

C O N T E N T S	
	PAGE
1	
2	ORAL ARGUMENT OF
3	GEN. RICHARD CORDRAY, ESQ.
4	On behalf of the Petitioner
5	MICHAEL J. BENZA, ESQ.
6	Appointed by this Court
7	REBUTTAL ARGUMENT OF
8	GEN. RICHARD CORDRAY, ESQ.
9	On behalf of the Petitioner
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11	
12	
13	
14	
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16	
17	
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P R O C E E D I N G S

(11:06 a.m.)

CHIEF JUSTICE ROBERTS: We will hear
argument next in Case 08-724, Smith v. Spisak.

General Cordray.

ORAL ARGUMENT OF GEN. RICHARD CORDRAY

ON BEHALF OF THE PETITIONER

MR. CORDRAY: Thank you, Mr. Chief Justice,
and may it please the Court:

Because this case arises under the
deferential standards of the AEDPA statute, Mr. Spisak
must show that the Ohio Supreme Court's decision was
contrary to Mills v. Maryland or that it unreasonably
applied Strickland v. Washington.

JUSTICE SOTOMAYOR: Why? I -- I have been
trying to figure out why the State court would know in
its decisionmaking that Mills commanded a different
result when Mills was issued after the State denied its
petition for rehearing.

MR. CORDRAY: It's a bit of a conundrum,
Your Honor, because Mills was issued after the Ohio
Supreme Court's decision here, but before it became
final on direct review when cert was denied by this
Court in March of 1989.

JUSTICE SOTOMAYOR: Well, finality in that

1 sense is generally looked at in terms of AEDPA statute
2 of limitations. Why should the same rule apply to the
3 question of whether a State has acted contrary to or
4 unreasonably in light of Supreme Court precedent when
5 the precedent didn't exist at the time it was rendering
6 its decision? How can a court act?

7 MR. CORDRAY: I'm perfectly willing, Your
8 Honor, to back it up a step and say Mills was not
9 clearly-established law at the time that the Ohio
10 Supreme Court decided, although the issues were current
11 at the time.

12 But I would go further and say the extension
13 of Mills that the Sixth Circuit's ruling made here is
14 not clearly-established law even today, more than
15 20 years later. There is a -- the vast majority of
16 Circuits, Fourth, Fifth, Seventh, Eighth, Tenth, have
17 rejected the position the Sixth Circuit took here, and
18 in fact, this case is quite distinct from Mills even if
19 Mills were applicable. But I would take your point and
20 I would agree with it that it's kind of tough to impose
21 on the Ohio Supreme Court Mills when --

22 JUSTICE SOTOMAYOR: We don't have to go any
23 further if we simply address the question, at what point
24 in time are we talking about a State court's decision,
25 correct?

1 MR. CORDRAY: Fair enough. Fair enough.
2 Yes. But I would say this case is distinct even from
3 Mills, where the Court determined that the jury
4 instructions gave the jury to believe that they could
5 only consider mitigating factors that they had
6 determined unanimously to be present. And in this case,
7 none of that was done. The verdict form was quite
8 different, and in fact the jury was only instructed to
9 be unanimous on the ultimate question of whether the
10 aggravators outweighed the mitigators, a common
11 instruction and one that's upheld around the country
12 consistently.

13 Second --

14 JUSTICE GINSBURG: General Cordray, under
15 the charge that was given, what happens if there is a
16 juror who thinks that the aggravating circumstances
17 don't outweigh the mitigating circumstances? Under
18 Ohio's current instruction that means no death penalty.

19 But under the instruction that was given
20 here, that all 12 must agree on -- on the aggravators
21 outweighing the mitigators, what is the consequence of a
22 failure of the jurors to agree on that question?

23 MR. CORDRAY: Even at the time, if the jury
24 effectively hung --

25 JUSTICE GINSBURG: Yes.

1 MR. CORDRAY: -- on that question, the
2 consequence would be that the court would then impose
3 some version of a life sentence.

4 The issue is whether the jury was required
5 to be instructed that at the time, whether they were
6 required to be instructed something that might push them
7 away from unanimity. This Court has never so held, and
8 in fact, in *Jones v. United States* the Court rejected
9 that rule in a ruling that was not dissented to by
10 anyone on the panel. Your dissent in that case at
11 footnote 20 took no issue with the -- with the notion
12 that the jury did not have to be instructed in ways that
13 would push them away from rendering unanimous verdict on
14 the ultimate question.

15 Since that time, as a matter of State court
16 practice the Ohio Supreme Court in *State v. Brooks* did
17 say: We are now going to add that instruction. But
18 they later themselves rejected that that was required by
19 the Eighth Amendment in *State v. Davis*, and that also
20 has been the consistent holding of most circuits, that
21 that is not required. If I could move --

22 JUSTICE GINSBURG: It would be -- under the
23 charge that was given in this case, you say it would be
24 -- then the judge would be obliged to give one of the
25 two life sentences. It would not be a deadlock

1 requiring a resentencing hearing.

2 MR. CORDRAY: I believe that's the case at
3 the time, Your Honor.

4 At the time, the instructions pushed the
5 jury toward unanimity one way or the other. Do the
6 aggravators outweigh the mitigators or do they not?
7 Since that time, the Ohio Supreme Court as a matter of
8 practice has been willing to go further and instruct the
9 jury, or have the jury be instructed, that if a single
10 one of you feels that the aggravators do not outweigh
11 the mitigators, that will preclude a death sentence.

12 But that has never been constitutionally
13 required by this Court. It is an extension of Mills v.
14 Maryland that has never been so held by this Court, and
15 in fact is a source of a -- of a significant
16 overwhelming majority of circuits the opposite way.

17 If I could move to the --

18 JUSTICE SOTOMAYOR: Isn't your adversary's
19 position -- I'm sure they will speak for themselves, but
20 their position would be that this is a step further than
21 Jones or other cases because if in fact -- what you are
22 telling us is that if the jury hangs, the court will
23 have to impose a life sentence or some form of it.

24 But the jury could believe that they could
25 -- that it's either death or life, and one holdout juror

1 would say: Well, I don't want to let this guy out;
2 because those are the only two choices and 11 people
3 want to go for dead -- death and I'm the only holdout, I
4 have to vote for death to make sure that he is
5 restrained in a way that I find acceptable.

6 MR. CORDRAY: This, as Your Honor notes from
7 your time on the trial court, is the jury dynamic in the
8 jury room. It is the push towards unanimity. The issue
9 here is whether the Constitution requires an instruction
10 to be given that would encourage a single juror to hold
11 out and try to avoid reaching a unanimous verdict. The
12 Court has never held that that is constitutionally
13 required, and if they did so hold in this case it would
14 be an extension that is a new rule and would not be
15 applicable on AEDPA review here.

16 Second, on the ineffectiveness claim,
17 Mr. Spisak loses sight of the fact that this was no
18 run-of-the-mill trial. His crimes were among the most
19 infamous in Ohio history. At the trial he groomed
20 himself to look like Adolf Hitler, and on the stand he
21 celebrated his victims' deaths, spewed his racist
22 beliefs, and pledged to continue his own brand of
23 personal warfare against society. In the sentencing
24 phase, defense counsel reasonably took the only tack
25 available to him. He used the sheer depravity of his

1 client's crimes and his disturbing character to tell a
2 story about his client's mental illness, and he asked
3 the jury to forego the death penalty for Mr. Spisak
4 because he is mentally ill and thus, under the
5 mitigating factor, lacked substantial capacity to
6 appreciate or conform his conduct to the requirements of
7 the law.

8 JUSTICE GINSBURG: General Cordray --

9 MR. CORDRAY: That is not sufficient --

10 JUSTICE GINSBURG: -- in reading that
11 closing argument, it is disjointed. It goes off on
12 tangents that have nothing to do with the sentence that
13 the defendant is getting. I mean, it really is quite a
14 stream of consciousness. And what's remarkable about it
15 is at no point did counsel say, give him a life
16 sentence. He said that either one would be acceptable,
17 either death or life would be acceptable.

18 MR. CORDRAY: First of all, I would disagree
19 with that characterization of the closing. It was not a
20 perfect closing, but it had three identifiable pieces to
21 it. The first was, he -- he did go back and
22 recapitulate the nature of the crimes, something this
23 Court said in Yarborough is an acceptable defense
24 strategy. That's the elephant in the room. The jury
25 heard weeks of testimony about this crime. The

1 prosecutor was surely going to highlight that. He was
2 attempting to take this sting out and identify with the
3 jury that he understood how they would react to the
4 crimes.

5 The second piece of the closing -- this is
6 at petition appendix, approximately 339a to 344a, he
7 goes into the mitigating factor of mental illness. He
8 had presented three mental health experts in the
9 sentencing phase to demonstrate that his client was
10 mentally ill. He had made a continued argument that
11 there was a larger jar of not guilty by reason of
12 insanity that he had not been able to fulfill, even
13 though he had tried at trial, and that evidence had
14 ultimately been struck by the trial court, which found
15 they have not made out a defense of not guilty by reason
16 of insanity.

17 But he pursued the same theme here in
18 sentencing, presenting evidence and saying: We have at
19 least fulfilled the smaller jar of mental illness,
20 diminished capacity to intend, and because we are a
21 humane society our general assembly has made that a
22 mitigating factor that you should apply here, and you
23 should not execute someone who has a diminished ability
24 to intend.

25 JUSTICE STEVENS: General Cordray, may I --

1 may I -- you are basically arguing that he was not --
2 not deficient in performance.

3 MR. CORDRAY: That's right.

4 JUSTICE STEVENS: Assume I am persuaded that
5 there was deficient performance, for all the reasons
6 your adversary argues, and I am focusing on the
7 prejudice issue. I think you make a very strong
8 argument that this guy would have gotten the death
9 penalty anyway. But what if -- what if the deficiency
10 had been even worse? Supposing the defense counsel had
11 got up and said: I wish I could make an argument, but I
12 really think you ought to give him the death penalty --
13 just outrageously sided with the prosecutor. Would that
14 mean that we could still find no prejudice?

15 MR. CORDRAY: I think in Cronin the Court
16 said that if there is effectively a structural
17 breakdown -- I mean, if in fact counsel had gotten up
18 and argued solely a prosecution argument and not pivoted
19 at all to mitigating circumstances, perhaps it would be
20 possible to presume prejudice in that situation. That's
21 not the situation in this case.

22 JUSTICE STEVENS: No, I -- I understand
23 that. But -- so you really are saying the question is
24 whether Cronin or Strickland controls?

25 MR. CORDRAY: That's one of the questions.

1 JUSTICE STEVENS: Yes.

2 MR. CORDRAY: Although in our cert petition
3 question 2, we also argue that the Sixth Circuit erred
4 by not deferring to the Ohio Supreme Court's application
5 of Strickland v. Washington.

6 And on the prejudice issue, this is
7 Landrigan. That is the case this Court decided and then
8 granted, vacated and remanded this case back to the
9 Sixth Circuit. If you look at the prejudice discussion
10 in Landrigan -- and I would direct attention to the
11 quote near the end where the Court says that the court
12 of appeals panel got it right, and what they said was
13 that the -- the testimony was chilling. The person in
14 Landrigan had repeated -- had committed repeated murders
15 and tried to kill again and again.

16 The same with Spisak in this case. He had
17 been unrepentant in the court and in fact had flaunted
18 his menacing behavior, just as Spisak went on for days
19 on the stand expressing his white power views and how he
20 would continue to war if he had the opportunity, if
21 given the chance.

22 In Landrigan this Court approved the court
23 of appeals statement in the end that any further, minor
24 mitigating evidence that could have been presented in
25 the wake of that record could not have been helpful;

1 there is no prejudice. That prejudice holding in
2 Landrigan I believe controls this case. In fact, this
3 case may be even a stronger case than Landrigan for no
4 prejudice.

5 JUSTICE STEVENS: But does your argument
6 really depend on any deference to the State Supreme
7 Court? It seems to me that your argument is just sort
8 of as a fresh matter there wasn't prejudice here. And
9 -- and isn't it also true that we really don't know what
10 the Ohio Supreme Court's basis for its decision was,
11 whether not competent, incompetence, or lack of
12 prejudice.

13 MR. CORDRAY: I would say three things, Your
14 Honor. First of all, I would agree with Yarborough,
15 where this Court said that the -- the determination
16 about deficiency and prejudice is doubly deferential
17 through the AEDPA lens. We would defer, as Yarborough
18 said, to reasonable tactical decisions made in closing
19 argument, but we would be doubly deferential under AEDPA
20 because we have to hold that the Ohio Supreme Court's
21 rejection of the ineffectiveness claim was itself
22 objectively an unreasonable application of Strickland.
23 So that's one.

24 Number two, the Ohio Supreme Court did
25 reject this claim. It cited Strickland v. Washington.

1 It did not go on in detail.

2 JUSTICE STEVENS: But we don't know which
3 prong of Strickland it relied on, do we?

4 MR. CORDRAY: We don't. But this is not a
5 case like Rompilla, where the -- where the Court was
6 faced with a court that had held only on one prong and
7 had disclaimed any attempt to review under the other
8 prong. If the court simply gives a summary affirmance
9 or summary disposition and doesn't specify which prong,
10 I think the Court has to give deference under both
11 prongs, because the alternative would be to give
12 deference under neither prong, which is inconsistent
13 with the -- the AEDPA statement that we have to did
14 defer to an adjudication on the merits by a State court.
15 And so I think that is -- that is fair here. But I
16 certainly think --

17 JUSTICE STEVENS: So you'd say a State
18 supreme court is entitled to more deference if it
19 doesn't tell us the basis for its decision?

20 MR. CORDRAY: It -- it may seem a little
21 odd, Your Honor.

22 JUSTICE STEVENS: Yes.

23 MR. CORDRAY: If they disclaim a prong, then
24 I think it's de novo review, and Rompilla did say that.
25 If they don't disclaim a prong, I think that the Court

1 has to defer because the alternative is it gives no
2 deference to summary dispositions, and -- and that has
3 been the general tenor of courts under AEDPA, is if
4 there is a question you err on the side of giving
5 deference. That clearly was Congress's intent in
6 enacting that statute.

7 JUSTICE SOTOMAYOR: Counsel, there are two
8 extremes. One is no defense whatsoever, Justice
9 Stevens' hypothetical. The attorney just comes in and
10 says, kill him, okay? And then there is another, which
11 is your very eloquent explanation of this attorney's
12 strategy. If he had done what you did here, we may not
13 be having this appeal. But at some point you can have a
14 strategy and execute it so poorly, so incompetently,
15 that you're providing ineffective assistance of counsel.
16 You are not accepting that that can occur, you are
17 saying the minute an attorney says, I had a strategy,
18 that that is effective counsel, regardless of how that
19 attorney executed that strategy. That appears to be
20 your argument.

21 MR. CORDRAY: We, of course, Your Honor,
22 don't have subjective testimony from the counsel as to
23 what his strategy was. But I think it's quite apparent
24 from the record. He at trial attempted to establish a
25 defense of not guilty by reason of insanity. He was set

1 back, he and his trial team, because in the end the
2 trial judge rejected that defense and struck that
3 testimony. He renewed his effort at the sentencing
4 phase by bringing several mental health experts and
5 having them testify on the stand to show that at least
6 they had met the lower standard of mental disease or
7 defect under the Ohio Revised Code.

8 He then argued, perhaps not as eloquently as
9 -- as one might, you know, as -- as Justice Jackson once
10 said, you know, in their bed that night, but he argued
11 about: Yes, these crimes were brutal. He went on at
12 some length about that. But these crimes were brutal
13 and the jury had heard all that and clearly had that in
14 their minds. He then pivoted to five pages of closing
15 arguments, in addition to days of presentation on the
16 subject, to say: We have shown at least mental illness;
17 it is a mitigating factor; the General Assembly made it
18 a mitigating factor and we as a humane people should be
19 proud that we do not execute someone who has substantial
20 deficiency in ability to intend.

21 He then went on to handle some rebuttal
22 points that he was -- he was feeling the heat on from
23 the prosecutor's presentation. For example, that he had
24 not necessarily met with these experts before they came
25 and testified at trial; that he had perhaps shopped for

1 experts and other matters of that sort; that maybe the
2 -- the jury was going to hold against him and his
3 defense team their deficiency as counsel, because they
4 had made this effort to get not a -- a not guilty by
5 reason of insanity plea and the judge had knocked that
6 out.

7 JUSTICE ALITO: Have you ever heard or read
8 a defense summation that was more derogatory of the
9 defendant than the summation here?

10 MR. CORDRAY: I have not read a great number
11 of defense summations, but this was derogatory. But
12 frankly, the bed that was made was made by his client,
13 who got on the stand for days on end and spewed his
14 racist propaganda, made it clear that he was not only
15 unrepentant but was triumphant; that one or more of his
16 murders were slick, pretty neat; that he celebrated the
17 killings; that he went out to kill again, that if he had
18 the opportunity now he would again go out to kill again.

19 JUSTICE ALITO: But defense counsel --

20 MR. CORDRAY: That's the context.

21 JUSTICE ALITO: -- goes so far as to say:
22 Don't look to him for sympathy because he demands none.
23 But isn't that exactly what he has to appeal for in
24 order not to get a death verdict, sympathy based on --
25 on mental illness, despite the horrific crimes that this

1 person committed and the things that he said on the
2 stand.

3 MR. CORDRAY: No, Your Honor. And I think
4 again counsel in the context of this proceeding judged,
5 perhaps rightly, that it was very unlikely this jury was
6 going to have sympathy for his client. Instead he
7 appealed to the jury's own sense of humanity and pride:
8 We have this mitigating factor under the law, we are a
9 civilized people, we do not execute people who have
10 substantial diminished ability to intend; and I appeal
11 to you, you jury, even though I can sense that you are
12 not feeling sympathy for my client, do what -- what
13 makes you a humane people, what makes us proud as a
14 people, and do not give the death penalty to a person
15 who is sick, demented, twisted, as my client has shown
16 himself to be here on the stand.

17 I think it's a coherent strategy. In fact,
18 I don't see easily how he could have done better. And
19 as in Landrigan, if he had said, give him sympathy, give
20 him a life sentence, which was the thrust of the entire
21 proceedings, I don't think that that created -- that
22 lack of saying that created any prejudice on this
23 record, which was very thoroughly established, in part
24 by his client 's own testimony.

25 I would also say in Yarborough, on the

1 deficiency point, this Court said that focusing in on
2 one particular theme may well be a preferable strategy,
3 and there has to be broad deference given to closing,
4 which is only a part, after all, of the entire
5 sentencing proceeding, in that taking an understated
6 approach that -- that emphasizes the jury's autonomy.

7 In Yarborough, if you remember, the defense
8 counsel did not actually ask specifically in so many
9 words for a life sentence. The Court said that's not
10 deficient. He could count on the judge's charge to the
11 jury. They were going to charge the jury as to how to
12 handle the evidence. It was the thrust of the whole
13 proceedings. He presented three mental health experts
14 to show mental illness and diminished ability to intend.
15 And he argued that as part of his closing.

16 I think it was not deficient, and I
17 certainly think on this record, this stunning record
18 created in part by his client's crimes, which were
19 acknowledged and undisputed and there was no factual
20 dispute about them and their heinousness, and then by
21 his client's testimony on the stand, which graphically
22 and at great length reinforced his, again, triumph in
23 his -- in his warfare against trying to kill as many
24 black people, Jewish people and gay people as he could
25 find, and that he would continue that warfare if given

1 the chance.

2 I think it's impossible to find that there
3 is prejudice on this record for the -- for the -- for
4 the -- even the medium-sized quibbles that are being
5 raised here 20 years after the fact.

6 If I -- if I may reserve the rest of my time
7 for rebuttal.

8 CHIEF JUSTICE ROBERTS: Thank you, General.

9 Mr. Benza.

10 ORAL ARGUMENT OF MICHAEL J. BENZA

11 ON BEHALF OF THE RESPONDENT

12 MR. BENZA: Good morning, Mr. Chief Justice,
13 and may it please the Court:

14 The Sixth Circuit evaluated performance of
15 trial counsel in this case and found deficient
16 performance for three primary areas.

17 First, counsel presented and argued to the
18 jury nonstatutory aggravating factors as reasons to
19 impose the death sentence on Mr. Spisak. In Ohio, the
20 jury is allowed to consider only the statutory
21 aggravator factors, not nonstatutory factors. The
22 counsel specifically identified and argued four reasons
23 to execute Mr. Spisak.

24 He then proceeded to tell the jury what was
25 not mitigating evidence in this case, including factors

1 that have long been accepted as mitigating factors like
2 performance in prison, adaptive skills and the issue
3 regarding his family upbringing and childhood.

4 Finally, the lawyer turned to what he argued
5 was the only mitigating evidence that they were going to
6 be arguing, and that was the issue of the client's
7 mental health. He then --

8 CHIEF JUSTICE ROBERTS: You say -- you fault
9 him for not talking about performance in prison,
10 prospective performance in prison?

11 MR. BENZA: That is correct.

12 CHIEF JUSTICE ROBERTS: It doesn't look like
13 that's going to be a very strong argument. I mean, he
14 is still talking about people he wants to kill, and you
15 are going to get up there and say he might perform well
16 in prison?

17 MR. BENZA: Absolutely, Your Honor. In
18 fact, because it is directly related to the mental
19 health evidence. Had the lawyer identified the
20 testimony of the mental health experts, including
21 Dr. Resnick, who is the court clinic psychiatrist, who
22 testified that while he has been incarcerated and
23 receiving treatment his performance and his mental
24 illness has resided -- that he has gotten better. And
25 that he is not --

1 CHIEF JUSTICE ROBERTS: He is on the stand
2 with a Hitler moustache testifying about what a great
3 job he did killing these people, and he says he is going
4 to do it again. I think -- didn't the letter identify
5 particular people he wanted to kill?

6 MR. BENZA: That is correct, it did.

7 CHIEF JUSTICE ROBERTS: And the jury is
8 supposed to believe that this guy is going to do well in
9 prison?

10 MR. BENZA: If the -- if the lawyer had
11 identified for the jury the testimony of the mental
12 health experts, that would have been the case. This
13 Court recognized --

14 JUSTICE SCALIA: These experts said he had
15 improved?

16 MR. BENZA: Yes. Dr. Resnick testified --

17 JUSTICE SCALIA: Before this testimony on
18 the stand?

19 MR. BENZA: During the trial, yes.

20 JUSTICE SCALIA: Wow.

21 MR. BENZA: That his performance --

22 JUSTICE SCALIA: That didn't look like
23 improvement to me.

24 (Laughter.)

25 MR. BENZA: Well, that may be, Your Honor,

1 but that's what the experts testified to. And this was
2 the court clinic expert who was testifying, who
3 evaluated him for the not guilty by reason of insanity.

4 CHIEF JUSTICE ROBERTS: But I guess it gets
5 back to the -- the point, we are talking about what a
6 jury would think and isn't it possible. You are
7 suggesting, I think, he -- he should grasp any straws
8 that are there, this might help. But isn't it possible
9 that that would have a negative effect on the jury? In
10 other words, they see this lawyer telling them this guy
11 is going to do well in prison and the lawyer's
12 credibility is -- is shot.

13 MR. BENZA: If there is no evidence to
14 support that, that would be correct. The problem that
15 this case presents -- and this is what the Sixth Circuit
16 found -- that had the lawyer then said, yes, for all of
17 these reasons they may weigh in favor of death, but here
18 are the reasons why you should consider life, we would
19 have a very case than we have here today.

20 JUSTICE GINSBURG: Mr. Benza, do you know of
21 any case where ineffective assistance was found on the
22 basis of a closing argument alone? General Cordray
23 pointed out that this lawyer had put on a number of
24 witnesses to testify to the defendant's mental illness,
25 and that he did play that theme in the closing.

1 Do you know of any case where the closing,
2 not tied to the way the case was presented at trial, was
3 held sufficient to constitute ineffective assistance of
4 counsel?

5 MR. BENZA: No. And that's because this
6 case is such an outlier. I have been litigating capital
7 cases since 1993. I have never seen a closing argument
8 like this.

9 JUSTICE BREYER: What would you have done?
10 I mean, I'm -- I'm not experienced in this. But I mean,
11 I have heard the other side and I have read the
12 argument. And it makes sense logically to say he has
13 the worst defendant he has ever seen. He's murdered
14 lots of people in cold blood. He gets up on the stand
15 and says: I'm going to kill a lot more. He sounds
16 totally bonkers. And -- and he says to the jury, I
17 can't tell you that what he did was not aggravating; it
18 was terrible. I can't tell you that there's anything
19 here that should make you feel better about him; there
20 is nothing. But we are a nation of people who are
21 humane and our law says don't put a person to death when
22 he fills with his nuttiness that third prong, which is a
23 lower standard of insanity than I had to meet. But it's
24 clearly met and here are the experts; I point to their
25 testimony, and that's what they said. So be humane.

1 Now, you think he should have said something
2 else. What?

3 MR. BENZA: He -- what he should have done
4 is what this Court recognized in Penry v. Lynaugh, is
5 that mental health evidence is a double-edged sword.
6 The job of the defense lawyer is to explain why the
7 mental health evidence mitigates the crimes --

8 JUSTICE BREYER: No, he -- he said why. He
9 said. He said: We don't execute people who are crazy
10 and this guy is crazy. He might not be crazy enough to
11 meet the standard of not guilty by reason of insanity.
12 He's not crazy enough to meet the standard of
13 incompetency, but you just heard three experts tell you
14 that he's seriously crazy. And if you don't -- if you
15 doubt them, don't doubt your own eyes.

16 I don't see -- how can I sit -- and we have
17 courts, two courts who said, yeah, that was okay.

18 MR. BENZA: Well, we actually don't know
19 what the State court said about --

20 JUSTICE BREYER: Or we had at least one
21 State court that found it okay.

22 MR. BENZA: For whatever reason we had the
23 State court decision that affirmed this. We have no
24 idea why.

25 The issue is, however, once the lawyer

1 decided that this was the mitigation strategy that he
2 was going to present, this was the evidence that he had
3 available to argue to him, it is the role of the defense
4 counsel to advocate.

5 So once the lawyer makes the strategic
6 decision, I am going to present the closing argument
7 focused -- based on mental health mitigating evidence,
8 then the lawyer's job is to stand up and explain to
9 the --

10 JUSTICE BREYER: But I agree with all that
11 you are saying. What I am saying my hard time is here
12 is why wasn't this advocacy, when indeed a reasonable
13 decision as to what constituted advocacy in those really
14 rare circumstances where it was the worst kind of
15 defendant he had ever seen in his life who deserved no
16 sympathy?

17 MR. BENZA: As the amici points out, there
18 is no strategic reason for this closing. The amici for
19 Petitioner -- or for Respondent has identified that
20 there can be no strategic reason to have provided this
21 closing argument. By any evaluation of the skill of
22 closing argument this was deficient.

23 JUSTICE SCALIA: Well, I think -- I think it
24 was swallowing the worst evidence. It was telling the
25 jury that was going to think this is a hateful person

1 who had done hateful things.

2 I agree with you. I accept all of that, but
3 even if you feel that way, I thought it was a brilliant
4 closing argument. You said you've -- you've conducted
5 many capital cases.

6 Have you ever conducted a capital case in
7 which the defendant takes the stand with a Hitler
8 moustache and says he's glad for what he's done and he
9 will do it again?

10 How many cases have you had like that?

11 MR. BENZA: No. Spisak is the only one like
12 that.

13 JUSTICE SCALIA: This was an extraordinary
14 trial, and it seems to me that the -- that the technique
15 that -- that counsel used to try to get mercy for this
16 fellow was -- was the best that could have been done.

17 MR. BENZA: If that's your conclusion, then
18 we -- we don't point on the merits of the claim. I beg
19 to differ --

20 JUSTICE KENNEDY: Well, if -- if the
21 strategy that Mr. Cordray and Justice Breyer and, to
22 some extent, Justice Scalia have outlined is a correct
23 strategy, would you go on to say that the implementation
24 of that strategy was substandard?

25 It's rambling, you have to -- in order to

1 get Mr. Cordray's very succinct explanation, you have to
2 go through a couple of pages and drift it out, as
3 Justice Sotomayor said, his argument was fine, and
4 Justice Breyer -- but that is not the argument we have.

5 MR. BENZA: That is correct. The lawyer
6 didn't --

7 JUSTICE KENNEDY: What -- what is the case
8 that you have -- the best case that you have, maybe a
9 case in the courts of appeals or the state supreme
10 courts, where it is said that the implementation of the
11 strategy was just inept -- totally inept.

12 I mean, is that what your argument is here?

13 MR. BENZA: Yes, that the application, that
14 the way the lawyer delivered the closing, the themes
15 that he identified, the things that he said, was the
16 deficiency --

17 JUSTICE KENNEDY: Again, that depends on,
18 oh, tone of voice, the ambiance of the courtroom.
19 This -- this is very hard for us -- you know, he was
20 trying to be folksy with the jury, obviously.

21 These are things that are very difficult for
22 us to assess.

23 MR. BENZA: They are very difficult, but
24 this case doesn't present those nuances. This case
25 presents the case where the lawyer stands up at closing

1 argument -- and the only thing he didn't say that could
2 have made this worse was Justice Stevens hypothetical of
3 it's fine by me if you actually execute him.

4 It's the only thing he didn't say in his
5 closing that could have possibly made it worse for the
6 client.

7 JUSTICE SOTOMAYOR: Well, he actually did
8 say that.

9 MR. BENZA: Not in those words.

10 JUSTICE SOTOMAYOR: Well, but, pretty much,
11 he said, no one's going to fault you if you impose the
12 death sentence.

13 MR. BENZA: And we will be proud of you,
14 whichever you do. Only those very words, I would like
15 you to execute him as well, did not escape his lips.

16 CHIEF JUSTICE ROBERTS: But, I mean, it
17 seems to me that you are imposing a strategic rule, and
18 the counsel obviously made a decision -- or the record
19 may reflect that the type of advocacy that you are
20 telling us he has to have.

21 Here's why you should give this guy
22 sympathy. Here's why. Here's -- he's a good guy. I
23 mean, there is -- even standing at that podium, there is
24 a different strategy that people sometimes employ, which
25 is sort of the understated -- you know, well, he did

1 some terrible things, don't -- I'm not asking for
2 sympathy for these things, but -- you know, we are very
3 proud of the fact that we don't execute -- you know, it
4 seems to me that this disagreement is over different
5 styles of advocacy.

6 And I don't know how to -- particularly in a
7 case where you don't have much to work with, I don't
8 know how to make a judgment that his choice was worse
9 than the other.

10 MR. BENZA: But that's what we do under
11 Strickland. The court recognizes, in Strickland
12 analysis, that there are multiple ways that various
13 lawyers will try the same case; all of which can be
14 effective.

15 JUSTICE GINSBURG: You just told me that,
16 under Strickland, under anything, there has been no case
17 in which there has been a decision for the defendant,
18 based on the inadequacy of the closing argument alone.

19 So you are asking us to take a new tact and
20 inviting arguments focused exclusively on the closing
21 argument, to see if it meets the Strickland standard.

22 MR. BENZA: Yes, but this court has already
23 recognized that the Sixth Amendment applies, the right
24 to counsel applies at closing argument.

25 In *Yarborough v. Gentry*, at page 5 of this

1 Court's opinion, the Court specifically stated that the
2 right to effective assistance extends to closing
3 argument.

4 So this is not a redevelopment or an
5 expansion of Strickland. It's simply an application of
6 the Strickland analysis, the particular facts of this
7 case before the --

8 JUSTICE GINSBURG: Why -- why isn't it the
9 Strickland analysis that you read the charge in the
10 context of the case that was presented at trial, and,
11 here, the case was.

12 The only thing going for the defendant were
13 the witnesses to his mental illness and whether,
14 eloquently or not, that theme was played to the jury.

15 This is a mentally ill man.

16 MR. BENZA: That's -- that's correct, and
17 that's the theme that defense counsel said he was going
18 to implement at the closing. What -- the failure of the
19 lawyer was to adequately and effectively make that
20 closing to the jury.

21 JUSTICE BREYER: Well, he talked about
22 nothing else. And I understand -- look, I am not an
23 expert. I haven't argued these things to juries, and I
24 recognize some lawyers tell me, okay, this was very
25 rambling. I didn't think it was rambling.

1 I thought he was trying to spend a lot of
2 time explaining away to the jury some prosecutorial
3 remark, that you shouldn't pay attention to the expert
4 because you, yourself, the lawyer, didn't talk to them
5 enough.

6 And so you describe that for a couple of
7 pages and why it was irrelevant, and the reason he
8 talked about the -- I thought, the reason he talked
9 about the -- how you will feel when you go out of here,
10 is because he recognizes this is the most sensational
11 case in this community, ever, and all your neighbors are
12 going to congratulate you.

13 But what you are doing here is you are
14 applying a standard, and you are proud to be an
15 American, and that standard, as an American, is a humane
16 standard that requires you to not give the death penalty
17 when the man's insane.

18 Now, I agree that he repeated that 7 or 8 or
19 9 or 10 times, but it was the same point over and over.
20 And how can I -- since there is a lower court that
21 seemed to find this adequate, how can I sit here and say
22 it wasn't?

23 MR. BENZA: Well, it -- first, as to the
24 question of whether or not the lower court found it
25 adequate, we have no idea, again, what the Ohio Supreme

1 Court determined as to question of deficient
2 performances or to prejudice or to strategy.

3 JUSTICE GINSBURG: How many -- how many
4 issues were before the Ohio Supreme Court?

5 MR. BENZA: There were 67 assignments of
6 error raised to the Ohio Supreme Court. This is the
7 only case on direct appeal, where the Ohio Supreme Court
8 issued a procuring of.

9 JUSTICE BREYER: Didn't -- didn't they cite
10 Strickland?

11 MR. BENZA: They did cite Strickland, along
12 with 49 other claims.

13 JUSTICE BREYER: Well, I guess then they
14 concede the argument.

15 MR. BENZA: They dismissed this claim and --

16 JUSTICE BREYER: Why do we have no idea
17 then? If they cited Strickland, why do we have no idea
18 what they -- -

19 MR. BENZA: We have no idea whether they
20 decided that there was deficient performance, but no
21 prejudice -- that there was, in fact, deficient
22 performance, but no prejudice, that this was not
23 deficient because it was reasonable strategy.

24 It is also possible that the lower courts
25 were misapplying, as this Court recognized in Michael

1 Williams' case, that --

2 JUSTICE SCALIA: So I think that we have to
3 defer to all of those, right?

4 MR. BENZA: I'm sorry?

5 JUSTICE SCALIA: I think, if they could have
6 been relying on any of those, we would have to defer to
7 all, wouldn't we?

8 MR. BENZA: Unless we --

9 JUSTICE SCALIA: One-by-one, I mean --

10 MR. BENZA: If we assume that they were then
11 applying the Lockhart v. Fretwell standard as to the
12 question of prejudice, then it would clearly be contrary
13 to Strickland, to have applied that standard of review
14 for prejudice.

15 JUSTICE SCALIA: Why would we assume that?

16 MR. BENZA: Well, because we don't know what
17 the Supreme Court actually did.

18 JUSTICE SCALIA: When we -- when you don't
19 know what a lower court has done, the rule is you assume
20 the best, not the worst. Isn't that the standard rule
21 of review?

22 MR. BENZA: That is.

23 JUSTICE SCALIA: You, very often, don't know
24 on what basis the lower court took action. You assume
25 it was a lawful basis.

1 JUSTICE STEVENS: That's the rule on direct
2 appeal, of course, not on collateral.

3 MR. BENZA: That is the rule on direct
4 appeal. It is also the implication of applying AEDPA.
5 The problem that you have in that is, when you try to
6 apply AEDPA to this particular claim, you don't know how
7 the state court, in fact, decided this case.

8 And, therefore, you don't know whether or
9 not you are going to give the AEDPA deference to the
10 decision that there was no deficient performance, that
11 there was no prejudice.

12 JUSTICE BREYER: How -- how does that work?
13 Certainly, it's a fairly common thing, that the
14 defendant will make -- let's say, 20 arguments, maybe he
15 would even number them.

16 And it's fairly common to find a court of
17 appeals in a state that says, as to argument number 17,
18 and then they characterize it, we reject that argument.

19 MR. BENZA: That is true.

20 JUSTICE BREYER: Now, that -- that happens
21 all the time.

22 MR. BENZA: That is correct.

23 JUSTICE BREYER: And, now, it's very, very
24 common that, in making that argument, there could be
25 some good grounds for rejecting it, and there could be

1 some bad grounds for rejecting it.

2 So would we send -- do we send every case
3 like that back, to say, I want to know if you rejected
4 it for a good reason or a bad reason?

5 MR. BENZA: I would think, no, that you
6 don't send it back, but what happens --

7 JUSTICE BREYER: What we do is we assume
8 they did it for a bad reason?

9 MR. BENZA: I would -- I think the issue
10 then would become that, when a state court chooses to
11 summarily deny, without evaluation, an explanation of
12 the merits of the claim, that, when it comes to habeas
13 review, the constraints of AEDPA are lifted.

14 JUSTICE GINSBURG: So the Ohio Supreme
15 Court, faced with 67 issues, would have to write at
16 least a per curiam opinion on each of the 67 to insulate
17 itself against being overturned on federal habeas?

18 MR. BENZA: Not insulate from overturning,
19 but to gain the benefit of 2254(d)'s restrictive reviews
20 of habeas.

21 JUSTICE SCALIA: Which insulates it from
22 being overturned.

23 MR. BENZA: If, in fact, it is not contrary
24 to our unreasonable application, it would be insulated
25 or --

1 JUSTICE BREYER: Is there any authority for
2 that? Because, I mean, I'm not positive of this one,
3 but I -- I do think hearing it that suddenly habeas
4 opinions and district court opinions would grow by an
5 order of magnitude, because it's very common to see
6 arguments rejected summarily.

7 MR. BENZA: That is correct.

8 JUSTICE BREYER: Now, is there any authority
9 for the proposition that if they reject it summarily,
10 that then we don't assume they are right, but rather we
11 assume they are wrong?

12 MR. BENZA: No, this Court has never
13 addressed how to apply 2254(d) to a summary decision.
14 In Knowles v. Mirzayance, the Court noted that this was
15 in fact an issue and reserved that for another day.

16 In Early v. Packer, this Court recognized,
17 though, however, that AEDPA constraints are looking at
18 not just at the outcome of the lower court's -- the
19 State court's decisions, but the reasoning behind it,
20 because if you are going to have an unreasonable
21 application of -- of a binding law from this court, the
22 lower courts have to be able to apply it and explain,
23 how did we apply it? Otherwise every decision of the
24 State court would be insulated from Federal habeas
25 review, making the writ available but unavailable.

1 Because no decision would therefore ever be unreasonable
2 if the standard is for a district court judge to say:
3 Can I imagine a reasonable way for the State court to
4 have reached this result? I have; I'm a reasonable
5 judge; the State court must have done what I have done;
6 therefore, the review is limited, and the writ -- and
7 the writ is denied.

8 CHIEF JUSTICE ROBERTS: So if you're -- if
9 you're right about that issue on which we haven't had a
10 decision yet, then we would look at prejudice on our
11 own, without deference to the State court findings?

12 MR. BENZA: It would review -- it would
13 revert to pre-AEDPA habeas review to the standards, and
14 with review of the State court decision but with de novo
15 application in the --

16 JUSTICE SCALIA: But that is not what AEDPA
17 says. AEDPA says that we have to give deference unless
18 it is an unreasonable application of Supreme Court law.
19 The burden is on the appealing defendant to show that it
20 was an unreasonable application. In case of doubt, he
21 loses.

22 Now, AEDPA could have been written
23 differently. It could have been written the way you
24 want. The Supreme Court shall evaluate the
25 reasonableness of the Supreme Court opinion. It isn't

1 written that way. It says the burden is on you to show
2 that this was an unreasonable application of Supreme
3 Court law. And where there is a summary disposition,
4 that's a hard road aho.

5 MR. BENZA: I would submit it is impossible.
6 If the --

7 JUSTICE SCALIA: It's -- it's not
8 impossible. I think there are cases where -- where
9 relying on prior Supreme Court law doesn't get you
10 there. It's not impossible.

11 MR. BENZA: I would -- I would beg to
12 differ. I would think that if the summary disposition
13 is going to be held to that standard of an unreasonable
14 application where we have no indication of how the State
15 courts actually applied the law, it would have to be the
16 extreme outlier that would demonstrate that that was an
17 unreasonable --

18 JUSTICE SCALIA: So we should revise the
19 statute and it should not say unreasonable application
20 of Supreme Court law?

21 MR. BENZA: It -- it does not require a
22 revision.

23 JUSTICE SCALIA: Why doesn't it?

24 MR. BENZA: It simply requires the Court to
25 say that when you have summary disposition, that when

1 evaluating the State claim, the State court decision is
2 given the deference that it is due, and that is that we
3 simply cannot determine whether or not it properly
4 applied Federal law, and therefore, it does not get the
5 safe harbor of AEDPA evaluation.

6 JUSTICE SCALIA: That's not how the --
7 that's not how the statute reads.

8 JUSTICE BREYER: Well, why wouldn't you do
9 that as well, then, even a fortiori, where I'm just an
10 appeals court judge and I get a district court opinion?
11 Most common thing in the world, summary judgment denied,
12 motion denied, this denied, denied, denied. And if I'm
13 going to start doing this for State cases, wouldn't I
14 also have to do it for Federal cases whenever a Federal
15 judge doesn't give all his reasons, which is the most
16 common thing in the world?

17 MR. BENZA: The Court does that when it
18 reviews those quarters constrained by what actually
19 happened in the lower court.

20 JUSTICE BREYER: We did? I mean, I've
21 reviewed thousands and thousands of them and I've always
22 thought that a trial judge doesn't have to spell out all
23 his reasons. And the question is really, given the
24 circumstance, can we say that he acted contrary to law?

25 MR. BENZA: And that is --

1 JUSTICE BREYER: If it's trial-based, you
2 look at what the facts are that he might have taken.

3 MR. BENZA: And that would be the evaluation
4 that would continue on in habeas review of these claims,
5 is evaluating the State court decision without, though,
6 simply saying, well, we're going to -- and this is what
7 happens in the lower courts. When you have these
8 summary decisions in 2254(d) analysis, those circuits
9 that have applied this say, what we will imagine a way
10 in which the State court could have reasonably applied
11 this law to reach this result, and therefore, since that
12 is a reasonable way, because of course we as Article 3
13 judges have reasonably come up with that, it must be
14 reasonable, it's not an unreasonable application, and
15 the writ is denied.

16 The problem that we face is when you look at
17 that in comparison to cases like Wiggins and Rompilla
18 where the State courts affirmatively denied applying
19 Federal standards, you get a different level of review.
20 And so you end up encouraging State courts in these
21 types of cases to simply issue postcard denials: Appeal
22 denied. Federal courts, you figure it out.

23 JUSTICE ALITO: Well, I think that assumes
24 that the State courts are -- what the Supreme Court of
25 Ohio and all the other State supreme courts are doing is

1 waiving briefs for Federal habeas courts.

2 MR. BENZA: I don't think --

3 JUSTICE ALITO: Do you think that's what
4 AEDPA was intended to do?

5 MR. BENZA: I think AEDPA was designed that
6 when the State courts, in fact, are doing their jobs
7 under the Constitution to protect defendants' rights to
8 review their claim, then they should receive the
9 protections of AEDPA. What that means for deferential
10 review --

11 JUSTICE SCALIA: That's not what it says.
12 That's not what it says. It says that you have to show
13 that it is an unreasonable application of Supreme Court
14 law. That's what it says.

15 MR. BENZA: It does. And as this Court has
16 explained, what happens in habeas is that the Federal,
17 the district courts and the circuit courts have to
18 evaluate the claim and determine whether or not there
19 was an unreasonable application. It still falls to the
20 district court and the circuit court to --

21 JUSTICE SCALIA: And if they can't, you
22 lose. Because that's the way the statute reads.

23 MR. BENZA: That's correct.

24 JUSTICE SCALIA: You want to say if they
25 can't, we have a new statute. But we don't. The burden

1 on you is to show that it's an unreasonable application.
2 If you tell me we can't tell, you lose.

3 MR. BENZA: That's the other alternative is
4 that then the statute doesn't apply, which as this Court
5 has recognized, when it comes to applying AEDPA, the
6 side that is left untouched regarding that is the issue
7 of the suspension of the writ.

8 JUSTICE BREYER: So you are saying -- I
9 mean, this is very helpful to me for a variety of
10 reasons, but is -- in your view, the correct role of the
11 habeas judge vis-à-vis the State judge there is the same
12 as the Federal appellate judge vis-à-vis the district
13 judge? That is, I'm thinking of a district judge makes
14 a finding, doesn't fully explain it. Now, I would think
15 it would be unlawful if it's an unreasonable application
16 of a Supreme Court case. And I know how to review that.
17 I mean, I -- I know how to review it, I think.

18 Okay. So you are saying however I do that,
19 I should do the same thing and the -- but you don't --
20 you don't think there is a more relaxed standard than
21 that? You think that's basically the standard?

22 MR. BENZA: It's still the same standard.

23 JUSTICE BREYER: Same -- but if they had
24 made an explicit finding, then maybe it would be a
25 tougher standard.

1 MR. BENZA: That's correct.

2 JUSTICE BREYER: All right.

3 MR. BENZA: The standards provided for in
4 AEDPA are there to protect the State court judgments
5 when they have done their job, when they explained their
6 rationale and applied the Federal law. If you see these
7 postcard denials --

8 JUSTICE GINSBURG: Mr. Benza, you might want
9 to use what time is remaining to deal with the other
10 issue, which we haven't talked about at all.

11 MR. BENZA: If I may, if I'm turning -- if
12 there are no further questions on the effect, I will
13 turn to the Mills issue.

14 The -- the question in front of the Sixth
15 Circuit was whether or not the totality of the jury
16 instructions in this case were such that they violated
17 Mills' directive that an individual jurist's
18 determination of a mitigating factor's existence could
19 not be precluded from being considered by the injection
20 of that -- of those factors by the other 11 jurors.

21 What you have in this particular case is the
22 totality of the jury instructions were such that a
23 reasonable understanding of the instruction was that the
24 jury had to be unanimous as to the understanding and the
25 existence of a mitigating factor before it could even be

1 considered.

2 JUSTICE ALITO: Well, what is your answer to
3 the first question that Justice Sotomayor asked? Half
4 of you say that -- that the State court's decision was
5 contrary to or involved an unreasonable application of
6 clearly-established Federal laws determined by the
7 Supreme Court of the United States, i.e., *Mills v.*
8 *Maryland*, when *Mills v. Maryland* hadn't been decided.

9 MR. BENZA: In *Terry Williams v. Taylor*,
10 this Court recognized in the opinion authored by Justice
11 O'Connor that the issue for contrary to or unreasonable
12 application is going to be governed by the
13 application of *Teague*.

14 JUSTICE ALITO: And are there -- are there
15 not quite a few instances of contrary statements in our
16 opinions?

17 MR. BENZA: As to the application of *Mills*?
18 Or --

19 JUSTICE ALITO: As to the -- as to the time
20 when the -- the law has to be clearly established by a
21 decision in that court.

22 MR. BENZA: No, this Court has maintained
23 that the issue regarding the application of -- of
24 controlling established -- what -- clearly established
25 law by this Court is going to be determined by *Teague*,

1 and Teague determines that Mills v. Maryland decision
2 applies to this claim. In -- it was adjudicated on the
3 merits in State court.

4 Now there is another -- underlying this is
5 another AEDPA concern, is how does the Federal -- or the
6 State court adjudicate the constitutional claim since
7 Mills had not been presented. It decided the merits of
8 the claim were -- were to be rejected but it did not
9 decide the case under Mills v. Maryland because of
10 course Mills had not been decided and we know from this
11 Court's decision in the Banks case that Mills was a new
12 law.

13 JUSTICE ALITO: This Court has not said that
14 clearly established Federal law refers to this Court's
15 decision as of the time of the relevant State court
16 decision.

17 MR. BENZA: That this Court has said, but
18 this Court has also said that the decision to that
19 question is based on the decision of Teague. If a case
20 applies to the Court based on Teague, then it will apply
21 to the merits of this particular claim. And what the
22 circuit found --

23 JUSTICE SCALIA: Counsel, I don't understand
24 that, I don't understand that. Do you want to go around
25 that again?

1 MR. BENZA: This Court has held that the
2 decision of whether a -- when a case is going to be
3 clearly established for review in habeas is going to be
4 based on Teague. That was the opinion by Justice
5 O'Connor concurring in the judgment in Terry Williams,
6 that the decision for clearly established is going to be
7 based on the decision of the applicability of Teague.

8 JUSTICE SCALIA: Does Teague say anything
9 about time?

10 MR. BENZA: Teague says that the decision
11 for application of a newly established law or a new
12 established constitutional rule is predicated on the
13 denial of direct appeal, which in this case would be the
14 cert denied by this Court of the direct appeal of the -
15 case, which happened in 1989, a year after the decision
16 in Mills was handed down.

17 CHIEF JUSTICE ROBERTS: Counsel, the Mills
18 opinion has one of those concluding paragraphs at the
19 end that sort of sums everything up, and it says that we
20 conclude there is a substantial probability that
21 reasonable jurors upon receiving the judge's
22 instructions in this case and in attempting to complete
23 the verdict form as instructed may have thought they
24 were precluded from considering any mitigating evidence
25 unless all 12 jurors agreed on the existence of a

1 particular such circumstance.

2 MR. BENZA: That is correct.

3 CHIEF JUSTICE ROBERTS: Now how is that
4 clearly established law that your claim is -- is
5 contrary to Mills?

6 MR. BENZA: Because in -- in our case every
7 jury instruction that was given to the jury told them
8 that they had to be unanimous, including the specific
9 instruction --

10 CHIEF JUSTICE ROBERTS: That is on death or
11 nondeath, not on whether a particular mitigating
12 circumstance exists.

13 MR. BENZA: Actually they -- they were told
14 that, because they were also told that that included
15 their decisions as to all disputes of fact. The
16 existence of a mitigating factor is of course a question
17 of fact. So the jury was in fact specifically
18 instructed to be unanimous to every decision that they
19 made including resolving disputes of fact. They were
20 told by both lawyers for the defense and lawyers for the
21 prosecution that the first question they had to answer
22 when they got into the jury room was to the existence of
23 mitigating factors.

24 If they -- if they reasonably understood
25 that they had to be unanimous as to that fact they would

1 have rejected the mitigating factors, even if 11 of them
2 had agreed that the mental health evidence in this case
3 was a mitigating factor. And when --

4 JUSTICE GINSBURG: How does that work? The
5 instruction was all 12 must agree that the aggravators
6 outweigh the mitigators before death is imposed.

7 MR. BENZA: That's correct, as to that
8 instruction. But the existence of the mitigator was the
9 predicate question that the jury would have to answer
10 and our position is that they also would have had to be
11 unanimous per the instruction.

12 JUSTICE SCALIA: Where -- where is that in
13 the instructions? I -- I didn't realize that that's
14 what you are counting on. Where is it?

15 MR. BENZA: They appear at -- let's see.
16 Just a moment --

17 JUSTICE SCALIA: It's in your brief, I
18 assume.

19 MR. BENZA: It is in my brief, Your Honor,
20 and I've lost my appendix cite to it but the -- oh, I'm
21 sorry. It's at petition appendix page 326: It is your
22 duty to carefully weigh the evidence, to decide all
23 disputed questions of fact, to apply the instructions of
24 court to your findings and to render your verdict
25 accordingly.

1 JUSTICE SCALIA: Read it again?

2 MR. BENZA: At page -- the petition appendix
3 page 326. "It is your duty to carefully weigh the
4 evidence. To decide all disputed questions of fact, to
5 apply the instructions of the Court to your findings and
6 to render your verdict accordingly."

7 CHIEF JUSTICE ROBERTS: Where does that say
8 what your summary was earlier, that they --

9 MR. BENZA: That the --

10 CHIEF JUSTICE ROBERTS: -- can't consider a
11 mitigating circumstance unless they unanimously agree
12 about it.

13 JUSTICE SCALIA: New? New?

14 MR. BENZA: Those instructions are given and
15 every reference to the jury is in a collective you. And
16 there -- that instruction tells the jury that they must
17 -- a reasonable understanding of that instruction is
18 that the jury would understand that they had to
19 unanimously agreed as to the existence of the mitigating
20 factors.

21 JUSTICE SCALIA: Is that in your brief, too?
22 I just don't remember it from your brief.

23 MR. BENZA: I believe it is, Your Honor, I
24 don't at the -- the page cite to it. It is at petition
25 appendix page 326.

1 CHIEF JUSTICE ROBERTS: Well, doesn't every
2 court tell them it's their duty to decide disputed
3 questions of fact?

4 MR. BENZA: That is correct.

5 CHIEF JUSTICE ROBERTS: And you think that
6 includes within it the idea that they -- they cannot
7 consider a mitigating circumstance unless they all 12
8 agree on it?

9 MR. BENZA: Yes, that then would violate
10 Mills. That's the error in this instruction.

11 CHIEF JUSTICE ROBERTS: Okay, I just --

12 MR. BENZA: That's the question in Mills.

13 CHIEF JUSTICE ROBERTS: I want to make sure
14 I have got your Mills argument.

15 CHIEF JUSTICE ROBERTS: It is that the
16 sentence that says "it's your duty to did decide all
17 disputed questions of fact is the same as saying they
18 are instructed that they cannot consider a mitigating
19 circumstance unless they are unanimous?

20 MR. BENZA: When considered in totality,
21 yes.

22 CHIEF JUSTICE ROBERTS: Okay. Thank you,
23 counsel.

24 Mr. Cordray, you have ten minutes remaining.

25 REBUTTAL ARGUMENT OF GEN. RICHARD CORDRAY

1 ON BEHALF OF THE PETITIONER

2 MR. CORDRAY: Thank you, Your Honor.

3 On the Mills instruction, it -- it's clear,
4 Mills was not decided at the time the Ohio Supreme Court
5 rendered its decision. It was decided before this Court
6 denied direct review.

7 CHIEF JUSTICE ROBERTS: Is that an argument
8 you made before this Court?

9 MR. CORDRAY: I beg your pardon.

10 CHIEF JUSTICE ROBERTS: Is this an argument
11 that you've made before this Court in your brief, that
12 we shouldn't consider whether Mills is the controlling
13 standard because Mills came after?

14 MR. CORDRAY: No. Nor am I making it now.

15 CHIEF JUSTICE ROBERTS: Okay.

16 MR. CORDRAY: I am simply summarizing a
17 response to Justice Sotomayor's question. But this
18 Court -- on -- on Teague, in Beard v Banks determined
19 that Mills itself expressed a new rule and expressed
20 some doubt as to whether that rule itself was even clear
21 until McKoy v. North Carolina was decided in 1990, which
22 was to finality in this case. But the -- the jury
23 instruction issue is entirely knocked out by the fact
24 that this case is an extension of Mills that goes beyond
25 anything this Court has ever held in the jury

1 instruction context. It is an extension of Mills that
2 has been rejected by the majority of circuits to
3 consider it, even today 20 years later, and it couldn't
4 possibly be understood to be clearly established law.

5 The reference to page 326a and the jury
6 instructions, that's quite distinct from the passage
7 where the jury was told specifically they have to be
8 unanimous only on the ultimate question, whether
9 aggravators outweigh mitigators. This was very
10 different from the jury form in Mills which was itself
11 was somewhat cryptic and -- and later was explained
12 further in McKoy.

13 If I could return then to the
14 ineffectiveness issues. Counsel argued that there was
15 deficiency on a couple of different grounds. First of
16 all, that -- that defense counsel should have argued
17 about family background and performance in prison. The
18 family background was uncontested; it was humdrum; there
19 was nothing special there. Performance in prison was an
20 issue that was raised at trial. The prosecutor read to
21 Spisak on the stand a letter he had written from prison.
22 I am not going to foul the record with his specific
23 verbiage but it was after a card game in which he had
24 gotten into a fight with inmates and said he would like
25 to kill them. When that was read to Spisak on the stand

1 his response was to say "Heil, Hitler" and give the Nazi
2 salute to the jury.

3 So the notion that we should be referring
4 back to his performance in prison and that somehow would
5 have helped mitigate the jury's consideration of the
6 death sentence to me is -- is fanciful.

7 In terms of the argument that defense
8 counsel here argued, nonstatutory aggravators, that is a
9 characterization that I don't think is accurate and it's
10 not accurate as a matter of Ohio law. In our reply
11 brief we cited State v. Hancock which indicates that the
12 nature and circumstances of crimes are always relevant
13 in determining whether the aggravators outweigh the
14 mitigators, and in fact the main aggravator here was
15 that Mr. Spisak engaged in a course of conduct that
16 involved the purposeful killing of more than one person
17 -- two or more persons, or the attempt to kill two or
18 more persons which he had done here and which certainly
19 was going to be and was, in fact, in fact if you read
20 the prosecutor's closing, the heart and soul of the
21 prosecutor's closing.

22 As to whether the mental health presentation
23 was, quote, "not strong enough," obviously it wasn't
24 strong enough in the end to sway the jury. But you
25 cannot judge by hindsight, this Court has said it again

1 and again, counsel's performance. The court said that
2 in *Strickland v. Washington* itself, emphasized that
3 tremendously in rejecting the deficiency claim in that
4 case. And then in *Yarborough* as applied to closing
5 arguments, the Court said very specifically we have to
6 be doubly deferential to -- to strategic decisions made
7 at closing, even if we might had made them differently
8 or might have executed them somewhat differently, and
9 particularly through the AEDPA lens.

10 CHIEF JUSTICE ROBERTS: What -- what is your
11 answer to your friend's explanation that it's hard to
12 defer when they don't even say anything?

13 MR. CORDRAY: I think that we have to read
14 the statute. The statute -- the AEDPA statute, 2254
15 says we defer to what? We defer to an adjudication by
16 the State court on the merits. There is no suggestion
17 here that this adjudication was on some procedural
18 grounds or default grounds. It was a merits
19 adjudication. It wasn't a lengthy, eloquent, you know,
20 long explained adjudication, but it was an adjudication
21 on the merits and deference should be given.

22 The alternative is that if they don't
23 explain which prong they are using that you defer to
24 nothing, and that seems to be not consistent with what
25 Congress clearly intended under AEDPA, nor is it

1 consistent with the language of the statute.

2 The claim was made that the deference only
3 applies when the State court, quote, "has done its job."
4 Under the statute the job is to adjudicate a claim on
5 the merits, not to provide a lengthy discourse in doing
6 so. As to the prejudice point which I think is finally
7 decisive and was the basis on which this Court GVR'd
8 in -- in Landrigan, this is Landrigan --

9 JUSTICE STEVENS: Can we just go back to
10 that one point for a minute.

11 MR. CORDRAY: Yes, sir.

12 JUSTICE STEVENS: Would your deference be
13 exactly the same if, instead of listing all 47 claims or
14 so, they simply entered a one-line order saying,
15 "Affirmed"?

16 MR. CORDRAY: I believe, Your Honor, under
17 the statute, it would be the same, although here they
18 did more than that -- you know, they cited Strickland.
19 We have to assume they applied Strickland.

20 And, as for the prejudice claim, we have
21 findings from the Ohio Supreme Court that, I think, bear
22 on the prejudice claim. In its decision -- this is
23 309(a) through 311(a) of the appendix --

24 JUSTICE STEVENS: Let me -- let me go back
25 to the question.

1 MR. CORDRAY: Yes, sir.

2 JUSTICE STEVENS: Do you think they are
3 entitled to more deference because they did cite
4 Strickland if they -- than if they did cite nothing?

5 MR. CORDRAY: I think that the Ohio Supreme
6 Court is entitled to deference because it adjudicated a
7 claim on the merits, so --

8 JUSTICE STEVENS: So it would be exactly the
9 same deference whether they say it's Strickland or not.

10 MR. CORDRAY: I would agree with that.
11 However, if the Court was inclined to make gradation --
12 this is a gradation beyond simply an unexplained order.
13 Yes.

14 As to prejudice, the Ohio Supreme Court at
15 309(a) through 311(a) itself independently reweighed the
16 aggravating factors against the mitigating factors,
17 which is something the Ohio Supreme Court does under
18 Ohio law.

19 There had been some issues of merger of some
20 of the aggravating circumstances. On direct appeal,
21 they had dealt with those issues, and then they went
22 back and reweighed, and they found that, on this record,
23 the aggravating factors heavily -- lie heavily and
24 beyond a reasonable doubt to outweigh the mitigating
25 factors.

1 That is, in fact, the same kind of
2 determination that the Court would make in trying to
3 determine if there was prejudice here.

4 As to the implementation of the strategy
5 here, it is coherent in understanding what counsel was
6 trying to do. Was it a bit rambling? Perhaps.

7 You know, were there -- were there side
8 issues that he tried to take up, which he thought went
9 to his credibility with the jury and the credibility of
10 the mental illness defense with the jury? Perhaps.

11 But the strategy was twofold. It was to
12 reference the crimes, make it clear to the jury he
13 understood the nature -- the horrific nature of the
14 crimes, as he thought the jury understood it, and then
15 pivot to the mental illness -- mental disease or defect
16 prong as the mitigator that the -- that the jury should
17 apply in not giving the death penalty in this case.

18 I think the strategy here was coherent. I'm
19 not sure what else defense counsel could have done in
20 this case, where his client had both committed these
21 horrific crimes, undisputed, and then had reveled in
22 them, in his flamboyant testimony from the stand.

23 In the context of that and given the doubly
24 deferential lens this Court has laid out in Yarborough,
25 I think that there is neither deficiency, nor could

1 there be prejudice on this record.

2 If there are no further questions, Your
3 Honor, thank you for your time.

4 CHIEF JUSTICE ROBERTS: Thank you, General
5 Cordray; Mr. Benza.

6 The case is submitted.

7 (Whereupon, at 12:06 p.m., the case in the
8 above-entitled matter was submitted.)

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A				
ability 10:23 16:20 18:10 19:14	15:3 35:4,6,9 36:13 37:17 38:16,17,22 40:5 42:4,5,9 43:5 44:4 46:5 55:9,14,25	48:21 49:9 55:11	50:5 58:17	assignments 33:5
able 10:12 37:22	affirmance 14:8	anyway 11:9	applying 32:14 34:11 35:4 41:18 43:5	assistance 15:15 23:21 24:3 31:2
above-entitled 1:11 59:8	affirmatively 41:18	apparent 15:23	Appointed 1:17 2:6	assume 11:4 34:10,15,19,24 36:7 37:10,11 49:18 56:19
Absolutely 21:17	affirmed 25:23 56:15	appeal 15:13 17:23 18:10 33:7 35:2,4 41:21 47:13,14 57:20	approach 9:6 approach 19:6 approved 12:22	assumes 41:23
accept 27:2	aggravating 5:16 20:18 24:17 57:16,20 57:23	appealed 18:7	approved 12:22	attempt 14:7 54:17
acceptable 8:5 9:16,17,23	aggravator 20:21 54:14	appealing 38:19	approximately 10:6	attempted 15:24
accepted 21:1	aggravators 5:10,20 7:6,10 49:5 53:9 54:8 54:13	appeals 12:12 12:23 28:9 35:17 40:10	areas 20:16	attempting 10:2 47:22
accepting 15:16	agree 4:20 5:20 5:22 13:14 26:10 27:2 32:18 49:5 50:11 51:8 57:10	appear 49:15	argue 12:3 26:3	attention 12:10 32:3
accurate 54:9,10	agreed 47:25 49:2 50:19	APPEARAN... 1:14	argued 11:18 16:8,10 19:15 20:17,22 21:4 31:23 53:14,16 54:8	attorney 1:15 15:9,17,19
acknowledged 19:19	ah 39:4	appears 15:19	argues 11:6	attorney's 15:11
act 4:6	ALITO 17:7,19 17:21 41:23 42:3 45:2,14 45:19 46:13	appellate 43:12	arguing 11:1 21:6	authored 45:10
acted 4:3 40:24	allowed 20:20	appendix 10:6 49:20,21 50:2 50:25 56:23	argument 1:12 2:2,7 3:4,6 9:11 10:10 11:8,11,18 13:5,7,19 15:20 20:10 21:13 23:22 24:7,12 26:6 26:21,22 27:4 28:3,4,12 29:1 30:18,21,24 31:3 33:14 35:17,18,24 51:14,25 52:7 52:10 54:7	authority 37:1,8
action 34:24	alternative 14:11 15:1 43:3 55:22	application 12:4 13:22 28:13 31:5 36:24 37:21 38:15,18 38:20 39:2,14 39:19 41:14 42:13,19 43:1 43:15 45:5,12 45:13,17,23 47:11	arguing 11:1 21:6	autonomy 19:6
adaptive 21:2	ambiance 28:18	applicable 4:19 8:15	argument 1:12 2:2,7 3:4,6 9:11 10:10 11:8,11,18 13:5,7,19 15:20 20:10 21:13 23:22 24:7,12 26:6 26:21,22 27:4 28:3,4,12 29:1 30:18,21,24 31:3 33:14 35:17,18,24 51:14,25 52:7 52:10 54:7	available 8:25 26:3 37:25
add 6:17	Amendment 6:19 30:23	application 12:4 13:22 28:13 31:5 36:24 37:21 38:15,18 38:20 39:2,14 39:19 41:14 42:13,19 43:1 43:15 45:5,12 45:13,17,23 47:11	arguing 11:1 21:6	avoid 8:11
addition 16:15	American 32:15 32:15	applied 3:14 34:13 39:15 40:4 41:9,10 44:6 55:4 56:19	argument 1:12 2:2,7 3:4,6 9:11 10:10 11:8,11,18 13:5,7,19 15:20 20:10 21:13 23:22 24:7,12 26:6 26:21,22 27:4 28:3,4,12 29:1 30:18,21,24 31:3 33:14 35:17,18,24 51:14,25 52:7 52:10 54:7	a.m 1:13 3:2
address 4:23	amici 26:17,18	applies 30:23,24 46:2,20 56:3	arguing 11:1 21:6	
addressed 37:13	analysis 30:12 31:6,9 41:8	apply 4:2 10:22 35:6 37:13,22 37:23 43:4 46:20 49:23	arguing 11:1 21:6	
adequate 32:21 32:25	answer 45:2		arguing 11:1 21:6	
adequately 31:19			arguing 11:1 21:6	
adjudicate 46:6 56:4			arguing 11:1 21:6	
adjudicated 46:2 57:6			arguing 11:1 21:6	
adjudication 14:14 55:15,17 55:19,20,20			arguing 11:1 21:6	
Adolf 8:20			arguing 11:1 21:6	
adversary 11:6			arguing 11:1 21:6	
adversary's 7:18			arguing 11:1 21:6	
advocacy 26:12 26:13 29:19 30:5			arguing 11:1 21:6	
advocate 26:4			arguing 11:1 21:6	
AEDPA 3:11 4:1 8:15 13:17 13:19 14:13			arguing 11:1 21:6	

B

back 4:8 9:21
12:8 16:1 23:5
36:3,6 54:4
56:9,24 57:22

background
53:17,18

bad 36:1,4,8

Banks 46:11
52:18

based 17:24
26:7 30:18
46:19,20 47:4
47:7

basically 11:1
43:21

basis 13:10
14:19 23:22
34:24,25 56:7

<p>bear 56:21 Beard 52:18 bed 16:10 17:12 beg 27:18 39:11 52:9 behalf 1:16 2:4 2:9 3:7 20:11 52:1 behavior 12:18 beliefs 8:22 believe 5:4 7:2 7:24 13:2 22:8 50:23 56:16 benefit 36:19 Benza 1:17 2:5 20:9,10,12 21:11,17 22:6 22:10,16,19,21 22:25 23:13,20 24:5 25:3,18 25:22 26:17 27:11,17 28:5 28:13,23 29:9 29:13 30:10,22 31:16 32:23 33:5,11,15,19 34:4,8,10,16 34:22 35:3,19 35:22 36:5,9 36:18,23 37:7 37:12 38:12 39:5,11,21,24 40:17,25 41:3 42:2,5,15,23 43:3,22 44:1,3 44:8,11 45:9 45:17,22 46:17 47:1,10 48:2,6 48:13 49:7,15 49:19 50:2,9 50:14,23 51:4 51:9,12,20 59:5 best 27:16 28:8 34:20 better 18:18 21:24 24:19</p>	<p>beyond 52:24 57:12,24 binding 37:21 bit 3:20 58:6 black 19:24 blood 24:14 bonkers 24:16 brand 8:22 breakdown 11:17 Breyer 24:9 25:8,20 26:10 27:21 28:4 31:21 33:9,13 33:16 35:12,20 35:23 36:7 37:1,8 40:8,20 41:1 43:8,23 44:2 brief 49:17,19 50:21,22 52:11 54:11 briefs 42:1 brilliant 27:3 bringing 16:4 broad 19:3 Brooks 6:16 brutal 16:11,12 burden 38:19 39:1 42:25</p> <hr/> <p style="text-align: center;">C</p> <hr/> <p>C 2:1 3:1 capacity 9:5 10:20 capital 24:6 27:5 27:6 card 53:23 carefully 49:22 50:3 Carolina 52:21 case 3:4,10 4:18 5:2,6 6:10,23 7:2 8:13 11:21 12:7,8,16 13:2 13:3,3 14:5 20:15,25 22:12</p>	<p>23:15,19,21 24:1,2,6 27:6 28:7,8,9,24,24 28:25 30:7,13 30:16 31:7,10 31:11 32:11 33:7 34:1 35:7 36:2 38:20 43:16 44:16,21 46:9,11,19 47:2,13,15,22 48:6 49:2 52:22,24 55:4 58:17,20 59:6 59:7 cases 7:21 24:7 27:5,10 39:8 40:13,14 41:17 41:21 celebrated 8:21 17:16 cert 3:23 12:2 47:14 certainly 14:16 19:17 35:13 54:18 Chagrin 1:17 chance 12:21 20:1 character 9:1 characterizati... 9:19 54:9 characterize 35:18 charge 5:15 6:23 19:10,11 31:9 Chief 3:3,8 20:8 20:12 21:8,12 22:1,7 23:4 29:16 38:8 47:17 48:3,10 50:7,10 51:1,5 51:11,13,15,22 52:7,10,15 55:10 59:4 childhood 21:3 chilling 12:13</p>	<p>choice 30:8 choices 8:2 chooses 36:10 circuit 4:17 12:3 12:9 20:14 23:15 42:17,20 44:15 46:22 circuits 4:16 6:20 7:16 41:8 53:2 Circuit's 4:13 circumstance 40:24 48:1,12 50:11 51:7,19 circumstances 5:16,17 11:19 26:14 54:12 57:20 cite 33:9,11 49:20 50:24 57:3,4 cited 13:25 33:17 54:11 56:18 civilized 18:9 claim 8:16 13:21 13:25 27:18 33:15 35:6 36:12 40:1 42:8,18 46:2,6 46:8,21 48:4 55:3 56:2,4,20 56:22 57:7 claims 33:12 41:4 56:13 clear 17:14 52:3 52:20 58:12 clearly 15:5 16:13 24:24 34:12 45:20,24 46:14 47:3,6 48:4 53:4 55:25 clearly-establi... 4:9,14 45:6 client 10:9 17:12 18:6,12,15,24</p>	<p>29:6 58:20 client's 9:1,2 19:18,21 21:6 clinic 21:21 23:2 closing 9:11,19 9:20 10:5 13:18 16:14 19:3,15 23:22 23:25 24:1,7 26:6,18,21,22 27:4 28:14,25 29:5 30:18,20 30:24 31:2,18 31:20 54:20,21 55:4,7 Code 16:7 coherent 18:17 58:5,18 cold 24:14 collateral 35:2 collective 50:15 Columbus 1:15 come 41:13 comes 15:9 36:12 43:5 commanded 3:17 committed 12:14 18:1 58:20 common 5:10 35:13,16,24 37:5 40:11,16 community 32:11 comparison 41:17 competent 13:11 complete 47:22 concede 33:14 concern 46:5 conclude 47:20 concluding 47:18 conclusion 27:17</p>
---	--	---	--	--

<p>concurring 47:5 conduct 9:6 54:15 conducted 27:4 27:6 conform 9:6 congratulate 32:12 Congress 55:25 Congress's 15:5 consciousness 9:14 consequence 5:21 6:2 consider 5:5 20:20 23:18 50:10 51:7,18 52:12 53:3 consideration 54:5 considered 44:19 45:1 51:20 considering 47:24 consistent 6:20 55:24 56:1 consistently 5:12 constitute 24:3 constituted 26:13 Constitution 8:9 42:7 constitutional 46:6 47:12 constitutionally 7:12 8:12 constrained 40:18 constraints 36:13 37:17 context 17:20 18:4 31:10 53:1 58:23 continue 8:22 12:20 19:25</p>	<p>41:4 continued 10:10 contrary 3:13 4:3 34:12 36:23 40:24 45:5,11,15 48:5 controlling 45:24 52:12 controls 11:24 13:2 conundrum 3:20 Cordray 1:15 2:3,8 3:5,6,8 3:20 4:7 5:1,14 5:23 6:1 7:2 8:6 9:8,9,18 10:25 11:3,15 11:25 12:2 13:13 14:4,20 14:23 15:21 17:10,20 18:3 23:22 27:21 51:24,25 52:2 52:9,14,16 55:13 56:11,16 57:1,5,10 59:5 Cordray's 28:1 correct 4:25 21:11 22:6 23:14 27:22 28:5 31:16 35:22 37:7 42:23 43:10 44:1 48:2 49:7 51:4 counsel 8:24 9:15 11:10,17 15:7,15,18,22 17:3,19 18:4 19:8 20:15,17 20:22 24:4 26:4 27:15 29:18 30:24 31:17 46:23 47:17 51:23</p>	<p>53:14,16 54:8 58:5,19 counsel's 55:1 count 19:10 counting 49:14 country 5:11 couple 28:2 32:6 53:15 course 15:21 35:2 41:12 46:10 48:16 54:15 court 1:1,12,18 2:6 3:9,16,24 4:4,6,10,21 5:3 6:2,7,8,15,16 7:7,13,14,22 8:7,12 9:23 10:14 11:15 12:7,11,11,17 12:22,22 13:7 13:15,24 14:5 14:6,8,10,14 14:18,25 19:1 19:9 20:13 21:21 22:13 23:2 25:4,19 25:21,23 30:11 30:22 31:1 32:20,24 33:1 33:4,6,7,25 34:17,19,24 35:7,16 36:10 36:15 37:4,12 37:14,16,21,24 38:2,3,5,11,14 38:18,24,25 39:3,9,20,24 40:1,10,10,17 40:19 41:5,10 41:24 42:13,15 42:20,20 43:4 43:16 44:4 45:7,10,21,22 45:25 46:3,6 46:13,15,17,18 46:20 47:1,14</p>	<p>49:24 50:5 51:2 52:4,5,8 52:11,18,25 54:25 55:1,5 55:16 56:3,7 56:21 57:6,11 57:14,17 58:2 58:24 courtroom 28:18 courts 15:3 25:17,17 28:9 28:10 33:24 37:22 39:15 41:7,18,20,22 41:24,25 42:1 42:6,17,17 court's 3:12,22 4:24 12:4 13:10,20 31:1 37:18,19 45:4 46:11,14 crazy 25:9,10,10 25:12,14 created 18:21,22 19:18 credibility 23:12 58:9,9 crime 9:25 crimes 8:18 9:1 9:22 10:4 16:11,12 17:25 19:18 25:7 54:12 58:12,14 58:21 Cronic 11:15,24 cryptic 53:11 curiam 36:16 current 4:10 5:18</p>	<p>de 14:24 38:14 dead 8:3 deadlock 6:25 deal 44:9 dealt 57:21 death 5:18 7:11 7:25 8:3,4 9:3 9:17 11:8,12 17:24 18:14 20:19 23:17 24:21 29:12 32:16 48:10 49:6 54:6 58:17 deaths 8:21 decide 46:9 49:22 50:4 51:2,16 decided 4:10 12:7 26:1 33:20 35:7 45:8 46:7,10 52:4,5,21 decision 3:12,22 4:6,24 13:10 14:19 25:23 26:6,13 29:18 30:17 35:10 37:13,23 38:1 38:10,14 40:1 41:5 45:4,21 46:1,11,15,16 46:18,19 47:2 47:6,7,10,15 48:18 52:5 56:22 decisionmaking 3:17 decisions 13:18 37:19 41:8 48:15 55:6 decisive 56:7 default 55:18 defect 16:7 58:15 defendant 9:13 17:9 24:13</p>
---	---	--	---	---

D

D 3:1
Davis 6:19
day 37:15
days 12:18
 16:15 17:13

<p>26:15 27:7 30:17 31:12 35:14 38:19 defendants 42:7 defendant's 23:24 defense 8:24 9:23 10:15 11:10 15:8,25 16:2 17:3,8,11 17:19 19:7 25:6 26:3 31:17 48:20 53:16 54:7 58:10,19 defer 13:17 14:14 15:1 34:3,6 55:12 55:15,15,23 deference 13:6 14:10,12,18 15:2,5 19:3 35:9 38:11,17 40:2 55:21 56:2,12 57:3,6 57:9 deferential 3:11 13:16,19 42:9 55:6 58:24 deferring 12:4 deficiency 11:9 13:16 16:20 17:3 19:1 28:16 53:15 55:3 58:25 deficient 11:2,5 19:10,16 20:15 26:22 33:1,20 33:21,23 35:10 delivered 28:14 demands 17:22 demented 18:15 demonstrate 10:9 39:16 denial 47:13 denials 41:21 44:7</p>	<p>denied 3:18,23 38:7 40:11,12 40:12,12,12 41:15,18,22 47:14 52:6 deny 36:11 depend 13:6 depends 28:17 depravity 8:25 derogatory 17:8 17:11 describe 32:6 deserved 26:15 designed 42:5 despite 17:25 detail 14:1 determination 13:15 44:18 58:2 determine 40:3 42:18 58:3 determined 5:3 5:6 33:1 45:6 45:25 52:18 determines 46:1 determining 54:13 differ 27:19 39:12 different 3:17 5:8 29:24 30:4 41:19 53:10,15 differently 38:23 55:7,8 difficult 28:21 28:23 diminished 10:20,23 18:10 19:14 direct 3:23 12:10 33:7 35:1,3 47:13 47:14 52:6 57:20 directive 44:17 directly 21:18 disagree 9:18</p>	<p>disagreement 30:4 disclaim 14:23 14:25 disclaimed 14:7 discourse 56:5 discussion 12:9 disease 16:6 58:15 disjointed 9:11 dismissed 33:15 disposition 14:9 39:3,12,25 dispositions 15:2 dispute 19:20 disputed 49:23 50:4 51:2,17 disputes 48:15 48:19 dissent 6:10 dissented 6:9 distinct 4:18 5:2 53:6 district 37:4 38:2 40:10 42:17,20 43:12 43:13 disturbing 9:1 doing 32:13 40:13 41:25 42:6 56:5 double-edged 25:5 doubly 13:16,19 55:6 58:23 doubt 25:15,15 38:20 52:20 57:24 Dr 21:21 22:16 drift 28:2 due 40:2 duty 49:22 50:3 51:2,16 dynamic 8:7 D.C 1:8</p>	<p style="text-align: center;">E</p> <p>E 2:1 3:1,1 earlier 50:8 Early 37:16 easily 18:18 effect 23:9 44:12 effective 15:18 30:14 31:2 effectively 5:24 11:16 31:19 effort 16:3 17:4 Eighth 4:16 6:19 either 7:25 9:16 9:17 elephant 9:24 eloquent 15:11 55:19 eloquently 16:8 31:14 emphasized 55:2 emphasizes 19:6 employ 29:24 enacting 15:6 encourage 8:10 encouraging 41:20 engaged 54:15 entered 56:14 entire 18:20 19:4 entirely 52:23 entitled 14:18 57:3,6 err 15:4 erred 12:3 error 33:6 51:10 escape 29:15 ESQ 1:15,17 2:3 2:5,8 establish 15:24 established 18:23 45:20,24 45:24 46:14 47:3,6,11,12 48:4 53:4 evaluate 38:24</p>	<p>42:18 evaluated 20:14 23:3 evaluating 40:1 41:5 evaluation 26:21 36:11 40:5 41:3 evidence 10:13 10:18 12:24 19:12 20:25 21:5,19 23:13 25:5,7 26:2,7 26:24 47:24 49:2,22 50:4 exactly 17:23 56:13 57:8 example 16:23 exclusively 30:20 execute 10:23 15:14 16:19 18:9 20:23 25:9 29:3,15 30:3 executed 15:19 55:8 exist 4:5 existence 44:18 44:25 47:25 48:16,22 49:8 50:19 exists 48:12 expansion 31:5 experienced 24:10 expert 23:2 31:23 32:3 experts 10:8 16:4,24 17:1 19:13 21:20 22:12,14 23:1 24:24 25:13 explain 25:6 26:8 37:22 43:14 55:23 explained 42:16</p>
---	---	--	---	--

<p>44:5 53:11 55:20 explaining 32:2 explanation 15:11 28:1 36:11 55:11 explicit 43:24 expressed 52:19 52:19 expressing 12:19 extends 31:2 extension 4:12 7:13 8:14 52:24 53:1 extent 27:22 extraordinary 27:13 extreme 39:16 extremes 15:8 eyes 25:15</p> <hr/> <p style="text-align: center;">F</p> <p>face 41:16 faced 14:6 36:15 fact 4:18 5:8 6:8 7:15,21 8:17 11:17 12:17 13:2 18:17 20:5 21:18 30:3 33:21 35:7 36:23 37:15 42:6 48:15,17,17,19 48:25 49:23 50:4 51:3,17 52:23 54:14,19 54:19 58:1 factor 9:5 10:7 10:22 16:17,18 18:8 44:25 48:16 49:3 factors 5:5 20:18,21,21,25 21:1 44:20 48:23 49:1 50:20 57:16,16</p>	<p>57:23,25 factor's 44:18 facts 31:6 41:2 factual 19:19 failure 5:22 31:18 fair 5:1,1 14:15 fairly 35:13,16 falls 1:17 42:19 family 21:3 53:17,18 fanciful 54:6 far 17:21 fault 21:8 29:11 favor 23:17 federal 36:17 37:24 40:4,14 40:14 41:19,22 42:1,16 43:12 44:6 45:6 46:5 46:14 feel 24:19 27:3 32:9 feeling 16:22 18:12 feels 7:10 fellow 27:16 Fifth 4:16 fight 53:24 figure 3:16 41:22 fills 24:22 final 3:23 finality 3:25 52:22 finally 21:4 56:6 find 8:5 11:14 19:25 20:2 32:21 35:16 finding 43:14,24 findings 38:11 49:24 50:5 56:21 fine 28:3 29:3 first 9:18,21 13:14 20:17 32:23 45:3</p>	<p>48:21 53:15 five 16:14 flamboyant 58:22 flaunted 12:17 focused 26:7 30:20 focusing 11:6 19:1 folksy 28:20 footnote 6:11 forego 9:3 form 5:7 7:23 47:23 53:10 fortiori 40:9 foul 53:22 found 10:14 20:15 23:16,21 25:21 32:24 46:22 57:22 four 20:22 Fourth 4:16 FRANK 1:6 frankly 17:12 fresh 13:8 Fretwell 34:11 friend's 55:11 front 44:14 fulfill 10:12 fulfilled 10:19 fully 43:14 further 4:12,23 7:8,20 12:23 44:12 53:12 59:2</p> <hr/> <p style="text-align: center;">G</p> <p>G 1:6 3:1 gain 36:19 game 53:23 gay 19:24 GEN 1:15 2:3,8 3:6 51:25 general 1:15 3:5 5:14 9:8 10:21 10:25 15:3 16:17 20:8</p>	<p>23:22 59:4 generally 4:1 Gentry 30:25 getting 9:13 GINSBURG 5:14,25 6:22 9:8,10 23:20 30:15 31:8 33:3 36:14 44:8 49:4 give 6:24 9:15 11:12 14:10,11 18:14,19,19 29:21 32:16 35:9 38:17 40:15 54:1 given 5:15,19 6:23 8:10 12:21 19:3,25 40:2,23 48:7 50:14 55:21 58:23 gives 14:8 15:1 giving 15:4 58:17 glad 27:8 go 4:12,22 7:8 8:3 9:21 14:1 17:18 27:23 28:2 32:9 46:24 56:9,24 goes 9:11 10:7 17:21 52:24 going 6:17 10:1 17:2 18:6 19:11 21:5,13 21:15 22:3,8 23:11 24:15 26:2,6,25 29:11 31:12,17 32:12 35:9 37:20 39:13 40:13 41:6 45:12,25 47:2 47:3,6 53:22 54:19 good 20:12</p>	<p>29:22 35:25 36:4 gotten 11:8,17 21:24 53:24 governed 45:12 gradation 57:11 57:12 granted 12:8 graphically 19:21 grasp 23:7 great 17:10 19:22 22:2 groomed 8:19 grounds 35:25 36:1 53:15 55:18,18 grow 37:4 guess 23:4 33:13 guilty 10:11,15 15:25 17:4 23:3 25:11 guy 8:1 11:8 22:8 23:10 25:10 29:21,22 GVR'd 56:7</p> <hr/> <p style="text-align: center;">H</p> <p>habeas 36:12,17 36:20 37:3,24 38:13 41:4 42:1,16 43:11 47:3 Half 45:3 Hancock 54:11 handed 47:16 handle 16:21 19:12 hangs 7:22 happened 40:19 47:15 happens 5:15 35:20 36:6 41:7 42:16 harbor 40:5 hard 26:11 28:19 39:4</p>
--	--	---	--	--

55:11	16:18 18:13	inclined 57:11	50:5,14 53:6	judged 18:4
hateful 26:25	24:21,25 32:15	included 48:14	insulate 36:16	judges 41:13
27:1	humanity 18:7	includes 51:6	36:18	judge's 19:10
health 10:8 16:4	humdrum 53:18	including 20:25	insulated 36:24	47:21
19:13 21:7,19	hung 5:24	21:20 48:8,19	37:24	judgment 30:8
21:20 22:12	hypothetical	incompetence	insulates 36:21	40:11 47:5
25:5,7 26:7	15:9 29:2	13:11	intend 10:20,24	judgments 44:4
49:2 54:22		incompetency	16:20 18:10	juries 31:23
hear 3:3	I	25:13	19:14	jurist's 44:17
heard 9:25	idea 25:24 32:25	incompetently	intended 42:4	juror 5:16 7:25
16:13 17:7	33:16,17,19	15:14	55:25	8:10
24:11 25:13	51:6	inconsistent	intent 15:5	jurors 5:22
hearing 7:1 37:3	identifiable 9:20	14:12	inviting 30:20	44:20 47:21,25
heart 54:20	identified 20:22	independently	involved 45:5	jury 5:3,4,8,23
heat 16:22	21:19 22:11	57:15	54:16	6:4,12 7:5,9,9
heavily 57:23,23	26:19 28:15	indicates 54:11	irrelevant 32:7	7:22,24 8:7,8
Heil 54:1	identify 10:2	indication 39:14	issue 6:4,11 8:8	9:3,24 10:3
heinousness	22:4	individual 44:17	11:7 12:6 21:2	16:13 17:2
19:20	ill 9:4 10:10	ineffective 15:15	21:6 25:25	18:5,11 19:11
held 6:7 7:14	31:15	23:21 24:3	36:9 37:15	19:11 20:18,20
8:12 14:6 24:3	illness 9:2 10:7	ineffectiveness	38:9 41:21	20:24 22:7,11
39:13 47:1	10:19 16:16	8:16 13:21	43:6 44:10,13	23:6,9 24:16
52:25	17:25 19:14	53:14	45:11,23 52:23	26:25 28:20
help 23:8	21:24 23:24	inept 28:11,11	53:20	31:14,20 32:2
helped 54:5	31:13 58:10,15	infamous 8:19	issued 3:18,21	44:15,22,24
helpful 12:25	imagine 38:3	injection 44:19	33:8	48:7,7,17,22
43:9	41:9	inmates 53:24	issues 4:10 33:4	49:9 50:15,16
highlight 10:1	implement	insane 32:17	36:15 53:14	50:18 52:22,25
hindsight 54:25	31:18	insanity 10:12	57:19,21 58:8	53:5,7,10 54:2
history 8:19	implementation	10:16 15:25	i.e 45:7	54:24 58:9,10
Hitler 8:20 22:2	27:23 28:10	17:5 23:3		58:12,14,16
27:7 54:1	58:4	24:23 25:11	J	jury's 18:7 19:6
hold 8:10,13	implication 35:4	instances 45:15	J 1:17 2:5 20:10	54:5
13:20 17:2	impose 4:20 6:2	instruct 7:8	Jackson 16:9	Justice 3:3,8,15
holding 6:20	7:23 20:19	instructed 5:8	jar 10:11,19	3:25 4:22 5:14
13:1	29:11	6:5,6,12 7:9	Jewish 19:24	5:25 6:22 7:18
holdout 7:25 8:3	imposed 49:6	47:23 48:18	job 22:3 25:6	9:8,10 10:25
Honor 3:21 4:8	imposing 29:17	51:18	26:8 44:5 56:3	11:4,22 12:1
7:3 8:6 13:14	impossible 20:2	instruction 5:11	56:4	13:5 14:2,17
14:21 15:21	39:5,8,10	5:18,19 6:17	jobs 42:6	14:22 15:7,8
18:3 21:17	improved 22:15	8:9 44:23 48:7	Jones 6:8 7:21	16:9 17:7,19
22:25 49:19	improvement	48:9 49:5,8,11	JR 1:6	17:21 20:8,12
50:23 52:2	22:23	50:16,17 51:10	judge 6:24 16:2	21:8,12 22:1,7
56:16 59:3	inadequacy	52:3,23 53:1	17:5 38:2,5	22:14,17,20,22
horrific 17:25	30:18	instructions 5:4	40:10,15,22	23:4,20 24:9
58:13,21	incarcerated	7:4 44:16,22	43:11,11,12,13	25:8,20 26:10
humane 10:21	21:22	47:22 49:13,23	43:13 54:25	26:23 27:13,20

<p>27:21,22 28:3 28:4,7,17 29:2 29:7,10,16 30:15 31:8,21 33:3,9,13,16 34:2,5,9,15,18 34:23 35:1,12 35:20,23 36:7 36:14,21 37:1 37:8 38:8,16 39:7,18,23 40:6,8,20 41:1 41:23 42:3,11 42:21,24 43:8 43:23 44:2,8 45:2,3,10,14 45:19 46:13,23 47:4,8,17 48:3 48:10 49:4,12 49:17 50:1,7 50:10,13,21 51:1,5,11,13 51:15,22 52:7 52:10,15,17 55:10 56:9,12 56:24 57:2,8 59:4</p> <hr/> <p style="text-align: center;">K</p> <p>KEITH 1:3 KENNEDY 27:20 28:7,17 kill 12:15 15:10 17:17,18 19:23 21:14 22:5 24:15 53:25 54:17 killing 22:3 54:16 killings 17:17 kind 4:20 26:14 58:1 knocked 17:5 52:23 know 3:16 13:9 14:2 16:9,10 23:20 24:1</p>	<p>25:18 28:19 29:25 30:2,3,6 30:8 34:16,19 34:23 35:6,8 36:3 43:16,17 46:10 55:19 56:18 58:7 Knowles 37:14</p> <hr/> <p style="text-align: center;">L</p> <p>lack 13:11 18:22 lacked 9:5 laid 58:24 Landrigan 12:7 12:10,14,22 13:2,3 18:19 56:8,8 language 56:1 larger 10:11 Laughter 22:24 law 4:9,14 9:7 18:8 24:21 37:21 38:18 39:3,9,15,20 40:4,24 41:11 42:14 44:6 45:20,25 46:12 46:14 47:11 48:4 53:4 54:10 57:18 lawful 34:25 laws 45:6 lawyer 21:4,19 22:10 23:10,16 23:23 25:6,25 26:5 28:5,14 28:25 31:19 32:4 lawyers 30:13 31:24 48:20,20 lawyer's 23:11 26:8 left 43:6 length 16:12 19:22 lengthy 55:19 56:5</p>	<p>lens 13:17 55:9 58:24 letter 22:4 53:21 let's 35:14 49:15 level 41:19 lie 57:23 life 6:3,25 7:23 7:25 9:15,17 18:20 19:9 23:18 26:15 lifted 36:13 light 4:4 limitations 4:2 limited 38:6 lips 29:15 listing 56:13 litigating 24:6 little 14:20 Lockhart 34:11 logically 24:12 long 21:1 55:20 look 8:20 12:9 17:22 21:12 22:22 31:22 38:10 41:2,16 looked 4:1 looking 37:17 lose 42:22 43:2 loses 8:17 38:21 lost 49:20 lot 24:15 32:1 lots 24:14 lower 16:6 24:23 32:20,24 33:24 34:19,24 37:18 37:22 40:19 41:7 Lynaugh 25:4</p> <hr/> <p style="text-align: center;">M</p> <p>magnitude 37:5 main 54:14 maintained 45:22 majority 4:15 7:16 53:2 making 35:24</p>	<p>37:25 52:14 man 31:15 man's 32:17 March 3:24 Maryland 3:13 7:14 45:8,8 46:1,9 matter 1:11 6:15 7:7 13:8 54:10 59:8 matters 17:1 McKoy 52:21 53:12 mean 9:13 11:14 11:17 21:13 24:10,10 28:12 29:16,23 34:9 37:2 40:20 43:9,17 means 5:18 42:9 medium-sized 20:4 meet 24:23 25:11,12 meets 30:21 menacing 12:18 mental 9:2 10:7 10:8,19 16:4,6 16:16 17:25 19:13,14 21:7 21:18,20,23 22:11 23:24 25:5,7 26:7 31:13 49:2 54:22 58:10,15 58:15 mentally 9:4 10:10 31:15 mercy 27:15 merger 57:19 merits 14:14 27:18 36:12 46:3,7,21 55:16,18,21 56:5 57:7 met 16:6,24 24:24</p>	<p>Michael 1:17 2:5 20:10 33:25 Mills 3:13,17,18 3:21 4:8,13,18 4:19,21 5:3 7:13 44:13,17 45:7,8,17 46:1 46:7,9,10,11 47:16,17 48:5 51:10,12,14 52:3,4,12,13 52:19,24 53:1 53:10 minds 16:14 minor 12:23 minute 15:17 56:10 minutes 51:24 Mirzayance 37:14 misapplying 33:25 mitigate 54:5 mitigates 25:7 mitigating 5:5 5:17 9:5 10:7 10:22 11:19 12:24 16:17,18 18:8 20:25 21:1,5 26:7 44:18,25 47:24 48:11,16,23 49:1,3 50:11 50:19 51:7,18 57:16,24 mitigation 26:1 mitigator 49:8 58:16 mitigators 5:10 5:21 7:6,11 49:6 53:9 54:14 moment 49:16 morning 20:12 motion 40:12 moustache 22:2</p>
--	--	--	--	---

27:8 move 6:21 7:17 multiple 30:12 murdered 24:13 murders 12:14 17:16	objectively 13:22 obliged 6:24 obviously 28:20 29:18 54:23 occur 15:16 October 1:9 odd 14:21 oh 28:18 49:20 Ohio 1:16,17 3:12,21 4:9,21 6:16 7:7 8:19 12:4 13:10,20 13:24 16:7 20:19 32:25 33:4,6,7 36:14 41:25 52:4 54:10 56:21 57:5,14,17,18 Ohio's 5:18 okay 15:10 25:17,21 31:24 43:18 51:11,22 52:15 once 16:9 25:25 26:5 one's 29:11 One-by-one 34:9 one-line 56:14 opinion 31:1 36:16 38:25 40:10 45:10 47:4,18 opinions 37:4,4 45:16 opportunity 12:20 17:18 opposite 7:16 oral 1:11 2:2 3:6 20:10 order 17:24 27:25 37:5 56:14 57:12 ought 11:12 outcome 37:18 outlier 24:6	39:16 outlined 27:22 outrageously 11:13 outweigh 5:17 7:6,10 49:6 53:9 54:13 57:24 outweighed 5:10 outweighing 5:21 overturned 36:17,22 overturning 36:18 overwhelming 7:16 O'Connor 45:11 47:5	18:9,9,13,14 19:24,24,24 21:14 22:3,5 24:14,20 25:9 29:24 perfect 9:20 perfectly 4:7 perform 21:15 performance 11:2,5 20:14 20:16 21:2,9 21:10,23 22:21 33:20,22 35:10 53:17,19 54:4 55:1 performances 33:2 person 12:13 18:1,14 24:21 26:25 54:16 personal 8:23 persons 54:17 54:18 persuaded 11:4 petition 3:19 10:6 12:2 49:21 50:2,24 Petitioner 1:4 2:4,9 3:7 26:19 52:1 Petitioners 1:16 phase 8:24 10:9 16:4 piece 10:5 pieces 9:20 pivot 58:15 pivoted 11:18 16:14 play 23:25 played 31:14 plea 17:5 please 3:9 20:13 pledged 8:22 podium 29:23 point 4:19,23 9:15 15:13 19:1 23:5	24:24 27:18 32:19 56:6,10 pointed 23:23 points 16:22 26:17 poorly 15:14 position 4:17 7:19,20 49:10 positive 37:2 possible 11:20 23:6,8 33:24 possibly 29:5 53:4 postcard 41:21 44:7 power 12:19 practice 6:16 7:8 precedent 4:4,5 preclude 7:11 precluded 44:19 47:24 predicate 49:9 predicated 47:12 preferable 19:2 prejudice 11:7 11:14,20 12:6 12:9 13:1,1,4,8 13:12,16 18:22 20:3 33:2,21 33:22 34:12,14 35:11 38:10 56:6,20,22 57:14 58:3 59:1 present 5:6 26:2 26:6 28:24 presentation 16:15,23 54:22 presented 10:8 12:24 19:13 20:17 24:2 31:10 46:7 presenting 10:18 presents 23:15
N				
N 2:1,1 3:1 nation 24:20 nature 9:22 54:12 58:13,13 Nazi 54:1 near 12:11 neat 17:16 necessarily 16:24 negative 23:9 neighbors 32:11 neither 14:12 58:25 never 6:7 7:12 7:14 8:12 24:7 37:12 new 8:14 30:19 42:25 46:11 47:11 50:13,13 52:19 newly 47:11 night 16:10 nondeath 48:11 nonstatutory 20:18,21 54:8 North 52:21 noted 37:14 notes 8:6 notion 6:11 54:3 novo 14:24 38:14 nuances 28:24 number 13:24 17:10 23:23 35:15,17 nuttiness 24:22	oh 28:18 49:20 Ohio 1:16,17 3:12,21 4:9,21 6:16 7:7 8:19 12:4 13:10,20 13:24 16:7 20:19 32:25 33:4,6,7 36:14 41:25 52:4 54:10 56:21 57:5,14,17,18 Ohio's 5:18 okay 15:10 25:17,21 31:24 43:18 51:11,22 52:15 once 16:9 25:25 26:5 one's 29:11 One-by-one 34:9 one-line 56:14 opinion 31:1 36:16 38:25 40:10 45:10 47:4,18 opinions 37:4,4 45:16 opportunity 12:20 17:18 opposite 7:16 oral 1:11 2:2 3:6 20:10 order 17:24 27:25 37:5 56:14 57:12 ought 11:12 outcome 37:18 outlier 24:6	P	P 3:1 Packer 37:16 page 2:2 30:25 49:21 50:2,3 50:24,25 53:5 pages 16:14 28:2 32:7 panel 6:10 12:12 paragraphs 47:18 pardon 52:9 part 18:23 19:4 19:15,18 particular 19:2 22:5 31:6 35:6 44:21 46:21 48:1,11 particularly 30:6 55:9 passage 53:6 pay 32:3 penalty 5:18 9:3 11:9,12 18:14 32:16 58:17 Penry 25:4 people 8:2 16:18	24:24 27:18 32:19 56:6,10 pointed 23:23 points 16:22 26:17 poorly 15:14 position 4:17 7:19,20 49:10 positive 37:2 possible 11:20 23:6,8 33:24 possibly 29:5 53:4 postcard 41:21 44:7 power 12:19 practice 6:16 7:8 precedent 4:4,5 preclude 7:11 precluded 44:19 47:24 predicate 49:9 predicated 47:12 preferable 19:2 prejudice 11:7 11:14,20 12:6 12:9 13:1,1,4,8 13:12,16 18:22 20:3 33:2,21 33:22 34:12,14 35:11 38:10 56:6,20,22 57:14 58:3 59:1 present 5:6 26:2 26:6 28:24 presentation 16:15,23 54:22 presented 10:8 12:24 19:13 20:17 24:2 31:10 46:7 presenting 10:18 presents 23:15
O				
O 2:1 3:1				

28:25	proud 16:19	rare 26:14	22:13 25:4	50:22
presume 11:20	18:13 29:13	rationale 44:6	30:23 33:25	render 49:24
pretty 17:16	30:3 32:14	reach 41:11	37:16 43:5	50:6
29:10	provide 56:5	reached 38:4	45:10	rendered 52:5
pre-AEDPA	provided 26:20	reaching 8:11	recognizes	rendering 4:5
38:13	44:3	react 10:3	30:11 32:10	6:13
pride 18:7	providing 15:15	read 17:7,10	record 12:25	renewed 16:3
primary 20:16	psychiatrist	24:11 31:9	15:24 18:23	repeated 12:14
prior 39:9	21:21	50:1 53:20,25	19:17,17 20:3	12:14 32:18
prison 21:2,9,10	purposeful	54:19 55:13	29:18 53:22	reply 54:10
21:16 22:9	54:16	reading 9:10	57:22 59:1	require 39:21
23:11 53:17,19	pursued 10:17	reads 40:7 42:22	redevelopment	required 6:4,6
53:21 54:4	push 6:6,13 8:8	realize 49:13	31:4	6:18,21 7:13
probability	pushed 7:4	really 9:13	reference 50:15	8:13
47:20	put 23:23 24:21	11:12,23 13:6	53:5 58:12	requirements
problem 23:14	p.m 59:7	13:9 26:13	referring 54:3	9:6
35:5 41:16		40:23	refers 46:14	requires 8:9
procedural	Q	reason 10:11,15	reflect 29:19	32:16 39:24
55:17	quarters 40:18	15:25 17:5	regarding 21:3	requiring 7:1
proceeded 20:24	question 4:3,23	23:3 25:11,22	43:6 45:23	resentencing 7:1
proceeding 18:4	5:9,22 6:1,14	26:18,20 32:7	regardless 15:18	reserve 20:6
19:5	11:23 12:3	32:8 36:4,4,8	rehearing 3:19	reserved 37:15
proceedings	15:4 32:24	reasonable	reinforced	resided 21:24
18:21 19:13	33:1 34:12	13:18 26:12	19:22	Resnick 21:21
procuring 33:8	40:23 44:14	33:23 38:3,4	reject 13:25	22:16
prong 14:3,6,8,9	45:3 46:19	41:12,14 44:23	35:18 37:9	resolving 48:19
14:12,23,25	48:16,21 49:9	47:21 50:17	rejected 4:17	Respondent
24:22 55:23	51:12 52:17	57:24	6:8,18 16:2	20:11 26:19
58:16	53:8 56:25	reasonableness	36:3 37:6 46:8	response 52:17
prongs 14:11	questions 11:25	38:25	49:1 53:2	54:1
propaganda	44:12 49:23	reasonably 8:24	rejecting 35:25	rest 20:6
17:14	50:4 51:3,17	41:10,13 48:24	36:1 55:3	restrained 8:5
properly 40:3	59:2	reasoning 37:19	rejection 13:21	restrictive 36:19
proposition 37:9	quibbles 20:4	reasons 11:5	related 21:18	result 3:18 38:4
prosecution	quite 4:18 5:7	20:18,22 23:17	relaxed 43:20	41:11
11:18 48:21	9:13 15:23	23:18 40:15,23	relevant 46:15	return 53:13
prosecutor 10:1	45:15 53:6	43:10	54:12	reveled 58:21
11:13 53:20	quote 12:11	rebuttal 2:7	relied 14:3	revert 38:13
prosecutorial	54:23 56:3	16:21 20:7	relying 34:6	review 3:23 8:15
32:2		51:25	39:9	14:7,24 34:13
prosecutor's	R	recapitulate	remaining 44:9	34:21 36:13
16:23 54:20,21	R 3:1	9:22	51:24	37:25 38:6,12
prospective	racist 8:21 17:14	receive 42:8	remanded 12:8	38:13,14 41:4
21:10	raised 20:5 33:6	receiving 21:23	remark 32:3	41:19 42:8,10
protect 42:7	53:20	47:21	remarkable	43:16,17 47:3
44:4	rambling 27:25	recognize 31:24	9:14	52:6
protections 42:9	31:25,25 58:6	recognized	remember 19:7	reviewed 40:21

<p>reviews 36:19 40:18 revise 39:18 Revised 16:7 revision 39:22 reweighed 57:15 57:22 RICHARD 1:15 2:3,8 3:6 51:25 right 11:3 12:12 30:23 31:2 34:3 37:10 38:9 44:2 rightly 18:5 rights 42:7 road 39:4 ROBERTS 3:3 20:8 21:8,12 22:1,7 23:4 29:16 38:8 47:17 48:3,10 50:7,10 51:1,5 51:11,13,15,22 52:7,10,15 55:10 59:4 role 26:3 43:10 Rompilla 14:5 14:24 41:17 room 8:8 9:24 48:22 rule 4:2 6:9 8:14 29:17 34:19,20 35:1,3 47:12 52:19,20 ruling 4:13 6:9 run-of-the-mill 8:18</p> <hr/> <p style="text-align: center;">S</p> <p>s 2:1 3:1 18:24 safe 40:5 salute 54:2 saying 10:18 11:23 15:17 18:22 26:11,11 41:6 43:8,18 51:17 56:14</p>	<p>says 12:11 15:10 15:17 22:3 24:15,16,21 27:8 35:17 38:17,17 39:1 42:11,12,12,14 47:10,19 51:16 55:15 Scalia 22:14,17 22:20,22 26:23 27:13,22 34:2 34:5,9,15,18 34:23 36:21 38:16 39:7,18 39:23 40:6 42:11,21,24 46:23 47:8 49:12,17 50:1 50:13,21 second 5:13 8:16 10:5 see 18:18 23:10 25:16 30:21 37:5 44:6 49:15 seen 24:7,13 26:15 send 36:2,2,6 sensational 32:10 sense 4:1 18:7 18:11 24:12 sentence 6:3 7:11,23 9:12 9:16 18:20 19:9 20:19 29:12 51:16 54:6 sentences 6:25 sentencing 8:23 10:9,18 16:3 19:5 seriously 25:14 set 15:25 Seventh 4:16 sheer 8:25 shopped 16:25</p>	<p>shot 23:12 show 3:12 16:5 19:14 38:19 39:1 42:12 43:1 shown 16:16 18:15 sick 18:15 side 15:4 24:11 43:6 58:7 sided 11:13 sight 8:17 significant 7:15 simply 4:23 14:8 31:5 39:24 40:3 41:6,21 52:16 56:14 57:12 single 7:9 8:10 sir 56:11 57:1 sit 25:16 32:21 situation 11:20 11:21 Sixth 4:13,17 12:3,9 20:14 23:15 30:23 44:14 skill 26:21 skills 21:2 slick 17:16 smaller 10:19 Smith 1:3 3:4 society 8:23 10:21 solely 11:18 somewhat 53:11 55:8 sorry 34:4 49:21 sort 13:7 17:1 29:25 47:19 Sotomayor 3:15 3:25 4:22 7:18 15:7 28:3 29:7 29:10 45:3 Sotomayor's 52:17 soul 54:20</p>	<p>sounds 24:15 source 7:15 speak 7:19 special 53:19 specific 48:8 53:22 specifically 19:8 20:22 31:1 48:17 53:7 55:5 specify 14:9 spell 40:22 spend 32:1 spewed 8:21 17:13 Spisak 1:6 3:4 3:11 8:17 9:3 12:16,18 20:19 20:23 27:11 53:21,25 54:15 stand 8:20 12:19 16:5 17:13 18:2,16 19:21 22:1,18 24:14 26:8 27:7 53:21,25 58:22 standard 16:6 24:23 25:11,12 30:21 32:14,15 32:16 34:11,13 34:20 38:2 39:13 43:20,21 43:22,25 52:13 standards 3:11 38:13 41:19 44:3 standing 29:23 stands 28:25 start 40:13 state 3:16,18 4:3 4:24 6:15,16 6:19 13:6 14:14,17 25:19 25:21,23 28:9 35:7,17 36:10 37:19,24 38:3 38:5,11,14</p>	<p>39:14 40:1,1 40:13 41:5,10 41:18,20,24,25 42:6 43:11 44:4 45:4 46:3 46:6,15 54:11 55:16 56:3 stated 31:1 statement 12:23 14:13 statements 45:15 States 1:1,12 6:8 45:7 statute 3:11 4:1 15:6 39:19 40:7 42:22,25 43:4 55:14,14 55:14 56:1,4 56:17 statutory 20:20 step 4:8 7:20 Stevens 10:25 11:4,22 12:1 13:5 14:2,17 14:22 15:9 29:2 35:1 56:9 56:12,24 57:2 57:8 sting 10:2 story 9:2 strategic 26:5,18 26:20 29:17 55:6 strategy 9:24 15:12,14,17,19 15:23 18:17 19:2 26:1 27:21,23,24 28:11 29:24 33:2,23 58:4 58:11,18 straws 23:7 stream 9:14 Strickland 3:14 11:24 12:5 13:22,25 14:3</p>
---	--	--	--	--

<p>30:11,11,16,21 31:5,6,9 33:10 33:11,17 34:13 55:2 56:18,19 57:4,9 strong 11:7 21:13 54:23,24 stronger 13:3 struck 10:14 16:2 structural 11:16 stunning 19:17 styles 30:5 subject 16:16 subjective 15:22 submit 39:5 submitted 59:6 59:8 substandard 27:24 substantial 9:5 16:19 18:10 47:20 succinct 28:1 suddenly 37:3 sufficient 9:9 24:3 suggesting 23:7 suggestion 55:16 summarily 36:11 37:6,9 summarizing 52:16 summary 14:8,9 15:2 37:13 39:3,12,25 40:11 41:8 50:8 summation 17:8 17:9 summations 17:11 sums 47:19 support 23:14 supposed 22:8 Supposing</p>	<p>11:10 supreme 1:1,12 3:12,22 4:4,10 4:21 6:16 7:7 12:4 13:6,10 13:20,24 14:18 28:9 32:25 33:4,6,7 34:17 36:14 38:18,24 38:25 39:2,9 39:20 41:24,25 42:13 43:16 45:7 52:4 56:21 57:5,14 57:17 sure 7:19 8:4 51:13 58:19 surely 10:1 suspension 43:7 swallowing 26:24 sway 54:24 sword 25:5 sympathy 17:22 17:24 18:6,12 18:19 26:16 29:22 30:2</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>T 2:1,1 tack 8:24 tact 30:19 tactical 13:18 take 4:19 10:2 30:19 58:8 taken 41:2 takes 27:7 talk 32:4 talked 31:21 32:8,8 44:10 talking 4:24 21:9,14 23:5 tangents 9:12 Taylor 45:9 Teague 45:13,25 46:1,19,20 47:4,7,8,10</p>	<p>52:18 team 16:1 17:3 technique 27:14 tell 9:1 14:19 20:24 24:17,18 25:13 31:24 43:2,2 51:2 telling 23:10 26:24 29:20 tells 50:16 ten 51:24 tenor 15:3 Tenth 4:16 terms 4:1 54:7 terrible 24:18 30:1 Terry 45:9 47:5 testified 16:25 21:22 22:16 23:1 testify 16:5 23:24 testifying 22:2 23:2 testimony 9:25 12:13 15:22 16:3 18:24 19:21 21:20 22:11,17 24:25 58:22 thank 3:8 20:8 51:22 52:2 59:3,4 theme 10:17 19:2 23:25 31:14,17 themes 28:14 thing 29:1,4 31:12 35:13 40:11,16 43:19 things 13:13 18:1 27:1 28:15,21 30:1 30:2 31:23 think 11:7,12,15 14:10,15,16,24 14:25 15:23</p>	<p>18:3,17,21 19:16,17 20:2 22:4 23:6,7 25:1 26:23,23 26:25 31:25 34:2,5 36:5,9 37:3 39:8,12 41:23 42:2,3,5 43:14,17,20,21 51:5 54:9 55:13 56:6,21 57:2,5 58:18 58:25 thinking 43:13 thinks 5:16 third 24:22 thoroughly 18:23 thought 27:3 32:1,8 40:22 47:23 58:8,14 thousands 40:21 40:21 three 9:20 10:8 13:13 19:13 20:16 25:13 thrust 18:20 19:12 tied 24:2 tilling 7:22 time 4:5,9,11,24 5:23 6:5,15 7:3 7:4,7 8:7 20:6 26:11 32:2 35:21 44:9 45:19 46:15 47:9 52:4 59:3 times 32:19 today 4:14 23:19 53:3 told 30:15 48:7 48:13,14,20 53:7 tone 28:18 totality 44:15,22 51:20 totally 24:16</p>	<p>28:11 tough 4:20 tougher 43:25 treatment 21:23 tremendously 55:3 trial 8:7,18,19 10:13,14 15:24 16:1,2,25 20:15 22:19 24:2 27:14 31:10 40:22 53:20 trial-based 41:1 tried 10:13 12:15 58:8 triumph 19:22 triumphant 17:15 true 13:9 35:19 try 8:11 27:15 30:13 35:5 trying 3:16 19:23 28:20 32:1 58:2,6 Tuesday 1:9 turn 44:13 turned 21:4 turning 44:11 twisted 18:15 two 6:25 8:2 13:24 15:7 25:17 54:17,17 twofold 58:11 type 29:19 types 41:21</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>ultimate 5:9 6:14 53:8 ultimately 10:14 unanimity 6:7 7:5 8:8 unanimous 5:9 6:13 8:11 44:24 48:8,18 48:25 49:11</p>
---	---	---	---	---

<p>51:19 53:8 unanimously 5:6 50:11,19 unavailable 37:25 uncontested 53:18 underlying 46:4 understand 11:22 31:22 46:23,24 50:18 understanding 44:23,24 50:17 58:5 understated 19:5 29:25 understood 10:3 48:24 53:4 58:13,14 undisputed 19:19 58:21 unexplained 57:12 United 1:1,12 6:8 45:7 unlawful 43:15 unreasonable 13:22 36:24 37:20 38:1,18 38:20 39:2,13 39:17,19 41:14 42:13,19 43:1 43:15 45:5,11 unreasonably 3:13 4:4 unrepentant 12:17 17:15 untouched 43:6 upbringing 21:3 upheld 5:11 use 44:9</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>v 1:5 3:4,13,14 6:8,16,19 7:13 12:5 13:25 25:4 30:25</p>	<p>34:11 37:14,16 45:7,8,9 46:1,9 52:18,21 54:11 55:2 vacated 12:8 variety 43:9 various 30:12 vast 4:15 verbiage 53:23 verdict 5:7 6:13 8:11 17:24 47:23 49:24 50:6 version 6:3 victims 8:21 view 43:10 views 12:19 violate 51:9 violated 44:16 vis-à-vis 43:11 43:12 voice 28:18 vote 8:4</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>waiving 42:1 wake 12:25 want 8:1,3 36:3 38:24 42:24 44:8 46:24 51:13 wanted 22:5 wants 21:14 war 12:20 WARDEN 1:3 warfare 8:23 19:23,25 Washington 1:8 3:14 12:5 13:25 55:2 wasn't 13:8 26:12 32:22 54:23 55:19 way 7:5,16 8:5 24:2 27:3 28:14 38:3,23 39:1 41:9,12</p>	<p>42:22 ways 6:12 30:12 weeks 9:25 weigh 23:17 49:22 50:3 went 12:18 16:11,21 17:17 57:21 58:8 we're 41:6 whatsoever 15:8 whichever 29:14 white 12:19 Wiggins 41:17 Williams 34:1 45:9 47:5 willing 4:7 7:8 wish 11:11 witnesses 23:24 31:13 words 19:9 23:10 29:9,14 work 30:7 35:12 49:4 world 40:11,16 worse 11:10 29:2,5 30:8 worst 24:13 26:14,24 34:20 wouldn't 34:7 40:8,13 Wow 22:20 writ 37:25 38:6 38:7 41:15 43:7 write 36:15 written 38:22,23 39:1 53:21 wrong 37:11</p> <hr/> <p style="text-align: center;">X</p> <hr/> <p>x 1:2,7</p> <hr/> <p style="text-align: center;">Y</p> <hr/> <p>Yarborough 9:23 13:14,17 18:25 19:7 30:25 55:4</p>	<p>58:24 yeah 25:17 year 47:15 years 4:15 20:5 53:3</p> <hr/> <p style="text-align: center;">0</p> <hr/> <p>08-724 1:5 3:4</p> <hr/> <p style="text-align: center;">1</p> <hr/> <p>10 32:19 11 8:2 44:20 49:1 11:06 1:13 3:2 12 5:20 47:25 49:5 51:7 12:06 59:7 13 1:9 17 35:17 1989 3:24 47:15 1990 52:21 1993 24:7</p> <hr/> <p style="text-align: center;">2</p> <hr/> <p>2 12:3 20 2:6 4:15 6:11 20:5 35:14 53:3 2009 1:9 2254 55:14 2254(d) 37:13 41:8 2254(d)'s 36:19</p> <hr/> <p style="text-align: center;">3</p> <hr/> <p>3 2:4 41:12 309(a) 56:23 57:15 311(a) 56:23 57:15 326 49:21 50:3 50:25 326a 53:5 339a 10:6 344a 10:6</p> <hr/> <p style="text-align: center;">4</p> <hr/> <p>47 56:13</p>	<p>49 33:12</p> <hr/> <p style="text-align: center;">5</p> <hr/> <p>5 30:25 51 2:9</p> <hr/> <p style="text-align: center;">6</p> <hr/> <p>67 33:5 36:15,16</p> <hr/> <p style="text-align: center;">7</p> <hr/> <p>7 32:18</p> <hr/> <p style="text-align: center;">8</p> <hr/> <p>8 32:18</p> <hr/> <p style="text-align: center;">9</p> <hr/> <p>9 32:19</p>
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