No. 17-6665
CAPITAL CASE

In the SUPREME COURT of the UNITED STATES

WALTER LEROY MOODY,

Petitioner,

v.

WARDEN, Holman Correctional Facility,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

A. Procedural History.

Walter Leroy Moody's petition for writ of certiorari seeks review of the Eleventh Circuit's decision affirming the denial of his petition for writ of habeas corpus. Accordingly, the procedural history of Moody's state court trial, direct appeal, and post-conviction proceedings is set forth, below, as is the procedural history of his federal habeas corpus proceedings.

1. Trial and Direct Appeal.

Moody was indicted in 1991 by a Jefferson County, Alabama, grand jury for the capital murder of United States District Judge Robert Vance and for the felonious assault of Judge Vance's wife, Helen. The murder of Judge Vance was a capital offense because it was carried out by means of an explosive device and because Judge Vance's murder was related to his position as a federal public official.

Moody's trial began on October 7, 1996, and he was convicted of all charges on November 5, 1996. Subsequently, Moody's jury recommended by a vote of 11-1 that he be sentenced to death for the murder of Judge Vance. On February 10, 1997, the judge accepted the jury's recommendation and sentenced Moody to death for his two capital murder convictions. Moody was sentenced to life imprisonment as a habitual felony offender for the felonious assault of Helen Vance.

Moody appealed to the Alabama Court of Criminal Appeals, which affirmed his convictions and sentence of death. *Moody v. State*, 888 So. 2d 532 (Ala. Crim. App. 2003). The Alabama Supreme Court denied certiorari review, as did this Court. *Ex parte Moody*, 888 So. 2d 605 (Ala. 2004) (Mem) (App. Vol. IV, Tab C-2); *Moody v. Alabama*, 543 U.S. 964 (2004).

2. State Post-conviction Proceedings.

Moody filed a state court petition for post-conviction relief in the Jefferson County Circuit Court on March 23, 2005. After Moody twice amended his petition, the circuit court denied relief on December 28, 2009. Moody appealed the denial of relief to the Alabama Court of Criminal Appeals, which affirmed. *Moody v. State*, 95 So. 3d 827 (Ala. Crim. App. 2011). The Alabama Supreme Court declined to exercise certiorari review.

3. The Federal Habeas Corpus Proceedings

Moody timely filed a petition for writ of habeas corpus in the United States District Court for the Northern District of Alabama, on December 20, 2012. Thereafter, Moody sought recusal of the assigned district court judge. After the court declined Moody's request for recusal, Moody unsuccessfully petitioned the Eleventh Circuit for a writ of mandamus. *In re Moody*, 755 F.3d 891 (11th Cir. 2014). Thereafter, the district court denied Moody's habeas petition on the pleadings, under the provisions of the Anti-terrorism and Effective Death Penalty Act of 1996 ("AEDPA").

Moody appealed the denial of habeas corpus relief to the Eleventh Circuit. After receiving the benefit of oral argument, the Eleventh Circuit affirmed the district court's judgment. *Moody v. Comm'r, Ala. Dep't of Corrs.*, 682 Fed. Appx. 802 (11th Cir. March 16, 2017). Moody applied for rehearing *en banc*, which was declined by the court. This petition for writ of certiorari follows.

B. Statement of the Facts

1. Facts of Moody's Capital Murder Conviction

The district court adopted the Alabama Court of Criminal Appeals' statement of the facts of Moody's crime. Those facts are set forth in *Moody v. State,* 888 So. 2d 532, 540-45 (Ala. Crim. App. 2003). Because the two questions put forth by Moody do not attack the correctness of the state court's findings of fact, Respondent will generally summarize the facts of Moody's offense.

In December 1989, Moody mailed four pipe bombs to various locations in the southeastern United States, including the Mountain Brook, Alabama, residence of United States District Judge Robert Vance. When Judge Vance opened the package containing the pipe bomb, it exploded and he was killed almost instantly. Helen Vance, Judge Vance's wife, was seriously injured by shrapnel from the blast, which included nails that had been secured to the pipe by rubber bands.

Analysis of the bomb's remains revealed that it had been constructed of one and one-half inch diameter pipe approximately five and one-half inches

long. It had been sealed at each end with threaded caps, contained Hercules brand red-dot smokeless powder, and utilized a detonator fashioned from a hollowed-out ballpoint pen barrel. Nails had been attached to the exterior of the pipe by rubber bands to serve as additional shrapnel. The bomb had been placed inside a box and designed to detonate upon the opening of the box's lid.

The bomb that killed Judge Vance was of similar design and construction of three other bombs mailed by Moody during December 1989.[1] Each bomb had been constructed of Hercules brand Red Dot smokeless powder. Each device had nails affixed by means of rubber band to their exterior and they shared the same type of triggering mechanism and detonator. All of the bombs used C-cell batteries with the same type of battery holders. Except for the bomb sent to the Eleventh Circuit, each device was accompanied by a typed "death threat" note. Unlike the bomb that killed Judge Vance, each of the other three bombs had end caps that were welded in place with a rod extending through the center of each pipe, secured into place by hexagonal nuts. There were enough similarities between the devices for forensic experts to conclude and opine that all four had been manufactured by the same individual.

In August 1989, before the bombing of Judge Vance, a tear gas device was delivered to the NAACP office in Atlanta. This device was accompanied by

[1] One of those devices killed civil rights attorney Robert Robinson in Savannah, Georgia, while two others were discovered in time to be destroyed or disarmed without injury to anyone. Of the two intercepted devices, one was found at the main Eleventh Circuit courthouse, while the other was found at the Jacksonville, Florida, office of the NAACP.

a note like those found accompanying the (later) December bombs. Afterwards, news media began receiving typed notes complaining about the Eleventh Circuit and declaring a war on the judiciary. The letters found accompanying the December 1989 bombs were typed on the same typewriter as prepared the August 1989 notes.

Moody declared his war on the federal judiciary following his 1972 conviction for possession of a pipe bomb and the resulting three-year federal prison sentence. Evidence at trial established that Moody had attended law school prior to his 1972 federal conviction, and that he knew his federal conviction would disqualify him from practicing law in Georgia. For this reason, in 1985 Moody bribed an acquaintance to give sworn testimony that a fictitious individual that had been offered by Moody as an alternate suspect during his 1972 trial existed. He provided this person a detailed script and began paying her to learn the story for purposes of providing testimony. After Moody, and his girlfriend, coached this person on the proper story, Moody filed a petition for writ of error *coram nobis* in a Georgia federal district court to vacate his 1972 conviction based on newly discovered evidence. Despite the perjured testimony procured by Moody, the federal district court denied

Moody's petition. This Eleventh Circuit affirmed the denial of that relief in June 1989.[2]

In the summer of 1989, Moody and his girlfriend, Susan Samford, began procuring the items necessary for the manufacture of the explosive devices mailed in December 1989, including the bomb that killed Judge Vance. Samford said she was first used to collect items for a "chemical project" Moody claimed he was working on, but she later obtained the components for the tear gas bomb sent to the Atlanta NAACP office. Afterwards, Moody gave Samford a list of materials he used to construct four pipe bombs, including the one that claimed the life of Judge Vance.

Among the items procured by Samford were the mailing labels for the packages, stamps, cardboard boxes, aluminum pie pans and paper towels used in the construction of the devices, C-cell batteries, flashlight bulbs, black latex paint, nails, string, brown wrapping paper, rubber bands, aluminum clothes line, and tape. Another eyewitness identified Moody as the person who purchased four pounds of Hercules brand Red Dot gunpowder and CCI pistol primers. Additionally, Samford was present when Moody cleaned and remodeled the room in which he constructed the bombs after the devices were built. According to Samford, Moody stated that the only evidence "they" would

[2] In July 1990, after the murder of Judge Vance, Moody was indicted by the United States for obstructing justice and suborning perjury. He was convicted of those offenses in December 1990.

have, if any, would be DNA.[3] Samford also noted that, after seeing a news report concerning a Maryland judge injured by a pipe bomb blast, Moody responded by saying that he had not been responsible for that incident.

An expert for the State of Alabama testified that the pipe bombs mailed in 1989 shared numerous similarities with the 1972 device that was the subject of Moody's prior federal conviction. These similarities were enough that the expert believed the 1989 bombs bore the "signature" of person who made the 1972 device. Additionally, State investigators found a steel pipe with threaded end caps in a storage area used by Moody; that item appeared to be a bomb component fashioned during a transitional phase from the 1972 pipe bomb and the construction of the 1989 pipe bombs.

2. Facts Pertaining to Moody's Waiver of Counsel.

Both questions Moody presents for certiorari review involve issues pertaining to his decision to invoke his right to represent himself at trial. For this reason, a discussion of the facts pertaining to his waiver of the Sixth Amendment right to counsel is required.

On July 25, 1994—more than two and one-half years after he was indicted—Moody petitioned the state trial court for leave to represent himself, *pro se*. In his petition, Moody specifically cited his right to represent himself under Alabama's constitution and federal law, citing *Faretta v. California*, 422

[3] Another former girlfriend testified that Moody once confided in her that a bombing was the perfect crime because after detonation there was nothing left to investigate.

U.S. 806 (1975). Moody described his request as the exercise of an "absolute right."

At a hearing on August 2, 1994, Moody again reiterated that he understood his ability to represent himself to be an absolute right. Moody also communicated to the trial court an understanding of the (then) present procedural posture of his case. Moody recognized "this is an extremely complex case" but defended his request to proceed *pro se* on the ground he had "been living with [the case] for four years and I can dig out stuff very quickly[.]" Moody clearly stated he thought he was the best person capable of getting "the truth before the jury." Moody had previously stood trial, and been convicted, of federal charges relating to his murder of Judge Vance, and he indicated he wanted to oversee his own strategy and in organizing the theory of his own defense. Moody further demonstrated to the trial court an understanding that evidence in the case was in Atlanta, Georgia, a potential problem for an incarcerated *pro se* litigant.

During this hearing, the trial court explained to Moody that if he were permitted to proceed *pro se*, he would have the opportunity to address the jury and the court and would be afforded all the rights of counsel. The trial court further explained that proceeding *pro se* would result in Moody's inability to go to Atlanta and review evidence and, as a result, the trial court felt Moody needed an attorney to represent his interests. Additionally, the trial court explicitly advised Moody not to proceed *pro se* and told Moody doing so was "a

foolhardy endeavor." Moody was further warned that a criminal trial was "a very complicated matter even for an accomplished trial attorney."

A colloquy conducted during this hearing established that Moody understood that the most serious charged offense was capital murder and that, if convicted, the only possible punishments would be death or life imprisonment without the possibility of parole. The trial court went through each individual charge brought against Moody, including potential sentences for each under the Alabama habitual felony offender act. Moody acknowledged that his lack of knowledge of Alabama rules of procedure would hamper his defense to these charges.

The trial court explained to Moody the elements of a criminal trial, including voir dire, opening statements, the State's case-in-chief, the importance of objections and motions, the availability of a defense case-in-chief, and the possibility of a State rebuttal case. The trial court further explained that Moody's trial would involve instructions to the jury, including the possibility of requesting specific jury instructions from the trial court. Moody was told that a criminal trial would involve each party's giving of summations to the jury.

The possibility of a penalty phase, as well as its mechanics, were similarly explained to Moody during this colloquy. Moody was made aware of the fact that possible lesser-included offenses might exist in his case. Finally,

Moody was warned that a failure to make certain objections could operate to waive their consideration on appeal.[4]

After this exchange, Moody informed the trial court that he was sixty years of age, possessed enough college hours to have a bachelor of science degree, and that he possessed a high school degree. Moody further represented that he had one and one-half years of legal training from a law school. Moody concluded by affirmatively stating to the court that he wished to proceed *pro se*.

The circuit court initially withheld ruling on Moody's request to proceed *pro se*. Instead, the trial court presented a clear choice to Moody: he could proceed *pro se* or with counsel, but not both. Moody responded by stating that he clearly understood that he was not entitled to a co-counsel.

Later in this hearing, the State presented evidence to the trial court reflecting Moody's extensive litigation history, consisting of thirty-three cases across twenty jurisdictions. Moody's litigation history reflected that he had appeared *pro se* in nineteen legal proceedings. On seven occasions, Moody represented himself *pro se* in a case from its initiation until its conclusion. Among Moody's *pro se* endeavors were appeals to this Court. Moody was allowed to ask questions of the State's witness in addition to the questions asked by his appointed attorneys. During this questioning, Moody represented

[4] At a subsequent hearing, one month later, Moody would remind the trial court that "on a prior occasion you had cautioned me about knowing when to object in order to preserve my rights."

to the trial court that he had won one of the cases where he had represented himself.

After considering this evidence, the trial court allowed Moody to proceed *pro se*. After the trial court announced that Moody would be permitted to represent himself, and allowing appointed counsel to withdraw, Moody immediately began making arrangements to obtain the files and materials necessary to mount a defense.

In a letter dated August 4, 1994, Moody reiterated to the trial court "I am representing myself *pro se*" and that he "insisted on proceeding *pro se*." In an August 8, 1994, filing, Moody again stated that he was acting *pro se*. Thereafter, Moody began filing motions on his own behalf, researching possible constitutional challenges, filing appellate briefs, and presenting argument during motions hearings. When, at a hearing one month later, the circuit court broached the subject of Moody's decision to represent himself, Moody told the trial court, "I was under the impression that I had already indicated that I wanted to proceed *pro se*. And there was discussion about standby counsel." To avoid confusion "from the last correspondence I had from you," the circuit court directly asked Moody if he was "requesting to proceed *pro se* as your own attorney." Moody replied, "Yes, sir." The court then asked, "And you are not requesting the Court to appoint you an attorney to represent you," and Moody replied, "That's correct."

At a subsequent hearing in January 1995, Moody continued to represent himself and present argument to the trial court. The cause of the hearing was a motion for Moody to show cause as to why he had not complied with an order of the court. Moody requested, and received, a continuance of his trial date during this hearing.

During a subsequent hearing in March 1995, Moody appeared *pro se* and presented a list of potential expert witnesses as required by prior court order. At that time, Moody made an oral motion to be provided with transcripts of *ex parte* motions hearings conducted by his appointed counsel before they were allowed to withdraw.

At the end of this hearing, the trial court again broached the subject of Moody's decision to proceed *pro se*. Moody confirmed that the trial court had explained trial procedure and requirements of criminal practice in August 1994 and that Moody nonetheless had decided to represent himself. Based on filings received from Moody since that time, however, the trial court asked Moody to provide a current explanation of his position on counsel. Moody responded that he wanted an attorney "to assist me to represent myself *pro se*." Moody was clear that he did not want an attorney to be his lawyer where he was "just to be the Defendant."

Instead, Moody indicated he wanted someone appointed to help him with "projects." One such project was a challenge to the constitutionality of Alabama's indigent defender compensation system (an issue waived by

Moody's choice to proceed *pro se*). Moody again told the court, "I'm requesting that the Court appoint an attorney to assist me to represent myself *pro se*," which, as Moody explained it, meant he wanted to keep the option of personally questioning witnesses and addressing the jury and court.

In response, the trial court made sure that Moody understood that while he had the right to appointed counsel as an indigent defendant, he did not have the right to appointed counsel of his own personal choosing. Moody clearly indicated that he understood this fact. The following exchange then occurred:

> COURT: …this Court is not going to allow you to be co-counsel, you know, in a trial or in a pretrial. You can represent yourself or you'll have a lawyer. Do you wish the Court to appoint you—
>
> MOODY: And when you say represent myself, do you mean without the assistance of counsel?
>
> COURT: That's correct.
>
> MOODY: Okay.
>
> COURT: How would you wish to proceed?
>
> MOODY: …until I've been shown that the Court has selected a counsel that is willing to make the sacrifices that I have just mentioned that nobody else can make, *then I will proceed pro se with the understanding that I'm asking the Court to appoint a counselor to assist me*.

(emphasis added).

The trial court later explained to Moody that "co-counsel" meant the defendant acted as a lawyer at the same time and with the same rights as a

second lawyer, with each having the right to address the court, examine witnesses and argue to the jury. Moody was further informed that standby counsel would mean someone present at trial to advise and answer questions, but not to investigate or prepare the case. The court informed Moody that standby counsel would not be permitted to assist in the preparation of pretrial motions, but would only be available for consultation as to trial procedures and questions. Moody acknowledged an understanding of the roles that standby counsel would be limited to performing. The trial court then denied Moody's request for hybrid representation, or "co-counsel." More than one year later, Moody indicated during a hearing that he would object to the appointment of standby counsel based on the description of standby counsel provided by the trial court during this March 1995 hearing. In May 1996, before trial but after Moody had been representing himself for over one and one-half years, the trial court revisited the issue and asked Moody if he wanted to have counsel appointed to represent him. Again, the choice was plainly put to Moody that appointed counsel would be counsel of the court's choosing, not of Moody's own choosing. At that time, and with that understanding, Moody declined the appointment of counsel.

During this hearing, Moody gave his age as 62. Moody reiterated that he had completed three and one-half years of college credit at Mercer College as a pre-med major and also had completed some law school coursework.

Moody indicated that his IQ was around 120. Moody denied having any mental conditions or issues that would disadvantage him as a *pro se* litigant.

Moody told the judge that he had filed a petition for writ of error *coram nobis* in 1985, handling part of it *pro se*. Moody also told the court he had represented himself in a civil case where he had to repossess an airplane from another person. Moody further noted that he was representing himself in a federal appeal at the time of the hearing.

During this hearing, Moody stated his understanding that he was being charged with the murder of Judge Vance and that it was a capital offense. Moody again stated he understood the potential punishments of life imprisonment without possibility of parole and death upon conviction of such an offense. Moody was also aware of the felony assault as to Mrs. Vance for which he could receive anywhere from 10 to 99 years or life in prison.

Once more, in May 1996, Moody indicated to the trial court that he desired to continue representing himself in lieu of accepting court-appointed counsel. In an apparent abundance of caution, the trial court continued to advise Moody against representing himself and again conducted a colloquy to make sure Moody's choice was knowing and voluntary. Among the court's admonitions was "that it is, and has continuously been, my advice that you do not proceed *pro se* in the case." The court told Moody his choice was viewed as "a foolhardy endeavor" that "could have serious consequences" and that

Moody's lack of training "could ultimately result in your execution in the electric chair."

Moody was cautioned by the trial court that "even the most experienced criminal attorney considers a capital murder case to be complex and difficult." Thus, Moody was told his decision was considered by the court to be against his best interest. Moody acknowledged the trial court's warning that a criminal trial of the magnitude expected "is a very complicated matter even for an accomplished trial lawyer." Moody acknowledged the warning that foregoing assistance of counsel would disadvantage him in the preparation of his case for trial and that he would remain incarcerated during the pretrial period. Moody acknowledged this would prevent him from travelling to interview witnesses or view the evidence or consult with an expert at their laboratory. The trial court again went over with Moody the parts of a criminal trial to make sure Moody understood the magnitude of his decision and the numerous disadvantages he might face.

Moody understood the multiple disadvantages he faced as a result of his decision. Moody's understanding is particularly reflected in one exchange with the trial court:

> COURT: And you would have a right to make appropriate motions and objections of you choose to represent yourself, do you understand that?
>
> MOODY: You have the right, but you don't have the ability to exercise that right.

COURT: Well, I'm saying you could be hampered in doing that because of your lack of legal experience at not being an attorney.

MOODY: And not having the facilities to do it, right?

COURT: Yes sir, that is correct, and not having the facilities. Like I said to you earlier, an attorney could go out and do things and talk to people that you would not have since you would be incarcerated, up to and leading to the trial.

* * *

MOODY: Well, how would I [subpoena witnesses?] In other words, I am indigent. How do I exercise any of those rights? In other words, I have had a lot of people explain to me what my rights are not as an indigent person *pro se*. I have had no one explain what my rights are.

In other words, how do I prepare these motions, how do I submit them? How do I do all of the things that you say I have the right to do, when I have no assistance, I have no money?

COURT: You do have a right, sir, to have an attorney appointed to you.

MOODY: But I also have a constitutional right to represent myself *pro se*.

COURT: That is correct.

The court then had Moody acknowledge that the trial court would not be representing him at trial. Once more, Moody acknowledged understanding that his failure to make certain objections might result in their not being

considered on appeal. Moody also acknowledged that his lack of familiarity with Alabama's procedural rules would work to his disadvantage.

When the trial court asked Moody for an explanation of his understanding of the term "lesser-included offense," Moody responded, "if you had a person which was charged with having intentionally tried to harm someone, and it was shown that they did maybe harm them, but it was not intentional, then they maybe could be charged with something lesser than the initial charge." Moody expressed an understanding that in his case such lesser-included offenses might include intentional murder, manslaughter or a lesser degree of assault.

Consistently, Moody indicated a desire to represent himself. On multiple occasions after making his choice to waive counsel, Moody admitted that he had been informed by the trial court (and was aware) of the disadvantages of proceeding to trial *pro se*. Most telling, after the trial court stated, "I need to advise you again that I believe that it is in your best interest to accept the appointment of counsel and that it is my opinion that to continue to represent yourself when you are facing a possible death sentence is extremely unwise," Moody expressed his desire to proceed *pro se* and rejected the appointment of standby counsel. Demonstrating the lengths that the trial court went to in order to have Moody's eyes opened to the dangers he faced, the trial court reminded Moody it had "stated to you numerous times today, and will state again, that I think it would be to your advantage to have appointed counsel."

Two months prior to trial, in August of 1996, the trial court again reminded Moody of its previous admonitions that Moody needed to have the assistance of an attorney. Moody's response to this warning was to remind the trial court that he did not want to have an attorney appointed to represent him.

REASONS FOR DENYING THE PETITION

Neither question posed by Moody's petition for writ of certiorari warrants further proceedings in this Court.

I. Moody's Petition for Writ of Certiorari is not an appropriate legal vehicle to revisit *Faretta v. California.*

The first question Moody presents for certiorari review asks this Court to revisit its holding in *Faretta v. California*, 422 U.S. 806 (1975), as applied to a capitally-charged defendant facing a potential death sentence. Moody offers his case as a means for this Court to accept Circuit Judge Beverly Martin's request, in her concurring opinion affirming the denial of relief, that the Court consider what she felt to be "the troubling consequences of *Faretta*" when a defendant proceeds *pro se* in a death penalty prosecution. There are several factors that make Moody's request impractical, even if this Court were inclined to accept a single circuit judge's request to revisit fairly well-settled law.

First, Judge Martin concurred in the affirmation of the district court's denial of habeas corpus relief, based on her finding that Moody did not exhaust his state court remedies as to his *Faretta* claim. (Pet. App. A 22.) The fact that Moody failed to exhaust his state court remedies would make consideration of

Moody's first question presented for review an exercise in futility. Simply put, Moody's claim cannot be reached in a federal habeas corpus proceeding under the governing provisions of the Anti-terrorism and Effective Death Penalty Act of 1996 (the "AEDPA"). Any discussion of *Faretta*'s impact on Moody's case would be entirely hypothetical and unrelated to any realistic avenue for Moody to obtain relief.

The majority opinion did not reach the exhaustion question because it was easier to deny Moody's claim on the merits. (Pet. App. 3a.) As noted above, Judge Martin concluded that Moody did not properly present and exhaust his *Faretta* claim. This means that to reach Moody's first question presented for review, this Court would have to resolve the exhaustion issue. *See* 28 U.S.C. 2254(b)(1) (West 2017). Yet, Moody's petition for writ of certiorari does not even claim he could proceed past this hurdle. And, for good reason; he cannot.

Second, in addition to Moody's failure to properly present and exhaust his *Faretta* claim, the AEDPA also would render any habeas case a poor legal vehicle to revisit its holding in the manner requested by Judge Martin. Pursuant to the AEDPA, federal habeas corpus proceedings are limited to a consideration of the objective reasonableness of a state court's resolution of a federal constitutional question, in the light of this Court's clear holdings at the time of the state court resolution of the claim. *See, e.g.*, *Woods v. Donald*, 135 S. Ct. 1372, 1376 (2015); *White v. Woodall*, 134 S. Ct. 1697, 1702 (2014); *Howe v. Fields*, 565 U.S. 499, 505 (2012); *Carey v. Musladin*, 549 U.S. 70, 74 (2006);

Lockyer v. Andrade, 538 U.S. 63, 71-72 (2003). This means that review of the Eleventh Circuit's affirmance of the district court's denial of habeas corpus relief would, at most, involve a review of what *Faretta* said at the time of Moody's trial in the mid 1990's, not what Judge Martin believes it should be modified to say in 2017.

Third, Moody's request for a new rule requiring the appointment of standby counsel in death penalty cases to provide a "seamless transition" for capital defendants "who change their minds about proceeding *pro se*" (Pet. 13), could not be derived from Moody's trial, even if the AEDPA did not preclude such review. Moody did not change his mind about proceeding *pro se*. Moody made clear he wished to proceed *pro se* unless he approved of the specific attorney(s) appointed to represent him. The facts of Moody's trial would not permit consideration of the new rule proposed by Moody, because that factual circumstance did not show itself at trial, much less cause prejudice or harm to Moody.

II. Moody's request for de novo review of the Eleventh Circuit's holding does not present an issue worthy of certiorari.

The Eleventh Circuit found that the state court decision on Moody's *Faretta* claim was neither contrary to, nor an unreasonable application of, clearly established federal law as determined by this Court. That court denied Moody's claim on the merits, because it determined doing so was easier than resolving Respondent's assertion of the defense of lack of exhaustion. Moody's second question presented for review merely seeks de novo review of the lower

court's holding, but it wholly ignores Respondent's defense of lack of exhaustion.

Without question, this Court could affirm the Eleventh Circuit's denial of relief on the merits if it determined that doing so was easier than resolving the Respondent's lack of exhaustion defense. *See* 28 U.S.C. § 2254(b)(2). It could not reverse that decision, however, unless it first determined that Moody did exhaust his state court remedies prior to seeking federal habeas corpus relief. Moody's petition for writ of certiorari does not address the exhaustion requirement or his failure to seek review of the *Faretta* question during discretionary certiorari review in the Alabama Supreme Court. This is problematic, because no state court ever reviewed the question of whether Moody voluntarily and knowingly waived his right to counsel pursuant to argument presented by Moody. Instead, the Alabama Court of Criminal Appeals did so *sua sponte*, in response to a claim that the trial court erred in denying a requested continuance. That determination was not challenged by Moody in his petition for writ of certiorari in the Alabama Supreme Court.

In fact, throughout his direct appeal Moody affirmatively represented to the Alabama Court of Criminal Appeals and the Alabama Supreme Court that he had waived his right to counsel, and that he did not challenge that waiver. Thus, while *a* state court considered the *Faretta* question on its own initiative, it was not *the last state court* in which Moody could seek relief. Moody sought discretionary certiorari review in the Alabama Supreme Court and he did not

seek to have the Court of Criminal Appeals *Faretta* discussion reviewed or reversed. Instead, as noted above, he again conceded that he waived his right to counsel at trial.

Exhaustion requires more than the *sua sponte* review of an issue by an intermediate appellate court. As this Court has noted, to exhaust a claim for federal habeas purposes "state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan v. Boerckal*, 526 U.S. 838, 845 (1999). This did not happen in Moody's case. Rather than challenge the state intermediate appellate court's *Faretta* discussion, Moody sought discretionary certiorari review in the Alabama Supreme Court, *through counsel*, omitted any *Faretta* claim or challenge, and affirmatively represented that he waived his right to counsel. Because Moody did not exhaust this claim in state court, this Court would not be able to grant Moody relief as to the second issue he presents for review in his petition.

Aside from the exhaustion question, Moody's second question presented for review is a textbook example of the "rarely granted" certiorari issue, because "the asserted error consists of [alleged] erroneous factual findings or the [alleged] misapplication of a properly stated rule of law." Sup. Ct. R. 12. Moody does not appear to disagree. He does not cite to any alleged conflict among the courts of appeals, a state court of last resort, nor does he allege that the panel decision "has so far departed from the accepted and usual course of

judicial proceedings" as to call for the exercise of this Court's supervisory power. *See* Sup. Ct. R. 10(a).

In fact, Moody's second question presented for review completely ignores the content of the panel decision of which he seeks review. (Pet. 13-18.) Throughout the entirety of his argument in support of certiorari, Moody attacks the state intermediate appellate court's decision, not the panel decision which found that state court decision was entitled to AEDPA deference. But this Court would not be reviewing the Alabama Court of Criminal Appeals' decision *de novo*. Instead, certiorari would issue to review the Eleventh Circuit's decision to affirm the district court's denial of habeas corpus relief. By failing to address any aspect of the panel decision under the framework established by Rule 10 of this Court's rules, Moody has essentially conceded that his case is not worthy of certiorari review.

CONCLUSION

For the foregoing reasons, this Court should deny Moody's petition for writ of certiorari.

Respectfully submitted,

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s/ James Roy Houts
James Roy Houts
Deputy Attorney General