**No. 21A____**

# In the Supreme Court of the United States

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TIM SHOOP, Warden,

*Applicant,*

v.

AUGUST CASSANO,

*Respondent.*

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CAPITAL CASE – NO EXECUTION DATE SET

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**UNOPPOSED APPLICATION TO RECALL AND STAY THE MANDATE OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT PENDING RESOLUTION OF WARDEN TIM SHOOP'S PETITION FOR A WRIT OF *CERTIORARI***

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## LIST OF DIRECTLY RELATED PROCEEDINGS

**Ohio Supreme Court:**

*State v. Cassano*, No. 1999-1268, 96 Ohio St. 3d 94 (Aug. 7, 2002)

**Supreme Court of the United States:**

*Cassano v. Ohio*, No. 02-8186, 537 U.S. 1235 (Mar. 3, 2003)

**Northern District of Ohio:**

*Cassano v. Bradshaw*, No. 1:03-cv-01206, 2018 WL 3455531 (N.D.Ohio July 18, 2018)

**Sixth Circuit:**

*Cassano v. Shoop*, No. 18-3761, 1 F.4th 458 (6th Cir. June 17, 2021)

*Cassano v. Shoop*, No. 18-3761, ___ F.4th ___, 2021 WL 3782661 (6th Cir. Aug. 26, 2021)

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**TO THE HONORABLE BRETT M. KAVANAUGH, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE SIXTH CIRCUIT:**

Warden Tim Shoop moves this Court to recall and stay the mandate of the United States Court of Appeals for the Sixth Circuit. In the proceedings below, the Sixth Circuit "erroneously" granted "postconviction relief to" August Cassano, "a repeat murderer." App.41 (Thapar, J., dissenting from the denial of rehearing *en banc*). The Sixth Circuit compounded its error by refusing to stay its mandate pending the disposition of the Warden's forthcoming *certiorari* petition. App.47. The Circuit gave no reason for denying the mandate. And it is hard to imagine what reason it might have given. On the one hand, Ohio will be severely prejudiced without a stay: because the Sixth Circuit's judgment gives the State just six months to retry Cassano for murdering his cellmate, the State will need to begin preparing immediately for a capital trial that, depending on what happens in this Court, may not take place. On the other hand, a stay will not prejudice Cassano: he will remain imprisoned for life on a separate murder conviction regardless of what happens in this case.

The Warden asked the Sixth Circuit to reconsider its order denying the stay. And Cassano *did not oppose* the Warden's request. Nonetheless, the Sixth Circuit rejected that request. Over Judge Siler's dissent, it said the *unopposed* motion was "without merit." App.48–49. It issued its mandate the next day, September 9, 2021. App.50.

Because the Sixth Circuit refused to stay its mandate, the Warden moves this Court to recall and stay the Sixth Circuit's mandate. Counsel for Cassano has

authorized the Warden to say that this motion is unopposed, though Cassano's counsel asked the Warden to include the following language:

> Cassano's counsel informed the Warden that he does not object to a stay of the mandate for the sole reason that the prejudice he faces from not being promptly retried is minimal. For this reason alone, and so as not to burden the Court with litigation on this matter, Cassano does not oppose a stay of the mandate, which would allow this Court to address any petition for writ of *certiorari* in the normal course. Cassano explicitly does not concede that this matter is worthy of *certiorari*, and he does not agree with Petitioner's assertions that this Court is likely to grant *certiorari* and/or to reverse the judgment below

## PARTIES TO THE PROCEEDINGS BELOW

Applicant Tim Shoop is the Warden of the Chillicothe Correctional Institution. He was Respondent in the United States District Court for the Northern District of Ohio and Appellee in the United States Court of Appeals for the Sixth Circuit.

Respondent August Cassano is an inmate at the Chillicothe Correctional Institution. He was Petitioner in the United States District Court for the Northern District of Ohio and Appellant in the United States Court of Appeals for the Sixth Circuit.

## OPINIONS BELOW

The District Court denied Cassano's petition for a writ of habeas corpus on July 18, 2018. *Cassano v. Bradshaw*, No. 1:03-cv-1206, 2018 WL 3455531 (N.D. Ohio, July 18, 2018). On June 17, 2021, the Sixth Circuit reversed the District Court and conditionally granted Cassano's habeas petition "unless the State retries him within six months." App.27. The Sixth Circuit's opinion is published at 1 F.4th 458. The Sixth Circuit denied rehearing *en banc* on August 26, 2021. *See* App.33. The opinions dissenting from the denial of rehearing *en banc* are available online. *See Cassano v.*

*Shoop*, —F.4th —, No. 18-3761, 2021 WL 3782661, at *1 (6th Cir. Aug. 26, 2021); *see also* App.34–46. The Sixth Circuit denied the State's motion to stay the mandate on September 2, 2021. App.47. The Sixth Circuit denied the State's motion to reconsider on September 8, 2021. App.48. It issued the mandate on September 9, 2021. App.50.

## JURISDICTION

This Court has jurisdiction to review the Sixth Circuit's order denying a stay of the mandate under Supreme Court Rules 22 and 23 and 28 U.S.C. §2101(f).

## STATEMENT OF THE CASE

**1.** August Cassano was already serving a life sentence for one murder when he chose to commit another. *State v. Cassano*, 96 Ohio St. 3d 94, 94 (Ohio 2002). Unhappy with his new cellmate, Walter Hardy, Cassano decided to "remove [Hardy] himself." *Id.* at 95. Late one night, Cassano attacked Hardy with a shank. He stabbed Hardy approximately seventy-five times, stabbing him in his head, neck, back, chest, abdomen, hips, legs, arms, and hands. Ten of those wounds would have been independently fatal. *Id.* at 96.

After a grand jury indicted Cassano for aggravated murder with two death-penalty specifications, the trial court appointed defense counsel. This habeas case is about what happened on the way to trial.

***May 1998.*** On a single day in May 1998, Cassano made conflicting requests in two *pro se* filings. In one filing, labeled "waiver of counsel," Cassano said that he wanted to control the "content of his defense." Waiver, R.134-1, PageID#863. But, in another, more-detailed filing, Cassano asked for "appointment of substitute counsel."

Motion, R.134-1, PageID#864–69. (Except as otherwise noted, all record citations refer to the District Court record.) In that filing, Cassano asked the court to appoint Kort Gatterdam of the Ohio Public Defender's Office. *Id.*, PageID#868. Neither of these filings addressed the other, though both were mailed and received on the same day. *See* R.134-1, PageID#863 & 869; App.14. The trial court responded by appointing three new defense attorneys, including Gatterdam. App.5. Cassano did not object, so the trial court 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. More precisely, he requested "hybrid representation," under which he would act as his own co-counsel alongside Gatterdam. *Id.,* PageID#1300–01. The trial court denied the motion. Tr., R.135-1, PageID#4242–44.

***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. Tr., R.135-4, PageID#4562–63. A discussion ensued and Cassano asked: "Is there any possibility I could represent myself?" *Id.*, PageID#4564. The trial court replied that self-representation would not be in Cassano's best interests. *Id.*, PageID#5464–65. After that brief exchange, the discussion shifted to whether the court should delay trial to allow defense counsel more time to prepare. *Id.,* PageID#4565–71. Cassano never returned to the topic of self-representation.

**2.** A jury convicted Cassano of aggravated murder and recommended a death sentence. After the trial court accepted that recommendation, *Cassano*, 96 Ohio St. 3d at 98, Cassano appealed to the Supreme Court of Ohio. Cassano argued that the trial court erred by denying Cassano's request to represent himself. *Id.* at 98–99.

Criminal defendants do indeed have the right to represent themselves. *Faretta v. California*, 422 U.S. 806, 807 (1975). But to invoke that right, a defendant must "clearly and unequivocally" demand self-representation. *Id.* at 835. And the defendant must do so in a timely fashion. *See Martinez v. Ct. of Appeal*, 528 U.S. 152, 162 (2000). Cassano claimed that he properly invoked his right to self-representation three times: in the May 1998 "waiver of counsel," in the September 1998 request to serve as his own co-counsel, and in April 1999 when he asked the trial court about whether self-representation would be an option. The court rejected Cassano's self-representation arguments in a section of its opinion entitled "Preliminary Issues: Self-representation." *Cassano*, 96 Ohio St. 3d at 98–100.

***May 1998.*** The court first addressed the "waiver of counsel" Cassano filed in May 1998. It noted that, on the "same day" Cassano filed the waiver, he also "asked that … Kort Gatterdam … be appointed as counsel." *Id.* at 99. The court did not elaborate on why the request for counsel defeated Cassano's *Faretta* claim. But its reasoning was obvious: the court concluded that Cassano's waiver, accompanied as it was by a request for a new lawyer, did not constitute a "clear[] and unequivocal[]" invocation of the right. *Faretta*, 422 U.S. at 835.

***September 1998.*** The court next addressed Cassano's September 1998 motion. Given Cassano's contradictory filings in May, the court viewed the September motion as "Cassano's initial demand to represent himself." *Cassano*, 96 Ohio St. 3d at 100. That motion asked for hybrid representation, in which Cassano would retain an attorney but serve as co-counsel for himself. *Id.* Critically, Cassano's "only written motion on that point"—"that point" being the issue of hybrid representation—did not go so far as to request self-representation *without* an attorney. *Id.* And because "[a] defendant has no right to a 'hybrid' form of representation," the Supreme Court of Ohio concluded, the trial court committed no constitutional violation by denying Cassano's motion. *Id.*

***April 1999.*** That left only the April 1999 request. The Supreme Court of Ohio concluded that, for several reasons, Cassano failed to prove any violation of his right to self-representation. *Id.* First, Cassano made no "explicit and unequivocal demand for self-representation"; he instead *asked* about the *possibility* of representing himself. *Id.* Second, even if Cassano's question had been a clear and explicit demand, it was "untimely because it was made only three days before the trial was to start." *Id.* The court concluded that Cassano's "remark about representing himself [was] an attempt to delay the trial." *Id.* Finally, the court determined that Cassano "abandoned" self-representation "when he did not pursue the issue … after the court told him it would not be a good idea." *Id.* (citing *McKaskle v. Wiggins*, 465 U.S. 168, 182 (1984)).

**3.** Cassano sought federal habeas relief in the United States District Court for the Northern District of Ohio. He claimed, among other things, that he was denied his constitutional right to self-representation. Op., R.146, PageID#7961–62. The District Court recognized that "AEDPA," the Antiterrorism and Effective Death Penalty Act of 1996, governed Cassano's claims. Under AEDPA, habeas petitioners generally cannot win relief based on federal claims that the state courts already adjudicated on the merits. *Id.*, PageID#7952–53, 7962. There are, however, two exceptions. First, under 28 U.S.C. §2254(d)(1), habeas relief may be appropriate if the state court, in adjudicating the petitioner's claim, issued 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." To meet this standard, a state court's error must be so obvious that there is no room for "fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). Second, under 28 U.S.C. §2254(d)(2), habeas relief may be appropriate if the state court's ruling rested upon a factual determination that the record unambiguously refutes. *See Rice v. Collins*, 546 U.S. 333, 341 (2006).

The District Court determined that Cassano had not proved his right to relief under these demanding standards. Op., R.146, PageID#7966–78.

**4.** Cassano appealed to the Sixth Circuit. That court reversed in a divided opinion. The two-judge majority held that Cassano had properly invoked his right to self-representation twice—in May 1998 and April 1999.

***May 1998.*** The Circuit determined that the Supreme Court of Ohio overlooked, and so failed to "adjudicate on the merits," §2254(d), Cassano's *Faretta* claim relating to the May 1998 "waiver of counsel." *See* App.12. As a result, it concluded that it could review the Supreme Court of Ohio's ruling *de novo*, rather than reviewing it under AEDPA's deferential standards. *Id.* at 11–15. (Remember, AEDPA's deferential standards apply only to claims that state courts previously adjudicated on the merits. *See* §2254(d)). And, reviewing the matter *de novo*, the Sixth Circuit ruled for Cassano. It determined that Cassano's "waiver of counsel" filing—the one Cassano made on the same day that he requested new counsel—constituted a proper demand for self-representation. App.13.

The majority added, in a footnote, that Cassano would also be entitled to relief even under AEDPA's demanding standards. More precisely, it concluded that the Supreme Court of Ohio's opinion, by failing to treat the "waiver of counsel" filing as a clear and unequivocal demand for self-representation, issued 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." §2254(d)(1); App.16 n.2. The majority concluded, apparently, that the Supreme Court of Ohio unreasonably applied *Faretta* itself. App.16 n.2.

***April 1999.*** After concluding that Cassano was entitled to habeas relief based on the May 1998 filing, the Circuit majority identified a second basis for awarding habeas relief: it determined that Cassano properly invoked his *Faretta* rights in April 1999, and that the Supreme Court of Ohio egregiously erred in holding otherwise.

Recall what this version of Cassano's *Faretta* argument entailed. In April 1999, three days before trial, Cassano asked the state trial court: "Is there any possibility I could represent myself?" Tr., R.135-4, PageID#4564. Cassano argued in state court that, with this question, he properly invoked his *Faretta* rights. The Supreme Court of Ohio disagreed, and rejected his argument. *See Cassano*, 96 Ohio St. 3d at 100. Cassano, in federal court, argued that the Supreme Court of Ohio erred. And on that basis, he sought habeas relief.

Because the Supreme Court of Ohio adjudicated Cassano's claim on the merits, the Circuit determined that AEDPA applied. Nonetheless, while purporting to apply AEDPA's deferential standards, it granted Cassano's request for a writ of habeas corpus. App.19–21. The majority conceded that Cassano's supposed request for self-representation came in the form of a question. And it appeared to recognize that this Court had never specifically addressed whether such questions could constitute clear and unequivocal demands for counsel. Nonetheless, it held that "no fairminded jurist could" interpret the *question* as anything other than a clear and unequivocal *demand* for counsel. *Id*. at 19. Therefore, the Circuit concluded, the Supreme Court of Ohio unreasonably applied this Court's precedent in finding no *Faretta* violation. *Id*. at 19–21. In other words, it concluded that the Supreme Court of Ohio's decision was not simply an error—it constituted "an unreasonable application of" this Court's precedent. §2254(d)(1).

That alone would not have entitled Cassano to relief with respect to his argument based on the April 1999 statement. The reason is that the Supreme Court of

Ohio gave two alternative and independent reasons for rejecting Cassano's *Faretta* claim insofar as it rested on the April 1999 question. *First*, even if Cassano had clearly and unequivocally demanded to represent himself, his request was "untimely because it was made only three days before the trial was to start." *Cassano*, 96 Ohio St. 3d at 100. Cassano's question, the state court said, was simply "an attempt to delay the trial." *Id.* *Second*, Cassano "abandoned" self-representation "when he did not pursue the issue … after the court told him it would not be a good idea." *Id.* To award habeas relief, the Sixth Circuit needed to conclude that *neither* of these alternative justifications passed muster even under ADPA's deferential standards. And that is what the majority concluded. Each of these alternative justifications, the Court said, rested on either unreasonable factual determinations or unreasonable applications of Supreme Court precedent. App.21–27. The majority went on to hold that neither of the Supreme Court of Ohio's justifications withstood scrutiny. And, after rejecting all of the state court's justifications, the Sixth Circuit held that Cassano was entitled to habeas relief based on his question about self-representation in April 1999.

***Judgment.*** After finding for Cassano on these *Faretta*-based habeas arguments, the Sixth Circuit "conditionally grant[ed] Cassano's petition for a writ of habeas corpus," adding that the writ would not issue if the State retried Cassano within six months.

**5.** Judge Siler dissented. He argued that AEDPA governed all aspects of Cassano's claims, and that a fair application of AEDPA foreclosed Cassano's request for relief. *Id*. at 27–29.

***May 1998.*** As an initial matter, Judge Siler explained, the Supreme Court of Ohio plainly determined that the May 1998 "waiver of counsel," because it was accompanied by a request for the *appointment* of counsel, did not constitute an invocation of the right to self-representation at all. *Id*. at 28. In other words, the Supreme Court of Ohio adjudicated that claim on the merits, entitling its decision to AEDPA deference. To win relief under §2254(d)(1), therefore, Cassano had to show that "clearly established Supreme Court precedent required" the state courts to rule for Cassano. App.28 (Siler, J., dissenting). But according to Judge Siler, no precedent compelled that result. To the contrary, the relevant precedent—*Faretta*—says that criminal defendants can exercise their right to self-representation only if they clearly and unequivocally demand to represent themselves. *Id*. at 28. Since Cassano's inconsistent filings in May 1998 did not clearly or unequivocally demand anything, Cassano failed to prove his entitlement to relief based on those filings. *Id*. at 28–29.

***April 1999.*** Judge Siler next considered Cassano's April 1999 question regarding the possibility of self-representation. Here too, Judge Siler disagreed that Cassano was entitled to relief under §2254(d)(1). No Supreme Court precedent clearly established that a *question* about self-representation constituted a clear and unequivocal *demand* for self-representation. App.29–30 (Siler, J., dissenting).

Because the Supreme Court of Ohio did not unreasonably apply any Supreme Court precedent, Judge Siler reasoned, Cassano could not win relief under §2254(d)(1).

**6.** The Warden filed a petition for *en banc* review. The Sixth Circuit denied that petition. Judge Siler noted that he would have granted rehearing for the reasons articulated in his panel-stage dissent. *Id*. at 33 (order). And three active judges dissented from the denial of the petition for *en banc* review. Judge Griffin criticized his court for indulging once again its "taste for disregarding" AEDPA. *Id*. at 34 (Griffin, J., dissenting from the denial of rehearing *en banc*) (quoting *Rapelje v. Blackston*, 126 S. Ct. 388, 389 (2015) (Scalia, J., dissenting from denial of petition for writ of certiorari)). He stressed that this Court had "reversed [the Sixth Circuit] twenty-two times for not applying the deference to state-court decisions mandated by AEDPA." *Id.* By setting up the Circuit for another rebuke, Judge Griffin argued, the court chose "reversal over duty." *Id.* Judge Thapar, joined by Judge Nalbandian, dissented for similar reasons. He wrote that the circuit majority had misapplied AEPDA and this Court's precedent. *Id*. at 39–45 (Thapar, J., dissenting from the denial of rehearing *en banc*). He noted that the Sixth Circuit "has been corrected for similar errors before. Unfortunately," he concluded, "we need to be reminded once again." *Id*. at 46.

**7.** Following the denial of his petition for *en banc* review, the Warden moved to stay the mandate pending the filing of a petition for a writ of *certiorari* with this Court. The original Sixth Circuit panel denied that motion. App.47. The Warden asked the court to reconsider its order denying the stay. Cassano did not oppose that request. *See* Unopposed Mot. to Recons. Order Den. Stay of Mandate, Doc.68 (6th

Cir., Sept. 3, 2021). The panel majority denied the reconsideration motion. App.48. Its order notes that Judge Siler would have granted the motion and stayed the mandate. App.49. The mandate issued the next day, on April 9, 2021. App.50.

## REASONS TO GRANT THE APPLICATION

"To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay. In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (*per curiam*).

Here, Cassano does not oppose the Warden's request for a stay of the mandate. Thus, it is unclear whether the Warden even needs to satisfy these factors. Regardless, the Warden can make the necessary showing. The Court should therefore recall and stay the Sixth Circuit's mandate in this case.

### I. There is a reasonable probability that the Court will grant *certiorari* and a fair prospect that it will reverse the judgment below.

For at least two reasons, the Court is likely to grant *certiorari* in this case and reverse the Sixth Circuit's judgment. *First*, because the Sixth Circuit egregiously misapplied AEDPA and "erroneously" granted habeas relief to "a repeat murderer," App.41 (Thapar, J., dissenting from the denial of rehearing *en banc*), this is a strong candidate for summary reversal. *Second*, even putting aside the possibility of

summary reversal, this case provides a sound vehicle for addressing important questions worthy of this Court's attention.

### A. The Court is likely to summarily reverse the Sixth Circuit.

"Federal habeas review of state convictions entails significant costs, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Davila v. Davis*, 137 S. Ct. 2058, 2070 (2017) (internal citation and quotation omitted). Perhaps for that reason, this Court often summarily reverses courts that improperly award habeas relief to state prisoners. *See, e.g.*, *Dunn v. Reeves*, 141 S. Ct. 2405 (2021) (*per curiam*); *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*); *Sexton v. Beaudreaux*, 138 S. Ct. 2555 (2018) (*per curiam*); *Kernan v. Cuero*, 138 S. Ct. 4 (2017) (*per curiam*); *Dunn v. Madison*, 138 S. Ct. 9 (2017) (*per curiam*); *Jenkins v. Hutton*, 137 S. Ct. 1769 (2017) (*per curiam*); *Virginia v. LeBlanc*, 137 S. Ct. 1726 (2017) (*per curiam*); *Johnson v. Lee*, 136 S. Ct. 1802 (2016) (*per curiam*); *Kernan v. Hinojosa*, 136 S. Ct. 1603 (2016) (*per curiam*); *Woods v. Etherton*, 136 S. Ct. 1149 (2016) (*per curiam*).

The Sixth Circuit often finds itself on the receiving end of these reversals. In the last two decades, this Court "has reversed" the Sixth Circuit at least "twenty-two times for not applying the deference to state-court decisions mandated by AEDPA." App.34 (Griffin, J., dissenting from the denial of rehearing *en banc*). "Of those twenty-two rebukes, twelve" were handed down via summary reversal. *Id.*

This case is likely to produce the thirteenth such rebuke. The Sixth Circuit majority concluded that Cassano twice properly invoked his right to self-representation—once through his "waiver of counsel" filing in May 1998, and once when he asked a question about self-representation in April 1999. In fact, Cassano did not properly invoke his Sixth Amendment right to self-representation on either occasion. "The panel here erred in concluding otherwise." *Id.* at 39 (Thapar, J., dissenting from the denial of rehearing *en banc*). While "that would be true under any standard of review," it is "especially true on habeas review." *Id.*

### 1. AEDPA strictly limits the power of federal courts to award habeas relief.

"AEDPA circumscribes a federal habeas court's review of a state-court decision." *Lockyer v. Andrade*, 538 U.S. 63, 70 (2003). It permits the award of habeas relief to a state petitioner in just two circumstances.

*First*, habeas relief may be appropriate if the petitioner is in custody pursuant to a state-court decision that "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." §2254(d)(2). A petitioner meets this demanding standard only if 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).

*Second*, and more relevant here, habeas relief may be appropriate if the state petitioner is in custody pursuant to 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." 28 U.S.C. §2254(d)(1). The Court has long read

these phrases—"contrary to" and "unreasonable application of"—to bear different meanings. *See Williams v. Taylor*, 529 U.S. 362, 405–06 (2000).

"The word 'contrary' is commonly understood to mean 'diametrically different,' 'opposite in character or nature,' or 'mutually opposed.'" *Id.* at 405 (citation omitted). So a state court's decision is "contrary to" the Court's cases in only two situations: (1) if "the state court applies a rule that contradicts the governing law set forth in [the Court's] cases," or (2) if "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 405, 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*) (citation omitted). Federal courts thus should not show a "readiness to attribute error" to state courts. *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (*per curiam*). Instead, state courts must "be given the benefit of the doubt" in federal habeas proceedings. *Id.*

The "unreasonable application of" standard is different, but no easier to satisfy. *See Harrington v. Richter*, 562 U.S. 86, 102 (2011). The Court has repeatedly "explained that 'an *unreasonable* application of federal law is different from an *incorrect* application of federal law.'" *Renico v. Lett*, 559 U.S. 766, 773 (2010) (quoting

*Williams*, 529 U.S. at 410). A state court's 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.

In assessing whether a petitioner is entitled to relief under these standards, federal courts look to the last reasoned state-court decision addressing the claim at issue. *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018). If the "last state court to decide" the case left its decision unexplained, then a federal court should ordinarily "'look through' … to the last related state-court decision that does provide a relevant rationale." *Id.* If no state court explained the decision, then the federal court must hypothesize "what arguments or theories supported," or "could have supported, the state court's decision." *Harrington*, 562 U.S. at 102.

Critically, AEDPA's deferential standards apply only with respect to claims that the state courts "adjudicated on the merits." §2254(d). Claims not adjudicated on the merits are reviewed *de novo*. But federal courts must indulge a "strong" presumption that a claim was adjudicated on the merits, even when a state court rejects a claim "without expressly addressing" it. *Johnson v. Williams*, 568 U.S. 289, 301 (2013). The presumption is overcome only if it is "very clear[]" that a "claim was inadvertently overlooked in state court." *Id.* at 303.

**2. Cassano is not entitled to relief under AEDPA.**

Cassano sought habeas relief based on a supposed denial of his right to self-representation. This Court has held that, in addition to having a right to counsel, a criminal defendant has a right to self-representation. *Faretta v. California*, 422 U.S.

806, 807 (1975). But courts apply a "strong presumption against" finding that a defendant has invoked that right. *Martinez v. Ct. of Appeal*, 528 U.S. 152, 161 (2000) (quotation omitted). Thus, a defendant wishing to exercise the right must "clearly and unequivocally declare[] to the trial judge that he want[s] to represent himself." *Faretta*, 422 U.S. at 835. And he must make that declaration "in a timely manner." *Martinez*, 528 U.S. at 162. Even if a defendant invokes the right, he may forfeit the right by voluntarily accepting the assistance of counsel. *See McKaskle v. Wiggins*, 465 U.S. 168, 182 (1984).

As relevant here, Cassano claims that he properly invoked his right to self-representation twice: once in May 1998 and once in April 1999. The Supreme Court of Ohio rejected his arguments. In light of AEDPA's deferential standards, federal habeas courts have no basis for upsetting that determination.

***May 1998.*** Cassano argued below that he invoked his right to self-representation when he filed a "waiver of counsel," together with a request for new counsel, in May 1998. The Sixth Circuit agreed with Cassano. It erred.

As an initial matter, Cassano's claim based on the "waiver of counsel" is subject to AEDPA deference because the Supreme Court of Ohio adjudicated the claim on the merits. That court dedicated an entire section of its opinion to deciding whether the trial court violated Cassano's right to self-representation. *Cassano*, 96 Ohio St. 3d at 98–100. It noted all of the potentially relevant proceedings and filings, including the May 1998 "waiver of counsel." *Id.* at 99. The court went on to hold that Cassano never made an unequivocal demand for self-representation. *Id.* One can thus infer

that the court did not deem the waiver—which it expressly noted was filed the "same day" as a conflicting request for new counsel, *id.*—to be a clear demand for self-representation. *See* App.28–29 (Siler, J., dissenting); *id.* at 36 (Griffin, J., dissenting from denial of rehearing *en banc*); *id.* at 43–44 (Thapar, J., dissenting from the denial of rehearing *en banc*). Because the inference is *at least* permissible, it is not "very clear[]" that the Ohio Supreme Court overlooked Cassano's claim. *Johnson*, 568 U.S. at 303. Therefore, the claim was adjudicated on the merits and AEDPA's deferential standards apply.

Those standards defeat Cassano's claim. Defendants, if they want to represent themselves, must "clearly and unequivocally" invoke that right. *Faretta*, 422 U.S. at 835. Cassano's "waiver of counsel" does not fit the bill. To the contrary, Cassano's "potential invocation of the right to self-representation was unclear and equivocal because Cassano signed a substitution-of-counsel motion the same day." App.36 (Griffin, J., dissenting from the denial of rehearing *en banc*). Because a "waiver of counsel" filed the same day as a mutually inconsistent request for new counsel does not clearly and unequivocally invoke the right to self-representation, Cassano would not be entitled to relief even under *de novo* review. *Id.* at 43 (Thapar, J., dissenting from the denial of rehearing *en banc*). But because this case is governed by AEDPA's deferential standards, the analysis is even easier. The Ohio Supreme Court's resolution of Cassano's claim did not turn on disputed facts, so §2254(d)(2) is inapplicable. The only question is whether Cassano can clear the high hurdle of §2254(d)(1).

He cannot. For starters, the Supreme Court of Ohio's decision was not "contrary to" Supreme Court precedent. §2254(d)(1). Its decision did not apply "a rule that contradicts the governing law set forth in" *Faretta* or any other U.S. Supreme Court case. *Williams*, 529 U.S. at 405. Instead, it applied the very test *Faretta* requires: it looked for a clear and unequivocal demand for self-representation. Nor did it "confront[] a set of facts that are materially indistinguishable from" a U.S. Supreme Court decision "and nevertheless arrive[] at a result different from that precedent." *Id*. at 406 (alteration adopted; quotation omitted). Indeed, no decision from this Court addresses *Faretta*'s application to contradictory filings regarding self-representation.

The state court's decision does not constitute an "unreasonable application" of Supreme Court precedent, either. *See* §2254(d)(1). A state court unreasonably applies Supreme Court precedent only if it applies one of this Court's holdings in a manner that 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, Cassano "simultaneously request[ed]": (1) to waive his right to counsel; and (2) the appointment of new counsel. Those contradictory requests left ample room for "[f]airminded jurists" to conclude that Cassano made no "clear and unequivocal declaration to the trial judge that he wanted to represent himself." App.36 (Griffin, J., dissenting from the denial of rehearing *en banc*) (alterations accepted). It follows that the Supreme Court of Ohio did not unreasonably apply this Court's precedent when it rejected the *Faretta* argument that Cassano

raised based on his May 1998 filings. §2254(d)(1); *accord Harrington*, 562 U.S. at 102.

***April 1999.*** Now consider whether Cassano is entitled to habeas relief based on his claim that he properly invoked his right to self-representation in April 1999. AEDPA's deferential standards, everyone agrees, apply to this claim. And AEDPA unambiguously forecloses Cassano's right to relief.

In April 1999, three days before trial, Cassano asked the trial court: "Is there any possibility I could represent myself"? *Cassano*, 96 Ohio St. 3d at 99. Cassano argues this constitutes a valid demand for self-representation. The Supreme Court of Ohio disagreed. *Id.* at 100. Among other things, it determined that a *question* about self-representation is not the sort of clear and unequivocal demand for self-representation that *Faretta* requires. *Id.*

The Supreme Court of Ohio's conclusion does not rest on any unreasonable determination of fact—no one disputes that Cassano's April 1999 utterance took the form of a question. Thus, §2254(d)(2) is once again irrelevant. And Cassano fares no better under §2254(d)(1). First, the Supreme Court of Ohio's decision was not "contrary to" Supreme Court precedent. It does not rest on "a rule that contradicts the governing law set forth in" *Faretta*. *Williams*, 529 U.S. at 405. And because this Court has never considered whether a *question* about self-representation can constitute a clear and unequivocal *demand* for self-representation, the Supreme Court of Ohio did not "confront[] a set of facts that are materially indistinguishable from" a U.S. Supreme Court decision "and nevertheless arrive[] at a result different from that

precedent." *Id*. at 406 (alteration adopted; quotation omitted). Finally, the Supreme Court of Ohio's decision does not constitute an "unreasonable application" of Supreme Court precedent. "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." App.37 (Griffin, J., dissenting from the denial of rehearing *en banc*). Because the latter understanding is reasonable, and because the latter understanding does not constitute a clear and unequivocal demand for self-representation, there is room for "fairminded disagreement" whether the Supreme Court of Ohio erred in rejecting Cassano's *Faretta* argument resting on his April 1999 question about self-representation. *Id*. (quoting *Harrington*, 562 U.S. at 103).

**3. The Sixth Circuit's contrary analysis was indefensible.**

The Sixth Circuit's contrary analysis disregards the principles that govern habeas cases under AEDPA.

***May 1998.*** The Sixth Circuit determined that the Supreme Court of Ohio erred when it held that Cassano failed properly to invoke his right to self-representation in May 1998. "It began by refusing to give the Ohio Supreme Court the deference it's due under AEDPA." App.43 (Thapar, J., dissenting from the denial of rehearing *en banc*). The Circuit concluded that state court had "'inadvertently overlooked' the request Cassano made in his conflicting motions." *Id.* On that basis, it concluded that AEDPA review did not apply and reviewed the matter *de novo*.

The Sixth Circuit erred. As an initial matter, "even on de novo review," the Sixth Circuit should have held that the Supreme Court of Ohio committed no error: "two conflicting statements" regarding self-representation "are not clear, let alone

unequivocal," demands for self-representation. *Id.* In any event, because the Supreme Court of Ohio adjudicated Cassano's argument on the merits, "AEDPA deference applies." *Id.* "The Ohio Supreme Court dedicated an entire section of its opinion—a full twelve paragraphs—to Cassano's *Faretta* arguments." *Id.* (citing *Cassano*, 90 Ohio St. 3d at 98–100). "The court described all the relevant facts, including that Cassano filed two conflicting motions" regarding self-representation "on the same day." *Id.* at 44. "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 *Cassano*, 90 Ohio St. 3d at 100). "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.* Especially given the "strong" presumption that state courts adjudicate federal claims on the merits—a presumption that is rebutted only when "the evidence leads very clearly to the conclusion that a federal claim was inadvertently overlooked in state court," *Johnson*, 568 U.S. at 303—the Sixth Circuit erred by concluding the Supreme Court of Ohio overlooked Cassano's claim.

Perhaps recognizing that its refusal to apply AEDPA was not likely to withstand scrutiny, the Sixth Circuit majority asserted in a footnote that it would have reached the same result even under §2254(d)(1)'s deferential standard. App.16 n.2. The majority wrote that, "because the [Supreme Court of Ohio] did not provide its reason for denying the claim," applying AEDPA would mean "'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." *Id.* (quotation omitted). The majority then "looked through" to comments the state trial court made about Cassano's request *for hybrid representation* in *September 1998*. *Id.* That was doubly wrong. First, there was no need to look through the Supreme Court of Ohio's decision. Its decision was not "unexplained." *Id.* Rather, the decision is best read as rejecting any argument that the May 1998 "waiver of counsel" was a clear and unequivocal invocation of the right to self-representation. *Id.* at 28–29 (Siler, J., dissenting). Second, the look-through doctrine permits courts to look only 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 motion for *hybrid representation* (as opposed to self-representation) in September 1998 does not qualify. *See* App.44 n.2 (Thapar, J., dissenting from the denial of rehearing *en banc*). Thus, *even if* the Supreme Court of Ohio's decision rejecting the claim had been "unexplained," the Sixth Circuit erred by assuming that the Supreme Court of Ohio adopted the same logic that the trial court gave when resolving an unrelated issue.

***April 1999.*** The Sixth Circuit also erred in granting habeas relief based on Cassano's April 1999 question regarding self-representation. The Circuit "purported to analyze this part of Cassano's challenge under AEDPA." *Id.* at 45. "But it failed to adhere to AEDPA's deferential standard." *Id.* Under AEDPA, the panel could properly grant relief only if it was beyond fairminded debate that Cassano's *question* about self-representation qualified as a clear and unequivocal *demand* for self-

representation. There is plenty of space for fairminded debate on that point, as explained above. If anything is unreasonable, it is concluding that Cassano *demanded* to represent himself by *asking* about self-representation. "Questions are not demands." *Id.* The majority opinion below pointed to various contextual clues that suggested the question was better understood as a request. *Id.* at 19–21. But the majority "offered little more than simple disagreement with the Ohio Supreme Court's decision." *Id.* at 45 (Thapar, J., dissenting from the denial of rehearing *en banc*). *At most*, the majority established that Cassano's question was *best* interpreted as a demand. That is not enough to win AEDPA relief under §2254(d)(1); "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Harrington*, 562 U.S. at 786.

What is more, "even assuming Cassano's question could be read as a clear and unequivocal demand for self-representation, his claim would still fail." App.45 (Thapar, J., dissenting from the denial of rehearing *en banc*). That is because the Supreme Court of Ohio gave two alternative and independent reasons for rejecting Cassano's *Faretta* claim insofar as it rested on the April 1999 question. If even one of those alternative justifications holds up under AEDPA's deferential standards, then Cassano would not be entitled to habeas relief *regardless* of whether the Supreme Court of Ohio erred in finding his question about self-representation to be insufficiently clear and unequivocal. Both easily survive scrutiny under §2254(d)(1).

*First*, according to the Supreme Court of Ohio, Cassano "unreasonably delayed" by asking about self-representation just three days before his trial was to

begin. *Cassano*, 96 Ohio St.3d at 100. The Circuit deemed this unreasonable-delay finding an unreasonable application of this Court's precedent. App.22. But the Circuit identified no precedent compelling a result different than the one the Supreme Court of Ohio reached. There is none. In fact, this Court has said that courts *may* properly reject late-in-the-day requests for self-representation. *Martinez*, 528 U.S. at 162. The Circuit additionally determined that the Supreme Court of Ohio's delay holding rested on an unreasonable finding of fact. App.22; *see also* §2254(d)(2). It pointed to the 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." *Cassano*, 96 Ohio St.3d at 100 (cited by App.22). The Sixth Circuit determined that this was "undisputedly wrong," as Cassano requested counsel in his "waiver of counsel" motion filed in May 1998. App.22. But a state court can be said to have made an "unreasonable determination of fact," for purposes of §2254(d)(2), only if the record left it with "no permissible alternative" but to reach a factual determination different from the one it reached. *Rice*, 546 U.S. at 341. And, as explained already, the Supreme Court of Ohio reasonably determined that the May 1998 waiver of counsel *did not qualify* as a request for self-representation. Given that reasonable determination, the record stopped well short of compelling the Supreme Court of Ohio to find that Cassano invoked his right to self-representation at some point before April 1999.

The Supreme Court of Ohio bolstered its unreasonable-delay determination by noting that Cassano asked about self-representation simply in hopes of delaying his

trial. Cassano's intentional delay, the court said, provided yet another reason for concluding that the April 1999 question about self-representation did not constitute a proper invocation of the right to self-representation. *Cassano*, 96 Ohio St.3d at 100. The Circuit asserted that this constituted another unreasonable application of Supreme Court precedent. But it did not explain how the Supreme Court of Ohio misapplied, unreasonably or otherwise, *any* precedent from this Court. App.26. The Circuit further determined that the Supreme Court of Ohio unreasonably determined, as a factual matter, that Cassano asked about self-representation in an attempt to delay his trial. The Circuit pointed to circumstances suggesting that Cassano was motivated by other concerns, including a genuine desire to represent himself. App.25–26. But the evidence hardly "compel[s] the conclusion that the [state] court had no permissible alternative" but to conclude that Cassano was motivated by concerns other than delay. *Rice*, 546 U.S. at 341. After all, the fact that Cassano asked about self-representation just three days before trial provides *some* basis for thinking he was motivated by delay. App.45 (Thapar, J., dissenting from the denial of rehearing *en banc*). So the Supreme Court of Ohio's unreasonable-delay finding was not unreasonable for purposes of §2254(d)(2).

*Second*, the Supreme Court of Ohio concluded that, even if Cassano had properly invoked the right to self-representation, he "abandoned" any request "when he did not pursue the issue of self-representation after the court told him it would not be a good idea." *Cassano*, 96 Ohio St.3d at 100. Ohio's high court supported this determination by citing *McKaskle*, 465 U.S. at 182. Correctly so; *McKaskle* shows

that defendants can waive the ability to represent themselves by voluntarily accepting representation of counsel. *Id*. The Sixth Circuit held otherwise. It reasoned that, because *McKaskle* arose in the context of *hybrid* representation, it did not establish that defendants waive their right to *self*-representation by accepting assistance from appointed counsel. App.27. Therefore, the Sixth Circuit concluded, the Supreme Court of Ohio unreasonably applied *McKaskle*. *Id*. That is a *non sequitur*. The Sixth Circuit's criticism establishes only that the Supreme Court of Ohio supported its conclusion regarding acquiescence 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 Supreme Court of Ohio gave three reasons for rejecting any *Faretta* claim resting on Cassano's April 1999 question about self-representation. If *any* of those three reasons pass muster under §2254(d)(1) and (d)(2), Cassano is not entitled to relief. And all three of them do. The Sixth Circuit erred in holding otherwise.

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Because the Sixth Circuit egregiously misapplied AEDPA, and because this Court often summarily reverses erroneous grants of habeas relief, there is a reasonable likelihood that this Court will agree to decide this case and a reasonable likelihood that it will reverse.

### B. Should the Court decide not to summarily reverse, this case presents important questions worthy of the Court's attention.

For two reasons, there is a reasonable likelihood that the Court will agree to hear this case and reverse even if it decides not to summarily reverse.

First, the Sixth Circuit's holding concerning Cassano's April 1999 question about self-representation implicates at least two circuit splits regarding *Faretta*.

The first split concerns whether defendants can invoke *Faretta* simply by *asking* about self-representation. Again, a criminal defendant can properly invoke his right to self-representation only by "clearly and unequivocally" demanding to represent himself. *Faretta*, 422 U.S. at 835. The Sixth Circuit held that Cassano's question about self-representation qualified as sufficiently clear and unequivocal. App.19–20. But other circuits have held that questions about self-representation are not sufficiently clear and unequivocal. *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). Because questions, by definition, are *not* clear and unequivocal demands, the Court would likely resolve this split in the Warden's favor.

The second circuit split relates to the timeliness of requests for self-representation. As explained already, a defendant must act in a timely fashion if he wants to represent himself. *See Martinez*, 528 U.S. at 162. Assuming Cassano's question about self-representation constituted a demand for self-representation, he made that demand just three days before his trial was to start. Other circuits have held similarly late-raised requests to be 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). Thus, there is now a conflict on this front, too. That conflict makes it likely that at least four

Justices "will consider the issue[s] sufficiently meritorious to grant certiorari." *See* S. Ct. Rule 10(a). And in light of *Martinez*, it would likely resolve this issue in the Warden's favor.

This Court may also wish to grant review because the case presents an important question about the circuit courts' interpretation of the rules governing *en banc* review. The Federal Rules of Appellate Procedure say that *en banc* review is appropriate in cases presenting "one or more questions of exceptional importance." Fed. R. App. P. 35(b)(1)(B). This Court should consider whether and when improper awards of habeas relief present questions of exceptional importance. There is a good argument that the answer is: "almost always." "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 (quotation omitted). When courts wrongly interfere with the sovereign authority of the States that form this Union, their errors are *per se* important and worthy of being corrected. That conclusion accords fully with this Court's practice of granting *certiorari* and summarily reversing factbound misapplications of AEDPA. *See*, *e.g.*, *Wright*, 141 S. Ct. 1467; *Mays*, 141 S. Ct. 1145; *Shinn*, 141 S. Ct. 517; *Shoop*, 139 S. Ct. 504.

It is true that "[n]ot every error … is worth correcting through the en banc process." *Issa v. Bradshaw*, 910 F.3d 872, 877 (6th Cir. 2018) (Sutton, J., concurring in the denial of rehearing *en banc*). But not every error is worth correcting through the *certiorari* process, either. *See City & Cnty. of S.F. v. Sheehan*, 135 S. Ct. 1765, 1779 (2015) (Scalia, J., concurring in part and dissenting in part). The fact that this

Court so often summarily reverses improper awards of habeas relief confirms that erroneous awards of habeas relief are worth correcting. In this case, according to Judge Griffin's dissent from denial, a majority of active judges on the Sixth Circuit believed the panel erred. App.34. Yet, instead of correcting the mistake themselves, they left Ohio to seek relief in this Court. This case presents an opportunity to make clear to the circuits that Rule 35 requires them, at least usually, to correct improper awards of habeas relief.

## II. The State is likely to be irreparably harmed in the absence of a stay.

The State will suffer irreparable harm absent a stay. AEDPA was enacted to protect a State's interest in the finality of its convictions. *See Duncan v. Walker*, 533 U.S. 167, 178 (2001). The Sixth Circuit's grant of habeas relief, in itself, disrupts the finality of Cassano's conviction. That disruption is significant. The issuance of the mandate would start a six-month clock for the State to retry Cassano. App.27 (majority). Absent a stay, therefore, the State will have to start preparing for another trial, even though that trial may never occur if this Court chooses to intervene.

The State will not know for some time whether its preparations will have been in vain. The Warden's petition for a writ of *certiorari* is due on November 24, 2021. And although he intends to file his petition early to facilitate prompt review, Cassano's brief in opposition will not be due until a month later. And Cassano can seek extensions of time. So it will not be until long after the Warden files that the parties will know whether this Court decides to grant review. Without a stay of the Sixth Circuit's mandate, it is therefore likely that a significant portion of the sixth-month retrial window will have expired before the State knows whether a new trial will in

fact be necessary. And without a stay, the State risks wasting significant resources planning for a murder trial that, should this Court grant review, is likely never to occur.

**III. Cassano will not be harmed by a stay.**

Cassano, on the other hand, will not be prejudiced by a stay of the Sixth Circuit's mandate. Cassano's death sentence will not be carried out while this case is pending. And, whether or not Cassano is ultimately retried for the 1997 killing at issue in this case, he will remain in prison for the foreseeable future if not the rest of his life: Cassano is serving a life sentence for a murder other than the one that formed the basis of the conviction at issue in this case. *See State v. Cassano*, No. 8161, 1976 Ohio App. LEXIS 6230 at *1–2 (Ohio Ct. App. Nov. 10, 1976). On top of that, in the early 1990s, Cassano was convicted of a felonious assault committed in prison. *Cassano*, 96 Ohio St. 3d at 94.

Thus, from Cassano's perspective, time is not of the essence. Because he will remain in prison, this is the rare case where a stay is truly harmless for the non-moving party. Counsel for Cassano has told the Warden that Cassano does not oppose a stay the Sixth Circuit's mandate.

## CONCLUSION

The Court should recall and stay the Sixth Circuit's mandate pending disposition of the Warden's petition for a writ of *certiorari*.

Respectfully submitted,

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