

In the
United States Court of Appeals
For the Seventh Circuit

No. 16-3253

RODNEY WASHINGTON,

Petitioner-Appellant,

v.

GARY A. BOUGHTON, Warden,
Wisconsin Secure Program
Facility,

Respondent-Appellee.

Appeal from the United States District Court for the
Western District of Wisconsin
No. 3:14-cv-00208-wmc — William M. Conley, Judge.

ARGUED JANUARY 10, 2018 — DECIDED MARCH 8, 2018

Before WOOD, *Chief Judge*, HAMILTON, *Circuit Judge*, and
BUCKLO, *District Judge*.*

BUCKLO, *District Judge*. A Wisconsin jury convicted Rodney Washington of multiple counts of first-degree sexual assault with the use of a dangerous weapon and other crimes. Washington appealed his conviction, arguing that the crimi-

* Of the Northern District of Illinois, sitting by designation.

nal complaint that triggered his prosecution was legally insufficient under Wisconsin law; that his trial attorney was ineffective for failing to seek dismissal of the complaint on that ground; and that the trial court deprived him of his constitutional right to self-representation. After exhausting these claims in state court, Washington sought federal habeas corpus relief. The district court denied his petition.

For the reasons explained below, we conclude that neither Washington's due process challenge to the state appellate courts' treatment of his claim based on the sufficiency of his charging documents nor his ineffective assistance of counsel claim entitles him to habeas relief. We are convinced, however, that the state courts' denial of his request to proceed *pro se* cannot be squared with *Faretta v. California*, 422 U.S. 806 (1975). Accordingly, we reverse.

I.

On March 16, 2000, the State of Wisconsin filed a "John Doe" criminal complaint charging an unknown individual with sexually assaulting five women between March 27, 1994 and January 14, 1995. Although the defendant's identity was unknown, the Wisconsin State Crime Laboratory had obtained evidence of his genetic code from semen samples taken from the victims' bodies and clothing. By comparing the DNA profiles developed from those samples, the State Crime Lab determined that the same individual was responsible for all five of the assaults. Indeed, the criminal complaint stated that the DNA profiles developed from the five semen samples "match[ed]" at all of the genetic locations for which DNA profiles had been developed. Accordingly, the complaint identified the defendant with reference to those genetic locations, describing him as "Doe, John #5, Unknown

Male with Matching Deoxyribonucleic Acid (DNA) Profile at Genetic Locations D1S7, D2S44, D4S139, D5S110, D10S28, and D17S79." An arrest warrant describing John Doe #5 in the same manner was issued the same day.

On June 25, 2007, a databank unit leader at the State Crime Lab matched Washington's DNA to the DNA from the semen obtained from the five sexual assault victims. Shortly thereafter, the state amended its complaint, naming Washington as the defendant and describing his specific DNA profile as a series of numbers (known as "alleles") at several genetic locations.¹

Washington was appointed counsel. During pre-trial proceedings, Washington expressed dissatisfaction with his counsel's performance and told the court that he wanted to represent himself. Four months before trial, he filed a written submission stating that unless his lawyer moved to dismiss the case prior to a hearing scheduled for February 14, 2008, he would seek to proceed *pro se*. True to his word, Washington told the court at that hearing, "I just want to go *pro se* in this case and defend myself." Although he withdrew his request the same day after conferring with his counsel, he revived it on the morning of April 28, 2008—the

¹ Illustrating the difference, the amended complaint describes the defendant as "Rodney Washington, DOB 3/31/58; Formerly Known as Doe, John #5, Unknown Male with matching Deoxyribonucleic Acid (DNA) Profile at Genetic Locations D127, D2S44, D4S139, D5S110, D10S28, and D17S79 and Further Identified with Matching DNA profile at Genetic Locations D3S1358(16), vWA(15,16), FGA(19, 26), D8S1179(14), D21S11(28), D18S51(15, 20), D5S818(8,13), D13S317(12, 13), D7S820 (10, 11), D16S539 (12, 13), TH01(6, 9, 3), TPOX (8, 10), AND CSF1PO(12)."

day his trial was scheduled to begin—insisting, “I’m going *pro se* in this case, Your Honor.”

The court confirmed that Washington wished to represent himself, prompting the following colloquy:

The Court: Okay. But you understand that by doing so you would have to comply with any and all the rules of the court and rules of evidence and case law, do you understand that?

Defendant: I have no problem with that.

The Court: Well, do you know the rules of evidence, sir?

Defendant: Do I what?

The Court: Know the rules of evidence?

Defendant: When they are brought to my attention, I will know.

The Court: So that would certainly help to have a lawyer help you do that.

Defendant: It won’t be this one.

The Court: Well, here is the problem with proceeding *pro [se]* like you want to, and you have a right to do that unless the court doesn’t feel that you’re competent to do that and the court doesn’t believe that you’re competent to do that and I’ll tell you why, because of the DNA. The DNA that’s involved in this case which is scientific and very few people outside

the legal profession and scientists know how that works. And in order to develop and cross-examine those witnesses, you have to have some knowledge in doing that. Even if you knew some of the rules of evidence and were capable in other ways in order to represent yourself, that's a big issue. And it becomes problematic, also problematic also since this is a sexual assault case for you to quite frankly cross-examine the witnesses.

Defendant: I have a right to face my accusers.

The judge denied Washington's request, and the case proceeded to trial with Washington represented by a lawyer he didn't want. He was convicted and sentenced to 100 years in prison.

Washington's first appellate lawyer filed a "no-merit" appeal, to which Washington filed a *pro se* response. The Court of Appeals of Wisconsin asked Washington's lawyer to respond to several of the issues Washington raised, including "whether the arrest warrant or complaint identified Washington sufficiently to toll the statute of limitations," and "whether the trial court erred by denying Washington's request to proceed without counsel." Rather than proceed with these issues on appeal, Washington moved, through new counsel, to dismiss the appeal and present his claims in a post-conviction motion.

Washington's post-conviction motion asserted that his trial counsel was ineffective for failing to seek dismissal of

the proceedings for lack of jurisdiction. He argued that because the DNA information in the John Doe complaint and arrest warrant did not identify him with reasonable certainty, it did not toll the statute of limitations, rendering the amended complaint untimely. The court denied the post-conviction motion after an evidentiary hearing that included extensive DNA testimony.

In a consolidated appeal, Washington challenged the trial court's denial of his request to represent himself and the post-trial court's rejection of his related claims alleging insufficiency of the complaint and arrest warrant and ineffective assistance of counsel. The Wisconsin Court of Appeals affirmed the post-trial decision on the ground that the John Doe complaint and arrest warrant satisfied the requirements of Wisconsin law under *State v. Dabney*, 663 N.W.2d 366 (Wis. Ct. App. 2003), and *State v. Davis*, 698 N.W.2d 823 (Wis. Ct. App. 2005). *State v. Washington*, 2013 WI App 55 (Wis. App. 2013) (unpublished). Because Washington's challenge to the charging documents lacked merit, the court explained, his lawyer was not ineffective for failing to pursue it.

The state appellate court went on to affirm the denial of Washington's request to represent himself. It agreed that Washington was not competent to proceed *pro se*, adding its own reasons to support the trial court's conclusion. Like the trial court, the appellate court believed Washington unable to defend against the state's DNA evidence, reasoning that Washington's "irrational and disruptive" pre-trial conduct reflected his inability to understand and focus on a critical part of the case. The appellate court further noted that Washington's desire to represent himself was grounded in a belief

that his attorney was complicit with the prosecutor and the trial court in “fabricating” his arrest warrants, and that his “obsession with a conspiracy theory led to frequent disruptions in the courtroom.”

After exhausting his state court remedies, Washington turned to federal court seeking a writ of habeas corpus under 28 U.S.C. § 2254. The district court denied his request. It first concluded that any constitutional claim potentially encompassed in Washington’s challenge to the John Doe criminal complaint and arrest warrant was procedurally defaulted because Washington failed to present it as such in the state proceedings. The court acknowledged that a state indictment alleged to be “so defective that the convicting court had no jurisdiction” could implicate constitutional concerns cognizable on habeas review. But because Washington explicitly rested his claim solely on state law grounds, it fell outside the scope of the court’s authority to grant relief.

The district court also rejected Washington’s ineffective assistance of counsel claim, agreeing with the state appellate court that the claim Washington faulted his attorney for omitting was “doomed by preexisting authority.” Finally, the district court rejected Washington’s *Faretta* claim. It concluded that the record supported the Wisconsin appellate court’s determination that Washington was incompetent to represent himself, pointing to his “irrational arguments” and “disrespectful, disruptive behavior during the proceedings.” 2016 WL 4382770, at *7.

We granted a certificate of appealability to review each of the foregoing claims.

II.

Washington's lead argument is that the Wisconsin Court of Appeals violated the Due Process Clause when it held that the John Doe complaint and arrest warrant were sufficient, under Wisconsin law, to satisfy the requirements of personal jurisdiction and toll the statute of limitations. His constitutional theory is that the court reached its conclusion by applying Wisconsin law in a manner "unexpected and indefensible by reference to preexisting law." In Washington's view, the state appellate court's decision violates *Bouie v. City of Columbia*, 378 U.S. 347 (1964), which prohibits the retroactive application of an unforeseeable state-court construction of state law.

The State offers a cascade of arguments for rejecting this claim without reaching its merits: first, that Washington procedurally defaulted the claim by failing to raise it in the state proceedings, and that his procedural default is not excused by the alleged ineffectiveness of his counsel; second, that if, as Washington now contends, his due process claim did not accrue until the Wisconsin Court of Appeals issued its decision, then it is unripe for federal habeas review because he has not exhausted his state court remedies²; and third, that

² Actually, the State does not assert failure to exhaust as an independent basis for denying Washington's petition, but it raises the issue in response to Washington's alternative argument that if his due process claim is procedurally defaulted, the default is excused by his counsel's failure to raise it in state court. The State's submissions do not address whether state remedies remain available for Washington to pursue his due process claim in state court. If they do, failure to exhaust is the more appropriate objection to Washington's due process claim; if not, it is procedural default. See *Perruquet v. Briley*, 390 F.3d 505, 514 (7th Cir. 2004). Because we deny Washington's due process claim on the merits, howev-

Washington forfeited his due process claim by failing to raise it in his *pro se* habeas petition to the district court. Rather than work our way through the maze of these procedural arguments, however, we think it best to cut to the chase and deny Washington's due process claim on the merits.

We pause here to confirm that this approach is consistent with the interests of comity, finality, federalism, and judicial efficiency that are at the heart of both the exhaustion requirement and the procedural default doctrine. *See Davila v. Davis*, 582 U.S. ----, 137 S. Ct. 2058, 2064 (2017); *Perruquet v. Briley*, 390 F.3d 505, 513–15 (7th Cir. 2004). Indeed, while the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) codifies these principles by narrowly circumscribing a federal court’s authority to *grant* habeas relief to a prisoner in state custody, it expressly authorizes a federal court to *deny* an unexhausted claim on the merits. 28 U.S.C. § 2254(b)(2). Similarly, procedural default is an affirmative defense that does not restrict our jurisdiction, *Trest v. Cain*, 522 U.S. 87, 89 (1997); *Lewis v. Sternes*, 390 F.3d 1019, 1029 (7th Cir. 2004), and our election to forgo a procedural default inquiry to uphold the state court’s judgment on the merits accords at least the same finality and respect for that judgment and for our system of federalism as declining to reach the merits at all. Finally, there is no dispute that we have discretion to overlook any forfeiture of Washington’s due process claim based on his failure to raise it in the district court. *See United States v. Bailey*, 777 F.3d 904, 908 (7th Cir. 2015).

er, we need not decide which procedural objection, if any, better suits Washington’s claim.

These considerations, coupled with the purely legal nature of Washington's due process claim, counsel in favor of its swift disposition on the merits. Indeed, given that our ultimate disposition of Washington's petition is likely to result in further proceedings in state court, leaving unresolved the merits of a claim that requires no additional factual development, and that has been fully briefed and ably argued in this court, will almost certainly engender needless reduplication of the proceedings.

This brings us to the substance of Washington's due process claim. Washington's theory is that the Wisconsin Court of Appeals exceeded *Bouie*'s "limitations on *ex post facto* judicial decisionmaking" when it held that the John Doe criminal complaint and arrest warrant were sufficient under *Dabney* and *Davis*. *Rogers v. Tennessee*, 532 U.S. 451, 456 (2001). In Washington's view, the state appellate court's application of *Dabney* and *Davis* departed so radically and unexpectedly from Wisconsin law as it had previously been expressed that it violated due process. The effect of the court's "unexpected and indefensible" decision, Washington argues, was to retroactively revive an expired statute of limitations. We review this claim *de novo*. See *Cone v. Bell*, 556 U.S. 449, 472 (2009) (federal court reviews *de novo* habeas claims the state courts did not reach on the merits); *Freeman v. Pierce*, 878 F.3d 580, 586 (7th Cir. 2017) (argument first raised in federal habeas proceedings is "due no AEDPA deference"); *Perruquet*, 390 F.3d at 518 (where "there is no state-court decision we can look to for an evaluation" of the claim, federal habeas court's review is *de novo*).

For well over a century, Wisconsin law has authorized the prosecution of a defendant whose name is unknown,

provided the “best description of the person” is given in the complaint and warrant. *Scheer v. Keown*, 29 Wis. 586, 588 (Wis. 1872). Wisconsin has refined this principle in the statutory requirement that a warrant “designate the person to be arrested by any description by which the person to be arrested can be identified with reasonable certainty.” WIS. STAT. § 968.04(3)(a)4. Additionally, the complaint must set forth “a written statement of the essential facts constituting the offense charged, WIS. STAT. § 968.01(2), and must indicate who is being charged, with what offense, and why. See *State ex rel. Evanow v. Seraphim*, 161 N.W. 2d 369, 372 (Wis. 1968).

In *State v. Dabney*, the Wisconsin Court of Appeals applied these principles to determine the adequacy, for jurisdictional and limitations purposes, of a criminal complaint and warrant issued against a suspect known only by his DNA. 663 N.W. 2d 366, 370-71 (Wis. Ct. App. 2003). Observing that “a DNA profile is arguably the most discrete, exclusive means of personal identification possible,” the court held that a complaint and warrant that set forth “a specific DNA profile” were adequate under Wisconsin law. *Id.* at 372. In *State v. Davis*, the court reaffirmed that “the State is permitted to file a complaint, which identifies the defendant only by his DNA profile.” 698 N.W. 2d 823, 831 (Wis. Ct. App. 2005). On the authority of these cases, the state appellate court held that the John Doe complaint and warrant issued against Washington were sufficient to confer jurisdiction, so the proceedings against him were timely filed.

Washington does not claim that *Dabney* and *Davis* themselves represent a departure from Wisconsin’s longstanding rule that the state must provide “the best description” of the

defendant. He insists, however, that in 1994 and 1995, when the crimes he was charged with were committed, he could not reasonably have anticipated that a complaint and warrant containing only the identifying information set forth in the John Doe complaint and warrant would be deemed to satisfy that standard. He argues that unlike the instruments in *Dabney* and *Davis*, “not only did the John Doe complaint and warrant not give the best description of the defendant available, they gave no description at all.” But this characterization is not consistent with the record.

Washington homes in on the state appellate court’s observations that “John Doe #5’s actual DNA profile was not included anywhere in the complaint,” and that “the complaint and arrest warrant did not include a DNA profile, but rather, only included the locations of six DNA markers that are common to all human beings.” But these statements must be viewed in context. The court went on to explain that the narrative portion of the complaint described in detail the forensic analysis performed on semen samples recovered from the five sexual assault victims and determined that the same individual had committed the crimes. Specifically, the complaint explained that the Wisconsin State Crime Lab developed DNA profiles for several genetic locations from each semen sample and determined that the DNA profiles “matched” one another at each of the locations. It further stated that the probability of randomly selecting an unrelated individual whose DNA profile matches the DNA profiles developed from the semen samples was, at most, one in 130 billion. Based on this information, the state filed a complaint against John Doe #5, whose identity was unknown, but whose DNA profile at the specified locations was known to

"match" the corresponding DNA profiles recovered from the sexual assault victims.

Washington's suggestion that the complaint and warrant do no more than describe the defendant as having unspecified genetic material at each of six universally common genetic locations overlooks the narrative portion of the complaint entirely. It also ignores the meaning of the word "matching" in both the complaint and the warrant. When the instruments are read together and in their entirety, the word "matching" means that the specific genetic markers at the identified locations on John Doe #5's genetic code are the same as the genetic markers found at those same locations on the genetic code of the assailant, as determined based on an analysis of his semen.

It is true that the complaint and warrant did not describe the genetic markers using numbers to represent the discrete "allele systems" observed at the identified genetic locations, as the amended complaint would later do. Indeed, as the DNA expert who testified at the hearing on Washington's post-conviction motion explained, the DNA technology in use at the time the John Doe complaint and warrant were issued "just was not advanced enough" to do so. Nevertheless, the Wisconsin State Crime Lab was able, using the technology available at the time, to determine that John Doe #5's genetic information "matched" the genetic information developed from the semen samples taken from the five sexual assault victims. Accordingly, the complaint and warrant identified the defendant "with particularity and specificity" by describing John Doe's DNA profile as "matching" DNA profiles they developed using the method then in use.

That is indeed how the Wisconsin Court of Appeals understood the use of the word “match[ing]” in the 2000 complaint and warrant. The court further understood that this description applied to fewer than one in 130 billion unrelated individuals. Accordingly, the court’s observation that the complaint did not include the defendant’s individual DNA profile is best understood as an acknowledgment that the complaint did not refer to the defendant’s genetic information in terms of “alleles,” as the amended complaint later did based on the more advanced DNA technology in use at the time. But nothing in Washington’s argument persuades us that when the term “matching” is properly understood and the complaint is read as a whole, the description of John Doe #5 in the 2000 charging instruments as having a “matching” DNA profile at the specified genetic locations was not in fact the “best description” available.

To be sure, an individual presented with the John Doe complaint and warrant issued in this case would have no immediate way of knowing whether he was the individual charged. That is, he could not know, without additional inquiry, whether his DNA profile “matches” the DNA profile the State Crime Lab developed based on semen collected from the victims. But we think it highly unlikely that an individual presented with documents identifying the person charged by the alleles observed at specific locations on his genetic code would have any better idea, without further investigation, whether the defendant was himself. Yet, *Dabney* and *Davis* confirmed that that information was sufficient to provide “the best description available” as required by Wisconsin law. Washington does not suggest that due process requires more.

Because we see little practical distinction between the identifying information set forth in the John Doe charging instruments in this case and the ones examined in *Dabney* and *Davis*, we discern no constitutional error in the state appellate court's conclusion that those cases were dispositive. The state court's extension of those cases to the materially similar facts here was not an "unexpected and indefensible" departure from established Wisconsin law, but rather within the permissible scope of "incremental and reasoned development of precedent that is the foundation of the common law system." *Rogers v. Tennessee*, 532 U.S. 451, 461 (2001). Accordingly, there was no due process violation under *Bouie*.

III.

Our analysis of Washington's ineffective assistance of counsel claim may be brief. Washington's theory is that his state-appointed lawyer performed deficiently by failing to move for dismissal of the proceedings on the ground that the trial court lacked personal jurisdiction over him. The Wisconsin Court of Appeals resolved this claim on the merits under *Strickland v. Washington*, 466 U.S. 668 (1984). Accordingly, our review is "doubly deferential." *Hinesley v. Knight*, 837 F.3d 721, 732 (7th Cir. 2016) (*Strickland* inquiry is "highly deferential" to counsel's plausible strategic choices, and federal habeas review under § 2254(d) is "highly deferential" to state court's decision).

The state appellate court rejected Washington's ineffective assistance of counsel claim on the ground that *Dabney* and *Davis* foreclosed the argument he faulted his lawyer for failing to assert. Because that conclusion rests on an interpretation of state law, it is iron-clad on habeas review. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) ("it is not the province of a

federal habeas court to reexamine state-court determinations on state-law questions."); *Ben-Yisrayl v. Buss*, 540 F.3d 542, 555 (7th Cir. 2008) ("[w]e are bound by a state court's interpretations of state law."). As the state court correctly observed, an attorney is not ineffective for failing to raise a meritless argument. *See Stone v. Farley*, 86 F.3d 712, 717 (7th Cir. 1996). Accordingly, the error Washington attributes to his lawyer does not entitle him to habeas relief.

IV.

Washington's final claim is that the trial court's refusal to allow him to represent himself violated *Faretta v. California*, 422 U.S. 806 (1975). We agree and hold that the state appellate court's conclusion to the contrary unreasonably applied the Supreme Court's decision in that case.

The record suggests three reasons for the trial court's determination that Washington was not competent to represent himself: first, that he was unfamiliar with the rules of evidence; second, that he was ill-equipped to deal with the state's DNA evidence; and third, that it would be "problematic" for him to cross-examine the state's witnesses. Without commenting on the first or third of these reasons, the state appellate court endorsed the second, reasoning that Washington's "irrational and disruptive" behavior leading up to trial evidenced an inability "to understand and decipher" the state's DNA evidence. The appellate court further concluded that Washington's "inability to recognize and follow courtroom decorum or to identify and argue legitimate legal issues in his own defense" supported the lower court's determination that Washington "would not be able to properly focus on and understand the complicated DNA evidence that was critical to the State's case."

A preliminary scan of the authorities the appellate court relied upon for its analysis does not bode well for its conclusion. With no mention of *Farettta* or the line of Supreme Court precedent it engendered on the subject of self-representation, the Wisconsin Court of Appeals relied almost exclusively on *State v. Klessig*, 564 N.W. 2d 716 (Wis. 1997), which state courts have interpreted as authorizing a heightened competency standard whose application we have criticized in several recent decisions, *see Tatum v. Foster*, 847 F.3d 459, 467 (7th Cir. 2017); *Imani v. Pollard*, 826 F.3d 939 (7th Cir. 2016), and on *State v. Imani*, 786 N.W.2d 40 (Wis. 2010), a decision that we later held was contrary to and unreasonably applied *Farettta*.

Undoubtedly perceiving the precarious footing on which the state court's decision rests, the State defends it on the ground that *no* Supreme Court case has clearly established "whether, or under what circumstances, a trial court could deny a demand for self-representation." So, the State reasons, the Wisconsin appellate court's decision cannot have violated any "clearly established" federal law. But as the State concedes, this argument cannot be squared with our decisions in *Imani* and *Tatum*, both of which similarly involved Wisconsin state prisoners denied the right to self-representation on grounds including their putative lack of competence. In both cases, we held that the Wisconsin courts violated the clearly established rule of *Farettta* that a court may not force a lawyer upon a defendant based on his perceived lack of education, experience or legal knowhow.

As we explained in *Tatum*, *Farettta* stands for the basic principle that a state may not constitutionally "hale a person into its criminal courts and there force a lawyer upon him,

even when he insists that he wants to conduct his own defense.” 847 F.3d 459, 464 (quoting *Faretta*, 422 U.S. at 807). While a defendant seeking to waive his Sixth Amendment right to counsel must do so “knowingly and intelligently,” and so must be mentally competent to make that decision, the Court made clear that the defendant’s “technical legal knowledge” is irrelevant to the court’s assessment of his competency. *Id.* at 835, 36. The Court’s subsequent decisions involving self-representation confirm that the focus of the inquiry is on the defendant’s mental competency, or as the Court sometimes calls it, his “mental functioning.” *Godinez v. Moran*, 509 U.S. 389, 404 (1993).

In *Godinez*, the Court held that the competency standard for pleading guilty or waiving the right to counsel is no higher than the basic competency standard for standing trial. Emphasizing that “the competence that is required of a defendant seeking to waive his right to counsel is the competence to *waive the right*, not the competence to represent himself,” *id.* at 399 (original emphasis), the Court reaffirmed *Faretta*’s holding that a defendant’s “ability to represent himself has no bearing upon his competence to *choose* self-representation.” *Id.* at 400 (original emphasis). Accordingly, the Court explained, so long as a defendant competent to stand trial effectuates a “knowing and voluntary” waiver of his right to counsel, no further inquiry into his ability to represent himself was required. *Id.* at 400-01.

It is true that *Godinez* does not prohibit states from additional inquiry, as the Court acknowledged in *Indiana v. Edwards*, 554 U.S. 164 (2008). In *Edwards*, the Court acknowledged a category of “gray area” defendants who are competent to stand trial, but whose mental illness or disability ren-

ders them incompetent to conduct trial proceedings without the assistance of counsel. *Id.* at 172. The Court concluded that states may insist upon trial counsel for gray-area defendants. *Id.* at 174-176.

Edwards did not, however, “introduce[] the possibility of taking into account the defendant’s legal knowledge,” as the Court’s emphasis remained on the defendant’s mental competence. *Tatum*, 847 F.3d at 465. Indeed, *Edwards* involved a defendant suffering from a well-documented, “severe mental illness” that at times caused “delusions and marked difficulties in thinking” and was manifest in his incomprehensible *pro se* submissions to the court. *Id.* at 168, 178, 179 (App’x). The Court reasoned that allowing a defendant who was fit to stand trial but who nevertheless lacked the mental capacity to “carry out the basic tasks needed to present his own defense without the help of counsel” would call into question the fundamental fairness of proceedings in which he was unrepresented. *Edwards*, 554 U.S. at 177-78.

In *Imani*, *Tatum*, and a third case, *Jordan v. Hepp*, 831 F.3d 837 (7th Cir. 2016), we synthesized the principles emerging from *Faretta*, *Godinez*, and *Edwards* as they bear on the Wisconsin courts’ application of *Klessig*. For example, we observed in *Imani* that while the *Godinez* Court held that states “are free to adopt competence standards that are more elaborate,” 826 F.3d at 946 (quoting *Godinez*, 509 U.S. at 402), this flexibility is not without limits, and that *Faretta* and *Edwards* “set the relevant benchmarks.” *Id.* at 947. We also acknowledged that *Edwards* authorizes states to impose a higher competency standard on “gray-area” defendants suffering from mental illness or disability, but we declined to “stretch *Edwards*” by applying the gray-area standard to *Imani*, who

"had a high school education, was literate, and was able to understand the trial judge's warnings about what he was getting himself into," when the record revealed no evidence of any mental illness or disability. *Id.* at 943, 946. Because from all that appeared, Imani's abilities were materially indistinguishable from Faretta's, we held that the Wisconsin Supreme Court's decision was contrary to, and an unreasonable application of *Faretta*. *Id.* at 947.

Similarly in *Tatum*, we concluded that the Wisconsin Supreme Court's application *Klessig* was contrary to, and an unreasonable application of, *Faretta* and its progeny. 847 F.3d at 469. As in *Imani*, nothing in the record "suggest[ed] that Tatum suffered from deficient mental functioning, as opposed to a limited education." *Id.* at 467. Accordingly, we concluded that the Wisconsin Supreme Court had "strayed from the 'mental functioning' sense of competence over to educational achievement and familiarity with the criminal justice system." *Id.* To illustrate the distinction, we contrasted Tatum's circumstances with those at issue in *Jordan*.

Jordan involved a defendant who was functionally illiterate. The trial court initially allowed Jordan to proceed *pro se*, reasoning that his limited literacy "should not prevent him from representing himself." 831 F.3d at 842. The court reversed course, however, after it became clear that police reports and other written documents would be used at trial. *Id.* The court asked Jordan to read some of the documents aloud, which he did "with dismal results," then confirmed that he only "somewhat" understood them. *Id.* at 846. The court concluded that Jordan's limited literacy prevented him from presenting a meaningful defense on his own and insisted that he be represented at trial. *Id.* We disagreed with

the court's decision, seeing "no hint that the Supreme Court was talking about this vast population [of adults with no or limited literacy] in *Edwards*." *Id.* at 845. But because AEDPA "does not permit us to apply our own independent assessment" of the case, we felt compelled to deny relief, concluding that the state courts did not unreasonably consider Jordan's illiteracy to fall within the scope of "mental disability" the Court recognized as deserving special consideration. *Id.*

But the State does not argue that Washington's mental capacities fall on Jordan's side of the competency line, rather than on Imani's and Tatum's. Indeed, the State does not suggest that Washington suffers from any mental illness or disability, or that the state courts' denial of his right to self-representation rested on the belief that he did. Rather than seek to distinguish *Imani* and *Tatum* on these or any other facts, the State urges us to view those cases as "wrongly decided," reiterating its theory that there is no "clearly established" Supreme Court rule on point. But we remain convinced that those decisions—which have withheld a motion for rehearing en banc (denied in *Imani*) and a petition for a writ of certiorari (denied in *Tatum*, *Foster v. Tatum*, 138 S. Ct. 355 (Oct. 16, 2017))—arrive at the outcome mandated by the clear rules established in *Faretta* and its progeny.

The State's final argument is that the state appellate court's decision should be upheld because Washington's "obstructionist conduct" warranted the trial court's decision. In dueling letters filed pursuant to Fed. R. App. P. 28(j), the parties dispute the standard of review that applies to this argument in the wake of our decision in *Freeman v. Pierce*, 878 F.3d 580 (7th Cir. 2017), issued after the close of briefing in this case. In *Freeman*, we granted an Illinois state prison-

er's habeas petition after concluding that the state courts' denial of his right to represent himself based on his limited education and legal abilities was contrary to *Faretta*. *Id.* at 586. We also rejected the respondent's argument—raised for the first time in its federal appellate brief—that the defendant had acquiesced to representation by counsel and waived his right to represent himself. *Id.* at 589–90. We observed that “[w]hether a defendant waived his right to self-representation through acquiescence is a question of fact,” and that the Illinois Appellate Court did not make such a factual finding. Accordingly, we reviewed the issue of acquiescence/waiver *de novo*. *Id.* at 590.

Washington argues that because the Wisconsin Court of Appeals did not rely on his putative “obstructionist misconduct” to support the denial of his right to self-representation, we consider the State’s argument with no deference to the state appellate court’s decision. The State disputes the premise of Washington’s argument, observing that the Wisconsin Court of Appeals cited Washington’s disruptive conduct as among the factors supporting the trial court’s denial of his right to represent himself, although it viewed the issue through the lens of competency. Indeed, after characterizing Washington’s behavior as “irrational and disruptive,” the Wisconsin Court of Appeals considered Washington’s “frequent disruptions in the courtroom, during which Washington interrupted and stalled proceedings, and in some instances refused to participate in proceedings or even physically come to court.”

It is true that the state appellate court did not frame Washington’s disruptive conduct as an independent reason supporting the trial court’s insistence upon counsel, but in-

stead viewed his conduct as supporting the court's competency determination. But we agree with the State that this distinction makes no difference in the AEDPA context, where "we review judgments, not opinions." *Rhodes v. Dittmann*, 783 F.3d 669, 675 (7th Cir. 2015). The hair-splitting Washington proposes finds no support in *Freeman*, where the respondent's newly minted argument rested on facts not determined by the state courts and presented a legal theory distinct from any the state courts had addressed.

What troubles us about the Wisconsin appellate court's conclusion that Washington's conduct justified the denial of his right to represent himself is another matter: The bulk of the conduct the court points to as "irrational and disruptive" (and nearly all of the conduct the State details in its brief) occurred *after* the trial court rejected Washington's request to proceed *pro se* and concerned his insistence that the court, the State, and his attorney were conspiring against him. As the Court observed in *Faretta*, "[t]o force a lawyer on a defendant can only lead him to believe that the law contrives against him." 422 U.S. at 834. Washington's conspiracy theory is almost certainly without substance—and his singular focus on it misguided—but it is not irrational. *See id.* The trial court would have been on solid constitutional ground had it allowed Washington to waive his right to counsel, then terminated his self-representation if it became clear that Washington was mentally unfit to conduct trial proceedings or that he sought to "use the courtroom for deliberate disruption" of his trial. *Id.* at 834 n. 46. What it could not do, consistently with *Faretta*, *Godinez*, and *Edwards*, was find him incompetent to waive his right to counsel and proceed to trial *pro se* based on its belief that he lacked the specialized knowledge required to confront the State's DNA evidence.

Nor could the Wisconsin Court of Appeals rehabilitate the trial court's constitutionally infirm decision by pointing to conduct that occurred after the decision was made. We conclude that the denial of Washington's right to represent himself was contrary to and an unreasonable application of Supreme Court precedent. That constitutional violation is not subject to harmless error analysis. *Imani*, 826 F.3d at 947.

The judgment of the district court is REVERSED and the case is REMANDED with instructions to grant the writ of habeas corpus, unless the State within 90 days of issuance of this court's mandate initiates steps to retry Washington.

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

April 23, 2018

Before

DIANE P. WOOD, *Chief Judge*

DAVID F. HAMILTON, *Circuit Judge*

ELAINE E. BUCKLO, *District Judge**

No. 16-3253

RODNEY WASHINGTON,
Petitioner-Appellant,
*v.*Appeal from the United States District
Court for the Western District of
Wisconsin.

GARY A. BOUGHTON,
Respondent-Appellee. No. 3:14-cv-00208
William M. Conley,
Judge.

ORDER

Petitioner-appellant filed a petition for rehearing and rehearing *en banc* on April 6, 2018. No judge in regular active service has requested a vote on the petition for rehearing *en banc*, and all members of the original panel have voted to deny panel rehearing. The petition for rehearing is therefore DENIED.

* Of the Northern District of Illinois, sitting by designation.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

RODNEY WASHINGTON,

Petitioner,

OPINION AND ORDER

v.

14-cv-208-wmc

GARY BOUGHTON, Warden,
Wisconsin Secure Program Facility,

Respondent.¹

State inmate Rodney Washington has filed a petition for a writ of habeas corpus, challenging his state court conviction in Milwaukee County Case No. 00CF1310 under 28 U.S.C. § 2254. The respondent has filed an answer and both parties have submitted briefing. Because Washington is not entitled to the relief sought, his petition will now be dismissed.

BACKGROUND

On March 16, 2000, shortly before the statute of limitations was set to expire, the State filed a John Doe complaint in Milwaukee County Case No. 00CF1310, charging “John Doe # 5” with four counts of first-degree sexual assault with use of a dangerous weapon, one count of second-degree sexual assault with use of force, and three counts of robbery. John Doe # 5 was identified in the caption of the complaint by a specific DNA profile. All of the crimes were alleged to have occurred between March 27, 1994, and

¹ Gary Boughton succeeded Tim Haines as Warden of the Wisconsin Secure Program Facility. Therefore, Boughton is automatically substituted as the proper respondent pursuant to Fed. R. Civ. P. 25(d).

January 14, 1995. Relying on the criminal complaint itself, the circuit court found probable cause and issued an arrest warrant for John Doe # 5 the same day the complaint was filed.

On June 25, 2007, over seven years after issuing an arrest warrant in Milwaukee County Case No. 00CF1310, the Wisconsin State Crime Lab matched Washington's DNA to DNA found on each of the victims. The State promptly filed an amended criminal complaint, naming Washington as the defendant. Following a trial, a jury found Washington guilty of four counts of first-degree sexual assault with the use of a dangerous weapon and three counts of second-degree sexual assault of a child. The circuit court then sentenced Washington to imprisonment for 100 years.

On direct appeal, Washington argued that the trial court lacked personal jurisdiction over him because the criminal complaint and arrest warrant that were filed in 2000 did not identify him with reasonable certainty and therefore failed to toll the statute of limitations. Reasoning that the complaint was deficient, Washington argued further that his trial counsel was ineffective for failing to file a motion to dismiss. In addition, Washington argued that the trial court erred when it denied his request to represent himself at trial and his alternative request for substitution of counsel.

The Wisconsin Court of Appeals rejected all of Washington's arguments on the merits and affirmed the conviction. *See State v. Washington*, 2013 WI App 55 347 Wis. 2d 550, 830 N.W.2d 723 (unpublished). The Wisconsin Supreme Court denied Washington's petition for review, *see State v. Washington*, 2013 WI 87, 350 Wis. 2d 729,

838 N.W.2d 637 (unpublished), and the United States Supreme court denied his request for a writ of certiorari. *See Washington v. Wisconsin*, 134 S. Ct. 1313 (2014).

In his pending federal habeas corpus petition, Washington raises essentially the same claims that he presented on direct appeal. The respondent argues that Washington's first ground for relief fails as a matter of law because it articulates, at most, a state law claim. The respondent argues further that none of Washington's claims warrant relief.

OPINION

To prevail, a federal habeas corpus petitioner must show that he is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §§ 2241(c), 2254(a). In deciding whether a habeas corpus petition merits relief, a reviewing court looks to the "last reasoned state-court opinion" to address the petitioner's claims. *Ylst v. Nunnemaker*, 501 U.S. 797, 805 (1991); *see also Ford v. Wilson*, 747 F.3d 944, 949 (7th Cir. 2014) ("[O]ur inquiry focuses entirely on what occurred in the state court. In so doing, we look at 'the decision of the last state court to rule on the merits of the petitioner's claim.'") (citation and quotation omitted). To the extent that Washington's claims were addressed on the merits by the Wisconsin Court of Appeals, he must show that the state court's adjudication "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." 28 U.S.C. § 2254(d)(1).

A state court's decision is deemed contrary to clearly established federal law if it reaches a legal conclusion in direct conflict with a prior decision of the Supreme Court or reaches a different conclusion than the Supreme Court based on materially indistinguishable facts. *See Williams v. Taylor*, 529 U.S. 362, 404-08 (2000). A state court unreasonably applies clearly established precedent if it identifies the correct governing legal principle but unreasonably applies that principle to the facts of the case. *See Brown v. Payton*, 544 U.S. 133, 141 (2005); *McNary v. Lemke*, 708 F.3d 905, 913 (7th Cir.), *cert. denied*, 134 S. Ct. 136 (2013). In this context, an "unreasonable application of" federal law means "objectively unreasonable, not merely wrong; even 'clear error' will not suffice." *White v. Woodall*, — U.S. —, 134 S. Ct. 1697, 1702 (2014) (quoting *Lockyer v. Andrade*, 538 U.S. 63, 75-76 (2003)).

The standard outlined in § 2254(d)(1) is exacting and "highly deferential," *Burt v. Titlow*, — U.S. —, 134 S. Ct. 10, 15 (2013), demanding that state courts be given "the benefit of the doubt." *Harrington v. Richter*, 562 U.S. 86, 131 S. Ct. 770, 786 (2011). Relief is authorized only in cases "where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [Supreme Court] precedents." *Richter*, 131 S. Ct. at 786.

To prevail, "a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 131 S. Ct. at 786-87. In addition to the "formidable barrier"

posed by this standard, *Titlow*, 134 S. Ct. at 16, the petitioner bears the burden of rebutting the state court's factual findings "by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). Alternatively, a petitioner must show that the state court's adjudication of the claim "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding." 28 U.S.C. § 2254(d)(2). None of petitioner Washington's challenges begin to overcome this extraordinarily high bar.

I. Sufficiency of the Criminal Complaint

Washington first contends that the criminal complaint filed in March 2000 was insufficient to identify him with reasonable certainty and, therefore, did not toll the statute of limitations for the charged offenses. If so, the complaint should have been dismissed for lack of personal jurisdiction.

The respondent correctly notes that the sufficiency of a state criminal charging instrument presents, at most, an issue of state law. So is application of the state statute of limitation in this instance. *See* Wis. Stat. 939.74(1); *State v. Jennings*, 2003 WI 10, ¶¶ 15-27, 259 Wis. 2d 523, 657 N.W.2d 393 (outlining the legislative history of the Wisconsin criminal statute of limitation, tolling and the sufficiency of a criminal complaint for personal jurisdiction).

Because Washington did not fairly present a federal claim concerning the criminal complaint on direct appeal, respondent argues that he has procedurally defaulted such a

claim on federal habeas review. *See, e.g., O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999); *Ward v. Jenkins*, 613 F.3d 692, 696–97 (7th Cir. 2010). While a habeas petitioner *may* overcome procedural default by demonstrating cause for the default and actual prejudice, this would require a showing that the court's failure to consider the claim would result in a fundamental miscarriage of justice. *See Coleman v. Thompson*, 501 U.S. 722, 7 750 (1991). Here, Washington neither attempts to demonstrate cause, nor to show that any other exception to the doctrine of procedural default applies. Accordingly, Washington is procedurally barred from pursuing any review of a potential federal constitutional claim concerning the sufficiency of the state's charging instrument.

Moreover, because there is no federal constitutional right to a grand jury indictment in state prosecutions, *see Hurtado v. California*, 110 U.S. 516 (1884), the sufficiency of a state charging instrument is governed by state law. *See Liner v. Phelps*, 731 F.2d 1201, 1203 (5th Cir. 1984) (observing that a state charging instrument is fatally defective only when there are no circumstances under which there could be a valid conviction based on that instrument, and that “determination can be made *only* by looking to the law of the state” (emphasis in original)). In that respect, the sufficiency of a state indictment “is not a matter for federal habeas corpus relief unless the indictment is so defective that the convicting court had no jurisdiction.” *Evans v. Cain*, 577 F.3d 620, 624 (5th Cir. 2009).

Unfortunately for Washington, the Wisconsin Court of Appeals already considered this argument, and it concluded rather persuasively that “the original complaint and arrest

warrant were sufficiently specific to toll the statute of limitations and to confer the trial court with personal jurisdiction" for the following reasons:

"Personal jurisdiction in criminal cases involves the power of the circuit court over the physical person of the defendant." [*State v. Dabney*, 2013 WI App 108, ¶ 10, 264 Wis. 2d 843, 851, 663 N.W.2d 366]. In order to confer personal jurisdiction: (1) a complaint or indictment must be filed stating that there is probable cause to believe that a crime has been committed and that the defendant probably committed it, and (2) there must be compliance with the relevant statute of limitations.^[2] *Id.*

Throughout his brief, Washington argues that the original complaint and arrest warrant failed to identify him with "reasonable certainty," thereby failing to toll the statute of limitations. However, in doing so, Washington mistakenly applies the "reasonable certainty" requirement to both the complaint and the arrest warrant. *See id.*, ¶ 12. "The 'reasonable certainty' requirement is specific to the warrant only." *Id.* Wisconsin Stat. § 968.04(3)(a)4. requires an arrest warrant to "[s]tate the name of the person to be arrested, if known, or if not known, designate the person to be arrested by any description by which the person to be arrested can be identified with reasonable certainty." (Emphasis added.) The complaint need only set forth a written statement of the essential facts constituting the offense, including answering the question of who is being charged and why. *Dabney*, 264 Wis. 2d 843, ¶ 12, 663 N.W.2d 366. We interpret Washington's appeal as arguing that the original complaint insufficiently identifies "who" is being charged. Regardless, the complaint and arrest warrant here meet both standards.

In *Dabney*, we held that a John Doe complaint and arrest warrant that identified the defendant by a DNA profile satisfied the requirements that a complaint state "who" is charged and that the arrest warrant describe the person to be arrested with "reasonable certainty." *Id.*, ¶¶ 8–15. In [*State v. Davis*], we reaffirmed that "the State is permitted to file a complaint, which identifies the defendant only by his DNA profile." [2005 WI App 98, ¶ 32, 281 Wis. 2d 118, 698 N.W.2d 823]. The trial court relied on both *Dabney* and *Davis* when finding that the original complaint and arrest warrant here adequately identified Washington. Washington attempts to distinguish this case, arguing that the complaints and arrest warrants in *Dabney* and *Davis* included the defendants' entire DNA profile, whereas here, the complaint and

² The parties agree that the statute of limitations for Washington's crimes in 1994 and 1995 was six years. *See* Wis. Stat. § 939.74(1) (1993–94). Washington does not argue that the original complaint was not filed within the statute of limitations.

arrest warrant did not include a DNA profile, but rather, only included the locations of six DNA markers that are common to all human beings.

While Washington is correct that the original complaint and arrest warrant in this case do not include an individual DNA profile, we conclude that they are nevertheless specific enough to describe who committed the crime and do so with reasonable certainty.

* * *

As noted by the State, and left unchallenged by Washington, the original complaint set out in exacting detail how the DNA samples in this case were collected, stored, and analyzed. Moreover, it explicitly stated that the defendant in this case is the individual whose DNA “[m]atch[es]” the DNA collected from the victims, and as the complaint notes, the chances of a random match for a nonrelative are substantially greater than one in a billion. While Washington finds fault with the fact that the actual DNA profile was not included in either the original complaint or the arrest warrant, the language in each requiring the defendant to be the individual who “[m]atch[es]” the DNA on file at the locations listed in the complaint and warrant is sufficient to describe “who” with “reasonable certainty.” *See Dabney*, 264 Wis.2d 843, ¶ 15, 663 N.W.2d 366 (“a DNA profile is arguably the most discrete, exclusive means of personal identification possible”).

* * *

Given the specificity in the rest of the complaint, and the language stating that the defendant is the individual whose DNA “[m]atch[es]” the DNA profile collected through the process described, the failure to include the specific DNA in the original complaint or arrest warrant is not dispositive.

State v. Washington, 2013 WI App 55, ¶¶ 17-23, 347 Wis.2d 550, 830 N.W.2d 723 (footnote [renumbered] in original).

As the state court’s decision reflects, the question whether a state trial court was deprived of jurisdiction by a fatally defective indictment was squarely presented to the Wisconsin Court of Appeals, which held that the trial court had jurisdiction. To the extent that Washington’s claim relies solely on state law and on the Wisconsin court’s

interpretation of its own law, his claim is not cognizable on federal habeas corpus review. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (“It is not the province of a federal habeas court to reexamine state court determinations on state law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws or treaties of the United States.”).

II. Ineffective Assistance of Counsel

Washington also contends that he was denied the right to effective assistance of counsel because his attorney failed to file a motion to dismiss the complaint for lack of jurisdiction. Claims for ineffective assistance of counsel are analyzed under the well-established standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail, a defendant must demonstrate both constitutionally deficient performance by counsel and actual prejudice as a result of the alleged deficiency. *See Williams v. Taylor*, 529 U.S. 362, 390-91 (2000). “Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.” *Strickland*, 466 U.S. at 687.

Washington’s ineffective-assistance claim was rejected by the Wisconsin Court of Appeals for much the same reason it rejected his attack on the sufficiency of the complaint. Having concluded that the original complaint and arrest warrant were sufficient to confer the trial court with jurisdiction, the court found that “Washington’s trial counsel could not have been ineffective for failing to raise a meritorious claim[.]”

Washington, 2013 WI App 55, ¶ 16, 347 Wis. 2d 550, 830 N.W.2d 723 (following the standard outlined in *Strickland*).

As a result, the central question here is not whether “the state court’s determination” under the *Strickland* standard ‘was incorrect but whether the determination was unreasonable — a substantially higher threshold.’” *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009) (quoting *Schrivo v. Landrigan*, 550 U.S. 465, 478 (2007)). Indeed, “because the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard.” *Id.* (citing *Youngblood v. Alvarado*, 541 U.S. 652, 664 (2004)). Thus, this standard is “doubly deferential” on habeas corpus review. *Id.*; see also *Richter*, 131 S. Ct. at 788 (emphasizing that the standards created by *Strickland* and § 2254(d) are “highly deferential,” and “doubly’ so” when applied in tandem) (citations and quotations omitted).

Regardless of the standard, as the Wisconsin Court of Appeals noted, Washington’s argument that the trial court lacked jurisdiction was doomed by pre-existing authority. See *Dabney*, 2003 WI App 108, 264 Wis. 2d 843, 663 N.S.2d 366; *Davis*, 2005 WI App 98, 281 Wis. 2d 118, 698 N.W.2d 823. Washington’s defense counsel testified at a hearing on post-conviction review that he chose not to pursue dismissal based on defects in the complaint and arrest warrant because such an argument was foreclosed by precedent upholding the validity of John Doe warrants in Wisconsin. See Dkt. # 23, *Post-Conviction Hearing Trans.* at 41-42, 47-48. Washington does not otherwise show that a motion to dismiss would have been successful if one had been filed.

Under these circumstances, defense counsel is not deficient for failing to file a meritless motion or objection. *See Northern v. Boatwright*, 594 F.3d 555, 561 (7th Cir. 2010); *see also United States v. Rezin*, 322 F.3d 443, 446 (7th Cir. 2003) (a lawyer has “no duty to make a frivolous argument”). Absent a showing that counsel’s performance was deficient and that he suffered prejudice as a result, Washington cannot establish that the state court’s decision was unreasonable. Therefore, Washington is not entitled to relief on this claim.

III. Denial of the Right to Proceed *Pro Se*

Washington next contends that the trial court violated his constitutional rights by denying his request to represent himself, which he first made on the day of trial. The trial court denied his last-minute request, noting that the case involved complicated DNA evidence from multiple victims of sexual assault, all of whom Washington would have to cross-examine. The trial court also noted that Washington’s irrational behavior and lack of decorum led to the conclusion that he was not competent to represent himself.

While the Sixth Amendment generally guarantees a defendant the right to have counsel present at all critical stages of a criminal proceeding, it also includes the right of a competent criminal defendant to represent himself at trial. *See Faretta v. California*, 422 U.S. 806, 835-36 (1975). However, because an accused who elects to represent himself relinquishes the traditional benefits associated with the right to counsel, a defendant who invokes this right must first make a knowing and intelligent waiver of his right to counsel.

Faretta, 422 U.S. at 835 (citing *Johnson v. Zerbst*, 304 U.S. 458, 464-65 (1938)). Thus, before allowing a defendant to represent himself, a court must conduct a two-step inquiry: (1) to ascertain that the defendant is competent to waive the right to counsel, where competence might appear to be at issue; and (2) to “satisfy itself that the [defendant’s] waiver of his constitutional rights is knowing and voluntary.” *Godinez v. Moran*, 509 U.S. 389, 400-01 (1993).

In this case, the trial court did not undertake a *Faretta* colloquy at step two because it concluded as an initial matter that Washington was not competent to represent himself. The Wisconsin Court of Appeals affirmed the trial court’s decision, observing that there were “numerous facts in the record to support the trial court’s finding that Washington was not competent to represent himself.”

“Whether a defendant is competent to proceed *pro se* is ‘uniquely a question for the trial court to determine.’” [*State v. Imani*, 2010 WI 66, 326 Wis. 2d 179, ¶ 37, 786 N.W.2d 40 (citation omitted)]. “It is the trial judge who is in the best position to observe the defendant, his conduct and his demeanor and to evaluate his ability to present at least a meaningful defense.” *Id.* (citation omitted). Appellate “review is limited to whether the [trial] court’s determination is ‘totally unsupported by the facts apparent in the record.’” *Id.* (citation omitted).

* * * *

The trial court accurately noted that DNA evidence was central to the State’s case. There was no dispute that the four victims had been sexually assaulted. All four testified that they were accosted by a stranger who said he had a gun, took them to a secluded area, and forced them to have mouth-to-penis intercourse; he also had penis-to-vagina intercourse with two of the victims. The victims described their assailant as a black man with a pockmarked or scarred face, but none of them identified Washington. In short, the DNA evidence was critical to determining Washington’s guilt, and Washington needed to be able to understand and decipher that evidence to properly represent himself.

* * *

The record shows that Washington's behavior leading up to his request to proceed *pro se* on the eve of trial was irrational and disruptive. In his written request to proceed *pro se*, Washington mentions a complaint he filed with the Department of Justice, the Director of State Courts, and the clerks of the circuit court and court of appeals, in which he asks that charges be brought against the trial court, the prosecutor, and defense counsel "for fabricating two John Doe arrest warrants and a complaint on the dates of Feb. 14, 2008 and March 3, 2008." Washington maintained throughout the trial court proceedings that the original arrest warrant did not bear a court seal, that the John Doe warrant that the prosecutor produced in 2008 was a forgery, and that he was the victim of an elaborate plot between defense counsel, the State, and the trial court.

Defense counsel did not share in Washington's belief that the warrant lacked a court seal, and informed the court that Washington's fixation on his fabrication theory left Washington unable "to get beyond the motion issues and deal with the case itself and how to proceed with the trial and discuss the strategy." In fact, Washington's obsession with a conspiracy theory led to frequent disruptions in the courtroom, during which Washington interrupted and stalled proceedings, and in some instances refused to participate in proceedings or even physically come to court.

Such irrational and obsessive behavior led defense counsel to question Washington's competency to stand trial. And while, after an evaluation, it was ultimately determined that Washington was competent to stand trial, the trial court could reasonably and rationally rely on that behavior to conclude that Washington was not competent to represent himself. His inability to recognize and follow proper courtroom decorum or to identify and argue legitimate legal issues in his own defense, made it logical to conclude that Washington would not be able to properly focus on and understand the complicated DNA evidence that was critical to the State's case. *See State v. Marquardt*, 2005 WI 157, ¶ 61, 286 Wis. 2d 204, 705 N.W.2d 878 ("the record must demonstrate an identifiable problem or disability that may prevent a defendant from making a meaningful defense"). As such, the trial court did not erroneously exercise its discretion when it denied Washington's motion to proceed *pro se*.

State v. Washington, 2013 WI App 55, ¶¶ 29-35, 347 Wis. 2d 550, 830 N.W.2d 723.

According to the United States Supreme Court, "the Constitution permits judges

to take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so." *Indiana v. Edwards*, 554 U.S. 164, 177-78 (2008). To determine whether a particular defendant has the requisite competence to represent himself, Wisconsin courts are generally required to "consider factors such as 'the defendant's education, literacy, fluency in English, and any physical or psychological disability which may significantly affect his ability to communicate a possible defense to the jury.'" *State v. Klessig*, 211 Wis. 2d 194, 212, 564 N.W.2d 716 (1997) (quoting *Pickens v. State*, 96 Wis. 2d 549, 569, 292 N.W.2d 601 (1980)).

Likewise, the Supreme Court has recognized that a court properly preterms self-representation by a defendant who deliberately engages in serious, obstructionist misconduct. *See Faretta*, 422 U.S. at 835, n.46 ("The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law.").

The findings of fact made by the Wisconsin Court of Appeals are supported by the trial transcripts, which show that Washington requested leave to represent himself on the scheduled day of trial, that he made irrational arguments and that he engaged in disrespectful, disruptive behavior during the proceeding. (Dkt. # 15.) Moreover, Washington does not refute these findings, which are presumed correct for purposes of federal habeas corpus review. *See* 28 U.S.C. § 2254(e)(1). Based on this record, Washington's claim of competence was wholly undermined by his irrational, disruptive

behavior, the state court did not unreasonably apply *Faretta* or any other clearly established precedent from the United States Supreme Court with regard to the right of self-representation. Accordingly, Washington is not entitled to relief on this claim.

IV. Request for New Counsel

Finally, after the trial court denied Washington's request to represent himself, Washington requested a different lawyer. With the trial about to start, the trial court understandably denied that request. Washington nevertheless contends that the trial court violated his rights by refusing his request for a new lawyer.

The Wisconsin Court of Appeals disagreed, concluding that the trial court properly exercised its discretion:

While Washington is correct in his assertion that indigent defendants are guaranteed the right to appointed counsel, "this guarantee does not include the right to the particular attorney of the defendant's choosing." *See State v. Darby*, 2009 WI App 50, ¶ 28, 317 Wis. 2d 478, 766 N.W.2d 770. Whether to grant a defendant's request for new counsel is a matter within the trial court's discretion. *Id.* We must uphold that "discretionary decision if the [trial] court logically interpreted the facts, applied the proper legal standard to the relevant facts, and used a rational process to reach a reasonable conclusion." *Id.* Having reviewed the record, we conclude that the trial court properly exercised its discretion here.

Washington complains that the trial court denied his request for a third attorney "based solely on [the] timing" of his request and contends that the breakdown in communication between himself and his lawyer went far beyond mere disagreement over strategy. The record belies his contention.

The record shows that the primary problem between Washington and his attorney was strategy, in particular, his attorney's refusal to pursue Washington's claim that the John Doe arrest warrant did not bear the court

seal and that the warrant in the file bearing the seal was a forgery. We agree with the State that the record shows that had the trial court appointed a new lawyer, the same scenario undoubtedly would have ensued. The trial court had already addressed Washington's concerns about the seal, but Washington refused to let the issue go, allegedly believing the court to be part of a conspiracy against him. Washington's compulsive unwillingness to drop the warrant issue and discuss anything else about the case makes it clear that he was unlikely to accept anyone appointed to represent him.

Furthermore, the trial court properly took into consideration whether granting Washington's request for new counsel would unnecessarily delay the administration of justice. *See, e.g., State v. Jones*, 2007 WI App 248, ¶ 13, 306 Wis. 2d 340, 742 N.W.2d 341. The crimes in this case had been committed over twenty years earlier and Washington's request came on the eve of trial. Because there was simply no indication that Washington would be any happier with new counsel than he had been with his two prior lawyers, it was reasonable and rational for the trial court to conclude that granting Washington's request would be an unnecessary delay in the resolution of this case. As such, we affirm the trial court's decision to deny Washington's request for a new attorney.

State v. Washington, 2013 WI App 55, ¶¶ 37-40, 347 Wis. 2d 550, 830 N.W.2d 723.

The Sixth Amendment right to counsel "guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006) (quoting *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624-625 (1989)). The Sixth Amendment does not guarantee an indigent defendant the counsel of his choice. *See Wheat v. United States*, 486 U.S. 153, 159 (1988) (observing that a defendant has no right to representation by an attorney whom he cannot afford, who does not wish to represent him or who has a conflict of interest); *United States v. Oreye*, 263 F.3d 669, 71 (7th Cir. 2001) ("[A]n indigent defendant has a right to competent counsel but not a right to counsel of his choice[.]")

(citing *Caplin & Drysdale*, 491 U.S. at 624). Likewise, the Sixth Amendment does not guarantee “a ‘meaningful relationship’ between an accused and his counsel.” *Morris v. Slappy*, 461 U.S. 1, 13 (1983). Nor does it “give an accused the power to manipulate his choice of counsel to delay the orderly progress of his case.” *United States ex rel. Kleba v. McGinnis*, 796 F.2d 947, 952 (7th Cir. 1986) (internal quotation marks omitted).

In this instance, the trial court denied Washington’s request for a new lawyer, noting that it was made on the day scheduled for trial, that the prosecution’s witnesses were present, and that his appointed defense counsel (Washington’s second lawyer) was prepared to try the case. Washington does not show that the Wisconsin Court of Appeals erred in upholding the trial court’s decision or that doing so resulted in an unreasonable application of clearly established Supreme Court precedent. Because Washington has failed to demonstrate that any of his claims have merit, his petition will be denied.

V. Certificate of Appealability

Under Rule 11 of the Rules Governing Section 2254 Cases, the court must issue or deny a certificate of appealability when entering a final order adverse to petitioner. A certificate of appealability will not issue unless the petitioner makes “a substantial showing of the denial of a constitutional right,” 28 U.S.C. § 2253(c)(2), which requires a petitioner to demonstrate “that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Tennard v. Dretke*, 542 U.S.

274, 282 (2004) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). Under the controlling standard, this requires a petitioner to show “that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were ‘adequate to deserve encouragement to proceed further.’” *Miller-El*, 537 U.S. at 336. Where denial of relief is based on procedural grounds, the petitioner must show not only that “jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right,” but also that they “would find it debatable whether the district court was correct in its procedural ruling.” *Slack*, 529 U.S. at 484.

Although the rule allows a court to ask the parties to submit arguments on whether a certificate should issue, it is not necessary to do so in this case. For the reasons already stated, the court concludes that petitioner has not made a showing, substantial or otherwise, that his conviction was obtained in violation of clearly established federal law as decided by the Supreme Court. Because reasonable jurists would not otherwise debate whether a different result was required, no certificate of appealability will issue.

ORDER

IT IS ORDERED that:

1. The federal habeas corpus petition filed by Rodney Washington is DENIED and this case is DISMISSED with prejudice.

2. A certificate of appealability is DENIED. If petitioner wishes he may seek a certificate from the court of appeals under Fed. R. App. 22.

Entered this 16th day of August, 2016.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge

**Additional material
from this filing is
available in the
Clerk's Office.**