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P R O C E E D I N G S

(11:06 a.m.)

CHIEF JUSTICE ROBERTS: We will hear
argument next in Case 08-724, Smith v. Spisak.

General Cordray.

ORAL ARGUMENT OF GEN. RICHARD CORDRAY

ON BEHALF OF THE PETITIONER

MR. CORDRAY: Thank you, Mr. Chief Justice,
and may it please the Court:

Because this case arises under the
deferential standards of the AEDPA statute, Mr. Spisak
must show that the Ohio Supreme Court's decision was
contrary to Mills v. Maryland or that it unreasonably
applied Strickland v. Washington --

JUSTICE SOTOMAYOR: Why? I -- I have been
trying to figure out why the State court would know in
its decisionmaking that Mills commanded a different
result when Mills was issued after the State denied its
petition for rehearing.

MR. CORDRAY: It's a bit of a conundrum,
Your Honor, because Mills was issued after the Ohio
Supreme Court's decision here, but before it became
final on direct review when cert was denied by this
Court in March of 1989.

JUSTICE SOTOMAYOR: Well, finality in that

1 sense is generally looked at in terms of AEDPA statute
2 of limitations. Why should the same rule apply to the
3 question of whether a State has acted contrary to or
4 unreasonably in light of Supreme Court precedent when
5 the precedent didn't exist at the time it was rendering
6 its decision? How can a court act?

7 MR. CORDRAY: I'm perfectly willing, Your
8 Honor, to back it up a step and say Mills was not
9 clearly established law at the time that the Ohio
10 Supreme Court decided, although the issues were current
11 at the time.

12 But I would go further and say the extension
13 of Mills that the Sixth Circuit's ruling made here is
14 not clearly established law even today, more than
15 20 years later. There is a -- the vast majority of
16 circuits -- Fourth, Fifth, Seventh, Eighth, Tenth --
17 have rejected the position the Sixth Circuit took here,
18 and, in fact, this case is quite distinct from Mills
19 even if Mills were applicable. But I would take your
20 point and I would agree with it that it's kind of tough
21 to impose on the Ohio Supreme Court Mills when --

22 JUSTICE SOTOMAYOR: We don't have to go any
23 further if we simply address the question of at what
24 point in time are we talking --

25 MR. CORDRAY: Fair enough.

1 JUSTICE SOTOMAYOR: -- about a State court's
2 decision, correct?

3 MR. CORDRAY: Fair enough. Yes. But I
4 would say this case is distinct even from Mills, where
5 the Court determined that the jury instructions gave the
6 jury to believe that they could only consider mitigating
7 factors that they had determined unanimously to be
8 present. And in this case, none of that was done. The
9 verdict form was quite different, and, in fact, the jury
10 was only instructed to be unanimous on the ultimate
11 question of whether the aggravators outweighed the
12 mitigators, a common instruction and one that's upheld
13 around the country consistently.

14 Second --

15 JUSTICE GINSBURG: General Cordray, under
16 the charge that was given, what happens if there is a
17 juror who thinks that the aggravating circumstances
18 don't outweigh the mitigating circumstances? Under
19 Ohio's current instruction, that means no death penalty.

20 But under the instruction that was given
21 here, that all 12 must agree on -- on the aggravators
22 outweighing the mitigators, what is the consequence of a
23 failure of the jurors to agree on that question?

24 MR. CORDRAY: Even at the time, if the jury
25 effectively hung --

1 JUSTICE GINSBURG: Yes.

2 MR. CORDRAY: -- on that question, the
3 consequence would be that the court would then impose
4 some version of a life sentence.

5 The issue is whether the jury was required
6 to be instructed that at the time, whether they were
7 required to be instructed something that might push them
8 away from unanimity. This Court has never so held, and,
9 in fact, in *Jones v. United States*, the Court rejected
10 that rule in a -- in a ruling that was not dissented to
11 by anyone on the panel. Your dissent in that case at
12 footnote 20 took no issue with the -- with the notion
13 that the jury did not have to be instructed in ways that
14 would push them away from rendering a unanimous verdict
15 on the ultimate question.

16 Since that time, as a matter of State court
17 practice, the Ohio Supreme Court in *State v. Brooks* did
18 say: We are now going to add that instruction. But
19 they later themselves rejected that that was required by
20 the -- by the Eighth Amendment in *State v. Davis*, and
21 that also has been the consistent holding of most
22 circuits, that that is not required. If I could move --

23 JUSTICE GINSBURG: It would be -- under the
24 charge that was given in this case, you say it would be
25 -- then the judge would be obliged to give one of the

1 two life sentences. It would not be a deadlock
2 requiring a resentencing hearing.

3 MR. CORDRAY: I believe that's the case at
4 the time, Your Honor.

5 At the time, the instructions pushed the
6 jury toward unanimity one way or the other. Do the
7 aggravators outweigh the mitigators, or do they not?
8 Since that time, the Ohio Supreme Court as a matter of
9 practice has been willing to go further and instruct the
10 jury -- have the jury be instructed that if a single
11 one of you feels that the aggravators do not outweigh
12 the mitigators, that will preclude a death sentence.

13 But that has never been constitutionally
14 required by this Court. It is an extension of Mills v.
15 Maryland that has never been so held by this Court and,
16 in fact, is a source of a -- of a significant
17 overwhelming majority of circuits the opposite way.

18 If I could move to the --

19 JUSTICE SOTOMAYOR: Isn't your adversary's
20 position -- I'm sure they will speak for themselves, but
21 their position would be that this is a step further than
22 Jones or other cases because if in fact -- what you are
23 telling us is that if the jury hangs, the court will
24 have to impose a life sentence or some form of it.

25 But the jury could believe that they could

1 -- that it's either death or life, and one holdout juror
2 would say: Well, I don't want to let this guy out;
3 because those are the only two choices and 11 people
4 want to go for dead -- death and I'm the only holdout, I
5 have to vote for death to make sure that he is
6 restrained in -- in a way that I find acceptable.

7 MR. CORDRAY: This, as Your Honor notes from
8 your time on the trial court, is the jury dynamic in the
9 jury room. It is the push toward unanimity. The issue
10 here is whether the Constitution requires an instruction
11 to be given that would encourage a single juror to hold
12 out and try to avoid reaching a unanimous verdict. The
13 Court has never held that that is constitutionally
14 required, and if they did so hold in this case, it would
15 be an extension that is a new rule and would not be
16 applicable on AEDPA review here.

17 Second, on the ineffectiveness claim,
18 Mr. Spisak loses sight of the fact that this was no
19 run-of-the-mill trial. His crimes were among the most
20 infamous in Ohio history. At the trial, he groomed
21 himself to look like Adolf Hitler, and on the stand he
22 celebrated his victims' deaths, spewed his racist
23 beliefs, and pledged to continue his own brand of
24 personal warfare against society. In the sentencing
25 phase, defense counsel reasonably took the only tack

1 available to him. He used the sheer depravity of his
2 client's crimes and his disturbing character to tell a
3 story about his client's mental illness, and he asked
4 the jury to forgo the death penalty for Mr. Spisak
5 because he is mentally ill and thus, under the
6 mitigating factor, lacked substantial capacity to
7 appreciate or conform his conduct to the requirements of
8 the law.

9 JUSTICE GINSBURG: General Cordray --

10 MR. CORDRAY: That approach was not
11 deficient --

12 JUSTICE GINSBURG: -- reading that closing
13 argument -- I mean, it is disjointed. It goes off on
14 tangents that have nothing to do with the sentence that
15 the defendant is getting. I mean, it really is quite a
16 stream of consciousness. And what's remarkable about it
17 is at no point did counsel say, give him a life
18 sentence. He said that either one would be acceptable,
19 either death or life would be acceptable.

20 MR. CORDRAY: First of all, I would disagree
21 with that characterization of the closing. It was not a
22 perfect closing, but it had three identifiable pieces to
23 it. The first was, he -- he did go back and
24 recapitulate the nature of the crimes, something this
25 Court said in Yarborough is an acceptable defense

1 strategy. That's the elephant in the room. The jury
2 had heard weeks of testimony about this crime. The
3 prosecutor was surely going to highlight that. He was
4 attempting to take the sting out and identify with the
5 jury that he understood how they would react to the
6 crimes.

7 The second piece of the closing -- this is
8 at petition appendix, approximately 339a to 344a, he
9 goes into the mitigating factor of mental illness. He
10 had presented three mental health experts in the
11 sentencing phase to demonstrate that his client was
12 mentally ill. He had made a continued argument that
13 there was a larger jar of not guilty by reason of
14 insanity that he had not been able to fulfill, even
15 though he had tried at trial, and that evidence had
16 ultimately been struck by the trial court, which found
17 they have not made out a defense of not guilty by reason
18 of insanity.

19 But he pursued the same theme here in
20 sentencing, presenting evidence and saying: We have at
21 least fulfilled the smaller jar of mental illness,
22 diminished capacity to intend, and because we are a
23 humane society, our general assembly has made that a
24 mitigating factor that you should apply here, and you
25 should not execute someone who has a diminished ability

1 to intend. He --

2 JUSTICE STEVENS: General Cordray, may I --
3 may I interrupt? You are basically arguing he was not
4 -- not deficient in performance.

5 MR. CORDRAY: That is correct, Your Honor.

6 JUSTICE STEVENS: Assume I am persuaded that
7 there was deficient performance for all the reasons
8 your adversary argues, and I am focusing on the
9 prejudice issue. I think you make a very strong
10 argument that this guy would have gotten the death
11 penalty anyway. But what if -- what if the deficiency
12 had been even worse? Supposing the defense counsel had
13 got up and said: I wish I could make an argument, but I
14 really think you ought to give him the death penalty --
15 just outrageously sided with the prosecutor. Would that
16 mean that we could still find no prejudice?

17 MR. CORDRAY: I think in *Cronic*, the Court
18 said that if there is effectively a structural
19 breakdown -- I mean, if in fact counsel had gotten up
20 and argued solely a prosecution argument and not pivoted
21 at all to mitigating circumstances, perhaps it would be
22 possible to presume prejudice in that situation. That's
23 not the situation in this case.

24 JUSTICE STEVENS: No, I -- I understand
25 that. But -- so you really are saying the question is

1 whether Cronin or Strickland controls?

2 MR. CORDRAY: That's one of the questions.

3 JUSTICE STEVENS: Yes.

4 MR. CORDRAY: Although in our cert petition
5 question 2, we also argued that the Sixth Circuit erred
6 by not deferring to the Ohio Supreme Court's application
7 of Strickland v. Washington.

8 And on the prejudice issue, this is
9 Landrigan. That's the case this Court decided and then
10 granted, vacated, and remanded this case back to the
11 Sixth Circuit. If you look at the prejudice discussion
12 in Landrigan -- and I would direct attention to the
13 quote near the end where the Court says that the court
14 of appeals panel got it right, and what they said was
15 that the -- the testimony was chilling. The person in
16 Landrigan had repeated -- had committed repeated murders
17 and tried to kill again and again.

18 The same as Spisak in this case. He had
19 been unrepentant in the court and, in fact, had flaunted
20 his menacing behavior, just as Spisak went on for days
21 on the stand expressing his white power views and how he
22 would continue to war if he had the opportunity, if
23 given the chance.

24 In -- in Landrigan, this Court approved the
25 court of appeals' statement in the end that any further,

1 minor mitigating evidence that could have been presented
2 in the wake of that record could not have been helpful;
3 there is no prejudice. That prejudice holding in
4 Landrigan, I believe, controls this case. In fact, this
5 case may be even a stronger case than Landrigan for no
6 prejudice.

7 JUSTICE STEVENS: But does your argument
8 really depend on any deference to the State supreme
9 court? It seems to me your argument is just sort
10 of, as a fresh matter, there wasn't prejudice here. And
11 -- and isn't it also true that we really don't know what
12 the Ohio Supreme Court's basis for its decision was,
13 whether not competent, incompetence, or lack of
14 prejudice.

15 MR. CORDRAY: I would say three things, Your
16 Honor: First of all, I would agree with Yarborough,
17 where this Court said that the -- the determination
18 about deficiency and prejudice is doubly deferential
19 through the AEDPA lens. We would defer, as Yarborough
20 said, to reasonable tactical decisions made in closing
21 argument, but we would be doubly deferential under AEDPA
22 because we have to hold that the Ohio Supreme Court's
23 rejection of the ineffectiveness claim was itself
24 objectively an unreasonable application of Strickland.
25 So that's one.

1 Number two, the Ohio Supreme Court did
2 reject this claim. It cited Strickland v. Washington.
3 It did not go on in detail --

4 JUSTICE STEVENS: But we don't know which
5 prong of Strickland it relied on, do we?

6 MR. CORDRAY: We don't. But this is not a
7 case like Rompilla, where the -- where the Court was
8 faced with a court that had held only on one prong and
9 had disclaimed any attempt to review under the other
10 prong. If the court simply gives a summary affirmance
11 or summary disposition and doesn't specify which prong,
12 I think the court has to give deference under both
13 prongs, because the alternative would be to give
14 deference under neither prong, which is inconsistent
15 with the -- the AEDPA statement that we have to defer to
16 an adjudication on the merits by a State court.
17 And so I think that that's fair here. But I
18 certainly think, even if it is --

19 JUSTICE STEVENS: So you'd say a State
20 supreme court is entitled to more deference if it
21 doesn't tell us the basis for its decision?

22 MR. CORDRAY: It -- it may seem a little
23 odd, Your Honor.

24 JUSTICE STEVENS: Yes.

25 MR. CORDRAY: If they disclaim a prong, then

1 I think it's de novo review, and Rompilla did say that.
2 If they don't disclaim a prong, I think that the Court
3 has to defer because the alternative is it gives no
4 deference to summary dispositions, and -- and that has
5 been the general tenor of courts under AEDPA, is if
6 there's a question, you err on the side of giving
7 deference. That clearly was Congress's intent in
8 enacting that statute. I --

9 JUSTICE SOTOMAYOR: Counsel, there are two
10 extremes. One is no defense whatsoever, Justice
11 Stevens's hypothetical. The attorney just comes in and
12 says, kill him, okay? And then there's another, which
13 is your very eloquent explanation of this attorney's
14 strategy. If he had done what you did here, we may not
15 be having this appeal. But at some point, you can have
16 a strategy and execute it so poorly, so incompetently,
17 that you're providing ineffective assistance of counsel.
18 You're not accepting that that can occur. You're
19 saying the minute an attorney says, I had a strategy,
20 that that's effective counsel, regardless of how that
21 attorney executed that strategy. That appears to be
22 your argument.

23 MR. CORDRAY: We, of course, Your Honor,
24 don't have subjective testimony from the counsel as to
25 what his strategy was. But I think it's quite apparent

1 from the record. He at trial attempted to establish a
2 defense of not guilty by reason of insanity. He was set
3 back, he and his trial team, because in the end the
4 trial judge rejected that defense and struck that
5 testimony. He renewed his effort at the sentencing
6 phase by bringing several mental health experts and
7 having them testify on the stand to show that at least
8 they had met the lower standard of mental disease or
9 defect under the Ohio Revised Code.

10 He then argued, perhaps not as eloquently as
11 -- as one might, you know, as -- as Justice Jackson once
12 said, you know, in their bed that night, but he argued
13 about, yes, these crimes were brutal. He went on at
14 some length about that. But these crimes were brutal,
15 and the jury had heard all that and clearly had that in
16 their mind. He then pivoted to five pages of closing
17 argument, in addition to days of presentation on the
18 subject, to say: We have shown at least mental illness;
19 it's a mitigating factor; the General Assembly made it
20 a mitigating factor, and we as a humane people should be
21 proud that we do not execute someone who has substantial
22 deficiency in ability to intend.

23 He then went on to handle some rebuttal
24 points that he was -- he was feeling the heat on from
25 the prosecutor's presentation. For example, that he had

1 not necessarily met with these experts before they came
2 and testified at trial; that he had perhaps shopped for
3 experts and other matters of that sort; that maybe the
4 -- the jury was going to hold against him and his
5 defense team their deficiency as counsel, because they
6 had made this effort to get a not -- a not guilty by
7 reason of insanity plea and the judge had knocked that
8 out in front of the jury.

9 JUSTICE ALITO: Have you ever heard or read
10 a defense summation that was more derogatory of the
11 defendant than the summation here?

12 MR. CORDRAY: I have not read a great number
13 of defense summations, but this was derogatory. But
14 frankly, the bed that was made was made by his client,
15 who got on the stand for days on end and spewed his
16 racist propaganda, made it clear that he was not only
17 unrepentant but was triumphant; that one or more of his
18 murders were slick, pretty neat; that he celebrated the
19 killings; that he went out to kill again; that if he had
20 the opportunity now, he would again go out to kill
21 again.

22 JUSTICE ALITO: But defense counsel --

23 MR. CORDRAY: That's the context.

24 JUSTICE ALITO: -- goes so far as to say:
25 Don't look to him for sympathy because he demands none.

1 But isn't that exactly what he has to appeal for in
2 order not to get a death verdict -- sympathy based on --
3 on mental illness, despite the horrific crimes that this
4 person committed and the things that he said on the
5 stand?

6 MR. CORDRAY: No, Your Honor. And I think,
7 again, counsel in the context of this proceeding judged,
8 perhaps rightly, that it was very unlikely this jury was
9 going to have sympathy for his client. Instead he
10 appealed to the jury's own sense of humanity and pride:
11 We have this mitigating factor under the law, we are a
12 civilized people, we do not execute people who have
13 substantial diminished ability to intend; and I appeal
14 to you -- you, Jury -- even though I can sense that you
15 are not feeling sympathy for my client, do what -- what
16 makes you a humane people, what makes us proud as a
17 people, and do not give the death penalty to a person
18 who is sick, demented, twisted, as my client has shown
19 himself to be here on the stand.

20 I think it's a coherent strategy. In fact,
21 I don't see easily how he could have done better. And
22 as in Landrigan, if he had said, give him sympathy, give
23 him a life sentence, which was the thrust of the entire
24 proceedings, I don't think that that created -- that
25 lack of saying that created any prejudice on this

1 record, which was very thoroughly established, in part
2 by his client's own testimony.

3 I would also say in Yarborough, on the
4 deficiency point, this Court said that focusing in on
5 one particular theme may well be a preferable strategy,
6 and there has to be broad deference given to closing,
7 which is only a part, after all, of the entire
8 sentencing proceeding, in that taking an understated
9 approach that -- that emphasizes the jury's autonomy.

10 In Yarborough, if you remember, the defense
11 counsel did not actually ask specifically in so many
12 words for a life sentence. The Court said that's not
13 deficient. He could count on the judge's charge to the
14 jury. They were going to charge the jury as to how to
15 handle this evidence. It was the thrust of the whole
16 proceeding. He presented three mental health experts
17 to show mental illness and diminished ability to intend.
18 And he argued that as part of his closing.

19 I think it was not deficient, and I
20 certainly think on this record, this stunning record
21 created in part by his client's crimes, which were
22 acknowledged and undisputed and there was no factual
23 dispute about them and their heinousness, and then by
24 his client's testimony on the stand, which graphically
25 and at great length reinforced his, again, triumph in

1 his -- in his warfare against trying to kill as many
2 black people, Jewish people, and gay people as he could
3 find, and that he would continue that warfare if given
4 the chance -- I think it's impossible to find that there
5 is prejudice on this record for the -- for the - even
6 the medium-sized quibbles that are being raised here 20
7 years after the fact.

8 If I -- if I may reserve the rest of my time
9 for rebuttal.

10 CHIEF JUSTICE ROBERTS: Thank you, General.

11 Mr. Benza.

12 ORAL ARGUMENT OF MICHAEL J. BENZA

13 ON BEHALF OF THE RESPONDENT

14 MR. BENZA: Good morning, Mr. Chief Justice,
15 and may it please the Court:

16 The Sixth Circuit evaluated performance of
17 trial counsel in this case and found deficient
18 performance for three primary areas:

19 First, counsel presented and argued to the
20 jury nonstatutory aggravating factors as reasons to
21 impose the death sentence on Mr. Spisak. In Ohio, the
22 jury is allowed to consider only the statutory
23 aggravator factors, not nonstatutory factors. The
24 counsel specifically identified and argued four reasons
25 to execute Mr. Spisak.

1 He then proceeded to tell the jury what was
2 not mitigating evidence in this case, including factors
3 that have long been accepted as mitigating factors like
4 performance in prison, adaptive skills, and the issue
5 regarding his family upbringing and childhood.

6 Finally, the lawyer turned to what he argued
7 was the only mitigating evidence that they were going to
8 be arguing, and that was the issue of the client's
9 mental health. He then --

10 CHIEF JUSTICE ROBERTS: You say -- you fault
11 him for not talking about performance in prison,
12 prospective performance in prison?

13 MR. BENZA: That is correct.

14 CHIEF JUSTICE ROBERTS: It doesn't look like
15 that's going to be a very strong argument. I mean, he
16 is still talking about people he wants to kill, and you
17 are going to get up there and say he might perform well
18 in prison?

19 MR. BENZA: Absolutely, Your Honor. In
20 fact, because it's directly related to the mental
21 health evidence. Had the lawyer identified the
22 testimony of the mental health experts, including
23 Dr. Resnick, who is the court clinic psychiatrist, who
24 testified that while he has been incarcerated and
25 receiving treatment his performance and his mental

1 illness has resided -- that he has gotten better. And
2 that he is not --

3 CHIEF JUSTICE ROBERTS: He is on the stand
4 with a Hitler moustache testifying about what a great
5 job he did killing these people, and he says he is going
6 to do it again. I think -- didn't the letter identify
7 particular people he wanted to kill?

8 MR. BENZA: That is correct. It did.

9 CHIEF JUSTICE ROBERTS: And the jury is
10 supposed to believe that this guy is going to do well in
11 prison?

12 MR. BENZA: If the -- if the lawyer had
13 identified for the jury the testimony of the mental
14 health experts, that would have been the case. This
15 Court recognized --

16 JUSTICE SCALIA: These experts said he had
17 improved?

18 MR. BENZA: Yes. Dr. Resnick testified that
19 he --

20 JUSTICE SCALIA: Before this testimony on
21 the stand?

22 MR. BENZA: During the trial, yes.

23 JUSTICE SCALIA: Wow.

24 MR. BENZA: That his performance -- that --

25 JUSTICE SCALIA: That didn't look like

1 improvement to me.

2 (Laughter.)

3 MR. BENZA: Well, that may be, Your Honor,
4 but that's what the experts testified to. And this was
5 the court clinic expert who was testifying, who
6 evaluated him for the not guilty by reason of insanity.

7 CHIEF JUSTICE ROBERTS: But I guess it gets
8 back to the -- the point we are talking about, what a
9 jury would think, and isn't it possible -- you're
10 suggesting, I think, he -- he should grasp any straws
11 that are there, this might help. But isn't it possible
12 that that would have a negative effect on the jury? In
13 other words, they see this lawyer telling them this guy
14 is going to do well in prison, and the lawyer's
15 credibility is -- is shot.

16 MR. BENZA: If there is no evidence to
17 support that, that would be correct. The problem that
18 this case presents -- and this is what the Sixth Circuit
19 found -- that had the lawyer then said, yes, for all of
20 these reasons they may weigh in favor of death, but here
21 are the reasons why you should consider life, we would
22 have a very case than we have here today.

23 JUSTICE GINSBURG: Mr. Benza, do you know of
24 any case where ineffective assistance was found on the
25 basis of a closing argument alone? General Cordray

1 pointed out that this lawyer had put on a number of
2 witnesses to testify to the defendant's mental illness,
3 and that he did play that theme in the closing.

4 Do you know of any case where the closing,
5 not tied to the way the case was presented at trial, was
6 held sufficient to constitute ineffective assistance of
7 counsel?

8 MR. BENZA: No. And that's because this
9 case is such an outlier. I have been litigating capital
10 cases since 1993. I have never seen a closing argument
11 like this. I --

12 JUSTICE BREYER: What would you have done?
13 I mean, I'm -- I'm not experienced in this. I mean --
14 but I heard the other side and I've read the
15 argument. And it makes sense logically to say he has
16 the worst defendant he has ever seen. He's murdered
17 lots of people in cold blood. He gets up on the stand
18 and says: I'm going to kill a lot more. He sounds
19 totally bonkers. And -- and he says to the jury, I
20 can't tell you what he did was not aggravating; it
21 was terrible. I can't tell you that there's anything
22 here that should make you feel better about him; there's
23 nothing. But we are a nation of people who are
24 humane, and our law says don't put a person to death
25 when he fills with his nuttiness that third prong, which

1 is a lower standard of insanity than I had to meet. But
2 it's clearly met, and here are the experts; I point to
3 their testimony, and that's what they said. So be
4 humane.

5 Now, you think he should have said something
6 else. What?

7 MR. BENZA: He -- what he should have done
8 is what this Court recognized in *Penry v. Lynaugh*, is
9 that mental health evidence is a double-edged sword.
10 The job of the defense lawyer is to explain why the
11 mental health evidence mitigates the crimes and --

12 JUSTICE BREYER: No, he -- he said why. He
13 said. He said: We don't execute people who are crazy,
14 and this guy is crazy. He might not be crazy enough to
15 meet the standard of not guilty by reason of insanity.
16 He's not crazy enough to meet the standard of
17 incompetency, but you just heard three experts tell you
18 that he's seriously crazy. And if you don't -- if you
19 doubt them, don't doubt your own eyes.

20 Now, I don't see -- how can I say -- and we
21 have courts, two courts, who said, yes, that was okay.

22 MR. BENZA: Well, we actually don't know
23 what the State court said about --

24 JUSTICE BREYER: Or we had at least one
25 State court that found it okay.

1 MR. BENZA: For whatever reason, we have the
2 State court decision that affirmed this. We have no
3 idea why.

4 The issue is, however, once the lawyer
5 decided that this was the mitigation strategy that he
6 was going to present, this was the evidence that he had
7 available to argue to him, it is the role of the defense
8 counsel to advocate.

9 So once the lawyer makes the strategic
10 decision, I am going to present the closing argument
11 focused on mental health mitigating evidence,
12 then the lawyer's job is to stand up and explain to
13 the --

14 JUSTICE BREYER: But I agree with all that
15 you're saying. What I am saying my hard time is here
16 is that why wasn't this advocacy? Indeed, a reasonable
17 decision as to what constituted advocacy in those really
18 rare circumstances where it was the worst kind of
19 defendant he had ever seen in his life who deserved no
20 sympathy?

21 MR. BENZA: As the amici points out, there
22 is no strategic reason for this closing. The amici for
23 Petitioner -- or for Respondent has identified that
24 there can be no strategic reason to have provided this
25 closing argument. By any evaluation of the skill of

1 closing argument, this was deficient.

2 JUSTICE SCALIA: Well, I think -- I think it
3 was swallowing the worst evidence. It was telling a
4 jury that was going to think this is a hateful person
5 who had done hateful things: I agree with you. I
6 accept all of that, but even if you feel that way, I
7 thought it was a brilliant closing argument.

8 You said you've -- you've conducted many
9 capital cases. Have you ever conducted a capital case
10 in which the defendant takes the stand with a Hitler
11 moustache and says he's glad for what he's done and he
12 will do it again?

13 MR. BENZA: No, sir.

14 JUSTICE SCALIA: How many cases have you had
15 like that?

16 MR. BENZA: Spisak is the only one that was
17 like that.

18 JUSTICE SCALIA: This was an extraordinary
19 trial, and it seems to me that the -- that the technique
20 that -- that counsel used to try to get mercy for this
21 fellow was -- was the best that could have been done.

22 MR. BENZA: If that's the conclusion, then
23 we --

24 JUSTICE SCALIA: Well --

25 MR. BENZA: -- we don't point on the merits

1 of the claim. I beg to differ with the Court.

2 JUSTICE KENNEDY: Well, if -- I -- if the
3 strategy that Mr. Cordray and Justice Breyer and, to
4 some extent, Justice Scalia have outlined is a correct
5 strategy, would you go on to say that the implementation
6 of that strategy was substandard?

7 It's -- it's rambling, you have to - in
8 order to get Mr. Cordray's very succinct explanation,
9 you have to go through a couple of pages and drift it
10 out, as Justice Sotomayor said; his argument was fine,
11 Justice Breyer's -- but that is not the argument we
12 have.

13 MR. BENZA: That is correct. The lawyer
14 didn't --

15 JUSTICE KENNEDY: What -- what is the case
16 that you have -- the best case that you have, maybe a
17 case in the courts of appeals or the State supreme
18 courts, where it is said that the implementation of the
19 strategy was just inept -- totally inept.

20 I mean, is that what your argument is here?

21 MR. BENZA: Yes, that the application, that
22 the way the lawyer delivered the closing, the themes
23 that he identified, the things that he said, was the
24 deficiency --

25 JUSTICE SCALIA: What was the --

1 JUSTICE KENNEDY: Again, that depends on,
2 oh, tone of voice, the ambiance of the courtroom.
3 This -- this is very hard for us -- you know, he was
4 trying to be folksy with the jury, obviously.

5 These are things that are very difficult for
6 us to assess.

7 MR. BENZA: They are very difficult, but
8 this case doesn't present those nuances. This case
9 presents the case where the lawyer stands up at closing
10 argument -- and the only thing he didn't say that could
11 have made this worse was Justice Stevens's hypothetical
12 of it's fine by me if you actually execute him.

13 That's the only thing he didn't say in his
14 closing that could have possibly made it worse for the
15 client.

16 JUSTICE SOTOMAYOR: Well, he actually did
17 say that.

18 MR. BENZA: Not in those words.

19 JUSTICE SOTOMAYOR: Well, but, pretty much,
20 he said, no one's going to fault you if you impose the
21 death sentence.

22 MR. BENZA: And we will be proud of you,
23 whichever you do. Only those very words -- I would like
24 you to execute him as well -- did not escape his lips,
25 but in --

1 CHIEF JUSTICE ROBERTS: But, I mean, it
2 seems to me that you are imposing a strategic rule, and
3 the counsel obviously made a decision or the record
4 may reflect the -- the type of advocacy that you are
5 telling us he has to have: Here's why you should give
6 this guy sympathy. Here's why. Here's -- he's a good
7 guy. I mean, there is -- even standing at that podium,
8 there is a different strategy that people sometimes
9 employ, which is sort of the understated -- you know,
10 well, he did some terrible things; don't -- I'm not
11 asking for sympathy for these things, but -- you know,
12 we are very proud of the fact that we don't execute.
13 You know, it seems to me that this disagreement is over
14 different styles of advocacy.

15 And I don't know how to -- particularly in a
16 case where you don't have much to work with, I don't
17 know how to make a judgment that his choice was worse
18 than the other.

19 MR. BENZA: But that's what we do under
20 Strickland. The court recognizes, in Strickland
21 analysis, that there are multiple ways that various
22 lawyers will try the same case, all of which can be
23 effective.

24 JUSTICE GINSBURG: You just told me that,
25 under Strickland, under anything, there has been no case

1 in which there has been a decision for the defendant
2 based on the inadequacy of the closing argument alone.

3 So you are asking us to take a new tack and
4 inviting arguments focused exclusively on the closing
5 argument, to see if it meets the Strickland standard.

6 MR. BENZA: Yes, but this Court has already
7 recognized that the Sixth Amendment applies, the right
8 to counsel applies at closing argument. In *Yarborough*
9 *v. Gentry*, at page 5 of this Court's opinion, the Court
10 specifically stated that the right to effective
11 assistance extends to closing argument.

12 So this is not a redevelopment or an
13 expansion of Strickland. It is simply an application of
14 the Strickland analysis to the particular facts of this
15 case before the court.

16 JUSTICE GINSBURG: Why -- why isn't it the
17 Strickland analysis that you read the charge in the
18 context of the case that was presented at trial, and
19 here the case was.

20 The only thing going for the defendant were
21 the witnesses to his mental illness and whether,
22 eloquently or not, that theme was played to the jury:
23 This is a mentally ill man.

24 MR. BENZA: That's -- that's correct, and
25 that's the theme that defense counsel said he was going

1 to implement at the closing. What -- the failure of the
2 lawyer was to adequately and effectively make that
3 closing to the jury.

4 JUSTICE BREYER: Well, he talked about
5 nothing else. And I understand -- look, I am not an
6 expert. I haven't argued these things to juries, and I
7 recognize some lawyers tell me, okay, this was very
8 rambling. I didn't think it was rambling.

9 I thought he was trying to spend a lot of
10 time explaining away to the jury some prosecutorial
11 remark, that you shouldn't pay attention to the expert
12 because you, yourself, the lawyer, didn't talk to them
13 enough.

14 And so you describe that for a couple of
15 pages and why it was irrelevant, and the reason he
16 talked about the -- I thought, the reason he talked
17 about the -- how you will feel when you go out of here,
18 is because he recognizes this is the most sensational
19 case in this community ever and all your neighbors are
20 going to congratulate you.

21 But what you are doing here is you are
22 applying a standard, and you are proud to be an
23 American, and that standard, as an American, is a humane
24 standard that requires you to not give the death penalty
25 when the man's insane.

1 Now, I agree that he repeated that 7 or 8 or
2 9 or 10 times, but it was the same point over and over.
3 And how can I -- since there's a lower court that
4 seemed to find this adequate, how can I sit here and say
5 it wasn't?

6 MR. BENZA: Well, it -- first, as to the
7 question of whether or not the lower court found it
8 adequate, we have no idea, again, what the Ohio Supreme
9 Court determined as to question of deficient
10 performance or to prejudice or to strategy. It's what
11 we have --

12 JUSTICE GINSBURG: How many -- how many
13 issues were before the Ohio Supreme Court?

14 MR. BENZA: There were 67 assignments of
15 error raised to the Ohio Supreme Court. This is the
16 only case on direct appeal where the Ohio Supreme Court
17 issued a per curiam opinion.

18 JUSTICE BREYER: Didn't -- didn't they cite
19 Strickland?

20 MR. BENZA: They did cite Strickland, along
21 with 49 other claims.

22 JUSTICE BREYER: Well, I guess then they
23 considered the argument.

24 MR. BENZA: They dismissed this claim and --

25 JUSTICE BREYER: Why do we have no idea

1 then? If they cited Strickland, why do we have no idea
2 what they thought?

3 MR. BENZA: We have no idea whether they
4 decided that there was deficient performance but no
5 prejudice -- that there was, in fact, deficient
6 performance but no prejudice; that this was not
7 deficient because it was a reasonable strategy.

8 It is also impossible that the lower courts
9 were misapplying, as this Court recognized in Michael
10 Williams's case, that --

11 JUSTICE SCALIA: So I think that we have to
12 defer to all of those, right?

13 MR. BENZA: I -- I'm sorry.

14 JUSTICE SCALIA: I think, if they could have
15 been relying on any of those, we would have to defer to
16 all, wouldn't we?

17 MR. BENZA: Unless we --

18 JUSTICE SCALIA: One-by-one, I mean --

19 MR. BENZA: If we assume that they were then
20 applying the Lockhart v. Fretwell standard as to the
21 question of prejudice, then it would clearly be contrary
22 to Strickland, to have applied that standard of review
23 for prejudice.

24 JUSTICE SCALIA: Why would we assume that?

25 MR. BENZA: Well, because we don't know what

1 the supreme court actually did.

2 JUSTICE SCALIA: Well, when we -- when you
3 don't know what a lower court has done, the rule is you
4 assume the best, not the worst. Isn't that the standard
5 rule of review?

6 MR. BENZA: That is.

7 JUSTICE SCALIA: You very often don't know
8 on what basis the lower court took action. You assume
9 it was a lawful basis.

10 JUSTICE STEVENS: That's the rule on direct
11 appeal, of course; not on collateral attack.

12 MR. BENZA: That is the rule on direct
13 appeal. It's also the implication of applying AEDPA.
14 The problem that you have in that is, when you try to
15 apply AEDPA to this particular claim, you don't know how
16 the State court, in fact, decided this case.

17 And, therefore, you don't know whether or
18 not you are going to give the AEDPA deference to the
19 decision that there was no deficient performance, that
20 there was no prejudice --

21 JUSTICE BREYER: How -- how does that work?
22 Certainly, it's a fairly common thing, that the
23 defendant will make -- let's say, 20 arguments; maybe he
24 would even number them.

25 And it's fairly common to find a court of

1 appeals in a State that says, as to argument number 17,
2 and then they characterize it, we reject that argument.

3 MR. BENZA: That is true.

4 JUSTICE BREYER: Now, that -- that happens
5 all the time.

6 MR. BENZA: That is correct.

7 JUSTICE BREYER: And, now, it's very, very
8 common that, in making that argument, there could be
9 some good grounds for rejecting it, and there could be
10 some bad grounds for rejecting it.

11 So would we send -- do we send every case
12 like that back, to say, I want to know if you rejected
13 it for a good reason or a bad reason?

14 MR. BENZA: I would think, no, that you
15 don't send it back, but what happens --

16 JUSTICE BREYER: What we do is we assume
17 they did it for a bad reason?

18 MR. BENZA: I would -- I think the issue
19 then would become that, when a State court chooses to
20 summarily deny, without evaluation, an explanation of
21 the merits of a claim, that, when it comes to habeas
22 review, the constraints of AEDPA are lifted.

23 JUSTICE GINSBURG: So the Ohio Supreme
24 Court, faced with 67 issues, would have to write at
25 least a per curiam opinion on each of the 67 to insulate

1 itself against being overturned on Federal habeas?

2 MR. BENZA: Not to insulate from
3 overturning, but to gain the benefit of 2254(d)'s
4 restrictive reviews in habeas. The court has --

5 JUSTICE SCALIA: Which insulates it from
6 being overturned.

7 MR. BENZA: If -- if , in fact, it is not
8 contrary to or unreasonable application, it would be
9 insulated or --

10 JUSTICE BREYER: Is there any authority for
11 that? Because, I mean, I'm not positive of this one,
12 but I -- I do think hearing it, that suddenly habeas
13 opinions and district court opinions would grow by an
14 order of magnitude, because it's very common to see
15 arguments rejected summarily.

16 MR. BENZA: That is correct, and --

17 JUSTICE BREYER: Now, is there any authority
18 for the proposition that if they reject it summarily,
19 that then we don't assume they are right, but rather we
20 assume they are wrong?

21 MR. BENZA: No, this Court has never
22 addressed how to apply 2254(d) to summary decisions.
23 In Knowles v. Mirzayance, the Court noted that this was
24 in fact an issue and reserved that for another day.

25 In Early v. Packer, this Court recognized,

1 though, however, that AEDPA constraints are looking at
2 not just at the outcome of the lower court's -- the
3 State court decisions, but the reasoning behind it,
4 because if you are going to have an unreasonable
5 application of -- of binding -- binding law from this
6 Court, the lower courts have to be able to apply it and
7 explain how did we apply it. Otherwise, every decision
8 of a State court would be insulated from Federal habeas
9 review, making the writ available but unavailable.
10 Because no decision would therefore ever be unreasonable
11 if the standard is for a district court judge to say:
12 Can I imagine a reasonable way for the State court to
13 have reached this result? I have; I'm a reasonable
14 judge; the State court must have done what I have done;
15 therefore, the review is limited, and the writ -- and
16 the writ is denied.

17 CHIEF JUSTICE ROBERTS: So if you're -- if
18 you're right about that issue on which we haven't had a
19 decision yet, then we would look at prejudice on our
20 own, without deference to the State court findings?

21 MR. BENZA: It would review -- it would
22 revert to pre-AEDPA habeas review, to the standards, and
23 with -- with review of the State court decision but with
24 de novo application in the Federal courts.

25 JUSTICE SCALIA: But that's not what AEDPA

1 says. AEDPA says that we have to give deference unless
2 it is an unreasonable application of Supreme Court law.
3 The burden is on the appealing defendant to show that it
4 was an unreasonable application. In case of doubt, he
5 loses.

6 Now, AEDPA could have been written
7 differently. It could have been written the way you
8 want. The Supreme Court shall evaluate the
9 reasonableness of the supreme court opinion. It isn't
10 written that way. It says the burden is on you to show
11 that this was an unreasonable application of Supreme
12 Court law. And where there's a summary disposition,
13 that's a hard road to hoe.

14 MR. BENZA: I would submit it's impossible.
15 If a summary disposition --

16 JUSTICE SCALIA: It's -- it's not
17 impossible. I think there are cases where -- where
18 relying on prior Supreme Court law doesn't get you
19 there. It's not impossible.

20 MR. BENZA: I -- I would beg to
21 differ. I would think if the summary disposition
22 is going to be held to that standard of an unreasonable
23 application where we have no indication of how the State
24 court actually applied the law, it would have to be the
25 extreme outlier that would demonstrate that that was an

1 unreasonable --

2 JUSTICE SCALIA: So we should revise the
3 statute --

4 MR. BENZA: It does not require --

5 JUSTICE SCALIA: -- and it should not say
6 "unreasonable application of Supreme Court law"?

7 MR. BENZA: It -- it does not require a
8 revision.

9 JUSTICE SCALIA: Why doesn't it?

10 MR. BENZA: It simply requires the Court to
11 say that when you have summary disposition, that when
12 evaluating the State claim, the State court decision is
13 given the deference that it is due, and that is that we
14 simply cannot determine whether or not it properly
15 applied Federal law; and, therefore, it does not get the
16 safe harbor of AEDPA evaluation.

17 JUSTICE BREYER: If that's so, why would --

18 JUSTICE SCALIA: But that's not how the --
19 that's not how the statute reads.

20 JUSTICE BREYER: Well, why wouldn't you do
21 that as well, then, even a fortiori, where I'm just an
22 appeals court judge and I get a district court opinion?
23 Most common thing in the world, summary judgment denied,
24 motion denied, this denied, denied, denied. And if I'm
25 going to start doing this for State cases, wouldn't I

1 also have to do it for Federal cases whenever a --
2 whenever a Federal judge doesn't give all his reasons,
3 which is the most common thing in the world?

4 MR. BENZA: The Court does that when it
5 reviews those orders constrained by what actually
6 happened in the lower court.

7 JUSTICE BREYER: We did? I mean, I've
8 reviewed thousands and thousands of them, and I'd always
9 thought that a trial judge doesn't have to spell out all
10 his reasons.

11 MR. BENZA: But he -- and he doesn't.

12 JUSTICE BREYER: And the question is really,
13 given the circumstance, can we say that he acted
14 contrary to law?

15 MR. BENZA: And that is --

16 JUSTICE BREYER: If it's trial-based, you
17 look at what the facts are that he might have taken.

18 MR. BENZA: And that would be the evaluation
19 that would continue on in habeas review of these claims,
20 is evaluating the State court decision without, though,
21 simply saying, well, we're going to -- this -- and this
22 is what happens in the lower courts. When you have
23 these summary decisions in 2254(d) analysis, those
24 circuits that have applied this say, well, we will
25 imagine a way in which the State court could have

1 reasonably applied this law to reach this result; and,
2 therefore, since that is a reasonable way, because of
3 course we as Article III judges have reasonably come up
4 with that, it must be reasonable, it's not an
5 unreasonable application, and the writ is denied.

6 The problem that we face is when you look at
7 that in comparison to cases like Wiggins and Rompilla
8 where the State court affirmatively denied applying
9 Federal standards, you get a different level of review.
10 And so you end up encouraging State courts in these
11 types of cases to simply issue summary, postcard
12 denials: Appeal denied. Federal courts, you figure it
13 out.

14 JUSTICE ALITO: Well, I think that assumes
15 that the State courts are -- what the Supreme Court of
16 Ohio and all the other State supreme courts are doing is
17 writing briefs for Federal habeas courts.

18 MR. BENZA: I don't think --

19 JUSTICE ALITO: Do we -- do you think that's
20 what AEDPA was intended to do?

21 MR. BENZA: I think AEDPA was designed that
22 when the State courts, in fact, are doing their jobs
23 under the Constitution to protect defendants' rights to
24 review their claim, then they should receive the
25 protections of AEDPA --

1 JUSTICE SCALIA: That's not what it says.

2 MR. BENZA: -- and what that means for
3 deferential review --

4 JUSTICE SCALIA: That's not what it says.
5 It says that you have to show that it is an unreasonable
6 application of Supreme Court law. That's what it says.

7 MR. BENZA: It does. And as this Court has
8 explained, what happens in habeas is that the Federal --
9 the district courts and the circuit courts have to
10 evaluate the claim and determine whether or not there
11 was an unreasonable application. It still falls to the
12 district court and the circuit court to --

13 JUSTICE SCALIA: And if they can't, you
14 lose. Because that's the way the statute reads.

15 MR. BENZA: That's correct.

16 JUSTICE SCALIA: You want to say if they
17 can't, we have a new statute. But we don't. The burden
18 on you is to show that it's an unreasonable application.
19 If you tell me we can't tell, you lose.

20 MR. BENZA: That -- the other alternative is
21 that then the statute doesn't apply, which, as this
22 Court has recognized, when it comes to applying AEDPA,
23 the side that is left untouched regarding that is the
24 issue of a suspension of the writ.

25 JUSTICE BREYER: So you are saying -- I

1 mean, this is very helpful to me for a variety of
2 reasons, but in -- in your view, the correct role of a
3 habeas judge vis-à-vis the State judge there is the same
4 as the Federal appellate judge vis-à-vis the district
5 judge? That is, I'm thinking of a district judge makes
6 a finding, doesn't fully explain it. Now, I would think
7 it would be unlawful if it's an unreasonable application
8 of a Supreme Court case. And I know how to review that.
9 I mean, I -- I know how to review it, I think.

10 Okay. So you are saying however I do that,
11 I should do the same thing and the -- but you don't --
12 you don't think there's a more relaxed standard than
13 that? You think that's basically the standard?

14 MR. BENZA: It's still the same standard.

15 JUSTICE BREYER: Same -- but if they had
16 made an explicit finding, then maybe it would be a
17 tougher standard.

18 MR. BENZA: That's correct.

19 JUSTICE BREYER: All right.

20 MR. BENZA: The standards provided for in
21 AEDPA are there to protect the State court judgments
22 when they've done their job, when they've explained
23 their rationale and they've applied the Federal law. If
24 you see these postcard denials, you have no idea whether
25 the court --

1 JUSTICE GINSBURG: Mr. Benza, you might want
2 to use what time is remaining to deal with the other
3 issue, which we haven't talked about at all.

4 MR. BENZA: If I may, I am turning -- if
5 there are no further questions on the effect, I will
6 turn to the Mills issue.

7 The -- the question in front of the Sixth
8 Circuit was whether or not the totality of the jury
9 instructions in this case were such that they violated
10 Mills' directive that an individual juror's
11 determination of a mitigating factor's existence could
12 not be precluded from being considered by the rejection
13 of -- of those factors by the other 11 jurors.

14 What you have in this particular case is the
15 totality of the jury instructions were such that a
16 reasonable understanding of the instructions was that
17 the jury had to be unanimous as to the understanding and
18 the existence of a mitigating factor before it could
19 even be considered.

20 JUSTICE ALITO: Well, what is your answer to
21 the first question that Justice Sotomayor asked? How
22 could we say that -- that the State court's decision was
23 contrary to or involved an unreasonable application of
24 clearly established Federal law as determined by the
25 Supreme Court of the United States, i.e., Mills v.

1 Maryland, when Mills v. Maryland hadn't been decided?

2 MR. BENZA: In Terry Williams v. Taylor,
3 this Court recognized in the opinion authored by Justice
4 O'Connor that the issue for contrary to or unreasonable
5 application is going to be governed by the
6 application of Teague.

7 JUSTICE ALITO: And are there --

8 MR. BENZA: And Mills applies.

9 JUSTICE ALITO: Are there not quite a few
10 instances of contrary statements in our opinions?

11 MR. BENZA: As to the application of Mills?

12 Or --

13 JUSTICE ALITO: As to the -- as to the time
14 when the -- the law has to be clearly established by a
15 decision of our Court.

16 MR. BENZA: No, this Court has maintained
17 that the issue regarding the application of a -- of
18 controlling established -- what -- clearly established
19 law by this Court is going to be determined by Teague.
20 And Teague determines that in this case, the Mills v.
21 Maryland decision applies to this claim. In the -- it
22 was adjudicated on the merits in State court.

23 Now, there is another -- underlying this is
24 another AEDPA concern, is how does the Federal -- or the
25 State court adjudicate the constitutional claim since

1 Mills had not been presented? It decided the merits of
2 the claim were -- were to be rejected, but it did not
3 decide the case under Mills v. Maryland because of
4 course Mills had not been decided and we know from this
5 Court's decision in the Banks case that Mills was a new
6 law.

7 JUSTICE ALITO: This Court has not said that
8 clearly established Federal law refers to this Court's
9 decision as of the time of the relevant State court
10 decision.

11 MR. BENZA: That this Court has said, but
12 this Court has also said that the decision for that
13 question is based on the decision of Teague. If a case
14 applies to the Court based on Teague, then it will apply
15 to the merits of this particular claim. And what the
16 circuit found --

17 JUSTICE SCALIA: Counsel, I don't understand
18 that. I don't understand that. Do you want to go
19 around that again?

20 MR. BENZA: This Court has held that the
21 decision of whether a -- when a case is going to be
22 clearly established for review in habeas is going to be
23 based on Teague. That was the opinion by Justice
24 O'Connor concurring in the judgment in Terry Williams,
25 that the decision for clearly established is going to be

1 based on the decision of the applicability of Teague.

2 JUSTICE SCALIA: Does Teague say anything
3 about the time?

4 MR. BENZA: Teague says that the decision
5 for application of a newly established law or a new
6 established constitutional rule is predicated on the
7 denial of direct appeal, which in this case would be the
8 cert denied by this Court of the direct appeal of
9 Spisak's case, which happened in 1989, a year after the
10 decision in Mills was handed down.

11 CHIEF JUSTICE ROBERTS: Counsel, the Mills
12 opinion has one of those concluding paragraphs at the
13 end that sort of sums everything up, and it says that we
14 conclude there is a substantial probability that
15 reasonable jurors upon receiving the judge's
16 instructions in this case and in attempting to complete
17 the verdict form as instructed may have thought they
18 were precluded from considering any mitigating evidence
19 unless all 12 jurors agreed on the existence of a
20 particular such circumstance.

21 MR. BENZA: That is correct.

22 CHIEF JUSTICE ROBERTS: Now, how is that
23 clearly established law that your claim is -- is
24 contrary to Mills?

25 MR. BENZA: Because in -- in our case, every

1 jury instruction that was given to the jury told them
2 that they had to be unanimous, including the specific
3 instruction --

4 CHIEF JUSTICE ROBERTS: That's on death or
5 non-death, not on whether a particular mitigating
6 circumstance exists.

7 MR. BENZA: Actually they -- they were told
8 that, because they were also told that that included
9 their decisions as to all disputes of fact. And the
10 existence of a mitigating factor is of course a question
11 of fact. So the jury was in fact specifically
12 instructed to be unanimous to every decision that they
13 made including resolving disputes of fact. They were
14 told by both lawyers for the defense and lawyers for the
15 prosecution that the first question they had to answer
16 when they got into the jury room was to the existence of
17 mitigating factors.

18 If they -- if they reasonably understood
19 that they had to be unanimous as to that fact, they
20 would have rejected the mitigating factors, even if 11
21 of them had agreed that the mental health evidence in
22 this case was a mitigating factor, and one of them --

23 JUSTICE GINSBURG: How does that - that
24 work? The instruction was all 12 must agree that the
25 aggravators outweigh the mitigators before death is

1 imposed.

2 MR. BENZA: That's correct, as to that
3 instruction. But the existence of the mitigator was the
4 predicate question that the jury would have to answer,
5 and our position is that they also would have had to be
6 unanimous per the instructions.

7 JUSTICE SCALIA: Where -- where is that in
8 the instructions? I -- I didn't realize that that's
9 what you are counting on. Where is it?

10 MR. BENZA: They appear at -- let's see.
11 Just a moment.

12 JUSTICE SCALIA: It's in your brief, I
13 assume, if that's what you're --

14 MR. BENZA: It is in my brief, Your Honor,
15 and I've lost my appendix cite to it, but the -- oh, I'm
16 sorry. It's at petition appendix page 326: "It is your
17 duty to carefully weigh the evidence, to decide all
18 disputed questions of fact, to apply the instructions of
19 court to your findings, and to render your verdict
20 accordingly."

21 JUSTICE SCALIA: Read it again.

22 MR. BENZA: At page -- the petition appendix
23 page 326. "It is your duty to carefully weigh the
24 evidence, to decide all disputed questions of fact, to
25 apply the instructions of the court to your findings,

1 and to render your verdict accordingly."

2 CHIEF JUSTICE ROBERTS: Where does that say
3 what your summary was earlier, that they --

4 MR. BENZA: That the --

5 CHIEF JUSTICE ROBERTS: -- can't consider a
6 mitigating circumstance unless they unanimously agree
7 about it.

8 JUSTICE SCALIA: "You"? "You"?

9 MR. BENZA: Those instructions are given and
10 every reference to the jury is in a collective "you."
11 And there -- that instruction tells the jury that they
12 must -- a reasonable understanding of that instruction
13 is that the jury would understand that they had to
14 unanimously agreed as to the existence of the mitigating
15 factors.

16 JUSTICE SCALIA: Is that in your brief, too?
17 I just don't remember it from your brief.

18 MR. BENZA: I believe it is, Your Honor. I
19 don't know at the -- the page cite to it. It is at
20 petition appendix page 326.

21 CHIEF JUSTICE ROBERTS: Well, doesn't every
22 court tell them it's their duty to decide disputed
23 questions of fact?

24 MR. BENZA: That is correct.

25 CHIEF JUSTICE ROBERTS: And you think that

1 includes within it the idea that they -- they cannot
2 consider a mitigating circumstance unless they all 12
3 agree on it?

4 MR. BENZA: Yes, that then would violate
5 Mills. That's the error in this instruction.

6 CHIEF JUSTICE ROBERTS: Okay. Well, I just
7 --

8 MR. BENZA: And here it relates to the
9 question in Mills.

10 CHIEF JUSTICE ROBERTS: I just want to make
11 sure I have got your Mills argument. It is that the
12 sentence that says "it's your duty to did decide all
13 disputed questions of fact" is the same as saying they
14 are instructed that they cannot consider a mitigating
15 circumstance unless they are unanimous?

16 MR. BENZA: When considered in totality,
17 yes.

18 CHIEF JUSTICE ROBERTS: Okay. Thank you,
19 counsel.

20 Mr. Cordray, you have 10 minutes remaining.

21 REBUTTAL ARGUMENT OF GEN. RICHARD CORDRAY

22 ON BEHALF OF THE PETITIONER

23 MR. CORDRAY: Thank you, Your Honor.

24 On the Mills instruction, it -- it's clear,
25 Mills was not decided at the time the Ohio Supreme Court

1 rendered its decision. It was decided before this Court
2 denied direct review.

3 CHIEF JUSTICE ROBERTS: Is that an argument
4 you made before this Court?

5 MR. CORDRAY: I beg your pardon.

6 CHIEF JUSTICE ROBERTS: Is this an argument
7 that you've made before this Court in your brief, that
8 we shouldn't consider whether Mills is the controlling
9 standard because Mills came after?

10 MR. CORDRAY: No. Nor am I making it now.

11 CHIEF JUSTICE ROBERTS: Okay.

12 MR. CORDRAY: I am simply summarizing a
13 response to Justice Sotomayor's question. But this
14 Court -- on -- on Teague, in Beard v. Banks determined
15 that Mills itself expressed a new rule and expressed
16 some doubt as to whether that rule itself was even clear
17 until McKoy v. North Carolina was decided in 1990, which
18 was subsequent to finality in this case. But the -- but
19 the jury instruction issue is entirely knocked out by
20 the fact that this case is an extension of Mills that
21 goes beyond anything this Court has ever held in the
22 jury instruction context. It is an extension of Mills
23 that has been rejected by the majority of circuits to
24 consider it, even today 20 years later, and it couldn't
25 possibly be understood to be clearly established law.

1 The reference to page 326a and the jury
2 Instructions -- that's quite distinct from the passage
3 where the jury was told specifically they have to be
4 unanimous only on the ultimate question, whether
5 aggravators outweigh mitigators. This was very
6 different from the jury form in Mills, which was itself
7 was somewhat cryptic and -- and later was explained
8 further in McKoy.

9 If I could return then to the
10 ineffectiveness issues. Counsel argued that there was
11 deficiency on a couple of different grounds. First of
12 all, that -- that defense counsel should have argued
13 about family background and performance in prison. The
14 family background was uncontested; it was humdrum; there
15 was nothing special there. Performance in prison was an
16 issue that was raised at trial. The prosecutor read to
17 Spisak on the stand a letter he had written from prison.
18 I am not going to foul the record with his specific
19 Verbiage, but it was after a card game in which he had
20 gotten into a fight with inmates and said he would like
21 to kill them. When that was read to Spisak on the
22 stand, his response was to say "Heil, Hitler" and give
23 the Nazi salute to the jury.

24 So the notion that we should be referring
25 back to his performance in prison and that somehow would

1 have helped mitigate the jury's consideration of the
2 death sentence to me is -- is fanciful.

3 In terms of the argument that defense
4 counsel here argued, nonstatutory aggravators, that is a
5 characterization that I don't think is accurate and is
6 not accurate as a matter of Ohio law. In our reply
7 brief, we've cited State v. Hancock, which indicates
8 that the nature and circumstances of crimes are always
9 relevant in determining whether the aggravators outweigh
10 the mitigators, and, in fact, the main aggravator here
11 was that Mr. Spisak had engaged in a course of conduct
12 that involved the purposeful killing of more than one
13 person -- two or more persons, or the attempt to kill
14 two or more persons which he had done here and which was
15 certainly going to be and was, in fact, if you read the
16 prosecutor's closing, heart and soul of the prosecutor's
17 closing.

18 As to whether the mental health presentation
19 was, quote, "not strong enough," obviously it wasn't
20 strong enough in the end to sway the jury. But you
21 cannot judge by hindsight -- this Court has said it
22 again and again -- counsel performance. The Court said
23 that in Strickland v. Washington itself, emphasized that
24 tremendously in rejecting the deficiency claim in that
25 case. And then in Yarborough, as applied to closing

1 arguments, the Court said very specifically we have to
2 be doubly deferential to -- to strategic decisions made
3 at closing, even if we might have made them differently
4 or might have executed them somewhat differently, and
5 particularly through the AEDPA lens. After the --

6 CHIEF JUSTICE ROBERTS: What -- what is your
7 answer to your friend's explanation that it's hard to
8 defer when they don't even say anything?

9 MR. CORDRAY: I think that we have to read
10 the statute. The statute -- the AEDPA statute, 2254,
11 says we defer to what? We defer to an adjudication by
12 the State court on the merits. There's no suggestion
13 here that this adjudication was on some procedural
14 grounds or default grounds. It was a merits
15 adjudication. It wasn't a lengthy, eloquent, you know,
16 long, explained adjudication, but it was an adjudication
17 on the merits, and deference should be given.

18 The alternative is that if they don't
19 explain which prong they are using, that you defer to
20 nothing, and that seems to be not consistent with what
21 Congress clearly intended under AEDPA, nor is it
22 consistent with the language of the statute.

23 The claim was made that the deference only
24 applies when the State court, quote, "has done its job."
25 Under the statute, the job is to adjudicate a claim on

1 the merits, not to provide a lengthy discourse in doing
2 so. As to the prejudice point, which I think is finally
3 decisive and was the basis on which this Court GVR'd
4 in -- in Landrigan, this is Landrigan --

5 JUSTICE STEVENS: Can we just go back to
6 that one point for a minute?

7 MR. CORDRAY: Yes, sir.

8 JUSTICE STEVENS: Would your deference be
9 exactly the same if, instead of listing all 47 claims or
10 so, they simply entered a one-line order saying,
11 "Affirmed"?

12 MR. CORDRAY: I believe, Your Honor, under
13 the statute, it would be the same --

14 JUSTICE STEVENS: I see.

15 MR. CORDRAY: -- although here they
16 did more than that, as you know. They cited Strickland.
17 We have to assume they applied Strickland.

18 And, as for the prejudice claim, we have
19 findings from the Ohio Supreme Court that, I think, bear
20 on the prejudice claim. In its decision -- this is
21 at 309a to 311a of the appendix --

22 JUSTICE STEVENS: Let me -- let me go back
23 to the question.

24 MR. CORDRAY: Yes, sir.

25 JUSTICE STEVENS: Do you think they are

1 entitled to more deference because they did cite
2 Strickland if they -- than if they did cite nothing?

3 MR. CORDRAY: I think that the Ohio Supreme
4 Court is entitled to deference because it adjudicated a
5 claim on the merits, so --

6 JUSTICE STEVENS: So it would be exactly the
7 same deference whether they cited Strickland or not.

8 MR. CORDRAY: I would agree with that.
9 However, if the Court was inclined to make gradations --
10 this is a gradation beyond simply an unexplained order.
11 Yes.

12 As to prejudice, the Ohio Supreme Court, at
13 309a to 311a, itself independently reweighed the
14 aggravating factors against the mitigating factors,
15 which is something the Ohio Supreme Court does under
16 Ohio law.

17 There had been some issues of merger of some
18 of the aggravating circumstances. On direct appeal,
19 they had dealt with those issues, and then they went
20 back and reweighed, and they found that, on this record,
21 the aggravating factors heavily -- lie heavily and
22 beyond a reasonable doubt to outweigh the mitigating
23 factors.

24 That is, in fact, the kind -- same kind of
25 determination that the Court would make in trying to

1 determine if there was prejudice here.

2 As to the implementation of the strategy
3 here, it's coherent in understanding what counsel was
4 trying to do. Was it a bit rambling? Perhaps. You
5 know, were there -- were there side issues that he tried
6 to take up, which he thought went to his credibility
7 with the jury and the credibility of the mental illness
8 defense with the jury? Perhaps.

9 But the strategy was twofold. It was to
10 reference the crimes, make it clear to the jury he
11 understood the nature -- the horrific nature of the
12 crimes, as he thought the jury understood it, and then
13 pivot to the mental illness -- mental disease or defect
14 prong as the mitigator that the -- that the jury should
15 apply in not giving the death penalty in this case.

16 I think the strategy was coherent. I'm
17 not sure what else defense counsel could have done in
18 this case, where his client had both committed these
19 horrific crimes, undisputed, and then had reveled in
20 them, in his flamboyant testimony from the stand.

21 In the context of that and given the doubly
22 deferential lens this Court has laid out in Yarborough,
23 I think that there is neither deficiency, nor could
24 there be prejudice on this record.

25 If there are no further questions, Your

1 Honor, thank you for your time.

2 CHIEF JUSTICE ROBERTS: Thank you, General
3 Cordray, Mr. Benza.

4 The case is submitted.

5 (Whereupon, at 12:06 p.m., the case in the
6 above-entitled matter was submitted.)

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