

Jury Instructions Regarding Death Penalty Mitigating Factors

Abhishek Jain, MD
Fellow in Forensic Psychiatry

Philip J. Resnick, MD
Professor of Psychiatry
Director of Forensic Psychiatry

Department of Psychiatry
University Hospital of Cleveland Case Medical Center
Case Western Reserve University
Cleveland, OH

Individual Mitigating Factors in a Capital Case Do Not Have to be Agreed on Unanimously

The U.S. Supreme Court has held that instructing a capital jury that individual mitigating circumstances must be agreed on unanimously is unconstitutional. However, the U.S. Supreme Court held that the jury instructions in *Smith v. Spisak*, 130 S. Ct 676 (2010), were not unconstitutional.

Facts of the Case

After engaging in a series of shootings at Cleveland State University in 1982, Frank G. Spisak, Jr, was tried in an Ohio trial court.

In the guilt phase, Mr. Spisak's attorney called him to the stand to demonstrate his defective mental condition and to show that he was not guilty by reason of insanity. Mr. Spisak boasted about committing three murders and two other shootings and testified that he was a follower of Adolf Hitler. He added that the shootings were racially motivated and threatened to commit future murders. Defense expert testimony and reports were excluded because none of the experts opined that Mr. Spisak met the Ohio insanity standard. He was convicted of three murders and two attempted murders.

In the sentencing phase, three defense experts agreed that Mr. Spisak had a mental illness. All three experts agreed that he had schizotypal personality disorder, one expert also diagnosed borderline personality disorder, and another additionally diagnosed an "atypical psychotic disorder." In the closing argument, Mr. Spisak's defense attorney described him as "sick," "twisted," and "demented." He stated

that Mr. Spisak is "never going to be any different" and "don't look for sympathy, because he demands none." However, the defense attorney added that Mr. Spisak should not be executed because he was mentally ill and that the jurors should draw on their own sense of "pride" for living in a "humane society." The trial court jury recommended the death sentence and the judge imposed it.

The Ohio Court of Appeals for the Eighth District in 1984 and The Ohio Supreme Court in 1988 upheld the conviction and death sentence. In 1989, The U.S. Supreme Court denied Mr. Spisak's petition for *certiorari*.

Mr. Spisak then filed a writ of *habeas corpus* in federal district court based on two claims. First, the jury instructions at the penalty phase unconstitutionally required the jury to consider in mitigation only those factors that the jury unanimously found to be mitigating. Second, Mr. Spisak's attorney's closing argument at the penalty phase was inadequate, thereby violating the defendant's Sixth Amendment rights.

The federal district court denied Mr. Spisak's petition. However, the U.S. Court of Appeals for the Sixth Circuit accepted both of Mr. Spisak's claims and forbade Mr. Spisak's execution (*Spisak v. Mitchell*, 465 F.3d 684 (6th Cir. 2006)). The U.S. Supreme Court then vacated the Sixth Circuit's judgment and remanded the case (*Hudson v. Spisak*, 552 U.S. 945 (2007)). The Sixth Circuit reinstated its earlier opinion and again held in favor of Mr. Spisak (*Spisak v. Hudson*, 512 F.3d 852 (6th Cir. 2008)). The U.S. Supreme Court granted the state of Ohio's writ of *certiorari* to re-examine Mr. Spisak's two claims.

Ruling

The U.S. Supreme Court reversed the judgment of the Sixth Circuit in a unanimous decision. The Court concluded that the jury instructions and forms did not state that the jury must determine the validity of each individual mitigating factor unanimously. The Court also concluded that there was no reasonable probability that a better closing argument would have changed the outcome of the case.

Reasoning

In *Lockett v. Ohio*, 438 U.S. 586 (1978), the U.S. Supreme Court held that the Eighth and Fourteenth Amendments forbid imposition of the death penalty if a sentencing judge or jury is "precluded from con-

sidering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death" (*Lockett*, p 604, emphasis in original). In *Mills v. Maryland*, 486 U.S. 367 (1988), the U.S. Supreme Court held that capital jury instructions and verdict forms are invalid if they require juries to consider in mitigation only those factors unanimously found to be mitigating.

In *Smith v. Spisak*, the U.S. Supreme Court held that the jury instructions and verdict forms differed from *Mills*. Although the jury was instructed that it had to unanimously find that the aggravating factors outweighed any mitigating circumstances to recommend the death sentence, the instructions did not require the jury to determine the existence of each mitigating factor unanimously. For example, if only one jury member believed that being abused in childhood is a mitigating circumstance, while the other 11 jury members did not believe that it was a mitigating circumstance, the instructions did not state that the one jury member has to exclude it as a mitigating factor in the overall balance.

Regarding the claim of "inadequate counsel," in *Strickland v. Washington*, 466 U.S. 668 (1984), the U.S. Supreme Court held that the defendant must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" (*Strickland*, p 698). In *Smith v. Spisak*, the Court held that, even if the defense counsel's closing argument was inadequate, the Court found no "reasonable probability" that a better closing argument would have overcome the imposition of the death penalty due to Mr. Spisak's crimes, his boastful and unrepentant confessions, and his threats of further violence.

In a concurring opinion, Justice Stevens identified two constitutional errors. First, the jury was instructed to reject a death sentence unanimously before considering other sentencing options. Citing *Beck v. Alabama*, 447 U.S. 625 (1980), Justice Stevens opined that the jury instructions in *Smith v. Spisak* may have led jury members to go along with a sentence of death in the erroneous belief that if they did not sentence Mr. Spisak to death, he would be freed or have a new trial. Second, Justice Stevens opined that the defense counsel's closing argument was deficient. However, he concluded that both the instructional error and the inadequate counsel were harmless, because it is unlikely that the jury would

have reached a different conclusion, given Mr. Spisak's heinous crimes and damning trial conduct.

Discussion

The decision in *Smith v. Spisak* clarified that a jury instruction is not unconstitutional if it either instructs the jury that each mitigating circumstance does not have to be unanimously agreed on or remains silent on the issue. However, a jury instruction is unconstitutional if the jury is told that it must unanimously agree on individual mitigating circumstances.

If the ruling regarding "inadequate counsel" had favored Mr. Spisak, it may have limited the future use of defense strategies, such as asserting the severity of the client's crimes, to build credibility and diminish the impact of the opposition's argument.

Mr. Spisak's conduct terrorized the Cleveland community. Because it was racially motivated, it would probably qualify as a hate crime today. There was very little sympathy for him in the press. One of the authors (PJR) of this case report testified that Mr. Spisak was not legally insane. On February 17, 2011, after more than 27 years on death row, Mr. Spisak was executed at age 59.

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Retrospective Competency Determinations

Przemyslaw Kapalczynski, MD
Fellow in Forensic Psychiatry

Stephen Noffsinger, MD
Associate Professor of Psychiatry

Department of Psychiatry
University Hospitals Case Medical Center
Case Western Reserve University
Cleveland, OH

Retrospective Competency to Stand Trial Determinations Are Permitted in Addressing an Appeal Alleging Sixth Amendment Violation During a Competency Hearing. The Tenth Circuit Court of Appeals Adopts a Per Se Rule That Counsel Is Automatically Deemed Ineffective When a Defendant Is Unknowingly Represented by a Bogus Attorney

In *United States v. Bergman*, 599 F.3d 1142 (10th Cir. 2010), Gwen Bergman was charged with solici-