No. 21-679 (CAPITAL CASE)

IN THE SUPREME COURT OF THE UNITED STATES

Tim Shoop, Warden,

Petitioner,

v.

August Cassano,

Respondent.

BRIEF IN OPPOSITION

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CAPITAL CASE—NO EXECUTION DATE

QUESTIONS PRESENTED

August Cassano asserted his right to self-representation multiple times before his trial, beginning with a written "Waiver of Counsel" motion he filed in May 1998 and ending with an oral request he made in April 1999. The trial court never held a *Faretta* hearing. The Ohio Supreme Court denied relief on direct appeal, but in doing so, failed to address the "Waiver of Counsel" motion and did not consider the context of the oral request. In habeas proceedings, the Sixth Circuit reviewed Mr. Cassano's first request *de novo*—because the state court had ignored his written May 1998 motion and instead erroneously determined that "Cassano's only written motion . . . was made in September 1998 and related solely to hybrid representation"—and applied AEDPA deference to that court's adjudication of his subsequent oral request. It granted the writ based on both invocations.

1. Where the Petitioner has failed to acknowledge significant facts that contradict his characterization of the record, should this Court reject Petitioner's request to overrule the fact-bound decision of the court below, which concluded that, under both *de novo* review and applying AEDPA deference, the state courts twice denied Mr. Cassano's Sixth Amendment right to waive counsel and represent himself?
2. Where Federal Rule of Appellate Procedure 35 vests the federal Courts of Appeals with discretion whether to grant rehearing *en banc*, should this Court deny Petitioner's request to create a rule that all decisions granting habeas

relief are important enough to justify *en banc* review whenever the State claims the ruling by a three-judge panel was incorrect?

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INTRODUCTION

Before his capital trial commenced, Mr. Cassano asked to represent himself: in a written motion he filed in May 1998; in discussions with the court in September 1998; and at a hearing in April 1999. The trial court refused all of these requests without holding a hearing to determine his competency to waive counsel as required by *Faretta v. California*, 422 U.S. 806, 835 (1975). Mr. Cassano was convicted and sentenced to death.

On direct appeal, the Supreme Court of Ohio affirmed, finding Mr. Cassano's right to self-representation had not been violated because, according to the court, he had not requested to represent himself until April 1999, three days prior to trial. Based upon this unreasonable determination of the facts, and without ever adjudicating Mr. Cassano's written May 1998 request, the state court denied his claim.

The Sixth Circuit granted habeas relief. Because the state court had unreasonably determined the facts and had not considered the May 1998 Waiver of Counsel, it concluded on *de novo* review that Mr. Cassano had been denied of his Sixth Amendment right to self-representation. It also found Mr. Cassano entitled to relief when applying AEDPA deference to his April 1999 oral invocation.

The Warden then petitioned for rehearing *en banc* without identifying a specific issue of "exceptional importance," Fed. R. App. P. 35(b)(1)(B), insisting it should be "reason enough to grant review" that "the panel erroneously granted habeas relief to a repeat murderer," Supp.App. 292a. The court denied the petition.

The Warden now asks this Court not only to reverse a correctly decided, fact-bound case, but also to create a new rule subjecting to *en banc* review any grant of habeas relief that is, in the State's view, "clearly erroneous," intruding upon the discretion of the circuit courts. This Court should deny these requests.

STATEMENT OF FACTS

August Cassano was convicted and sentenced to death for the October 21, 1997, death of Walter Hardy, Mr. Cassano's cellmate at Mansfield Correctional Institution.

In the months leading up to his trial, Mr. Cassano repeatedly asked the trial court to represent himself. Without ever holding a *Faretta* hearing, the trial court refused Mr. Cassano's requests. The state supreme court rejected his *Faretta* claim on direct review, but the Sixth Circuit granted a writ of habeas corpus, holding Mr. Cassano had twice clearly and unequivocally asserted his right to self-representation and had been denied of his Sixth Amendment rights by the state courts. The Sixth Circuit reviewed the claim related to Mr. Cassano's initial written motion *de novo* after determining that state-court decision was not subject to AEDPA deference, and applied AEDPA deference to the state court's adjudication of his final oral invocation.

The relevant facts occurred in May and September of 1998 and April of 1999:

May 1998. On May 14, 1998, Mr. Cassano submitted a motion he titled "Waiver of Counsel" requesting to represent himself. Supp.App. 297a. The Waiver of Counsel was filed with a concurrent Motion for Appointment of Substitute Counsel, both motions requesting that his counsel be dismissed. *Id*. at 297a–303a. In his

waiver motion, Mr. Cassano specifically stated that he "now respectfully waives counsel in the above captioned case as is his constitutional right." *Id.* at 297a. He explained that he would "rather control the org[a]nization and content of his defense, be able to file motions, argue points of laws, call fav[o]rable witnesses, cross-examine any adverse witnesses and be allowed to conduct his defense." *Id.* On May 20, 1998, Mr. Cassano's counsel moved to withdraw, and the court granted their motion. *Id.* at 304a. The trial court never discussed or explicitly addressed Mr. Cassano's Waiver of Counsel motion.

September 1998. On September 25, 1998, Mr. Cassano filed a *pro se* Motion for Appointment of Co-Counsel. The motion emphasized his Sixth Amendment right of self-representation and cited and discussed *Faretta v. California*, 422 U.S. 806 (1975), for the principle that a defendant could opt for "mix[ed] representation by both counsel and [the] defendant himself." Supp.App.307a.

At a pretrial hearing that same day, the trial court addressed this motion and commented on Mr. Cassano's demand for self-representation. The judge noted that "[d]efendant pro se has filed a motion to appoint co-counsel to represent him while he represents himself," but indicated the court would overrule the motion because the law did not require the judge to "allow him to represent himself," and "the defendant, not being trained in the law, is not capable, in my estimation, to represent himself." Pet.App.259a–260a. The judge further commented, "I would be setting him up to be represented by ineffective assistance of counsel should I allow him to represent himself." Pet.App.260a.

Hearing his request overruled, Mr. Cassano asked, "Can I speak?" Pet.App.260a. In response, the court rebuked him:

> Mr. Cassano, you're not going to represent yourself in this matter. If you wish to say a word on the record about that, you can. But thereafter you won't be speaking in the courtroom. I'm in charge of the courtroom, not you. You will never be in charge of this courtroom. You understand that?

Id. Mr. Cassano then insisted that he had "a right to be co-counsel with my attorneys." *Id*. When the trial judge asked, "You read that in the Constitution somewhere, Mr. Cassano?" Cassano responded, "*F[a]retta v. California.*" *Id*. The trial judge responded, "What I'm saying is that I can't allow you to represent yourself." *Id*. The court did not discuss Mr. Cassano's motion for hybrid representation or his right to self-representation further and did not hold a *Faretta* hearing.

April 1999. The issue of Mr. Cassano's representation arose again on April 23, 1999, during a pretrial hearing three days prior to the start of trial. Mr. Cassano raised concerns that his lead counsel, Andrew Love, would be unprepared for his trial. Co-counsel confirmed that Mr. Love had been litigating another capital trial and "was preparing for that case and that case alone probably into February," and had "not looked at anything on the Cassano matter since some time in February of 1999," that is, for the two months leading up to Mr. Cassano's trial. Pet.App.264a–265a. The trial judge then asked, "Mr. Cassano, you have anything else you want to say in that regard?" Pet.App.265a. Mr. Cassano replied, "Yes. Is there any possibility I could represent myself?" noting that he wished his request "to go on record." *Id*. The trial judge again rejected Mr. Cassano's request out of hand, again without holding a

Faretta hearing, explaining, "We've talked about it before. I think I'd be doing you a disservice by allowing that. You have very competent and very engaged attorneys and I believe they should be representing you. It would be in your best interest not to represent yourself. I wouldn't be representing myself if I were charged." *Id*.

On Appeal. The Ohio Supreme Court held that Mr. Cassano's right to self-representation was not violated. In analyzing this claim, the court stated:

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

State v. Cassano, 772 N.E.2d 81, 91 (Ohio 2002); Pet.App.202a–203a.

Federal Habeas Corpus. The District Court denied Mr. Cassano's habeas petition, applying deference to the Ohio Supreme Court's decision under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").

The Sixth Circuit reversed and granted relief. It determined the Ohio Supreme Court "did not address the May 14, 1998 Waiver of Counsel" and "incorrectly referred to Cassano's September 25, 1998 motion as the 'only written motion,' and his statements at the April 23, 1999 hearing as the only time he 'mentioned[] that he wanted to represent himself.'" Pet.App.16a. Accordingly, it applied *de novo* review to his first request, and analyzed the April 1999 request under AEDPA's deferential standards. Pet.App.16a–17a, 24a–41a. The court held that both the May 14, 1998 written Waiver of Counsel and the April 23, 1999 oral self-representation request

were valid invocations of the right to self-representation, and each would have entitled Mr. Cassano to a *Faretta* hearing, which the trial court did not provide.

The Warden petitioned for a rehearing *en banc*, complaining that the panel was incorrect and urging the *en banc* court to correct this error because the panel had "awarded habeas relief to a repeat murderer." Supp.App.292a. The court declined to rehear the case. The Warden now petitions this Court to grant *certiorari*.

REASONS FOR DENYING THE WRIT

I. The petition requests review of highly fact-bound questions that the Court of Appeals carefully considered in correctly deciding this case.

The Warden's first Question Presented, requesting summary reversal, is an acknowledgement that this matter is not worthy of *certiorari* and does not present an important federal question. Instead, Petitioner asserts the Sixth Circuit's grant of habeas relief was simply "incorrect." Pet.35.

Even putting aside the fact that the Sixth Circuit's decision is well-reasoned and supported by the law, this Court should decline the Warden's invitation to wade into such a fact-intensive case. This Court "do[es] not generally grant review of such factbound questions." *Murphy v. Collier*, 139 S. Ct. 1475, 1480 (2019) (Alito, J., dissenting). Indeed, the application of settled law to the facts like that done here—applying *Faretta* to Mr. Cassano's written "Waiver of Counsel" motion in 1998 and his other actions in 1998 and 1999, the trial court's handling of those requests, the Ohio Supreme Court's mistakes in determining the facts and failing to adjudicate Mr. Cassano's first request, and then applying the settled law to the unique facts of this situation—is precisely the type of situation in which this Court routinely decides

"not to take up that factbound question." *McKee v. Cosby*, 139 S. Ct. 675, 675–76 (2019) (Thomas, J., concurring in the denial of certiorari). Tellingly, Petitioner devotes a large portion of the Petition to rehashing the unique circumstances of this case, confirming that this is decidedly a request that this Court grant review of a fact-bound determination. *See* Pet.5–10, 20–28.

None of Petitioner's arguments can overcome the fact that the Ohio Supreme Court overlooked a key piece of factual evidence necessary for adjudicating Mr. Cassano's self-representation claims. To be sure, the state court initially noted that Mr. Cassano "filed several pro se motions, including a waiver of counsel, on May 14, 1998." Pet.App.201a. But one page later in its decision, the court's legal analysis entirely overlooked that written motion: the state court incorrectly stated that Mr. Cassano's "initial" demand to represent himself "focused on hybrid representation," and that his "only written motion" on the point was made "in September 1998 and related solely to hybrid representation":

> We reject Cassano's claim that his rights of self-representation were violated. 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.

Pet.App.202a–203a. Each sentence of this paragraph is factually incorrect. *See* 28 U.S.C. § 2254(d)(2). Mr. Cassano's *initial demand* was a written Waiver of Counsel motion filed in May 1998 that relinquished the right to counsel entirely and did not contemplate hybrid representation: Mr. Cassano "respectfully waive[d] counsel . . . as

is his constitutional right." Supp.App.297a. Mr. Cassano's second demand, in September 1998, requested stand-by or hybrid counsel, but the trial court's discussion that day was focused on his right to represent himself. Pet.App.259a–261a. And Mr. Cassano's final request in April of 1999 was accordingly *not* the first time he had raised the self-representation issue.

Simply put, the Supreme Court of Ohio forgot about Mr. Cassano's first request in its analysis. In the earliest stages of his case, Mr. Cassano *did* mention that he wanted to represent himself alone, in writing, in a motion filed in May of 1998. Yet the Ohio court did not adjudicate this claim.[1] As the Sixth Circuit 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.'" Pet.App.16a (quoting *Johnson v. Williams*, 568 U.S. 289, 303 (2013)).[2]

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[1] Petitioner's argument that "the Ohio Supreme Court did not overlook the May 1998 filing when it described Cassano's September 1998 motion as his 'initial demand to represent himself' and his 'only written motion on that point'" cannot overcome the plain language of the court's opinion. Pet.24 (quoting Pet.App.202a). The state court's reference to "that point" in the third sentence of the relevant paragraph can be understood only to mean the self-representation matter mentioned in the preceding sentence (and the following sentence as well).

Petitioner previously offered a paradoxical reading—that "[t]he 'point' to which the Supreme Court was referring was 'hybrid representation,'" Supp.App.289a—that would render that sentence of the court's decision redundant and unintelligible.

[2] Alternatively, as Mr. Cassano argued below, the state court's decision was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding under 28 U.S.C. § 2254(d)(2). *De novo* review was therefore appropriate for this reason as well.

But to make matters worse, Petitioner's recitation of the factual record is, at best, misleading. The petition is premised on a misrepresentation of the record which presents portions of the trial record and state court opinion bereft of critical context.

For one, the Ohio Supreme Court did *not* "h[o]ld that Cassano failed to properly invoke his right to self-representation" in his May 1998 motion. Pet.3. In fact, as Petitioner later admits, the state court "did not explicitly discuss" Mr. Cassano's May 1998 motion after initially noting it in its discussion of the facts. Pet.7. But its lengthy legal analysis not only neglected to address the motion, it incorrectly stated that Mr. Cassano's "only written motion" concerning his self-representation rights was the one he filed in September 1998, which "related solely to hybrid representation." *See* Pet.App.202a.

To absolve the state court of this failure, Petitioner has concocted a theory not raised in either the District Court or the Sixth Circuit merits briefing. Petitioner now asserts the state court "implicitly concluded" that Mr. Cassano's simultaneously filed motions for appointment of counsel and to represent himself constituted "contradictory filings [that] were too unclear and equivocal to support a valid claim for denial of the right to self-representation." Pet.7. But the Ohio Supreme Court's opinion contains no hint of such reasoning; it does not even use "contradictory," or any words like it, to describe the two May 1998 motions. *See* Pet.App.201a–202a.

Moreover, it strains credulity to presume that the court silently decided to discount that formal written invocation when the remainder of its lengthy decision thoroughly analyzed every other legal issue Mr. Cassano raised. Indeed, it spent six

paragraphs alone explaining the reasoning behind its rejection of Mr. Cassano's requests in September 1998 and April 1999. "Given that this claim had arguable merit, and in light of the state [supreme] court's otherwise careful consideration and evaluation of every other claim in [his] petition, 'the evidence leads very clearly to the conclusion that a federal claim was inadvertently overlooked in state court,' thus permitting de novo review." *Murdaugh v. Ryan*, 724 F.3d 1104, 1121 (9th Cir. 2013) (quoting *Johnson v. Williams,* 568 U.S. 289, 303 (2013)). *See also Brown v. Romanowski*, 845 F.3d 703, 711–12 (6th Cir. 2017) (concluding "it seems likely that the state court 'inadvertently overlooked'" unaddressed claims where "[t]here appears to be no sound rationale" for the state court's "silence" on a claim that "was sufficiently raised as a separate federal claim by way of more than a mere 'fleeting reference;' . . . was not 'too insubstantial to merit discussion,' a fact underscored by the district court's conclusion that it was at least meritorious enough to warrant a certificate of appealability; . . . [and] was not covered by any other claims by implication" (citing *Johnson*, 568 U.S. at 298–300, 303)); *Garcia v. Burton,* No. 19-cv-07600-VC (N.D. Cal. Apr. 29, 2021) (concluding AEDPA deference did not apply where the state court "ruled on" some issues "in a thorough fashion, drawing a particularly stark contrast between the way it handled those issues and its failure to even mention the other ones," suggesting "that the court merely focused on" the issues it explicitly addressed "and forgot about the other claims").

Nor would it be reasonable for the Ohio Supreme Court to have rejected Mr. Cassano's May 1998 invocation anyway. "[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 v. Haviland*, 531 F.3d 393, 403 (6th Cir. 2008). Indeed, 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." *Faretta*, 422 U.S. at 810 n.5.

Mr. Cassano's very next appearance in court, in September 1998, illuminates the matter. At that hearing, the trial judge repeatedly stated that Mr. Cassano would not be allowed "to represent himself." Pet.App.259a. It overruled Mr. Cassano's request except to the extent it is "provided that the law requires me **to allow him to represent himself**." *Id.* (emphasis added). Although the motion Mr. Cassano filed that day requested hybrid representation, the court's explanations all related to self-representation: "The reason being, of course, that the defendant, not being trained in the law, is not capable, in my estimation, **to represent himself**." Pet.App.259a–260a (emphasis added). The judge reiterated: "I would be setting him up to be represented by ineffective assistance of counsel **should I allow him to represent himself**. That would be absolutely improper in my estimation." Pet.App.260a (emphasis added). When Cassano asked to speak, the judge made clear: "Mr. Cassano, **you're not going to represent yourself in this matter,**" and told him: "What I'm saying is that **I can't allow you to represent yourself** when it would be setting you up to have ineffective assistance of counsel." *Id.* (emphasis added).

And Petitioner's representation of Mr. Cassano's April 1999 oral invocation is similarly inaccurate. Shorn of factual context, perhaps Mr. Cassano's question, "[i]s there any possibility I could represent myself?" could appear equivocal. *See* Pet.6. But Petitioner leaves out what Mr. Cassano stated immediately after that sentence: that he would like his request "to go on record." Pet.App.265a. Further, Petitioner omits the full context of Mr. Cassano's exchange with the trial court, which referenced the judge's previous rejection of Mr. Cassano's request to represent himself in the September 1998 hearing. The April request was clear enough for the court to understand that Mr. Cassano was asking to represent himself, leading the court to chastise him immediately, "**[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.* (emphasis added).

Having been similarly rebuked by the trial court the last time he spoke in court, Mr. Cassano cannot be faulted for not continuing to argue with the court after he had made sure the record reflected his request. Nor, indeed, was any more required of him: *Faretta* does not demand any special formality of invocation. *Buhl v. Cooksey*, 233 F.3d 783, 792 (3d Cir. 2000) (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)). And the state court's flawed factual findings tainted its conclusion that Mr. Cassano was requesting for the first time to represent himself in an attempt to delay his trial. Far from it: after repeatedly querying the court about the possibility

that he might represent himself, when it became clear that his lead counsel was alarmingly unprepared for trial, Mr. 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.

At bottom, the Petition should be denied not simply because Petitioner asks this Court to plunge into an intensely fact-bound issue, but because Petitioner has also failed to provide this Court with critical facts that demonstrate the correctness of the court of appeals' decision, and because Petitioner's new theory of implicit denial by Ohio Supreme Court is not properly before this Court.

II. No circuit split on any important legal question warrants this Court's review.

Petitioner also offers, seemingly as an afterthought, two purported circuit splits over what constitutes an unequivocal and timely motion for self-representation. But courts reaching differing conclusions based on different facts does not make a circuit split. *United States v. Light*, 406 F.3d 995 (8th Cir. 2005); *Burton v. Collins*, 937 F.2d 131 (5th Cir. 1991), *United States v. Pena*, 279 Fed. App'x 702 (10th Cir. 2008), *Jackson v. Ylst*, 921 F.2d 882 (9th Cir. 1990), *United States v. Edelmann*, 458 F.3d 791 (8th Cir. 2006), *United States v. Mackovich*, 209 F.3d 1227 (10th Cir. 2000), and *United States v. George*, 56 F.3d 1078 (9th Cir. 1995), *see* Pet.36–37, all found equivocation and delay in facts that do not exist in Mr. Cassano's case.

Timeliness is not a strict question of the calendar date of the self-representation request. An invocation is timely when not made for the purpose of delay. *See United States v. Farias*, 618 F.3d 1049, 1052 (9th Cir. 2010); *United States v. Tucker*, 451 F.3d 1176, 1180–81 (10th Cir. 2006); *United States v. Betancourt-*

Arretuche, 933 F.2d 89, 96 (1st Cir. 1991); *c.f. United States v. Bankoff*, 613 F.3d 358, 373 (3d Cir. 2010). In fact, a request made *during* trial can be timely, so long as the defendant "act[s] swiftly" once the "grounds for dissatisfaction with counsel's representation arose." *Moore*, 531 F.3d at 403.

Mr. Cassano did quite the opposite of the defendants in the Petitioner's cases. He repeatedly requested to represent himself, far in advance of his trial, and his final request was actually for the purpose of *preventing* delay. Mr. Cassano again raised the idea of representing himself because lead counsel, who had been preoccupied with another capital case for the preceding two months, was "not going to be prepared for [his] trial." Pet.App.264a. And unlike the defendants in Petitioner's cases, Mr. Cassano did *not* ask for a continuance or to delay his trial in any way.

Mr. Cassano's actions also contrast with those defendants who asked a question about self-representation only once, requested only information, or just expressed frustration. His April 1999 question was so clearly a request to represent himself, it prompted the trial court to refer back to the lengthy explanation it gave previously for prohibiting Mr. Cassano from representing himself. Indeed, Mr. Cassano explained he wanted to register his invocation for the record, preserving not a mere request for information, but his demand to represent himself. Pet.App.265a. Considering the court's admonishments, as well as Mr. Cassano's concern that lead counsel was unprepared for trial, his response, "Is there any possibility I could represent myself?" was clear and unequivocal. *Id*.

III. This Court should reject the Warden's request for a new rule mandating *en banc* review in cases granting habeas relief.

As final matter, this Court should reject Petitioner's unjustified suggestion to grant certiorari to advise the court of appeals that it could have granted *en banc* rehearing.

The language of the Federal Rules of Appellate Procedure, as well as longstanding practice in the courts of appeals, makes clear that *en banc* review "*may*" be ordered by a majority of circuit judges if they so choose, but even in a case involving a "question of exceptional importance," an *en banc* hearing is "is not favored." Fed. R. App. P. 35(a). As the Rules Advisory Committee pointed out, this language "emphasizes the discretion a court has with regard to granting en banc review." *Id*. (Notes of Advisory Committee on 1998 amendments).

Further, it is well-established that 28 U.S.C. § 46(c), the provision of the U.S. Code providing for *en banc* review by the federal courts of appeals, "is a grant of power," not a requirement:

> It vests in the court the power to order hearings en banc. It goes no further. It neither forbids nor requires each active member of a Court of Appeals to entertain each petition for a hearing or rehearing en banc. The court is left free to devise its own administrative machinery to provide the means whereby a majority may order such a hearing.

W. Pac. R. Corp. v. W. Pac. R. Co., 345 U.S. 247, 250 (1953) (interpreting predecessor version of § 46(c)).

Petitioner asks that, when considering a state's claim that a decision involves a "clearly incorrect award of habeas relief," this Court should advise the courts of

appeals that "every such award of habeas relief presents an issue important enough to permit *en banc* review." Pet.36. Petitioner posits that this rule would not mean "that the circuits must go *en banc* to correct every clearly incorrect award of habeas relief," but rather, such relief would qualify as "an issue important enough to permit *en banc* review" under Rule 35. *Id.*

Putting aside the question of whether this Court is even permitted to issue what amounts to an advisory opinion on the appropriateness of *en banc* review, Petitioner's argument is premised on several underlying flaws: Petitioner does not specify who is to determine that a panel's decision is "clearly incorrect," nor establish that its proposed rule would even apply to Mr. Cassano's case. For all Petitioner's talk regarding the "exceptional importance" of this matter, *see* Pet.33, 34, Petitioner failed below to comply with the Federal Rules, which *required* Petitioner to file in the Court of Appeals a petition that began with a statement that "the proceeding involves one or more questions of exceptional importance." Fed. R. App. P. 35(b)(1)(B). Having failed to do so below, Petitioner now comes to this Court asserting that it should intervene because of a majority of the judges on the court of appeals[3] failed to divine an issue of exceptional importance.

[3] Fifteen judges reviewed the petition for *en banc* review. *See* Pet.App.236a. Only three judges, however, articulated reasons why they believed *en banc* rehearing should have been granted, Pet.App.236a-254a, meaning that 12 of the 15 stated no reasons on the record either for or against *en banc* review. Judge Griffin stated that a majority of the active judges "appears to recognize" that the panel opinion was incorrect, but did not explain that statement any further. Pet.App.239a.

Even if Petitioner's argument were properly before this Court, Petitioner offers no intelligible basis, much less a compelling one, for the Court to revisit this settled doctrine. Nor does Petitioner explain why a grant of certiorari, rather than a more circumspect process such as a revision to the Federal Rules of Appellate Procedure, is appropriate or sensible. The Court should reject Petitioner's ill-advised invitation.

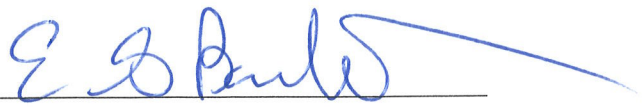
CONCLUSION

On at least two separate occasions, Mr. Cassano clearly and unequivocally invoked his right to represent himself, going so far as to explain, in writing, that he wanted to "control the org[a]nization and content of his defense, be able to file motions, argue points of law[], 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." Supp.App.297a. Mr. Cassano was correct that the fundamental tenets of the American system of justice guarantee him that right, and have done so "since the beginnings of our Nation." *Faretta*, 422 U.S. at 812 (citing section 35 of the Judiciary Act of 1789, 1 Stat. 73, 92).

The Ohio Supreme Court erred by overlooking Mr. Cassano's clear and timely requests to represent himself and by unreasonably determining the facts, and the Sixth Circuit was correct to grant Mr. Cassano relief. For these reasons, the Court should deny the Warden's request for summary reversal and deny the petition for a writ of certiorari.

Respectfully submitted,

Deborah L. Williams
Federal Public Defender,

by 

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