

No. 08-598

**In the Supreme Court of the United States**

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KEITH SMITH, Warden,  
*Petitioner,*

v.

FRANK G. SPISAK, JR.,  
*Respondent.*

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

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**REPLY BRIEF OF PETITIONER**

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## REPLY BRIEF OF PETITIONER

Respondent Frank G. Spisak, Jr., presents the very same analysis that this Court rejected two years ago when it remanded this case in light of *Carey v. Musladin*, 549 U.S. 70 (2006), and *Schriro v. Landrigan*, 550 U.S. 465 (2007). Given the absence of support for Spisak’s “acquittal first” rule, the deferential manner in which closing arguments are reviewed, and the standards of the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), the Sixth Circuit erred in granting habeas relief. This Court should reverse.

### **A. Spisak’s jury instructions were consistent with *Mills v. Maryland*.**

*Mills v. Maryland*, 486 U.S. 367 (1988), provides that a State may not condition a juror’s consideration of a relevant mitigating factor upon agreement from “all 12 jurors . . . on the existence of a particular such circumstance.” *Id.* at 384. Even though this Court has explained that this rule “applies fairly narrowly,” *Beard v. Banks*, 542 U.S. 406, 420 (2004), Spisak asserts that *Mills* broadly prevents the States from asking jurors first to reach a unanimous decision on the question of death before they consider life-sentence options. (Br. 24). The jury must understand, Spisak says, that “one juror’s vote against the death penalty would prevent a death sentence.” (Br. 25).

Spisak’s approach would not just expand *Mills*; it would give a single juror a veto power that *Mills* never contemplated. The lesson of *Mills* is that one juror’s decision to reject a mitigating factor may not preclude other jurors from accepting and weighing that same factor. *Mills* does not bar instructions

that ask the jury to reach consensus on the ultimate question—whether death is an appropriate punishment. Spisak reaches a different result only by misrepresenting Ohio case law, misreading this Court’s precedents, and ignoring AEDPA.

**1. Spisak’s jury instructions complied with Ohio Supreme Court precedent.**

Throughout his brief, Spisak claims that the Ohio Supreme Court already has found the jury instructions at issue in this case unconstitutional under *Mills*. (Br. 21, 23, 31) (citing *State v. Brooks*, 661 N.E.2d 1030 (Ohio 1996)). This assertion is factually and legally incorrect.

First, the Ohio Supreme Court has never invalidated the penalty-phase instructions used at Spisak’s trial. In *Brooks*, the court reversed a death sentence because the trial court gave the following instruction: “You are now required to determine unanimously that the death penalty is inappropriate before you can consider a life sentence.” 661 N.E.2d at 1040. Four months later, the Ohio Supreme Court considered a challenge to jury instructions that were similar—indeed, nearly verbatim—to the instructions at Spisak’s trial. *State v. Davis*, 666 N.E.2d 1099, 1108-09 (Ohio 1996). The *Davis* court clarified that the deficiency in *Brooks* was limited to the trial court’s *express* unanimity instruction. *Id.* at 1109. Because the instructions in *Davis* (and here) contained no such explicit defect, the court affirmed the defendant’s death sentence. *Id.*

Second, even if the instructions here mirrored those in *Brooks*, the Ohio Supreme Court’s holding in that case was based on state law—not, as Spisak claims (Br. 23), a *Mills* deficiency. The court in *Brooks* held that *Ohio law* “require[s] the jury to recommend a life sentence even if only one juror finds the death penalty inappropriate.” 661 N.E.2d at 1042 (citing Ohio Rev. Code § 2929.03(D)(2)). Then, “consistent with the *policy* behind R.C. 2929.03(D),” the court mandated that Ohio juries receive an explicit “instruction which requires the jury, when it cannot unanimously agree on a death sentence, to move on in their deliberations to a consideration of which life sentence is appropriate.” *Id.* (emphasis added). Language was then added to Ohio’s pattern jury instructions reflecting the Ohio Supreme Court’s interpretation of the state death-penalty statute. See 2 Ohio Jury Instructions: Criminal § 503.011 (2009).

Therefore, even if Spisak could establish that his jury instructions contravened *Brooks*, he has shown nothing more than a violation of state law, which “is not a basis for habeas relief.” *Estelle v. McGuire*, 502 U.S. 62, 71-72 (1991).

**2. So-called “acquittal first” instructions do not violate *Mills*.**

Spisak argues that the trial court gave an unconstitutional “acquittal first” instruction when it told the jury to determine whether the aggravating circumstances outweighed the mitigating factors beyond a reasonable doubt. Pet. App. 323a-324a. Spisak claims that “a reasonable juror would have understood the[se] instruction[s] to mean that a

death sentence had to be unanimously rejected before a life sentence could be considered”—a potential understanding that he says violates *Mills*. (Br. 24).

Even if Spisak’s reading of the instructions is correct, his interpretation of *Mills* stretches that case beyond recognition. The *Mills* Court invalidated a cryptic set of jury instructions and verdict form because “reasonable jurors . . . well may have thought that they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance.” 486 U.S. at 384. Such a unanimity requirement as to mitigating factors, the Court said, could give rise to the perverse outcome of a jury imposing a death sentence even though all twelve jurors found the presence of at least one, albeit different, mitigating factor. *Id.* at 374. The *Mills* Court concluded that such a situation would be intolerable, because each juror “must be permitted to consider all mitigating evidence” when deciding the ultimate question about the appropriateness of the death penalty. *Id.* at 384.

Spisak would dramatically expand that holding. Whereas *Mills* prohibits instructions that “require[] jurors to find mitigating factors unanimously,” *Beard*, 542 U.S. at 413, Spisak would prohibit instructions that require jurors to answer the ultimate question—life or death—unanimously. He claims that such directives “preclude each individual juror from individually giving effect to the mitigating evidence.” (Br. 24). See also *Davis v. Mitchell*, 318 F.3d 682, 689 (6th Cir. 2003) (“Any 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*.”). Rather, Spisak argues, the jury must understand “that one juror’s vote against the death penalty would prevent a death sentence.” (Br. 25). And if such a vote occurs in deliberations, the jury should move to a discussion of life sentences. (Br. 21, 22, 24, 32).

This Court has already made clear, however, that a State may instruct the jury to reach consensus on the ultimate question—whether the aggravating circumstances outweigh the mitigating factors. In *Jones v. United States*, 527 U.S. 373 (1999), a capital defendant argued that “the Eighth Amendment requires that the jury be instructed as to the effect of their inability to agree” on the death penalty. *Id.* at 380. The defendant asked the trial court to give the following instruction: “In the event . . . the jury is unable to agree on a unanimous decision as to the sentence to be imposed, you should so advise me and I will impose a sentence of life imprisonment . . . .” *Id.* at 379.

This Court refused, holding that “the Eighth Amendment does not require that the jury be instructed as to the consequences of their failure to agree.” *Id.* at 381. Rather, the Court noted, “the very object of the jury system is to secure *unanimity* by a comparison of views.” *Id.* at 382 (quoting *Allen v. United States*, 164 U.S. 492, 501 (1896)) (emphasis added). *Jones* therefore forecloses Spisak’s argument that his jury instructions violated the Eighth Amendment by “command[ing] that the jury

unanimously reject the death penalty before considering a life sentence.” (Br. 21).

Spisak’s argument further rests on a flawed hypothetical. He contends that, under the jury instructions, “one juror voting for a death sentence would prevent the remaining eleven jurors from voting for a life sentence because only after unanimously rejecting death could the jury consider life.” (Br. 17). But there is no constitutional defect in such an outcome. All twelve jurors are allowed to consider and give effect to the mitigating evidence. The one dissenting juror in the hypothetical does not “prevent the remaining eleven jurors from giving effect to the mitigating evidence” (Br. 32); his vote simply results in a jury deadlock on the ultimate question.

Put simply, *Mills* protects the right of each individual juror to identify and weigh a relevant mitigating factor even if other jurors have rejected that same factor. See James S. Liebman, *Slow Dancing With Death*, 107 Colum. L. Rev. 1, 65 (2007) (“Each juror must make his or her own independent judgment about the presence and weight of mitigating factors.”). It does not prohibit the State from asking the jury, as a collective body, to “express the conscience of the community on the ultimate question of life or death.” *Lowenfield v. Phelps*, 484 U.S. 231, 238 (1988) (citation omitted). Nor does it require the State to inform the jury “as to the consequences of a breakdown in the deliberative process” on that question. *Jones*, 527 U.S. at 382.

**3. Even if “acquittal-first” instructions are unconstitutional, AEDPA bars relief.**

Even if Spisak could demonstrate that “acquittal first” jury instructions are unconstitutional under *Mills*, he cannot demonstrate a violation of “clearly established law” under AEDPA. See *Musladin*, 549 U.S. at 74 (“[C]learly established Federal law’ in § 2254(d)(1) ‘refers to the holdings . . . of this Court’s decisions as of the time of relevant state-court decision.” (citation omitted)).

First, *Mills* was not clearly established law at the time of Spisak’s conviction. As this Court has noted, “it is arguable that the ‘*Mills* rule’ did not fully emerge until the Court issued *McKoy v. North Carolina*, 494 U.S. 433 (1990).” *Banks*, 542 U.S. at 413 n.4. And *McKoy* was issued two years after the Ohio Supreme Court’s decision affirming Spisak’s conviction and sentence.

Second, even if *Mills* was clearly established law at the time, the Ohio Supreme Court’s rejection of Spisak’s jury instruction claim was not contrary to or an unreasonable application of that decision. Notwithstanding Spisak’s protestations (Br. 25-28), the Warden is not invoking AEDPA to defeat application of *Mills* to a similar fact pattern. See *Musladin*, 549 U.S. at 81 (Kennedy, J., concurring in judgment). (“AEDPA does not require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied.”). To the contrary, the Warden’s merit brief cited a litany of circuit court opinions, including a Sixth Circuit opinion, that applied *Mills* and approved jury

instructions similar to those at issue here. (Br. 24-25). Spisak did not cite a single decision going the other way. Given the many courts that have agreed with the Warden's position, either Spisak's expansive interpretation of *Mills* is wrong or it is not clearly established law.

Third, no support exists for Spisak's assertion that *Mills* clearly established the "acquittal first" doctrine. (Br. 31). No other circuit has adopted the Sixth Circuit's analysis, nor has the term emerged in any recognized treatise or law review article on penalty-phase procedures. Moreover, the Sixth Circuit recently rejected a claim by a capital habeas petitioner that his appellate counsel was ineffective for failing to raise an "acquittal first" jury instruction claim on direct appeal in the mid-1990s. See *Davie v. Mitchell*, 547 F.3d 297, 313 (6th Cir. 2008). The court observed that the circuit first adopted its "acquittal first" rule in 2003. *Id.* at 314 (citing *Davis*, 318 F.3d at 682). The *Davie* court then cited to earlier cases from the Ohio courts and the circuit itself approving jury instructions that were almost identical to those before it. *Id.* at 315-16 (citing *Davis*, 666 N.E.2d at 1109; *Henderson v. Collins*, 262 F.3d 615, 622 (6th Cir. 2001)). And those instructions are almost identical to the set used at Spisak's trial. See *id.* at 313. If an appellate attorney was not at fault in the mid-1990s for failing to predict the Sixth Circuit's subsequent creation of the "acquittal first" doctrine, then the Ohio Supreme Court also acted reasonably in 1988 when it failed to recognize the doctrine.

Thus, by the Sixth Circuit's own acknowledgement, the "acquittal first" rule was not clearly established law in 1988, and, therefore, AEDPA bars relief on that theory.

**B. The Ohio Supreme Court's denial of Spisak's ineffective assistance claim was not contrary to or an unreasonable application of *Strickland v. Washington*.**

**1. The Sixth Circuit failed to conduct the proper *Strickland* inquiry.**

On his ineffective-assistance claim, Spisak initially accuses the Warden of straying beyond the boundaries of the Petition. He argues that the sole concern of the second question presented is whether *United States v. Cronin*, 466 U.S. 648 (1984), or *Strickland v. Washington*, 466 U.S. 668 (1984), applies to his case. (Br. 32). And because the Sixth Circuit cited *Strickland*—which both parties agree applies—Spisak urges the Court to affirm the judgment below. (Br. 37).

The Warden's Petition, however, squarely asked whether the Sixth Circuit applied the correct analysis to Spisak's ineffective-assistance claim, and the Warden consistently has maintained that the circuit failed to conduct a *Strickland* prejudice inquiry. The Sixth Circuit referenced "prejudice" at just one point in its opinion: "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." Pet. App. 67a. There is

no indication that the court, as a proper *Strickland* analysis would require, “reweigh[ed] the evidence in aggravation against the totality of available mitigating evidence.” *Wiggins v. Smith*, 539 U.S. 510, 534 (2003). The appeals court’s silence shows that it presumed prejudice.

Spisak emphasizes that the Sixth Circuit’s opinion cited *Strickland*, not *Cronic*, (Br. 33, 36, 37), and he asserts that “[w]hen a court cites the correct legal standard it is presumed that the court actually applied that standard.” (Br. 34). And he casts the Sixth Circuit’s repeated invocation of *Rickman v. Bell*, 131 F.3d 1150 (6th Cir. 1997), an earlier circuit decision applying *Cronic*, as limited to the panel’s deficient-performance finding. (Br. 35).

The Sixth Circuit’s passing incantation of *Strickland*, however, does not substitute for actual analysis, and Spisak identifies no point in the Sixth Circuit’s opinion where such an analysis occurred *because it never happened*. The Sixth Circuit did not identify the nature and weight of the aggravating circumstances in this case. Nor did it articulate the mitigating factors that had been established at trial, and how they should be balanced against the aggravating circumstances. This Court therefore should not presume, as Spisak urges, that the Sixth Circuit conducted a prejudice inquiry simply because it cited *Strickland*.

**2. AEDPA deference applies to the Ohio Supreme Court's decision on direct review.**

Spisak raised his ineffective assistance claim as one of 64 propositions in a 497-page merit brief to the Ohio Supreme Court, and the court summarily rejected it on the merits. Pet. App. 306a-307a. Spisak now asserts that the court's "cursory and unexplained treatment of th[e] claim" entitles him to *de novo* federal habeas review (Br. 42), because AEDPA deference applies only to state court opinions that contain "the complexity and multi-level analysis necessary to review an ineffective assistance of counsel claim." (Br. 41-42). But this argument has no merit.

AEDPA applies "to *any* claim that was adjudicated on the merits in State court proceedings," 28 U.S.C. § 2254(d) (emphasis added), and this Court has straightforwardly applied that command. In *Weeks v. Angelone*, 528 U.S. 225, 231 (2000), the state supreme court summarily denied the petitioner's jury instruction claim on the merits. This Court nevertheless applied AEDPA and deferred to the state court's reasonable analysis of the law. *Id.* at 237.

The federal appellate courts likewise have rejected arguments that summary denials receive no deference under AEDPA. A summary denial is still a "state court decision on the merits of a federal constitutional claim" and, therefore, "an 'adjudication' of the claim for purposes of § 2254(d)." *Bell v. Jarvis*, 236 F.3d 149, 163 (4th Cir. 2000) (en banc). In such cases, the habeas court applies

AEDPA's deferential standards but "focus[es] on the result of the state court's decision." *Harris v. Stovall*, 212 F.3d 940, 943 n.1 (6th Cir. 2000); accord *Ferguson v. Culliver*, 527 F.3d 1144, 1146 (11th Cir. 2008); *Weaver v. Bowersox*, 438 F.3d 832, 839 (8th Cir. 2006); *Murth v. Frank*, 412 F.3d 808, 815 (7th Cir. 2005); *Chadwick v. Janecka*, 312 F.3d 597, 606 (3d Cir. 2002); *Sellan v. Kuhlman*, 261 F.3d 303, 310-12 (2d Cir. 2001); *Aycox v. Lytle*, 196 F.3d 1174, 1177-78 (10th Cir. 1999).

**3. Spisak cannot demonstrate deficient performance in this unusual case.**

Spisak acknowledges that counsel had "an admittedly difficult case in closing argument," (Br. 43), but his analysis completely ignores that reality. This was not a run-of-the-mill capital murder trial. Spisak's counsel faced a next-to-impossible task when his client expressed pride in how he executed his victims, antagonized the jury with his racist views, insisted that he would continue to kill if given the chance, groomed himself to look like Adolf Hitler, and performed a Nazi salute before the jury. The customary rules of trial advocacy do not have the same currency in such extraordinary circumstances. And the *Strickland* analysis, of course, "judge[s] the reasonableness of counsel's challenged conduct *on the facts of the particular case*, viewed as of the time of counsel's conduct." 466 U.S. at 690 (emphasis added).

Spisak raises four main objections. First, he criticizes counsel for recounting the gruesome circumstances of each murder. He asserts that,

under Ohio law, “[t]he nature and circumstances of the killings themselves may not be considered as aggravating circumstances,” and that counsel’s statements therefore improperly invited the jury to consider “inflammatory non-statutory aggravating factors.” (Br. 53). But Spisak is simply wrong about Ohio law. The jury in this case found that Spisak’s offense “was part of a course of conduct involving the purposeful killing of . . . two or more persons.” Ohio Rev. Code § 2929.04(A)(5). It would therefore weigh that “course of conduct” as an aggravating circumstance—specifically, that Spisak targeted his five victims as part of his effort “to inflict the maximum amount of damage and casualties on the enemies.” J.A. 147. Furthermore, the Ohio Supreme Court has flatly stated that “the sentencer ‘may rely upon and cite the nature and circumstances of the offense as reasons supporting its finding that the aggravating circumstances were sufficient to outweigh the mitigating factors.’” *State v. Hancock*, 840 N.E.2d 1032, 1054 (Ohio 2006) (citing *State v. Stumpf*, 512 N.E.2d 598, 602 (Ohio 1987)). Thus, because the jury would in any event have considered the indisputably heinous nature of Spisak’s crimes, it was not unreasonable for trial counsel to acknowledge the circumstances of the offenses.

Amici similarly complain that “counsel’s lengthy and detailed focus” on Spisak’s crimes “far exceeded an exercise in gaining credibility,” and that counsel should not have made the circumstances of the murders “the central point” of his presentation. (Br. 12-13). But amici fail to acknowledge that it was Spisak, not his lawyer, who made these facts the “central point” of the case. Far from expressing

remorse for, or even indifference toward, his victims' suffering, Spisak celebrated it. His murder of Reverend Rickerson was, in Spisak's words, "pretty nice" and "pretty slick," J.A. 323, and he commemorated it with "a small party at [his] house," J.A. 99. Spisak felt "[p]retty good" about hunting down and shooting John Hardaway on a transit platform, marking it with "a pizza and a couple of Cokes." J.A. 119-20. His murder of Brian Warford in a public bus stop "was so perfect" because he went "unseen and unheard," J.A. 172, and he bragged that he shot Timothy Sheehan "right between his eyes" in a campus restroom, J.A. 194.

Amici's statement that counsel should have been "as brief as possible" with these "potential problems" is unpersuasive. (Br. 13). Given the candor and revelry with which Spisak embraced his victims' deaths, his counsel likely would have engendered the jurors' skepticism if he tried to sweep these unforgettable facts under the carpet. Instead, counsel reasonably attempted to gain credibility by confronting the depravity of Spisak's crimes head on.

Second, Spisak and his amici condemn counsel's decision to malign Spisak's associations with Hitler and Nazism. There was "no justification," amici argue, for "relating the commission of [Spisak's] crimes to Nazi Germany" at summation. (Br. 26). But this position, too, disregards the trial's indelible moments. Spisak boasted that his crimes were motivated by his desire to advance the goals of Hitler. See, e.g., J.A. 93 ("I would give my life for the survival of my people and my race."); J.A. 144 ("I am fighting against the forces of darkness which are

represented by . . . the Jews and Satan creation which is the dark races.”). And if jurors needed a reminder at closing argument, Spisak sat in the courtroom sporting a thin, Hitler-style mustache. J.A. 289, 391, 437. Given that Spisak’s neo-Nazi allegiances were the elephant in the room, his counsel had no choice but to acknowledge those beliefs and condemn them for what they are—“sick,” “distorted,” and “twisted.” Pet. App. 337a.

Third, Spisak attacks counsel for failing to “humaniz[e]” his client and “assert the many mitigating factors that were present.” (Br. 55-56). But Spisak does not identify what positive traits or anecdotes counsel could have presented. The records in defense counsel’s possession revealed that Spisak had a normal childhood, J.A. 663-67, and an average I.Q. of 94, J.A. 680. Spisak was married at one point with a child, but he often physically abused his wife (because “it seemed like she wanted to get beat up”) and once shot her in the stomach with a BB gun. J.A. 660. Spisak regularly smoked marijuana, J.A. 671-72, and collected Nazi memorabilia, J.A. 686. At time of his arrest, he was unemployed and living alone. J.A. 660.

Spisak similarly overstates the inadequacy of counsel’s description of his mental illnesses. To be sure, counsel might have offered more detailed descriptions of the expert testimony on Spisak’s mental disorders, but it is not clear than those details would have *helped* a plea for leniency. Spisak’s lead expert, Dr. McPherson, offered the most detailed testimony on Spisak’s psychological profile. She said that, due to his personality

disorder, Spisak had “no emotional response” to his murders. J.A. 468. His gender identity disorder has a “sexualized component” whereby Spisak “gets rather excited with the idea of killing” due to his “out of control” sexuality. J.A. 472. Dr. McPherson also concluded that Spisak’s hatred of blacks was “a sexualized kind of thing,” and “a power thing,” J.A. 474, and that his affiliation with Hitler was a vehicle for him to control his “very disturbing and troublesome” impulses, J.A. 480. Dr. McPherson next testified that Spisak’s psychological profile was elevated due to possible malingering, J.A. 482, and marijuana use, J.A. 484. She found that Spisak’s long-term outlook was “very poor,” J.A. 475, and emphasized that Spisak was “capable of doing very, very bad things,” J.A. 484.

This testimony shows why it might have been unwise for counsel to present, as Spisak argues, a detailed “explanation of the nature of [his] significant mental illnesses” and how “those illnesses related to . . . the crimes” at closing argument. (Br. 57). The testimony would not, as amici suggest, have evoked feelings of “compassion due to Spisak’s mental illness.” (Br. 16). Counsel therefore had to walk a fine line, presenting enough detail in summation for the jury to identify mental illness as a mitigating factor, but not so much that the jury recalled the disturbing aspects of the experts’ testimony. Counsel might have failed to thread this needle, but it was not unreasonable to try.

Fourth, Spisak argues that counsel was ineffective because he failed to “request a life sentence.” (Br. 52). Amici likewise contend that

counsel “let[] jurors off the hook” by saying he would be proud of them no matter the verdict, thereby “ignor[ing] the well-accepted tenant of trial advocacy that the advocate should ask the jurors for something specific.” (Br. 23). But Spisak and his amici disregard case law that says the opposite.

Federal courts have refused to find constitutional ineffectiveness when defense counsel’s closing statement candidly acknowledges that jurors could vote either way. The Fifth Circuit has recognized that “counsel . . . may even concede that the jury would be justified in imposing the death penalty.” *Carter v. Johnson*, 131 F.3d 452, 466 (5th Cir. 1997); see also *Riley v. Cockrell*, 339 F.3d 308, 315 (5th Cir. 2003) (“I’m not asking you to look at mitigation. It’s not—not there. Wouldn’t lie to you”). The Fourth Circuit has sustained the constitutionality of a similar summation. *United States v. Jackson*, 327 F.3d 273, 299 (4th Cir. 2003) (“[H]is lawyer conceded during closing argument that ‘justice in this case says death.’”).

At closing argument, counsel stressed the one theme he had left—mental illness. To be clear, the Warden does not in the least suggest, as amici fear, that counsel’s effort should be a lesson for “generations of future lawyers . . . about how to present a case.” (Br. 3). The summation was confusing and disjointed, and it obviously failed to persuade. But these problems are attributable less to counsel’s own failings and more to the fact that Spisak himself undercut all possible mitigation

themes from the stand.<sup>1</sup> Under the peculiar facts of this case, counsel's summation did not transform the trial into "a[n] [un]reliable adversarial testing process." *Strickland*, 466 U.S. at 688.

**4. Spisak cannot demonstrate prejudice.**

Even if counsel's performance was deficient, it was not prejudicial. *Strickland's* prejudice inquiry asks "whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." 466 U.S. at 695. And nothing counsel could have done would have altered that ultimate balance.

The record offered Spisak's counsel no recourse to the traditional mitigation themes. As discussed above, there is no evidence of a traumatic upbringing, childhood abuse, or neglect, for Spisak testified that his parents properly cared for him. J.A. 252-53. Nor is there evidence of a positive relationship between Spisak and his parents, siblings, ex-wife, or daughter. On the contrary, Spisak beat his wife. J.A. 660-68. And at the time of his arrest, Spisak was unemployed, living alone, and using marijuana. J.A. 660-61.

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<sup>1</sup> It is worth noting that counsel had considerable trial experience in criminal cases, specifically capital cases. See James F. McCarty, *Defense Lawyer Thomas M. Shaughnessy*, 63, *Dies*, Cleveland Plain Dealer, Nov. 25, 1997, at 1A. See generally *Cronic*, 466 U.S. at 665 ("The character of a particular lawyer's experience may shed light in an evaluation of his actual performance.").

The record likewise offered counsel little basis at closing argument for allaying the jury's natural fears about Spisak's future dangerousness. The defendant's "future dangerousness is on the minds of most capital jurors, and is thus at issue in virtually all capital trials, whether or not it is argued by the prosecution or is a statutorily mandated sentencing consideration." ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 10.11 cmt. (rev. ed. 2003) (internal quotation marks omitted), *reprinted in* 31 Hofstra L. Rev. 913, 1062 (2003). The jurors would have to choose between a death sentence and two different life sentences with the possibility of parole, Pet. App. 324a-325a, and Spisak's behavior gave them cause for particular concern. While in custody awaiting trial, Spisak fought with two black inmates over playing cards. J.A. 368. He later penned a hate-filled letter to a friend about the incident, lamenting, "I wish I had a human submachine gun right now so I could exterminate every single one of those kinky-haired mother-fuckers in this jail just like Hitler's Nazi SS soldiers did to all those poor Jews in World War II." J.A. 372. He promised to "slay these vile, filthy, foul-mouthed Pagan, Devil-worshipping illegitimate black bastard sons of Satan." J.A. 374. Any juror hearing that pledge would reasonably think that Spisak was a risk for further acts of violence.

Rather, Spisak confines his prejudice argument to one point. He contends that counsel should have "explain[ed] the nature of the mental illness" and "their direct relationship to the crimes and Spisak's beliefs," and then "advocate[d] directly for a life

sentence.” (Br. 64). But Spisak’s experts offered detailed testimony about his schizotypal personality, borderline personality, and gender identity disorders. Spisak cannot show a reasonable likelihood that, had counsel reiterated those details at closing argument, the jury would have returned a life sentence.

The fact that a defendant has a personality disorder is not, in and of itself, a strong mitigating factor under Ohio law. For one thing, the Ohio Supreme Court has explained that “[p]ersonality disorders are often accorded little weight because they are so common in murder cases.” *State v. Wilson*, 659 N.E.2d 292, 310 (Ohio 1996); accord *State v. Taylor*, 676 N.E.2d 82, 98 (Ohio 1997) (“As to the R.C. 2929.04(B)(7) ‘other factors,’ this court normally has accorded little weight to ‘personality disorders’ as a mitigating ‘other factor.’”). In fact, Spisak’s own experts contributed to the dilution of his mental-disorder evidence by observing that “a high proportion” of prisoners—and perhaps every Ku Klux Klan member—have personality disorders. See Trial Tr. at 2490, 2761 (6th Cir. J.A. 2663, 2934).

Such evidence carries substantial weight in mitigation only if the defendant establishes a certain connection between his condition and the crime. Under the statute, he must show that “a mental disease or defect” caused him to “lack[] substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.” Ohio Rev. Code § 2929.04(B)(3). Or, stated more generally, the defendant must show that his disorder was “so severe as to inhibit [his] ability to

control his actions.” *State v. Hoffner*, 811 N.E.2d 48, 66 (Ohio 2004).

On this score, Spisak’s evidence was weak. All three defense experts stated that Spisak knew that his actions were criminal. See, e.g., J.A. 593 (Markey) (“[H]e knew that what he was doing was against the law.”); J.A. 704 (McPherson) (“[H]e showed a capacity to identify his situation, understand it and his prospects.”); J.A. 719 (Bertschinger) (“[H]e knew the wrongfulness of his acts and had the ability to refrain from the acts.”). And although these experts also concluded that Spisak had difficulty controlling his aggressive impulses to kill, the trial testimony demonstrated otherwise. For instance, Spisak described an occasion where he refrained from shooting a black man:

Q: If you hadn’t seen the police car, you would have gone out there and shot him?

A: No doubt about it.

Q. That’s why you didn’t do it, the police were there?

A: That would be kind of stupid to do with the police there.

J.A. 350. This exchange establishes Spisak’s ability to control his impulses—or, in the words of the statute, to “conform his conduct to the requirements of law.”

Moreover, Spisak fails to recognize that a detailed discussion of his psychological profile at

closing could have been damaging. As discussed above, the experts painted a grim portrait. Dr. McPherson called Spisak “pathological,” said he had a fetish for killing, and reported that he was “capable of doing very, very bad things.” J.A. 472, 484. Dr. Bertschinger indicated that, if given the chance, Spisak would likely kill again. J.A. 546. Dr. Markey testified that Spisak “had views of his own of the law . . . in which he could indict, convict, and execute the enemy.” J.A. 596. All three expressed pessimism that these views or behaviors would change with treatment or time. J.A. 475, 546, 605. It is unlikely that the jurors would have shown greater sympathy for Spisak if only they had been reminded of this testimony.

Finally, no matter what defense counsel argued in summation, the State would get the last word. And during that presentation, the State could “legitimately refer to the nature and circumstances of [Spisak’s] offense[s] . . . to explain why the specified aggravating circumstances outweigh[ed] mitigating factors” in the case. *State v. Frazier*, 873 N.E.2d 1263, 1294 (Ohio 2007).

For all the faults that Spisak finds in his counsel’s summation, he nowhere articulates an alternative closing argument that would have been more effective. Given the heinous nature of the murders, Spisak’s unforgettable trial testimony and conduct, and his stated desire to commit future crimes, there is not a reasonable probability that a different closing argument would have yielded a different result in this case.

**CONCLUSION**

The Court should reverse the Sixth Circuit's grant of the habeas writ.

Respectfully submitted,

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