

No. __-____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2017

GERALD HAND,
Petitioner,

v.

TIM SHOOP, WARDEN, CHILLICOTHE CORRECTIONAL INSTITUTION
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

CAPITAL CASE

JACOB ANDREW CAIRNS (OH 0075828)

Counsel of Record

CAROL ANN WRIGHT (OH 0029782)

Office of the Federal Public Defender

Capital Habeas Unit

Southern District of Ohio

10 West Broad Street, Suite 1020

Columbus, OH 43215-3469

Telephone: (614) 469-2999

Facsimile: (614) 469-5999

jacob_cairns@fd.org

carol_wright@fd.org

JENNIFER M. KINSLEY (OH 0071629)

Kinsley Law Office

Post Office Box 19478

Cincinnati, Ohio 45219

(513) 708-2595

kinsleylawoffice@gmail.com

Members of the Bar of this Court

Counsel for Petitioner Gerald Hand

CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the procedural default doctrine bars federal habeas corpus review in cases where the state courts clearly misapplied their own procedural rules in determining that a claim was defaulted.

2. Whether the petitioner in this case, Gerald Hand, is entitled to a certificate of appealability on his claim that his trial lawyers were ineffective in failing to file a motion for a change of venue based on extensive pretrial publicity.

LIST OF PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

TABLE OF CONTENTS

CAPITAL CASE	1
QUESTIONS PRESENTED.....	1
LIST OF PARTIES.....	2
TABLE OF CONTENTS.....	3
TABLE OF AUTHORITIES	6
PETITION FOR WRIT OF CERTIORARI	9
JURISDICTIONAL STATEMENT	9
OPINIONS BELOW.....	9
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	10
INTRODUCTION	12
STATEMENT OF THE CASE AND FACTS	13
RELEVANT PROCEDURAL HISTORY	16
REASONS FOR GRANTING THE WRIT.....	17
I. This Court should grant certiorari and hold that the procedural default doctrine does not preclude federal habeas corpus review if the state courts clearly misapplied their own procedural rules in determining that a claim was defaulted.	17
A. Ohio’s <i>res judicata</i> doctrine.....	17
B. The Ohio state courts misapplied the <i>res judicata</i> doctrine in Hand’s case.	18
C. The procedural default doctrine should not preclude federal habeas corpus review in cases where the state court finding of default was clearly erroneous.	21
D. This Court can proceed directly to the merits of the procedural default issue, notwithstanding the Sixth Circuit’s denial of a certificate of appealability on this particular claim.....	22
E. This Court should also grant certiorari to consider the propriety of applying <i>res judicata</i> to Hand’s claim that the trial judge conducted an inadequate <i>voir dire</i> on the question of pretrial publicity.	23

II.	In the alternative, this Court should grant certiorari to determine if the Sixth Circuit erred in denying Hand a certificate of appealability on his claim that trial counsel were ineffective in failing to file a motion for a change of venue.	23
A.	Reasonable jurists could conclude that Hand’s claim is not procedurally defaulted.	25
B.	Reasonable jurists could conclude that Hand’s claim is meritorious.	26
CONCLUSION.....		27

APPENDIX

Sixth Circuit opinion affirming denial of petition for writ of habeas corpus, <i>Hand v. Houk</i> , 871 F.3d 390 (6th Cir. 2017).....	A-1
Sixth Circuit order granting in part and denying in part motion to expand certificate of appealability, <i>Hand v. Houk</i> , No. 14-3148, Order (6th Cir. Jan. 12, 2016).....	A-21
District Court order granting in part and denying in part motion for certificate of appealability, <i>Hand v. Houk</i> , No. 2:07-cv-846, 2014 WL 617594 (S.D.Ohio Feb. 18, 2014)	A-23
Report and recommendation of the Magistrate Judge addressing motion for certificate of appealability, <i>Hand v. Houk</i> , No. 2:07-cv-846, 2014 WL 29508 (S.D.Ohio Jan. 3, 2014)	A-28
District Court order denying petition for writ of habeas corpus, <i>Hand v. Houk</i> , No. 2:07-cv-846, 2013 WL 2372180 (S.D.Ohio May 29, 2013)	A-45
Report and recommendation of the Magistrate Judge addressing petition for writ of habeas corpus, <i>Hand v. Houk</i> , No. 2:07-CV-846, 2011 WL 2446383 (S.D.Ohio Apr. 25, 2011)	A-106
Ohio Supreme Court opinion affirming convictions and death sentence on direct review, <i>State v. Hand</i> , 840 N.E.2d 151 (Ohio 2006)	A-195
Ohio Supreme Court order declining discretionary review of appeal from the denial of post-conviction relief, <i>State v. Hand</i> , 852 N.E.2d 1215 (Ohio 2006) (Table).....	A-223
Ohio Court of Appeals opinion affirming denial of post-conviction petition, <i>State v. Hand</i> , No. 05CAA060040, 2006 WL 1063758 (Ohio App. Apr. 21, 2006)	A-224
Delaware County, Ohio, Court of Common Pleas opinion denying post-conviction petition, <i>State v. Hand</i> , Delaware Cty. No. 02CR-I-08-366 (Ohio Com. Pl. May 27, 2005)	A-230
Sixth Circuit order denying petition for rehearing and rehearing <i>en banc</i> , <i>Hand v. Houk</i> , No. 14-3148, Order (6th Cir. Oct. 18, 2017)	A-238

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Buck v. Davis</i> , 137 S.Ct. 759 (2017)	23
<i>Clemons v. Luebbbers</i> , 381 F.3d 744 (8th Cir. 2004)	22
<i>Cone v. Bell</i> , 556 U.S. 449 (2009)	22, 26
<i>Edwards v. Carpenter</i> , 529 U.S. 446 (2000)	18
<i>Hand v. Houk</i> , 871 F.3d 390 (6th Cir. 2017)	10, 17, 24
<i>Hand v. Houk</i> , No. 14-3148, Order (6th Cir. Jan. 12, 2016)	16, 17, 26
<i>Hand v. Houk</i> , No. 14-3148, Order (6th Cir. Oct. 18, 2017)	17
<i>Hand v. Houk</i> , No. 2:07–CV–846, 2011 WL 2446383 (S.D.Ohio Apr. 25, 2011)	10
<i>Hand v. Houk</i> , No. 2:07–cv–846, 2013 WL 2372180 (S.D.Ohio May 29, 2013)	10, 16, 17, 26
<i>Hand v. Houk</i> , No. 2:07–cv–846, 2014 WL 29508 (S.D.Ohio Jan. 3, 2014)	10
<i>Hand v. Houk</i> , No. 2:07–cv–846, 2014 WL 617594 (S.D.Ohio Feb. 18, 2014)	10, 16, 17
<i>Hand v. Ohio</i> , 549 U.S. 1217 (2007)	17
<i>Hill v. Mitchell</i> , 842 F.3d 910 (6th Cir. 2016)	18, 19
<i>Johnson v. Lee</i> , 136 S.Ct. 1802 (2016)	18

<i>Johnson v. Williams</i> , 568 U.S. 289 (2013).....	27
<i>LeBere v. Abbott</i> , 732 F.3d 1224 (10th Cir. 2013)	22
<i>Lee v. Kemna</i> , 534 U.S. 362 (2002).....	23
<i>Miller v. State</i> , 750 So.2d 137 (Fl.App. 2000)	28
<i>Miller-El v. Cockrell</i> , 537 U.S. 322 (2003).....	25, 28
<i>Oaks v. Pfister</i> , 863 F.3d 723 (7th Cir. 2017)	22
<i>In re Ohio Criminal Sentencing Statutes Cases</i> , 847 N.E.2d 1174, 1180 (Ohio 2006) (Mem)	21
<i>Richey v. Bradshaw</i> , 498 F.3d 344 (6th Cir. 2007)	23, 26
<i>Sheppard v. Maxwell</i> , 384 U.S. 333 (1966).....	21
<i>Skilling v. United States</i> , 561 U.S. 358 (2010).....	16
<i>Skinner v. Quarterman</i> , 528 F.3d 336 (5th Cir. 2008)	25
<i>State v. Getsy</i> , 702 N.E.2d 866 (Ohio 1998).....	20
<i>State v. Hand</i> , 840 N.E.2d 151 (Ohio 2006).....	11, 17
<i>State v. Hand</i> , 852 N.E.2d 1215 (Ohio 2006).....	11, 16, 17, 21
<i>State v. Hand</i> , Delaware Cty. No. 02CR-I-08-366 (Ohio Com. Pl. May 27, 2005).....	20
<i>State v. Hand</i> , No. 05CAA060040, 2006 WL 1063758 (Ohio App. Apr. 21, 2006)	<i>passim</i>

<i>State v. Lundgren</i> , 653 N.E.2d 304 (Ohio 1995).....	16
<i>State v. Mammone</i> , 13 N.E.3d 1051 (Ohio 2014).....	20
<i>State v. McKelton</i> , 70 N.E.3d 508 (Ohio 2016).....	19
<i>State v. Smith</i> , 477 N.E.2d 1128 (Ohio 1985).....	16
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984).....	27
<i>Tharpe v. Sellers</i> , 583 U. S. ___, No. 17–6075, 2018 WL 311568 (Jan. 8, 2018)	25
<i>Weaver v. Massachusetts</i> , 137 S.Ct. 1899 (2017).....	27
<i>Williams v. Alabama</i> , 791 F.3d 1267 (11th Cir 2015)	22
<i>Wilson v. Belleque</i> , 554 F.3d 816 (9th Cir. 2009)	25
Statutes	
28 U.S.C. § 1254.....	10
28 U.S.C. § 2241.....	12
28 U.S.C. § 2253.....	12, 23, 25
28 U.S.C. § 2254.....	13, 27
Other Authorities	
S.Ct.R. 10(a)	25
S.Ct.R. 10(c)	18
United States Constitution Sixth Amendment	11, 27
United States Constitution Fourteenth Amendment	11

PETITION FOR WRIT OF CERTIORARI

Gerald Hand respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Sixth Circuit affirmed the denial of Hand's habeas corpus petition on September 8, 2017. Hand's petition for rehearing and rehearing *en banc* was denied on October 18, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

OPINIONS BELOW

The opinion of the Sixth Circuit affirming the denial of Hand's petition for a writ of habeas corpus is published as *Hand v. Houk*, 871 F.3d 390 (6th Cir. 2017), and is reproduced in the appendix at A-1. The order of the Sixth Circuit granting in part and denying in part Hand's motion to expand the certificate of appealability is unpublished and is reproduced in the appendix at A-21. The order of the District Court granting in part and denying in part Hand's motion for a certificate of appealability is unpublished and available at *Hand v. Houk*, No. 2:07-cv-846, 2014 WL 617594 (S.D.Ohio Feb. 18, 2014), and is reproduced in the appendix at A-23. The report and recommendation of the Magistrate Judge addressing Hand's motion for a certificate of appealability is unpublished and available at *Hand v. Houk*, No. 2:07-cv-846, 2014 WL 29508 (S.D.Ohio Jan. 3, 2014), and is reproduced in the appendix at A-28. The order of the District Court denying Hand's petition for a writ of habeas corpus is unpublished and available at *Hand v. Houk*, No. 2:07-cv-846, 2013 WL 2372180 (S.D.Ohio May 29, 2013), and is reproduced in the appendix at A-45. The report and recommendation of the Magistrate Judge recommending the denial of Hand's habeas corpus petition is unpublished and available at *Hand*

v. Houk, No. 2:07–CV–846, 2011 WL 2446383 (S.D.Ohio Apr. 25, 2011), and is reproduced in the appendix at A-106. The opinion of the Ohio Supreme Court affirming Hand’s convictions and death sentence on direct review is published as *State v. Hand*, 840 N.E.2d 151 (Ohio 2006), and is reproduced in the appendix at A-195. The order of the Ohio Supreme Court denying discretionary review of Hand’s appeal from the denial of post-conviction relief is published as *State v. Hand*, 852 N.E.2d 1215 (Ohio 2006) (Table), and is reproduced in the appendix at A-223. The opinion of the Ohio Court of Appeals affirming the denial of Hand’s petition for post-conviction relief is unpublished and available at *State v. Hand*, No. 05CAA060040, 2006 WL 1063758 (Ohio App. Apr. 21, 2006), and is reproduced in the appendix at A-224. The opinion of the Delaware County Court of Common Pleas denying Hand’s petition for post-conviction relief is unpublished and is reproduced in the appendix at A-230. The order of the Sixth Circuit denying Hand’s petition for rehearing and suggestion for rehearing *en banc* is unpublished and is reproduced in the appendix at A-238.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Section One of the Fourteenth Amendment to the United States Constitution provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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 any 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.

Section 2241 of Title 28 of the United States Code provides, in relevant part:

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

Section 2253 of Title 28 of the United States Code provides:

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

Section 2254 of Title 28 of the United States Code provides, in relevant part:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) 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; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

INTRODUCTION

This case presents an important question relating to the procedural default doctrine in federal habeas corpus proceedings. Specifically, this case will provide the Court with an opportunity to determine the circumstances in which a state court's misapplication of its own procedural rules will result in the default being excused in federal court. Hand alleged in his state post-conviction proceedings that he was deprived of the effective assistance of counsel when his trial lawyers failed to file a motion for a change of venue. Hand supported this claim with a voluminous collection of media reports relating to his case. The state courts found that the claim was barred by Ohio's *res judicata* doctrine because it could have allegedly been raised on direct appeal, notwithstanding the fact that none of the media reports about the case had been made part of the trial record. The federal courts not only upheld the finding of default, but

denied Hand a certificate of appealability on this particular claim. This Court should grant certiorari and reverse.

STATEMENT OF THE CASE AND FACTS

Gerald Hand has been married four times. Hand's first wife was the victim of a homicide that took place at Hand's residence in 1976. Hand had an alibi, and the crime went unsolved. Hand's second wife was found strangled and shot to death in the same residence in 1979. Hand again had an alibi, and this crime also went unsolved. Hand married a third time, but the marriage ended in divorce.

On January 15, 2002, Hand called 911 and reported that an intruder had shot his fourth wife, and that he shot the intruder in self-defense. Law enforcement arrived and found Jill Hand dead from a gunshot wound to the head. The body of Lonnie Welch, a friend and former employee of Hand's, was found outside the residence in a neighbor's driveway. Welch had died from gunshot wounds, and his autopsy indicated that there was cocaine in his system. A paramedic who treated Hand at the scene described him as being very upset and emotionally distraught.

Following an investigation that lasted several months, Hand was charged with aggravated murder. The government alleged that Hand hired Welch to kill Jill, but that Hand had killed her himself and then shot Welch to cover up the crime. Although Hand was not charged with the murders of his first two wives, the government claimed at trial that Hand had also hired Welch to kill them in the 1970s. The government alleged that Hand was in extreme financial debt, that he arranged for Jill's death in order to collect the life insurance money, and that the deaths of his first two wives were motivated by similar financial incentives.

The nature of the allegations against Hand resulted in an extraordinary amount of pretrial publicity in Delaware County, Ohio. Even before Hand was charged, local newspapers were reporting that he was a suspect in the murders of three of his four wives. The local police chief was asked about Hand in one early article and said, “No matter how badly we suspect somebody, if we don’t have probable cause to arrest them we can’t arrest them.” (ROW Apx., ECF 133-10, PageID 6543.)¹ When Jill Hand’s estate was frozen due to Hand’s suspected involvement in her death, the news ran across the front page of the *Delaware Gazette* as the main headline. (*Id.* at 6553.) Hand’s subsequent indictment resulted in a local media firestorm, and the press continued to report developments in an extensive and sensationalized manner. Despite the extremely prejudicial nature of the pretrial publicity, Hand’s trial lawyers failed to file a motion for a change of venue. Hand testified and maintained his innocence at trial, but he was convicted and sentenced to death.

In his state post-conviction proceedings, Hand alleged, among other things, that his trial lawyers had been ineffective in failing to seek a venue change. In support of his claim, Hand submitted a voluminous collection of local media reports relating to his case. The Court of Common Pleas dismissed the claim as barred by Ohio’s *res judicata* doctrine, finding that it should have been raised on direct appeal. The court made this determination notwithstanding the fact that none of the media reports were in the trial record, and they were therefore unavailable for consideration on direct review. The Ohio Court of Appeals affirmed, *State v. Hand*, No. 05CAA060040, 2006 WL 1063758 (Ohio App. Apr. 21, 2006), and the Ohio Supreme Court

¹ The state court record in this case is contained in the Warden’s appendix to the return of writ, which has been filed electronically in the District Court. The abbreviation “ROW Apx.” refers to the appendix to the return of writ.

denied Hand's request for discretionary review. *State v. Hand*, 852 N.E.2d 1215 (Ohio 2006) (Table).

In his federal habeas corpus proceedings, Hand consistently argued that his claim was not defaulted because the Ohio state courts had misapplied the *res judicata* doctrine. The Ohio courts have recognized for decades that *res judicata* is inapplicable if a fair determination of the petitioner's claim requires the consideration of evidence outside of the trial record. *See, e.g., State v. Smith*, 477 N.E.2d 1128, 1131, n.1 (Ohio 1985). Furthermore, both this Court and the Ohio Supreme Court have recognized that pretrial publicity can be so pervasive and inflammatory in some cases that a presumption of prejudice will be required. *Skilling v. United States*, 561 U.S. 358, 377-85 (2010); *State v. Lundgren*, 653 N.E.2d 304, 313 (Ohio 1995). Accordingly, trial counsel's performance could not be fairly assessed without taking the nature and extent of the pretrial publicity into consideration.

The District Court nevertheless found that Hand's claim was defaulted, reasoning "[t]hese articles were all available to Hand at the time of trial, along with the jury questionnaires which clearly established the fact that extensive publicity had occurred. This issue should have been raised on direct appeal." *Hand v. Houk*, No. 2:07-cv-846, 2013 WL 2372180, at *32 (S.D. Ohio May 29, 2013). Although Hand was granted a certificate of appealability on other claims, the District Court refused to certify this issue. *Hand v. Houk*, No. 2:07-cv-846, 2014 WL 617594, at *2 (S.D. Ohio Feb. 18, 2014). The Sixth Circuit likewise rejected Hand's request to certify the claim. *Hand v. Houk*, No. 14-3148, Order (6th Cir. Jan. 12, 2016). Hand now asks this Court to grant certiorari and reverse.

RELEVANT PROCEDURAL HISTORY

Hand's convictions and death sentence were affirmed by the Ohio Supreme Court on direct review. *State v. Hand*, 840 N.E.2d 151 (Ohio 2006). The Ohio Court of Appeals affirmed the dismissal of Hand's petition for post-conviction relief, *State v. Hand*, No. 05CAA060040, 2006 WL 1063758 (Ohio App. Apr. 21, 2006), and the Ohio Supreme Court denied Hand's subsequent request for discretionary review. *State v. Hand*, 852 N.E.2d 1215 (Ohio 2006) (Table). Hand's petition for certiorari was denied. *Hand v. Ohio*, 549 U.S. 1217 (2007) (Mem).

Hand sought federal habeas corpus relief, but the District Court denied his petition. *Hand v. Houk*, No. 2:07-cv-846, 2013 WL 2372180 (S.D.Ohio May 29, 2013). The District Court granted in part and denied in part Hand's motion for a certificate of appealability. *Hand v. Houk*, No. 2:07-cv-846, 2014 WL 617594 (S.D.Ohio Feb. 18, 2014). Hand asked the Sixth Circuit to expand the certificate, and this was granted in part. *Hand v. Houk*, No. 14-3148, Order (6th Cir. Jan. 12, 2016). The Sixth Circuit subsequently affirmed the denial of habeas corpus relief. *Hand v. Houk*, 871 F.3d 390 (6th Cir. 2017). Hand's petition for rehearing and rehearing *en banc* was denied. *Hand v. Houk*, No. 14-3148, Order (6th Cir. Oct. 18, 2017). Hand now petitions this Court for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari because the lower court decisions involve “an important question of federal law that has not been, but should be, settled by this Court[.]” *See* S.Ct.R. 10(c). Although this Court has addressed the procedural default doctrine extensively in prior decisions, *see, e.g., Edwards v. Carpenter*, 529 U.S. 446 (2000), along with the closely-related issue of adequate and independent state grounds to bar federal review, *see, e.g., Johnson v. Lee*, 136 S.Ct. 1802 (2016), the Court’s precedents provide little guidance on the question of what to do when a state court has simply misapplied its own procedural rules in determining that a federal claim has been defaulted. Furthermore, the Sixth Circuit’s denial of a certificate of appealability on Hand’s claim that his trial lawyers were ineffective in failing to seek a venue change cannot be reconciled with this Court’s precedent. This Court should grant certiorari to determine if Hand’s claim is procedurally defaulted. In the alternative, this Court should grant certiorari to determine if Hand is entitled to a certificate of appealability on his claim that his trial lawyers were ineffective in failing to move for a change of venue.

I. This Court should grant certiorari and hold that the procedural default doctrine does not preclude federal habeas corpus review if the state courts clearly misapplied their own procedural rules in determining that a claim was defaulted.

The question of how to address a state court’s misapplication of its own procedural rules in the procedural default context represents an important issue, and it is likely to recur in many different jurisdictions throughout the country. Certiorari should accordingly be granted.

A. Ohio’s *res judicata* doctrine.

Ohio employs a *res judicata* doctrine in conducting review of criminal convictions. *See, e.g., Hill v. Mitchell*, 842 F.3d 910, 936 (6th Cir. 2016). Claims based solely on the trial record must be raised on direct appeal, while claims based on evidence outside the record must be

raised in a post-conviction proceeding. *Id.* The Ohio state courts routinely apply this doctrine to claims of ineffective assistance of trial counsel. *Id.* The doctrine is sometimes applied in a highly questionable manner. *See State v. McKelton*, 70 N.E.3d 508, 586-87, ¶¶368-71 (Ohio 2016) (O’Neill, J., dissenting). Hand will assume, for the purposes of the present appeal only, that the framework created by this doctrine constitutes an adequate and independent state ground as a general matter.

B. The Ohio state courts misapplied the *res judicata* doctrine in Hand’s case.

The state courts clearly misapplied the *res judicata* doctrine in dismissing Hand’s claim that his trial lawyers were ineffective in failing to file a motion for a change of venue. Hand included this claim as his third ground for relief in his state post-conviction petition. (ROW Apx., ECF 133-10, PageID 6504-06.) Hand submitted a voluminous collection of media reports in support of his claim. (*Id.* at 6526-6617.)² Hand’s petition specifically asserted that “Petitioner’s conviction and sentence are void or voidable because he was denied the effective assistance of counsel when defense counsel failed to make a motion for a change of venue.” (*Id.* at 6504.) Hand also alleged that he “was prejudiced when his case was tried in a county where prospective jurors were overly exposed to the media’s detailed, sensationalized coverage of his case. Furthermore, trial counsel was aware of the extensive press coverage of this case.” (*Id.* at 6505.) Hand cited the media reports he had attached to his petition in support of his claim. (*Id.* at 6504-06.)³

² In addition to the newspaper articles that are available on the District Court docket, state post-conviction counsel appear to have also submitted recordings of television broadcasts. (*See* ROW Apx., ECF 134-2, PageID 7169.)

³ In the same ground for relief, Hand also claimed that trial counsel “were further ineffective when they failed to use all of Petitioner’s peremptory challenges.” (*Id.* at 6505.) The Ohio Supreme Court had suggested in the past that a defendant who did not exhaust all of their

The Court of Common Pleas nevertheless dismissed the claim on the basis of *res judicata*; the court's disposition of the claim, in its entirety, reads as follows:

The Defendant's second, third, fourth, fifth, sixth, eighth, and eleventh claims are barred by *res judicata*. Again, *res judicata* applies to post-conviction petitions and bars the defendant from raising and litigating issues that could have been or have been raised at trial or on appeal. *Perry*, 10 Ohio St.2d 175, at paragraph two of the syllabus. In each of these claims the Defendant argues that he had ineffective assistance of counsel including ineffective counsel during jury selection and the penalty phase. However, the Sixth Amendment right to effective counsel should be raised on appeal and cannot be relitigated in a post-conviction relief petition if the basis for raising the issue of ineffective counsel is drawn from the record. *State v. Lentz* (1994), 70 Ohio St.3d 527, 529-30. All of the Defendant's grounds can be found in the record. The Defendant has also raised these same arguments on appeal. Since the issues were properly raised on appeal and they are based on the trial record, the Defendant's second, third, fourth, fifth, sixth, eighth, and eleventh claims of the post-conviction relief petition are hereby denied on the basis of *res judicata*.

State v. Hand, Delaware Cty. No. 02CR-I-08-366 (Ohio Com. Pl. May 27, 2005), slip op. at 3-4.

Hand appealed and argued that *res judicata* did not apply because the media reports were not part of the trial record. (ROW Apx., ECF 134-2, PageID 7169.) The Ohio Court of Appeals similarly rejected Hand's arguments and found that *res judicata* barred his claim:

A review of appellant's direct appeal indicates he specifically raised numerous claims of ineffective assistance of counsel, including: ineffective assistance of counsel during voir dire; failure to call witnesses during both the guilt and mitigation phases of trial; failure to investigate, prepare and present evidence during both phases; and failure to form a reasonable trial strategy. However, appellant asserts, without evidence gathered outside the

peremptory challenges waived claims relating to the denial of a change of venue. See *State v. Getsy*, 702 N.E.2d 866, 879 (Ohio 1998). More recent precedent has clarified that a venue change may be obtained in advance of *voir dire* if a defendant establishes a presumption of prejudice. *State v. Mammone*, 13 N.E.3d 1051, 1067 (Ohio 2014) ("To prevail on a claim of presumed prejudice, however, a defendant must make a clear and manifest showing that pretrial publicity was so pervasive and prejudicial that an attempt to seat a jury would be a vain act.") (citation, internal quotation marks and ellipsis omitted).

record, there was insufficient evidence available in the record to assert the claims at issue on direct appeal. We disagree.

In the second and third claims, appellant asserts counsel was ineffective for failing to question members of the venire who demonstrated knowledge of pretrial publicity, and failing to use all of the peremptory challenges necessary to make a valid claim a change of venue should be granted.

We find the claims presented were cognizable and capable of review on direct appeal. Appellant does not offer any new evidence outside the record precluding the application of *res judicata*. We note the record on direct appeal was supplemented with the jury questionnaires which appellant asserts merit review under post conviction relief herein.

State v. Hand, No. 05CAA060040, 2006 WL 1063758, at *5, ¶31-33 (Ohio App. Apr. 21, 2006).

As previously noted, the Ohio Supreme Court subsequently denied Hand's request for discretionary review. *State v. Hand*, 852 N.E.2d 1215 (Ohio 2006) (Table).

The application of *res judicata* to this claim was clearly erroneous. Determining if a presumption of prejudice was warranted required consideration of the extent and nature of the media coverage at issue. *See, e.g., Sheppard v. Maxwell*, 384 U.S. 333 (1966). Judging the adequacy of trial counsel's performance therefore necessarily required consideration of the media reports. Furthermore, the Ohio appellate courts will not take judicial notice on direct review of media reports that have not been made a part of the trial record. *See State v. Ross*, Nos. 22447, 22598, 2005 WL 2401611, at *2, ¶8-11 (Ohio App. Sep. 30, 2005), *reversed on other grounds in In re Ohio Criminal Sentencing Statutes Cases*, 847 N.E.2d 1174, 1180 (Ohio 2006) (Mem). The Ohio state courts nevertheless refused to consider Hand's claim on the merits, finding that he was obligated to raise it on direct appeal. The imposition of this procedural bar clearly violated Ohio's own procedural rules, and Hand should have been allowed to have this claim heard on the merits in his federal habeas corpus proceedings.

C. The procedural default doctrine should not preclude federal habeas corpus review in cases where the state court finding of default was clearly erroneous.

This Court's precedent on this particular issue appears to be somewhat limited, but it supports a finding that Hand's claim is not defaulted. In *Cone v. Bell*, 556 U.S. 449, 466 (2009), this Court indicated that a state procedural bar may not be adequate and independent if it is based on a "false premise." In that case the state court erroneously found that the petitioner had already raised his claim in an earlier proceeding, when in fact the claim had never been raised before. *Cone*, 556 U.S. at 466. The Sixth Circuit concluded that the claim was procedurally barred, but the State declined to defend that aspect of the Court of Appeals' ruling when the case reached this Court. *Id.* This Court subsequently concluded that the claim was not defaulted. *Id.* at 467.

The Tenth and Eleventh Circuits have relied on *Cone* and reached similar results. *Williams v. Alabama*, 791 F.3d 1267, 1275-76 (11th Cir. 2015); *LeBere v. Abbott*, 732 F.3d 1224, 1230-34 (10th Cir. 2013). In contrast, the Seventh Circuit recently explained that federal courts "do not have license to question ... whether the state court properly applied its own law" in enforcing a default. *Oaks v. Pfister*, 863 F.3d 723, 727 (7th Cir. 2017) (citation and internal quotation marks omitted). Likewise, earlier Eighth Circuit precedent determined that the propriety of a state court's finding of default under its own rules is generally not reviewable in federal proceedings. See *Clemons v. Luebbers*, 381 F.3d 744, 750 (8th Cir. 2004) ("And, federal courts should not consider whether the state court *properly* applied its default rule to the claim; federal courts do not sit to correct a state court's application of its ordinarily adequate procedural rules . . . except in unusual circumstances not present here") (citations omitted, emphasis in original). This divergence of authority provides an additional basis for granting certiorari.

Furthermore, the Sixth Circuit has previously recognized that the state courts' misapplication of Ohio's *res judicata* doctrine will not necessarily result in a procedural bar foreclosing federal review. *See Richey v. Bradshaw*, 498 F.3d 344, 359-60 (6th Cir. 2007) (collecting cases). The Sixth Circuit failed to explain why this principle was not applicable to Hand's claim that his attorneys were ineffective in failing to request a change of venue, however. This Court should grant review to clarify the standards for determining when a state court's failure to act in accordance with its own procedural rules will excuse the purported default of the petitioner's claim.⁴

D. This Court can proceed directly to the merits of the procedural default issue, notwithstanding the Sixth Circuit's denial of a certificate of appealability on this particular claim.

This Court recently clarified that it can reach the merits of a petitioner's arguments notwithstanding the denial of a certificate of appealability in the lower federal courts. *Buck v. Davis*, 137 S.Ct. 759, 774-75 (2017) ("With respect to this Court's review, § 2253 does not limit the scope of our consideration of the underlying merits, and at this juncture we think it proper to meet the decision below and the arguments of the parties on their own terms."). Accordingly, it is not necessary to determine if Hand is entitled to a certificate of appealability before considering the merits of Hand's procedural default arguments. *See id.* Given the significance of the issue, certiorari should be granted.

⁴ Moreover, this Court could alternatively conclude that the state courts' reliance on *res judicata* to reject Hand's claim qualifies as the type of "exorbitant application" of a state procedural rule that was found inadequate to bar review in *Lee v. Kemna*, 534 U.S. 362, 376 (2002).

E. This Court should also grant certiorari to consider the propriety of applying *res judicata* to Hand’s claim that the trial judge conducted an inadequate *voir dire* on the question of pretrial publicity.

In addition to alleging that his trial lawyers had been ineffective in failing to seek a change of venue, Hand’s post-conviction petition also alleged that the trial judge failed to conduct an adequate *voir dire* on the issue of pretrial publicity. (ROW Apx., ECF 133-10, PageID 6498-6500.) As with his claim that counsel had been ineffective in failing to seek a venue change, Hand relied on media reports that were not a part of the trial record. (*Id.*) The Ohio Court of Appeals nevertheless found that the claim was barred by *res judicata*, and the Sixth Circuit condoned its application as a basis for imposing a procedural default. *State v. Hand*, No. 05CAA060040, 2006 WL 1063758, at *4, ¶23 (Ohio App. Apr. 21, 2006); *Hand v. Houk*, 871 F.3d 390, 408-09 (6th Cir. 2017).⁵ This Court should grant certiorari to determine if Ohio’s *res judicata* doctrine forecloses federal review of this claim, as well.

II. In the alternative, this Court should grant certiorari to determine if the Sixth Circuit erred in denying Hand a certificate of appealability on his claim that trial counsel were ineffective in failing to file a motion for a change of venue.

This Court should alternatively grant certiorari to determine if Hand is entitled to a certificate of appealability on his claim that trial counsel were ineffective in failing to move for a change of venue. The Sixth Circuit’s denial of a certificate of appealability on this claim is clearly incompatible with this Court’s precedent. As previously explained, the Sixth Circuit granted a certificate of appealability on several issues, but declined Hand’s request to certify this

⁵ The Ohio Court of Appeals found that *res judicata* barred this claim because “Appellant’s attachment of exhibits demonstrating pre-trial publicity to the post-conviction relief petition, though admittedly outside the original trial record, merely supplements appellant’s argument which was capable of review on direct appeal on the then extant record.” *Hand*, 2006 WL 1063758, at *4, ¶23.

particular claim. This failure was serious enough to call for the “exercise of this Court’s supervisory power,” and certiorari is therefore warranted. *See* S.Ct.R. 10(a); *see also* *Tharpe v. Sellers*, 583 U. S. ___, No. 17–6075, 2018 WL 311568 (Jan. 8, 2018).

Miller-El v. Cockrell, 537 U.S. 322 (2003), established the showing a petitioner must make to obtain a certificate of appealability under 28 U.S.C. § 2253(c). As this Court explained:

. . . a prisoner seeking a COA need only demonstrate a ‘substantial showing of the denial of a constitutional right’ A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.

Miller-El, 537 U.S. at 327 (citations omitted).

This Court further explained that a petitioner seeking a certificate of appealability is not required to prove “that some jurists would grant the petition for habeas corpus.” *Id.* at 338.

“Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail.” *Id.*

As the foregoing makes clear, the certificate of appealability standard is not difficult to satisfy. The requirements of § 2253(c) are “non-demanding.” *Wilson v. Belleque*, 554 F.3d 816, 826 (9th Cir. 2009). A certificate of appealability should be granted unless the claim presented is “utterly without merit.” *Id.* (quoting *Jefferson v. Welborn*, 222 F.3d 286, 289 (7th Cir. 2000)). Furthermore, in cases where the death penalty is at issue, any doubts regarding the propriety of a certificate of appealability must be resolved in the petitioner’s favor. *Skinner v. Quarterman*, 528 F.3d 336, 341 (5th Cir. 2008) (citations omitted). Hand satisfies these standards, and this Court should grant certiorari and reverse.

A. Reasonable jurists could conclude that Hand's claim is not procedurally defaulted.

As Hand has already explained at length, his claim should not be barred by the procedural default doctrine because the state courts clearly misapplied their own procedural rules. This Court's decision in *Cone* suggests that a finding of default based on this type of "false premise" does not constitute an adequate and independent state ground to bar federal review. *Cone v. Bell*, 556 U.S. 449, 466 (2009). Moreover, the Sixth Circuit itself has acknowledged that the Ohio courts' invocation of the *res judicata* doctrine will not bar federal review when it has been improperly applied. *See Richey v. Bradshaw*, 498 F.3d 344, 359-60 (6th Cir. 2007). In denying Hand's request for a certificate of appealability on this claim, the Sixth Circuit did not provide any explanation for why this principle did not permit the federal courts to excuse the default and reach the merits. *See Hand v. Houk*, No. 14-3148, Order (6th Cir. Jan. 12, 2016). The District Court's rationale for denying the claim was questionable, however. The court found that the "articles were all available to Hand at the time of trial, along with the jury questionnaires which clearly established the fact that extensive publicity had occurred. This issue should have been raised on direct appeal." *Hand v. Houk*, No. 2:07-cv-846, 2013 WL 2372180, at *32 (S.D.Ohio May 29, 2013).

But the availability of the articles at the time of trial is exactly the point. Trial counsel should have collected and used these materials in order to secure a change of venue. Reasonable jurists could conclude that the refusal of the state courts to take the articles into consideration and review Hand's claim on the merits was a clear misapplication of the state's own procedural rules that excuses the alleged procedural default.

B. Reasonable jurists could conclude that Hand's claim is meritorious.

Reasonable jurists could also find that Hand is entitled to relief on this claim. Hand's claim was never considered on the merits in state court, and as a result the restrictive standards set out in 28 U.S.C. § 2254(d) do not apply. *Johnson v. Williams*, 568 U.S. 289, 302-03 (2013). Furthermore, trial counsel's failure to seek a change of venue under these circumstances amounted to deficient performance under *Strickland v. Washington*, 466 U.S. 668 (1984). In light of the pervasive and sensationalized media coverage that persisted for months in advance of Hand's trial, counsel's failure to protect Hand's right to an unbiased jury cannot be viewed as a reasonable tactical decision. This was an error "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687.

Reasonable jurists could also determine that Hand was prejudiced. Even assuming for the sake of argument that Hand must demonstrate actual prejudice notwithstanding the structural nature of the underlying error, *see Weaver v. Massachusetts*, 137 S.Ct. 1899 (2017), it is reasonably probable that an untainted jury considering the same evidence would have returned an acquittal.⁶ The evidence against Hand was not overwhelming, and the State's case was largely circumstantial. Much of the evidence consisted of hearsay statements attributed to Lonnie Welch before his death, but many of these alleged statements were recounted by Welch's family members. These witnesses undoubtedly had reasons to feel a great deal of animosity toward Hand because Hand was not disputing that he shot and killed Welch, but alleged that he

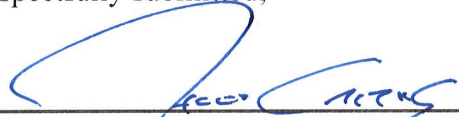
⁶ This Court's decision in *Weaver* found that the petitioner was required to demonstrate actual prejudice where attorney error resulted in the denial of a public trial (which would ordinarily qualify as a structural defect), but left open the possibility that no showing of prejudice would be required in cases where counsel's errors rendered the trial fundamentally unfair. *Weaver*, 137 S.Ct. at 1911. Accordingly, it may not be necessary for Hand to establish prejudice. *See id.*

had done so in self-defense. A jury untainted by extensive pretrial publicity could have found their testimony to be unreliable. At a minimum, this claim deserves “encouragement to proceed further.” *See Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *see also Miller v. State*, 750 So.2d 137 (Fl.App. 2000). This Court should grant certiorari to determine if Hand is entitled to a certificate of appealability on this claim.

CONCLUSION

For the foregoing reasons, Petitioner Gerald Hand prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,



JACOB ANDREW CAIRNS (OH 0075828)

Counsel of Record

CAROL ANN WRIGHT (OH 0029782)

Office of the Federal Public Defender

Southern District of Ohio

10 West Broad Street, Suite 1020

Columbus, OH 43215-3469

Telephone: (614) 469-2999

Facsimile: (614) 469-5999

jacob_cairns@fd.org

JENNIFER M. KINSLEY (OH 0071629)

Kinsley Law Office

Post Office Box 19478

Cincinnati, Ohio 45219

(513) 708-2595

kinsleylawoffice@gmail.com

Members of the Bar of this Court

Counsel for Petitioner Gerald Hand

January 12, 2018