No. 08-724

In the Supreme Court of the United States

KEVIN SMITH, Warden,

Petitioner,

v.

FRANK G. SPISAK, JR.,

Respondent.

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

RICHARD CORDRAY
Attorney General of Ohio

BENJAMIN C. MIZER*
Solicitor General
**Counsel of Record*
KIMBERLY A. OLSON
DAVID M. LIEBERMAN
Deputy Solicitors
CHARLES WILLE
Assistant Attorney General
30 E. Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes and Rules

REPLY BRIEF FOR THE PETITIONER

The Sixth Circuit's grant of the habeas writ in this case warranted this Court's remand just last Term, and nothing has changed since then: The Sixth Circuit failed to correct its errors, and Spisak offers nothing in his Brief in Opposition to counter the Warden's case for this Court's review. Spisak's jury instructions differed materially from those in *Mills v. Maryland*, 486 U.S. (1988), and other circuits—indeed, other Sixth Circuit panels—have upheld the same instructions. Meanwhile, the Sixth Circuit ignored half of the inquiry under *Strickland v. Washington*, 466 U.S. 668 (1984)—the requirement that the petitioner show actual prejudice. Even more problematic, the court reached these conclusions despite the deferential rubric of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 110 Stat. 1214, 1219.

A. The Sixth Circuit failed to apply clearly established federal law to Spisak's jury-instruction claim, exacerbating a division of authority.

1. The Sixth Circuit failed to apply AEDPA deference.

Contrary to this Court's remand order, the Sixth Circuit failed to observe AEDPA's limitations when considering Spisak's claim for habeas relief under *Mills*. On direct appeal, the Ohio Supreme Court reviewed Spisak's sixty-four propositions of law—including his jury-instruction claim—and found each to be without merit. App. 306a; see also *id.* (rejecting Spisak's *Mills* argument because it had "previously been raised and rejected" in other cases). AEDPA

deference applies to that judgment regardless of whether the Ohio Supreme Court decided the issue "without extended discussion." *Harris v. Stovall*, 212 F.3d 940, 943 n.1 (6th Cir. 2000); see also *DiBenedetto v. Hall*, 272 F.3d 1, 6 (1st Cir. 2001).

To meet the "high standard" that AEDPA erects before "a federal court may issue a writ of habeas corpus to set aside state-court rulings," *Uttecht v. Brown*, 127 S. Ct. 2218, 2224 (2007), the federal court must do more than pay lip service to § 2254(d)(1)—and lip service is all the Sixth Circuit paid here. The Ohio Supreme Court decision at issue was neither "contrary to," nor "an unreasonable application of, clearly established Federal law," 28 U.S.C. § 2254(d)(1), because the disputed jury instructions were materially different from the problematic jury instructions in *Mills*. That difference alone required the Sixth Circuit to deny Spisak's request for habeas relief.

2. *Mills* does not apply to jury instructions that require unanimity in the verdict, as opposed to instructions that require unanimity on individual mitigation factors.

The Warden and Spisak agree that the relevant constitutional question is whether a reasonable juror could have understood the jury instruction or verdict forms to require unanimous findings on individual mitigating factors. Opp. at 5. After all, that is what *Mills* was about: The Court held that a 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. 486 U.S. at 384.

What Spisak and the Sixth Circuit's opinion fail to recognize is that the instructions in this case differ markedly from those in *Mills*. The jury instructions and verdict form in *Mills* were unconstitutional because the jurors were first 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 those mitigating factors. That problematic procedure apparently resulted in the jurors' complete failure to conduct the required weighing process. *Id.* at 380 n.13. As a result, the jurors could reasonably have thought that they needed unanimously to agree on each mitigating factor.

No reasonable juror in this case could have made the same mistake. The jury instructions at Spisak's penalty phase simply required juror unanimity in the ultimate determination—whether the aggravating factors 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 circumstance in each separate count outweigh[ed] the mitigating factors," then it was required to recommend "that a sentence of death be imposed upon the defendant." App. 324a. If the jury found, however, "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 a life sentence. *Id.* The verdict form

further required juror agreement only as to the overall balance between aggravating and mitigating factors. That requirement is a far cry from mandating uniform agreement on individual mitigating factors. Finally, even assuming Spisak is correct that Ohio law required a different jury instruction, see Opp. at 14 n.7, "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).

3. Other circuits and other panels of the Sixth Circuit have reached opposite conclusions when evaluating nearly identical jury instructions.

The inter- and intra-circuit conflicts on the application of *Mills* to jury-instruction claims further justify this Court's review. First, the conflicts demonstrate that the Sixth Circuit's holding is not "clearly established" for AEDPA purposes. See *Carey v. Musladin*, 127 S. Ct. 649, 654 (2006) (lower court divergence reflects "lack of guidance from this Court"). And second, the conflicting rulings show the need for this Court to clarify the reach of *Mills*.

Contrary to Spisak's assertions, the Sixth Circuit's decision that *Mills* prohibits instructions that require unanimity on the ultimate balance of aggravating versus mitigating factors directly conflicts with other circuits' decisions. The Third Circuit, for instance, found that *Mills* does not prohibit the trial court from instructing the jury to impose death "if you unanimously agree . . . that the aggravating circumstance outweighs any mitigating circumstances." *Zettlemoyer v. Belcomer*, 923 F.2d

284, 308 (3d Cir. 1991). Similarly, the Tenth Circuit found that an instruction requiring the jury to "find unanimously that the aggravating circumstances outweigh any mitigating circumstances before imposing the death penalty" did not violate *Mills*. *LaFevers v. Gibson*, 182 F.3d 705, 719 (10th Cir. 1999); see also *Powell v. Bowersox*, 112 F.3d 966, 970-71 (8th Cir. 1997) (finding no *Mills* violation where jury instructions "deal with balancing mitigating circumstances against aggravating factors"); *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). Yet the Sixth Circuit here, considering virtually indistinguishable instructions that required the jury impose death "[i]f all twelve members of the jury find . . . that the aggravating circumstance[s] . . . outweigh[] the mitigating factors," found a *Mills* violation. App. 4a. That decision created a clear conflict among the circuits.

The Sixth Circuit is not alone on the wrong side of that conflict. In *Abu-Jamal v. Horn*, 520 F.3d 272 (3rd Cir. 2008), *petition for cert. filed*, No. 08-652 (U.S. Nov. 14, 2008), the Third Circuit held that a verdict form requiring a unanimous finding that aggravating circumstances outweighed mitigating factors ran afoul of *Mills*. Spisak's case therefore provides this Court with an opportunity to resolve a division with at least four circuits finding no *Mills* problem, and two finding constitutional error with respect to materially indistinguishable instructions.

The division of authority is exacerbated by the Sixth Circuit's inconsistent application of *Mills* to jury instructions similar to those at issue here. Even though both the district court, see App. 189a, and the Sixth Circuit, see, e.g., *Williams v. Anderson*, 460 F.3d 789, 810-13 (2006), have acknowledged an intra-circuit inconsistency, Spisak insists that that "'confusion' is not 'conflict.'" Opp. at 12 n.4. But the varying outcomes are not, as Spisak asserts, attributable to differences between jury instructions, see Opp. at 12; rather, the circuit has considered similar instructions before and arrived at the opposite conclusion. In *Coe v. Bell*, 161 F.3d 320 (6th Cir. 1998), the Sixth Circuit held that *Mills* did not prohibit an instruction requiring the jury to impose death if they "'unanimously determine[d]'" that the aggravating circumstances were "'not outweighed by any mitigating circumstances,'" *id.* at 337 (quoting instructions), because "language requir[ing] unanimity as to the results of the *weighing* . . . is a far different matter than requiring unanimity as to the *presence* of a mitigating factor," *id.* at 338; see also *Scott v. Mitchell*, 209 F.3d 854, 876-77 (6th Cir. 2000) (following *Coe*).

The courts are inconsistently applying *Mills*, in short, both within and among the circuits, and this Court's guidance is needed.

B. The Sixth Circuit's analysis of Spisak's ineffective assistance claim misapplied *Strickland* and contravened the principles of AEDPA.

1. The Sixth Circuit failed to conduct an inquiry into actual prejudice.

The Warden showed in his Petition that the Sixth Circuit, by focusing on trial counsel's alleged deficiencies to the exclusion of any sort of prejudice inquiry as required by *Strickland*, indulged a presumption of prejudice akin to *United States v. Cronic*, 466 U.S. 648 (1984). For his part, Spisak does not claim any entitlement to a presumption of prejudice, but instead contends that the Sixth Circuit *did* conduct a prejudice inquiry. Spisak's argument finds no support in the Sixth Circuit's opinion.

To establish prejudice under *Strickland*, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. At the penalty phase of a capital trial, courts "reweigh the evidence in aggravation against the totality of available mitigating evidence" to determine whether, but for counsel's deficiencies, a reasonable probability exists that the jury would have imposed a life sentence. *Wiggins v. Smith*, 539 U.S. 510, 534 (2003).

The Sixth Circuit never conducted this reweighing. After cataloging the deficiencies in trial counsel's closing argument, the Sixth Circuit offered a one-sentence conclusory statement: "[W]e 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 court never articulated why, but for the closing, a reasonable probability existed that the jury would have voted for life.

The Sixth Circuit's embrace of *Rickman v. Bell*, 131 F.3d 1150 (6th Cir. 1997), confirms the Warden's position. The *Rickman* court found that trial counsel's "performance was so egregious as to amount to the virtual or constructive denial of the assistance of counsel, and thus implicate[d] the *Cronic presumption* of prejudice." *Id.* at 1156. Here, the Sixth Circuit struck an identical chord: "We believe that trial counsel's actions discussed above are so egregious that they are equivalent to those in *Rickman*, and similarly deprived [Spisak] of effective assistance of counsel." App. 66a. And as in *Rickman*, the court here omitted any analysis into *Strickland*'s prejudice prong.

In response, Spisak observes that the Sixth Circuit cited only *Strickland*, not *Cronic*, and asserts that "it must be presumed that a court does not follow law it does not cite." Opp. at 18. But this simplistic statement elevates citation over substance and ignores the Sixth Circuit's actual analysis. The Sixth Circuit omitted any inquiry into prejudice, relying instead on a conclusory statement to complete its *Strickland* analysis. Regardless of the label, this approach expands *Cronic*'s presumption of prejudice.

2. Spisak has not established that the Ohio Supreme Court's decision was contrary to or an unreasonable application of *Strickland*.

Spisak isolates a series of passages from trial counsel's closing argument and asserts that their content establishes ineffective assistance. Opp. at 20-25. His argument is not only inaccurate but also fails to afford proper deference to counsel's judgments, as required by *Strickland*, or to the state court's adjudication of the claim, as required by AEDPA.

a. Spisak has not demonstrated deficient performance.

As to deficient performance, Spisak asserts, falsely, that trial counsel "discount[ed] any and all mitigation that might be offered on Spisak's behalf," suggesting "that the *only* mitigation was to be found within the jurors themselves." Opp. at 23, 24. But counsel unambiguously pressed, in way of mitigation, the theme of Spisak's mental illness, referring expressly to the testimony of his psychological experts. See App. 339a-344a; 353a-354a. His soliloquy on societal values—"we are different," "we are a humane society"—was the vehicle for that theme: "[A]s a people," counsel explained to the jury, "we have instructed our General Assembly to make that inability [to know wrongfulness], that substantial inability a mitigating circumstance." App. 344a.

Spisak also criticizes trial counsel for openly discounting other mitigation leads in his closing—

"redeeming qualities," "good deeds," and "sympathy." Opp. at 24. But this argument simply begs the question whether Spisak had positive traits and anecdotes to present, and whether such items would constitute a compelling mitigation case. The Sixth Circuit itself already answered that question in the negative: "The best chance of mitigation available was in fact the evidence that [Spisak] was, to some degree, mentally ill." App. 69a. Accordingly, counsel cannot be faulted for discarding arguments with little to no chance of success.

Spisak further challenges trial counsel's discussion of the nature and circumstances of the murders in his closing, asserting that counsel improperly "argued non-statutory aggravating circumstances warranting a death sentence," Opp. at 21, but this position, too, is meritless. Under Ohio law, the State must first establish a statutory aggravating factor to demonstrate a defendant's eligibility for the death penalty. See Ohio Rev. Code § 2929.04(A). Given Spisak's uncontested murder spree, his eligibility cannot be disputed. See § 2929.04(A)(5). And once eligibility is established, the jury "shall consider," in part, "the nature and circumstances of the offense" in assessing whether the defendant has presented any mitigating factors favoring a life sentence. § 2929.04(B). Therefore, the nature and circumstances of Spisak's crimes were unquestionably on the minds of the jury at the penalty phase, and subject to comment by both parties. See *State v. Smith*, 721 N.E.2d 93, 114 (Ohio 2000).

More broadly on this point, Spisak ignores the principle that "[j]udicial review of a defense attorney's summation is . . . highly deferential—and doubly deferential when it is conducted through the lens of federal habeas review." *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003). During the penalty phase, Spisak proudly testified to his involvement in the murders, his hatred of African-Americans and Jews, and his desire to "continue the war." App. 388a-397a. He also performed a "Heil Hitler" salute in front of the jury. See J.A. to 6th Cir. Case No. 03-4034, at 1820. In light of Spisak's hate-filled presentation, trial counsel faced a high degree of difficulty in crafting his closing argument. It was not unreasonable for counsel to show disgust at Spisak's actions before weaving that natural reaction into an argument that Spisak's mental defects mitigated the brutality of his acts. See, e.g., *Yarborough*, 540 U.S. at 10 (quoting Clarence Darrow) ("[Y]our Honor would be merciful if you tied a rope around their necks and let them die; merciful to them, but not merciful to civilization.").

b. Spisak has not demonstrated prejudice.

On *Strickland*'s prejudice prong, Spisak repeats the Sixth Circuit's mistake. After cataloging trial counsel's deficiencies, he states "there is a reasonable probability that at least one juror would have voted for a life sentence." Opp. at 25. Spisak offers no analysis of whether counsel's closing argument had an adverse impact on the jury's verdict, nor could he.

First, Spisak improperly magnifies the role of closing argument in the jury's deliberations. The

trial court instructed that closing arguments "are not evidence" for their deliberations, App. 316a, and jurors are presumed to have followed this instruction. See *Richardson v. Marsh*, 481 U.S. 200, 211 (1987).

Second, Spisak incorrectly suggests that trial counsel's closing argument prejudiced his mitigation case. As the Sixth Circuit noted, however, trial counsel offered at the penalty phase "extensive evidence of Defendant's severe personality disorder, flirtation with the idea of having a sex change, sexual confusion, and social isolation." App. 69a. He further drew the jury's attention to the subject of mental illness during closing argument. App. 339a-344a. And the trial court instructed the jury that "mental disease or defect" was an appropriate subject for mitigation. App. 323a. Spisak has not shown a reasonable possibility of a different result had counsel presented the mental illness theme more forcefully or effectively.

Third, Spisak fails to recognize that *he* introduced the damaging and inflammatory subjects of which he now complains. While testifying, Spisak volunteered gruesome details of each murder and expressed no remorse. For instance, he indicated that he "accomplished something" in shooting John Hardaway, celebrating the achievement with "a pizza and a couple of Cokes," App. 392a, and that he targeted Brian Warford because "[i]t's best to get them when they're young," App. 396a. Spisak also used the occasion as a soapbox, exclaiming that Hitler was "the greatest man in the last two thousand years of man's history," App. 387a, and

that his own testimony provided "a reasonable logical concise explanation for those things which must be done," App. 393a. Finally, if given the chance, Spisak said he would "escape from jail" and "continue the war [he] started." App. 397a. Even if trial counsel was wrong to repeat these facts at closing argument, there was no prejudice. The facts were already before the jury in their rawest and powerful form—Spisak's own testimony.

Errors by trial counsel violate the Sixth Amendment only where they are "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Given the incontestability of the murders, their heinous nature, Spisak's expressions of pride, and his desire to continue his criminal conduct, any error by counsel at closing argument did not prejudice the overall fairness of the trial. At the very least, the Ohio Supreme Court's rejection of Spisak's ineffective assistance claim was not contrary to or an unreasonable application of *Strickland*.

CONCLUSION

For these reasons, the Court should grant the Petition.

Respectfully submitted,

RICHARD CORDRAY
Attorney General of Ohio

BENJAMIN C. MIZER*
Solicitor General
**Counsel of Record*
KIMBERLY A. OLSON
DAVID M. LIEBERMAN
Deputy Solicitors
CHARLES WILLE
Assistant Attorney General
30 E. Broad Street, 17th Fl.
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax

Counsel for Petitioner

January 12, 2008