No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2008

KEVIN SMITH, 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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The petition accurately lists the parties to the proceeding.

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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 sixty-four assignments of error." Pet. at 9. 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. at 305a-309a.

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. Even if one issue is deemed worthy of this Court's review, the other issue provides the same relief rendering further review merely advisory as the outcome of the case will not be affected.

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 original decision-making process fully comports with established *habeas* law and AEDPA. There is no conflict among the circuits applying such well established principles. While Petitioner continues to insist that the Sixth Circuit ignored AEDPA's restraints, Pet. 13, the Sixth Circuit has consistently and 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 its initial ruling the Circuit outlined the AEDPA standards and requirements as a precursor to the merits review. Pet Apx. F-32a-33a. In its Amended Order following this Court's remand order, and prior to additional consideration in light of *Musladin* and *Landrigan*, the Circuit reiterated the applicability of AEDPA principles of review. Pet. Apx. B-5a.

It remains 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). There is no evidence that the Circuit did not do what is said it did - apply AEDPA standards to this case.

On remand by this Court, the Circuit again directly acknowledged that the case is subject to AEDPA standards. Pet. App. at 5a; Pet. App. at 14a. In total, over the course of three opinions, the Sixth Circuit cited AEDPA or its standards at least eighteen (18) times. The Circuit Court properly reviewed this issue under AEDPA and determined that Spisak was entitled to relief.

Petitioner-Warden's argument reduces to nothing more than a disagreement with the conclusions reached by the Sixth Circuit Court. The Circuit's Amended Orders and its initial decision make 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.

What Petitioner fails to explain as an initial matter, is that the state court 'decision' to which AEDPA is being applied was unarticulated and unreasoned. 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. H-306a). The *Mills* error was raised to the Ohio Supreme Court in Proposition of Law No. 54. 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 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.

It is problematic, of course, for Petitioner to argue that the Ohio court's decision was a reasonable application of clearly established federal law given such a cavalier disposal of Spisak's constitional claims in a capital case.

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 that the Sixth Circuit "extended" *Mills* to a situation that *Mills* did not address, Pet.15, 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

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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.

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 Spisak's 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 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 Petitioner acknowledges, Pet.16, in *Spisak,* like *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. I-324a-326a). 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 *Spisak* 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*.

3. There is nothing in *Musladin* or *Landrigan* that is inconsistent with the Sixth Circuit's decision granting relief on Spisak's jury instruction claim.

Petitioner's argument essentially asserts that the mere fact that the *Mills* jury instructions that were not identical to Spisak's jury instructions, means that Spisak's state court decision was not contrary to or an unreasonable application of clearly established federal law and the Sixth Circuit must be misapplying *Musladin* because "this Court has

never addressed the type of claim presented." Pet.14. This argument is the equivalent of saying that habeas relief could be granted under *Strickland* only if the facts of the ineffectiveness claim were identical to those in *Strickland* itself.[2]

In *Musladin*, the Supreme Court noted and contrasted how some factual distinctions reflect categorically distinct legal scenarios. For analytical purposes, defendants forced to wear prison garb and uniformed state troopers sitting immediately behind the defendant reflected a legally distinct category from individual courtroom spectators wearing buttons carrying the likeness of the victim. The Court denied relief under §2254(d)(1) because the former fact patterns spoke to clearly established legal principles about a defendant's right to a fair trial in the context of "state sponsored courtroom practices," unlike the button-wearing spectators, whose actions clearly had no relation whatsoever to any official state action. As the Court noted, clearly established federal law "has never addressed a claim that such private-actor courtroom conduct was so inherently prejudicial that it deprived a defendant of a fair trial." *Musladin*, 127 S.Ct. at 653.

But *Musladin* could never be utilized, for example, to reject all factual scenarios under *Strickland* where the fact scenario about counsel's failures was not identical to those detailed in *Strickland.* In considering the applicability of *Musladin*, the Sixth Circuit noted that this Court noted in *Panetti v. Quarterman*, 551 U.S. ___, 127 S.Ct. 2842, 2858 (2007)

[2] Of notes is the fact that Petitioner never cites *Musladin* in his arguments on the ineffective assistance of counsel claim.

(quoting *Musladin*, 127 S.Ct. at 656 (Kennedy, J., concurring)), that "AEDPA does not 'require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied.'" Pet.Apx. B-7a.

As the analysis in section 2 above demonstrates, Petitioner Warden's argument that Spisak's jury instructions must reflect a claim outside 'clearly established law' of *Mills* because they lack identity with *Mills*' instructions, ignores the Circuit's significant and rational analysis of the *Musladin- Panetti* law. Thus, it is significant that the *Mills* Court specifically crafted a holding much like the Court did in *Strickland:* the legal principle established was clearly meant to encompass a myriad of factual situations which might implicate those clearly established legal principles. After making clear that in a capital case the sentencer may not be precluded from considering mitigation and that the issue under consideration was that a jury that does not unanimously agree on the existence of any mitigating circumstance may not give mitigating evidence any effect whatsoever, the *Mills* Court asserted that it's holding was expressing a broad legal principle meant to be applied to the myriad of unique statutory variations and contexts in which capital mitigation is considered throughout the country:

> Under our decisions, *it is not relevant whether the barrier to the sentencer's consideration of all mitigating evidence is interposed by statute, (citations omitted), by the sentencing court, (citations omitted), or by an evidentiary ruling.* (Citations omitted). The same must be true with respect to a single juror's holdout vote against finding the presence of a mitigating circumstance. *Whatever the cause, if petitioner's interpretation of the sentencing process [that a jury that does not unanimously agree on the existence of any mitigating circumstance results in a situation in which the jury or jurors may not give mitigating evidence effect], is correct, the conclusion would necessarily be the same: "Because the [sentencer's] failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence, in plain violation of Lockett it is out duty to remand this case for resentencing.* (Citations omitted)(Emphasis added).

Mills, 486 U.S. at 375.

Petitioner Warden is simply incorrect to premise his request for certiorari on the argument that *Mills* applies 'fairly narrowly to its unusual circumstances.' Pet. 19.[3] This analytical error by Petitioner, which leaves the Warden seeking some non-required identity of language or form between Ohio's 'acquittal first' jury instruction and verdict form and those specific instructions and verdict forms at play in *Mills*, reflects a gross misreading of *Mills* by the Petitioner, not the Sixth Circuit. How Ohio chooses to comply with *Mills* or by what nomenclature the instructions go by is properly left to Ohio. But as the Circuit recognized in its consideration of *Musladin*, "we may find the application of a *principle* of federal law unreasonable despite the "involve[ment of] a set of facts 'different from those of the case in which the principle was announced.'" (Emphasis in original, citations omitted). Pet. Apx. B-7a.

The Sixth Circuit's opinion and the Amended Orders do no more than *Mills* insists upon, and that is to consider whether the instructions and verdict forms, given a reasonable interpretation, might be interpreted to require juror unanimity as to the presence of a mitigating factor. *See Andres v. United States*, 333 U.S. 740, 752 (1948) (cited in *Mills*, 486 U.S. at 377)(noting "[t]hat reasonable men might derive a meaning from the instructions given other than the proper meaning of §567 is probable. In death cases doubts such as those presented here should be resolved in favor of the accused.").

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[3] In the effort to support this untenable argument Petitioner uses the "fairly narrowly" reference to *Mills* from *Beard v. Banks*, 542 U.S. 406, 420 (2004). However, Petitioner misrepresents the context from within which the quote was secured. *Beard* rendered the 'fairly narrow' assessment of *Mills* in the context of a *Teague* analysis as to whether the recent *Mills* decision could be applied retroactively. In rejecting the argument, this Court considered whether *Mills* fell within the second *Teague* exception as a " 'watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.' " *Beard*, 542 U.S. at 420 ("The *Mills* rule applies fairly narrowly and works no fundamental shift in "our understanding of the *bedrock procedural elements*" essential to fundamental fairness.") (Citation omitted). This Court ruled that *Mills* did not fall within *Teague*'s second exception.

Petitioner's failure to understand that *Mills*'s holding was explicitly meant to encompass all the various forms of states' capital statutes encourages other shortcomings and outright misstatements about the nature of this claim. For example, Petitioner argues that the Sixth Circuit's analysis is based largely upon it's own jurisprudence in *Davis v. Mitchell*, 318 F.3d 682 (6th Cir. 2003), which Petitioner admits was anchored in the state case of *Ohio v. Brooks*, 661 N.E.2d 1030 (Ohio 1996). Pet.18. Petitioner then argues erroneously that the Sixth Circuit's interpretation of Spisak's jury instruction "was based solely on Ohio law," Pet. 19, never realizing that the *Brooks*' decision, which addressed this same instruction, was specifically based upon and cited to *Mills*. *Brooks*, 661 N.E.2d at 1041.

Nor did the Court err in citing this Court's post-*Mills* opinions or circuit cases. Pet. 18, n.1. 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.

4. There is no conflict between the Circuits.

Petitioner's claim of a circuit conflict, Pet. 20, is simply incorrect. Every case relied upon by Petitioner 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 both the diversity of state statutes that *Mills* recognized as a given context for capital jurisprudence, as well as the acknowledged compliance with *Mills* and the individual consideration required by the Constitution and this Court.

Nor is there a conflict within the Sixth Circuit itself. Pet. 21. There are cases that reach different conclusions, that is grant or deny the Writ, on *Mills* issues. However, those cases only 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.[4]

[4] The Petitioner specifically cites to *Williams v. Anderson*, as the Circuit Court's acknowledgment of confusion within the Circuit. Pet. 22. But 'confusion' is *not* 'conflict.' *Williams* reconciled these cases in order to alleviate any further confusion and issued an unequivocal statement as to why the so-called 'acquittal first' instructions are, consistent with the Circuit precedent under *Davis*, unconstitutional under *Mills*:

> Under the doctrine established in *Mapes,* 171 F.3d at 415, and expanded in *Davis,* 318 F.3d at 689, acquittal first jury instructions are unconstitutional in this Circuit. An acquittal first jury instruction is _any instruction requiring that a jury unanimously reject the death penalty before it can *consider* a life sentence ...._*Davis,* 318 F.3d at 689 (emphasis added); *see also Henderson v. Collins,* 262 F.3d 615, 622 (6th Cir.2001). Acquittal first jury instructions are unconstitutional because they violate the Eighth and Fourteenth Amendments. *Davis,* 318 F.3d at 689; *see also Mapes,* 171 F.3d at 416 (noting that the Ohio Supreme Court found that acquittal first instructions violate the Eighth and Fourteenth Amendments). As the Supreme Court explained in *Mills v. Maryland,* 486 U.S. at 374-75, 108 S.Ct. 1860, the Eighth Amendment, which applies to the states through the Fourteenth Amendment, requires jurors to consider all mitigating evidence. Any instruction which precludes jurors from considering mitigating evidence violates the Eighth Amendment. *Id.* According to *Davis,* acquittal first jury instructions violate the Eighth Amendment because they _preclude[ ] the individual juror from giving effect to mitigating evidence and [thus] run afoul of *Mills.*_ *Davis,* 318 F.3d at 689 (citing *Mills,* 486 U.S. at 367, 108 S.Ct. 1860).

Williams, 460 F.3d at 810.

In fact, in *Williams,* the Sixth Circuit distinguished the 'acquittal first' instruction and analysis from precisely the argument Petitioner is putting forth to argue that the Circuit erroneously 'expanded' *Mills* to violate *Musladin*.[5] Petitioner argues that "[t]he Sixth Circuit thus failed to recognize the significant distinction between a jury instruction that requires unanimity in *specific mitigation findings* and an instruction that simply requires unanimity in the *ultimate outcome*." Pet.16 (emphasis in original). In *Williams*, the Circuit acknowledged that the 'acquittal first' analysis under *Mills,* (as referenced in footnote 4, *supra*), is a

[5] Petitioner did not seek this Court's review of *Williams* despite the fact that Williams was granted relief on both an ineffective assistance of counsel claim (Williams was represented by the same trial attorney as Spisak), and a *Mills* claim.

separate and distinct argument from the 'unanimity in the ultimate outcome' argument. *Id*., 460 F.3d at 808.[6]

[6] Prior to its *Mills* analysis, the *Williams* Court distinguished unanimous outcome arguments from unanimous mitigating factor issues. *Id*., 460 F.3d at 808 ("Unanimous -life claims must also be distinguished from unanimous -mitigating factor claims. A unanimous life claim is based on a jury instruction stating that a *verdict imposing life* must be unanimous. A unanimous-mitigating factor claim is based on a jury instruction stating that *mitigating factors* must be unanimously found in order to be considered."). The Circuit went on to note that a trial court's instruction to the jury stating that any verdict recommending life would have to be unanimous did not violate the Eighth Amendment as set forth in *Caldwell* because it properly reflected Ohio law. *Id.* While not germane to Spisak's case, it demonstrates that the Circuit completely understands the distinction which serves as a basis for Petitioner's argument that the Circuit has violated *Musladin* by trying to "wedge Spisak's case into the *Mills* paradigm." Pet.16.

Contrary to Petitioner Warden's assertion, the Sixth Circuit created no rule that Ohio must give some specific instruction. How Ohio chooses to comply with *Mills* is left to Ohio.[7] 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 or run afoul of the *Mills* principles. 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 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.

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[7] It should 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). *See also State v. Diar*, 2008 Ohio 6266, pp. 241-246, ___ N.E.2d. ___, ___ (2008), vacating a death sentence for failure to give a single juror instruction and accepting State's concession that such error constitutes reversible error.

5. 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 Sixth Circuit Properly Reviewed This Matter Pursuant to AEDPA.

As noted in Section A(1), *supra*, the Circuit did apply AEDPA to this claim. The Ohio Supreme Court's decision gave no analysis or reasoning for any of its rulings in denying Spisak's numerous claims. Rather the Ohio Supreme Court merely grouped issues together and denied them with undifferentiated string-citations. Pet. App. at 306a-309a.

The entire analysis of Spisak's claim was:

> In propositions of law two through eight, ten through fifteen, seventeen, eighteen, twenty-one, twenty-two, twenty-four through thirty-six, thirty-eight through forty-one, forty-three through forty-seven, forty-nine, fifty-one through fifty-three, fifty-seven through sixty-one, and sixty-three, appellant raises arguments which we find to be not well-taken on the basis of our review of the record in light of the following authorities: *Maurer*, *supra*; *Donnelly v. DeChristoforo* (1974), 416 8 U.S. 637; *Darden v. Wainwright* (1986), 477 U.S. 168; *Strickland v. Washington* (1984), 466 U.S. 668; *Evitts v. Lucey* (1985), 469 U.S. 387; *State v. Smith* (1985), 17 Ohio St.3d 98, 17 OBR 219, 477 N.E.2d 1128; *State v. Lytle* (1976), 48 Ohio St.2d 391, 2 O.O.3d 495, 358 N.E.2d 623; *State v. Staten* (1969), 18 Ohio St.2d 13, 47 O.O.2d 82, 247 N.E.2d 293; *State v. Pi Kappa Alpha Fraternity* (1986), 23 Ohio St.3d 141, 23 OBR 295, 491 N.E.2d 1129 (distinguished); *Payton v. New York* (1980), 445 U.S. 573 (distinguished); *Rawlings v. Kentucky* (1980), 448 U.S. 98; *State v. Rogers* (1986), 28 Ohio St.3d 427, 28 OBR 480, 504 N.E.2d 52, paragraph one of the syllabus (*Rogers* II), reversed on other grounds (1987), 32 Ohio St.3d 70, 512 N.E.2d 581; *Buell*, *supra*; *Wainwright v. Witt* (1985), 469 U.S. 412; *State v. Rogers* (1985), 17 Ohio St.3d 174, 17 OBR 414, 478 N.E.2d 984, paragraph three of the syllabus (*Rogers* I), reversed on other grounds (1987), 32 Ohio St.3d 70, 512 N.E.2d 581; *State v. Williams* (1983), 6 Ohio St.3d 281, 6 OBR 345, 452 N.E.2d 1323; *State v. Williams* (1986), *supra*; *State v. Byrd* (1987), 32 Ohio St.3d 79, 512 N.E.2d 611; *State v. Kidder* (1987), 32 Ohio St.3d 279, 513 N.E.2d 311; *Illinois v. Allen* (1970), 397 U.S. 337; *State v. White* (1968), 15 Ohio St.2d 146, 44 O.O. 2d 132, 239 N.E.2d 65, paragraph two of the syllabus (distinguished); Evid R. 404(B); *State v. Spikes* (1981), 67 Ohio St. 2d 405, 21 O.O. 3d 254, 423 N.E. 2d 1123; *Schade v. Carnegie Body Co.* (1982), 70 Ohio St. 2d 207, 24 O.O.3d 316, 436 N.E.2d 1001; *State v. Morales* (1987), 32 Ohio St. 3d 252, 513 N.E.2d 267; *Maurer*, *supra*, paragraph seven of the syllabus; *State v. Graven* (1977), 52 Ohio St.2d 112, 6 O.O.3d 334, 369 N.E.2d 1205; *State v. Adams* (1980), 62 Ohio St.2d 151, 16 O.O.3d 169, 404 N.E.2d 144; *State v. Thompson*

> (1981), 66 Ohio St.2d 496, 20 O.O.3d 411, 422 N.E.2d 855 (distinguished); *State v. Mann* (1985), 19 Ohio St.3d 34, 19 OBR 28, 482 N.E.2d 592; *State v. Ferguson* (1983), 5 Ohio St.3d 160, 5 OBR 380, 450 N.E.2d 265; *Estelle v. Smith* (1981), 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359; *Steffen*, *supra*; R.C. 2945.39(D); *Doyle v. Ohio* (1976), 426 U.S. 610 (distinguished); *Wainwright v. Greenfield* (1986), 474 U.S. 284 (distinguished); *State v. Fanning* (1982), 1 Ohio St.3d 19, 1 OBR 57, 437 N.E.2d 583; *Carter v. Kentucky* (1980), 450 U.S. 288 (distinguished); *State v. Price* (1979), 60 Ohio St.2d 136, 14 O.O. 3d 379, 398 N.E.2d 772, paragraph four of the syllabus; *State v. DeMarco* (1987), 31 Ohio St.3d 191, 31 OBR 390, 509 N.E.2d 1257 (distinguished); *Chapman v. California* (1967), 386 U.S. 18.
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> . . .
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> In summary, we find no merit in the propositions of law raised by appellant relevant to the proceedings below or to the constitutionality of this state's death penalty scheme.

Pet. App. at 306a-309a. The ineffective assistance of counsel claim at issue was raised as Proposition of Law No. 57 before the Ohio Supreme Court. It was this opinion that the Sixth Circuit reviewed through the AEDPA lens. As the Circuit Court stated it was applying AEDPA standards, quoted this Court's AEDPA standards, gave the state court decision the requisite deference, and still determined that Spisak was entitled to relief there are no grounds for this Court's review and the Petition should be denied.

2. The Sixth Circuit Properly Reviewed this Matter Under *Strickland v. Washington*, 466 U.S. 668 (1984).

Petitioner acknowledges that the Sixth Circuit identified the proper legal standard, *Strickland v. Washington*, 466 U.S. 668 (1984), applicable to this claim but asserts that the Circuit merely "paid lip service to *Strickland*." Petition at 24. Petitioner's argument is nothing more than a disagreement with the conclusions reached by the Sixth Circuit and presents no grounds for this Court's review.

Petitioner attempts to refashion the Circuit Opinion in order to create an issue that simply does not exist. Petitioner asserts that the Circuit Court must have applied *Cronic* in

spite of never citing it because the Court cited a case in which *Cronic* was an issue. *Rickman v. Bell*, 131 F.3d 1150, 1156 (6th Cir. 1997). This assertion is wrong for two reasons. First, the Circuit clearly granted relief under *Strickland*, not *Rickman*. The Court determined that Spisak satisfied both the deficient performance and prejudice prongs of *Strickland*:

> In 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." *Strickland,* 466 U.S. at 689. Defendant is correct 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 no (sic) sympathy, and is entitled to no mitigation." (Def.'s Br. at 64.) Absent trial counsel's behavior during the closing argument of the mitigation phase of the trial, we find that a reasonable probability exists that at least one juror would have reached a different conclusion about the appropriateness of death, and may have voted for life instead. Therefore, we reverse the district court's denial of habeas on this claim.
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> Pet. App. at 66a-67a.

Second, *Rickman* was not used as some sort of code for *Cronic* but simply to demonstrate the nature of the ineffective assistance of counsel. The Court noted that Spisak's counsel, as Rickman's counsel had also done, abandoned his duty of loyalty to his client. Pet. App. at 65a. The duty of loyalty to a client is a duty recognized and addressed not by *Cronic* but by *Strickland*, 466 U.S. at 688. Every citation and analogy to *Rickman* was clearly followed by review of Spisak's claim under *Strickland*. Pet. App. at 65a-66a. That the Sixth Circuit recognizes the difference between a *Strickland* claim and a *Cronic* claim is demonstrated by *Spisak* and *Rickman*. In *Spisak* the Court never cited *Cronic*, specifically refused to presume prejudice, and relied solely on *Strickland*. In *Rickman*, the

Court repeatedly analyzed the claim under *Cronic*, explained why *Cronic*'s presumption of prejudice applied, and did not apply the two-prong *Strickland* test.

On remand the Circuit clearly demonstrated that *Strickland* was the applicable standard by citing only *Strickland* in its analysis. The Court did not even cite *Rickman* demonstrating that Petitioner's argument of subversive application of *Cronic* is frivolous. Contrary to Petitioner's argument, the Circuit Court did not review this case under the presumed prejudice standard of *United States v. Cronic*, 466 U.S. 648 (1984). This is demonstrated by a review of the opinions. The Circuit never cited, let alone relied on, *Cronic* in reviewing the claim. Only by imagining that the Circuit Court decided this case on law not cited can Petitioner assert an error. However, just as it is presumed that a court follows the law it cites, it must be presumed that a court does not follow law it does not cite. *See Bell v. Cone*, 543 U.S. at 455-56. The Circuit specifically stated it was reviewing the claim under *Strickland*, identified the two-prong test of *Strickland*, never cited *Cronic*, and did not presume prejudice but specifically stated "we find that a reasonable probability exists that at least one juror would have reached a different conclusion about the appropriateness of death." Pet. App. at 67a. Since Petitioner's argument regarding *Cronic* is factually and legally incorrect, the Petition for Certiorari must be denied. The "error" Petitioner asserts simply did not happen.

3. Spisak was Denied his Sixth Amendment Right to the Effective Assistance of Counsel in the Mitigation Phase of his Capital Trial.

Noticeably absent from Petitioner's argument is any quotation of what trial counsel actually said to Spisak's jury. Only by reviewing what counsel actually said can the claim be evaluated and this is exactly what the Sixth Circuit did on its review. A review of the full record reveals that the Sixth Circuit properly understood the entire record, applied AEDPA,

and concluded that counsel unreasonably breached a duty of loyalty to his client such that there was a Sixth Amendment violation that prejudiced Spisak, and that the Ohio Supreme Court determination was contrary to, or an unreasonable application of, *Strickland*.

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

Petitioner asserts that "counsel made a strategic choice to concede certain facts about his client's character, his background, and the brutality of his criminal acts." Pet. at 31. Counsel's argument did not "concede certain facts" but instead argued that the jury must consider non-statutory aggravating circumstances (which are not permissible under Ohio law), that Spisak was unworthy of sympathy, had no good deeds, and "He is sick, he is twisted. He is demented, and he is never going to be any different." Pet. App. at 339a. There is absolutely no evidence that counsel made a strategic choice. In fact, the Sixth Circuit described sections of counsel's argument as "rambling incoherently towards the end of the closing argument about integrity in the legal system." Pet. App. at 65a. It is not sufficient to assume that counsel made a strategic decision, counsel must actually make the strategic decision and for this there is no evidence to support Petitioner's assertion. Furthermore, any strategic decision must still be "reasonable." *Strickland*, 466 U.S. at 690-91. As the Circuit determined, "Defendant is correct 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 no (sic) sympathy, and is entitled to no mitigation.'" Pet. App. at 66a-67a.

As the Circuit found, "[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. at 66a. There can be

no reasonable defense counsel strategy to make such an argument to a capital jury. The argument told the jury in no uncertain terms that a death sentence was the proper sentence.

b. Arguments by Trial Counsel.

Petitioner ignores that in the mitigation closing argument, trial counsel suggested to the jury that there 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. Let's talk first about the aggravating factors. (Emphasis added)
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> Pet. App. at 333a.

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

After denigrating the only mitigation evidence he presented, counsel then argued non-statutory aggravating circumstances warranting a death sentence. Under Ohio law only statutory aggravating circumstances can be considered by the jury. 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, 515 (2003), *citing* to *State v. Wogenstahl*, 75 Ohio St.3d 344, 356 (1996). The record demonstrates 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. at 334a.

> 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. at 334a-335a.
>
> c) ... and we all know the terror [of Coletta Dartt], or we can feel that right in the pit of our stomach. Pet. App. at 335a.
>
> 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. at 335a.
>
> 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. at 336a.

Counsel further argued that Nazi Germany, the Holocaust, and Spisak's political views were aggravating circumstances to warrant death.

> f) ... 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. Pet. App. at 336a-337a.
>
> g) ... And those clown couldn't buy 12 or 13. Pet. App. at 337a.
>
> h) ... 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. Pet. App. at 337a.
>
> i) *Aggravating circumstances, all the aggravating circumstances you ever want*. Pet. App. at 337a.

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 *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 *State v. Reynolds*, 80 Ohio St.3d 670, 679 (1998). Counsel went beyond simply discussing the suffering of the victims and their families and actively urged the jury to identify *with the victims* and use that identification as aggravating circumstances.

> j) ...[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. at 335a.
>
> k) ...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. at 336a.
>
> l) ...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. at 338a.

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

> m) ... 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. at 359a.

Finally, 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:

> n) 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 none. And, ladies and gentlemen, when you turn and look at Frank Spisak, don't look for good deeds, because he has done none. Don't look for good thoughts, because he has none.
>
> And, ladies and gentlemen, don't look to him with the hope that he can be rehabilitated, because he can't be. He is sick, he is twisted. He is demented, and he is never going to be any different.
>
> 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.
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> Pet. App. at 338a-339a.

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. 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. at 66a-67a.

Such vivid, incendiary and improper oratory violates the principle that

> [T]he right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the "ample opportunity to meet the case of the prosecution" to which they are entitled. ... That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.

Strickland, 466 U.S. at 685. The Circuit was clearly correct in determining that, had this closing argument been made by the prosecutor, it would warrant reversal and also demonstrates that Spisak was deprived of the effective assistance of counsel. And this demonstrates the prejudice visited upon Spisak. Had counsel not urged the jurors to consider non-statutory aggravators (including sympathy and identification with the victims, Nazi Germany's war crimes, and Spisak's political views), told that jurors that the only mitigating factor was that found within the jurors coupled with counsel's disavowment of the only mitigating evidence presented (Spisak's mental illnesses), and instead advocated for a life sentence, argued how Spisak's mental illness warranted a life sentence, and why his life was worth saving, there is a reasonable probability that at least one juror would have voted for a life sentence. As it is, Spisak would have been better served by counsel had counsel said nothing.

4. *Carey v. Musladin*, 127 S.Ct. 649 (2006), and *Schriro v. Landrigan*, 127 S.Ct. 1933 (2007), Do Not Affect the Circuit's Analysis or Conclusions.

Finally, this matter was previously before the Court. *Hudson v. Spisak*, 128 S.Ct. 373 (2007). Although this Court remanded the matter to the Sixth Circuit for review in light of *Carey v. Musladin*, 127 S.Ct. 649 (2006), and *Schriro v. Landrigan*, 127 S.Ct. 1933 (2007), Petitioner never cites either of these cases in the ineffective assistance of counsel claim nor makes any argument on how the cases impact the Sixth Circuit's opinion. Petitioner therefore waives any argument that *Musladin* or *Landrigan* warrants further review. That is because it is clear that *Strickland* applies to all aspects of counsel's performance, including closing arguments in mitigation. *Bell v. Cone*, 535 U.S. 685, 701-702 (2002); *Herring v. New York*, 422 U.S. 853, 865 (1975). 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). Nor is there any evidence that Spisak consented to counsel's argument, hindered counsel's performance, or in any way influenced counsel's performance. Spisak's counsel did not sharpen the issues, did not advocate for a finding that the aggravating circumstance did not outweigh the mitigating factors, or even that a life sentence was the proper and just sentence. As the Circuit found, "[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. at 66a. The Circuit's opinion did not break new ground or in any other way violate AEDPA standards of review.

For these reasons, the petition for a writ of certiorari on the issue of ineffective assistance of counsel is meritless and should be denied.

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 decisions and opinions. The Sixth Circuit's decisions create no conflict of law, will in no way create any sort of confusion in this Court's jurisprudence, nor do they 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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