IN THE UNITED STATES COURT OF APPEAL
FOR THE THIRD CIRCUIT

No. 01-9014

MUMIA ABU-JAMAL,

Appellee,

v.

JEFFREY BEARD, Commissioner, Pennsylvania Department of Corrections; CONNER BLAINE, Superintendent of the State Correctional Institution at Greene; District Attorney for Philadelphia County; the Attorney General of the Commonwealth of Pennsylvania,

Appellants.

BRIEF OF APPELLEE, MUMIA ABU-JAMAL
On Remand from the Supreme Court of the United States

On Appeal from the Order of the United States District Court for the Eastern District of Pennsylvania (Yohn, J.), Dec. 18, 2001, granting the Petition for Writ of Habeas Corpus, No. 99 Civ. 5089 (Capital Habeas Corpus)

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Dated: July 28, 2010

PRELIMINARY STATEMENT REGARDING CITATIONS

All emphasis herein is supplied, unless otherwise indicated. Parallel citations usually are omitted.

The Supplemental Appendix of Appellee was filed in this matter on July 28, 2006, and is cited as "App." followed by the page number. It contains the referenced proceedings held on July 3, 1982, in which the jurors were instructed as to the death penalty. App. 128-150.

Appellee, Mumia Abu-Jamal, is referred to herein by name. Respondents below, are generally referred to as "the Commonwealth."

Transcripts from state court proceedings are cited as "NT" followed by the date and page number, as is the standard of practice in Pennsylvania, .

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

Other Provisions

For the reasons set forth herein, this Court should reaffirm its grant of habeas relief under *Mills v. Maryland*, 486 U.S. 367 (1988).

COUNTERSTATEMENT OF THE CASE

A. State Court: Mumia Abu-Jamal was convicted and sentenced to death in Philadelphia. The Pennsylvania Supreme Court affirmed on direct appeal, *Commonwealth v. Abu-Jamal*, 555 A.2d 846 (Pa. 1989) ("*Abu-Jamal-1*"), and denied post-conviction relief, *Commonwealth v. Abu-Jamal*, 720 A.2d 79 (Pa. 1998) ("*Abu-Jamal-2*"). In the state post-conviction proceedings, Mr. Abu-Jamal exhausted a claim that the capital sentencing verdict form and instructions violated *Mills*.

B. District Court: On federal habeas review, the District Court (Honorable William H. Yohn, Jr.) addressed the *Mills* claim at length, found it meritorious, and granted relief from the death sentence. *See Abu-Jamal v. Horn*, 2001 WL 1609690 (E.D. Pa. Dec. 18, 2001) ("*Abu-Jamal-3*").

The District Court carefully discussed the Supreme Court's *Mills*-related precedent, including *Mills*, *McKoy v. North Carolina*, 494 U.S. 433 (1990), and *Boyde v. California*, 494 U.S. 370 (1990), as well as prior Third Circuit rulings on *Mills* claims. It recognized that, under Supreme Court and Third Circuit precedent, the standard for evaluating whether jury instructions violate *Mills* is described in *Boyde* – "whether there is a reasonable likelihood that the jury [as opposed to a reasonable individual juror] has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Abu-Jamal-3* at *115 (quoting *Boyde*, bracketed material in original). The District Court further

explained:

> While the Third Circuit repeatedly has noted the applicability of the *Boyde* standard in assessing *Mills* claims, *see Banks v. Horn*, 271 F.3d 527, 2001 WL 1349369, at *16 (3d Cir. Oct.31, 2001) and *Frey v. Fulcomer* 132 F.3d 916, 921 (3d Cir.1997), the court of appeals also has at least mentioned an alternate, arguably less stringent standard for determining whether *Mills* has been violated. ... There is no dispute, however—and indeed, both *Frey* and *Banks* make this point explicitl—that the standard to be applied to *Mills* claims is that articulated in *Boyde*. Accordingly, I am concerned in evaluating petitioner's *Mills* claim with 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*, 494 U.S. at 380 (emphasis added).

Abu-Jamal-3 at *115 n.80.[1]

Because the Pennsylvania Supreme Court denied the *Mills* claim on the mer-

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[1]In *Boyde*, the Supreme Court observed that the "legal standard for reviewing jury instructions claimed to restrict impermissibly a jury's consideration of relevant evidence is less than clear from our cases," with various formulations of the standard having been given in *Mills* and other cases. *Boyde*, 494 U.S. at 378-79. The Court observed that, in *Mills* in particular, it "alluded to at least three different inquiries for evaluating such a challenge: whether reasonable jurors '*could have*' drawn an impermissible interpretation from the trial court's instructions, *id.* at 375-376 (emphasis added); whether there is a '*substantial possibility* that the jury may have rested its verdict on the improper ground,' *id.* at 377 (emphasis added); and how reasonable jurors '*would have*' applied and understood the instructions. *Id.* at 389 (White, J., concurring) (emphasis added)."

The *Boyde* Court found it "important to settle upon a single formulation for this Court and other courts to employ in deciding this kind of federal question," and held that "the proper inquiry" 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; *accord Abdul-Kabir v. Quarterman*, 550 U.S. 233, (2007) ("in *Boyde*[], 'we held that a reviewing court must determine "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"'); *see also Hackett v. Price*, 381 F.3d 281, 290-91 (3d Cir. 2004) (describing *Boyde*).

its, the District Court applied the deferential standards of 28 U.S.C. § 2254(d) to the state court decision. It first observed:

> A petitioner seeking a writ based on a claim that was . . . adjudicated on the merits in the state courts may have his application granted only if the state court decision: (1) was "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States"; (2) "involved an unreasonable application of" such established federal law; or (3) was the result of "an unreasonable determination of the facts in light of the evidence presented" in state court. § 2254(d).

Abu-Jamal-3 at *10 (footnote omitted).

The District Court then described the interpretation given § 2254(d) in *Williams v. Taylor*, 529 U.S. 362 (2000) ("*Terry Williams*"):

> In *Terry Williams*, the Court explained that a state court decision falls within the prohibition of the "contrary to" clause if it is "substantially different from the relevant precedent" of the Supreme Court, or if it "applies a rule that contradicts the governing law set forth" in Supreme Court opinions. *Terry Williams*, 529 U.S. at 405. "A state-court decision will also be contrary to this Court's clearly established precedent if the state court 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. In other words, "[u]nder the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts." *Id.* at 412-13.
>
> T]he Supreme Court . . . also addressed the proper standard of review under the "unreasonable application" clause. *See Terry Williams*, 529 U.S. at 407-13. The Court . . . cautioned federal habeas courts against insufficiently deferential review of state court decisions. "[A] federal habeas court making the _unreasonable application" inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable." *Id.* Moreover, "the most important point is that an *unreasonable* applica-

> tion of federal law is different from an *incorrect* application of federal law." *Id.* at 410 (emphasis in original). In short, "[u]nder the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principles from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. It is important to recognize that AEDPA requires of federal habeas courts greater deference to state court applications of law to fact than did prior law. *See id.* at 403-04 (discussing the AEDPA's restriction of independent federal review).

Abu-Jamal-3 at *10-*11; *see also id.* at *107 ("Again, I stress that in *Terry Williams*, the Supreme Court explained that in making the unreasonable application inquiry, a federal habeas court should ask whether the state court's application of clearly established federal law was objectively unreasonable, which is different from an incorrect application of federal law. [T]he AEDPA standard requires federal habeas courts to give greater deference to state court applications of law to fact than did prior law.").

When the District Court specifically addressed the *Mills* claim, it again emphasized that it was applying the deferential standards of § 2254(d):

> [I]t is important to reiterate here that the standards under which [Mr. Abu-Jamal's] *Mills* claim must be evaluated are those set forth in the AEDPA. . . .Therefore, habeas relief will not be warranted pursuant to *Mills* if it is merely the case that, had I evaluated [Mr. Abu-Jamal's] *Mills* claim *ab initio,* I would have found it to be meritorious. ... Put differently, a significant degree of deference is due the state supreme court's application of federal law. Instead, if [Mr. Abu-Jamal] is to be granted a writ of habeas corpus pursuant to this claim, it must necessarily be the case that the Pennsylvania Supreme Court's determination *Mills* had not been transgressed was "contrary to," or "involved an unreasonable application of" the United States Supreme Court's decision in that case. *See* 28 U.S.C. 2254(d)(1); *Terry Williams*, 529 U.S. at 405.

Abu-Jamal-3 at *116 & n.82.

The District Court applied *Mills* and *Boyde*, and found that the instructions given here violated the Eighth Amendment. The District Court applied the deferential standards of § 2254(d), and found that the state court decision was an "unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States." Accordingly, the District Court vacated the death sentence.

C. Third Circuit: This Court unanimously affirmed the District Court's grant of relief on the *Mills* claim. *See Abu-Jamal v. Horn*, 520 F.3d 272 (3d Cir. 2008) ("*Abu-Jamal-4*"). This Court found the District Court had "thoroughly explored" the *Mills* claim, *Abu-Jamal-4* at 278, then gave its own thorough analysis.

This Court first described *Mills*:

> In *Mills*, the Supreme Court vacated a death sentence after finding there was a "substantial probability that reasonable jurors, upon receiving the judge's instructions in this case, and in attempting to complete the verdict form as instructed, well may have thought 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. In capital cases, a juror must "be permitted to consider and give effect to mitigating evidence when deciding the ultimate question whether to vote for a sentence of death." *McKoy v. North Carolina*, 494 U.S. 433, 442-43 (1990); *see also Mills*, 486 U.S. at 374-75; *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion).
>
> The petitioner in *Mills* challenged Maryland's capital sentencing statute, as applied to him, contending a reasonable juror could have understood the verdict form and the judge's instructions to require jury unanimity on any mitigating circumstances. The Court considered an "intuitively disturbing" hypothetical situation:
>
> > All 12 jurors might agree that some mitigating cir-

> cumstances were present, and even that those mitigating circumstances were significant enough to outweigh any aggravating circumstance found to exist. But unless all 12 could agree that the same mitigating circumstance was present, they would never be permitted to engage in the weighing process or any deliberation on the appropriateness of the death penalty.
>
> *Mills*, 486 U.S. at 374. The Court concluded that even though a constitutional construction of Maryland's sentencing scheme was possible, reasonable jurors could have interpreted the verdict form and judge's instructions to preclude consideration of mitigating circumstances if not found unanimously. Accordingly, the Court vacated Mills's sentence because "[t]he 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.* at 384.

Abu-Jamal-4 at 300-01.

This Court, like the District Court, recognized that the standard for reviewing a *Mills* challenge to jury instructions is set forth in *Boyde*, and, like the District Court, this Court applied *Boyde*:

> In *Mills*, the Court posed "[t]he critical question . . . whether petitioner's interpretation of the sentencing process is one a reasonable jury could have drawn from the instructions given by the trial judge and from the verdict form employed in this case." *Id.* at 375-76. In *Boyde v. California* 494 U.S. 370 (1990), the Supreme Court clarified the legal standard as "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.

Abu-Jamal-4 at 301; *see also id.* at 274 ("whether the jury charge and sentencing verdict sheet violated Abu-Jamal's constitutional rights under *Mills* . . . and *Boyde*"); *id.* at 300 ("We must determine whether the Pennsylvania Supreme Court decision was unreasonable in light of *Mills* and *Boyde*"); *id.* at 298, 302 (noting with approval that District Court applied *Mills* and *Boyde*); *id.* at 304 ("We con-

clude the Pennsylvania Supreme Court's decision was objectively unreasonable under the dictates of *Mills* and *Boyde*.").

This Court, like the District Court, also recognized and applied the deferential standards of § 2254(d):

> Under the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), a state prisoner's habeas petition must be denied as to any claim that was "adjudicated on the merits in State court proceedings" unless the adjudication "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1) & (2). Under the "unreasonable application" prong of § 2254(d)(1), "the question . . . is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable – a substantially higher threshold." *Schriro v. Landrigan*, [550 U.S. 465, 473], 127 S.Ct. 1933, 1939 (2007) (citing *Williams[]*, 529 U.S. [at] 410 . . .).

Abu-Jamal-4 at 278-79;

> Our standard on collateral review is whether the state's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). AEDPA creates "an independent, high standard to be met before a federal court may issue a writ of habeas corpus to set aside state-court rulings," and we are guided by the statute's "binding [] directions to accord deference."

Abu-Jamal-4 at 293 (quoting and citing *Uttecht v. Brown*, 127 S.Ct. 2218 (2007); *Landrigan*; *Williams*); *see also id.* at 292 (describing "AEDPA's deferential standard of review"); *id.* at 292 n.21 (noting "deferential standards provided by AEDPA § 2254(d)"); *id.* at 300 ("Our review is limited to whether the Pennsylva-

nia Supreme Court unreasonably applied *Mills*. *See* 28 U.S.C. § 2254(d)(1); *Williams*, 529 U.S. at 405. . . . We must determine whether the Pennsylvania Supreme Court decision was unreasonable in light of *Mills* and *Boyde*.").

Turning to the record in this case, this Court considered the verdict form, the oral instructions, and the Pennsylvania Supreme Court's ruling. *See Abu-Jamal-4* at 301-04. This Court applied *Mills* and *Boyde*, and the deferential standards of § 2254(d), and concluded that the form and instructions violated *Mills*, and that the the Pennsylvania Supreme Court's decision was objectively unreasonable. The Court therefore affirmed the District Court's grant of relief. *Abu-Jamal-4* at 304.

D. Supreme Court: On November 14, 2008, the Commonwealth sought certiorari review. The Commonwealth claimed this Court failed to apply the "reasonable likelihood" standard required by *Boyde*. According to the Commonwealth, this Court instead applied a "risk of confusion" standard:

> Under the Third Circuit's view of *Mills*, relief is required if one may posit a "risk of confusion," 520 F.3d at 303 . . ., such that jurors hearing that unanimity applies to some aspects of the capital sentencing decision might, without being told, assume unanimity is also necessary to finding mitigating circumstances.

Beard v. Abu-Jamal, No. 08-652, Commonwealth's Certiorari Petition at 8, 2008 WL 4933629; *see also id.* at 6, 9, 11, 12, 14, 21 (same argument).

On February 23, 2009, the Supreme Court granted certiorari in *Smith v. Spisak*, 129 S.Ct. 1319 (2009), to review, *inter alia*, the Sixth Circuit's grant of relief under *Mills*.

On March 2, 2009, the Commonwealth filed a Reply Brief in *Abu-Jamal*, in

which it asserted that the grant of certiorari in *Spisak* showed that habeas review of *Mills* issues "is a national problem."

On May 29, 2009, the Commonwealth filed an amicus brief in *Spisak*, in which it again asserted that this Court in *Abu-Jamal-4* applied a "risk of confusion" standard instead of *Boyde*. According to the Commonwealth:

> In *Abu-Jamal v. Horn*, 520 F.3d 272 (3d Cir. 2008), the Third Circuit ... [stated that] the jury instructions in the penalty phase had caused it to have an "impression" that there was a "risk of confusion." *Id.*, 520 F.3d 303. It found the state court's decision to be an unreasonable application of *Mills* for not intuiting this and upheld issuance of the writ.

Smith v. Spisak, No. 08-724, Brief for the States of Pennsylvania, et al., as Amici Curiae in Support of Petitioner at 11-12, 2009 WL 1556547.

On January 12, 2010, the Supreme Court reversed the Sixth Circuit. *Smith v. Spisak*, 130 S.Ct. 676 (2010).

On January 19, 2010, the Supreme Court issued the following order in *Abu-Jamal*: "Petition for writ of certiorari granted. Judgment vacated, and case remanded to the United States Court of Appeals for the Third Circuit for further consideration in light of *Smith v. Spisak*." *Beard v. Abu-Jamal*, 130 S.Ct. 1134 (2010).

SUMMARY OF ARGUMENT

The District Court and this Court applied United States Supreme Court precedent, found that the penalty-phase jury instructions and verdict sheet used in this case violated *Mills*; found that the state court failed to reasonably apply clearly

established Supreme Court law; and granted habeas relief from the death sentence.

After this Court ruled, the Supreme Court granted certiorari in *Spisak*, in which it ruled upon a *Mills* claim. The Supreme Court then remanded Mr. Abu-Jamal's case for reconsideration in light of *Spisak*, as it routinely does under such circumstances.

This Court should reaffirm its grant of habeas relief under *Mills*. Nothing in *Spisak* calls into question the propriety of this Court's earlier ruling. Indeed, *Spisak* confirms that this Court properly granted relief.

STANDARD OF REVIEW

A. The "legal standard for reviewing jury instructions claimed to restrict impermissibly a jury's consideration of relevant evidence," including claims under *Mills,* 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,* 494 U.S. at 378-80. This Court applied this standard in *Abu-Jamal-4*, *see* Counterstatement of the Case § C; the same standard applies here.

B. This Court reviews the Pennsylvania Supreme Court's decision to determine if it "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). This Court applied this standard in *Abu-Jamal-4*, *see* Counterstatement of the Case § C; the same standard applies here.

C. In the Standard of Review section of its Brief, the Commonwealth ob-

serves that the Supreme Court's order in *Abu-Jamal* is a what is typically called a "'grant, vacate and remand' (or 'GVR') order." *Id.* at 4. The Supreme Court's GVR order actually has no implications for this Court's standard of review, which is governed by parts A and B, *supra*. In particular, a GVR order "does not create an implication that the lower court should change its prior determination." *Hughes Aircraft Co. v. United States*, 140 F.3d 1470, 1473 (Fed. Cir. 1998); *see also Stutson v. United States*, 516 U.S. 163, 178 (1996) (Scalia, J., dissenting) (GVR is used as a "no fault" order, "*without* any determination of error in the judgment below") (emphasis in original); E. Chemerinsky & N. Miltenberg, *The Need to Clarify the Meaning of Supreme Court Remands*, 36 ARIZ. ST. L.J. 513, 515 (2004) ("Today, it is typical for the Court to issue GVR orders rather reflexively, even when its underlying decision on the merits of one case provides scant reason for revising a lower court's ruling in a different case.").

ARGUMENT

I. THIS COURT DID NOT ERR WHEN IT UNANIMOUSLY GRANTED RELIEF UNDER *MILLS*

A. This Court Did Not Err When it Unanimously Found That the Sentencing Verdict Form and Oral Instructions Violated *Mills*

Jury instructions that require the jury to unanimously find a mitigating circumstance violate the Eighth Amendment because they create a "barrier to the sentencer's consideration of all mitigating evidence." *Mills*, 486 U.S. at 375. Instructions violate *Mills* when, "viewed in the context of the overall charge," there is a "reasonable likelihood" that the jury interpreted the instructions as requiring a unanimous mitigation finding. *Boyde*, 494 U.S. at 378, 380. In *Abu-Jamal-4*, this Court correctly found that the verdict form and oral instructions violated *Mills*.

1. Verdict form: A single, three-page verdict form was given to the jury. The form, as completed by the jury, states:

> We, the jury, having heretofore determined that the above-named defendant is guilty of murder of the first degree, do hereby further find that:
>
> (1) We, the jury, unanimously sentence the defendant to
> ☒ death
> ☐ life imprisonment.
>
> (2) (To be used only if the aforesaid sentence is death)
> We, the jury, have found unanimously
> ☐ at least one aggravating circumstance and no mitigating circumstance. The aggravating circumstance(s) is/are _____.
> ☒ one or more aggravating circumstances which outweigh any mitigating circumstances. The aggravating circumstance(s) is/are A.
> The mitigating circumstance(s) is/are A.

AGGRAVATING AND MITIGATING CIRCUMSTANCES

AGGRAVATING CIRCUMSTANCE(S):

(a) The victim was a fireman, peace officer or public servant concerned in official detention who was killed in the performance of his duties. (✓)

[nine more statutory aggravating circumstances, labeled (b)-(j) and followed by a ( ), not checked by the jury]

- -

MITIGATING CIRCUMSTANCE(S):

(a) The defendant has no significant history of prior criminal convictions (✓)

[seven more statutory mitigating circumstances, labeled (b)-(h) and followed by a ( ), not checked by the jury]

[twelve lines with signatures of all jurors]

Supplemental Appendix 128-30[2] ("- - -" denotes page breaks).

This verdict form *plainly requires* the jury to find each mitigating circumstance *unanimously*, for several reasons.

(a) The form opens with "*We, the jury*, having heretofore determined that the above-named defendant is guilty of murder of the first degree, *do hereby further find that:*" The form thus requires that *everything* marked on it must be *found by the jury that found Mr. Abu-Jamal guilty* – *i.e.*, the *unanimous jury*. The form does not allow an individual juror to find anything, including a mitigating circumstance.

Page One of the form requires the jury to specify the sentence; requires the

[2] Supplemental Appendix of Appellee and Cross-Appellant, Mumia Abu-Jamal, filed in this matter on July 28, 2006 (hereinafter cited as App.).

jury to specify that "[t]he aggravating circumstance(s) is/are __"; and requires the jury to specify that "[t]he *mitigating circumstance(s)* is/are __." Given the form's opening statement, that everything on the form must be *unanimously* found, the form thus requires that the sentence, the aggravating circumstances and the *mitigating* circumstances must be unanimously found. While the first two requirements are proper, the third violates *Mills*.

Pages Two and Three of the form list ten possible aggravating circumstances and eight possible mitigating circumstances, with a "( )" next to each aggravating and mitigating circumstance to be checked if it is found. The form does not provide any mechanism for an individual juror to find, or indicate that he or she has found, aggravating or mitigating circumstances. The very small space next to each mitigating circumstance is insufficient for any markings beyond a single checkmark and thus reinforces the notion that only unanimously found mitigating circumstances are to be considered. Given the form's opening statement, which tells the jury to record only items it unanimously finds, the form thus specifies that the jury is to find an aggravating or *mitigating* circumstance only if it is *unanimously* found. While the first requirement is proper, the second violates *Mills*.

(b) The form has an additional express unanimity requirement on Page One:

> We, the jury, have found *unanimously*
> ☒ one or more aggravating circumstances which outweigh any mitigating circumstances. The aggravating circumstance(s) is/are ___A___
> *The mitigating circumstance(s) is/are* ___A___.

Thus, the form requires the jury to find and consider only the aggravating and *mitigating* circumstances that it has "found *unanimously*." While the first requirement is proper, the second violates *Mills*.

(c) Page Three of the form, just below the list of mitigating circumstances, requires the signatures of *all twelve jurors*. Again, this ensures that only *unanimously* found mitigating circumstances are considered. If fewer than twelve jurors found a mitigating circumstance, checked it on the checklist on Page Three (despite the fact that the form opens with a requirement that only findings of the *unanimous jury* be recorded), and wrote it on Page One (despite the fact that Page One says "We the jury have found *unanimously* ... [t]he mitigating circumstance(s) is/are ___"), then jurors who disagreed *could not sign the verdict form without violating their oaths*. The presence of all twelve signatures confirms that the jury considered only the mitigating circumstance that it unanimously found.

(d) Unanimity for finding a mitigating circumstance is also required by the form's everywhere *identical treatment* of aggravating and mitigating circumstances. To comply with *Mills*, the jury would have to *ignore* this and assume, *contrary to the form's plain language* and *without any rational basis*, that aggravation and mitigation should be treated *differently*. A court cannot assume that the jury treated aggravating and mitigating circumstances differently. Instead, the court must "presume that, unless instructed to the contrary, the jury would read similar language throughout the form consistently." *Mills*, 486 U.S. at 378. Thus, the identical treatment of aggravating and mitigating circumstances confirms that

both must be unanimously found.

(e) The specific findings recorded on the form by the jury further highlight the *Mills* violation.

Trial counsel argued for several mitigating circumstances, under 42 Pa.C.S. § 9711(e): Mr. Abu-Jamal had no prior convictions and, thus, had "no significant history of prior criminal convictions," (e)(1); Mr. Abu-Jamal was "under the influence of extreme mental or emotional disturbance," (e)(2), as a result of seeing the decedent beating Mr. Abu-Jamal's brother; Mr. Abu-Jamal's age (27 years) at the time of the offense, (e)(4); and "other evidence of mitigation concerning the character and record of the defendant," (e)(8), based upon testimony from 15 defense witnesses, *see* NT 6/30/82 at 17-50, 125-56; NT 7/1/82 at 3-31, regarding Mr. Abu-Jamal's good character and history of concern for and assistance to Philadelphia's African-American community. *See* NT 7/3/82 at 38-42.

The (e)(1) mitigating circumstance ("no significant history of prior criminal convictions") was *not disputed* by the Commonwealth and was present as a matter of law because Mr. Abu-Jamal had no prior convictions. However, the Commonwealth vigorously disputed the *other* mitigating circumstances – (e)(2), (e)(4) and (e)(8) – that were argued by counsel.

The jury's mitigation findings were *exactly* what one would expect, given the *Mills* violation. The jury *unanimously found* the (e)(1) mitigating circumstance, as it *had to*. But the jury did *not* unanimously find the other, *disputed*, mitigating circumstances. The jury's specific findings thus confirm that there is a

reasonable likelihood that the jury understood the verdict form and instructions in a way that violated *Mills*.

(f) Further confirmation that the *Abu-Jamal* form violated *Mills* is found in the similarity between the *Abu-Jamal* form and the form used in *Mills*, 486 U.S. at 384-89, which contained a similar checklist of mitigating circumstances. *See Spisak*, 130 S.Ct. at 682-84 (comparing *Spisak* form and instructions to those used in *Mills*). If anything, the *Abu-Jamal* form was *more likely* to be understood as requring a unanimous mitigation finding than was the *Mills* form.

The *Mills* form gave the jury the choice of marking "yes" or "no" for each listed mitigating circumstance, and the list was prefaced with: "[W]e unanimously find that each of the following mitigating circumstances which is marked 'yes' has been proven to exist by a preponderance of the evidence and each mitigating circumstance marked 'no' has not been proven by a preponderance of the evidence." *Id.*, 486 U.S. at 387 (capitalization altered); *see also Spisak*, 130 S.Ct. at 682 (quoting *Mills* form).

Maryland's high court interpreted the jury's "no" entries on the form as showing that the jury *unanimously rejected* the "no"-marked mitigating circumstance. *See id.*, 486 U.S. at 372. So-interpreted, the death sentence was *constitutional*—if the jury *unanimously rejected* each mitigating circumstance, no juror was prevented from giving effect to mitigation that s/he believed to exist.

The Supreme Court found the Maryland court's interpretation of the *Mills* form "plausible" in light of the form's language ("we unanimously find that ...

each mitigating circumstance marked 'no' has not been proven by a preponderance of the evidence"). 486 U.S. at 377. The death sentence was nevertheless unconstitutional because it was not clear that the *jury* gave the form the same interpretation as did the Maryland court. *See id.* at 375-76.

The *Abu-Jamal* form is not even susceptible to the "plausible" saving-interpretation that the Maryland court gave the *Mills* form. In *Mills*, the jury marked each mitigating circumstance "yes" or "no," and a "no" mark was plausibly interpreted as a *unanimous rejection* of the mitigating circumstance. Here, the jury's options were to check a mitigating circumstance if it was found, or *leave it blank*, and the failure to check cannot plausibly be interpreted as a unanimous rejection. Instead, it plainly signifies the jury's failure to *unanimously find* a mitigating circumstance. Thus, the *Mills* violation is even more clear in *Abu-Jamal* than it was in *Mills* itself.

(g) The Pennsylvania Supreme Court responded to *Mills* by requiring a new standard capital sentencing verdict form. The radical differences between Pennsylvania's post-*Mills* standard form and the *Abu-Jamal* form further highlight the *Mills* violation herein.

Mills was decided on June 6, 1988. A few months later, on February 1, 1989, the Pennsylvania Supreme Court responded by issuing new rules of criminal procedure requiring the use of a standard sentencing verdict form. *See* Pa. R.Cr.P. 807-08. The post-*Mills* form specifies that aggravating circumstances must be unanimously found, and a death sentence must be unanimous, but mitigating cir-

cumstances may be found by "one or more" of the jurors:

> A. We, the jury, unanimously sentence the defendant to (check one):
>
> ___ Death
> ___ Life Imprisonment
>
> B. The findings on which the sentence of death is based are (check one):
>
> ___ 1. At least one aggravating circumstance and no mitigating circumstance. The aggravating circumstance(s) unanimously found (is) (are): ____
>
> ___ 2. One or more aggravating circumstances which outweigh(s) any mitigating circumstance(s).
>
> The aggravating circumstance(s) unanimously found (is) (are): _____
>
> The *mitigating circumstance(s) found by one or more of us* (is) (are): _____
>
> C. The findings on which the sentence of life imprisonment is based are (check one):
>
> ___ 1. No aggravating circumstance exists.
> ___ 2. The mitigating circumstance(s) (is) (are) not outweighed by the aggravating circumstance(s).
>
> The *mitigating circumstance(s) found by one or more of us* (is) (are): _____
>
> The aggravating circumstance(s) unanimously found (is) (are): _____
>
> _____ DATE _____ JURY FOREPERSON

Rule 808. Thus, the post-*Mills* form specifies that any individual juror can find and consider a mitigating circumstance, even if no other juror agrees.

In *Mills*, the Supreme Court described similar verdict form changes made by the Maryland court, and concluded: "We can and do infer from these changes at least *some* concern on the part of that court that juries could misunderstand the

previous instructions as to unanimity and the consideration of mitigating evidence by individual jurors." 486 U.S. at 382 (emphasis in *Mills*). Similarly, here, the Pennsylvania Supreme Court's post-*Mills* adoption of a verdict form that is significantly different from the *Abu-Jamal* form further highlights the existence of a *Mills* violation herein.

(h) In sum, the *Abu-Jamal* verdict form *plainly requires* that mitigating circumstances be *unanimously* found. There is even more than a "reasonable likelihood," *Boyde*, that the jury understood the form in a *Mills*-violating way – the jury would have to *disobey the form's plain language and structure* in order to comply with *Mills*.

2. Oral instructions: Since the verdict form violates *Mills*, this death sentence is unconstitutional unless the oral instructions cured the error by making the jury understand the form as meaning something other than what its plain language states. Nothing in the oral instructions even comes close to doing so. Instead, the oral instructions *compound* the *Mills* error.

(a) The oral instructions on how to use the form highlighted and compounded the form's *Mills* error.

The judge instructed: "You will be given a verdict slip upon which to record your verdict and findings." App. 135-36; NT 7/3/82 at 92. Here, and throughout, the judge made *no distinction* between "findings" of aggravating circumstances and "findings" of mitigating circumstances (except for different burdens of proof, *see infra*); thus, the jury had no reason to believe there was any difference in those

"findings" (except for different burdens of proof) – both must be unanimous.

The judge instructed on how to use the checklist of aggravating circumstances on Page Two and complete Page One where it says "[t]he aggravating circumstance(e) is/are ___":

> [W]hat you do, you go to Page 2. Page 2 lists all the aggravating circumstances. They go from small letter (a) to small letter (j). Whichever one of these that you find, you put an "X" or check mark there and then, put it in the front. Don't spell it out, the whole thing, just what letter you might have found.

App. 137; NT 7/3/81 at 94.

The judge then used *materially identical language* regarding how to use Page Three's checklist of *mitigating* circumstances and how to complete Page One where it says "[t]he *mitigating* circumstance(e) is/are ___":

> [T]hose mitigating circumstances appear on the third page here, they run from a little (a) to a little letter (h). And whichever ones you find there, you will put an "X" mark or check mark and then, put it on the front here at the bottom, which says mitigating circumstances. And you will notice that on the third or last page, it has a spot for each and every one of you to sign his or her name on here as jurors . . .

App. 137-38; NT 7/3/82 at 94-95.

These instructions on how to use the form, like the form itself, treat aggravating and mitigating circumstances *identically* as things to be "found" and recorded only by the *unanimous jury*. The instructions do not even hint that an aggravation finding must be unanimous but a mitigation finding need not be. And the last instruction on finding mitigating circumstances and signing the form "places in the closest temporal proximity the task of finding the existence of miti-

gating circumstances and the requirement that each juror indicate his or her agreement with the findings of the jury" by signing the form. *Abu-Jamal-3* at *125. The instructions on how to use the form thus highlight the form's *Mills* error.

(b) The judge also instructed:

> Members of the jury, you must now decide whether the defendant is to be sentenced to death or life imprisonment. The sentence will depend upon your findings concerning aggravating and mitigating circumstances. The Crimes Code 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 circumstances.
>
> The verdict must be a sentence of life imprisonment in all other cases.
>
> . . . .
>
> Remember, that your verdict must be a sentence of death if you unanimously find at least one aggravating circumstance and no mitigating circumstance. Or, if you unanimously find one or more aggravating circumstances which outweigh any mitigating circumstances. In all other cases, your verdict must be a sentence of life imprisonment.

App. 133-35; NT 7/3/82 at 90-92.

In these instructions, as in all of the instructions, aggravating and mitigating circumstances are treated *identically* as matters to be "found" by the jury or not considered at all. Nothing in the instructions would allow the jury to reasonably conclude that mitigating circumstances should be treated differently than aggravating circumstances.

(c) The judge instructed that there was one difference between the jury's treatment of aggravating and mitigating circumstances – the burden of proof:

> Whether you sentence the defendant to death or to life imprisonment will depend upon what, if any, aggravating or mitigating circumstances you find are present in this case. . . . [A]ggravating circumstances must be proved by the Commonwealth beyond a reasonable doubt, while mitigating circumstances must be proved by the defendant by a preponderance of the evidence.

NT 7/3/82 at 2-3.

> The Commonwealth has the burden of proving aggravating circumstances beyond a reasonable doubt. The defendant has the burden of proving mitigating circumstances, but only be a preponderance of the evidence. This is a lesser burden of proof than beyond a reasonable doubt.

App. 134; NT 7/3/82 at 91.

Since the instructions stressed the different *burdens* for proving aggravating and mitigating circumstances, but were otherwise silent as to any differences in the *manner* of proof, jurors would naturally conclude that *both* "aggravating *and* mitigating circumstances must be discussed and unanimously agreed to, as is typically the case when considering whether a burden of proof has been met." *Frey v. Fulcomer*, 132 F.3d 916, 924 (3d Cir. 1997). "Such an understanding . . . is plainly inconsistent with the requirements of *Mills*," and "adds to [the] concern that the jury could have understood the charge to require unanimity in consideration of mitigating evidence." *Id.* In short, the burden of proof instructions "likely cemented the jury's mistaken impression that it was obligated *not* to consider a mitigating circumstance that was found to exist by anything other than the entire panel." *Abu-Jamal-3* at *119 (emphasis in *Abu-Jamal-3*).

(d) Throughout the instructions, the pronoun "you" was used to refer

without distinction to the entity that "finds" the defendant guilty, "finds" a sentence, "finds" aggravating circumstances, and "finds" mitigating circumstances.[3] To reach a *Mills*-compliant understanding, the jury would have to know that the "you" that "finds" meant the *unanimous jury* for the first three matters, but meant *each individual juror* for the last. But *nothing* in the instructions even remotely suggested that. The "natural interpretation," *Mills*, 486 U.S. at 381, of the instructions was that the same "you" – the unanimous jury – "finds" all of these things.

(e) After *Mills*, Pennsylvania's standard instructions were changed, as was the verdict form, *see supra*. The post-*Mills* standard instructions state, *inter alia*:

> [Y]ou are to regard a particular aggravating circumstance as present only if you all agree that it is present. On the other hand, each of you is free to regard a particular *mitigating* circumstance as present despite what other jurors may believe. This is different from the general findings to reach your ultimate sentence of either life in prison or death. The specific findings as to any particular aggravating circumstance must be unanimous. All of you must agree that the Commonwealth has proven it beyond a reasonable doubt. That is not true for any mitigating circumstance. Any circumstance that any juror considers to be mitigating may be considered by that juror in determining the proper sentence.

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[3]In addition to the instructions already quoted, *see* NT 7/3/82 at 2-3 ("Ladies and gentlemen of the jury, *you* have found the defendant guilty of murder in the first degree, and *your* verdict has been recorded. We are now going to hold a sentencing hearing during which . . . *you* will decide whether the defendant is to be sentenced to death or life imprisonment. Whether *you* sentence the defendant to death or life imprisonment will depend upon what, if any, aggravating or mitigating circumstances *you* find are present in this case."). Again, there is *no distinction* between guilt-finder, sentence-finder and finder of aggravating and *mitigating* circumstances.

Pennsylvania Suggested Standard Criminal Jury Instruction 15.2502H (PBI 2006) (emphasis in original) ("Pa. SSJI (Crim)"). The advisory committee for these instructions notes that they were promulgated in response to *Mills*. *See* Pa. SSJI (Crim) 15.2502H, Advisory Committee note to subdivision 3. This post-*Mills* change to the instructions, like the post-*Mills* change to the verdict form, confirms that the instructions given here violated *Mills*. *Id.*, 486 U.S. at 382.

(f) In sum, the oral instructions violated *Mills*; they did *not* cure the form's *Mills* error.

B. This Court Did Not Err When It Unanimously Found That Relief Is Appropriate under § 2254(d)

This Court correctly found that the state court decision denying this claim was objectively unreasonable under clearly established Supreme Court law, requiring habeas relief under § 2254(d)(1). In fact, the state court decision is both "contrary to" and "an unreasonable application of" clearly established law.

1. The Pennsylvania Supreme Court first complained that Mr. Abu-Jamal "offered absolutely no evidence in support of this claim at the PCRA hearing." *Abu-Jamal-2* at 119. It is contrary to clearly established law, including *Mills*, to denigrate a challenge to a *jury instruction* because the defendant has not presented "evidence" to support the claim. *See Mills*, 486 U.S. at 381 ("There is, of course, *no extrinsic evidence* of what the jury in this case actually thought. We have before us only the verdict form and the judge's instructions."); *Kelly v. South Carolina*, 534 U.S. 246, 256 (2002) ("Time after time appellate courts have found jury instructions to be insufficiently clear without any record that the jury mani-

fested its confusion"). Here, as in *Mills* and most cases challenging jury instructions, the claim is based upon "the verdict form and the judge's instructions." *Mills*, 486 U.S. at 381. The Pennsylvania Supreme Court's belief that the claim fell short because Mr. Abu-Jamal did not present "evidence" is contrary to this clearly established law.

2. Regarding the verdict form, the Pennsylvania Supreme Court noted that it "consisted of three pages" and stated (we have lettered each sentence for future reference):

> [a] The requirement of unanimity is found only at page one in the section wherein the jury is to indicate its sentence. [b] The second page of the form lists all the statutorily enumerated aggravating circumstances and includes next to each such circumstance a designated space for the jury to mark those circumstances found. [c] The section where the jury is to checkmark those mitigating circumstances found, appears at page three and includes no reference to a finding of unanimity. [d] Indeed, there are no printed instructions whatsoever on either page two or page three. [e] The mere fact that immediately following that section of verdict slip, the jurors were required to each sign their name is of no moment since those signature lines naturally appear at the conclusion of the form and have no explicit correlation to the checklist of mitigating circumstances. . . . [f] Moreover, verdict slips similar to that employed in the instant matter have been held by our court not to violate the dictates of *Mills*. *See e.g. Commonwealth v. Murphy, 657* A.2d 927 (Pa. 1995).

Abu-Jamal-2 at 119. The state court said *nothing* about the oral instructions.

This treatment of the verdict form is unreasonable for several reasons.

(a) The Pennsylvania Supreme Court's claim that the "requirement of unanimity is found only at page one in the section wherein the jury is to indicate its *sentence*" is contrary to the record. In addition to stating "We, the jury unani-

mously *sentence* the defendant to death," Page One of the form also states:

> We, the jury, have found *unanimously* . . .
> The aggravating circumstance(s) is/are ___A___.
> The *mitigating circumstance(s) is/are* ___A___.

Thus, Page One's "requirement of unanimity" *expressly applied* to both aggravating and *mitigating* circumstances.

Moreover, in addition to this express use of the word "unanimously," the form opens with the requirement that *everything on the form* must be the "find[ings]" of "the jury" that found Mr. Abu-Jamal guilty – *i.e.*, the *unanimous* jury. This applies to Page One's finding that the "*mitigating* circumstance(s) is/are __" and to Page Three's checklist of *mitigating* circumstances *just as clearly* as it applies to Page One's finding that the "aggravating circumstance(s) is/are __" and Page Two's checklist of aggravating circumstances. Moreover, the form closes with a requirement that *all twelve jurors* sign it, reinforcing the form's opening statement that all findings – including findings of mitigating circumstances – must be by the unanimous jury. The Pennsylvania Supreme Court, however, "never addressed the effect of the lead-in language." *Abu-Jamal-3* at *126 n.91.

The Pennsylvania Supreme Court simply ignored these ways (and others, described herein) in which the form imposed a "requirement of unanimity"; thus, the state court unreasonably applied *Mills*. *See Williams*, 529 U.S. at 397-98 (state court decision "unreasonable insofar as it failed to evaluate the totality of" relevant facts).

(b) The Pennsylvania Supreme Court correctly stated that Page

Two "lists all the . . . aggravating circumstances and includes next to each such circumstance a designated space for the jury to mark those circumstances found" – *i.e.*, an aggravating circumstance was checked on Page Two only if the "*the jury*," not an *individual juror,* "found" it. This is a proper requirement. What the Pennsylvania Supreme Court unreasonably failed to recognize is that the list of *mitigating* circumstances on Page Three is *identical* in format to the aggravating circumstances list. Thus, "the natural interpretation of the form," *Mills*, 486 U.S. at 381, was for the jury to believe that mitigating circumstances, like aggravating circumstances, must be *unanimously* found. The jury had no reason to believe it should treat the list of mitigating circumstances any differently than the list of aggravating circumstances. Instead, it had every reason to believe that aggravating and mitigating circumstances should be treated the same.

(c) The Pennsylvania Supreme Court also unreasonably applied *Mills* when it relied on the fact that Page Three, which has the mitigating circumstances checklist, "includes no reference to a finding of unanimity." As stated above, the form opens with a requirement that *everything* thereon be found by the *unanimous* jury; the form ends – on Page Three itself, just below the checklist of mitigating circumstances – with a requirement that all twelve jurors sign, indicating their *unanimous* agreement with *everything* on the form; the form treats aggravating and mitigating circumstances identically. This shows, at least, a "reasonable likelihood," *Boyde*, that the jury believed it had to unanimously find a mitigating circumstance. Indeed, Page Two, the aggravating circumstances list, is

just as bereft of a "reference to a finding of unanimity" as Page Three, yet it is undisputed that the jury knew it had to find aggravating circumstances unanimously.

Even the *Pennsylvania Supreme Court's own description* of Page Three shows that Page Three, in the context of entire form, requires unanimity for finding a mitigating circumstance. The Pennsylvania Supreme Court observed that Page Three is the "section where *the jury* is to checkmark those mitigating circumstances *found*." *Abu-Jamal-2* at 119. There is, at least, a "reasonable likelihood" that the jury understood Page Three in exactly that way – only mitigating circumstances "*found*" *by* "*the jury*," not by *individual jurors*, should be checked and considered. To use Page Three in a way that satisfies *Mills*, the jury would have to know that *each juror* should check those mitigating circumstances *found by him or her*, even if the other jurors disagreed. To say the least, that is an odd reading of the form. And the jury would have to give this treatment to mitigating circumstances but *not* aggravating circumstances, despite the fact that aggravating and mitigating circumstances are treated identically on the form.

(d) The Pennsylvania Supreme Court noted that "there are no printed instructions whatsoever on either page two [listing aggravating circumstances] or page three [listing mitigating circumstances]" of the form, but the Pennsylvania Supreme Court unreasonably failed to recognize that this *contributes to* the *Mills* error. Because there are no printed instructions on the pages listing the aggravating and mitigating circumstances, the jury had to look to the other parts of the form, the overall structure of the form, and the oral instructions to understand

what to do with those lists. As set forth herein, all of those factors – *e.g.*, the identical treatment, apart from burdens of proof, of aggravating and mitigating circumstances; Page One's opening requirement that everything on the form must be unanimously found; Page One's requirement that the jury record only the "aggravating circumstance(s)" and "*mitigating circumstance(s)*" that "We, the jury, have found *unanimously*"; Page Three's requirement that all twelve jurors show their agreement to the findings by signing the form; and the oral instructions on how to use the form – indicated that both aggravating and mitigating factors must be unanimously found.

(e) The Pennsylvania Supreme Court also unreasonably applied *Mills* when it said Page Three's signatures-of-all-jurors requirement "is of no moment since those signature lines naturally appear at the conclusion of the form and have no explicit correlation to the checklist of mitigating circumstances." The reason it is "natural[]" for the twelve signatures to "appear at the conclusion of the form" is that it *signifies the agreement of all twelve jurors* to the *findings recorded on the form*. This is especially obvious here, where the form *opens* with a requirement that everything on the form be the findings of the *jury*, not individual jurors.

To the extent the signatures "have no explicit correlation to the checklist of mitigating circumstances," *exactly the same* is true for the checklist of *aggravating circumstances* and the *sentence*. To satisfy *Mills*, the jurors would have to know that signing the form signaled *agreement* to the sentence and *agreement* to the

findings of aggravating circumstances, but was *meaningless* with respect to mitigating circumstances. Nothing in the form or instructions conveyed that bizarre concept.

Even if the Pennsylvania Supreme Court's "reasoning" about the signatures made any sense in isolation, the Pennsylvania Supreme Court unreasonably failed to consider the trial judge's "explanation of th[e] form" in his oral instructions. *Abu-Jamal-3* at *125. As stated above, the oral instructions on how to use Page Three *did* make an "explicit correlation" between the signatures and the mitigating circumstances and, thus, cemented the *Mills*-violation that is apparent on the face of the form. The state court unreasonably failed to consider the effect of the oral instructions on the jury's understanding of the form.

(f) The Pennsylvania Supreme Court added nothing to the above-described analysis when it concluded by saying it previously had approved a "verdict slip[] similar to" the *Abu-Jamal* slip, in *Commonwealth v. Murphy, 657* A.2d 927 (Pa. 1995). The entire discussion of the verdict slip in *Murphy* is that "the portion of the verdict slip where the jury is to list mitigating circumstances is set apart from sections A and B of the verdict slip which do require a finding of unanimity." 657 A.2d at 936. There is no description of what the *Murphy* verdict slip actually said.

3. The Pennsylvania Supreme Court's failure to consider the oral instructions on how to use the form, *see* part 2.e, *supra*, is symptomatic of its general violation of the clearly established law 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. The Pennsylvania Supreme Court looked at each page of the form *in isolation* from the other parts of the form and from the form's overall structure, and *failed to consider the oral instructions at all.* The state court decision is thus contrary to or, at least, an unreasonable application of, *Mills* and *Boyde*, for this reason as well. *See Abu-Jamal-3* at *121 (Pennsylvania Supreme Court unreasonably considered "only the verdict sheet" and never undertook the analysis required by *Boyde* and *Mills*); *id.* at *126 ("Pennsylvania Supreme Court failed even to address the *Boyde* standard or the consequence of the jury instructions in this case"); *Abu-Jamal-4* at 302 (Pennsylvania Supreme Court unreasonably "reached this conclusion [denying relief] without evaluating whether there was a reasonable likelihood that the jury could have misinterpreted the entire scheme employed at the sentencing phase, that is, the structure and substance of the verdict form together with the oral instructions from the judge."); *id.* at 303 ("It was unreasonable for the Pennsylvania Supreme Court" to deny relief "based on only a portion of the form, rather than the entire form, and without evaluating ... the judge's jury instructions and the entire verdict form together.").

4. Even aside from the many flaws in its analysis, described above, the Pennsylvania Supreme Court's decision is "objectively unreasonable," *Williams*, 529 U.S. at 409, simply because it is unreasonable to fail to find a *Mills* violation on this record. The verdict form *plainly requires* that mitigating circumstances be unanimously found; the oral instructions highlight and compound the form's *Mills*

error. It was unreasonable for the Pennsylvania Supreme Court to fail to find a "reasonable likelihood" that the jurors understood the form and instructions in a way that violated *Mills*.

II. *SPISAK* CONFIRMS THAT THIS COURT DID NOT ERR

The Supreme Court's ruling in *Spisak* confirms that this Court did not err in *Abu-Jamal-4*.

A. The Supreme Court and this Court Applied the Same Law

The Supreme Court in *Spisak* and and this Court in *Abu-Jamal-4* provided identical interpretations of *Mills* and AEDPA.

The Supreme Court in *Spisak* and this Court in *Abu-Jamal-4* described *Mills* in *identical* terms as holding that the Eighth Amendment is violated when the jury instructions and verdict form caused the jurors to believe "they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance." *Spisak* at 684 (quoting *Mills*, 486 U.S. at 384); *Abu-Jamal-4* at 300 (identical quote from *Mills*).

The Supreme Court in *Spisak* and this Court in *Abu-Jamal-4* both observed that the *Mills* rule derives from the line of Eighth Amendment cases, starting with *Lockett v. Ohio*, 438 U.S. 586 (1978), holding that the jury may not be precluded from considering and giving effect to mitigating evidence. *See Spisak* at 681-82 (citing *Lockett*, 438 U.S. at 604 (plurality opinion), *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982), *Mills* and *McKoy v. North Carolina*, 494 U.S. 433, 442-43 (1990)); *Abu-Jamal-4* at 300 (citing the *same pages* of the *same cases*).

In short, the Supreme Court in *Spisak* applied the same *Mills* rule this Court applied in *Abu-Jamal-4*. Thus, *Spisak* confirms that this Court applied the correct Eighth Amendment rule in *Abu-Jamal-4* – the rule announced in *Mills*.[4]

The Supreme Court in *Spisak* and this Court in *Abu-Jamal-4* also applied the same law of deference to the state courts under § 2254(d). This Court repeatedly emphasized that it was applying § 2254(d)'s standards, as interpreted by the Supreme Court in case such as *Williams v. Taylor*, *Schriro v. Landrigan* and *Uttecht v. Brown*. *See* Counterstatement of the Case § C (quoting *Abu-Jamal-4*). The Supreme Court applied exactly the same standard. *See Spisak* at 681 (citing *Williams v. Taylor*, *Schriro v. Landrigan* and *Carey v. Musladin*, 549 U.S. 70 (2006)).

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[4]In *Spisak*, the Supreme Court did not cite *Boyde*'s "reasonable likelihood" standard for evaluating jury instruction claims. There is no doubt, however, that *Boyde* supplies the appropriate standard, as this Court recognized in *Abu-Jamal-4*. *See* note 1, *supra* (describing *Boyde*); Counterstatement of the Case § C (quoting *Abu-Jamal-4*) The Commonwealth does not dispute that *Boyde* controls; indeed, the Commonwealth erroneously asserts that this Court erred in *Abu-Jamal-4* by *failing* to apply *Boyde*. *See* Argument § III.A, *infra*.

While the Commonwealth agrees that *Boyde* provides the appropriate standard, the Commonwealth at one point erroneously states that "*Boyde* clarified that a valid challenge to jury instructions requires a 'substantial possibility' that the jury's verdict rested on a constitutionally improper ground." Commonwealth's Brief at 21. The "substantial possibility" language actually comes from one of the alternative formulations that was *rejected* by *Boyde*, which settled instead on the "reasonable likelihood" standard. *See* note 1, *supra*. Given the clarity of *Boyde*'s actual holding on this matter, we assume that the Commonwealth's misstatement was inadvertent, and not an attempt at serious argument about *Boyde*.

B. The *Spisak* Verdict Form and Instructions Are Significantly and Materially Different from those in *Mills* and *Abu-Jamal*

In *Spisak*, the Supreme Court compared the *Spisak* jury "instructions and jury forms" to those used in *Mills*, and found that they "differ significantly." *Spisak*, 130 S.Ct. at 683. In contrast, the *Abu-Jamal* form and instructions are very similar to those in *Mills*; the *Abu-Jamal* form even more clearly violates *Mills* than the *Mills* form did, because the *Abu-Jamal* form does not allow the "plausible" interpretation, which the *Mills* form could be given, that the jury *unanimously rejected* each mitigating circumstance. *See* Argument § I.A.1(f).

While the *Abu-Jamal* form and instructions are similar to those in *Mills*, they differ significantly from the *Spisak* form and instructions.

1. The *Abu-Jamal* form has *express* unanimity requirements for finding mitigating circumstances, and requires the jury to specify which mitigating circumstances it has found. *See* Argument § I.A.1(a)-(b). The *Spisak* form had nothing even remotely comparable. The *Spisak* form did not require the jury to make *any* findings, unanimous or otherwise, about the existence of mitigating circumstances, and did not require the jury to specify what mitigating circumstances were found. *See* 130 S.Ct. at 684. Instead, the only finding the *Spisak* form required, and the only finding the *Spisak* jury made, was the ultimate sentence. *Id.*[5]

2. A pervasive feature of the *Abu-Jamal* form and instructions, contribut-

[5]While the *Spisak* form is radically different from the *Abu-Jamal* form, it is similar to the form in *Zettlemoyer v. Fulcomer*, 923 F.2d 284 (3d Cir. 1991), which this Court held does not violate *Mills*. *See* Argument § III.D, *infra*.

ing to the conclusion that they violate *Mills*, is that they treat aggravating and mitigating circumstances *identically*, apart from burdens of proof, as things that must be found by the jury. The natural conclusion is that aggravating and mitigating circumstances should be found *in the same way*, apart from burdens of proof; thus, both must be *unanimously* found. *See* Argument §§ I.A.1(d), I.A.2(a)-(d).

The form and instructions in *Spisak* lacked this similar treatment of aggravating and mitigating factors; instead, they were treated very differently.

First, the structure of the Ohio capital sentencing scheme at issue in *Spisak* made it unlikely that the *Spisak* jury would believe there were *any* similarities between proof of aggravating and mitigating factors. In *Spisak*, as in every Ohio capital case, the aggravating factors were introduced to and found by the jury *at the guilt-phase*, where they were called "specifications"; at capital sentencing, the judge then "instructed the jury that the aggravating factors they would consider were the *specifications that the jury had found proved beyond a reasonable doubt at the guilt phase*." *Spisak*, 130 S.Ct. at 683.[6] Because the aggravating factors

[6]*See also State v. Gumm*, 653 N.E.2d 253, 260 (Ohio 1995) ("In Ohio, a capital defendant is tried and sentenced in a two-stage process. During the first phase (commonly referred to as the 'guilt phase') the state must prove the defendant guilty beyond a reasonable doubt of the crime of aggravated murder, and must also prove the defendant guilty of at least one statutorily defined 'aggravating circumstance' as set forth in R.C. 2929.04(A)(1) through (8). At the point in time at which the factfinder . . . finds the defendant guilty of both aggravated murder and an R.C. 2929.04(A) specification, the defendant has become 'death-eligible,' and a second phase of the proceedings (the 'mitigation' or 'penalty' or 'sentencing' or 'selection' phase) begins."); *State v. Jenkins*, 473 N.E.2d 264, 277 (Ohio 1984) (Ohio "requir[es] proof of aggravating circumstances at the guilt phase of the trial, rather than at the sentencing phase").

were found at the guilt-phase, the jury had no reason to believe that consideration of mitigating circumstances, first introduced at sentencing, had anything in common with the manner in which aggravating factors were proved. The contrast with *Abu-Jamal*—where aggravating and mitigating circumstances were introduced together at sentencing and treated identically, apart from burden of proof, as things to be found by the jury—is profound.

Second, while the *Spisak* jury was instructed (at the guilt phase) that aggravating factors must be proved beyond a reasonable doubt, it was *not told* there was *any* burden of proof for mitigating factors. Instead, the *Spisak* judge explained the concept of mitigation, gave some examples of mitigation, and told the jurors to consider "all of the relevant evidence." 130 S.Ct. at 683. Because the *Spisak* jurors were not told that mitigation must be established by some burden of proof, they had no reason to conclude that "mitigating circumstances must be discussed and unanimously agreed to, as is typically the case when considering whether a burden of proof has been met." *Frey*, 132 F.3d at 924. In this way, too, *Spisak* sharply differs from *Abu-Jamal*, where the jury was told that mitigating circumstances must be proved by a preponderance of the evidence. *See* Argument § I.A.2(c).

Third, while the *Spisak* jury was required (at the guilt phase) to make specific findings of aggravating circumstances, it was *not required* to make any findings as to mitigating circumstances. *See* 130 S.Ct. at 684. Thus, again, the *Spisak* jury had no reason to believe it should find mitigating factors in the same

way it found aggravating factors. Again, this is in sharp contrast to *Abu-Jamal*, where the jury was required to make specific findings of mitigating circumstances, and where the verdict form's provision for those findings was identical in structure to that for findings of aggravating circumstances. *See* Argument § I.A.

3. The *Abu-Jamal* form requires the signatures of all twelve jurors just below the checklist on which the jury must record its findings of mitigating circumstances. The natural reading of this is that all twelve jurors must agree that a mitigating factor exists, just as all twelve must agree as to the existence of each aggravating factor and the ultimate sentence. *See* Argument §§ I.A.1(c), I.B.2(e). This natural reading of the signatures requirement was reinforced by the oral instructions on how to use the form, which expressly connected the signatures requirement with finding mitigating circumstances. *See* Argument §§ I.A.2(a), I.B.2(e).

The *Spisak* form also required the signatures of all twelve jurors, *see* Commonwealth's Brief at 13 n.5, but that was wholly insignificant in *Spisak* because the *Spisak* form *did not require the jury to specify what mitigating circumstances were found*, *see* 130 S.Ct. at 684; thus, signing the *Spisak* form signified nothing about an individual juror's finding or consideration of mitigation. Nor did the *Spisak* oral instructions connect the signatures requirement to finding mitigating circumstances.

4. The *Abu-Jamal* jury's specific findings on the form further highlight the *Mills* violation – the *Abu-Jamal* jury found the one mitigating circumstance the

Commonwealth did not contest, but failed to find the contested mitigating circumstances, which is exactly what one would expect from a jury that believed it must be unanimous to find a mitigating circumstance. *See* Argument § I.A.1(e).

In *Spisak*, the only finding recorded on the form was the ultimate sentence. 130 S.Ct. at 684. The form did not require any findings of mitigating factors, and the jury did not make any such findings. *Id.* Thus, the *Spisak* jury's findings do not suggest a *Mills* violation.

III. THE COMMONWEALTH'S ARGUMENTS ARE ERRONEOUS

Many of the Commonwealth's arguments are at best tangentially related to *Spisak* and, instead, are rehashed versions of arguments it made to this Court in its prior briefs. In any event, the Commonwealth's arguments are without merit.

A. This Court Did *Not* Apply a "Gloss Upon" *Mills*

The Commonwealth devotes much of its brief to its assertion that this Court in *Abu-Jamal-4* "was not applying the rule in *Mills*," but, instead, was applying a "gloss upon" *Mills* that the Supreme Court rejected in *Spisak*. Commonwealth's Brief at 5. The Commonwealth's "gloss" argument is frivolous. This Court applied *Mills*, not a "gloss upon" *Mills*.[7]

1. According to the Commonwealth, this Court's supposed "gloss upon" *Mills* "substitutes a 'risk of confusion' analysis" for the "reasonable likelihood"

[7]Even if *Abu-Jamal-4* had applied a "gloss upon" *Mills*, which it did not, relief is appropriate under the "gloss"-free analysis set forth in this Brief. We respectfully urge the Court to make clear that it has not applied a "gloss upon" *Mills*, so the Commonwealth cannot continue to make this misleading argument.

analysis required by *Boyde*. Commonwealth's Brief at 5; *see generally id.* at 5, 7-22, 28 (same argument).[8]

The Commonwealth's argument is frivolous. This Court did *not* apply a "risk of confusion" "gloss upon" *Mills*. Instead, this Court (and the District Court) *expressly and repeatedly recognized* that *Boyde*'s "reasonable likelihood" standard applies, and this Court (and the District Court) *expressly applied* the *Boyde* standard to the facts of this case. *See* Counterstatement of the Case §§ B-C. Indeed, this Court criticized the Pennsylvania Supreme Court for *failing to apply* the *Boyde* standard, *see Abu-Jamal-4* at 303 ("The Pennsylvania Supreme Court did not evaluate whether this language would create a reasonable likelihood the jury had applied the form in violation of *Mills*."), as did the District Court, *see Abu-Jamal-3* at *122 ("the Pennsylvania Supreme Court never mentioned, much less did it apply, the *Boyde* standard for evaluating claims pursuant to *Mills*").

The Commonwealth's assertion that this Court applied a "risk of confusion" "gloss upon" *Mills* is based upon a single passage in *Abu-Jamal-4* in which this Court used such language. *See* Commonwealth's Brief at 7 (quoting *Abu-Jamal-4* at 303). Throughout its opinion, however, this Court *repeatedly* made clear that

[8] *E.g.*, Commonwealth's Brief at 5 (claiming this Court finds *Mills* error when there is a "risk" that instructions "might be creatively construed" to require unanimity for mitigation); *id.* at 10 (claiming this Court "applied a 'risk of confusion' rule that goes beyond *Mills*" and "found error, based not on what jurors were told, but on what they might have imagined"); *id.* at 13 (claiming this Court found "putative 'risk of confusion' error"); *id.* at 15 (claiming this Court applied a "'risk of confusion' rule"); *id.* at 17-18 (same); *id.* at 20-22 (same); *id.* at 22 (claiming this Court applied a "'risk of confusion' rule" that "conflicts with *Boyde*").

Boyde's "reasonable likelihood" standard applies, as set forth above. The Court did not apply a "risk of confusion" "gloss."

2. The Commonwealth says this Court put a "gloss upon" *Mills* in "a second way" by supposedly failing to recognize that a unanimity requirement for mitigation does not violate *Mills* unless it prevents the jury from giving effect to mitigation. *See* Commonwealth's Brief at 5-6, 15-24. This "gloss" argument, too, is frivolous.

This Court in *Abu-Jamal-4* expressly and repeatedly recognized that the essence of a *Mills* violation is that it prevents the jury from giving effect to mitigation. *See Abu-Jamal-4* at 300 (*Mills* issue is whether verdict form and instructions "*precluded members of the jury from considering* a particular mitigating circumstance unless there was unanimous agreement as to its proof"); *id.* (death sentence vacated in *Mills* because jurors "well may have thought they were *precluded from considering* any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance") (quoting *Mills*); *id.* (jurors must "be permitted to *consider and give effect to* mitigating evidence when deciding the ultimate question whether to vote for a sentence of death") (quoting *McKoy*); *id.* at 301 (*Mills* violated when form and instructions "*preclude consideration* of mitigating circumstances if not found unanimously"); *id.* (under *Mills* and *Boyde* "the legal standard [i]s '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'") (quoting *Boyde*). Thus, this plainly did *not*

apply the "gloss upon" *Mills* that the Commonwealth says it did.

Nor does the Commonwealth explain how the *Abu-Jamal* jury reasonably could have believed *both*: (1) that it had to unanimously find mitigating circumstances; *and* (2) that, despite this unanimity requirement for finding mitigation, each juror could give effect to mitigating circumstances that were not unanimously found. The Commonwealth seems to suggest that, in sentencing Mr. Abu-Jamal, an individual juror would consider all mitigation s/he believed established even if it had not been unanimously found. But the jury was instructed to base its sentence on its "*findings* concerning aggravating and mitigating circumstances." App. 133; *accord*; NT 7/3/82 at 2-3 ("Whether you sentence the defendant to death or to life imprisonment will depend upon what, if any, aggravating or mitigating circumstances you find are present in this case."). Since the jury's "findings" had to be unanimous, and the sentence had to be based on the jury's "findings," the instructions required the jury to base its sentence only on mitigating circumstances that were unanimously found. In order to believe that each juror could give effect to mitigation even if it was not unanimously found, the jury would have to ignore the instructions *and* reach the bizarre conclusion that the entire process of making unanimous mitigation findings, and recording those findings on the verdict sheet, was an empty charade with no implications for the actual sentencing decision. There is no reason to believe the jury understood the instructions and form in the strange way the Commonwealth suggests.

As part of its argument that this Circuit misunderstands *Mills*, the Com-

monwealth notes that a unanimity requirement does not violate *Mills* if it requires the jury to unanimously *reject* mitigation. Commonwealth's Brief at 16, 18 & n.7. But this Circuit is well aware of that – it applied that rule to deny relief under *Mills* in *Hackett v. Price*, 381 F.3d 281 (3d Cir. 2004), four years before *Abu-Jamal-4* was decided. The unanimous-rejection-is-ok rule is entirely inapposite here, because there is no reason to believe that the jury unanimously rejected all of the mitigating evidence that it failed to unanimously find.

B. *Mills* Is Not Limited to Cases in which the Jury Is Unambiguously Instructed to Disregard Mitigation it Does Not Unanimously Find

Throughout its brief, the Commonwealth suggests that *Mills* can be violated only when the jury is unambiguously instructed to disregard mitigation it does not unanimously find. The Commonwealth errs.

The instructions in *Mills* were not unambiguous in the way the Commonwealth suggests. There was a "plausible" "construction of the [*Mills*] jury instructions and verdict form," taken as a whole, that did *not* require unanimity. 486 U.S. at 377; *see also id.* at 382 (instructions and form suffered from "*ambiguity*"). The Supreme Court reiterated this in *McKoy v. North Carolina*, 494 U.S. 433, 444 n.8 (1990), when the Court contrasted the "express" unanimity requirment in *McKoy* with the ambiguous situation in *Mills*:

> In *Mills*, the Court divided over the issue whether a reasonable juror could have interpreted the instructions in that case as allowing individual jurors to consider only mitigating circumstances that the jury unanimously found. ... In [*McKoy*], *by contrast*, the instructions and verdict form *expressly* limited the jury's consideration to mitigating circumstances unanimously found.

McKoy, 494 U.S. at 444 n.8; *see also id.* at 445 (Blackmun, J., concurring) (*Mills* "instructions were held to be invalid because they were susceptible of two plausible interpretations, *and under one of those interpretations the instructions were unconstitutional*") (emphasis in original).

Morever, the *Abu-Jamal* verdict form and instructions were at least as clear in their unanimity requirement as those in *Mills*. As set forth above, Argument § I.A.1, the verdict form's opening statement expressly told the jury that *all of its findings* on the form – including the sentence, aggravating circumstances and *mitigating* circumstances – should be findings of the unanimous jury; the verdict form expressly told the jury to record and consider only mitigating circumstances that "We, the jury, have found unanimously"; the oral instructions reinforced these *Mills*-violating rules; and the *Abu-Jamal* verdict form is not even subject to the "plausible" saving construction given the *Mills* form by the Maryland courts.

C. *Abu-Jamal-4* Does *Not* Require an Express Anti-Unanimity Instruction in Order to Avoid *Mills* Error

The Commonwealth says this Court's analysis will always find *Mills* error unless there is an express *anti*-unanimity instruction. Commonwealth's Brief at 13-14 & n.6. The Commonwealth is wrong.

Neither *Abu-Jamal-4* nor any other of this Circuit's *Mills* cases requires an express anti-unanimity instruction. Instead, this Circuit asks, as required by *Mills* and *Boyde*, if the instructions and form are "reasonably likely" to make the jury believe it must unanimously find mitigation. *See* Counterstatement of the Case § B (District Court's survey of this Court's cases shows that "[t]here is no dispute ...

that the standard to be applied to *Mills* claims is that articulated in *Boyde*"); *id.* § C (describing *Abu-Jamal-4*'s use of *Boyde*); Argument § III.A (same). And, in two decisions, this Court has held that *Mills* was not violated even in the absence of an express anti-unanimity instruction. *See Zettlemoyer v. Fulcomer*, 923 F.2d 284 (3d Cir. 1991); *Hackett v. Price*, 381 F.3d 281 (3d Cir. 2004).

D. *Zettlemoyer* Does Not Help the Commonwealth

The Commonwealth says the state court must have been "reasonable" here because this Circuit, in *Zettlemoyer v. Fulcomer*, 923 F.2d 284 (3d Cir. 1991), denied a *Mills* claim involving what supposedly were "instructions virtually identical to those here." Commonwealth's Brief at 25-26; *see also id.* at 6, 25-29. The Commonwealth made the same argument in its prior briefing to this Court. *See* Brief for Appellants Horn, et al., at 47-48, 52-56 (filed 3/16/2006); Third Step Brief for Appellants Horn, et al., at 89-95 (filed 8/23/2006). The Commonwealth's argument, then and now, is frivolous.

The Commonwealth's claim that the *Zettlemoyer* instructions were "virtually identical to those here" is utterly wrong. In making this claim, the Commonwealth quotes *one sentence* of the *oral* instructions given in *Zettlemoyer*. Commonwealth's Brief at 26 n.11. While this *single sentence* is similar to *one part* of the oral instructions given in *Abu-Jamal*, there are "important distinctions" between the *Zettlemoyer* and *Abu-Jamal* oral instructions as a whole. *Abu-Jamal-3* at 120; *see id.* at *123 (describing "numerous aspects" of the *Abu-Jamal* oral instructions that materially differ from the *Zettlemoyer* oral instructions).

More significantly, there are *vast differences* between the *verdict forms* in *Zettlemoyer* and *Abu-Jamal*. *See Abu-Jamal-3* at *126 n.92 (describing some ways in which *Abu-Jamal* verdict "sheet differed significantly from that used in *Zettlemoyer*"). The Commonwealth does not even claim that the *Zettlemoyer* form was "virtually identical," or even similar, to the *Abu-Jamal* form – the Commonwealth never even *mentions* the *Zettlemoyer* form and barely mentions the *Abu-Jamal* form. Even if it is erroneously assumed that the *Zettlemoyer* oral instructions were *identical* to those given here, the differences in the *verdict forms* make this a very different case from *Zettlemoyer*.

The *Zettlemoyer* verdict form stated:

> 1. We the jury unanimously sentence the defendant to: [X] death
> ___ life imprisonment.
> 2. (To be used in the sentence if death)
> We the jury have found unanimously:
> ___ at least one aggravating circumstance and no mitigating circumstance.
> The aggravating circumstance is _____.
> [X] the aggravating circumstance outweighs [the] mitigating circumstances. The aggravating circumstance is [the murdering of a prosecution witness to prevent testimony in a felony case.]

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

In finding the *Zettlemoyer* form unobjectionable, this Circuit stressed two things about it, both of which materially distinguish it from the *Abu-Jamal* form.

First, the *Zettlemoyer* form said "We the jury have found unanimously ... The aggravating circumstance is __," but there was *no such language* for *mitigating* circumstances. 923 F.2d at 308. "This language requires that the jury's

conclusion on the particular aggravating circumstance must be unanimous. The *absence of a similar instruction for mitigating circumstances indicates that unanimity is not required.*" *Id.* In sharp contrast, the analogous part of the *Abu-Jamal* form contains identical language for aggravating *and* mitigating circumstances: "We, the jury, have found *unanimously* . . . The aggravating circumstance(s) is/are __. The *mitigating circumstance(s) is/are* __." *See also* Argument § I.A, *supra* (quoting *Abu-Jamal* form). Thus, on the *Abu-Jamal* form the *presence* of "a similar instruction for mitigating circumstances indicates that unaninimity" *is required.*

Second, on the *Zettlemoyer* form, while "the jury was obliged to specify the aggravating circumstance it found, it had no such duty with respect to mitigating circumstances, thus suggesting that consideration of mitigating circumstances was broad and unrestricted." 923 F.2d at 308. Again, the *Abu-Jamal* form is very different—the *Abu-Jamal* form requires the jury to specify *both* the aggravating circumstances *and* the mitigating circumstances it found, with no distinction made between the two. Thus, the *Abu-Jamal* form requires that both aggravating and mitigating circumstances be unanimously found.

In short, the *Abu-Jamal* form suffers from *exactly* the *Mills*-violating features that this Circuit found *absent* from the *Zettlemoyer* form. Moreover, the *Abu-Jamal* form requires a unanimous mitigation finding for additional reasons that also were absent from the *Zettlemoyer* form. *See* Argument § I.A, *supra.* There is no basis for the Commonweath's claims about *Zettlemoyer.*

E. *Mills*-related Rulings from Other Jurisdictions Do Not Help the Commonwealth

The Commonwealth says denials of *Mills* claims by other Courts of Appeal show that *Jamal-2* was reasonable. The Commonwealth made the same argument, with the same citations, in its prior briefing to this Court. *See* Brief for Appellants Horn, et al., at 46-48, 53-54 (filed 3/16/2006); Third Step Brief for Appellants Horn, et al., at 89-90, 95-96 (filed 8/23/2006). None of the decisions cited by the Commonwealth consider jury instructions and verdict forms that are materially similar to the ones used here. Instead, those decisions simply hold that some instructions and forms used in some other states do not violate *Mills*. Since proper consideration of a jury instruction challenge requires careful consideration "of the overall charge," *Boyde*, 494 U.S. at 378, these decisions from other Circuits are not informative.

CONCLUSION

For the reasons set forth herein, this Court should find that habeas relief is appropriate under *Mills*, and thus reaffirm its prior ruling on this issue.

Date: July 28, 2010

Respectfully submitted,

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CERTIFICATE OF MEMBERSHIP IN THE BAR OF THIS COURT

I, Robert R. Bryan, lead counsel for Appellee, hereby certify that I am a member in good standing of the Bar of this Court.

Date: July 28, 2010

ROBERT R. BRYAN
Lead counsel for Appellee

CERTIFICATE OF WORD COUNT PURSUANT TO FRAP 32(a)(7)(C)

I, Robert R. Bryan, hereby certify that this Brief of Appellee consists of 12,117 words as determined by the word processing system used to prepare the brief, and numbers 51 pages.

Date: July 28, 2010

ROBERT R. BRYAN
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CERTIFICATE PURSUANT TO LAR 31.1(c), THAT E-BRIEF AND HARD COPY ARE IDENTICAL, AND OF VIRUS CHECK

I, Robert R. Bryan, counsel for Appellee, pursuant to LAR 31.1(c), certify that the text of the electronic copy of the Brief of Appellee is identical to the text in the paper copies. I further certify that that a virus check was performed this date of the electronic brief in this matter utilizing McAfee Virus Scan software and no viruses were detected.

Date: July 28, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on this date I caused a true and correct copy of the foregoing **Brief of Appellee, Mumia Abu-Jamal, On Remand from the Supreme Court of the United States** to be served by the Court's ECF filing system and United States Mail, first class postage prepaid, upon the following:

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