No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2024

**JOSHUA AUSTIN WARD,** *Petitioner*

v.

**COMMONWEALTH OF KENTUCKY**, *Respondent*

# PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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November 20, 2024

## QUESTIONS PRESENTED

Where a defendant has been permitted to proceed pro se, does his agreement to the assistance of counsel on some issues – generally known as "hybrid representation" – waive his right to determine which witnesses to call ? If so, must that waiver of the defendant's right to determine what witnesses to call be explicit and on the record?

## LIST OF PARTIES

1. Petitioner Joshua Austin Ward is represented by Hon. Timothy G. Arnold and Hon. Kayley V. Barnes, Department of Public Advocacy, 5 Mill Creek Park, Frankfort, Kentucky 40601.

2. Commonwealth of Kentucky, Real Party in Interest, who is represented by Hon. Russell Coleman, Attorney General, 1024 Capital Center Drive, Frankfort, Kentucky 40601.

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Joshua Austin Ward, Petitioner, respectfully petitions for a writ of certiorari to review the opinion of the Kentucky Supreme Court, affirming the Boone Circuit Court's judgment below.

## OPINIONS BELOW

The unpublished opinion of the Kentucky Supreme Court in *Joshua Ward v. Commonwealth of Kentucky,* 2021-SC-0568-MR, originally issued on April 18, 2024, and modified on August 22, 2024, is attached at Appendix A. The Petitioner sought a petition for modification or rehearing from the Supreme Court of Kentucky. The Kentucky Supreme Court granted modification but denied rehearing on August 22, 2024. The order denying the petition for rehearing and granting modification is

attached in Appendix B. The Boone Circuit Court's judgment imposing a sentence of life imprisonment in this case are attached at Appendix C. The Boone Circuit Court's order granting hybrid representation is attached at Appendix D.

## JURISDICTION

The Supreme Court of Kentucky's order denying the petition for rehearing, which made the judgment of the Kentucky Supreme Court final, was entered on August 22, 2024. Pursuant to United States Supreme Court Rule 13.1, the Petitioner has 90 days to seek a writ of certiorari, and this petition has been timely filed. The Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment of the United States Constitution provides in relevant part: "No State shall … deprive any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV.

The Sixth Amendment provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI.

## STATEMENT OF THE CASE

Josh Ward was charged with killing his ex-girlfriend, Kelli Kramer, and her nine-year old son, Aiden Kramer in March of 2018. Ward and Kramer had broken up over nine months earlier and Ward had not been in contact with Kramer or Aiden since the breakup. Ward became the focus of the murder investigation when he was misidentified in a store surveillance video where Kramer had worked four months

before the murders. DNA evidence on the shell casings found at the crime scene excluded Ward as a contributor. Cell phone data indicated Ward was at home, over 40 minutes away in a different state, at the time of the murders. There were no eyewitnesses to the murders. The sole physical evidence "linking" Ward to the murders was testimony by a firearms examiner that the shell casings found at the crime scene matched shell casings found in a field[1] where Ward and other individuals had target practiced eight months before the murder. No gun was ever recovered. Despite the very weak evidence, Ward was found guilty of both murders and sentenced to life without parole.

Prior to trial, Ward requested and was granted the right to be hybrid counsel throughout his case. The trial court ruled that some of his responsibilities as hybrid counsel included:

> The Defendant shall be jointly responsible for cross-examination of all witnesses called by the [prosecutor]; and to raise any objections to evidence. The Defendant shall be jointly responsible for deciding whether to produce any witnesses at trial or to introduce any exhibits… it will be the Defendant's joint responsibility to make all strategy decision which would include whether to testify; to call other witnesses; and, to offer exhibits and other evidence.[2] (emphasis added).

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[1] The Kentucky Supreme Court requested supplemental briefing and heard oral argument on the questionable scientific validity of the ballistic matching but ultimately ruled the issue was unpreserved and therefore did not address the argument.

[2] Trial Court Order, page 3. – attached at Appendix D.

Several months later at a pretrial conference, defense counsel stated on the record that counsel's understanding from talking with Ward was that defense counsel would "take on all the trial work" but counsel understood Ward wanted to be involved but not have "him do anything that counsel would be doing". The trial court asked if the prosecutor had anything to add but failed to ask Ward if he was in agreement with counsel's assertions.

The prosecutor filed a pretrial motion asking the trial court to prohibit Ward from personally examining some of the witnesses because the witnesses feared harm by Ward. The prosecution did not object to Ward preparing questions and consulting with defense counsel as to cross-examining the witnesses. The trial court granted the motion.

After the prosecutor rested its case, Ward learned that defense counsel was not planning on recalling four of the prosecution's witnesses that had given damaging but incredible testimony. Ward had assumed defense counsel would recall these witnesses for the defense so they could be questioned and impeached more extensively, including with extrinsic documents. Ward demanded that trial counsel call these witnesses, but defense counsel thought it would be negligent to recall these individuals "to establish very minor tweaks." Counsel also thought this would open the door to cross-examination by the prosecutor which would "result in completely obliterating the work we have done thus far."

Due to the disagreement between Ward and defense counsel about whether to call the aforementioned individuals as defense witnesses, the trial court held an *ex-*

*parte* hearing to address the issue. During the hearing, Ward said if he had known that counsel would refuse to call the witnesses in the defense's case in chief, he would have demanded a more thorough cross-examination. The trial court remained neutral but told Ward that although he was hybrid counsel, he had very experienced attorneys representing him. The trial court reminded Ward and defense counsel that the witnesses could be recalled, but that Ward would not be allowed to personally conduct the direct examination of three of the four witnesses due to the pretrial ruling. Defense counsel argued that since Ward could not personally question the witnesses, counsel would essentially be asking the questions that Ward prepared, which "turns me into his puppet as opposed to counsel. I no longer have autonomy."

Ward and defense counsel discussed how to move forward privately off the record but remained at an impasse. The trial court, by remaining neutral, effectively resolved this matter in favor of defense counsel and merely confirmed with Ward that the issue was preserved on the record and the trial would move forward. The subject witnesses were not recalled. The trial court's refusal to specifically order that Ward, as the defendant and co-counsel, should make the ultimate decision, deprived Ward of his of his ability to present a defense and confront witnesses.

The Kentucky Supreme Court held that the right to call witnesses was a strategic decision and that the defense counsel, not the defendant, got to "make the final call." KY Supreme Court Opinion pg. 15. Even though Ward was hybrid counsel, and the trial court's order stated specifically that Ward was jointly responsible for deciding who to call as witnesses, the Kentucky Supreme Court ruled that Ward did

not have a constitutional right to personally cross-examine witnesses and that if there was any error, it was harmless because the witnesses had already been cross-examined by counsel during the prosecution's case-in-chief. KY Supreme Court Opinion pg. 17.

This petition follows.

## REASONS FOR GRANTING THE WRIT

### This Court Should Grant the Writ to Decide Whether The Final Decision Of Which Witnesses To Call Should Be Allocated To The Lawyer Or To The Defendant.

When discussing the importance of the Confrontation Clause, Chief Justice Marshall pointedly cautioned, "I know of no principle in the preservation of which all are more concerned. I know none, by undermining which, life, liberty, and property, might be more endangered. It is therefore incumbent on courts to be watchful of every inroad on a principle so truly important." *U.S. v. Burr*, 25 F. Cas. 187, 193 (No. 14,694 (CC VA 1807). Ninety years later, this Court echoed that the Sixth Amendment's right to confrontation was "[o]ne of the fundamental guaranties of life and liberty … a right long deemed so essential for the due protection of life and liberty that it is guarded against legislative and judicial action by provisions in the constitution of the United States and in the constitutions of most, if not of all, the states composing the Union." *Kirby v. U.S.,* 174 U.S. 47, 55-56 (1899). See Ky. Const. §11. More recently, Justice Scalia wrote:

> The Sixth Amendment gives a criminal defendant the right 'to be confronted with the witnesses against him.' This

> language 'comes to us on faded parchment,' *California v. Green*, 399 U.S. 149, 174, 90 S.Ct. 1930, 1943, 26 L.Ed. 2d 489 (1970)(Harlan, J., concurring), with a lineage that traces back to the beginnings of Western legal culture. There are indications that a right of confrontation existed under Roman law. The Roman Governor Festus, discussing the proper treatment of his prisoner, Paul, stated: 'It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges.' Acts 25:16. It has been argued that a form of the right of confrontation was recognized in England well before the right to jury trial. Pollitt, The Right of Confrontation: Its History and Modern Dress, 8 J. Pub. L. 381, 3840387 (1959).

*Coy v. Iowa*, 487 U.S. 1012, 1015-16 (1988). The Kentucky courts have failed to heed *Burr*'s warning, disregarding the historical underpinnings of the right of confrontation, and inflicting a crippling blow to an indispensable constitutional right which is essential to due process of law in a fair adversary process.

### A. The Final Decision Of Which Witnesses To Call Should Be Allocated To The Defendant.

In *Faretta v. California*, 422 U.S. 806 (1975), this Court recognized that the Sixth Amendment grants to every accused individual the right to self-representation, that is, to conduct one's own defense personally, because it is the defendant that suffers the consequences. As Justice Stewart observed, "the language and spirit of the Sixth Amendment…contemplate that counsel…shall be an aid to a willing defendant" and that "an assistant, however expert, is still an assistant."

Both the Due Process Clause and the Compulsory Process Clause of the Sixth Amendment grant defendants the right to present witness on their own behalf.

*Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987); *Rock v. Arkansas,* 483 U.S. 44, 51 (1987); *Crane v. Kentucky*, 476 U.S. 683, 690-91 (1986); *Chambers v. Mississippi*, 410 U.S. 284, 298-302 (1973). The right to call witnesses has long been held as essential to the accused's right to a fair trial. *Chambers,* 410 U.S. at 294. "Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Id.* at 302. "Indeed, this right is an essential attribute of the adversary system itself." *Taylor v. Illinois*, 484 U.S. 400, 408 (1988).

**B. In Cases Where The Defendant Is Afforded The Right Of Hybrid Representation, The Defendant's Decision Must Control As To What Witnesses To Call Unless There Is A Valid Waiver On The Record.**

Even "[t]he most basic rights of criminal defendants are… subject to waiver." *New York v. Hill*, 528 U.S. 110, 114 (2000)(quoting *Peretz v. United States*, 501 U.S. 923, 936 (1991)). However, any such waiver must be sufficiently clear "as to indicate a conscious intent." *Powell v. Commonwealth*, 346 S.W.2d 731, 734 (Ky. 1961). The standard for finding a waiver of a defendant's right to confront his accusers should be evaluated as any other constitutional right which requires "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). These important rights "may be waived only by a voluntary and knowing action." *Boyd v. Dutton*, 405 U.S. 1, 2-3 (1972). The United States Court of Appeals for the District of Columbia Circuit has further explained the importance of obtaining an explicit on-the-record waiver.

> On the subject of waiver, "it has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we

> 'do not presume acquiescence in the loss of fundamental rights.'… This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused." *Cross [v. United States]*, 325 F.2d [629,] 631 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464-65, 58 S. Ct. 1019, 1023, 82 L. Ed. 1461 (1938)). Where the defendant is in custody," the serious and weighty responsibility' of determining whether he wants to waive a constitutional right requires that he be brought before the court, advised of that right, and then permitted to make 'an intelligent and competent waiver.'" *Id.*
>
> … The slight additional burden on the criminal justice process wrought by a personal waiver requirement is more than offset by avoidance of lengthy appeals to determine whether the defendant's right to presence has been violated. The practice of obtaining open court waivers is, as we have noted, particularly warranted in cases like this where the defendant is not out on bail, but remains in custody and readily available to the court.
>
> Further we find an on-the-record-waiver desirable because in its absence it is difficult, if not impossible, to determine whether the defendant has knowingly and intelligently relinquished a known right.

*United States v. Gordon*, 829 F.2d 119, 125-26 (D.C. Cir. 1987) (footnote omitted). It is plain that a defendant's fundamental constitutional right to confront his accusers and any witnesses against him is not of recent vintage, nor is its existence something which can be seriously doubted or questioned. This right should be protected with equal fervor to all other fundamental constitutional rights.

The trial court and defense counsel limited Ward's ability to call witnesses and present his defense. Defense counsel's "participation over the defendant's objection effectively allows counsel to make or substantially interfere with any significant tactical decisions, or to control the questioning of witnesses, or to speak

instead of the defendant on any matter of importance" and essentially erodes the *Faretta* right. *McKaskle v. Wiggins*, 465 U.S. 168, 178 (1984). Ward was *Faretta* counsel, and his rights were interfered with which negatively impacted the outcome of his trial.

As Justice Steward concluded in *Faretta, supra,* "law and tradition may allocate to the counsel the power to making binding decisions of trial strategy in many areas. This allocation can only be justified, however, by the defendant's consent, at the outset, to accept counsel as his representative." In this case, Ward did not accept counsel as his representative. He was hybrid counsel. Without a waiver on the record, Ward had the final and ultimate control as to who to call as witnesses in his defense.

*United States v. Gordon, supra,* stated "Further we find an on-the-record-waiver desirable because in its absence it is difficult, if not impossible, to determine whether the defendant has knowingly and intelligently relinquished a known right." Here, Ward not only did not make a waiver on the record, his objection as the defendant and the co-counsel was clearly stated on the record.

### C. This Case Squarely Presents This Issue, Which Has Split the Lower Courts

On the issue of who ultimately controls which, if any, witnesses will be called, caselaw is split. A majority of state courts appear to ascribe to the view that it is a tactical matter to be decided by the attorney. *See State v. Davis*, 506 A.2d 86, 89 (Conn. 1986); *State v. Johnson*, 901 S.W.2d 60, 63 (Mo. 1995) (en banc); *People v.*

*Smith*, 31 A.D.2d 847, 848 (N.Y. App. Div. 1969); *Ridley v. State,* 510 S.E.2d 113, 119 (Ga. App. 1998); *State v. Lee*, 689 P.2d 153, 159 (Ariz. 1984) (en banc); *Winter v. State*, 502 P.2d 733, 738 (Kan. 1972); *State v. Voorhees*, 596 N.W.2d 241, 255 (Minn. 1999); *People v. Barrow*, 549 N.E.2d 240, 248-49 (Ill. 1989); *People v. Williams*, 471 P.2d 1008, 1015-17 (Cal. 1970); *State v. Rubenstein*, 531 N.E.2d 732, 740 (Ohio Ct. App. 1987); *State v. Pratts*, 366 A.2d 1327, 1333-34 (N.J. Super. Ct. App. Div. 1975); *Falkner v. State*, 462 So.2d 1040, 1041-42 (Ala. Crim. App. 1984); *Aragon v. State*, 760 P.2d 1174, 1179 (Idaho 1988); *People v. Schultheis*, 638 P.2d 8, 12 (Colo. 1981) (en banc); *Bell v. State*, 733 So.2d 372, 375 (Miss. 1999); *Phillips v. State*, 989 P.2d 1017 (Okla. Crim. App. 1999); *Stoppleworth v. State*, 501 N.W.2d 325, 328 (N.D. 1993); *People v. Morris*, 163 N.W.2d 16, 18-19 (Mich. Ct. App. 1968); *In re King*, 336 A.2d 195, 198 (Vt. 1975); *State v. Orosco*, 833 P.2d 1155, 1163 (N.M. Ct. App. 1991); *Commonwealth v. Stokes*, 408 N.E.2d 887, 889-90 (Mass. App. Ct. 1980); *State v. Tome*, 742 P.2d 479, 482 (Mont. 1987); *State v. Lindsay*, 517 N.W.2d 102, 107 (Neb. 1994); ; *State v. Glidden*, 499 A.2d 1349, 1351 (N.H. 1985); *State ex rel. Juv. Dept. v. Geist*, 796 P.2d 1193, 1203 (Or. 1990); *Jacques v. State*, 669 A.2d 1124, 1149-50 (R.I. 1995); *Hofer v. Class*, 578 N.W.2d 583, 587-88 (S.D. 1998); *Commonwealth v. Porter*, 569 A.2d 942, 945-46 (Pa. 1990); *Jackson v. State*, 495 S.E.2d 768, 769-70 (S.C. 1998); *In re Jeffries*, 752 P.2d 1338, 1341-42 (Wash. 1988) **(**"We do not disagree with petitioner's argument that the decision of whether or not to call a witness is normally a tactical decision to be made by counsel. We do, however, decline to adopt a rule that would suggest that taking nontactical

considerations into account, such as a client's clearly expressed wishes, automatically renders counsel's decision constitutionally infirm. Any such rule would not only be illogical, but would fly in the face of our prior recognition of the constitutional right of criminal defendants 'to at least broadly control' their own defenses."); *Hamburg v. State*, 820 P.2d 523, 528 (Wyo. 1991); *Johnson v. Riddle*, 281 S.E.2d 843, 846 (Va. 1981); *Ex parte Wellborn*, 785 S.W.2d 391, 393 (Tex. Crim. App. 1990); *State v. Tyler*, 850 P.2d 1250, 1256 (Utah 1993); *State v. Kerley*, 820 S.W.2d 753, 756 (Tenn. Crim. App. 1991); *Helton v. State*, 924 S.W.2d 239, 242-43 (Ark. 1996); *State v. Miller*, 459 S.E.2d 114, 127 (W. Va. 1995); *Moore v. Commonwealth*, 983 S.W.2d 479, 484 (Ky. 1998); *State v. Elm*, 549 N.W.2d 471, 476 (Wis. Ct. App. 1996).

However, other states have taken a different approach and found that if the attorney and defendant disagree as to matter of trial strategy, the defendant must be permitted the final say. *Anderson v. State,* 574 So.2d 87, 95 (Fla. 1991), *Blanco v. Wainwright,* 507 So.2d 1377, 1383 (Fla. 1987); *Burton v. State,* 651 So.2d 641, 656 (Ala. Crim. App. 1993); *State v. Ali,* 407 S.E.2d 183, 189 (N.C. 1991)(if defense counsel and a fully informed criminal defendant reach an impasse, the client's wishes must control); *State v. White,* 508 S.E.2d 253 (N.C. 1998); *State v. Thomas,* 625 S.W.2d 115, 123-24 (Mo. 1981); *People v. Roofener,* 420 N.E.2d 189 (Ill.App.Ct. 1981). In *Carter v. Sowders,* 5 F.3d 975 (6th Cir. 1993), the Sixth Circuit held the decision of whether to stipulate to the testimony of a prosecution's witness belongs to the defendant and even if defense counsel's actions "could constitute a waiver of

the defendant's rights under the Confrontation Clause, the waiver would not bind [the defendant] in the absence of a showing that he consented." *Id.* at 981. (see part b).

Additionally, the legal profession also has expressed inconsistent views about who ultimately controls decisions about which witnesses to call. For example, the American Bar Association's Standards for Criminal Justice provide that the decision as to "what witnesses to call, whether and how to conduct cross-examination**"** are strategic and tactical decisions to be made by the defense counsel after consultation with the client. ABA Standards for Criminal Justice 4-5.2(b) (1980). Standard 4-3.1 provides that counsel is to establish a relationship of trust and confidence with the accused and to discuss the objectives of the representation. Notably in this case, the decision as to which witnesses to call was specified as belonging jointly to both the defense counsel and to the defendant.

However, in the Model Code of Professional Responsibility, the Code provides that "a lawyer should, however, present any admissible evidence his client desires to have presented" unless the lawyer knows or should know that the evidence is false. Ethical Consideration 7-26 of the A.B.A. Code of Prof'l Resp. (1975). The Model Rules state that "[a] lawyer shall abide by a client's decisions concerning the objectives of representation and… shall consult with the client as to the means by which they are to be pursued." Model Rules of Prof'l Conduct R. 1.2(a) (2002).

Some courts have found that an attorney's failure to investigate a potential defense witness combined with a specific showing of the importance of that witness'

testimony rendered counsel's strategic choice unreasonable and counsel's performance deficient. See e.g., S*anders v. Ratelle*, 21 F.3d 1446, 1457-58 (9th Cir. 1994); C*hambers v. Armontrout*, 907 F.2d 825 (8th Cir. *1990*), cert. denied, 111 S. Ct. 369 (1990); *Code v. Montgomery*, 799 F.2d 1481, 1483 (11th Cir. 1986); *Gomez v. Beto*, 462 F.2d 596, 596-97 (5th Cir. 1972). See also *People v. Gadson,* 24 Cal. Rptr.2d 219, 225-26 (Cal. Ct. App. 1993); *People v. Galan,* 261 Cal. Rptr. 834, 835-37 (Cal. Ct. App. 1989) (finding no ineffective assistance of counsel when the lawyer defers to the defendant's preference and calls witnesses that the lawyer firmly believes should not be called).

Here, the Kentucky Supreme Court acknowledged in its opinion that disagreements between defense counsel and a defendant that "involve constitutional rights" are "always reserved for the defendant's decision." Despite this concession, the Kentucky Supreme Court found that there was no error here even though Ward was hybrid counsel and there was a court order specifying the decision to call witnesses was to be made jointly. Ward's fundamental right to present an adequate defense, combined with his right to represent himself, was compromised by giving defense counsel the final say as to which witnesses would be called.

The Kentucky trial court restricted Ward's ability to call his own witnesses and impeach critical testimony. There was very little evidence in this circumstantial case. The four witnesses Ward wished to recall in defense's case in chief were critical to Ward's ability to present a defense and to challenge the prosecutor's case.

> The right of an accused to have compulsory process for obtaining witnesses in his favor stand on no lesser footing than the other Sixth Amendment rights that we have previously held applicable to the States. This Court had occasion in *In re Oliver*, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948), to describe what it regarded as the most basic ingredients of due process of law it observed that:
>
> 'A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense – a right to his day in court – are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.' 333 U.S., at 273, 68 S. Ct. at 507 (footnote omitted).
>
> The right to present the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses of the purpose of challenging their testimony, [Ward] has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

*Washington v. Texas*, 388 U.S. 14, 18-19 (1967)

Ward was prevented from recalling four of the prosecutor's witnesses in order to further impeach their testimony, including with extrinsic documents. Because this was a purely circumstantial case based on testimony of these witnesses, Ward believed these individuals to be critical to his defense. He had the right to place his defense theory before the jury, especially given his status as co-counsel. *Davis v. Alaska*, 415 U.S. 308, 316 (1974), distinguished between a general attack on credibility and a more particular attack on credibility directed toward revealing possible biases, prejudices or ulterior motives as they may directly relate to issues

or personalities at hand. In *Davis*, this court concluded "that the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place" on witness' testimony. *Id.* at 317. The issue in *Davis* relates to limited cross examination but the conclusion still applies to Ward's non-existence ability to re-call witnesses. The *Davis* court concluded that "defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." *Id.* at 318.

Ward wanted to re-call the witnesses to impeach them which would allow the jury to draw inferences relating to the reliability of the witnesses. While the Confrontation clause does not guarantee the right to impeach the general credibility of a witness it does guarantee the right to show bias, motive, or ulterior motive for testifying. *Delaware v. Van Arsdall*, 475 U.S. 673 (1986)(constitutional violation established if a defendant is prevented from cross-examination designed to show a prototypical form of bias on the part of a witness. *Id.* at 678-79). Although the right to confront and cross-examine is not absolute (it must bow to accommodate other legitimate criminal trial interests), the denial or significant diminution of that right requires that the competing interest be closely examined. *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) citing *Berger v. California*, 393 U.S. 314, 315 (1969). Rules that deny the presentation of witnesses cannot be inflexibly applied. *Taylor v. Illinois*, 484 U.S. 400, 411 (1988).

In *McKaskle v. Wiggins*, when there was an impasse, "all conflicts between

Wiggins and counsel were resolved in Wiggins' favor. The trial judge repeatedly explained to all concerned that Wiggins' strategic choices, not counsel's, would prevail." 465 U.S. at 181. The Kentucky Supreme Court stated in its opinion "for those witnesses whom [Ward] wanted to recall but could not personally question, it is well established that the appropriate solution would have been for Ward to prepare questions for counsel to use to question such witnesses on his behalf. See *Partin [v. Commonwealth]*, 168 S.W.3d [23,] at 28-29." KY Supreme Court Order pg. 17. Unlike the judge in *McKaskle*, the trial judge did not allow Ward's strategic choices to prevail, nor did it allow Ward to prepare questions for counsel, nor did it obtain a proper waiver of Ward's rights on the record.

Considering the competing interest here, the risk of having defense counsel act on client's wishes despite counsel's advice that it is a bad idea, versus Ward's right to confrontation and to present a defense, the *Chambers* rationale demands that Ward's right to a fair trial must prevail, especially in a case where the defendant had been granted co-counsel status. Here Ward did not fail to comply with some condition precedent such as in *Allen v. Morris*, 845 F.2d 610 (6th Cir. 1988) or *Taylor v. Illinois, supra*. The trial court's broad "non-ruling" ruling precluded Ward from presenting compelling evidence impeaching witnesses and attacking their credibility in a purely circumstantial case where credibility was a big factor, denied Ward the right to confront witnesses and present a defense. Because there was an impasse regarding whether to re-call the witnesses, Ward's Sixth Amendment right to call witnesses should have trumped the defense counsel's

strategic choice to not call the individuals as witnesses. This is especially true because Ward was hybrid counsel.

For all the foregoing reasons, this Court should grant this Petition to resolve the critical legal question – which only this Court can finally resolve – of who controls the witnesses to be called in a case of hybrid representation.

## CONCLUSION

**WHEREFORE**, for the reasons set forth above, Petitioner Joshua Austin Ward pray that this Court grant this Petition for a Writ of Certiorari, vacate the ruling of the Kentucky Supreme Court, and remand the matter for further proceedings.

Respectfully submitted,

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