

No. 21A94 (CAPITAL CASE)

IN THE SUPREME COURT OF THE UNITED STATES

Time Shoop, Warden

Applicant

v.

August Cassano,

Respondent.

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

No execution date is presently scheduled.

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After the United State Court of Appeals for the Sixth Circuit granted Respondent August Cassano a writ of habeas corpus based on two denials of his constitutional right to represent himself as recognized in *Faretta v. California*, 422 U.S. 806 (1975), the *en banc* Sixth Circuit denied the Warden's petition for rehearing. The Sixth Circuit then denied the Warden's motion to stay the mandate, as well as a subsequent unopposed motion to reconsider the motion to stay. With Cassano's permission, the Warden filed an unopposed motion to recall and stay the mandate with Justice Kavanaugh, who requested Cassano file this response.

Wishing to avoid burdening this Court with litigation over this matter, Cassano agreed not to oppose the Warden's motion solely because he faces minimal prejudice from the delay associated with allowing this Court to dispose of the Warden's petition for writ of *certiorari* in the normal course. As the Warden correctly noted, however, "Cassano explicitly does not concede that this matter is worthy of *certiorari*, and he does not agree with Petitioner's assertions that this Court is likely to grant *certiorari* and/or to reverse the judgment below." (Applicant's Mot. at 2.)

Cassano extensively rebutted the Warden's arguments that the Sixth Circuit erred in deciding this case in his response opposing the Warden's petition for rehearing before the *en banc* Sixth Circuit, and refers the Court to that document, appended here, (*see* Appendix, 6th Cir. Doc. 61), for detailed reasons why the Warden's anticipated petition for writ of *certiorari* is not likely to be granted and this Court is not likely to reverse the court of appeals. Of course, in his Brief in Opposition, Cassano will set forth all the reasons why this Court should deny the Warden's petition for writ of *certiorari*. For purposes of this response, however, Cassano notes that the Warden's pending motion to recall and stay the mandate offers the same arguments as his rehearing petition, with one notable exception.

Here, the Warden does not even attempt to account for the state-court language that fatally undermines his arguments regarding Cassano's initial written request to represent himself, in a motion he filed in May of 1998 titled "Waiver of Counsel." In that motion, Cassano stated that he wanted to "control the organization and content of his defense, be able to file motions, argue points of laws [sic], call favorable witnesses, cross-examine any adverse witnesses and be allowed to conduct his defense in a manner considered fundamental to the fair administration of American justice." (R. 134-1, PageID 863.) Although the Supreme Court of Ohio initially acknowledged this motion when reciting the facts of Cassano's *Faretta* claim, it inaccurately stated in its analysis of that claim the following:

Cassano's initial demand to represent himself focused on hybrid representation. *Cassano's only written motion on that point was made in September 1998 and related solely to hybrid representation.* Cassano did not mention that he wanted to represent himself alone until April 23, 1999, only three days before the start of the trial.

State v. Cassano, 772 N.E.2d 81, 91 (Ohio 2002) (emphasis added). Cassano did file a "Motion for Appointment of Co-counsel" on September 25, 1998, (R. 134-3, PageID 1300), but Cassano's earlier (written) May 1998 motion concerned Cassano's right under *Faretta* to "represent himself," not hybrid representation. (R. 134-1, PageID 863.)

Whether considered an unreasonable determination of the facts in the record before it under 28 U.S.C § 2254(d)(2) or a failure to adjudicate the claim related to his written request altogether, the state court's mistake means AEDPA deference does not apply to this claim, as the Sixth Circuit correctly held. The Warden's arguments here ignore this mistake. Below, they hinged on a paradoxical reading of the state court's words that would render that section of the court's decision redundant and unintelligible. (See Appendix, 6th Cir. Doc. 61, at pages 11–14.) The Sixth Circuit's *de novo* review was proper because there is simply no way around the fact

that the state court overlooked Cassano's initial written motion when adjudicating his self-representation claim.

For these reasons, as well as all of the reasons stated in his opposition to the Warden's rehearing petition, (*see id.* at pages 7–17), Cassano submits that this Court will deny the Warden's petition for writ of *certiorari* and will not reverse the Sixth Circuit's well-reasoned opinion. Nevertheless, he does not object to the Court granting the Warden's pending motion to recall and stay the mandate to allow for the orderly disposition of this case in the normal course.

Respectfully submitted,

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September 17, 2021