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December 18, 2013

Clerk of the Court
Supreme Court of the United States
1 First Street, NE
Washington, DC 20543

RE: Bonita Hoffner v. Reginald Walker
S.Ct. No. 13-603

Dear Clerk,

Enclosed please find the original and ten (10) copies of the following pleadings that we request you file:

Motion for Leave to Proceed In Forma Pauperis
Affidavit of Indigency

Brief in Opposition to Petition for a Writ of Certiorari
to the United States Court of Appeals Sixth Circuit

Certificate of Service

Sincerely,

Jonathan Sacks
Deputy Director

Enclosures

cc: Mr. John J. Bursch, Solicitor General

No. 13-603

In The
Supreme Court of the United States

BONITA HOFFNER, Warden,
Petitioner,

vs.

REGINALD WALKER,
Respondent.

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

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AFFIDAVIT OF INDIGENCY

*** BRIEF IN OPPOSITION ***

CERTIFICATE OF SERVICE

SUBMITTED BY:
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No. 13-603

In The
Supreme Court of the United States

BONITA HOFFNER, Warden,
Petitioner,

vs.

REGINALD WALKER,
Respondent.
_____/

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent, REGINALD WALKER, who is indigent, asks leave to file the attached Brief in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit without prepayment of costs, and to proceed *in forma pauperis* pursuant to rule 39.

This Court granted respondent's previous Motion for Leave to Proceed *in forma pauperis* on July 11, 2012. The United States District Court for the Eastern District of Michigan granted respondent's Application to Proceed *in forma pauperis* on Appeal on February 11, 2010. The Respondent's affidavit in support of this application is attached hereto.

STATE APPELLATE DEFENDER OFFICE
Counsel for Respondent

BY: _____
JONATHAN SACKS (P 67389)
Deputy Director
645 Griswold Street
3300 Penobscot Building
Detroit, Michigan 48226
(313) 256-9833

Date: December 18, 2013

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, REGINALD WALKER, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	**Average monthly amount during the past 12 months**		**Amount expected next month**	
	You	Spouse	You	Spouse
Employment	$ 0	$	$ 0	$
Self-employment	$ 0	$	$ 0	$
Income from real property (such as rental income)	$ 0	$	$ 0	$
Interest and dividends	$ 0	$	$ 0	$
Gifts	$ 0	$	$ 0	$
Alimony	$ 0	$	$ 0	$
Child Support	$ 0	$	$ 0	$
Retirement (such as social security, pensions, annuities, insurance)	$ 0	$	$ 0	$
Disability (such as social security, insurance payments)	$ 0	$	$ 0	$
Unemployment payments	$ 0	$	$ 0	$
Public-assistance (such as welfare)	$ 0	$	$ 0	$
Other (specify):	$ 0	$	$ 0	$
Total monthly income:	$ 0	$	$ 0	$

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
NONE			$
			$
			$

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
NONE			$
			$
			$

4. How much cash do you and your spouse have? $_____
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
NONE		$	$
		$	$
		$	$

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☐ Home
Value 0

☐ Other real estate
Value 0

☐ Motor Vehicle #1
Year, make & model 0
Value 0

☐ Motor Vehicle #2
Year, make & model 0
Value 0

☐ Other assets
Description 0
Value 0

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
0	$ 0	$ 0
0	$ 0	$ 0
0	$ 0	$ 0

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
—	—	—
—	—	—
—	—	—

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real estate taxes included? ☐ Yes ☐ No Is property insurance included? ☐ Yes ☐ No	$ 0	$ 0
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ 0	$ 0
Home maintenance (repairs and upkeep)	$ 0	$ 0
Food	$ 0	$ 0
Clothing	$ 0	$ 0
Laundry and dry-cleaning	$ 0	$ 0
Medical and dental expenses	$ 0	$ 0

	You	Your spouse
Transportation (not including motor vehicle payments)	$ 0	$ —
Recreation, entertainment, newspapers, magazines, etc.	$ 0	$ —
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$ 0	$ —
Life	$ 0	$ —
Health	$ 0	$ —
Motor Vehicle	$ 0	$ —
Other: 0	$ 0	$ —
Taxes (not deducted from wages or included in mortgage payments)		
(specify): 0	$ 0	$ —
Installment payments		
Motor Vehicle	$ 0	$ —
Credit card(s)	$ 0	$ —
Department store(s)	$ 0	$ —
Other: 0	$ 0	$ —
Alimony, maintenance, and support paid to others	$ 0	$ —
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ 0	$ —
Other (specify): 0	$ 0	$ —
Total monthly expenses:	$ 0	$ —

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☑ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☑ No

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☑ No

If yes, how much? _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: 12- 9- _____, 2013

Reginald Walker
(Signature)

No. 13-603

In The
Supreme Court of the United States

BONITA HOFFNER, Warden,
Petitioner,

vs.

REGINALD WALKER,
Respondent.
_____/

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUBMITTED BY:
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(Counsel of Record)
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QUESTION PRESENTED

In a habeas grant where the petitioner disagrees with the result and concedes that there is no conflict or significant issue, is the extreme and unusual remedy of summary reversal appropriate?

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INTRODUCTION

There are no compelling reasons to grant the petition for certiorari. In this case, it is uncontested that counsel performed in a constitutionally deficient manner by failing to assert the only valid defense available. Counsel should have presented an insanity defense for Mr. Walker, who had a thirty year history of treatment and hospitalization for mental illness, most recently an involuntary commitment just six months before the incident. The U.S. Court of Appeals correctly held that the state court unreasonably applied Supreme Court law in determining that Mr. Walker was not prejudiced by this failure. Petitioner concedes that it is seeking fact-bound error correction, and that no important federal question is raised. Instead, petitioner argues for the extreme and unusual remedy of summary reversal. Neither summary reversal nor certiorari is appropriate.

STATEMENT OF THE CASE

A. Trial

The evidence at trial established that on April 11, 2000, Reginald Walker shot and killed Larry Troup, a complete stranger, after Mr. Troup and his companion, Walter Gaiter, purchased beer at a store. When Mr. Gaiter leaned back into Mr. Walker, who stood behind him in line, the two men exchanged words. Mr. Walker then paid for his items and shot Mr. Troup multiple times with an automatic handgun. Pet. App. 91a-92a.

After the shooting, Mr. Walker picked up the clip from the floor and walked out of the store. *Id.* Mr. Walker went to a semi-abandoned house, and placed the gun inside a hole he punched in the drywall in the bathroom. Pet. App. 30a. On three different occasions, he

provided aliases to police officers[1]. Pet. App. 90a.

At trial, Mr. Walker offered a "hybrid" defense of accident and self-defense. He testified that he accidentally fired his gun after Mr. Gaiter shot him in the hand. Pet. App. 92a. All forensic evidence and eyewitness testimony contradicted this version of events. Pet. App. 3a-4a, 34a. Both the store clerk and Mr. Gaiter observed Mr. Walker shoot Mr. Troup after they bumped in line and exchanged words. Pet. App. 4a. Neither Mr. Gaiter nor Mr. Troup had any weapons. Pet. App. 3a, 92a.

On March 1, 2001, a Michigan jury convicted Mr. Walker of first degree murder and possession of a firearm in the commission of a felony. Mich. Comp. Laws § § 750.316, 750.227b. On March 19, 2001, Mr. Walker was sentenced to life imprisonment for first degree murder plus two years consecutive imprisonment for felony firearm. Pet. App. 86a.

B. Direct Appeal and Evidentiary Hearing on Remand

Mr. Walker appealed as of right, claiming ineffective assistance of counsel for counsel's failure to investigate and present the defense of insanity. Pet. App. 91a-93a.

On January 3, 2003, the Michigan Court of Appeals held that trial counsel made an objectively unreasonable, non-strategic mistake in failing to properly investigate and raise an insanity defense. The Court of Appeals held:

> Even though an indigent defendant in Michigan, such as defendant in this case, may request an independent psychiatric evaluation by a clinician of his choice pursuant to M.C.L. § 768.20a(3), defense counsel never sought an independent psychiatric evaluation for his client and did not pursue an insanity defense at trial. Instead, trial counsel, who was clearly aware of defendant's long history of mental illness, elected to forego the presentation of an insanity defense in order to argue the defenses of accident, self-defense and intoxication based on defendant's version of the events

[1] Petitioner claims that Mr. Walker provided the three aliases to police *after* the shooting. Pet. 6. However, the trial record indicates only that on three completely separate occasions he provided different names to police officers, a fact the state court repeated. 2/28/01 Tr. at 105. Pet. Ap. 90a.

> presented at trial.
>
> Here, trial counsel's decision not to pursue an insanity defense, but to present the conflicting defenses of accident and self-defense based on defendant's testimony, was objectively unreasonable.

Pet. App. 95a. The Court of Appeals remanded for an evidentiary hearing on the remaining question of prejudice. Pet. App. 96a-97a.

At the subsequent evidentiary hearing, a forensic psychologist testified that Mr. Walker was legally insane at the time of the shooting in 2000. Pet. App. 43a-44a. Dr. Stephen Miller reported that Mr. Walker's first contact with mental health professionals was at the age of 16, at the time of his father's death, and lasted for three or four years. In 1983 he was diagnosed with severe depression and mental confusion, including hallucinations. According to Dr. Miller, "in every admission to the hospital from 1983 up through and including his admission to the Wayne County Jail and the records that I have obtained . . . indicate that he had a schizophrenic type of diagnosis." Pet. App. 128a. Mr. Walker had been in at least ten hospitals or treatment facilities over the last thirty years and had received numerous diagnoses and treatment for schizophrenic type disorders. Pet. App. 128a-130a, 256a-262a.

At the time of the incident, Mr. Walker received Social Security benefits for his mental health problems, and his mother served as his guardian. Pet. App. 3a-4a. Six months prior to the shooting, Mr. Walker's mother had him involuntarily committed for mental health treatment for symptoms that included talking to himself "all day and night." Pet. App. 4a, 35a, 133a, 261a-262a.

Dr. Miller testified that Mr. Walker was mentally ill at the time of the offense, and his diagnosis was Schizo-affective Disorder with a bipolar component. Mr. Walker had first received that diagnosis in 1990. Pet. App. 130a-131a. The delusional side of this disorder

consisted of hearing voices, including negative voices about other people's actions. His symptoms included a generalized paranoia, which Dr. Miller termed "ideas of reference": a sense that others were generally out to hurt him, as opposed to some fixed delusion. Pet. App. 131a-132a.

Mr. Walker would respond to these hallucinations, interacting with the voices. Pet. App. 132a. He suffered from a disorder that significantly impaired his capacity to recognize reality and significantly impaired his judgment and behavior. Pet. App. 132a. As a result of this mental illness, Mr. Walker lacked the substantial capacity to appreciate the nature and quality of his acts, lacked the substantial capacity to appreciate the wrongfulness of his conduct, and lacked the substantial capacity to conform his conduct to the requirements of the law. Pet. App. 133a.

In Dr. Miller's opinion, Mr. Walker was legally insane at the time of the offense. Mr. Walker's extensive psychiatric history and his involuntary commitment months before the instant offense informed this diagnosis. Pet. App. 134a. Dr. Miller described Mr. Walker's trial testimony of self-defense and a shooting to his hand in the context of a possible confabulation. Mr. Walker had described an incident several months before the offense, where two people broke into his niece's house and shot him in the hand. He could well have confused the source of his hand injury, resulting in the "memory" here that he was shot in the hand by the decedent. Pet. App. 145a-147a.

The prosecution's expert witness, Dr. Dexter Fields was aware of Mr. Walker's prior mental health hospitalizations, but stated they did not have much effect on his opinion. 199a. Dr. Fields had observed Mr. Walker's "bizarre behavior" previously and found him mentally ill in a prior case when referred for a criminal responsibility evaluation. Pet. App. 263a. Dr. Fields

acknowledged Mr. Walker's prescription for an antipsychotic medication at the time of the interview. Pet. App. 253a. Nevertheless, Dr. Fields diagnosed Mr. Walker as criminally responsible and not even mentally ill at the time of the offense. Pet. App. 196a, 265a-266a. He diagnosed an unspecified personality disorder with a history of substance abuse. Pet. App. 241a.

Dr. Miller based his evaluation on Mr. Walker's cognitive processes at the time of the shooting. Pet. App. 186a-187a. Mr. Walker's apparent goal directed behavior after the shooting had very little weight in the calculus, because such behavior could be part of a patient's delusion, and not meaningful for a diagnosis. Pet. App. 141a. Behavior such as leaving the scene of the shooting needed to be evaluated based on the clinical findings and history of insanity. Pet. App. 170a-171a. Dr. Fields agreed that someone could engage in what appeared to be goal-directed behavior, such as fleeing police and hiding a gun, but still be suffering from delusions such that he lacked the substantial capacity to appreciate the nature and quality of his acts. Pet. App. 242a, 249a-252a.

Despite the Michigan Court of Appeals conclusion that counsel performed deficiently and the court's remand only for a prejudice inquiry, the trial court nevertheless took testimony from trial counsel. Counsel knew of Mr. Walker's extensive history of mental illness and prior schizophrenia diagnosis. Pet. App. 220a-221a, 227a. Nevertheless, he did not request or review medical records, did not request the independent psychiatric evaluation to which he was entitled under Michigan law, Mich. Comp. Laws § 768.20a(3), and did not investigate and raise an insanity defense. Pet. App. 205a-207a, 211a, 220-221a. Although counsel provided a series of explanations for this decision, he admitted that he had no legitimate reason for failing to seek an independent evaluation. Pet. App. 205a-213a.

At the conclusion of the hearing, the trial court determined there was no prejudice to the

defense. Although the court discussed prejudice, its ultimate conclusion was that trial counsel's error was not prejudicial because it was not an error at all, but a "sound, legal, strategic decision." 6/4/03 Tr. at 19-28.

C. Conclusion of Direct Appeal

Following the trial court ruling, Mr. Walker appealed and the Michigan Court of Appeals affirmed. In spite of the b i n d i n g prior holding that counsel's representation fell below an objective standard of reasonableness, the state court determined that counsel was justified in failing to present an insanity defense. Pet. App. 88a-89a. The court acknowledged that the law of the case doctrine meant counsel performed deficiently, such that "the sole issue on appeal is whether defendant's claim of ineffective assistance of counsel satisfied the prejudice factor of the test." Pet. App. 88a. The court then made prejudice findings, focusing on Mr. Walker's actions after the shooting:

> Further, defendant's actions, such as picking up the clip after the shooting, leaving the scene of the crime, going into the abandoned house and hiding the gun in a hole, suggest that defendant recognized the consequences of his criminal behavior, and that his behavior was wrongful. The evidence further shows that defendant lied to police by giving them aliases on three different occasions. Even with Dr. Stephen Miller's testimony in favor of an insanity defense, in light of evidence that defendant had the consciousness of guilt, we conclude that there is not a reasonable probability that defendant had a likely chance of acquittal.
>
> Additionally, the evidence shows that defendant alleged self-defense to his counsel and, at trial, defendant testified clearly and consistently in his own behalf that he acted in self-defense. As such, we are unable to conclude that counsel's decision to advance defendant's self-defense claim deprived defendant of a substantial defense.

Pet. App. 89a-90a. The Michigan Supreme Court denied Mr. Walker's application for leave to appeal. Pet. App. 85a.

D. Federal Habeas Corpus Proceedings

Mr. Walker filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, raising the sole claim of ineffective assistance of counsel, in the United States District Court for the Eastern District of Michigan on December 21, 2006. Pet. App. 72a. The district court denied the petition on January 14, 2010 and a Certificate of Appealability issued on February 18, 2010. Pet. App. 59a, 69a. Mr. Walker appealed to the United States Court of Appeals for the Sixth Circuit, which granted his habeas petition on September 2, 2011. Pet. App. 27a. The state then filed a petition for a writ of certiorari in this Court. On June 11, 2012, this Court summarily reversed the U.S. Court of Appeals and remanded the case to be reconsidered in light of *Parker v. Matthews*, 132 S. Ct. 2148 (2012). Pet. App. 26a.

On remand, the U.S. Court of Appeals held that *Matthews* did not affect the ultimate outcome of the case because the state court had failed to apply the correct standard for ineffective assistance of counsel, and even if they had applied the correct standard, there was no reasonable application of federal law justifying the outcome in the state courts. Pet. App. 21a. Importantly, the U.S. Court of Appeals found that *Matthews* was different from Mr. Walker's case because the jury in *Matthews* heard testimony about Mr. Matthews's EED defense while Mr. Walker's jury heard absolutely no testimony about his thirty year history of mental illness. Pet. App. 21a. Therefore, the U.S. Court of Appeals reasoned, *Matthews* applied to ensure that it was applying the proper legal precedent – from this Court – when determining an "unreasonable application" of federal law. Pet. App. 21a.

REASONS FOR DENYING THE WRIT

I. Petitioner Concedes He Seeks Fact-Bound Error Correction.

A. Petitioner points to no circuit split, nor is there one.

Petitioner's question presented is, quite simply, whether the U.S. Court of Appeals was correct to grant habeas relief. Petitioner does not, indeed petitioner cannot, claim that there is a circuit split implicated by the holding or analysis of the U.S. Court of Appeals.

The U.S. Court of Appeals applied the correct underlying law for ineffective assistance of counsel as clearly established by *Strickland v. Washington*, 466 U.S. 668 (1984). The Court analyzed this law under the correct deferential AEDPA standard of review that a state court holding "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States..." Pet. App. 7a. The U.S. Court of Appeals distinguished an unreasonable application from an incorrect application per *Harrington v. Richter*, 131 S. Ct. 770 (2011). Petitioner never cites Rule 10(a) asserting a conflict between federal appellate courts on these areas of law.

B. Petitioner does not claim a significant issue for review.

Petitioner raises two questions: (1) whether the U.S. Court of Appeals properly followed *Parker v. Matthews*, 132 S. Ct. 2148 (2012); and (2) whether the state court, after finding counsel performed deficiently, made a prejudice determination that should survive habeas review. Neither presents a significant question for this Court.

The Michigan Court of Appeals held, and every court since has refused to disturb the holding, that counsel's performance was objectively unreasonable under *Strickland*. Pet. App. 95a-96a. Therefore, the only issue has been whether counsel's deficient performance prejudiced

Mr. Walker. This Court has recognized that *Strickland* holdings, especially on the prejudice prong, are intensive fact-bound inquiries. *Sears v. Upton*, 130 S. Ct. 3259, 3266 (2010).

Due to the fact-bound nature of the case here, there is no need for this Court to intervene. Petitioner does not allege and this case does not present important questions about the interpretation of *Strickland*. Both the state's petition and the U.S. Court of Appeals decision delve into the facts and circumstances of Mr. Walker's mental illness and expert testimony on insanity. Further, petitioner does not assert that this case raises important questions about the meaning or interpretation of AEDPA, because it does not. The U.S. Court of Appeals correctly applied deference to the state court decision and based the decision to grant habeas relief on a finding that the state court unreasonably applied clearly established Supreme Court law. In short, this case is not a vehicle for this Court to develop its habeas corpus or ineffective assistance of counsel law; and petitioner does not allege that it does. Certiorari should be denied.

II. Petitioner Asks Only for the Extreme and Unusual Remedy of Summary Reversal.

A. Summary reversal is only appropriate in rare cases where a court contravenes clear precedent on an issue of constitutional significance. The U.S. Court of Appeals analysis of the state court prejudice holding is not such a case.

Petitioner requests that this Court engage in error correction and overturn the U.S. Court of Appeals without full briefing on the merits. Pet. 5, 23-25. The Supreme Court "is not, and never has been, primarily concerned with the correction of errors in lower court decisions." *Boag v. MacDougall*, 454 U.S. 364, 368 (1982) (Rehnquist, J., dissenting) (citing Address of Chief Justice Vinson before the American Bar Association, Sept. 7, 1949). Summary reversal on the merits is a "rare disposition, usually reserved by this Court for situations in which the law is well settled and stable, the facts are not in dispute, and the decision below is clearly in error." *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting). Summary reversal

should only be granted when the decision to be reviewed "contravened this Court's clear precedents" on an issue of constitutional significance. *Presley v. Georgia*, 558 U.S. 209 (2010). *See also Sears v. Upton*, 130 S. Ct. 3259, 3261 (2010).

In this ineffective assistance of counsel case, the state court already found deficient performance by counsel. Petitioner quarrels with the U.S. Court of Appeals analysis of the state court prejudice inquiry and requests the extraordinary remedy of summary reversal. That is plainly not the role of this Court, as stated in Rule 10: "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." The U.S. Court of Appeals analysis does not contravene clear precedent on an issue of constitutional significance.

Petitioner makes much of other summary reversals of Sixth Circuit habeas grants, but all present situations where the Sixth Circuit contravened clear constitutional precedents rather than basic fact-bound error correction. Pet. 23. In *Bobby v. Mitts*, 131 S. Ct. 1762 (2011), this Court reversed a habeas grant on a jury instruction issue because it had "all but decided the question presented" regarding the constitutionality of penalty phase jury instructions in *Smith v. Sizak*, 558 US 139 (2010). In *Bobby v. Dixon*, 132 S. Ct. 26 (2011), this Court reversed a habeas grant because the admission of a murder defendant did not implicate constitutional concerns. In *Stovall v. Miller*, 132 S. Ct. 573 (2011), this Court reversed and remanded for further consideration based on *Greene v. Fisher*, 132 S. Ct. 38 (2011), a case that decided the *identical* legal issue six days earlier that the law at the time of the state court decision was the clearly established federal law for AEDPA purposes. In *Parker v. Matthews*, 132 S. Ct 2148 (2012), this Court reversed the Sixth Circuit's grant of habeas for again contravening clear precedent.

The Sixth Circuit wrongly based the grant on its own rather than Supreme Court precedent, and incorrectly analyzed a sufficiency of the evidence claim for habeas purposes.

In contrast, the U.S. Court of Appeals here applied the correct legal standards under AEDPA and *Strickland*, the controlling Supreme Court precedent. There is no dispute that counsel's performance was constitutionally deficient. Petitioner disagrees with the U.S. Court of Appeals finding that the state court unreasonably applied clearly established Supreme Court law on prejudice, where Mr. Walker was deprived of his only valid defense. Even in the event that the Court believes that the U.S. Court of Appeals may have erred, the error is not so clear to warrant summary disposition.

B. Petitioner mistakes the Supreme Court's prior order in this case as a judgment on the merits. It was not. It ordered reconsideration under a different legal standard which the U.S. Court of Appeals has done at length and in good faith.

Petitioner points to the prior decision of this Court granting certiorari to require the U.S. Court of Appeals to consider in light of *Parker v. Matthews*, 132 S. Ct. 2148 (2012) as proof that the U.S. Court of Appeals erred when it granted the habeas petition. Pet. 13-15. However, the prior grant of certiorari to reconsider the case is not a decision on the merits, has no precedential value, and does not require the U.S. Court of Appeals to reverse itself. *See Tyler v. Cain*, 533 U.S. 656, 666 n.6 (2001). Instead, the U.S. Court of Appeals properly reconsidered under the correct legal standard and reached the correct result.

In *Walker II*, the U.S. Court of Appeals noted that under *Matthews*, it could only use the precedents of the Supreme Court in evaluating ineffective assistance of counsel and the reasonable application of clearly established federal law. Pet. App. 9a-10a, 19a. The U.S. Court of Appeals acknowledged that in the initial habeas grant, it instead applied circuit court precedents for review of ineffective assistance of counsel. Pet. App. 9a-10a, 19a-21a. The U.S.

Court of Appeals proceeded to then grant habeas based on an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984) per this Court's AEDPA requirements. In reconsidering under the correct legal standard, the U.S. Court of Appeals granted habeas because the state court both applied the incorrect rule *and* unreasonably applied *Strickland* in finding no prejudice. Pet. App. 9a-15a

In addition to examining the habeas petition under Supreme Court law, as dictated by *Matthews,* the U.S. Court of Appeals also highlighted the major distinguishing factor between *Matthews* and Mr. Walker's case. In *Matthews*, the court improperly drew conclusions from facts that should have been left to a jury in a sufficiency of the evidence claim. 132 S. Ct. 2148, 2152-2153 (2012). This Court reinforced the principle that "it is the responsibility of the jury – not the court – to decide what conclusions should be drawn from evidence admitted at trial." *Id.* at 2152, *citing Cavazos v. Smith*, 565 U.S. 1 __ (2011). The U.S. Court of Appeals erred by analyzing the evidence – in that case of extreme emotional disturbance – when it had already been considered by a jury. The U.S. Court of Appeals in *Walker II* properly contrasted this dynamic, where the jury never had the opportunity to evaluate the defense of insanity due to ineffective assistance of counsel: "If anything, the reasoning of *Parker* [*v. Matthews*] strengthens our belief that the Michigan court's decision was unreasonable, because the state appellate court usurped the fact-finding province of the jury, which was never permitted to consider Petitioner's claim of legal insanity." Pet. App. 20a.

The U.S. Court of Appeals granted habeas in *Walker II* under the proper legal standard of *Parker v. Matthews* because the state court unreasonably applied *Strickland.* The U.S. Court of Appeals also distinguished *Matthews* from the case at hand. The U.S. Court of Appeals in this

case complied with this Court's remand order and carefully analyzed the relevant and correct law.

III. The U.S. Court of Appeals Correctly Held that the State Court Unreasonably Applied Clearly Established Federal Law in Finding no Prejudice for the Failure to Raise his Only Valid Defense, that of Insanity.

The Michigan Court of Appeals held that counsel performed deficiently in failing to investigate and evaluate the defense of insanity. Pet. App. 94-96a. According to the court, "trial counsel, who was clearly aware of defendant's long history of mental illness, elected to forego the presentation of an insanity defense in order to argue the defenses of accident, self-defense and intoxication based on defendant's version of the events presented at trial." Pet. App. 95a. The only issue then on habeas review is whether the state court unreasonably applied *Strickland* in finding no prejudice to counsel's deficient performance. The U.S. Court of Appeals properly granted habeas due to the overwhelming evidence of insanity that a jury never had the opportunity to evaluate.[2]

At the post-conviction hearing, Dr. Miller presented a finding of insanity based on Mr. Walker's thirty year history of hospitalization for mental illness, most recently six months prior to the shooting, his prior diagnosis of schizophrenia, an evaluation of the shooting, and an interview. Without such an expert, Mr. Walker was deprived of a viable trial defense – indeed, the only viable defense. There is thus sufficient prejudice on habeas review because the state court unreasonably applied the *Strickland* prejudice standard of a reasonable probability of a different result. *Strickland*, *supra*, 466 U.S. at 694.

[2] Petitioner claims that "fairminded jurists" disagree with this holding, but the Michigan Supreme Court simply denied leave without a finding on the merits, and the District Court and dissenting U.S. Court of Appeals judge each relied on AEDPA deference, not an agreement with the state court on prejudice. Only the state court and the magistrate judge made the faulty prejudice finding.

In affirming the trial court's finding that no prejudice came from counsel's unreasonable performance, the Michigan Court of Appeals made three basic findings: (1) that trial counsel justifiably rejected an insanity defense; (2) that an insanity defense would have been unsuccessful; and (3) that Mr. Walker clearly testified to and presented a substantial claim of self-defense. Pet. App. 88a-90a. Each of these findings represents an unreasonable application of federal law.

First, despite the previous determination of deficient performance, the state court relied on counsel's justification that even with an independent forensic evaluation, he still would have rejected an insanity defense. Pet. App. 88a-89a. The state court opinion discussed at length counsel's strategy and decisions within the context of its prejudice analysis:

> Therefore, counsel believed that even if he could obtain an independent evaluation to support defendant's insanity defense, it would not have had much effect on the jury's decision. Counsel was concerned about a compromise verdict finding defendant guilty but mentally ill. Because mental illness short of legal insanity does not relieve a defendant from criminal responsibility, defendant failed to show that he had a meritorious insanity defense, and thus, failed to show that counsel was ineffective for failing to present such a defense.

Pet. App. 89a (internal citation omitted). This selection is typical of the state court's flawed legal analysis on prejudice. The state court analysis is an unreasonable application of federal law because it virtually neglects prejudice in favor of revisiting the already resolved deficient performance issue.

This Court has recognized just this sort of flawed prejudice inquiry and deemed it to be an unreasonable application of federal law. In *Sears v. Upton,* 130 S. Ct. 3259, 3265 (2010), this Court criticized the state court for improperly basing a prejudice inquiry on counsel's reasonableness in the context of a mitigation theory:

> First, the court curtailed a more probing prejudice inquiry because it placed undue reliance on the assumed reasonableness of counsel's mitigation theory. The court's determination that counsel had conducted a constitutionally deficient mitigation investigation, should have, at the very least, called into question the reasonableness of this theory. And, more to the point, that a theory might be reasonable, in the abstract, does not obviate the need to analyze whether counsel's failure to conduct an adequate mitigation investigation before arriving at this particular theory prejudiced Sears. The 'reasonableness' of counsel's theory was, at this stage in the inquiry, beside the point: Sears might be prejudiced by his counsel's failures, whether his haphazard choice was reasonable or not.

Hereto, the state court determined there was no prejudice based on a misplaced focus on counsel's decisions to not present the insanity defense, which was beside the point once the court found deficient performance. The U.S. Court of Appeals rightly held this error an unreasonable application of federal law. Pet. App. 13a-14a.

Second, the state court unreasonably applied *Strickland* in requiring proof that an insanity defense would have led to acquittal. Pet. App. 90a. Where the failure to even present the only valid defense "undermines the reliability of the result of the proceeding," there is prejudice, regardless of some possibility of the identical verdict. *Strickland*, 466 U.S. at 693. In the death penalty context, this Court held:

> This evidence adds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury, and although we suppose it is possible that a jury could have heard it all and still decided on the death penalty, that is not the test. It goes without saying that the undiscovered "mitigating evidence, taken as a whole, 'might well have influenced the jury's appraisal' of ... culpability, and the likelihood of a different result if the evidence had gone in is "sufficient to undermine confidence in the outcome" actually reached at sentencing. *Rompilla v. Beard*, 545 U.S. 374, 393 (2005).

The U.S. Court of Appeals properly highlights the state court's misplaced requirement of an acquittal rather than evidence of insanity that undermined confidence in the outcome. Pet. App.

11a-13a. The state's request for summary reversal focuses on this analysis, pointing out that the state court decision also cites the correct *Strickland* standard, and that there is support for the state's interpretation. Pet. 16-19. The point here is that the state court shrugs aside significant and overwhelming evidence of a successful insanity defense by asserting there would not have been an acquittal. Such an application of *Strickland* is unreasonable because the key is the reliability of the proceeding:

> An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower. The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome. *Strickland*, 466 U.S. at 694.

Compare Knowles v. Mirzayance, 556 U.S. 111 (2009) (holding there was no prejudice where counsel withdrew an insanity defense because the jury had *already* rejected testimony about defendant's mental condition when the state bore the burden of proof).

The only actual prejudice analysis in the state court decision examines Mr. Walker's actions after the shooting, such as concealing evidence, and concludes no probability of acquittal because of "consciousness of guilt." Pet. App. 89a-90a. In reaching this conclusion, the Michigan Court of Appeals engaged in the analysis discredited by *Rompilla*; that since a jury *could* still have convicted with an insanity defense, there is no prejudice. Instead, the proper analysis focuses on whether the unreasonable failure to offer a potentially successful defense undermines confidence in the outcome. *Strickland*, 466 U.S. at 693-694.

The undisputed record belies the state court's conclusion that evidence of Mr. Walker's consciousness of guilt meant no possibility of acquittal on an insanity defense. The state court focused on Mr. Walker's actions after the shooting rather than the actual offense. But Dr. Miller

explained that the insanity diagnosis stemmed from Mr. Walker's cognition during the shooting, not his behavior after the shooting. Even Dr. Fields acknowledged that an individual suffering from insanity could exhibit goal-directed behavior.

As the U.S. Court of Appeals observed:

> Petitioner had a long history of mental illness. Despite being only 46 years old at the time of trial, he received Social Security Disability benefits as a result of mental health issues. His medical history indicated that Petitioner had been hospitalized many times, starting in 1983, for various "schizophrenic" illnesses. While he had been prescribed anti-psychotic medications since 1983, he had not always taken them. Treatment at several different hospitals had resulted in diagnoses of "paranoid schizophrenia, generalized schizophrenia, schizoaffective disorder, depression, bi-polar disorder, and alcohol dependence." At multiple times, Petitioner reported to doctors that he had suicidal or homicidal feelings, and that he had been hearing voices. Within the six months preceding the shooting, Petitioner's mother, who was an appointed guardian to him, had him involuntarily committed to a treatment facility because of acute psychotic symptoms. Pet. App. 3a-4a (internal citations omitted).

The U.S. Court of Appeals properly found that had a jury heard this evidence coupled with expert testimony, it would have contextualized evidence involving the actions of Mr. Walker in hiding the gun, removing the clip, and providing false names. Pet. App. 21a.

Finally, the state court found that Mr. Walker:

> alleged self-defense to his counsel and, at trial, defendant testified clearly and consistently in his own behalf that he acted in self-defense. As such, we are unable to conclude that counsel's decision to advance defendant's self-defense claim deprived defendant of a substantial defense.

Pet. App. 90a. The Court of Appeals unreasonably applied federal law by again making a finding that is inapplicable in light of its finding of deficient performance, and irrelevant to a determination of prejudice. In the initial opinion on the case, the Court of Appeals found that "trial counsel's decision not to pursue an insanity defense, but to present the conflicting defenses

of accident and self-defense based on defendant's testimony, was objectively unreasonable." Pet. App. 95a. Therefore, the court erred under *Sears v. Upton*, *supra* in subsequently finding no prejudice because of a vigorous self-defense claim at trial.

Indeed, it is only the insanity claim that provides context to the objectively unreasonable self-defense theory based on Mr. Walker's testimony. Multiple eyewitnesses observed Mr. Walker shoot Mr. Troup with no provocation and police confirmed that neither the victim nor Mr. Gaiter had a gun. The fact that Mr. Walker's testified "clearly and consistently in his own behalf that he acted in self-defense" provides perhaps the best indication of prejudice through counsel's objectively unreasonable decision not to offer and investigate an insanity defense. In a vacuum Mr. Walker testified to a false account of events. However, coupled with the diagnosis of Dr. Miller, he genuinely described the psychotic and delusional behavior that resulted from his insanity. Regardless, it was for the jury to evaluate this valid insanity defense that would have produced a reasonable probability of a different result, as required by *Strickland.* In finding otherwise, the Michigan Court of Appeals unreasonably applied *Strickland.*

In *Parker v. Matthews*, 132 S. Ct. 2148 (2012), this Court makes it clear that AEDPA imposes a "highly deferential" standard that prohibits second guessing reasonable decisions of state courts. In *Walker II*, the U.S. Court of Appeals properly showed this deference in finding that the state court unreasonably applied *Strickland* when counsel's deficient performance deprived Mr. Walker of his only valid defense. The state court's finding of no prejudice represents an "extreme malfunction" that warranted the habeas grant by the U.S. Court of Appeals. *Harrington v. Richter*, 131 S. Ct. 770, 786-787 (2011).

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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December 18, 2013

No. 13-603

In The
Supreme Court of the United States

BONITA HOFFNER, Warden,
Petitioner,

vs.

REGINALD WALKER,
Respondent.
_____/

CERTIFICATE OF SERVICE

Jonathan Sacks, Counsel of Record in this matter, hereby certifies that on December 18, 2013, that he mailed one copy of the following:

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS
AFFIDAVIT OF INDIGENCY

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

via first class U. S. Mail with postage prepaid to:
Mr. John J. Bursch
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