IN THE SUPREME COURT OF THE UNITED STATES

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KEITH SMITH, WARDEN, :

Petitioner :

v. : No. 08-724

FRANK G. SPISAK, JR. :

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Washington, D.C.

Tuesday, October 13, 2009

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:06 a.m.

APPEARANCES:

GEN. RICHARD CORDRAY, ESQ., Attorney General, Columbus, Ohio; on behalf of the Petitioners.

MICHAEL J. BENZA, ESQ., Chagrin Falls, Ohio; Appointed by this Court.

C O N T E N T S

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

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

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

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

JUSTICE SOTOMAYOR: We don't have to go any further if we simply address the question, at what point in time are we talking about a State court's decision, correct?

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

Second --

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

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

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

JUSTICE GINSBURG: Yes.

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

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

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

JUSTICE GINSBURG: It would be -- under the charge that was given in this case, you say it would be -- then the judge would be obliged to give one of the two life sentences. It would not be a deadlock

requiring a resentencing hearing.

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

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

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

If I could move to the --

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

But the jury could believe that they could -- that it's either death or life, and one holdout juror

would say: Well, I don't want to let this guy out; because those are the only two choices and 11 people want to go for dead -- death and I'm the only holdout, I have to vote for death to make sure that he is restrained in a way that I find acceptable.

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

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

client's crimes and his disturbing character to tell a story about his client's mental illness, and he asked the jury to forego the death penalty for Mr. Spisak because he is mentally ill and thus, under the mitigating factor, lacked substantial capacity to appreciate or conform his conduct to the requirements of the law.

JUSTICE GINSBURG: General Cordray --

MR. CORDRAY: That is not sufficient --

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

MR. CORDRAY: First of all, I would disagree with that characterization of the closing. It was not a perfect closing, but it had three identifiable pieces to it. The first was, he -- he did go back and recapitulate the nature of the crimes, something this Court said in Yarborough is an acceptable defense strategy. That's the elephant in the room. The jury heard weeks of testimony about this crime. The

prosecutor was surely going to highlight that. He was attempting to take this sting out and identify with the jury that he understood how they would react to the crimes.

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

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

JUSTICE STEVENS: General Cordray, may I --

may I -- you are basically arguing that he was not -- not deficient in performance.

MR. CORDRAY: That's right.

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

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

JUSTICE STEVENS: No, I -- I understand that. But -- so you really are saying the question is whether Cronic or Strickland controls?

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

JUSTICE STEVENS: Yes.

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

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

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

In Landrigan this Court approved the court of appeals statement in the end that any further, minor mitigating evidence that could have been presented in the wake of that record could not have been helpful;

there is no prejudice. That prejudice holding in Landrigan I believe controls this case. In fact, this case may be even a stronger case than Landrigan for no prejudice.

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

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

Number two, the Ohio Supreme Court did reject this claim. It cited Strickland v. Washington.

It did not go on in detail.

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

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

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

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

JUSTICE STEVENS: Yes.

MR. CORDRAY: If they disclaim a prong, then I think it's de novo review, and Rompilla did say that. If they don't disclaim a prong, I think that the Court

has to defer because the alternative is it gives no deference to summary dispositions, and -- and that has been the general tenor of courts under AEDPA, is if there is a question you err on the side of giving deference. That clearly was Congress's intent in enacting that statute.

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

MR. CORDRAY: We, of course, Your Honor, don't have subjective testimony from the counsel as to what his strategy was. But I think it's quite apparent from the record. He at trial attempted to establish a defense of not guilty by reason of insanity. He was set

back, he and his trial team, because in the end the trial judge rejected that defense and struck that testimony. He renewed his effort at the sentencing phase by bringing several mental health experts and having them testify on the stand to show that at least they had met the lower standard of mental disease or defect under the Ohio Revised Code.

He then argued, perhaps not as eloquently as -- as one might, you know, as -- as Justice Jackson once said, you know, in their bed that night, but he argued about: Yes, these crimes were brutal. He went on at some length about that. But these crimes were brutal and the jury had heard all that and clearly had that in their minds. He then pivoted to five pages of closing arguments, in addition to days of presentation on the subject, to say: We have shown at least mental illness; it is a mitigating factor; the General Assembly made it a mitigating factor and we as a humane people should be proud that we do not execute someone who has substantial deficiency in ability to intend.

He then went on to handle some rebuttal points that he was -- he was feeling the heat on from the prosecutor's presentation. For example, that he had not necessarily met with these experts before they came and testified at trial; that he had perhaps shopped for

experts and other matters of that sort; that maybe the -- the jury was going to hold against him and his defense team their deficiency as counsel, because they had made this effort to get not a -- a not guilty by reason of insanity plea and the judge had knocked that out.

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

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

JUSTICE ALITO: But defense counsel --

MR. CORDRAY: That's the context.

JUSTICE ALITO: -- goes so far as to say: Don't look to him for sympathy because he demands none. But isn't that exactly what he has to appeal for in order not to get a death verdict, sympathy based on -- on mental illness, despite the horrific crimes that this

person committed and the things that he said on the stand.

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

I think it's a coherent strategy. In fact, I don't see easily how he could have done better. And as in Landrigan, if he had said, give him sympathy, give him a life sentence, which was the thrust of the entire proceedings, I don't think that that created -- that lack of saying that created any prejudice on this record, which was very thoroughly established, in part by his client 's own testimony.

I would also say in Yarborough, on the

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

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

I think it was not deficient, and I certainly think on this record, this stunning record created in part by his client's crimes, which were acknowledged and undisputed and there was no factual dispute about them and their heinousness, and then by his client's testimony on the stand, which graphically and at great length reinforced his, again, triumph in his -- in his warfare against trying to kill as many black people, Jewish people and gay people as he could find, and that he would continue that warfare if given

the chance.

I think it's impossible to find that there is prejudice on this record for the -- for the -- for the -- even the medium-sized quibbles that are being raised here 20 years after the fact.

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

CHIEF JUSTICE ROBERTS: Thank you, General.

Mr. Benza.

ORAL ARGUMENT OF MICHAEL J. BENZA

ON BEHALF OF THE RESPONDENT

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

The Sixth Circuit evaluated performance of trial counsel in this case and found deficient performance for three primary areas.

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

He then proceeded to tell the jury what was not mitigating evidence in this case, including factors

that have long been accepted as mitigating factors like performance in prison, adaptive skills and the issue regarding his family upbringing and childhood.

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

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

MR. BENZA: That is correct.

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

MR. BENZA: Absolutely, Your Honor. In fact, because it is directly related to the mental health evidence. Had the lawyer identified the testimony of the mental health experts, including Dr. Resnick, who is the court clinic psychiatrist, who testified that while he has been incarcerated and receiving treatment his performance and his mental illness has resided -- that he has gotten better. And that he is not --

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

MR. BENZA: That is correct, it did.

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

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

JUSTICE SCALIA: These experts said he had improved?

MR. BENZA: Yes. Dr. Resnick testified --

JUSTICE SCALIA: Before this testimony on the stand?

MR. BENZA: During the trial, yes.

JUSTICE SCALIA: Wow.

MR. BENZA: That his performance --

JUSTICE SCALIA: That didn't look like improvement to me.

(Laughter.)

MR. BENZA: Well, that may be, Your Honor,

but that's what the experts testified to. And this was the court clinic expert who was testifying, who evaluated him for the not guilty by reason of insanity.

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

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

JUSTICE GINSBURG: Mr. Benza, do you know of any case where ineffective assistance was found on the basis of a closing argument alone? General Cordray pointed out that this lawyer had put on a number of witnesses to testify to the defendant's mental illness, and that he did play that theme in the closing.

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

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

JUSTICE BREYER: What would you have done? I mean, I'm -- I'm not experienced in this. But I mean, I have heard the other side and I have read the argument. And it makes sense logically to say he has the worst defendant he has ever seen. He's murdered lots of people in cold blood. He gets up on the stand and says: I'm going to kill a lot more. He sounds totally bonkers. And -- and he says to the jury, I can't tell you that what he did was not aggravating; it was terrible. I can't tell you that there's anything here that should make you feel better about him; there is nothing. But we are a nation of people who are humane and our law says don't put a person to death when he fills with his nuttiness that third prong, which is a lower standard of insanity than I had to meet. But it's clearly met and here are the experts; I point to their testimony, and that's what they said. So be humane.

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

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

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

I don't see -- how can I sit -- and we have courts, two courts who said, yeah, that was okay.

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

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

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

The issue is, however, once the lawyer

decided that this was the mitigation strategy that he was going to present, this was the evidence that he had available to argue to him, it is the role of the defense counsel to advocate.

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

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

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

JUSTICE SCALIA: Well, I think -- I think it was swallowing the worst evidence. It was telling the jury that was going to think this is a hateful person

who had done hateful things.

I agree with you. I accept all of that, but even if you feel that way, I thought it was a brilliant closing argument. You said you've -- you've conducted many capital cases.

Have you ever conducted a capital case in which the defendant takes the stand with a Hitler moustache and says he's glad for what he's done and he will do it again?

How many cases have you had like that?

MR. BENZA: No. Spisak is the only one like that.

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

MR. BENZA: If that's your conclusion, then we -- we don't point on the merits of the claim. I beg to differ --

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

It's rambling, you have to -- in order to

get Mr. Cordray's very succinct explanation, you have to go through a couple of pages and drift it out, as Justice Sotomayor said, his argument was fine, and Justice Breyer -- but that is not the argument we have.

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

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

I mean, is that what your argument is here?

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

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

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

MR. BENZA: They are very difficult, but this case doesn't present those nuances. This case presents the case where the lawyer stands up at closing

argument -- and the only thing he didn't say that could have made this worse was Justice Stevens hypothetical of it's fine by me if you actually execute him.

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

JUSTICE SOTOMAYOR: Well, he actually did say that.

MR. BENZA: Not in those words.

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

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

CHIEF JUSTICE ROBERTS: But, I mean, it seems to me that you are imposing a strategic rule, and the counsel obviously made a decision -- or the record may reflect that the type of advocacy that you are telling us he has to have.

Here's why you should give this guy sympathy. Here's why. Here's -- he's a good guy. I mean, there is -- even standing at that podium, there is a different strategy that people sometimes employ, which is sort of the understated -- you know, well, he did

some terrible things, don't -- I'm not asking for sympathy for these things, but -- you know, we are very proud of the fact that we don't execute -- you know, it seems to me that this disagreement is over different styles of advocacy.

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

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

JUSTICE GINSBURG: You just told me that, under Strickland, under anything, there has been no case in which there has been a decision for the defendant, based on the inadequacy of the closing argument alone.

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

MR. BENZA: Yes, but this court has already recognized that the Sixth Amendment applies, the right to counsel applies at closing argument.

In Yarborough v. Gentry, at page 5 of this

Court's opinion, the Court specifically stated that the right to effective assistance extends to closing argument.

So this is not a redevelopment or an expansion of Strickland. It's simply an application of the Strickland analysis, the particular facts of this case before the --

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

The only thing going for the defendant were the witnesses to his mental illness and whether, eloquently or not, that theme was played to the jury.

This is a mentally ill man.

MR. BENZA: That's -- that's correct, and that's the theme that defense counsel said he was going to implement at the closing. What -- the failure of the lawyer was to adequately and effectively make that closing to the jury.

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

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

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

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

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

MR. BENZA: Well, it -- first, as to the question of whether or not the lower court found it adequate, we have no idea, again, what the Ohio Supreme

Court determined as to question of deficient performances or to prejudice or to strategy.

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

MR. BENZA: There were 67 assignments of error raised to the Ohio Supreme Court. This is the only case on direct appeal, where the Ohio Supreme Court issued a procuring of.

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

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

JUSTICE BREYER: Well, I guess then they concede the argument.

MR. BENZA: They dismissed this claim and --

JUSTICE BREYER: Why do we have no idea then? If they cited Strickland, why do we have no idea what they -- -

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

It is also possible that the lower courts were misapplying, as this Court recognized in Michael

Williams' case, that --

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

MR. BENZA: I'm sorry?

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

MR. BENZA: Unless we --

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

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

JUSTICE SCALIA: Why would we assume that?

MR. BENZA: Well, because we don't know what the Supreme Court actually did.

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

MR. BENZA: That is.

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

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

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

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

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

And it's fairly common to find a court of appeals in a state that says, as to argument number 17, and then they characterize it, we reject that argument.

MR. BENZA: That is true.

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

MR. BENZA: That is correct.

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

some bad grounds for rejecting it.

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

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

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

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

JUSTICE GINSBURG: So the Ohio Supreme Court, faced with 67 issues, would have to write at least a per curiam opinion on each of the 67 to insulate itself against being overturned on federal habeas?

MR. BENZA: Not insulate from overturning, but to gain the benefit of 2254(d)'s restrictive reviews of habeas.

JUSTICE SCALIA: Which insulates it from being overturned.

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

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

MR. BENZA: That is correct.

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

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

In Early v. Packer, this Court recognized, though, however, that AEDPA constraints are looking at not just at the outcome of the lower court's -- the State court's decisions, but the reasoning behind it, because if you are going to have an unreasonable application of -- of a binding law from this court, the lower courts have to be able to apply it and explain, how did we apply it? Otherwise every decision of the State court would be insulated from Federal habeas review, making the writ available but unavailable.

Because no decision would therefore ever be unreasonable if the standard is for a district court judge to say: Can I imagine a reasonable way for the State court to have reached this result? I have; I'm a reasonable judge; the State court must have done what I have done; therefore, the review is limited, and the writ -- and the writ is denied.

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

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

JUSTICE SCALIA: But that is not what AEDPA says. AEDPA says that we have to give deference unless it is an unreasonable application of Supreme Court law. The burden is on the appealing defendant to show that it was an unreasonable application. In case of doubt, he loses.

Now, AEDPA could have been written differently. It could have been written the way you want. The Supreme Court shall evaluate the reasonableness of the Supreme Court opinion. It isn't

written that way. It says the burden is on you to show that this was an unreasonable application of Supreme Court law. And where there is a summary disposition, that's a hard road aho.

MR. BENZA: I would submit it is impossible. If the --

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

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

JUSTICE SCALIA: So we should revise the statute and it should not say unreasonable application of Supreme Court law?

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

JUSTICE SCALIA: Why doesn't it?

MR. BENZA: It simply requires the Court to say that when you have summary disposition, that when

evaluating the State claim, the State court decision is given the deference that it is due, and that is that we simply cannot determine whether or not it properly applied Federal law, and therefore, it does not get the safe harbor of AEDPA evaluation.

JUSTICE SCALIA: That's not how the -- that's not how the statute reads.

JUSTICE BREYER: Well, why wouldn't you do that as well, then, even a fortiori, where I'm just an appeals court judge and I get a district court opinion? Most common thing in the world, summary judgment denied, motion denied, this denied, denied, denied. And if I'm going to start doing this for State cases, wouldn't I also have to do it for Federal cases whenever a Federal judge doesn't give all his reasons, which is the most common thing in the world?

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

JUSTICE BREYER: We did? I mean, I've reviewed thousands and thousands of them and I've always thought that a trial judge doesn't have to spell out all his reasons. And the question is really, given the circumstance, can we say that he acted contrary to law?

MR. BENZA: And that is --

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

MR. BENZA: And that would be the evaluation that would continue on in habeas review of these claims, is evaluating the State court decision without, though, simply saying, well, we're going to -- and this is what happens in the lower courts. When you have these summary decisions in 2254(d) analysis, those circuits that have applied this say, what we will imagine a way in which the State court could have reasonably applied this law to reach this result, and therefore, since that is a reasonable way, because of course we as Article 3 judges have reasonably come up with that, it must be reasonable, it's not an unreasonable application, and the writ is denied.

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

JUSTICE ALITO: Well, I think that assumes that the State courts are -- what the Supreme Court of Ohio and all the other State supreme courts are doing is

waiving briefs for Federal habeas courts.

MR. BENZA: I don't think --

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

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

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

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

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

MR. BENZA: That's correct.

JUSTICE SCALIA: You want to say if they can't, we have a new statute. But we don't. The burden

on you is to show that it's an unreasonable application. If you tell me we can't tell, you lose.

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

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

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

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

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

MR. BENZA: That's correct.
JUSTICE BREYER: All right.
MR. BENZA: The standards provided for in AEDPA are there to protect the State court judgments when they have done their job, when they explained their rationale and applied the Federal law. If you see these postcard denials --
JUSTICE GINSBURG: Mr. Benza, you might want to use what time is remaining to deal with the other issue, which we haven't talked about at all.
MR. BENZA: If I may, if I'm turning -- if there are no further questions on the effect, I will turn to the Mills issue.
The -- the question in front of the Sixth Circuit was whether or not the totality of the jury instructions in this case were such that they violated Mills' directive that an individual jurist's determination of a mitigating factor's existence could not be precluded from being considered by the injection of that -- of those factors by the other 11 jurors.
What you have in this particular case is the totality of the jury instructions were such that a reasonable understanding of the instruction was that the jury had to be unanimous as to the understanding and the existence of a mitigating factor before it could even be

considered.

JUSTICE ALITO: Well, what is your answer to the first question that Justice Sotomayor asked? Half of you say that -- that the State court's decision was contrary to or involved an unreasonable application of clearly-established Federal laws determined by the Supreme Court of the United States, i.e., Mills v. Maryland, when Mills v. Maryland hadn't been decided.

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

JUSTICE ALITO: And are there -- are there not quite a few instances of contrary statements in our opinions?

MR. BENZA: As to the application of Mills? Or --

JUSTICE ALITO: As to the -- as to the time when the -- the law has to be clearly established by a decision in that court.

MR. BENZA: No, this Court has maintained that the issue regarding the application of -- of controlling established -- what -- clearly established law by this Court is going to be determined by Teague,

and Teague determines that Mills v. Maryland decision applies to this claim. In -- it was adjudicated on the merits in State court.

Now there is another -- underlying this is another AEDPA concern, is how does the Federal -- or the State court adjudicate the constitutional claim since Mills had not been presented. It decided the merits of the claim were -- were to be rejected but it did not decide the case under Mills v. Maryland because of course Mills had not been decided and we know from this Court's decision in the Banks case that Mills was a new law.

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

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

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

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

JUSTICE SCALIA: Does Teague say anything about time?

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

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

particular such circumstance.

MR. BENZA: That is correct.

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

MR. BENZA: Because in -- in our case every jury instruction that was given to the jury told them that they had to be unanimous, including the specific instruction --

CHIEF JUSTICE ROBERTS: That is on death or nondeath, not on whether a particular mitigating circumstance exists.

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

If they -- if they reasonably understood that they had to be unanimous as to that fact they would

have rejected the mitigating factors, even if 11 of them had agreed that the mental health evidence in this case was a mitigating factor. And when --

JUSTICE GINSBURG: How does that work? The instruction was all 12 must agree that the aggravators outweigh the mitigators before death is imposed.

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

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

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

JUSTICE SCALIA: It's in your brief, I assume.

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

JUSTICE SCALIA: Read it again?

MR. BENZA: At page -- the petition appendix page 326. "It is your duty to carefully weigh the evidence. To decide all disputed questions of fact, to apply the instructions of the Court to your findings and to render your verdict accordingly."

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

MR. BENZA: That the --

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

JUSTICE SCALIA: New? New?

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

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

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

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

MR. BENZA: That is correct.

CHIEF JUSTICE ROBERTS: And you think that includes within it the idea that they -- they cannot consider a mitigating circumstance unless they all 12 agree on it?

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

CHIEF JUSTICE ROBERTS: Okay, I just --

MR. BENZA: That's the question in Mills.

CHIEF JUSTICE ROBERTS: I want to make sure I have got your Mills argument.

CHIEF JUSTICE ROBERTS: It is that the sentence that says "it's your duty to did decide all disputed questions of fact is the same as saying they are instructed that they cannot consider a mitigating circumstance unless they are unanimous?

MR. BENZA: When considered in totality, yes.

CHIEF JUSTICE ROBERTS: Okay. Thank you, counsel.

Mr. Cordray, you have ten minutes remaining.

REBUTTAL ARGUMENT OF GEN. RICHARD CORDRAY

ON BEHALF OF THE PETITIONER

MR. CORDRAY: Thank you, Your Honor.

On the Mills instruction, it -- it's clear, Mills was not decided at the time the Ohio Supreme Court rendered its decision. It was decided before this Court denied direct review.

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

MR. CORDRAY: I beg your pardon.

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

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

CHIEF JUSTICE ROBERTS: Okay.

MR. CORDRAY: I am simply summarizing a response to Justice Sotomayor's question. But this Court -- on -- on Teague, in Beard v Banks determined that Mills itself expressed a new rule and expressed some doubt as to whether that rule itself was even clear until McKoy v. North Carolina was decided in 1990, which was to finality in this case. But the -- the jury instruction issue is entirely knocked out by the fact that this case is an extension of Mills that goes beyond anything this Court has ever held in the jury

instruction context. It is an extension of Mills that has been rejected by the majority of circuits to consider it, even today 20 years later, and it couldn't possibly be understood to be clearly established law.

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

If I could return then to the ineffectiveness issues. Counsel argued that there was deficiency on a couple of different grounds. First of all, that -- that defense counsel should have argued about family background and performance in prison. The family background was uncontested; it was humdrum; there was nothing special there. Performance in prison was an issue that was raised at trial. The prosecutor read to Spisak on the stand a letter he had written from prison. I am not going to foul the record with his specific verbiage but it was after a card game in which he had gotten into a fight with inmates and said he would like to kill them. When that was read to Spisak on the stand

his response was to say "Heil, Hitler" and give the Nazi salute to the jury.

So the notion that we should be referring back to his performance in prison and that somehow would have helped mitigate the jury's consideration of the death sentence to me is -- is fanciful.

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

As to whether the mental health presentation was, quote, "not strong enough," obviously it wasn't strong enough in the end to sway the jury. But you cannot judge by hindsight, this Court has said it again

and again, counsel's performance. The court said that in Strickland v. Washington itself, emphasized that tremendously in rejecting the deficiency claim in that case. And then in Yarborough as applied to closing arguments, the Court said very specifically we have to be doubly deferential to -- to strategic decisions made at closing, even if we might had made them differently or might have executed them somewhat differently, and particularly through the AEDPA lens.

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

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

The alternative is that if they don't explain which prong they are using that you defer to nothing, and that seems to be not consistent with what Congress clearly intended under AEDPA, nor is it

consistent with the language of the statute.

The claim was made that the deference only applies when the State court, quote, "has done its job." Under the statute the job is to adjudicate a claim on the merits, not to provide a lengthy discourse in doing so. As to the prejudice point which I think is finally decisive and was the basis on which this Court GVR'd in -- in Landrigan, this is Landrigan --

JUSTICE STEVENS: Can we just go back to that one point for a minute.

MR. CORDRAY: Yes, sir.

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

MR. CORDRAY: I believe, Your Honor, under the statute, it would be the same, although here they did more than that -- you know, they cited Strickland. We have to assume they applied Strickland.

And, as for the prejudice claim, we have findings from the Ohio Supreme Court that, I think, bear on the prejudice claim. In its decision -- this is 309(a) through 311(a) of the appendix --

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

MR. CORDRAY: Yes, sir.

JUSTICE STEVENS: Do you think they are entitled to more deference because they did cite Strickland if they -- than if they did cite nothing?

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

JUSTICE STEVENS: So it would be exactly the same deference whether they say it's Strickland or not.

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

As to prejudice, the Ohio Supreme Court at 309(a) through 311(a) itself independently reweighed the aggravating factors against the mitigating factors, which is something the Ohio Supreme Court does under Ohio law.

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

That is, in fact, the same kind of determination that the Court would make in trying to determine if there was prejudice here.

As to the implementation of the strategy here, it is coherent in understanding what counsel was trying to do. Was it a bit rambling? Perhaps.

You know, were there -- were there side issues that he tried to take up, which he thought went to his credibility with the jury and the credibility of the mental illness defense with the jury? Perhaps.

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

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

In the context of that and given the doubly deferential lens this Court has laid out in Yarborough, I think that there is neither deficiency, nor could

there be prejudice on this record.

If there are no further questions, Your Honor, thank you for your time.

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

The case is submitted.

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