No. 09-

In the Supreme Court of the United States

ROBERT WELCH, Warden,

Petitioner,

v.

JOHN C. MOORE, JR.,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Sixth Circuit improperly grant a writ of habeas corpus solely on the ground that the state trial court failed to rule formally on a defendant's request for self-representation under *Faretta v. California*, 422 U.S. 806 (1975), even where the trial court's actions amounted to a denial of the defendant's request?

2. Where a criminal defendant waited until the penultimate day of a five-day trial to request self-representation, and where the trial court refused to grant the request, did the Sixth Circuit err under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") in ruling that the trial court unreasonably applied federal law?

LIST OF PARTIES

The Petitioner is Robert Welch, the Warden of the Toledo Correctional Institution. Robert Welch is substituted for his predecessor, James Haviland. See Fed. R. Civ. P. 25(d).

The Respondent is John C. Moore, Jr., an inmate at Toledo Correctional Institution.

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PETITION FOR WRIT OF CERTIORARI

The Attorney General of Ohio, on behalf of Robert Welch, Warden, respectfully petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Sixth Circuit's opinion and orders are reproduced at App. 1a-2a, 3a-31a. The United States District Court for the Northern District of Ohio's opinion and order is reproduced at App. 32a-54a. The Report and Recommendation of the federal magistrate judge is reproduced at App. 55a-99a. The state court of appeals judgment is reproduced at App. 101a-136a. The Supreme Court of Ohio's decision denying review of Moore's appeal of his conviction is reproduced at App. 100a.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Sixth Circuit issued its order granting the writ of habeas corpus on July 15, 2008. The Sixth Circuit denied rehearing en banc on December 17, 2008. Justice Stevens extended the time period to file a petition for writ of certiorari to May 16, 2009. The Warden now files this petition and invokes the Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

Section 2254 of Title 28 of the United States Code provides in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to a 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.

INTRODUCTION

On the penultimate day of his five-day trial, Respondent John C. Moore told the trial judge that he wanted to proceed *pro se.* The trial judge considered Moore's request and deliberated, in particular, about whether the request was timely and unequivocal. The judge denied the request—though not in so many words—by directing that the trial proceed to completion with Moore's counsel in place. None of the state courts found a deprivation of Moore's Sixth Amendment right to self-representation.

On federal habeas review, however, the Sixth Circuit found a Sixth Amendment violation—not because Moore's self-representation request actually had merit, but rather on the ground that the state trial court's failure to issue an explicit, formal ruling on Moore's request constituted a *per se* constitutional violation. The Sixth Circuit's holding runs contrary to fundamental principles of procedure and AEDPA and warrants this Court's review for two reasons.

First, the trial court's failure formally to deny Moore's self-representation request is not an automatic basis for granting the writ, because the continuation of the proceedings with counsel in place clearly amounted to a denial of Moore's request. Simply put, it is undisputed that Moore was not allowed to proceed *pro se* at trial. Therefore, the proper inquiry on habeas review was whether that denial violated Moore's Sixth Amendment rights.

Second, no Sixth Amendment violation occurred here because no clearly established right to self-representation exists under the Sixth

Amendment and *Faretta* where, as in this case, the request for self-representation was untimely.

Accordingly, this Court should grant review and reverse the Sixth Circuit's erroneous issuance of the writ.

STATEMENT OF THE CASE

A. An Ohio jury convicted Moore of aggravated robbery and two counts of kidnapping, all with firearms specifications.

In September 2000, Moore was tried in the Cuyahoga County Common Pleas Court for crimes stemming from a robbery at the Hard Rock Cafe in Cleveland, Ohio. App. 102a. On the fourth day of Moore's five-day trial, Moore's attorney informed the trial judge that Moore was displeased with certain aspects of his counsel's representation and that Moore wanted to address the court. App. 104a-105a. Outside the presence of the jury, Moore complained to the trial court that his counsel was not asking prosecution witnesses certain questions that Moore wanted him to ask. App. 106a.

Moore then asked the trial court if he could proceed *pro se*. App. 106a.[1] The trial court replied: "It is too late for that now. You have already started

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[1] In its majority opinion, the Sixth Circuit stated that Moore made his request "[o]n the third day of trial." App. 5a. That is incorrect. As the record reflects, and as the Sixth Circuit dissent properly noted, Moore did not express interest in proceeding *pro se* until the fourth day of trial. App. 28a; Trial Tr. at 802, 843.

with an attorney. I don't believe you can go [*pro se*] mid trial." App. 106a. The trial court addressed the following additional concern to Moore: "I don't think you are in a position to discharge your attorney. You haven't demonstrated any knowledge of the law or willingness to comply with the orders of the court or understanding of the rules of evidence." App. 9a. Nevertheless, the trial judge permitted Moore, over the lunch hour, to prepare a written motion to proceed *pro se* and to explain his "general capability of conducting a trial." *Id.*

Just before the lunch break, Moore transmitted an earlier-prepared note to the trial court, expressing his dissatisfaction with his counsel's failure to ask prosecution witnesses certain questions. App. 10a-11a. During the lunch break, Moore wrote out his request to proceed *pro se*, as the trial judge had asked him to do. App. 11a. The note was not given to the judge immediately because the judge granted defense counsel's request to review the letter with his client and to attach it to the record the following morning. App. 107a.

Before the jury entered the courtroom the next morning—the fifth and last day of the trial—Moore's counsel submitted the letter to the court and the trial judge read the letter. App. 11a-12a. (The Sixth Circuit and the state court of appeals reproduced the letter verbatim in their opinions. App. 12a-15a, 108a-109a.)

The jury then entered the courtroom and Moore's counsel called Moore to the witness stand. App. 109a. During Moore's direct testimony, the trial judge held a sidebar to address a hearsay objection and raised the subject of Moore's letter with

both prosecution and defense counsel. App. 15a-16a. At the sidebar, the trial judge stated that Moore's letter was confusing, in that Moore indicated a desire to participate in closing arguments, and apparently to serve as co-counsel, but that it was unclear whether or not he was actually asking to proceed *pro se*. *Id.* The trial judge also speculated whether Moore had abandoned his *pro se* request, since he took the witness stand without objection after the request was made. App. 16a. The trial judge concluded the sidebar by stating: "We will inquire of [Moore] later on again to see where he is at. I can't make heads or tails from that letter, the combination of the letter and his actions here getting up on the witness stand." *Id.*

Later that day, outside the presence of the jury, the trial judge asked Moore about his letter. In relevant part, the colloquy went as follows:

> Court: [Y]ou have asked a couple of things. I'm not quite sure what you want, but you wanted a chance to address the jury. The court would certainly give you that. You had the chance. Your attorney asked is there anything you wanted to say. You gave your statement. That is what you are looking for. Do you want to impress [sic] the jury again at [the] end of this [the direct examination]?
>
> Moore: I think it's appropriate in light of I interrupted the proceedings.
>
> Court: You want to address the jury and apologize you said for interrupting the proceedings?
>
> Moore: Right.

> Court: Okay. Well, that's fine. You can do that. I will allow you to do – you would have a redirect. You can ask him the question if he has something to say to the jury.
>
> Moore: Not just the jury. It was you, too.
>
> Court: Your apology is accepted here. You don't have to apologize to me in front of the jury. Now, if you want to do it to the jury, it's your business. I don't care about it or you can ask that open-ended question. Again, that would subject you to cross-examination for whatever you say of course.
>
> Defense counsel: Your Honor –
>
> Court: So you talk it over and whatever you want to do, that's fine. Okay. Have a nice break here.

App. 17a-18a.

After the jury returned, another witness was examined and, after the lunch break, the prosecutor cross-examined Moore. App. 18a. Upon completion of redirect and recross-examination of Moore, the defense rested, and Moore's counsel presented closing argument. *Id.*

The jury convicted Moore on the three counts against him. *Id.* On direct review, the Ohio court of appeals affirmed his conviction, although it reversed the trial court's imposition of consecutive sentences and remanded for resentencing. *Id.* The Ohio court of appeals concluded that Moore had waived any right he might have had to self-representation when he permitted himself to be examined on the stand by counsel after apparently requesting to proceed *pro se.*

App. 114a. The Supreme Court of Ohio denied Moore leave to appeal. App. 100a. Moore was ultimately sentenced by the trial court to 33 years in prison. Journal Entry, May 24, 2006.

B. The federal courts granted habeas relief.

Moore then filed a petition for writ of habeas corpus. The district court denied Moore relief on three of his four grounds, but granted a conditional writ of habeas corpus on the ground that Moore's participation in a direct examination by his counsel was not a waiver of his right to self-representation, and that the trial court unreasonably applied *Faretta* by failing to conduct an appropriate hearing on the record as to whether Moore was knowingly and voluntarily waiving his right to counsel. App. 46a-54a.

The Sixth Circuit affirmed the district court's grant of a conditional writ of habeas corpus, subject to Moore being retried by the State. App. 25a-26a. The court concluded that the trial court deprived Moore of his Sixth Amendment right to self-representation "[b]y failing to rule on Moore's unequivocal requests to proceed pro se." App. 25a. The Sixth Circuit held, as did the district court, that the trial court was required to engage in a *Faretta* inquiry to determine whether Moore should be permitted to proceed *pro se*. App. 20a-25a.

In dissent, Judge Rogers stated that where a criminal defendant waits until the fourth day of a five-day trial to request self-representation, a trial judge does not unreasonably apply clearly established federal law in declining to grant that request. App. 26a-31a. Because Moore's motion was

untimely, Judge Rogers concluded, it is not an objectively unreasonable application of clearly established federal law to decide that a *Faretta* hearing was not required. *Id.*

REASONS FOR GRANTING THE WRIT

The Court should grant the Warden's petition and reverse the Sixth Circuit's judgment. The proper question is not whether Moore was denied the right to self-representation; he clearly was. After all, the trial proceeded with counsel in place after Moore made his request. Instead, the proper question is whether that denial violated Moore's Sixth Amendment rights; and it did not. A criminal defendant does not have a clearly established right to self-representation under the Sixth Amendment where, as in this case, his *Faretta* request was untimely.

A. The trial court's failure to issue a formal denial of Moore's self-representation request is not an automatic basis for granting a writ where the continuation of the proceedings with trial counsel in place was equivalent to a denial of the request.

The Sixth Circuit sidestepped the core question presented by Moore's habeas petition—whether he even possessed a Sixth Amendment right to proceed *pro se*—by holding that the trial court's "fail[ure] to rule" formally on Moore's request constituted an automatic violation of his Sixth Amendment right to self-representation. App. 25a. But the trial court's purported failure to rule on Moore's self-representation request is an improper basis for granting a writ where, as here, the failure to rule clearly amounted to a denial of the request.

As countless federal courts have recognized, a motion is denied whenever the court enters a final

judgment or conducts any proceedings inconsistent with the granting of the motion. For instance, in *Saldana v. United States,* 273 F. App'x 842, 844 (11th Cir. 2008), a habeas petitioner's motions to add a claim to his 28 U.S.C. § 2255 motion were treated as denied where the court's entry of final judgment was clearly inconsistent with permitting an additional claim for relief. Similarly, in *SEC v. Clayton*, 253 F. App'x 752, 754 (10th Cir. 2007), the Tenth Circuit ruled that an individual's motion to intervene would be considered implicitly denied where the court failed to rule on the motion. *See also Schatzman v. County of Clermont*, No, 99-4066, 2000 U.S. App. LEXIS 25957 (6th Cir. Oct. 11, 2000); *Americans United for Separation of Church & State v. City of Grand Rapids*, 922 F.2d 303, 306 (6th Cir. 1990); *Toronto-Dominion Bank v. Cent. Nat'l Bank & Trust Co.*, 753 F.2d 66, 68 (8th Cir. 1985); *Addington v. Farmer's Elevator Mut. Ins. Co.*, 650 F.2d 663 (5th Cir. 1981).

It is undisputed that the trial court did not permit Moore to proceed *pro se.* Moore asked to proceed on his own, and the trial went forward—and a verdict was entered—with counsel in place. It follows that Moore's request was denied.

Given that the self-representation request was denied, the proper inquiry on federal habeas review is whether that denial violated Moore's Sixth Amendment rights. By bypassing that core question, the Sixth Circuit's ruling compels state courts to conduct a full-blown *Faretta* inquiry whenever a defendant asks to proceed *pro se.* But this approach ignores the fact that federal courts have widely held that the right to self-representation is not absolute

and can be waived in various ways—for instance, where the defendant fails to timely assert the request, or by conduct giving the appearance of uncertainty. *See, e.g.*, *Martinez v. Court of Appeal,* 528 U.S. 152, 161-62 (2000); *McKaskle v. Wiggins*, 465 U.S. 168, 182 (1984); *United States v. Edelmann*, 458 F.3d 791, 808 (8th Cir. 2006); *United States v. Singleton*, 107 F.3d 1091, 1096-97 (4th Cir. 1997).

In those situations, the decision to allow *pro se* representation rests in the trial court's sound discretion. *Robards v. Rees*, 789 F.2d 379, 384 (6th Cir. 1986); *United States v. Lawrence*, 605 F.2d 1321, 1325 (4th Cir. 1979). That discretion derives from this Court's longstanding recognition that a court has inherent power "to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. North Am. Co.,* 299 U.S. 248, 254 (1936). The Sixth Circuit significantly diminished that discretion by requiring courts to conduct a *Faretta* hearing in response to any *pro se* request, even if the request was untimely or equivocal.

The Sixth Circuit's ruling should be corrected before this erroneous precedent is perpetuated. A trial court's failure to rule formally on a request or motion should not automatically warrant a writ where proceedings inconsistent with the request amount to an implicit denial. Rather, the courts should be required to address the core constitutional question—in this case, whether the trial court's denial of Moore's self-representation request violated his Sixth Amendment rights.

B. Where Moore's request to proceed *pro se* was untimely, the decision to grant or deny his request resided in the trial court's sound discretion, and the trial judge did not unreasonably apply clearly established federal law in declining to grant that request.

Faretta does not establish an unqualified right to self-representation whenever it is requested. Rather, timing matters. In fact, *Faretta* itself emphasized the timeliness of the defendant's request no fewer than three times, noting that the request was made "[w]ell before the date of trial," 422 U.S. at 807, and "weeks before trial," *id.* at 835, and that a hearing on the motion was held "[s]everal weeks thereafter, but still prior to trial," *id.* at 808. As this Court has therefore recognized, "most courts" have interpreted *Faretta* to require that a defendant assert his right to self-representation "in a timely manner." *Martinez*, 528 U.S. at 161-62.

For instance, in both *United States v. Young*, 287 F.3d 1352 (11th Cir. 2002), and *United States v. Lawrence*, 605 F.2d 1321 (4th Cir. 1979), the Courts of Appeals held that the trial court had properly denied the defendants' requests to proceed *pro se* as untimely where the requests had been made after the jury was empanelled, although before the jury had been sworn. As the court in *Lawrence* concluded, the right of self-representation can be "limited or waived if not raised before trial," and if raised only after trial has begun, the grant or denial of the request "rests within the sound discretion of the trial court." 605 F.2d at 1324. Other cases are to the same effect. *See, e.g., Wood v. Quarterman,* 491

F.3d 196, 202 (5th Cir. 2007) ("no decision of the Supreme Court obligates state courts to permit self-representation when the defendant fails to invoke his Faretta right in a timely manner."); *United States v. Edelmann*, 458 F.3d 791, 808 (8th Cir. 2006) (denying request for self-representation as untimely when made five days before trial and noting that "[t]he right to self-representation . . . is not absolute" and that "the defendant must make his request in a timely manner"); *United States v. Young*, 287 F.3d 1352, 1353-55 (11th Cir. 2002) (district court properly denied defendant's request to proceed *pro se* as untimely where request was made after jury was empanelled); *United States v. Brown*, 744 F.2d 905, 908 (2d Cir. 1984) (denial of mid-trial request to proceed *pro se* was proper; the right is "unqualified only if exercised before the commencement of trial").

Indeed, the Sixth Circuit failed to apply its own law on this very point. The Sixth Circuit, like most other federal circuits, repeatedly has declined to find constitutional error where a trial court denies a request for self-representation made after trial proceedings have begun. For example, in *United States v. Conteh*, 234 F. App'x 374, 381 (6th Cir. 2007), the Sixth Circuit declined to find an abuse of discretion where the trial court denied the defendant's self-representation request as untimely, since the request was made after trial began. Similarly, in *United States v. Pleasant*, 12 F. App'x 262 (6th Cir. 2001), the court held that the defendant's self-representation request was properly denied where it was made "on the day of trial with prospective jurors standing outside of the courtroom." *Id.* at 266-67. In *United States v. Martin,* 25 F.3d 293 (6th Cir. 1994), the court ruled

that the trial court's denial of a defendant's self-representation motion made "after the trial was in full swing [was] *a fortiori* a proper exercise of discretion." *Id.* at 296 n.3. *See also Robards v. Rees*, 789 F.2d 379, 383-84 (6th Cir. 1986) (denial of defendant's *pro se* request was proper where request was made after the jury was sworn in and roll had been called).

In short, courts are afforded significant discretion to deny untimely requests for self-representation. That latitude comports fully with this Court's broader Sixth Amendment jurisprudence, which has long recognized that a defendant's Sixth Amendment rights may be tempered by the practical aspects of conducting a criminal trial. It is well-settled, for example, that a criminal defendant's voluntary absence from trial, or his disruptive behavior during trial, can waive his Sixth Amendment right to be present. *See, e.g., Taylor v. United States*, 414 U.S. 17, 20 (1973); *Illinois v. Allen*, 397 U.S. 337, 343 (1970); *Diaz v. United States*, 223 U.S. 442, 445 (1912). In those circumstances, as here, a defendant's Sixth Amendment rights are not absolute, and courts are afforded discretion to account for the interests of the parties and of judicial economy. In direct contravention of those well-settled principles, the Sixth Circuit's ruling here parlays a hollow technicality—the trial court's failure to rule formally on Moore's request—into a rigid right to self-representation regardless of the request's untimeliness or other legitimate countervailing considerations.

Because the denial of self-representation was deemed proper in all of the above cases—and because Moore's request was made even later in the trial than most of the requests in the cases above—the trial court's denial of Moore's self-representation request did not violate clearly established federal law. Accordingly, the Sixth Circuit exceeded its authority under AEDPA in granting the writ.

CONCLUSION

For the above reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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