

No. \_\_\_\_\_

\_\_\_\_\_  
**IN THE  
SUPREME COURT OF THE UNITED STATES**  
\_\_\_\_\_

DAWNTWAI HUBBARD – PETITIONER

vs.

JAMES HAVILAND – (Warden) – RESPONDENT

**ON PETITION FOR A WRIT OF CERTIORARI TO  
UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OHIO  
WESTERN DIVISION**

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**PETITION FOR A WRIT OF CERTIORARI TO**

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DAWNTWAI HUBBARD  
ALLEN CORRECTIONAL INSTITUTION  
P.O. BOX 4501  
LIMA, OHIO 45802

## Questions Presented

1. Whether Petitioner Dawntwai Hubbard was denied substantial due process under the Confrontation and Compulsory Process Clauses as pronounced by the United States Supreme Court in *Crawford v. Washington*, 514 U.S. 36 (2004).
2. Whether Petitioner Dawntwai Hubbard was denied his Sixth Amendment right to the effective assistance of counsel, thereby, existing as cause and prejudice to excuse any procedural bar federal habeas corpus review under 28 U.S.C. §2254.
3. Whether Petitioner Dawntwai Hubbard adequately exhausted his Sixth and Fourteenth Amendments federal constitutional lesser-included offense assignment of error before the state appellate courts.

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**IN THE  
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**DAWNTWAI HUBBARD – PETITIONER**

**VS.**

**JAMES HAVILAND – (Warden) – RESPONDENT**

**On petition for Writ of Certiorari to**

**United States District Court  
For The Northern District of Ohio**

**PETITION FOR A WRIT OF CERTIORARI**

*To the Honorable Chief Justice and the  
Associate Justices of the Supreme Court*

### OPINION BELOW

[x] For cases from **federal courts**:

The opinion of the United States court of appeals at Appendix A to the petition and is reported at *Hubbard v. Haviland*, 2017 U.S. App. LEXIS 16339.

The opinion of the United States district court appears at Appendix \_\_\_\_ to the petition and is reported at *Hubbard v. Sheldon*, 2016 U.S. Dist. LEXIS 176622 (N.D. Ohio, Dec. 21, 2016).

[x] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix \_\_\_\_ to the petition and is reported at *State v. Hubbard*, 137 Ohio St. 3d 1422, 2013-Ohio-5285, 998 N.E.2d 1177, 2013 Ohio LEXIS 2840 (2013).

The opinion of the Court of Appeals of Ohio, Tenth Appellate District, Franklin County appears at Appendix \_\_\_\_ to the petition and is reported at *State v. Hubbard*, 2013-Ohio-2735.

### JURISDICTION

[x] For cases from **federal courts**:

The date on which the United States court of Appeals decided my case was August 8, 2017.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: Rehearing, en banc, denied by *Hubbard v. Haviland*, 2017 U.S. App. LEXIS 22455 (6th Cir., Nov. 8, 2017), and a copy of the order denying rehearing appears at Appendix B.

The Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

[x] For cases from **state courts**:

The date on which the highest state court decided my case was *State v. Hubbard*, 137 Ohio St. 3d 1422, 2013-Ohio-5285, 998 N.E.2d 1177, 2013 Ohio LEXIS 2840 (2013).

A copy of that decision appears at Appendix \_\_\_\_\_.

The jurisdiction of this Court is invoked under U.S.C. § 1257(a).

### **CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED**

#### **SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION:**

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.

#### **FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION:**

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.

#### **28 USCS § 2254:**

(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.

#### **R.C. 2903.02:**

(A) No person shall purposely cause the death of another or the unlawful termination of another's pregnancy.

(B) No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree and that is not a violation of section 2903.03 or 2903.04 of the Revised Code.

(C) Division (B) of this section does not apply to an offense that becomes a felony of the first or second degree only if the offender previously has been convicted of that offense or another specified offense.

(D) Whoever violates this section is guilty of murder, and shall be punished as provided in section 2929.02 of the Revised Code.

**R.C. 2903.11:**

(A) No person shall knowingly do either of the following:

- (1) Cause serious physical harm to another or to another's unborn;
- (2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance.

(B) No person, with knowledge that the person has tested positive as a carrier of a virus that causes acquired immunodeficiency syndrome, shall knowingly do any of the following:

- (1) Engage in sexual conduct with another person without disclosing that knowledge to the other person prior to engaging in the sexual conduct;
- (2) Engage in sexual conduct with a person whom the offender knows or has reasonable cause to believe lacks the mental capacity to appreciate the significance of the knowledge that the offender has tested positive as a carrier of a virus that causes acquired immunodeficiency syndrome;
- (3) Engage in sexual conduct with a person under eighteen years of age who is not the spouse of the offender.

**Ohio App. Rule 12:**

**(A) Determination**

- (2) The court may disregard an assignment of error presented for review if the party raising it fails to identify in the record the error on which the assignment of error is based or fails to argue the assignment separately in the brief, as required under App.R. 16(A).

**Ohio App. Rule 16:**

(A) Brief of the appellant. The appellant shall include in its brief, under the headings and in the order indicated, all of the following:

(7) An argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies. The argument may be preceded by a summary.

**STATEMENT OF THE CASE**

On September 27, 2010, the State indicted defendant on one count of aggravated murder, an unclassified felony, one count of attempted murder, a first degree felony, one count of murder, an unclassified felony, and one count of felonious assault, a second degree felony, all with firearm specifications in accordance with R.C. 2941.145. The events giving rise to the indictment occurred on September 18, 2010, on the near east side of Columbus, Ohio. Throughout the daytime hours on September 18, 2010, defendant's 19-year-old neighbor, Ravenna Bronaugh, and her group of friends had numerous verbal and physical altercations with defendant's 14-year-old daughter and her group of friends. Defendant and his daughter lived at 422 Morrison Avenue, while Bronaugh lived at 396 Morrison Avenue, five houses north from defendant's house on the same side of the street. The police responded to several calls from the area throughout the day to break up the fighting between the two groups. As a neighbor explained, the day "appeared to be a series of escalating arguments and tempers were getting hotter and hotter."

Around 8:00 p.m., the fighting between the two groups had died down, defendant's daughter and her friends were inside defendant's home, and Bronaugh and her friends were on Bronaugh's front porch. At that time, Lavada McCurdy, Bronaugh's good friend, and Bronaugh left the group at 396 Morrison Avenue and walked down the street to defendant's house. McCurdy picked up a cement block on the walk and, while standing in defendant's front yard, she "threw it at [defendant's front] window and busted it." The group standing on Bronaugh's porch walked out to the sidewalk to see what had happened. McCurdy and Bronaugh started to walk back to 396 Morrison Avenue, stopping to talk to another individual on the street, when suddenly they "started hearing shots."

The witnesses from 396 Morrison Avenue explained that, after McCurdy and Bronaugh broke defendant's window, defendant came out "on the porch and started shooting." McCurdy stated that, as she was running, she turned around and "noticed it was defendant" shooting. Another witness explained that the shots were coming "down Morrison from [the direction] which [McCurdy] and [Bronaugh] were walking from." As the shots were being fired, Teddy McGraph and Candace Keys, who had arrived at 396 Morrison Avenue minutes before the shooting, started yelling that they had been shot. McGraph walked back from the sidewalk to the steps in front of 396 Morrison Avenue, sat down and started taking "deep breathe[s] and blood started coming out." McGraph died from the gunshot wound to his torso. There were several individuals inside defendant's house when the cement block came crashing through the

window. The witnesses from inside defendant's house testified to hearing two gun shots either immediately before or immediately after the brick came through the window. Other witnesses for the State, however, testified that the only gunshots they heard that evening were the shots fired from defendant's gun. Defendant's daughter testified that, after she heard the gunshots and the cement block crash through the window, her father entered from the "rear of the house" and instructed everyone to "go upstairs." Defendant's daughter "got on the ground and climbed up the stairs," and then heard gunshots, approximately "four or five."

Defendant testified at trial. He explained that when he returned home around 8:00 p.m. from a brief outing with a friend, he saw a "group of people carousing and gathering," on Morrison Avenue. Defendant stated that he entered his house through the back door, heard approximately two gunshots followed by a terrifying crash, retrieved the gun which he had placed behind the mantel earlier in the day, and walked out onto his front porch. Defendant saw people approaching "from [his] yard coming closer" and, because he "didn't want to harm no one," he grabbed the pillar on the side of his porch, and shot "to the side and down to warn them, back, just back up." Defendant explained that he fired his gun "down towards the ground" in the direction of the abandoned house immediately north from his house and in the vicinity of a green trash can sitting in front of the abandoned house. Defendant explained that he did not intend to kill or harm anyone when he shot his gun. Allison Fife, defendant's neighbor at 430 Morrison Avenue, witnessed the shooting. Fife explained that at approximately 8:00 p.m. she saw a group of people standing down the street from her house and saw someone from the group run towards defendant's house and throws something that "went through the window." About a minute after the window broke, defendant walked out onto his

front porch, grabbed a hold of the brick pillar, and fired four or five shots in rapid succession while pointing his gun "towards the group" standing down the street. Fife, and other witnesses from 396 Morrison Avenue, stated that when defendant fired his gun, there was no one standing in front of his house.

Police arrived shortly after the shooting. Detective Gregory Sheppard stated that "several of the witnesses stated that the person that actually committed the shooting was [defendant] and that he lived at 422 Morrison." Police entered defendant's home and, as they proceeded to the second floor of the house, they heard "like steps or some creaking in another level of the house" and told whoever was upstairs to come down. Defendant came down the stairs and officers noted that, while defendant was "sweating from his forehead," his shirt "was very dry" causing the officers to "believe that maybe [defendant] just changed his shirt or something like that." Witnesses from the scene told officers that defendant had "ran and changed his clothes," as defendant wore a white "wife beater" undershirt during the day, but had on a yellow T-shirt when police found him. Police recovered five spent Winchester 45-automatic shell casings on and around defendant's front porch. Inside defendant's house, in a large box underneath a bed, police found a "handgun and some ammunition along with a gun box." The ammunition was Winchester 45-automatic ammunition. The gun box was for a Hi-Point firearm, and contained a receipt from Vance's gun shop, evidencing the sale of a Hi-Point 45-automatic firearm to defendant on October 12, 2007. The gun was not inside the gun box, rather it was "stuck down in" the larger box. The magazine had eight live rounds in it. Forensic testing revealed that the five spent shell casings from defendant's front porch were fired from

the Hi-Point firearm. The bullet which caused McGraph's death was also fired from the Hi-Point firearm. Samples taken from defendant's hands on the night of the incident revealed gunshot primer residue, indicating that defendant had fired a gun that day. Defendant's trial concluded on October 4, 2011. The jury found defendant guilty of attempted murder and felonious assault relative to Keys, found defendant guilty of murder regarding McGraph, and found defendant guilty of the firearm specifications for each crime. The jury was unable to reach a verdict on the aggravated homicide charge and a nolle prosequi was entered as to Count 1 of the indictment. The court sentenced defendant to a prison term of 15 years to life on the murder charge, 7 years on the attempted murder charge, and 3 years on each firearm specification. The court ordered that the sentences be served consecutively, for a total prison term of 28 years to life.

#### **THE STATE POST-JUDGMENT PROCEEDINGS**

Petitioner asserts that the evidence does not support the convictions. The appellate court held that the evidence was sufficient to allow the jury to infer that he acted with the intention of causing death when he fired his gun into a crowd of people standing down the street from his house. The State contends, such evidence supports the inference that the Petitioner knowingly attempted to cause physical harm to another by firing his weapon into the

crowd. A neighbor stated that petitioner held his arm straight out in front as he pulled the trigger, directing the shots down the street into the group of people. Further, the petitioner asserts there was error in the jury instructions because the evidence warranted an instruction on the lesser-included offense of reckless homicide or instructions on self-defense, accident, duress, mistake of fact, or transferred intent. Additionally, the trial court refused to merge the convictions, *supra*. Even further, the trial court failed to make the findings required by R.C. 2929.14(C)(4) before it imposed consecutive sentences. Thereafter, the imposition of his consecutive sentences was reversed, and his sentence was vacated, and the case was remanded for resentencing. In all other respects, the judgment of the trial court was affirmed.

### **The Federal Habeas Corpus Proceedings**

#### **The District Court Decision**

Petitioner, Dawntwai Hubbard filed a *pro se* petition for writ of habeas corpus under 28 U.S.C. § 2254 on April 20, 2015 in the United States District Court for the Northern District of Ohio, Western Division. The thrust of the petition was that his Sixth Amendment right to cross-examine his accuser was violated because Candace Keys did not testify at trial. The respondent

argues that his right to Confrontation was procedurally defaulted because he failed to raise it on direct appeal, and the Ohio Supreme Court enforced a rule from *State v. Sanders*, 92 Ohio St.3d 245, 2001 Ohio 189, 750 N.E.2d 90 (2001) which provides that an issue is waived if not raised in the court of appeals. To the contrary, Petitioner did actually raise the Confrontation Clause issue on direct appeal. The District Court stated, Hubbard fairly presented his Sixth Amendment confrontation clause argument on direct appeal in state court, and the State's argument to the contrary was not well taken. Moreover, the Petitioner argued that testimonial statements by Ms. Keys were introduced through the testimony of Dezaray Moore. Ms. Moore was then asked to identify the shoe that Candace Keys was wearing. The Petitioner, asserts, the statements by Ms. Keys that were introduced through the testimony of Ms. Moore was testimonial in nature. As a result the introduction of the statements this violated his right to confront his accuser.

The Petitioner relied upon *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 and *Bullcoming v. New Mexico*, 564 U.S. 647, 131 S.Ct. 2705, 180 L. Ed. 2d 610; 564 U.S. 647, 131 S. Ct. 2705, 180 L.Ed.2d 610 (2011) in support of his Confrontation Clause argument. The District Court in its decision concluded, the *Bullcoming* decision did not support his argument that testimonial statements made by Ms. Keys were improperly admitted into evidence. For this reason, the Petitioner's argument, in the petition for writ of habeas corpus was DENIED on the merits.

In Ground Two, Hubbard argued that he received ineffective assistance of counsel because; (1) his attorney did not subpoena Candace Keys, the only living witness/alleged victim, to testify at trial; and (2) his attorney did not verify the credentials of the state's expert. Because of his counsel ineffectiveness, the Petitioner asserts this must excuse any procedural default, thereby, supporting the cause and prejudice in the context of a habeas corpus petition. *Coleman v. Thompson*, 501 U.S. 722, 735, 115 L.Ed.2d 640, 111 S.Ct. 2546 (1991). The Petitioner argues due to his trial counsel's ineffectiveness, this objective factor was the primary cause external to his defense which impeded his efforts to comply with the State's procedural rule. Hubbard's asserts his procedural default on ineffective assistance of counsel should be excused because the alleged constitutional violation has "probably resulted in the conviction of one who is actually innocent. Ineffective assistance of counsel, if independently pleaded and

proved, can establish cause for a default. *Id.*; *Edwards v. Carpenter*, 529 U.S. 446, 451, 120 S. Ct. 1587, 146 L. Ed. 2d 518 (2000).

In Ground Three of Hubbard's habeas petition, he asserted that his Fifth and Fourteenth Amendment rights to due process were violated when the trial court failed to instruct the jury on lesser included offenses. The State argued, this ground was procedurally defaulted for two reasons: 1) because he did not request a lesser included offense jury instruction at the close of trial; and 2) because this argument was found to be procedurally barred by the Ohio court of appeals when it enforced Ohio Appellate Rules 12(A)(2) and 16(A)(7). Because his trial counsel failed to request the lesser offense included jury instructions during at trial, the court of appeals stated, "[d]efendant failed [¶44] to timely request an instruction on any lesser-included offense." Therefore, he waived this error where he failed to make a contemporaneous objection during trial at the time of the alleged error or errors. *Osborne v. Ohio*, 495 U.S. 103, 124, 110 S. Ct. 1691, 109 L. Ed. 2d 98 (1990). The court of appeals further noted that, "[a]bsent plain error, a party forfeits error concerning jury instructions if the party fails to object before the jury retires." The court of appeals then reviewed Hubbard's argument under the plain error doctrine.

In this case, due to his counsel's failure to request a lesser included offense jury Instructions and failing to object to the omission of such jury instructions at trial, Hubbard had

waived all but plain error review on this issue. Moreover, due to his counsel *ineffectiveness*, this resulted in a procedural default. See *Maupin v. Smith*, 785 F.2d 135 (6<sup>th</sup> Cir. 1986). For the reason(s) stated, *supra*, the District Court procedurally defaulted and claim dismissed this claim.

### **The Sixth Circuit Court of Appeals**

Dawntwai Hubbard, filed a notice of appeal from the district court's judgment denying his 28 U.S.C. § 2254 habeas corpus petition. This court construed Hubbard's timely appeal as an application for a certificate of appealability (COA). See 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b). He also requests permission to proceed in forma pauperis (IFP) on appeal.

The Sixth Circuit Court of Appeals stated, "this case, it is clear that the petitioner failed to comply with Ohio procedural rules when he failed to bring his second and fourth claims before the state courts. [¶]9] He was also barred, under state rules, from raising his third ground in state court after attempting to do so in an untimely fashion. The applicable state procedural rules, as stated above, were adequate and independent state grounds for purposes of federal habeas review, see *Maupin*, 785 F.2d at 135, and Hubbard failed to show any cause for his default or prejudice from the state court's rulings. Lastly, Hubbard failed to present evidence of his actual innocence. Under these circumstances, reasonable jurists could not

debate the district court's procedural ruling on grounds two, three, and four." *Slack*, 529 U.S. at 484. Accordingly, the court denied the application for a COA.

### **Rehearing En banc**

*Hubbard v. Haviland*, 2017 U.S. App. LEXIS 22455

Dawntwai Hubbard petitioned for a rehearing en banc. The court's order entered on August 8, 2017, denied his application for a certificate of appealability. The petition was initially referred to the panel, on which the original deciding judge did not sit. After review of the petition, the panel issued an order announcing its conclusion that the original application was properly denied. The petition was then circulated to all active members of the court, none of whom requested a vote on the suggestion for an en banc rehearing. Pursuant to established court procedures, the panel denies the petition for rehearing en banc.

### **Reasons for Granting the Writ**

The decision in this case expands federal habeas corpus review of state conviction to permit federal courts to exercise supervisory power over the conduct of state Prosecutors by violating a Defendant's right to confront witnesses, thereby, affecting the outcome of the trial. Such violation poses a serious threat to federal-state comity and has so far departed from the accepted constitutional principles and statutory requirements as to call for review by this Court.

The decision of the Sixth Circuit District and Court of Appeals grossly departed from the principle set forth in *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2718, 180 L. Ed. 2d 610 (2011).

In this case, at defendant's trial, a substitute analyst from the same laboratory testified concerning the testing device and the laboratory's testing procedures. The prosecution contended that the reporting analyst only transcribed the machine-generated test results. The U.S. Supreme Court held that admission of the report of defendant's blood alcohol level violated defendant's right to confront the analyst who prepared the report. **The report was clearly testimonial in nature as a statement made in order to prove a fact at defendant's criminal trial**, and the testimony of the substitute analyst who did not perform or observe the reported test did not satisfy the right to confrontation. The judgment affirming defendant's conviction was reversed, and the case was remanded for further proceedings. 5-4 Decision; 1 Concurrence; 1 Dissent. As in *Bullcoming v. New Mexico* C.f. *State v. Hubbard*, 2013-Ohio-2735, the Prosecutor introduced a "bloody shoe" as evidence to prove the truth of the matter. (Exhibit 90). As a rule, if an out-of-court statement is testimonial in nature, it may not be introduced against an accused at trial unless the witness who made the statement is unavailable and the accused has had a prior opportunity to confront that witness. (Ginsburg, J., joined by Scalia, Sotomayor, Kagan, and Thomas, JJ.)

Additionally, in the Petitioner's case the State contended that Candace Keys was shot in the foot, let it be noted that Keys failed to testify at trial. Moreover, the State never produced a

report from the hospital stating that Keys reported an injury as such to the hospital. The Sixth Amendment's Confrontation Clause confers upon an accused in all criminal prosecutions the right to be confronted with the witnesses against him. More fundamentally, as this Court stressed in *Crawford*, "[t]he text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts." 541 U.S., at 54, 124 S. Ct. 1354, 158 L. Ed. 2d 177. Nor is it "the role of courts to extrapolate from the words of the [Confrontation Clause] to the values behind it, and then to enforce its guarantees only [¶28] to the extent they serve (in the courts' views) those underlying values."

The next questions presented are: (1) Whether the Petitioner was denied his Sixth Amendment right to the effective assistance of appellate counsel, thereby, existing as cause and prejudice to excuse any procedural bar federal habeas corpus review under 28 U.S.C. §2254; and (2) Whether he adequately exhausted his Sixth and Fourteenth Amendments federal constitutional lesser-included offense assignment of error before the state appellate courts.

In this matter, Mr. Hubbard was represented by the same counsel at trial and on his direct appeal as of right. Several federal courts have recognized that having the same counsel on appeal as at trial creates a conflict in trying to raise ineffective assistance of counsel claims on direct appeal. See *English v. Cody*, 146 F.3d 1257, 1998 WL 348019, at ¶7. Generally, a

petitioner may show "cause" by demonstrating a substantial reason to excuse the procedural default. *Rust v. Zent*, 17 F.3d 155, 161 (6th Cir. 1994). Nonetheless, however, the Supreme Court has held that a petitioner may establish adequate "cause-and-prejudice" by [¶1790] offering proof of either ineffective assistance of counsel or an objective factor that impeded his counsel's efforts to comply with state procedural law, such as the novelty of the proposed claim. See *Reed v. Ross*, 468 U.S. 1, 13, 82 L. Ed. 2d 1, 104 S. Ct. 2901 (1984).

In Petitioner's case, his appellate counsel failed to argue on appeal the issue of his Sixth Amendment violation in regards to the Confrontation Clause and the issue of the lesser included offense. If such practice is allowed to stand, there will be a multitude of state court Defendants, "**unjust conviction**", allowed to stand, due to the violation of his right to have effective assistance of counsel on their appeal as of right. Against the backdrop, given the finding of the Sixth Circuit District Court, that explained "[H]ubbard fairly presented his Sixth Amendment confrontation clause argument on direct appeal in state court and respondent's argument to the contrary was not well taken. Hubbard has preserved this argument for federal habeas review." The court of appeals overruled Hubbard's confrontation clause argument, in part, because his appellate counsel failed to cite to the portions of the transcript or record to support his argument. Such a ruling could be construed as the enforcement of a state procedural rule under the *Maupin* test and Ground One could have procedurally defaulted on

that basis. In *Richey v. Bradshaw*, 498 F.3d 344 (2007), in April 1994, Richey moved to reopen his appeal, arguing that he lacked the effective assistance of appellate counsel. His motion was denied by the court of appeals, which was affirmed by the Ohio Supreme Court. *See State v. Richey*, 73 Ohio St. 3d 523, 1995 Ohio 329, 653 N.E.2d 344 (Ohio 1995). Advancing to federal district court, Richey filed a petition for a writ of habeas corpus, alleging that both his conviction and sentence were tainted by constitutional errors. The district court denied Richey's petition. In a challenge that implicates his convictions on all charges, Richey also contends that his trial counsel was constitutionally ineffective in the way he handled his forensic expert and his failure to challenge the scientific evidence of arson. The State argues that this claim has been procedurally defaulted and disputes the claim on the merits. The State argues that this claim has been defaulted because Richey neglected to raise it on direct appeal. Court of Appeals for the Sixth Circuit concluded that counsel's incompetent handling [¶77] of the sole forensic expert in this case fell far below the wide range of acceptable professional standards.

The nexus between *State v. Hubbard* and *Richey v. Bradshaw*, both defaulted on direct appeal their constitutional violations due to their appellate counsel egregious misconduct. Moreover, a properly licensed attorney is presumed to be competent by Ohio courts. *State v. Lytle*, 48 Ohio St. 2d 391 at 397. Therefore, in Hubbard's case, *because his appellate lawyer failed to reference the record or cite authorities on appeal*, rendered his performance deficient under the *Strickland* standard. Even further, because there was a substantial violation of his appellate counsel's essential duties the petitioner was prejudiced by counsel's ineffectiveness.

Although, the claims, *supra*, was not presented on direct appeal due to Mr. Hubbard's appellate counsel's neglect, this actually constitutes "cause and prejudice" for his defaulted claims.

Furthermore, to overcome this inescapable constitutional violation, this Court must address the "prejudice" which the Petitioner now endures. This Court has stated in *Fay v. Noia*, 372 U.S. 391 (1963), although in form the Great Writ is simply a mode of procedure, its history is inextricably intertwined with the growth of fundamental rights of personal liberty. For its function has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints. Its root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release.

The Petitioner recognize that certiorari is rarely granted and the record here shows that he has been clearly deprived the effective assistance of appellate counsel as guaranteed by our Sixth Amendment. Moreover, the incomprehensible and egregious conduct of his appellate counsel cause actual prejudice to him on his first appeal as of right. By seeking certiorari, he seek vindication of the accepted legal principles from which the court so clearly departed pursuant to *Evitts v. Lucey*, 469 U.S. 387, 396, 83 L. Ed. 2d 821, 105 S. Ct. 830 (1985).

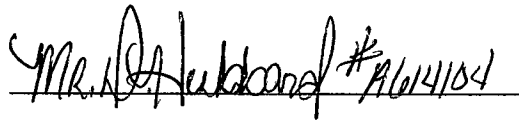
Because the procedural default in his case, is the result of ineffective assistance of appellate counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State. *Evitts v. Lucey*, supra, held that this right encompasses a right to effective assistance of counsel for all criminal defendants in [¶756] their first appeal as of right.

For the foregoing reasons, the judgment of the Sixth Circuit must be vacated, and the case is remanded for further proceedings.

#### CONCLUSION

The Petition for writ of certiorari should be granted.

Respectfully submitted,



Dawntwai Hubbard, *pro se* - #614-104

Allen Correctional Institution

P.O. Box 4501

Lima, Ohio 45802