No. ——

In the Supreme Court of the United States

MARC C. HOUK, Warden,

Petitioner,

v.

FRANK J. SPISAK,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Eighth Amendment, as construed by the Court in *Mills v. Maryland*, 486 U.S. 367 (1988), prohibit instructions to the jury that its capital sentencing verdict must be unanimous, unless the jurors are also instructed that in weighing the aggravating circumstances against mitigating factors they do not need to unanimously agree on the existence of any particular mitigating factor?

2. In finding that trial counsel's closing argument constituted an ineffective assistance of counsel, did the Sixth Circuit improperly ignore the trial counsel's strategy and give too little deference to the state courts?

LIST OF PARTIES

The Petitioner is Marc C. Houk, the Warden of the Ohio State Penitentiary. (Betty Mitchell, Respondent-Appellee below, was the former warden at the Mansfield Correctional Institution, where Ohio's death-sentenced prisoners had previously been held.)

The Respondent is Frank Spisak, an inmate at the Ohio State Penitentiary.

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PETITION FOR WRIT OF CERTIORARI

The Attorney General of Ohio, on behalf of Marc C. Houk, the Warden of the Ohio State Penitentiary, respectfully petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Sixth Circuit's opinion, *Spisak v. Mitchell*, 465 F.3d 684 (6th Cir. 2006), is reproduced at App. 1a–63a. The Sixth Circuit's order denying the State's petition for rehearing and suggestion for rehearing en banc is reproduced at App. 64a. The Memorandum of Opinion and Order of the United States District Court for the Northern District of Ohio is reproduced at App. 65a–241a.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Sixth Circuit issued its order denying the State's rehearing petition on February 15, 2007. The State timely filed this petition and invokes the Court's jurisdiction under 28 U.S.C. 1254(1) (2003).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

* * *

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to a judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

* * *

INTRODUCTION

Respondent Frank G. Spisak engaged in a shooting spree on the Cleveland State University campus spanning several months in which he killed three persons, seriously wounded a fourth, and threatened a fifth. App. 5a-6a. Spisak openly admitted to the shootings in his statements to the police and at trial, expressing no remorse and describing in detail his allegiance to the teachings of Adolf Hitler and to "declaring war on the society that exists today." See, e.g., App. 31a-33a, 300a-302a, 304a-318a. An Ohio jury found Spisak guilty of aggravated murder and sentenced him to death. The Ohio courts affirmed on appeal, and the federal district court denied his habeas corpus petition. The Sixth Circuit reversed, vacating Spisak's sentence based on his arguments of constitutional error in the sentencing-phase jury instructions and ineffective assistance of counsel at sentencing.

The Sixth Circuit's grant of habeas relief on each issue calls for the Court's review and reversal. First, the Sixth Circuit's expansive and erroneous application of *Mills v. Maryland*, 486 U.S. 367 (1988), in habeas review has created inconsistency among the federal circuit courts and

violated the strictures of AEDPA. Specifically, the Sixth Circuit has incorrectly concluded that *Mills* prohibits instructing a jury that they must reach unanimous agreement on the *ultimate question* of whether aggravating factors outweigh mitigating factors, even though *Mills* addresses only a procedural anomaly that improperly required unanimous agreement on the existence of particular mitigating factors. The Sixth Circuit has also incorrectly read *Mills* to prohibit an instruction that arguably suggests a jury must unanimously reject the death penalty before considering non-capital sentences; this prohibition on so-called "acquittal-first" instructions reflects a fundamental misunderstanding of the *Mills* requirement that a juror be "permitted to consider all mitigating evidence." See *Mills*, 486 U.S. at 384. In applying these newly-created rules, the Sixth Circuit failed to comply with the highly deferential AEDPA review standards, and has mandated jury-instruction requirements that are not recognized by any other circuit court and that are at odds with other Sixth Circuit panel decisions.

Second, the Sixth Circuit improperly granted habeas relief on the petitioner's ineffective assistance claim. At sentencing, counsel for the petitioner candidly confronted facts about his client that had never been in dispute: that he was a professed follower of Adolf Hitler and had killed three people in a hate-inspired shooting spree. Rather than attempting to convince the jury of his client's fundamental goodness, counsel emphasized his client's psychiatric problems. The Sixth Circuit's conclusion—not only that trial counsel's performance was deficient, but that any disagreement with that conclusion would be objectively unreasonable—"g[ave] too little deference to the state courts that have primary responsibility for supervising defense counsel in state criminal trials." *Yarborough v. Gentry*, 540 U.S. 1, 11 (2004). The State therefore asks that the Court grant review and reverse the Sixth Circuit's grant of the writ.

STATEMENT OF THE CASE

A. Spisak killed three people and seriously injured a fourth during a hate-inspired campus shooting spree.

The Respondent, Frank G. Spisak, is under a sentence of death for the aggravated murders of Horace T. Rickerson, Timothy Sheehan, and Brian Warford. The prosecution's evidence at trial disclosed that Spisak killed Rickerson, Sheehan, and Warford in a series of shootings at Cleveland State University in Cleveland, Ohio, in early 1982. During the spree Spisak also shot John Hardaway seven times, while Hardaway waited for a commuter train at a city station. Hardaway miraculously survived his wounds and was later able to identify Spisak as the shooter. App. 5a–6a.

The jury was also presented with compelling evidence that the shootings were motivated by Spisak's hatred of black men and Jews and that Spisak would have continued to kill if he had not been caught. The prosecution introduced into evidence a book about Adolph Hitler taken from Spisak that was hollowed out to conceal a gun; a tee shirt worn by Spisak that had on it the words "white power;" and a Nazi flag. Trial Tr. 772–774. A detective testified for the prosecution that in a post-arrest interview, Spisak described an incident in which he returned to Cleveland State and was about to shoot a black man he encountered in an elevator but decided not to shoot when a white man got on the elevator just as he was drawing his gun. Spisak also stated that he planned to go to a downtown bar with a machine gun and just "open up" on every black person that was in there; that he was then "going to start on all the Jewish lawyers;" and that he wanted to kill all the Jewish lawyers, "one by one." App. 301a. In his testimony at trial, Spisak admitted that he was an admirer of Adolph Hitler, and that he was a member of a splinter group of the American Nazi Party at the time he killed Rickerson. App. 311a, 313a.

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

The defense did not contest that Spisak shot the victims, but instead unsuccessfully sought to establish that Spisak was legally insane. The defense attempted to explain Spisak's Nazi beliefs as a symptom of mental illness, eliciting lengthy testimony from Spisak regarding the nature of his beliefs. See, e.g., App. 303a–318a. The defense then offered the testimony of Dr. Oscar Markey, who gave contradictory testimony concerning whether Spisak suffered from a mental illness at the time of the crimes.

The trial court ultimately disallowed Spisak's insanity defense, granting the prosecution's motion to strike Dr. Markey's testimony as irrelevant and prejudicial to the defense, App 18a, and refusing to instruct the jury on insanity, App. 27a. The jury returned a guilty verdict on, among other things, four counts of aggravated murder with nineteen death specifications.

During sentencing, Spisak's counsel presented additional expert testimony that Spisak was mentally ill. Dr. Sandra McPherson, a clinical psychologist, opined that Spisak suffered from Schizotypal and Borderline Personality Disorders characterized by bizarre and paranoid thinking, gender identification conflict and emotional instability. Trial Tr. 2429–40. According to Dr. McPherson, Spisak's defects substantially impaired his ability to conform to the law. Trial Tr. 2429. Dr. Kurt Bertschinger, a psychiatrist, testified that although Spisak did not meet Ohio's criteria for legal insanity, Spisak nevertheless suffered from a mental illness that would substantially impair his ability to conform his conduct to the requirements of the law. Trial Tr. 2554. Finally, Dr. Markey again testified, stating that he essentially agreed with Dr. Bertschinger's diagnosis. Trial Tr. 2704–06 .

In closing argument, Spisak's counsel began by acknowledging the number and brutality of the proven aggravating circumstances, and expressing sympathy for the victims' families. App. 271a–273a. Counsel then argued that although Spisak did not lead a "good life" and had no "good deeds" to his credit, Spisak's mental illness was a mitigating factor that the jury should consider. App. 275a–277a. Counsel reminded the jury that under Ohio law, the jury was required to consider as a factor in mitigation a mental illness that substantially impairs a defendant's ability to conform his conduct to the law. Counsel then argued extensively that although the defense's expert testimony was insufficient to meet the test for legal insanity, it was more than sufficient for the jury to conclude that Spisak was substantially impaired by mental illness and that this mitigating factor outweighed the admittedly strong aggravating circumstances. App. 277a–289a. Finally, counsel responded to arguments he expected the prosecution to make, App. 289–290a, and concluded by assuring the jurors that he was proud of them for doing their duty, App. 293a–294a.

In its sentencing instructions to the jury, the court explained that the State had "the burden of proving beyond a reasonable doubt that the aggravating circumstances which the defendant, Frank G. Spisak, Jr. was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the [sentence] of death." The court further instructed that "to outweigh means to weigh more than, to be more important than," and that "[t]he existence of mitigating factors does not preclude or prevent the death sentence if the aggravating circumstances outweigh the mitigating factors." App. 257a.

The court explained that the aggravating factors were those death specifications that the jury had already returned guilty verdicts on during the guilt phase. The court read through each of these specifications for the jury. App. 258a–261a.

The trial court then stated that "[m]itigating factors are those which, while not excusing or justifying the offense, or offenses, may in fairness and mercy, be considered by you, as extenuating or reducing the degree of the defendant's responsibility or punishment." The court specifically listed as a mitigating factor that "at the time of committing the offense the defendant because of mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law." The court also instructed the jury that it could consider "the history, character and background of the offender" as a mitigating factor, as well as "any other factors that are relevant to the issue of whether the defendant should be sentenced to death." The court did not instruct the jury that it needed to reach a unanimous conclusion as to the presence or absence of the mitigating factors. App. 261a.

The court then summarized the Ohio statute setting forth the proper jury sentencing procedure as follows:

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

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

App. 263a. The court described the two possible life sentences from which the jury would choose in such a circumstance. *Id.*

The court then described in detail the verdict forms that the jury would be required to complete. The first stated,

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

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

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

The court noted that "again, all twelve of [the jurors] must sign whatever verdict it is you arrive at." App. 264.

The jury recommended a sentence of death, which the trial court accepted. App. 3a.

C. The Ohio Supreme Court adjudicated on the merits Spisak's claims regarding the jury's sentencing instructions and ineffective assistance of counsel at sentencing, and rejected both claims.

The Ohio Court of Appeals vacated one of the four aggravated murder convictions and the accompanying specifications, and affirmed the remainder of Spisak's convictions. App. 67a. Spisak obtained new counsel and, under Ohio procedure, moved for a second round of review before the Ohio Court of Appeals, which the Supreme Court of Ohio granted. The Ohio Court of Appeals again affirmed his convictions. The Supreme Court of Ohio denied Spisak's motion for a *third* round of appellate court review. App. 68a.

In his appeal to the Supreme Court of Ohio, Spisak claimed, among his sixty-four assignments of error, that

"[j]ury instructions requiring unanimity for a life verdict at the penalty phase deny the accused his right to a fair trial and freedom from cruel and unusual punishment" under the U.S. and Ohio constitutions, and that he was denied his constitutional right to effective assistance of counsel during the mitigation phase of his trial. App. 80a–81a. The Supreme Court of Ohio reviewed and rejected all of Spisak's claims on the merits. App. 246a. As to Spisak's jury-instruction claim (claim fifty-four), the court found that it had already rejected the same argument in several of its prior cases. App. 246a. As to Spisak's ineffective assistance claim (claim fifty-seven), the court found it not well-taken in light of numerous authorities, including *Strickland v. Washington*, 466 U.S. 668 (1984). App. 247a.

Spisak's convictions became final when this Court denied certiorari review of the Ohio Supreme Court's decision on March 6, 1989. See 489 U.S. 1071.

D. The federal district court denied Spisak's petition for habeas corpus relief.

After unsuccessfully seeking state post-conviction relief, App. 83a, and to reopen his direct appeal, App. 95a, Spisak filed a petition for habeas corpus. The district court denied Spisak relief on all of his thirty-three grounds, including a challenge to the sentencing-phase jury instructions and to his counsel's performance during sentencing. App. 65a–241a.

As to Spisak's challenge to the sentencing-phase jury instructions, the district court found that the argument was precluded by *Jones v. United States*, 527 U.S. 373 (1999). Spisak argued that the trial court erred by instructing the jury its sentence must be unanimous but failing to explain the consequences of the jury's inability to reach unanimity. App. 141a–144a. But in *Jones*, the Court established that a trial court's failure to instruct on the consequence of jury

deadlock does not give rise to a cognizable constitutional claim. 527 U.S. at 381-82.

The district court further noted the possible applicability of the Sixth Circuit's decision in *Davis v. Mitchell*, 318 F.3d 682 (6th Cir. 2003), which had applied *Mills v. Maryland*, 486 U.S. 367 (1988), and *McKoy v. North Carolina*, 494 U.S. 433 (1990), in habeas to vacate a petitioner's sentence. In *Davis*, the Sixth Circuit had held that an instruction requiring a capital jury to "first unanimously reject the death penalty before it can consider a life sentence . . . precludes the individual juror from giving effect to mitigating evidence and runs afoul of *Mills*." 318 F.3d at 689. Observing that *Davis* apparently was in conflict with other Sixth Circuit decisions holding that similar instructions did not violate the Eighth Amendment, the district court declined to address whether Spisak's sentence was unconstitutional in light of *Davis*, in view of Spisak's failure to allege specifically that the instructions in his case precluded the jury from considering mitigating evidence. App. 145a–146a.

Rejecting Spisak's claim that counsel's closing arguments at sentencing were constitutionally ineffective, the district court found that counsel's alleged errors "can easily be attributed to a trial strategy." App. 154a. The district court found specifically that counsel's vivid portrayal of the murders and his own expressed sympathy for the victim's families were likely part of a strategy to ingratiate himself with the jury and to blunt the prosecutor's depiction of the murders in his forthcoming closing argument; that counsel's negative references to Spisak were also clearly part of the defense's strategy in mitigation, that is to show that Spisak's mental defect was a mitigating factor; and that counsel argued "at great length about the testimony from each of the defense's three psychological experts and how such testimony demonstrated that Spisak's mental defect substantially reduced his ability to conform his conduct to the

requirements of the law." App. 155a–156a. Finally, the district court concluded that "[e]ven assuming counsel's performance was deficient, Spisak cannot claim that he was prejudiced by counsel's behavior," because there is no reasonable probability that the jury would have reached a different sentence if counsel had portrayed Spisak with more sympathy, given the "heinous nature of the murders, Spisak's self-admitted lack of remorse, and the totality of the evidence." App. 158–159.

E. The Sixth Circuit reversed the district court and vacated Spisak's sentence

The Sixth Circuit reversed the district court and granted habeas corpus relief, vacating Spisak's sentence.

The Sixth Circuit concluded that the Spisak jury's sentencing instructions were improper under *Davis*, 318 F.3d at 689–90, the circuit's previous habeas corpus precedent applying *Mills* and *McKoy*, because the instructions did not explicitly tell jurors that they need not find mitigating factors unanimously, the verdict form required twelve signatures next to the sentencing verdict, and the instruction did not inform jurors that they need not unanimously reject a death sentence before imposing a life sentence. App. 44a–47a. In so holding, the Sixth Circuit ignored other circuit precedent upholding virtually identical instructions. See, e.g., *Coe v. Bell*, 161 F.3d 320 (1998).

The Sixth Circuit also found that counsel was constitutionally ineffective in closing argument because counsel abandoned his duty of loyalty to Spisak by denigrating him before the jury, by making only a "limited effort" to argue for a sentence less than death, by "rambling" on irrelevant matters, by suggesting that a verdict of death would be acceptable to the defense, and by going "so far as to tell the jury that [Spisak] was undeserving of mitigation." App. 36a–37a. In addition to finding counsel's performance deficient, the Sixth Circuit also stated conclusively, in one

sentence, that counsel's closing statements were prejudicial: "Absent trial counsel's behavior during the closing argument of the mitigation phase of the trial, we find that a reasonable probability exists that at least one juror would have reached a different conclusion about the appropriateness of death, and may have voted for life instead." App. 38a–39a.

The State now respectfully requests certiorari review.

REASONS FOR GRANTING THE WRIT

The decision below, and the prior decision *Davis v. Mitchell*, 318 F.3d 682 (6th Cir. 2003) upon which it relies, misread *Mills* in two fundamental ways. First, the Sixth Circuit incorrectly read *Mills* as prohibiting a jury instruction or a jury verdict form that requires a unanimous conclusion on the *ultimate question* of whether aggravating factors outweigh mitigating factors. Second, the Sixth Circuit incorrectly read *Mills* as prohibiting a jury instruction suggesting jurors must reach a unanimous up-or-down conclusion on whether aggravating factors outweigh mitigating factors before they move on to consider non-capital sentences. But *Mills* does not clearly establish either of these rules, and indeed the logic of *Mills* does not even support such rules, as other circuit courts and other Sixth Circuit panels have already recognized. The Court's review is therefore necessary to ensure consistent understanding and application of *Mills*, as well as faithful application of the narrow AEDPA review standards.

Furthermore, in granting relief based on Spisak's ineffective assistance of counsel claim, the Sixth Circuit clearly exceeded its authority in federal habeas corpus. The Supreme Court of Ohio's rejection of Spisak's claim was not objectively unreasonable. As recognized by the district court, trial counsel's arguments obviously were based on a reasonable strategic decision to empathize with the jurors by acknowledging the horrific nature of Spisak's crimes, while asking the jurors to spare Spisak's life because Spisak's

"twisted mind" was the result of mental illness. The Sixth Circuit's contrary conclusion is not only clearly erroneous, but, as the basis for habeas corpus relief, "gives too little deference to the state courts that have primary responsibility for supervising defense counsel in state criminal trials." *Yarborough*, 540 U.S. at 11.

The Court should therefore grant the State's petition and reverse the Sixth Circuit's judgment.

A. In granting habeas corpus relief on Spisak's jury instruction claim, the Sixth Circuit misapplied Supreme Court precedent, exceeded its authority under AEDPA, and increased inter-circuit and intra-circuit conflict.

1. The decision below fundamentally misunderstood and misapplied the Court's holding in *Mills v. Maryland*.

The decision below, relying upon the circuit's prior decision in *Davis v. Mitchell*, 318 F.3d 682 (6th Cir. 2003), misread and misapplied *Mills v. Maryland* in order to grant habeas relief on Spisak's jury-sentencing-instruction claim. The Sixth Circuit's reasoning appears to rest on three theories: First, that an instruction requiring unanimity on the ultimate balance of aggravating versus mitigating factors improperly implies a unanimity requirement as to the presence or absence of specific individual mitigating factors. Second, that a verdict form requiring twelve signatures, i.e., unanimity, on the ultimate sentence likewise carries the same improper implication. Third, that an instruction requiring unanimity on the ultimate factor balance implies that a jury must unanimously reject a death sentence before considering other sentences, which, in turn, somehow "precludes the individual juror from giving effect to mitigating evidence and runs afoul of *Mills*." See *Davis*, 318 F.3d at 689. *Mills* addresses none of these three factors, and none can properly form the basis of habeas relief for Spisak. Furthermore, the

Sixth Circuit's newly-created rules reflect a fundamental misunderstanding of *Mills*, calling for the Court's clarification.

A federal court may grant habeas corpus relief to a state prisoner on a claim previously adjudicated on the merits in state court only if the state court decision is contrary to or an unreasonable application of clearly-established United States Supreme Court precedent. 28 U.S.C. § 2254(d). In *Mills*, the Court established that a jury sentencing instruction in a capital case is unconstitutional if it leads a reasonable juror to believe that any mitigating factors not found unanimously by all twelve jurors must be ignored when the individual juror casts his or her ultimate sentencing vote. 486 U.S. at 370. The Court noted that a unanimity-in-mitigation-findings requirement could result in an absurd and troubling outcome, if, for example, all the jurors agree that some mitigating factors exist and that a life sentence is appropriate, but fail to agree on any specific mitigating factor. In such a case, a jury of twelve people favoring life would have to ignore all the mitigating factors in their final vote, and thus return a death sentence, simply because they disagreed on precisely which factors were present. *Id.* at 374.

Spisak's case differs starkly from the uniquely problematic sentencing scheme in *Mills*, as here the jury instructions simply required juror unanimity in the ultimate determination of whether aggravating factors found beyond a reasonable doubt outweighed any mitigating factors. The Spisak jury was instructed that if "all twelve members of the jury find by proof beyond a reasonable doubt that the aggravating circumstances in each separate count outweighs the mitigating factors, . . . then [the jury] must recommend to the Court that a sentence of death be imposed upon the defendant," but that if the jury finds "that the State failed to prove beyond a reasonable doubt that the aggravating circumstances which [Spisak] has been found guilty of committing in the separate counts outweigh the mitigating

factors," then it should impose one of two life sentences. App. 262a–263a. Unlike the *Mills* jury, see 486 U.S. at 378, Spisak's jury was never instructed that it must unanimously conclude whether or not a particular mitigating factor had been shown. The Sixth Circuit thus failed to recognize the significant factual distinction between a jury instruction that requires unanimity in *specific mitigation findings* and an instruction that simply requires unanimity in *outcome*.

The Sixth Circuit's rule prohibiting unanimity-in-outcome instructions turns *Mills* on its head. The decision below, along with the prior decision in *Davis*, improperly forbade an instruction that requires jurors to agree unanimously on whether aggravating factors outweigh mitigating factors, for fear that a juror will misunderstand the instruction as requiring unanimous agreement on the existence or absence of particular mitigating factors. But no reasonable jury would understand the trial court's sentencing instruction here to mean that a jury must unanimously agree on a mitigating factor before a juror could consider it. Only a very strained and improbable reading of the instruction can transform a unanimity-in-verdict requirement into a unanimity-in-mitigating-factor requirement.

Similarly, the sentencing verdict form in Spisak's case, like the jury instruction, is entirely unproblematic under *Mills*. The verdict form used in this case differs markedly from the form the Court found problematic in *Mills*. In *Mills*, the jurors were required to render a yes-or-no answer under each potential mitigating factor, and all twelve jurors were required to sign the form. 486 U.S. at 378–379. Here, by dramatic contrast, the jurors were simply required to indicate by signature whether the aggravating factors ultimately outweighed any mitigating factors. App. 263a–264a. The Sixth Circuit describes this form as "misleading," but offers no analysis or support for this conclusion. App. 47a. Given that a unanimous sentencing verdict is not error in any way, it

makes no more sense to find error in a twelve-signature form that reflects a unanimous verdict.

Third, the lower court also created a new rule not contemplated by *Mills* when it found constitutional error in so-called "acquittal-first" jury sentencing instructions—that is, sentencing instructions that suggest a jury must unanimously acquit the defendant of death before imposing a life sentence. In *Davis*, the Sixth Circuit observed that under Ohio law, a deadlocked jury need not reach unanimity on the death penalty, but instead may proceed to return a unanimous noncapital sentence. 318 F.3d at 689 (citing *Ohio v. Brooks*, 75 Ohio St. 3d 148 (1996)). The *Davis* court then stated, without citation, that such a "non-unanimous mechanism" for preventing a death sentence was "constitutionally required," *Davis*, 318 F.3d at 689. The court also stated, again without citation or explanation, that an "instruction requiring that a jury must first unanimously reject the death penalty before it can consider a life sentence . . . precludes the individual juror from giving effect to mitigating evidence and runs afoul of *Mills*." *Id.* In the decision below, the panel echoed this unsupported conclusion of *Davis*, stating that Spisak's so-called "acquittal-first" instruction was "improper" and "would have led a jury to apply an unconstitutional unanimity standard at all stages of the deliberative process." App. 47a.

Even if the Sixth Circuit were correct in reading Spisak's jury instruction as an improper "acquittal-first" instruction, this is a conclusion based solely on Ohio law, not federal constitutional law. Both in the present case and in *Davis*, the Sixth Circuit improperly confused *Mills*'s holding with Ohio court interpretation of Ohio law. The Sixth Circuit in both of its opinions concluded that the instruction at issue "not only 'could' but by its plain language 'would' lead a reasonable juror to conclude that the only way to get a life verdict is if the jury unanimously finds that the aggravating circumstances do not outweigh the mitigating

circumstances." App. 47a (quoting *Davis*, 318 F.3d. at 689–90). But even if a jury would attach the meaning that the Sixth Circuit imagined, the court never explained why this would be a constitutionally problematic reading. While an instruction requiring a jury to either unanimously accept or reject the death penalty might be an inaccurate statement of Ohio law, "the fact that [an] instruction was allegedly incorrect under state law is not a basis for habeas relief." *Estelle v. McGuire*, 502 U.S. 62, 71–72 (1991).

In fact, *Mills* never says anything about whether a state may require unanimous agreement on the outcome of the death penalty balancing test before a jury chooses a non-capital sentence, and, in fact, the Sixth Circuit's holding on acquittal-first instructions is logically unrelated to the holding of *Mills*. In *Mills*, the jury instructions at issue created a procedural anomaly whereby juror disagreement on the presence or absence of a particular mitigating factor literally barred jurors from considering that factor when casting their vote on the ultimate sentencing issue. But here, by deliberating on the balance of mitigating and aggravating circumstances and reaching a consensus on the outcome of that balance, each juror *is* giving weight to mitigating evidence, and is performing the very type of individual analysis of mitigating factors that *Mills* is designed to protect. Thus, in overturning Spisak's sentence on the theory that it was imposed after an improper acquittal-first instruction, the Sixth Circuit's opinion reflects a deep misunderstanding of *Mills*'s requirement that juries be permitted to give weight to mitigating evidence.

Furthermore, Spisak's acquittal-first jury-instruction claim essentially reduces to an argument that the instruction is silent on the consequence of juror deadlock. Such an argument is true but irrelevant, since a claim based on the absence of a juror-deadlock instruction is not a basis for habeas relief. See *Jones v. United States*, 527 U.S. 373, 382 (1999).

Thus, the Sixth Circuit's decision below is not only wrong in its failure to apply AEDPA deference in evaluating the state-court jury instruction under *Mills*, but is so directly contradictory to the logic of Supreme Court precedent that certiorari review is warranted. The Court should reverse the Sixth Circuit's decision because the decision below misunderstood the holding of *Mills v. Maryland* in fundamental ways that require clarification.

2. The decision below failed to apply the deferential review mandated by AEDPA.

The Court should also accept review of the decision below to clarify that the deference accorded in habeas review to state-court determinations requires more than a mere recitation of the AEDPA standards.

Although the Sixth Circuit recited the AEDPA review standard at the opening of the opinion, the court's legal analysis of the petitioner's claims never reflects the application of, or recognition of, the standard previously recited. Rather, in its analysis of the petitioner's jury-instruction claim, the Sixth Circuit panel mistakenly identified its sole question as being "whether there is a reasonable likelihood that the jury has applied the challenged instructions in a way that violates the Constitution." App. 44a. Although this accurately states the standard of review for a direct-appeal jury instruction claim, the court overlooked the additional deferential review requirement for a federal court examining a post-AEDPA habeas claim by a state prisoner. See 28 U.S.C. § 2254. Specifically, the court should have asked whether it would have been contrary to *Mills*, or an unreasonable application of *Mills*, for a state court to conclude that the jury instruction was constitutionally defective. *Id.*

Second, the Sixth Circuit exhibited a failure to apply proper deference when it cited to authority prohibited by AEDPA. Spisak's conviction became final on March 6, 1989,

see 489 U.S. 1071 (denying certiorari review), and thus only Supreme Court cases decided before that date constitute the relevant precedent for determining whether the Ohio Supreme Court's decision was contrary to or an unreasonable application of federal constitutional law. See *Williams v. Taylor* 529 U.S. 362 (2000) ("The threshold question under AEDPA is whether [the petitioner] seeks to apply a rule of law that was clearly established at the time his state-court conviction became final."). The panel opinion properly cites to *Mills*, which the Court decided shortly before Spisak filed his certiorari petition. See App. 43a. But the panel opinion also cites to *McKoy v. North Carolina*, 494 U.S. 433 (1990), see App. 43a, which the Court did not decide until after Spisak's conviction became final. The decision below also relies heavily upon the prior circuit precedent of *Davis*, which, in turn, relied not only on *McKoy*, but also on several other decisions that came out after Spisak's conviction became final, including *Jones v. United States*, 527 U.S. 373 (1999) and *Boyde v. California*, 494 U.S. 370 (1990). The Spisak panel's failure to acknowledge that the timing of these opinions mattered suggests that it mechanically applied *Davis* without considering whether AEDPA required a different analysis.

The Sixth Circuit's failure to apply proper deferential review is evident not only from citation to improper authority and recitation of an improper standard, but also from the novel rules upon which its decision rests. Rather than applying the clear holding of *Mills* to evaluate the reasonableness of the Ohio Supreme Court's decision, the Sixth Circuit has improperly expanded and confused the *Mills* holding by invoking newly-created rules prohibiting "acquittal-first" instructions and requiring affirmative explanation, in both instruction and verdict form, of the jury's freedom to disagree about mitigating factors. As argued in Part A.1, such rules are not compelled by *Mills*, nor can they even be inferred.

The Sixth Circuit's failure to apply AEDPA review standards calls for the Court's reversal.

3. The decision below adds to inter-circuit and intra-circuit conflict on the proper scope of *Mills* in habeas review.

Finally, the Court should accept certiorari review of the decision below to resolve inter-circuit and intra-circuit conflict on the proper application of *Mills*. The decision below, as well as the decision in *Davis v. Mitchell* upon which it relies, conflict with the decisions of other circuits that have examined similar circumstances and found no *Mills* violation warranting habeas relief. They also directly conflict with the Sixth Circuit's own decisions in other cases that rejected Eighth Amendment challenges to virtually identical instructions. The Court should grant the State's petition to resolve this conflict.

Other federal circuit courts sitting in habeas review have examined unanimous-sentencing-verdict instructions that are virtually identical to Ohio's, and have repeatedly rejected the argument that *Mills* requires an affirmative explanatory instruction that the jury need not unanimously find mitigating factors. The Tenth Circuit recently examined a claim nearly identical to Spisak's, in which the petitioner argued that the unanimity instruction in other areas but silence on the need for unanimity regarding mitigating factors "erroneously implied that the jury was required to find a mitigating factor unanimously before each juror could consider the mitigating circumstance." *LaFevers v. Gibson*, 182 F.3d. 705, 719 (10th Cir. 1999). In rejecting the petitioner's claim, the Tenth Circuit reaffirmed that 'a trial court need not . . . expressly instruct a capital sentencing jury that unanimity is not required before each juror can consider a particular mitigating circumstance." *Id.* (quoting *Duvall v. Reynolds*, 139 F.3d 768, 791 (10th Cir. 1998)). The Third Circuit, likewise, has found no *Mills* violation in its

examination of instructions nearly identical to those at issue here. See *Zettlemoyer v. Fulcomer*, 923 F.2d 284, 307-08 (3d Cir. 1991). Other circuits have reached the same conclusions under *Mills*. See *Powell v. Bowersox*, 112 F.3d 966, 970-91 (8th Cir. 1997) (finding no *Mills* violation where "challenged instructions deal with balancing mitigating circumstances against aggravating factors, not with determining what mitigating circumstances exist"); *Arnold v. Evatt*, 113 F.3d 1352, 1363 (4th Cir. 1997) (no *Mills* violation where instruction required unanimous finding on aggravated factors but no unanimous instruction on mitigating factors); *James v. Whitley*, 926 F.2d 1433, 1448-49 (5th Cir. 1991) (same).

The Sixth Circuit's prohibition against acquittal-first sentencing instructions is also unparalleled in any other circuit in the country. Indeed, the only federal courts outside the Sixth Circuit to use the phrase have applied it to guilt-phase instructions that require rejection of a greater offense before consideration of a lesser-included offense. And these courts have found that a trial court may give an acquittal-first guilt-phase instruction without running afoul of the constitution, particularly if the defendant does not timely express a preference in instruction. See *United States v. Jackson*, 726 F.2d 1466, 1469 (9th Cir. 1984); *United States v. Tsanas*, 572 F.2d 340 (2d Cir. 1978); *Catches v. United States*, 582 F.2d 453, 459 (8th Cir. 1978). And, to the extent Spisak's acquittal-first complaint is actually a request for affirmative instructions regarding the consequence of a jury's failure to agree on the death penalty, the opinion below is in clear conflict with numerous other circuits that properly apply the Court's *Jones* decision to this context. See, e.g., *Zettlemoyer*, 923 F.2d at 309; *United States v. Chandler*, 996 F.2d 1073, 1089 (11th Cir. 1993); *Lyons v. Lee*, 316 F.3d 528, 535 n.8 (4th Cir. 2003).

Furthermore, even the Sixth Circuit's application of its own precedent has been inconsistent. Some panels have noted that jury instructions like those at issue here were

originally upheld by the Sixth Circuit in cases such as *Coe v. Bell*, 161 F.3d 320, 337-38 (6th Cir. 1998) and *Henderson v. Collins*, 262 F.3d 615 (6th Cir. 2001), before more recent and thus non-binding precedent created inconsistency and obscurity in the governing law. See, e.g., *Scott v. Mitchell*, 209 F.3d 854, 876 (6th Cir. 2000). The Sixth Circuit has repeatedly acknowledged the confusion among its own opinions. See, e.g., *id.*; *Williams v. Anderson*, 460 F.3d 789, 810-13 (2006).

The Court should therefore grant certiorari review to correct the Sixth Circuit's mistaken reading of *Mills*, to enforce proper deferential habeas review standards, and to resolve the inter- and intra-circuit conflicts in *Mills*'s application.

B. In granting habeas corpus relief on Spisak's ineffective assistance claim, the Sixth Circuit ignored trial counsel's strategy and exceeded its authority under AEDPA.

The Sixth Amendment requires that a criminal defendant receive the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984). However, "[j]udicial scrutiny of a counsel's performance must be highly deferential," and "every effort [must] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689. To obtain habeas corpus relief, a prisoner

> must do more than show that he would have satisfied *Strickland's* test if his claim were being analyzed in the first instance, because under [28 U.S.C.] Section 2254(d)(1) it is not enough to convince a federal habeas court that, in its independent judgment, the state court decision applied *Strickland* incorrectly. Rather, he must show that [the state court]

> applied *Strickland* to the facts of his case in an objectively unreasonable manner.

Bell v. Cone, 535 U.S. 685, 698-99 (2002), citing *Williams v. Taylor*, 529 U.S. at 411.

This deference applies all the more to a counsel's closing arguments. While the constitutional right to effective assistance extends to closing arguments, "[n]onetheless counsel has wide latitude in deciding how best to represent a client, and deference to counsel's tactical decisions in his closing presentation is particularly important because of the broad range of legitimate defense strategy at that stage." *Yarborough*, 540 U.S. at 5-6. "Indeed, it might sometimes make sense to forgo closing argument altogether." *Id.* at 6, citing *Bell v. Cone*, 535 U.S. at 701-02 (state court's assessment that waiving closing argument could be considered sound trial strategy and "at the very least . . . was not unreasonable." See also *Woodford v. Visciotti*, 537 U.S. 19, 25 (2002) (state court was objectively reasonable in concluding that defense counsel's "multiple concessions" during closing argument did not mean that counsel was constitutionally ineffective).

The Court has already reversed the grant of habeas corpus relief based on closing arguments that depicted the defendant more negatively than in Spisak's case. In *Yarborough*, the Ninth Circuit censured counsel's description of his client as a "bad person, lousy drug addict, stinking thief, jail bird," and criticized counsel for confessing to the jury that counsel himself could not be sure of the truth. Summarily reversing the Ninth Circuit's judgment, the Court observed that by admitting his client's shortcomings, counsel might have convinced the jury to put aside facts they would have remembered in any event. And, as the Court further observed, there was nothing wrong with counsel echoing the doubts that the jurors might have, because indicating that the speaker shares the listeners' attitudes and thereby "winning

over an audience by empathy" is a long-recognized technique. 540 U.S. at 9, 11.

In Spisak's case, the circumstances of defense counsel's challenged actions speak for themselves. Counsel had no choice but to concede that Spisak was the perpetrator of a series of fatal shootings that terrorized the campus of Cleveland State University. Added to the brutal and senseless nature of the murders, the prosecution presented compelling evidence that Spisak's racial hatred and Nazi beliefs motivated his crimes. Manifest in counsel's closing argument is an obvious attempt to gain the trust of the jurors by empathizing with their likely revulsion by the brutal and senseless nature of the shootings and the reprehensibility of Spisak's Nazism. Counsel's theme was that everyone participating in the trial was affected by Spisak's crimes. Repeatedly framing his comments in terms of "us" and "we," counsel argued that "none of us" could forget the day that Horace Dickerson was found dead, that "we can go back to Cleveland State University, and we were there," and that "you and I and everyone of us, we were sitting in that bus shelter," App. 272a–273a.

Counsel then argued that although Spisak did not lead a "good life" and had no "good deeds" to his credit, Spisak's mental illness was a mitigating factor that the jurors should consider. App. 275a. Again, counsel framed his approach in terms of a common interest with the jurors, arguing that "we are a humane society," that "the reason we have this hearing is because we are a humane people;" that "if you can't intend to commit a sin, to break the law, then as a humane people, different than most other countries, we don't terrorize one who can't intend to commit an offense;" and that this was also "the reason our general assembly has put this mitigating factor . . . not sane enough to be criminally insane, but sick and demented so that the ability to intend is substantially reduced." App. 276a–277a.

Counsel also argued extensively, using the metaphor of jars of three different sizes, that although the defense's expert testimony was insufficient to meet the test for incompetence to stand trial or the test for legal insanity, it was more than sufficient for the jury to conclude that Spisak was substantially impaired by mental illness and that this mitigating factor outweighed the admittedly strong aggravating circumstances. App. 278a–288a. Counsel specifically reviewed the testimony of defense experts that established the statutory mitigating factor, App. 279a, 287a–289a, and specifically argued that the jury must find this mitigating factor to "outweigh the aggravating circumstances that have been so graphically and so three-dimensionally brought out before us." App. 278a.

Finally, counsel responded to arguments he expected the prosecution to make, and concluded by assuring the jurors that he was proud of them for doing their duty. Counsel obviously anticipated that the prosecution would emphasize the defense's failure to establish an insanity defense during the guilt phase. Counsel argued specifically that "what we did . . . or what we didn't do, that isn't an issue[,] but the issue is, and rather obviously, that the mental inability of Frank Spisak, that description as described by Dr. McPherson, Dr. Bertschinger, and Dr. Markey, is that a mitigating factor, and does that factor outweigh the aggravating circumstances." App. 280a. Counsel also sought to repair damages that the prosecutor may have inflicted via cross-examination of the defense's experts, particularly with respect to an exchange during which Dr. Markey appeared to confuse an assistant prosecutor who interviewed him before trial with a member of the defense team. App. 284a-285a.

The Sixth Circuit failed to apply the appropriate deference to counsel's performance when it concluded that "there cannot be any objectively reasonable tactical reason" for the arguments he made in closing. See App. 38a. The Sixth Circuit's findings are based on a selective view of the

record that typifies the hindsight approach condemned by *Strickland*. As the district court concluded, each of counsel's alleged errors "can easily be attributed to a trial strategy." App. 154a. For example, the Sixth Circuit criticized counsel's arguments that Spisak had not earned the jurors' sympathy, that Spisak had no "good deeds" to his credit, and that Spisak was "sick," "twisted" and "demented," App. 37a, but counsel's comments were made in the context of arguing that "good deeds" or a "good life" were not the only grounds for mitigation, and that Spisak's incapacity due to mental illness was a substantial mitigating factor that could outweigh the aggravating circumstances. Although the Sixth Circuit further criticized counsel for "rambling incoherently towards the end of the closing statement about integrity in the legal system," counsel's arguments about the legal system could well have been in response to the prosecution's earlier statements that Spisak was responsible for putting the jurors and survivors through the ordeal of a lengthy and emotionally-charged trial. Indeed, this is the natural reading of counsel's comments that "none of us had any choice in that matter, we had to go through with it," because counsel "didn't sit down before this trial and invent the presumption of innocence." App. 281.

The Sixth Circuit also incorrectly found that counsel erred by going "so far as to tell the jury that [Spisak] was undeserving of mitigation." App. 36a. The Sixth Circuit failed to cite the record for this finding; there is no statement by counsel in the closing argument that Spisak "was undeserving of mitigation." Rather, as noted above, counsel brought out Spisak's lack of "good deeds" and his failure to lead a "good life" in the context of arguing that despite Spisak's terrible crimes and reprehensible beliefs, his mental illness was a significant mitigating factor that outweighed the aggravating circumstances. Indeed, it is difficult to understand the Sixth Circuit's apparent belief that counsel could and should have attempted to portray Spisak more

sympathetically, because, as recognized by the district court, any attempt to minimize Spisak's crimes was fraught with the danger of jury backlash.

The Sixth Circuit also misleadingly characterizes the record when it states that "most shocking of all, . . . trial counsel suggested to the jury that either outcome, death or life, would be a valid conclusion." App. 37a. The Sixth Circuit's findings ignore the context in which counsel's arguments were made. Counsel sought to sympathize with the jury's emotional response to sitting through such a difficult trial, again using the pronouns "we" and "us," and stating that the trial would "leave us a little bit older, . . . a little bit more jaded, and a little bit more hurt." App. 293a. Further, counsel never stated that a death verdict would be a proper outcome; rather, counsel spoke of being proud of the jury for fulfilling their jury duty, because he recognized it was a difficult task. Specifically, counsel stated that "whatever you do, we can be proud because we lived up to the oath that we took." App. 293a. Finally, as the Court observed in *Yarborough*, it is acceptable for counsel to argue in a way that stresses the jury's autonomy and that does not suggest that the verdict must be in the defendant's favor. *Yarborough*, 540 U.S. at 10.

Even if the Sixth Circuit had been correct in its analysis of *Strickland*'s deficient-performance prong, Spisak did not and could not demonstrate the prejudice required under *Strickland*. Spisak was required to show, based on an objective review of the totality of the evidence, a reasonable probability that but for counsel's errors the jury would have concluded the balance of aggravating and mitigating circumstances did not warrant death. *Strickland*, 466 U.S. at 695-696. The Sixth Circuit concluded, in a single sentence, that "[a]bsent trial counsel's behavior during the closing argument of the mitigation phase of the trial, we find that a reasonable probability exists that at least one juror would have reached a different conclusion about the appropriateness

of death, and may have voted for life instead." App. 38a–39a. While paying lip service to the *Strickland* prejudice test, the Sixth Circuit's subjective assessment ignores the overwhelming aggravating circumstances proven by the State, as well as counsel's lengthy argument urging the jury to consider the mitigation presented by the defense.

Finally, even if the Sixth Circuit's conclusions could be seen as a reasonable interpretation of the record, the Ohio court certainly was not objectively unreasonable in reaching the opposite conclusions. Indeed, notably absent from the Sixth Circuit's decision is an express determination that the Supreme Court of Ohio was objectively unreasonable in denying Spisak relief. Although it did not explain its decision, the Supreme Court of Ohio adjudicated the merits of Spisak's ineffective assistance of counsel claims, and, hence, its decision was subject to the standard of deference applicable in federal habeas corpus. *Harris v. Stovall*, 212 F.3d 930, 943 (6th Cir. 2000) (standard of deference applies even where state court decides a constitutional issue by form order or without extended discussion); *Aycox v. Lytle*, 196 F.3d 1174, 1177-78 (10th Cir. 1999) (noting decisions of the 4th, 5th, and 7th circuits holding that a summary decision can constitute an adjudication on the merits for purposes of § 2254(d), provided that the decision was reached on substantive rather than procedural grounds); *Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir. 1997) (recognizing that to condition "reasonableness" or "unreasonableness" on the quality of a state court's reasoning, rather than its result "would place the federal court in just the kind of tutelary relation to the state courts that the recent amendments are designed to end").

In sum, the Sixth Circuit clearly exceeded its authority in federal habeas corpus by overturning the district court and granting Spisak relief.

CONCLUSION

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

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