06-5340

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

JUDITH CLARK

Petitioner-Appellee

v.

ADA PEREZ, Superintendant, Bedford Hills Correctional Facility
and ANDREW CUOMO, Attorney General, State of New York

Respondent-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC ON BEHALF OF PETITIONER-APPELLEE JUDITH CLARK

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Preliminary Statement

Petitioner-Appellee respectfully seeks rehearing, with suggestion for rehearing en banc, following a unanimous decision of this Court (Chief Judge Jacobs and Judges Leval and Sotomayor on the Panel), dated January 3, 2008 (Exhibit "A," annexed), reversing the decision of the District Court (Sheindlin, J) (reported at 450 F.Supp.2d 396, 431 (S.D.N.Y. 2006)) which granted a writ of habeas corpus on behalf of Petitioner.

The principal issue raised in this appeal is one that goes to the core of our system of justice and thus raises an issue of extraordinary importance: is a trial "fair" and is due process satisfied if neither the defendant nor any attorney representing her was present in the courtroom during the entire presentation of the prosecution's case. The result of the trial was a guilty verdict and a sentence of 75 years to life. The Panel found that the Petitioner had chosen her trial "strategy" and waived her right to have the assistance of counsel despite undisputed evidence that she was a political revolutionary and declared at the outset that she rejected the court's jurisdiction.

The Panel committed legal error in not dealing adequately with the well-established rule that waiver of certain rights or the desire of a defendant to commit legal suicide will not be accepted if it leads to a fundamentally unfair trial that offends our society. "[S]ome minimum of civilized procedure is required by

community feeling regardless of what the defendant wants or is willing to accept." *United States v. Mezzanto*, 573 U.S. 196, 204 (1995). The District Court properly found that the "proceedings at issue, with no one sitting at the defense table during the prosecution's entire case, would have appeared unfair to many people with knowledge of the constitutional right to counsel or a respect for our adversarial system of justice." 450 F.Supp.2d 396, 431 (S.D.N.Y. 2006). The state court had a duty to appoint stand-by counsel to avoid such a problem.[1] But the Panel decision never directly dealt with that issue

The secondary question is: under this court's decision in *Cotto v. Herbert*, 331 F.3d 217 (2d Cir. 2003), how must the three factors or "guideposts" described in that case be weighed? [2] (The factors are derived from the Supreme Court decision in *Lee v. Kemna*, 534 U.S. 362 (2002) where the Supreme Court rejected a procedural default defense in a habeas corpus case). While everyone agrees that procedural requirements of state law should ordinarily be followed, both *Lee* and *Cotto* emphasized that "exorbitant application of a generally sound rule renders the

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[1] See *Faretta v. California*, 422 U.S. 806, 834, n. 46 (1975): "the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct. . . . . Of course, a State may -- even over objection by the accused -- appoint a 'standby counsel' to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary." When it is clear that the accused will not abide by courtroom procedures, a trial judge must refuse pro se representation or at the least appoint stand-by counsel to assume responsibility for the case. *See e.g. McKastle v. Wiggins*, 465 U.S. 168, 173 (1984)

[2] See discussion below at pp 11-12 for a discussion of the "guideposts."

state ground inadequate to stop consideration of a federal question," *Lee*, 534 U.S. at 376. This Court in *Cotto* held "that the adequacy of a state procedural bar is determined with reference to the 'particular application' of the rule; it is not enough that the rule 'generally serves a legitimate state interest.'" [citing *Lee* 534 U.S. at 387], 331 F.3d at 240. The Panel decision simply did not give proper weight to the need to measure the procedural requirement against the unfairness of applying it to a unique factual situation, as the *Cotto* decision required. The district court followed the correct rule and determined that under the special and unusual circumstances in this case, there was no procedural default under the *Cotto* rule.

For these reasons, we suggest that the Panel decided both issues incorrectly.

A. A Trial in Which Neither Counsel Nor the Defendant Were Present During the Presentation of the Prosecution's Case is Fundamentally Unfair

The Panel found that it was necessary to reach the merits of petitioner's claims since the procedural issues were tied into the merits of petitioner's claims: [3]

> the district court's conclusion that, under state law, Clark was justified in her failure to appeal makes plain that any cause and prejudice inquiry on remand would be bound up in the merits of Clark's claim. In the district court's view, the purported constitutional violation itself -- allowing Clark to act *pro se* without appointed or stand-by counsel -- was the primary reason Clark failed to timely appeal; this would be an "external" factor [permitting application of the cause and prejudice standard] only if it were truly a violation." Appendix, Panel Decision ("Dec.") at 29.

[3] The district court found it could reach the merits since there was no procedural default after application of the *Cotto* and *Lee* rules. The Panel found it had to reach the merits (even though there was procedural default) because it was then required to apply the cause and prejudice rule.

The Panel then proceeded to reject the claim on the merits on the ground that Petitioner had waived her right to counsel (and agreed to appear pro se) and waived her right to be present during the proceedings. In so finding the Panel necessarily held that the state court acted properly in refusing to appoint stand-by counsel who could have assumed trial responsibility in Petitioner's absence, although it did not rule directly on that issue. This constitutes another reason why en banc review is necessary.

Almost the entire basis for the Panel decision was this Court's decision in *Torres v. United States*, 140 F.3d 392 (2d Cir. 1998), a case with what the Court describes as presenting "near-identical facts" which "closely mirror" the situation before the Court. (Dec. at 36, 37). However, there are significant differences between this case and *Torres*. It is true that in that case, the defendant Marie Beltran Torres, a supposed member of the FALN, the revolutionary Puerto Rican organization, refused counsel, and she did not participate in any way during the proceedings. But the trial judge in that case appointed an amicus lawyer on her behalf to argue difficult issues concerning the ability of the jury to determine the sentence under 18 U.S.C. § 34. During the second day of testimony, the District Court took the highly unusual step of appointing a private lawyer, Arthur Viviani, as amicus curiae. [*Torres v. United States,* Second Circuit Docket No. 97-2061, Joint Appendix "JA" 353] The District Court instructed Viviani to assume

responsibility for arguing a defense position regarding the construction of 18 U.S.C. §§ 34 and 844(i). [JA 369-70]

On the third (and final) day of trial, the District Court heard arguments from government counsel and Viviani concerning sentencing. Viviani argued that Section 34 was not mandatory; the District Court retained the discretion to sentence and did not have to send the decision to the jury. [JA 503-08] He argued that with neither defense counsel nor the defendant participating, no mitigating evidence would be available if the jury determined the sentence. [JA 526-27] In contrast, if the judge were to sentence, a presentence report would be prepared to provide information on Ms. Beltran's behalf. [JA 528]

The jury found Torres guilty and found that she should be sentenced to life imprisonment. The District Court (Knapp, J.) then held a series of post-trial proceedings. It asked the *amicus* to brief the question whether Ms. Beltran had a meaningful opportunity to waive her right to counsel. [JA 620-21]

Ms. Beltran was subsequently brought into the courtroom and informed that a motion had been made on her behalf to set aside the conviction and sentence because the Court was concerned that "there is a serious question of whether or not this judgment or this phase of the judgment should or should not be set aside." [JA 622] The District Court then sentenced Ms. Beltran to life in prison. [JA 626]

Pursuant to the District Court's request, Viviani filed a brief supporting the *sua sponte* post-trial motion on the right to counsel issue. At a hearing on July 2, 1980, Viviani argued for a new trial on a number of grounds, including that Ms. Beltran had not properly waived her right to counsel. [JA 634-42] The District Court denied the motion. Citing Ms. Beltran's articulateness and apparent understanding of the proceedings, the District Court found that Ms. Beltran was intelligent and understood that she had the right to counsel. [JA 656] Ms. Beltran was brought into the District Court, informed that the post-trial motion was denied, and advised of her right to appeal. [JA 662-63] The District Court directed the clerk to file a notice of appeal. [JA 662] No counsel, however, was appointed for the appeal. [JA 663] No one pursued the appeal on Ms. Beltran's behalf, and it was dismissed for lack of prosecution. [JA 667]

In this case, no appointment of an *amicus* occurred. No argument of any kind was made before the state court as to the adequacy of the determination that Petitioner was competent to waive and had properly waived her right to counsel. No notice of appeal was filed on her behalf.

Furthermore, in the Section 2255 proceedings before the district court and the Court of Appeals, no argument was apparently made on Torres' behalf on the

need to appoint stand-by counsel at the point where pro se representation was granted, a key issue in this case. [4]

More fundamentally, it is offensive to our system of justice to have a trial with no one in the courtroom to defend an accused. There have been many "political trials" in recent times or trials with mentally disturbed defendants. In both situations there is the danger that the defendants will refuse to follow required courtroom procedures and commit legal suicide. The answer is for the courts to insure that justice must satisfy the appearance of justice. In *Faretta v. California*, 422 U.S. 806, 840 (1975), the Court noted: "The system of criminal justice should not be available as an instrument of self-destruction."

This Court has noted the judiciary's " 'independent interest in ensuring that criminal trials are conducted [ethically] . . . and that legal proceedings appear fair to all who observe them.' " *United States v. Locascio,* 6 F.3d 924, 931 (2d Cir.1993) (quoting *Wheat v. United States,* 486 U.S. 153, 160 (1988).

The Supreme Court has emphasized that "[S]ome minimum of civilized procedure is required by community feeling regardless of what the defendant wants or is willing to accept." *United States v. Mezzanto*, 573 U.S. 196, 204 (1995) (Thomas, J quoting with approval *United States v. Josefik*; 753 F.2d 585, 588 (7th

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[4] An examination of the briefs before the Second Circuit in the *Torres* case reveal that the no such argument was made concerning the failure to appoint stand-by counsel, presumably because of the appointment of an amicus to argue legal points on behalf of Ms.Torres.

Cir. 1985). See also *Wheat v. United States*, 486 U.S. 153 (1988) (defendant not entitled to choice of counsel who had conflict).

Many courts have acknowledged that absence of the defendant without counsel demeans the dignity of the courtroom. In recent times, a federal court in Virginia appointed stand-by counsel for Zacharias Moussaoui, the so-called twentieth bomber in the World Trade Center case after he was allowed to proceed *pro se*. They assumed responsibility for the case when Moussaoui's pro se status was terminated because of his odd behavior in court.[5] In the Colin Ferguson case (the Long Island Railroad murderer who clearly had mental problems), the court permitted pro se representation but appointed stand-by counsel as well. See *Newsday*, February 15, 1995, p. A31. Even Saddam Hussein had stand-by counsel who assumed responsibility for defending him when he walked out of court in Iraq and his own lawyers boycotted the proceedings. See *New York Times*, July 28, 2006, p. A10. The District Court cited numerous cases in which courts have appointed stand-by counsel (even in the absence of any request by pro se defendants) who then assumed responsibility for the case when the pro se status was terminated. See 459 F.Supp. 2d at 422, fn 183. See also *People v. Anderson,* 133 A.D.2d 120, 121, 518 N.Y.S.2d 658 (2d Dept. 1987) where the conviction was

[5] See *United States v. Moussaoui*, 382 F.3d 453, 460, n. 6 (4th Cir. 2004): "Shortly before we heard oral argument on this appeal, the district court vacated its order granting Moussaoui's request to represent himself and appointed standby counsel as counsel of record."

reversed when pro se status was revoked and stand-by counsel was not available

> [P]art of the purpose of appointing stand-by counsel – which can be done even over the objection of the accused – is to have an attorney available to represent the accused in the event that termination of the Petitioner's self-representation becomes necessary. . . . Here, given the early warning signs of trouble, the court should not have dismissed the Petitioner's stand-by counsel, who could have taken over the defense once the Petitioner's conduct had forced the court's hand."

A federal court has noted the need for appointing stand-by counsel, quoting from the Uniform Code of Criminal procedure:

> Notwithstanding acceptance of a waiver (of counsel), the court may appoint standby counsel to assist when called upon by the defendant, to call the court's attention to matters favorable to the defendant upon which the court should rule on its own motion, *and if it becomes necessary for a fair trial, to conduct the defense*. Uniform R.Crim. P. 711(c)

United States v. Davis, 180 F.Supp.2d 797, 804 (E.D. La. 2001)(emphasis added)

In *Faretta*, the Court emphasized that "the right to self-representation [is the right] to make one's own defense personally." 422 U.S. at 819. The right to proceed *pro se* is just that – *a right to proceed,* that is "to manage and conduct their own defense," *id.* at 817. It is not a right to withdraw from the proceedings. The *Faretta* exception to the counsel requirement is designed to increase, not diminish, the accused's participation in the trial. An accused's refusal to participate in the proceedings is antithetical to any purported invocation of the right to proceed *pro se* carved out by *Faretta*. At the least, when a court sees the possibility of such a

withdrawal, it must appoint stand-by counsel. The District Court found that stand-by counsel should have been appointed, but the Panel never ruled on that issue.

It stands to reason that the more likely it is that a defendant will take disruptive actions and forfeit the right to appear pro se, the more compelling is the need to appoint stand-by counsel at the outset.

In this case, the state court should never have allowed Petitioner to appear pro se without such an appointment. Under the governing rules, a defendant must be "able *and willing* to abide by rules of procedure and courtroom protocol" in order for pro se status to be properly granted." *McKaskle v. Wiggins,* 465 U.S. 168, 173 (1984) (emphasis added). That was certainly not the case here. The trial judge knew that there would be disruption in view of the political stance of Petitioner and in view of the previous courtroom disruptions and never determined that the defendant would be willing to abide by court procedures.[6] In an astonishing statement, the judge noted the problems he was having keeping order before he could pass on the request for *pro se* representation, which he knew could only lead to more disruption. He said:

> My efforts to conduct the questioning required by law of a defendant so that [I] can make a determination as to whether the waiver of counsel . . is a knowing and intelligent waiver . . have been frustrated by the refusal of the defendants to conform to the most rudimentary rules of order so that I

[6] The district court decision describes the numerous disruptions that occurred on the very day that he granted pro se status. See 450 F.Supp.2d at 403.

can elicit the information required in order to make a ruling. [7]

He spoke to Ms. Clark immediately prior to granting her request to appear pro se:

> You are aware that if I grant your application, and I am disposed to do so, that if there comes a time where I am required as I see fit by reason of your conduct to remove you from the courtroom, you will, at that juncture, be unrepresented. Are you aware of that significance? (Supplemental Appendix 25; Pretrial Hearing, June 2, 1983 at 65-66)

Given the reality of the situation which was obvious to all, the grant of *pro se* Status was improper and led to a prejudicial deprivation of the right to counsel.

B. The Rule in *Cotto* and *Lee* Was Not Followed by the Panel, Since Those Cases Require a Review of the State Procedural Requirements in Light of the Circumstances of a Particular Case Which Did Not Occur Here.

It was the position of the District Court that there was no procedural default under the *Cotto* rule. The rule reads as follows:

> (1) whether the alleged procedural violation was actually relied on in the trial court, and whether perfect compliance with the state rule would have changed the trial court's decision; (2) whether state case law indicated that compliance with the rule was demanded in the specific circumstances presented; and (3) whether petitioner had "substantially complied" with the rule given "the realities of trial," and, therefore, whether demanding perfect compliance with the rule would serve a legitimate governmental interest.

Cotto v. Herbert, 331 F.3d 217, 240 (2d Cir.2003)

The district court found that the unusual circumstances of this particular case did not require compliance with the state rules on preserving trial errors though a

[7] *Id.*

timely appeal. State law required that to preserve trial errors, it was necessary to take a timely appeal (CPL § 440.10(c)(2)).[8]

The District Court believed that the emphasis of the *Cotto* rule was on whether a procedural requirement should be followed given "the circumstances of a particular case." 450 F.Supp.2d at 419. It found that:

> Given Clark's lack of counsel and her refusal to recognize the legitimacy of the court, it is not surprising that she failed to appeal. Had the court appointed standby counsel, things might have been different. Because Clark's failure to appeal was "justifiable" given the rare circumstances of her case, application of the procedural bar in section 440.10(2)(c) was not demanded. 450 F.Supp.2d at 428.

The Panel disagreed. It gave a tortured reading of the *Cotto* rule. Rather than focus on the main purpose of the rule – which was the need to evaluate the state procedural requirements in light of particular facts of a given case – the Panel decided that if the state prevailed on one of the so-called "guideposts," then the procedural default rule has been followed. The Panel explained: "only the second of the *Cotto* guideposts is germane to a state court's denial of collateral review on the basis that a petitioner failed to file any direct appeal whatsoever." Dec.

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[8] That provision reads: "the court must deny a motion to vacate a judgment when: ... Although sufficient facts appear on the record of the proceedings underlying the judgment to have permitted, upon appeal from such judgment, adequate review of the ground or issue raised upon the motion, no such appellate review or determination occurred owing to the defendant's *unjustifiable* failure to take or perfect an appeal during the prescribed period or to his unjustifiable failure to raise such ground or issue upon an appeal actually perfected by him...." (emphasis added)

at 22. [9] Based on the CPL provision noted above, the Panel concluded that Petitioner was not justified in failing to appeal since the error complained of appeared on the face of the record., even if she did not have counsel.

> We conclude that the district court erred in holding that the state court's application of section 440.10(2)(c) did not constitute an adequate state procedural bar to Clark's federal habeas petition. Moreover, even if no state court had applied section 440.10(2)(c) to Clark's claim, the district court itself should have done so in the first instance pursuant to the exhaustion requirement for federal habeas. Dec. at 27.

The Panel decision was simply wrong. In the first place, the court disregarded the *particular and unique facts of this case* which was required by both *Cotto* and *Lee.* In *Lee*, the Supreme Court rejected the dissent's claim that "it is never appropriate to evaluate the state interest in a procedural rule under the circumstances of a particular case." 534 U.S. at 386-87. It emphasized that state procedural rules must be evaluated under "special circumstances" of a particular case, 534 U.S. at 387. In *Cotto*, this Court focused on the overall purpose of its rule. The three guideposts must be applied "in evaluat[ing] the state interest in a procedural rule against the circumstance of a particular case." 331 F.3d at 240.

The Panel simply said that Petitioner was properly allowed to appear pro se, consciously chose to mount a political defense, and therefore had no excuse for

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[9] In a footnote, it dismissed consideration of the other two *Cotto* guideposts, finding that the first guidepost did not apply in this situation and the third factor did not favor Petitioner since total noncompliance with a procedural rule did not constitute "substantial compliance" under the third guidepost. (Dec. at 22, n. 4).

failing to appeal. We insist that she should never have been allowed to appear *pro se* or at the least, stand-by counsel should have been appointed. Once again, the merits overlaps with the procedural default: if the court improperly allowed her to appear pro se, knowing that she would disregard court rules, then it is certainly understandable and predicable that she would fail to appeal, and thus her failure to appeal is therefore "justified" within the meaning of the rule. Application of the procedural rule under those circumstances would be "exorbitant," prohibited by *Lee*. "There are, however, exceptional cases in which exorbitant application of a generally sound rule renders the state ground inadequate to stop consideration of a federal question. . . . This case fits within that limited category." 534 U.S. at 376.

In the second place, even if the Panel could rely upon the CPL § 440.10(c)(2), state case law did not "indicate[] that compliance with the rule was demanded in the specific circumstances presented." The issue is whether the failure to appeal was "justified." It is clear that lack of appropriate assistance of counsel would constitute "justification" for the failure to appeal. The District Court properly analyzed the situation. It quoted from McKinney's Practice Commentaries, a source that this Court relied upon in *Cotto* to interpret that provision.[10] See P. Preiser, Practice Comm. N.Y.§440.10 at 426 (McKinney 2005):

Although the revisors did not supply any specific explanation of the purpose

[10] *See Cotto,* 331 F.3d at 245-46, 247 n. 16, n. 17

> of this escape hatch, and there is no generally applicable appellate rubric construing it, consideration might be given to applying it in two situations. One would be where the ground was overlooked due to ineffective assistance of counsel.

Relying on this analysis, the District Court found:

> Although Clark's case does not turn on the ineffective assistance of trial counsel, the same excuse exists where defendant had *no trial counsel at all* combined with an obvious unwillingness to represent herself in accordance with court rules and procedures. 450 F.Supp.2d at 427.

The Panel dismissed this contention by stating that the District Court relied upon two "aged New York cases." (Dec. at 25). But the Panel does not cite any contemporary New York law that holds to the contrary under the circumstances of this case. Nor did it discuss the district court's reliance of the continued vitality of *coram nobis* (which would excuse procedural defaults relating to failure to afford the assistance of counsel). See 450 F.Supp.2d at 438, n. 218.

Even under the Panel's analysis, its conclusion was wrong.

CONCLUSION

For the foregoing reasons, Petitioner's petition for rehearing and her suggestion for rehearing en banc should be granted in all respects.

Dated: New York, N.Y.
January 15, 2008

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Certificate of Compliance

I, Leon Friedman, hereby certify that the foregoing Petition for Rehearing of Petitioner-Appellee Judith Clark is in compliance with F.R.A.P. 32 and with the local rule of the Second Circuit. The brief was printed in 14-point proportional font and, including footnotes and headings, contains 3,971 words.

Dated: New York, New York
January 15, 2008

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Leon Friedman