

IN THE UNITED STATES SUPREME COURT

*

Charles Edward Cooley, Jr.,
Petitioner,

*

Vs.

Case No.: 17-7353

*

Cynthia Stewart, Warden, et al. *
Respondents.

PETITION FOR REHEARING

Comes now, the petitioner, Charles Edward Cooley, Jr., Pro-se in the above styled cause and hereby petition this Honorable Court pursuant to Rule 44, , Rehearing, praying that the judgment entered on March 19, 2018, denying the petition for Writ of Certiorari, and submits the following as good grounds therefore.

1. The petitioner avers that this Honorable Court overlooked a crucial point of law in deciding the questions presented by Cooley's petition.

2. Mr. Cooley, is praying that after a preliminary review of his Faretta claim that this Honorable Court will restore the petition back to its docket and the court proceed under its rule

to grant the petition.

STATEMENT REGARDING JURISDICTION

The United States Court of Appeals for the Eleventh Circuit issued its opinion on June 8, 2017, a timely petition for rehearing was denied on July 19, 2017. A timely petition for Writ of Certiorari to the United States Supreme Court was filed and denied on March 19, 2018.

STATEMENT OF THE ISSUE PRESENTED

WHETHER A STATE MAY CONSTITUTIONALLY HOLE A
PERSON INTO ITS CRIMINAL COURT AND....THERE
FORCE A LAWYER UPON THE PETITIONER WITHOUT
A VALID WAIVER?

STATEMENT OF THE CASE

Petitioner, Charles Edward Cooley, Jr., was convicted of Attempted Murder and Assault in the First Degree, in the Circuit Court of Mobile County, Alabama and the Court sentenced, Cooley pursuant to Alabama Habitual Offender Act to Life imprisonment on both convictions, with the sentences ordered to run concurrently.

Petitioner gave **Notice of Appeal** at sentencing and on Direct Appeal argued that: 1.) He was denied his rights to a fast and speedy trial; 2.) His photographic line-up was inadmissible; 3.) He was entitled to a mistrial because the victim referred to his photo as a mug-shot; and 4.) He did not knowingly, intelligently and voluntarily waive his rights to counsel.

The Alabama Court of Criminal Appeals affirmed Cooley's conviction in a Memorandum Opinion on July 16, 2010, and overruled his **Application for Rehearing** on July 30, 2010.

The Alabama Supreme Court denied Cooley's petition for Writ of Certiorari, and issued a **Certificate of Judgment** on January 7, 2011.

Petitioner filed a Rule 32 [Ala.R.Crim.P] petition in the Circuit Court of Mobile County, Alabama accompanying by an **Informa Pauperis** application, the Circuit Court on **June 6, 2012**, initially granted the motion, but after the state filed its **Motion to Dismiss**, the Circuit Court issued an Order reversing its previous Order granting Cooley's informa pauperis status, and dismissed Cooley's case without a ruling on the Rule 32 petition. Cooley appealed the dismissal, reasserting several of his arguments raised in his petition. The Alabama Court of Criminal Appeals dismissed the appeal on August 20, 2013, holding that the Circuit Court did not abused its dis-

cretion, in withdrawing the grant of Cooley's *informa pauperis* status, and because the trial court did not address Cooley's Rule 32 petition, there was no final judgment from which to appeal.

Cooley filed a **Petition for Writ of Mandamus** requesting an order directing the Circuit Court to dispose of his Rule 32 petition. On October 31, 2013, the Alabama Court of Criminal Appeals denied the writ on the ground that because no filing fee had been paid or waived, the Circuit Court does not have subject matter jurisdiction, and therefore could not be directed to dispose of the Rule 32 petition.

The Alabama Supreme Court denied review, and a Certificate of Judgment was issued November 15, 2013.

On March 28, 2014, petitioner filed a **Petition for Writ of Habeas Corpus** pursuant to 28 U.S.C. §2254, in the United States District Court for the Southern District of Alabama.

In his habeas petition, Cooley asserted that he did not knowingly, intelligently, and voluntarily waive his right to counsel, and the State Court did not adequately determine that petitioner's waiver of his right to counsel was knowingly, intentionally and voluntarily made. Respondent, in response asserted that Cooley's claim is procedurally barred because

Cooley never received an adverse ruling on his Rule 32 petition, thus, there is no final judgment from which to appeal.

On January 18, 2017, a United States Magistrate Judge, apparently, rejecting Respondent's procedural default defense, issued a **Report and Recommendation** addressing the merits of Cooley's habeas claim, and concluded that the record shows that Cooley knowingly and voluntarily waived his right to counsel, and recommended that habeas relief be denied, the District Court on January 31, 2017, adopted the recommendation, of the Magistrate Judge and declined Cooley's request for issuance of a **Certificate of Appealability**. Cooley, thereafter sought a **Certificate of Appealability** in the United States Court of Appeals for the Eleventh Circuit, in which that Court on June 8, 2017 denied, and subsequently on July 19, 2017, denied Cooley's Motion for Reconsideration.

Thus, the instant petition for Writ of Certiorari ensues.

STATEMENT OF SUMMARY OF ARGUMENT

The petitioner Charles Edward Cooley, respectfully request that this **Honorable Court** in exercising its supervisory position, rehear this case to resolve the important question presented by Cooley. In spite of the Respondent's assertion that

Cooley's claims are procedurally barred on January 18, 2017, a United States Magistrate Judge, apparently, rejected Respondents procedural default defense, issued a report and recommendation addressing the merits of Cooley's habeas claim, and denied, habeas relief. Cooley has demonstrated that his Constitutional Rights were violated by the State of Alabama. Where Mr. Cooley, did not knowingly, intelligently and voluntarily waive his right to counsel, therefore his conviction and sentence are void.

STATEMENT OF ARGUMENT

WHETHER A STATE MAY CONSTITUTIONALLY HOLD A
PERSON INTO ITS CRIMINAL COURT AND....THERE
FORCE A LAWYER UPON THE PETITIONER WITHOUT
A VALID WAIVER?

The petitioner, Charles Edward Cooley contends that the Sixth Amendment to the United States Constitution includes several rights necessary to a full defense, it provides that:

"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 defense."

The right to defend is given directly to the accused for it is he who suffers the consequences if the defense fails. Accord Faretta Vs. California, 422 U.S. 806, 818-820, 45 L.2d.2d 562, 95 S.ct. 2525 (1975). Thus, in Faretta, the Supreme Court held that an accused has a Sixth Amendment Right to conduct his own defense in a criminal case. Id. at 821. However, the court stated that in order for the accused to represent himself or proceed Pro-se, he must knowingly and intelligently waive the right to counsel. Id. at 835. To ensure a valid waiver of counsel, a Judge should make a "searching or formal" inquiry into both the defendant's understanding of the Sixth Amendment, waiver and awareness of the disadvantages of self representation. See: Iowa Vs. Tovar, 541 U.S. 77, 89 (2004).

Petitioner avers that the record in this case reflects that immediately after counsel for petitioner finished cross-examining the victim, Cooley became frustrated with counsel's performance; and refusal to put forth his defense and counsel failure to ask particular questions of the witness, Cooley informed the court that he would like to waive his right to counsel, so he could obtain the assistance of a new attorney, because his trial counsel, **Mr. Pierson** was not acting in his best interest. [R.534-41]

Cooley requested a continuance to retain counsel. (Id.)

The trial court initially denied petitioner's request to waive his right to counsel. [R.538, 541]. However, the court stated that it would reconsider the request, when the court see that it's not in Cooley's best interest. [R.541-44] The court then took a recess, and after the recess reconsidered Cooley's request to represent himself, and conducted the following colloquy with Cooley regarding his request to waive his right to counsel:

"The Court: Everybody be seated, Please. All right. Mr. Cooley, the court has during the recess taken a look at some other matters involving your case. And I need to go over a few things with you. And we've already gone over some of it already, but I'll go over it with you again and see if the court believe you are in a position to represent yourself or not

You understand that the court thinks its a bad idea for you to represent yourself; do you understand that?

The defendant: Yes, Sir.

The Court: All right. Do you understand the reason why the court thinks that?

The defendant: No, Sir.

The Court: Because you are not trained in the law, because -- have you ever tried a criminal case before?

The Defendant: No Sir.

The Court: Have you ever sat through a criminal trial before?

The Defendant: Somewhat.

The Court: All right. Do you understand that there are rules of court that you would have to follow if you tried to represent yourself?

The Defendant: Yes, Sir.

The Court: And that you would be treated just like a lawyer would be treated; that you couldn't just say whatever you wanted to say; that you would have to do whatever the court said as far as the Rules of Evidence is concerned?

The Defendant: Yes, sir.

The Court: All right. Have you ever studied the Rules of Evidence?

The Defendant: Not--not--no, sir.

The Court: All right. Do you know what the rules are concerning making closing argument, and that you would potentially be putting yourself into a position of making statements against your own interests that could be used against you?

The Defendant: I won't do that, Your Honor, make a statement against myself, but I get exactly what you're saying.

The Court: I mean you would have a right to address the jury at the end.

The Defendant: Yes, sir.

The Court: And do you understand that; that you might say something that could potentially be used against you; you may not realize it, but it could be?

The Defendant: Yes, sir.

The Court: Is there anything further? Have you reconsidered, your position at all about whether you want to proceed representing yourself or not?

The Defendant: I have a couple of questions concerning representing myself.

The Court: All right. And what are those?

The Defendant: Okay. Concerning with the transcripts that the victims made under oath, will I be able to use those.

The Court: You can use anything your attorney has here that's available to you. It's your file.

The Defendant: Okay.

The Court: Do you still wish to represent yourself?

The Defendant: Yes, sir. Could you give me like 20 minutes, 20 to 25 minutes to get myself together to get my documents together with my lawyer?

The Court: Well, we're going to proceed with the trial. We've got a witness who's medical doctor who is going to testify. And after he's through -- and also I'm going to call back to the stand Napoleon Jones, if that's what you want to do.

The Defendant: I would also like to question Mr. Donald Bernoudy as well.

Mr. Seymore: (D.A.) - Judge --

The Court: Well, the request was made after Mr. -- during Mr. Jones testimony. I'm going to allow you to do that. I'm not going to allow you to question Mr. Bernoudy.

The Defendant: I had brought it to my attorney's attention the question that I would like -- that I

would have liked for him to ask Mr. Donald Bernoudy, but he didn't regard my question.

The Court: I'm going to allow you to -- since you made the request specifically to me during Mr. Jones testimony, I'm going to allow you to question Mr. Bernoudy.

Now, the other thing I'm going to do is that I'm not completely discharging Mr. Pierson. Mr. Pierson is going to remain in the courtroom, and may remain at the back table, if that's what you prefer. And any time you want to withdraw your waiver of counsel, you can withdraw it.

The Defendant: I understand.

The Court: And Mr. Pierson will be there. And if you want to consult with Mr. Pierson during any of it, you can consult with him. But again, you must understand the court is not recommending this. In fact, I am telling that I think this is a very bad decision on your part. Do you understand that?

The Defendant: Yes, sir.

The Court: All right. That's the way we'll proceed. Mr. Pierson if you will move to the back table, make your files available to your client.

[R. 545-549]

The record further reflects that during the presentation of defense case, the defendant withdraw his waiver and allowed the defense counsel to question Clinical Psychologist Thomas S. Bennett. [R. 659-661] However, later during trial, petitioner

again requested to represent himself and waive his right to counsel. Specifically, the record reflects:

The Court: Mr. Cooley, have you made a decision as to who is going to proceed handling your defense today?

The Defendant: Yes. Your Honor. I will be proceeding, Your Honor.

Mr. Seymore: Judge, I want --

The Court: Well, wait a minute. I'm not through.

Mr. Seymore: I apologize.

The Court: All right. The court wants to again state to you on the record that I think that is very detrimental to your own case that you proceed as your own attorney. You have competent counsel here to assist you in this matter and to handle your case. I do not recommend that you do that. I think it is a mistake on your part. We've gone over this before. You understand all of the problems that can occur when you handle your own case, don't you?

The Defendant: Problems like what, your Honor?

The Court: Like getting into areas that the court had forbid the prosecutor to go into, you got into and brought it out. None of the evidence would have ever been in this case, but you brought it out, you see, because you're not a lawyer. And I recommend very strongly that unless you're going to keep bringing out evidence against yourself, that you have a lawyer there to take over this case and handle it for you. That's my recommendation.

[R.704-05]

Petitioner avers that this was the extent of the trial court's colloquy in regards to the petitioner's second waiver of his right to counsel.

Petitioner contends that the above colloquies are insufficient to establish that Cooley knowingly and intelligently waive his right to counsel and fail to comport with the minimum of the guidance that this Court dictated in its decision in Farette and its progeny.

The Alabama Court of Criminal Appeals on direct appeal of petitioner conviction, fail to address or even mention the second waiver, but, quoted the colloquy from the first waiver, and while citing Faretta in its analysis, it unreasonably applied Faretta to the facts and circumstances of Cooley's case, resulting, in a decision on the merits of Cooley's Constitutional Claim by a State Court, that is contrary to this Court's clearly established precedents.

Petitioner contends that the District Court and the Court of Appeals did not apply the proper standard of review to his Constitutional Claim as set out by the **Antiterrorism & Effective Death Penalty Act of 1996 [AEDPA]**, which provides when a claim has been adjudicated on the merits in the State Court, an application for **Writ of Habeas Corpus** should be granted, if the State Court adjudication ---

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 proceedings.

28 U.S.C. §2254(d)

Petitioner contends that the "contrary to" Clause is satisfied if a State Court has arrived at a conclusion opposite to that reached by the Supreme Court on a question of law or confronts facts that are materially indistinguishable from a relevant Supreme Court precedent, but arrives at the opposite result. See Williams Vs. Taylor, 529 U.S. 362, 405 (2000). A state court "unreasonable applies" clearly established Federal Law when it identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the prisoner's case. *Id.* at 413.

In the instant case, *sub judice*, Cooley contends that the state court adjudication of the merits of his claim

were both contrary to and an unreasonable application of Faretta and its progeny, and the state court decision was based on an unreasonable determination of the facts in light of the record evidence presented in the state court proceedings.

In Faretta Vs. California, Supra, the Supreme Court made clear that a defendant must knowingly and intelligently waive the right to counsel. *Id.* at 835. To ensure a valid waiver of counsel, a judge should make a searching or formal inquiry into both the defendant's understanding of the Sixth Amendment waiver and awareness of the disadvantages of self-representation. See Iowa Vs. Tovar, 541 U.S. 77, 89 (2004). In Tovar this court explained that the Supreme Court has not prescribed any formula or script to be read to a defendant who states that he elects to proceed without counsel, but, held the information a defendant, must have to waive counsel intelligently will depend upon the particular facts and circumstances surrounding the case. *Id.* at 88, 92 [quoting Johnson Vs. Zerbst, 304 U.S. 458, 464 (1938)]. Among the case-specific factors to be considered, are the defendant's education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding. *Id.*

None of the case specific factors was discussed with Cooley by the trial judge, the colloquy was perfunctory and fail to show that Cooley knowingly, voluntarily and intelligently

waived his right to counsel, it appears from the record that Cooley was forced to choose between going to trial with incompetent appointed counsel or represent himself, as the record reflects from the beginning and throughout the colloquy, Cooley stated that he was attempting to basically obtain a new counsel rather proceed pro se, Cooley even requested a continuance, because his family was going to retain **Attorney Jerome Carter**. [R.537-43). It appears that Cooley was more concerned with changing lawyers, than proceeding pro se. Courts have held that a waiver is involuntary when a defendant must choose between the right to self-representation, and inadequate counsel. Pazden Vs. Mayner, 424 F.3d 303, 316 (3rd Cir. 2005); also U.S. Vs. Silkwood, 893 F.2d 245, 248-49 (10th Cir. 1989). Thus, under the circumstances, it was the duty of the trial court to ensure Cooley was knowingly, voluntarily and intelligently understanding what he was doing and the waiver was being made with open eyes.

±The court must go beyond the perfunctory questioning as reflected by the record in this case, and specifically warn defendant of dangers of proceeding pro se, including that he must conduct his defense in accordance with the Rules of Evidence and Criminal procedure. See U.S. Vs. Jones, 452 F.3d 233, 228-29 (3rd Cir. 2006); U.S. Vs. Kimball, 291 F.3d 726, 730 (11th Cir. 2002).

The record in this case, reflects that after initially denying, Cooley's request for self-representation, the trial court after calling a recess, attempted to conduct a Faretta hearing, but, fail to inquire into the minimum requirement, such as Cooley's education, nature of the charge, penalties involved, whether Cooley was familiar with the rules and the danger and disadvantages of self-representation. U.S. Vs. Jones, Supra.

±Court must determine the defendant understands the nature of the charges, the range of possible punishment, potential defenses, technical problems that he may encounter and any other facts important to a general understanding of the risk involved. Von Moltke Vs. Gillies, 332 U.S. 708, 723-24 (1948).

Cooley argues while there is a conflict among the circuits as to the particular questions to as a defendant who states that he elects to proceed without counsel, some circuits have articulated a three factor test to be used to determine whether a defendant knowingly and intelligently waived the right to counsel. U.S. Vs. Jones, Supra; U.S. Vs. Marks, 530 F.3d 799 (9th Cir. 2008); U.S. Vs. Smith, 413 F.3d 253, 279 (10th Cir. 2005). Other circuits focus on whether the defendant actually understood the risk of self-representation instead of whether the judge made a searching inquiry into defendant's understanding of the waiver. See e.g. U.S. Singleton, 107 F.3d 1091 (4th Cir. 1997); U.S. Vs. Todd, 424 F.3d 525 (7th Cir. 2005).

Thus, this court in it's supervisory position should take this opportunity based on the conflicting positions among the circuits, to do what the court's didn't do in Faretta. The record in this case clearly shows that the trial court's in Cooley case purported Faretta warning was insufficient to establish that Cooley, with open eye's knowingly, voluntarily and intelligently, waived his rights to counsel.

Accordingly, this court should reverse the - judgment back to the state court for a new trial.

CONCLUSION

Wherefore, premises considered, petitioner, **Charles Edward Cooley**, respectfully request that this petition for Rehear be granted, and this Honorable Court proceed under its Rules to address the matters submitted herein.

CERTIFICATE OF SERVICE

I hereby certify that this 3rd day of April, 2018, served a copy of this **Petition for Rehearing** in good faith without delay to be served on all parties to this proceeding, by placing a copy of the same in the Prison Internal Mailing System for mailing, postage prepaid and properly addressed to the Honorable Clerk Scott S. Harris Office of the Clerk, Washington, DC 20543, and Luther Strange, Alabama Attorney General 501 Washington Ave., Montgomery, Alabama 36130.

/s./ Charles E. Cooley

I swear that the foregoing is true and correct to the best of my knowledge and belief.

/s./ Charles E. Cooley
Charles Edward Cooley