No. 21-679

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

REPLY IN SUPPORT OF 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?

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REPLY

The Sixth Circuit's decision in this case "disregarded federal law, spurned Supreme Court precedent, and trampled on Ohio's state courts." Pet.App. 246a (Thapar, J. dissenting from the denial of rehearing *en banc*). The Court should grant *certiorari* and either summarily reverse or set the case for argument.

I. The Court should summarily reverse the Sixth Circuit.

August Cassano murdered his cellmate. After being indicted but before trial, he made at least three statements pertaining to self-representation. The first time, in May 1998, he simultaneously filed a motion for the appointment of new counsel *along with* a motion waiving his right to counsel. Pet.App.201a; *see also* Supp.App.297a–303a. The second time, in September 1998, he asked for a hybrid form of representation: he wanted to serve as his own co-counsel, alongside appointed counsel. Pet.App.201–02a. Finally, three days before trial, he asked the trial court during a hearing about appointed counsel's preparedness: "Is there any possibility I could represent myself?" Pet.App.202a

On appeal to the Ohio Supreme Court, Cassano argued that he properly invoked his right to self-representation in all three instances. The Ohio Supreme Court disagreed and affirmed his conviction. Pet.App. 201a–04a. Years later, the Sixth Circuit overrode the Ohio Supreme Court's decision. It determined that Cassano *had* properly invoked his right to self-representation through the May 1998 filing and the April 1999 question. On those grounds, it awarded habeas relief.

The Sixth Circuit's decision constitutes an egregious misapplication of AEDPA. This Court should summarily reverse.

Cassano responds with two principal arguments. First, he contends that the State's request for summary reversal is factbound and thus improper. BIO.6. That argument is a non-starter, since the Court often issues factbound summary reversals when circuit courts misapply AEDPA. *See, e.g.*, *Dunn v. Reeves*, 141 S. Ct. 2405 (2021) (*per curiam*). Second, Cassano tries to defend the Sixth Circuit's ruling on the merits. He fails. This is easiest to see by separately addressing the two alleged invocations of self-representation at issue in this case. (Cassano also rehashes events surrounding his September 1998 request for hybrid representation. BIO.3, 11. But the Sixth Circuit correctly rejected any claim to habeas relief resting on that September 1998 request, Pet.App.24a, and Cassano does not challenge its decision.)

A. May 1998.

In May 1998, Cassano filed two inconsistent motions with the state trial court. One purported to waive the right to counsel. The other demanded the appointment of new counsel. Pet.App.201a. The Sixth Circuit awarded Cassano habeas relief, concluding that his inconsistent motions properly invoked the right to self-representation. It erred.

1. Cassano's claim fails even on *de novo* review. Defendants seeking to represent themselves must "clearly and unequivocally" declare their intent to do so. *Faretta v. California*, 422 U.S. 806, 835 (1975). "A request is unequivocal if it's 'free from uncertainty.'" Pet.App.248a (Thapar, J. dissenting from denial of rehearing *en banc*) (citation omitted). "When, as here, a

defendant simultaneously files two conflicting motions that don't reference each other, things are anything but clear and certain." *Id.*

The Warden will assume *arguendo* that a criminal defendant could clearly and unequivocally demand self-representation "in the alternative," while "simultaneously request[ing] the appointment of new counsel." BIO.11 (quotation omitted). Even then, however, the defendant's alternative demand for self-representation would need to be clear and unequivocal. Cassano filed two inconsistent motions on the same day, neither of which referenced the other. He thus made no clear and unequivocal demand, in the alternative or otherwise.

2. While the Warden would prevail even under *de novo* review, the Ohio Supreme Court's decision must be reviewed under AEDPA's deferential standards. *See* 28 U.S.C. §2254(d)(1), (d)(2). The Sixth Circuit held otherwise, and reviewed *de novo* the question whether Cassano properly invoked his right to self-representation in May 1998. Pet.App.15a–16a. Once again, it erred.

Federal courts must "apply a 'strong' presumption that a federal claim was adjudicated on the merits in state court." Pet.App.249a (Thapar, J., dissenting from denial of rehearing *en banc*) (quoting *Johnson v. Williams*, 568 U.S. 289, 301–02 (2013)). "The presumption is overcome only when 'the evidence leads *very clearly* to the conclusion that a federal claim was inadvertently overlooked in state court.'" Pet.App. 250a (Thapar, J., dissenting from denial of rehearing *en banc*) (quoting *Johnson*, 568 U.S. at 303) (emphasis added).

The evidence here does not show "very clearly" that the Ohio Supreme Court overlooked Cassano's claim. "The Ohio Supreme Court dedicated an entire section of its opinion—a full twelve paragraphs—to Cassano's *Faretta* arguments." *Id.* "The court described all the relevant facts, including that Cassano filed two conflicting motions on the same day" in May 1998. *Id.* "Although the Ohio Supreme Court did not mention these motions again, it did conclude that 'Cassano did not unequivocally and explicitly invoke his right to self-representation.'" *Id.* (quoting Pet.App.203a). "The inference is obvious: The Ohio Supreme Court didn't consider those conflicting filings to be a clear and unequivocal demand for self-representation." *Id.*; *accord* Pet.App.42a–43a (Siler, J., dissenting); Pet. App.240a–41a (Griffin, J., dissenting).

Cassano silently concedes that, if §2254(d)(1) applies, the Sixth Circuit wrongly awarded him relief on the May 1998 claim; he makes no attempt to defend the Sixth Circuit's footnoted assertion to the contrary, *see* Pet.App.22a n.2. Instead, he argues that AEDPA does not apply. That argument does nothing to help Cassano since he loses even if one reviews the Ohio Supreme Court's decision *de novo*. *See above* 2–3. Regardless, the argument fails. It requires accepting that the Ohio Supreme Court "forgot about" Cassano's May 1998 filing when it rejected his arguments. BIO.8. Cassano says it "strains credulity" to believe that the Ohio Supreme Court chose to implicitly address his May 1998 "waiver of counsel" even though the court discussed his other alleged demands for self-representation in greater detail. BIO.10–11. In fact, what strains credulity is Cassano's suggestion that the Ohio Supreme Court summarized Cassano's May 1998 motions, *see* Pet.App.201a–02a, but then

promptly forgot about those motions when rejecting Cassano's self-representation arguments only four paragraphs later. Under the better reading of the Ohio Supreme Court's opinion, the court thought any argument resting on the May 1998 filing was "too insubstantial to merit discussion." *Johnson*, 568 U.S. at 303.

Cassano notes that the Ohio Supreme Court described the September 1998 motion for hybrid representation as Cassano's "initial demand to represent himself" and his "only written motion on that point." BIO.7-8 & n.1 (quoting Pet.App.202a). Cassano says that, in fact, *the May 1998* filing was his "initial … written motion" regarding self-representation. He therefore interprets this quoted language as proving that the state court overlooked the May 1998 filing. In fact, this language bolsters the Warden's interpretation of the Ohio Supreme Court's opinion. As just explained, the Ohio Supreme Court could not possibly have forgotten about the May 1998 motion it just finished addressing. Thus, the fact that the court described the September 1998 motion as the "initial" (and only "written") "demand" for self-representation confirms that the court did not consider the written "waiver of counsel" from May 1998 to be a demand for self-representation at all.

At most, Cassano has offered *one* reading of the Ohio Supreme Court's opinion. Even if that reading were plausible, it is not the only reading. As the opinions from Judges Siler, Griffin, and Thapar all establish, the Ohio Supreme Court's opinion can be read as rejecting implicitly Cassano's weak argument resting on the May 1998 filing. Because the opinion can reasonably be read in that manner, Cassano cannot overcome the presumption that the Ohio Supreme Court

adjudicated the claim on the merits. *See Johnson*, 568 U.S. at 303. Cassano never attempts to rebut this presumption—he never even acknowledges its existence.

Cassano finally suggests that the Warden's reading of the Ohio Supreme Court's opinion is a "new theory" that is "not properly before the Court." BIO.13. That is wrong twice over. First, the Warden has consistently argued that the Ohio Supreme Court addressed this claim on the merits. His Sixth Circuit brief, for example, defended as "reasonable" the state court's "finding that Cassano did not unequivocally assert a desire to represent himself" in May 1998. Warden's Br. at 30, Doc. 41. Second, this Court may properly review any issue that was "passed upon below," *United States v. Williams*, 504 U.S. 36, 41 (1992) (quotation omitted), and the Sixth Circuit clearly passed upon the question whether the Ohio Supreme Court implicitly resolved this claim on the merits. *See* Pet.App.15a–17a.

B. April 1999.

In April 1999, three days before trial, Cassano asked the state trial judge: "Is there any possibility I could represent myself?" Pet.App.202a. The Ohio Supreme Court concluded that this question did not properly invoke the right to self-representation, and supported that conclusion with three independently sufficient justifications. First, it determined that the question was insufficiently clear and unequivocal. Pet.App.203a. Second, it determined that the request was untimely. Pet.App.203a. Third, it determined that Cassano "abandoned any intention to represent himself when he did not pursue the issue after being told it would not be a good idea." Pet.App.204a.

The Ohio Supreme Court unquestionably adjudicated on the merits Cassano's claim pertaining to the April 1999 question. As a result, the Sixth Circuit had to review the Ohio Supreme Court's rejection of this claim under AEDPA's deferential standards. *See* §2254(d)(1), (d)(2). The Sixth Circuit acknowledged all that. Pet.App.25a. But in purporting to apply these deferential standards, it awarded relief to Cassano. It erred, because Cassano has no plausible argument for habeas relief under §2254(d)(1) or (d)(2).

1. Section 2254(d)(1) permits federal courts to award habeas relief when a state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law." §2254(d)(1). "Clearly established Federal law" includes only the holdings, as opposed to the dicta, of decisions from this Court. *Williams v. Taylor*, 529 U.S. 362, 412 (2000). And a state court's application of a holding from this Court is "unreasonable," for purposes of §2254(d)(1), only when 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 v. Richter*, 562 U.S. 86, 103 (2011).

Cassano argued, and the Sixth Circuit held, that *all three* of the Ohio Supreme Court's alternative holdings rested on an unreasonable application of Supreme Court precedent. That is wrong, and obviously so. Consider first the state court's determination that Cassano's *question* about the *possibility* of self-representation was too unclear and equivocal to satisfy *Faretta*. Pet.App.203a. No language in any Supreme Court case, and certainly no holding, makes this determination wrong "beyond fairminded disagreement." *Harrington*, 562 U.S. at 103. The Sixth

Circuit, for its part, "offered little more than simple disagreement with the Ohio Supreme Court's decision." Pet.App.252a (Thapar, J. dissenting from denial of rehearing *en banc*). "The panel relied on 'context' to reach what it thought was the better reading of Cassano's question." *Id.* But it does not matter who has the better reading—"'even a strong case for relief does not mean the state court's contrary conclusion was unreasonable.'" *Id.* (quoting *Harrington*, 562 U.S. at 102) (citation omitted). Here, no decision from this Court forbade the state courts from interpreting Cassano's April 1999 remark as "a contingent question inquiring whether self-representation is even an option for the future," rather than an explicit demand. Pet. App.242a (Griffin, J., dissenting). "Questions are not demands," and the Ohio Supreme Court "reasonably concluded that Cassano's tepid question—which was not pursued further—was not a clear and unequivocal demand for self-representation." Pet.App.252a (Thapar, J. dissenting from denial of rehearing *en banc*).

Cassano's brief in opposition parrots the Sixth Circuit's flawed, context-based arguments. BIO.12–13. He raises just one not-yet-rejected thought, stressing that he asked for his question about self-representation to "go on record." Pet.App.265a. But Cassano does not (and could not) explain how these three additional words establish that the Ohio Supreme Court made a legal error "well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103.

In any event, the Ohio Supreme Court alternatively rejected Cassano's claim based on timeliness and abandonment grounds. Pet.App.203a–04a. Neither determination contradicted or unreasonably

applied a holding from this Court. Pet.27–28, 31–32; *see also* Pet.App.252a–53a (Thapar, J., dissenting from denial of *en banc* review). Cassano does not seriously argue otherwise. The closest he comes is when he identifies some lower-court cases in which courts allowed defendants to demand self-representation shortly before trial. BIO.13–14. But those cases are irrelevant to the task at hand: "AEDPA permits habeas relief only if a state court's decision is 'contrary to, or involved an unreasonable application of, clearly established Federal law' as determined by this Court, not by the courts of appeals." *Lopez v. Smith*, 574 U.S. 1, 6 (2014) (*per curiam*).

2. Cassano's arguments under §2254(d)(2) fare no better. That section permits courts to award relief only when the state court's decision rested on an "unreasonable" factual determination. *Id.* A factual determination is "unreasonable" only if the state-court record left the state courts with "no permissible alternative but to" resolve the factual dispute differently. *Rice v. Collins*, 546 U.S. 333, 341 (2006).

The Sixth Circuit determined that the Ohio Supreme Court's untimeliness holding rested on two unreasonable factual determinations. The first was the state court's determination that "Cassano did not mention that he wanted to represent himself alone until April 23, 1999, only three days before the start of trial." Pet.App.32a (quoting Pet.App.202–03a). The second was the state court's statement that Cassano asked about self-representation "as an attempt to delay the trial." Pet.App.32a (quoting Pet.App.204a).

Even if both findings were unreasonable that would not entitle Cassano to relief. After all, neither bears on the Ohio Supreme Court's determination

that that the April 1999 question was neither clear nor unequivocal, which was an independently sufficient basis for denying relief. *See* Pet.App.203a. Regardless, the Ohio Supreme Court's statements were not unreasonable because they are consistent with the state-court record.

The first finding—that Cassano first asked to represent himself alone in April 1999—reflects the Ohio Supreme Court's reasonable interpretation of the May 1998 "waiver of counsel." If, as the Ohio Supreme Court reasonably concluded, the May 1998 "waiver of counsel" was too unclear and equivocal to constitute a proper invocation of the right to self-representation, then the April 1999 question *was* the first time Cassano expressed a desire to represent himself alone. (The September 1998 filing sought hybrid representation, meaning Cassano would have co-counsel.)

The state court's finding regarding Cassano's intent to delay was also "well within the bounds of reason." Pet.App.253a (Thapar, J., dissenting from denial of rehearing *en banc*). Cassano—a repeat murderer with substantial experience in court—asked about self-representation "only *three days* before the start of his trial." *Id*. A reasonable jurist could think that request was motivated by an attempt at assuring delay. Cassano protests that he was not trying to delay his trial, and that he asked about self-representation only "when," in his view, "it became clear that his lead counsel was alarmingly unprepared for trial." BIO.13. Even if his *post hoc* explanation is accurate, however, nothing in the record "compel[led] the conclusion that the [state] court had no permissible alternative" but to construe Cassano's late-in-the-day question as something other than an attempt at delay.

Rice, 546 U.S. at 341. As such, the court's delay finding was not unreasonable for purposes of §2254(d)(2).

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In the end, Cassano offers no plausible defense of the Sixth Circuit's indefensible ruling.

II. The Warden's second and third questions presented are worthy of review.

The Warden's petition offered two other matters worthy of this Court's review.

1. If the Court decides against summary reversal, it could grant review to resolve two circuit splits. One concerns the circumstances in which defendants can invoke their *Faretta* rights by asking questions, instead of making demands, about self-representation. The other concerns what constitutes timely invocation of the right to self-representation. Cassano responds that there is no split; he says courts agree on the governing principles and are "reaching differing conclusions based on differing facts." BIO.13. It is true that the facts in each case are different, and that the split is not as obvious as it would be were the circuits applying different legal rules. But the facts in these cases are often quite similar. *Compare,* Pet.App.26a–27a *with United States v. Light*, 406 F.3d 995, 999 (8th Cir. 2005); *compare also* Pet.App.33a *with United States v. Edelmann*, 458 F.3d 791, 809 (8th Cir. 2006). A ruling from this Court would help ensure that defendants facing similar circumstances in different circuits are treated similarly.

Incidentally, Cassano claims that an "invocation is timely when not made for the purpose of delay." BIO.13. None of the cases he cites go that far—each seems to treat intent to delay as relevant but not

dispositive. But if any cases *did* say that, it would deepen the split, because some circuits do not treat delay as a necessary element of untimeliness. *See, e.g.*, *Edelmann*, 458 F.3d at 809.

2. The case also asks whether clearly erroneous awards of habeas relief necessarily present questions important enough to justify *en banc* review. Cassano protests that any opinion addressing this issue would be advisory. Not so. This Court may reverse lower courts that decline discretionary appeals on legally improper grounds. *Dart Cherokee Basin Operating Co., LLC v. Owens*, 574 U.S. 81, 90–91 (2014). The same logic would permit reversing a circuit that fails to go *en banc* based on a misunderstanding of what constitutes "a question of exceptional importance." Fed. R. App. P. 35(a)(2); *see* Pet.App.239a (Griffin, J., dissenting). In any event, even non-binding guidance on this issue would be useful. And lower courts would not likely ignore it, for "there is dicta and then there is Supreme Court dicta." *Schwab v. Crosby*, 451 F.3d 1308, 1325 (11th Cir. 2006).

CONCLUSION

The Court should grant the petition for *certiorari*.

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