No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ROY L. RAMBO,

Petitioner,

v.

ADMIN. EAST JERSEY STATE PRISON, ET AL,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

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QUESTIONS PRESENTED

1. Whether the Sixth Amendment right to counsel of choice was violated when a state court issued an order which froze the defendant's lawfully acquired personal assets, and thereby deprived the defendant of access to the funds he needed to exercise his Sixth Amendment right to retain counsel of his choice to represent him in connection with a criminal prosecution where he was charged with murdering his wife.

2. Whether the Antiterrorism and Effective Death Penalty Act ("AEDPA") standard of deference to a state court ruling on a federal constitutional claim applies when the only state court "merits" ruling substituted the Sixth Amendment indigent right to counsel for the Sixth Amendment right to counsel of choice.

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Petitioner, Roy L. Rambo, Jr. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

DECISION BELOW

The opinion of the court of appeals (App. A) is not reported. The opinions of the district court granting Mr. Rambo's habeas corpus petition *Rambo v. Nogan*, No. CV 14-874 (MAS), 2017 WL 3835670 (D.N.J. Sept. 1, 2017) and denying a motion for reconsideration Rambo v. Nogan, No. CV 14-874 (MAS), 2017 WL 4366984 (D.N.J. Oct. 2, 2017) are attached as App. B and App. C, respectively.

JURISDICTION

The Third Circuit entered judgment in this case on January 30, 2019. No petition for rehearing was filed. This Petition is being filed within 90 days after

entry of the judgment below, so it is timely under Rule 13.1. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution provides:

> No state shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2254(d):

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in the State court proceedings unless the adjudication of the claim –
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

N.J.S.A. § 3B: 7-1 (1982) (repealed 2004) (current version at N.J.S.A. § 3B: 7-1.1) (2004):

> A surviving spouse . . . who criminally and intentionally kills the decedent is not entitled under a testate or intestate estate and the estate of decedent passes as if the killer had predeceased the decedent. Property appointed by the will of the decedent to or for the benefit of the killer passes as if the killer had predeceased the decedent.

STATEMENT OF THE CASE

Roy L. Rambo, having been charged with murdering his wife on August 16, 2002, was deprived of his Sixth Amendment choice of counsel right when, days later, on August 28, 2002, a New Jersey Superior Court ordered that "(1) all assets of Roy L. Rambo will be frozen, wherever located" and "(3) Roy L. Rambo is enjoined from expending any sums of money *owned individually* or as a marital asset." (Emphasis added.) Mr. Rambo had been charged with first degree murder in New Jersey Superior Court – Law Division. The order which deprived Mr. Rambo of access to his personal assets was entered in New Jersey Superior Court – Chancery Division in response to a motion filed by Mr. Rambo's adult son. The motion was filed pursuant to N.J.S.A. § 3B:7-1, *et seq.*, the so-called "Slayer Statute", and sought to enjoin Mr. Rambo "from expending any sums of money *owned individually* or as a marital asset." (Emphasis added.)[1]

Mr. Rambo was in custody without counsel. After he was barred from using his own money to hire an attorney, Mr. Rambo applied to the State Public Defender for appointment of counsel in his criminal case. Mr. Rambo's application was denied because the Public Defender concluded that he had assets – *i.e.,* an estate that included both personal and marital assets - that should be used to hire counsel. On September 19, 2002, an "Attorney Clarification" hearing was conducted by the

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[1] The statute was ostensibly intended to codify New Jersey common law and has since been amended. N.J.S.A. § 3B:7-1.1.

Honorable John H. Pursel, J.S.C., the Law Division judge assigned to the criminal case. Mr. Rambo explained his dilemma, *i.e.*, he did not qualify for appointment of counsel because he had assets, but could not access the assets to hire a lawyer because the Chancery Division judge had "enjoin[ed] him from expending any sums of money owned individually or as a marital asset." Judge Pursel expressed his disbelief and explained that the assets were frozen in part to protect Mr. Rambo's interest in the estate, but not to preclude him from using his own assets to hire a lawyer – "You can liquidate some assets and pay an attorney . . . The assets are accessible to you if you make an application to the court. . . Well, you're mistaken on that fact, Dr. Rambo. The funds were frozen for - for your protection . . . An application may be made to the court to release those funds to hire private counsel." Judge Pursel assured Mr. Rambo that upon request, sufficient assets would be provided to hire counsel, consistent with the requirements of the Sixth Amendment – "Your assets are available. Your position is not sound . . . [The Chancery Division] froze your assets to protect them . . . Not to prevent you from hiring an attorney. . . Civil litigation takes a back seat to your [criminal] litigation. . . It takes a front seat to other creditors." Judge Pursel, nevertheless, conditionally appointed the public defender to represent Mr. Rambo in the criminal case. Several months later, following a request for new counsel and bail, Judge Pursel remarked, "[S]ince the beginning of this case I – I've – I'm not troubled with what Judge Seybolt did, but I don't know any precedent that allows somebody to freeze a criminal suspect's assets. . . . I just am astounded by that. . . . [T]here's still a presumption of

innocence in America. And Mr. Rambo – Dr. Rambo, excuse me, should have access to funds which he needs to provide for his defense."

In October 2003, the Chancery Court conducted a hearing to address Mr. Rambo's renewed request to release his funds so that he could exercise his Sixth Amendment counsel of choice right. The Chancery judge cut off the Sixth Amendment counsel of choice argument to discuss the New Jersey Slayer Statute. The court then disposed of the counsel of choice issue by noting that because counsel had been appointed, Mr. Rambo's Sixth Amendment rights were vindicated. Regarding the Sixth Amendment choice of counsel right, the judge noted an irrelevant truism – "the right is not a[n] absolute right" and conflated the right to counsel of choice and the indigent right to counsel: "Obviously Mr. Rambo will have . . . an opportunity to have counsel, whether it is a counsel that he pays for or whether [it is] counsel that is provided to him." (App. D).

Eventually, Mr. Rambo's frustration with the attorneys who were appointed became too much to bear, and he chose to proceed without counsel when the case went to trial in February 2005. Following his conviction and the imposition of a 40-year sentence, Mr. Rambo continued to assert his Sixth Amendment right to counsel of choice claim. He raised the issue on direct appeal from his conviction. *See State v. Rambo*, 951 A.2d 1075 (App. Div. 2008), *cert. denied*, 556 U.S. 1225 (2009). (App. E). The Appellate Division rejected Mr. Rambo's Sixth Amendment claims and his motions to expand the appellate record to include the Chancery Division proceedings on jurisdictional grounds, noting that the only case on appeal was the

criminal case, so examination of the Chancery Division decisions was beyond their reach. *Id.* On March 23, 2009, Mr. Rambo filed an application for post-conviction relief (PCR) in New Jersey Superior Court. Again, both the Law and Appellate Division Courts declined to address the merits of Mr. Rambo's Sixth Amendment arguments because the Chancery Division decisions were not a part of the criminal case. On September 17, 2013, the New Jersey Supreme Court declined Mr. Rambo's request for review.

Meanwhile, Mr. Rambo's appeal from the Chancery Division final judgment was denied solely upon reference to the Slayer Statute, and without any discussion of the Sixth Amendment, except to say that the arguments "lack[ed] sufficient merit to warrant a discussion in a written opinion." *See In re Estate of Rambo*, No. P – 02 -438 – D, 2012 WL 1969954 (App. Div. June 4, 2012). (App. E). Both the New Jersey and United States Supreme Courts declined Mr. Rambo's further appeals of the Chancery Division case.

On February 11, 2014, Mr. Rambo filed a petition for writ of habeas corpus in United States District Court for the District of New Jersey. Among the issues raised in the petition was the claim that his Sixth Amendment right to counsel of his choice was violated by the New Jersey court decisions which denied him access to funds needed to retain counsel. After extensive briefing by both sides, the Honorable Michael A. Shipp, United States District Judge, granted Mr. Rambo's petition, and ordered that he either be retried or released. The District Court denied

the State's motion for reconsideration, but granted a stay pending appeal. The State appealed.

Following oral argument on March 14, 2018, and the submission of supplemental briefs on April 9, 2018, the Third Circuit Court of Appeals issued a non-precedential opinion on January 30, 2019, which reversed the decision by the District Court to grant the writ of habeas corpus. The Court of Appeals concluded that a passing reference to the Sixth Amendment by the Chancery Division judge in October 2003 was an adjudication on the merits of Mr. Rambo's right to counsel of choice claim. The Court further concluded that the Chancery Court decision was not clearly contrary to the Supreme Court case law that existed at the time Mr. Rambo's conviction became final on May 4, 2009. In this context, the Court of Appeals reasoned that the Slayer Statute impediment to choice of counsel funds encountered by Mr. Rambo was different than the forfeiture impediment at issue in earlier Supreme Court cases, *i.e., Caplin & Drysdale, Chartered v. United States*, 491 U.S.617, 624 (1989) and *United States v. Monsanto*, 491 U.S. 600 (1989). Consequently, the Third Circuit determined that the decision by the New Jersey Chancery Court to freeze Mr. Rambo's personal assets did not clearly violate the core constitutional right that Mr. Rambo sought to exercise. "Rambo's purported Sixth Amendment right, however, is different than the right at issue in *Caplin* and *Monsanto* [because] his claim had nothing to do with an interest in property that was subject to governmental seizure because of its nexus to alleged illegal activity."

See Roy L. Rambo v. Administrator East Jersey State Prison, No. 17-3156, (3d Cir. January 30, 2019) (App. A).

But "Rambo's purported Sixth Amendment right" was no different than the core Constitutional *right* that was asserted in those earlier cases, *i.e.* the right to use one's own assets to retain counsel of choice. What was different was that the source of money in those cases was "tainted" because it was derived from criminal conduct and the assets were, therefore, subject to forfeiture under a long recognized theory that vested title to the assets in the government of the United States. The Third Circuit, by focusing on the *impediment* rather than the firmly established constitutional *right* to counsel of choice, mistakenly framed the issue in terms of whether the Supreme Court had previously addressed the specific impediment, *i.e.*, a Slayer Statute, rather than whether the impediment infringed on Mr. Rambo's clearly established constitutional right to use his own assets to retain counsel.

This Petition follows.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari because the Third Circuit's decision is at odds with the original understanding of the Sixth Amendment right to counsel, conflicts with this Court's right to counsel of choice precedents, and because without clear direction from the Supreme Court, the right to counsel of choice will be at risk of further erosion through statutory schemes and appointed counsel substitutes that

will render it an illusory promise.[2] The petition should also be granted to clarify the application of the so-called look through doctrine as applied to a fundamental constitutional right.

I. The Decision Below Is Wrong; Controlling Supreme Court Precedent Established Unequivocal Guidance That Compelled the New Jersey Chancery Division to Release Mr. Rambo's Personal Assets So that he Could Exercise His Sixth Amendment Right to Counsel of Choice.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." As originally understood, the Sixth Amendment right to counsel "meant only that a defendant had a right to employ counsel, or to use volunteered services of counsel." *Garza v. Idaho*, -- U.S. -- , -- S.Ct. --, 2019 WL 938523 (February 27, 2019) (Thomas, J., dissenting and quoting *Padilla v. Kentucky*, 559 U. S. 356, 389 (2010) (Scalia, J., dissenting)). The right to counsel of choice does more than protect the right to a fair trial, it "has been regarded as the root of the Constitutional guarantee." *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006). This Court has "previously held that an element of this right is the right of a defendant who does not require appointed counsel to choose who will represent him." *Id.* at 144 (citations omitted). The Sixth Amendment "commands, not that a trial be fair, but that a particular guarantee of fairness be provided—to wit, that the accused be defended by the counsel he

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[2] The Sixth Amendment is applicable to the States through the Fourteenth Amendment. *See Gideon v. Wainwright*, 372 U.S. 335, 342-345 (1963).

believes to be best." *Id.* at 146. A violation of the choice of counsel right is a structural error that is complete from the moment the deprivation occurs. *Id.* at 149-151.

The Third Circuit, in reversing the District Court decision to grant Mr. Rambo's habeas corpus petition, focused on the nature of the restraint and failed to appreciate the substance of the Constitutional right at issue. As a result, the Court of Appeals erroneously concluded that the decision by the New Jersey Superior Court to deny Mr. Rambo access to money and property that he "owned individually or as a marital asset" was entitled to deference because there was no clearly established precedent involving a "Slayer Statute" at the time the state court confronted the issue. The Third Circuit further erred when it concluded that the District Court misapplied the law as it existed at the time Mr. Rambo's conviction became final - May 4, 2009 - and that the United States Supreme Court decision in *Luis v. United States*, 136 S.Ct 1083 (2016) regarding "untainted" assets could not be relied upon because it was announced after Mr. Rambo's conviction became final. In this regard, the Third Circuit determined that regardless of the relevance of *Luis*, both that Supreme Court decision and the District Court's application of that decision represented extensions of existing precedent and could not be applied to Mr. Rambo. Mr. Rambo respectfully submits that the District Court properly applied existing Supreme Court law and that the decision to grant relief should have been affirmed.

The fundamental problem with the Third Circuit's Sixth Amendment analysis is that it misapprehends the history of the choice of counsel jurisprudence. Instead of starting as the District Court did from the well-established principle that the Sixth Amendment protects an individual's right to use his own funds to retain the lawyer of his choosing, the Third Circuit, in effect, concluded that Supreme Court decisions in *Caplin & Drysdale, Chartered v. United States,* 491 U.S.617, 624 (1989) and *United States v. Monsanto*, 491 U.S. 600 (1989), marked the starting point for the controlling constitutional analysis. The question in those cases, however, was whether the then novel forfeiture statutes which impeded access to criminally derived "tainted" assets violated the clearly established Sixth Amendment choice of counsel right. The validity of the core right was never in question when this Court relied upon a well-established property law concept concerning criminally derived assets to uphold the application of the forfeiture statutes. *See Caplin*, 491 U.S. at 626.

The *Caplin & Drysdale* and *Monsanto* decisions were premised on the long-recognized "taint" theory, which provides that when there is probable cause to believe assets are traceable to or proceeds of the criminal activity, a defendant's property interest in the asset is greatly diminished – title is vested in the United States upon commission of the criminal act. *Caplin & Drysdale*, 491 U.S. at 627, 629. Though the defendant may possess the property, he does not have a legitimate claim to the "tainted" class of assets, and whatever theoretical interest he might have is outweighed by the strong governmental interest in law enforcement and in

making sure the assets are available for trial and restitution. *Id.* at 629, 631. The Court made clear that the restraint (impediment) was permissible only because there was probable cause to believe the assets were "tainted," *i.e.* they were unlawfully acquired and did not belong to the defendant. *Id.*; *Monsanto,* 491 U.S. at 616.

The Third Circuit, instead of focusing on the Constitutional right and source of funds, framed the issue as a question of whether the Supreme Court had ever had occasion to consider whether a Slayer Statute based impediment to assets not derived from criminal activity violated the Constitution. That is, the Third Circuit failed to appreciate that the question in those cases was not whether the Sixth Amendment right to use one's own assets to hire counsel of choice was clearly established, but rather whether even a restraint on tainted, criminally derived funds was permissible under the Constitution. But by focusing on the impediment rather than the right, the Third Circuit turned the history and analysis of the choice of counsel right on its head.

The original understanding of the Sixth Amendment and the case law before *Caplin & Drysdale* and *Monsanto* had clearly established that a criminal defendant could not be prevented from using his personal funds to hire counsel of his choice. *See e.g. Powell v. Alabama*, 287 U.S. 45, 52-53 (1932) ("However guilty defendants, upon due inquiry, might prove to have been, they were, until convicted, presumed to be innocent. It was the duty of the court having their cases in charge to see that they were denied no necessary incident of a fair trial. . . It is hardly necessary to say

that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his choice.") *See also United States v. Stein*, 541 F.3d 130, 154 (2d Cir. 2008) ("The holding in *Caplin & Drysdale* is narrow: the Sixth Amendment does not prevent the government from reclaiming its property from a defendant even though the defendant had planned to fund his legal defense with it.") Considered from this perspective, it is apparent that the Supreme Court in both *Caplin & Drysdale*, and *Monsanto*, simply recognized that while the Sixth Amendment protects a defendant's right to spend his own money to pay a lawyer, it does not create a right to spend someone else's money, *i.e.* money derived from criminal activity subject to forfeiture. *Caplin & Drysdale,* 491 U.S. at 624; *Monsanto*, 491 U.S. 600. Those decisions, therefore, did nothing to alter the well-established Constitutional principle that is at issue here: whether a defendant has a Sixth Amendment right to use his own money to retain counsel. *See Caplin & Drysdale*, 491 U.S at 626 ("Whatever the full extent of the Sixth Amendment's protection of one's right to retain counsel of his choosing, that protection does not go beyond the individual's right to spend his own money to obtain the advice and assistance of . . . counsel." (internal quotation marks omitted)); *Wheat v. United States*, 486 U.S. 153, 159 (1988) (acknowledging that Sixth Amendment guarantees right to choose own counsel, but not one defendant cannot personally afford).

The decision by the Third Circuit, therefore, is fundamentally flawed because it failed to account for the clearly established law that should have framed the analysis of Mr. Rambo's request for funds. The right to counsel of choice does more

than protect the right to a fair trial, it "has been regarded as the root of the Constitutional guarantee." *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006). It was the same failure by the New Jersey courts to acknowledge the fundamental right at stake that distracted them from the relevant legal question *i.e.,* whether a court ordered restraint on personal assets violated Mr. Rambo's Sixth Amendment right to spend his own money to hire counsel of his choice. The District Court, in contrast, recognized that the New Jersey courts violated "the root of the constitutional guarantee" from the moment an order was issued that prevented Mr. Rambo from using his own money to hire counsel for his defense.

II. The District Court's Decision did not Improperly Rely Upon *Luis v. United States,* 136 S.Ct 1083 (2016).

The Third Circuit erroneously concluded that the District Court improperly relied upon *Luis v. United States*, 136 S.Ct 1083 (2016), a case decided after Mr. Rambo's conviction became final. The District Court addressed this issue when it denied the State's motion for reconsideration by explaining that it used *Luis* to "further illustrat[e] . . . the constitutional principles addressed in *Caplin* and *Monsanto*." (JA 469). The decision in *Luis*, therefore, while discussed by the District Court, was not the basis for the decision to grant Mr. Rambo's petition, but was instead an example of how the principles that pre-dated *Caplin* and *Monsanto* retain the fullest reach afforded by the Constitution. *See Gonzalez-Lopez*, 548 U.S. at 150-51 (discussing the fundamental nature of the right to counsel of choice and how the interests protected differed from those protected by the right to effective assistance of counsel).

The District Court was correct. The decision in *Luis* was not an extension of *Caplin* and broke no new ground. This Court's *Luis* decision was simply a logical application of the historic, core choice of counsel principles. *Luis* merely confirmed that the restraints on property allowed in *Caplin* and *Monsanto* marked the outer limits of the "taint" concept and that only specifically identifiable assets derived from criminal activity were subject to restraint. The District Court's understanding of *Luis* was correct: the decision did not establish a new rule, but merely applied the Sixth Amendment law that existed at the time of Mr. Rambo's case - a criminal defendant has the "right to spend his own money to obtain the advice and assistance of counsel." *Caplin & Drysdale*, 491 U.S. at 625 (citation omitted).

The issue in *Luis* was whether the strong governmental interests served by the statutory forfeiture framework outweighed the Sixth Amendment when the "*tainted*" assets had been dissipated, and the restraint was applied to lawfully acquired "*substitute*" assets. This Court concluded that the Sixth Amendment does not permit a restraint in that circumstance because the "taint" theory can only justify restraint if the asset was derived from the criminal activity because that property does not belong to the defendant. *Luis*, 136 S.Ct. at 1093. The decision, therefore, was not a new rule, but was instead a straightforward application of the pre-*Caplin/Monsanto* Sixth Amendment rule that a defendant must be allowed a reasonable opportunity to use lawfully acquired assets to hire counsel. *Luis* was important in terms of clarifying the reach of forfeiture statutes when measured

against the right to counsel of choice, but announced nothing new relative to the use of lawfully acquired and held assets for purposes of the Sixth Amendment.

In contrast, the issue in this case does not touch on the question of "taint." Rather, the right to use one's own assets, the very core of the Sixth Amendment right to counsel choice is at stake. Assuming for the moment the state court adjudicated Mr. Rambo's Sixth Amendment claim, it resolved the question in a manner that was clearly contrary to established constitutional law.

This Court in *Gonzalez-Lopez* referenced the "differences in the defense that would have been made by the rejected counsel – in matters ranging from questions asked on *voir dire* and cross-examination to such intangibles as argument style and relationship with the prosecutors." 548 U.S. at 151. In a case where the defendant, instead of being allowed to use his money to hire counsel, was appointed two attorneys whose representation was in the first instance was described by the court as "shameful," and in the second of doubtful utility, the importance of vigilant protection for the right to choose counsel resonates with particular clarity. The District Court, therefore, did not improperly rely upon the *Luis* decision when it correctly concluded that the state court ordered restraint of funds "owned individually" by Mr. Rambo, *i.e.* personal assets of at least $290,000, violated the Sixth Amendment counsel of choice right.

III. The New Jersey Courts did not Address the Merits of Mr. Rambo's Sixth Amendment Choice of Counsel Claim.

In recent years, this Court has decided two cases that shed light on the questions of "deference" and "merits adjudication." First, in *Harrington v. Richter*,

562 U.S. 86 (2011), the Court held that where "a state court issues an order that summarily rejects without discussion all of the claims – federal and state – raised by a defendant," the federal habeas court must presume that the federal claim was adjudicated on the merits. *Id.* at 99. The Court clarified, however, that this presumption may be overcome "when there is reason to think some other explanation for the state court's decision is more likely," such as where a lower state court previously resolved petitioner's federal claims upon independent state law grounds. *Id.* at 99-100 (citation omitted).

Second, in *Johnson v. Williams*, 568 U.S. 289, 293, 298 (2013), the Court determined that where the "state court rules against the defendant and issues an opinion that addresses some issues but does not expressly address the federal claim in question, *e.g.*, the court is silent as to the reasons the federal claim is denied, the same rebuttable presumption that the claim was adjudicated on the merits applies." The rebuttable presumption applies only "in the absence of any indication or state-law principles to the contrary." *Id.* at 298. The Court identified a non-exhaustive list of "other explanations" sufficient to rebut a presumption of adjudication on the merits. *Id.* at 301-03. Two of these other explanations include situations where a state court based its decision on state law that is independent of and does not subsume federal law or where the state court may have "inadvertently overlooked" the federal claim that was raised. *Id.*; *accord Bennett v. Superintendent Graterford SCI, et al*, --- F.3d ---, 2018 WL 1463505 *10 (3d Cir. March 26, 2018).

An important criterion in assessing an adjudication on the merits is that:

"[a] judgment is normally said to have been rendered 'on the merits' only if it was 'delivered after the court . . . heard and *evaluated* the evidence and the parties' substantive arguments." *Williams*, 568 U.S. at 302 (emphasis in original) (citations omitted). As used in this context, the word "merits" is defined as "*the intrinsic rights and wrongs of a case* as determined by *matters of substance*, in distinction from matters of form." *Id.* (emphasis in original). Likewise, if a federal claim is rejected as a result of sheer inadvertence, it has not been evaluated based on the intrinsic right and wrong of the matter. In deciding that the claim in *Williams* was not inadvertently overlooked or decided on state grounds, but was adjudicated on the merits, this Court observed that Petitioner treated her state and federal claims interchangeably, and the state court specifically addressed the core elements of petitioner's federal claim, thus indicating that state law subsumed federal law. *Id.*

In contrast, where federal claims were inadvertently overlooked or decided on independent state grounds that did not subsume essential federal law principles, "it does not follow that they have been adjudicated 'on the merits.'" *Id.* Therefore, the presumption of adjudication on the merits can be rebutted "[w]hen the evidence leads very clearly to the conclusion that a federal claim was inadvertently overlooked in State court. . . ." *Id.* In that circumstance, "the prisoner is entitled to an unencumbered opportunity to make his case before a federal judge." *Id. See also e.g.*, *Appel v. Horn*, 250 F.3d 203, 210 (3d Cir. 2001) (No "merits adjudication" where the state courts misconstrued the petitioner's federal claim and decided an issue he did not present, *i.e.* petitioner raised a Sixth Amendment claim of

constructive denial of counsel, but state courts decided it as if it were a claim of ineffective assistance of counsel: "The two claims . . . of course, are different.")

With that as background, it is apparent that the Third Circuit was wrong when it concluded that the New Jersey Chancery Division had rendered a "merits" judgment on Mr. Rambo's Sixth Amendment choice of counsel claim. The record is clear that the District Court was correct in concluding that the state courts had failed to evaluate the evidence supporting the claim, apply the relevant legal analysis, or weigh the "intrinsic rights and wrongs" of the claim. *Williams*, 568 U.S. at 303.

In this case, on the criminal side, the New Jersey Law Division judge recognized and articulated the Sixth Amendment issue, remarking, "I don't know any precedent that allows somebody to freeze a criminal suspect's assets . . . I'm just astounded by that . . . And Mr. Rambo . . . should have access to funds which he needs to provide for his defense." Nevertheless, the criminal court never issued a ruling on the merits because it concluded that, as a matter of state procedure, it was powerless to intervene in the Chancery Division matter.

On direct appeal, the Appellate Division observed that Rambo's counsel-of-choice claim was "complex" and, if decided on the merits, would require "a close analysis of the statutory language, the legislative goals sought to be achieved by the statute and the proper balance to be given to the defendant's choice of counsel." *State v. Rambo*, 951 A.2d 1075, 1084 (N.J. Super. App. Div. 2008). (App.E). But the Appellate Division denied Rambo's motion to expand the record to include a review

of the Chancery Division proceedings and, like the trial court, refused to reach the merits of the Sixth Amendment claim because doing so "would inextricably require that we either uphold or reverse a determination made in Chancery which is not properly before us." *Id.*

Likewise, in response to Mr. Rambo's State post-conviction relief (PCR) application, both the Law Division and Appellate Division avoided the Sixth Amendment claim by refusing to consider the Chancery Division record. *State v. Rambo*, No. 02-12-0472, 2013 WL 512116 (N.J. Super. App. Div. Feb. 13, 2013) (unpublished decision).

In the Chancery Division, although there was a passing reference to Mr. Rambo's Sixth Amendment claim, a close examination of the record discloses that the state court failed to evaluate "the intrinsic rights and wrongs" of the issue. The focus of the court was directed almost exclusively to the interpretation and application of the New Jersey Slayer Statute, N.J.S.A. 3B:7-1, *et seq*. Indeed, although argument on a motion to release funds to hire counsel began with reference to the Sixth Amendment issue, the court promptly redirected the inquiry: "I don't think you have to talk about the right to – the Sixth Amendment right. I think what you need to talk about is why you're entitled to these particular assets" under the Slayer Statute. In denying the motion, the court ignored the only New Jersey case that addressed the Sixth Amendment choice-of-counsel issue that was before the court on the grounds that the Slayer Statute – which supposedly codified New Jersey common law - was enacted after the Sixth Amendment/common law

based decision in *Jacobson v. Jacobson*, 376 A.2d 558 (N.J. Super. App. Div. 1977). Instead, the court limited the inquiry to whether the Slayer Statute permitted freezing Mr. Rambo's assets and failed to consider the long established Supreme Court precedent regarding the fundamental nature of the right to counsel of choice. (App. D).

The court dismissed the salient Sixth Amendment issue by conflating Mr. Rambo's specific Sixth Amendment right to counsel of choice claim, the *Powell v. Alabama,* 287 U.S. 45 (1932), right, with the *Gideon v. Wainwright,* 372 U.S. 335 (1963), indigent right to counsel remedy. "And although there is a Sixth Amendment right, that right is not – is not without some – is not a absolute right. Obviously the doctor will have a – an opportunity to have counsel, whether it's a counsel that he pays for or whether it's a counsel that is provided to him. . . . [T]he defendant's right to counsel of his choice is not absolute and must give way when required by the fair and proper administration of justice." (App. D).

The Chancery Division therefore never addressed the merits of Mr. Rambo's choice of counsel claim. Rather, to the extent that a state court did discuss a Sixth Amendment issue, it did so by substituting a different Sixth Amendment protection for the choice of counsel claim that was raised. This utterly failed to give meaning to the right at stake, and elevated the *Gideon* right to appointed counsel to a position of Constitutional supremacy relative to the counsel of choice right that lies at the heart of the Sixth Amendment. If the availability of appointed counsel can be so easily used to supplant the counsel of choice right, there would be virtually nothing

to stop further efforts to all but eliminate the ability of criminal defendants to exercise the core promise of the Sixth Amendment right to counsel. That was never the intent of this Court when it decided *Gideon*, and the Chancery Division reference to such a "remedy" demonstrates that Mr. Rambo's Sixth Amendment counsel of choice claim was not decided on the merits, and should have been subject to *de novo* review.

The Appellate Division did no better when it reviewed the chancery case nine years later. With respect to the Sixth Amendment claim, the court merely said "[d]efendant's remaining arguments, including those attacking the Chancery Division's decision *as a denial of his right to counsel* under the Sixth Amendment, lack sufficient merit to warrant a discussion in a written opinion." *In re Estate of Rambo*, No. P-02-438-D, 2012 WL 1969954 (App. Div. June 4, 2012) (citing N.J. R. Ct. 2:11-3(e)(1)(E)) (emphasis added). The Appellate Division's summary affirmance of the issue merely accepted the Chancery Court's *right to counsel* disposition and added not even a veneer of case-specific or constitutional analysis to Mr. Rambo's overlooked claim that he was denied *counsel of choice*. (App. F).

Mr. Rambo's appeal of the Chancery Division decision did not fill the gap because the Appellate Division summarily disposed of Mr. Rambo's constitutional claim, and therefore, presumably adopted the same reasoning of the Chancery Division. *See Ylst v. Nunnemaker*, 501 U.S. 797, 802-803 (1991) (an unexplained order of a state court upholding a prior judgment of a lower court is presumed to be based upon the same ground as that relied upon by the lower court); *Wilson v.*

Seller, 138 S.Ct. 1188 (2018). Accordingly, the decision of the Appellate Division, like that of the chancery court, cannot be said to have been an adjudication of the merits. And by denying certification, the New Jersey Supreme Court added no additional analysis of Mr. Rambo's Sixth Amendment right to counsel of choice. *See In re Estate of Rambo*, 54 A.3d 810 (N.J. 2012). The Third Circuit, therefore, erred when it concluded that the claim had been adjudicated on the merits.[3]

[3] And, of course, as argued above, even if the New Jersey courts can be said to have adjudicated the merits, the resolution was clearly contrary to established constitutional precedent.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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