistance of counsel claim as the state court summary disposition is not entitled to AEDPA standards of review. Because there is a reasonable probability that a juror misapplied the jury instructions as to mitigation evidence and a life sentence, and/or because counsel's closing argument was deficient and prejudiced Spisak, the Court should affirm the granting of the Writ.

Respectfully submitted,

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