No. 21-949

IN THE SUPREME COURT OF THE UNITED STATES

GEORGE LITTLE, ACTING SECRETARY,
PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL., PETITIONERS

v.

SAMUEL RANDOLPH, RESPONDENT

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

BRIEF FOR RESPONDENT IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

A unanimous panel of the Third Circuit affirmed the district court's grant of habeas relief on the ground that Respondent was denied his Sixth Amendment right to counsel of choice. Respondent was initially represented by appointed counsel but became financially able to retain counsel shortly before trial due to the sale of a family asset. Retained counsel had a scheduling conflict on the morning of the first day of jury selection and the trial court refused to postpone the start of jury selection by three hours to accommodate him. The trial court formally rejected retained counsel's entry of appearance as a result and forced Respondent to proceed to trial with previously appointed counsel, about whom Respondent had been complaining for months due to a lack of preparation and communication.

The question presented is:

> Whether the Court should revisit the settled, undisputed principle that a criminal defendant may forfeit his qualified right to counsel of choice by not retaining counsel in a timely manner in a case in which the decision below applies that principle, does not conflict with any decision of this Court or any other court of appeals and in which the Petitioners have made numerous material misrepresentations?

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A. Introduction

After months of complaining on the record about his appointed counsel's lack of pretrial preparation and of a complete breakdown in the attorney-client relationship, Respondent Samuel Randolph became financially able to hire his counsel of choice shortly before trial as a result of his family's sale of an asset. App. 4a–8a. After retained counsel's request for continuance was denied, he informed the court that he would be prepared and available to try the case, if the start of jury selection could be postponed for a few hours to accommodate a scheduling conflict. App. 8a–12a. Appointed counsel, meanwhile, confirmed the breakdown of his relationship with Mr. Randolph and urged the trial court to grant retained counsel's request. App. 12a. But the trial court refused, formally rejected retained counsel's entry of appearance, and forced Respondent to proceed to trial with appointed counsel.

Petitioners seek review of the Third Circuit's unanimous affirmance of a grant of habeas relief for denial of Respondent's Sixth Amendment right to counsel of his choice. Petitioners posit a circuit split that does not exist and propose a question that this case does not present. Notwithstanding Petitioners' suggestion that it is an unsettled question worthy of this Court's review, every circuit, including the Third Circuit, agrees that "a criminal defendant's right to counsel of choice may be moderated by a trial court's schedule" and ruled that the Pennsylvania Supreme Court "reasonably observed that the right of the accused to choose his own counsel must be weighed against and may be reasonably restricted

by the state's interest in the swift and efficient administration of criminal justice." App 21a-22a (internal quotation and ellipsis omitted). Yet the certiorari petition proceeds as if the Third Circuit held the opposite.

Applying the standard of review required by the Antiterrorism and Effective Death Penalty Act of 1996, both the Third Circuit and the district court concluded that no fairminded jurist would disagree that Mr. Randolph's Sixth Amendment right to counsel of choice was violated by the state court's unreasonable application of these settled principles, i.e., the bald and unjustified refusal to delay the start of jury selection for mere hours to allow retained counsel to represent Respondent. App. 17a–31a; App. 48a–62a. Petitioners do not challenge the Third Circuit's application of AEDPA in any respect. Nor do they explicitly request error correction. Rather, the crux of the petition appears to argue that the Third Circuit adopted a new rule whereby criminal defendants may no longer "forfeit or waive" their right to counsel of choice. Pet. i, 4. The Third Circuit did no such thing.

B. Factual Background

Mr. Randolph is incarcerated as a result of convictions stemming from three separate shooting incidents in Harrisburg, Pennsylvania in September 2001. Two of the shootings were non-fatal; in the third, Thomas Easter and Anthony Burton were killed, and several other individuals were injured. *See Commonwealth v. Randolph*, 873 A.2d 1277, 1280 (Pa. 2005). Mr. Randolph's most serious convictions were for the first-degree murders of Mr. Easter and Mr. Burton, for which he received death sentences. *Randolph*, 873 A.2d at 1280.

Attorney Allen Welch was appointed as Mr. Randolph's attorney in late-August 2002, approximately one year after the shootings and eight months prior to trial. *See* JA833[1] (8/27/02 appointment order). At the first pretrial hearing in which Mr. Welch participated, in December 2002, Mr. Randolph was not present. JA748 (Tr. 12/9/02 at 4). Mr. Welch requested a continuance of the trial date because he had not received important discovery and had just recently received a copy of the file kept by prior counsel in the non-capital cases.[2] JA748 (Tr. 12/9/02 at 2–3).

Mr. Welch indicated that while he would like to be able to try the case the following month (January 2003), he hesitated to commit to such a trial date because he was not prepared and was in the process of moving his office. JA748 (Tr. 12/9/02 at 3). The court continued the trial date until February. JA748 (Tr. 12/9/02 at 4).

The first hearing at which Mr. Randolph and Mr. Welch were both present took place in early January. From the beginning of this hearing, Mr. Randolph expressed his concerns about Mr. Welch's lack of preparation and communication. Mr. Randolph noted that, despite Mr. Welch having been appointed for several months at that point, he had visited Mr. Randolph in jail only once. JA614 (Tr. 1/3/03 at 6); JA615 (Tr. 1/3/03 at 11). Mr. Welch acknowledged that he had not been communicating much with Mr. Randolph because he viewed such communication as

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[1] References to the Joint Appendix filed in the Third Circuit are cited JA___.

[2] Mr. Randolph was previously represented by another attorney on the non-fatal shootings, but that attorney withdrew because he did not feel capable of trying a capital case. *See* App. 4a. Mr. Welch ultimately took over representation of all three cases.

useless at that juncture. JA615 (Tr. 1/3/03 at 11–12) ("Your Honor, what I've tried to explain to Sam and I would say it again, I can sit out at the jail and he can talk to me all day long and night. That doesn't accomplish anything."). Mr. Randolph also expressed concern at the hearing that Mr. Welch wanted Mr. Randolph to plead insanity, that they "can't agree on how [they are] going to trial," and that Mr. Welch "doesn't have [his] best interest at hand." JA614 (Tr. 1/3/03 at 6).

Mr. Randolph's dissatisfaction with Mr. Welch eventually led the prosecutor to inform Mr. Randolph that he also had the right to retain counsel or to proceed pro se. JA617 (Tr. 1/3/03 at 17–18). At the conclusion of this hearing, the court indicated that it would permit Anthony Thomas, another attorney who previously had limited involvement in the case, to participate as second chair counsel on a voluntary basis. JA617 (Tr. 1/3/03 at 19–20); JA618 (Tr. 1/3/03 at 23–24).

Although "[t]he record reflects that Randolph was anxious to go to trial," at the early January hearing the court nonetheless concluded, sua sponte, that trial would have to be continued to March. Pet. App. 36a–37a. The circumstances supporting this determination included the fact that Mr. Welch had only recently received significant discovery, was still waiting on grand jury transcripts, and had not filed pretrial motions; Mr. Welch "was simply not prepared." *Id.*

The next pretrial hearing took place in chambers a few weeks later. Again, Mr. Randolph was not present for this hearing, and Mr. Welch admitted that he had not advised Mr. Randolph that it was taking place. JA750 (Tr. 1/31/03 at 2). In light of Mr. Randolph's absence, the court explained that the hearing was just "to make a

record for the Court to consider some of the omnibus pretrial motions" and stated that it was "not going to require [Mr. Randolph's] presence because there's nothing going to be done or said or decisions made." *Id.* Despite the court's characterization of this hearing, the entire proceeding involved substantive discussion of the pretrial motions that had, by that point, been filed. *See* JA750–54 (Tr. 1/31/03 at 2–17). Mr. Welch had filed a six-page omnibus document comprising five separate motions. JA882–87 (omnibus motion).

One of the motions discussed was Mr. Welch's request for funds to hire an investigator. JA752 (Tr. 1/31/03 at 12). Mr. Welch indicated that he "would like to get one out real fast." *Id.* He believed this was important because "[o]bviously, at the bare minimum I'm not about to just presume that everything that the police say they were told is a hundred percent correct." JA752 (Tr. 1/31/03 at 12).

Towards the end of this hearing, Mr. Welch made several comments in the presence of the court and the prosecutor that revealed privileged information from Mr. Randolph. Mr. Welch revealed that Mr. Randolph had told him that he did not want to be evaluated by a psychologist or to present mitigating evidence. JA753 (Tr. 1/31/03 at 15). And Mr. Welch offered the unsolicited comment that:

> [M]y way of working with Sammy, quite frankly, if he's pushing for a motion and I don't think the motion is appropriate or needed, I'll take a sheet of paper out, write in my own handwriting on such and such a date he wanted me to file this motion, I'm refusing to do it, here is why, state the reason, sign it and give it to him. He can have that if he wants to come in yelling somewhere that I was ineffective for not doing it.

JA753 (Tr. 1/31/03 at 16).

In February, Mr. Welch requested a continuance because his mother was hospitalized and critically ill, and the court continued the trial date to May 5, 2003. App. 37a.

During the next hearing, held on March 27, Mr. Welch revealed that he still had not hired an investigator. JA756–57 (Tr. 3/27/03 at 8–9). Despite indicating in January that he needed an investigator right away, Mr. Welch did not file his petition for funds until February 19. JA905. This petition was denied without prejudice by the president judge on February 24 because it did not comply with a local administrative order. JA906. Specifically, it did not contain an hourly rate or a total cap amount. *Id.* Instead of refiling a compliant petition immediately, Mr. Welch waited over a month to complain to the trial judge.

Mr. Welch offered a series of excuses for not simply correcting and refiling his petition. He first stated that he did not want to include too much detail to avoid revealing his investigation plans to the prosecution. JA756–57 (Tr. 3/27/03 at 8–9); JA758 (Tr. 3/27/03 at 14). But both the prosecutor and the court pointed out that nothing in the administrative order required him to do so; it simply required an hourly rate and an overall cap amount. JA758 (Tr. 3/27/03 at 14–15). Mr. Welch then complained that he could not possibly estimate the number of hours required. JA757 (Tr. 3/27/03 at 11) (claiming that he did not know "if it's going to take 10 [hours] or if it's going to take a thousand"). Again, the prosecutor proposed a solution: "If I might suggest, I think that if you could just start high, maybe 50 hours, 100 hours; and then if you need more, you could always ask for supplemental

funds." *Id.* Finally, Mr. Welch complained that "[t]here's no doubt in my mind, Your Honor, that the President Judge is not about to give me what I want." *Id.* The trial judge responded that it was impossible to know without asking. *Id.*

Mr. Welch ultimately obtained funds for an investigator on April 4, 2003, a month before trial. JA907. Mr. Welch subsequently acknowledged that he never used these funds. JA788 (Tr. 9/5/03 at 16). He blamed Mr. Randolph for his failure. He claimed that, because information Mr. Randolph had provided had not yielded results, he saw no need to investigate further. *Id.* Mr. Welch did not explain why the purported failure of Mr. Randolph to provide fruitful information obviated the previously expressed need to independently interview key witnesses who had spoken with the police.

By the end of the March 27 hearing, it was apparent that the attorney-client relationship between Mr. Randolph and Mr. Welch had broken down completely. Mr. Randolph noted that Mr. Welch had not even informed him that pretrial motions had been filed and requested to proceed pro se. JA763 (Tr. 3/27/03 at 34–35).

On April 3, 2003, the court held a hearing on Mr. Randolph's request to proceed pro se. The court indicated that it had wanted to afford Mr. Randolph time to reflect on his decision because it believed Mr. Randolph was responding more out of frustration than a genuine desire to proceed pro se. JA620 (Tr. 4/3/03 at 2). Mr. Randolph agreed and said that he "didn't want to waive [his] right to counsel, but [he] did want to change [his] appointed counsel." JA620 (Tr. 4/3/03 at 3). The court

summarily denied that request and refused to consider Mr. Randolph's complaints about counsel's conduct, informing Mr. Randolph that he could raise Mr. Welch's ineffectiveness later. JA620–21 (Tr. 4/3/03 at 3–5). After Mr. Randolph's request for new counsel was denied, the court indicated Mr. Randolph had to decide between proceeding pro se or with Mr. Welch as counsel. JA620 (Tr. 4/3/03 at 4); JA621 (Tr. 4/3/03 at 8). Mr. Randolph began asking the court about the circumstances in which he would be permitted to proceed pro se. JA621–22 (Tr. 4/3/03 at 5–9).

The court eventually expressed its view that Mr. Randolph was delaying the proceedings by not being clear whether he wished to proceed pro se or be represented by Mr. Welch. JA622 (Tr. 4/3/03 at 9). Mr. Randolph reiterated that he wanted the trial "to be as prompt as possible," and that his "whole thing was Mr. Welch's performance." *Id.* Following a recess and further exchange between Mr. Randolph and the court regarding the conditions of proceeding pro se, Mr. Randolph informed the court that he did not wish to proceed pro se. JA624 (Tr. 4/3/03 at 19).

Mr. Randolph retained attorney Samuel Stretton on April 29, 2003. Mr. Randolph initially contacted Mr. Stretton in January 2003 but had previously been unable to afford to retain him. App. 8a. Mr. Thomas contacted Mr. Stretton about his retention on April 29 and Mr. Stretton sent both his entry of appearance and a motion to continue the trial date to the trial court via overnight mail the next day. *Id.*

Mr. Stretton's entry of appearance and continuance motion were received on the Thursday before the Monday on which jury selection was scheduled to begin; the

trial court scheduled a telephonic hearing for that same day. *Id.*; JA822–24 (Stretton entry of appearance); JA827–31 (Stretton continuance motion). During that hearing, Mr. Stretton stated that he had received communications from Mr. Randolph and his family about potentially retaining him on January 26, 2003. JA626 (Tr. 5/1/03 at 8). But Mr. Randolph's ability to retain Mr. Stretton was dependent on his mother's ability to sell the family bar. Although the family thought the sale would occur in February or March, that sale fell through. JA626–27 (Tr. 5/1/03 at 8–9). It was not until just before the telephonic hearing that Mr. Thomas told Mr. Stretton that the sale was securely in place; Mr. Stretton told the court that "[i]t was then I felt I could enter my appearance." JA627 (Tr. 5/1/03 at 9–10).

Mr. Stretton noted that the relationship between Mr. Welch and Mr. Randolph had broken down and that Mr. Randolph no longer had confidence in Mr. Welch. JA625–26 (Tr. 5/1/03 at 3–5). Mr. Stretton explained to the court that while he believed a continuance would be necessary, Mr. Randolph wished for it to be short because he "would like to get to trial as soon as possible." JA626 (Tr. 5/1/03 at 6). Mr. Stretton also explained that he needed a continuance as a result of conflicting court proceedings in the ensuing two weeks and because he had yet to receive a copy of Mr. Randolph's case file. JA625 (Tr. 5/1/03 at 3–4); JA628 (Tr. 5/1/03 at 14). Mr. Welch likewise "implored the court to grant the continuance, reiterating the breakdown in his relationship with Randolph and emphasizing the importance of a defendant's right to counsel of choice." App. 39a.

The trial court indicated that it was inclined to deny the continuance. JA627 (Tr. 5/1/03 at 12). It declared that "[t]he selection process is pretty much etched in stone" even after Mr. Stretton modified his request to ask whether the court would be willing to delay the proceedings by "several days" or by "a day or two" so that he could prepare and try the case. JA628 (Tr. 5/1/03 at 14); JA629 (Tr. 5/1/03 at 19). It simply stated that it would "consider" building in time between jury selection and the start of trial. JA629 (Tr. 5/1/03 at 19).

On the morning of Monday, May 5, court convened at 10:37 a.m. JA636 (Tr. 5/5/03 at 2). The parties and the trial court discussed the matter of Mr. Randolph's counsel prior to the commencement of jury selection. The trial court put on the record that it had received a call from someone in Mr. Thomas's office the preceding Friday indicating "that Mr. Stretton wants to be in on the case as long as he retains discovery and that we postpone the jury selection until 12 o'clock today because he has a schedule conflict." JA637 (Tr. 5/5/03 at 6). The court noted that it refused this three-hour accommodation and instead agreed to postpone the start of jury selection only until ten o'clock. *Id.*

The trial court next officially denied Mr. Stretton's continuance motion. JA637 (Tr. 5/5/03 at 7). In response, Mr. Thomas renewed the request to delay jury selection by "a few hours" so that Mr. Stretton could pick the jury and then try the case. JA638 (Tr. 5/5/03 at 9). The court again refused this request and then formally rejected Mr. Stretton's entry of appearance. JA638 (Tr. 5/5/03 at 9–10).

Mr. Welch, Mr. Thomas, and Mr. Randolph all protested the trial court's decision yet again. Mr. Welch asserted that he had "at this point absolutely a complete breakdown of communication with my client, which is largely why Mr. Thomas is here, so somebody can—he acts as a translator for us I guess is the best way to put it. It's a very difficult situation." JA638 (Tr. 5/5/03 at 11). Mr. Thomas reiterated that the only reason for the delay was that the funds for Mr. Stretton's retainer had become available only the prior week and made clear that "[t]here was no bad faith on the part of the Defendant at all." *Id.* He also corroborated the existence of a breakdown in communication between Mr. Randolph and Mr. Welch. JA639 (Tr. 5/5/03 at 16). Mr. Randolph confirmed the breakdown with Mr. Welch, stating that "[o]ur differences just can't be settled. Our relationship is just too damaged. And I feel comfortable with Mr. Stretton." JA640 (Tr. 5/5/03 at 18).

The court again refused to consider a brief continuance and directed that Mr. Welch and Mr. Thomas would begin the jury selection process. JA640 (Tr. 5/5/03 at 19). The first prospective jury panel entered the courtroom at 11:10 a.m. JA640 (Tr. 5/5/03 at 20). The continuance sought by Mr. Stretton would thus have delayed the beginning of jury selection by less than an hour.

Mr. Welch represented Mr. Randolph during jury selection and the guilt phase of trial. On the first day of trial, Mr. Randolph renewed his request to permit Mr. Stretton to represent him and indicated that Mr. Welch "definitely wasn't prepared without the proper investigation. It's a lot of witnesses that has to be

contacted." SA44[3] (Tr. 5/8/03 at 44). Mr. Thomas agreed, noting that "Mr. Welch and I disagree on the degree of the preparedness that we have." SA51 (Tr. 5/8/03 at 51).

C. Procedural History

The jury convicted Mr. Randolph on all counts at the conclusion of a four-day trial. App. 12a. Following the guilty verdicts but before the commencement of the penalty phase, Mr. Randolph informed the court that he wished to proceed pro se. *Id.* He was permitted to do so and then declined to testify or present evidence at the penalty phase. *Id.* The jury found two statutory aggravating circumstances and no mitigating circumstances, and sentenced Mr. Randolph to death on both first-degree murder counts. App. 12a–13a.

Mr. Stretton represented Mr. Randolph at the formal sentencing proceeding two months later, during which the trial court imposed the death sentences for the murder counts and sentenced Mr. Randolph to a term of years on the remaining counts. Mr. Stretton again raised the counsel-of-choice issue by way of motion for extraordinary relief. JA777 (Tr. 7/10/03 at 5–7). Mr. Stretton made a proffer regarding trial counsel's unpreparedness and regarding the breakdown in communication between Mr. Randolph and Mr. Welch. *Id.* The trial court denied Mr. Stretton's motion and denied his request to make a fuller record. *Id.* at 12.

[3] References to the Supplemental Appendix filed in the Third Circuit are cited as SA___.

Mr. Stretton continued to represent Mr. Randolph on direct appeal where he again raised the claim that Mr. Randolph was unconstitutionally denied his counsel of choice, among other issues. The Pennsylvania Supreme Court affirmed Mr. Randolph's convictions and sentences, *Randolph*, 873 A.2d at 1284, and this Court denied certiorari, *Randolph v. Pennsylvania*, 547 U.S. 1058 (2006).

Mr. Randolph next initiated state post-conviction proceedings by filing a pro se petition pursuant to Pennsylvania's Post Conviction Relief Act, 42 Pa. Stat. and Cons. Stat. Ann. §§ 9541–46 (West). The PCRA claims were never ruled on, however. Following "a series of events, including Randolph being severely injured during an altercation with correctional officers, Randolph sought to waive PCRA review and to pursue only federal habeas relief." App. 45a. Mr. Randolph was permitted to withdraw his PCRA petition. *Id.*

Mr. Randolph then litigated this habeas petition in the United States District Court for the Middle District of Pennsylvania. The district court granted habeas relief on Mr. Randolph's claim that he was denied his right to counsel of choice. In evaluating the claim, the district court found, on one side of the scale, "a multitude of good-faith, compelling reasons," App. 60a, for briefly continuing the trial to permit retained counsel to represent Mr. Randolph and "quite literally, not a single countervailing reason for denying the continuance" on the other, *id.*

Applying AEDPA's standard of review, the district court determined that "the state court's ruling on this claim 'was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility of

fairminded disagreement.'" App. 60a–61a (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)). It then determined that habeas relief was appropriate after conducting the necessary de novo review, concluding that "there is but one conclusion a reasonable jurist could reach when confronted with the facts of this case: Randolph was unlawfully denied his Sixth Amendment right to counsel of choice." App. 63a.

Petitioners appealed, and a Third Circuit panel affirmed in a unanimous opinion. The opinion of the court of appeals largely mirrors the district court's decision. *See* App. 1a–32a. Petitioners' rehearing petition was denied. This petition follows.

REASONS TO DENY CERTIORARI

Petitioners' fact-specific plea for error correction does not satisfy this Court's criteria for certiorari review. *See* Sup. Ct. R. 10. Contrary to Petitioners' suggestion, this case does not present any unsettled question of law or split of authority. Moreover, Petitioners' argument is dependent on multiple significant factual misstatements, which is reason alone for the Court to deny certiorari. *See* Sup. Ct. R. 14.4. The Third Circuit's straightforward application of AEDPA's standard of review and this Court's precedents is correct. Certiorari should be denied.

I. The Petition Seeks Nothing More than Error Correction.

Petitioners seek nothing more than for this Court to correct what he believes to be an erroneous application of a properly stated rule of law. That is not an appropriate basis for this Court's review. Petitioners do not identify a single legal proposition that the Third Circuit got wrong. *See* Pet. 1–8. Indeed, Petitioners do

not cite or reference anything from the Third Circuit opinion, except to note the bare fact that it affirmed the district court's grant of relief. *Id.*

Instead, Petitioners first set forth a summary of this Court's counsel-of-choice cases, with which Respondent does not quarrel and the Third Circuit's opinion is entirely consistent. Pet. 4–5. They then provide a grossly distorted recitation of the facts, *see* Sec. IV, *infra*, and summarily complain that Mr. Randolph's "counsel of choice claim prevailed," Pet. 6. Petitioners provide no reason to depart from this Court's practice of refusing to grant review for pure error correction, and such a departure would "very substantially alter the Court's practice." *Tolan v. Cotton*, 572 U.S. 650, 661 (2014) (per curiam) (Alito, J., concurring in the judgment).

II. The Petition Does Not Raise an Unsettled Question of Law.

Petitioners' question presented—whether a criminal defendant may waive or forfeit his right to counsel of choice by his actions, Pet. i—is neither unsettled nor in dispute. This Court has made clear that "[t]he Sixth Amendment right to choose one's own counsel is circumscribed in several important respects." *Wheat v. United States*, 486 U.S. 153, 159 (1988). It has specifically explained that the qualified right to counsel of choice may be forfeited by the defendant's dilatory conduct. *Morris v. Slappy*, 461 U.S. 1, 13 (1983) ("[T]he trial court was abundantly justified in denying respondent's midtrial motion for a continuance so as to have Goldfine represent him. On this record, it could reasonably have concluded that respondent's belated requests to be represented by Goldfine were not made in good faith but were a transparent ploy for delay.").

The Third Circuit's opinion applied these precedents. It accurately analyzed *Wheat*, *Morris*, and other relevant decisions of this Court. App. 20a–22a. It acknowledged that "the right to counsel of choice is not absolute." App. 22a. And it made clear that "the Pennsylvania Supreme Court reasonably observed that 'the right of the accused to choose his own counsel . . . must be weighed against and may be reasonably restricted by the state's interest in the swift and efficient administration of criminal justice.'" App. 22a (quoting *Randolph*, 873 A.2d at 1282) (alteration in original). The petition does not identify any question of law that has been left unanswered and does not identify any prior case that needs any further clarification or explanation.

III. There is No Split of Authority.

Petitioners allege two splits of authority, neither of which withstands scrutiny. Petitioners first claim that the decision below creates a split of authority over "whether a defendant must establish that he or she is able to afford the attorney he or she wishes to retain" in order to assert the right to counsel of choice. Pet. 6. But nothing in the Third Circuit's opinion suggests that a criminal defendant can insist upon representation by an attorney he cannot afford. To the contrary, the Third Circuit expressly recognized that a criminal defendant cannot "'insist on representation by an attorney he cannot afford or for other reasons declines to represent the defendant.'" App. 21a (quoting *Wheat*, 486 U.S. at 159). The Third Circuit's decision plainly does not conflict with any decision of this Court or any other court of appeals.

Petitioners next claim that the decision below creates a split of authority as to "whether a defendant may malinger and maliciously delay his or her case without justification" and still insist on his right to counsel of choice. Pet. 6. This claim echoes their suggestion that this case presents the question of whether "a criminal defendant can forfeit or waive his or her sixth amendment right to counsel of choice by not alerting the trial court of his or her intention to retain new counsel until shortly before trial begins." Pet. i, 4. But Petitioners again point to no portion of the Third Circuit's opinion that purports to stand for these propositions. Nothing in the opinion does.

The Third Circuit observed that this Court "has recognized that a trial court must have 'wide latitude in balancing the right to counsel of choice against the needs of fairness.'" App. 21a (quoting *United States v. Gonzalez-Lopez*, 548 U.S. 140, 151 (2006)). It further noted that "a defendant's right to counsel of choice may be moderated by a trial court's schedule, or the court's need to 'assembl[e] the witnesses, lawyers, and jurors at the same place at the same time.'" *Id.* (quoting *Morris*, 461 U.S. at 11) (alteration in original).

In light of these observations, it is difficult to discern how Petitioners believe the decision below held that a criminal defendant may "maliciously delay" his case without justification and nonetheless insist on his right to counsel of choice. Pet. 6. No part of the opinion below supports that characterization. As such, there is no split of authority on the question and this Court's review is unwarranted.

IV. The Petition Depends on Multiple Misstatements of Fact.

Petitioners make sweeping allegations that contain no citations to the record or the opinions below. *See* Pet. 5–6. Virtually every one of these allegations is misleading or outright false. Because Mr. Randolph has an obligation to point out these misstatements in his brief in opposition, *see* Sup. Ct. R. 15.2, he enumerates them here.

A. Petitioners' assertion that Mr. Randolph "was adequately represented by his appointed attorney where he has heretofore failed to establish that Attorney Welch was ineffective in any manner" is false. Pet. 5.

As set forth above, Mr. Welch failed to meaningfully communicate with Mr. Randolph leading up to trial, revealed privileged information in the presence of the court and prosecutor, and failed to hire an investigator in a capital double homicide case despite being provided funds to do so. JA615 (Tr. 1/3/03 at 11–12); JA753 (Tr. 1/31/03 at 15–16); JA788 (Tr. 9/5/03 at 16). Mr. Welch's co-counsel, Mr. Thomas, announced on the record during trial that the defense was not prepared. SA51 (Tr. 5/8/03 at 51). Mr. Thomas subsequently testified about Mr. Welch's lack of preparation and the haphazard manner in which the defense was conducted. JA594–95 (Tr. 7/29/19 at 38–43).

Mr. Randolph raised multiple specific claims of ineffective assistance of counsel in this habeas litigation, the details of which are not germane to this petition. The district court's decision "addressed only the choice-of-counsel claim, as the disposition of that claim obviated the need to address any others." App. 16a. But in no sense did Mr. Randolph receive adequate representation at trial.

B. Petitioners' assertion that Mr. Randolph's request to be represented by his counsel of choice "was made for the sole purpose of delay" is false. Pet. 5.

As the Third Circuit found, "[u]p until the point he secured the funds to hire Stretton, Randolph more-or-less was the only party eager to proceed to trial." App. 24a (cataloging instances in which Mr. Randolph urged the trial court to proceed as quickly as possible); *see also* App. 28a ("Throughout the pretrial months, Randolph was eager to get to trial and resisted each delay. Randolph announced his hiring of Stretton as soon as he had the money to hire him, and Stretton's final request for a delay was modest—he sought to postpone the beginning of jury selection by only *three hours*.") (emphasis in original).

The district court likewise noted that prior to hiring Mr. Stretton, Mr. Randolph had "been averse to delays." App. 39a. Mr. Randolph attempted to hire Mr. Stretton when he did because his "financial circumstances changed several days before trial." App. 38a. And even at the point Mr. Randolph sought to delay the trial to enable Mr. Stretton's participation, he "only wanted a short continuance" because he wanted "to get to trial as soon as possible." JA626 (Tr. 5/1/03 at 6). Mr. Randolph's request to have his counsel of choice represent him at his capital trial was not for the purpose of delay at all, let alone for the sole purpose of delay.

C. Petitioners' assertion that Mr. Randolph "continued his trial for a year without alerting the trial court that he intended to retain Attorney Stretton" is false. Pet. 5.

First, Mr. Randolph did not "continue[] his trial for a year." Pet. 5. Mr. Welch was not appointed to represent Mr. Randolph until August 27, 2002. JA833 (8/27/02 appointment order). Trial commenced on May 5, 2003. The *total* amount of time

between when Mr. Randolph was first appointed counsel on his capital charges and the first day of jury selection was just over eight months.

During that time, the defense requested two continuances, both of which owed entirely to Mr. Welch's personal circumstances. The first resulted in a continuance from December 2002 to February 2003, "with the full concurrence of the prosecution," because Mr. Welch was not prepared. App. 57a. The "second and *only other* continuance Attorney Welch sought was in February 2003 because his mother was critically ill and hospitalized, circumstances again outside the control of Randolph and his counsel." App. 58a (emphasis in original). As the Third Circuit correctly found, these continuances "had nothing to do with Randolph or Stretton." App. 24a. Regardless, the total amount of time attributable to defense continuances was approximately four months, not a year.

Second, Mr. Randolph did not wait to alert the trial court that he wished to retain Mr. Stretton. Mr. Randolph "informed the court about his desire to retain Attorney Stretton as soon as retaining him was possible, *i.e.*, when funds became available." App. 61a. And "the trial court had known for months that Randolph was ardently opposed to being represented by Attorney Welch." App. 61a–62a. As early as January 2003, Mr. Randolph "not only expressed to the trial court his dissatisfaction with Welch . . ., he also asked the court whether he could 'hir[e] a second chair counsel.'" App. 24a–25a (quoting JA 617).

D. Petitioners' assertion that Mr. Randolph "decided to retain Attorney Stretton as early as his preliminary hearings in this matter" is false. Pet. 5.

Mr. Randolph did not "decide[] to retain Attorney Stretton as early as his preliminary hearings." Pet. 5. Mr. Randolph "first contacted Stretton in January 2003 but could not afford to hire him." App. 8a. The first contact thus occurred a little more than three months before trial, which was months after the preliminary hearings and at a time when Mr. Randolph was not yet in a financial position to hire Mr. Stretton.

E. Petitioners' assertion that Mr. Randolph "refused to assist Attorney Welch, his appointed attorney, in investigating his defense" is false. Pet. 5.

Mr. Randolph did not refuse to assist Mr. Welch in investigating his defense. The breakdown in the relationship between Mr. Randolph and Mr. Welch was primarily the result of Mr. Welch's failure to communicate and prepare. And Mr. Welch did not hire an investigator, so he could not have properly investigated the case regardless of Mr. Randolph's level of cooperation with him.

F. Petitioners' assertion that Mr. Randolph's chosen counsel "was not prepared to proceed to trial without unreasonable delay" is false. Pet. 5.

The eventual continuance request that Mr. Stretton made to enable his participation at trial was simply to delay the start of jury selection by three hours; the trial court "refused to grant even that modest accommodation." App. 25a. As the district court found,

> [a]ny potentially legitimate basis to deny the continuance evaporated when Attorney Stretton modified his request and asked for a mere three-hour delay: the jury pool would not need to be sent home and recalled on

> a different day; no other criminal or civil matters would be affected or delayed; the prosecution would not be materially prejudiced by having to reschedule witnesses; the victims' families would not be facing significant delays in trial. Quite simply, no objectively valid reason for denying the continuance remained.

App. 60a. Mr. Stretton spoke with Mr. Thomas late the night before jury selection was to commence and reiterated his willingness to try the case if only the three-hour continuance were granted, which Mr. Thomas relayed to the trial court on the morning jury selection began. JA638 (Tr. 5/5/03 at 9). Mr. Stretton was therefore prepared to proceed to trial with virtually no delay whatsoever, as the Third Circuit correctly found. *See* App. 29a ("Given the short delay Stretton requested, the Commonwealth cannot seriously claim that 'Stretton would have had to build Randolph's defense from the ground up which would require an unreasonable delay.'").

G. Petitioners' assertion that Mr. Randolph "did not have the funds to hire Attorney Stretton" is false. Pet. 5.

The Third Circuit rejected this contention for two reasons. For one, the district court concluded otherwise, and the Third Circuit determined that this finding was not clearly erroneous. App. 29a. For another, "whether Randolph secured the funding *to eventually pay* Stretton is largely irrelevant. By May 1, 2003, Stretton had agreed to represent Randolph and had entered his appearance to do just that." *Id.* (emphasis in original).

V. The Opinion Below is Correct.

The Third Circuit engaged in an exhaustive analysis of the Pennsylvania Supreme Court's denial of the counsel-of-choice claim and determined that it

constituted an unreasonable application of clearly established federal law under 28 U.S.C. § 2254(d)(1). App. 22a–28a. This analysis was correct, and Petitioners do not challenge it in any respect.

The Third Circuit's determination that habeas relief is warranted under the facts of this case was also correct. While the right to counsel of choice is qualified, "the Sixth Amendment entails a 'presumption in favor of counsel of choice.'" App. 21a (quoting *Wheat*, 486 U.S. at 160). That presumption cannot be overcome where the Commonwealth identifies no legitimate countervailing interest.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: February 28, 2022