No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2006

MARC C. HOUK, Warden,

PETITIONER,

-vs-

FRANK J. SPISAK, JR.,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SIXTH CIRCUIT COURT OF APPEALS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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_____
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PARTIES TO THE PROCEEDING

The petition does not accurately list the parties to the proceeding.

The Respondent, Frank ***G.*** Spisak, Jr., aka Frances Anne Spisak, is misnamed in the Petition as Frank ***J.*** Spisak, Jr. Spisak is an inmate in Ohio sentenced to death.

The Petitioner is Stuart Hudson, warden of the Mansfield Correctional Institution, where all mentally ill death row inmates are housed. Spisak, due to his ongoing mental illness, is housed there as well. Stuart Hudson is the present warden of the Mansfield Correctional Institution and replaced Betty Mitchell, Defendant-Warden below. Due to his ongoing mental illness, Spisak has never been held at the Ohio State Penitentiary (O.S.P.). As such, Marc C. Houk, the Warden of O.S.P., is not properly named as Petitioner.

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STATEMENT OF THE CASE

There are aspects of Petitioner's Statement of the Case that are factually misleading as relates to the summarizing of the record specific to Petitioner's second issue, the ineffective assistance of Spisak's counsel. These facts and omissions will be addressed specifically in Respondent Spisak's reply.

In section C of Petitioner's Statement of the Case, it is noted that the Supreme Court of Ohio "reviewed and rejected all of Spisak's claims on the merits." While this is correct, it should be noted that the Ohio Supreme Court's decision gave no analysis or reasoning for any of its rulings in denying Spisak's numerous claims. Rather Ohio's Supreme Court merely grouped issues together and denied them with undifferentiated string-citations. Pet. App. 246 a.

The Sixth Circuit granted relief on two separate grounds: the specific jury instructions and forms used at the mitigation phase of the case violated *Mills*, and the ineffective assistance of counsel at mitigation. These grounds are separate and independent and both result in sentencing phase relief.

REASONS FOR DENYING THE WRIT

A. The Sixth Circuit Decision Properly Applied Both AEDPA Standards and this Court's Precedents to Spisak's *Mills* Claim.

1. The Sixth Circuit Properly Reviewed This Matter Pursuant to AEDPA.

The Sixth Circuit's decision-making process fully comports with established *habeas* law and AEDPA. There is no conflict among the circuits applying such well established principles. In granting relief, the Sixth Circuit properly addressed the jury instruction analysis by the Ohio Supreme Court under §2254(d)(1), while acknowledging both the AEDPA's presumption of correctness standard and the "special deference" due state court findings. In fact the Circuit outlined the AEDPA standards and requirements as a precursor to the merits review. Pet Apx. A-8a-9a.

Petitioner recognizes that the Court cited the proper standards but argues that the Court failed to actually apply the standards. (Pet. 19). It is well established that when a court cites the correct legal standard it is presumed that the court actually applied that standard. "There is no principle of law better settled, than that act of a court of competent jurisdiction shall be presumed to have been rightly." *Harvey v. Tyler*, 69 U.S. 328, 344 (1864). *Moragne v. States Marine Lines*, 398 U.S. 375, 378 n.1 (1970). *See also Bell v. Cone*, 543 U.S. 447, 455-56 (2005); *Parker v. Dugger*, 498 U.S. 308 (1991); *Walton v. Arizona*, 497 U.S. 639, 653 (1990), *overruled on other grounds*, *Ring v. Arizona*, 536 U.S. 584 (2002); *LaVallee* v. *Delle Rose*, 410 U.S. 690, 694-695 (1973) (per curiam). Petitioner-Warden's argument is nothing more than a disagreement with the conclusions reached by the Sixth Circuit Court. The decision makes clear that the Circuit Court thoroughly reviewed and evaluated the totality of the instructions, the state court decisions, and, applying the proper AEDPA standards, determined not only that the instructions violated *Mills v. Maryland*, 486 U.S. 367 (1988), but that the state court's determination to the contrary was unreasonable given the facts.

The Ohio Supreme Court's treatment of this issue on direct appeal was limited to:

> In propositions of law one, nineteen, fifty-four through fifty-six, sixty-two and sixty-four, appellant raises arguments which have previously been raised and rejected in the following cases: *State v. Jenkins* (1984), 15 Ohio St.3d 164, 15 OBR 311, 473 N.E.2d 264, certiorari denied (1985), 472 U.S. 1032; *Maurer*, *supra*; *State v. Buell* (1986), 22 Ohio St.3d 124, 22 OBR 203, 489 N.E.2d 795, certiorari denied (1986), 479 U.S. ___, 93 L. Ed. 2d 165; *State v. Williams* (1986), 23 Ohio St.3d 16, 23 OBR 13, 490 N.E.2d 906, certiorari denied (1987), 480 U.S. ___ , 94 L. Ed.2d 699; and *State v. Steffen* (1987), 31 Ohio St.3d 111, 31 OBR 273, 509 N.E.2d 383.

(Pet. Apx. 246a). The *Mills* error was raised to the Ohio Supreme Court in Proposition of Law No. 54 (Pet. App. 80a). The Sixth Circuit gave this decision all the "deference" it was due.[1]

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[1]Arguably Spisak was entitled to *de novo* review because the Ohio Supreme Court opinion prevents unreasonable application of federal law review. That is because the court's opinion did not identify what law the court actually applied or its reasoning. It is not possible to determine whether or not the underlying decision was an "unreasonable application" of clearly

2. The Circuit's Opinion is a Straight-Forward Application of this Court's Precedence in *Mills v. Maryland*, 486 U.S. 367 (1988).

Contrary to Petitioner-Warden's claim, the Sixth Circuit's opinion is nothing more than the straight-forward application of *Mills* to the jury instructions and forms used in Spisak's trial. The core holding of *Mills* is simply that if the jury instructions and/or forms prevented a single juror from giving effect to mitigating evidence those instructions and forms violate *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982). The instruction given is identical in its impact to the instruction given in *Mills*. Looking at the instructions actually given demonstrates that the jury was repeatedly addressed in the collective and instructed that every decision was to be the decision of the jury. The constitutional question is "whether a reasonable jury would have interpreted the instructions in a way that is constitutionally impermissible." *Mills v. Maryland*, 486 U.S. at 375-376. "The question, however, is not what the State Supreme Court

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established federal law since the court gave no indication of what law was applied. A state court must be aware of the federal law and attempt to apply it before there can be a determination that there was an unreasonable application of that law to the facts of the case. *Williams v. Taylor*, 529 U.S. 362, 407 (2000). The "unreasonable application" clause of the AEDPA is only applicable when the state court actually "identifies the correct governing legal rule." *Id.*

Federal courts may make a determination that a state court ruling is "contrary to" clearly established federal law even in the absence of any citation to or even awareness of clearly established Supreme Court precedent. *Early v. Packer*, 537 U.S. 3 (2002). *See also Mitchell v. Esparza*, 540 U.S. 12, 16 (2003)(reviewing only "contrary to" standard); *Bell v. Cone*, 125 S. Ct. 847 (2005) (same). The Court, however, has not applied this same reasoning to "unreasonable application" review under the AEDPA. Given the impossibility of determining whether an unexplained state court decision is an unreasonable application of clearly established federal law, the constraints of the AEDPA cannot limit federal court review.

A contrary policy or statutory interpretation would permit a state court to insulate its decisions from federal review by simply denying relief without any explanation of its reasoning or the cases it relied on. The federal courts would then be left to determine whether a decision was an unreasonable application of law without any guidance as to whether the state courts were aware of or attempted to apply the correct law. This situation would upset the traditional balance between state and federal courts established by principles of comity and would result in a suspension of the Writ and render the AEDPA provisions void and unconstitutional.

declares the meaning of the charge to be, but rather what a reasonable juror could have understood the charge as meaning. *Sandstrom [v. Montana]*, 442 U.S. [510], at 516-517 [1979](state court "is not the final authority on the interpretation which a jury could have given the instruction")." *Francis v. Franklin*, 471 U.S. 307, 315-316 (1985). The constitutional question is whether a reasonable juror could have understood the instructions and/or verdict forms to require unanimous finding of mitigating factors before considering a life sentence. As such it is important to address the possible interpretations of the jury instructions, not what the Petitioner-Warden, or even this Court, think the instructions mean. *Mills v. Maryland*, 486 U.S. at 375-76.

As in *Mills* every instruction given to the jurors advised them that every decision they made had to be unanimous and addressed the jury as the collective "you" rather than individually. Immediately after being told to unanimously determine that death was the proper sentence the jury was instructed that "if you find that the State failed to prove beyond a reasonable doubt that the aggravating circumstances . . . outweigh the mitigating factors, you will then proceed to determine which of the two possible life imprisonment sentences to recommend." (Pet. Apx. 262a-263a). It must be presumed that the jury would understand the unanimity requirement to apply to every decision since there was never a contrary instruction. *Mills*, 486 U.S. at 378-379. There is simply nothing in the jury instructions or the verdict forms that suggests the unanimity instruction did not apply to every single jury determination, including the existence of mitigating factors or the impact of that evidence. The totality of the jury instructions were such that the reasonable juror could have understood the charges as meaning that a death sentence had to be unanimously rejected before a life sentence could be considered. As in *Mills*, the impact of this instruction is to preclude each individual juror from individually giving effect to the mitigation evidence.

It is possible that the jury properly understood and applied the instructions but it is just as possible that the jury was mislead and misapplied the law. Given the high degree of certainty required in capital cases, *see Andres v. United States*, 333 U.S. 740, 752 (1948), there is substantial probability that a juror in this case was prevented from independently considering and giving weight to mitigation evidence as required by *Lockett* and *Eddings*. Therefore, the resulting death sentence is unconstitutional. *Mills*.

Nor did the Court err in citing this Court's post-*Mills* opinions or circuit cases. The Court's citation to *McCoy v. North Carolina*, 494 U.S. 433 (1990), simply illustrated the *Mills* error.

> Rather, *Mills* requires that each juror be permitted to consider and give effect to mitigating evidence when deciding the ultimate question whether to vote for a sentence of death. This requirement means that, in North Carolina's system, each juror must be allowed to consider all mitigating evidence in deciding Issues Three and Four: whether aggravating circumstances outweigh mitigating circumstances, and whether the aggravating circumstances, when considered with any mitigating circumstances, are sufficiently substantial to justify a sentence of death. Under *Mills*, such consideration of mitigating evidence may not be foreclosed by one or more jurors' failure to find a mitigating circumstance under Issue Two.

This is the exact analysis engaged in by the Circuit and demonstrates how the state court decision is contrary to and/or an unreasonable application of *Mills*. Therefore, the Petition for a Writ must be denied.

3. There is no conflict between the Circuits.

Respondent's claim of a circuit conflict is simply incorrect. Every case relied upon by Respondent demonstrates that the Circuits are consistent in applying *Mills*. The Circuits consistently review the instructions as given in light of *Mills* and evaluate whether those instructions violate the constitution because there is a possibility a reasonable juror may have been precluded from giving effect to mitigating evidence because of the unanimity instructions. *LaFevers v. Gibson*, 182 F.3d 705, 719 (10th Cir. 1999). *See also Zettlemoyer v. Fulcomer*, 923 F.3d 284, 307-08 (3rd Cir. 1991);

Arnold v. Evatt, 113 F.3d 1352, 1363 (4th Cir. 1997). Rather than demonstrating a conflict, these cases demonstrate compliance with *Mills* and the individual consideration required by the Constitution and this Court.

Nor is there a conflict within the Sixth Circuit itself. There are cases that reach a different conclusions, that is grant or deny the Writ, on *Mills* issues. However, those cases again demonstrate that the Circuit is properly reviewing the issue under *Mills*. That is, the Court reviews the specific instructions and verdict forms given in individual cases as well as the specific law of each state and determines whether those instructions comply with *Mills*. *See Coe v. Bell*, 161 F.3d 320, 337-38 (6th Cir. 1998) (reviewing Tennessee jury instructions). In fact the Circuit clearly rejected the Warden's claim of some intra-circuit conflict. In *Williams v. Anderson*, 460 F.3d 789, 810-13 (6th Cir. 2006), the Court went to great length to explain exactly why there is no conflict.

Contrary to Petitioner-Warden's assertion of a new rule the Sixth Circuit created no rule that Ohio must give some specific instruction. How Ohio chooses to comply with *Mills* is left to Ohio.[2] The Circuit simply evaluated the instructions actually given in Spisak's case in light of *Mills* and determined that the instructions as given failed to comply with this Court's precedent. Ohio remains free to require unanimous "verdicts" but is must ensure that the unanimity instructions do not apply to mitigating factors. If Ohio's instruction in this case had done that, the Circuit would have denied relief.

There is no conflict, either intra-Circuit or between the Circuits. The application of *Mills* to specific cases will naturally result in different outcomes as the instructions and forms used vary from

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[2]It must be noted that the Ohio Supreme Court subsequently determined that the "acquittal first" instruction given in this cases violates both Ohio law and *Mills*. *State v. Brooks*, 75 Ohio St. 3d 148, 159-62, 661 N.E.2d 1030, 1040-42 (1996)

jurisdiction to jurisdiction and even within specific jurisdictions. Rather than demonstrating a conflict, the difference in outcomes demonstrate a straight forward application of *Mills* to the specifics of the individual cases. Therefore, the petition should be denied.

4. Conclusion

For the reasons outlined above, the petition for a writ of certiorari should be denied.

B. The Sixth Circuit Decision Properly Applied Both AEDPA Standards and this Court's Precedents to Spisak's ineffective assistance of counsel claim.

1. The Petition fails to note that the Ohio Supreme Court's decision on the merits was unreasoned and unanalyzed.

There is no reason for granting the writ as to Spisak's ineffective assistance claim, given that the Sixth Circuit properly reviewed the record, applied deference under the AEDPA to the state court decision, and enunciated its reasons pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984). It is the Petitioner's brief that evades discussion of the full record, which, as will be demonstrated, clearly supports the Sixth Circuit's analysis. It should be noted at the outset that the 'deference' that Petitioner seeks to enforce is hardly deserved, given the Ohio Supreme Court's ruling, which is completely unreasoned and unanalyzed, and without even the slightest hint as to what facts, if any, were being considered in denying Spisak's claim. App. 247a. (Referencing Proposition of law 57, Spisak's ineffective assistance at mitigation claim). In short, the Ohio Supreme Court's perfunctory un-analytic decision itself undermines Petitioner's argument that the Sixth Circuit's conclusion is 'clearly erroneous' and "gives too little deference to the state courts." Pet. 14.

2. Additionally, By Failing Analyze the Full Context Within Which Trial Counsel Heaped Contempt and Disdain upon His Client, the Petitioner Misrepresents the Factual Basis of the IAC Claim.

In the Petitioner Warden's Statement of the Case only a few generalized quotes from trial counsel's closing argument are noted. Pet. 6. As will be discussed within Respondent's analysis, these few quotes do not convey the full tenor of trial counsel's disdainful comments directed towards his client. These omissions allow for Petitioner's benign portrayal of trial counsel's argument at mitigation and allow Petitioner to argue there must have been some underlying 'strategy.' Additionally, Petitioner does not stress that Ohio is a 'weighing' state and as such, there must be mitigation to 'weigh' else the jury is compelled by law to impose a death sentence. The factual basis omitted from Petitioner's arguments demonstrate that trial counsel argued, as a prosecutor, that there was a vast amount of aggravation to weigh and virtually nothing in mitigation to weigh against it.

A review of this full record reveals that the Sixth Circuit properly reviewed the entire record, applied deference under the AEDPA, and concluded that counsel unreasonably breached a duty of loyalty to his client such that there was a 6th Amendment violation that prejudiced Spisak.

3. There Is No Evidence in the Record That Trial Counsel Had a Strategy or That the Sixth Circuit Ignored Such a Strategy.

Petitioner Warden asserts that under *Strickland,* deference "applies all the more to a counsel's closing argument." Pet. 24. Petitioner's argument, however, only addressed counsel's closing argument in mitigation. Confining the discussion to this argument, Petitioner asserts that counsel argued that "Spisak's mental illness was a mitigating factor that the jury should consider," and that counsel "argued extensively that although the defense's expert testimony was insufficient to meet the test of insanity it was more than sufficient for the jury to conclude that Spisak was substantially impaired by mental illness and that this mitigating factor outweighed the admittedly strong aggravating circumstances." Pet. 6.

As will be demonstrated, this is a poor characterization of what occurred as the only issue "extensively" argued by counsel was his disdain for Spisak and how brutal non-aggravating, non-statutory aggravating circumstances should be weighed against him.

Even *Yarborough v. Gentry*, a non-capital case cited by Petitioner, acknowledges that "[c]losing arguments should "sharpen and clarify the issues for resolution by the trier of fact." 540 U.S. 1, 6 (2004). Spisak's counsel did not sharpen the issue, which in a weighing state such as Ohio, must be to assess whether the aggravated circumstances outweigh the mitigation beyond a reasonable doubt. Counsel's argument suggested a death sentence was warranted.

a. Arguments by trial counsel that are excluded from the Petition indicate that counsel expressed doubt as to the validity of the mitigation that was offered.

The Ohio Supreme Court noted that counsel offered mitigation solely as to Ohio's mitigating factor R.C. 2929.04(B)(3), "Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law." Pet. App. 250a. Yet, counsel began the mitigation phase by acknowledging in his opening argument that Spisak may not be sick at all. Counsel unreasonably restricted the scope of mitigation itself by arguing that mitigation was limited to a "very, very narrow question. . . [that] is how sick, *if he is sick*, and the mental illness, the mental defect, *if any*, that Frank Spisak *may* have." (Trial Tr. 2417) Counsel concluded the mitigation opening statement with the following: "...At the appropriate time you will weigh [the mitigation, which "we will try to show you"]. If you agree with us, fine. If you don't agree with us, you are the jurors." (Trial Tr. 2419). The meaning of these statements is not an equivocal question of context.

Petitioner ignores that in the mitigation closing argument, trial counsel suggested to the jury that there probably was no mitigation:

> You are here, and the issue is to weigh the aggravating circumstances and the mitigating factors, *and before the prosecution rushes to point out, if any, let me add a coma, and say, if any*. That's probably the first thing you have to find. (Emphasis added)
>
> Pet. App. 270a.

It is in this context that the analysis of counsel's actions are properly comprehended.

b. In this weighing State there can be no reasonable 'strategy' that includes repeatedly misinforming the jury about non-statutory aggravating circumstances that were contrary to Ohio law, and arguing that when deliberating, the jurors should identify with the suffering of the victims and the victim's families.

Petitioner never addresses that part of the Sixth Circuit's analysis which undercuts the 'strategy' label that Petitioner would seek to apply to trial counsel's unreasonable actions. The Circuit Court reviewed the record and noted that "[m]uch of Defendant's counsel's argument during the closing of mitigation could have been made by the prosecution, and if it had, would likely have been grounds for a successful prosecutorial misconduct claim." Pet. App. 38a. This was not mere rhetoric.

The only aggravating circumstances that can be considered in Ohio's statutory weighing process are those charged and proven beyond a reasonable doubt at the trial's guilt phase. R.C. 2929.03, 2929.04. Ohio law is "well settled that the nature and circumstances of the crime may not be weighed against the mitigating factors." *State v. Williams*, 99 Ohio St.3d 493 (2003), citing to *State v. Wogenstahl*, 75 Ohio St.3d 344, 356, 662 N.E.2d 311 (1996).

For example, the Ohio Supreme Court has repeatedly concluded that it is error to focus closing remarks on the victim's mental anguish, thereby converting the nature and circumstances

of the offense into a non-statutory aggravating circumstance. *Combs v. Coyle*, 205 F.3d 269, 292 (6th Cir. 2000), citing *State v. Gumm*, 73 Ohio St.3d 413, 653 N.E.2d 253, 262-63 (1995), *cert*. denied, 516 U.S. 1177 (1996); *State v. Landrum*, 53 Ohio St.3d 107, 559 N.E.2d 710, 719 (1990), *cert*. denied, 498 U.S. 1127 (1991); *State v. Davis*, 38 Ohio St.3d 361, 528 N.E.2d 925, 931 (1988), *cert*. denied, 488 U.S. 1034 (1989).

In that context, it is objectively unreasonable and falls below prevailing professional norms for counsel not to know what are and what are not statutory aggravating circumstances. *Williams v. Anderson*, 460 F.3d 789, 800 (2006)("Appellate counsel's decision to ignore this substantial body of case law was objectively unreasonable and falls below prevailing professional norms." referencing Ohio Rules of Court, Code of Professional Responsibility, Canon 6, (requiring Ohio attorneys to be familiar with relevant area of practice); *See* Ohio Rules of Court, Code of Professional Responsibility, Canon 6, available at http://www.sconet.state.ohio.us/Rules/professional/default.asp#c6 (last visited April 19, 2006) (requiring Ohio attorneys to be familiar with relevant area of practice).

Rather than reflect some 'strategy', the record reflects that Spisak's counsel encouraged jurors to weigh the following 'aggravating circumstances', which were, as a matter of Ohio law, **not** aggravating circumstances:

> a) ...And we can feel that, or see the cold marble, and will forever, and undoubtedly we are going to see the photographs, we are going to see Horace Rickerson dead on the cold floor. Aggravating circumstances, indeed it is... And, ladies and gentlemen, the reality of what happened on February 1st, such that you can smell almost the blood. You can smell, if you will, the urine. You are in the bathroom, and it is death, and you can smell the death. Pet. App. 271a.

None of those circumstances are statutory aggravating circumstances. See R.C. 2929.04(A); *Wogenstahl*, 75 Ohio St.3d at 356, 662 N.E.2d 311 ("[I]t is improper for prosecutors in the penalty

phase of a capital trial to make any comment before a jury that the nature and circumstances of the offenses are 'aggravating circumstances.'").

> b) ...And we can all know the terror that John Hardaway felt when he turned and looked into those thick glasses [worn by Spisak] and looked into the muzzle of a gun that kept spitting out bullets.. . . And we all went through the surgery, and we were all kind of with John Hardaway when he came in here and he still got some physical problems, and we can all feel those, and we are not going to forget. Pet. App. 272a.

> c) ...and we all know the terror [of Coletta Dartt], or we can feel that right in the pit of our stomach. (Tr. 2890; JA pp. __). Pet. App. 272a.

Ohio courts have also held that it is improper for prosecutors to speculate about what the victim was thinking. *State v. Combs*, 62 Ohio St.3d 278, 283, 581 N.E.2d 1071(1991); *State v. Wogenstahl*, 75 Ohio St.3d at 357-758, 662 N.E.2d 311 (1996).

> d) ...on the 27th of August we were in another lavatory, and we were all there because we could smell the death. And we could smell the latrine smells, and we could feel the cold floor. And we can see a relatively young man cut down with so many years to live, and we could remember his widow, and we certainly can remember looking at his children, and we certainly can feel all of the things that they felt, because ladies and gentlemen we participated, and we were there. Pet. App. 272a.- 273a.

> e) ...There are too many family albums. There are too many family portraits dated 1982 that have too many empty spaces. And there is too much terror left in the hearts of those that we call lucky. Coletta Dartt and John Hardaway. We call them lucky [because they survived]. Lucky, if you have a nightmare that will never go away. That's lucky, it may be, but its an aggravating circumstance. Pet. App. 273a

The suffering inflicted upon the families of the homicide victims is similarly improper and would not have been admissible if offered as evidence, *State v. Williams*, 99 Ohio St.3d 493 (2003), citing generally to *State v. White*, 85 Ohio St.3d 433, 445-446 (1999), nor would a prosecutor's invocation of it in argument have been proper. *Id*., citing to *State v. Reynolds*, 80 Ohio St.3d 670, 679 (1998).

And while Petitioner cites passages and speculates that trial counsel used pronouns like "we" and "us" as a way of "sympathiz[ing] with the jury's emotional response to sitting through such a

difficult trial," (Pet. 28), Petitioner ignores the comments of record in which counsel used "we and "us" to have the jury identify *with the victims* themselves.

> e) ...[O]n the 30th of August, nearly a year ago, you and I and everyone of us, we were sitting in that bus shelter, and you can see the kid, the kid that was asleep, the kid that never knew what hit him, and we can feel that bullet hitting, and that's an aggravating circumstance. Pet. App. 273a.
>
> f) ...We were with [Spisak] when he stalked this kid that never got any older than 17. And we were with him when he fired the gun six times, shot him through the head. And we were there when that straw hat fell off. And, ladies and gentlemen, would you ever want any more aggravating circumstances? I don't think that you would. Pet. App. 273a.

By incorrectly informing the jury that the nature and circumstances of the homicides and shootings *were* aggravating circumstances, trial counsel invited the jury to identify with the victims and weigh those non-statutory aggravators against the mitigating factors.

Arguably, most egregious of all, was counsel's argument that the jurors should also identify with the suffering inflicted upon the families of the homicide victims.

> g) ...Turn and look at [Spisak]. And let me suggest to you, and we are talking about aggravating circumstances, if each drop of blood in this sick demented body were full of atonement for the anguish, the terror, the aggravating circumstances that we have seen here, ladies and gentlemen, it wouldn't be enough. It wouldn't be enough to repay. It wouldn't be enough because there are too many empty places in those 1983 family portraits. And there was too much life left to live for Timothy Sheehan, Horace Rickerson and Brian Warford. Pet. App. 275a.

As a final unreasonable act, trial counsel then drew the jury's attention to the victims' families, who were seated inside the courtroom, and argued to the jury that their sentencing decision was "awfully important" to them:

> My God, you've looked in the back of the courtroom, and there are some people sitting right there, right back there now, and you know who they were. And you know that their lives have been tremendously affected, and you know that they are torn up. And it is important. And it is awfully important what you do. Pet. App. 293a.

Such 'vivid' and incendiary oratory violates the principle that a capital sentence should be imposed as a "'reasoned *moral* response'" *Cf. Penry v. Lynaugh*, 492 U.S. 302, 319-328 (1989)

(quoting *California v. Brown*, 479 U.S. 538 (1987); *See also State v. White*, 15 Ohio St.2d 146, 445-446 (1968) (holding that testimony designed to show the suffering of grieving survivors is not admissible because it focuses the jury's attention on prejudicial matters which are outside their function as triers of fact); *State v. Reynolds*, 80 Ohio St.3d 670, 679 (1998).

Being a weighing state, the Ohio statute and case law make clear that there can be no evidence introduced or argument made about non-statutory circumstances. *State v. Jenkins*, 15 Ohio St.3d 164, 207 and 215 (1985), *cert.* denied 105 S.Ct. 3514 (1985), reh'g. den. 106 S.Ct. 19 (1985); *State v. Johnson*, 24 Ohio St.3d 87 (1986); *Barclay v. Florida*, 463 U.S. 939 (1983). Yet, as the Sixth Circuit realized, this is precisely what Spisak's counsel did by encouraging the jurors to factor into their weighing deliberations a slew of non-aggravating circumstances.

c. In this weighing State there can be no reasonable 'strategy' that includes telling the jury that non-statutory aggravating circumstances such as the "likely revulsion" that the jury probably felt for Spisak's beliefs were actually aggravating circumstances.

Petitioner speculates that trial counsel had a strategy of trying to gain the jury's trust by "empathizing with their likely revulsion by the . . . reprehensibility of Spisak's Nazism [sic]." Pet. 25. However, the record reflects that counsel's references during the closing argument in the mitigation phase of the trial were not a mere effort to empathize, but rather are properly characterized as advocacy suggesting that the hatred espoused was itself part of the aggravating circumstances to be weighed:

> . . . And. Ladies and gentlemen, that's what you have got to weigh, the aggravating circumstances against the mitigating factors. And you heard the hate, and you heard the misguided philosophy, and if you live another ten years, or twenty years, or fifteen years, or fifty years, you are always going to be another Spisak juror, among other things, because isn't what you heard kind of a microcosm, and some of us, not all of us, are old enough to remember. Isn't what you heard just a microcosm of a twelve year reign of terror that was unparalleled in history, the Third Reich, and it was going to last for a thousand years.
>
> And those clown couldn't buy 12 or 13.

. . .
. . .

> . . . And listen to this sick distorted mind, and you will hear once again kind of a muffled dissent, but those hobnail boots on the cobblestone streets, but ladies and gentlemen, one thing you won't hear, and one thing even the sick distorted minds don't admit, you won't hear the gas at Buchenwald, and you won't hear the gas in Auschwitz, because ladies and gentlemen, it never made any noise in killing six million.
>
> Aggravating circumstances, all the aggravating circumstances you ever want.

Pet. App. 274a.

This was a clear misstatement of Ohio law.

d. In a weighing State, it is also objectively unreasonable for counsel to argue that the Client is not worthy of any mitigation.

Petitioner acknowledges that although trial counsel argued that Spisak did not lead a "good life" and had no "good deeds" to his credit, counsel did assert that "mental illness was a mitigating factor that juror should consider." Pet. 25. Petitioner referenced counsel's telling the jury that we are a "humane society." Id.

Using those references to attack the Sixth Circuit's analysis, Petitioner argues that "there is no statement by counsel in the closing argument that Spisak "was undeserving of mitigation." Pet. 27. This is blatantly incorrect. The Petitioner's abbreviated references fail to convey the true context within which counsel argued.

First, counsel's argument denigrated Spisak to the point of suggesting his future dangerousness, which became a springboard for providing the jurors with reasons to discount any and all mitigation that might be offered on Spisak's behalf:

> Now, the Judge has told you about mitigating factors. . . . The Court has told you that, or the Court will tell you that the defense on this portion could bring forward, and bring to you anything that the defense might consider to be mitigating, good deed that a person might have done, an otherwise good life.

> Sympathy, of course, is not part of your consideration. And even if it was, certainly, don't look to him for sympathy, because he demands non. And, ladies and gentlemen, when you turn and look at Frank Spisak, don't look for good deeds, because he has done none. Don't look for good thoughts, because he has none.
>
> And, ladies and gentlemen, don't look to him with the hope that he can be rehabilitated, because he can't be. He is sick, he is twisted. He is demented, and he is never going to be any different.
>
> The question then comes up, ladies and gentlemen, is there any mitigation. Is there any reason for you, ladies and gentlemen, to go back to your jury room, . . . and to do anything other than to recommend to this Judge that at the earliest possible time he be strapped in the chair and electrocuted.
>
> Well, there is only one reason, ladies and gentlemen, pride. It is not within Frank Spisak, it lies not within Frank Spisak, but within ourselves. . . . It is the reason that you get that little bit of a flutter when you hear them play the star Spangled Banner, because, ladies and gentlemen, we are different. We are a humane society.

Pet. App. 275a - 276a.

Counsel's argument that the *only* mitigation was to be found within the jurors themselves, and that Spisak had no redeeming qualities was objectively unreasonable in a weighing state like Ohio. The Sixth Circuit correctly analyzed that "there cannot be any objectively reasonable tactical reason to argue to the jury in a mitigation phase that one's client has no redeeming qualities, will never be rehabilitated, has never done a good deed, is not deserving of sympathy, and is entitled to no mitigation." Pet. App. 38a.

Demonstrating that trial counsel's argument was more disdain than specific strategy is the fact that counsel knew that the comment about Spisak "never going to be any different" was false. During Spisak's pre-trial competency hearing, the State's expert, Dr. Resnick, acknowledged that "[Spisak's] thinking *has improved substantially since he has been incarcerated*." (Trial Tr. 20) **JA 824**, In fact, there was nothing in the record to suggest that Spisak could not be rehabilitated. Trial counsel's argument to the jury was, therefore, not only factually untrue, but it destroyed one

powerful mitigation argument, *i.e*. that the structured setting of a long prison sentence could improve Spisak's mental illness. Counsel did not utilize this information or argument at mitigation.

Additionally, counsel's comment about Spisak never having done a good deed or had a good thought was also disdainfully misleading given that counsel failed to raise the statutory mitigating factor that the Spisak had no prior criminal record under. R.C. 2929.04(B)(5). There could be no strategic reason for failing to assert this mitigating factor and had counsel done so it would have emphasized the severity of the mental illness active at the time of the homicides.

Petitioner's arguments are simply a disagreement with the characterization of the evidence as reviewed by the Circuit Court. Contrary to the implication of Petitioner's general argument, (*see* Pet. 26, arguing that counsel "extensively" argued that Spisak was substantially impaired by mental illness, citing to Pet. App. 278a - 288a), the Sixth Circuit's specific review of the record notes that trial counsel's "final moments were not devoted to a discussion of the reasons why Defendant's mental illness made him deserving of mitigation, but rather to discussing all the other participants in the trial. Namely, trial counsel discussed the jurors, lawyers, the judge, policemen, and the victims' families, and focused on the importance of the jury's decision to all of these various individuals, instead of arguing how and why the mitigating factors outweighed the aggravating factors." Pet. App. 37a.

A review of counsel's argument demonstrates that that not once did trial counsel ever discuss how the jurors might find that the aggravating circumstances did not outweigh the mitigating factors.

Strickland recognized that merely invoking the word 'strategy' to explain errors was insufficient since "particular decision[s] must be directly assessed for reasonableness [in light of] all the circumstances. at 691, 104 S.Ct. at 2066. In considering *all* the circumstances, it become clear that counsel's comments at mitigation were indeed disdainful and contemptuous of Spisak

rather than some un-enunciated 'strategy.' Completely ignored by Petitioner are other comments by counsel demonstrating the disdain he harbored for his client.

e. The record reflects counsel's breech of loyalty to Spisak beyond the closing mitigation argument.

"The right to counsel guaranteed by the Constitution contemplates the services of an attorney devoted solely to the interests of his client." *Penson v. Ohio*, 488 U.S. 75, 86-87 (1988), quoting *Von Moltke v. Gillies*, 332 U.S. 708, 725 (1948). *Strickland*, 466 U.S. at 688, held that "[r]epresentation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes a duty of loyalty" to the client.

That Spisak's trial counsel's disdain during mitigation closing argument was a primary focus is not mere rhetoric.

During the culpability phase, for example, defense counsel himself disdainfully referred to Spisak a 'fag'. (Trial Tr. 2920). (**JA 3093**).

This bears mentioning for two reasons. First, Spisak's mental illness mitigation was anchored in his gender identity disorders. (*See* Pet. 5. Petitioner's sole reference to this, noting mitigation witness Dr. Sandra McPherson's diagnosis of Spisak's Schizotypal and Borderline Personality Disorders "characterized by bizarre and paranoid thinking, gender identification conflict and emotional instability."). When mitigation expert Dr. Bertschinger was testifying, counsel commented: "Just the fact that someone might think about a sex change, and the fact that sex changes are generally the subject of jokes and laughter, *and reasonably so*--" (Trial Tr. 2566) (JA 2739)

Secondly, the gender identity disorders explained, in mitigatory fashion, the Nazi-identity that Spisak had assumed, and for which counsel had so expressed his disdain, as noted above. For example, in a pre-trial competency and sanity report generated by the Trial Court's Clinic, which

was proffered for the record, a psychological profile was given that sympathetically detailed severe Spisak's gender identity disorders and explained the relationship with the structured identity Spisak found in the Nazi order:

> **Excerpt from Dr. Koerner and Dr. Samy's 5-27-83 report:**
>
> ... Mr. Spisak appears to be an emotionally stunted individual with a high need to feel in control and [sic] fear of inadequacy and vulnerability. He tends to view the world in an over simplistic manner and he aligns himself with ideologies that legitimize his feelings of alienation and fear. He vacillates between identifying with groups that espouse these socially deviant beliefs and with being a loner. He has a very poorly formed concept of his identity as an adult. In general, his identification with deviant groups and researching beliefs that agree with his view of the world appear to sufficiently allow him to intellectually distance himself from his feelings of alienation, fear, and inadequacy. However, in stressful situations such as his divorce and loss of his job, his belief system is not adequate to shield him from the aforementioned emotional states. He apparently attempts to regain feelings of control and power through more intense violent fantasies and through acts of violence.
>
> * * *
>
> ... [Mr. Spisak's] mother was bossy and somewhat of a dictator. He used to see her as an image of Hitler. His father was a passive person. This situation probably affected the development of his gender identity. He did not want to be like his father. He wanted to be strong like his mother and be a leader. At the age of 20, he developed a feeling that he was lost, that he did not belong to the existing world (society) and asked himself "who am I?" Everything- people, shops, etc., looked strange to him...
>
> ... It is clear that the contrasting personalities of his parents as well as reading about Hitler resulted in the development of an Identity Disorder manifested in conflicts about himself, his goals, sexual orientation, group loyalties, etc., and the development of Gender Identity Disorders manifested by Transvestism and Transsexualism.
>
> * * *
>
> Mr. Spisak developed Identity Disorders which affected his way of life and resulted in the development of social, occupational and marital problems. He was aware of that and he stopped wearing female clothing to get his wife back. He was also affected by his mother's strong personality and wanted to be like her, but was unable to achieve a "boss" position as she did. He tried to gain some strength by joining the Nazi Party, but this did not help him in his attempt. This failure aggravated him and he blamed others for his problems...
>
> ... At a later time, he adopted the plan to kill black people. To justify that, he adopted the theory that he wanted to make room for the white people. Although it might sound ridiculous, it became an established idea in his mind...
>
> **Cross-Cert. Pet. Apx. 1143a - 147a.**
>
> **Excerpt from Dr. Althof's Psychological Evaluation report:**

> In structured situations, Mr. Spisak's thought processes ranged from logical, intact, efficient and adaptive to self-referential, loose, peculiar and strained. In less structured situations, his thinking was generally of poorer quality ranging from adequate to over fabulized, frankly paranoid, illogical and autistic. Paranoid obsessions were noted, focusing on hatred of Blacks**,** sadistic morbid fantasies of dead babies and identifications with powerful Nazi figures. Emotionally ladden [sic] stimuli resulted in the disruption of logical thinking and the intrusion of fused primitive highly charged sexual and aggressive impulses. Additionally, abstract thinking ability was significantly and consistently compromised.
>
> * * *
>
> One can speculate that underlaying Mr. Spisak's multiple ego dysfunctions are struggles to control his massive primitive inner rage and to come to grips with his sexual identity confusion. Mr. Spisak projects his unacceptable sexual and aggressive impulses onto Blacks. He then perceives them as powerful, aggressive, evil and seductive. Consequently, Mr. Spisak feels hate, fear, and envy for Blacks coupled with an inner sense of inadequacy, vulnerability and sexual confusion. His quasi political identifications serve as an obsessive- paranoid defense mechanism, whereby he wards off, albeit unsuccessfully, his projected aggression, inadequacy and sexual confusion.

Cross-Cert. Pet. Apx. 1151a.

The Sixth Circuit's decision gives a rather brief summary of the mitigation phase evidence that was presented through the presentation of mitigation phase witnesses. Pet. Apx. 39a - 42a. Significantly, lead trial counsel made no specific references to any aspect of Spisak's mental illnesses in his mitigation closing argument.

In reversing the District Court, the Sixth Circuit noted that the lower court "had reasoned that once counsel identified with the[] [juror's] emotions towards Defendant, he could then explain to them that their feelings were misplaced because Defendant was mentally ill." Pet. App. 36a. The Sixth Circuit acknowledged: "Had Defendant's trial counsel actually done the latter, and spent a substantial amount of time humanizing and rehabilitating Defendant in the eyes of the jury be arguing that Defendant was misguided or mentally ill and deserved to have his life spared, then the district court might be correct that this was permissible strategy." Id.

However, upon reviewing the record, the Sixth Circuit correctly concluded, that "[t]he record reveals, however, that trial counsel did very little to offset the negative feelings that his own hostility and disgust for Defendant may have evoked in the jury." Id. It is telling that Petitioner never directly challenges this assertion with references to the record. Rather, the Petitioner simply disagrees with the Sixth Circuit's conclusion.

4. The Sixth Circuit Gave Deference to the State Court's Unreasoned Decision.

A review of the facts not noted by Petitioner suggests that it is the Petitioner and not the Sixth Circuit that has taken a "selective view of the record." Pet. 26-27. There is nothing about the Sixth Circuit's analysis that is in anyway the "hindsight approach condemned by *Strickland*." Id., at 27. Petitioner's argument that the Sixth Circuit did not "apply the appropriate deference," Pet. 26, is belied by the Circuit's decision itself.

As the Sixth Circuit analyzed, "[i]n light of all the circumstances of this case, and even conceding that counsel faced some unique challenges, we still find that Defendant has rebutted the "strong presumption" that counsel's actions constituted "sound trial strategy."

5. Conclusion.

For the reasons outlined above, the petition for a writ of certiorari should be denied as to this issue.

C. Conclusion.

For the above stated reasons, Spisak requests the Court deny Petitioner Warden's petition for *certiorari*. The Warden's petition misrepresents the scope and analysis of the Sixth Circuit's decision and opinion. The Sixth Circuit's decision creates no conflict of law, will in no way create any sort of confusion in this Court's jurisprudence, nor does it provide any other reason to warrant

revisiting these well and clearly-established areas of the law. Therefore, Petitioner Warden's petition should be denied.

Respectfully Submitted,

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