No. 02-1603

In The Supreme Court of the United States

JEFFREY A. BEARD, Commissioner, Pennsylvania Department of Corrections; JAMES E. PRICE, Superintendent of the State Correctional Institution at Greene; RAYMOND COLLERAN, Superintendent of the State Correctional Institution at Waymart; COMMONWEALTH OF PENNSYLVANIA,

Petitioners,

v.

GEORGE E. BANKS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF FOR RESPONDENT

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COUNTERSTATEMENT OF THE CASE

In June 1983, a jury convicted Banks of thirteen murders and sentenced him to death. The defense testimony at trial "presented a profile of a disturbed and paranoid man." *Commonwealth v. Banks,* 521 A.2d 1, 7 (1987) (*Banks I*).[1] Both prosecution and defense experts agreed that Banks suffered from a "serious mental defect," specifically, "paranoia psychosis." *Id*. at 8. Paranoia psychosis is a chronic, rare and severe mental illness characterized by fixed delusional beliefs. In Banks' case, the fixed delusions involved racial persecution, violence and racial conspiracies. R. 1024-25, 2079-80.

One source for Banks' delusional beliefs regarding racial persecution and conspiracies was the pervasive racism he experienced as a child. Banks, born in 1942, was one of four illegitimate children of a bi-racial couple. R. 1013, 1317. Growing up in an all-white neighborhood in Wilkes-Barre, Pennsylvania, Banks was subjected to racial prejudice from the white and black communities. In school, white students called Banks "black trash" and "half breed," and referred to his white mother as "nigger lover," while black students called Banks "zebra," and his mother "white trash." R. 1014, 1057-60, 1225. Banks quit school in the tenth grade and enlisted in the army at the age of 17.

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[1] Although the court rejected claims raised on direct appeal related to Banks' mental illness, it noted:

> Before we leave the subject of appellant's mental condition, we wish to make it clear that we are aware that appellant suffers and has suffered from a mental defect that contributed to his bizarre behavior both in the courtroom and on September 25, 1982, when thirteen innocent persons were murdered by his hand. His behavior was inexplicable, and his thought-processes remain difficult to comprehend.

Banks I, 521 A.2d at 15-16.

He left the army 19 months later because of racial difficulties, receiving a general discharge under honorable conditions. R. 1319-30.[2]

In August 1969, Banks married Doris Jones, an African American. They had two children, but marital difficulties developed and the parties ultimately separated in October 1976. R. 1062, 1320. Between 1974 and 1979, Banks became involved with four white women: Regina Clemons, Sharon Mazzillo, Susan Yuhas and Dorothy Lyons. Banks fathered five children from these relationships.[3] At trial, family, co-workers and friends described Banks as a loving, caring and protective father. R. 1063-1067, 1092, 1096, 1180-1181, 1207.[4] Banks was particularly concerned about protecting his children from the racism he experienced as a child. R. 1207.[5] He often expressed the view that he would rather see his children dead than exposed to the racial humiliation that he experienced as a child. R. 1210, 1222.

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[2] Banks' mother related that Banks talked about his military service and how a white superior officer would "kick him" and call him "black trash." R. 1061.

[3] Regina Clemens gave birth to Montanzuma in June 1976; Sharon Mazzillo gave birth to Kismayu in 1976; Susan Yuhas, Regina Clemens' sister, gave birth to Bowende in 1978 and Mauritania in 1980; and, Dorothy Lyons gave birth to Foraroude in 1981. R. 1321-22.

[4] Banks' two older children, Montanzuma and Kismayu, attended Catholic school because, as Banks' brother testified, "he [George] wanted to give them the best education he could, and have them grow up with a better opportunity and a better chance in life than what he had." R. 1068, 1098.

[5] A co-worker of Banks testified that Banks had described mounting racial prejudice in the community towards his children to the point where he could not take it anymore. R. 1139. At trial, Banks testified that white neighbors firebombed his house and threw bricks through the windows. Banks and others further testified that white neighbors called his children "niggers" and their mothers were called "nigger lovers," "whores," and "sluts." Complaints to the authorities went unanswered. R. 1207, 1659-60.

Plagued by feelings of insecurity, persecution and anger, Banks did not feel accepted by either whites or blacks, and he viewed himself as "a man without a race." R. 1014,1056-1060, 1086, 1209. Trial testimony indicated that, over time, Banks "developed a persecution complex and became obsessed with the paranoid delusion of imminent international race wars and uprisings." *Banks I*, 521 A.2d at 7.

Beginning in 1976, Banks became convinced that a racial war would erupt. He talked about and wrote numerous stories reflecting his pre-occupation with white supremacy and a racial war in which his male sons would be generals leading an army in a fight against the systematic elimination of Blacks. He prepared for the impending war by stockpiling supplies in remote mountain locations and purchasing an AR-15 rifle. R. 1111-17, 1209, 1219-20, 1245-49, 1269-71, 1484-88, 1491,1624-33.

In February 1980, Banks began working as a prison guard at the Camp Hill Pennsylvania State Correctional Institution. R. 1130. On November 25, 1981, Banks wrote in a journal,

> "I feel that I am insane. I have the impulse to take the shotgun out on the catwalk and kill some inmates. I can't think. I'm writing one word at a time. I beg Allah for help – please. My young children come from play and in vain, they ask for me. What has the white man and his senseless racism done to me? Will I live to see my children grow?" R. 1111.

On September 6, 1982, Banks was relieved from guard duty at the state prison and transported to a mental health facility after telling a fellow guard that, due to depression and other family problems, he wanted "to go to

the tower and blow his brains out." R. 1170, 1194, 1224.[6] Between September 6 and September 24, Banks underwent three mental health evaluations in Wilkes-Barre. R. 1330-33.[7] On September 17, eight days before the shootings, one evaluator noted that Banks was more preoccupied with the racial situation (in Wilkes-Barre and the world) than with any ongoing marital difficulty. R. 1333-36.[8]

On September 24, Banks went to a party with Dorothy Lyons and Regina Clemens. He left the party and returned home where he drank gin and took some pills. He subsequently called Dorothy at the party and told her that he was going to the mountains. He also told her to bring home the AR-15 rifle that was at her sister's house. Dorothy, Regina and Susan Yuhas returned home with the rifle sometime after 1:30 a.m. on September 25. R. 1653-54, 1657-58.

In the early morning hours of September 25, 1982, at their home on Schoolhouse Lane in Wilkes-Barre, Banks shot to death Dorothy Lyons, Regina Clemens and Susan Yuhas, four of his five children and Nancy Lyons, the

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[6] In August, 1982, Banks told co-workers about a custody suit involving Sharon Mazzillo and their son Kismayu and that if he wasn't successful in the suit he would kill his family and himself. He was successful in retaining custody. R. 1158, 1238-41.

[7] Banks also had to undergo a psychiatric re-evaluation by the state prison psychiatrist before returning to work. Banks scheduled the appointment for September 22 and then rescheduled it for the 28th. R. 1337-38.

[8] By September 23, despite previously expressed concerns of family problems, some things were going quite well for Banks. As noted, he had successfully retained legal custody of his son Kismayu. On the 23rd, he met with the state prison board, which approved his transfer to a facility closer to home. Banks sought the transfer for economic reasons. He attended a PTA meeting regarding his children, Kismayu and Montanzuma, and on the 24th, he was notified that a HUD loan had also been approved so he could begin making anticipated repairs to his home. R. 1133, 1253-54, 1279.

daughter of Dorothy. R. 490, 492-93, 496-99, 501-03. Outside his home, he confronted four teenagers and shot two of them, killing one. R. 175-80, 194-97, 221-24.

After stealing a car, he went to Sharon Mazzillo's trailer park. He broke into her trailer and shot to death his girlfriend, Sharon Mazzillo, their son, Kismayu, Sharon's mother, Alice, and her nephew, Scott. Alice's two children were unharmed. R. 1027-28, 1345.

Banks had only a limited recall of these tragic events. He recalled passing out, then waking up in a military flight suit, with a loaded gun and a bandoleer of bullets. He "just started banging away and couldn't control it." It seemed like "something he had to do." R. 1027, 1344-45, 1695-96. Banks then remembered waking up in a ditch, soaking wet, smelling of gunpowder and seeing a figure in the fog. He felt he had been involved in a great deal of violence. R. 1028, 1346.

Police located Banks later that morning barricaded in a friend's house in Wilkes-Barre city. R. 571. During the ensuing standoff, Banks told the police that he killed his children to spare them from the racial prejudice that he experienced as a child. R. 588, 625-26. He repeatedly threatened suicide. R. 544. The police used a fake radio broadcast, which aired that his children were still alive and being treated. This ruse convinced Banks to surrender to police without further incident. R. 629, 1512-13.

On three separate occasions before trial, defense counsel raised the issue of Banks' competency. During the first two hearings, counsel presented psychiatric and lay testimony that Banks could neither assist counsel in relating a reliable, accurate account of the incident, nor understand the object of the criminal proceedings. Defense psychiatrists concluded that Banks had a fixed delusional, paranoid belief that a white police detective had shot and mutilated his family, changed their clothing and body

locations and covered up bullet holes with coroner paste.[9] They further concluded that Banks perceived that the criminal proceedings provided a method to exhume the bodies[10] and thereby prove the existence of a racially motivated conspiracy to fabricate and destroy evidence. R. 3/14/83 at 6-7, 24, 34-37, 41-46, 76, 262-63, 267; R. 5/6/83 at 10, 26-27, 30.[11] The state trial court denied these motions.[12]

After jury selection, trial commenced on June 6, 1983. The state trial court permitted defense counsel, over Banks' objection, to assert an insanity defense. This defense asserted that at the time of the incident Banks held a psychotic belief that he had a right to kill his children to protect them from the racial prejudice he suffered and to insure that they died pure in the hands of God. R. 1028-29. Both the prosecution and defense psychiatrists agreed that, at the time of the incident, Banks was suffering from paranoia psychosis. R. 1024, 1033, 1312-13, 1354, 1826, 1831, 2078-79.[13] Disagreement centered on whether, as a result of his severe mental illness, Banks was able to understand the nature and

[9] Banks believed, for example, that police, motivated by racial hatred, murdered Nancy Lyons to cover-up their killing Fararoude. R. 1666.

[10] Banks had filed a *pro se* motion to exhume the bodies, which the state trial court denied after hearing. R. May 19, 1983, at 110-12.

[11] During the May 14th hearing, Banks testified that he objected to an insanity defense and that he wanted the jury to exhume the bodies. R. May 14, 1983 at 102-106.

[12] The state trial court summarily denied a third competency motion, filed on May 20, 1983. The trial court also summarily denied a motion to withdraw as counsel, which alleged concerns over the trial court's competency determinations.

[13] The version of the *Diagnostic and Statistical Manual of Mental Disorders* in effect at the time of Banks' trial describes the essential feature of this disorder as including "a permanent and unshakable delusional system." *Diagnostic and Statistical Manual of Mental Disorders 3rd Edition* (1980) at 197.

quality of his acts or able to distinguish between right and wrong with respect to those acts. R. 1033, 1349, 1482, 1831, 1874, 2080-81.

During trial, the state court permitted Banks, over the objections of his counsel, to cross-examine witnesses personally, to direct counsel's cross-examination of witnesses, and introduce into evidence photos of the deceased victims, which the court had initially suppressed due to their prejudicial content. R. 445-49, 454-56, 888-89, 1670-82, 1938-40, 2056-58. In addition, a prosecution psychiatrist testified that Banks was psychotic and delusional when he testified, and his trial testimony was, therefore, unreliable. R. 1827, 1832. Despite this conduct, the state trial court summarily denied repeated defense counsel motions challenging Banks' competency. R. 1642-43, 1849-50, 1941-42.[14]

Following presentation of the evidence, the jury convicted Banks of twelve counts of first degree murder, one count of third degree murder, one count of attempted murder, and related charges.

At the sentencing hearing, the Commonwealth sought to prove three aggravating factors under 42 Pa. C.S.A. § 9711(d): that Banks knowingly created a grave risk of death to others (7); that Banks had a significant history of felony convictions involving violence (8); and that he had been convicted of another offense for which a sentence of life imprisonment or death was imposable (10). Defense counsel sought to prove three mitigating factors under § 9711(e): that Banks was under the influence of extreme mental or emotional disturbance at the time of the incident (2); that his ability to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired (3); and, "any other

[14] Because of the introduction of 13 photographs by Banks, which the trial court suppressed, the Commonwealth introduced 38 additional previously suppressed photographs in rebuttal. R. 1947, 1951, 1968, 1979, 1993, 2023, 2029, 2033, 2043, 2045, 2050.

evidence of mitigation concerning the character and record of the defendant and the circumstances of the offense" (8).

In its opening instructions during the sentencing hearing, the court told the jury:

> "The sentence you impose will depend on your findings concerning aggravating and mitigating circumstances. The Crime Code in this Commonwealth provides that the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance and no mitigating circumstance, or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstance or circumstances." J.A. 21.

Later, the Court repeated the substance of this instruction, but substituted the collective pronoun "*you*" for the collective term "the jury" – "if *you* unanimously find . . ." J.A. 26 (emphasis added).

The trial court then listed the potential aggravating factors, telling the jury that the "following matters, if established beyond a reasonable doubt, can constitute an aggravating circumstance," and discussing in detail what the jury would have to consider in deciding whether each circumstance had been so established. J.A. 21-23. The court followed the same procedure with respect to mitigating circumstances, telling the jury that the "following matters, if proven by a preponderance of the evidence, constitute mitigating circumstances," and discussing in detail what the jury would have to consider in deciding whether each mitigating circumstance had been so proven. J.A. 23-25.

The trial court made clear that the jury had to "find" a mitigating circumstance before it could "consider" that circumstance: "If . . . you *find* [defendant's capacity substantially impaired] from a preponderance of the evidence, you may *consider* that a mitigating circumstance." J.A. 25.

The trial court instructed the jury that there were different burdens of proof for aggravating circumstances

(beyond a reasonable doubt) and for mitigating circumstances (by a preponderance of the evidence), but made no other distinction between the manner in which aggravating and mitigating circumstances were to be "found." J.A. 25.

The trial court reminded the jury that its verdict and findings had to be unanimous. J.A. 26. The court then gave a further instruction about how to weigh the aggravating and mitigating circumstances on the "scales of justice," emphasizing that circumstances of both kinds had to be "found" before they could be "place[d] . . . on the scale of justice":

> "A mitigating circumstance, if found to exist, need not outweigh an aggravating circumstance in order to find in favor of life imprisonment. If, after you consider all the evidence and the arguments of counsel, you place the aggravating circumstances you find, if any, on the scale of justice and you weigh them, if, after you do that, the scales of justice are still balanced, then your sentence must be life imprisonment." J.A. 26-27.[15]

The trial court provided the jury with a verdict form that provided, in pertinent part, the following:

> "WE THE JURY HAVE FOUND UNANIMOUSLY . . .
>
> __/__ ONE OR MORE AGGRAVATED CIRCUMSTANCE WHICH OUTWEIGH ANY MITIGATING CIRCUMSTANCE OR CIRCUMSTANCES.

[15] *See also* J.A. 28: "If you find at least one aggravating circumstance and at least one mitigating circumstance, then you are required by law to weigh them."

THE AGGRAVATING CIRCUMSTANCE(S) (IS) (ARE):

1. ___ IN THE COMMISSION OF THE OFFENSE THE DEFENDANT KNOWINGLY CREATED A GRAVE RISK OF DEATH TO ANOTHER PERSON IN ADDITION TO THE VICTIM OF THE OFFENSE.
2. ___ THE DEFENDANT HAS A SIGNIFICANT HISTORY OF FELONY CONVICTIONS INVOLVING THE USE OF THREAT OR VIOLENCE TO THE PERSON.
3. _/_ THE DEFENDANT HAS BEEN CONVICTED OF ANOTHER FEDERAL OR STATE OFFENSE COMMITTED EITHER BEFORE OR AT THE TIME OF THE OFFENSE AT ISSUE, FOR WHICH A SENTENCE OF LIFE IMPRISONMENT OR DEATH WAS IMPOSABLE OR THE DEFENDANT WAS UNDERGOING A SENTENCE OF LIFE IMPRISONMENT FOR ANY REASON AT THE TIME OF THE COMMISSION OF THE OFFENSE.

THE MITIGATING CIRCUMSTANCE(S) (IS) (ARE):

1. _/_ THE DEFENDANT WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE.
2. ___ THE CAPACITY OF THE DEFENDANT TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF THE LAW WAS SUBSTANTIALLY IMPAIRED.
3. ___ ANY OTHER MITIGATING MATTER CONCERNING THE CHARACTER OR RECORD OF THE DEFENDANT OR THE CIRCUMSTANCES OF HIS OFFENSE." J.A. 66-68.

After deliberations, the jury found one aggravating circumstance (multiple murder, 42 Pa. C.S.A. § 9711(d)(10)), and one mitigating circumstance (extreme mental disturbance at the time of the incident, 42 Pa. C.S.A. § 9711(e)(2)), and returned twelve death sentences. Following denial of post-verdict motions, the state trial court formally imposed twelve consecutive death sentences on November 22, 1985.

On direct appeal, Banks asserted that the jury, in imposing a death sentence, did not consider the "mitigating factors" as "evidence of individualization." J.A. 108. The Pennsylvania Supreme Court affirmed the convictions and death sentences on February 13, 1987. *Banks I*. J.A. 70-118. This Court denied Banks' Petition for a Writ of Certiorari on October 5, 1987. *Banks v. Pennsylvania*, 484 U.S. 873 (1987).

In February 1989, Banks filed a post-conviction petition under the *Pennsylvania Post-Conviction Relief Act* ("PCRA"), 42 Pa. C.S.A. § 9541-46. In that petition, Banks alleged that the jury instructions, verdict form and jury poll violated *Mills v. Maryland*, 486 U.S. 36 (1988), by requiring jury unanimity on any mitigating circumstances. On appeal, the Pennsylvania Supreme Court considered and rejected this claim on the merits. *Commonwealth v. Banks*, 656 A.2d 467, 470 (1995) (*Banks II*), *cert. denied*, *Banks v. Pennsylvania*, 516 U.S. 835 (1995) (reprinted, J.A. 119-138).

In March 1996, Banks filed for habeas relief in federal court raising eleven claims, three of which were unexhausted. The district court dismissed the unexhausted claims as procedurally barred and denied the remaining claims on the merits. *Banks v. Horn*, 939 F. Supp. 1165 (M.D. Pa. 1996).

While his appeal was pending in the Third Circuit, Banks filed a second PCRA petition in state court seeking to litigate the three unexhausted claims. The Third Circuit, meanwhile, vacated the decision of the district court

and directed that the district court dismiss the habeas petition without prejudice. The Third Circuit held that the new claims were not procedurally defaulted because Pennsylvania might yet entertain those claims under the state's relaxed waiver doctrine applicable in capital cases. *Banks v. Horn*, 126 F. 3d 206, 214 (3d Cir. 1997).

The state courts rejected Banks' second PCRA petition as untimely pursuant to the one-year time limit that became effective on January 1, 1996 under 42 Pa. C.S.A. § 9545(b). *Commonwealth v. Banks*, 726 A.2d 374, 376 (1999) (*Banks III*). On March 22, 1999, Banks reinstituted habeas proceedings in federal court. The district court dismissed four claims as procedurally barred and denied relief on the remaining claims. *Banks v. Horn*, 63 F. Supp. 2d 525 (M.D. Pa. 1999).

On appeal, the Third Circuit reversed, finding that Banks was entitled to a new sentencing hearing because the jury instructions and verdict slip violated *Mills*. *Banks v. Horn,* 271 F. 3d 527 (3d Cir. 2001) (*Banks IV*). In reaching this determination, the Third Circuit found that a *Teague* retroactivity analysis was not required because the state courts had reviewed the merits of the *Mills* claim. Following denial of rehearing, this Court granted Petitioners' Certiorari Petition and issued a *per curiam* decision reversing judgment and remanding to the Third Circuit to conduct a *Teague v. Lane*, 489 U.S. 288 (1989), analysis. *Horn v. Banks*, 536 U.S. 266 (2002) (*per curiam*) (*Banks V*).

On remand, the Third Circuit conducted a *Teague* retroactivity analysis, and concluded that *Mills* was not a new rule because it was "dictated and compelled" by prior clearly established United States Supreme Court precedent. The Third Circuit also reaffirmed its prior decision that the Pennsylvania Supreme Court had unreasonably

applied *Mills*. *Banks v. Horn*, 316 F. 3d 228, 239 (2003). (*Banks VI*).[16]

Petitioner's filed their Petition for a Writ of Certiorari to this Court raising two issues with respect to the Third Circuit's ruling. On September 30, 2003, this Court granted certiorari.[17]

SUMMARY OF ARGUMENT

Eight months after Banks exhausted his direct appeals, this Court decided *Mills v. Maryland*, 486 U.S. 367 (1988). The Supreme Court of Pennsylvania, on collateral review, applied *Mills* on the merits and held that the jury instructions and verdict slip did not violate *Mills*. (*Banks II*). On habeas, the United States Court of Appeals for the Third Circuit correctly concluded, after conducting a *Teague* retroactivity analysis, that this Court's decision in *Mills* was dictated by *Lockett v. Ohio*, 438 U.S. 586 (1978) and its progeny. (*Banks VI*). Having also concluded that the Supreme Court of Pennsylvania had unreasonably applied *Mills*, the Third Circuit ordered habeas relief as to the sentences of death.

Lockett and its progeny establish a fundamental rule of general application that the Eighth Amendment prohibits any state mandated process that creates a barrier to

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[16] Judge Sloviter agreed with the two-judge majority that consideration of Banks' *Mills* claim was not *Teague*-barred. However, she concluded that the judgment in Banks' case did not become final until 1995 due to Pennsylvania's unique system of capital jurisprudence, and therefore, Banks was entitled to the benefit of *Mills*. *Banks*, 316 F.3d at 254-55 (Sloviter, J. concurring).

[17] *Amicus Curiae*, CJLF, seem to infer that Banks has deliberately delayed the execution of the judgment through years of frivolous appeals. Brief for CJLF as *Amicus Curiae* at 2. No court has ever faulted Banks for the appeals he has litigated nor concluded that he has deliberately evaded the execution of judgment through filing frivolous appeals. The state courts alone took 12 years to decide his appeals on direct and collateral review.

any sentencer considering and giving effect to relevant mitigating evidence in a capital case. A court does not adopt a "new rule" every time it evaluates a capital sentencing process to determine whether a constitutionally prohibited barrier to mitigating evidence exists. Each time this rule is applied to eliminate such barriers, it does not become "new" again simply because the source of the barrier is different. Banks is entitled to the benefit of the *Lockett* rule, which pre-dated the exhaustion of his direct appeals and dictated the result in *Mills*. The application of *Lockett* to a single juror's holdout vote on the existence of mitigating evidence was a necessary result of the *Lockett* principle, and did not create a new rule. Accordingly, Banks is entitled to rely on *Mills*.

Alternatively, Banks is entitled to rely on *Mills* because – under the unique Pennsylvania doctrine of "relaxed waiver" – his conviction was not actually final until the Pennsylvania Supreme Court denied his post-conviction petition in 1995.

Federal habeas courts should permit state courts to determine how "final" their judgments are. *Lefkowitz v. Newsome*, 420 U.S. 283 (1975). The date of finality of the judgment for *Teague* purposes is 1995, when the Supreme Court of Pennsylvania addressed the *Mills* question on collateral review. The application of *Mills* by the state supreme court arose out of that court's exercise of its former "relaxed waiver" doctrine in capital cases. This doctrine had extended the concept of "finality" in capital cases to the post conviction stage. It was more than a procedural default rule. Based upon *Woodson v. North Carolina*, 428 U.S. 325 (1976), the doctrine was designed to insure that a sentence of death was "constitutionally beyond reproach". *Commonwealth v. McKenna*, 383 A.2d 174 (1978).

When the Supreme Court of Pennsylvania undertook to apply *Mills* to this case, its decision was both "contrary to" and "an unreasonable application" of *Mills*. The jury instructions and verdict slip in *Banks* are materially indistinguishable from those in *Mills*. As in *Mills*, it is

reasonably likely that the jury understood the instructions and verdict slip as requiring them to unanimously find a mitigating circumstance before they could weigh that circumstance. The state supreme court failed to understand *Mills* and completely failed to undertake any meaningful analysis to determine whether the instructions and verdict slip violated *Mills*.

ARGUMENT

I. *MILLS* DID NOT ANNOUNCE A NEW RULE

Mills v. Maryland, 486 U.S. 367 (1988), was decided approximately eight months after Banks exhausted his direct appeal. *Banks v. Pennsylvania,* 484 U.S. 873 (1987). Petitioners contend that Banks cannot rely on *Mills* under the "new rule" doctrine of *Teague v. Lane*, 489 U.S. 288 (1989), because Banks' conviction became final before *Mills*, and *Mills* purportedly announced a new rule. Petitioners are wrong.

Teague analysis requires a survey of the legal landscape as it existed when a conviction became final to determine whether then existing precedent dictated the rule on which Respondent relies. *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994).[18] If existing precedent dictates a holding, then it is not a "new rule" for *Teague* purposes. *Teague,* 489 U.S. at 301; *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989), *rev'd on other grounds*, *Atkins v. Virginia,* 536 U.S. 304 (2002).[19]

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[18] Under *Teague*, the court must first determine when the state conviction and sentence became final. *Caspari*. As will be discussed below, Banks contends that his conviction and sentence became final in 1995.

[19] There is no requirement that the Supreme Court unanimously adopt a rule in order for its consideration as an "old" rule for *Teague* purposes. *Penry*, 492 U.S. at 351-52 (Scalia, J., dissenting both from the decision on the merits of petitioner's claim, and from the decision that the ruling was upon an "old" rule).

Teague, however, is not a straitjacket. *Teague* does not bar a habeas court from applying settled law to different factual situations. "Where a rule is designed for the purpose of evaluating a myriad of factual contexts, it will be the infrequent case so novel that it forges a new rule, one not dictated by precedent." *Wright v. West*, 505 U.S. 277, 309 (1992). Thus, a rule of law may be sufficiently clear for habeas purposes when expressed in terms of generalized standards rather than as a bright line rule, and the repeated applications of a rule that necessarily require a case-by-case examination of the evidence do not create a "new rule" under *Teague*. *Williams v. Taylor*, 529 U.S. 362, 382 (2000).[20]

When Banks exhausted his direct appeal in 1987, this Court already had decided a series of cases upholding the constitutional requirement of "individualized sentencing" and the indispensable nature of mitigating evidence in capital cases. In *Woodson v. North Carolina*, 428 U.S. 280 (1976), this Court recognized that:

> "A fundamental respect for humanity underlying the Eighth Amendment . . . . requires the consideration of the character and record of an offender as an indispensable part of the process of inflicting the death penalty." *Id*., at 304.

In *Lockett v. Ohio*, 438 U.S. 586, 604 (1978), this Court held that the Eighth Amendment prohibits any barrier which precludes the sentencer "from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the

[20] In *Banks v. Horn*, 316 F.3d 228, 234 (3d Cir. 2003) (*Banks VI*), the Third Circuit, citing *Saffle v. Parks*, 494 U.S. 484, 488 (1990); *Graham v. Collins*, 506 U.S. 461, 467 (1993); *Butler v. McKellar*, 494 U.S. 407, 412-13 (1990); and *Mackey v. U.S*., 401 U.S. 667, 695 (1971) (Harlan, J. concurring and dissenting in part), reasoned that it is difficult to determine whether a case announces a new rule particularly "when the decision in question merely extends the reasoning of prior cases."

defendant proffers as a basis for a sentence less than death." In *Lockett,* this court struck down a statute that allowed the jury to consider only statutorily enumerated mitigating factors, precluding consideration of any non-statutory factors regarding a defendant's character, background and circumstances of the offense offered as a basis for a sentence of less than death. In the cases that followed *Woodson* and *Lockett*, this Court applied these principles to a myriad of factual contexts. *See Eddings v. Oklahoma*, 455 U.S. 104 (1982) (sentencer's belief that certain evidence may not be weighed in mitigation); *Skipper v. South Carolina*, 476 U.S. 1 (1986) (an evidentiary ruling); and *Hitchcock v. Dugger*, 481 U.S. 393 (1987) (a jury instruction).

These cases establish a fundamental rule of general application – that the Eighth Amendment prohibits any state mandated process that creates a barrier to any sentencer considering and giving effect to relevant mitigating evidence in a capital case. This Court does not adopt a new rule every time it evaluates a capital sentencing process to determine whether a constitutionally prohibited barrier to mitigating evidence exists. The elimination of constitutionally impermissible barriers to the consideration of mitigating evidence is not a new rule under *Teague*. This elimination, dictated by precedent, is to insure compliance with the Eighth Amendment mandate of an individualized assessment of the appropriateness of the death penalty. Thus, *Mills* did not announce a "new rule." Rather, it applied the well-established *Lockett* principle to eliminate a constitutionally impermissible barrier to the consideration of mitigating evidence. Under *Teague*, Banks is "entitled to the benefit," *Penry*, 492 U.S. at 314-15, of both the *Lockett* rule and the specific application of that rule in *Mills*.

This Court's decision in *Penry* also supports the proposition that the elimination of all such barriers is not a "new rule." In *Penry*, this Court further emphasized both the breadth of *Lockett* as an Eighth Amendment doctrine, *and* that the broad application of *Lockett* was dictated by *Lockett* and *Eddings* (the decisions that had been rendered

when Penry's conviction became final on January 13, 1986). *Penry*, 492 U.S. at 314-15. In *Penry,* the defendant sought to persuade the jury to sentence him to life based on evidence, *inter alia*, of mental retardation and an abused childhood. In this Court, Penry contended that the Texas special issues for capital sentencing precluded the jury from being able "to fully consider and give effect to" his mitigating evidence "in answering the three special issues." *Id*. at 315. This Court agreed:

> [A]t the time Penry's conviction became final, it was clear from *Lockett* and *Eddings* that a State could not, consistent with the Eighth and Fourteenth Amendments, prevent the sentencer from *considering and giving effect* to [relevant mitigating] evidence . . . . The rule Penry seeks – that when such mitigating evidence is presented, Texas juries must, upon request, be given jury instructions that make it possible for them to give effect to that mitigating evidence in determining whether the death penalty should be imposed – is not a "new rule" under *Teague* because it is dictated by *Eddings* and *Lockett. Id.* at 318-19.

In *Mills*, this Court held that a State may not create a barrier to any juror considering mitigating evidence through a requirement of jury unanimity. *Mills*, 486 U.S. at 384 ("The possibility that a single juror could *block* . . . *consideration* [of mitigating evidence], and consequently require the jury to impose the death penalty, is one we dare not risk"); *see McKoy v. North Carolina*, 494 U.S. 433, 438 (1990) (*Mills* held that "allowing a 'holdout' juror to *prevent* the other jurors from *considering* mitigating evidence violated the principle established in *Lockett*"). It is "*well established*" and "*beyond dispute*" that *any* "barrier to the sentencer's consideration of all mitigating evidence" violates the Eighth Amendment, "*whatever its source* may be." *Mills*, 486 U.S. at 374-75 (citing *Lockett*, *Eddings,* S*kipper*, *Hitchcock*). In *Mills*, this Court simply applied that well established rule to invalidate the barrier created

by a single juror's holdout vote on the existence of mitigating evidence.

The condemned instruction in *Mills* and the *Banks* instruction and verdict slip, as discussed below, govern how a jury deliberates, but they also dictate what evidence a juror or jurors may consider in their sentencing decision. For example, if eleven jurors believed that Banks had established the racial prejudice that he experienced as a mitigating factor, one juror could prevent the eleven from using this factor in their sentencing decision. Such a process creates a constitutionally impermissible barrier to the sentencer's consideration of mitigating evidence. The *Lockett* line of cases dictated the decision in *Mills,* and Banks is entitled to the benefit of those decisions.

Faced with the evident conviction of this Court that the *Lockett* line of cases compelled the result in *Mills*,[21] Petitioners offer various reasons for thinking that *Mills* was a new rule. None of those reasons are convincing.

First, Petitioners assert that the crucial issue in *Mills* was "whether, in the absence of unanimity, individual jurors must be permitted to carry over [their] consideration [of mitigating evidence] from the fact-finding stage into the weighing stage." Brief for Petitioners, at 18.[22] Petitioners seem to believe that was an open issue in 1987. *Penry* and *Hitchcock*, however, make clear that this Court had already answered that question.

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[21] *Mills*, 486 U.S. at 375 (it "*must* be true" that when a "barrier to the sentencer's consideration of all mitigating evidence" results from "a single holdout juror's vote against finding the presence of a mitigating circumstance," the result "would *necessarily* be the same" as in the other *Lockett* cases).

[22] That was not evident to this Court in *Mills.* In *Mills,* this Court thought the answer to that question an easy one, *see Mills*, 486 U.S. at 375; it thought the hard question was whether the instructions and verdict slip used there likely had that effect. *Id.* at 375-76.

In *Penry*, *Lockett* was violated because there was no way for the jury to answer "no" to the special issues (and sentence to life) based on the proffered mitigating evidence. *Penry*, 492 U.S. at 328. In *Hitchcock*, a *Lockett* violation occurred when the jurors received an exclusive list of mitigating factors to consider that did not include all of the factors required by *Lockett*. *Hitchcock*, 481 U.S. at 397-99. In both *Penry* and *Hitchcock*, the jury was allowed to hear the mitigating evidence, and to "consider" whether it was credible and even to "consider" whether because of that evidence the defendant "was not sufficiently culpable to deserve the death penalty." *Penry*, 492 U.S. at 326. However, the juries, in *Penry*, *Hitchcock*, *Mills* and *Banks,* were not allowed to *vote for life* based on the evidence they heard and considered. Accordingly, *Lockett* dictated that all of these restrictions on giving effect to mitigating evidence violated the Eighth Amendment.

That is not surprising, given that *Lockett* and its precursor, *Woodson,* are based on the fundamental principle of individualized sentencing. *Lockett,* 436 U.S. at 604-05; *Woodson,* 428 U.S. at 303-304; *See Zant v. Stephens*, 462 U.S. 872, 879 (1983) ("What is important at the selection stage is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime.") (emphasis original); *Tuilaepa v. California,* 512 U.S. 967, 972 (1994) (*Lockett* principle operates at the selection stage). *Lockett* would be a hollow shell if a State could satisfy it by allowing the sentencer to "hear" and "consider" mitigating evidence, while nevertheless barring the sentencer from doing anything meaningful with that evidence. Thus, *Lockett* compelled the result in *Mills*.

Second, Petitioners propose that a highly restrictive application of *Teague* applies to all categories of rules – *i.e.*, that "a rule is new whenever it is the product of reasoned debate rather than indisputable mandate." Brief for Petitioners at 19. Petitioners ignore the fact that

Teague does not treat all categories of rules in the same fashion. In particular, Teague does not bar a habeas court from applying a settled rule of general application to different factual situations. *See*, *Wright*, 505 U.S. at 309. An example of this kind of rule is the *Strickland v. Washington*, 466 U.S. 668 (1984), standard for evaluating ineffective assistance of counsel claims. *See*, *Williams*, 529 U.S. at 390-91 (rule of *Strickland* was clearly established; existing precedent dictated that state court apply *Strickland*); *Wiggins v. Smith,* 123 S. Ct. 2527, 2535 (2003) (Court "made no new law" in *Williams*). The *Lockett* rule is another rule of this type. As indicated above, by 1987 the *Lockett* rule either had been applied or was required to be applied in numerous factual contexts. Moreover, the breath of the *Lockett* rule is also indicated by this Court's consistent citation of it (along with guided sentencing discretion) as one of the two pillars of Eighth Amendment jurisprudence.[23] Because *Lockett* is a rule of general application, the narrower *Teague* rulings cited by Petitioners do not apply – though, even if they did, *Penry* makes clear that the *Lockett* principle dictates *Mills*.

Third, Petitioners acknowledge that, as of the time Banks exhausted his direct appeal in 1987, the *Lockett* line of cases dictated the rule that "the sentencer may not . . . be precluded from considering any relevant mitigating evidence." Brief for Petitioners at 18 (quoting *Mills*, 486 U.S. at 374-75). Relying on *Saffle v. Parks*, 494 U.S. 484 (1990), however, Petitioners contend that *Mills* was a new rule because it dealt with a state restriction on "the **way** the mitigating evidence may be considered," as opposed to a state restriction on "the **kind** of mitigating evidence a

[23] *See, e.g., Romano v. Oklahoma*, 512 U.S. 1, 7 (1994); *McCleskey v. Kemp*, 481 U.S. 279, 302-05 (1987); *Zant v. Stephens*, 462 U.S. at 879 (1983).

jury may consider." Brief for Petitioners at 22 (emphasis in original); *see, Saffle*, 494 U.S. at 490 (distinguishing rules that "govern what factors the jury must be permitted to consider" from rules that "govern how the State may guide the jury in considering and weighing those factors").

Petitioners fail to acknowledge, however, that *Penry* considered and rejected application of such a distinction in precisely the same context as in *Mills*. The failure of Petitioners and *Amicus Curiae*, Criminal Justice Legal Foundation (CJLF), to address *Penry* in any meaningful way is telling. Petitioners utterly ignore *Penry*, while the CJLF argues that *Penry* was wrongly decided. Brief for CJLF as *Amicus Curiae*, at 12-15. Neither makes any argument that *Penry* can be reconciled with their contentions that *Mills* established a "new" rule for *Teague* purposes. In *Penry*, the defendant presented the relevant mitigating evidence, *see Penry*, 492 U.S. at 320; thus, the jury had the opportunity to "consider" that evidence in some fashion. What the Texas special issues did *not* allow Penry's sentencing jury to do was to "give effect" to that evidence "in determining whether death was the appropriate punishment." *Id*., at 322.

Penry thus makes clear that "how" restrictions that effectively prevent the sentencing jury from "giving effect" to all relevant mitigating evidence *at the selection stage* of the sentencing process were prohibited by *Lockett* before *Mills* was decided, just like "what" restrictions on the evidence the jury can consider. Accordingly, *Penry* further makes clear that the "how" rule of *Mills* – that a single holdout juror may not preclude the rest of the sentencing jury from "giving effect" to mitigating evidence by weighing it at the selection stage – was dictated by existing law as of January 1986. Permitting one or more jurors to force the jury as a whole to impose death through a jury unanimity requirement violates *Lockett*, as was clear at least by 1986 (*Penry's* finality date).

The preclusive effect of a jury unanimity requirement distinguishes *Mills* and *Penry* from *Saffle* and *Walton v. Arizona,* 497 U.S. 639, 649-51 (1990) (state may require defendant to establish mitigating circumstance by preponderance of the evidence). Even though the jury instructions in *Saffle* allowed the jury to consider *and* give effect to his mitigating evidence, the petitioner there sought creation of a rule that he was entitled under *Lockett* to a further clarifying instruction, to the effect that jurors could vote for life based on sympathy engendered by the mitigating evidence. *Saffle,* 494 U.S. at 489. This Court explained why neither *Lockett* nor *Penry* required such a rule:

> "Here, by contrast, there is no contention that the State *altogether prevented* Parks' jury from *considering, weighing, and giving effect* to all of the mitigating evidence that Parks put before them; rather, Parks' contention is that the State has unconstitutionally limited the manner in which his mitigating evidence may be considered. As we have concluded above, the former contention would come under the rule of *Lockett* and *Eddings*; the latter does not." *Saffle,* 494 U.S. at 491.

Accordingly, *Saffle* itself acknowledges that *Mills* prohibits a jury unanimity requirement that operates to prevent the jury from weighing and giving effect to mitigating evidence "would come under the rule of *Lockett* and *Eddings*," unlike the rule in *Saffle*. *Saffle*, 494 U.S. at 491.

Similarly, the burden-of-proof requirement approved in *Walton* merely establishes a threshold for the jury to use in deciding whether the mitigating evidence presented is sufficiently credible to be placed in the weighing process. In contrast, the unanimity requirement – as it operated here and in *Mills* – meant that a single juror (or two or three) could preclude all the other jurors from voting for life even though they were convinced the defendant

established mitigating evidence.[24] *Lockett* dictated the rejection of any such requirement, well before *Mills*. *See Mills,* 486 U.S. at 384.

Fourth, Petitioners contend that *Mills* must have been "new" because, in *McKoy*, four Justices indicated their belief that *Mills* was not "**dictated** by pre-*Mills* precedent." Brief for Petitioners at 19 (emphasis original). That statement is not strictly accurate. In *McKoy*, Justice Kennedy expressed the view that *Mills* did not involve a *Lockett* violation, but rather a violation of the Eighth Amendment principle forbidding arbitrariness in capital sentencing. *McKoy*, 494 U.S. at 452-54 (Kennedy, J., concurring in judgment). The dissenters in *McKoy* asserted that neither *Mills* nor *McKoy* involved a *Lockett* violation, but that it violates the Constitution to instruct a jury that unanimity is required in a state like Maryland (or Pennsylvania) where the statute does *not* require unanimity. *McKoy*, 494 U.S. at 459-60 n.1 (Scalia, J., dissenting). While the concurring and dissenting Justices disagreed with the majority in *Mills* and *McKoy* that *Mills* was dictated by *Lockett*, they left open the possibility that *Mills* was compelled by *other* "pre-*Mills* precedent." In fact, it was.

In *Mills,* this Court, before finding that the jury unanimity requirement violated *Lockett*, determined that "it would certainly be the height of arbitrariness to allow or require the imposition of the death penalty," based on a jury unanimity requirement. *Mills,* 486 U.S. at 374. This Court reiterated that arbitrariness ruling in *McKoy*, 494 U.S. at 440. The conclusion that a jury unanimity requirement is impermissibly arbitrary "fits within," *McKoy*,

[24] In that respect, as discussed in n. 21, *supra*, the effect of the unanimity requirement is identical to the effect of the special issues in *Penry*.

494 U.S. at 454 (Kennedy, J., concurring), and is compelled by this Court's arbitrariness decisions.

II. BANKS' CONVICTION BECAME FINAL IN 1995

In 1995, the Pennsylvania Supreme Court **actually applied *Mills*** in this case, *Banks II,* 656 A.2d at 470-72, albeit in a manner that, as shown in Part III infra, was objectively unreasonable and contrary to clearly established law. The *Banks II* decision resulted from the unique judicial authority of the Supreme Court of Pennsylvania and that Court's exercise of its "relaxed waiver" doctrine in capital cases. Under these unusual circumstances, a critical question was not answered by this Court's decision in *Banks V.* What is the date of finality of the judgment for *Teague* purposes? Under Pennsylvania's doctrine of "relaxed waiver," that date in this case is when the Supreme Court of Pennsylvania addressed the *Mills* question on post conviction review. Therefore, Banks' conviction actually became final in 1995, when the state court decided *Banks II*. "Finality of judgment" for purposes of *Teague* did not occur until then. This determination of finality is consistent with this Court's decision last year directing the Third Circuit to conduct a Teague retroactivity analysis. *Banks V*.[25]

Petitioners assume that Banks' conviction became "final" for *Teague* purposes in 1987, with "final" being defined as occurring at the conclusion of direct appeal.

[25] In *Horn v. Banks*, 536 U.S. 266 (2002), this Court did not have the opportunity to fully examine the unique quality of capital jurisprudence in Pennsylvania, the colonial powers of the Supreme Court of Pennsylvania and the development of the doctrine of "relaxed waiver". The Supreme Court of Pennsylvania has now abolished this doctrine of relaxed waiver at all levels of a capital case. *Commonwealth v. Freeman*, 827 A.2d 385 (2003).

Brief for Petitioners at 12, 14. This position does not recognize Pennsylvania's unique doctrine applicable to capital cases. That doctrine extended the concept of "finality" to the post conviction stage, and permitted the raising of issues at that stage for the first time without regard to any prior default. This doctrine, commonly referred to as the "relaxed waiver rule," was rooted in the Pennsylvania Supreme Court's recognized "duty to uphold the mandates of the Constitution over the countervailing considerations of normal appellate procedure." *Commonwealth v. McKenna*, 383 A.2d 174, 181 (1978). It is not a rule simply governing procedural default but rather was adopted to ensure that the application of the death penalty, which is "irrevocable in its finality," also "be constitutionally beyond reproach," in accordance with this Court's requirement of heightened reliability in capital cases. *Id.,* citing *Woodson,* 428 U.S. at 304-05.[26]

When the Supreme Court of Pennsylvania applied *Mills* in *Banks II*, it applied the "relaxed waiver" doctrine reviewing the constitutional claims raised in the capital PCRA proceedings in exactly the same manner as it would have reviewed the claims on direct review. *Banks II,* 656 A.2d at 470, n. 7. At that time of review, the court adjourned consideration of "normal appellate procedure" and finality in favor of insuring that the sentence of death is constitutionally beyond reproach.

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[26] Enforcement of a rule as unusual as "relaxed waiver" is consistent with the unique position the Pennsylvania Supreme Court holds in that Commonwealth's judicial structure. For example, the Court continues to exercise its power of "the King's Bench", despite the events of July, 1776. *See, e.g. Carpentertown Coal and Coke v. Laird,* 61 A.2d 426 (1948); *In re Assignment of Avellino*, 690 A.2d 1138 (1997). The Court has recently refused to exercise its King's Bench power to resurrect a jurisdictional defect in the late filing of a post conviction petition in a capital case. *Commonwealth v. Fahy*, 737 A.2d 214 (1999).

Under Pennsylvania's "relaxed waiver" doctrine, capital cases did not become "final" at the conclusion of direct appeal. Rather, the court ruled that "Finality of execution" had outweighed any state interest in "finality of the judgment," thus requiring that constitutional claims had to be addressed on their merits in capital cases whenever they were raised. *Commonwealth v. Albrecht*, 720 A.2d 693 (1998). Simply put, conventional notions of finality, as contemplated under *Teague,* did not exist in capital cases in Pennsylvania when it applied the "relaxed waiver" doctrine.

Indeed, this lack of finality had been recognized by the Supreme Court of Pennsylvania in assessing amendments to the *Post Conviction Relief Act* (PCRA), *see, e.g.*, 42 Pa. C.S.A. § 9543(a)(3), and had formed the basis for that Court's decision to abolish the relaxed waiver rule in the collateral appellate context. *Albrecht*, *supra* at 700. *See Commonwealth v. Bracey*, 795 A.2d 935, 956 (2002) (before *Albrecht*, capital case relaxed waiver rule had "prevent[ed] finality in capital cases"); *Commonwealth v. Tilley*, 780 A.2d 649, 654 (2001) (before *Albrecht*, relaxed waiver rule had "virtually eliminated any semblance of finality in capital cases" (quoting *Albrecht*)).

The definition of "finality" cannot always be, as Petitioners suggest, so clearly divorced from comity considerations. While conventional notions of "finality" may come at the conclusion of direct review in cases arising from other jurisdictions, it had not done so here, given Pennsylvania's unique doctrine of "relaxed waiver." The Supreme Court of Pennsylvania had chosen to implement the requirements of its own constitutional and statutory authority when, under its doctrine of "relaxed waiver", it had addressed the merits of the *Mills* claim in *Banks II*. Any suggestion that the action that was taken by the Supreme Court of Pennsylvania was somehow "extracurricular" to a rendering that the judgment was "final" only serves as insult to the manner in which the

highest court of a sovereign state had chosen to implement the requirements of its own constitutional and statutory provisions.

Because the Supreme Court of Pennsylvania did not treat capital convictions as "final" after direct appeal, the federal habeas courts should not impose a more rigid definition of finality. As this Court has explained in a similar context, *see*, *Lefkowitz v. Newsome*, 420 U.S. 283 (1975), federal habeas courts should instead permit a state court to determine how "final" its judgments are.

In *Lefkowitz,* this Court addressed the degree of "finality" that federal habeas courts should afford a guilty plea entered in a New York state court. This Court first noted that "**[i]n most States** a defendant must plead not guilty and go to trial to preserve the opportunity for state appellate review of his constitutional challenges to arrest, admissibility of various pieces of evidence, or the voluntariness of a confession." *Lefkowitz*, 420 U.S. at 289 (emphasis added). In states that have such a requirement, "the State acquires a **legitimate expectation of finality** in the conviction" obtained from a guilty plea, and the federal habeas courts will also treat that guilty plea as final – the defendant cannot bring "constitutional challenges to arrest, admissibility of various pieces of evidence, or the voluntariness of a confession" in federal habeas proceedings. *Id.* (emphasis added).

While this was the finality rule in "most states," New York had a different scheme, which allowed the defendant to plead guilty without waiving "certain types of constitutional claims raised in pretrial proceedings." *Id.* As a result of this unique structure of New York state law, a guilty plea in a New York state court did not create "a legitimate expectation of finality," and there was no barrier to federal habeas review of the defendant's constitutional claims. *Id*. Any other rule would give a guilty plea greater finality in the federal habeas courts than it enjoyed in the state courts, a result that is inconsistent with

federalism and the importance of the writ of habeas corpus. The same result applies here.

Petitioners state that the "Pennsylvania Supreme Court has already ruled, in this very case, that direct review concluded and Banks' conviction became final when the court affirmed it in 1987 and this Court denied certiorari." Brief for Petitioners, at 27 n.14 (citing *Banks III,* 726 A.2d at 375). This is remarkably misleading.

The Pennsylvania Supreme Court "ruling" in *Banks III*, to which Petitioners refer, was decided in 1999, after the Supreme Court of Pennsylvania's 1998 abandonment of the capital case relaxed waiver doctrine. As indicated, the court had abandoned this doctrine for the first time in the post conviction context. This was in response to statutory and jurisprudential considerations of the issue of finality in capital cases. Thus, the statement in *Banks III* about "finality" says nothing about how the state court defined finality during the reign of relaxed waiver, when it decided *Banks II* and addressed the *Mills* claim. Moreover, the statements in *Banks III* about "finality" are based entirely upon the statutory language of the 1996 amendments to the PCRA – amendments that post-date and did not apply to the decision in *Banks II*.[27] The *Banks III* court

[27] In *Banks III,* the court's statement about "finality" was based solely upon the following quotation from amendments to the PCRA that were enacted on November 17, 1995 and became effective sixty days thereafter:

"42 Pa. C.S.A.§ 9545. Jurisdiction and proceedings . . .

(b) Time for filing petition.

(1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the **judgment becomes final** . . . .

(3) **For purposes of this subchapter**, a **judgment becomes final** at the conclusion of direct review, including discretionary review in the Supreme Court of the United

(Continued on following page)

stated that under these 1996 amendments to the PCRA: "The Legislature has spoken on the requisites of receiving relief under the PCRA and has established a scheme in which PCRA petitions are to be accorded finality." *Banks III,* 726 A.2d 376. Thus, after abolition of the relaxed waiver doctrine, and the enactment of these 1996 amendments to the PCRA, Pennsylvania now deems its capital cases "final" at the conclusion of direct appeal. At the time of *Banks II*, however, it did not.

The CJLF asserts that "this Court used the usual definition [of finality] in identical circumstances in *Sawyer v. Smith*, 497 U.S. 227 (1990)," where the Court held that *Caldwell v. Mississippi*, 472 U.S. 320 (1985), announced a "new rule" under *Teague*. Brief for *Amicus Curiae*, CJLF, at 3 n.2. There are two flaws in CJLF's arguement.

First, there is no suggestion in *Sawyer* that either party questioned the finality date in that case, and this Court did not address the issue. Thus, even assuming that *Sawyer* and *Banks* confronted "identical circumstances," this Court in *Sawyer* did not decide the issue presented here. Second, CJLF errs when it says *Sawyer* and *Banks* were identical. There is a significant difference between them. As stated above, *Sawyer* concerned the retroactivity of *Caldwell v. Mississippi.* The *Sawyer* petitioner raised the *Caldwell* claim in state post-conviction proceedings. However, there is **no** indication in the *Sawyer* state court opinions that the state courts actually applied *Caldwell* to the claim. See *Sawyer*, 1990 WL 10023010, *72aa-*93aa (March 6, 1990) (state court opinions). In *Banks II*, the state courts addressed *Mills*, but Petitioners and CJLF, now ask this court to ignore that state court decision.

States and the Supreme Court of Pennsylvania, or expiration of time for seeking the review. (emphasis added).

Banks III, 726 A.2d at 375 (quoting 42 Pa. C.S.A. § 9545(b)(1), (3)).

The purpose of *Teague* is to protect state courts from being blindsided by the application of new rules that were not available to them. *Teague's* purpose is fulfilled when the federal court uses exactly the same precedent as the state court. Just as "[i]t would be a strange rule of federalism that ignores the view of the highest court of a State as to the meaning of its own law," *Stringer v. Black*, 503 U.S. 222, 235 (1992) (citing *Teague*), it would be a "strange rule" to show "respect" for a state court judgment by barring the federal court from applying the same precedent that was applied by the state court. In *Stringer*, this Court confirmed that the federal habeas courts, under *Teague,* could apply the same precedent applied by the state court:

> "Insofar as our new rule jurisprudence "validates reasonable, good-faith interpretations of existing precedents," *Butler v. McKellar*, 494 U.S., at 414, 110 S.Ct., at 1217, . . . the State may have little cause to complain if in deciding to allow a petitioner to rely upon a decision the federal courts look only to those precedents which the state courts knew at the relevant time." *Stringer*, 503 U.S. at 236.

As this Court has stated, the state court "is the primary beneficiary of the *Teague* doctrine." *Stringer*, 503 U.S. at 237. Therefore, when the state court considers itself to be "bound by" Supreme Court precedent, the federal habeas courts do not violate *Teague* when they apply that same precedent. *Id.* Thus, under the unusual circumstances of this case, *Mills* applies because finality of judgment for *Teague* purposes occurred in 1995, well after the *Mills* decision.

III. THE PENNSYLVANIA SUPREME COURT'S DECISION WAS CONTRARY TO, AND AN UNREASONABLE APPLICATION OF, *MILLS V. MARYLAND* AND OTHER CLEARLY ESTABLISHED PRECEDENTS OF THIS COURT.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) governs this case. To be entitled to relief under AEDPA, Banks must show that the state court's rejection of the claim was "contrary to" or an "unreasonable application of" clearly established precedent of this Court. 28 U.S.C. § 2254(d)(1).

Under the AEDPA, "A state-court decision will . . . be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases," *Williams v. Taylor*, 529 U.S. 362, 405 (2000), or if it "confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent." *Id.* at 406. "[W]hen a state-court decision unreasonably applies the law of this Court to the facts of a prisoner's case, . . . the state-court decision falls within that provision's 'unreasonable application' clause." *Id.* at 409.

Here, Banks shows both that the state court decision was contrary to *Mills* and related decisions of this Court, and that it was an unreasonable application of that clearly established law.[28]

[28] The Pennsylvania Supreme Court decided the *Mills* claim in 1995. J.A. 119, 122-24. That is the relevant date for AEDPA purposes. *Lockyer v. Andrade*, 123 S. Ct. 1166, 1172 (2003); *Williams v. Taylor*, 529 U.S. 362, 412 (2000). **All** of the decisions relied on by Banks were "clearly established" as of 1995.

A. The Facts of This Case Are Materially Indistinguishable From *Mills*, but the State Court Arrived at a Different Result.

In *Mills,* this Court reviewed a death sentence based on jury instructions and a verdict form that arguably required the capital sentencing jury to find mitigating circumstances unanimously before it could weigh those circumstances against the aggravating circumstances in making its decision whether to sentence to life or death.

This Court reached two conclusions in *Mills*. First, this Court decided that there was a "substantial probability that reasonable jurors" would have believed that they "were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance." *Mills*, 486 U.S. at 384.[29] Second, this Court concluded that, under its prior Eighth Amendment decisions, the "possibility that a single juror could block such consideration, and consequently require the jury to impose the death penalty, is one we dare not risk." *Id*. If the facts of a case are materially indistinguishable from those which this Court relied on in reaching the former conclusion, then a denial of relief is "contrary to" *Mills.*

The facts of *Banks* are indeed materially indistinguishable from those on which this Court relied in *Mills*. We here set out the facts relied on in *Mills*, together with the parallel facts of *Banks*.

1. Under the Maryland capital sentencing statute, as construed by the Maryland Court of Appeals, each juror was free to decide for himself or herself whether the

[29] This Court has since clarified that the correct question is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde v. California*, 494 U.S. 370, 380 (1990).

defense had established a mitigating circumstance. Each juror could then weigh the circumstance(s) that he or she found against the aggravating circumstances, and a death sentence could not be rendered unless all jurors agreed that the aggravating circumstances outweighed the mitigating circumstances. *Mills,* 486 U.S. at 372 (discussing *Mills v. State*, 310 Md. 33, 54, 527 A.2d 3, 13 (1987)). Despite the fact that Maryland law so provided, it was not clear whether a "reasonable jury" would have understood this aspect of Maryland law "from the instructions given by the trial judge and from the verdict form" provided. *Mills*, 486 U.S. at 375-76.

Like the Maryland Court of Appeals, the Supreme Court of Pennsylvania has interpreted Pennsylvania's capital sentencing statute as not requiring jury unanimity for finding mitigating circumstances. *See*, J.A. 124; *Commonwealth v. Frey,* 554 A.2d 27 (1989). While Maryland and Pennsylvania law are identical in that respect, the issue here – as in *Mills* – is what a reasonable jury would have understood from the instructions and verdict sheet.

2. Under Maryland law, if the jury finds one or more aggravating circumstances, it must impose the death sentence unless it also finds one or more mitigating circumstance(s), and that the mitigating circumstance(s) are not outweighed by the aggravating circumstance(s). *See*, *Mills*, 486 U.S. at 373-75. Thus, by refusing to find any mitigating circumstance(s), a single juror could force the jury to impose death, if the jury understood that a unanimous vote was required to find a mitigating circumstance.

Under Pennsylvania law, as under Maryland law, if no mitigating circumstances are "found," the jury must sentence the defendant to death, and the jury may weigh only those circumstances that it "finds." *Blystone v. Pennsylvania*, 494 U.S. 299, 302-05 (1990) (citing 42 Pa. C.S.A. § 9711(c)(1)(iv)). Thus, as in Maryland, if the jury understood that it must be unanimous to "find" a mitigating

circumstance, a single juror could compel a death sentence by refusing to find any mitigating circumstances, or preclude the remainder of the jury from weighing any circumstances that juror did not "find."

3. In *Mills*, the trial court did not expressly instruct the jurors that they had to be unanimous in order to find a mitigating circumstance – and thus to weigh it against the aggravating circumstance(s).[30] As this Court explained, *Mills,* 486 U.S. at 377-80, there were, however, numerous aspects of the instructions and verdict form that reasonably gave rise to such an impression. In *Banks*, as in *Mills,* the instructions and verdict sheet did not expressly tell the jurors that they had to be unanimous in order to find a mitigating circumstance, but they nevertheless reasonably gave rise to that impression, for precisely the same reasons relied on by this Court in *Mills*.

a. The instructions in *Mills* regarding aggravating circumstances clearly indicated that there were two choices: check off "yes" if there was unanimous agreement that the circumstance in question had been established beyond a reasonable doubt; or check off "no." Except for the fact that there was a different burden of proof (preponderance of the evidence), the instructions and form regarding mitigating circumstances were identical. *Mills*, 486 U.S. at 378. Unanimity was clearly required to find aggravating circumstances. The instructions and verdict

[30] Indeed, the Maryland Court of Appeals construed the instructions and verdict sheet as allowing the jury to weigh any mitigating circumstances that were not unanimously rejected by the jury, *Mills v. State*, 310 Md. 33, 54-56, 527 A.2d 3, 13-14 (1987), as did the dissenting Justices in this Court. *Mills*, 486 U.S. at 394 (Rehnquist, C.J., dissenting). The Pennsylvania Supreme Court has given its sentencing statute a similar construction. *See, e.g*., *Commonwealth v. Hackett*, 627 A.2d 719, 725 (1993). Contrary to the Commonwealth's argument, *see* Brief for Petitioners at 37, this fact does not establish the reasonableness of the state court's decision. Rather, it is one more way in which the *Banks* statute, jury instructions and verdict sheet mirror those reviewed by this Court in *Mills*.

form used the same language with respect to finding mitigating circumstances as those for finding aggravating circumstances. These facts raised the inference that unanimity was also required to find mitigating circumstances.

The jury instructions and verdict form in *Banks* are materially indistinguishable. The *Banks* jury instructions and verdict form required the jury to be unanimous in order to find an aggravating circumstance, and that if the jurors were not unanimous as to an aggravating circumstance, they could not find or weigh it. *See,* J.A. 21 (death sentence "if the jury unanimously finds" an aggravating circumstance and no mitigating circumstance, or one or more aggravating circumstances that outweigh any mitigating circumstances); J.A. 26 (death sentence "if you unanimously find" an aggravating circumstance and no mitigating circumstance, or one or more aggravating circumstances that outweigh any mitigating circumstances); J.A. 26 ("[P]lace the aggravating circumstances you find, if any, on the scale of justice and . . . weigh them"); J.A. 66 (verdict sheet: "WE THE JURY HAVE FOUND UNANIMOUSLY . . . . ONE OR MORE AGGRAVATED CIRCUMSTANCES WHICH OUTWEIGH ANY MITIGATING CIRCUMSTANCE OR CIRCUMSTANCES.").

The instructions and verdict form with respect to mitigating circumstances – here as in *Mills* – were precisely the same as those for aggravating circumstances (aside from the different burden of proof for mitigating circumstances). The court opened its instructions as follows:

> "The sentence you impose will depend on your *findings* concerning aggravating and mitigating circumstances . . . . [T]he verdict must be a sentence of death if the jury *unanimously finds* at least one aggravating circumstance and no mitigating circumstance, or if the jury *unanimously finds* one or more aggravating circumstances which outweigh any mitigating circumstance or circumstances." J.A. 21; *see,* J.A. 26 (repeating the substance of this instruction,

> but substituting the collective pronoun "you" for the collective term "the jury" – "if *you* unanimously find . . . .").[31]

This instruction coupled aggravating and mitigating circumstances in emphasizing the importance of "your findings concerning aggravating and mitigating circumstances"; twice stated that such findings had to be unanimous; and made no distinction between the manner in which aggravating and mitigating circumstances were to be "found."

The trial court instructed the jury that there were different burdens of proof for aggravating circumstances (beyond a reasonable doubt) and for mitigating circumstances (by a preponderance of the evidence). J.A. 25. Other than the differing burdens of proof, the instructions made no distinction between the manner in which aggravating and mitigating circumstances were to be "found."[32]

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[31] In these two instructions, the trial court equated the unanimous jury with the collective pronoun "you." Indeed, throughout its charge the court used the collective pronoun "you" to refer without distinction to the entity that sentences, finds aggravating circumstances, and finds mitigating circumstances. *e.g.,* J.A. 21 ("your findings concerning aggravating and mitigating circumstances"); J.A. 23 ("Do you find, from the evidence" a mitigating circumstance?); J.A. 25 ("If [petitioner's capacity was substantially impaired], and you find that from a preponderance of the evidence, you may consider that a mitigating circumstance"); J.A. 26 ("A mitigating circumstance, if found to exist"); J.A. 27 ("if you find the existence of one or more aggravating circumstance and one or more mitigating circumstance"); J.A. 28 ("If you find at least one aggravating circumstance and at least one mitigating circumstance"); J.A. 29 ("In order to find a mitigating circumstance, you must be satisfied that it has been established"); J.A. 30 ("If you find, . . . that there is one or more mitigating circumstances"); J.A. 30 ("the mitigating circumstance or circumstances that you have found"). This consistent use of the collective pronoun "you" strongly suggested that the same body, i.e., the jury-as-a-unanimous-whole, was to find aggravating circumstances, find mitigating circumstances, weigh them, and render the ultimate verdict.

[32] A reasonable jury would infer from the fact that the only stated difference between finding aggravating and mitigating circumstances

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Finally, the trial court instructed the jury that it was to weigh "on the scale of justice" the "found" aggravating circumstances against any "found" mitigating circumstances:

> A mitigating circumstance, *if found to exist*, need not outweigh an aggravating circumstance in order to find in favor of life imprisonment. If, after you consider all the evidence and the arguments of counsel, you *place the aggravating circumstances you find, if any*, on the scale of justice *and you weigh them*, if, after you do that, the scales of justice are still balanced, then your sentence must be life imprisonment. J.A. 26-27.[33]

The instructions clearly told the jurors they had to be unanimous to find aggravating circumstances; that they had to find aggravating circumstances to weigh them; and that they had to find mitigating circumstances to weigh them. The only logical conclusion, as in *Mills*, is that the jurors had to be unanimous to find mitigating circumstances, just like aggravating circumstances.

b. The *Mills* verdict sheet used a check-off form, which gave the jury the options of checking "yes" (if the jury unanimously agreed that an aggravating or mitigating circumstance had been proved) or "no." The jury was not given any other option, leaving the impression that anything less than unanimity should result in checking the "no" box. Although, theoretically, checking "no" could

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was the different burden of proof that the burden of proof was in fact the only difference between the two. *See, Mills*, 486 U.S. at 378.

[33] This instruction (the substance of which was repeated at J.A. 30) does not make sense unless the jury weighs only those mitigating circumstances that it unanimously finds. Otherwise, each juror would have to have his or her own individual balancing scale, with the aggravating circumstances unanimously found on one side and the mitigating circumstances found **by that juror** on the other. The instruction, however, clearly indicates that there is but one scale for the entire jury, reinforcing the idea that mitigating circumstances must be unanimously found before they could be weighed.

indicate affirmatively that the jury had unanimously rejected the circumstance, a reasonable jury could also infer that "no" meant anything other than a unanimous "yes." *See Mills*, 486 U.S. at 378. And if the jury did not check "yes," it could not weigh the circumstance. "Nothing in the verdict form or the judge's instructions even arguably is construable as suggesting the jury could leave an answer blank and proceed to the next [weighing] stage in its deliberations." *Id.* at 378-79.

As in *Mills*, the *Banks* verdict sheet used a check-off form. The slight differences between the two forms made the unanimity requirement even more clear in *Banks*.

The *Banks* verdict sheet gave jurors the options of checking that they had found a circumstance, or leaving the space blank. They were only to check an aggravating or mitigating circumstance if they had found it unanimously. They could only weigh those circumstances that they checked. Instead of having options of "unanimous yes," "unanimous no," and possibly something in between (the *Mills* form), they had the options of "unanimous yes" or nothing. The obvious inference is that they could only check and weigh those mitigating circumstances that the jurors found unanimously.

c. The *Mills* instructions and verdict sheet could be construed as telling the jurors to weigh only those aggravating or mitigating circumstances marked "yes," as found by the unanimous jury. *Id.* at 380.

The *Banks* verdict sheet made this at least as clear as the *Mills* sheet, by the following language, which explicitly requires unanimity:

WE THE JURY HAVE *FOUND UNANIMOUSLY* . . .

✓	ONE OR MORE AGGRAVATING CIRCUMSTANCE WHICH OUTWEIGH ANY MITIGATING CIRCUMSTANCE OR CIRCUMSTANCES.

THE AGGRAVATING CIRCUMSTANCE(S) (IS) (ARE):

3. ✓ THE DEFENDANT HAS BEEN CONVICTED OF ANOTHER FEDERAL OR STATE OFFENSE, ...

THE MITIGATING CIRCUMSTANCE(S) (IS) (ARE):

1. ✓ THE DEFENDANT WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE.

J.A. 66-68.[34]

There simply is no other logical conclusion from this verdict sheet (together with the instructions) than that mitigating circumstances, like aggravating circumstances, were to be "found," checked off, and weighed only if they were circumstances that "WE THE JURY HAVE FOUND UNANIMOUSLY," and that all mitigating circumstances *not* found unanimously were not to be considered "found," not to be checked off, and not to be weighed.[35]

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[34] Throughout the verdict sheet aggravating and mitigating circumstances are treated identically. Thus, the verdict sheet provides spaces for the jury to mark: (1) which aggravating circumstance(s) it has found; (2) which mitigating circumstance(s) it has found; (3) whether the aggravating circumstances outweigh the mitigating circumstances; and (4) whether the sentence is death or life. To use the sheet in a constitutionally appropriate manner, the jury would have to know that (1), (3) and (4) could be marked only by unanimous agreement, but that (2) should be marked even if only one juror believes it should be. It is highly unlikely that the jury would arrive at such an irrational understanding of the verdict sheet.

[35] CJLF argues that the verdict sheet requires unanimity "only with regard to the ultimate issue." Brief of *Amicus Curiae*, CJLF, at 28. A lawyer could parse the verdict sheet in that fashion. But to do so would require closing his or her eyes to the undoubted fact that the unanimity requirement applied at least to aggravating circumstances, as well as to the "ultimate issue." Moreover, from the outset of the instructions, the trial judge emphasized the importance of the jury's findings. *See*, J.A. 21. After recording its decision as to the "ultimate issue," the jury was required to record its findings as to aggravating and mitigating circumstances. J.A. 67-68. The jury did so by placing a check mark next to each aggravating and mitigating circumstance that

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4. Finally, immediately after issuing its decision in *Mills*, the Maryland Court of Appeals promulgated a new verdict form that eliminated the ambiguity as to the jury unanimity requirement, and made clear that, if jury unanimity could not be reached as to the mitigating circumstances, individual jurors could weigh those mitigating circumstances which they found had been established by a preponderance of the evidence. *Id.,* at 381-82 (quoting Md. Rule Proc. 4-343(3) (amended July 27, 1987). This Court inferred that the amendment to the verdict form reflected "at least some concern" on the part of the Maryland Court of Appeals as to jury confusion about the unanimity requirement. *Mills*, 486 U.S. at 382.

After this Court's decision in *Mills*, the Pennsylvania Supreme Court took precisely the same action, as had the Maryland Court of Appeals. On February 1, 1989, the Pennsylvania Supreme Court adopted a new Rule of Criminal Procedure (Rule 358A, since renumbered Rule 807), which contains a verdict form that states:

> The aggravating circumstance(s) unanimously found (is)(are):
>
> The mitigating circumstance(s) **found by one or more of us** (is)(are)
>
> * * *

No such verdict sheet was used in the instant case.

Similarly, Pennsylvania Standard Criminal Jury Instruction 15.2502H now specifically instructs the jury that "each of you is free to regard a particular mitigating circumstance as present despite what other jurors may believe." No such instruction was provided here.

As in *Mills*, the changes in the instructions and verdict slip indicate "at least some concern . . . that juries

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it found. The logical understanding of the form is that in doing so, the jury was checking those circumstances that "WE THE JURY HAVE FOUND UNANIMOUSLY." J.A. 66.

could misunderstand" the prior instructions and verdict slip employed in *Banks*. *See Mills*, 486 U.S. at 382

Because the operative facts of *Mills* and of *Banks* are materially indistinguishable, the Supreme Court of Pennsylvania's rejection of Banks' *Mills* claim was contrary to *Mills*. Hence, § 2254(d) does not preclude the relief granted by the court below.

B. The State Court Decision Was an Objectively Unreasonable Application of *Mills*.

When a state court's application of this Court's precedent is "objectively unreasonable," § 2254(d) "pose[s] no bar to granting [the] petitioner habeas relief." *Wiggins v. Smith*, 123 S. Ct. 2527, 2539 (2003). Here, while the Supreme Court of Pennsylvania gave lip service to this Court's decision in *Mills*, its decision reveals an utter failure to understand and apply *Mills*, resulting in an objectively unreasonable denial of relief.

This Court's decision in *Mills*, together with its subsequent decision in *Boyde*, makes clear that the focus of a court reviewing a *Mills* claim must be on the jury's understanding of the jury instructions and verdict sheet. In *Mills* itself, this Court emphasized that the "critical question" before it was how a "reasonable jury" would have understood "the instructions given by the trial judge and . . . the verdict form employed in this case." *Mills*, 486 U.S. at 375-76. This Court paid little attention to the Maryland capital sentencing statute, which had been construed by its high court "in a manner that preserves its constitutionality." *Id.* at 369.

The longstanding principle that jury instructions must be considered in their entirety was implicit in *Mills* itself. *Id.* at 375-76. In *Boyde*, this Court explicitly applied the "familiar rule" that a "single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Boyde,* 494 U.S. at 378 (quoting *Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973)). *Boyde* further clarified that "the proper inquiry in such a case is whether there is a reasonable likelihood that the

jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Id.* at 380.

Thus, *Mills* and *Boyde* together establish that a court reviewing a *Mills* claim must consider the jury instructions and verdict sheet as a whole, in order to determine whether there is a reasonable likelihood that the instructions and verdict sheet led the jury to believe that they were required to unanimously find a mitigating circumstance before they could weigh that circumstance. The Supreme Court of Pennsylvania completely failed to undertake such an analysis.

With respect to the trial judge's instructions, the Supreme Court of Pennsylvania quoted three sentences of the instruction, and then stated:

> "This instruction, which mirrors the language found in the death penalty statute of our Sentencing Code, has previously been reviewed by this Court and determined not to violate *Mills*. *Commonwealth v. Hackett*, 627 A.2d 719 (1993); *Commonwealth v. Marshall*, 633 A.2d 1100 (1993); *Commonwealth v. O'Shea*, 567 A.2d 1023 (1989), *cert. denied*, 498 U.S. 881 (1990). Accordingly, appellant's claim with respect to the instruction is without merit." J.A. 123-24 (quoting J.A. 21).

The three decisions cited by the state court – *O'Shea*, *Hackett* and *Marshall* – all ultimately rely on the court's earlier decision in *Commonwealth v. Frey*, 554 A.2d 27 (1989).[36] In *Frey*, the court held that the jury instructions did not violate *Mills* because they were not identical to those given in *Mills* and because a sentence from the instructions "closely followed" the language of the capital sentencing statute, which it found to be constitutional. *Id.*

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[36] *See O'Shea*, 567 A.2d at 1036 (citing *Frey*); *Hackett*, 627 A.2d at 725 (citing *O'Shea* and *Frey*); *Marshall*, 567 A.2d at 1111 (citing *O'Shea* and *Frey*).

554 A.2d at 31. Thus, in *Frey*, the court asserted that because the statute was constitutional, and part of the instructions tracked the language of the statute, the instructions must be constitutional – but without ever examining the instructions as a whole to determine whether there was a reasonable likelihood that the jury understood the instructions as requiring unanimity.

The state supreme court elaborated on its misunderstanding of *Mills* in *Hackett*:

> "*Mills* concerned a Maryland *statute*, which required jurors unanimously to agree on each individual mitigating circumstance after deciding aggravating factors. Absent unanimous agreement, the Maryland *statute* barred consideration of the mitigating evidence as to a given circumstance. The Supreme Court held that the *statute* violated the Eighth Amendment because a single Maryland juror could force a death verdict on the other jurors by refusing to agree that mitigation existed.
>
> The Pennsylvania *statute*, 42 Pa. C.S.A. § 9711, does the opposite and, therefore, does not violate the rule in *Mills*. The Pennsylvania *statute*, 42 Pa. C.S.A. § 9711(c)(1)(iv), requires that the jury unanimously agree that no mitigating circumstances exist and unanimously agree on a verdict for a sentence of death. Thus, while a single Pennsylvania juror can always prevent a death sentence, a single juror can never compel one, as could a single juror under the former Maryland *statute*."

Hackett, 524 Pa. at 222-23, 627 A.2d at 725 (emphasis supplied) (footnote omitted).

In *Banks*, as in *Frey* and *Hackett*, the court found that the instructions were unobjectionable because a few sentences from the instructions "mirror" the language found in the death penalty statute of our Sentencing Code." (*Banks II*) J.A. 124. According to the Supreme Court of Pennsylvania, review of a *Mills* claim requires

only a simple syllogism: the statute, as we have interpreted it, does not require jury unanimity and is therefore constitutional; some language in the jury instructions "mirrors" or "closely follows" that of the statute; *ergo*, the instructions are constitutional.[37]

Of course, all of this is antithetical to *Mills*. Contrary to *Hackett*, the Maryland *statute*, like the Pennsylvania *statute*, was constitutional, because each high court had adopted a "plausible" construction of the statute as not requiring jury unanimity. *See Mills*, 486 U.S. at 370. But because that "plausible" construction of the statute "may not have been evident to the jury," *Id.* The "critical question," here as in *Mills*, was whether a "reasonable jury could have" concluded from the instructions as a whole that unanimity was required to find a mitigating circumstance. *Id.* at 375-76. *The Supreme Court of Pennsylvania never asked that "critical question."*. As the Third Circuit found, the Supreme Court of Pennsylvania "failed to analyze the penalty phase of Banks' trial in accordance with [the principles of *Mills* and *Boyde*], and, as a consequence, unreasonably applied *Mills*." *Banks II,* Pet. App. at 106.

With respect to the *Banks* verdict sheet, the state supreme court again relied on the assertion that the verdict sheet was "virtually identical" to the one in *Frey*. J.A. 124. As a factual matter, that assertion was inaccurate.[38] As with the Supreme Court of Pennsylvania's

[37] The Maryland high court's analysis in *Mills* was very similar. According to the Maryland high court, the Maryland statute required jury unanimity only for the final sentencing determination, not for the findings as to mitigating circumstances, and "the [verdict] form and the instructions were entirely in accord with" the statute. *Mills v. State*, 310 Md. 33, 54-56, 527 A.2d 3, 13-14 (1987).

[38] The *Frey* verdict sheet was materially indistinguishable from the one reviewed in *Zettlemoyer v. Fulcomer*, 923 F.2d 284 (3d Cir. 1991). *See Frey v. Fulcomer*, 132 F.3d 916, 924 (3d Cir. 1997). The *Zettlemoyer*/*Frey* verdict sheet did not require the jury to list mitigating circumstances found, but only the aggravating circumstances found.

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review of the jury instructions, its failure to confront the actual verdict sheet and determine how a reasonable jury could have understood it was an objectively unreasonable application of *Mills*.

The state supreme court's decision was not simply wrong. As set forth in Part A, *supra*, the facts of this case are "materially indistinguishable" from those in *Mills*. Alternatively, any conceivable distinctions that can be drawn between this case and *Mills* are so minor that it would be objectively unreasonable for a court that actually reviews the jury instructions and verdict sheet in their entirety to reach any conclusion other than the one reached by the court below – that the instructions and verdict sheet violate *Mills*.

In its brief asserting the reasonableness of the state court's decision, the Petitioners largely ignore both that decision and the language of the jury instructions and verdict slip, in favor of hyperbolic attacks on the court below. *See, e.g.*, Brief for Petitioners at 30 ("caprice"); at 31 (Third Circuit's "effort to appear in compliance with AEDPA"); at 34 (accusing the court below of being motivated by a desire to "provide the appearance of compliance with the AEDPA deference standard"); at 35 (Third Circuit's "tergiversation on *Mills*").[39] Those attacks are unfounded.[40] More to the point, they are irrelevant – whether

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Zettlemoyer, 923 F.2d at 308. As discussed above, however, the *Banks* verdict sheet requires the jury to list the mitigating circumstances that "WE THE JURY HAVE FOUND UNANIMOUSLY." J.A. 66, 68. Thus, contrary to the Commonwealth's assertion, Brief for Petitioners at 39, the *Banks* instructions and verdict sheet are not "identical" to those in *Zettlemoyer*; those in *Banks* result in a clear violation of *Mills*.

[39] "Tergiversation" is defined as "1. subterfuge; evasion. 2. desertion."

[40] For example, the Petitioners discourse at length on its view that the Third Circuit ignored this Court's decision in *Boyde*. Brief for Petitioners at 35-37. In fact, the Third Circuit discussed *Boyde* at length, *twice* setting forth the *Boyde* standard in full, Pet. App. 109 (stating the standard), 115 (finding the standard violated), citing

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or not the Third Circuit committed apostasy or subterfuge has nothing to do with whether the state court's decision was an objectively unreasonable application of *Mills*.

The Petitioners' principal argument on the actual merits of the AEDPA issue is that the jury instructions should be read as instructing "that the jury must be unanimous to *reject* any mitigating circumstances." Brief for Petitioners at 30 (emphasis original); *Id.* at 31. In making this contention, Petitioners rely on the emphasis it places on a single word in the instructions: "the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance and **no** mitigating circumstances, or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstance or circumstances." Brief for Petitioners, at 30 (quoting J.A. 21).

According to the Petitioners, the only reasonable understanding of the coupling of "unanimously finds" and "no mitigating circumstance" in this instruction is that it told the jurors that they must be unanimous to reject mitigating circumstances, not to find them. The Petitioners' argument strains credulity.

The sentence quoted by the Petitioners also couples "unanimously finds" with "at least one aggravating circumstance" and with "any mitigating circumstance or circumstances." There is no question that the instructions conveyed that the jury must be unanimous to find an aggravating circumstance. Given the parallel language, it would certainly be at least reasonable for a jury to understand that it must be unanimous to find a mitigating

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numerous times, Pet. App. 105, 108-09, 115, and applying it. Given that the Third Circuit stated and applied *Boyde's* reasonable likelihood standard, its occasional use of the shorthand "could" for the likely effect of the instructions on a reasonable jury is of no moment. While this Court noted in *Boyde* that "there may not be great differences among the [ ] various phrasings," *Id*. at 379, of the standard, the Third Circuit clearly understood and applied *Boyde's* clarification of *Mills*.

circumstance, and *not* to construe "unanimously *finds* . . . *no* mitigating circumstance" as meaning "unanimously *rejects* . . . *all* mitigating circumstances," which is what Petitioners contend the language means.

Like the Supreme Court of Pennsylvania, the Petitioners concentrate on a single sentence from the jury instructions. When the instructions are viewed in their entirety, as discussed in Part A, *supra*, it is clear that a reasonable jury could understand them as requiring jury unanimity to find mitigating circumstances.

The Petitioners also appear to argue that there cannot be a *Mills* violation because the instructions and jury sheet do not expressly require jury unanimity. Brief for Petitioners at 31. Here, it is the Petitioners that ignore both *Mills* and *Boyde*. As discussed above, the *Mills* jury instructions also did not contain an express jury unanimity requirement. This Court vacated the death sentence because it could not tolerate the reasonable likelihood that the jury so understood the instruction. *Mills*, 486 U.S. at 384. Nor does *Boyde* require explicit language for a violation to result. If explicit language *were* required, however, it is present in the verdict sheet. In placing a check by a mitigating circumstance, the jury was affirmatively stating that "WE THE JURY HAVE UNANIMOUSLY FOUND" that mitigating circumstance. J.A. 66-68.

For its part, CJLF appears to suggest both that the jury instructions and verdict sheet could have been interpreted as requiring only that the jury "continue deliberating until it is unanimous *one way or the other*," Brief for *Amicus Curaie* CJLF, at 26 (emphasis original), and that under *Boyde*, a state court could assume that a jury would ignore contrary instructions and just get the ultimate verdict right. *Id.* at 27-28.

The former argument grasps at straws. The Supreme Court of Pennsylvania and Petitioners urge that the instructions and verdict sheet contained *no* requirement of unanimity; now CJLF concedes that the instructions and verdict sheet suggested unanimity, but argues the jury could have thought this meant unanimity both for and

against the finding of a mitigating circumstance. CJLF does not suggest where in the instructions and verdict sheet the jury could draw the necessary conclusion that it must be unanimous to *find* aggravating circumstances, but to *find or reject* mitigating circumstances. Its reading would also have resulted in rewriting Pennsylvania capital sentencing law, to provide for a mistrial if the jury could not reach unanimity as to any of the mitigating circumstances.

CJLF's latter argument – besides being contrary to *Mills* itself – would "place[ ] law-abiding jurors in an impossible situation." *Penry v. Johnson*, 532 U.S. 782, 799 (2002). It assumes that a reasonable jury in fact would have understood the instructions and verdict sheet as requiring unanimity to find and then weigh mitigating circumstances, but that such a jury would ignore its instructions, decide what ultimate outcome it thought was appropriate, and fill out the verdict sheet in a manner consistent with that outcome. The breathtaking assertion that courts should assume jurors disregard their instructions if they think the instructions would lead to an unjust result is inconsistent with every Eighth Amendment decision of this Court since *Gregg v. Georgia*, 428 U.S. 153 (1976), and its companion decisions established that guided sentencing discretion is a solution to the Eighth Amendment violative risk of arbitrariness in capital sentencing identified in *Furman v. Georgia*, 408 U.S. 238 (1972). If CJLF is correct, and sentencing juries feel free to disregard their instructions in favor of arriving at what they think is a just result, then we are right back to *Furman*. As Justice Kennedy has noted, however, *Mills* stands as a necessary protection against such arbitrariness. *McKoy*, 494 U.S. at 456 (Kennedy, J., concurring).

The state court's decision was both "contrary to" *Mills*, and an "unreasonable application" of that decision. Accordingly, § 2254(d) creates no barrier to the grant of habeas relief. The decision below should be affirmed.

CONCLUSION

The decision of the Court of Appeals for the Third Circuit should be affirmed.

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