No. 21-679 (CAPITAL CASE)

IN THE SUPREME COURT OF THE UNITED STATES

Tim Shoop, Warden,

Petitioner,

v.

August Cassano,

Respondent.

SUPPLEMENTAL APPENDIX

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No. 18-3761

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AUGUST CASSANO, Petitioner-Appellant, v. TIM SHOOP, WARDEN, Respondent-Appellee.	: : : : : : :	On Appeal from the United States District Court for the Northern District of Ohio District Court Case No. 1:03-cv-01206

APPELLEE'S PETITION FOR REHEARING *EN BANC*

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RULE 35(B) STATEMENT

The Court should grant *en banc* review to ensure uniformity in this Court's habeas decisions, to prevent conflicts with decisions from the Supreme Court and other circuits, and to ensure the faithful application of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").

INTRODUCTION

The panel majority egregiously misapplied AEDPA and, as a result, mistakenly awarded habeas relief to a repeat murderer. The Warden seeks *en banc* review. He acknowledges 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). So when the Supreme Court repeatedly grants *certiorari* to correct one type of error, that is a good sign that such errors are worthy of special attention in the lower courts, too.

That insight proves dispositive here. The Supreme Court repeatedly grants *certiorari* and summarily reverses factbound misapplications of AEDPA. *See*, *e.g.*, *Alaska v. Wright*, 141 S. Ct. 1467 (2021) (*per curiam*); *Mays v. Hines*, 141 S. Ct. 1145 (2021) (*per curiam*); *Shinn v. Kayer*, 141 S. Ct. 517 (2020) (*per curiam*); *Shoop v. Hill*, 139 S. Ct. 504 (2019) (*per curiam*). Understandably so. "Federal habeas review of

state convictions … intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Harrington v. Richter*, 562 U.S. 86, 103 (2011) (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. Thus, the panel's misapplication of AEDPA deserves this Court's attention. And the need for review is amplified by the fact that the panel's mistakes cause or contribute to circuit splits and intracircuit confusion.

STATEMENT

1. "[Murder] was his habit." *United States v. Alvarez*, 567 U.S. 709, 713 (2012) (op. of Kennedy, J.). August Cassano was already serving a life sentence for one murder when he committed another by stabbing his cellmate about seventy-five times. *State v. Cassano*, 96 Ohio St. 3d 94, 94 (Ohio 2002). After a grand jury indicted Cassano, the trial court appointed defense counsel, and the case moved toward trial. This case is about what happened on the way.

May 1998. One key development occurred 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, Page-

Id#864–69. 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; both were mailed on the same day, R.134-1, PageID#863 & 869; and both were received on the same day, Panel Op.13. The trial court responded by appointing three new defense attorneys, including Gatterdam. Panel Op.4. 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 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 coun-

sel 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 Ohio Supreme Court. Cassano argued that the trial court erred by refusing his 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 it, a defendant must "clearly and unequivocally" demand self-representation. *Id.* at 835. And he must do so in a timely fashion. *See Martinez v. Ct. of Appeal*, 528 U.S. 152, 162 (2000).

The court rejected Cassano's self-representation claim in a section of its opinion entitled "Preliminary Issues: Self-representation." *Cassano*, 96 Ohio St. 3d at 98–100. The court first reviewed Cassano's *pro se* filings. It noted the "waiver of counsel" Cassano filed in May 1998. But it quickly moved past that filing because, on the "same day" that Cassano filed the waiver, he also "asked that … Kort Gatterdam … be appointed as counsel." *Id.* at 99. Thus, without saying so expressly, the court implicitly decided 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.

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. *Id.* But 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 trial court committed no constitutional violation by denying that motion. *Id.*

That left only the April 1999 request. The Ohio Supreme Court concluded that, for several reasons, Cassano had not proven a 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 further concluded that Cassano's "remark about representing himself [was] an attempt to delay the trial." *Id.* Finally, the court held 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.*

3. Cassano sought federal habeas relief in 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's hard-to-satisfy standards apply when a habeas petitioner, like Cassano, seeks relief based on a claim that the state courts already adjudicated on the merits. *Id.*, PageID#7952–53, 7962. Those standards permit relief in only two narrow circumstances. The first occurs when the state court, in adjudicating the petitioner's claim, misapplies a Supreme Court holding so egregiously that the state court's error is beyond "fairminded disagreement." *Harrington*, 562 U.S. at 103; *see* 28 U.S.C. §2254(d)(1). The second occurs when the state court's ruling rests upon a factual determination that the record unambiguously refutes. §2254(d)(2). The District Court determined that Cassano had not proved his right to relief under these standards. *Id.*, PageID#7966–78.

Cassano appealed and this Court reversed. The panel majority held that Cassano had properly invoked his right to self-representation twice—in May 1998 and April 1999.

First, the panel determined that the Ohio Supreme Court overlooked, and so failed to "adjudicate on the merits," Cassano's claim relating to the May 1998 "waiver of counsel." Thus, it concluded that AEDPA did not govern that claim at

all. Panel Op.10–14. And assessing the merits *de novo*, the Court found that the state courts violated Cassano's rights by failing to treat the "waiver of counsel" filing—the one Cassano made on the same day that he requested new counsel—as a demand for self-representation. The majority added, in a footnote, that Cassano would also be entitled to relief even under AEDPA's demanding standards. *Id.* at 15 n.2.

Second, the panel held that the Ohio Supreme Court unreasonably rejected the claim predicated on Cassano's April 1999 question about self-representation. The panel acknowledged that AEDPA's standards governed this claim. But it concluded that the Ohio Supreme Court's rejection of the claim contained errors egregious enough to justify relief. *Id.* at 16–26.

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

ARGUMENT

This case presents the question whether the Supreme Court of Ohio, in concluding that Cassano was not denied his right to self-representation, committed an error bad enough to justify habeas relief. The answer is "no," and the panel egregiously erred in holding otherwise.

1. "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*, courts can award relief to a state petitioner 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). A state-court decision meets this standard "only if it is so erroneous that there is no possibility fairminded jurists could disagree that [it] conflicts" with a Supreme Court holding (as opposed to dicta). *Nevada v. Jackson*, 569 U.S. 505, 508–09 (2013) (*per curiam*) (quotation omitted). *Second*, federal courts may award habeas relief to a petitioner who 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).

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 de-

cide" 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. A claim is not "overlooked" simply because it is "imperfectly discusse[d]" or arguably "misunderstood." *Smith v. Cook*, 956 F.3d 377, 386–87 (6th Cir. 2020); *accord Wofford v. Woods*, 969 F.3d 685, 717 (6th Cir. 2020).

2. Cassano seeks relief based on a supposed denial of his right to self-representation. The Supreme Court has held that, in addition to having a right to counsel, a criminal defendant has a right to self-representation. *Faretta*, 422 U.S. at 807. But courts apply a "strong presumption against" finding that a defendant has

invoked that right. *Martinez*, 528 U.S. at 161 (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." *See 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. *McKaskle v. Wiggins*, 465 U.S. 168, 182 (1984).

Combining these principles and AEDPA's standards, Cassano is not entitled to relief.

May 1998. Consider first Cassano's argument 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.

As an initial matter, Cassano's claim based on the "waiver of counsel" is subject to AEDPA because the Ohio Supreme Court 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 counsel, *id.*—to be a clear demand for self-representation. *See* Panel Op.27–28 (Siler, J., dissenting). 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," which he filed simultaneously with a request for *new counsel*, does not fit the bill. Indeed, Cassano should lose even under *de novo* review. But he certainly loses under AEDPA, because the Ohio Supreme Court's decision was not "so erroneous that" every "fairminded jurist[]" would agree it "conflicts with" Supreme Court precedent. *Nevada*, 569 U.S. at 508–09 (quotation omitted). The Ohio Supreme Court did not apply "a rule that contradicts the governing law set forth in" *Faretta* or any other U.S. Supreme Court case. *Shaneberger v. Jones*, 615 F.3d 448, 452 (6th Cir. 2010) (quotation omitted). 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.* (alteration adopted; quotation omitted). There is, in short, no plausible basis for concluding that the Ohio Supreme Court misapplied U.S. Su-

preme Court precedent egregiously enough to justify relief under §2254(d)(1). And because the Ohio Supreme Court's resolution of this claim does not turn on disputed facts, §2254(d)(2) is inapplicable.

The panel majority wrongly claimed in a footnote that Cassano was entitled to relief even under §2254(d)(1). Panel Op.15 n2. It concluded that, "because the [Ohio Supreme Court] did not provide its reason for denying the claim, this Court would 'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale and would then presume that the unexplained decision adopted the same reasoning." *Id.* (quotation omitted). It then "looked through" to comments the trial court made about Cassano's request for hybrid representation in *September 1998*. *Id.* This is doubly wrong. First, there is no need to look through the Ohio Supreme Court's decision; again, the court's opinion 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 27–28 (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 *hybrid-representation motion* in September 1998 does not qualify.

Perhaps because Cassano obviously loses under §2254(d)(1), the majority relied primarily on its conclusion that the Ohio Supreme Court did not adjudicate the May 1998 claim on the merits, making AEDPA inapplicable. This argument, too, is doubly wrong. First, Cassano's claim would fail even under *de novo* review. Second, this conclusion rests on a misreading of the state-court opinion. The panel stressed that the Ohio Supreme Court must have overlooked the claim predicated on the May 1998 "waiver of counsel," because it described Cassano's September 1998 motion as the "only written motion" on self-representation. Panel Op.11. But that quote ignores the fact that the Ohio Supreme Court already deemed the "waiver of counsel" *not* to qualify as a motion for self-representation. The quote also omits two key words: the Ohio Supreme Court referred to the September motion as the "only written motion on *that point*." *Cassano*, 96 Ohio St. 3d at 100 (emphasis added). The "point" to which the Supreme Court was referring was "hybrid representation"—the topic of the September 1998 motion. *Id.* And the September 1998 motion *was* the only motion on "that point."

The panel also made much of the Ohio Supreme Court's statement that "Cassano did not mention that he wanted to represent himself alone until April 23, 1999." *Id.*; *see* Panel Op.11. But that does not show the Ohio Supreme Court overlooked the claim predicated on the May 1998 "waiver of counsel"; it shows only

that the Ohio Supreme Court believed that neither the May 1998 "waiver of counsel" nor the September 1998 request for *hybrid* counsel constituted a valid request for self-representation.

April 1999. That leaves only the question whether Cassano is entitled to habeas relief based on his claim that he was improperly denied the right to counsel in April 1999. (Even the panel agreed he was not entitled to relief based on the September 1998 filing. Panel Op.16.) AEDPA unambiguously applies to this claim. Panel Op.17. And AEDPA unambiguously forecloses Cassano's arguments.

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 Ohio Supreme Court disagreed, for three reasons. *Id.* at 100. First, a *question* about self-representation is not the sort of clear and unequivocal demand for self-representation that *Faretta* requires. *Id.* Second, the request was "untimely because it was made only three days before the trial was to start." *Id.* Finally, 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." *Id.*

None of these conclusions is foreclosed by any Supreme Court holding. *Faretta* requires clear and unequivocal demands. 422 U.S. at 835. *Martinez* recognizes that courts may deny untimely requests. 528 U.S. at 162. And *McKaskle* establishes that defendants waive the right to self-representation by voluntarily accepting representation of counsel. 465 U.S. at 182. So the Ohio Supreme Court's decision was neither contrary to, nor an unreasonable application of, U.S. Supreme Court precedent. That defeats Cassano's §2254(d)(1) claim. And Cassano fares no better under §2254(d)(2): the record did not *compel* the Court to conclude that the waiver was clear and unequivocal, that it was timely, or that Cassano unwillingly accepted counsel's assistance. (And it is unclear whether these conclusions would be factual determinations anyway.)

In concluding otherwise, the panel majority made more errors than the Warden can catalogue in an *en banc* petition. Two, however, highlight the problems.

First, the majority defined "clearly established Federal law" using circuit precedent. *See, e.g.*, Panel Op.22 & 24 (quoting *Robards v. Rees*, 789 F.2d 379 (6th Cir. 1986); *United States v. Farias*, 618 F.3d 1049 (9th Cir. 2010)). The Supreme Court has repeatedly told this and other circuits not to do that. *See, e.g.*, *Marshall v. Rodgers*, 569 U.S. 58, 64 (2013) (*per curiam*).

Second, although the panel majority used language from AEDPA, its analysis of Cassano's right to relief is indistinguishable from *de novo* review. *See* Panel Op.17–26. Consider, for example, the majority's conclusion that the Ohio Supreme Court unreasonably determined Cassano acted for the purpose of delay when he asked about self-representation three days before trial. *See* Panel Op.20–25. The majority reached this conclusion based on its own assessment of contextual clues. Those clues, it thought, suggested Cassano made the late request not to delay trial, but rather because his concerns arose just before trial and because the trial court's previous statements had intimidated Cassano from speaking up. *Id.* This speculation shows, at most, that the record might have supported an opposite conclusion—it does not establish that the record *compelled* the Ohio Supreme Court to come out the other way, as §2254(d)(2) requires. *Rice*, 546 U.S. at 341. The majority's contrary decision is *de novo* review in disguise.

3. That the panel erroneously granted habeas relief to a repeat murderer is reason enough to grant review. *See above* 1–2. But other reasons further justify review. The panel decision increases discord among the circuits. Its ruling contradicts, for example, decisions holding that questions about self-representation are not the same as unequivocal demands. *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, 707 (10th Cir. 2008); *cf. also Jackson v. Ylst*, 921 F.2d 882, 889 (9th Cir. 1990). And it contradicts decisions holding that similarly late-in-the-date requests for self-representation are untimely. *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). The panel's decision will confuse this Circuit's caselaw, too. For instance, the panel's hypercritical approach to AEDPA's adjudication-on-the-merits inquiry, *see* Panel Op.11, looks nothing like the approach this Court usually takes, *see, e.g.*, *Cook*, 956 F.3d at 386–87; *Wofford*, 969 F.3d at 717.

CONCLUSION

In recent years, the Supreme Court has often needed to summarily reverse this Court's improper grants of habeas relief. *See, e.g.*, *Mays*, 141 S. Ct. 1145; *Shoop*, 139 S. Ct. 504; *Jenkins*, 137 S. Ct. 1769; *Woods*, 136 S. Ct. 1149; *White*, 136 S. Ct. 456. The *en banc* Court should follow the Supreme Court's lead. It need not even hear oral argument to do so: in straightforward cases like this one, the full court can issue a decision without argument, effectively summarily reversing the panel before the Supreme Court has to get involved. *See, e.g.*, *Van Hook v. Anderson*, 560 F.3d 523, 524 (6th Cir. 2009). Indeed, the full court need not even write a new opinion—it can simply adopt Judge Siler's opinion as its own. *See, e.g.*, *Va. Dep't of*

Educ. v. Riley, 106 F.3d 559, 561 (4th Cir. 1997) (*en banc*) (*per curiam*) (plurality adopting panel dissent).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this petition for rehearing and rehearing *en banc* complies with the type-volume requirements for such a petition, as it contains 3,881 words. *See* Fed. R. App. P. 35(b)(2)(A) & 40(b).

I further certify that this brief complies with the typeface requirements of Federal Rule 32(a)(5) and the type-style requirements of Federal Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Equity font.

/s/ Benjamin M. Flowers
BENJAMIN M. FLOWERS

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of June, 2021, this petition for re-hearing and rehearing *en banc* was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Benjamin M. Flowers
BENJAMIN M. FLOWERS

F1

IN THE COURT OF COMMON PLEAS
RICHLAND COUNTY, OHIO

RICHLAND COUNTY
CLERK OF COURTS
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PHILLIP SCOTT
CLERK OF COURTS

STATE OF OHIO * CASE No 98 CR-171
Plaintiff * HONORABLE JUDGE HENSON

— VS —

AUGUST A. CASSANO * WAIVER OF COUNSEL.
Defendant *

August A. CASSANO, Pro-Se, Now Respectfully Waives Counsel in the Above Captioned Case As is His Constitutional RIGHT.

The Substance of Mr. CASSANO'S Position before The Law, is that He Would rather Control the orginization and Content of his defense, be able to file Motions, Argue points of Laws, CALL favarable Witnesses, Cross-Examine Any Adverse Witnesses and be allowed to Conduct His defense in A Manner Considered Fundemental to The fair Administration of American Justice.

Respectfully Submitted
August Alfred Cassano

PROOF OF SERVICE:

I, August A. CASSANO, Hereby Certify that A True Copy of this Waiver of Counsel was Sent Via Regular U.S. Mail To Richland County Prosecutors office ON THIS 12 DAY OF May 1998.

August Alfred Cassano
August ALFRED CASSANO

(12)

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IN T. COURT OF COMMON PLEAS
RICHLAND COUNTY OHIO

STATE OF OHIO — CASE NO. 98-CR-171-H
PLANTIFF

JUDGE - HENSON

- VS. -

MOTION FOR APPOINTMENT OF SUBSTITUTE COUNSEL

AUGUST A CASSANO
DEFENDANT

AUGUST CASSANO, PRO-SE, HEREBY OBJECTS TO INEFFECTIVE ASSISTANCE OF COUNSEL, AND THEREBY REQUESTS SUBSTITUTION COUNSEL.

MR CASSANO REQUESTS AN ORDER DISMISSING ATTORNEY BOB WHITNEY AND BERNARD DAVIS, AND WITHIN SAID ORDER, APPOINTMENT OF MR KORT GATTERDAM ATTY AT LAW

RESPECTFULLY SUBMITTED
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MANSFIELD OHIO 44901-0001

BRIEF IN SUPPORT

IN THE CASE AT BAR MR CASSANO SEEKS THE APPOINTMENT OF KORT GATTERDAM FOR VARIOUS REASONS STATED MORE FULLY HEREIN. (13)

ARGUMENT AND LAW

ONE OF THE SIXTH AMENDMENT PURPOSES OF

- VS. -

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ARGUMENT AND LAW

ONE OF THE SIXTH AMENDMENT PURPOSES OF COUNSEL, IS TO ENSURE A PERSON CHARGED WITH A CRIMINAL OFFENCE HAVE THE AID "AND "ADVICE" OF ONE TRAINED IN LAW AND THE PROCEEDURES OF COURT U.S. V. MEEKS, 88 S.CT. 1154, 420 U.S. 936.

PAGE (1)

INDeeD, IN U.S. V. TARLOWSKI, 305 F. Supp. 112, The COURT STATED THAT COUNSEL is DesigNED TO ENSURE AN ACCUSSED INTRESTS will BE PROTECTED CONSISTENTLY. WITH ADVERSARY THEORY OF CRIMINAL PROSECUTION, TO ENABLE INDIVIDUAL WITH whole POWER OF STATE AGAINST Him, TO DeFeND AGAINST LOSS OF PERSONAL LIBERTY AND ENSURE THAT OTHER FUNDEMENTAL RIGHTS SECURED TO INDIVIDUAL will Recieve ADeQUATE AND EFFective ENFORCEMENT

The COURT WENT SO FAR IN UNITED STATES TO SAY THAT The Right TO ASSISTANCE OF COUNSEL, WAS INTENDED TO SUPPLEMENT AN ACCUSSED'S OTHER FUNDEMENTAL RIGHTS OF A DeFENDANT.

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STATE V. BODLEY, 394 SO(2d) 584, CONCURRED 435 SO.(2D) 421.

IN The CASE AT BAR, COUNSEL HAS ONLY VISITED ACCUSSED ~~ONCE~~ TWICE SINCE MARCH 24, 1998, AND HAVEN'T TOLD me ANY THING OR DID ANY ON MY CASE, I CASSANO HAS HAD TO FILE MY OWN MOTIONS CAUSE MY LAWYERS will NOT DO IT, I even WROTE A letter TO JUDge

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MR. CASSANO ALSO HAS MOTIONS NEEDED FILED AND HAS BEEN DENIED ACCESS TO THE COURTS WITHIN THIS ASPECT OF "ACCESS" ALSO.

THE DEFENDANT COULD BE DENIED THE RIGHT TO BE HEARD IF HIS MOTIONS AND OTHER PETITIONS ARE NOT TIMELY FILED PURSUANT TO CRIMINAL RULE 12., OR IF THE MOTIONS ARE NOT SUSTAINED BY ALL ISSUES OR COMPETENCY.

THE DEFENDANT SO FAR HAS STOOD ALONE, WITHOUT THE AID OR ADVICE OF MR WHITNEY AND MR. DAVIS, AND THEREFORE REQUESTS MR KORT GATTERDAM AS COUNSEL OF RECORD. MR WHITNEY AND MR DAVIS "OVERBEARING" AND INDIFFERENT" MANNOR HAS CREATED A MALFIESANT JUSTICE SYSTEM TO DATE, SO DISTRUST AND ANIMOSITY IS SO PREVELANT BECAUSE OF INADAQUATE CONSULTATION AND REPRESENTATION.

MR CASSANO REQUEST, MR KORT GATTERDAM IN THE INTRESTS OF TIME AND JUSTICE OF STATE EX,REL. KIRTZ V. CORRIGAN, 575 N.E.(2D) 186.

IF DEFENDANT IS DENIED HIS REQUEST, HE WANTS AN ORAL HEARING WITH HIS RIGHT TO BE PRESENT UNDER CRIM. R. 43(A). ALSO STATE V. PRATER 593 NE(20)XX

Respectfully summitted,

August Cassano

AUGUST CASSANO

CERTIFICATE OF SERVICE

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Respectfully summitted,

August Cassano

AUGUST CASSANO

CERTIFICATE OF SERVICE

I AUGUST CASSANO, HEREBY CERTIFY THAT A TRUE COPY OF THIS MOTION WAS SENT VIA REGULAR U.S. MAIL TO PROSECUTER OF RICHLAND COUNTY ON THIS 12 DAY OF MAY 1998

August Cassano

AUGUST CASSANO

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IN THE FIFTH DISTRICT COURT OF APPEALS

State of Ohio,	:	Case No. 98-CR-171-H
Plaintiff,	:	
v.	:	**JUDGMENT ENTRY**
August A. Cassano,	:	
Defendant.	:	

It is hereby ordered, adjudged and decreed that David H. Bodiker of the Public Defender's Office is appointed to represent the defendant, August A. Cassano. The Public Defender's Office is hereby notified that a prosecutor pretrial in this case is scheduled for June 8, 1998 at 10:00 a.m. at the Richland County Courthouse, 50 Park Avenue East, Mansfield, Ohio. It is not necessary for the defendant to be present for the prosecutor pretrial.

James D Henson

Judge James D. Henson

J284/905

cc: David H. Bodiker
Public Defender
8 E. Long Street
Atlas Building, 11th Floor
Columbus, OH 43215

James J. Mayer, Jr.

August A. Cassano#145-242
Mansfield Correctional Institution
P. O. Box 788
Mansfield, OH 44901

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IN THE COMMON PLEAS COURT
OF RICHLAND COUNTY, OHIO

STATE OF OHIO
PLAINTIFF

-VS-

AUGUST CASSANO
DEFENDANT

CASE NUMBER 98-CR-171H

JUDGE JAMES D. HENSON

MOTION FOR APPOINTMENT OF CO-COUNSEL

The DEFENDANT, AUGUST CASSANO, moves This HONORABLE COURT To APPOINT, KORT GATTERDAM ATTORNEY AT LAW, AS CO-COUNSEL ON His BEHALF. The REASONS FOR This REQUEST APPEAR IN The ATTACHED MEMORANDUM.

Respectfully Submitted.,

August Cassano

AUGUST CASSANO
#A-145-242
P.O. Box 788
Mansfield Ohio

(90)

MEMORANDUM IN SUPPORT

The DEFENDANT, AUGUST CASSANO, STANDS ACCUSED OF COMMITTING A CRIME THAT CARRIES WITH IT A POSSIBLE SENTENCE OF DEATH, 30 OR 20 YEARS TO LIFE INCARCERATION. A CASE OF THIS MAGNITUDE DESERVES THE MAXIMUM JUDICAL CONSIDERATION TO GUARANTEE A FAIR TRIAL.

AN INDIGENT PERSON ACCUSED OF COMMITTING A CRIME HAS A RIGHT TO HAVE AN ATTORNEY APPOINTED TO REPRESENT HIM; GIDEON V. WAINWRIGHT (1963), 372 U.S. 355, OR TO REPERSENT HIMSELF PRO-SE: FARETTA V. CALIFORNIA (1975), 422 U.S. 806; STATE V. GIBSON (1976), 45 OHIO ST. 2D 366.

THE UNITED STATES SUPREME COURT NOR THE OHIO SUPREME COURT HAS RULED ON THIS ISSUE OF HYBRID REPRESENTATION, (i.e., WHERE THE DEFENDANT REPRESENTS HIMSELF AS CO-COUNSEL ALONG WITH AN ATTORNEY). THE RATIONAL OF FARETTA AND THE LANGUAGE OF THE OHIO CONSTITUTION SUPPORT THE RECONGNITION OF DEFENDANTS RIGHT TO BE APPOINTED AS CO-COUNSEL IN HIS OWN DEFENSE.

IN FARETTA, SUPRA, THEY RULED THAT THE RIGHT TO PROCEED PRO SE, EMANATES FROM THE HISTORY OF THE SIXTH AMENDMENT AND THE INESTIMABLE WORTH OF FREE CHOICE, I.D. AT 834

"THE RIGHT TO REPRESENT ONESELF does NOT, ARISE MECHANICALLY FROM A DEFENDANT'S POWER TO WAIVE THE RIGHT TO ASSISTANCE OF COUNSEL," Id AT 819, FN 15; RATHER, EACH RIGHT EXISTS INDEPENDENTLY OF THE OTHER.

FARETTA CONCEIVES OF COUNSEL AS AN ASSISTANT TO A DEFENDANT WILLING TO CHOOSE THE AID OF A TRAINED ATTORNEY. "AND AN ASSISTANT, HOWEVER EXPERT, IS STILL AN ASSISTANT." ID AT 82 THUS, FARETTA CAN BE CONSTRUED AS ENVISIONING A CONTINUM ALONG WHICH A DEFENDANT MAY CHOOSE VARYING DEGREES OF REPRESENTATION, RANGING FROM PRO-SE COMPLETE REPRESENTATION BY COUNSEL, AND INCLUDING MIX REPRESENTION BY BOTH COUNSEL AND DEFENDANT HIMSELF.

IN UNITED STATES V. HILL (C.A. 10, 1975), 526 F. 2D 1019 AND UNITED STATES V. WOLFISH (C.A. 5, 1975) 525 F. 2d 457, CERTIORARI DENIED (1975) 423 U.S. 1059.

THE COURTS OVERLOOK THE COMPLIMENTARY CHARACTER OF THE PROCEDURAL RIGHTS TO REPRESENTION BY A ATTORNEY OR BY ONESELF. APPOINTING DEFENDANT CO-COUNSEL WOULD SERVE THE GOAL OF RESPECTING THE DIGNITY OF THE INDIVIDUAL WHILE ENSURING THAT THE FACT FINDING PROCESS AS SMOOTHLY UNDER THE GUIDANCE OF TRAINED COUNSEL.

THE LOGIC OF ALLOWING AN ACCUSED TO REPRESENT HIMSELF AS CO-COUNSEL WITH TRAINED ATTORNEYS UNDERLIES THE FARETTA COURT'S RECOGNITION OF THE WISDOM OF APPOINTING STAND BY COUNSEL TO ASSIST A DEFENDANT IN SATISFYING THE RULES GOVERNING THE TRIAL PROCESS. FARETTA SUPRA AT 834, FN. 46. THIS COURT HAS PREVIOUSLY DISPLAYED EQUAL WISDOM BY APPOINTING THE OHIO PUBLIC DEFENDER COMMISSION AS STAND BY COUNSEL FOR AUGUST CASSANO, EXTENDING THIS LOGIC TO ALLOW FOR MIXED OR HYBRID REPRESENTAION

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FULLY COMPORTS WITH THE HOLDING of FARETTA AND THE PRINCIPLES EMBODIED IN THE SIXTH AMENDMENT. EVEN BEFORE FARETTA WAS DECIDED, A KENTUCKY COURT HELD THAT THE SIXTH AMENDMENT CREATES A RIGHT TO MIXED REPRESENTATION, WARE V. BARKER (Ky., 1974), 514 S.W. 2d 692.

FORCING AN ACCUSED INTO AN either/OR SITUATION VIOLATES THE RULE THAT [T] He PROCEDURAL SAFE-GUARDS OF THE BILL OF RIGHTS ARE NOT TO BE TREATED AS mechANICAL RIGIDITIES. WHAT WERE CONTRIBUTED AS PROTECTIONS FOR THE ACCUSED SHOULD NOT BE TURNED INTO FETTERS, ADAMS V. UNITED STATES, EX REL McCANN (1942) 317 U.S. 269, 279.

DEFENDANTS REQUESTS THIS COURT TO Respect THE RATIONALE OF FARETTA BY APPOINTING him CO-COUNSEL IN his OWN BEHALF. THIS Request TO Recognize THE RIGHT TO BEAppointED CO-COUNSEL GAINS FURTHER SUPPORT FROM SECTION 10, ARTICAL 1 OF THE OHIO CONSTITUTION, which STATES IN PERTINENT PART: "IN ANY TRIAL, IN ANY COURT, THE PARTY ACCUSED SHALL BE ALLOWED TO APPEAR AND DEFEND IN PERSON AND WITH COUNSEL." ALTHOUGH a LOWER COURT HAS RULED THAT SECTION 10, ARTICAL 1, DOES NOT CREATE A RIGHT TO hyBRID REPRESENTATION, STATE V CARTER (1977) 53 OHIO APP. 2D 125, THE OHIO SUPREME COURT HAS NEVER RULED ON THIS ISSUE. THIS COURT MAY NOT IGNORE THE EXPLICIT USE OF THE CONJUCTIVE BY SECTION 10, ARTICAL 1.

IF THIS COURT WERE TO REFUSE TO APPOINT DEFENDANT CO-COUNSEL AS A MATTER OF RIGHT,

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IT CLEARLY HAS THE DISCRETIONARY AUTHORITY TO DO SO. SEE, EG., UNITED STATES V. HILL (CA. 10, 1975) 526 F. 2d 1019, 1024 1025: UNITED STATES V. CONDER (CA. 6, 1970) 423 F. 2d 904, 908, CERTIORARI DENIED (400 U.S. 958 UNITED STATES V. SWINTON (S.D.N.Y. 1975) 400 F. SUPP 805, 806. MANY COURTS HAVE ALLOWED SOME FORM OF HYBRID REPRESENTATION SEE EG HASLAM V. UNITED STATES (CA. 9, 197) 431 F.2D 362, CERTIORARI DENIED ( ) 402 U.S. 976 AFFIRMED ON REHEARING ( ), 437 F. 2d 955. (DEFENDANT AND COUNSEL BOTH ACTIVELY PARTTICIPATED DURING TRIAL): UNITED STATES V. GOW (CA. 4 1986) 394 F. 2d 182, (COUNSEL PREFORMED VOIR DIRE FOR DEFENDANT AND GAVE ADVICE DURING TRIAL; BAYLESS V. UNITED STATES (CA. 9, 1967) 381 F. 2D. 67 (DEFENDANTS ATTORNEY HELPED HIM CROSS EXAMINATION). THE DISCRETIONARY APPOINTMENT OF DEFENDANT AS CO-COUNSEL IS JUSTFIED BY ALL THE SAME REASONS SET FORTH ABOVE REGUARDING APPOINTMENT AS OF RIGHT.

DEFENDANT NEED NOT PARTIALLY WAIVE HIS RIGHT TO BE REPRESENTED BY APPOINTED COUNSEL IN ORDER TO BE APPOINTED AS CO-COUNSEL IN HIS OWN CASE. ALTHOUGH, FARETTA SUPRA AT 835 REQUIRES AN ACCUSED TO WAIVE THE RIGHT TO APPOINTED COUNSEL WHEN HE INVOKES THE RIGHT TO WAIVE REPRESENT HIM SELF, HERE THE DEFENDANT DOES NOT WANT TO WAIVE REPRESENTATION BY COUNSEL. HE SEEKS TO HAVE HIM SELF APPOINTED AS CO-COUNSEL ALONG WITH TRAINED ATTORNEYS ASSIGNED TO REPRESENT HIM. IT IS SIMPLY NONSENSICAL TO BE MUST COMPLY WITH FARETTA'S WAIVER REQUIREMENTS IN HIS SITUATION

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where He wants To act as a member of The Defense Team. Just as attorneys who act as co-counsel need not withdraw from the case when one of Them is taking a more active role in trial, Defendant need not waive Representation in order To Take an Active Role During certain portions of His Trial.

For The Reasons setforth Herein and in his original motion. The Defendant, August Cassano Respectfully Request That This Honorable Court Appoint him and The above named Attorneys From The Ohio Public Defender Commission as co-counsel on his Behalf.

Respectfully Submitted.

August Cassano

August Cassano
Pro-se
#A-145-242
P.O. Box 788
Mansfield Ohio
44901

Certificate of Service

Cassano, Hereby Certifies That a true copy of This motion For Appointment of co-counsel was mailed via Regular mail on This 25 Day of September 1998 To The Prosecutors of