No. 08-724

In the Supreme Court of the United States

KEITH SMITH, WARDEN,

Petitioner,

v.

FRANK G. SPISAK, JR.,

Respondent.

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

BRIEF OF STEVEN LUBET, THOMAS A. MAUET, JAMES W. McELHANEY, JOHN B. MITCHELL, LAURENCE M. ROSE, FAUST F. ROSSI, JACOB A. STEIN, HERBERT J. STERN, AND MICHAEL E. TIGAR AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

This brief addresses whether the closing argument given by defense counsel in the sentencing phase of Spisak's trial was deficient under *Strickland* v. *Washington*, 466 U.S. 668 (1984).

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are law professors and other persons who teach and write about effective trial advocacy. Steven Lubet is the Edna B. and Ednyfed H. Williams Memorial Professor of Law and Director of the Fred Bartlit Center for Trial Strategy at Northwestern University School of Law. Thomas A. Mauet is the Milton O. Riepe Professor and Director of Trial Advocacy at the University of Arizona James E. Rogers College of Law, and the author or co-author of numerous books, including Trial Techniques (now in its seventh edition) and Trials: Strategy, Skills, and the New Powers of Persuasion (2d ed. 2009). James W. McElhaney is the Baker and Hostetler Distinguished Scholar in Trial Practice at Case Western Reserve University School of Law and the Joseph C. Hutcheson Distinguished Lecturer in Trial Advocacy at South Texas College of Law, and is the author of the monthly litigation column in the ABA Journal. He is also the author of McElhaney's Trial Notebook (2005) and McElhaney's Litigation (1995). John B. Mitchell is a Professor of Law at Seattle University School of Law, co-author of Pretrial Advocacy: Planning, Analysis, and Strategy (2007) and Trial Advocacy: Planning, Analysis, and Strategy (2008), and author of a number of articles concerning the nature and scope of the responsibilities of the criminal defense attorney, which have appeared in journals including the Stanford Law Review, the

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[1] The parties have consented to the filing of this amicus brief. No counsel for a party has authored this brief in whole or in part, and no counsel for a party or a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than amici or their counsel has made a monetary contribution to this brief's preparation or submission.

Georgetown Journal of Legal Ethics, the Southern California Law Review, and the American Journal of Criminal Law. Laurence M. Rose is President of the National Institute for Trial Advocacy and Professor Emeritus and Director Emeritus of the Litigation Skills Program at the University of Miami School of Law. Faust F. Rossi is the Samuel S. Liebowitz Professor of Trial Techniques at Cornell Law School. Jacob A. Stein is a trial lawyer, an adjunct professor at the Georgetown University Law Center, and author of Closing Argument: The Art and the Law (originally published 1969 and updated since then by looseleaf supplements). Herbert J. Stern is a trial lawyer, former U.S. Attorney for the District of New Jersey, and former federal judge, having served as United States District Judge for the District of New Jersey from 1974 to 1987. He is the author of several books on the subject of trial advocacy, including Trying Cases to Win: Anatomy of a Trial (1999), co-authored with Stephen E. Saltzburg. Michael E. Tigar is Professor of the Practice of Law at Duke Law School, and has held faculty positions at other universities in the United States and abroad. He is author, among other works, of Examining Witnesses (2d ed. 2003), Persuasion: The Litigator's Art (1999); and Fighting Injustice (2002), and an editor of Trial Stories (M. Tigar & A.J. Davis eds., 2008).

The views expressed in this brief are those of the individual *amici* and do not necessarily reflect the views of the institutions at which they teach or with which they are otherwise affiliated.

This case raises important questions about the advisability of certain techniques for delivering a closing argument in a criminal trial, an issue about which the *amici* have great expertise. Given their

collective knowledge about the subject, *amici* are well situated to assess whether defense counsel's performance was deficient under *Strickland* v. *Washington*, 466 U.S. 668 (1984).

Petitioner cites various trial advocacy treatises, including those written by *amici*, for the proposition that defense counsel's closing argument was the result of a legitimate strategy. In doing so, petitioner overstates and mischaracterizes the literature, to a degree that causes some of the *amici* considerable dismay. The cited treatises actually demonstrate—in accordance with all of the *amici*'s experience and views—that the closing argument in this case was far afield from any sound trial strategy. Thus, *amici* respectfully submit that petitioner's invocation of their teachings is seriously misplaced.

Although there is not a single correct closing statement to be given in any individual case, some basic tenets of trial advocacy are widely accepted. Trial counsel in this case adhered to none of those principles, and violated many. For example, although acknowledgment of weakness in the context of arguing a case's strong points *is* a sound strategy, a closing argument that magnifies and obsesses on weaknesses, while discussing strengths in an indirect and at times incomprehensible manner, is below any reasonable measure of professional competence. For this Court to determine otherwise in this case would teach generations of future lawyers incorrect lessons about how to present a case, and would leave clients—both Mr. Spisak and future clients in like cases—without the reasonable assurance of actual assistance of counsel to which the Sixth Amendment entitles them. Concerned about the effect of this case on both lawyers and clients, *amici* wish to

make their views known and hope that they can assist the Court by doing so.

SUMMARY OF ARGUMENT

In delivering his closing argument, defense counsel defied all recognized strategies of trial advocacy. He dwelled on the central weakness of his own case; the opening act of the argument comprised a discussion of why the defendant was a despicable person undeserving of sympathy. He misstated the statutory aggravating factors that the jury was permitted to consider, drastically overstating the argument in favor of imposing the death penalty. When he was done attacking the defendant, he became inefficient and disorganized. If he was attempting at that point to make an argument in mitigation, it was barely—if at all—recognizable as such.

The only possible strategic reason for this presentation would be to build credibility with the jury so that counsel could then make a strong affirmative presentation that the mitigating factors supported leniency. But defense counsel did not do that. Instead, he stated baldly and repeatedly that his client was undeserving of mitigation, and he concluded with a promise that no one—not even defense counsel—would fault the jury for returning a death sentence.

Amici do not believe there could be a legitimate strategic reason for this penalty-phase closing argument. In their view, the argument was deficient to such a level that it constituted ineffective assistance of counsel.

ARGUMENT

A lawyer who takes on the duty of representing a client charged with a terrible crime faces many difficult challenges. Prominent among them is navigating the inevitable hostility of the jurors—a challenge that defense counsel in this case did not even attempt to take on. Rather, defense counsel seemingly did everything he could to empower the jury to return a death sentence, including presenting a closing argument at sentencing that read like a closing argument given by an overzealous prosecutor.[2]

Among the most basic principles of closing argument are:

- "[A]sk for what you want. * * * [Y]ou will guide the jury through the judge's instructions."
- "The law is something the jurors care about. You must stress the important principles of law that guide decision * * * ."

MICHAEL E. TIGAR, PERSUASION: THE LITIGATOR'S ART Ch. 5, at 151-52 (1999) (focusing on principles of advocacy and on the lessons of Edward Bennett

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[2] *Amici* are unsurprised that the Sixth Circuit commented that the same argument, if made by a prosecutor, "would likely have been grounds for a successful prosecutorial misconduct claim." *Spisak* v. *Mitchell*, 465 F.3d 684, 706 (6th Cir. 2006) (citing *Rickman* v. *Bell*, 131 F.3d 1150, 1160 (6th Cir. 1997)), *vacated*, 128 S. Ct. 373 (2007), *reinstated*, 512 F.3d 852 (2008). See generally JOSEPH F. LAWLESS, PROSECUTORIAL MISCONDUCT §§ 9.14-9.15, 9.19, 9.21 (3d ed. 2003) (typical prosecutorial abuses in a closing argument include "appeals to the * * * prejudices of the jury," "[a]ttacking the defendant—name calling," and "express[ing] his personal opinion as to the * * * guilt of the defendant").

Williams). It is of critical importance to show the jury, in words and actions, why the evidence and law compel respect for the defendant's right to live, or to liberty. TIGAR Ch. 5 at 151-235 (citing examples from lawyer argument in the cases of Terry Nichols, Queen Caroline, and John Connally).

In this case, instead of attempting to convince the jurors that mitigating factors weighed against the imposition of the death penalty, defense counsel homed in on what he called "aggravating factors" and spent the critical first portion of his closing argument graphically describing the "horrendous" nature of Spisak's crimes. Then, rather than attempting to rehabilitate the defendant in the eyes of the jurors, or imploring them to consider Spisak's mental illness as a reason to spare him, defense counsel embarked on a meandering and often-nonsensical discourse, "rambling incoherently towards the end of the closing statement." *Spisak*, 465 F.3d at 704-05. He did not present a case for mitigation, but instead told the jury that his client was undeserving of mitigation—or even sympathy—and that a decision to impose the death penalty would be just as praiseworthy as a decision not to. See Argument p. 49;[3] *Spisak*, 465 F.3d at 705-06.

Petitioner argues that defense counsel's performance was the objectively reasonable result of a sound trial strategy. Pet. Br. 31-40. Characterizing the closing statement (without quoting the actual words), petitioner identifies defense counsel's strategy as one designed to demonstrate his credibility by addressing

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[3] Citations to defense counsel's closing argument are to the original pagination of the trial transcript.

the weaknesses in his own case and to "bolster his own sincerity by criticizing his client's indefensible views." Pet. Br. 37-40. *Amici* respectfully disagree, however, that the closing statement could have been the result of any reasonable strategy.

First, Spisak's counsel's treatment of what he termed "aggravating factors" cannot be considered the result of legitimate tactical decisionmaking. Counsel's discussion went far beyond a dignified acknowledgment of the harsh reality of Spisak's crimes. Pet. Br. 37. The discussion was too prominent, too long, and too aggressive to be considered merely an attempt to gain credibility with the jury. In any case, the general strategy of conceding one's weaknesses cannot bear the weight of defense counsel's closing remarks here. Even a milder and more succinct version could not have been part of a sound strategy to win over the jurors, as defense counsel made virtually no effort to rehabilitate the defendant. Counsel's denigration of his client simply was not offset by an affirmative effort for which credibility would have been helpful. Thus, "trial counsel abandoned the duty of loyalty owed to Defendant," *Spisak,* 465 F.3d at 706 (citing *Rickman*, 131 F.3d 1150), and Spisak effectively was left without the assistance of counsel.

Second, there is no context in which it is a sound strategy to urge the jurors to consider non-enumerated, emotionally charged issues as aggravating factors. Yet defense counsel went well beyond a review of the statutorily permissible aggravating factors to focus the jurors on the nature and circumstances of the crimes, the defendant's extremist political beliefs, and the pain felt by the victims' families. None of these so-called "aggravating factors" was a permissible consideration

under Ohio law, and defense counsel was not raising these arguments anticipatorily, because the prosecution would have been prohibited from making them. Defendant's counsel's gross misstatement of the law in this area, especially to the detriment of his own client, deprived Spisak of the effective assistance of counsel.

Amici respectfully submit that "counsel's performance was deficient," *i.e.*, it "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88. Thus, the first of two prongs for analysis of ineffective assistance of counsel under *Strickland* v. *Washington* was met.[4] Notwithstanding the "strong presumption" that counsel's decisions were reasonable, *id.* at 689, the errors made by counsel in the present case were "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," *id.* at 687.[5]

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[4] *Amici* do not address the second prong of the *Strickland* analysis, whether the defendant was prejudiced by counsel's deficient performance, because their expertise lies primarily in judging the competence of the argument, and because they do not have the familiarity with the complete record necessary to make a fully informed assessment of prejudice. *Amici* do commend to the Court respondent's analysis of the second *Strickland* prong (Resp. Br. 60-64), which makes a facially persuasive case that there is a reasonable probability that in the absence of defense counsel's deficient closing—which undoubtedly did much more harm to his client than it did good—at least one juror would have reached a different conclusion about the appropriateness of the death penalty.

[5] Petitioner handpicks select quotations from the closing argument and then—completely ignoring how a jury would interpret this closing argument—concludes that defense counsel's summation was the product of a sound trial strategy. Pet. Br. 31-40. *Amici* disagree strongly with that characterization. Furthermore, even if the "strategy" pulled from petitioner's artificial reading of the

I. Defense Counsel Did Not Have A Sound Strategic Reason For Dwelling On The Details Of The Murders

According to defense counsel, "little really needs to be said about the degree of the aggravating factors, *clearly horrendous*." Argument p. 9 (emphasis added). Yet the first half of defense counsel's closing statement comprised a review, in great and gory detail, of the brutality of Spisak's crimes and the pain felt by the victims and their families. Counsel's unnecessarily vivid and vitriolic descriptions, none of which touched on actual aggravating circumstances, included statements such as the following:

- "[W]e can feel that, or see that cold marble, and will forever, and undoubtedly we are going to see the photographs, we are going to see Horace Rickerson dead on the cold floor. *Aggravating circumstances, indeed it is*." Argument p. 10 (emphasis added).

- "[Y]ou can smell almost the blood. You can smell, if you will, the urine. You are in a bathroom, and it is death, and you can smell the death." Argument p. 10.

- "And you can feel, you can feel, the loneliness of that railroad platform * * * * and we can all know the terror that John Hardaway felt when he turned and looked into those thick glasses and looked into

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record were entitled to *Strickland*'s presumption of competence, that presumption is rebutted here, where the "strategy" was implemented in such an extraordinarily poor manner that it actually harmed the client's cause.

the muzzle of a gun that kept spitting out bullets." Argument pp. 10-11.

- "[W]e all know the terror, or we can feel that right in the pit of our stomach. We know how that feels when she ran down the hall first left and then right, and tried to dodge, or did dodge the bullet. But we were there, and we know she feels. And is it an aggravating circumstance, indeed it is." Argument pp. 11-12.

- "[W]e could smell it. And we could smell the death. And we could smell the latrine smells, and we could feel the cold floor. And we can see a relatively young man cut down with so many years to live, and we could remember his widow, and we certainly can remember looking at his children, and we certainly can feel all of the things that they fell [*sic*], because, ladies and gentlemen, we participated, and we were there." Argument p. 12.

- "[Y]ou can see the kid, the kid that was asleep, the kid that never [knew] what hit him, and we can feel that bullet hitting, and *that's an aggravating circumstance*." Argument p. 12 (emphasis added).

- "[W]e were there so we can remember that hot night, and we could probably smell the stale beer in the car. And we can probably, maybe, smell some marijuana smoke, and we can feel the hatred, and if we listen closely, we probably could hear some jeers, some racial slurs. * * * We were with him when he stalked this kid that never got any older than 17. And we were with him when he fired the gun six times, shot him through the head. And we were there when that straw hat fell off. And, ladies

and gentlemen, *would you ever want any more aggravating circumstances*?" Argument p. 13 (emphasis added).

- "There are too many family albums. There are too many family portraits dated 1982 that have too many empty spaces." Argument p. 13.

- "Coletta Dartt and John Hardaway. We call them lucky. Lucky, if you have a nightmare that will never go away. That's lucky, it may be, but *it's an aggravating circumstance*." Argument pp. 13-14 (emphasis added).

As stated by General George C. Marshall, "[r]epeating that we are surrounded does not qualify as a plan of escape." Jacob A. Stein, *A Personal Creed*, WASHINGTON LAWYER (Mar. 2003). This is also true here; harping on the gruesomeness of the crimes does not qualify as a defense. Defense counsel's "rather heav[y]" focus "on what he called the aggravating circumstances and the heinousness of the crimes" constituted ineffective assistance of counsel. *Spisak*, 465 F.3d at 704. Especially in light of defense counsel's complete failure to present mitigating evidence, counsel's tirade about the defendant's "clearly horrendous" behavior cannot have been "an appropriate part of trial counsel's strategy." *Id.* at 704-05.

A. Defense Counsel's Discussion Of Aggravating Factors Was Too Long and Impassioned To Be Legitimately Designed To Gain Credibility

Petitioner argues that "[c]ounsel might reasonably have calculated that it was better to draw the sting out of the prosecution's argument and gain credibility with

the jury by conceding the weaknesses of his own case." Pet. Br. 37. Indeed, petitioner now asserts that, because the "damaging facts were already before the jury," *id.*, counsel's focus on the gruesome details of the murders was a "common" and "advisable" trial tactic, *id.* (citing ROGER HAYDOCK & JOHN SONSTENG, ADVOCACY: OPENING AND CLOSING: HOW TO PRESENT A CASE § 3.51, at 106 (1994); THOMAS A. MAUET, TRIAL TECHNIQUES 413 (5th ed. 1999)). Petitioner's argument ignores the outer limits of this strategy and exaggerates the extent to which it can be detected in defense counsel's closing argument.

It can be a legitimate strategy for counsel to build credibility with the jurors by acknowledging weaknesses in his case.[6] But defense counsel's lengthy and

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[6] Clarence Darrow did so in the case of Ossian Sweet:

> The defense in this case faces and admits facts which are sometimes subject to equivocation and avoidance. We are not ashamed of our clients and will not apologize for them. We are American citizens; you men of the jury are American citizens; they are American citizens. Every juryman said that he conceded equal rights to all Americans. On the basis of the legal rights of the defendants we make our defense. We say this with the full realization of the sacredness of human life and having quite as much sympathy for the bereaved family of the deceased as has the prosecution.

Barbara Bergman, *The Sweet Trials*, in TRIAL STORIES 379 (M. Tigar & A.J. Davis eds., 2008). Darrow's acknowledgment was in the context of dignifying, not deriding, his clients. A look at Darrow's client list shows a life devoted to fulfilling the lawyer's highest duty, and a look at his summations demonstrates that he did not denigrate or belittle his clients, but rather asserted their claims for justice eloquently and emphatically. See ATTORNEY FOR THE DAMNED: CLARENCE DARROW IN THE COURTROOM (Arthur Weinberg ed., 1957).

detailed focus on the nature and circumstances of the crimes far exceeded an exercise in gaining credibility; the "clearly horrendous" nature of the crimes became the centerpiece of an improperly emotional argument.

It is not sound strategy to make discussion of the weaknesses in one's own case the central point of one's argument, and it is not sound strategy to harp on those weaknesses in great and focused detail. Among the most fundamental rules of closing arguments is to "[a]void being an expert on the strength of your opponent's case. If there are weaknesses in your case bolster them, do not celebrate them." JACOB A. STEIN, CLOSING ARGUMENT: THE ART AND THE LAW § 200, at 6. Commentators advise counsel: "adopt a positive attitude about your theory. Concentrate on and emphasize your own case first and then incidentally anticipate and disprove the other side's claims." FRED LANE & SCOTT LANE, LANE GOLDSTEIN TRIAL TECHNIQUE § 23:93 (3d ed. 2008). Treatment of potential problems should be as brief as possible, and should not—under any circumstances—be the focal point of a closing argument. "A significant portion of the closing argument should not be spent defensively responding to the opponent's issues, positions and argument because the advocate may be perceived as not having any substantial positions. Arguments that attack the opponent's case must be balanced with arguments that support the case." HAYDOCK & SONSTENG § 3.53, at 107; see also ALBERT J. MOORE, PAUL BERGMAN & DAVID A. BINDER, TRIAL ADVOCACY: INFERENCES, ARGUMENTS AND TECHNIQUES Ch. 14, at 231 (1996) ("Overuse often makes your closing too long, and detracts from your affirmative arguments by spending too much time discussing the adversary's case."); STEVEN LUBET, MODERN TRIAL ADVOCACY:

ANALYSIS AND PRACTICE Ch. 12, at 469 (2d ed. 1997) ("As with all argument it is more effective to present the positive side of your own case."); THOMAS A. MAUET, TRIAL TECHNIQUES 398 (7th ed. 2007) ("you want to concentrate on your strengths, force your opponent to argue his weaknesses."); PETER C. LAGARIAS, EFFECTIVE CLOSING ARGUMENT § 3.20, at 122 (2d ed. 1999) ("Counsel's closing argument should usually be at least seventy-five percent affirmative, i.e., no more than twenty-five percent refutation and rebuttal. Defense counsel should be especially mindful of not overemphasizing plaintiff counsel's argument.").

To the extent that it is advisable for defense counsel to acknowledge weaknesses during closing argument, such statements should not be included in the introductory remarks or in the first section of a closing statement, which all experts agree should contain the party's strongest arguments. See, *e.g.*, LANE & LANE § 1A:61 ("[I]t is wise to place the strongest arguments at the beginning and end of the presentation, repeating the central theme throughout."); LUBET Ch. 12, at 476 ("it is certain that prime time—the very beginning and the very end of the argument—must be devoted to the most important considerations in the case."); MOORE ET AL. Ch. 14, at 216 ("[Y]ou will usually want to begin with your strongest affirmative arguments"); HERBERT J. STERN & STEPHEN A. SALTZBURG, TRYING CASES TO WIN Ch. 14, at 546 (1999). "The first minute or two of your closing argument should communicate * * * your theme, why the jury should find in your favor, and your enthusiasm about your case." MAUET, at 390 (7th ed. 2007). In other words, the "beginning of the closing argument should have an impact and should be in a dramatic manner calculated to frame the issues that we deem most critical to our case in a way favorable to our

position." Laurence M. Rose, *Closing Arguments: An Exercise in Persuasion*, 11 J. KAN. TRIAL LAW. ASS'N 18 (Nov. 1987). "As a corollary to the 'start and end strong' rule * * * concessions should be 'buried' in the middle of your argument." LUBET Ch. 12, at 480. Yet Spisak's defense counsel spent the opening minutes of his argument (and a substantial amount of time thereafter) focusing on the brutality of the crimes and his disdain for Spisak.

Moreover, defense counsel's review of the crimes went far beyond an acknowledgment of weakness. It was an improperly emotional argument that appealed to the passion and prejudice of the jury. See STEIN § 21, at 74 (a statement "which tends to influence the jury to resolve the issues by an appeal to passion and prejudice is improper"); *id.* § 14, at 38 ("[N]either the prosecutor nor defense counsel should argue so as to inflame the passions or prejudices of the jury."); MARILYN J. BERGER, JOHN B. MITCHELL & RONALD H. CLARK, TRIAL ADVOCACY: PLANNING, ANALYSIS, AND STRATEGY Ch. XII, at 481 (1989) ("Arguments calculated to inflame the passion, prejudice, or fear of the jurors should be avoided."); LANE & LANE § 23:6 ("Neither may counsel make statements to inflame, prejudice or mislead the jury."); LAGARIAS § 1.19, at 38 (2d ed. 1999) ("Emotional argument directed at inciting passions and prejudices, rather than at reviewing record evidence, is improper.").

Even the precise way in which defense counsel offered the details of the killings—instructing the jurors to put themselves in the place of the victims and the victims' families—was improper. Indeed, it would have been improper even coming from the *prosecutor*. STEIN § 22, at 81 (it is improper for a prosecutor to

"comment that the victim's family would be facing the holiday season one short"); *id.* § 12, at 29 ("It is * * * improper for a prosecutor in a criminal case to deliver a closing argument in the first-person voice of the victim."); cf. JAMES W. MCELHANEY, MCELHANEY'S TRIAL NOTEBOOK Ch. 78, at 677 (4th ed. 2005) ("it is forbidden to ask jurors to put themselves in the position of a party").

There simply is no support for the notion that this was a sound trial strategy.

B. Counsel's Discussion Of Aggravating Factors Was Not Offset By A Discussion Of Mitigating Factors

The approach of building credibility with the jurors might have made strategic sense only if, after all of the concession of weakness and emphasis on the despicable nature of the crimes and the defendant, defense counsel argued that the defendant was nonetheless entitled to leniency. It would perhaps be possible to say that these sections of counsel's closing statement were grounded in strategy if defendant's trial counsel had spent his remaining time refuting and rebutting the feelings of hostility that the jurors inevitably harbored towards Spisak after the first portion of the closing. See LAGARIAS § 3.20, at 122 (2d ed. 1999). But defense counsel did not argue to the jurors that their hostility should be replaced by compassion due to Spisak's mental illness, or that the brutal crimes were committed by a misguided, mentally ill defendant who deserved to be spared. And defense counsel did not impress upon the jurors their obligation to give effect to mitigating evidence. See *Abdul-Kabir* v. *Quarterman*, 550 U.S. 233, 246 (2007). Instead, defendant's counsel

made only a fleeting attempt to argue that Spisak was mentally ill if not legally insane, and then proceeded to undermine even that meager effort by telling the jurors that Spisak warranted neither sympathy nor mitigation.

Petitioner argues that defense counsel should be excused from his complete failure to present mitigating factors because there was "no chance" the jurors "harbored any sympathy for Spisak" anyway. Pet. Br. 39 (citing FRANK M. COFFIN, A LEXICON OF ORAL ADVOCACY 29 (1984)). Petitioner understates the gravity of this deficiency and cites Judge Coffin selectively and out of context. Although defense counsel was not obligated to try to paint a picture of Spisak as a model citizen, minimum professional competence required him to say what could be said positively rather than to dwell on the negative and remain silent on the positive. "Counsel should spend little time in trying to paint a weed as a lily, *except to say what can be said positively* concerning his client's motives or tactics." COFFIN, A LEXICON OF ORAL ADVOCACY 29 (emphasis added). Petitioner's cursory treatment of this deficiency also ignores the fact that, in the absence of an affirmative case for mitigation, defense counsel's drawn-out discussion of so-called "aggravating factors" was entirely without purpose.

In his introductory remarks, defense counsel had already planted doubt about the existence of mitigating factors: "You are here, and the issue is to weigh the aggravating circumstances and the mitigating factors, and before the prosecution rushes to point out, if any, let me add a comma, and say if any." Argument pp. 8-9. Then, after describing "all the aggravating circumstances you ever want," defense counsel told the

jurors that he was going to discuss the "mitigating factors." Argument p. 16. At that point his style changed from the pointed, graphic, and direct statements about aggravating factors, to an almost incomprehensible, desultory discussion that ostensibly was about mitigation but gave only cursory treatment to the idea of leniency.[7]

Defense counsel began his "mitigation discussion" as follows:

> Sympathy, of course, is not part of your consideration. And even if it was, certainly, don't look to him for sympathy, because he demands none. And, ladies and gentlemen, when you turn and look at Frank Spisak, don't look for good deeds, because he has done none. Don't look for good thoughts, because he has none. And, ladies and gentlemen, don't look to him with the hope that he can be rehabilitated, because he can't be. He is sick, he is twisted. He is demented, and he is never going to be any different.

Argument p. 17. He then pointed out that there was no possible ground for mitigation other than the fact that

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[7] The denigration of Spisak was exacerbated by trial counsel's lengthy defense of his own performance. Instead of asking the jury to spare his client's life, trial counsel focused attention on how sorry he was that he had to argue on Spisak's behalf: "I hope that * * * when we walk out of this courtroom that I will have the same respect, and we will have the same friendship with both of these fine [prosecutors]; but I have got to argue because the Judge said was I ready for argument, so let me argue just a little bit." Argument pp. 35-36; see *id.* at 31-32 ("And if I did something wrong, if that's to be considered, so be it.").

"[w]e are a humane society." Argument p. 18. After stating that the defendant was undeserving of mitigation, counsel drifted into a meandering, half-hearted assertion that Spisak was mentally ill. As opposed to a persuasive argument that Spisak's mental illness warranted a life sentence instead of death, defense counsel limited his advocacy to repeating that defendant's mind was "sick" and "twisted" and that there was no hope of his rehabilitation. But cf. STEIN § 70, at 256 ("although a defendant's prospects for rehabilitation are a relevant topic for argument," even a prosecutor "may not discuss his or her own opinion of those prospects."); William Hazlitt, *Capital Punishments*, THE EDINBURGH REVIEW 247 (July 1821) (a sentence of death "ought not be inflicted for any act which does not * * * cut the individual completely off from all sympathy").

The remainder of defense counsel's closing was made up of further attacks on the defendant, impassioned argument that Spisak was undeserving of mitigation, and a rambling and incoherent discussion of the esteem in which defense counsel held the prosecution and the court and the overall integrity of the legal system. 465 F.3d at 705. At no point did defense counsel assert that Spisak's mental illness should lead the jury to avoid imposing a death sentence. Instead, he highlighted the difficulty of proving an insanity defense and rambled disjointedly about the medical opinions that had been offered:

- "If you find it mitigation, then, of course, you must find it * * * outweigh[s] the aggravating circumstances that have been so graphically and so three-dimensionally brought out before us. And, ladies

and gentlemen, that is a pretty tall order." Argument p. 22.

- "[I]n the guilt portion, if anyone hasn't heard it up until now, let the word go out loud and clear, [defense counsel was] wrong, dead wrong, very, very wrong. We did not establish * * * that Frank Spisak was not guilty by reason of insanity." Argument p. 27.

- "And you heard the doctor say that it wasn't an exact science. Here's not two and two is four. And you heard the doctor, the doctor say that a couple hundred years ago, and we don't think of 200 years ago as being that unenlightened, we had a guy around then by the name of Benjamin Franklin, he had already invented electricity. * * * [B]ut at the same time they were, their contemporaries in the medical profession were sitting people down in chairs, putting hoods on their heads, and spinning them around, and that was thought to be a cure for the dementation, the twisted minds of the day." Argument pp. 38-39.

- "Somewhere along the way, we heard that earlier in our history, the learned medical men, the respected medical men of the day, thought that burning witches was the way that problems ought to be handled, if indeed they were witches. And they were no less respected." Argument p. 39.

- "And the job simply is to put personality aside, to weigh the mitigation, the smaller of the three jars, with the aggravating circumstances, which no question about it are substantial." Argument p. 45.

No possible tactical reason exists that would justify defense counsel's failure to present a coherent argument for mitigation. To the contrary, defense counsel's failure to present an affirmative case for mitigation effectively nullified Spisak's right to have the sentencing jury "give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual, notwithstanding the severity of his crime or his potential to commit similar offenses in the future." *Abdul-Kabir*, 550 U.S. at 246. Indeed, defense counsel was ineffective precisely because he derided and undermined Spisak's right to have evidence of mitigation given effect.

Given defense counsel's failure to present arguments in favor of mitigation, petitioner is left without any support for the argument that there was strategy behind counsel's deeply damaging discussion of aggravating circumstances. The combination of the two flaws—failing to argue mitigation coherently and aggressively arguing aggravation—resulted in the worst possible kind of closing argument. *Amici* would never encourage such an argument, and they strongly urge this Court not to give its imprimatur to such an argument as being even remotely within the bounds of acceptable advocacy.

C. Defense Counsel Was Wrong To Concede That The Death Penalty Would Be Justified

Not only did he fail to present a case for mitigation, but defense counsel also invited the jurors to impose the death penalty with clear consciences. He wrapped up his argument by reminding the jurors of the

negative impact of the trial on the families of the victims and on the jurors personally:

> [T]he sordidness, the awfulness of what we have experienced has to leave us. Ladies and gentlemen, it has to leave us a little bit older, and it has to leave us a little bit more jaded, and a little bit more hurt. My God, you've looked in the back of the courtroom, and there are some people sitting right there, right back there now, and you know who they were. And you know that their lives have been tremendously affected, and you know that they are torn up. And it is important. And it is awfully important what you do. * * * And maybe * * * the sun won't really look as bright, and the air won't smell as sweet, and the air won't sing as nicely, and that's a shame, isn't it? It's a real shame that we can't all be back in the doll house existence where we once were, where Bambi ran in the forest and everything was good, and there was no evil.

Argument pp. 47-78. He then concluded by assuring the jurors that it would be just fine for them to return a sentence of death. No matter what, defense counsel concluded, whether the outcome was death or life, "whatever you do, we are going to be proud of you." Argument p. 49.

Petitioner argues that these statements were made only to "stress[] the jury's autonomy," an approach that petitioner suggests is reasonable in these circumstances. Pet. Br. 39 (asserting that STEIN § 206, at 15 and LANE & LANE § 23:102 "commend that approach."). Quite the contrary, there is no legitimate

reason for defense counsel's suggestion that he would be "proud" of the jurors for imposing a death sentence. Stein does instruct counsel to "[a]void *challenging* the jury to find for your client," but nowhere does he make the perverse suggestion that counsel should actually encourage the jury to find *against* his client. STEIN § 206, at 15 (emphasis added). Petitioner quotes Stein's statement that "[t]he better policy is to indicate by voice, manner, and words that you know the jury will do its duty under the law and under the evidence in the case," as if Stein were saying that counsel should avoid taking any position on what the result of the jury's performance of its duty will yield. But that is not what Stein says, as his example of a "nonoffensive but effective approach" in the next paragraph makes clear: "With this evidence, I believe you will be able to persuade yourself that the appropriate verdict is not guilty." *Id.* § 206, at 15-16; see LUBET Ch. 12, at 444 ("[T]he argument should bring together information * * * in a way that creates only one result."). That is a far cry from letting jurors off the hook for reaching the verdict that, counsel should be contending, is inappropriate. Whatever the desirability of ingratiating oneself with jurors, doing so by encouraging the very action *against* which counsel are supposed to be arguing goes too far, and it is not a technique suggested by any authority of which *amici* are aware.

In addition, defense counsel ignored the well-accepted tenet of trial advocacy that the advocate should ask the jurors for something specific, *i.e.*, let them know what result he wants them to reach. See, *e.g.*, Rose, 11 J. KAN. TRIAL LAW. ASS'N 18 ("One major failure of counsel in closing arguments is the absence of a specific request for jury action."). Thus, Stein does not recommend inviting the jury to rule against one's

client, but instead "repeatedly invit[ing] the jurors to change their minds," and inviting them to "persuade" themselves to reach the "appropriate verdict." STEIN § 206, at 15-l6; see also HAYDOCK & SONSTENG § 3.09, at 70 ("The closing argument is the last opportunity the advocate has to explain and ask for a specific result."); LAGARIAS § 3.01, at 105 (2d ed. 1999) ("[A]ll counsel in summation must always consider the focused objective, the desired verdict they are seeking."); LUBET Ch. 12, at 444 ("[Y]ou must tell the jury, or the court, why your client is entitled to a verdict."); MOORE ET AL. Ch. 14, at 239 ("An effective closing argument typically discloses your desired verdict to the factfinder.").

Trial counsel failed even to ask the jury for the result his client sought, the imposition of a life sentence instead of a death sentence.

II. There Was No Strategic Reason For Defense Counsel's Incorrect Statement Of Aggravating Factors

It is settled Ohio law that only statutorily enumerated aggravating factors can be considered as grounds for a death sentence. OHIO REV. CODE §§ 2929.03, 2929.04. "[T]he nature and circumstances of the crime may not be weighed against the mitigating factors." See *State* v. *Williams*, 99 Ohio St. 3d 493, 514 (2003) (citing *State* v. *Wogenstahl*, 75 Ohio St. 3d 344, 356 (1996)). Yet, with a complete disregard for what is and is not permissible as an aggravating factor under Ohio law, defense counsel characterized the graphic details of the murders as "[a]ggravating circumstances, all the aggravating circumstances you ever want." Argument p. 16. Defense counsel lingered on the "smell," the "feel," the "loneliness" and the "terror" of

the murders. *None* of these descriptors was an "aggravating circumstance" that the jury was allowed to consider, yet these are the factors on which defense counsel encouraged the jurors to focus their attention.

Petitioner defends counsel's misstatement that virtually all of the circumstances of the crimes were "aggravating" as a reasonable "decision to bolster his own sincerity by criticizing his client's indefensible views." Pet. Br. 38. Petitioner cites for support the undisputed proposition that "'[t]he effect of sincerity is heightened if it appears that your code of morality and judgment of what is right and wrong coincide with the code of morality of the jury.'" Pet. Br. 38 (quoting STEIN § 204, at 10). But counsel's purpose in building credibility through sincerity is that he will then be better able to "convince the jury that [he] believe[s] what [he is] asking them to believe." STEIN § 204, at 10. Likewise, petitioner points out that counsel in closing argument "'should indicate to the audience that the speaker shares the attitudes of the listener.'" Pet. Br. 38 (quoting PETER C. LAGARIAS, EFFECTIVE CLOSING ARGUMENT § 2.06, at 100-01 (1st ed. 1998)). Lagarias explains, however, that the point of doing so is "that, in turn, the listener will respond positively to the views of the speaker." LAGARIAS § 2.06, at 97 (2d ed. 1999). If the speaker has no views that can be helpful to his client, the exercise is moot.

Counsel's misstatement of the law, to the detriment of his own client, cannot have been the result of a strategic plan. Even if it had been appropriate for defense counsel to describe the "horrendous" nature of the crimes at such length and in such great detail, it would not have been reasonable for him to have labeled

numerous graphic details of the crimes as "aggravating factors" when they were not.

Similarly, there can be no justification for defense counsel's assertions that the defendant's views on Nazi Germany and the Holocaust were aggravating circumstances the jury should consider in sentencing. After emphasizing the brutality of the crimes and the pain felt by the victims, defense counsel began relating the commission of those crimes to Nazi Germany:

- "Isn't what you heard just a microc[o]sm of a twelve year reign of terror that was unparalleled in history, the Third Reich, and it was going to last for a thousand years." Argument p. 14.

- "They talked about crystal night. * * * crystal night when they broke out every window and ruined the business of every Jewish businessman in Germany. Crystal night, and it is funny? But to think if [sic] is awfully funny, you have to have a sick twisted mind." Argument pp. 14-15.

- "And listen to this sick distorted mind, and you will hear once again * * * those hobnail boots on the cobblestone streets, but, ladies and gentlemen, one thing you won't hear, and one thing even the sick distorted minds don't admit, you won't hear the gas at Buchenwald, and you won't hear the gas at Auschwitz, because, ladies and gentlemen, it never made any noise in killing six million." Argument p. 15.

Finally, defense counsel focused the jury on yet another non-statutory aggravating factor, the pain and suffering of victims' families. The prosecution could not have introduced evidence of the families' suffering or

invoked it in the prosecution's own closing argument. *State* v. *Reynolds*, 80 Ohio St. 3d 670, 679 (1998). The prosecution did not need to, however, because defense counsel did just that, noting how important the sentence would be to the victims' families and reiterating that "[t]here are too many family albums. There are too many family portraits dated 1982 that have too many empty spaces." Argument p. 13.

Defense counsel summed up his "aggravating circumstances" review for the jury, stating:

> [I]f each drop of blood in this sick demented body were full [of] atonement for the anguish, the terror, the aggravating circumstances that we have seen here, ladies and gentlemen, it wouldn't be enough. It wouldn't be enough to repay. It wouldn't be enough because there are too many empty places in those 1983 family portraits. And there was too much of life left to live for Timothy Sheehan, Horace Rickerson and Brian Warford.

Argument p. 16.

There was no strategic reason for defense counsel's repeated references to any of these impermissible "aggravating factors." HAYDOCK & SONSTENG § 3.81, at 127 ("The advocate may not argue a personal interpretation of the law applicable to the case. * * * It is improper to misstate or misinterpret the law."); LUBET Ch. 12, at 499 ("Counsel may not, however, misstate the law."); TIGAR Ch. 5, at 152 ("The law is something the jurors care about. You must stress the important principles of law that guide decision."); MCELHANEY Ch. 78, at 669 ("You may not misstate the

* * * law."). Indeed, counsel's emphasis on these things cannot be attributed to anything other than his own apparent disgust for Spisak. But closing argument "must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law." LAGARIAS § 1.21, at 44 (2d ed. 1999). Defense counsel was well outside the bounds of sound strategy.

Further, defense counsel cannot have been anticipating that the prosecutor would make any of these arguments, since the prosecutor would not have been able to raise these points. Indeed, the statements made by defense counsel would easily have been prosecutorial misconduct if made by the prosecutor. See *Williams*, 99 Ohio St. 3d at 515 ("[I]t is improper for prosecutors in the penalty phase of a capital trial to make any comment before a jury that the nature and circumstances of the offense are aggravating circumstances.") (quoting *Wogenstahl*, 75 Ohio St. 3d at 356) (quotation marks and alterations omitted); see generally STEIN § 14, at 38 ("Scrupulous care must be exercised by the prosecutor in arguing capital cases because of the uniqueness of the death penalty."); A.B.A. Standards for Criminal Justice, Prosecution Function Standards § 3-5.8 (3d ed. 1993). The rationale behind prophylactically addressing the weaknesses in one's own case is that "the mosquito repellant is more effective than the mosquito bite lotion." RANDALL H. SCARLETT, ART OF ADVOCACY: SUMMATION § 1.34, at 1-39 (2008). But here, where the prosecutor could not have raised these issues as aggravating factors, there was no sound reason for defense counsel to do so. This is especially true "[i]n the penalty phase argument in death penalty cases," where "the prosecutor may not

argue prejudicial information, such as that the defendant possessed religious materials, not relevant to the moral culpability of the defendant." LAGARIAS § 1.36, at 73 (2d ed. 1999).

Perhaps if defense counsel had asked the jury at any time for leniency on Spisak's behalf, credibility building might have been a strategic effort. But in the context of the closing argument as a whole, counsel's overstatement of aggravating factors served no strategic purpose.

CONCLUSION

The Court should affirm the Sixth Circuit's determination that defense counsel's performance fell below the standard for effective assistance of counsel.

Respectfully submitted.

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