No. 06-1535

In the Supreme Court of the United States

STUART HUDSON, Warden,

Petitioner,

v.

FRANK G. SPISAK, JR.,

Respondent.

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

REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION

The Sixth Circuit noted, but failed to apply, the deference owed to state court decisions under 28 U.S.C. 2254(d). Instead of asking whether the Ohio Supreme Court's decision was contrary to or an unreasonable application of *Mills v. Maryland*'s rule that jury capital sentencing instructions cannot require unanimity as to each mitigating factor, see 486 U.S. 367 (1988), the panel invoked a new rule created by the circuit court to declare that Spisak's jury instruction requiring unanimity in the ultimate verdict was somehow unconstitutional. This decision not only does not properly defer to the state court, but also improperly interprets *Mills*. Further, in reviewing Spisak's ineffective assistance of counsel claim, the Sixth Circuit did not take into account the wide latitude afforded defense counsel in presenting sentencing phase closing arguments.

Spisak responds that the Sixth Circuit correctly deferred to the state court decision because it cited the right rule of deference. Mere citation without proper application, however, is error, and perhaps recognizing this, Spisak also argues for a new rule that declares state-court merits decisions are not entitled to AEDPA deference if the opinions are too short. But the Court has never held that a state-court merits opinion is not entitled to AEDPA deference because of its brevity, and federal circuit courts across the country have held the contrary.

Nor does Spisak's discussion of the merits of his claims respond adequately to the Sixth Circuit errors identified in the State's petition. Spisak ignores the obvious factual distinctions between *Mills* and this case. And despite his blanket denial of an inter-circuit or intra-circuit split, Spisak offers no way to reconcile the decision below with existing circuit precedent that has denied habeas relief on indistinguishable facts.

As to Spisak's ineffective assistance claim, Spisak cannot rebut the State's argument that particularly wide latitude should be given to counsel in presenting closing arguments. Instead, Spisak improperly attempts to expand the issues before the Court by asserting new theories of counsel's ineffective assistance. The claims bear no relation to the theory upon which the Sixth Circuit granted relief, and cannot form a basis for upholding the decision below.

Before further discussing these issues, however, the State notes that Frank G. Spisak is incarcerated at Mansfield Correctional Institution, not at Ohio State Penitentiary as incorrectly stated at Page ii of the State's petition. The Warden at Mansfield is Stuart Hudson. The case caption has already been corrected by letter to the clerk of the Court on July 6, 2007, to reflect the correct name of the Warden.

A. The Court should review and reverse the Sixth Circuit's grant of habeas relief on Spisak's jury instruction claim.

1. The Sixth Circuit's failure to apply AEDPA is not absolved by its recitation of the AEDPA standard or by the state court opinion's brevity.

Spisak first erroneously contends that the Sixth Circuit correctly applied AEDPA deference because it cited AEDPA in its opinion. But the Court has made clear that the test for AEDPA compliance is the correct application of the standard, not merely its recitation. *Rice v. Collins*, 126 S. Ct. 969, 973 (2006) ("Though it recited the proper standard of review, the panel majority improperly substituted its evaluation of the record for that of the state trial court."); *Price v. Vincent*, 538 U.S. 634, 639 (2004) (reversing the Sixth Circuit for reciting the AEDPA standard but then "proceed[ing] to evaluate respondent's claim *de novo* rather than through the lens of §2254(d)"). The lower court's *analysis* matters; its citation of the right test does not overcome its failure to follow that test.

Spisak seems to implicitly recognize the circuit court's dearth of AEDPA analysis, and now offers his own new rule of habeas review. That is, he insists that the panel gave the state court decision "all the 'deference' it was due" in light of the Supreme Court of Ohio's brevity. See Cert Opp. at 2–3. Spisak suggests that the Court should hold that state-court merits decisions are not even *entitled* to AEDPA deference if the opinions are too short. But the Court has never held that a state-court merits opinion is not entitled to AEDPA deference because of its brevity, and such a holding would run contrary to the precedent among the circuit courts. See, e.g., *Harris v. Stovall*, 212 F.3d 930, 943 (6th Cir. 2000); *Aycox v. Lytle*, 196 F.3d 1174, 1177–78 (10th Cir. 1999); *Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir. 1997). If the Court sees a need to clarify the level of deference due to summary state-court decisions, this issue provides all the more reason for the Court to grant certiorari review.

2. The Sixth Circuit's opinion fundamentally alters the meaning of *Mills v. Maryland*.

a. *Mills* does not require any affirmative clarifying instruction, but merely prohibits misleading instructions.

Spisak's bald assertion that the decision below is merely a "straight-forward application" of *Mills*, see Cert. Opp. at 3, is not responsive to the State's detailed argument that the jury instructions here are factually distinguishable from those in *Mills* in significant ways, see Cert. Pet. at 15–16. His argument that the jury sentencing instruction was "identical in its impact to the instruction given in *Mills*," Opp. Cert. at 3, assumes without explanation that the Spisak jury would likely misunderstand the instructions they were given to require unanimity on individual mitigating factors, even though there was nothing in the Spisak jury instructions that told them to make unanimous findings as to individual factors. *Mills* instructs courts to consider how a reasonable

juror could naturally understand the instructions. 486 U.S. at 375–76. Spisak incorrectly implies that a presumption of unconstitutionality attaches to jury instructions that are silent on whether individual factors must be unanimous. In reality, instructions need only be clarified if they were misleading in the first place, and Spisak's were not.

b. *Mills* does not prohibit "acquittal-first" jury instructions that require unanimous rejection of the death penalty before jurors may consider non-capital sentences.

Spisak's assertion that the Sixth Circuit simply applied the *Mills* rule also ignores the emphasis the Sixth Circuit placed upon its finding that the jury instructions were "acquittal-first" instructions. As explained in the State's petition, so-called "acquittal-first" jury instructions, or instructions requiring a jury to reject the death penalty before considering a non-capital sentence, bear no relation to the instructions found problematic in *Mills*. Cert. Pet. at 17–19.

Spisak ignores this half of the Sixth Circuit's reasoning, except to acknowledge that the prohibition against acquittal-first instructions finds its origin in a state law case, *State v. Brooks*, 75 Ohio St. 3d 148, 159–62 (1996). A state court misapplication of state law, however, even if it had occurred, is not a basis for habeas relief. See Cert. Pet. at 18 (citing authority). The Sixth Circuit has never adequately explained why acquittal-first instructions violate the federal Constitution, let alone why such instructions should fail under AEDPA review. Rather, the Sixth Circuit has only summarily declared that "acquittal first jury instructions . . . 'preclude[] the individual juror from giving effect to mitigating evidence'" without any explanation of how or why jurors are thus "precluded." See, e.g., *Davis v. Mitchell*, 318 F.3d 682, 689 (6th Cir. 2003). Whatever the source of the Sixth Circuit's concerns regarding "acquittal-first" jury instructions, they clearly are not the same concerns

articulated in *Mills* or any other Court precedent, and are not the proper subject matter for AEDPA habeas review.

3. The inter-circuit and intra-circuit conflict over *Mills*'s application is real, and warrants this Court's attention and resolution.

a. Cases from other circuits cannot be reconciled with the Sixth Circuit's decision in *Davis* and *Spisak*.

Spisak completely misses the point when he claims that no inter-circuit conflict exists because all of the State's cited cases cite *Mills*. The conflict, of course, is created by the circuit courts' differing applications of *Mills*. Specifically, unlike the Sixth Circuit, other circuits have concluded that reasonable jurors can be presumed to understand, and need not be affirmatively told, that unanimous agreement about the ultimate balance of factors is not the same thing as unanimous agreement about the existence of any particular factor. See, e.g., *LaFevers v. Gibson*, 182 F.3d 705, 719 (10th Cir. 1999); *Zettlemoyer v. Fulcomer*, 923 F.2d 284, 307-308 (3d Cir. 1991). Simply put, the jury instructions found unconstitutional in *Davis* and this case would have been upheld in the Third, Fourth, Eighth and Tenth Circuits.

Spisak does not address the State's further assertion that the Sixth Circuit stands alone in its prohibition of "acquittal-first" sentencing instructions. This Sixth Circuit rule conflicts with *Jones v. United States*, 527 U.S. 373 (1999), holding that jurors need not be told about their ability to deadlock on certain issues, and with other circuits' faithful application of *Jones*. See Cert. Pet. at 22 (collecting cases).

b. Sixth Circuit decisions are themselves inconsistent.

The laborious effort in the dicta of *Williams v. Anderson*, 460 F.3d 789, 810–13 (6th Cir. 2006), to reconcile the Sixth Circuit's precedent highlights the chaos of existing circuit law. Spisak insists that the lengthy *Anderson* dicta proves that no intra-circuit conflict exists. But the case's

strained analysis supports the need for this Court's clarification, which is why the State cited *Anderson* in its own petition. See Cert. Pet. at 23.

As an initial matter, *Anderson* only addresses the rule against acquittal-first instructions, and does not attempt to reconcile the circuit's holdings regarding unanimity instructions. For example, the unanimity instructions upheld in *Coe v. Bell*, 161 F.3d 320, 337 (1998) are indistinguishable from the unanimity instructions struck down here and in *Davis*. And even *Anderson*'s reconciliation of existing "acquittal-first" case law does not hold up. *Anderson* ignores *Coe*'s conclusion, cited approvingly by the decision below, that a trial court "may require juror unanimity as to the results of the process of weighing aggravating circumstances and mitigating factors." App. 43a. This cannot be squared with *Anderson*'s assertion that a jury must be free to reach a unanimous life sentence without first unanimously agreeing on the factor balance outcome. See 460 F.3d at 813. The scope of the acquittal-first rule and the basis of its rationale remain far from settled even within the Sixth Circuit.

B. The Court should review and reverse the Sixth Circuit's grant of habeas relief on Spisak's ineffective assistance claim.

1. The Sixth Circuit's failure to apply AEDPA is not absolved by its recitation of the AEDPA standard or by the state court opinion's brevity.

Spisak claims that the Sixth Circuit applied AEDPA review to his claim of ineffective assistance during the mitigation phase, but as discussed in A.1 above, the Sixth Circuit's mere recitation of the AEDPA standard is inadequate, and its opinion is devoid of any analysis of how the state court's decision unreasonably applied or contradicted this Court's precedent.

The Sixth Circuit's review standard for Spisak's ineffective assistance claims is particularly muddled, given that the relevant portion of the panel opinion at one point states that "trial counsel's performance here is subject to de novo review." See App. 33a. This statement seems to conflict with the panel's earlier explication of the AEDPA standard in its "Standard of Review" section that precedes the "Discussion" section's treatment of each individual claim. The panel offers no explanation for why de novo review should apply to the ineffectiveness claims in particular. The Sixth Circuit's separate references to both a blanket AEDPA review and claim-specific de novo review cast doubt on what standard the panel even thought it was applying.

Spisak again suggests that de novo review is appropriate because of the cursory nature of the Ohio Supreme Court's opinion.[1] But as explained in B.1 above, the circuit courts agree that unreasoned state court opinions are still subject to deferential AEDPA review upon the federal court's thorough review of the record.

2. The Sixth Circuit failed to take into account the special deference appropriate for reviewing counsel's closing arguments.

The Sixth Circuit failed to give proper AEDPA deference, or even proper de novo review under the deferential standard of *Strickland v. Washington*, 466 U.S. 668 (1984), to the state court's determination that defense counsel's assistance during closing arguments at sentencing.

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[1] Spisak falsely asserts that the State "fails to note" the abbreviated nature of the Ohio Supreme Court's merits decision. See Opp. Cert. at 7. The State openly acknowledged that the state court did not explain its decision, and cited several cases to support its assertion that the decision was still entitled to AEDPA deference. See Cert. Pet. at 29. The Court may examine for itself the Ohio Supreme Court's opinion, as the State faithfully reproduced it in its Appendix at 242a.

Spisak does not respond directly to the State's argument that counsel enjoys a special degree of latitude in shaping his closing arguments. Rather, Spisak makes generalized complaints about which facts the State did or did not choose to emphasize in its petition. As to Spisak's various allegations that the State misrepresents the tenor or context of the defense counsel's closing statements,[2] the record speaks for itself, see App. 268a–294a, and shows that defense counsel exhibited an ongoing effort to relate to the jury, to confront candidly the atrocity of Spisak's crimes, and to offer Spisak's psychiatric illness as a possible mitigating factor. Spisak points to his counsel's concession that the jury might reject the defense's theory of mitigation, but as the State noted in its petition, counsel is not unconstitutionally ineffective for acknowledging that the jury is free to reach whatever conclusion it sees fit. Cert. Pet. at 28. And for rhetorical effect, counsel framed the mitigating factor of mental illness as a reason that lies "not within Frank Spisak, but within ourselves" as a "humane people" that does not "terrorize one who can't intend to commit an offense." Pet. App. 276a–277a. Contrary to Spisak's assertions, see Cert. Opp. at 16–17, this rhetorical effort cannot be characterized as a concession that Spisak was undeserving of mitigation.

Nor did defense counsel's references to Spisak's gender identity render his assistance ineffective. Spisak takes particular issue with counsel's use of the word "fag" during the mitigation phase. But trial counsel obviously used that term in furtherance of his strategy—not to disparage his client. See Cert. Opp. at 19. The complete sentence at issue is

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[2] Insofar as Spisak promises a more "specific[]" discussion of the State's allegedly "misleading" statement of the case in his "reply" brief, see Opp. Cert. at 1, the State reminds Spisak that his cross-petition reply brief must be limited to addressing arguments raised in the State's response to his cross-petition; it is not a second chance for responding to arguments in the State's petition.

as follows: "And if getting along well in your neighborhood is keeping your across-the-hall neighbor in somewhat of a constant tizzy, not knowing if you are a fag or a transvestite or if you are going to start shooting up the place, . . . well, I suppose that we can lay that to rest then." App. 289a. In stating this, defense counsel was referencing his cross-examination of Spisak's neighbor, Sharon McConaha, as part of his strategy to elicit lay witness concessions that Spisak was insane, in order to compensate for the fact he could not find any expert witnesses who could testify that Spisak was legally insane. In questioning McConaha, defense counsel focused on several aspects of Spisak's behavior that a lay witness might find unusual, including the tendency to fire off guns indoors, to listen to recordings of Hitler, to wear Nazi uniforms and insignia, and to wear women's make-up and accessories. Tr. 655–680. During the course of this cross-examination, McConaha testified that she had in the past referred to Spisak as a "nut" or "crazy." Tr. 663, 671–672. As Spisak acknowledges, the theory that Spisak's gender identity was relevant to his legal sanity was also presented in at least one pre-trial expert psychiatric report. Cert. Opp. at 19–20.

One might, of course, disagree with the accuracy of defense counsel's insanity theory and with the rather insensitive manner in which the theory was presented. But the Sixth Amendment does not protect defendants from inartful, awkward, or ultimately unsuccessful closing arguments. Spisak cannot overcome the highly deferential standard the Court has set forth for determining whether a closing argument is so deficient as to render counsel's performance ineffective under the Sixth Amendment. See *Yarborough v. Gentry*, 540 U.S. 1, 5–6 (2004).

Finally, Spisak offers no response to the State's argument that the Sixth Circuit effectively ignored *Strickland*'s prejudice prong. See Cert. Pet. at 28–29 (quoting circuit court's single conclusory sentence that Spisak was

prejudiced). Even if this Court's precedent could support a conclusion that Spisak's counsel was deficient, the Sixth Circuit's grant of habeas must be reversed because Spisak cannot show prejudice. The Sixth Circuit's conclusion that defense counsel's closing argument was deficient cannot stand, under the proper AEDPA review or even under de novo review.

3. Spisak's efforts to introduce additional theories of ineffectiveness in his response brief must fail.

The sole ineffective assistance issue before the Court is whether the Sixth Circuit erred in determining, upon habeas review, that defense counsel's closing statement in mitigation contained hostile references that rendered the representation unconstitutionally ineffective. Spisak improperly seeks in his response brief to expand the question presented to encompass other theories of alleged inefficiency, arguing that defense counsel ignored other potential mitigating factors. See S. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."). Specifically, Spisak now asserts that his counsel should have argued his lack of criminal record as a mitigating factor. The federal district court concluded that Spisak procedurally defaulted this claim by failing to raise it in state court, see Dist. Ct. Op., Pet. App. at 159a–160a, and Spisak did not re-raise it before the Sixth Circuit. Spisak's second argument of a neglected theory of mitigation—namely, that Spisak could be rehabilitated in prison—was also not raised in Spisak's state court direct appeal and is likewise procedurally defaulted. Spisak has also failed to present either of these distinct theories of ineffective assistance in his conditional cross-petition. Spisak's efforts to introduce new legal arguments at this stage must fail.

CONCLUSION

For the above reasons, Ohio urges the Court to grant the State's petition and reverse the Sixth Circuit's decision.

Respectfully Submitted,

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