No. -------

IN THE SUPREME COURT OF THE UNITED STATES

JOHN WETZEL, et al.
Petitioners

v.

MUMIA ABU-JAMAL,
Respondent

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

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PETITION FOR WRIT OF CERTIORARI

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Capital case: Question presented

This Court issued a GVR to the Third Circuit to consider *Smith v. Spisak*, which had not been decided when that court ruled for respondent under *Mills v. Marlyand*. The circuit court nevertheless reinstated its original decision.

The issue is whether the circuit court on remand misapplied *Spisak* and applied not a deferential, but a deprecatory, standard of review.

List of parties

Petitioners

John Wetzel, Secretary, Pennsylvania Department of Corrections

Jeffrey A. Martin, Acting Superintendent of the State Correctional Facility at Greene, Pennsylvania

R. Seth Williams, District Attorney of Philadelphia, Pennsylvania

Linda L. Kelly, Attorney General of the Commonwealth of Pennsylvania,

Respondent

Mumia Abu-Jamal

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Orders and Opinions below

The April 26, 2011 judgment and opinion of the United States Court of Appeals for the Third Circuit, affirming the order of the district court following remand from this Court for reconsideration, is reported at *Abu-Jamal v. Secretary, Pennsylvania Department of Corrections, et. al.*, __ F.3d __ (3d Cir. 2011), and is reprinted in the Appendix at App. 1-38. The former March 27, 2008 judgment and opinion of the Third Circuit, also affirming the order of the district court, is reported at *Abu-Jamal v. Horn*, 520 F.3d 272 (3d Cir. 2008), and is excerpted in the Appendix in relevant part at App. 43-70. The July 22, 2008 order of the Third Circuit denying respondent's petition for rehearing and rehearing en banc is reprinted in the Appendix at App. 41-42. The December 18, 2001 order of the district court conditionally granting the petition for writ of habeas corpus is excerpted in relevant part in the Appendix at App. 71-115. The October 29, 1998 decision of the Supreme Court of Pennsylvania is reprinted in relevant part in the Appendix at App. 116-119. The Philadelphia Court of Common Pleas PCRA decision of September 15, 1995 is excerpted in relevant part in the Appendix at App. 120-122. The July 2, 1982 sentencing jury instructions and sentencing verdict form are reprinted in relevant part in the Appendix at App. 123-135. Pages 21 through 24 of the brief for respondent in *Smith v. Spisak*, No. 08-724, are reprinted in the Appendix at App. 136-141.

Jurisdiction

This is a federal habeas corpus proceeding. Petitioner seeks review of the order of the United States Court of Appeals of the Third Circuit dated April 26, 2011, affirming the order of the district court granting the writ as to sentencing. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

Constitutional and statutory provisions involved

The Eighth Amendment to the United States Constitution provides:

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

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

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; ...

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

(c) INSTRUCTIONS TO JURY.--

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

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

Statement of the case

Nearly three decades ago Philadelphia Police Officer Daniel Faulkner was murdered by Mumia Abu-Jamal. After the Third Circuit upheld the grant of a new sentencing hearing under *Mills v. Maryland*, this Court granted the Commonwealth's petition for certiorari, vacated the circuit court's judgment, and remanded for reconsideration under *Smith v. Spisak*. In its original ruling the circuit court lacked the benefit of the latter decision. But on remand, it found no need for a different result.

That was surprising. *Spisak* established that *Mills* is not violated where jurors – as here – were told they must unanimously decide the *balancing* of aggravating and mitigating circumstances, but were not so instructed concerning the *finding* of mitigating circumstances. That the state court's ruling was at least reasonable should have been obvious.

But a law requiring deference is nullified if federal courts do not apply it. Here, even after the GVR, deference was absent in the circuit court, in a capital case remanded for the very purpose of enforcing § 2254. Further review is warranted.

Shortly before 3:38 a.m. near the corner of 13th and Locust Streets in Philadelphia, Officer Daniel Faulkner stopped a Volkswagen driven by one William Cook. The officer, who was in uniform and

drove a marked police car, sent a radio call for the assistance of a police van. As he stood behind Cook and was apparently about to frisk him, Cook turned and punched the officer in the face. Officer Faulkner attempted to subdue and handcuff Cook. As he did so, Mumia Abu-Jamal, a/k/a Wesley Cook – William Cook's brother – emerged from a parking lot across the street. He ran up behind the officer and shot him in the back. The officer turned and managed to fire one shot that hit Abu-Jamal in the upper chest. Officer Faulkner fell to one knee, and then fell to the ground and lay face-up. Abu-Jamal stood over him and methodically emptied his revolver at the officer's face. One bullet struck the officer between the eyes and entered his brain (N.T. 6/19/82, 106, 209-216, 276-277; 6/21/82, 4.79-4.106, 5.179; 6/23/82, 6.97; 6/25/82, 8.4-8.34, 8.181; 6/28/82, 28.65).

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

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

In the penalty phase the jury was instructed to impose death if either of two scenarios was established, and otherwise to impose a life sentence:

> [Y]our verdict must be a sentence of death if you unanimously find at least one aggravating circumstance and no mitigating circumstances. Or, if you unanimously find one or more aggravating circumstances which outweigh any mitigating circumstances. In all other cases, your verdict must be a sentence of life imprisonment.

N.T. 7/3/82, 92; App. 126-127.[1]

The jurors were provided with a form on which to record the penalty verdict. It stated, "We, the jury,

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

having heretofore determined that the above-named defendant is guilty of murder of the first degree, do hereby further find that ...," followed by each of above options (aggravating and no mitigating; aggravating and "any" mitigating; or life imprisonment). Lines for recording aggravating and mitigating circumstances were provided. The two subsequent pages listed all statutory aggravating and mitigating circumstances. Next to each was a space for a check mark, and at the end of the form were lines for the signatures of the jurors and the date. There were no instructions of any kind on the form. With respect to recording the aggravating and mitigating circumstances, the court told the jurors to "put an 'X' mark or check mark" next to "whichever ones you find" (*Id.*, 94-95; App. 129). The completed form (App. 131-135) showed the following:

> (2) (To be used only if the aforesaid sentence is death)
>
> We, the jury, have found unanimously
>
> ___ at least one aggravating circumstance and no mitigating circumstance. The aggravating circumstance(s) is/are _____.
>
> _X_ one or more aggravating circumstances which outweigh any mitigating circumstances. The aggravating circumstance(s) is/are
>
> A_____.

The mitigating circumstance(s) is/are

A .[2]

The jurors were not instructed that unanimity was required to find a mitigating circumstance, or that failure to agree barred consideration of mitigating evidence.

The jury returned a verdict of death on July 3, 1982 and Abu-Jamal filed a direct appeal to the state supreme court. During the appeal, on June 6, 1988, this Court decided *Mills v. Maryland*, but no corresponding claim was raised on appeal.

The state supreme court affirmed the judgments of sentence on March 6, 1989. During the pendency of Abu-Jamal's ensuing petition for certiorari,[3] on January 16, 1991, the Third Circuit

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[2] The letter "A" on the first line stood for the first listed sole aggravating circumstance, murdering a peace officer acting in the performance of his duties. On the second line "A" stood for the first listed mitigating circumstance, that the offender had no significant history of prior criminal convictions. On the separate pages on which the aggravating and mitigating circumstances were listed, the jurors also placed check marks next to the circumstances identified by letter on the first page.

[3] Abu-Jamal filed a petition for certiorari on May 2, 1990, which this Court denied on October 1, 1990. He filed a

(continued...)

decided *Zettlemoyer v. Fulcomer*, a Pennsylvania capital case. It held that the instructions given there, which were substantially the same as those here, did not violate *Mills*.

State collateral review

On June 5, 1995, Abu-Jamal filed a petition for collateral review under Pennsylvania's Post Conviction Relief Act (PCRA), raising a *Mills* claim. Following evidentiary hearings the state court denied the petition on September 15, 1995. In deciding the *Mills* claim it cited and relied on *Zettlemoyer*. App. 121.

Abu-Jamal appealed the PCRA ruling to the state supreme court. In order to distinguish his case from *Zettlemoyer*, he chose to limit his *Mills* claim to "the penalty phase verdict slip." The state supreme court denied relief on October 29, 1998, concluding that the form did not "lead the jurors to believe that they must unanimously agree on mitigating evidence before such could be considered." *Commonwealth v. Abu-Jamal*, 720 A.2d 79, 119 (Pa. 1998); App. 118-119.

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[3](...continued)
petition for rehearing on October 29, 1990, which was denied on November 26, 1990. Six months later, on May 15, 1991, he filed a second request for rehearing, which was denied on June 10, 1991.

Federal habeas review

On October 15, 1999, Abu-Jamal filed a petition for a federal writ of habeas corpus. On December 18, 2001, nine days after the 20th anniversary of his murder of Officer Faulkner, the district court granted one of his twenty-nine habeas claims and ordered a new penalty hearing, finding that the state had unreasonably applied *Mills*.

The Commonwealth appealed. In affirming, the Third Circuit concluded that the state supreme court had acted unreasonably in its "failure to address the entire sentencing scheme," and that the instructions created a risk of "confusion about a unanimity requirement." *Abu-Jamal v. Horn*, 520 F.3d 272, 303 (3d Cir. 2008); App. 66-67.

The Commonwealth sought certiorari. While its petition was pending, on January 12, 2010, this Court decided *Smith v. Spisak*. In that case the Sixth Circuit had granted habeas relief under *Mills* because, even though the instructions there "did not say that the jury must determine the existence of each mitigating factor unanimously," the circuit court considered that a likely inference. This Court reversed, holding that such instructions did not "clearly bring about" the error in *Mills*. On January 19, 2010, this Court granted the Commonwealth's certiorari petition in this case, vacated the Third Circuit's judgment on the *Mills* claim, and remanded for further consideration in light of *Spisak*.

On April 26, 2011, the Third Circuit announced its instant, precedential decision. It concluded that *Spisak* was distinguishable because there was no *Mills* error in that case. Independently determining that there was one in this case, it deemed the decision of the Pennsylvania Supreme Court unreasonable and reaffirmed the grant of habeas relief.

The Commonwealth again seeks certiorari in this 1981 murder case.

Reasons for granting the writ

1. The circuit court on remand misapplied *Spisak*.

Smith v. Spisak, 130 S. Ct. 676 (2010), clarified this Court's prior decision in *Mills v. Maryland*, 486 U.S. 367 (1988). In *Mills* jurors were told they must unanimously agree in order to find any mitigating circumstance, and that failure to agree barred its use. A single juror could veto mitigation.[4]

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[4] *See Walton v. Arizona*, 497 U.S. 639, 647-651 (1990) (*Mills* instruction "likely led the jury to believe that any particular mitigating circumstance could not be considered unless the jurors unanimously agreed"); *McKoy v. North Carolina*, 494 U.S. 433, 440 (1990) (in *Mills* "1 juror was able to prevent the other 11 from giving effect to mitigating evidence").

The instructions in *Spisak* avoided that error. They did not "say that the jury must determine the existence of each individual mitigating factor unanimously." Instead the references to unanimity were "focused only on the overall balancing question." *Id.* at 683-684.

Likewise here. The jurors in this case were not told they must decide mitigation unanimously or that failure to agree precluded a mitigating circumstance. Instead, on the verdict form the word "unanimously" referred to the balancing decision: "we, the jury, have found unanimously ... one or more aggravating circumstances which outweigh any mitigating circumstances." The oral instructions likewise said that the verdict must be death "if you unanimously find one or more aggravating circumstances which outweigh any mitigating circumstances" (N.T. 7/3/82, 92; App. 126-127).

Spisak virtually described the instructions given here. It approved telling jurors that, to recommend death, they "had to find, unanimously ... that each of the aggravating factors outweighed any mitigating circumstances." 130 S Ct. at 684. Here, as in *Spisak*, unanimity was not required to find mitigating circumstances. Unanimity was required to decide the *balancing* question that determined the verdict. *See Kansas v. Marsh*, 548 U.S. 163, 179 (2006) ("Weighing is not an end; it is merely a means to reaching a decision. The decision the jury must reach is whether life or death is the appropriate

punishment"). The jury was thus required to be unanimous only in its ultimate decision.

Spisak is at odds with the circuit court's decision – in which its task, paradoxically enough, was to reconcile its reasoning with *Spisak*.

This Court ruled that, to trigger a death sentence, jurors may be told to "find, unanimously ... that each of the aggravating factors outweighed any mitigating circumstances." 130 S Ct. at 684. In this case the instruction was, "if you unanimously find one or more aggravating circumstances which outweigh any mitigating circumstances" (N.T. 7/3/82, 92; App. 127). Yet on remand, the circuit court nevertheless concluded that there was a "substantial possibility" that jurors would have understood "unanimously find one or more aggravating circumstances which outweigh any mitigating circumstances" to "mean that both aggravating and mitigating circumstances must be found unanimously." *Mumia Abu-Jamal v. Sec'y, Pa. Dep't of Corr.*, 2008 U.S. App. LEXIS 28098, 16 (3d Cir. Mar. 27, 2008); App. 18.

Spisak cannot be reconciled with this analysis. It held that "find, unanimously ... that each of the aggravating factors outweighed any mitigating circumstances" does *not* impose a requirement that mitigating circumstances be found unanimously. It contradicts the circuit court's counterintuitive conclusion that "unanimously find one or more

aggravating circumstances which outweigh any mitigating circumstances" is somehow another way of saying "both aggravating and mitigating circumstances must be found unanimously."

While "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable," *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011), in light of *Spisak* the case for relief here was nonexistent. Jurors here were told to be unanimous in the balancing decision, just as in *Spisak*.

The Third Circuit nevertheless decided that *explicitly* requiring a unanimous *balancing* decision *implicitly* required a unanimous *mitigation* decision. It concluded, in essence, that jurors would have been hypnotized by the word "unanimous" because it was "repeatedly" used "throughout" the instructions. 2008 U.S. App. LEXIS 28098, 16; App. 18. But there is no reason why jurors here were susceptible to this hypnosis while *Spisak* jurors were not. The instructions here certainly used the word "unanimous" repeatedly, but did so in calling for a unanimous *verdict*:

> Remember again that your verdict must be unanimous. It cannot be reached by a majority vote or by any percentage. It must be the verdict of each and every one of you. Remember that your verdict must be a sentence of death if you

> unanimously find at least one aggravating circumstance and no mitigating circumstances. Or, if you unanimously find one or more aggravating circumstances which outweigh any mitigating circumstances. In all other cases, your verdict must be life imprisonment.

N.T.7/3/82, 92; App. 126-127.

Spisak made the same argument, contending that jurors would understand a unanimity requirement to apply to every subpart of every sentencing decision (*Spisak,* Brief for Respondent, 21-24; App. 136-141). That argument failed, as it should. Telling jurors that they must be unanimous to decide whether aggravating circumstances *outweigh* mitigating circumstances says nothing about *how to find* mitigating circumstances, let alone imply that doing so requires unanimity.

2. The circuit court's review remained unaffected by § 2254.

The circuit court was required to be "highly deferential" to the state court decision and give it "the benefit of the doubt," *Felkner v. Jackson,* 131 S. Ct. 1305 (2011), (citations and internal quotation marks omitted). Moreover, the claim raised here required application of a general rule to specific

facts.[5] When the deference requirement and a general rule of decision apply "in tandem," habeas review by a federal court is to be "doubly deferential." *Cullen v. Pinholster*, 131 S. Ct. 1388, 1403 (2011); *Harrington v. Richter*, 131 S. Ct. at 788 (review of state court's application of the general prejudice standard must be not only "highly deferential" but "doubly so").

That the court below was even aware of this standard could not be demonstrated by its opinion. It did recite some appropriate terms, such as the words "objectively unreasonable" from *Williams v. Taylor*, 529 U.S. 362, 409 (2000), but its discussion of the merits proved this was merely symbolic. Its task on remand was to "determine what arguments or

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[5] The general rule for deciding jury instruction claims, including those raising *Mills*, is stated in *Boyde v. California*, 494 U.S. 370, 380 (1990). "[T]he proper inquiry in such a case is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." This "reasonable likelihood" standard is an iteration of the "reasonable probability" standard for evaluating prejudice established in *Strickland v. Washington*, 466 U.S. 668, 694 (1984). *Boyde*, 494 U.S. at 381 n.4 (explaining that the same prejudice standard applies to claims of ineffective assistance of counsel and failure to disclose exculpatory evidence). *See Brown v. Payton*, 544 U.S. 133, 144 (2005) ("*Boyde* sets forth a general framework for determining whether a challenged instruction precluded jurors from considering a defendant's mitigation evidence").

theories supported" the state decision and decide if "fairminded jurists could disagree." *Harrington v. Richter*, 131 S. Ct. at 786. Instead the circuit court labored to undermine the state decision by insisting that *Spisak* made no difference.

The circuit court deemed this case "easily distinguished" from *Spisak* because "the identified language of unanimity here indisputably addresses more than the final balancing" in the sense that the word unanimously "directly refers to one or more aggravating circumstances." 2008 U.S. App. LEXIS 28098, 23; App. 25 (internal quotation marks omitted). But this cramped reinterpreting of the instruction is simply wrong. In "if you unanimously find one or more aggravating circumstances which outweigh any mitigating circumstances," "unanimously" modifies "outweigh." *Spisak* concluded that telling jurors to "find, unanimously ... that each of the aggravating factors outweighed any mitigating circumstances," does *not* address "more than the final balancing." The circuit court's bald pronouncement that the same words here did just the opposite is no distinction at all, much less an easy one.

Spisak also made no difference, according to the circuit court, because a unanimity-for-everything inference nonetheless arose when the verdict form addressed the jury as a group, saying "[w]e, the jury." 2008 U.S. App. LEXIS 28098, 16, 23; App. 18, 25. But so did the form in *Spisak* – a fact noted, surprisingly, in the Third Circuit's own opinion. 2008

U.S. App. LEXIS 28098, 20; App. 22-23 (quoting the *Spisak* verdict form repeatedly saying "We the jury"). Spisak unsuccessfully made the same argument in this Court (*Spisak*, brief for respondent, 21, App. 137, contending that unanimity was implicitly required because the jury was addressed "in the collective 'you'"). Yet the circuit court never explained why the same words, used in the same way, have opposite meanings here and in *Spisak*.

The circuit court also sought to distinguish *Spisak* on the ground that jurors here had "to identify each mitigating circumstance it found," 2008 U.S. App. LEXIS 28098, 24, App. 26, while those in *Spisak* did not. This is no distinction. *Spisak* jurors did not have to *record* mitigating circumstances, but they still had to *decide* them. What mattered was that they were not required to decide unanimously. Here, jurors were told to record the mitigating circumstances they decided, but they likewise were not required to decide unanimously.[6]

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[6] The trial court in Spisak specified two potential mitigating circumstances, one of which was an open-ended or "catchall" provision. The mitigating circumstances here also included a catchall provision. Thus, that the form here listed all of the statutory mitigating circumstances was not a limiting factor. Jurors in both cases were unrestricted in deciding what could amount to mitigation. *See Blystone v. Pennsylvania*, 494 U.S. 299, 305 (1990) (explaining that, due to the catchall provision, Pennsylvania law "does not limit the types of mitigating evidence which can be considered").

Spisak was also different, the circuit court found, in that jurors there decided aggravating factors in the guilt phase, but jurors here decided mitigating and aggravating circumstances "contemporaneously" and were instructed "identically as to each" giving them "apparent similitude." 2008 U.S. App. LEXIS 28098, 24-25; App. 27-29. But this similitude theory makes no sense, because the jurors were not told they must be unanimous to decide either kind of circumstance. Further, even if the word "unanimously" is construed to modify "aggravating circumstances" rather than "outweigh," the instructions still do not require unanimity to find "any mitigating circumstances." Thus, regardless of whether the sentencing factors were in some sense treated differently *or* identically, unanimity was not required to find mitigating circumstances.

And while the complaint that jurors here decided the factors "contemporaneously" did not distinguish *Spisak* (unanimity was not required whether the decisions were sequential or simultaneous), it distinguished *Mills*. The instructions there rigidly precluded any mitigating circumstance not marked "yes" in step II from being considered in later deliberations. 486 U.S. at 379-380 ("Section III instructed the jury to weigh only those mitigating circumstances marked "yes" in Section II. Any mitigating circumstance not so marked ... could not be considered by any juror"). Here, the process denigrated by the circuit court had no such rigid

steps, allowing jurors to consider any relevant fact before reaching a final verdict.

Likewise, the circuit court stressed that no one affirmatively told jurors that unanimity was *not* required to find mitigating circumstances. 2008 U.S. App. LEXIS 28098, 17, 26; App. 19, 29. But there was no need to correct a nonexistent defect. This Court properly rejected this argument when Spisak made it (*Spisak*, brief for respondent, 21, App. 137, arguing that jurors were not told that mitigation was a "non-unanimous decision,"; 24, App. 140, arguing that unanimity requirement was implicit "since there was never a contrary instruction").[7]

Spisak's arguments failed in his own case but succeeded in this one because the central premise of

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[7] The circuit court's view that such an "anti-*Mills* instruction" is required inevitably follows from the imagined need to rebut an imagined unanimity requirement. But there is no such requirement, and the circuit court's "anti-*Mills* instruction" rule is of its own invention. The Sixth Circuit's reliance on this novel rule was precisely the error that led to the first grant of certiorari in *Spisak*. *Hudson v. Spisak*, 552 U.S. 945 (2007) (GVR granted on Ohio's claim that Sixth Circuit's requirement of an affirmative instruction that jurors are free to disagree about mitigating factors was a new rule not clearly established in Supreme Court precedent); *see Spisak v. Mitchell*, 465 F.3d 684, 711 (6th Cir. 2006) (finding violation of *Mills* based on "silence on the lack of unanimity required to find mitigating circumstances"). The error is equally clear here.

those arguments – that a reference to unanimity, even though grammatically directed to the weighing decision, implicitly attaches itself to other decisions in the sentencing phase – is thoroughly entrenched in the Third Circuit's own precedent.[8]

Rather than "determine what arguments or theories supported" the state court decision, *Harrington v. Richter*, 131 S. Ct. at 786, the circuit court on remand continued to apply the reasoning of its own decisions, deeming it "substantially probable" that the jury "applied the unanimity requirement to mitigating circumstances," 2008 U.S. App. LEXIS 28098, 27; App. 29 (internal quotation marks omitted) – even though there was no such instruction. That it is habitual for the circuit court to

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[8] *Kindler v. Horn*, 542 F.3d 70, 83 (3d Cir. 2008), *vacated on other grounds sub nom. Beard v. Kindler*, 130 S. Ct. 612 (2009) (*Mills* violated because jurors were not told "that the requirement of unanimity did not apply to any mitigating circumstance"); *Abu-Jamal v. Horn*, 520 F.3d 272, 303 (3d Cir. 2008) (that word "unanimity" appeared "in close relation" to instructions on mitigation violated *Mills*); *Banks v. Horn*, 271 F.3d 527, 548, 550 (3d Cir. 2001), *reversed on other grounds sub nom. Beard v. Banks*, 542 U.S. 406 (2004) (asserting that *Mills* error can arise from "proximity" of words, and concluding that unanimity for mitigation was required "by implication"); *Frey v. Fulcomer*, 132 F.3d 916, 923 (3d Cir.1997), *cert. denied*, 524 U.S. 911 (1998) (*Mills* violated because words "unanimous" and "mitigating" appeared close together, creating a "sound bite" leading jurors to believe mitigation must be found unanimously).

infer such a meaning, however, is not evidence that any juror ever did. "Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might ... commonsense understanding of the instructions in the light of all that has taken place at the trial [is] likely to prevail over technical hairsplitting." *Boyde v. California*, 494 U.S. 370, 380-381 (1990); *see Renico v. Lett*, 130 S. Ct. 1855, 1864-1865 (2010) (although circuit court's view of the record was "not implausible," it erred in basing its decision on disagreement with the state supreme court about "the inferences to be drawn from" objective facts).

3. The circuit court's analysis was not deferential but deprecatory.

The circuit court's misapplication of *Spisak* and its failure to afford deference are of serious concern. But the circuit court went further. Its analysis was remarkable in its unfairness to the state court.

The standard defined by § 2254 is not a suggestion, but a bar to habeas relief in the absence of "extreme malfunctions in the state criminal justice system." The ruling of the state court is to be upheld absent "an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 131 S. Ct. at 787.

The circuit court inverted this standard. In both its original decision and in its latest decision following the GVR, the circuit court deemed the state decision unreasonable because it "focused exclusively on the verdict form and reached its conclusion without considering the entire jury charge." 2008 U.S. App. LEXIS 28098, 29; App.31-32; *Abu-Jamal v. Horn*, 520 F.3d at 303, App. 66 (state decision unreasonable for "failure to address the entire sentencing scheme").

This reasoning inexplicably ignored *why* the state supreme court focused on the verdict form. Abu-Jamal had narrowed his state appellate claim for the specific purpose of avoiding the Third Circuit's own decision in *Zettlemoyer v. Fulcomer*, 923 F.2d 284 (3d Cir.), *cert. denied*, 502 U.S. 902 (1991).

In *Zettlemoyer* the Third Circuit held that the instructions in that case did not violate *Mills*. 923 F.2d at 308 ("Neither the court nor the verdict sheet stated that the jury must unanimously find the existence of particular mitigating circumstances ... *Mills* is clearly distinguishable"). As Abu-Jamal himself recognized when he filed his brief in the state supreme court, the instructions in that case and in this were substantially the same – both required unanimity in the final weighing decision:

Zettlemoyer (923 F.2d at 307):

> The verdict, of course, must be unanimous. Again, if you find unanimously, beyond a reasonable doubt, the aggravating circumstance that I have mentioned, the only one that's applicable, that the victim was a prosecution witness to a felony and it was committed and he was murdered so that he would not testify, that is an aggravating circumstance. If you find that aggravating circumstance and find no mitigating circumstances or if you find that the aggravating circumstance which I mentioned to you outweighs any mitigating circumstance you find, your verdict must be the death penalty.

This case (N.T.7/3/82, 92; App. 126-127):

> [Y]our verdict must be a sentence of death if you unanimously find at least one aggravating circumstance and no mitigating circumstances. Or, if you unanimously find one or more aggravating circumstances which outweigh any mitigating circumstances.

When it addressed Abu-Jamal's *Mills* claim in 1995, the state PCRA court expressly relied on *Zettlemoyer*. *Commonwealth v. Abu-Jamal,* 30 Phila.

1, 110 (1995); App. 121 ("The constitutionality of similar verdict forms, along with the instructions given here, has repeatedly been upheld"; citing, *inter alia, Zettlemoyer*).

On appeal to the Supreme Court of Pennsylvania, Abu-Jamal – at the time represented by five privately retained lawyers – sought to differentiate his *Mills* claim from that in *Zettlemoyer*. He restricted his *Mills* claim to the verdict form, and in a footnote explained that he was doing so to avoid *Zettlemoyer*: that case and other such cases were inapposite, he argued, because they "dealt with deficient instructions, not verdict forms" (Abu-Jamal's brief on appeal from collateral review to the state supreme court, No. 119 Capital Appeal Docket,, pp. 114-116 & n.143). Abu-Jamal said nothing in his brief about the trial court's instructions and did not even quote them.

Abu-Jamal's effort to distinguish his case from *Zettlemoyer* was understandable. In 1996 that case was the sole existing Third Circuit decision construing *Mills* and Pennsylvania capital case instructions -- instructions indistinguishable from those here -- and it had declared them valid. The state supreme court discussed the issue just as Abu-Jamal chose to present it, but found that there was nothing about the form that violated *Mills*. *Commonwealth v. Abu-Jamal*, 720 A.2d 79, 119 (Pa. 1998); App. 117-119.

Remarkably, the Third Circuit determined that the state supreme court was unreasonable because it "focused exclusively on the verdict form and reached its conclusion without considering the entire jury charge." 2008 U.S. App. LEXIS 28098, 29; App.31-32. In other words, the state court was "unreasonable" for addressing the claim as narrowed *by the appellant* in his effort to avoid the circuit court's own precedent that undermined his *Mills* claim.

Further, the circuit court explained that the state court's focus on the form was unreasonable because of the "parallel structure of the form and instructions." According to the circuit court, "the verdict form's first page" and the oral instructions "read similarly," both stating that a death sentence would result "if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances." 2008 U.S. App. LEXIS 28098, 16-17; App. 18-19. In other words, it was "unreasonable" to focus on the form and not the instructions notwithstanding that the form and the instructions *said exactly the same thing.*

To make matters all the more inexplicable, even the most cursory look at the forms used here and in *Zettlemoyer* shows that the forms and the instructions in *both* cases were saying exactly the same thing:

Zettlemoyer (923 F.2d at 308, footnotes omitted):

> We the jury have found unanimously:
> at least one aggravating circumstance and no mitigating circumstance. The aggravating circumstance is .
>
> [X] the aggravating circumstance outweighs [the] mitigating circumstances. The aggravating circumstance is [the murdering of a prosecution witness to prevent testimony in a felony case.]

This case (App. 131-132):

> We, the jury, have found unanimously
>
> ___ at least one aggravating circumstance and no mitigating circumstance. The aggravating circumstance(s) is/are _____.
>
> _X_ one or more aggravating circumstances which outweigh any mitigating circumstances.[...]

In the end, the circuit court's baffling analysis is nothing more than a reiteration of its view that, contrary to its own ruling in *Zettlemoyer*, requiring unanimity in the weighing decision implicitly violates *Mills*.

The Third Circuit's refusal to even discuss *Zettlemoyer* is also striking because that case uniquely demonstrates the reasonableness of the state court's decision. It is a simple syllogism: the Third Circuit found in *Zettlemoyer* that instructions like those here did not violate *Mills*. Third Circuit judges are reasonable. Reasonable judges can find that the instructions here did not violate *Mills*.

The Third Circuit has chosen not to engage this argument. In its decision prior to the GVR, it at least acknowledged that *Zettlemoyer* was "in tension with" its later decisions. *Abu-Jamal*, 520 F.3d at 304; App. 69. But that remark failed to recognize or resolve the fact that such tension, in and of itself, shows that reasonable jurists can disagree. And the circuit court's instant decision on remand makes no mention of *Zettlemoyer* at all. The issue, however, remains: whether "the state court's ruling ... was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 131 S. Ct. at 787.

If the circuit court's own decision in *Zettlemoyer* does not establish the "possibility of fairminded disagreement," nothing ever could. The circuit court's analysis went beyond a mere lack of deference. It more closely resembles dismissal.

The circuit court's refusal to address *Zettlemoyer* is characteristic of its deprecatory treatment of the state court decision in this case. *Zettlemoyer* was no abberation. It remains squarely in the mainstream of federal appellate decisions applying *Mills*, while the later decisions of the Third Circuit departing from *Zettlemoyer* are in the minority. Not only *can* reasonable jurists agree with the Pennsylvania Supreme Court decision, they actually do -- *frequently*.

For example, in *Noland v. French*, 134 F.3d 208, 213-214 (4th Cir.), *cert. denied*, 525 U.S. 851 (1998) -- a case decided nine months before the state supreme court ruled in this case -- the Fourth Circuit rejected a *Mills* claim where, "[j]ust before releasing the jury to begin its deliberations in the penalty phase," the trial court gave "a general unanimity instruction," saying they were to reach "a unanimous decision as to each issue." Reading the entire charge in context, the Fourth Circuit disagreed with Noland's argument that this "created a reasonable likelihood that the jury believed that it must have found any mitigating circumstances unanimously." Doubtless the Third Circuit would have reached a different result, but on habeas review that is not the issue.[9]

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[9] *See also, e.g., Henley v. Bell*, 487 F.3d 379, 391 (6th Cir. 2007) ("the plain language of both the instructions and the verdict form require unanimity as to the weighing of

(continued...)

In litigating *Mills* claims on federal habeas

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[9](...continued)
aggravating and mitigating circumstances -- not the existence of a mitigating circumstance"); *Scott v. Mitchell*, 209 F.3d 854, 874 (6th Cir.), *cert. denied*, 531 U.S. 1021 (2000) (no *Mills* issue where jurors told "all 12 of you must sign [the verdict form] ... [i]t must be unanimous"); *LaFevers v. Gibson*, 182 F.3d 705, 719 (10th Cir. 1999) ("[a] trial court need not ... expressly instruct a capital sentencing jury that unanimity is not required before each juror can consider a particular mitigating circumstance"); *Duvall v. Reynolds*, 139 F.3d 768, 791 (10th Cir.), *cert. denied*, 525 U.S.933 (1998) (same); *Arnold v. Evatt*, 113 F.3d 1352, 1363 (4th Cir. 1997), *cert. denied*, 522 U.S. 1058 (1998) ("Arnold now claims a "substantial possibility" existed that the jury could have thought it must also unanimously agree as to the existence of any mitigating circumstances. Unlike in *McKoy* or *Mills*, however, the jury instructions never required the jury to find any mitigating factor unanimously"); *Parker v. Norris*, 64 F.3d 1178, 1187 (8th Cir. 1995), *cert. denied*, 516 U.S. 1095 (1996) (that verdict form "failed to inform jurors that they could consider non-unanimous mitigating circumstances" did not violate *Mills*); *Griffin v. Delo*, 33 F.3d 895, 905-906 (8th Cir. 1994), *cert. denied*, 514 U.S. 1119 (1995) (instruction that jurors must impose life if they unanimously found that any mitigating circumstances outweighed aggravating circumstances did not imply that they must be unanimous to find mitigating circumstances); *Lawson v. Dixon*, 3 F.3d 743, 754 (4th Cir. 1993), *cert. denied*, 471 U.S. 1120 (1994) (*Mills* not violated where jurors told to "find unanimously" whether aggravating circumstances outweigh mitigating ones; "such an instruction does not run afoul of *Mills/McKoy* because it does not state that jurors must agree unanimously on the existence of a mitigating factor") (citation and internal quotation marks omitted).

review in this circuit, the Commonwealth has constantly cited the fact that most other circuit courts to consider similar claims have ruled consistently with the Pennsylvania Supreme Court. Yet in none of its *Mills* decisions has the Third Circuit even acknowledged this argument, much less discussed it on the merits.

As further proof of the state court's supposed unreasonableness, the circuit court noted that, soon after *Mills* was decided, the state supreme court issued a new verdict form stating that unanimity was not required in finding mitigating circumstances. The circuit court treated this as if it were an admission that the standard instructions were unconstitutional absent such an "anti-*Mills* instruction." It was characteristically blind to the possibility that the state could reasonably have decided to preclude potential *Mills* claims by altering its verdict form, in order to protect its judgments from being erroneously overturned by a federal court acting outside the proper scope of its authority -- exactly as occurred here.

The state's protective change to the form was futile. Pennsylvania has been fighting and losing the *Mills* battle since 1997, when the Third Circuit departed from *Zettlemoyer* in *Frey v. Fulcomer*. The judgments in this case and in other similar cases have been erroneously overturned by the court below notwithstanding the clear limitations on federal collateral review imposed by Congress.

4. Summary reversal is warranted.

Having already once been fruitlessly remanded by this Court for enforcement of the AEDPA standard, this case calls for summary reversal.

The Third Circuit originally acted without the benefit of *Spisak*. That was duly considered when this Court issued its GVR in January 2010. Since then – and *before* the circuit court issued its instant opinion – this Court has handed down decisions such as *Harrington v. Richter* and *Cullen v. Pinholster*. One would have thought all doubt concerning the federal habeas standard of review had been removed. But one would be wrong. On remand following the GVR, the circuit court misapplied *Spisak*, and its mode of review was anything but deferential.

AEDPA will remain ineffective in the Third Circuit until the circuit court enforces it. This Court has taken steps to insist that this law be followed in other circuits that had failed to comply, such as the Ninth and Sixth Circuits. It should do the same here.

This Court could have summarily reversed under *Spisak*, but instead gave the circuit court the benefit of the doubt. Pennsylvania should now be given the benefit it was due under § 2254. The circuit court should be summarily reversed.

Conclusion

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

Respectfully submitted:

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