Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

SMITH, WARDEN *v.* SPISAK

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 08–724. Argued October 13, 2009—Decided January 12, 2010

After the Ohio courts sentenced respondent Spisak to death and denied his claims on direct appeal and collateral review, he filed a federal habeas petition claiming that, at his trial's penalty phase, (1) the instructions and verdict forms unconstitutionally required the jury to consider in mitigation *only* those factors that it *unanimously* found to be mitigating, see *Mills* v. *Maryland*, 486 U. S. 367, and (2) his counsel's inadequate closing argument deprived him of effective assistance of counsel, see *Strickland* v. *Washington*, 466 U. S. 668. The District Court denied the petition, but the Sixth Circuit accepted both arguments and ordered relief.

Held:

1. Because the state court's upholding of the mitigation jury instructions and forms was not "contrary to, or . . . an unreasonable application of, clearly established Federal law, as determined by [this] Court," 28 U. S. C. §2254(d)(1), the Sixth Circuit was barred from reaching a contrary decision. The Court of Appeals erred in holding that the instructions and forms contravened *Mills*, in which this Court held that the jury instructions and verdict forms at issue violated the Constitution because, read naturally, they told the jury that it could not find a particular circumstance to be mitigating unless all 12 jurors agreed that the mitigating circumstance had been proved to exist, 486 U. S., at 380–381, 384. Even assuming that *Mills* sets forth the pertinent "clearly established Federal law" for reviewing the state-court decision in this case, the instructions and forms used here differ significantly from those in *Mills:* They made clear that, to recommend a death sentence, the jury had to find unanimously that each of the aggravating factors outweighed any mitigating circumstances, but they did not say that the jury had to determine the exis-

tence of each individual mitigating factor unanimously. Nor did they say anything about how—or even whether—the jury should make individual determinations that each particular mitigating circumstance existed. They focused only on the overall question of balancing the aggravating and mitigating factors, and they repeatedly told the jury to consider all relevant evidence. Thus, the instructions and verdict forms did not clearly bring about, either through what they said or what they implied, the constitutional error in the *Mills* instructions. Pp. 2–9.

2. Similarly, the state-court decision rejecting Spisak's ineffective-assistance-of-counsel claim was not "contrary to, or . . . an unreasonable application" of the law "clearly established" in *Strickland.* §2254(d)(1). To prevail on this claim, Spisak must show, *inter alia,* that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, *supra,* at 694. Even assuming that the closing argument was inadequate in the respects claimed by Spisak, this Court finds no "reasonable probability" that a better closing argument without these defects would have made a significant difference. Any different, more adequate closing argument would have taken place in the following context: Spisak's defense at the trial's guilt phase consisted of an effort by counsel to show that Spisak was not guilty by reason of insanity. Counsel, apparently hoping to demonstrate Spisak's mentally defective condition, called him to the stand, where he freely admitted committing three murders and two other shootings and repeatedly expressed an intention to commit further murders if given the opportunity. In light of this background and for the following reasons, the assumed closing argument deficiencies do not raise the requisite reasonable probability of a different result but for the deficient closing. First, since the sentencing phase took place immediately after the guilt phase, the jurors had fresh in their minds the government's extensive and graphic evidence regarding the killings, Spisak's boastful and unrepentant confessions, and his threats to commit further violent acts. Second, although counsel did not summarize the mitigating evidence in great detail, he did refer to it, and the defense experts' more detailed testimony regarding Spisak's mental illness was also fresh in the jurors' minds. Third, Spisak does not describe what other mitigating factors counsel might have mentioned; all those he proposes essentially consist of aspects of the "mental defect" factor that the defense experts described. Finally, in light of counsel's several appeals to the jurors' sense of humanity, it is unlikely that a more explicit or elaborate appeal for mercy could have changed the result, either alone or together with the foregoing circumstances. The Court need not reach Spisak's claim that

§2254(d)(1) does not apply to his claim, because it would reach the same conclusion even on *de novo* review. Pp. 9–16.

512 F. 3d 852, reversed.

BREYER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, THOMAS, GINSBURG, ALITO, and SOTOMAYOR, JJ., joined, and in which STEVENS, J., joined as to Part III. STEVENS, J., filed an opinion concurring in part and concurring in the judgment.