No. 21-___

In the Supreme Court of the United States

TIM SHOOP, Warden,

Petitioner,

v.

AUGUST CASSANO,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE – NO EXECUTION DATE

QUESTIONS PRESENTED

August Cassano is a convicted murderer. Before his state trial, he filed a "waiver of counsel" alongside a request for the appointment of counsel. Then, three days before trial, Cassano asked the trial court: "Is there any possibility I could represent myself?" The Ohio Supreme Court held that neither the "waiver of counsel" nor the question about self-representation constituted a proper invocation of the Sixth Amendment right to self-representation. To invoke that right, a defendant must "clearly and unequivocally declare[]" his intention to proceed *pro se*, *Faretta v. California*, 422 U.S. 806, 835 (1975), and he must do so in a timely fashion, *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.*, 528 U.S. 152, 161 (2000). The Ohio Supreme Court determined that neither a "waiver of counsel' filed with a request for counsel, nor a question about the possibility of self-representation, qualified as a clear and unequivocal declaration of an intent to proceed *pro se*. Further, it held that Cassano's question about self-representation would have been untimely *even if* it had been a clear and unequivocal demand.

The Sixth Circuit held that Cassano properly invoked his right to self-representation on both occasions and that the Ohio Supreme Court egregiously erred in holding otherwise. On that basis, it awarded habeas relief to Cassano.

1. Should the Court summarily reverse the Sixth Circuit's award of habeas relief?

2. When a three-judge panel clearly errs in awarding habeas relief, does its decision raise questions important enough to justify *en banc* review?

3. What constitutes a clear and timely request for self-representation?

LIST OF PARTIES

The Petitioner is Tim Shoop, the Warden of the Chillicothe Correctional Institution.

The Respondent is August Cassano, an inmate imprisoned at the Chillicothe Correctional Institution.

LIST OF DIRECTLY RELATED PROCEEDINGS

1. *State v. Cassano*, No. 1998-CR-171H (Ohio Ct. Common Pleas, Richland County, conviction entered May 13, 1999)

2. *State v. Cassano*, No. 1999-1268 (Supreme Court of Ohio, judgment entered Aug. 7, 2002)

3. *Cassano v. Ohio*, No. 02-8186 (U.S., *certiorari* denied Mar. 3, 2003)

4. *State v. Cassano*, No. 07CA27 (Ohio Ct. App., 5th Dist., judgment entered March 6, 2008)

5. *State v. Cassano*, No. 12CA55 (Ohio Ct. App., 5th Dist., judgment entered April 11, 2013)

6. *State v. Cassano*, No. 2013-846 (Supreme Court of Ohio, appeal not accepted June 24, 2015)

7. *Cassano v. Ohio*, No. 15-6258 (*certiorari* denied Feb. 29, 2016)

8. *Cassano v. Bradshaw*, No. 1:03-cv-1206 (N.D. Ohio, judgment entered July 18, 2018)

9. *Cassano v. Shoop*, No. 18-3761 (6th Cir., judgment entered June 17, 2021; *en banc* review denied Aug. 26, 2021)

10. *Shoop v. Cassano*, No. 21A34 (U.S., recall and stay of mandate entered Sept. 20, 2021)

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JURISDICTIONAL STATEMENT

The District Court had jurisdiction to decide this habeas case under 28 U.S.C. §§1331, 1254(1). The Sixth Circuit had jurisdiction to hear an appeal of the District Court's ruling under 28 U.S.C. §1291. The circuit issued its judgment on June 17, 2021. On August 26, 2021, it denied rehearing *en banc*. This petition timely invokes the Court's jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right … to have the Assistance of Counsel for his defence."

The Fourteenth Amendment provides, in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") provides in relevant part:

> (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.

28 U.S.C. §2254(d).

INTRODUCTION

The Sixth Amendment guarantees defendants the right to represent themselves. But a "*pro se* defense is usually a bad defense." *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.*, 528 U.S. 152, 161 (2000) (quotation omitted). For that reason, courts apply a strong presumption against finding a proper invocation of the right to self-representation. *Id.* To overcome that presumption—to properly invoke the right to self-representation—defendants must "clearly and unequivocally declare[]" that they want to represent themselves. *Faretta v. California*, 422 U.S. 806, 835 (1975). And they must do so in a timely fashion. *Martinez*, 528 U.S. at 161–62.

August Cassano—an Ohio inmate who fatally attacked a cellmate while serving a life sentence for a different murder—claims that he properly invoked his right to self-representation on two occasions. On the first occasion, Cassano filed a *pro se* "waiver of counsel" alongside a motion seeking the appointment of counsel. On the second occasion, Cassano asked: "Is there any possibility I could represent myself?" Pet.App.265a. He asked that question just three days before trial, in a discussion about appointed counsel's preparedness.

The Ohio Supreme Court held that Cassano failed to properly invoke his right to self-representation on either occasion. Rightly so. A "waiver of counsel" filed alongside a *request* for counsel does not constitute a clear and unequivocal invocation of the right to self-representation. *Faretta*, 422 U.S. at 835. Neither does a *question* about the *possibility* of self-representation. *Id.* And even if Cassano's question about self-representation qualified as a clear and un-

equivocal declaration, it was untimely, since Cassano asked his question just three days before the start of his capital trial. *See Martinez*, 528 U.S. at 161–62.

As this shows, the Ohio Supreme Court's decision would survive even *de novo* review. But because this is a habeas case, the Ohio Supreme Court's decision must be reviewed according to the deferential standards laid out in 28 U.S.C. §2254(d). Those standards forbid awarding habeas relief unless the petitioner is in custody because of a state-court decision that: (1) was "contrary to, or involved an unreasonable application of," this Court's holdings; or (2) rested on "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. §§2254(d)(1), (d)(2). Cassano can make neither showing. The Ohio Supreme Court's decision denying Cassano's Sixth Amendment claims was *consistent with*, not contrary to or otherwise at odds with, this Court's precedents. And because the relevant facts are undisputed, Cassano cannot show that the Ohio Supreme Court's decision is "based on" an unreasonable factual finding. §2254(d)(2).

The Sixth Circuit, over the dissent of Judge Siler, granted habeas relief anyway. Its decision "disregarded federal law, spurned Supreme Court precedent, and trampled on Ohio's state courts." Pet.App.246a (Thapar, J., dissenting from denial of hearing *en banc*). By misapplying the law, the majority "erroneously" awarded "postconviction relief" to a "repeat murderer." *Id.* While a "majority" of the circuit "appeare[d] to recognize that" the panel's decision was "clearly incorrect," the circuit refused to rehear the case *en banc*. Pet.App.239a (Griffin, J., dissenting). According to Judge Griffin, the Sixth Circuit chose "reversal over duty." Pet.App.237a.

This Court should honor that choice by summarily reversing the Sixth Circuit. Alternatively, it should grant the petition for a writ of *certiorari* and decide the case after full briefing on the merits.

STATEMENT OF THE CASE

1. August Cassano was already serving a life sentence for one murder when he stabbed to death his cellmate, Walter Hardy. Pet.App.194a–95a. Investigators determined that Cassano inflicted approximately seventy-five stab wounds, including wounds to Hardy's head, neck, back, chest, abdomen, hips, legs, arms, and hands. Pet.App.196a.

Ohio charged Cassano with aggravated murder. A jury convicted him. The trial court sentenced Cassano to death. Pet.App.200a.

This case involves events that occurred on the way to trial. More precisely, it centers around two of the three occasions on which Cassano raised the possibility of representing himself. Before going further, it is helpful to describe each of the three occasions.

May 1998. On the same day in May 1998, Cassano submitted two conflicting *pro se* filings. One, labeled "waiver of counsel," said that Cassano wanted to control the "content of his defense." Waiver, R.134-1, PageID#863. (All record citations refer to the District Court record.) A second, more-detailed pleading asked for "appointment of substitute counsel." Motion, R.134-1, PageID#864–69. In this second filing, Cassano asked the court to appoint Kort Gatterdam of the Ohio Public Defender's Office. *Id.*, PageID#868. Neither of these contradictory filings addressed the other.

The trial court granted Cassano's request for new defense attorneys, including Gatterdam. *See* Pet. App.201a. It made no explicit ruling on the "waiver of counsel" filing.

September 1998. In late September 1998, Cassano moved "for appointment of co-counsel." Motion, R.134-3, PageID#1300–05. Cassano wanted "hybrid representation"—in other words, he wanted to serve as his own co-counsel, alongside Gatterdam. *Id.*, PageID#1301. The trial court held a hearing on the motion. There, Cassano asserted that he had "a right to be co-counsel with [his] attorneys." Pet.App. 260a. The trial court disagreed and denied Cassano's motion. Pet.App.259a–60a.

April 1999. Cassano's representation came up a final time in April 1999, three days before trial. During a hearing, Cassano expressed concern about whether his lead counsel would be prepared for trial. Pet.App.264a–65a. In the ensuing discussion, Cassano asked: "Is there any possibility I could represent myself?" Pet.App.265a. The trial court replied that self-representation would not be in Cassano's best interests. *Id.* After that brief exchange, the discussion shifted to whether the court should delay trial to allow defense counsel more time to prepare. Pet.App.265a–71a. Cassano never again raised the topic of self-representation with the trial court. *See id.*

2. After being convicted and sentenced, Cassano appealed to the Ohio Supreme Court. There, he argued that the trial court erred by refusing to allow him to represent himself. His claim invoked *Faretta v. California*, 422 U.S. 806 (1975). In *Faretta*, this Court held that the Sixth Amendment right to coun-

sel includes the right to represent oneself. But *Faretta* held that criminal defendants may invoke their right to self-representation only by "clearly and unequivocally" declaring their intent to do so. *Id*. at 835. Cassano claimed to have clearly and unequivocally invoked that right on all three of the just-discussed occasions.

The Ohio Supreme Court disagreed, rejecting his arguments in a lengthy portion of its opinion entitled: "Preliminary Issues: Self-representation." Pet. App.200a–04a.

May 1998. The Ohio Supreme Court observed that Cassano filed a *pro se* "waiver of counsel" in May 1998, on the same day that he requested the appointment of counsel. Pet.App.201a. The court did not explicitly discuss these inconsistent filings in any greater detail. It did, however, conclude that Cassano had not "unequivocally and explicitly" invoked his right to self-representation, as *Faretta* requires, at any point. Pet.App.203a. Thus, it implicitly concluded that Cassano's contradictory filings were too unclear and equivocal to support a valid claim for denial of the right to self-representation.

September 1998. The Ohio Supreme Court next addressed Cassano's September 1998 motion, which it considered Cassano's "initial demand to represent himself." Pet.App.202–03a. The court noted that this motion "focused on hybrid representation." Pet. App.202a–03a. It reasoned that, because defendants have no right to hybrid representation, the trial court had not violated Cassano's rights by denying this motion. Pet.App.203a.

April 1999. Finally, the Ohio Supreme Court rejected Cassano's claim that he properly invoked his

right to self-representation by asking about self-representation at the April 1999 hearing. It gave three independent reasons for doing so. *First*, it held that Cassano's question about the possibility of self-representation did not constitute the sort of clear and unequivocal demand that *Faretta* requires. Pet.App. 203a. *Second*, the court held that, because Cassano made this request just three days before trial, the request was untimely. Pet.App.203a–04a. Indeed, Cassano asked about self-representation only in "an attempt to delay the trial." Pet.App.204a. *Finally*, the Ohio Supreme Court concluded that Cassano abandoned any right to self-representation when he did not further pursue the issue of self-representation. *Id.* In support of this last proposition, the Ohio Supreme Court cited *McKaskle v. Wiggins*, 465 U.S. 168 (1984).

3. Cassano filed a petition for a writ of habeas corpus. *See* Pet.App.45a. Relevant here, he claimed the Ohio Supreme Court erred in rejecting his *Faretta* claims. Pet.App.76a.

The District Court recognized that the Antiterrorism and Effective Death Penalty Act of 1996—"AEDPA," for short—governed Cassano's habeas case. Pet.App.80a. AEDPA mostly prohibits federal courts from awarding habeas relief based on claims the state courts already "adjudicated on the merits." §2254(d). It lifts this prohibition *only* if the state court's adjudication resulted in a decision that was: (1) "contrary to, or involved an unreasonable application of," Supreme Court precedent; or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." §2254(d)(1) & (2).

The District Court determined that the Ohio Supreme Court's decision rejecting Cassano's *Faretta* claims did not contradict or unreasonably apply Supreme Court precedent. It further held that the Ohio Supreme Court's ruling did not rest on any unreasonable factual determinations. *See* Pet.App.91a–112a. On that basis, the District Court denied Cassano's habeas petition.

4. The Sixth Circuit reversed. Pet.App.2a. A two-judge majority concluded that Cassano properly invoked his right to self-representation twice: once in May 1998, and once in April 1999. On that basis, and notwithstanding the deferential review of state-court decisions that AEDPA commands, the majority awarded habeas relief to Cassano.

May 1998. The majority first considered Cassano's claim that he properly invoked his *Faretta* rights in the May 1998 "waiver of counsel" filing. It concluded that, with respect to this claim, it did not have to review the Ohio Supreme Court's decision under AEDPA's deferential standards. Those standards, it recognized, apply only to claims that the state courts "adjudicated on the merits." §2254(d). The Sixth Circuit concluded that the Ohio Supreme Court *had not* adjudicated on the merits Cassano's claim pertaining to the May 1998 "waiver of counsel." The majority acknowledged that the Ohio Supreme Court had discussed the filing. Pet.App.16a. But the state court never *expressly* rejected Cassano's claim that, with the May 1998 filing, he clearly and unequivocally invoked his right to self-representation. Pet.App.16a–17a. The majority concluded that the Ohio Supreme Court must have overlooked Cassano's claim rather than adjudicating it on the merits.

With AEDPA out of the way, the circuit reviewed the Ohio Supreme Court's decision *de novo*. And it held that Cassano's "waiver of counsel," even though it was docketed one minute before his separately-filed request for new counsel, constituted a clear and unequivocal demand for self-representation. *See* Pet. App.20a–21a. On that basis, it held that Cassano was entitled to habeas relief.

The majority added, in a brief footnote, that it would have granted Cassano relief under §2254(d)(1) had it determined that AEDPA applied. Pet.App.22a n.2.

September 1998. The Sixth Circuit *denied* Cassano's habeas claim resting on the September 1998 motion for hybrid representation. It concluded that the Ohio Supreme Court had not unreasonably erred in denying that claim. Pet.App.23a–24a.

April 1999. Finally, the majority held that Cassano was entitled to habeas relief based on his claim that he properly invoked the right to self-representation by asking about self-representation in April 1999. Pet.App.24a–41a. The majority reached this conclusion notwithstanding its acknowledgment that the Ohio Supreme Court had adjudicated this claim on the merits, and that AEDPA therefore supplied the governing standard.

The court first held that the Ohio Supreme Court unreasonably applied *Faretta* when it determined that Cassano's question about the possibility of self-representation was too unclear and equivocal. Pet.App.26a–31a. That alone would not have entitled Cassano to relief on this claim, because the Ohio Supreme Court gave two alternative bases for its holding. First, it held that Cassano's question was

untimely even if it constituted a clear invocation of the right to self-representation. Second, it held that Cassano abandoned any self-representation claim by accepting the services of appointed counsel. Pet.App.203a–04a. The Sixth Circuit, however, held that both of these alternative rationales rested on an unreasonable application of Supreme Court precedent, §2254(d)(1), or an unreasonable assessment of the state-court record, §2254(d)(2). Pet.App.31a–41a.

5. Judge Siler dissented. He recognized that the Ohio Supreme Court had adjudicated (and rejected) Cassano's claim regarding the May 1998 "waiver of counsel." Pet.App.42a–43a. The state court, he explained, expressly discussed the "waiver of counsel" before concluding that Cassano failed to clearly and unequivocally invoke his right to counsel. Pet.App.42a. "Thus," it "must have determined" that the "waiver of counsel" was "not a clear and unequivocal" invocation of the "right to self-representation." Pet.App.42a.

Because Judge Siler believed the Ohio Supreme Court had rejected all of Cassano's claims on the merits, he would have reviewed the Ohio Supreme Court's decision under AEDPA. And AEDPA, Judge Siler explained, allows federal courts to correct only the most egregious of errors in state-court opinions. Pet.App.42a. Neither of Cassano's supposed requests for self-representation—one accompanied by a request for *new* counsel, the other raised in the form of a question about the *possibility* of self-representation—obviously constituted the sort of clear and unequivocal declaration of intent to pursue self-representation that *Faretta* requires. Pet.App. 42a–44a. As a result, Judge Siler would have af-

firmed the District Court's decision denying habeas relief to Cassano.

6. The Warden moved for *en banc* review. The Sixth Circuit denied his request. Pet.App.236a. Judge Siler would have granted a panel rehearing. *Id.* And three active judges wrote or joined opinions dissenting from the denial of rehearing *en banc*. *Id.*

Judge Griffin said that the panel should have reviewed the Ohio Supreme Court's decision under AEDPA and affirmed the District Court's judgment denying habeas relief. Pet.App.239a–42a. The rest of the court, he said, should have voted to rehear the case *en banc*. Judge Griffin reported that a majority of his colleagues "appear[ed] to recognize that" the panel's decision was "clearly incorrect." Pet.App. 239a. By failing to correct that ruling, he wrote, the circuit was setting itself up for reversal. Pet.App.237a–38a.

Judge Thapar, joined by Judge Nalbandian, filed a dissent of his own. Pet.App.243a–54a. He began by addressing Cassano's arguments pertaining to the May 1998 "waiver of counsel." He stressed that, because a waiver of counsel filed alongside a request for counsel does not constitute a clear and unequivocal invocation of the right to self-representation, Cassano would lose "even on de novo review." Pet.App. 249a. But, Judge Thapar explained, the panel should have reviewed the Ohio Supreme Court's rejection of Cassano's claim under AEDPA. In concluding otherwise, the panel ignored the "strong presumption" that state courts adjudicate properly raised claims on the merits. Pet.App.249a. Habeas petitioners can overcome that presumption only by showing "very clearly" that the state court over-

looked their claims. Pet.App.250a (citing *Johnson v. Williams*, 568 U.S. 289, 298 (2013)). Cassano could not overcome the presumption because all signs suggested that the Ohio Supreme Court *had* adjudicated his claim on the merits. Its opinion "described all the relevant facts, including that Cassano filed two conflicting motions on the same day." *Id.* "Although the Ohio Supreme Court did not mention these motions again, it did conclude that 'Cassano did not unequivocally invoke his right to self-representation.'" *Id.* (quoting Pet.App.203a.)) "The inference," therefore, "was obvious: The Ohio Supreme Court didn't consider these conflicting filings to be a clear and unequivocal demand for self-representation." *Id.* AEDPA thus applied, making indefensible the panel's decision to award relief based on the May 1998 "waiver of counsel."

Judge Thapar then turned to Cassano's argument that he properly invoked his right to self-representation in April 1999. Judge Thapar concluded that the Ohio Supreme Court neither unreasonably determined the facts nor unreasonably applied the law when it determined that Cassano's "tepid" question was insufficient to invoke his right to self-representation. Pet.App.252a. In holding otherwise, the panel "treated the unreasonableness question" under AEDPA "as a test of its confidence in the result it would have reached under *de novo* review." Pet.App.252a (quoting *Harrington v. Richter*, 562 U.S. 86, 102 (2011) (alterations accepted)).

Judge Thapar concluded by noting that the Sixth Circuit had been "corrected for similar errors before." Pet.App.254. "Unfortunately," he wrote, the circuit "need[ed] to be reminded once again." Pet.App.254a.

7. The Warden asked the panel to stay its mandate. The panel refused. Pet.App.257a. The Warden filed an *unopposed* motion to reconsider the order denying a stay of the mandate. The panel again refused, saying the request was "without merit." Pet. App.255a. At that point, the Warden filed an unopposed application for a recall and stay of the mandate. Justice Kavanaugh granted the request. *See Shoop v. Cassano*, Order, No. 21A34 (Sept. 20, 2021).

REASONS FOR GRANTING THE PETITION

By awarding habeas relief to August Cassano, the Sixth Circuit "disregarded federal law, spurned Supreme Court precedent, and trampled on Ohio's state courts." Pet.App.246a (Thapar, J., dissenting from denial of rehearing *en banc*). This Court should summarily reverse. Alternatively, the Court should grant the Warden's *certiorari* petition and decide the case after full briefing and argument. This latter route would enable the Court to address the important question of when clearly erroneous panel decisions awarding habeas relief are worthy of *en banc* review, and to resolve two circuit splits concerning the scope of the right to self-representation.

I. This Court should summarily reverse the Sixth Circuit.

The Sixth Circuit has "acquired a taste for disregarding" AEDPA. Pet.App.237a (Griffin, J., dissenting) (quoting *Rapelje v. Blackston*, 136 S. Ct. 388, 389 (2015) (Scalia, J., dissenting from denial of petition for a writ of *certiorari*)). By Judge Griffin's count, this Court has reversed the Sixth Circuit "twenty-two times for not applying the deference to state-court decisions mandated by AEDPA." *Id.* (col-

lecting cases). "Of those twenty-two rebukes, twelve" were handed down by summary reversal. *Id.*

This case should make thirteen. The panel majority's decision is indefensible; indeed, the only difficulty presented by this petition is selecting which of the circuit's many errors to rely upon as grounds for reversal. As Judge Thapar observed, "the panel's decision 'illustrates a lack of deference to the state court's determination and an improper intervention in state criminal processes.'" Pet.App.254a (quoting *Harrington v. Richter*, 562 U.S. 86, 104 (2011)). The Sixth Circuit "has been corrected for similar errors before." *Id.* It "need[s] to be reminded once again." *Id.*; *accord* Pet.App.237a.

A. AEDPA significantly limits the circumstances in which federal courts may award habeas relief.

Understanding the Sixth Circuit's errors requires some background on AEDPA. The Warden begins with that.

1. "As amended by AEDPA, 28 U.S.C. §2254 sets several limits on the power of a federal court to grant an application for a writ of habeas corpus on behalf of a state prisoner." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). Relevant here, §2254(d) generally prohibits federal courts from awarding habeas relief based on claims that state courts already "adjudicated on the merits." The only exceptions to this prohibition appear in §2254(d)(1) and §2254(d)(2).

§2254(d)(1). Section 2254(d)(1), for its part, permits awarding habeas relief to petitioners who are in custody because of a state-court decision that "was contrary to, or involved an unreasonable appli-

cation of, clearly established Federal law, as determined by the Supreme Court of the United States. The phrase "clearly established Federal law," for these purposes, "refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000).

The phrases "contrary to" and "unreasonable application of" encompass separate categories of errors. A state court's decision is "contrary to" this Court's cases in only two situations. The first arises when "the state court applies a rule that contradicts the governing law set forth in [this Court's] cases." *Id.* at 405. The second occurs when "the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from [its] precedent." *Id.* at 406. "Avoiding these [two] pitfalls does not require citation of [the Court's] cases—indeed, it does not even require *awareness* of [its] cases, so long as neither the reasoning nor the result of the state-court decision contradicts them." *Early v. Packer*, 537 U.S. 3, 8 (2002) (*per curiam*). And when deciding whether a state court's ambiguous opinion correctly identified the governing legal rules, the Court starts with a "presumption that state courts know and follow the law." *Woods v. Donald*, 575 U.S. 312, 316 (2015) (*per curiam*) (quotation and citation omitted). Federal courts must not show a "readiness to attribute error" to state courts. *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (*per curiam*).

The "unreasonable application" standard is equally difficult to satisfy. It is not enough that a federal court simply "disagrees with the state court." *Cavazos v. Smith*, 565 U.S. 1, 2 (2011) (*per curiam*). In-

stead, a federal court can find the state court's application of a Supreme Court decision "unreasonable" only if the application is "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103. This "difficult to meet" standard stops just short of "imposing a complete bar on federal-court relitigation of claims already decided in state court proceedings." *Id.* at 102.

§2254(d)(2). Section 2254(d)(2) allows courts to award habeas relief in cases where the state court's rejection of the petitioner's claim "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." §2254(d)(2). To meet this standard, the petitioner must show that the record "compel[s] the conclusion that the [state] court had no permissible alternative" but to arrive at a conclusion other than the one it reached. *Rice v. Collins*, 546 U.S. 333, 341 (2006). Thus, a "state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 558 U.S. 290, 301 (2010). As long as "'reasonable minds reviewing the record might disagree' about the finding in question," §2254(d)(2) is not satisfied. *Id.* (quoting *Rice*, 546 U.S. at 341–42 (alteration accepted)).

2. These deferential standards apply only with respect to claims that the state court "adjudicated on the merits." §2254(d). When a state court *failed* to adjudicate a claim on the merits, federal habeas courts may review its resolution of that claim *de novo*.

When "the last state court to decide a prisoner's federal claim explains its decision on the merits in a reasoned opinion," *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018), it qualifies as an adjudication on the merits. But the same is true of most decisions that never *expressly* address a petitioner's claim. The reason is that state courts are presumed to have adjudicated properly raised claims: "When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Harrington*, 562 U.S. at 99.

This presumption is "strong." *Johnson*, 568 U.S. at 301. To rebut it, the petitioner must produce "evidence" that "leads *very clearly* to the conclusion that a federal claim was inadvertently overlooked in state court." *Id.* (emphasis added).

3. The deferential standards in §2254(d)(1) and §2254(d)(2) require "the federal habeas court to train its attention on the particular reasons—both legal and factual—why state courts rejected a state prisoner's federal claims." *Wilson*, 138 S. Ct. at 1191–92 (citation and internal quotation marks omitted). The state courts' reasons are typically found in the opinion of the last state court to have addressed the petitioner's claim. But if the "last state court to decide" the case left its decision unexplained, then federal courts "'look through' … to the last related state-court decision that does provide a relevant rationale." *Wilson*, 138 S. Ct. at 1192. If no state court explained its decision, federal courts must consider "what arguments or theories supported," or "*could*

have supported, the state court's decision." *Harrington*, 562 U.S. at 102 (emphasis added).

B. Cassano is not entitled to habeas relief.

Cassano's claims for habeas relief invoke the Sixth Amendment. That amendment guarantees every defendant "the right … to have the Assistance of Counsel for his defence." The Court has interpreted the right to counsel as guaranteeing criminal defendants the right to represent themselves. *Faretta v. California*, 422 U.S. 806, 807 (1975). Defendants who wish to represent themselves, however, must "clearly and unequivocally" invoke that right. *Id.* at 835. And they must do so "in a timely manner." *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.*, 528 U.S. 152, 162 (2000).

August Cassano claims that he properly invoked (and was improperly denied) his right to self-representation in May 1998 and April 1999. The Ohio Supreme Court rejected both claims. Rightly so. Cassano's claims would thus fail even if the Ohio Supreme Court's decision were reviewed *de novo*. But because the Ohio Supreme Court adjudicated (and rejected) Cassano's claims on the merits, its decision should instead be reviewed under AEDPA's deferential standards. Its decision easily survives that relaxed form of scrutiny.

1. May 1998.

Cassano argued below that he properly invoked his right to self-representation by filing a "waiver of counsel," together with a request for new counsel, in May 1998. And on that basis, he sought habeas re-

lief. The Sixth Circuit awarded relief to Cassano. It erred.

a. Defendants, if they want to represent themselves, must "clearly and unequivocally" invoke that right. *Faretta*, 422 U.S. at 835. Here, Cassano's supposed "invocation of the right to self-representation was unclear and equivocal because Cassano signed a substitution-of-counsel motion the same day." Pet.App.239a (Griffin, J., dissenting). "[T]wo conflicting statements"—one demanding counsel and one waiving any right to counsel—"are not clear, let alone unequivocal," demands for self-representation. Pet.App.249a (Thapar, J., dissenting from the denial of rehearing *en banc*). Thus, as the Ohio Supreme Court held, Cassano did not properly invoke his rights under *Faretta*. Pet.App.248a (Thapar, J., dissenting from the denial of rehearing *en banc*).

As this shows, Cassano's habeas claim pertaining to the May 1998 "waiver of counsel" would fail even if the Ohio Supreme Court's decision were reviewed *de novo*. *Id.* But Cassano is not entitled to *de novo* review. Instead, Cassano must prove his right to relief under AEDPA. AEDPA governs because the Ohio Supreme Court "adjudicated on the merits," §2254(d), Cassano's claim that he properly invoked the right to self-representation in May 1998.

Again, federal habeas courts must presume that the state courts adjudicated a petitioner's claims on the merits. *Harrington*, 562 U.S. at 99. They may conclude otherwise only if there is evidence that leads "*very clearly* to the conclusion that" the state court "inadvertently overlooked" the claim in question. *Johnson*, 568 U.S. at 303 (emphasis added).

Here, there is no such evidence. The Ohio Supreme Court dedicated an entire section of its opinion to addressing whether the trial court violated Cassano's right to self-representation. Pet.App. 200a–04a. It noted all of the potentially relevant proceedings and filings, *including* the May 1998 "waiver of counsel." Pet.App.201a. The court went on to hold that Cassano never made an unequivocal demand for self-representation. Pet.App.203a. One can thus infer that the court did not consider the waiver—which it noted was filed the "same day" as a conflicting request for new counsel, Pet.App.201a—to be a clear demand for self-representation. Pet.App. 42a–43a (Siler, J., dissenting); Pet.App.239a–41a (Griffin, J., dissenting); Pet.App.248a–51a (Thapar, J., dissenting from the denial of rehearing *en banc*). Because that inference is at least permissible, Cassano has not shown "very clearly" that the Ohio Supreme Court overlooked his claim. *Johnson*, 568 U.S. at 303. The claim was therefore adjudicated on the merits, and the Ohio Supreme Court's decision must be reviewed under §2254(d).

Neither §2254(d)(1) nor §2254(d)(2) permit upsetting the Ohio Supreme Court's decision. The latter provision is not even applicable, since the Ohio Supreme Court's resolution of Cassano's claim did not turn on any disputed facts. And Cassano loses under §2254(d)(1), because the Ohio Supreme Court's decision was neither "contrary to" nor an "unreasonable application of" this Court's precedent.

Consider first the "contrary to" prong. The Ohio Supreme Court did not apply "a rule that contradicts the governing law set forth in" *Faretta* or any other case from this Court, *Williams*, 529 U.S. at 405—instead, it recognized that *Faretta*'s clear-and-

unequivocal standard applied to Cassano's *Faretta* claims. *See* Pet.App.203a. Further, this is not a case in which the state court "confronted a set of facts that are materially indistinguishable from" a decision of this Court "and nevertheless arrive[d] at a result different from [that] precedent." *Williams*, 529 U.S. at 406. Indeed, no case presents comparable facts. Because the Ohio Supreme Court neither applied the wrong governing standard nor reached a result at odds with a factually indistinguishable decision from this Court, its decision was not "contrary to clearly established federal law." *Id*. at 405–06.

The Ohio Supreme Court did not unreasonably apply this Court's precedent, either. Again, an application of Supreme Court precedent is "unreasonable" only if it is "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103. Here, there is ample room for "[f]airminded jurists" to conclude that Cassano made no "clear and unequivocal declaration" when he filed a "waiver of counsel" at the same time as his motion for new counsel. Pet.App. 240a (Griffin, J., dissenting) (alterations accepted). Because no decision from this Court compelled the Ohio Supreme Court to hold that Cassano had properly invoked his right to self-representation in May 1998, its decision does not qualify as an "unreasonable application" of Supreme Court precedent. §2254(d)(1).

b. The Sixth Circuit's contrary decision rests on a series of errors. Recall that the court began by rejecting §2254(d)'s applicability. It held that the Ohio Supreme Court "overlooked" Cassano's claim that he properly invoked his right to counsel in May 1998,

thereby failing to adjudicate that claim on the merits. In light of that conclusion, the circuit eschewed AEDPA and awarded habeas relief to Cassano based on its own *de novo* review of Cassano's claim. Pet.App.16a–17a. It later asserted in a cursory footnote that it would have denied relief even under §2254(d)(1). Pet.App.22a n.2.

The Sixth Circuit committed at least three serious errors.

First, because Cassano's claim fails even under *de novo* review, *see above* 20, AEDPA's applicability should not have mattered.

Second, the Sixth Circuit erred "by refusing to give the Ohio Supreme Court the deference it's due under AEDPA." Pet.App.249a (Thapar, J., dissenting from denial of rehearing *en banc*). In concluding that the Ohio Supreme Court overlooked Cassano's claim, the Sixth Circuit relied on this passage from the state court's decision:

> We reject Cassano's claim that his rights of self-representation were violated. Cassano's *initial demand* to represent himself focused on hybrid representation. Cassano's *only written motion on that point was made in September 1998* and related solely to hybrid representation. Cassano did not mention that he wanted to represent himself alone until April 23, 1999, only three days before the start of the trial.

Pet.App.202a (discussed at Pet.App.16a–17a) (emphasis added). According to the Sixth Circuit, the italicized language proved that the Ohio Supreme

Court had "overlooked" the "waiver of counsel" filing that Cassano made in September 1998. Not so. As explained above, context shows that the Ohio Supreme Court thought the waiver of counsel Cassano filed in May 1998 "was not an effective waiver" of the right to counsel. Pet.App.42a (Siler, J., dissenting). Thus, the Ohio Supreme Court did not overlook the May 1998 filing when it described Cassano's September 1998 motion as his "initial demand to represent himself" and his "only written motion on that point." Pet.App.202a. Instead, that description reflects the court's conclusion that the May 1998 filing *did not qualify* as a valid invocation of the right to self-representation. At the very least, this passage *can be* read as indicating that the state court deemed the "waiver of counsel" insufficient to constitute a valid invocation of the right to self-representation. It thus "falls far short" of "very clearly" establishing that the Ohio Supreme Court "'inadvertently overlooked'" Cassano's claim. Pet.App.250a–51a (Thapar, J., dissenting from denial of rehearing *en banc*) (quoting *Johnson*, 568 U.S. at 303)). The Sixth Circuit therefore erred in refusing to review the Ohio Supreme Court's decision under AEDPA's deferential standards.

Third, the Sixth Circuit asserted in a footnote that it would have ruled for Cassano even under §2254(d)(1). Pet.App.22a n.2. It would have had no valid basis for doing so. *See above* 21–23. And the Sixth Circuit's contrary conclusion rests on still more legal errors. It wrote that, "because the [Ohio Supreme Court] did not provide its reason" for rejecting Cassano's claim, applying §2254(d)(1) would require "'look[ing] through' the unexplained decision to the last related state-court decision that does provide a

relevant rationale and … then presum[ing] that the unexplained decision adopted the same reasoning." Pet.App.22a n.2. (quotation omitted). The majority then "looked through" to comments the state trial court made about Cassano's separate request for *hybrid representation* in *September 1998*. *Id.* And it inferred that the Ohio Supreme Court agreed with the trial court's reasoning.

As an initial matter, and as already explained, the Ohio Supreme Court's reasoning is clear enough to make any look-through unnecessary: it concluded that the May 1998 "waiver of counsel" was unclear and equivocal. *See above* 20–21. But the Sixth Circuit's look-through reasoning would fail even if the Ohio Supreme Court's decision were silent on the May 1998 waiver. The look-through doctrine permits courts to look at "the last related state-court decision" that provides "a relevant rationale." *Wilson*, 138 S. Ct. at 1192 (emphasis added). The trial court's rationale for denying Cassano's *September 1998* motion for *hybrid representation* is not relevant to the question whether Cassano properly requested *self-representation* in *May 1998*. *See* Pet.App.251a n.2 (Thapar, J., dissenting from the denial of rehearing *en banc*). In fact, assuming for argument's sake that the Ohio Supreme Court's opinion cannot be read to address Cassano's claim, *there is no* state-court decision addressing that claim. Remember, the trial court never ruled on the May 1998 "waiver of counsel." In the absence of a reasoned state-court decision, AEDPA requires that courts consider all arguments that "*could have* supported the state court's decision." *Harrington*, 562 U.S. at 102 (comma omitted). Here, as already explained, the state court could have supported its decision by concluding

that Cassano's "waiver of counsel," because it was filed alongside a *request* for counsel, was too unclear or equivocal to support a *Faretta* claim. As already explained, that reasoning survives scrutiny under §2254(d)(1). Thus, applying the look-through doctrine would not affect Cassano's entitlement to relief.

2. April 1999.

Three days before trial, Cassano asked the trial court: "Is there any possibility I could represent myself"? Pet.App.202a. Cassano argued that, with this question, he properly invoked his rights under *Faretta*. The Ohio Supreme Court rejected that claim in a reasoned analysis. Pet.App.202a–04a. It thus adjudicated the claim on the merits, as the Sixth Circuit recognized. *See* Pet.App.25a–26a. Therefore, the Ohio Supreme Court's decision must be reviewed under AEDPA's deferential standards. *Id.* Further, because the Ohio Supreme Court gave alternative and independent bases for its holdings, *see* Pet.App.202a–03a, Cassano would be entitled to habeas relief only if he proved that *all* of those alternative justifications failed to pass muster under either §2254(d)(1) or §2254(d)(2). He cannot make that showing. The Sixth Circuit erred in holding otherwise.

a. The Ohio Supreme Court's primary basis for rejecting Cassano's claim was this: Cassano's *question* about the *possibility* of self-representation "was not an explicit and unequivocal demand for self-representation." Pet.App.203a. The Ohio Supreme Court's reasoning is correct. Thus, its decision would survive even *de novo* scrutiny. It certainly survives review under §2254(d)(1) and §2254(d)(2).

As an initial matter, this claim does not implicate §2254(d)(2) because the Ohio Supreme Court's ruling

does not rest on disputed facts. The only question, therefore, is whether the state court contradicted or unreasonably applied this Court's precedents. §2254(d)(1). It did not. "Cassano's question can mean, 'I would like to represent myself.' But it can also be a contingent question inquiring whether self-representation is even an option for the future." Pet. App.242a (Griffin, J., dissenting). Given that ambiguity, it is impossible to conclude that the Ohio Supreme Court's decision was wrong "beyond any possibility for fairminded disagreement." *Id.* (quoting *Harrington*, 562 U.S. at 103). In other words, its decision does not constitute an "unreasonable application" of this Court's precedent. And its decision was not "contrary to" this Court's precedent either: the opinion did not apply the wrong governing standard (it recognized that *Faretta*'s clear-and-unequivocal standard governed, Pet.App.203a), or reach a conclusion at odds with a materially indistinguishable decision from this Court (there is no such decision).

In short, the Ohio Supreme Court's primary reason for denying relief to Cassano survives review under AEDPA. That, by itself, defeats Cassano's claim for relief. But remember that the Ohio Supreme Court gave independent and alternative bases for rejecting Cassano's claim pertaining to the April 1999 question. None rests on an error, let alone an error egregious enough to correct under AEDPA. Thus, those alternative justifications independently preclude any award of habeas relief.

Consider in particular the Ohio Supreme Court's first alternative justification: its determination that, even if the question constituted a clear and unequivocal declaration of Cassano's intent to represent himself, it was untimely and thus improper. Pet.

App.203a–04a. Cassano asked about self-representation just three days before trial. This Court has held that courts *may* properly reject late-in-the-day requests for self-representation. *Martinez*, 528 U.S. at 162. So the Ohio Supreme Court, by applying that rule to Cassano's question about self-representation, did not contradict or unreasonably apply Supreme Court precedent. And insofar as this reasoning rests on a factual determination, nothing in the state-court record "compelled" the conclusion that Cassano timely invoked his rights by raising them just three days before trial. *See Rice*, 546 U.S. at 341. Thus, Cassano cannot disrupt the untimeliness determination under §2254(d)(2).

In sum, Cassano is not entitled to relief unless he can show that *none* of the Ohio Supreme Court's alternative holdings withstand scrutiny under §2254(d)(1) and §2254(d)(2). He cannot make that showing, so he is not entitled to habeas relief based on his claim that he properly invoked his right to self-representation in April 1999.

b. The Sixth Circuit at least "purported" to apply AEDPA to Cassano's claim that he had made a clear request to represent himself in April 1999. Pet.App. 252a (Thapar, J., dissenting from the denial of rehearing *en banc*). But it "is not apparent how the Court of Appeals' analysis would have been any different without AEDPA." *Harrington*, 562 U.S. at 101. For it performed the type of "de-novo-masquerading-as-deference" review that this Court has condemned. *Shinn v. Kayer*, 141 S. Ct. 517, 522 (2020) (*per curiam*) (quotation and citation omitted).

The Sixth Circuit first concluded that the Ohio Supreme Court unreasonably applied this Court's

precedent when it concluded that Cassano's question about self-representation was not a clear and unequivocal declaration of intent to exercise the right of self-representation. Pet.App.27a–31a. But to support this conclusion, the majority "offered little more than simple disagreement with the Ohio Supreme Court's decision." Pet.App.252a (Thapar, J., dissenting from the denial of rehearing *en banc*). Its analysis began with *ipse dixit*. The court recited the facts and insisted that no fairminded jurists would find Cassano's question unclear or equivocal. Pet.App.26a–28a. The majority made no attempt to rest this assertion on a Supreme Court decision placing the matter beyond fairminded disagreement—perhaps because there is none.

Beyond the *ipse dixit*, the panel suggested that context turned Cassano's question into a demand for self-representation. It reasoned that, since Cassano asked his question during a discussion about his counsel's "preparedness for trial," Cassano *must* be understood to have been demanding self-representation. Pet.App.29a. This reasoning is doubly flawed. First, the context does not change the fact that Cassano's question could be interpreted as a "contingent question inquiring whether self-representation [was] even an option for the future." Pet.App.242a (Griffin, J., dissenting). After all, if Cassano had concerns about his attorney's preparedness, it would have been perfectly natural for him to ask about the possibility of representing himself should counsel's performance turn out to be inadequate. Second, even if Cassano's question is *best* interpreted as a demand, the Ohio Supreme Court did not obviously misapply any Supreme Court holding by concluding that the "tepid" question was too un-

clear and equivocal to satisfy *Faretta*. Pet.App.252a (Thapar, J., dissenting from the denial of rehearing *en banc*). The panel tried to excuse "any equivocality in Cassano's request" based on the trial court's supposedly "harsh" response to Cassano's earlier request for hybrid representation. Pet.App.29a. This is legally irrelevant It does not matter *why* Cassano was equivocal. If he was—or, more accurately, if a fair-minded jurists could conclude that he was—the Ohio Supreme Court's holding cannot be deemed an unreasonable application of Supreme Court precedent.

If this Court agrees that the Ohio Supreme Court reasonably applied this Court's precedent in deeming Cassano's question too unclear and equivocal to qualify as a proper invocation of the right to self-representation, it need not go any further: the adequacy of that independent justification for the Ohio Supreme Court's decision defeats Cassano's claim for habeas relief. Regardless, the Sixth Circuit misapplied both §2254(d)(1) and (d)(2) when it rejected the Ohio Supreme Court's two alternative justifications for rejecting Cassano's arguments: untimeliness and abandonment.

The Sixth Circuit, invoking §2254(d)(1), claimed that the Ohio Supreme Court's untimeliness determination unreasonably applied Supreme Court precedent. Pet.App.33a, 36a–39a. But it never identified any decision from this Court that the Ohio Supreme Court contradicted or unreasonably applied. Nor could it have, since the only relevant decision on the matter says that courts *may* properly reject late-in-the-day requests for self-representation. *Martinez*, 528 U.S. at 162.

The Sixth Circuit fared no better in defending its view that the untimeliness determination rested on unreasonable findings of fact, justifying relief under §2254(d)(2). It began by homing in on the Ohio Supreme Court's statement that "Cassano did not mention that he wanted to represent himself alone until April 23, 1999, only three days before the start of the trial." Pet.App.32a. (citing Pet.App.202–03a). The Sixth Circuit said this was "undisputedly [*sic*] wrong," Pet.App.32a, as Cassano filed his "waiver of counsel" motion in May 1998. But again, the quoted statement is accurate in light of the Ohio Supreme Court's reasonable conclusion that the waiver-of-counsel motion was *not* a valid demand for self-representation. So the statement reflects a reasonable interpretation of the record, not an unreasonable one. The Sixth Circuit also accused the Ohio Supreme Court of unreasonably determining that Cassano raised his question as a ploy for delaying trial. Pet.App.34a–39a. But since Cassano's question came just three days before trial, the state court had *some basis* for finding a dilatory motive. *See* Pet.App. 253a–54a (Thapar, J., dissenting from the denial of rehearing *en banc*). Because there is some basis in the record for the Ohio Supreme Court's characterization, it does not constitute an "unreasonable" finding of fact for purposes of §2254(d)(2). *See Rice*, 546 U.S. at 341–42.

The Ohio Supreme Court's final alternative and independent basis for rejecting Cassano's claim rested on an abandonment theory. More precisely, the state court held that Cassano "abandoned any intention to represent himself" when he failed to continue pursuing the issue after the trial court told him self-representation would be a bad idea. Pet.App.204a.

The Ohio Supreme Court supported this conclusion by citing this Court's decision in *McKaskle v. Wiggins*, 465 U.S. 168 (1984).

The Sixth Circuit held that this reasoning rested on an unreasonable application of *McKaskle* and was thus entitled to no deference under §2254(d)(1). *McKaskle* held that a *pro se* defendant may lose his ability to object to the participation of standby counsel if he allows standby counsel to participate substantially in his defense. *Id.* at 182–83. Since Cassano was not allowed to represent himself, he never had standby counsel. Therefore, the majority reasoned, the Ohio Supreme Court should not have cited *McKaskle* to support its conclusion that Cassano abandoned his request for self-representation by accepting appointed counsel's assistance. Pet.App.40a.

The Sixth Circuit's discussion of *McKaskle* establishes only that the Ohio Supreme Court supported its abandonment conclusion by citing a case that arose in a different-yet-analogous context. Citing analogous cases hardly constitutes the sort of obvious error that a federal court can correct under §2254(d)(1).

In sum, the Sixth Circuit's opinion fails to establish that *any* of the Ohio Supreme Court's three alternative holdings—let alone all of them—were erroneous under AEDPA's deferential standards. It thus erred in holding that Cassano was entitled to habeas relief based on his claim that he properly invoked the right to counsel in April 1999.

*

The Sixth Circuit egregiously erred in granting habeas relief to August Cassano. This Court should summarily reverse.

II. Alternatively, the Court should grant review to resolve an important question pertaining to *en banc* review and two circuit splits.

Even if the Court determines that summary reversal would be improper, it should nonetheless grant review and decide this matter after full briefing and argument. This would allow the Court to decide two important issues, one involving the availability of *en banc* review in habeas cases, the other involving the scope of *Faretta*.

A. Circuit decisions that clearly err in awarding habeas relief always present questions of exceptional importance.

Under Rule 35 of the Federal Rules of Appellate Procedure, the courts of appeals may grant *en banc* review to resolve "questions of exceptional importance." Fed. R. App. P. 35(a)(2). And when a panel clearly errs in granting habeas relief to a state petitioner, its error necessarily presents a "question of exceptional importance." This Court should say so, in either a *per curiam* summary reversal or an opinion issued after full briefing and argument.

"Federal habeas review of state convictions … intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Harrington*, 562 U.S. at 103 (quotations omitted). It interferes with "both the States' sovereign power to pun-

ish offenders and their good-faith attempts to honor constitutional rights." *Murray v. Carrier*, 477 U.S. 478, 487 (1986) (quoting *Engle v. Isacc*, 456 U.S. 107, 128 (1982). Recognizing that federal habeas review involves a significant intrusion on state power, Congress adopted AEDPA to "further the principles of comity, finality, and federalism." *Duncan v. Walker,* 533 U.S. 167, 178, (2001) (quotation omitted). AEDPA, by making habeas relief hard to win, limits the degree to which federal courts can meddle in state affairs. Pet.App.247a (Thapar, J., dissenting from denial of rehearing *en banc*) (quoting *Harrington*, 562 U.S. at 102)).

Perhaps because improper awards of habeas relief severely intrude upon state sovereignty, the Court routinely grants *certiorari* and summarily reverses factbound or case-specific misapplications of AEDPA. *See, e.g., Alaska v. Wright*, 141 S. Ct. 1467 (2021) (*per curiam*); *Mays v. Hines*, 141 S. Ct. 1145 (2021) (*per curiam*); *Shinn v. Kayer*, 141 S. Ct. 517 (2020) (*per curiam*); *Shoop v. Hill*, 139 S. Ct. 504 (2019) (*per curiam*). That matters here, because this Court grants *certiorari* "only for compelling reasons." S. Ct. Rule 10. The Court's policing of this issue thus confirms that these cases, by their nature, present important issues.

If improper awards of habeas relief present issues "compelling" enough to justify error correction through the *certiorari* process, *id.*, they present "question[s] of exceptional importance" that justify error correction through the *en banc* process, Fed. R. App. P. 35(a). But few circuits see things that way. Indeed, many opinions suggest that a case must implicate something over and above an improper award of habeas relief before *en banc* review is appropriate.

See Kipp v. Davis, 986 F.3d 1281, 1285 (9th Cir. 2021) (Miller, J., concurring in the denial of rehearing *en banc*); *Issa v. Bradshaw*, 910 F.3d 872, 877 (6th Cir. 2018) (Sutton, J., concurring in the denial of rehearing *en banc*); *Gongora v. Thaler*, 726 F.3d 701, 701–02 (5th Cir. 2013) (Higginbotham, J., respecting the denial of rehearing *en banc*); *Evans v. Sec'y, Dep't of Corr.*, 703 F.3d 1316, 1337 (11th Cir. 2013) (*en banc*) (Wilson, J., dissenting); *Young v. Conway*, 715 F.3d 79, 86–87 (2d Cir. 2013) (Parker, J., concurring in the denial of rehearing *en banc*).

This case is illustrative. In his opinion dissenting from the denial of *en banc* review, Judge Griffin reported that a majority of the Sixth Circuit "appear[ed] to recognize that" the panel majority was "clearly incorrect." Pet.App.239a. The full court nonetheless allowed the panel's decision "to stand because it conclude[d] that this case is not of exceptional importance." *Id.* Thus, responsibility for correcting any error fell to this Court.

This *laissez-faire* approach is bad for the States. It causes States to suffer an unjustified intrusion on their sovereign authority that they can redress only by spending significant resources seeking relief in this Court. (Here, for example, the State had to file this petition and seek an *unopposed* request for a stay of the mandate that the circuit refused to grant.) The approach is also bad for this Court, which is forced to expend resources correcting factbound errors that the circuits could correct themselves. Finally, the approach is bad for the law: it provides insufficient deterrence to courts tempted to indulge a "taste for disregarding" AEDPA. Pet.App.237a (Griffin, J., dissenting) (quoting *Rapelje*, 136 S. Ct. at 389 (Scalia, J., dissenting from denial of petition for a

writ of *certiorari*)). This Court cannot plausibly correct all misapplications of AEDPA. So the threat of summary reversal can serve as a proper deterrent only if it is coupled with a serious threat of *en banc* review.

To be clear, the foregoing does not mean that the circuits must go *en banc* to correct every clearly incorrect award of habeas relief. But it does mean that every such award of habeas relief presents an issue important enough to permit *en banc* review under Rule 35(a) of the Federal Rules of Appellate Procedure.

B. This case presents two circuit splits regarding *Faretta*.

The Sixth Circuit, in holding that Cassano properly invoked his *Faretta* rights by asking about the possibility of self-representation in April 1999, created or deepened two circuit splits.

The first involves the question whether and when defendants can invoke their *Faretta* rights by asking questions about self-representation. The Sixth Circuit held that they can and that Cassano had. Pet. App.26a–28a. But other circuits have held that similar questions about self-representation were *not* sufficiently clear and unequivocal to satisfy *Faretta*. *See, e.g., United States v. Light*, 406 F.3d 995, 999 (8th Cir. 2005); *Burton v. Collins*, 937 F.2d 131, 133–34 (5th Cir. 1991); *United States v. Pena*, 279 F. App'x 702, 706–07 (10th Cir. 2008); *cf. also Jackson v. Ylst*, 921 F.2d 882, 889 (9th Cir. 1990).

The other circuit split concerns the issue of what constitutes a timely demand for self-representation under *Martinez*, 528 U.S. at 162. Assuming Cas-

sano's April 1999 question constituted a demand for self-representation, he made that demand just three days before his trial was to start. Other circuits have held that similarly late-raised requests were untimely. *See, e.g., United States v. Edelmann*, 458 F.3d 791, 809 (8th Cir. 2006); *United States v. Mackovich*, 209 F.3d 1227, 1237 (10th Cir. 2000); *United States v. George*, 56 F.3d 1078, 1084 (9th Cir. 1995).

CONCLUSION

The Court should grant the petition for *certiorari* and reverse.

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