No._____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

Petitioner,

EDWARD MCELROY

v.

UNITED STATES OF AMERICA,

Respondent.

_____

MOTION FOR LEAVE
TO PROCEED IN FORMA PAUPERIS

_____

The petitioner, Edward McElroy, requests leave to file the attached petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of costs and to proceed *in forma pauperis* pursuant to Rule 39.1 of this Court and 18 U.S.C. §3006A(d)(7). The petitioner was represented by counsel appointed under the Criminal Justice Act in the District Court of Oregon.

RESPECTFULLY SUBMITTED December 10, 2018

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No._____

IN THE SUPREME COURT OF THE UNITED STATES

EDWARD MCELROY

Petitioner,

vs.

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Respondent.

On Petition for Writ of Certiorari
To the Ninth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Where a defendant is charged in federal court with possession and production of child pornography, the maximum punishment for which carries a lifetime term of supervised release that must follow the term of imprisonment, and where the defendant wishes to represent himself under *Faretta v. California*, 422 U.S. 806 (1975), is his waiver of counsel "knowing and intelligent" when, during the *Faretta* colloquy, the district court fails to advise him about the meaning and effect of "supervised release"?

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Edward McElroy, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-5) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 2018. The court denied a petition for rehearing and a suggestion for rehearing en banc on September 13, 2018. Pet. App. 6. This Court has jurisdiction to consider a petition for certiorari under 28 U.S.C. § 1254 (1).

RELEVANT CONSTITUTIONAL PROVISIONS

A. The Fifth Amendment to the United States Constitution provides in relevant part that "No person . . . shall be deprived of life, liberty, or property, without due process of law . . ."

B. The Sixth Amendment to the United States Constitution provides in relevant part that an accused shall be provided with the "Assistance of Counsel" for his defense.

STATEMENT OF THE CASE

1. Edward McElroy was charged by indictment with various counts related to child pornography in violation of 18 U.S.C. §§ 2251(a), 2422(b), 2252A (a) (1), 2252A (a) (2), and 2252A (a) (5) (B). The indictment also set forth a Notice of Enhanced Penalty under 18 U.S.C. § 3559(e) (1). The Notice described McElroy's prior Oregon state conviction for First Degree Sexual Abuse and stated that upon conviction of the charge of production of child pornography, he would be subject to a mandatory sentence of life imprisonment. Defense counsel Per Olson, who initially represented Mr. McElroy, challenged the applicability of the enhancement, and the trial judge took the matter under submission.

2. Toward the end of the trial, Mr. McElroy moved the district court to allow him to represent himself pursuant to *Faretta v. California,* 422 U.S. 806 (1975). At that time, the trial court had not yet ruled on the applicability of the sentencing enhancement. During the *Faretta* colloquy with McElroy, the court advised him of the maximum possible sentence he faced and told him he would also be subject to supervised release. However, the court did not explain to him what "supervised release" meant, or that it would follow any prison sentence. Nor did the court explain the effects of any violation of supervised release. Over the government's objection, the court granted McElroy's motion to represent himself,

and Mr. Olson became stand-by counsel. The validity of the *Faretta* waiver was one of the issues on appeal and is the subject of this petition.

3. The jury convicted McElroy on May 2, 2014. On May 9, 2014, the trial court found McElroy was *not* subject to the enhanced penalty provided in 18 U.S.C. § 3559(e) (1). On December 8, 2014, the court sentenced McElroy to 37 years' incarceration to be followed by a lifetime term of supervised release. On July 6, 2018, the Ninth Circuit affirmed his conviction in a memorandum decision and the Court denied a petition for en banc review.

REASONS FOR GRANTNG THE WRIT

This Court should grant certiorari because the case raises the important constitutional question: Whether the *Faretta* waiver was invalid because it was not made knowingly and intelligently in that McElroy was not advised about the meaning and effect of supervised release.

The Sixth Amendment confers upon a criminal defendant the right to represent himself at trial. *Faretta v. California*, 422 U.S. 806 (1975). However, the decision to proceed *pro se* entails the waiver of the right to counsel provided by the same Amendment. Any such decision to represent oneself is invalid unless "knowingly and intelligently" made. *Id.* at 835; *Godinez v. Moran*, 509 U.S. 389, 400 (1993). The record must establish that the defendant "knows what he is doing

and his choice is made with eyes open." *Faretta*, 422 U.S. at 835 (citations omitted).

For a defendant's *Faretta* waiver to be knowing and intelligent, "the district court must insure that [the defendant] *understands* 1) the nature of the charges against him, 2) *the possible penalties*, and 3) the dangers and disadvantages of self-representation." *United States v. Forrester*, 512 F.3d 500, 506 (9th Cir. 2008) (citation and internal quotation marks omitted, emphasis added). In *Forrester*, the Ninth Circuit found the defendant's *Faretta* waiver invalid in part because "the district court did not accurately describe the possible penalties faced by Forrester." *Id*. at 507.

Supervised release "is an integral part of the federal sentencing structure." *United States v. Huerta-Pimental*, 445 F.3d 1220, 1222 (9th Cir. 2006). By the plain language of the statute, "supervised release, although imposed in addition to the period of incarceration, is a part of the sentence . . . Thus, the entire sentence, including the period of supervised release, is the punishment for the original crime." *United States v. Soto-Olivas*, 44 F.3d 788, 790 (9th Cir. 1995) (citations omitted).

In his appeal to the Ninth Circuit, Mr. McElroy argued his waiver of the right to counsel was not knowing and intelligent because the district court failed to ascertain that he understood "the possible penalties" he faced when he waived

counsel in that he was not advised of the meaning and effect of a term of "supervised release" which, as shown above, is an integral part of the sentence and punishment he faced.

During the *Faretta* colloquy, the prosecutor did tell Mr. McElroy that upon conviction a term of supervised release "of between five years and life" would be imposed. When the court asked him if he understood, he responded that he did. However, neither the prosecutor nor the court explained to McElroy what "supervised release" meant. They did not explain that it was a time of supervision that came after the term of imprisonment was completed. Nor did they explain to McElroy the consequences of a violation of supervised release; that is, that violations could result in more prison followed by yet another term of supervised release. Nor did they explain that this pattern could be repeated until his death. These omissions rendered the *Faretta* waiver not knowing and intelligent.

Since *Faretta* was decided, the law is clear that in order for defendants to waive counsel and represent themselves they must know the maximum possible penalties they face. This is the very same standard applied to defendants who wish to plead guilty with or without a lawyer. Thus, waiver of counsel in a *Faretta* hearing is subject to the same protections as the waiver of counsel when a person pleads guilty; namely, that each decision must be knowing, intelligent and voluntary. *See Godinez*, 509 U.S. at 400 ("In addition to determining that a

defendant who seeks to plead guilty or waive counsel is competent, a trial court must satisfy itself that the waiver of his constitutional rights is knowing and voluntary."); *United States v. Hernandez*, 203 F.3d 614, 621 (9th Cir. 2000) (whether defendant seeks to plead guilty or waive counsel, "a trial court must satisfy itself that the waiver of his constitutional rights is knowing and voluntary").

In order for a guilty plea to be entered knowingly and intelligently, the defendant must be informed of the direct consequences of his plea including a term of special parole or supervised release, if any, and the consequences that flow from a violation of that term. *Carter v. McCarthy*, 806 F.2d 1373, 1376 (9th Cir. 1986). As the Ninth Circuit stated in *Carter*, the person pleading guilty must understand that "the critical fact is not that the imposition of the parole term is mandatory but that the parole term is to be served *in addition to the term of confinement* under the sentence." *Id*. (emphasis added).

The Fifth Circuit has emphasized that the meaning and effect of "supervised release" is not self-evident to many lawyers, much less to a layman. As explained by the court,

> [S]upervised release has unique characteristics that might not be readily apparent to a layperson, including the possibility that a defendant may have to serve a number of years in prison, in addition to his original sentence of imprisonment, without credit for time already spent on supervised release. For example, if a defendant sentenced to a term of five years of supervised release violates a condition of supervised release after having served four years of the supervised release term, he is subject to imprisonment for an

> additional five full years, without any credit for the four years already served under the term of supervised release.

United States v. Tuangmaneeratmun, 925 F.2d 797, 803 (5th Cir. 1991). *See also United States v. Reyes*, 300 F.3d 555, 560 (5th Cir. 2002) ("a district court should explain that a term of supervised release is imposed in addition to any sentence of imprisonment and that a violation of the conditions of supervised release can subject the defendant to imprisonment for the entire term of supervised release, without any credit for any time already served on the term of supervised release").

The importance of explaining the meaning of supervised release is evidenced by its inclusion in the mandatory admonishments of Rule 11 of the Federal Rules of Criminal Procedure. For example, in *United States v. Sanclemente-Bejarano*, 861 F.2d 206 (9th Cir. 1988), at issue was the validity of a guilty plea under Rule 11. In finding the guilty plea invalid, the court reasoned as follows:

> Rule 11 requires that the court "address the defendant . . . and inform the defendant of, and determine that the defendant understands . . . the effect of any special parole term. . . Here, the only reference to the term of supervised release was in the court's question to counsel as to whether there was a special parole term, and her affirmative response. *The court did not inform Sanclemente of the provision, nor did it ask him if he understood the meaning of supervised release or its effect.* The court therefore violated the requirement of Rule 11.

Id. at 210 (emphasis added) (superseded on other grounds). In *Sanclemente-Bejarano*, the Ninth Circuit observed that "[b]ecause supervised release may increase the length of the ultimate sentence, this court has long held that *it must be*

explained to the defendant before his guilty plea is accepted." *Id*. (emphasis added). Although Rule 11 is not at issue here, the reasoning of *Sanclemente-Bejarano* applies. Because the district court here did not advise McElroy of the meaning and nature of "supervised release," his waiver of counsel was neither knowing nor intelligent.

From the foregoing cases, and this Court's precedents it follows that in order for Mr. McElroy's *Faretta* waiver of his right to counsel to be valid, he had to be informed of the meaning and effect of supervised release and of the consequences of a violation of its conditions. Mr. McElroy was not so informed. Stated another way, Mr. McElroy was not informed of the true maximum sentence or possible penalty he was facing. It is simply not enough, as was done here, to say the words "supervised release."

The Ninth Circuit justified its holding in part on the grounds that the trial court advised Mr. McElroy that the maximum sentence he was facing was life imprisonment. Therefore, reasoned the court, "McElroy was not given any incorrect information." Pet. App. 3. This reasoning is flawed. First, that the defendant was not given any incorrect information does not establish that his waiver was knowing and intelligent. Indeed, a knowing and intelligent waiver can only be made when the defendant is affirmatively provided with sufficient *correct* information; that he was not provided with *incorrect* information is inapposite to

that inquiry.

Second, at the time of the defendant's *Faretta* waiver, the district court still had under submission McElroy's challenge to the applicability of the statutory enhancement which would subject McElroy to mandatory life. Indeed, as it turned out, the enhancement was not applicable. Therefore, the maximum sentence that could be imposed on McElroy was *not* life imprisonment, and there would necessarily be a term of supervised release imposed at the end of his sentence.

Finally, the Ninth Circuit entirely overlooked this Court's admonition "to indulge every reasonable presumption against waiver" of counsel. *Currier v. Virginia*, 138 S.Ct. 2144, 2162 (2018) (Kennedy J., concurring) (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). In finding a valid *Faretta* waiver here, the court below did not indulge every reasonable presumption against waiver, but rather did the opposite.

CONCLUSION

Mr. McElroy was sentenced to 37 years' incarceration to be followed by a lifetime term of supervised released. At the time he waived counsel, however, he never knew what supervised release meant or the consequences that would flow from any violation of supervised release. In short, when deciding to waive counsel and represent himself under *Faretta*, Mr. McElroy did not do so knowingly and intelligently because he was not informed of the true maximum possible

punishment he faced. Therefore, his waiver was not valid.

This Court should grant the petition for certiorari.

Respectfully submitted December 10, 2018

/s/ *Michael R. Levine*
Michael R. Levine
Attorney for Defendant-Appellant

APPENDIX

NOT FOR PUBLICATION

FILED

JUL 6 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. EDWARD ALLEN MCELROY, Defendant-Appellant.	No. 14-30264 D.C. No. 3:12-cr-00542-HZ-1 MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Marco A. Hernandez, District Judge, Presiding

Argued and Submitted June 6, 2018
Portland, Oregon

Before: M. SMITH and MURGUIA, Circuit Judges, and KORMAN,** District Judge.

Edward McElroy appeals his convictions for sexual exploitation of a child, online enticement, and four child pornography offenses. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Edward R. Korman, United States District Judge for the Eastern District of New York, sitting by designation.

1. After being represented by counsel for most of trial, McElroy was permitted to represent himself for the final phase. The jury found McElroy guilty on all counts. McElroy argues that his waiver of the right to counsel was not knowing and intelligent under *Faretta v. California*, 422 U.S. 806 (1975), because the district court failed to ascertain that he understood "the possible penalties" he faced as to Count 1. *United States v. Erskine*, 355 F.3d 1161, 1167 (9th Cir. 2004) (quoting *United States v. Balough*, 820 F.2d 1485, 1487 (9th Cir. 1987)). As to Count 1, McElroy was correctly informed of the minimum possible penalty he faced (25 years), but was not advised of the maximum penalty he faced (50 years). McElroy was correctly informed that he faced a possible penalty of life imprisonment if a sentencing enhancement applied. McElroy was not provided with any incorrect information about his possible sentence. *Cf. United States v. Forrester*, 512 F.3d 500, 507 (9th Cir. 2008). The district judge "did not err in including the potential sentencing enhancements in his calculation of the maximum possible penalty provided by law." *United States v. Gerritsen*, 571 F.3d 1001, 1010 (9th Cir. 2009).

McElroy also argues that his waiver was not knowing and intelligent because he was not advised of the meaning and effect of a term of "supervised release." McElroy points to no authority requiring the district court judge to provide such information. In addition, the judge correctly informed McElroy that

the "maximum possible penalty provided by law" was a life sentence without any term of supervised release. *See id*.

Because McElroy was not given any incorrect information regarding Count 1, *cf. Forrester*, 512 F.3d at 507, and no authority required McElroy to be informed about the nature of supervised release, McElroy knowingly and intelligently waived his right to counsel.

2. While representing himself, McElroy introduced into evidence an affidavit that identified him as a convicted sex offender. When he realized his mistake, he moved to withdraw the exhibit. The district court's response ("It's in. I'm sorry. You offered it. I received it.") does not show that the court was unaware of its discretion. Contrary to McElroy's argument on appeal, even if McElroy was prejudiced by the exhibit, neither that prejudice nor his *pro se* status, without more, establishes that the district court abused its discretion. *See United States v. Dujanovic*, 486 F.2d 182, 188 (9th Cir. 1973).

3. McElroy argues that the district court abused its discretion in admitting into evidence images of his erect penis and a video of him masturbating that he had sent to the victim. This evidence had probative value insofar as it tended to show McElroy's intent to entice the victim into sexual activity and, because McElroy's face appears in the video, his identity. However, McElroy offered a stipulation that would have had the same or greater probative value, and the government does

not contest that McElroy was unfairly prejudiced by the admission of the images and video. *See United States v. Merino-Balderrama*, 146 F.3d 758, 762 & n.3 (9th Cir. 1998). In these circumstances, it is a close question whether the district court abused its discretion in admitting the photos and video in light of McElroy's willingness to stipulate, but we need not decide that question because any error was harmless. The evidence that McElroy attempted to entice the victim, a minor, into sexual activity was plentiful, as was the evidence on the other counts. The jury heard uncontradicted testimony from the victim herself, her mother, and law enforcement officers, and was presented with records and transcripts of McElroy's communications with the victim. All of this evidence tended to establish McElroy's guilt, and, in part due to his decision to represent himself for the last portion of the trial, he offered no coherent defense. In light of the circumstances, it is more likely than not that the introduction of the photos and video did not affect the jury's verdict. *See United States v. Pang*, 362 F.3d 1187, 1192 (9th Cir. 2004).

4. McElroy challenges his conviction for attempted transportation of child pornography, arguing that the evidence showed at most that he prepared to commit this offense. *See Hernandez-Cruz v. Holder*, 651 F.3d 1094, 1102 (9th Cir. 2011). This conviction was based on the undisputed evidence that an email was found in McElroy's "sent items" folder containing sexually explicit images of the victim. Although the intended recipient denied receiving the email and a police officer

testified that he did not find it in her email account, a reasonable juror could choose to discredit her testimony and conclude that she received and deleted the email, which had the subject line "Read then delete!!" Furthermore, another officer testified that McElroy admitted sending the email when questioned. Accordingly, this conviction is supported by sufficient evidence.

AFFIRMED.

FILED

SEP 13 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. EDWARD ALLEN MCELROY, Defendant-Appellant.	No. 14-30264 D.C. No. 3:12-cr-00542-HZ-1 District of Oregon, Portland ORDER

Before: M. SMITH and MURGUIA, Circuit Judges, and KORMAN,* District Judge.

The panel has unanimously voted to deny the petition for panel rehearing; Judges M. Smith and Murguia have voted to deny the petition for rehearing en banc, and Judge Korman so recommends. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

* The Honorable Edward R. Korman, United States District Judge for the Eastern District of New York, sitting by designation.