

No. 22- \_\_\_\_\_

In the  
**SUPREME COURT of the UNITED STATES**  
**October Term, 2022**

**LESTER S. BARNEY,**  
**Petitioner,**

**against**

**ADMINISTRATOR NEW JERSEY STATE PRISON;**  
**ATTORNEY GENERAL NEW JERSEY,**  
**Respondents.**

**ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

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**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

1. Whether, because the state court unreasonably determined that Lester S. Barney (“Barney”) did not clearly and unequivocally assert his right to proceed *pro se*, on *habeas* review, the New Jersey District Court and the Third Circuit, on appeal therefrom, misapprehended and misapplied this Court’s jurisprudence under both *Faretta v. California*, 422 U.S. 806 (1974) and Title 28, United States Code, Section 2254(d), and reached a decision in conflict with this Court’s precedent.
2. Whether, because in evaluating Barney’s ineffective assistance of counsel claim on *habeas* review, the New Jersey District Court and the Third Circuit, on appeal therefrom, misapprehended and misapplied this Court’s jurisprudence under *Strickland v. Washington*, 466 U.S. 668 (1984), *United States v. Cronic*, 466 U.S. 648 (1984), and *Weaver v. Massachusetts*, 582 U.S. \_\_\_, 137 S. Ct. 1899 (2017), as well as Title 28, United States Code, Section 2254(d), the decisions below are in conflict with this Court’s precedent.

## **PARTIES TO THE PROCEEDING**

No parties other than those named in the caption of this petition were parties to the proceeding before the court whose judgment is sought to be reviewed.

## **CORPORATE DISCLOSURE**

There are no corporate entities involved in this case.

## **RELATED CASES**

*Barney v. Administrator of New Jersey State Prisons, et al.*, No. 18-2258, United States Court of Appeals for the Third Circuit

*Barney v. D'illio, et al.*, Civ. Action No. 15-0057, United States District Court, District of New Jersey

*New Jersey v. Barney*, Docket No. 070762, Supreme Court of New Jersey

*New Jersey v. Barney*, Ind. No. 04-01-0077-I, Superior Court of New Jersey

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**PETITION FOR A WRIT OF CERTIORARI**

Petitioner Lester S. Barney (“Barney”) respectfully petitions for a writ of certiorari to review the Opinion of the United States Court of Appeals for the Third Circuit entered in this case.<sup>1</sup>

**OPINIONS AND ORDERS BELOW**

The opinion of the United States Court of Appeals for the Third Circuit, *Barney v. Administrator of New Jersey State Prisons, et al.*, 48 F.4th 162 (3d Cir. 2022), dated September 7, 2022, appears in Appendix A to this petition beginning at page 1a.<sup>2</sup> The

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<sup>1</sup>Unless otherwise indicated, quotations in this petition omit all internal alterations, quotation marks, footnotes, and citations.

<sup>2</sup>References to the appendix, attached to this petition, will be designated by the page number followed by the letter “a.” These references correspond to the numbering at (continued...)

opinion, *Barney v. D'Ilio, et al.*, 2018 WL 2018054 (D.N.J., May 1, 2018), and order, of the United States District Court for the District of New Jersey, entered May 1, 2018, appears in Appendix B beginning at page 9a.

## **JURISDICTION**

The opinion of the Court of Appeals for the Third Circuit was entered on September 7, 2022. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The Sixth Amendment to the United States Constitution provides, in relevant part:

In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

Title 28, Section 2254(d), of the United States Code provides:

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

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<sup>2</sup>(...continued)  
the top center of each page of the appendix.

## STATEMENT OF THE CASE

### *Background*

Barney appealed to the Third Circuit on two related grounds arising from the state court's failure to afford Barney his right to self-representation, and the parallel failure of his trial counsel to take the steps necessary to secure that right, as Barney had requested. The district court had granted Barney a certificate of appealability on these two grounds, finding the state court handling of both grounds "troublesome" and "troubling."

The court of appeals agreed with the district court that Barney's self-representation request was "unequivocal" and thus in essence erroneous, but nonetheless managed to sanction the violation of Barney's rights that had been plainly exposed. To do so, the court of appeals disregarded this Court's precedents – on both the direct self-representation issue and also on the failure of Barney's counsel to represent him in connection with his request. The Third Circuit has thus acted in conflict with this Court's jurisprudence, and adopted a reasoning on both grounds that it is important that this Court makes clear is not the law. For this reason, we urge herein that the Court grant the petition and, after briefing, vacate Barney's unconstitutional conviction.

### *Pertinent Facts*

#### Pretrial Proceedings

All of the essential facts in this case occurred during the month preceding the commencement of Barney's New Jersey state court trial. Below, we provide a chronology

that includes the factual underpinnings of both grounds on the basis of which Barney's appeal to the Third Circuit proceeded.

**July 14, 2005.** In the course of a pretrial conference that addressed various matters such as preparation for jury selection and discovery issues, the court admonished Barney (as it had previously) that, since he was represented by counsel, any communication with the court should be through counsel. Nonetheless, the court heard from Barney personally regarding matters raised in his letters to the court and his dissatisfaction with the manner in which they had been addressed by his attorney.

The court repeatedly told Barney to communicate through his counsel, Michael E. Riley ("Riley"), and that his "application should go through [his] attorney." Barney interjected that he was being denied "access to the Court," to which the court reiterated that motions needed to be submitted through counsel. After this conference, Barney and Riley met in the holding area of the court. Barney testified (at a post-conviction hearing in 2013<sup>3</sup>) that he told Riley that he had decided that he was going to proceed *pro se* and requested that Riley so inform the court. Barney added that Riley said he would ask the court to change his (Riley's) role to, in effect, "stand-by counsel." Barney stated that he understood that Riley would inform the court and that a hearing would be held. Riley testified (at the same post-conviction hearing) that he did not have "an independent

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<sup>3</sup>Additional details related to this hearing are included in the following subsection of this petition.

recollection" of this meeting (or what was communicated at it) "although it wouldn't surprise me."

**July 21, 2005.** One week later, having heard nothing further about a hearing on the self-representation matter, Barney wrote a letter to the court. The pertinent paragraph of that letter reads as follows:

On July 14th 2005, after my hearing, I informed my pool attorney [Riley] that I will proceed on a PRO-SE basis. The pool attorney told me that he would inform the court and that a hearing would be scheduled early the following week. Since it's now Thursday, July 21, 2005 and no hearing has been held, I'm not sure the court is aware that the defendant will go forward PRO-SE. This letter is to inform you of that fact.

This letter was not stamped as received in the trial court's chambers until August 10, 2005.

**August 10, 2005.** At the beginning of proceedings to select a jury for Barney's trial, the court very briefly referenced Barney's July 21 letter [interspersed within an unrelated discussion regarding a juror that is not included here]:

THE COURT: I have another letter from Mr. Barney and he's not representing himself so I'm going give you this letter, Mr. Riley. I haven't read the letter from Mr. Barney.

\* \* \* \*

THE COURT: This letter is dated July 21st. He's not representing himself. I don't know why he continues to write the Court.

There is no further discussion of the letter in the trial record.

There is considerable testimony about this letter and the court's reaction to it in the record of the post-conviction hearing. In particular, Barney testified that he would never forget that reaction:

The Judge was very angry as he was waving the letter as he came through the door right behind Your Honor and he was extremely angry and he looked directly at me and told me that Mr. Barney is not representing himself.

Barney then related that Riley came back to the holding area after the described encounter with the letter in his hand. Barney told him: "You know what I want and I know what he said." Barney stated that Riley responded that "the Judge addressed that." Barney went on to explain that he was "afraid to even bring it up again [because he] was told the matter had been addressed." He never raised the matter again with the court because "it was clear to me that a decision had been made."

Riley's testimony was consistent with Barney's. He had a "firm recollection" of discussing the letter with Barney in the holding area on the day of jury selection. Noting that there had been "friction" between the two of them previously and that there had been situations when Barney had said, in effect, "if you don't do it my way, I'm going to do it myself," Riley testified that to his recollection nothing had been "memorialized" except in the letter to the court. Riley continued:

He said that he wanted to proceed *pro se* and I said, well, that's your right but right now with the jury coming up and we're getting ready to proceed, we'll have to have a hearing on that. You just can't walk in and represent yourself. You've got

to go through a process. And I said, well, that's fine, then, you know, the Judge is aware of your concerns and obviously it's in the letter and we'll deal with it. But right now the jury was being brought up in the elevators as I remember and the focus at that time was get squared away and begin to pick the jury.

Riley testified he had no recollection of broaching the subject with Barney again.

### **The State Post-Conviction Relief Proceedings**

After he was convicted and sentenced, Barney initiated proceedings for post-conviction relief ("PCR"). Among many issues raised therein were the ones now before this Court. After the trial court, sitting as a PCR court, denied all PCR relief and the state appellate court affirmed that action, on May 2, 2013, the New Jersey Supreme Court remanded the case:

for an evidentiary hearing at which that court will make findings on whether defendant clearly and unequivocally made a request to the trial court to represent himself or whether defendant communicated with his attorney to make such a request on his behalf.

The evidentiary hearing on remand (the substance of which we discussed in the preceding subsection) was held on August 22, 2013, before a different judge (the "remand court") than the one who had presided at trial and had adjudicated the PCR application in the first instance. On October 24, 2013, the remand court filed its decision ("the remand decision"). The court found that Barney had not "made a clear and unequivocal request to

proceed *pro-se*.<sup>4</sup> Notably, the remand court makes no mention of the second prong of the remand order: “whether defendant communicated with his attorney to make such a request on his behalf.” The New Jersey Supreme Court denied Barney’s petition for certification by order filed on April 3, 2014.

### ***The Petition for a Writ of Habeas Corpus***

Barney’s timely petition pursuant to 28 U.S.C. § 2254 was dated December 31, 2014, and filed in the district court on January 5, 2015. The United States District Court for the District of New Jersey (Hillman, J.) issued its opinion and order [9a *et seq.*]

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<sup>4</sup>Before reaching its decision, the court reviewed and characterized the evidence at the remand hearing, as follows:

- “During the evidentiary hearing the defendant was unable to convince this Court that the letter . . . was a clear and unequivocal request by the defendant to proceed *pro se*. ”
- “The defendant merely mentioned wanting to proceed *pro-se* in a letter where he also discusses his dissatisfaction with his attorney as it related to receiving discovery.”
- “There is no evidence that was presented to this Court during the Evidentiary Hearing that this right to counsel was waived by the defendant.”
- “In this present case the letter was not received until one day before jury selection.”
- “The defendant failed to offer any excuse or even offered a valid basis to disrupt his trial which was already in progress.”
- “Although defense counsel argued that Judge Almeida (the trial judge) was dismissive of the July 21, 2005 letter, this should not discount the weight of the defendant’s request, however, it still does not address the fact that the letter does not only reference his desire to proceed *pro-se*. In the first two paragraphs the defendant does mention he is interested in proceeding *pro-se*, but the overall the tone and the length of the letter was to inform the Judge of his dissatisfaction with his attorney.”

denying the petition on May 1, 2018. The district court granted the limited certificate of appealability leading to the appeal to the Third Circuit. [68a-69a]<sup>5</sup>

The pertinent portions of the district court’s opinion are found in the Appendix at pages 19a-68a. The court first addressed the Ground One claim that Barney had been deprived of his constitutional right under *Faretta v. California*, 422 U.S. 806 (1975). While acknowledging that Barney’s letter appeared to state unequivocally his intention to proceed *pro se* [28a], the court denied the petition on this ground because it found no Supreme Court precedent with “facts that are materially indistinguishable” from this case. [30a] Recognizing that the state court decision was “likely in error” and “troublesome,” the court nonetheless found that the decision was not “objectively unreasonable” and denied this claim. [37a-38a]

The district court separately addressed the portion of Ground Seven that claimed a constitutional violation based on the ineffective assistance of counsel, within the context of *Strickland v. Washington*, 466 U.S. 668 (1984), with regard to Barney’s request to proceed *pro se*. [38a-55a] Again, the court denied relief based on its conclusion that, while the decision on this point “may have been incorrect,” that “there is nothing in the record to indicate that Mr. Riley ever spoke with the trial judge” about Barney’s request to proceed

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<sup>5</sup>This opinion is unofficially reported as *Barney v. D’Illio*, 2018 WL 2018054 (D.N.J., May 1, 2018).

*pro se*, and that it was “quite troubled by what occurred,” the state court decision was not objectively unreasonable. [44a, 51a, 55a]

### ***The Third Circuit’s Opinion***

The Third Circuit’s opinion appears in the Appendix at pages 1a-8a.<sup>6</sup> The court separately addressed the two grounds raised by Barney, as authorized by the Certificate of Appealability issued by the district court: the erroneous denial of the self-representation request [4a-5a], and the erroneous denial of Barney’s ineffective assistance of counsel claim. [5a-7a] At the outset, the court (incorrectly, as we will discuss in the Argument *infra*) concluded that it “need only focus on the § 2254(d)(1) standard: an unreasonable application of law” [thus entirely disregarding § 2254(d)(2), which Barney expressly invoked in the court of appeals, and which addressed “a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.”]

Regarding the self-representation ground, the court began by essentially agreeing with the district court that the state court’s ruling that Barney had expressed no more than a “vague ‘desire’ to represent himself” was at odds with the letter Barney had submitted (which it described as “seem[ing] clear”) and that the state court ruling “may have been unreasonable.” [4a] Notwithstanding, the court of appeals ruled that Barney was not

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<sup>6</sup>The opinion is officially reported at *Barney v. Administrator of New Jersey State Prisons, et al.*, 48 F.4th 162 (3d Cir. 2022).

entitled to relief on this ground because the state court's ruling that the request was "untimely" was reasonable. [4a-5a] (As we discuss in the argument, it was not and in any event there is no "clearly established Federal law", as determined by this Court, establishing a time limit for a *Farett*a request that the Third Circuit was authorized to apply).

Regarding the ineffective assistance of counsel ground, the court began by "presum[ing]" the state court denied the ineffectiveness claim on the merits – even though it said nothing about the claim. [5a] It then proceeds to analyze the claim (only under § 2254(d)(1)) pursuant to *Strickland v. Washington* (and thus requiring a showing of prejudice). The court found the state court's ruling not to be "unreasonable" because "Barney cannot show prejudice." [Id.]

Recognizing that Barney had argued that, for two reasons, he was not required to show prejudice, the court addressed (and rejected) both of those reasons. [Id.] First, with regard to Barney's demonstration that Riley had "completely abandoned" him with regard to the exercise of his right of self-representation, within the meaning of *United States v. Cronic* (and thus was not required to prove prejudice), the court of appeals ruled that because "Riley actively defended Barney at trial [thereafter]," Barney somehow was precluded from claiming abandonment at the critical stage of the proceedings pretrial, at which he sought to exercise his right to represent himself. [6a] Second, with regard to Barney's demonstration that, because his right to self-representation was "structural" and

this was not required to prove prejudice, the court of appeals held that the structural error in this case was not a structural error of the type that “require[s] automatic reversal.” Thus, as to this reason as well, it holds that Barney would have been required to prove prejudice. [6a-7a] Having reached these twin conclusions (that we submit in the argument below were both erroneous), the court of appeals swiftly declares that “[w]ithout prejudice, Barney goes no further.” [8a]

### **REASONS FOR GRANTING THE WRIT**

**IN AFFIRMING THE DENIAL OF BARNEY’S HABEAS PETITION, THE THIRD CIRCUIT COURT OF APPEALS REPEATEDLY APPLIED STANDARDS IN CONFLICT WITH THOSE ESTABLISHED BY THIS COURT; APPLIED RULES THAT CANNOT BE LOCATED IN THIS COURT’S PRECEDENTS; AND MISAPPREHENDED, MISINTERPRETED, MISAPPLIED, AND MISTATED LEGAL PRINCIPLES AS WELL AS THE RECORD FACTS LEADING TO A COMPOUNDING OF ERRORS. CERTIORARI IS ESSENTIAL IN THIS CASE TO ENABLE THIS COURT TO MAKE CLEAR THAT THE DECISION BELOW STANDS ON INFIRM FOUNDATIONS**

As a threshold matter, we note that the Third Circuit opinion in this case stated that Barney raised his claims under 28 U.S.C. § 2254(d)(1) and not § 2254(d)(2). Specifically, the court stated: “Yet he [Barney] does not quibble with the state habeas court’s account of what happened, just with its legal conclusions. So we need focus only on the § 2254(d)(1) standard: an unreasonable application of law.” [4a] This is both inexplicable and incorrect.

In fact, while Barney presented arguments under both subsections, his briefing to the court of appeals manifestly urged an analysis under subsection (d)(2):

At the root of these errors is the district court’s reliance on the wrong prong of § 2254(d). As discussed *supra*, pages 19–20, subsection (d)(1) provides that Federal habeas relief is available when a state court adjudication is contrary to Supreme Court precedent or resulted from an unreasonable application of such precedent. This is the basis on which the district court denied habeas relief. Although we submit that the state court’s remand decision constituted an unreasonable application of *Faretta*, and will explain why *infra*, we suggest that a far less complex route to granting Barney’s petition for a writ of habeas corpus is found in subsection (d)(2). The district court failed even to consider this alternative provision which fully justifies a grant of the petition now before this Court on plenary review.

(Barney’s principal brief to the Third Circuit, p. 23 [3d Circuit Document #87]) Barney then elaborated at length on his claims under Section 2254(d)(2), at pages 23-28 of that brief and again in his reply brief, at pages 1 and 3-5 [Document #110].

As a result of the court’s disregard of Barney’s subsection (d)(2) arguments, he was deprived of the opportunity to seek certiorari on the basis of whatever rationale the court of appeals might have offered.<sup>7</sup> In particular, the court of appeals circumvented any ruling as to whether the factual basis of the state court rulings was “objectively unreasonable.”

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<sup>7</sup>This Court interpreted the alternative basis for granting a petition, as provided in § 2254(d)(2), in *Miller-El v. Cockrell*, 537 U.S. 322 (2003). “[A] decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding.” *Id.* at 340, referencing *Williams v. Taylor*, 529 U.S. 362, 399 (2000). The Court cautioned, however, that “deference does not imply abandonment or abdication of judicial review,” and “does not by definition preclude relief.” *Id.*

We thus proceed herein on the basis of the opinion rendered by the Third Circuit which, as we show, was laden with errors warranting a grant of certiorari by this Court.

### **A. Governing Legal Principles**

This Court addressed § 2254(d)(1) in detail in *Williams*, 529 U.S. 362. It explained that “clearly established Federal law, as determined by the Supreme Court of the United States” referred to “the holdings, as opposed to the *dicta*, of [its] decisions as of the time of the relevant state-court decision.” *Id.* at 412. In turn, the Court defined “contrary to” as a state court adjudication that *either* “contradicts the governing [Supreme Court] law” *or* “confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent.” *Id.* at 405–06. Adopting the Fourth Circuit’s formulation, the Court went on to explain that “an unreasonable application” occurs when (1) “the state court identifies the correct governing legal rule from this Court’s cases but unreasonably applies it to the facts of the particular state prisoner’s case,” or (2) “the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.” *Id.* at 407.

### **B. The Third Circuit’s Ruling Regarding Barney’s Right to Self-Representation Was Erroneous and in Conflict with the Clearly Established Federal Law as Determined by This Court**

#### **1. Applicable Law**

The “clearly established” Supreme Court precedent regarding the right to self-representation is found in *Faretta v. California*, 422 U.S. 806 (1975). The Court set out the holding in the opening paragraph of the decision:

The question before us now is whether a defendant in a state criminal trial has a constitutional right to proceed *without* counsel when he voluntarily and intelligently elects to do so. Stated another way, the question is whether a State may constitutionally haul a person into its criminal courts and there force a lawyer upon him, even when he insists that he wants to conduct his own defense. It is not an easy question, but we have concluded that a State may not constitutionally do so.

*Id.* at 807 (emphasis in original). As the Court goes on to explain, this right is implicit in the Sixth Amendment: “The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails.” *Id.* at 819-820.

The right of self-representation is “structural.” Thus, “its denial is not amenable to ‘harmless error’ analysis. The right is either respected or denied; its deprivation cannot be harmless.” *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984). *Faretta* conditioned its recognition of a defendant’s constitutional right to conduct his own defense (1) on the defendant having “clearly and unequivocally declared to the trial judge that he wanted to represent himself and did not want counsel,” and (2) that “[t]he record affirmatively show[ed] that [the defendant] was literate, competent, and understanding, and that he was voluntarily exercising his informed free will.” *Id.* at 835.

**2. The Appeals Court’s Rationale For Denying Barney’s Petition Cannot Be Reconciled With *Faretta* or Section 2254(d) Jurisprudence**

The history of the rulings on the *Faretta* question is as follows:

- The trial court made no ruling on whether Barney had clearly and unequivocally demanded to represent himself.
- On remand from the New Jersey Supreme Court, the remand court ruled that Barney had not shown a clear and unequivocal demand for self-representation. This ruling was affirmed on appellate review.
- The district court acknowledged that the letter containing the request to proceed *pro se* was unequivocal:

Petitioner stated his desire to proceed *pro se* twice, in capital letters, and continued to make discovery demands prefaced with the words “acting now PRO-SE”. [28a]

That court plainly recognized that there was no reasonable interpretation of Barney’s words that suggested anything unclear or equivocal in his self representation request. Cabining itself within the constraints of subsection (d)(1), the court was heavily influenced not by any determinative decision of this Court but by its own decision in *Fischetti v. Johnson*, 384 F.3d 140 (3d Cir. 2004). Specifically, on that basis, it was persuaded to deny Barney’s petition on this ground because (even though it was troubled by the blatantly wrong state court *Faretta* ruling) it could identify no case of this Court that was based on facts it considered “materially indistinguishable” from the

facts in the present case (citing *Fischetti*, 384 F.3d at 150 ). [30a] It highlighted that it did not find any precedent in this Court suggesting that the timing of Barney's request to represent himself was "materially distinguishable." [30a-31a]<sup>8</sup>

With the district court's decision before it, the court of appeals began by concurring (albeit perhaps begrudgingly) with the district court that the state court *Farettta* ruling was unreasonable:

Yet the letter seems clear. "On July 14th 2005, after my hearing, I informed my pool attorney that I will proceed on a PRO-SE basis," Barney wrote. App. 88. "I'm not sure the court is aware that the defendant will go forward PRO-SE. This letter is to inform you of that fact." *Id.* So the state habeas court's holding to the contrary may have been unreasonable. [4a]

Nonetheless, the court affirmed the district court's denial of the petition on this ground based on the "timing" of the petition. But although it may appear superficially that the appeals court followed the district court's reasoning regarding timing (a reasoning that remained a detour from the state court decision), it actually turned the matter of timing on its head.

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<sup>8</sup>As to "timing," it should be noted that the entire focus on that subject is misplaced in any event because the record shows that Barney was not seeking an adjournment of the trial in connection with his self-representation; he was ready and willing to go to trial on the existing schedule. Moreover, and significantly, the remand decision did *not* rely on "timing" as a basis for its finding that there was no clear and unequivocal waiver and thus the district court's decision was a "detour" from the ruling it was charged with evaluating.

The district court had ruled that the timing issue prevented a grant of Barney's habeas petition because it could not find any "clearly established Federal law, as determined by the Supreme Court of the United States," that was not "materially indistinguishable" from Barney's case. The Third Circuit opinion applied an entirely different rationale: its ruling was based on a misinterpretation of *Faretta*: it found that this Court's precedent *required* the *same* timing as that found in *Faretta*. But *Faretta* provides no holding to that effect, and does not even suggest such a requirement in *dicta*. In fact, the only mention of timing in *Faretta* is the passing observation that "weeks before trial, *Faretta* clearly and unequivocally declared to the trial judge that he wanted to represent himself and did not want counsel." 422 U.S. at 835. There is no reading of that case that can supply a requirement that the right to self-representation depends upon an invocation of the right "weeks before trial." Plainly, no such requirement is mandated by "clearly established Federal law," as determined by this Court.

Deciding whether Barney's timing (which would necessarily include determining who was at fault for the delayed docketing of Barney's letter requesting self-representation – a letter that was dated some twenty days before it was docketed) was adequate was a matter that might have been entertained by the trial court at a *Faretta* hearing. But no such hearing was held, which is the reason this matter is now before the Court.

This is a case in which the court of appeals affirmed the denial of the *Faretta* ground of Barney's petition on a basis (1) contrary to that articulated in the decision it was

affirming, (2) which in turn denied the relief Barney sought on a basis of a different reason that (3) the state court had not relied upon in its ruling because that ruling was deemed unreasonable in the eyes of every Federal judge who has encountered it in these habeas proceedings. The decision of the Third Circuit that is before this Court is the product of compound errors, the most glaring of which is that it misinterprets the holding of this Court in *Faretta* and misapplies it under Section 2254(d). We ask that the Court address these errors by granting certiorari in this case, correcting the errors and clarifying that the Court's precedent is in conflict with the rulings below.

**C. The Third Circuit's Ruling Regarding Ineffective Assistance by Barney's Counsel With Respect to His Right to Self-Representation Was Also Erroneous and in Conflict with this Court's Precedent**

**1. Applicable Law**

The right to the effective assistance of counsel is "one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty." *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938). The "clearly established Federal law, as determined by the Supreme Court of the United States," on the basis of which the district court evaluated Barney's assistance of counsel claim, is *Strickland v. Washington*, 466 U.S. 668 (1984). [43a-44a] A defendant's Sixth Amendment right to effective assistance of counsel is violated under *Strickland* when "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686. To prevail on such an ineffectiveness

claim, a defendant must show (1) that his attorney’s performance fell “below an objective standard of reasonableness,” and (2) that there is a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 669.<sup>9</sup>

**2. The Third Circuit’s Decision on Barney’s Sixth Amendment Right is in Conflict with This Court’s Precedent in *Strickland*, *Cronic*, and *Weaver***

Barney argued below that the second *Strickland* prong (generally described as the prejudice requirement) does not apply in this case, for two reasons: because (as noted in *Strickland*, 466 U.S. at 692), under *United States v. Cronic*, 466 U.S. 648 (1984), prejudice is presumed when the attorney abandons a client’s cause, and also because the failure to pursue a self-representation request under *Faretta* is a “structural error” in which the prejudice is presumed. The opinion of the Third Circuit acknowledges both arguments [5a-7a], but misreads and thus misapplies this Court’s precedent in relation to both. Because of these serious decisional errors that conflict with this Court’s determinations (either of which invalidates the affirmance of the district court’s order by the court of appeals), we urge that this Court grant certiorari.

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<sup>9</sup>The Federal courts below noted that the remand decision is silent as to the assistance of counsel ground in Barney’s petition, but concludes that the denial on this basis is nonetheless presumed to be an adjudication on the merits. [5a, 41a-43a]

With regard to the “abandonment” argument, the Third Circuit seemingly acknowledges *Strickland* and *Cronic* [5a-6a], but then embellishes its readings of those cases with a *non-sequitur* to this Court’s jurisprudence that distorts that precedent to reach a flawed result by virtue of which Barney was deprived of the relief to which he is properly entitled. Thus, the court first quotes *Strickland*, 466 U.S. at 692, regarding those instances when (consistent with *Cronic*) prejudice is presumed (“when a defendant is ‘[a]ctual[ly] or constructive[ly] deni[ed] the assistance of counsel altogether’”) but then adds its own language (“at a critical stage of *trial*”) [6a (emphasis added)], as if to suggest that a client who is abandoned at any other critical stage of the proceedings other than at trial is to be left without a remedy. (On the contrary, this Court’s precedent has long declared that the Sixth Amendment right to counsel attaches at *all* critical stages in the proceedings “after the initiation of formal charges.” *Moran v. Burbine*, 475 U.S. 412, 431 (1986).)

The appeals court makes clear that it is treating only the trial itself as the focus of the counsel clause of the Sixth Amendment. Thus, in the following paragraph [6a], the court concludes that because “Riley actively defended Barney at trial[,] . . . Barney cannot claim abandonment.” That sentence, on its own, is in total conflict with this Court’s Sixth Amendment jurisprudence and we offer that this pronouncement alone by the Third Circuit warrants a grant of certiorari so that this serious error may be noted and corrected.

Along its way to this conclusion, the Third Circuit follows a baffling and mistaken path through two other established precedents of this Court (and describing the present case as a “far cry” from those cases). [*Id.*] Correctly analyzed, both of those cases *support* Barney’s position here, and undermine the appeals court’s flawed conclusion.

First, *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000) [which Barney cited in his briefing to the Third Circuit], does not involve an abandonment at trial; it deals with a lawyer who failed to file a notice of appeal as requested by his client. This Court explained why a showing of prejudice was not required in such a case:

We have long held that a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable. *See Rodriguez v. United States*, 395 U.S. 327, 89 S.Ct. 1715, 23 L.Ed.2d 340 (1969); *cf. Peguero v. United States*, 526 U.S. 23, 28, 119 S.Ct. 961, 143 L.Ed.2d 18 (1999) (“[W]hen counsel fails to file a requested appeal, a defendant is entitled to [a new] appeal without showing that his appeal would likely have had merit”). This is so because a defendant who instructs counsel to initiate an appeal reasonably relies upon counsel to file the necessary notice. Counsel’s failure to do so cannot be considered a strategic decision; filing a notice of appeal is a purely ministerial task, and the failure to file reflects inattention to the defendant’s wishes.

*Id.* at 477. There is no suggestion that counsel in that case had not “actively defended” his client at trial. The abandonment was at a different critical stage, when counsel failed to pursue his client’s right to an appeal that the client had requested. Barney’s case is no different: Riley failed to pursue Barney’s request to exercise his right of self-

representation. (If anything, the request in Barney’s case was even more critical, because it involved the exercise of a constitutional right.)

Second, the court cites *Penson v. Ohio*, 488 U.S. 75, 88 (1988), stating that the lawyer there left his client “completely without representation” on appeal. There again, the abandonment was not at trial, and this Court made clear that it need not be for prejudice to be presumed. Indeed, the *Penson* Court said, “this is quite different from a case in which it was claimed that counsel’s performance was ineffective.” *Id.* Barney was “completely without representation” in his pursuit of his right to proceed *pro se*.

Barney asked his attorney to take the steps necessary to have a *Faretta* hearing scheduled. The attorney clearly testified that Barney had made this request. The attorney was aware – and informed Barney – that he would schedule a *Faretta* hearing but he never did. The attorney was in court when the trial judge instructed that the request for self-representation would need to come from counsel. He never acted on Barney’s request. The Third Circuit’s bypass of this Court’s precedent is a matter of great importance that justifies the grant of certiorari in this case.

The Third Circuit also addressed the other ground on which Barney sought habeas relief based on the inapplicability of the prejudice requirement in relation to the Sixth Amendment right to counsel: that prejudice would also be presumed in this case because the error was “structural.” Following the analysis of the district court, the appeals court ruled that an *ineffective assistance* claim based on a request for self-representation is not

structural. [6a-7a] The short answer here is the same one discussed immediately above: that this is a case of abandonment, not ineffectiveness. And the appeal court's error is thus also a familiar one: the court employs a *non-sequitur* that provides an infirm foundation for its ruling.

To reach its conclusion regarding structural error, the Third Circuit relies (as had the district court) on an analogy to this Court's decision in *Weaver v. Massachusetts*, 582 U.S. \_\_\_, 137 S. Ct. 1899, 1908 (2017), that a denial of the right to effective assistance of counsel in this context is *not* structural and thus requires a showing of prejudice. Once again, however, the court's reliance on the case it cites does not hold up upon examination. There is no holding in *Weaver* that constitutes "clearly established Federal law," as determined by this Court, applicable in a case of involving abandonment rather than ineffectiveness.

Through the lens of abandonment, the holdings of *Weaver* come into high relief:

The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial. Thus, the defining feature of a structural error is that it "affect[s] the framework within which the trial proceeds," rather than being "simply an error in the trial process itself."

*Weaver*, 137 S.Ct at 1907 (citing *Arizona v. Fulminante*, 386 U.S. 279, 310 (1991)).

Riley's abandonment of Barney with respect to his requested *Farettta* hearing is quite clearly an error affecting the framework of the trial that was to come, and not "simply an error in the trial process itself." As was the case in *Roe v. Flores-Ortega*, this was not a

strategic decision; Riley simply failed to undertake the ministerial task of asking for the hearing that his client was demanding, and to which his client had a constitutional right.

Here again, then, the Third Circuit was not abiding by the established precedent of this Court, but simply citing cases the essences of which it then disregarded. Because the court's decision in this case was in contravention of the requirements of Section 2254(d), and also in conflict with the jurisprudence of this Court, we submit that certiorari should be granted for this reason as well.

## **CONCLUSION**

For all of the reasons identified herein, a writ of certiorari should issue to review the decision of the Third Circuit, and upon such review, the conviction in this case should be vacated.

Respectfully submitted,

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