

**IN THE SUPREME COURT OF OHIO**

STATE OF OHIO,	)	
	)	
Plaintiff-Appellee	)	
	)	
	)	Case No. 89-722
	)	
vs.	)	
	)	
JOHN G. SPIRKO, JR.	)	DEATH PENALTY CASE
	)	
Defendant-Appellant	)	

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**DEFENDANT’S OPPOSITION TO STATE’S MOTION TO SET EXECUTION DATE  
OR, ALTERNATIVELY, DEFENDANT’S MOTION TO HOLD STATE’S MOTION TO  
SET EXECUTION DATE IN ABEYANCE PENDING RULING BY THE UNITED  
STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO**

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CHARLES E. KENNEDY  
Van Wert County Prosecutor  
101 East Main Street  
Van Wert, Ohio 45891  
  
COUNSEL FOR APPELLEE

JOHN J. CALLAHAN\* (0016285)  
\*Counsel of Record  
5580 Monroe Street  
Sylvania, OH 43560-2538  
(419) 885-3597  
  
THOMAS C. HILL  
ALVIN DUNN  
Pillsbury Winthrop  
Shaw Pittman LLP  
2300 N Street, N.W.  
Washington, D.C. 20037  
(202) 663-8000  
  
COUNSEL FOR APPELLANT

Defendant-Appellant John G. Spirko, Jr., by counsel, respectfully requests that the Court deny the State's Motion to Set Execution Date or, in the alternative, hold the State's Motion in Abeyance pending a ruling by the United States District Court for the Northern District of Ohio on Spirko's Motion for Relief from Judgment pending in that court.

### **ARGUMENT**

#### **Spirko Has A Motion Pending Before The Federal District Court**

On April 21, 2005, Spirko will file a Motion for Relief from Judgment in the United States District Court for the Northern District of Ohio, seeking relief from the judgment entered in this matter on July 18, 2000, denying his petition for writ of habeas corpus for the reasons stated in that Court's order dated July 11, 2000. A copy of that Motion and the accompanying exhibits is attached hereto as Attachment A.

Spirko will file the Motion for Relief from Judgment pursuant to Federal Rule of Civil Procedure 60(b) because he has just obtained new evidence – directly from Paul Hartman, who was the lead investigator and chief State witness at trial – demonstrating that the federal court's judgment was procured by fraud that included misrepresentations and misleading statements made by the State to the District Court. Hartman has just now stated that a key element of the State's case at trial was false, that he knew it was false at the time of the trial, that he shared his conclusion and the evidence supporting it with the prosecuting attorney and other members of the prosecution team, and that the State as well knew it was false at the time of the trial, all contrary to the representations and argument of the State before the District Court and again on appeal before the United States Court of Appeals for the Sixth Circuit Court.

The State obtained its conviction and death sentence against Spirko by presenting evidence at trial and arguing to the jury that Spirko kidnapped and murdered Betty Jane Mottinger with Delaney Gibson, “his best friend in the whole world.” Trial Transcript 3744 (Exhibit 1 of Attachment A). Indeed, the Sixth Circuit in its 2-1 majority opinion upholding the judgment of the District Court held that “it is true that Gibson was indicted for the murder, and the state viewed him as probably having been the chief perpetrator.” *Spirko v. Mitchell*, 368 F.3d 603, 611 (6<sup>th</sup> Cir. 2004). Proving that Gibson was involved in the Mottinger crime was critical to the State’s case because the State was unable with certainty to place Spirko at the crime scene at the time Mrs. Mottinger was kidnapped, but the State did have an eyewitness who thought she had seen Gibson there.

Spirko’s attorneys have just discovered new evidence demonstrating that the State actively misled the federal court. Paul Hartman, the lead investigator and the State’s most important witness at the trial, has now stated unequivocally that he had concluded prior to the trial that Gibson could not have been in Elgin at the time of the crime and, indeed, had absolutely nothing to do with the crime. Moreover, Hartman stated that prior to Spirko’s trial he shared his conclusion that Gibson was not involved with the crime – and the extensive evidence he had developed to support that conclusion – with Thomas Strausbaugh, his supervising investigator who testified at trial, and with Stephen Keister, the lead prosecuting attorney at the trial. Hartman also has stated that he shared his conclusion with the Capital Crimes Unit of the Ohio Attorney General’s Office, which has been representing the State in these proceedings.

Hartman has recently made the same statements – that he had concluded prior to the trial that Gibson had absolutely nothing to do with the crime and that he had shared this conclusion with the prosecutors prior to the trial – on at least three separate occasions to at least three people

or groups of people: (1) in April or May of 2004, Hartman made the statements to Connie Mottinger, the wife of Clarence Mottinger, Betty Jane Mottinger's widower (*see* affidavit of Connie Mottinger at Exhibit 3 of Attachment A); (2) on January 11, 2005, Hartman made the statements in a taped interview with Bob Paynter, projects editor at the Cleveland Plain Dealer (*see* Sandra Livingston and Bob Paynter, *New Claim Raised in Spirko Case*, Cleveland Plain Dealer, April 10, 2005 at Exhibit 5 of Attachment A); and (3) on April 5, 2005, and April 7, 2005, Hartman made the statements to Spirko's counsel over the telephone (*see* affidavit of Thomas Hill at Exhibit 9 of Attachment A).

The State has denied knowingly presenting untrue testimony or argument. Now that Hartman has chosen to speak, it is abundantly clear for the first time in this case that the State indeed procured Spirko's conviction and death sentence by knowingly misleading the jury and that the State has preserved that conviction and death sentence by continuing to knowingly mislead the U.S. District Court and the Sixth Circuit, as well as the Ohio state courts that earlier considered Spirko's post-conviction petitions. In *In re Abdur'rahman*, 392 F.3d 174 (6th Cir. 2004), the United States Court of Appeals for the Sixth Circuit, sitting *en banc*, concluded in a habeas case that "the purpose of a Rule 60(b) motion is to allow a district court to reconsider its judgment when that judgment rests on a defective foundation." *Id.* at 179. *See also Alley v. Bell*, No. 04-5596, 2005 U.S. App. LEXIS 6277, at \*1 (6th Cir. 2005). The District Court, where Spirko seeks an expedited hearing on his Motion for Relief, is now evaluating the impact of Hartman's acknowledgement that the State presented a false case at trial and has continued to mislead the court. Had the State not misled the District Court and had the State acknowledged that the prosecution team, led by Hartman, knew that the Gibson evidence and theory was false, the court's evaluation of Spirko's habeas arguments would have been different. At a bare

minimum, the District Court would have granted Spirko an evidentiary hearing on his habeas claims.

**CONCLUSION**

Spirko asks this Court to deny the State's Motion to Set Execution Date or, in the alternative, hold the State's Motion in Abeyance pending a ruling by the District Court on the Motion for Relief from Judgment pending there. The State should not be permitted to execute Spirko while a decision is still pending in the federal court on this brand-new evidence of fraud on the courts.

Dated: April 20, 2005

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John J. Callahan", written over a horizontal line.

John J. Callahan  
5580 Monroe Street  
Sylvania, OH 43560-2538  
(419) 885-3597

and

Thomas C. Hill  
Alvin Dunn  
Jonathan Gannon  
Ashley McDonald Delja  
Pillsbury Winthrop Shaw Pittman LLP  
2300 N Street, N.W.  
Washington, D.C. 20037  
(202) 663-8000

*Counsel for Defendant-Appellant John G. Spirko, Jr.*

## CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of April, 2005, a copy of the foregoing Opposition To State's Motion To Set Execution Date, Or, Alternatively, Defendant's Motion To Hold State's Motion To Set Execution Date In Abeyance Pending Ruling By The United States District Court For The Northern District Of Ohio was served by first class U.S. Mail on the following counsel of record:

Charles E. Kennedy  
Van Wert County Prosecutor  
101 East Main Street  
Van Wert, Ohio 45891

Charles L. Wille, Esq.  
Principal Assistant Attorney General  
30 East Broad Street, 23<sup>rd</sup> Floor  
Columbus, OH 43215-7055

  
Ashley McDonald Delja