Appendix

No. 18-3761

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AUGUST CASSANO, *Petitioner-Appellant*,

v.

WARDEN, Chillicothe Correctional Institution, *Respondent-Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
CASE NO. 1:03-cv-1206

PETITIONER-APPELLANT AUGUST CASSANO'S RESPONSE TO PETITION FOR REHEARING *EN BANC*

THIS IS A DEATH PENALTY CASE

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The Court should deny the Warden's *en banc* petition. For all its bluster, the petition fails to offer a single reason why this request complies with the requirements of Federal Rule of Appellate Procedure 35 or this Court's operating procedures. A petition for rehearing *en banc* "is an extraordinary procedure intended to bring to the attention of the entire court a precedent-setting error of exceptional public importance or an opinion that directly conflicts with Supreme Court or Sixth Circuit precedent." 6 Cir. I.O.P. 35(a). The panel's well-reasoned decision presents neither problem. The opinion does not commit the errors enumerated in the Warden's retelling; it pays careful respect to the determinations of the Supreme Court of Ohio and faithfully applies controlling U.S. Supreme Court case law. It merely reaches a conclusion contrary to that which the Warden would prefer.

The Warden all but concedes that he cannot meet Rule 35's requirements for *en banc* rehearing, insisting it should be "reason enough" for *en banc* review that "the panel erroneously granted habeas relief to a repeat murderer." (Pet., Doc. 58, at 21.) But "[a]lleged errors" in "the application of correct precedent to the facts of the case" are not matters for rehearing *en banc*. 6 Cir. I.O.P. 35(a). The Warden identifies no Circuit splits created by the panel's decision, and identifies no binding precedent which the panel defied. At most, the Warden complains that the panel's analysis "looks nothing like the approach this Court usually takes." (Pet., Doc. 58, at 22.) This is a far cry from the demanding requirements of Rule 35. Nor would this

case present a convenient vehicle for rehearing *en banc*, given that the panel reached only one of the seven issues certified for Cassano's appeal.

The Court should reject the Warden's demand for *en banc* review of a decision that he cannot show contradicts any binding caselaw or creates any Circuit conflict.

I. The Warden identifies no issues necessitating the intervention of the *en banc* Court.

Despite reciting the elements of Federal Rule of Appellate Procedure 35(b), (*see* Pet., Doc. 58, at 6), the Warden's petition fails to comport with the requirements of the Rule; fails to explain what decisions of the Supreme Court the panel's decision flouts; and fails to identify any issue of exceptional importance for the *en banc* Court's consideration.

To begin, the Warden makes no attempt to comply with Rule 35(b)(1)(A)'s requirement that an *en banc* petition "begin with a statement that . . . the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases)." Nor does the Warden explain how the panel's decision establishes "a precedent-setting error of exceptional public importance or an opinion that directly conflicts with Supreme Court or Sixth Circuit precedent." 6 Cir. I.O.P. 35(a); *see also* Fed. R. App. P. 35(b)(1)(B). In truth, the Warden cannot identify any decision of this Court, or the United States Supreme Court, that the panel's decision contravenes.

Tellingly, the petition proclaims that the panel "made more errors than the Warden can catalog in an *en banc* petition," (Pet., Doc. 58, at 20), while offering only two pages collecting such alleged errors, (*see id.* at 20-21). And even those "errors" do not exist.

First, the petition accuses the panel of "defin[ing] 'clearly established Federal law' using circuit precedent." (Pet., Doc. 58, at 20 (citing Panel Op. at 22, 24).) But the decision does no such thing. It invokes Circuit precedent to explain the general contours of *Faretta v. California*, 422 U.S. 806 (1975), as this Court has already understood that decision. The cases flagged by the Warden's petition—*Robards v. Rees*, 789 F.2d 379 (6th Cir. 1986); *United States v. Farias*, 618 F.3d 1049 (9th Cir. 2010)—are not even necessary to the panel's ultimate determination of the issues. And nowhere does the panel suggest that the Supreme Court of Ohio's decision conflicts with *those* decisions. In fact, on the pages cited by the petition, the panel discusses the Ohio court's flawed determination of the *facts*, not the law. *See* Panel Op. at 22 (discussing the timeline and context of Cassano's April 1999 *Faretta* invocation); *id.* at 24-25 (analyzing the facts in relation to whether Cassano's request was dilatory).

The Warden further accuses the panel of engaging in "de novo review in disguise," (Pet., Doc. 58, at 21), when the panel "reached [its] conclusion [about Cassano's lack of dilatory purpose] based on its own assessment of contextual

clues." (*Id.*) Yet here too, the Warden's allegations are untethered from the actual text of the panel's decision. The panel explains, *see* Panel Op. at 22, that the primary reason the Ohio court's factual determination is unreasonable is that it is premised on the April 1999 request being Cassano's "first time seeking to represent himself." As the panel recognizes, this is flatly inaccurate, and therefore unreasonable, in light of Cassano's written motion nearly a year before. The panel then considers whether Cassano's April 1999 invocation can reasonably be considered dilatory, when the reason for seeking to represent himself did not previously exist, and when in fact Cassano did not ask for any delay. *See* Panel Op. at 23-24. The panel concludes that no fairminded jurist could read these facts to conclude that Cassano's request was made for the purpose of delay, or that his request was equivocal or subsequently abandoned, when he had been seeking to represent himself since May 1998, when he had been repeatedly admonished and rejected by the trial judge, when he had been harshly criticized when he asked to speak, and when he had only just learned that his lead counsel was entirely unprepared for trial. *See* Panel Op. at 25.

Finally, the Warden suggests that *en banc* review is needed because the panel's decision would "increase[] discord among the circuits." (Pet., Doc. 58, at 21.) But courts reaching differing conclusions based on different facts does not make a circuit split. Cassano already demonstrated why *Burton v. Collins*, *United States v. Pena*, and *Jackson v. Ylst* do not control here, (*see* Cassano's Merit Brief, Doc.

40, at 61-62), and the additional cases the Warden now cites likewise found equivocation and delay in facts that do not exist in Cassano's case.[1] What's more, there can be no increase in the "discord" among the Circuits when a panel follows the binding precedent already set by a prior published decision of this Court. This Court's decision in *Moore v. Haviland*, for example, already established that habeas relief can lie, under certain circumstances, even when a defendant invokes his right in the form of a question, not a demand. *See* 531 F.3d 393, 402 (6th Cir. 2008).

These purported circuit conflicts serve only as window-dressing for the Warden's true motivation: that *en banc* review is warranted because the panel "granted habeas relief to a repeat murderer." (Pet., Doc. 58, at 21.) Yet habeas review is not merely a rubber stamp for all state-court adjudications. As the Supreme Court has made clear, AEDPA's "standard is demanding but not insatiable," and even deference "does not by definition preclude relief." *Miller-El v. Dretke*, 545 U.S. 231,

[1] *See United States v. Light*, 406 F.3d 995, 999 (8th Cir. 2005) (defendant only asked for information about the rule on self-representation and never requested to proceed pro se); *United States v. Edelmann*, 458 F.3d 791, 809 (8th Cir. 2006) (noting "the special facts of this case" included several continuances already, that the defendant wanted to proceed pro se because her lawyer refused to file frivolous pleadings, and that she "coupled her request to proceed pro se with several other motions"); *United States v. Mackovich*, 209 F.3d 1227, 1237 (10th Cir. 2000) (same); *United States v. George*, 56 F.3d 1078, 1084 (9th Cir. 1995) (defendant's two pre-trial escapes had already "caused substantial delay," he asked for a continuance at the same time, and the court had previously denied additional continuances).

240 (2005) (internal quotation marks omitted). That a capital inmate succeeded in obtaining relief is not sufficient to merit extraordinary *en banc* review.

Indeed, the Warden spends a large portion of his petition, (*see* Pet., Doc. 58, at 7-10, 15-19), discussing the unique facts of this case—confirming that this is decidedly a request that the entire Court conduct rehearing of a fact-bound determination. This simply does not meet the standards for *en banc* review. "Alleged errors in the determination of state law or in the facts of the case (including sufficient evidence), or errors in the application of correct precedent to the facts of the case, are matters for panel rehearing but not for rehearing *en banc*." 6 Cir. I.O.P. 35(a).

In short, "disagreement with the panel's decision on the merits" "rarely suffices" to warrant *en banc* review. *Mitts v. Bagley*, 626 F.3d 366, 370 (6th Cir. 2010) (Sutton, J., concurring in the denial of rehearing *en banc*). This Court should not abide the Warden's attempt to circumvent the Court's *en banc* procedures, and claim "exceptional public importance" befitting the full Court's review, simply because of the identity of the prevailing party. The rule of law demands more.

II. The panel correctly concluded that Cassano was entitled to relief on his self-representation claim.

Even examining the facts and applying the law—an undertaking not countenanced by this Court's *en banc* rules—the panel decision is correct. On at least two separate occasions before his trial, Cassano clearly and unequivocally invoked his right to represent himself: once, in writing, filed in May 1998; and again,

orally, in April 1999. Although it recognized both as self-representation requests, in neither instance did the trial court engage in a dialog with Cassano as required under *Faretta*, nor did it offer any appropriate reasons for rejecting his requests. And in both instances, the Supreme Court of Ohio's treatment of the issues is not entitled to deference under 28 U.S.C. § 2254(d).

The May 1998 motion. In the first instance, Cassano's written "Waiver of Counsel" explained that he "would rather 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.) The trial court ignored this motion, granting only Cassano's contemporaneous motion for substitute counsel.

The panel rightly found that the Supreme Court of Ohio's decision on Cassano's direct appeal overlooked this invocation. Panel Op. at 10-11. To be sure, the court's recitation of the facts mentioned that, "[f]ollowing his indictment, Cassano filed several pro se motions, including a waiver of counsel, on May 14, 1998." *State v. Cassano*, 772 N.E.2d 81, 90 (Ohio 2002). But one page later, the court's review of Cassano's legal claim overlooked this first motion:

> 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.

Id. at 91 (emphasis added).

Read in full context, the court's reference to "that point" can be understood only to mean the self-representation matter mentioned in the preceding sentence (and the following sentence as well). The Warden's paradoxical reading—that "[t]he 'point' to which the Supreme Court was referring was 'hybrid representation,'" (Pet., Doc. 58, at 18)—would render that sentence of the court's decision redundant and unintelligible. It would mean the court meant "Cassano's only written motion on [*hybrid representation*] was made in September 1998 and related solely to *hybrid representation*." 772 N.E.2d at 91 (emphasis added).

Simply put, the Supreme Court of Ohio forgot about Cassano's first request in its analysis. Cassano *did* mention that he wanted to represent himself alone, in his *written* May motion. Yet the Ohio court did not adjudicate this claim. As the panel rightly recognized, "'when the evidence leads very clearly to the conclusion that a federal claim was inadvertently overlooked in state court . . . § 2254(d) entitles the prisoner to an unencumbered opportunity to make his case before a federal judge.'" Panel Op. at 11 (quoting *Johnson v. Williams*, 568 U.S. 289, 303 (2013)).

The best the Warden can muster is to insist that Supreme Court of Ohio must have neglected all discussion of that written May 1998 motion because it thought it didn't count, since Cassano accepted the replacement counsel appointed by the trial

court. (*See* Pet., Doc. 58, at 18-19.) Putting aside the illogic of the Ohio court deciding *sub silentio* to discount that critical invocation, when the remainder of its 25-page decision catalogs every legal issue raised in Cassano's brief, the Warden's preferred reading conflicts with *Faretta* itself—as every Circuit to address this issue has already concluded. *See Moore*, 531 F.3d at 403; *Freeman v. Pierce*, 878 F.3d 580, 590 (7th Cir. 2017); *Batchelor v. Cain*, 682 F.3d 400, 412 (5th Cir. 2012); *Buhl v. Cooksey*, 233 F.3d 783, 803 (3d Cir. 2000); *Wilson v. Walker*, 204 F.3d 33, 37 (2d Cir. 2000); *United States v. Arlt*, 41 F.3d 516, 523 (9th Cir. 1994).

The Warden maintains that Cassano's May 1998 motion lacked sufficient clarity because it was filed simultaneously with a request for new counsel, which the trial court granted. (Pet., Doc. 58, at 16.) But Mr. Faretta himself "also urged without success that he was entitled to counsel of his choice, and three times moved for the appointment of a lawyer other than the public defender." 422 U.S. at 810 n.5. "[A] defendant is not deemed to have equivocated in his desire for self-representation merely because he expresses that view in the alternative, simultaneously requests the appointment of new counsel, or uses it as a threat to obtain private counsel." *Williams v. Bartlett*, 44 F.3d 95, 100 (2d Cir. 1994); *see also Moore*, 531 F.3d at 403.

Cassano's very next appearance in court, in September 1998, further illuminates the matter. True, on that day Cassano filed another motion, this time

seeking "co-counsel" to work with him while he represented himself. But the court's response when the matter was raised makes clear that the trial judge understood Cassano again to be asking to represent himself: the trial judge reasoned that "the defendant, not being trained in the law, is not capable, in my estimation, to represent himself" and "I would be setting him up to be represented by ineffective assistance of counsel should I allow him to represent himself." (R. 135-1, PageID 4242-44). The court concluded, "you're not going to represent yourself in this matter," harshly castigating Cassano, "I'm in charge of this courtroom, not you. You will never be in charge of this courtroom," and admonishing, "you won't be speaking in the courtroom" any further. (*Id.* at 4243.)

The April 1999 motion. At the April 23, 1999 final pretrial hearing, Cassano orally raised his concern that his lead counsel was entirely unprepared to begin trial, since counsel had been preoccupied with another capital trial for at least the past month and a half. (R. 135-4, PageID 4562-63; 4567.) When the court rebuffed this fear, Cassano asked, "[i]s there any possibility I could represent myself? I'd like that to go on the record." (*Id.* at PageID 4564.) Again, the court substituted its own judgment for Cassano's, rebuking him: "[w]e've talked about it before. I think I'd be doing you a disservice by allowing that. . . . It would be in your best interest not to represent yourself. I wouldn't be representing myself if I were charged." (*Id.* at 4564-65.)

The panel was right to find that the Supreme Court of Ohio's conclusion—that this invocation was equivocal, untimely, and subsequently abandoned—is not subject to AEDPA deference. *See* Panel Op. at 17-26. The Ohio court both unreasonably determined the facts and unreasonably applied clearly established federal law.

For one, Cassano's request was clear enough for the trial court to understand that he was asking to represent himself. And the context of Cassano's request matters: Cassano had just finished expressing his concern that his lead counsel was unprepared for trial. And, having been harshly chastised by the trial court the last time he spoke in court, Cassano cannot be faulted for not asserting himself more strenuously. Nor, indeed, was any more required of him: *Faretta* does not demand any special formality of invocation, as this Court has already held. *See Moore*, 531 F.3d at 396, 402-03; *see also, e.g.*, *Buhl*, 233 F.3d at 792 (recognizing that "[a] defendant need not recite some talismanic formula hoping to open the eyes and ears of the court to his request to invoke his/her Sixth Amendment rights under *Faretta*" (internal quotation marks omitted)); *Dorman v. Wainwright*, 798 F.2d 1358, 1366 (11th Cir. 1986) (same).

The Ohio court similarly made an unreasonable determination that Cassano's request was untimely. Putting aside the fact that a request can be timely even *during* trial, as long as a defendant "act[s] swiftly" once the "grounds for dissatisfaction

with counsel's representation ar[i]se," *Moore*, 531 F.3d at 403, the Ohio court's conclusion was founded on a flawed premise: April 1999 was *not* the first time Cassano asked to represent himself alone. As the panel rightly found, the Supreme Court of Ohio's factual determination to the contrary "was undisputedly wrong." Panel Op. at 21. The Ohio court further ignored the fact that Cassano had already been scolded by the trial judge and directed not to speak again in court. In the face of these facts, the Ohio court's determination that Cassano's request was untimely and that he abandoned it is unreasonable.

And its flawed factual findings similarly colored the Ohio court's conclusion that Cassano had acted only in an attempt to delay his trial. Far from it: Cassano had repeatedly queried the court about the possibility that he might represent himself. When, in April 1999, it became clear that his lead counsel was alarmingly unprepared for trial, Cassano sought again to make a record of his request to represent himself, not to delay trial, but to allow the trial to begin on time.

Lastly, the suggestion that Cassano abandoned his request after being denied is wholly unreasonable. The trial judge had already repeatedly reprimanded Cassano for speaking in his courtroom, and even so Cassano persisted in asking to represent himself, again. It would be hard to imagine what else a defendant in Cassano's position would be expected to say or do in order to invoke his right to represent himself. In any event, the Supreme Court of Ohio's use of *McKaskle v. Wiggins*, 465

U.S. 168 (1984), to find that Cassano abandoned his request, was an unreasonable application of that decision, as the panel rightly explained. *See* Panel Op. at 26.

Should any doubt remain that the panel's decision is unfit for *en banc* review, Judge Siler's dissent resolves the issue. The dissent did not call for this Court to reconsider the panel's decision, nor point to any growing rifts between the Circuits or issues of exceptional importance that the *en banc* Court need correct. Instead, the dissent invoked only the general principle that habeas relief is difficult to obtain. Panel Op. at 28-29 (Siler, J., dissenting) (citing *Shinn v. Kayer*, 141 S. Ct. 517, 520 (2020) (per curiam)). Undoubtedly, the demands of AEDPA are high. But they are not insurmountable, and the panel majority's conclusion to the contrary is not the sort of radical departure from controlling caselaw that cries out for the extraordinary corrective procedure of *en banc* review.

III. This appeal is an inappropriate vehicle for *en banc* consideration.

This Court ought to be reluctant to grant rehearing *en banc*, lest "many cases a year would be decided in panels of 16, a rarely satisfying, often unproductive, always inefficient process." *Mitts*, 626 F.3d at 370 (Sutton, J., concurring in the denial of rehearing *en banc*). Where, as here, the Warden seeks it simply because of his disagreement with the merits of the panel's decision, *en banc* review is not appropriate. *See id.*

The unique posture of this case is a further reason why it is an especially poor vehicle for the Court's *en banc* procedure. The panel's decision addressed only one of Cassano's seven certified issues for appeal. *See* Panel Op. at 26 n.5. Because "[a] decision to grant rehearing en banc vacates the previous opinion and judgment of the court, stays the mandate, and restores the case on the docket as a pending appeal," 6 Cir. R. 35(b), the *en banc* Court would face not just the heavily fact-bound question of Cassano's requests to represent himself, but also the remaining (also fact-bound) issues on appeal that the panel did not reach.

Seemingly understanding this complication, the Warden asks this Court to engage in *en banc* review *only* as to Cassano's self-representation claim. The Warden urges the Court to "issue a decision without argument," without the need "even [to] write a new opinion" by "simply adopt[ing] instead Judge Siler's opinion as its own." (Pet., Doc. 58, at 22.) Sixth Circuit Rule 35(b), however, prohibits any such procedure: Any granting of *en banc* review would restore the entire "case on the docket as a pending appeal," requiring all of the judges of the *en banc* Court to resolve *all* of the claims pending in this appeal, not just the self-representation claim. That would not be a wise expenditure of the Court's resources. This Court should reject the Warden's radical and unjustified approach to the *en banc* process.

CONCLUSION

For the foregoing reasons, the Court should deny the Warden's request for rehearing *en banc*.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Counsel for Petitioner-Appellant August Cassano hereby certifies that the foregoing brief complies the Court's order requiring a response, and with the type-volume limitations provide in Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6). The relevant portions of the foregoing brief contain 3,620 words in Times New Roman (14-point) proportional type. The word processing software used to prepare this brief was Microsoft Word 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on July 23, 2021, I electronically filed the foregoing **PETITIONER-APPELLANT AUGUST CASSANO'S RESPONSE TO PETITION FOR REHEARING *EN BANC*** with the Clerk of the United States Court of Appeals for the Sixth Circuit using the CM/ECF system, which will send notification of such filing to the email address of opposing counsel on file with the Court.

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