



SECOND CIRCUIT REVIEW

BY MARTIN FLUMENBAUM AND BRAD S. KARP

Sixth Amendment Right to Counsel

In this month's column, we discuss *Clark v. Perez*,¹ in which a panel comprised of Chief Judge Dennis G. Jacobs, Judge Pierre N. Leval, and Judge Sonia Sotomayor earlier this month reversed a district court judgment granting a habeas petition and ordering a new trial for prisoner Judith Clark.

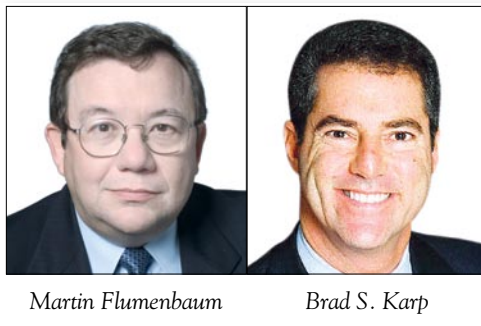
In particular, the panel rejected the district court's holding that Ms. Clark's Sixth Amendment rights were violated when a New York State trial court permitted her to defend herself pro se, without stand-by counsel, notwithstanding her refusal to accept the legitimacy of the court, abide by its rules and procedures, or even appear in court for much of her trial. Additionally, the panel rejected the district court's holding that New York Criminal Law (CPL) §440.10(2)(c) was not an adequate procedural bar against habeas review because Ms. Clark's decision to proceed pro se, and her antagonism towards the legal system, rendered "justifiable" her failure to raise her Sixth Amendment claims on direct appeal.

Background

On Oct. 21, 1980, Ms. Clark drove one of two getaway cars in connection with an armored car robbery in Nyack, N.Y. The robbery went horribly awry and three men, a guard named Peter Paige and police officers Waverly Brown and Edward O'Grady, were shot and killed. Shortly afterwards, Ms. Clark crashed her getaway car and was arrested. She and four codefendants were charged with three counts of second-degree murder, six counts of first-degree robbery, and various lesser charges. The case was transferred to Orange County Supreme Court and was assigned to Justice David Ritter.

At the time of the robbery, Ms. Clark was a member of the radical group the "Weather Underground." She and her codefendants saw their participation in the robbery as a justified part of a revolutionary struggle against an oppressive political system. Ms. Clark's political beliefs lead her to reject the legitimacy of the New York state courts. She called the court "a tool of imperialist rule" in her closing arguments.²

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During pretrial proceedings, Ms. Clark and two of her co-defendants, Kuwasi Balagoon and David Gilbert, requested permission to forgo legal representation and proceed pro se. Ms. Clark told the court that she did not want to associate herself with an officer of the court and that, as a "freedom fighter," it was necessary for her to speak for herself.³ After advising the defendants of the risks and problems associated with proceeding pro se, and warning them that it would be "unwise" for them to do so, Justice Ritter asked each defendant individually whether they knew and understood what he had said and still wished to proceed pro se. Ms. Clark told Justice Ritter that she "absolutely" understood and confirmed her desire to proceed pro se.⁴

Ms. Clark and her codefendants put on a disruptive and ineffective defense. The trio repeatedly absented themselves from the courtroom in protest of the court and trial developments. For example, the defendants boycotted jury selection for political reasons. According to Ms. Clark,

For us to continue voir dire and give any legitimacy to the picking of a jury whose function is illegitimate and whose fascist implications are made more extreme by its anonymous nature would undermine our basic principles.⁵

After Justice Ritter instructed Mr. Balagoon to restrict his opening statement to the facts that would be proved at trial, the trio boycotted the trial for five days. Justice Ritter advised the defendants that when they elected to boycott, the trial would proceed without them and they would be unable to participate. The defendants, including Ms. Clark, affirmed that they understood and that they desired to boycott the proceedings anyway. The defendants were not represented by stand-by attorneys and, when they elected to boycott, they were not represented at trial.⁶

Ms. Clark and her codefendants presented only one witness, Sekou Odinga, from whom they elicited testimony regarding the "New Afrikan political movement" and the responsibilities of white people in connection with that movement.⁷ Similarly, the defendants' closing statements focused on the coming revolution and the illegitimacy of the trial.⁸

The jury found the defendants guilty on all charges on Sept. 14, 1983. Justice Ritter sentenced Ms. Clark to be imprisoned for three consecutive 25-year terms. She did not file a direct appeal.

Motion to Vacate Conviction

On Dec. 12, 2002, Ms. Clark moved in Rockland County Supreme Court to have her conviction set aside pursuant to CPL §440.10(1)(h). In her motion, Ms. Clark claimed that her Sixth Amendment right to counsel was violated at her trial because Justice Ritter: (1) permitted her to proceed pro se after she had demonstrated that she would be disruptive and would frequently not appear in the courtroom; (2) failed to appoint a stand-by counsel once it became clear that Ms. Clark would be disruptive and frequently absent; and (3) allowed the trial to go forward without any representatives for the defendants present in the courtroom.

The Rockland County Supreme Court rejected her motion without reaching the merits. Relying on CPL §440.10(2)(c), which provides—

Although sufficient facts appear on the record of the proceeding 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.

—the court reasoned that Ms. Clark's Sixth Amendment claims were based entirely on events that transpired on the record and that she had waived her rights to object to those events by failing to assert them in a direct appeal. The Appellate Division summarily rejected Ms. Clark's motion for leave to appeal.⁹

Habeas Petition

Ms. Clark filed a habeas petition in the U.S. District Court for the Southern District of New York on Jan. 20, 2005. The district court granted

her petition on Sept. 22, 2006, holding that CPL §440.10(2)(c) was not an adequate state procedural bar against habeas review of her Sixth Amendment claims, that de novo review was appropriate because no state court had ever considered Ms. Clark's claims on the merits, and that, on the merits, Ms. Clark's Sixth Amendment rights were violated when Justice Ritter: (1) permitted her to proceed pro se even though Ms. Clark made clear that she not willing to abide by the rules or procedures of the court, and (2) failed to terminate Ms. Clark's pro se status and appoint stand-by counsel when it became clear that no one would be in the courtroom to represent her interests during the prosecution's case. The district court concluded that these violations amounted to a structural defect in Ms. Clark's trial, vacated her conviction, and ordered a new trial.

Central Issues

The U.S. Court of Appeals for the Second Circuit reversed the district court's judgment. We focus below on the two central issues addressed by the Second Circuit: (1) whether CPL §440.10(2)(c) operated as an adequate procedural bar to further proceedings, and (2) whether the district court erred in its analysis of Ms. Clark's Sixth Amendment claims.

Procedural Bar

As the Rockland County Supreme Court held, Ms. Clark waived her Sixth Amendment claims by failing to raise them in a timely fashion. This default presented a significant problem for her habeas petition. Except in certain limited circumstances, where a habeas petitioner has failed to raise a claim during state proceedings, and that failure constitutes a default of the claim in further state proceedings, the petitioner cannot raise the claim in a federal habeas petition. Consequently, even if Ms. Clark's Sixth Amendment claims were meritorious, her failure to raise them as required by CPL §440.10(2)(c) would bar review in a habeas proceeding.

There are a few limited circumstances in which a federal habeas court will consider defaulted claims on the merits, most notably if a petitioner can shoulder the heavy burden of demonstrating cause for the default and actual prejudice, or demonstrating that she is actually innocent. The district court focused on another exception. Federal courts decline to review arguments that were defaulted as a matter of state procedure on prudential grounds. These prudential grounds give way in those "exceptional cases in which exorbitant application of a generally sound rule renders the state ground inadequate to stop consideration of a federal question."¹⁰ In such exceptional cases, a state procedural bar is said to be inadequate to prevent a federal habeas court from reviewing the defaulted claims. In *Cotto v. Herbert*, the Second Circuit has identified three guideposts for "evaluating the state interest in a procedural bar against the circumstances of a particular case."

(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 government interest.¹¹

The district court concluded that each of these considerations weighed in favor of finding that CPL §440.10(2)(c) did not operate as a procedural bar against Ms. Clark's claims. Principally, the district court relied on the second guidepost as well as the language of CPL §440.10(2)(c) and New York case law.

CPL §440.10(2)(c) precludes a court from granting a motion to set aside a judgment based on a defendant's "unjustifiable" failure to include claims in a timely direct appeal. The district court noted that ineffective assistance of counsel constituted one example of a "justifiable" failure under CPL §440.10(2)(c), and reasoned that the logic that exempted failures brought by ineffective assistance of counsel should also apply to instances in which a defendant had no trial counsel at all. The district court found this argument compelling in Ms. Clark's case because her antipathy to the court rendered her extremely unlikely to comply with appellate procedures and rules.¹²

The Second Circuit disagreed. According to the panel, the district court misconstrued the first and third guideposts and misinterpreted New York case law with respect to the second. Indeed, the analogy to ineffective assistance of counsel did not favor Ms. Clark because such defaults were considered "justifiable" under CPL §440.10(2)(c) on the ground that they involved extrinsic evidence rather than the trial record. In the case of Ms. Clark, all of the evidence in support of her Sixth Amendment claims was in the record. Finally, the panel noted that there was no suggestion that Ms. Clark had not been aware of her rights.¹³

Sixth Amendment Claims

Noting that a defendant's right to forgo legal representation and represent herself is limited by a willingness "to abide by rules of procedure and courtroom protocol,"¹⁴ the district court held that, where a defendant is unwilling to follow such rules and protocol, the Sixth Amendment requires a court to refuse to permit the defendant to proceed pro se or to appoint stand-by counsel. Accordingly, the district court reasoned that Ms. Clark's Sixth Amendment rights were violated in two ways. First, when the trial court permitted Ms. Clark to represent herself even though it was clear that she was not willing to abide by the rules and procedures of the court. Second, when the trial court failed to terminate her pro se status once it became clear that no one would be present to represent Ms. Clark's interests during the prosecution's case.

Having concluded that CPL §440.10(2)(c) constituted sufficient grounds for reversal, the panel could have reversed on such grounds and remanded to the district court for further proceedings, including consideration of whether Ms. Clark could show cause and actual prejudice for her default. But given that the district court had concluded that Ms. Clark's failure was justifiable under New York law, the Second Circuit panel predicted that the district court's analysis of "cause" would become entangled in the merits of Ms. Clark's Sixth Amendment claims. The panel, therefore, chose to address and reject on the merits the district courts' analysis of the CPL.¹⁵

Although the panel agreed with the district court that a defendant's right to proceed pro se was limited, and that a trial court may deny a defendant's request to proceed pro se "when the defendant deliberately engages in serious and obstructionist misconduct,"¹⁶ the panel cautioned that, just as a court should not compel a defendant to accept an attorney she did not want, a court should not interfere with a defendant's chosen method of defense. In particular, the panel emphasized that Ms. Clark had "adopted a conscious strategy to use [her] trial to further [her] political objectives and to challenge the jurisdiction of the court and win political sympathy" and that it was her choice to conduct her trial by protesting its legitimacy and boycotting its proceedings.¹⁷ And the panel further pointed out that the Second Circuit had recently held in *Torres v. United States* that a trial court's decision to permit a similar defense did not violate the defendant's Sixth Amendment rights.¹⁸

In light of the deference owed to a defendant's choice of defense and the Second Circuit's decision in *Torres*, Ms. Clark's knowing and voluntary waiver of her right to counsel, her unequivocal assertion of her right to self-representation, and the opportunity Justice Ritter afforded her to be present at her trial, the panel concluded that the state trial court had not violated Ms. Clark's Sixth Amendment rights by permitting her strategic choice to engage in a "de facto political protest defense."¹⁹

Conclusion

The Second Circuit's review of the merits highlights a central irony of Ms. Clark's habeas petition: she was seeking a new trial on the ground that the state trial court violated her Sixth Amendment rights by permitting her to engage in her preferred form of defense. Although there are circumstances in which it is error for a trial court to permit a defendant to proceed pro se, the circumstances are fleeting in which a defendant can successfully challenge her own conviction based on the court acceding to the defendant's self-selected strategy.



1. No. 06-5340-PR, ___F3d___, 2008 WL 43646 (2d Cir. Jan. 3, 2008).

2. *Clark v. Perez*, 450 F.Supp.2d 396, 412 (2d Cir. 2006).

3. 450 F.Supp.2d at 405-406 ("I wish to represent myself because as a freedom fighter I am the only one who can speak for myself and I can definitely not be represented by an officer of the court.")

4. *Id.* at 406.

5. *Id.* at 409.

6. *Id.* at 410-411.

7. *Id.* at 412.

8. *Id.* at 412.

9. *Id.* at 414.

10. 2008 WL 43646 at *6.

11. *Cotto v. Herbert*, 331 F.3d 217, 240 (2d Cir. 2003); see also 2008 WL 43646 at 7 (discussing *Cotto*).

12. 450 F.Supp.2d at 427-28.

13. 2008 WL 43646 at *7-8.

14. 450 F.Supp.2d at 430.

15. 2008 WL 43646 at *9.

16. *Id.* at 10.

17. *Id.* at 13.

18. *Id.* at 12.

19. *Id.*