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No. 08-652

IN THE
SUPREME COURT OF THE UNITED STATES

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JEFFREY A. BEARD, et al.
Petitioners

v.

MUMIA ABU-JAMAL,
Respondent

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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# PETITION FOR WRIT OF CERTIORARI

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## Capital case: Questions presented

In 1995 the state court faced a *Mills v. Maryland* claim on collateral review. In denying the claim it expressly relied on *Zettlemoyer v. Fulcomer,* in which the Third Circuit held that the Pennsylvania instructions and verdict form did not violate *Mills*. It also relied on many similar rulings by other circuits. But by the time the claim was on federal habeas review the Third Circuit had changed its mind. In *Banks v. Horn* the circuit court applied a rule not clearly stated in *Mills*, and held that to uphold the Pennsylvania instructions and verdict form (as the circuit court itself had previously done) is not merely *incorrect*, but *unreasonable*.

1. Can a state court's failure to anticipate a rule not clearly stated by this Court but derived from *Mills* by a federal circuit court be an unreasonable application of "clearly established" federal law?

2. Can a state court ruling amount to an "unreasonable" application of federal law where the state court decision conforms to consistent decisions of federal appellate courts over the course of a decade?

[These questions were presented but left undecided in *Beard v. Banks*, 542 U.S. 406 (2004)]

## List of parties

*Petitioners*

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Department of Corrections

Louis S. Folino, Superintendent of the State
Correctional Facility at Greene, Pennsylvania

Lynne Abraham, District Attorney of Philadelphia,
Pennsylvania

Tom Corbett, Attorney General of the
Commonwealth of Pennsylvania,

*Respondent*

Mumia Abu-Jamal

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## Orders and Opinions below

The March 27, 2008 judgment and opinion of the United States Court of Appeals for the Third Circuit, affirming the order of the district court, is reported at *Abu-Jamal v. Horn, et.al.,* 520 F.3d 272 (3d Cir. 2008), and is reprinted in the Appendix at App. 3-125. The July 22, 2008 order of the Third Circuit denying respondent's petition for rehearing and rehearing en banc is reprinted in the Appendix at App. 1-2. The December 18, 2001 order of the district court conditionally granting the petition for writ of habeas corpus is reprinted in relevant part in the Appendix at App. 126-170. The October 29, 1998 decision of the Supreme Court of Pennsylvania is reprinted in relevant part in the Appendix at App. 171-174. The September 15, 1995 PCRA decision of the Philadelphia Court of Common Pleas is reprinted in relevant part in the Appendix at App. 175-177. The July 2, 1982 sentencing jury instructions and sentencing verdict form are reprinted in relevant part in the Appendix at App. 178-190.

## Jurisdiction

This is a federal habeas corpus proceeding. Petitioner seeks review of the order of the United States Court of Appeals of the Third Circuit dated March 27, 2008, affirming the order of the district court granting the writ as to sentencing. The court denied en banc rehearing on July 22, 2008. This

Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

## Constitutional and statutory provisions involved

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

28 U.S.C. § 2254(d) provides, in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the 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; ...

42 Pa.C.S. § 9711 states, in pertinent part:

(c) INSTRUCTIONS TO JURY.--

(1) Before the jury retires to consider the sentencing verdict, the court shall instruct the jury on the following matters:

(i) the aggravating circumstances specified in subsection (d) as to which there is some evidence.

(ii) the mitigating circumstances specified in subsection (e) as to which there is some evidence.

(iii) aggravating circumstances must be proved by the Commonwealth beyond a reasonable doubt; mitigating circumstances must be proved by the defendant by a preponderance of the evidence.

(iv) the verdict must be a sentence of death if the *jury unanimously finds at least one aggravating* circumstance specified in subsection (d) and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances. The verdict must be a sentence of life imprisonment in all other cases.

## Statement of the case

The Third Circuit affirmed habeas relief under *Mills v. Maryland*, granting a new sentencing hearing to the killer of a police officer two decades after his conviction. But the reasonableness of the state ruling was obvious. It expressly relied on a decision of the Third Circuit itself, and mirrored decisions of many other federal appellate courts over the course of a decade. The state court also could not have unreasonably applied "clearly established" federal law by failing to anticipate the Third Circuit's extension of *Mills* after that court had changed its mind and declined to adhere to its own prior decision.

These AEDPA deference issues were left unresolved by *Beard v. Banks*, 542 U.S. 406 (2004), but they continue to arise in Pennsylvania capital habeas cases, and the proper level of deference due such claims continues to be disputed.

Shortly before 3:38 a.m. near the corner of 13th and Locust Streets in Philadelphia, Officer Daniel Faulkner stopped a Volkswagen driven by one William Cook. The officer, who was in uniform and drove a marked police car, sent a radio call for the assistance of a police van. As he stood behind Cook and was apparently about to frisk him, Cook turned and punched him in the face. Officer Faulkner attempted to subdue and handcuff Cook. As he did so, respondent Mumia Abu-Jamal, a/k/a Wesley Cook

– William Cook's brother – emerged from a parking lot on the opposite side of the street. He ran up behind the officer and shot him in the back. The officer turned and managed to fire one shot that hit respondent in the upper chest. Officer Faulkner fell to one knee, and then fell to the ground and lay face-up. Respondent stood over him and methodically emptied his revolver at the officer's upturned face. One of his bullets struck the officer between the eyes and entered his brain (N.T. 6/19/82, 106, 209-216, 276-277; 6/21/82, 4.79-4.106, 5.179; 6/23/82, 6.97; 6/25/82, 8.4-8.34, 8.181; 6/28/82, 28.65).

Having been shot in turn by his victim, respondent sat on the curb and was still there when backup officers arrived moments later. He tried to pick up his gun and use it against them but was disarmed by one of the officers who kicked the weapon out of reach (N.T. 6/19/82, 116-117). The police transported respondent to Jefferson University Hospital, where he twice loudly announced, "I shot the mother f__ker and I hope the mother f__ker dies" (N.T. 6/19/82, 176-199, 263-264; 6/21/82, 4.109, 4.194-4.199; 6/24/82, 27-30, 33-34, 56-61, 67-68, 74, 112-116, 123, 126, 133-136). Shortly thereafter, Officer Faulkner, who had been brought to the same hospital, was pronounced dead.

On July 1, 1982, following seventeen days of testimony, a jury convicted respondent of murder of the first degree and possession of an instrument of crime (Nos. 1357-1358, January Term 1982).

In the penalty phase the jury was instructed to impose death only if it was unanimous in *rejecting* mitigation: "Remember that your verdict must be a sentence of death if you unanimously find at least one aggravating circumstance and no mitigating circumstances." Otherwise the jurors were told they must weigh "any" mitigation: "Or, if you unanimously find one or more aggravating circumstances which outweigh any mitigating circumstances. In all other cases, your verdict must be a sentence of life imprisonment" (N.T. 7/3/82, 92).[1]

The jurors were also provided with a verdict form stating "We, the jury, having heretofore determined that the above-named defendant is guilty of murder of the first degree, do hereby further find that ...," followed by each of the three options described above. Lines for recording any aggravating and mitigating circumstances were provided, followed by a complete list of all statutory aggravating and mitigating circumstances. Next to each listed aggravating and mitigating circumstance was a space for a check mark, and at the end of the form were

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[1] As in all contemporary Pennsylvania cases, these instructions closely followed 42 Pa.C.S. § 9711(c)(iv): "the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance specified in subsection (d) and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances. The verdict must be a sentence of life imprisonment in all other cases."

lines for the signatures of the jurors and the date. The form itself included no instructions. With respect to recording aggravating and mitigating circumstances, the court told the jurors to "put an 'X' mark or check mark" next to "whichever ones you find" (*Id.*, 94-95). The jurors were not instructed that unanimity was required to find a mitigating circumstance, or that failure of all twelve to agree on any particular circumstance barred consideration of mitigating evidence by individual jurors voting on the ultimate question of death versus life imprisonment.

On July 3, 1982, the jury returned a verdict of death, finding that one or more aggravating circumstances outweighed any mitigating circumstances. The jurors identified the aggravating circumstance as murdering a peace officer acting in the performance of his duties, and identified as a mitigating circumstance that respondent had no significant history of criminal convictions.

Post-trial motions were litigated through May 1983. On direct appeal the state supreme court affirmed the judgments on March 6, 1989. Respondent filed a petition for certiorari on May 2, 1990, which this Court denied on October 1, 1990. He filed a petition for rehearing on October 29, 1990, which was denied on November 26, 1990. Six months later, on May 15, 1991, he filed a second request for rehearing, which was denied on June 10, 1991.

On June 5, 1995, Respondent filed a petition

for state collateral review under Pennsylvania's Post Conviction Relief Act (PCRA), in which he raised *Mills* for the first time. Evidentiary hearings on his collateral review claims lasted from June 26, 1995, through September 1, 1995, with a supplemental evidentiary proceeding on September 11-12, 1995. On September 15, 1995, the court denied the petition. With respect to respondent's *Mills* claim, the state court expressly relied on the Third Circuit's 1991 decision in *Zettlemoyer v. Fulcomer*, as well as similar rulings by other circuit courts.

Respondent appealed the PCRA ruling to the state supreme court. After ordering supplemental evidentiary hearings held in October 1996 and July 1997, the court affirmed on October 29, 1998, and denied reconsideration on November 25, 1998.

On October 15, 1999, respondent filed in the United States District Court for the Eastern District of Pennsylvania a petition for a writ of habeas corpus raising 29 issues. On December 18, 2001, nine days after the 20th anniversary of respondent's murder of Officer Faulkner, the district court granted one of his twenty-nine habeas claims, finding that the state had unreasonably applied this Court's 1988 decision in *Mills v. Maryland* and granting a new penalty hearing.

The Commonwealth appealed. In affirming, the Third Circuit acknowledged that the trial court had not instructed that jurors must unanimously

agree on mitigating circumstances, or that failure to agree on a mitigating circumstance barred consideration of mitigating evidence in the weighing stage. Rather, the circuit court concluded that the trial court "risked jury confusion about a unanimity requirement" by the "close relation" of the instructions concerning mitigation and those stating that the verdict must be unanimous.

The Commonwealth now seeks certiorari.

## Reasons for granting the writ

### This Court should resolve the persistent AEDPA deference issues left unfinished in *Beard v. Banks.*

In granting habeas relief under *Mills v. Maryland*, 486 U.S. 367 (1988), the federal court in this case denied deference to the state judgment. Such rulings are all too typical, because AEDPA deference is persistently misunderstood. The failure of federal courts to assimilate this standard puts numerous state criminal judgments at risk.

The deference questions raised here were present in *Beard v. Banks*, 542 U.S. 406 (2004), but the Court did not reach them, because as a threshold matter the *Mills* claim was barred by *Teague v. Lane,* 489 U.S. 288 (1989). *Teague* does not apply here, but its goals of comity, finality, and federalism do. They are the basis for the deference

requirement of 28 U.S.C. § 2254(d). *Duncan v. Walker*, 533 U.S. 167, 178 (2001) ("AEDPA's purpose [is] to further the principles of comity, finality, and federalism").

The unresolved *Mills* deference issues live on. Habeas petitioners continue to raise *Mills* claims in Pennsylvania, relying on the Third Circuit's precedent that was not addressed in *Beard v. Banks*. *E.g.*, *Lambert v. Beard*, 2007 U.S. Dist. LEXIS 54047 (E.D. Pa. July 24, 2007); *Morris v. Beard*, 2007 U.S. Dist. LEXIS 44707 (E.D. Pa. June 20, 2007); *Williams v. Beard*, 2007 U.S. Dist. LEXIS 41310 (E.D. Pa. May 7, 2007); *Cross v. Price*, 2005 U.S. Dist. LEXIS 18510, 15-16 (W.D. Pa. Aug. 30, 2005); *Thomas v. Beard*, 388 F. Supp. 2d 489 (E.D. Pa. 2005); *Rollins v. Horn*, 2005 U.S. Dist. LEXIS 15493 (E.D. Pa. July 26, 2005).

This case should be accepted to resolve what was left unfinished in *Beard v. Banks*.

**1. Because this Court has never considered the *Mills*-based rule discerned by the circuit court, the state court could not have misapplied "clearly established" federal law.**

In *Mills* "this Court held invalid capital sentencing schemes that require juries to disregard mitigating factors not found unanimously." *Beard v. Banks*, 542 U.S. at 408. The *Mills* jurors were specifically told that they must unanimously agree

in order to find any mitigating circumstance, and that failure to agree on a mitigating circumstance required them to reject it. In effect, one juror could veto mitigation.

Not so in Pennsylvania: the jurors here were instructed to decide, first, if they unanimously found aggravating circumstances but no mitigating circumstances. If they found aggravating circumstances but did not unanimously agree that there were "no" mitigating circumstances, they were to weigh "any" mitigating circumstances. Since the jurors were told they must be unanimous not to *find* mitigation but to *exclude* it, and that they must otherwise weigh *any* mitigation, the instructions were the inverse of those in *Mills*.

The *Mills* error found by the federal court here does not concern what the jurors were told, but what they might have imagined -- *i.e.*, that "any mitigating circumstances" might mean "any *unanimously found* mitigating circumstances." Under the Third Circuit's view of *Mills*, relief is required if one may posit a "risk of confusion," 520 F.3d at 303 (App. 82), such that jurors hearing that unanimity applies to some aspects of the capital sentencing decision might, without being told, assume unanimity is also necessary to finding mitigating circumstances.

The difficulty with the Third Circuit's "risk of confusion" view is that *Mills*, quite simply, stated

no such rule. In both that case and *McKoy v. North Carolina*, 494 U.S. 433 (1990), it was undisputed that jurors had been *explicitly* instructed that unanimity was required to find mitigating circumstances.[2]

The Third Circuit's "risk of confusion" standard is not a restatement of the *Mills* Court's holding that jurors may not be instructed that unanimity is required to find mitigation. It is instead a gloss, derived from the *Mills* Court's discussion of Maryland's "saving construction."

In *Mills* the state conceded that the instructions erroneously required unanimity to *find* mitigation, but argued that the error was offset because the instructions could be read to require unanimity to *reject* mitigation (thus proving that no juror was prevented from giving effect to mitigating evidence because all rejected it). This Court found the proposed saving construction unpersuasive because, *on that latter point,* the instructions were ambiguous. *Mills*, 486 U.S. at 376 (if jurors

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[2] *Mills*, 486 U.S. at 378 ("it was clear that the jury could not mark "yes" in any box without unanimity"); 401 (verdict form stated "we unanimously find that each of the following mitigating circumstances which is marked 'yes' has been proven"); *McKoy*, 494 U.S. at 436 ("write 'Yes' if you unanimously find that mitigating circumstance ... [w]rite 'No' if you do not unanimously find that mitigating circumstance").

understood instructions as the state court asserted, "the court properly upheld the judgment"; but the verdict "must be set aside" if valid on only one of two grounds where court could not be certain which was adopted by the jury); 486 U.S. at 383 ("We cannot say with any degree of confidence which interpretation Mills' jury adopted"); 486 U.S. at 391 (Rhenquist, C.J., with O'Connor, Scalia, and Kennedy, J.J., dissenting) (contending that sole reasonable interpretation was that jurors "unanimously found that no mitigating factors existed") (emphasis omitted).

The ambiguity disputed in *Mills* thus concerned only the state's argument that the instructions there, which expressly required unanimity to find mitigation, might be construed to require unanimity to reject mitigation. There was no ambiguity at all in the instruction that actually created the constitutional error to begin with: the explicit instruction that jurors must unanimously agree in order to find mitigation. Because that instruction was error, the state bore the risk of ambiguity or confusion *in its saving construction.*[3]

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[3] Likewise in *McKoy*, there was no dispute that jurors had been clearly told they must be unanimous in order to find mitigation; the controversy there concerned whether the state was entitled to define as "irrelevant" mitigating circumstances not found unanimously. 494 U.S. at 438-439.

Neither in *Mills*, nor in any other case, however, has this Court ever held that a *Mills* error consists of a "risk of confusion" arising from instructions that do *not* require unanimity to find mitigation.

Indeed, such a gloss conflicts with *Boyde v. California*, 494 U.S. 370 (1990). There, this Court set out to correct improper formulations of the standard for evaluating jury instructions, several of which had appeared in *Mills* itself. *Boyde* clarified that a valid challenge to jury instructions requires a "substantial possibility" that the jury's verdict rested on a constitutionally improper ground. The principle that relief is due when a jury "is clearly instructed that it may [act on] an impermissible legal theory, as well as on a proper theory or theories," does *not* apply to instructions containing *no clear error*. 494 U.S. at 380 (relief unwarranted where instruction "is not concededly erroneous," but rather is claimed to be "ambiguous and therefore subject to an erroneous interpretation"). To hold otherwise would undermine the "strong policy against retrials years after the first trial where the claimed error amounts to no more than speculation." *Id.*

The Third Circuit's "risk of confusion" rule depends on such speculation. For the error in *Mills* – an instruction requiring unanimity to find mitigation – it substitutes an "impression" of a unanimity requirement, supposedly derived from

reference to unanimity "in close relation to ... discussion of mitigating circumstances." 520 F.3d at 303 (App. 81). But the error in *Mills* had nothing to do with the proximity of the words "unanimous" and "mitigation," and *Boyde* precludes relief where the instruction is not erroneous but merely "subject to an erroneous interpretation."

Indeed, under the Third Circuit's rule that a *Mills* error can arise from mere word proximity, error can be avoided only with an affirmative "anti-*Mills*" instruction. Because there is no way to know if the trigger words are too close or far enough apart, the circuit court's rule, in effect, requires jurors to be explicitly told that unanimity is *not* required to find mitigation. There is no other way to avoid the "risk of confusion."

Whatever else might be true of the Third Circuit's gloss, it was not clearly established by *Mills* or by any other decision of this Court. This is an AEDPA case. The writ may not issue unless the state decision unreasonably applied this Court's "clearly established" precedent. A rule that this Court has never stated cannot be "clearly established." *Wright v. Van Patten*, 128 S. Ct. 743, 747 (2008) ("Because our cases give no clear answer to the question presented, let alone one in Van Patten's favor, it cannot be said that the state court unreasonably applied clearly established Federal law") (quotation marks, citation and brackets omitted); *Schriro v. Landrigan*, 127 S. Ct. 1933,

1942 (2007) (because Supreme Court had "never addressed a situation like this," state court decision was not unreasonable at the time it was made); *Carey v. Musladin*, 127 S. Ct. 649, 653-654 (2006) (where claim raised "an open question" that Supreme Court "has never addressed," circuit court erred in ruling that state court had unreasonably applied clearly established federal law).

Directly on point is *Hudson v. Spisak*, 128 S. Ct. 373 (2007). In that case the circuit court had applied *Mills* despite the absence of a mitigation unanimity instruction. As here, it reasoned that a mitigation unanimity requirement was *implied* because the trial court told jurors they must unanimously decide whether aggravating factors outweighed mitigating factors, and "failed to instruct the jury that it need not be unanimous in rejecting the death penalty." *Spisak v. Mitchell*, 465 F.3d 684, 710 (6th Cir. 2006) (citation and internal quotation mark omitted).

In its certiorari petition in *Spisak* the state of Ohio noted that the circuit court had applied a rule not found in *Mills* by "requiring affirmative explanation ... of the jury's freedom to disagree about mitigating factors" (Ohio's petition for writ of certiorari, 20). This Court granted certiorari, vacated the circuit court's decision, and remanded for further consideration in light of *Carey v. Musladin* and *Schriro v. Landrigan*.

Certiorari is equally called for here. As in *Spisak*, the Third Circuit applied a rule – its own "risk of confusion" rule that effectively requires a non-unanimity instruction – that is not found in *Mills*.

Because the Pennsylvania supreme court could not have misapplied "clearly established" law that this Court never established, *Spisak* calls for certiorari to be granted.[4]

**2. The Pennsylvania supreme court's *Mills* ruling conforms to consistent federal appellate decisions over the course of a decade, and could not have been unreasonable.**

The Third Circuit's "risk of confusion" rule is not clearly established by *Mills*. Indeed, it conflicts with *Boyde,* which indicates that the state court's judgment here was correct. But *it did not need to be.* The question is not whether the state court's decision was *incorrect.* The question is whether it

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[4] When *Spisak* was remanded for further consideration, moreover, the Sixth Circuit persisted in its failure to abide by the "clearly established" requirement of § 2254. *Spisak v. Hudson,* 512 F.3d 852 (6th Cir. 2008). The state of Ohio is therefore expected to file another petition for certiorari, shortly after the filing of the Commonwealth's petition in this case, raising the same deference issue.

was *unreasonable*. *Woodford v. Viscotti*, 537 U.S. 19, 24 (2002) (per curiam).

The resolution of that question is simple. The state court's ruling cannot be unreasonable, because federal appellate decisions over the course of a decade *have consistently reached the same result*. These decisions reasonably conclude, as does the Pennsylvania Supreme Court, that *Mills* is not violated where there is no explicit unanimity requirement to find mitigation:

* In *Abdur'rahman v. Bell*, 226 F.3d 696, 712 (6th Cir. 2000), *cert. denied*, 534 U.S. 970 (2001), the court rejected a claim that *Mills* required relief because the proximity of the terms "unanimous" and "mitigating circumstances" implied that mitigating circumstances must be found unanimously.

* *Smith v. Dixon*, 14 F.3d 956, 982 n.15 (4th Cir.) (*en banc*), *cert. denied*, 513 U.S. 841 (1994), held that there was no *Mills* error where the jury was required to write "Yes" on the verdict form beside each mitigating circumstance "for which the defendant has satisfied you," and the instructions required unanimity as to aggravating circumstances and the outcome of the weighing stage.

* Nine of thirteen judges on the en banc panel in *Kordenbrock v. Scroggy*, 919 F.2d 1091, 1120 (6th

Cir. 1990) (*en banc*), *cert. denied*, 499 U.S. 970 (1991), concluded that, while the jurors there were told that unanimity was necessary to find an aggravating circumstance, "it cannot be reasonably inferred that silence as to finding a mitigating factor would likely cause the jury to assume that unanimity was also a requirement."[5]

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[5] *Accord Henley v. Bell*, 487 F.3d 379, 391 (6th Cir. 2007) ("the plain language of both the instructions and the verdict form require unanimity as to the weighing of aggravating and mitigating circumstances -- not the existence of a mitigating circumstance"); *Scott v. Mitchell*, 209 F.3d 854, 874 (6th Cir.), *cert. denied*, 531 U.S. 1021 (2000) (no *Mills* issue where jurors told "all 12 of you must sign [the verdict form] ... [i]t must be unanimous"); *LaFevers v. Gibson*, 182 F.3d 705, 719 (10th Cir. 1999) ("[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"); *Duvall v. Reynolds*, 139 F.3d 768, 791 (10th Cir.), *cert. denied*, 525 U.S.933 (1998) (same); *Arnold v. Evatt*, 113 F.3d 1352, 1363 (4th Cir. 1997), *cert. denied*, 522 U.S. 1058 (1998) ("Arnold now claims a "substantial possibility" existed that the jury could have thought it must also unanimously agree as to the existence of any mitigating circumstances. Unlike in *McKoy* or *Mills*, however, the jury instructions never required the jury to find any mitigating factor unanimously"); *Parker v. Norris*, 64 F.3d 1178, 1187 (8th Cir. 1995), *cert. denied*, 516 U.S. 1095 (1996) (that verdict form "failed to inform jurors that they could consider non-unanimous mitigating circumstances" did not violate *Mills*); *Griffin v. Delo* 33 F.3d 895, 905-906 (8th Cir. 1994), *cert. denied*, 514 U.S. 1119 (1995) (instruction that jurors must impose life if they unanimously found that

(continued...)

Tellingly, *this list includes the Third Circuit itself.* In 1991 – four years before respondent raised his *Mills* claim in state court – the Third Circuit followed suit in *Zettlemoyer v. Fulcomer*, 923 F.2d 284 (3d Cir.), *cert. denied,* 502 U.S. 902 (1991). There, the circuit court reviewed instructions virtually identical to those here, and concluded that they did not violate *Mills.* 923 F.2d at 308 ("Neither the court nor the verdict sheet stated that the jury must unanimously find the existence of particular mitigating circumstances ... *Mills* is clearly distinguishable").[6]

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[5](...continued)
any mitigating circumstances outweighed aggravating circumstances did not imply that they must be unanimous to find mitigating circumstances); *Lawson v. Dixon*, 3 F.3d 743, 754 (4th Cir. 1993), *cert. denied,* 471 U.S. 1120 (1994) (*Mills* not violated where jurors told to "find unanimously" whether aggravating circumstances outweigh mitigating ones; "such an instruction does not run afoul of *Mills/McKoy* because it does not state that jurors must agree unanimously on the existence of a mitigating factor") (citation and internal quotation marks omitted).

[6] The instructions in *Zettlemoyer* stated: "If you find [the sole proffered] aggravating circumstance and find no mitigating circumstances or if you find that the aggravating circumstance which I mentioned to you outweighs any mitigating circumstance you find, your verdict must be the death penalty."

When respondent first raised a *Mills* claim in his 1995 PCRA petition, the state court denied it, expressly citing and relying on *Zettlemoyer*. *Commonwealth v. Abu-Jamal*, 30 Phila. 1, 110 (1995) ("The constitutionality of similar verdict forms, along with the instructions given here, has repeatedly been upheld"; citing *Zettlemoyer* and similar cases from other circuit courts) (App. 176).

Two years after the state PCRA court relied on *Zettlemoyer*, however, the Third Circuit changed its mind.[7]

In *Frey v. Fulcomer*, 132 F.3d 916 (3d Cir.1997), *cert. denied*, 524 U.S. 911 (1998), the circuit court reached exactly the opposite result. It purported to distinguish *Zettlemoyer* by noting that in *Frey* there were fewer words between the trial court's use of the words "unanimous" and "mitigating." While those terms were seventeen words apart in *Zettlemoyer*, the court explained, they were only seven words apart in *Frey*, and created a "sound bite" that could confuse jurors into thinking that "unanimous" modified "mitigating." 132 F.3d at 923.

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[7] Although this deference question was not decided in *Beard v. Banks*, the change of mind was noted in a question from the Court at oral argument (Transcript of oral argument, *Beard v. Banks*, 11 ["... the court of appeals has changed its mind in this area, has it not?"]).

This distinction was clearly specious. Whether the words in *Zettlemoyer* or *Frey* were close or far apart, it was undisputed that they never said that the jurors must be unanimous to find mitigating circumstances.[8]

The circuit court faced a virtually identical *Mills* claim in *Banks v.Horn*, 271 F.3d 527 (3d Cir. 2001), *reversed on other grounds sub. nom. Beard v. Banks*, 542 U.S. 406 (2004).[9] *Banks*, unlike *Frey*, was governed by the new AEDPA provisions. Yet, despite the conflict with *Zettlemoyer*, in which the circuit court *itself* had ruled identically with the state court, in *Banks* the circuit court declared the state court's ruling an unreasonable application of *Mills*.

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[8] The instructions in *Frey* stated: "You are obliged by your oath of office to fix the penalty at death if you unanimously agree and find beyond a reasonable doubt that there is an aggravating circumstances [sic] and either no mitigating circumstance or that the aggravating circumstance outweighs any mitigating circumstances."

[9] The instructions in *Banks* stated: "The Crimes Code in this Commonwealth provides that the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance and no mitigating circumstances, or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstance or circumstances."

To reach that result the *Banks* court compared the trial court's instructions "with those we found in *Frey* to be constitutionally defective," and concluded that the "same concerns" discussed in *Frey* "dictate the same result here." 271 F.3d at 544, 546-548. But *Frey* was a non-deference case. Thus, while the court in *Banks* was ostensibly bound by the new, highly deferential § 2254 standard, it admitted that it actually followed its prior decision in *Frey* – a case in which there was no such deference.[10]

The situation continues to the present day. In this case the district court considered itself obliged to follow *Banks*. On appeal the Third Circuit also followed *Banks*, notwithstanding *Zettlemoyer*. It did so even though *Banks* had been reversed on *Teague* grounds in 2004, because the validity of the Third Circuit's resolution of the *Mills* claim under § 2254 was not reached by this Court.

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[10] The *Banks* court stated that it was entitled to rely on its "independent judgment in its interpretation of federal law." 271 F.3d at 542 n.15. In concluding that "independent judgment" equals deference, the *Banks* court cited part II of the opinion of Justice Stevens in *Williams v. Taylor*, 529 U.S. 362 (2000). But a majority of this Court joined only parts I, III, and IV of that opinion. As was made clear in 2002 in *Woodford v. Viscotti, supra,* this Court has rejected the view that a federal court's "independent judgment" controls under § 2254. 537 U.S. at 24 (federal court erred when it "substituted its own judgment for that of the state court").

Thus here, once again citing *Banks*, the Third Circuit found that the state court's decision that expressly relied on a controlling decision of the Third Circuit itself was *unreasonable*. The circuit court brushed aside the conflict with *Zettlemoyer* and its bearing on the reasonableness issue, vaguely acknowledging that there is "tension" between its own decisions. 520 F.3d at 304 (App. 83).

Had the Third Circuit reviewed the state court's judgment in 1991, when it decided *Zettlemoyer*, it would necessarily have found the state decision not merely *reasonable*, but *correct*. Did that same state decision somehow become not merely *incorrect*, but *unreasonable*, simply because the circuit court later changed its mind?

The Third Circuit has never addressed the conflict between its "risk of confusion" gloss on *Mills,* and the contrary view of numerous federal decisions that *Mills* is inapplicable unless jurors are in fact told to be unanimous to find mitigation. Nor has it ever addressed the conflict between its own decisions and *Zettlemoyer*, on which the state court had expressly relied in 1995, and which had previously agreed with the rulings of other circuits before the change of mind.

Thus, the circuit court has never really addressed whether the contrary view of the Supreme Court of Pennsylvania is *reasonable*. And

how could it not be? To conclude otherwise would irrationally deem *un*reasonable the persistently contrary decisions of other federal appellate courts over the course of a decade, to say nothing of the Third Circuit's own decision in *Zettlemoyer*.[11]

These issues show no sign of abating. They continue to be asserted in Pennsylvania federal habeas petitions.

This Court's intervention is needed to finally settle the unfinished business of *Banks*. Because the state court's judgment could not possibly have been an *unreasonable* application of clearly established federal law, and because the Third Circuit's decision conflicts with those of other circuits as well as its own precedent, certiorari should be granted.

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[11] Indeed, when the state of Ohio first petitioned for certiorari in the *Spisak* case, it argued that the Sixth Circuit decision conflicted with those of other circuits, citing the Third Circuit's decision in *Zettlemoyer* (Ohio petition for certiorari at No. 06-1535, p. 22). The split here is not merely between circuits, but both between other circuits and *within* the deciding circuit.

Conclusion

For the reasons stet forth above, the Commonwealth respectfully requests this Court to grant its petition for writ of certiorari.

Respectfully submitted:

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