

1 UNITED STATES COURT OF APPEALS

2
3 FOR THE SECOND CIRCUIT

4 August Term, 2012

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7
8 (Argued: June 24, 2013 Decided: August 9, 2013)

9
10 Docket No. 12-256

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12 - - - - -X
13
14 RAMON RAMOS,

15
16 Petitioner-Appellant,

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18 - v. -

12-256

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20 STEVEN RACETTE,

21
22 Respondent-Appellee.

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24 - - - - -X
25 Before: JACOBS, Chief Judge, CARNEY and DRONEY,
26 Circuit Judges.

27
28 During his trial for multiple rape-related crimes,
29 Ramon Ramos elected to appear pro se and to absent himself
30 from the proceedings. The trial judge introduced Ramos's
31 standby counsel to the voir dire panel as Ramos's lawyer.
32 After a recess, the court attempted to correct the
33 mischaracterization by reintroducing counsel as Ramos's
34 "legal advisor." Following his conviction, Ramos filed for

1 a writ of habeas corpus in the United States District Court
2 for the Eastern District of New York (Gleeson, J.), arguing
3 that the brief introduction violated his Sixth Amendment
4 right to self-representation. We affirm the denial of the
5 writ because there is no clear Supreme Court precedent
6 controlling this case, and because the introduction did not
7 substantially impair his right to self-representation.

8 SALLY WASSERMAN, New York, NY,
9 for Appellant.

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11 JOHNNETTE G. A. TRAILL (John M.
12 Castellano, on the brief),
13 Queens County District
14 Attorney's Office, Kew Gardens,
15 NY, for Appellee.

16
17 DENNIS JACOBS, Chief Judge:
18

19 Ramon Ramos appeals from the judgment of the United
20 States District Court for the Eastern District of New York
21 (Gleeson, J.) denying his petition for a writ of habeas
22 corpus. Charged with first-degree rape, first-degree
23 sodomy, and second-degree burglary in state court, Ramos
24 elected to forego counsel and to absent himself from the
25 proceedings in protest. Shortly thereafter, the trial judge
26 introduced Ramos's standby counsel to the jury as his
27 attorney--a mischaracterization that the court attempted to
28 correct by reintroducing him as a "legal advisor." Ramos

1 argues that this violated his Sixth Amendment right to self-
2 representation. We affirm because the state proceeding did
3 not result "in a decision that was contrary to, or involve[]
4 an unreasonable application of, clearly established Federal
5 law, as determined by the Supreme Court of the United
6 States." 28 U.S.C. § 2254(d). And the Supreme Court case
7 on which Ramos relies, McKaskle v. Wiggins, fairly read,
8 does not support his position because standby counsel's
9 extremely limited participation was "simply not substantial
10 or frequent enough to have seriously undermined [Ramos's]
11 appearance before the jury in the status of one representing
12 himself." 465 U.S. 168, 187 (1984). The judgment is
13 affirmed.

14 15 **BACKGROUND**

16 In July 1993, a young woman reported to police that she
17 had been raped. A sexual assault kit was used to collect
18 evidence at the local hospital in Queens. The case went
19 cold for some time. In March 1994, Ramos was arrested for
20 burglary, also in Queens. Although police suspected his
21 involvement in the rape, the victim was unable to identify
22 him in multiple photo arrays and lineups, and the case went
23 cold again.

1 That changed in October 2001, when state officials
2 procured a DNA sample from Ramos, who was then serving time
3 for a third-degree robbery conviction. In July 2002,
4 Ramos's DNA was matched to the semen from the victim's
5 sexual assault kit. Ramos was indicted for the rape in May
6 2003.

7 Ramos's first trial in New York Supreme Court ended in
8 a mistrial when the prosecutor took ill. During those
9 truncated court proceedings in 2005, Ramos evinced a desire
10 to represent (and eventually absent) himself. Ramos advised
11 the court that he would appear pro se, except for certain
12 challenges to DNA evidence, which he wanted his standby
13 counsel, John Scarpa, to make. However, during the Sandoval
14 hearing,¹ Ramos expressed disgust with the court and the
15 proceedings, and a distrust of lawyers based in part on his
16 perception that unchallenged police perjury had led to a
17 prior conviction. He refused counsel and refused to stay:

18 I will not sit here and have this court convict me for
19 wrongs done by the police. . . . I do not wish to
20 attend this trial. . . . I am a minority and I cannot
21 afford a lawyer—it seems the system would like to take

¹ In New York, "a Sandoval hearing is held, upon a defendant's request, to determine the extent to which he will be subject to impeachment by cross-examination about prior bad acts if he testifies." Grayton v. Ercole, 691 F.3d 165, 173 (2d Cir. 2012) (quotation marks omitted).

1 advantage but after being convicted here and serving 15
2 to life based on the fact that the court protected a
3 police officer from having perjured himself, I am not
4 going to go through it and I respectfully refuse to
5 attend any further of my trial and conviction. Let it
6 go on without me. . . . I want to make it clear that I
7 do not wish an attorney for me. What I feel is
8 happening, there is corruption going on in the system,
9 corruption going on.

10
11 Ramos v. Racette, No. 11-CV-1412, 2012 WL 12924, at *2-3

12 (E.D.N.Y. Jan. 4, 2012) (quoting the trial transcript). The
13 court then instructed Scarpa to act as counsel in Ramos's
14 absence, explaining, "[w]e can't have an empty defense chair
15 and table, so it's a good thing that you are advisory
16 counsel because now you are back in the box [F]rom
17 this point on, you are the attorney for the defendant." Id.
18 at *3. However, the trial prosecutor missed three
19 consecutive days with illness before the jury was sworn in,
20 and the court declared a mistrial.

21 The retrial was held over five days from January 3 to
22 10, 2006. On the first day, Ramos indicated that he was
23 unhappy with the new legal advisor assigned to his case,
24 Russell Rothberg. Although Ramos had not objected to
25 Scarpa's replacement when it occurred, he now insisted that
26 he wanted Scarpa back. The court informed him that "Mr.
27 Rothberg . . . has been on the case for the past

1 month . . . and you, frankly, don't have a say in the
2 matter." Id. at *4. Ramos made clear that he would protest
3 the trial if Rothberg were involved, and the court allowed
4 Ramos to leave the courtroom.

5 After Ramos went to his cell, Rothberg asked the court
6 to clarify his role: "Judge, just so the record is
7 absolutely clear, I know that the Court has made the inquiry
8 of the defendant who has voluntarily absented himself from
9 the courtroom, so again my status now changes from legal
10 advisor to counsel for the defendant?" Id. at *5. The
11 court confirmed that "[f]or the purposes of the trial, and
12 for the jury's edification, obviously you have to be
13 referred to as the defendant's attorney, yes, or you are
14 representing the defendant." Id. The jury was brought into
15 the courtroom, and the court introduced Rothberg to the jury
16 as "the attorney for the defendant." Id.

17 The prosecutor returned from the lunch break worried,
18 and suggested to the court that a defendant had a
19 constitutional right both to appear pro se and to absent
20 himself from trial without representation. The prosecutor
21 advised that the court could not "force [Ramos] to have Mr.
22 Rothberg represent him merely because he [wanted] to go pro
23 se and absent himself." Id. at *6.

1 After this exchange, the court ordered Ramos returned
2 to court. Ramos confirmed, again, that he wished to appear
3 pro se without any representation from Rothberg. He
4 declared that he wanted to “take [his] chances with appeal,”
5 and voluntarily returned to his cell. Id.

6 The prosecutor asked the court to clarify for the jury
7 that Ramos was actually representing himself, but the
8 request strangely was denied. Instead, the court obliquely
9 informed the jury that “Mr. Rothberg has been appointed by
10 the Court to be available to serve as a legal advisor to Mr.
11 Ramos.” Id. Jury selection continued.

12 Before each day of trial, Ramos was asked whether he
13 would like to participate in the proceedings. Each day,
14 Ramos elected to remain in the holding cell. After the
15 prosecution rested, the court charged the jury, including an
16 instruction to draw no inference from the defendant’s
17 absence. On January 10, 2006, the jury returned a verdict
18 of guilty on all counts.

19 Ramos appealed through the state court system, arguing
20 that his right to self-representation had been abrogated.
21 The Second Department denied the appeal: “Contrary to the
22 defendant’s contention, he was not denied [his] right [to

1 self-representation] when the court appointed a new attorney
2 to act as standby counsel.” People v. Ramos, 877 N.Y.S.2d
3 177, 178 (2d Dep’t 2009). The New York Court of Appeals
4 granted Ramos leave to appeal, People v. Ramos, 13 N.Y.3d
5 748 (2009), but subsequently affirmed the Second
6 Department’s order without taking up the Sixth Amendment
7 issue. People v. Ramos, 13 N.Y.3d 881, 881-82 (2009).
8 Reargument and reconsideration were denied. People v.
9 Ramos, 14 N.Y.3d 794 (2010).

10 On March 10, 2011, Ramos petitioned pro se for a writ
11 of habeas corpus in the United States District Court for the
12 Eastern District of New York (Gleeson, J.), presenting six
13 claims for relief. Ramos, 2012 WL 12924, at *9. The court
14 denied the petition. Id. at *29. Ramos appeals from that
15 judgment. The only question now before us is whether his
16 Sixth Amendment right to self-representation was violated in
17 the state trial.

18 19 **DISCUSSION**

20 **I**

21 We review the denial of a habeas petition de novo.
22 Sweet v. Bennett, 353 F.3d 135, 139 (2d Cir. 2003). “An

1 application for a writ of habeas corpus on behalf of a
2 person in custody pursuant to the judgment of a State court
3 shall not be granted with respect to any claim that was
4 adjudicated on the merits in State court proceedings unless
5 the adjudication of the claim [either] (1) resulted in a
6 decision that was contrary to, or involved an unreasonable
7 application of, clearly established Federal law, as
8 determined by the Supreme Court of the United States; or (2)
9 resulted in a decision that was based on an unreasonable
10 determination of the facts in light of the evidence
11 presented in the State court proceeding." 28 U.S.C.
12 § 2254(d).

13 "A state court's determination that a claim lacks merit
14 precludes federal habeas relief so long as 'fairminded
15 jurists could disagree' on the correctness of the state
16 court's decision." Harrington v. Richter, 131 S. Ct. 770,
17 786 (2011) (quoting Yarborough v. Alvarado, 541 U.S. 652,
18 664 (2004)). This standard protects against intrusion of
19 federal habeas review upon "both the States' sovereign power
20 to punish offenders and their good-faith attempts to honor
21 constitutional rights." Id. at 787 (internal quotations
22 omitted); see id. at 786 ("If this standard is difficult to
23 meet, that is because it was meant to be.").

1 Ramos's primary argument on appeal is that his Sixth
2 Amendment right to self-representation was violated when the
3 2006 trial court initially disregarded his request to appear
4 pro se, assigned counsel during voir dire, and introduced
5 Rothberg to the jury as Ramos's counsel.

6 The fleeting imposition of counsel upon a pro se
7 defendant who has elected to abstain from participating at
8 trial is a matter of first impression in this Court.
9 Critically, the Supreme Court has not specifically addressed
10 it, either. "[I]t is not an unreasonable application of
11 clearly established Federal law for a state court to decline
12 to apply a specific legal rule that has not been squarely
13 established by [the Supreme] Court." Knowles v. Mirzayance,
14 556 U.S. 111, 122 (2009) (quotation marks omitted); see 28
15 U.S.C. § 2254(d). Ramos can point to no Supreme Court case
16 analyzing whether the unwanted participation of standby
17 counsel violated the Sixth Amendment rights of a pro se
18 defendant asserting an absentee protest defense. In Davis
19 v. Grant, we called for further guidance from the Supreme
20 Court on appointment of counsel for pro se defendants who
21 are forcibly absented, 532 F.3d 132, 149-50 (2d Cir. 2008);
22 the same gap exists with respect to pro se defendants like

1 Ramos who voluntarily absent themselves, and who thus (as it
2 were) “disappear” pro se.

3 Given the lack of Supreme Court guidance in this area,
4 “fairminded jurists” could reasonably support the state
5 court judgment. See Harrington, 131 S. Ct. at 786. We
6 decline to grant a writ of habeas corpus in the absence of
7 “clearly established Federal law” that requires it. The
8 Supreme Court authority on which Ramos relies does not
9 support his claim, let alone do so with the requisite
10 clarity.

11 12 II

13 Ramos argues that McKaskle v. Wiggins, 465 U.S. 168
14 (1984), constitutes the Supreme Court precedent he needs.
15 However, analysis of that case confirms that Ramos’s self-
16 representation was not substantially disturbed by the
17 court’s brief introduction of counsel.

18 The Supreme Court has instructed that a pro se
19 defendant has a right to maintain control over the case that
20 the defendant wants to present to the jury personally.
21 McKaskle, 465 U.S. at 178. “[O]nce a defendant has
22 knowingly and intelligently waived her right to counsel, a

1 [trial] court should not interfere with the defendant's
2 choice, even though it 'may sometimes seem woefully foolish
3 to the judge.'" Torres v. United States, 140 F.3d 392, 402
4 (2d Cir. 1998) (quoting United States v. Curcio, 694 F.2d
5 14, 25 (2d Cir. 1982)). "[P]articipation by standby counsel
6 without the defendant's consent should not be allowed to
7 destroy the jury's perception that the defendant is
8 representing himself." McKaskle, 465 U.S. at 178.

9 However, a pro se defendant's control over the defense
10 is not limitless. In McKaskle, the Supreme Court considered
11 whether unsolicited participation of standby counsel
12 violated a defendant's right to defend pro se. Although the
13 trial court permitted the defendant to appear pro se, it
14 also allowed standby counsel an occasional interjection.
15 Standby counsel "made motions, dictated proposed strategies
16 into the record, registered objections to the prosecution's
17 testimony, urged the summoning of additional witnesses, and
18 suggested questions that the defendant should have asked of
19 witnesses"--over the explicit objections of the defendant.
20 Id. The Court held that the intrusions of the standby
21 counsel "were simply not substantial or frequent enough to
22 have seriously undermined [the defendant's] appearance

1 before the jury in the status of one representing himself.”
2 465 U.S. at 187.

3 Here, the court introduced Rothberg to the jury as “the
4 attorney for the defendant” notwithstanding that Ramos
5 expressly asked to appear pro se and without Rothberg’s
6 participation. Ramos, 2012 WL 12924, at *5. The court’s
7 brief statement was alarming enough that the state
8 prosecutor soon after asked the court to limit Rothberg to
9 an observer’s role, with a clarifying instruction for the
10 jury. The instruction given was that Rothberg was acting as
11 the defendant’s “legal advisor.” Id., at *6. Although it
12 would have been best if the court had not made the initial
13 introduction, the mischaracterization did not cross
14 McKaskle’s “substantial” interruption threshold for a
15 constitutional violation.

16 Ramos argues that the momentary introduction crossed
17 the line. He cites a footnote from McKaskle: “[s]ince the
18 right of self-representation is a right that when exercised
19 usually increases the likelihood of a trial outcome
20 unfavorable to the defendant, its denial is not amenable to
21 ‘harmless error’ analysis. The right is either respected or
22 denied; its deprivation cannot be harmless.” 465 U.S. at

1 177 n.8. Ramos similarly points to United States v.
2 Gonzalez-Lopez, which instructed that structural errors
3 “defy analysis by harmless error standards because they
4 affect the framework within which the trial proceeds and are
5 not simply an error in the trial process itself.” 548 U.S.
6 140, 148-49 (2006) (quotation marks omitted).

7 However, “[i]t does not necessarily follow . . . that
8 every deprivation in a category considered to be
9 ‘structural’ constitutes a violation of the Constitution or
10 requires reversal of the conviction, no matter how brief the
11 deprivation or how trivial the proceedings that occurred
12 during the period of deprivation.” Gibbons v. Savage, 555
13 F.3d 112, 120 (2d Cir. 2009), cert. denied, 558 U.S. 932
14 (2009). The Gibbons court discussed (albeit in dicta) a
15 scenario similar to the one before us: a pro se defendant
16 “who, in spite of his demand to represent himself, was
17 required to be represented by counsel.” Id. The court
18 speculated that such an encroachment upon self-
19 representation would support a viable habeas claim if the
20 unwanted representation persisted “throughout the trial, or
21 for a *substantial or important part of it*.” Id. (emphasis
22 added). This notion of a “substantial” intrusion is

1 consistent with McKaskle, which held that the standby
2 counsel's comments made over the defendant's protests were
3 not "substantial" or "frequent enough" to disrupt the jury's
4 perception of his pro se defense. 465 U.S. at 187. The
5 right of self-representation is not a matter of all or
6 nothing, especially in the context of a habeas review
7 following an adverse state court ruling.

8 It is true that a spectacle of total protest against
9 the proceedings could be undermined, slightly, by an
10 introduction of counsel to the jury. Any presentation of a
11 defense at all, no matter how limited, inherently disrupts a
12 concerted refusal to participate.

13 Ramos made it plain enough that he wanted nothing to do
14 with the trial and wanted nothing done on his behalf. But
15 it is not clear from his statement of position that the
16 absence of any defense effort was a strategic defense
17 measure to convey a protest to the jury. Rather than
18 mounting a theatrical defense, Ramos could have simply been
19 quitting.² But even assuming his absence was intended to

² Ramos argues on appeal that he was hoping to "telegraph a message to the jury with both his self-representation and his absence." Reply Br. at 13. But his behavior seems more like pure apathy. His declaration (made out of the presence of the jury) that he preferred to "take [his] chances with appeal" does not support his current

1 somehow influence the jury to acquit, any impact of the
2 introduction on the jury's perceptions was insubstantial,
3 checked by the prosecutor's prompt intervention. Rothberg's
4 participation was limited to a three-word greeting, and that
5 was it. After the lunch break, the trial court explained to
6 the jury that "Mr. Rothberg has been appointed by the Court
7 to be available to serve as a legal advisor to Mr. Ramos."
8 Ramos, 2012 WL 12924, at *6. Given that laymen might
9 consider availability to serve as legal advisor to be an
10 attorney's function, an explicit clarification would
11 certainly have been preferable. However, this statement
12 sufficiently indicated that Rothberg was not, in fact,
13 Ramos's active counsel (an impression greatly reinforced
14 when Rothberg sat in the spectator section, rather than at
15 the counsel's table, for the remainder of the trial).

16 More importantly, after the initial introductions,
17 Ramos was able to advance a strategy of boycott for the
18 duration of the trial. Rothberg never presented any sort of
19 a defense to the jury whatsoever; indeed, he never uttered
20 another word. Thus, "the intrusions by counsel at [Ramos's]
21 trial were simply not substantial or frequent enough to have

characterization that his absence was intended as a signal
of injustice to the jury.

1 seriously undermined [Ramos's] appearance before the jury in
2 the status of one representing himself." McKaskle, 465 U.S.
3 at 187. This was not a situation where "only the lawyers in
4 the courtroom" knew that Ramos was exercising his right to
5 pro se representation. Id. at 179. Ramos was therefore not
6 deprived of his right to self-representation, and his claim
7 for a writ of habeas corpus is denied.

8
9 **CONCLUSION**

10 For the foregoing reasons, we affirm.
11