CASE NO.: _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2021

MAURICE O. BYRD, JR.
Petitioner

vs.

STATE OF TENNESSEE
Respondent

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

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QUESTION PRESENTED FOR REVIEW

I. Does grossly inadequate representation on appeal by appellate counsel, counsel acting after announcing an actual conflict of interest was the basis to withdraw, and/or abandonment of an appeal amount to a structural error where prejudice can be presumed for *habeas corpus* and/or state post-conviction relief purposes?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page of this petition. Petitioner has been incarcerated for approximately ten (10) years and has no personal or corporate affiliations which may be subject to this petition or could create a conflict of interest with any of the members of this Honorable Court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES
CASES

STATUTES/CONSTITUTIONS/RULES

OPINIONS BELOW

Maurice O. Byrd, Jr., ("Mr. Byrd"), was convicted by jury of First Degree Murder (Felony Murder) under Tenn. Code Ann. § 39-13-202(a)(2). [App. A at A-1, *1-*2]. On direct appeal, the only issue presented was sufficiently of evidence based solely on *State v. Crawford*, 470 S.W.2d 610 (Tenn. 1971) (the "web of guilt"). The problem was, as the State pointed out by the Appellee's brief, that *Crawford* was overruled, by name, several months prior to Mr. Byrd's Appellant's brief being filed by *State v. Dorantes*, 331 S.W.3d 370 (Tenn. 2011). [App. A at A-9, *26]. Counsel for Mr. Byrd did not respond to the State's claim in the Appellee's brief that *Crawford* was specifically nullified by the Tennessee Supreme Court's published *Dornates* opinion. [App. G at G-2, pt. 2.3]. The direct appeal decision for Mr. Byrd was rendered by the Tennessee Court of Criminal Appeals in an unpublished decision on November 29, 2012. [App. A at A-1, *1]. The Tennessee Supreme Court denied T.R.A.P. 11 permissive appeal on direct appeal in an unpublished decision dated December 11, 2013. [App. B at B-1, *1].

Mr. Byrd timely sought post-conviction relief on the basis of ineffective assistance of counsel, which was denied in an unpublished decision rendered by the Tennessee Court of Criminal Appeals on August 24, 2017. [App. C at C-1, *1]. The focus of this appeal asserted that arguing law that has been overruled, ***by name***, in a published opinion as the sole basis for reversal, and then failing to offer absolutely no response or explanation for arguing the overruled *Crawford* decision, was a structural defect allowing presumed prejudice and that Mr. Byrd's retained appellate counsel had previously withdrawn ***from this case*** due to an actual conflict of interest. [App. G at G-3 to G-4, pt. 5.1 and App. C-

12, at *33]. The Tennessee Supreme Court, in an unpublished ruling, denied permissive appellate review under T.R.A.P. 11 on November 16, 2017. [App. D at D-1, *1].

A timely petition for *habeas corpus* was filed by Mr. Byrd arguing the structural defect issue. The United States Magistrate Judge made an unpublished report and recommendation (R&R) on February 26, 2021 recommending denial of the petition. [App. E at E-1, *2]. The United States District Court for the Middle District of Tennessee, speaking through the Honorable Aleta A. Trager, adopted the R&R in full in an unpublished opinion dated March 29, 2011 and denied the *habeas* petition. [App. F at F-1, *1]. This opinion also denied a 28 U.S.C. § 2253(a) Certificate of Appealability ("COA"). [App. F aft F-6, *14-*15]. On November 12, 2021, the United States Court of Appeals for the Sixth Circuit, speaking through the Honorable Ralph G. Guy, Jr., denied the certificate of appealability under 28 U.S.C. § 2253(c)(1) in an unpublished opinion dated November 12, 2021. [App. H at H-2 to H-3, at *4-*5].

STATEMENT OF JURISDICTION

This Honorable Court may review this case pursuant to 28 U.S.C. § 1254(1) as this petition is questioning a decision of a federal appellate court.

CONSTITUTIONAL PROVISIONS INVOLVED

Sixth Amendment, U.S. Constitution:

> "In all criminal prosecutions, the accused shall enjoy the right…to have the Assistance of Counsel for his defence."

Fourteenth Amendment of the U.S. Constitution:

> "…no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive a person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner, Maurice O. Byrd, Jr., was convicted of Felony First Degree Murder in violation of Tenn. Code Ann. § 39-13-202(a)(2) (Aggravated Robbery was underlying felony where death occurred). [App. A at A-3, *1-*2]. Mr. Byrd was ordinally appointed attorney Carrie W. Gasaway, (now disbarred), who withdrew as counsel of record claiming an actual conflict of interest existed. [App. E at E-7, *16]. Attorney H. Reid Poland, III was appointed and tried the case. [App. C at C-9, *25]. After trial, but before filing a motion for new trial, attorney Carrie W. Gasaway was retained by Mr. Byrd's mother to present an appeal. [App. C at C-10, *27-*28]. Ms. Gasaway filed a motion for new trial "marker motion"[1] for the case, claiming sufficiency of evidence and ineffective assistance of counsel against Mr. Byrd's appointed trial counsel. [App. C at C-10, n.2]. This marker motion was later amended to proceed solely on sufficiency of evidence and abandoning the ineffective assistance of counsel claim. [App. C at C-10, n.2]. Ms. Gasaway never talked with Mr. Byrd's appointed trial counsel about potential appellate issues. [App. C at C-13, *34]. Appointed trial counsel testified that here were several procedural evidentiary issues he would have included on appeal and in the motion for new trial, had appointed counsel not been replaced by Ms. Gasaway. [App. C at C-9, *25]. In Tennessee, issues not listed in a motion for new trial are generally considered waived on direct appeal. [*See*, *State v. Robinson*, 239 S.W.3d 211, 224 (Tenn. Crim. App. 2006)].

[1] "Marker Motion" is a filed motion for new trial that is filed primarily to ensure that the time limit for filing is not lost, with a *caveat* that the motion will be amended and supplemented later. [App. E at E-5, *11].

On direct appeal, sufficiency of evidence was the only issue argued by trial/appellate counsel for Mr. Byrd. [App. E at E-12, *29].[2] Mr. Byrd's appellate counsel based the sole argument exclusively on a circumstantial "web of guilt" platform in the Appellant's brief pursuant to State v. Crawford, 470 S.W.2d 610, 612 (Tenn. 1971). [App. E at E-12, *29]. The State, in their Appellee's brief, noted that the Tennessee Supreme Court, in *State v. Dorantes*, 331 S.W.3d 370 (Tenn. 2011), overruled *Crawford*, ***by name***, several months prior to counsel filing Mr. Byrd's Appellant's brief in Mr. Byrd's direct appeal. [App. E at E-12, *30]. Counsel did not file a reply brief addressing the overturned *Crawford* decision and oral arguments were not requested. [App. G at G-3, pt. 4.4 and App. E at E-6, *13-*15]. Basically, the *Dorantes/Crawford* issue brought out in the State's Appellee's brief went unanswered by Mr. Byrd's counsel. The Tennessee Court of Criminal Appeals specifically noted that the *Crawford* argument as follows:

> …the State correctly notes hat the Defendant's arguments are based entirely on legal precedents explicitly overruled by our supreme court in Dorantes. The Defendant's assertion that because his conviction was based solely upon circumstantial evidence the State was required to rule out every reasonable hypothesis except that of guilt is simply no longer the law in Tennessee.

[App. A at A-10, *30].

On both post-conviction and *habeas corpus*, Mr. Byrd argued that his direct appeal counsel as grossly inadequate for arguing overruled law and/or abandoning the appeal after this malfeasance came to light, which amounts to a structural error as

[2] Attorney Carrie W. Gasaway and Attorney John E. Herbison have both been barred from practicing law in Tennessee. *See, In Re: John Herbison*, 2014 Tenn. Lexis 1134 (Tenn. 11/20/2014) and *In Re: Carrie Watson Gasaway*, Appeal No. M2018-00815-SC-BAR-BP (Tenn. 5/7/2018). Mr. Herbison is now listed on disability status for not practicing law. Ms. Gasaway's disbarment stemmed from various issues, including a criminal conviction. [App. E at E-12, *30].

discussed in *Arizona v. Fulminate*, 499 U.S. 279 (1991) and/or *Moman v. State*, 18 S.W.3d 152 Tenn. 1999). [App. C at C-12, *32; App. E at E-15 to E-16, *39-*41; and App. F at F-4 to F-5, *9-*12].

Mr. Byrd's appointed trial counsel, H. Reid Poland, III, testified at a July 17, 2014 post-conviction hearing as follows:

> Counsel testified he represented the Petitioner at trial. Following the trial, Counsel learned that the Petitioner planned to retain someone else. Counsel agreed that there were issues that arose during the trial that, had he remained on the case, he would have pursued in the motion for new trial.
>
> Counsel testified that, in his opinion, it is important to Sherardize cases in order to know whether the law had been overturned or modified. He confirmed that attorneys are not to cite as precedent caselaw that has been overturned. Counsel further agreed that he had an "ethical obligation" to address, upon learning of it, a "blatant obvious and fatal defect" in an appellate brief. Counsel opined that it would be a "dangerous proposition for [a] client "if an attorney became aware of overturned case law relied upon in a brief, and the attorney did not address it."

[App. C at C-9 to C-10, *25]. Ms. Gasawy agreed, stating, "She further agreed that if a 'glaring error' in the Appellant's brief was pointed out by the Appellee, as appellate counsel she would try to address the issue." [App. C at C-11, *29]. Since no reply brief was filed and Ms. Gasaway, in 2014, still did not know about *Dorantes*, it is reasonable to presume she did not bother reading the State's brief in Mr. Byrd's case. [*Id*. at *30]. Ms. Gasaway "conceded that such an error would 'probably' provide a reasonable basis for finding ineffective assistance of appellate counsel." [*Id*].

Mr. Byrd's mother, Sandra McQueen, testified at a March 30, 2015 continued post-conviction relief hearing that she spoke with Ms. Gasaway solely by phone and Ms. Gasaway never mentioned previously representing Mr. Byrd or withdrawing from Mr. Byrd's case due to an actual conflict of interest. [App. C at C-12, *33]. This Honorable Court, in Smith v. Robbins, 528 U.S. 259, 287 (2000) held that "when counsel is burdened by an actual conflict of interest," presumed prejudice exists for ineffective assistance of counsel purposes. [App. H at H-3, *4].

The United States District Court for the Middle District of Tennessee, (the Honorable Aleta A. Trauger), noted that the case of *Cooper v. State*, 847 S.W.2d 521 (Tenn. Crim. App. 1992), in *dicta* potentially, but not conclusively, supports Mr. Byrd's position that presumed prejudice may apply to a complete abandonment of an appeal or gross and complete failure of adequate attorney representation. [App. F at F-5, *12 and *12 n.1].

Other relevant facts my be set out in the reasons for granting the petition section of this brief.

REASONS FOR GRANTING THE WRIT

I. This Honorable Court should grant this petition to address an important question of law that is likely to re-occur in State, Federal and Tribal courts, namely that an attorney who offers grossly incompetent representation meets the *Powell v. Alabama*, 287 U.S. 45, 68 (1932) criteria that "the right to the aid of counsel is of…[a] fundamental character" or that said actions (or lack of action) amounts to a structural error for which prejudice can be presumed for ineffective assistance of counsel purposes.

The District Court, the Honorable Aleta A. Trauger, held that prejudice may be presumed under *Strickland v. Washington*, 466 U.S. 668, 692 (1984) "when a defendant has suffered an actual or constructive denial of the assistance of counsel altogether," quoting *Smith v. Robbins*, 528 U.S. 259, 286 (2000). [App. F at F-4, *10]. The Sixth Circuit reads this to mean, "The lodestar that guides courts presume prejudice is whether the attorney's actions effectively deprived the defendant of the appellate process altogether." [App. H at H-2, *3-*4]. According to the Sixth Circuit, this is limited to "only when a defendant is denied appellate counsel or when appellate counsel fails to file a notice of appeal." [App. H at H2, *4]. XIVth Amendment Due Process differs when the abandonment of a case comes before a notice of appeal is filed, but not after? That is simply illogical. The District Court also approved a factual finding of the Magistrate Judge as follows:

> As the state post-conviction court and the Magistrate Judge here recognized, the petitioner's counsel's reliance on Crawford several months after Dorantes had been issued was clearly erroneous.

[App. E at E-4, *8]. This factual finding conforms with the following statement from the Tennessee Court of Criminal Appeals, opinion in Mr. Byrd's case which states the following:

> Appellate counsel testified that she was unfamiliar with State v. Dorantes, 331 S.W.3d 370 (Tenn. 2011). She confirmed that she was unaware that the Dorantes case changed "the whole issue on sufficiency and guilt, direct versus circumstantial" evidence. Appellate counsel stated that she would be surprised if the law relied upon in the Petitioner's brief was incorrect…She stated she had not seen the State's brief identifying an error of that nature…Counsel conceded that such an error would "probably" provide a reasonable basis for finding ineffective assistance of counsel.

[App. C at C-11, *29-*30].

The situation at hand is a classic example of Justice Brennan's "asleep at the wheel" warning from his *Strickland* dissent. [*Strickland v. Washington*, 466 U.S. 668, 703 n.2].[3] It is not at issue that blatant attorney error exists in this case – be it counsel being "asleep at the wheel" or that counsel abandoned the appeal outright, (as Justice Alito finds can amount to an "extraordinary" circumstance), justifying allowing a ***habeas corpus*** petition to be heard outside of the normal statute of limitations time period due to the structural issue of the attorney ceasing to act as the defendant's agent without notice. [Maples v. Thomas, 565 U.S. 226, 281-283 (2012)].

Irrespective of whether trial counsel's actions amount to total incompetence or active abandonment, the result is identical – a structural defect. Mr. Byrd's direct appeal case argued law that was, ***by name***, overruled in a published opinion of the Tennessee Supreme Court.[4] The question at hand is whether or not total abandonment of an appeal

[3] Justice Brennan's footnote reads, "…counsel's incompetence can be so serious that it rises to the level of a constructive denial of counsel which can constitute constitutional error without any showing of prejudice…(Prejudice is inherent in this case because unconscious or sleeping counsel is equivalent to no counsel at all"). [Parenthetical in original text].

[4] In *State v. Crawford*, 470 S.W.2d 610, 613 (Tenn. 1971), the Tennessee Supreme Court made the following circumstantial evidence "web of guilt" standard saying:

or a total failure to accurately research and present controlling caselaw amounts to a "structural defect" as discussed in *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991); *Entsminger v. Iowa*, 386 U.S. 748 (1967); *Evitts v. Lucey*, 469 U.S. 387 (1985); or *Momon v. State*, 13 S.W.3d 152 (Tenn. 1999)? It is important to remember that Mr. Byrd cannot waive his appeal by counsel's abandonment. *See generally*, *Johnson v. Zerbet*, 304 U.S. 458, 464 (1938)]. Under *Gideon v. Wainwright*, 372 U.S. 335, 339-340 (1963), the complete denial of counsel amounts to a *Fulminante* "structural defect," where prejudice is presumed for VIth Amendment purposes. [*Momon*, 18 S.W.3d at 165-166]. Likewise, prejudice can be presumed where an actual conflict of interest exists. [*Strickland v. Washington*, 466 U.S. 668, 692 (1984) and *U.S. v. Schwartz*, 283 F.3d 76, 95 (2nd Cir. 2002)].

The Tennessee Court of Criminal Appeals, in Mr. Byrd's post-conviction appeal, opined that:

> The Petitioner correctly identifies deficiencies with Appellate Counsel's performance; however, he has failed to show prejudice. Appellate Counsel relied on old law about circumstantial evidence rather than current law even after the State identified this error the brief.

> In order to convict on circumstantial evidence alone, the facts and circumstances must be so closely interwoven and connected that the finger of guilt is pointed unerringly at the defendant and the defendant alone. A web of guilt must be woven around the defendant from which he cannot escape and from which facts and circumstances the jury could draw no other reasonable inference save the guilt of the defendant beyond a reasonable doubt. Mere suspicion and straws in the wind are not enough for circumstances take strange forms.

The Tennessee Supreme Court, in *State v. Dorantes*, 331 S.W.3d 370 (Tenn. 2011), spent three (3) pages in the Southwestern Reporter to disavow *Crawford*. [*Dorantes*, 331 S.W.3d at 379-381]. In doing so, the *Dorantes* court twice quoted the block quote set out above. [*See*, *Dorantes*, 331 S.W.3d at 379-380 and 380 n.7]. There is no way the *Dorantes* case "flew under the radar" of either prosecutors or criminal defense lawyers in Tennessee.

[App. C at C-16, *42-*43]. The timeline for how *Dorante*s plays into this matter is set out in the Magistrate Judge's Report and Recommendation, (R&R), stating:

> 9. Order denying Motion for New Trial October 28, 2010
>
> 10. *State v. Dorantes* filed January 25, 2011
>
> 11. Record filed in Court of Criminal Appeals March 8, 2011
>
> 12. Assigned on briefs on December 7, 2011
>
> 13. Opinion entered Court of Criminal Appeals on November 29, 2012.

[App. E at E-6, *14]. The R&R, quoting the CCA opinion, said:

> …the State correctly notes that the [Petitioner's] arguments are based entirely on legal precedents explicitly overruled by our supreme court in Dorantes. The [Petitioner's] assertion that because his conviction was based solely upon circumstantial evidence the State was required to rule out every other reasonable hypothesis except that of guilt is simply no loner the law in Tennessee.

[App. A at A-10, *30. *Accord*, App. E at E-6, *14-*15. Parentheticals in original R&R text].

This Honorable Court must, respectfully, grant *certiorari* in this case to clarify when the total abandonment of a criminal court defendant or when attorneys do not bother learning obvious controlling law amounts to a structural error where prejudice may be presumed in VIth Amendment ineffective assistance of counsel appellate situations. This Honorable Court, in *Garza v. Idaho*, 139 S. Ct. 738, 747-748 (2019), held that if an appeal is forfeited due to ineffective assistance of counsel, the defendant deserves an appellate re-start – without a need to prove the crippled appeal would be

successful {a/k/a presumed prejudice}. Justices Thomas and Alito in *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1916 (2017), opined that the complete denial of counsel during a critical stage, including the appellate stage of a case, justifies presumed prejudice. [*Roe v . Flores-Ortega*, 528 U.S. 470, 483 (2000)]. The logic here is simple – when court procedures lack a "presumption of reliability," a structural defect in the process exists and prejudice should be presumed. [*Id*]. This case should return to the pre-motion for new trial stage.

How can a proceeding be "reliable" if an attorney doesn't bother correcting an obvious mistake that appeared in the State's brief – either the brief was unread or ignored. Either way, Maurice O. Byrd, Jr. was left to fend for himself on appeal in a world of lawyer's who know the most current law – at least usually.

Certiorari is justified and must be granted.

In regards to an actual conflict of interest, Ms. Gasaway claimed this to get off of an appointed case, but fails to mention the exact same conflict when Mr. Byrd's exact case became a retained motion for new trial and appeal. [App. C at C-12, *33]. An attorney cannot ***sua sponte*** waive an actual conflict of interest merely because the attorney appears to be acting in good faith. [*See generally*, *Woolsey v. Aetna Life Ins. Co.*, 457 F. Supp.3d 757, 767 n.16 (D. Ariz. 2020)]. A waiver, if any, belongs to the ***defendant***, not the attorney. In upholding a *habeas* relief claim based on an actual conflict that was not personally released by the defendant, the Seventh Circuit noted that an attorney with multiple clients may compromise one client to benefit another. [*Griffin v. McVicar*, 84 F.3d 880, 889 n.8 (7th Cir. 1996)]. In the case at hand, Ms. Gasaway affirmatively withdrew from Mr. Byrd's case because she claimed an actual conflict of

interest compromised her ability to represent Mr. Byrd; then never explained how or why this conflict disappeared. [App. C at C-12, *33]. Likewise, Ms. Gasaway did not respond to Mr. Byrd other than to say, in court, "she was his new lawyer." [App. C at C-10, *27]. The gist of the R&R claims that structural errors are limited to actions at trial -- but never on appeal. [App. E at E-10, *40 n.4, citing *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907 (2017)]. Respectfully, *Weaver* does not stand for the proclamation that structural error cannot originate at the appellate level. This case is a clear example that structural error can, ***and does*** exist in the appellate arena. *Certiorari* should be granted. Why should the attorney abandonment of Cory R. Maples' trial be treated differently that the attorney abandonment of Maurice O. Byrd, Jr.'s appeal? [*See, Maples v. Thomas*, 565 U.S. 266, 281-282 (2012)]. This is an Equal Protection and Due Process issue worthy of this Honorable Court's consideration. This Honorable Court has declared that an accused "has a constitutional right to the effective assistance of counsel at all critical stages of a criminal prosecution." [*State v. Covington*, 845 S.W.2d 785, 786 (Tenn. Crim. App. 1992), citing *Powell v. Alabama*, 287 U.S. 45 (1932)]. This Honorable Court has also acknowledged, "our system of the administration of justice suffers when any accused is treated unfairly." [*Brady v. Maryland*, 373 U.S. 83, 87 (1963)]. This phrase usually is applied to prosecutors, but it equally applies to defense counsel undermining fundamental fairness by actions – such as abandoning an appeal. Said actions is a structural defect.

As the Tennessee Supreme Court has declared, "It would be a cruel mockery to follow the letter of the law, and give counsel…and the argument be a useless ceremonial." [*Poindexter v. State*, 191 S.W.2d 445, 445 (Tenn. 1946)]. As stated by the Supreme Court of Maine, "Whatever may be the outcome of this case on retrial, the

integrity of the administration of justice…cannot be maintained is such a conviction is permitted to stand." [*State v. Thurow*, 414 A.2d 1241, 1245 (Maine 1980)]. *Certiorari* should be granted to address the important question of law involving whether an unauthorized abandoned appeal amounts to a structural error for VIth amendment purposes.

CONCLUSION

For the foregoing reasons, this Honorable Court must, respectfully, grant *certiorari* to address how/when/if prejudice can be presumed when an attorney is grossly incompetent, abandons an appeal, or where an attorney works under an unwaived actual conflict of interest on appeal?

This is the 26th day of January, 2022.

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