No. _____

In the Supreme Court of the United States

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KEVIN SMITH, Warden,

*Petitioner,*

v.

FRANK G. SPISAK, JR.,

*Respondent.*

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

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**PETITION FOR WRIT OF CERTIORARI**

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**CAPITAL CASE — NO EXECUTION DATE SET**

## QUESTIONS PRESENTED

1. Did the Sixth Circuit contravene the directives of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") and *Carey v. Musladin*, 127 S. Ct. 649 (2006), when it applied *Mills v. Maryland*, 486 U.S. 367 (1988), to resolve in a habeas petitioner's favor questions that were not decided or addressed in *Mills*?

2. Did the Sixth Circuit exceed its authority under AEDPA when it applied *United States v. Cronic*, 466 U.S. 648 (1984), to presume that a habeas petitioner suffered prejudice from several allegedly deficient statements made by his trial counsel during closing argument instead of deferring to the Ohio Supreme Court's reasonable rejection of the claim under *Strickland v. Washington*, 466 U.S. 668 (1984)?

## LIST OF PARTIES

The Petitioner is Kevin Smith, the Warden of the Mansfield Correctional Institution. Smith is substituted for his predecessor, Betty Mitchell. See Fed. R. Civ. P. 25(d).

The Respondent is Frank Spisak, an inmate at the Mansfield Correctional Institution.

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## PETITION FOR WRIT OF CERTIORARI

The Attorney General of Ohio, on behalf of Kevin Smith, the Warden of the Mansfield Correctional Institution, 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 opinions and orders are reproduced at App. 1a-20a, 22a-94a. The United States District Court for the Northern District of Ohio's opinion and order is reproduced at App. 95a-300a.

## JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Sixth Circuit issued its order denying the State's petition for rehearing on July 28, 2008. Justice Stevens extended the time period to file a petition for writ of certiorari to December 10, 2008. The Warden now files this petition and invokes the Court's jurisdiction under 28 U.S.C. 1254(1) (2003).

## INTRODUCTION

This Court has seen this case before. Just last Term, the Court granted the Warden's petition for certiorari, vacated the Sixth Circuit's opinion granting the writ, and remanded for reconsideration in light of *Carey v. Musladin*, 127 S. Ct. 649 (2006), and *Schriro v. Landrigan*, 127 S. Ct. 1933 (2007). The implication of the Court's remand order was unmistakable: The Court directed the Sixth Circuit to observe carefully the limitations of the Antiterrorism and Effective Death Penalty Act of

1996 ("AEDPA"), 110 Stat. 1219, when considering a claim for habeas relief.

On remand, the Sixth Circuit again ignored AEDPA's constraints on the court's habeas power when it reinstated its earlier grant of the writ. The Warden accordingly asks the Court to review this case for two reasons.

First, the Sixth Circuit exceeded its authority by granting habeas relief based on its finding that so-called "unanimity" and "acquittal-first" instructions violate *Mills v. Maryland*, 486 U.S. 367 (1988). Contrary to both AEDPA and this Court's directive in *Musladin*, the Sixth Circuit applied its own interpretation of *Mills* to resolve questions that were not decided or addressed in *Mills*, and on which this Court has provided no clear guidance. Numerous decisions of other circuits—and even of the Sixth Circuit itself—have rejected claims similar to Spisak's precisely because *Mills* did not address such claims.

Second, the Sixth Circuit improperly presumed that Spisak suffered prejudice from several allegedly deficient statements made by trial counsel during his closing argument. In *Bell v. Cone*, 535 U.S. 685 (2002), this Court directed habeas petitioners to apply *Strickland v. Washington*, 466 U.S. 668 (1984), when challenging such single, discrete acts of trial counsel. And the Ohio courts reasonably rejected Spisak's claim of ineffective assistance under the *Strickland* standard. Trial counsel's decision to reference the aggravating circumstances of Spisak's crimes in his closing argument was reasonable—and non-prejudicial—given the indisputably heinous and unprovoked nature of the murders, Spisak's lack of

remorse, and Spisak's on-the-stand descriptions of his depraved motives and beliefs.

The Court should again grant the Warden's petition and reverse the Sixth Circuit's judgment.

## STATEMENT OF THE CASE

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

Respondent Frank G. Spisak, Jr. killed Horace T. Rickerson, Timothy Sheehan, and Brian Warford in a series of shootings at Cleveland State University in 1982. App. 29a-31a. During the spree, Spisak also shot at John Hardaway and Coletta Dartt. Hardaway was shot seven times but survived and identified Spisak as the shooter. App. 29a.

Spisak's hatred of African Americans and Jews motivated the murders. App. 84a. When the police arrested Spisak, they found a book about Adolf Hitler that was hollowed out to conceal a gun, a "white power" tee shirt, and a Nazi flag. At trial, Spisak testified that he admired Hitler, and that he was a member of a splinter group of the American Nazi Party. App. 375a-382a. Spisak also told the investigating officer that he planned to go to a downtown bar with a machine gun and just "open up" on every black person that was 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. 369a-370a.

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

During the guilt phase of Spisak's trial, the defense did not contest that Spisak shot the victims; instead, it sought unsuccessfully 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. 371a-388a. The defense also offered the testimony of Dr. Oscar Markey, who gave contradictory testimony concerning whether Spisak was mentally ill at the time of the crimes. The trial court ultimately struck Dr. Markey's testimony, App 43a, and refused to instruct the jury on insanity, App. 53a-54a.

The jury returned a guilty verdict on, among other charges, four counts of aggravated murder with nineteen death specifications.

At sentencing, Spisak's counsel presented additional expert testimony that Spisak was mentally ill. A clinical psychologist testified that Spisak suffered from Schizotypal and Borderline Personality Disorders characterized by bizarre and paranoid thinking, gender identification conflict, and emotional instability, and that these defects substantially impaired Spisak's ability to conform to the law. (Trial Tr. 2429-40; Joint Appendix to Sixth Circuit case no. 03-4034 ("J.A.") at 2602-13). A psychiatrist similarly testified that Spisak suffered from schizotypal personality disorder—a mental condition that substantially impaired his ability to conform his conduct to the requirements of the law. (*Id.* at 2549-54; J.A. at 2722-27). Finally, Dr.

Markey again testified, stating that he essentially agreed with the psychiatric diagnosis. (*Id.* at 2704-06; J.A. at 2877-79).

In his closing argument, Spisak's counsel acknowledged the brutality of the aggravating circumstances and expressed sympathy for the victims' families. App. 333a-336a. Counsel then argued that although Spisak had not led 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. 338a-341a. 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. 340a-355a. Finally, counsel concluded by telling the jurors that he was proud of them for doing their duty. App. 359a-360a.

In its sentencing instructions to the jury, the court explained that the State had "the burden of proving by proof 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." App. 318a. 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." *Id.*

The court explained that the aggravating factors were those death specifications that the jury had already returned guilty verdicts on during the guilt phase. App. 319a-323a.

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." App. 323a. 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." *Id.* 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." *Id.* 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.

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

> [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. 323a-324a.

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 . . . .

App. 325a. 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." *Id.*

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].

App. 325a-326a. The court noted that "again, all twelve of [the jurors] must sign whatever verdict it is you arrive at." App. 326a.

The jury recommended a sentence of death, which the trial court accepted. App. 27a.

### C. The Ohio Supreme Court rejected Spisak's jury instruction and ineffective assistance of counsel claims on the merits.

On direct review, 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. 97a. Spisak obtained new counsel and moved for a second round of review before the Ohio court of appeals, which the Ohio Supreme Court granted. The Ohio appeals court again affirmed Spisak's convictions. App. 98a-99a.

On appeal, the Ohio Supreme Court reviewed and rejected all of Spisak's sixty-four assignments of error, including his claim 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 his claim that he was denied effective assistance of counsel during the mitigation phase of his trial. App. 113a-114a, 306a. As to Spisak's jury-instruction claim, the court found that it had already rejected the same argument in earlier cases. App. 306a. The court then concluded that Spisak's ineffective assistance claim was not well taken in light of numerous authorities, including *Strickland v. Washington*, 466 U.S. 668 (1984). App. 307a.

Spisak's convictions became final on March 6, 1989, when this Court denied certiorari review of the

Ohio Supreme Court's decision. See *Spisak v. Ohio*, 489 U.S. 1071 (1989).

### D. The federal district court denied Spisak's habeas petition.

After unsuccessfully seeking state post-conviction relief, App. 116a, 130a, Spisak filed a petition for writ of habeas corpus. The district court denied Spisak relief on all of his thirty-three grounds, including his challenges to the sentencing-phase jury instructions and counsel's performance during sentencing. App. 299a.

The district court first rejected Spisak's challenge to the sentencing-phase jury instructions. Spisak argued that the trial court erred by instructing the jury that its sentence must be unanimous but failing to explain the consequences of the jury's inability to reach unanimity. App. 183a-188a. But the district court found that argument precluded by *Jones v. United States*, 527 U.S. 373, 381-82 (1999), which held that a trial court's failure to instruct on the consequence of jury deadlock does not give rise to a cognizable constitutional claim. App. 187a.

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 applied *Mills v. Maryland*, 486 U.S. 367 (1988), and *McKoy v. North Carolina*, 494 U.S. 433 (1990), to grant habeas relief. In *Davis*, the Sixth Circuit 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* conflicted 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. 188a-189a.

The district court next rejected Spisak's claim that counsel's closing argument was constitutionally ineffective, finding that counsel's alleged errors "can easily be attributed to a trial strategy." App. 199a. Specifically, the court found that defense counsel's challenged statements were part of a strategy to ingratiate himself with the jury, to blunt the prosecutor's depiction of the murders, and to show that Spisak's mental defect was a mitigating factor. App. 199a-201a. 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 had counsel 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. 203a-204a.

### 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 death sentence. The court first concluded that the jury's sentencing instructions were improper under *Davis*,

318 F.3d at 689–90, because they did not explicitly tell jurors that they need not find mitigating factors unanimously, they required that all twelve jurors sign the sentencing verdict form, and they did not inform jurors that the jurors need not unanimously reject a death sentence before imposing a life sentence. App. 71a-76a.

The Sixth Circuit also found that counsel was constitutionally ineffective during closing argument because he abandoned his duty of loyalty to Spisak by making only a "limited effort" to argue for a life sentence, 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. 62a-64a. The Sixth Circuit also stated, 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 . . . ." App. 67a.

### F. After this Court granted the Warden's petition, vacated the Sixth Circuit's judgment, and remanded the case, the Sixth Circuit reinstated its original opinion.

The Warden filed a petition for writ of certiorari. The Court granted the petition, vacated the Sixth Circuit's judgment, and remanded the case for further consideration in light of *Musladin* and *Landrigan*. *Hudson v. Spisak*, 128 S. Ct. 373 (2007). Without further briefing by the parties, the Sixth

Circuit issued a four-page order reinstating its previous opinion. App. 12a. After the Warden filed a petition for rehearing and suggestion for rehearing en banc, the court issued an amended order that again reinstated its original opinion. App. 2a. The Sixth Circuit later denied en banc review. App. 1a.

## REASONS FOR GRANTING THE WRIT

The Court should grant the Warden's petition and reverse the Sixth Circuit's judgment for two reasons. First, the Sixth Circuit ignored AEDPA's constraints, as well as this Court's instruction to apply *Musladin* on remand, when it granted habeas relief based on allegedly defective jury instructions that were not addressed or even presented in *Mills v. Maryland*. That error further amplified the existing division of authority on the question of proper jury instructions under *Mills*. Second, the Sixth Circuit improperly indulged a presumption of prejudice when it accepted Spisak's allegation that trial counsel was constitutionally ineffective during his closing argument, disregarding clear directives from this Court that habeas petitioners show actual prejudice when challenging a discrete decision or act of counsel. In doing so, the Sixth Circuit failed to afford proper deference to the Ohio Supreme Court's reasonable rejection of Spisak's claim under *Strickland*.

### A. The Sixth Circuit applied its own interpretation of *Mills*—rather than clearly established federal law—and failed to apply AEDPA deference to the state court decisions, contributing to a division of authority on the jury instruction issue.

AEDPA dictates that an application for a writ of habeas corpus shall not be granted "unless the adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1). The phrase "clearly established Federal law" "refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000). In *Musladin*, the Court explained that a state court's adjudication is not contrary to or an unreasonable application of clearly established federal law where this Court has never addressed the type of claim presented and the lower courts have diverged in their treatment of the claim. See 127 S. Ct. at 654; see also *Landigran*, 127 S. Ct. at 1942 (reversing the Ninth Circuit's application of AEDPA because the Court had "never addressed a situation like this"). Where this Court's cases give no clear answer to the question presented, "it cannot be said that the state court 'unreasonabl[y] appli[ed] clearly established Federal law.'" *Musladin*, 127 S. Ct. 649 (quoting 28 U.S.C. § 2254(d)(1)).

After this Court vacated the Sixth Circuit's judgment and remanded the case for further consideration in light of *Musladin* and *Landigran*, App. 21a, the Sixth Circuit ignored the Court's

directive and again misapplied *Mills* to grant habeas relief on Spisak's "unanimity" and "acquittal-first" instruction claims. See App. 4a. This decision was incorrect for two reasons: First, the court failed to apply clearly established federal law and instead expanded this Court's holding in *Mills*. Second, the courts are divided on the application of *Mills*—indeed, even the Sixth Circuit itself has issued conflicting rulings—and this division demonstrates not only that the Sixth Circuit's application of *Mills* is not "clearly established Federal law," but also that the issue warrants this Court's review.

### 1. The Sixth Circuit extended *Mills* to a situation that *Mills* did not address.

*Mills v. Maryland* does not apply to jury instructions that require unanimity in the ultimate determination of whether aggravating factors outweigh mitigating factors. 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 must be ignored when the individual juror casts his or her ultimate sentencing vote. 486 U.S. at 384. The Court further 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, twelve jurors favoring a life sentence 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 mitigating factors were present. *Id.* at 374.

This case differs starkly from the *Mills* scenario. The jury instructions at Spisak's penalty phase simply required juror unanimity in the ultimate determination of whether aggravating factors found beyond a reasonable doubt outweighed any mitigating factors. The trial court instructed the jury that if "all twelve members of the jury [found] by proof beyond a reasonable doubt that the aggravating circumstances in each separate count outweigh[ed] the mitigating factors," then it was required to "recommend to the Court that a sentence of death be imposed upon the defendant," but that if the jury found "that the State failed to prove beyond a reasonable doubt that the aggravating circumstances which [Spisak] ha[d] been found guilty of committing in the separate counts outweigh[ed] the mitigating factors," then it should impose one of two life sentences. App. 324a. Unlike the *Mills* jury, see 486 U.S. at 378, Spisak's jury was never instructed that it must determine unanimously whether or not a particular mitigating factor had been shown. The Sixth Circuit thus failed to recognize the significant distinction between a jury instruction that requires unanimity in *specific mitigation findings* and an instruction that simply requires unanimity in the *ultimate outcome*.

Ignoring this critical distinction, the Sixth Circuit attempted to wedge Spisak's case into the *Mills* paradigm based on three theories, none of which *Mills* addressed. First, the court found 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. The instruction here, however, required only that the jury agree unanimously that the aggravating factors outweighed the mitigating factors, see App. 323a—a requirement fully consistent with this Court's case law. The Sixth Circuit contorted that straightforward instruction, citing its fear that the jury misunderstood the instruction to require unanimous agreement on specific mitigating factors. But no reasonable jury would understand the sentencing instruction here to mean that a jury must unanimously agree on a mitigating factor before a juror could consider it. More to the point, *Mills* did not cast doubt on the appropriateness of such an instruction.

Second, the Sixth Circuit found that a verdict form requiring twelve signatures—unanimity, in other words—on the ultimate sentence also improperly implies that the jurors must unanimously agree on mitigating factors. But the sentencing verdict form in this case differs markedly from the problematic verdict form in *Mills*. In *Mills*, the jurors were required to render a yes-or-no answer as to each potential mitigating factor, and all twelve jurors were required to sign the form. *Mills*, 486 U.S. at 378-79. Here, by contrast, the jurors were simply required to indicate by signature whether the aggravating factors ultimately outweighed any mitigating factors. App. 325a. Given that a unanimous sentencing verdict is in no way erroneous, it follows that the verdict form may require the signatures of the twelve jurors to reflect a unanimous verdict.

Third, the Sixth Circuit created a new rule not contemplated by *Mills* when it found constitutional error in so-called "acquittal-first" sentencing instructions—that is, sentencing instructions that suggest a jury must unanimously acquit the defendant of death before it may impose a life sentence. The court's reasoning rested on the Sixth Circuit's earlier decision in *Davis v. Mitchell*, 318 F.3d 682 (6th Cir. 2003). In *Davis*, the court 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. *Id.* at 689 (citing *Ohio v. Brooks*, 661 N.E.2d 1030 (Ohio 1996)). The 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 *Davis* court next 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.* The Sixth Circuit panel in this case echoed *Davis*'s unsupported conclusion, stating that Spisak's so-called "acquittal-first" instruction "impermissibly imposed a unanimity requirement on the jury's ability to find mitigating factors in violation of . . . *Mills* and *McKoy*." App. 4a.[1]

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[1] The Sixth Circuit further erred under AEDPA by relying on *McKoy v. North Carolina*, 494 U.S. 433 (1990), because this Court decided *McKoy* after Spisak's conviction became final. See *Williams v. Taylor*, 529 U.S. 362 (2000) ("The threshold question under AEDPA is whether [the petitioner] seeks to

Two fundamental flaws inhere in that reasoning. First, even if the Sixth Circuit correctly read Spisak's jury instruction as an "acquittal-first" instruction—a doubtful proposition—its reading was based solely on Ohio law (*Davis*'s interpretation of *Brooks*), not federal constitutional law. In other words, even if an instruction requiring the jury to accept or reject the death penalty before moving on to other possible sentences were improper under 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).

Moreover, regardless of what Ohio law says on the matter, an "acquittal-first" instruction does not fall within the contours of *Mills*, and thus the Sixth Circuit *extended*, rather than applied, this Court's case law. *Mills* applies "fairly narrowly" to its unusual circumstances. *Beard v. Banks*, 542 U.S. 406, 420 (2004). The jurors in *Mills* were required to make what amounted to unanimous special findings that a particular mitigating factor existed before they weighed, in a second stage, the aggravating factors against the mitigating factors that they had found. That unique procedure was all the more problematic because it apparently resulted in the jurors' complete failure to conduct the required weighing process. *Mills*, 486 U.S. at 380 n.13. Here, by contrast, the jurors were instructed to deliberate on the balance of mitigating and aggravating circumstances to reach a consensus on the outcome of that balance. In that weighing process, each juror

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apply a rule of law that was clearly established at the time his state-court conviction became final.").

by definition gave weight to mitigating evidence and performed the very type of individual analysis that *Mills* is designed to protect.

**2. Given the lack of clear guidance from this Court, the lower courts are divided on the jury instruction issue.**

The Sixth Circuit should not have granted habeas relief on Spisak's jury instruction claim, because this Court has never spoken clearly on the issue. Indeed, that lack of clear guidance is why this Court vacated and remanded the Sixth Circuit's original opinion in light of *Musladin*. See 127 S. Ct. at 654 ("Given the lack of holdings from this Court . . . it cannot be said that the state court 'unreasonabl[y] appli[ed] clearly established Federal law.'") (citing § 2254(d)(1) (alteration in original)). The courts of appeals are now divided on the issue, and that division of authority further warrants this Court's review.

Other circuits—and even other Sixth Circuit panels—have reached the opposite outcome by declining to interpret or apply *Mills* to prohibit the type of instructions that the court below found constitutionally defective. The Tenth Circuit, for instance, examined a claim nearly identical to Spisak's: The petitioner argued that an instruction that expressly required unanimity in some respects but remained silent on the need for unanimity when considering mitigating factors "'erroneously implied that the jury was required to find a mitigating circumstance unanimously before each juror could consider the mitigating circumstance.'" *LaFevers v. Gibson*, 182 F.3d 705, 719 (10th Cir. 1999) (quoting *Duvall v. Reynolds*, 139 F.3d 768, 791-92 (10th Cir.

1998)). 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.* Other courts have reached the same conclusion. See *Powell v. Bowersox*, 112 F.3d 966, 970-71 (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) (finding no *Mills* violation where instruction required unanimous finding on aggravating factors but no unanimous instruction on mitigating factors); *James v. Whitley*, 926 F.2d 1433, 1448-49 (5th Cir. 1991) (same).

The Third Circuit, for its part, is internally divided on the issue. One panel found no *Mills* violation when it considered instructions nearly identical to those here. See *Zettlemoyer v. Fulcomer*, 923 F.2d 284, 307-08 (3d Cir. 1991). A different panel, however, recently departed from *Zettlemoyer* and found that an instruction must affirmatively clarify that the jury must be unanimous as to aggravating, but not mitigating, factors. See *Abu-Jamal v. Horn*, 520 F.3d 272, 303-04 (3d Cir. 2008). The Commonwealth of Pennsylvania has filed a petition for certiorari with this Court seeking review of that decision. See Petition for Writ of Certiorari, *Beard v. Abu-Jamal*, No. 08-652 (U.S. Nov. 14, 2008).

Even the Sixth Circuit's application of its own precedent has been inconsistent. Jury instructions like those at issue here were originally upheld by in

cases such as *Coe v. Bell*, 161 F.3d 320, 337-38 (6th Cir. 1998), and *Henderson v. Collins*, 262 F.3d 615, 621-22 (6th Cir. 2001), before more recent precedent created inconsistency and obscurity in the governing law. See, e.g., *Scott v. Mitchell*, 209 F.3d 854, 876-77 (6th Cir. 2000). The Sixth Circuit has acknowledged the confusion among its own opinions, see, e.g., *id.*; *Williams v. Anderson*, 460 F.3d 789, 810-13 (2006), as did the district court in this case, see App. 189a.

Additionally, the Sixth Circuit's prohibition of so-called "acquittal-first" sentencing instructions is unparalleled in any other circuit. 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 object. See *United States v. Jackson*, 726 F.2d 1466, 1469 (9th Cir. 1984); *Catches v. United States*, 582 F.2d 453, 459 (8th Cir. 1978); *United States v. Tsanas*, 572 F.2d 340, 346 (2d Cir. 1978). To the extent that 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 conflicts with numerous other circuits that properly apply the Court's decision in *Jones v. United States*, 527 U.S. 373, 381-82 (1999), which prohibits habeas relief based on the absence of a juror-deadlock instruction. See, e.g., *Lyons v. Lee*, 316 F.3d 528, 535 n.8 (4th Cir. 2003); *United States v. Chandler*, 996 F.2d 1073, 1089 (11th Cir. 1993);

*Zettlemoyer*, 923 F.2d at 309. In light of this conflict, this Court should grant review.

### B. The Sixth Circuit misapplied settled law and ignored AEDPA when it applied *Cronic*, and not *Strickland*, to Spisak's ineffective assistance claim.

Allegations of ineffective assistance of counsel are reviewed under the familiar two-part test enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984). First, the habeas petitioner must show that counsel's performance "fell below an objective standard of reasonableness." *Id.* at 688. Second, he must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. In rare circumstances, where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing," courts will presume that the petitioner has suffered prejudice and excuse him from the second requirement. *United States v. Cronic*, 466 U.S. 648, 659 (1984).

Spisak's allegations of ineffective assistance focus not on the totality of trial counsel's preparation and performance, but on one discrete portion of the trial—statements made by trial counsel during his closing argument. Although this Court has affirmed, in no uncertain terms, that *Strickland*'s two-part test governs review of such claims, the Sixth Circuit instead applied its own circuit precedent (which in turn rested squarely on *Cronic*) to presume that trial counsel's performance prejudiced Spisak. When the correct standard is applied, it is clear that the Ohio Supreme Court's rejection of Spisak's claim was reasonable under AEDPA. This Court should grant

review to correct the Sixth Circuit's unwarranted expansion of *Cronic*.

### 1. Allegations of ineffective assistance at specific points in the trial proceeding are governed by *Strickland*.

Although the Sixth Circuit paid lip service to *Strickland*, the court in fact indulged in a presumption of prejudice that contradicts this Court's case law. The appeals court first held that trial counsel's closing argument was deficient: Counsel offered an "extremely graphic and overly descriptive recounting of Defendant's crimes," told the jury of Spisak's "sick twisted mind" and his associations with Nazis, reminded the jury that Spisak had no good deeds or thoughts, and undertook only a "limited effort" to stress evidence of Spisak's mental illness. App. 64a-65a. The court then found that "trial counsel's hostility toward [Spisak] aligned counsel with the prosecution against his client." App. 66a. Finally, the court analogized Spisak's case to *Rickman v. Bell*, 131 F.3d 1150, 1156 (6th Cir. 1997), where the Sixth Circuit applied "the *Cronic presumption* of prejudice" after determining that trial counsel's "performance was so egregious as to amount to the virtual or constructive denial of the assistance of counsel." *Id.* at 1156. Without any analysis of *Strickland*'s prejudice prong, the court concluded: "Absent trial counsel's behavior during the closing argument of the mitigating 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 . . . ." App. 67a.

The Sixth Circuit's analysis disregards *Cronic*'s clear holding. The *Cronic* Court identified three exceptions to *Strickland*'s prejudice requirement: (1) where a "complete denial of counsel" occurs at "a critical stage of [the] trial," 466 U.S. at 659; (2) where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing," *id.*; or (3) where "the surrounding circumstances ma[k]e it . . . unlikely that any lawyer could provide effective assistance." *Id.* at 661. The first and third exceptions are not relevant here; counsel was present for the entire proceeding and no external circumstances constrained his advocacy. The question, then, is whether counsel's performance—even assuming it was deficient—triggered *Cronic*'s second exception.

*Cronic*'s second exception does not apply because the allegedly deficient performance occurred at a single point—during the penalty-phase closing argument—not throughout the entire trial proceeding. *Bell v. Cone*, 535 U.S. 685 (2002), is illustrative. There, defense counsel completed four tasks on behalf of his client, Gary Bradford Cone, during the penalty phase of a capital murder trial: (1) he asked the jury for mercy during his brief opening statement; (2) he referenced evidence that Cone suffered from Vietnam Veterans Syndrome; (3) during cross examination, he elicited the fact that Cone had received the Bronze Star; and (4) he successfully objected to the introduction of two photographs of the murder victims. *Id.* at 708 (Stevens, J., dissenting). Counsel did not interview a number of character witnesses who would have testified that Cone did not engage in any criminal behavior before leaving for Vietnam. *Id.* Nor did

counsel present the mitigation evidence he did have—testimony from Cone's family members and medical experts, the facts and circumstances of Cone's Bronze Star, or a letter of forgiveness from the victim's sister. *Id.* at 709-10. Rather, he rested without *any* mitigation presentation or closing argument. *Id.* at 713.

When assessing Cone's claim of ineffective assistance, the Court rejected calls to presume prejudice: "When we spoke in *Cronic* of the possibility of presuming prejudice based on an attorney's failure to test the prosecutor's case, we indicated that the attorney's failure must be complete. We said, 'if counsel *entirely* fails to subject the prosecution's case to meaningful adversarial testing.'" *Id.* at 696-97 (quoting *Cronic*, 466 U.S. at 659). It then observed that Cone had argued "not that his counsel failed to oppose the prosecution throughout the sentencing proceeding as a whole, but that his counsel failed to do so at specific points." *Id.* at 697. The Court therefore concluded that Cone's claim of ineffective assistance was governed by *Strickland*. *Id.* at 697-98.

After *Bell*, the courts of appeals, including the Sixth Circuit, have recognized that *Cronic* cannot be applied to discrete acts of alleged ineffectiveness by trial counsel. See, e.g., *Miller v. Martin*, 481 F.3d 468, 473 (7th Cir. 2007) ("In the wake of *Bell*, courts have rarely applied *Cronic*, emphasizing that only non-representation, not poor representation, triggers a presumption of prejudice."); *Benge v. Johnson*, 474 F.3d 236, 247 (6th Cir. 2007) ("[T]he *Cronic* presumption applies only where defense counsel *completely* or *entirely* fails to oppose the prosecution

throughout the guilt or penalty phase *as a whole*."); *United States v. Theodore*, 468 F.3d 52, 57 (1st Cir. 2006) (noting that trial counsel's limited efforts—his cross examination of government witnesses, suggestion of some defense themes, and introduction of several exhibits—was "minimal performance . . . sufficient to remove this case from *Cronic*'s ambit"); *Freeman v. Graves*, 317 F.3d 898, 900 (8th Cir. 2003) ("The defendant must assert counsel failed to oppose the prosecution throughout the proceeding as a whole, rather than at specific points."); *Haynes v. Cain*, 298 F.3d 375, 381 (5th Cir. 2002) ("*Cronic* is reserved only for those extreme cases in which counsel fails to present any defense.").

Under this established framework, Spisak cannot claim a presumption of prejudice from his counsel's allegedly deficient performance. No dispute exists as to the adequacy of counsel's representation aside from the closing argument. The Sixth Circuit rejected Spisak's argument that counsel performed an inadequate mitigation investigation, finding that counsel had collected "an extensive social history." App. 68a. Further, counsel presented that history—Spisak's difficult and isolated childhood, his gender confusion, and his pursuit of a sex change operation—to the jury. App. 68a-69a. Finally, counsel could not realistically challenge the aggravating circumstances of Spisak's three murders and two attempted murders at the penalty-phase hearing. His client confessed to them, admitting that they were unprovoked acts of violence. App. 364a-368a, 388a-396a. Because Spisak's claim turns entirely on what "his counsel failed to do . . . at specific points" in the trial—specifically, during the closing argument—Spisak

must establish an entitlement to relief under *Strickland*. *Bell*, 535 U.S. at 697.

**2. The Sixth Circuit's contrary conclusion was not based on clearly established federal law in effect at the time of the state court decision.**

In granting relief to Spisak, the Sixth Circuit jettisoned *Strickland*, invoking its earlier decision in *Rickman v. Bell* to presume prejudice and grant relief. This approach was flawed for several reasons.

As a threshold matter, the court ignored AEDPA. Under 28 U.S.C. § 2254(d)(1), habeas relief can be granted based only on "the holdings . . . of this Court's decisions as of the time of the relevant state-court decision." *Williams*, 529 U.S. at 412. *Rickman* was neither a decision of this Court nor established law when the Ohio Supreme Court rejected Spisak's ineffective-assistance claim. In 1988, the only relevant cases on the books were *Cronic* and *Strickland*. And the Ohio Supreme Court's decision to deny relief under *Strickland*, see App. 307a, was neither contrary to nor an unreasonable application of those precedents. As explained above, Spisak did not allege, nor did the Sixth Circuit find, that his "counsel *entirely* fail[ed] to subject the prosecution's case to meaningful adversarial testing" during the penalty phase. *Cronic*, 466 U.S. at 659 (emphasis added).

Moreover, the facts of *Rickman* distinguish it from Spisak's case. In *Rickman*, trial counsel did not undertake any investigation or meaningful preparation for the guilt phase of the trial. 131 F.3d at 1157. Then, at the penalty phase, counsel elicited

damaging testimony from his own witnesses—suggestions that his client planned the murder despite contrary evidence in the record, information that his client possessed a hand grenade detonator, and statements that his client expressed an intent to commit unrelated crimes. *Id.* at 1158. Further, during his witness examinations, trial counsel portrayed his client as crazed and dangerous—that he was "nuts," that he had "a wild, glassy look in his eyes," and that he "just got out of somebody's insane asylum." *Id.* at 1158-59. Finally, during closing argument, counsel indicated that he personally suffered "guilt by association" with his client, that his client was as "wild as a March hare," and that "[h]e may take off after me in a minute." *Id.* at 1159.

The Sixth Circuit presumed prejudice under *Cronic*, noting that "these outrageous tactics were introduced by [trial counsel] himself," that the portrayal was "even more frightening than the prosecution could paint," that these tactics "were employed during both the guilt and the sentencing phases," and that counsel had "express[ed] personal sympathy for the prosecution and shame from representing Rickman" during his closing argument. *Id.* at 1159-60. In sum, defense counsel had "aligned himself with the prosecution" throughout the entire proceeding. *Id.* at 1159.

The claimed deficiencies in trial counsel's performance here are different in kind. The Sixth Circuit held that counsel's investigation was adequate, and Spisak does not challenge any part of counsel's advocacy during the guilt phase. With respect to the closing argument, the allegedly damaging content cited by the Sixth Circuit is

confined to a nine-page section of the forty-five-page transcript. See App. 334a-339a. Unlike *Rickman*, it is undisputed that the vast majority of Spisak's trial proceedings retained an adversarial nature.

Because Spisak challenges a single, discrete act of trial counsel's conduct during the proceedings, he cannot claim a presumption of prejudice under *Cronic*. Instead he must show actual prejudice. And on that score, the Ohio Supreme Court's decision to apply *Strickland* to Spisak's claim warrants deference.

### 3. The Ohio Supreme Court's rejection of Spisak's ineffective assistance claim was not contrary to or an unreasonable application of *Strickland*.

Under 28 U.S.C. § 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*, 535 U.S. at 699 (internal citation omitted). Had the Sixth Circuit applied Strickland instead of *Cronic* to this case, it would have recognized that the Ohio Supreme Court acted reasonably when it rejected Spisak's claim of ineffective assistance.

#### a. Spisak cannot establish deficient performance.

In finding that counsel was constitutionally deficient during closing argument, the Sixth Circuit focused on four of his decisions: (1) his overly

graphic description of Spisak's crimes; (2) his recounting of Spisak's philosophical association with the Nazi party and his "sick twisted mind"; (3) his concession that Spisak did not deserve sympathy based on his "good deeds" or "good thoughts" because he had none; and (4) his failure to make an express plea that the jury return a verdict of life. App. 64a-65a. None of these decisions was an objectively unreasonable trial tactic. As this Court has explained, "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 v. Gentry*, 540 U.S. 1, 5-6 (2003) (per curiam).

With respect to the first three alleged deficiencies, counsel made a strategic decision to concede certain facts about his client's character, his background, and the brutality of his criminal acts. The jury had heard testimony from the investigating police officer that Spisak readily volunteered information about his role in the murders and attempted murders. App. 364a-368a. And when Spisak took the stand, he proudly testified to his association with the American Nazi Party and his spiritual identification with Hitler. App. 374a-380a. Spisak then blamed Jews for "control[ling] all the thoughts of public opinion" and blacks for "breeding at a rate that will soon make the white people extinct," App. 383a-384a, and commented that "[t]he force of God" motivated him to "take up arms." App. 386a.

Finally, Spisak openly described his thoughts, actions, and motives in committing each of the murders and attempted murders. App. 388a-396a. Without any hint of remorse, he expressed personal pride in giving this testimony: "We need somebody to get up here and take the stand and give a reasonable logical concise explanation for those things which must be done and this has not been done until now." App. 393a. Spisak also testified that, given the chance, he would "continue the war [he] started" by "inflict[ing] the maximum amount of damage on the enemies"—specifically, "Blacks and Jews." App. 397a.

During his closing argument, trial counsel could neither challenge nor ignore his client's damaging admissions or self-portrayal before the jury. His decision to recognize and concede certain aggravating factors was not, given these circumstances, an unreasonable choice. See *Yarborough*, 540 U.S. at 9 ("By candidly acknowledging his client's shortcomings, counsel might have built credibility with the jury and persuaded it to focus on the relevant issues in the case.").

With respect to the fourth alleged deficiency, the Sixth Circuit found that counsel's failure to ask the jury to return a life sentence was "[m]ost shocking of all." App. 65a. Yet, in *Yarborough*, the defense attorney also failed to request a life sentence during his closing argument. This Court found no deficient performance, emphasizing that "a low-key strategy that stresses the jury's autonomy is not unreasonable." 540 U.S. at 10.

**b. Spisak cannot establish prejudice.**

Even if trial counsel's closing argument were constitutionally deficient, Spisak cannot show prejudice—that is, he cannot establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Nor can Spisak show that it was objectively unreasonable for the Ohio Supreme Court to reach that conclusion.

As discussed above, the depraved nature of Spisak's crimes and thoughts was graphically displayed to the jury through the guilt-phase evidence, the investigating officer's testimony, and Spisak's own unvarnished statements while on the stand. That trial counsel lent his credence to this aggravating evidence during his closing argument does not establish prejudice, because the jury would have accepted the evidence anyway. It was neither contested nor, given Spisak's own testimony, contestable.

Moreover, the Sixth Circuit recognized that the list of promising mitigation themes for Spisak was short: "The best chance of mitigation available was in fact the evidence that Defendant was, to some degree, mentally ill." App. 69a. It then found that trial counsel's investigation and presentation of the mental-illness theme during the penalty phase was adequate; he offered "extensive evidence of Defendant's severe personality disorder, flirtation with the idea of having a sex change, sexual confusion, and social isolation." *Id.*

Trial counsel's closing argument further pressed the mental-illness theme. Using the metaphor of

three different-sized jars, counsel argued that, although insufficient to establish legal incompetence or insanity, the defense's evidence was sufficient for the jury to conclude that Spisak was impaired by mental illness and that this illness outweighed the admittedly strong aggravating circumstances. App. 341a-354a. Counsel supported this argument with references to his medical experts' testimony. App. 342a-343a, 353a-354a.

All told, Spisak's "best chance of mitigation"—his claim of mental illness—was adequately presented and argued to the jury. Whether or not trial counsel was wise to recite the aggravating circumstances of the murders or the tortured beliefs of his client during closing argument is of little moment. Those facts were already in the record, and they would have been burned into the memory of any reasonable juror regardless of what trial counsel said. Accordingly, Spisak cannot show a reasonable probability that, but for his trial counsel's closing argument, the result of the proceeding would have been different.

## CONCLUSION

For the above reasons, the Court should grant the petition for a writ of certiorari.

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December 1, 2008