

No. 17-160

In the Supreme Court of the United States



OMAR RASHAD POUNCY, PETITIONER

v.

SHANE JACKSON, WARDEN

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Omar Pouncy asserts that his right to self-representation under *Faretta v. California*, 422 U.S. 806 (1975), was violated when he was forced to choose between representing himself or being represented by counsel he thought was unprepared for trial. See *Strickland v. Washington*, 466 U.S. 668 (1984). He says the circuits are split over how to address this “Hobson’s choice” *Faretta* claim, and that they are also split on what the standard is for whether counsel is adequately prepared under *Strickland*. The questions presented are:

1. Whether an inmate who concedes that there is no clearly established law on a substantive constitutional question—by saying there is a circuit split on that question—is precluded from habeas relief under 28 U.S.C. § 2254.

2. Whether raising a new legal argument in support of a claim that was adjudicated on the merits by a state court creates a new claim that has not been adjudicated on the merits within the meaning of 28 U.S.C. § 2254.

PARTIES TO THE PROCEEDING

There are no parties to the proceeding other than those listed in the caption. The petitioner is Omar Pouncy, a Michigan prisoner who was convicted of multiple counts of carjacking, of armed robbery, and of felony-firearm. The named respondent is Carmen Palmer. Pouncy is now being held at the Carson City Correctional Facility, where the Warden is Shane Jackson.

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OPINIONS BELOW

The opinion of the Sixth Circuit finding Pouncy was not entitled to habeas relief on his *Faretta* “Hobson’s choice” claim, Pet. App. 1a–52a, is reported at 846 F.3d 144. The Sixth Circuit’s subsequent decision denying rehearing en banc, Pet. App. 224a, is unpublished. The district court’s amended opinion and order granting habeas relief on the *Faretta* claim, Pet. App. 53a–85a, is reported at 165 F. Supp. 3d 615.

Pouncy raised his *Faretta* claim on direct appeal. The Michigan Court of Appeals opinion on reconsideration adjudicating this claim, Pet. App. 87a–160a, is unreported, but available at 2008 WL 9869818. The Michigan Supreme Court’s denial of leave to appeal, Pet. App. 161a, is reported at 753 N.W.2d 187.

JURISDICTION

The State accepts Pouncy’s statement of jurisdiction and agrees that this Court has jurisdiction over the petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the U.S. Constitution provides, in part, that “[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defence.”

The Fourteenth Amendment to the United States Constitution provides, in part, that “[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law;”

The Antiterrorism and Effective Death Penalty Act, of 1996, Pub. L. 104-132, 104, 110 Stat. 1214, 1219 (codified at 28 U.S.C. § 2241, *et seq.*), (AEDPA) provides, in relevant part:

(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. [28 U.S.C. § 2254(d).]

INTRODUCTION

Pouncy presents his case as an opportunity to resolve three circuit conflicts, one regarding the standard for proving a *Faretta* claim when a defendant chooses to represent himself because he thinks his attorney is not competent, one concerning what constitutes adequate preparation for a criminal trial, and one about when AEDPA deference applies, i.e., what constitutes a new “claim” under AEDPA. But this case is a poor vehicle to address any of these questions.

At the outset, this is an interlocutory appeal: Pouncy has at least 13 unresolved habeas claims pending in the district court and possibly two claims pending on appeal before the Sixth Circuit. Rather than encouraging him to seek certiorari on these claims one after another, this Court should postpone any review of his claims until he has a final judgment.

In any event, not one of his three questions warrants this Court’s review. Two of them raise substantive constitutional questions—how prepared does counsel need to be to provide effective assistance, and what standard governs attorney performance where a defendant chooses to represent himself because he believes his attorney is ineffective. But he asserts that the circuit are divided on these questions, and that assertion is fatal to his case—it is a concession that he is not entitled to relief under 28 U.S.C. § 2254, because the law is not clearly established in his favor.

His procedural question fares no better, for the circuits are not split on whether a new *argument* for an adjudicated claim creates a new *claim* not subject to AEDPA deference. Review should be denied.

STATEMENT OF THE CASE

A. Pouncy engages in a string of armed carjackings.

In September 2005, Samuel Anderson agreed to put his friend Ralph Haynes' Chevy Monte Carlo for sale on his lawn. Pouncy noticed the car and returned a few days later, asking to take the car to his own mechanic. 1/27/06 Tr. 107–10. When Haynes declined, Pouncy still said he wanted to buy it, so they arranged for Pouncy to return to buy it in a couple days. *Id.* at 112. Haynes was busy when Pouncy wanted to take the car for another test drive, so Anderson said he would stand-in. *Id.* at 173. As Pouncy drove with Anderson in the passenger seat, Pouncy pulled a handgun and forced Anderson from the car before driving away. *Id.* at 173–75.

Five days after stealing Haynes's car, Pouncy repeated this crime with different victims. Joseph Davis displayed his friend Early Brady's souped-up Chevrolet Camaro at his auto shop for sale. 1/24/06 Tr. 222–24. Pouncy and two other individuals came to the shop and expressed interest in buying the Camaro. *Id.* at 226–28, 308–09. After multiple visits and some discussion about the vehicle, including a look under the hood, Pouncy said he was ready to purchase it. *Id.* at 228–30. Pouncy, along with Pouncy's stepbrother Wayne Grimes and another man, came by the shop to meet with Brady. *Id.* at 230. Pouncy asked Brady if he could take the vehicle to his own mechanic to have him look at it. *Id.* at 230. Brady agreed and followed Pouncy and his two associates to a house where the mechanic was supposed to meet them. *Id.* at 278. Awaiting the mechanic's arrival, one of the associates,

Grimes, pulled out a gun, told Brady to give him the keys, threatened Brady's life, and fired a warning shot into the air. *Id.* at 280–82. Brady handed over the keys and his cellphone and fled on foot into the nearby woods as directed. *Id.* at 282–83.

About two weeks later, Pouncy repeated his crime a third time. Pouncy called Thomas Sandstrom, who had just listed his classic Cadillac for sale in a local newspaper, expressing interest in the car. 1/25/06 Tr. 66, 69. The next day Pouncy and Grimes went to Sandstrom's house to evaluate it. *Id.* at 68–69. Pouncy asked if he could take the car to Pouncy's mechanic to look it over. *Id.* at 69. Sandstrom agreed and drove the Cadillac to the supposed mechanic's house with Pouncy in the passenger seat, making small talk along the way. *Id.* at 69–70. Sandstrom's wife, Maria, followed in her own car so Thomas would have a ride home should Pouncy buy the car. *Id.* at 69. On arrival, Pouncy asked for the title of the Cadillac; after Sandstrom retrieved the title from Maria's car, he felt Pouncy shove a gun in into his side. *Id.* at 74. Pouncy forced Maria out of her car at gunpoint and demanded Sandstrom's wallet. *Id.* at 74–75. Pouncy told the Sandstroms to walk out into the woods; they complied. *Id.* at 75.

The Sandstroms provided license plate numbers to police, who tracked down Grimes. *Id.* at 75–76. Grimes flipped, confessing involvement in the two car-jackings, identified Pouncy as one of his cohorts, and testified at trial. See generally 1/26/06 Tr.; 1/27/06 Tr. Grimes pled to armed robbery and using a firearm to commit a crime. 1/26/06 Tr. 115.

B. Pouncy is convicted of four counts of carjacking, four counts of armed robbery, and three gun-related crimes.

The State of Michigan charged Pouncy with multiple counts of carjacking, armed robbery, and related gun crimes for his involvement in the carjacking scheme. The self-representation claims now at issue arose during the trial that addressed the Brady and Sandstrom carjackings, with evidence about the Haynes carjacking admitted as other-acts evidence. Pet. App. 94a, 130a. A separate trial occurred for the Haynes carjacking, and the cases were consolidated on appeal in the state courts, but the claims at issue here relate solely to the Brady and Sandstrom trial.

When the parties came on the record the morning of trial, Pouncy’s counsel (Michael Breczinski) said that, so far, his investigator “has been coming up with nothing on some of the leads that we have as to possible alibi witnesses and such,” and represented that the investigator “made numerous calls,” but added that, because he did not have a “final written report” from the investigator, “to say whether I’m ready for trial or not is problematic.” 1/24/06 Tr. 3–4. Pouncy then said that he and Breczinski were “really not on the same page,” *id.* at 5, and that “I don’t really feel comfortable with talkin’ to him ‘cause every time we try to talk . . . I think it’s like some kind of conflict” *Id.* at 5–6. Pouncy then complained that *he* (not counsel) did not have the discovery packet. *Id.* at 6. Pouncy added: “I don’t even feel like *I’m* ready, . . . *I’m* not ready [sic] prepared.” *Id.* at 7 (emphasis added). After a vague reference to “if some motions would have been filed,” and saying “I really don’t feel comfortable with . . . the representation I have now,”

Pouncy noted that the longest he had ever talked to Brezinski was ten to fifteen minutes and that “[i]t’s just I don’t feel comfortable that’s all.” *Id.*

When the trial court asked counsel to respond to Pouncy’s comments, Brezinski said that he visited with Pouncy at the jail “maybe a half-dozen [times].” 1/24/06 Tr. 7–8. Pouncy confirmed this fact, but then complained that “we don’t talk” and added that he had asked Brezinski to file motions that had not been filed. *Id.* at 8. The trial court explained to Pouncy that Brezinski had been “practicin’ law longer than you’ve been [alive]” and that “you might think it’s, it’s wise to file the motion but you don’t know the law.” *Id.* at 9–10.

The trial court then asked counsel what he had discovered through the private investigator that counsel had hired at county expense to follow up on some of the leads Pouncy had provided. 1/24/06 Tr. 10. Counsel explained that one of the reasons he hired the investigator was to try to find the possible alibi witness. In so doing, Brezinski said he gave the investigator everything he had in his files so that the investigator could review them and follow up on any leads, and he put the investigator in touch with Pouncy. *Id.* at 11–12. Among the investigator’s tasks was to look into Pouncy’s proposed alibi defense and investigate other leads for him. *Id.* But, said Brezinski, the investigator, whom he described as “a fairly thorough person,” had “come up with nothin’.” *Id.* at 10–11, 17.

When the trial court asked if Brezinski planned on filing an alibi notice, counsel responded, “we have discussed that matter.” 1/24/06 Tr. 11. He then stated, “Obviously, if there are no other witnesses, he can get

up on the stand with or without a notice and say I wasn't there," adding that an alibi notice was necessary only with "other proof witnesses or other material proof of that alibi." *Id.* The trial court then confirmed with counsel, "at least you've had a chance to look into the alibi issue and you've had your investigator look into it," to which Breczinski replied, "[y]es." *Id.* at 12–13.

Then Pouncy talked about a photo that he wanted introduced into evidence of Grimes (Pouncy's stepbrother and co-defendant) with Grimes' "best friend," who he said was with Grimes all the time, and represented that people mistook him for his stepbrother's friend all the time. 1/24/06 Tr. 14.

The parties then discussed a plea offer. 1/24/06 Tr. 21. The prosecutor and the defense then discussed their preliminary calculations of the sentencing guidelines if the trial court sentenced Pouncy as a habitual third offender, and if the court sentenced him without that enhancement. *Id.* at 20–21. It turns out that the prosecutor and Breczinski's calculations of the guidelines underestimated the potential sentence Pouncy faced. Regardless, Pouncy understood from his arraignment (and reiterated that morning of trial) that he faced up to life imprisonment for each of the armed robbery and carjacking charges. 1/9/06 Hr'g Tr. 4–5; 1/24/06 Tr. 19. Pouncy said he had no interest in a plea because he was innocent. 1/24/06 Tr. 23.

The prosecutor then made several motions in limine. The first was a motion to admit other-act evidence concerning the Haynes (the third) carjacking for the purpose of showing a similar course of conduct,

scheme, or plan. 1/24/06 Tr. 23–24. Breczinski responded that he did not believe that the other-act evidence was necessary to the case, and that it would not necessarily “add anything to the trial or . . . bolster their case.” *Id.* at 24–25. Finding that the other-act evidence was probative and that the probative value of the evidence was not substantially outweighed by its prejudicial value, the trial court ruled the evidence admissible. *Id.* at 28–29.

The prosecutor also moved to admit a tape recording of an answering machine message left with one of the victims purporting to be Pouncy threatening the victim after the carjacking occurred. After some discussion with Breczinski and the prosecutor, the Court granted the prosecutor’s motion conditioned upon a proper foundation and authentication. 1/24/06 Tr. 34.

The case proceeded to jury selection. Breczinski fully participated in the jury selection, both in his statements to the jury pool, *see e.g.*, 1/24/06 Tr. 94–99, and in his exercise of peremptory challenges (more than a dozen) on behalf of Pouncy.

After the trial court gave preliminary instructions to the jury, the prosecutor presented his opening statement. But before Breczinski could give his opening statement, Pouncy informed Breczinski that Pouncy wanted to make his own opening statement. Counsel brought this to the trial court’s attention outside the presence of the jury. 1/24/06 Tr. 212. Addressing the trial court, Pouncy reiterated his perceived lack of contact with his counsel, stating that, although Breczinski had come to see him “about a dozen times,” he did not feel comfortable because “I didn’t talk to him” and no alibi had been “formed.” 1/24/06 Tr. 214.

Then, Pouncy stated that “there ain’t nobody gonna take care more, no more than yourself,” adding that “I want to just give my opening statement.” *Id.* at 215. The trial court told Pouncy that he could not just do his opening statement and then turn the rest of the case over to Breczinski—he had to choose between representing himself or having Breczinski represent him. *Id.* at 216.

Pouncy continued to reiterate his lack of contact with Breczinski. 1/24/06 Tr. 216–17. When Pouncy continued to speak without answering the court’s question about his choice of representation, the court indicated that it was calling the jury back into the courtroom and cautioned Pouncy against misbehaving. *Id.* at 217–18.

Breczinski then gave his opening statement, posing a theory of mistaken identity. 1/24/06 Tr. 220–21. Counsel questioned the reliability of four of the five witnesses who had identified Pouncy as the perpetrator because they had never seen Pouncy before and had little interaction with the perpetrator. *Id.* at 220. Breczinski also raised the specter of cross-racial identification, which can be unreliable; four of the witnesses were white, Pouncy is African-American. *Id.* Counsel noted the lack of any fingerprint, DNA, or video evidence linking Pouncy to the carjackings. *Id.* Anticipating the testimony of Grimes, Pouncy’s stepbrother, Breczinski alluded to Grimes’ motive to lie given the “bad blood” between Pouncy and Grimes after Pouncy had been “intimate” with Grimes’ girlfriend. *Id.*

During the prosecutor’s direct examination of the State’s first witness, Pouncy wrote Breczinski a note

stating: "I'm gonna represent myself from now on so you can tell the Judge." 1/24/06 Tr. 232. After excusing the jury, the judge engaged in a colloquy with Pouncy:

THE COURT: Okay Mr. Pouncy would you stand sir? Is that your desire at this time? Please remain standing sir. Mr. Pouncy you understand you have the right to an attorney and you have the right to Court appointed counsel if you can't afford one, do you understand that?

MR. POUNCY: I don't have [an] attorney right now.

THE COURT: Sir I'm just asking you do understand your rights sir?

MR. POUNCY: Oh yes I do understand.

THE COURT: You understand that if you represent yourself that I will have to treat you like any other lawyer and if you don't comply with the Court rules I'm gonna have to call you on it you understand that?

MR. POUNCY: Yes sir.

THE COURT: And you understand that Mr. Brezinski will be here just simply to advise you from this trial forth and if you stand up and start representing yourself you're not gonna be able to change horses in the middle of the stream. You're gonna be representing yourself from beginning to end. Is that really what you want to do?

MR. POUNCY: Yes. Yes.

THE COURT: Mr. Pouncy I'm gonna tell you that in my opinion you have no business representing yourself, none whatsoever.

MR. POUNCY: The fact that they found the (inaudible) shoe—

THE COURT: Sir I just, sir I just want you to understand that uh—

MR. POUNCY: All right I'm ready to go then.

THE COURT: All right then Mr. Breczinski have a seat and Mr. Pouncy have a seat sir.
[1/24/06 Tr. 232–34.]

Pouncy represented himself throughout the six-day trial.

Having heard several eyewitnesses unequivocally identify Pouncy, the jury convicted Pouncy as charged. 2/1/06 Tr. 104–06. The trial court sentenced Pouncy to 586 to 824 months' imprisonment. 3/9/06 Tr. 80–83.

C. Pouncy unsuccessfully seeks relief in Michigan's courts.

Pouncy appealed his convictions to the Michigan Court of Appeals, with appellate counsel raising ten claims for review. Pouncy also raised additional claims in his own separate *pro se* brief including the claim that Pouncy's conviction must be reversed because his waiver of counsel was not knowing, intelligent, and voluntary.

Relying on Michigan precedent derived from *Faretta*, and after a thorough review of the on-the-record discussions between the trial court, Breczinski, and Pouncy, the Michigan Court of Appeals found that Pouncy repeatedly raised the issue of self-representation. Pet. App. 102a–03a. The court also determined that Pouncy was well advised of the pitfalls of self-representation prior to the trial court’s ultimate acceptance of Pouncy’s waiver of counsel. Pet. App. 104a. Accordingly, the Michigan Court of Appeals held that “[t]he trial court did not clearly err when it determined that defendant knowingly, intelligently and voluntarily waived his right to counsel. Therefore, the trial court did not err when it permitted defendant to represent himself.” Pet. App. 108a–09a.

After determining that the remainder of his claims lacked merit, the Michigan Court of Appeals affirmed Pouncy’s convictions, Pet. App. 87a, and the Michigan Supreme Court denied leave to appeal, Pet. App. 161a.

After his direct appeal concluded, counsel for Pouncy filed a motion for relief from judgment in state trial court raising another list of claims. Pouncy supplemented those with a set of claims he raised *pro se*. The *pro se* motion included what he now calls his “Hobson’s Choice” claim: a claim that his waiver of counsel at trial was involuntary because he was forced to choose between unprepared counsel or no counsel.

In a lengthy opinion, the trial court denied the motion. Specifically, the court denied the *Faretta* claim because, under Michigan Court Rule 6.508(D)(2), it could not grant relief on a claim that “alleges grounds for relief which were decided against the defendant in

a prior appeal” and because “the [Michigan] Court of Appeals decided this issue against Defendant Pouncy in his prior appeal.” Pet. App. 197a–98a.

Pouncy’s efforts to appeal the denial failed. The Michigan Court of Appeals denied his application for leave to appeal for failure to establish entitlement to relief under Michigan Court Rule 6.508(D). Pet. App. 219a. And the Michigan Supreme Court also denied him relief under the same provision. Pet. App. 221a.

D. The district court grants Pouncy habeas relief.

Pouncy raised more than a dozen claims for relief between his federal habeas petition and his amended petition. One of his claims asserted that the state courts erred in holding that his waiver of counsel was constitutionally sufficient.

The district court determined that AEDPA, 28 U.S.C. § 2254(d), applied to Pouncy’s claim because the Michigan Court of Appeals understood that Pouncy’s claim included the Hobson’s choice issue. In recounting Breczinski’s pretrial advocacy, the district court took note of the following facts: that Breczinski did not file any substantive pretrial motions, did not receive a final written report from his investigator, did not meaningfully respond to the prosecutor’s two motions in limine, misscored Pouncy’s guidelines range, and did not extensively meet with his client. Pet. App. 55a–61a.

Despite acknowledging AEDPA’s heavy deference to state-court adjudications, and emphasizing this

Court’s precedent limiting the applicable “clearly established Federal law” to “‘*specific question[s]*’ decided by the Supreme Court,” Pet. App. 73a (quoting *Lopez v. Smith*, 135 S. Ct. 1, 4 (2014)) (emphasis in district-court opinion), the district court relied on court of appeals’ authority to determine that Pouncy’s waiver of counsel was involuntary under *Faretta v. California*, 422 U.S. 806 (1975), because he was “forced . . . to choose between unprepared counsel and representing himself.” Pet. App. 76a. Because the Michigan Court of Appeals did not account for the so-called “Hobson’s Choice” aspect implicit in the claim, the district court held that the state court unreasonably applied *Faretta*, and granted Pouncy relief. Pet. App. 82a, 84a.

E. The Sixth Circuit reverses the district court’s grant of habeas relief.

The court of appeals reversed. Recognizing its limited role under AEDPA, and applying the “highly deferential standards applicable to federal collateral review of state-court convictions,” Pet. App. 3a, the court of appeals concluded that the state court’s ruling was not “‘so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility of fairminded disagreement.’” Pet. App. 38a (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)).

After an exhaustive recounting of the pretrial colloquies concerning Brezinski’s level of preparedness and Pouncy’s decision to proceed in his own defense, Pet. App. 5a–18a, the court of appeals turned to whether a state court adjudicated Pouncy’s claim on

the merits, finding, like the district court below, that the Michigan Court of Appeals did so. Pet. App. 29a. Because Pouncy merely shifted the emphasis of his claim that his waiver of counsel was involuntary, the court of appeals determined that the “Hobson’s choice” theory was a different angle, but not a distinct claim. Pet. App. 30a. Because the state court adjudicated the claim, AEDPA deference was warranted, and the question became whether the state-court adjudication was contrary to or an unreasonable application of clearly established Supreme Court precedent.

The court of appeals then highlighted this Court’s command that “[a] legal principle is ‘clearly established’” if and only if it is “‘embodied in a holding of the Supreme Court.’” Pet. App. 33a (quoting *Thaler v. Haynes*, 559 U.S. 43, 47 (2010) (per curiam)) (brackets omitted). What’s more, only “on-point holdings” are eligible for evaluation, and those holdings are to be narrowly construed. Pet. App. 33a. Heeding this caution, the court of appeals “ha[d] doubts” that *Faretta* supplied applicable “clearly established” Supreme Court law because in *Faretta* this Court was not “confronted [with] a situation in which a defendant decided to waive counsel due to his attorney’s lack of preparedness.” Pet. App. 33a.

The court of appeals went on to discuss how it would proceed if the case were subject to de novo review. The Sixth Circuit has, in its own precedent, acknowledged the existence of a “Hobson’s choice” claim like the one Pouncy advanced. Pet. App. 34a. But even applying that rule, the court of appeals noted that Pouncy would have an uphill battle to prove his

waiver was involuntary given Breczinski's representations that his investigator, one of apparent repute, had turned up nothing despite making "numerous" contacts, as well as Breczinski's statements on the record revealing full comprehension of Pouncy's file and his "vigorous[] participat[ion]" in voir dire. Pet. App. 35a, 36a. Further, the court of appeals characterized Pouncy's complaint as one primarily of a personal nature. Pet. App. 36a. In sum, "one could read the record and conclude . . . that Breczinski was sufficiently prepared that Pouncy's waiver of counsel was the product of voluntary choice." Pet. App. 37a.

The court of appeals noted that Pouncy has a number of yet-unreviewed habeas claims pending in the district court. Pet. App. 37a–38a. This tranche of claims includes other unreviewed arguments pertaining specifically to his *Faretta* claim, which the court of appeals left for the district court to evaluate in the first instance.

The court of appeals dissent would have affirmed the district court's grant of relief. Although the dissent agreed that AEDPA deference was appropriate given the Michigan Court of Appeals adjudication of the claim, it cast the facts in a different light, concluding that the "record is replete with examples of Breczinski's unpreparedness." Pet. App. 46a.

When opining that even applying AEDPA deference should not save the Michigan Court of Appeals decision, the dissent relied heavily on Sixth Circuit precedent for the proposition that Pouncy was forced into a "constitutionally-abhorrent choice" between unprepared counsel and self-representation. Pet. App. 40a–41a.

Finally, the dissent took issue with the majority’s perceived importation of *Strickland* into the *Faretta-Hobson’s-choice* context. Pet. App. 48a–49a.

REASONS FOR DENYING THE PETITION

I. The interlocutory nature of this federal habeas appeal is reason enough not to grant certiorari.

Pouncy’s petition concedes that he “has additional habeas claims still pending in the district court.” Pet. 33. That concession is correct: of his more than a dozen claims, he has been denied relief on only two. In fact, the Sixth Circuit noted that only part of his *Faretta* claim has been denied. Pet. App. 37a. That means he still has the potential to prevail on other claims in the ongoing district-court proceedings; as the Sixth Circuit noted, “[n]othing in [its] opinion prevents Pouncy from arguing those claims in the district court on remand.” Pet. App. 37a.

This Court usually awaits a final judgment in the lower courts before exercising its certiorari jurisdiction. E.g., *Virginia Military Institute v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring) (“We generally await final judgment in the lower courts before exercising our certiorari jurisdiction.”); *Locomotive Firemen v. Bangor & Aroostook R. Co.*, 389 U.S. 327, 328 (1967) (per curiam) (“[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court.”); *Hamilton-Brown Shoe Co. v. Wolf Brothers & Company*, 240 U.S. 251, 258 (1916) (“except in extraordinary cases, the writ [of certiorari] is not issued until final decree.”); *American Constr. Co.*

v. *Jacksonville, T. & K.W.R. Co.*, 148 U.S. 372, 384 (1893).

There is good reason for this practice: it prevents this Court from having to address a single case multiple times or, for that matter, from having to address a claim unnecessarily, such as if the parties settle or if a party might ultimately prevail for a different reason (such as a different defense). See *Collins v. Miller*, 252 U.S. 364, 370 (1920) (“A case may not be brought here by appeal or writ of error in fragments. To be appealable, the judgment must be, not only final, but complete.”); *Rose v. Lundy*, 455 U.S. 509, 520 (1982) (when the district court “review[s] all of the prisoner’s claims in a single proceeding,” this provides “for a more focused and thorough review.”). Adhering to this longstanding rule promotes judicial economy and avoids entangling this Court in issues that may no longer matter to the outcome of the case by the time final judgment is reached.

These concerns are especially compelling in the context of habeas appeals. Allowing a prisoner to proceed as Pouncy is proceeding in this case—concurrently at all three levels of the federal judiciary, with at least 13 claims pending in the district court, two pending in the Sixth Circuit, and part of his *Faretta* claim pending before this Court—“undermines [Congress’s] goal of streamlining federal habeas proceedings.” *Rhines v. Weber*, 544 U.S. 269, 277 (2005). And the relief a habeas petitioner seeks is the same with each claim, so a win on any of his other claims would make this Court’s resolution of this *Faretta* claim irrelevant to the outcome of his case. For habeas appeals, the better course is to wait for a final judgment.

Indeed, the Eleventh Circuit, exercising its supervisory authority, has instructed district courts “to resolve all claims for relief raised in a petition for writ of habeas corpus pursuant to § 2254, regardless of whether habeas relief is granted or denied,” because piecemeal federal habeas review has a “disruptive effect” on a state’s criminal justice system. *Clisby v. Jones*, 960 F.2d 925, 935–36 (11th Cir. 1992).

While conceding that his petition is interlocutory, Pouncy cites six cases where this Court heard an appeal on an interlocutory basis in an effort to persuade this Court to hear his interlocutory appeal. *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002 (2017) (copyright); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (religious liberty); *American Broad. Cos. v. Aero, Inc.*, 134 S. Ct. 2498 (2014) (copyright); *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014) (fiduciary duties under Employee Retirement Income Security Act); *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014) (securities); *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024 (2014) (tribal sovereign immunity). But while interlocutory review was appropriate in those cases because they involved large numbers of parties, a controlling issue, or immunity from suit, he has not identified a single habeas case where this Court granted review when the inmate still had other claims pending. Certiorari is not warranted over this interlocutory appeal.

II. The lack of clearly established law is dispositive under 28 U.S.C. § 2254(d)(1), which means this Court would not reach the constitutional questions Pouncy raises.

Even if this appeal were not interlocutory, this Court’s review of Pouncy’s constitutional questions would not be warranted because resolving them will not affect the outcome of his case. Any discussion of the standard for proving a *Faretta* “Hobson’s choice” claim or of what constitutes adequate preparation for a criminal trial would be merely an advisory opinion, because Pouncy has conceded the ultimate question under § 2254—that there is no clearly established law supporting his claim.

A. As Pouncy has conceded, there is no clearly established law on either constitutional question he presents.

He makes this concession by asserting that the circuits have split on each of his two constitutional questions—on what the proper standard is for proving a *Faretta* “Hobson’s choice” claim, and on what constitutes adequate preparation for a criminal trial. Pet. 13, 23. But the existence of circuit splits is fatal to his claim, because “the only question that matters under § 2254(d)(1)” is whether the state court’s merits decision is contrary to, or involved an unreasonable application of, clearly established federal law, as determined by *this* Court. *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003).

Pouncy cannot point to a decision of this Court addressing either of his questions, Pet. 13–18 (relying entirely on circuit-court decisions addressing what he

calls the “Hobson’s choice” situation); Pet. 23–32 (relying almost entirely on circuit-court decisions addressing what constitutes adequate preparation for trial, with one passing reference to the definition of “routine investigation” in *Taylor v. Illinois*, 484 U.S. 400, 415–16 (1988)). And for good reason: this Court has never addressed the situation where a defendant must choose between representing himself or being represented by counsel he thinks is not prepared for trial. As the court of appeals put it, no precedent from this Court “clearly establishes the proposition that a defendant’s decision to waive counsel cannot be voluntary where his . . . counsel is unprepared.” Pet. App. 33a. Or, to borrow wording from this Court, “[t]his Court has never found a [*Faretta*] violation in circumstances remotely resembling [Pouncy’s] case.” *Metrish v. Lancaster*, 569 U.S. 351, 367 (2013). Nor has this Court defined the precise parameters of what constitutes adequate preparation or held that counsel was unprepared for trial because counsel had not received a final report from an investigator who had already told counsel that his numerous call and contacts had turned up no alibi witnesses. Pet. App. 35a (Sixth Circuit noting that “no Supreme Court precedent explains just how unprepared counsel must be before a court may deem a waiver of counsel to be involuntary . . .”).

This is a problem for Pouncy: where “[n]o precedent of [the Supreme Court] clearly forecloses” a state court’s ruling, it simply cannot be an unreasonable application of Supreme Court precedent. *Woods v. Ether-ton*, 136 S. Ct. 1149, 1152 (2016) (per curiam); *Lopez v. Smith*, 135 S. Ct. 1, 4 (2014) (explaining that absent

a decision by this Court addressing “the specific question presented by [a] case” a federal court cannot reject a state court’s assessment of claim).

Pouncy’s reliance on circuit splits on these issues confirms that this Court has not definitively resolved these questions. Although a conflict between court of appeals’ decisions may be a reason to grant certiorari if the circuit split is on a *procedural* issue (such as the statute of limitations or a procedural default), a conflict between the court of appeals on a *substantive* constitutional question in a habeas case is a reason *not* to do so, as circuit splits reflect a *lack* of clearly established law from this Court. See, e.g., *Carey v. Musladin*, 549 U.S. 70, 76–77 (2006) (concluding that the fact “lower courts have diverged widely” on the question presented “[r]eflects the lack of guidance from this Court” and supports a finding that “the state court’s decision was not contrary to or an unreasonable application of clearly established federal law”); *Kane v. Garcia Espitia*, 546 U.S. 9, 10 (2005) (per curiam) (in reversing a grant of habeas relief, remarking that “federal appellate courts have split on” the disputed question); *Evenstad v. Carlson*, 470 F.3d 777, 783 (8th Cir. 2006) (“When the federal circuits disagree as to a point of law, the law cannot be considered ‘clearly established’ under 28 U.S.C. § 2254(d)(1).”); *Lowe v. Swanson*, 663 F.3d 258, 263 (6th Cir. 2011) (recognizing that a “split of authority provides strong support under AEDPA to affirm the [state court’s] decision”); *Miller v. Colson*, 694 F.3d 691, 698 (6th Cir. 2012) (“[A] disagreement among the circuit courts is evidence that a certain matter of federal law is not clearly established.”). But see *Hall v. Zenk*, 692 F.3d 793, 799 (7th Cir. 2012) (relying solely on qualified-

immunity cases for the proposition that “a split is not dispositive of” whether the law is clearly established, without addressing § 2254(d)(1)’s text).

Under AEDPA, the lack of clearly established law as determined by this Court is fatal to Pouncy’s claims and should be the end of the inquiry. See, e.g., *House v. Hatch*, 527 F.3d 1010, 1017 (10th Cir. 2008) (“[T]he threshold determination that there is no clearly established federal law is analytically dispositive in the § 2254(d)(1) analysis.”).

B. Addressing the merits of Pouncy’s constitutional questions would not affect the outcome of his case.

Article III of the U.S. Constitution limits federal courts to hearing “Cases” or “Controversies.” U.S. Const. art. III, § 2; *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014). And “no justiciable ‘controversy’ exists when parties . . . ask for an advisory opinion.” *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007); see also *Flast v. Cohen*, 392 U.S. 83, 96 (1968) (noting that “the oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions”) (internal quotation marks omitted). This prohibition covers a party’s request to “decide questions that cannot affect the rights of litigants in the case.” *Chafin v. Chafin*, 133 S. Ct. 1017, 1023 (2013) (quotation marks omitted); see also *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974) (repeating “the familiar proposition that ‘federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them’ ”).

Consistent with these principles, this Court has repeatedly avoided giving advisory opinions in the habeas context, reversing many habeas grants based on the lack of “clearly established” law without deciding the constitutional question, and has repeatedly acknowledged that the “‘narrow context’” of federal habeas review is not the proper forum for making new constitutional law. See, e.g., *Virginia v. LeBlanc*, 137 S. Ct. 1726, 1729 (2017) (per curiam) (noting, in response to competing arguments about the merits of a constitutional claim, that “[t]hese arguments cannot be resolved on federal habeas review”); *Woods v. Donald*, 135 S. Ct. 1372, 1378 (2015) (per curiam) (“Because we consider this case only in the narrow context of federal habeas review, we ‘expres[s] no view on the merits of the underlying Sixth Amendment principle.’”); *Marshall v. Rogers*, 133 S. Ct. 1446, 1451 (2013) (per curiam) (same); *Lopez v. Smith*, 135 S. Ct. 1, 5 n.2 (2014) (per curiam) (noting, when reversing a habeas grant because of a lack of clearly established law, that Court “need not opine on the correctness of [the state court’s] decision”); *White v. Woodall*, 134 S. Ct. 1697, 1703, 1707 (2014) (noting that “[w]e need not decide here and express no view on” whether the state court’s conclusion “would be correct in a case not reviewed through the lens of § 2254(d)(1)” and that “[t]he appropriate time to consider the question as a matter of first impression would be on direct review, not in a habeas case”); *Wright v. Van Patten*, 552 U.S. 120, 126 (2008) (leaving consideration of the merits “for another day” because “this case turns on the recognition that no clearly established law” justified habeas relief); *Kane*, 546 U.S. at 10 (noting that the

constitutional question “cannot be resolved here” because the alleged constitutional right was not clearly established).

This Court’s determination on the “clearly established” question is adequate to resolve the dispute in this habeas case. And because going beyond that threshold inquiry to address the constitutional questions is unnecessary, and cannot affect Pouncy’s rights or change the outcome of this habeas case, any ruling on the merits of Pouncy’s claims would be advisory—and would contradict the restrictions of AEDPA.

While it may be permissible to address whether constitutional rights are violated before deciding whether those rights are “clearly established” in the qualified-immunity context, there are major differences between qualified-immunity cases and habeas cases. *Williams v. Taylor*, 529 U.S. 362, 380 n.12 (2000) (noting that habeas law and the law of qualified immunity are “doctrinally distinct”). For one, § 2254(d)(1) governs habeas proceedings; in contrast, no similar statute governs the qualified-immunity context. And this Court has said that “the only question that matters under § 2254(d)(1)” is whether the state court’s merits decision is contrary to, or involved an unreasonable application of, clearly established federal law, as determined by this Court. *Lockyer*, 538 U.S. at 71.

For another, qualified-immunity cases arise on direct review, while habeas cases reach the federal courts on collateral review. And while a qualified immunity case, as a case on direct review, may be a vehicle to establish or refine constitutional rights (even

if those don't benefit the current plaintiff—because otherwise, such questions could never be decided), a habeas case cannot be such a vehicle, as the question in a habeas case on collateral review is only whether such rights have already been established. And following AEDPA's rules will not prevent the Court from reaching the merits of the whole spectrum of constitutional rights applicable to criminal defendants, as the Court's direct review of cases arising from all 50 States and from federal jurisdictions provides the appropriate avenue for addressing merits issues and for resolving circuit splits.

Thus, in a habeas case, if there is no “clearly established” law that a state court would be required to follow, there is no need to pursue the question any further. This is unlike the qualified-immunity context, where even if there is no clearly established law at the outset, the question itself may still need to be answered so as to guide future government action.

Granting this petition to settle the proper standard for proving a *Faretta* “Hobson's choice” claim and what constitutes adequate preparation for a criminal trial would result in an advisory opinion on those issues because the lack of clearly established law under AEDPA is dispositive of these constitutional claims. As a result, even if this Court resolved these constitutional claims, the Court's ruling would have no affect on Pouncy's case.

III. The circuits are not split on whether presenting a new legal argument converts an already adjudicated claim into a new claim.

Pouncy also raises a procedural question that is not subject to AEDPA's "clearly established" requirement, namely, whether adding a new argument in support of a claim already rejected by the state courts creates a new claim that is subject to only de novo review by the federal courts. He notes that in *Cullen v. Pinholster*, 563 U.S. 170, 181 n. 10 (2011), this Court declined to decide "where to draw the line between new claims and claims adjudicated on the merits." He then argues that this case would be a good vehicle in which to do so and that the court of appeals opinion in this case created a circuit split on how to distinguish a new claim from one adjudicated on the merits. Though AEDPA has now been in effect for more than two decades, and though a half-dozen years have passed since *Pinholster*, Pouncy puts forward only two cases as evidence that the lower courts are confused as to what counts as a "new claim." And neither case conflicts with Pouncy's.

Pouncy first asserts a conflict with the Seventh Circuit's opinion in *Warren v. Baenen*, 712 F.3d 1090, 1096 (7th Cir. 2013). But the Seventh Circuit's discussion of new claims in *Warren* was dicta that did not impact the outcome of his case: "Even with *de novo* review, however, Warren's arguments are not convincing." *Id.* at 1098. In short, whether his claim was a new one to be reviewed de novo or an old one to be reviewed under AEDPA deference did not matter to the Seventh Circuit's holding in that case, because the prisoner's claim failed even under de novo review.

Dickens v. Ryan, 740 F.3d 1302 (9th Cir. 2014) (en banc), is also weak grounds for a circuit split. Pouncy asserts that the Ninth Circuit “held that a *new legal argument*, even if closely related to an *argument* decided by the state courts, is still a new claim entitled to *de novo* review.” Pet. 19 (emphasis added). But *Dickens* did not involve a new legal argument. Rather, the issue in *Dickens* was whether new *facts* could mean that a claim was not fairly presented to the state courts and therefore was procedurally defaulted. *Id.* at 1318–19 (referring repeatedly to “new factual allegations” and “new evidence”). Pouncy is not alleging that he has uncovered any new *facts*; he is merely adding a different *argument* that relies on the same facts that have been recorded in the transcripts since his trial. In short, Pouncy has not identified a single court of appeals decision that reached a different holding on the issue he presents: “that a distinct legal argument constitutes a new claim under AEDPA.” Pet. 22.

In fact, not even the district court or the dissenting judge in the Sixth Circuit agreed with Pouncy’s Hobson’s choice claim was presenting a new claim. And for good reason. Pouncy raised, and the Michigan Court of Appeals adjudicated on its merits, a *Faretta* waiver-of-counsel claim. The district court explained why AEDPA deference applied: “That court understood Pouncy’s argument—at least in a general sense—to be that he ‘did not knowingly, intelligently, and voluntarily waive his right to have counsel represent him at trial,’ ” and “that court purported to apply the *Faretta* standard to Pouncy’s waiver and to determine whether Pouncy had, in fact, waived his right to counsel.” Pet. App. 71a n.2. The dissenting judge also concluded that Pouncy’s *Faretta* “Hobson’s choice”

claim had been adjudicated by the state appellate court. Pet. App. 39a.

Indeed, as the Sixth Circuit pointed out, Pouncy himself had previously conceded that “his ‘Hobson’s choice’ theory does not amount to a distinct claim.” Pet. App. 29a.

In any event the Sixth Circuit correctly concluded that the state court had ruled on this claim when the state court ruled that Pouncy had “ ‘knowingly, intelligently and voluntarily waived his right to counsel.’ ” Pet. App. 30a (quoting *Pouncy*, 2008 WL 9869818, at *10). The state appellate court “was aware that ‘[t]he existence of a knowing and intelligent waiver of counsel depends on the particular facts and circumstances of a case’ and ‘review[ed] de novo the entire record’ with this principle in mind.” *Id.* at 31a (quoting *Pouncy*, 2008 WL 9869818, at *4–8). The state court’s opinion included “consideration of Brezczinski’s preparedness for trial,” and held “that Pouncy’s ‘allegations that Brezczinski was ineffective’ lacked support in the record.” *Id.* (quoting *Pouncy*, 2008 WL 9869818, at *11). And the Sixth Circuit noted that the Michigan court “explicitly rejected Pouncy’s contention that Brezczinski was unprepared on the day of trial, concluding that Accardo’s ‘investigation apparently revealed no legitimate potential for an alibi defense.’ ” *Id.* (quoting *Pouncy*, 2008 WL 9869818, at *19). Accordingly, the Sixth Circuit correctly concluded that the Michigan Court of Appeals adjudicated Pouncy’s claim “ ‘on the merits.’ ” Pet. App. 31a (quoting 28 U.S.C. § 2254(d)).

CONCLUSION

The petition for writ of certiorari should be denied.

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