No. 22-

IN THE

Supreme Court of the United States

JASON DEVON LENOIR,

Petitioner,

v.

LYNN GUYER; AND ATTORNEY GENERAL OF THE STATE OF MONTANA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ATHILL MUHAMMAD, ESQ.
Counsel of Record
P. O. Box 8493
Houston, Texas 77288
(713) 807-8167
amuhammadlaw@aol.com

Counsel for Petitioner

316988

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Jason Devon Lenoir was convicted of the offense of sexual intercourse without consent as a result of a guilty plea, in the State of Montana, and desired to represent himself at trial. The court, without the benefit of a psychological evaluation, held a Faretta hearing, and eventually allowed Lenoir to proceed pro se. However, given his youth, and other pertinent factors, the court should have been more assiduous in its colloquy.

Lenoir timely filed a Federal a Writ of Habeas corpus, but it, and a COA was denied, and affirmed. He now petitions for a Writ of Certiorari opining that he substantially demonstrated constitutional denials that reasonable jurists could debate were adequate for further proceedings.

Thus, the following question is presented: Is a criminal defendant entitled to a COA when he has demonstrated and made a substantial showing that his rights were denied under the Sixth and Fourteenth Amendments, where reasonable jurists could determine or debate, as evidenced by the varying approaches used by the Federal Circuits in determining, during a *Faretta* hearing, whether or not a defendant has knowingly, voluntarily, and intelligently waived his right to counsel, and decides to represent himself after the hearing?

LIST OF PARTIES

Petitioner is Jason Devon Lenoir, a citizen of the United States of America. Respondents are Lynn Guyer, and the Attorney General of the State of Montana.

DIRECTLY RELATED PROCEEDINGS

(Federal and State Courts)

Parties: Jason Devon Lenoir, Petitioner, v. Lynn Guyer, and the Attorney General for the State of Montana, Respondents

Court: United States Court of Appeals for the Ninth Circuit
Cause No.: 22-35280
Date of Judgment: August 25, 2022

Parties: Jason Devon Lenoir, Petitioner, v. Lynn Guyer and the Attorney General for the State of Montana, Respondents

Court: United States District Court for the District of Montana, Missoula Division
Cause No.: CV 19-191
Date of Judgment: March 4, 2022

Parties: State of Montana, Plaintiff, vs. Jason Devon Lenoir, Defendant

Court: Montana Fourth Judicial District Court, Missoula County
Cause No.: DC-2016-539
Date of Judgment: March 16, 2018

TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

Page

Page

CONSTITUTIONAL AMENDMENTS

Page

STATUTES

RULES

Page

OTHER AUTHORITIES

OPINIONS BELOW

The United States Court of Appeals for the Ninth Circuit denied Lenoir's request for a Certificate of Appealability on August 25, 2022, and this order appears in Appendix A, at page 1a. Only the Westlaw citation is currently available, and reported at 2022 WL 4943969.

The United States District Court for the District of Montana, Missoula Division, denied Lenoir's Writ of Habeas Corpus, and his Certificate of Appealability on March 4, 2022, and this order appears in Appendix B, at pages 2a - 18a. Only the Westlaw citation is currently available, and reported at 2022 WL 656557.

STATEMENT OF JURISDICTION

The United States District Court for the District of Montana, Missoula Division, denied Petitioner's Writ of Habeas Corpus, and denied him a Certificate of Appealability. On August 25, 2022, the United States Court of Appeals for the Ninth Circuit denied Petitioner's request for a Certificate of Appealability. In *Hohn v. United States*, 524 U.S. 236 (1998), this Honorable Court held that, pursuant to *28 U.S.C. §1254(1)*, the United States Supreme Court has jurisdiction, on Certiorari., to review a denial of a request for a Certificate of Appealability by a circuit judge or panel of a Federal Court of Appeals.

In accordance with *S. Ct. R. 13.5*, Petitioner timely applied, Pro Se, for a forty five - day extension of time, up to January 7, 2023, within which to file this Petition for Writ of Certiorari, and said application was granted, thus extending the deadline to file this Petition to January 7,

2023. However, since the extended deadline date was a Saturday, in accordance with *S. Ct. R. 30.1*, this petition is timely filed on January 9, 2023.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This matter involves the Sixth Amendment to the United States Constitution, which text appears in Appendix C, at page 19a, the Eighth Amendment to the United States Constitution, which text appears in Appendix C, at pages 19a-20a, the Fourteenth Amendment to the United States Constitution, which text appears in Appendix C, at page 20a, Title 28 United States Code Section 2253 – Appeal, which text appears in Appendix C, at page 20a-21a, and Title 28 United States Code Section 2254 - State Custody, which text appears in Appendix C, at pages 21a – 25a.

STATEMENT OF THE CASE

In October of 2016, the State of Montana charged Jason Devon Lenoir by information with sexual intercourse without consent, burglary, and violation of a protective order.

When he committed the offense of sexual intercourse without consent, a person found guilty of that crime could be punished by life imprisonment or by imprisonment for a term of not less than two years or more than 100 years. *Mont. Code Ann. §45-5-503(2)*. Since he was sentenced, however, the Montana Legislature amended §45-5-503(2). This provision now provides that "[a] person convicted of sexual intercourse without consent shall be punished by

life imprisonment or by imprisonment in the state prison for a term of not more than twenty years." *Mont. Code Ann. §45-5-503(2).*

Lenoir's prosecution arose out of an allegation that he entered the apartment of his ex-girlfriend, Devi, through a window in the middle of the night. After entering her home, Lenoir found Devi naked and passed out in her bed -- she had been drinking that night and was intoxicated. While Devi was passed out, Lenoir had sexual intercourse with her. Devi woke up the next morning and found Lenoir lying next to her in bed. According to Devi, Lenoir told her that he had broken into her apartment and that they had sex.

Lenoir returned to Devi's apartment later that day. Devi told him to leave, and, when he refused, a neighbor called the police. When the police arrived, they spoke to both Devi and Lenoir.

Devi told the police that she and Lenoir had dated for approximately one year, but the relationship ended several months earlier. She stated that after they broke up, Lenoir moved to Texas. They remained in contact for a while, but she eventually quit responding to his telephone calls and messages. She stated that Lenoir returned to Missoula about a week before the allegation and made attempts to contact her. However, because she did not want any further contact with him, she obtained a court order of protection.

Lenoir was interviewed by a detective at the police department. After being informed of his rights, and without the presence of counsel, Lenoir submitted to an interview, and confirmed that he had returned to Missoula about a week earlier, and, on the day prior to the alleged

crime, he went to Devi's apartment and the police were called. He confirmed that a responding officer informed him that Devi did not want to see him, and that she had obtained a court order of protection. He further stated that after the conversation with the responding officer regarding the order of protection, he returned to Devi's apartment and found her getting ready to go out. He informed the detective that he left [Devi's apartment] and returned at about 1:30AM, and, when Devi did not answer the door, he entered her apartment through a window.

Lenoir informed the detective that he found Devi passed out drunk and unclothed in her bed, and that she did not know he was there. During the interview, Lenoir admitted that he spent the night with Devi, and had sex with her.

Continuing with the interview, Lenoir told the detective that Devi was really drunk, and that she did not speak to him or open her eyes while he had sex with her. Lenoir allegedly acknowledged that what he had done was technically a rape, but he believed that he did not really commit rape because they used to date.

At the conclusion of the interview, Lenoir was arrested, and bail was set at $100,000.

The Pretrial and Trial Proceedings

Lenoir was arrested on September 20, 2016, arraigned on November 1, 2016, and appointed a public defender for his representation. Trial was initially set for April 10, 2017. On February 1, 2017, Lenoir's public defender filed a motion stating that Lenoir wished to proceed pro se. Subsequently, the trial court set a *Faretta* hearing.

At the beginning of the hearing, the trial judge confirmed that Lenoir wanted to represent himself with the public defender serving as stand-by counsel. After doing so, he asked a series of questions designed to ensure that Lenoir's decision was knowing, voluntary, and intelligent.

During the hearing, the trial judge re-emphasized that, while stand-by counsel could provide advice as to courtroom procedures, he would not actually participate as a full attorney.

The trial judge informed Lenoir that he would be expected to follow the rules of evidence and warned him that if he failed to object to inadmissible evidence, he, and he alone, would bear the consequences. He warned Lenoir that he would be expected to abide by courtroom decorum and the court would not tolerate any type of disruptive behavior. He informed Lenoir that he would be expected to prepare his own jury instructions, explained the charge hearing process to him, informed him that the jury would rely on the instructions during deliberation.

The trial court further explained the purpose of closing argument and informed Lenoir that he could not use it as an opportunity to testify, introduce facts not in evidence, or vouch for the credibility of witnesses.

Continuing with the hearing, the trial judge inquired as to whether Lenoir was under the influence of alcohol, drugs, narcotics, or any other medication or substance, and asked Lenoir his age and the extent of his education, to wit Lenoir informed the judge that he was 20 years old, had started college, and knew how to read and write.

The trial judge then asked Lenoir if he had any physical or mental disability that he believed would affect his ability to represent himself, and Lenoir told him he did not. The trial judge asked Lenoir if he understood that he had an absolute right to an attorney, and Lenoir replied that he did and re-emphasized his desire to proceed pro se.

After confirming his desire to proceed pro se, the trial judge again informed Lenoir that the court would not provide him with any advice about defenses, jury instructions, or other issues, and that he would be treated as if he were an attorney, and told Lenoir that he could be sentenced to a term of two years to lifetime imprisonment on the rape charge, plus an additional 20 years on the burglary charge, without the possibility of parole. However, despite this colloquy, the trial judge did not advise Lenoir of the dangers and disadvantages of self-representation. And, at no point preceding or during this *Faretta* hearing did Lenoir undergo a psychological evaluation.

On or about July 13, 2017, Lenoir extended a plea offer to the State, wherein he offered to plead guilty to sexual intercourse without consent if the State would make a binding recommendation that he serve 15 years with 10 years suspended. The State counteroffered and sent Lenoir a plea agreement that required him to plead guilty to sexual intercourse without consent in return for a binding recommendation that he serve 15 years with 5 years suspended. Lenoir did not accept the State's counteroffer.

Lenoir's trial began, on August 4, 2017. During a pretrial conference in chambers, the trial judge inquired

as to whether Lenoir still wanted to represent himself, and advised him of his right not to testify. After doing so, the trial judge went through his preliminary jury instructions, and then commenced voir dire.

After the trial judge finished his questioning, he turned the jury over to the State. Lenoir objected on a couple of occasions to the State's voir dire, but those were overruled. Lenoir then voir dired the jurors. However, toward the end of his questioning, one of the jurors indicated that he was troubled by the way Lenoir "presented" himself during the process.

Lenoir elected to give an opening statement. Although it was short, he was admonished on at least two occasions by the court for making statements the court deemed inappropriate. At the conclusion of opening statements, the State called three witnesses, after which the court recessed. The trial recommenced on August 7, 2017. However, before witnesses were called, the State informed the court that the parties reached a settlement.

The State provided Lenoir with a plea agreement that contemplated that he would plead guilty to sexual intercourse without consent in return for the State's promise to dismiss the remaining two counts. In return for his guilty plea, the State agreed to recommend a sentence of 15 years, with five years suspended, and under the agreement, Lenoir was entitled to make his own sentencing recommendation. This agreement, however, was not binding on the court. Lenoir subsequently signed the agreement and provided it to the court.

The judge reviewed the provisions of the agreement with Lenoir, and went through the sexual intercourse

without consent charge. After reading that charge, the judge asked Lenoir if the allegations were true, and Lenoir responded they were. The judge then, for the first time, informed Lenoir that he would have to undergo an evaluation and participate in a presentence investigation. Subsequently, the judge accepted Lenoir's guilty plea, discharged the jury, and allowed the State to call Devi to the stand to provide a victim impact statement. In response to the State's questioning, Devi stated she agreed with its sentencing recommendation, and thought a sentence of 10 years would be appropriate.

Sentencing

Sentencing was held on May 17, 2018, at which time Lenoir recommended that the court adhere to the plea agreement. Consistent with the plea agreement, the State recommended that the court minimally adopt the plea agreement, and impose a sentence of 15 years with five years suspended. However, advising that he was not going to follow the plea recommendation, stating, rather, that he was going to base Lenoir's sentence primarily on his assessment of the presentence investigation report and Lenoir's psychological evaluation, the judge stated that Lenoir was a danger to society. After noting that Lenoir violated a restraining order and broke into Devi's house before raping her, the judge imposed a sentence of 70 years imprisonment – a seven-fold increase from that recommended by the State.

Relevant State Post-Conviction Proceedings: Sentence Review

Lenoir did not file a direct appeal after sentencing. However, he filed an application for review of sentence with

the Montana Sentence Review Division of the Supreme Court of Montana. His application was heard on November 2, 2018, and his sentence was reduced to 50 years.

Federal Habeas Corpus Proceedings

On or about November 21, 2019, Lenoir, acting Pro Se, filed a *28 U.S.C. §2254* petition in the United States District Court for the District of Montana. In his petition, he raised three issues: (1) that his 50 year sentence violated the Eighth Amendment's ban on cruel and unusual punishment[1]; (2) that he was denied the right to counsel

1. In arguing that his sentence violated the Eighth Amendment, Lenoir informed the district court that he was convicted of sexual intercourse without consent in violation of *Mont. Code Ann. §45-5-503*, and initially received a sentence of 70 years, which was subsequently reduced to 50. However, despite the sentence reduction, this was still in contravention to the Eighth Amendment. In maintaining this position, Lenoir informed the district court that at the time of the commission of the offense, he was only 20 years old, and compared his sentence to others convicted of the same crime in the State of Montana in years 2016, 2017, and 2018. In comparing, he noted that: in 2016, there were 39 persons older than him who were convicted of the same crime, but only two would be incarcerated longer; in 2017, there were 32 persons older than him who were convicted of the same crime, but only four would be incarcerated longer; and in 2018, there were 40 persons older than him who were convicted of the same crime, but only six would be incarcerated longer. He further compared the punishments imposed for the commission of the same crime in other jurisdictions within the Ninth Circuit.

Lenoir also pointed out that at the time of the commission of this instant offense, the penalty range for this crime was imprisonment for a term of not less than two or more than 100 years, but that in 2019, the Legislature amended the code, whereby

as guaranteed by the Sixth Amendment[2]; and (3) that he was denied a speedy trial as guaranteed by the Sixth Amendment.[3]

After reviewing the petition, the district court concluded that, although his claims may be unexhausted and/or procedurally defaulted, it could not be certain that Lenoir's [State court] conviction was untainted by constitutional error. The district court opined that because

---

now any person convicted of that crime could be punished by life imprisonment or for a term of not more than 20 years.

2. In arguing that he was denied the right to counsel, Lenoir informed the district court, among other things, that after he filed his motion to proceed pro-se, the trial judge held a hearing in which he asked questions regarding that motion, but never inquired if he had ever undergone any psychological evaluations before, and pointed out that the only time he was ordered to have a psychological evaluation was after the court accepted his plea - clearly intimating that the trial court should have ordered a psychological evaluation as part and parcel of his *Faretta* hearing.

Continuing, Lenoir pointed out that his presentence investigation report noted that the preparer's interview with him stated that Lenoir "brought forth a bizarre persona, as he was seemingly incapable of giving simple answers, and continuously took the conversations and answers down rabbit holes that were hard to follow." Lenoir further pointed out that his history of anti-social behavior was gleaned and addressed through the psychological evaluations and the report prepared regarding his conviction.

3. In arguing that he was denied the right to a speedy trial - Lenoir provided facts and argument that the delay from his arrest to trial was 338, and, thus, maintained that this delay was beyond the Federal Court's established 200 days, irrespective of fault for the delay, as the necessary length of time to trigger a speedy trial analysis.

the record indicated that Lenoir may have been suffering from mental health problems, it ordered that counsel be appointed to investigate whether or not there were any meritorious claims that should be pursued. Consequently, on or about March 31, 2020, Lenoir was appointed counsel from the Federal Public Defenders office.

After reviewing the claims set forth in Lenoir's pro se petition, counsel determined that all but one of his claims, the Sixth Amendment Right to Counsel claim, was procedurally barred and lacked merit. Subsequently, counsel amended Lenoir's pro se petition, and asserted only his Sixth Amendment Right to Counsel claim.

Lenoir's live habeas petition maintained that he was denied his Sixth Amendment Right to Counsel during the trial court's *Faretta* hearing. Specifically, his amended petition maintained that, despite the trial court's efforts, its colloquy did not satisfy the requirements of *Faretta*, for, although he was made aware of the charges and the potential penalties he faced, he was not adequately advised of the dangers and disadvantages of self-representation under *Hayes*. Consequently, he was denied the opportunity to make a knowing and voluntary decision to waive counsel in violation of the Sixth [and Fourteenth] Amendments.

The district court subsequently denied Lenoir's habeas petition, and he timely motioned to the United States Court of Appeals for the Ninth Circuit for a Certificate of Appealability. However, that court denied Lenoir's motion in a one-page order, stating that, "[Lenoir] had not made a 'substantial showing of the denial of a constitutional right' " (quoting *28 U.S.C. §2253(c)(2)*, and directing to see *Miller-El v. Cockrell*, 537 U.S. 322, 327

(2003)). Lenoir now petitions this High Court for a Writ of Certiorari.

REASONS FOR ALLOWANCE OF THE WRIT

Petitioner Lenoir seeks review in this Court, and offers the following reasons why a Writ of Certiorari is warranted.

INTRODUCTION

This Court's jurisprudence regarding one's right to counsel embodied in the Sixth and Fourteenth Amendments to the United States Constitution includes a constitutional right to proceed without counsel when a criminal defendant "voluntarily and intelligently elects to do so." However, there has not been any detailed guidelines concerning what tests or lines of inquiry a trial judge is required to conduct to determine whether a defendant's decision is knowing, voluntary, and intelligent.

Lenoir is currently serving a 50 year sentence in the Montana State prison upon conviction of sexual intercourse without consent, in violation of the then applicable Montana Code Annotated §45-5-503(2). Although he was granted a *Faretta* hearing by the Fourth Judicial District Court, Missoula County, Montana, he maintains that he did not voluntarily, knowingly, or intelligently waive his right to counsel to proceed in his trial matter pro se.

Various Federal Circuits have dealt with the issue of determining whether criminal litigants have validly waived their constitutional rights to counsel, and, thus, proceed on their matters pro se. However, the various

Circuits have different approaches in determining this issue resulting in a conflict. Consequently, this conflict warrants this Court's review, and Petitioner's case is an ideal vehicle for resolving such, for, when there is an inadequate *Faretta* hearing, there is a violation of the Sixth and Fourteenth Amendments.

THE CERTIFICATE OF APPEALABILITY

A state prisoner whose petition for a writ of habeas corpus is denied by a federal district court does not enjoy an absolute right to appeal. Federal law requires that a petitioner must first obtain a Certificate of Appealability (COA) from a circuit justice or judge. *28 U.S.C. §2253(c)(1).* The Federal Rules of Appellate Procedure make specific provisions for consideration of applications for certificates of appealability by the entire court.

Specifically, Rule 22(b) states, in relevant part, that, "[I]n a habeas corpus proceeding in which the detention complained of arises from process issued by a State court…the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under *28 U. S. C. §2253(c).* . . . If the district judge has denied the certificate, the applicant may request issuance of the certificate by a circuit judge." *Fed. R. App. P. 22(b).* Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a COA "may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right." *28 U. S. C §2253(c)(2).*

Supreme Court precedent gives form to this statutory command, explaining that a petitioner must "sho[w] 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.' " *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893, n. 4, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983) (some internal quotation marks omitted)). "Satisfying that standard", this Court has stated, "does not require a showing that the appeal will succeed." *Miller–El v. Cockrell*, 537 U.S. 322, 337, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003). Instead, "[a] prisoner seeking a COA must prove something more than the absence of frivolity or the existence of mere good faith on his or her part." *Id.*, at 338, 123 S.Ct. 1029 (internal quotation marks omitted). The AEDPA does not "require petitioner[s] to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus." *Miller-El, 537 U. S. at 338*. Rather, "[a]t the COA stage, the only question is whether" the "claim is reasonably debatable." *Buck v. Davis* , 580 U. S. ____, ____, ____, 137 S.Ct. 759, 773, 774, 197 L.Ed.2d 1 (2017); *Miller–El, 537 U.S., at 327*.

A certificate ruling is not the occasion for a ruling on the merits of [a] petitioner's claim, it requires only an overview of the claims in the habeas petition and a general assessment of their merits. *Miller–El 537 U.S. at 336*.

It is in this manner that Lenoir maintains that in denying his certificate of appealability, the Ninth Circuit's order contravened this Court's standards, and, therefore, a writ should issue. Thus, in Petitioner's case, he posits that the issue before the Ninth Circuit in his request for a certificate of appealability was whether he presented sufficient evidence to the district court that a constitutional

violation occurred in order to deserve encouragement to proceed further. In this posture, Lenoir maintains that this question depended on whether reasonable jurists could argue that his *Faretta* hearing at the state trial court stage was adequate and reasonable under the totality of circumstances. Consequently, this is a petition seeking relief for an immediate and redressable injury.

THE SIXTH AMENDMENT, THE FOURTEENTH AMENDMENT, AND FARETTA

In Order To Resolve This Matter, Review Is Warranted To Determine A Uniformed Standard Among The Circuits When Determining, During A *Faretta* Hearing, Whether Or Not A Defendant Knowingly, Voluntarily, And Intelligently Waives His Right To Counsel And Decides To Represent Himself

The Sixth Amendment affords the right to those accused in all criminal prosecutions to have the assistance of counsel for their defense. *U.S. CONST. amend. VI.* At the same time, the Sixth Amendment grants the accused the right to make his own defense. "Although not stated in the Amendment in so many words, the right to self-representation—to make one's own defense personally—is, thus, necessarily implied by the structure of the Amendment." *Faretta v. California*, 422 U.S. 806, 819, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). *Faretta* also held that the Sixth and Fourteenth Amendments include a "constitutional right to proceed without counsel when" a criminal defendant "voluntarily and intelligently elects to do so." *Faretta, 422 U.S. at 807.*

When an accused apprises the court of his desire to waive counsel and represent himself, a hearing is required to determine whether the accused understands the consequences of waiving his Sixth Amendment right to counsel and is relinquishing that right knowingly and intelligently.

Even though the *Faretta* Court recognized the absolute right of a defendant to represent himself as long as that decision is made knowingly, intelligently, and voluntarily, it did not lay down detailed guidelines concerning what tests or lines of inquiry a trial judge is required to conduct to determine whether the defendant's decision is knowing and intelligent. *United States v. Gallop*, 838 F.2d 105, 109 (4th Cir. 1988). Consequently, there appears to be varying standards employed in the Federal Circuits when evaluating whether or not a defendant knowingly, voluntarily, and intelligently waives his right to counsel and decides to represent himself during a *Faretta* hearing. With these Circuit variances, this Court's review is warranted to establish a uniformed framework by which courts can make an informed determination as to whether a defendant knowingly, voluntarily, and intelligently waives his right to counsel and decides to represent himself.

The Ninth Circuit, from which this matter at bar arises, formulated a suggested script that trial courts can follow to ensure that defendants are sufficiently informed of the "dangers and disadvantages" of proceeding pro se:

> The court will now tell you about some of the dangers and disadvantages of representing yourself. You will have to abide by the same

> rules in court as lawyers do. Even if you make mistakes, you will be given no special privileges or benefits, and the judge will not help you. The government is represented by a trained, skilled prosecutor who is experienced in criminal law and court procedures. Unlike the prosecutor you will face in this case, you will be exposed to the dangers and disadvantages of not knowing the complexities of jury selection, what constitutes a permissible opening statement to the jury, what is admissible evidence, what is appropriate direct and cross examination of witnesses, what motions you must make and when to make them during the trial to permit you to make post-trial motions and protect your rights on appeal, and what constitutes appropriate closing argument to the jury.

United States v. Hayes, 231 F.3d 1132, 1138-39 (9th Cir. 2000).

However, *Hayes* was careful to emphasize that the formula was not meant to be mandatory or followed verbatim.

The First Circuit has stated that, "[E]ven though most circuits require "clear and unequivocal" *Faretta* waivers, it is generally incumbent upon the courts to elicit that elevated degree of clarity through a detailed inquiry. That is, the triggering statement in a defendant's attempt to waive his right to counsel need not be punctilious; rather, the dialogue between the court and the defendant must result in a clear and unequivocal statement." *U.S. v. Proctor*, 166 F.3d 396, 402-403 (1st Cir.1999), quoting

United States v. Noah, 130 F.3d 490, 498 (lst Cir.1997). However, no set of queries or script to be followed within that Circuit appears.

The Second Circuit has stated that, "[W]hile [we have] strongly endorsed *Faretta* warnings as a factor important to the knowing and intelligent waiver of counsel, see *United States v. Fore*, 169 F.3d 104, 108 (2d Cir.1999) (noting, in a case involving waiver of counsel at trial, that court "should conduct a full and calm discussion with defendant during which he is made aware of the dangers and disadvantages of proceeding pro se" (internal quotation marks omitted)), we have, at the same time, also rejected rigid waiver formulas or scripted procedures, *Id. at 107* ("district courts are not required to follow a formulaic dialogue with defendants wishing to waive their Sixth Amendment rights to counsel, and we decline to impose a rigid framework"), and emphasized that "knowing and intelligent" waivers depend on the totality of the circumstances, *Id. at 108* (because "`knowing and intelligent' waiver depends upon the particular facts and circumstances of the case and characteristics of the defendant himself," a trial court should "carefully consider defendant's education, family, employment history, general conduct, and any other relevant circumstances," (internal quotation marks omitted))." *Dallio v. Spitzer*, 343 F.3d 553, 563 (2nd Cir. 2003). Thus, the Second Circuit, similar to the First, appears not to have a set of queries or script to be followed either.

The Third Circuit has stated that, "[B]efore being permitted to waive the right to counsel in favor of self-representation, a defendant in a criminal prosecution must be made aware of the dangers and disadvantages

of proceeding pro se and must knowingly, intelligently, and voluntarily forego the benefits of representation by counsel. See *United States v. Manuel*, 732 F.3d 283, 290- 291 (3rd Cir. 2013), quoting *Faretta, at 835*, (citing *Johnson v. Zerbst*, 304 U.S. 458, 464–65, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). Recognizing the fundamental importance of this constitutional right, this Circuit stated that, "[I]n a criminal prosecution, the trial court bears "the weighty responsibility of conducting a sufficiently penetrating inquiry to satisfy itself that the defendant's waiver of counsel is knowing and understanding as well as voluntary.' " *United States v. Peppers*, 302 F.3d 120, 130–31 (3d Cir.2002). Thus, to assist in conducting the inquiry, that Circuit adopted questions derived from the Federal Judicial Center, Benchbook for U.S. District Court Judges § 1.02 (4th ed.2000), that it believed would be a useful framework for a court to assure itself that a defendant's decision to proceed pro se is knowing and voluntary. The queries adopted are:

> 1. Have you ever studied law?; 2. Have you ever represented yourself in a criminal action?; 3. Do you understand that you are charged with these crimes: [state the crimes with which the defendant is charged]?; 4. Do you understand that the U.S. Sentencing Commission has issued sentencing guidelines that will be used in determining your sentence if you are found guilty?; 5. Do you understand that if you are found guilty of the crime charged in Count 1, the Court must impose an assessment of $___, and could sentence you to as many as ___ years in prison and fine you as much as $ ___? [Ask defendant this question for each count

of the indictment or information.]; 6. Do you understand that if you are found guilty of more than one of these crimes, this Court can order that the sentences be served consecutively, that is, one after another?; 7. Do you understand that if you represent yourself, you are on your own? I cannot tell you —or even advise you — as to how you should try your case.; 7a. Do you know what defenses there might be to the offenses with which you are charged? Do you understand that an attorney may be aware of ways of defending against these charges that may not occur to you since you are not a lawyer? Do you understand that I cannot give you any advice about these matters?; 8. Are you familiar with the Federal Rules of Evidence?; 8a. Do you understand that the Federal Rules of Evidence govern what evidence may or may not be introduced at trial and that, in representing yourself, you must abide by those rules?; 9. Are you familiar with the Federal Rules of Criminal Procedure?; 9a. Do you understand that these rules govern the way a criminal action is tried in federal court? Do you understand that you must follow these rules?; 10. Do you understand that you must proceed by calling witnesses and asking them questions, and that, except when and if you yourself testify, you will not be permitted to tell the jury matters that you wish them to consider as evidence?; 10a. Do you understand that it may be much easier for an attorney to contact potential witnesses, gather evidence, and question witnesses than it may be for you?; 11. I must advise you that in my

> opinion a trained lawyer would defend you far better than you could defend yourself. I think it unwise of you to try to represent yourself. You are not familiar with the law. You are not familiar with court procedure. You are not familiar with the rules of evidence. I strongly urge you not to try to represent yourself.; 12. Now, in light of the penalties that you might suffer if you are found guilty, and in light of all of the difficulties of representing yourself, do you still desire to represent yourself and to give up your right to be represented by a lawyer?; 13. Are you making this decision freely, and does it reflect your personal desire?; and 14. Do you have any questions, or do you want me to clarify or explain further anything that we have discussed here?
>
> If the answers to the foregoing questions satisfy the court that the defendant knowingly and voluntarily desires to proceed pro se, the court would then state the necessary conclusions, such as: I find that the defendant has knowingly and voluntarily waived the right to counsel. I will therefore permit the defendant to represent himself (or herself).

United States v. Peppers, 302 F.3d 120, 136-137 (3d Cir.2002).

The Fifth Circuit has maintained that for self-representation, a defendant must "knowingly and intelligently" forego counsel, and the request to proceed pro se must be "clear and unequivocal." *Brown v.*

Wainwright, 665 F.2d 607, 610 (5th Cir.1982) (en banc). "In order to determine whether the right to counsel has been effectively waived, the proper inquiry is to evaluate the circumstances of each case, as well as the background of the defendant." *Wiggins v. Procunier*, 753 F.2d 1318, 1320 (5th Cir.1985). This Circuit has underscored various factors which are to be weighed in this process: The court must consider the defendant's age and education, see *Mixon v. United States*, 608 F.2d 588 (5th Cir.1979), and the defendant's background, experience, and conduct, see *Middlebrooks v. United States*, 457 F.2d 657 (5th Cir.1972). This Circuit has also stated that the court must ensure that the waiver is not the result of coercion or mistreatment of the defendant, see *Blasingame v. Estelle*, 604 F.2d 893 (5th Cir.1979), and that the court must be satisfied that the accused understands the nature of the charges, the consequences of the proceedings, and the practical meaning of the right he is waiving, see *United States v. Martin*, 790 F.2d 1215 (5th Cir. 1986).

Similar to the Third Circuit, the Sixth Circuit has adopted the model inquiry set forth in the Bench Book for District Judges. See *United States v. McBride*, 362 F.3d 360, 366 (6th Cir. 2004) ("whenever a district court in the Sixth Circuit is faced with an accused who wishes to represent himself, the court must ask the defendant a series of questions drawn from, or substantially similar to, the model inquiry set forth in the Bench Book for United States District Judges.").

The Seventh Circuit encourages courts to engage in a, "[T]horough and formal inquiry" that probes the defendant's age, education level, and understanding of the criminal charges and possible sentences, as well as

inform the defendant of the difficulties of proceeding pro se.", see *United States v. Sandles*, 23 F.3d 1121, 1126 (7th Cir. 1994), and maintains that a defendant's waiver of counsel must also be "unequivocal" meaning that, "[D]istrict courts must press difficult, hesitant, or ambivalent defendants to answer 'yes' or 'no' whether they wish to waive the right to counsel." *United States v. Campbell*, 659 F.3d 607, 612 (7th Cir. 2011).

The Tenth Circuit maintains that, "[A]n intelligent waiver turns not only on the state of the record, but on all the circumstances of the case, including the defendant's age, education, previous experience with criminal trials, and representation by counsel before trial." *United States v. Vann*, 776 F.3d 746, 763 (10th Cir. 2015). This Circuit has maintained, generally, that for a waiver to be valid, "[A] defendant must make his waiver with an understanding of "the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter.' " *United States v. Hansen*, 929 F.3d 1238, 1250 (10th Cir. 2019).

The foregoing illustrates the somewhat different approaches and queries encouraged and in use by the respective Circuits for answering the concern raised by Lenoir. While the approaches employed in the Third and Sixth Circuits adds some form of clarity, they may not adequately protect the finality interests at play in Lenoir's and similar proceedings. Consequently, there may be continued uneven approaches in determining whether a knowing, voluntary, and intelligent waiver has been made

by an accused which could potentially invite re-litigation of the circumstances without affording finality to the contours of what is an adequate *Faretta* hearing. In this manner, further review is appropriate in order to settle the issue nationally. *Sup. Ct. R. 10(a).*

FARETTA AND THE PSYCHOLOGICAL EVALUATION

A Psychological Evaluation Of A Defendant Needs To Be Part Of The Uniformed Standard That Circuits Need To Follow When Determining, During A *Faretta* Hearing, Whether Or Not A Defendant Knowingly, Voluntarily, And Intelligently Waives His Right To Counsel And Decides To Represent Himself

As stated above, *Faretta* holds that the Sixth and Fourteenth Amendments includes a constitutional right to proceed without counsel when a criminal defendant voluntarily and intelligently elects to do so. However, similar to not laying down detailed guidelines concerning tests or lines of inquiry by a trial judge, *Faretta*, likewise, did not consider the problem of mental competency (cf. 422 U.S., at 835, 95 S.Ct. 2525 (Faretta was "literate, competent, and understanding"), nor did it confer upon an incompetent defendant a constitutional right to conduct his own defense. However, this matter at bar may afford such an opportunity.

Lenoir maintains that the circumstances in this case should have led the [Montana] trial court to entertain a good faith doubt about his competency to make a voluntary, knowing, and intelligent waiver of constitutional rights,

and that the Due Process Clause, therefore, required the trial court to hold a an adequate *Faretta* hearing to evaluate and determine his competency before it accepted his decision to proceed pro se. See *Drope v. Missouri*, 420 U.S. 162, 180-181, 95 S.Ct. 896, 908, 43 L.Ed.2d 103 (1975) ("Trial courts have the obligation of conducting a hearing whenever there is sufficient doubt concerning a defendant's competence.").

Specifically, since Lenoir was facing a possible sentence of 100 years, had spoken with law enforcement without the benefit of counsel, somewhat admitted that he "raped" Devi, but also stating that it was not really rape because the two had dated before, this was all indicia that warranted a competency evaluation before allowing him to represent himself. In this manner, Lenoir opines that a defendant who represents himself must have greater powers of comprehension, judgment, and reason than would be necessary to stand trial with the aid of an attorney. Thus, the question is begged - what is the extent of an adequate *Faretta* hearing under the totality of circumstances attendant in Lenoir's matter and others similarly situated? In other words, should a psychological evaluation have been ordered and conducted in furtherance of Lenoir's *Faretta* hearing to determine whether he was making an informed decision to represent himself in accord with the Due Process clause? The answer, he surmises, is yes!

This Court has recognized that "a defendant's mental condition may be relevant to more than one legal issue, each governed by distinct rules reflecting quite different policies." See *Drope at 176*, and *Jackson v. Indiana*, 406 U.S. 715, 739, 92 S.Ct. 1845, 1858, 32 L.Ed.2d 435 (1972).

To this end, although the Court has not articulated explicitly the standard for determining competency to represent oneself, this Court has required competency evaluations to be specifically tailored to the context and purpose of a proceeding, and hinted at its contours in *Rees*, where it directed a lower court, "to determine petitioner's mental competence in the present posture of things." *Rees v. Peyton*, 384 U.S. 312, 314, 86 S.Ct. 1505, 1506, 16 L.Ed.2d 583 (1966).

In *Rees*, the Court required an evaluation of competence that was designed to measure the abilities necessary for a defendant to make certain relevant decisions. In that case, a capital defendant who had filed a petition for certiorari ordered his attorney to withdraw the petition and forgo further legal proceedings. The petitioner's counsel advised the Court that he could not conscientiously do so without a psychiatric examination of his client because there was some doubt as to his client's mental competency. Under those circumstances, this Court directed the lower court to conduct an inquiry as to whether the defendant possessed the "capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or, on the other hand, whether he was suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises." *Rees at 314*. Likewise, the Court has ruled that a defendant who had been found competent to stand trial with the assistance of counsel should have been given a hearing as to his competency to represent himself because, "[o]ne might not be insane in the sense of being incapable of standing trial, and yet lack the capacity to stand trial without the benefit of counsel." See *Massey v. Moore*, 348 U.S. 105, 108, 75 S.Ct. 145, 147, 99 L.Ed. 135 (1954).

This Court has stated that, "[I]n certain instances an individual may well be able to satisfy *Dusky's*[4] mental competence standard, for he will be able to work with counsel at trial, yet at the same time he may be unable to carry out the basic tasks needed to present his own defense without the help of counsel." See *Indiana v. Edwards*, 554 U.S. 164, 175 – 176, 128 S.Ct. 2379, 171 L.Ed.2d 345 (2008), directing to see e.g., N. Poythress, R. Bonnie, J. Monahan, R. Otto, & S. Hoge, Adjudicative Competence: The MacArthur Studies 103 (2002) ("Within each domain of adjudicative competence (competence to assist counsel; decisional competence) the data indicates that understanding, reasoning, and appreciation [of the charges against a defendant] are separable and somewhat independent aspects of functional legal ability"), and directing to see also *McKaskle v. Wiggins*, 465 U.S. 168, 174, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984) (Describing trial tasks as including organization of defense, making motions, arguing points of law, participating in voir dire, questioning witnesses, and addressing the court and jury.).

The *Edwards* Court also stated that, "Mental illness itself is not a unitary concept, it varies in degree and can vary over time. It interferes with an individual's functioning at different times in different ways." *Id., at 175*. *Edwards* pointed out that the American Psychiatric Association (APA) had informed it (without dispute) in its amicus brief filed in support of neither party that, "[D]isorganized thinking, deficits in sustaining attention and concentration, impaired expressive abilities, anxiety,

4. *Dusky v. United States*, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960).

and other common symptoms of severe mental illnesses can impair the defendant's ability to play the significantly expanded role required for self-representation even if he can play the lesser role of represented defendant."). *Id., at 176*.

Edwards also stated that, in its view, "[A] right of self-representation at trial will not "affirm the dignity" of a defendant who lacks the mental capacity to conduct his defense without the assistance of counsel. *Id*., and quoting *McKaskle*, at 176 - 177 ("Dignity" and "autonomy" of individual underlie self-representation right.). "To the contrary, given that defendant's uncertain mental state, the spectacle that could well result from his self-representation at trial is at least as likely to prove humiliating as ennobling. *Id., at 176*. "Moreover, insofar as a defendant's lack of capacity threatens an improper conviction or sentence, self-representation in that exceptional context undercuts the most basic of the Constitution's criminal law objectives - providing a fair trial. *Id., at 176, 177*. "As Justice Brennan put it, "[t]he Constitution would protect none of us if it prevented the courts from acting to preserve the very processes that the Constitution itself prescribes." (*Illinois v. Allen*, 397 U.S. 337, 350, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970) (concurring opinion))." *Id., at 177*.

In furtherance of its decision, *Edwards* directed to see *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist*., 528 U.S. 152, 162, 120 S.Ct. 684, 145 L.Ed.2d 597 (2000) ("Even at the trial level ... the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer."), *Id., at 177*, and *Sell v. United States*, 539 U.S.

166, 180, 123 S.Ct. 2174, 156 L.Ed.2d 197 (2003) ("[T]he Government has a concomitant, constitutionally essential interest in assuring that the defendant's trial is a fair one."), *Id., at 177*, and stated that "[P]roceedings must not only be fair, they must 'appear fair to all who observe them.' " *Wheat v. United States*, 486 U.S. 153, 160, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988). *Id., at 177.*

Using this analysis as a backdrop, Lenoir submits to this Court that in circumstances similar to his, and, for that matter, concerns that others similarly situated may face regarding competence to represent themselves, it is best to have one undergo a psychological evaluation in order to protect one's self from his desires. Indeed, a person may appear lucid and articulate, and be able to answer basic questions intelligently and without deep introspective thought, while still suffer from mental infirmities that only the trained professional would be able to detect through observation and evaluation. In this manner, it is thusly opined that a psychological evaluation is necessary in the grand scheme of an adequate *Faretta* hearing when circumstances emerge as evidenced by one's actions and behavior that boarders on irrational thought and delusion that crosses the threshold of reality and realism.

CONCLUSION

This Court has a special responsibility to superintend the administration of justice which includes promulgating uniformed rules that encourage fair and adequate *Faretta* hearings so that defendants can make an assured knowing, voluntary, and intelligent decision as to whether to waive rights to counsel and proceed in matters pro se. To this

end, and for the foregoing reasons, Petitioner respectfully requests that this High Court grant review of this matter.

Respectfully submitted,

Athill Muhammad, Esq.
Counsel of Record
P. O. Box 8493
Houston, Texas 77288
(713) 807-8167
amuhammadlaw@aol.com

Counsel for Petitioner

Dated: January 9, 2023

APPENDIX

TABLE OF APPENDICES

Page

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED AUGUST 25, 2022

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22-35280

D.C. No. 9:19-cv-00191-KLD
District of Montana, Missoula

JASON DEVON LENOIR,

Petitioner-Appellant,

v.

LYNN GUYER; ATTORNEY GENERAL
FOR THE STATE OF MONTANA,

Respondents-Appellees.

ORDER

Before: SILVERMAN and M. SMITH, Circuit Judges.

The request for a certificate of appealability (Docket Entry Nos. 2, 3, and 4) is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, MISSOULA DIVISION, FILED MARCH 4, 2022

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

Cause No. CV 19-191-M-KLD

JASON DEVON LENOIR,

Petitioner,

vs.

LYNN GUYER; ATTORNEY GENERAL
OF THE STATE OF MONTANA,

Respondents.

ORDER

Petitioner Jason Devon Lenoir initially filed a petition seeking a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in November of 2019. Given concerns the Court had surrounding his filing, counsel was appointed to represent Mr. Lenoir and investigate his claims. See generally, (Doc. 4.)

On March 29, 2021, Petitioner, through counsel, filed an Amended Petition. (Doc. 9.) In his petition, Mr. Lenoir raised one claim: his Sixth Amendment right to counsel was violated when the trial court did not ensure that he knowingly, voluntarily, and intelligently waived his right

to counsel in violation of *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). *Id.* at 24-29. Mr. Lenoir does not dispute that this claim is procedurally defaulted but believes he can establish cause and prejudice to excuse the default. *Id.* at 19-24.

The Respondents were directed to file an Answer and timely did so. See, (Docs. 10 &14.) In their response, Respondents contend Mr. Lenoir's *Faretta* claim is unexhausted and procedurally defaulted and that he cannot demonstrate a valid basis to set aside the default. (Doc. 14 at 31-43.) Respondents assert the *Faretta* claim also fails on its merits. *Id.* at 44-58.

Generally, federal courts will not hear defaulted claims unless the petitioner can demonstrate cause for his noncompliance and actual prejudice or establish that a miscarriage of justice would result from the lack of review. See, *Schlup v. Delo*, 513 U.S. 298, 321, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995); see also, *McKinney v. Ryan*, 730 F.3d 903, 913 (9th Cir. 2013). But this Court is empowered to bypass a procedural default issue in the interest of judicial economy when the claim clearly fails on the merits. See, *Flournoy v. Small*, 681 F. 3d 1000, 1004 n. 1 (9th Cir. 2012); see also, *Franklin v. Johnson*, 290 F. 3d 1223, 1232 (9th Cir. 2001); *Lambrix v. Singletary*, 520 U.S. 518, 525, 117 S. Ct. 1517, 137 L. Ed. 2d 771 (1997) (noting that, in the interest of judicial economy, courts may proceed to the merits, in the face of procedural default issues).

Upon a review of the record before the Court, it appears Mr. Lenoir has failed to establish adequate cause

and prejudice to excuse the default of his *Faretta* claim. But at this juncture, it is more efficient to proceed to the merits of the claim. As explained herein, the claim lacks merit and will be denied.

Both parties have consented to proceed before the undersigned for all purposes. See, 28 U.S.C. § 636(c).[1] Further, because Mr. Lenoir's federal claim was not adjudicated on the merits in the state court, this Court reviews the claim de novo. See, *Runningeagle v. Ryan*, 825 F. 3d 970, 978 (9th Cir. 2016); see also, *Cone v. Bell*, 556 U.S. 449, 472, 129 S. Ct. 1769, 173 L. Ed. 2d 701 (2009).

I. Background

The procedural history of this matter has been set forth at length in a prior order of the Court. See, (Doc. 4 at 1-5.) The pertinent background is summarized below and additional factual development will be included as necessary.

On November 1, 2016, Lenoir was arraigned on counts of Sexual Intercourse without Consent, Burglary, and Violation of an Order of Protection, in Montana's Fourth Judicial District Court, Missoula County. See, (Doc. 14-2); see also, (Doc. 14-3.) A jury trial was set for Monday April 10, 2017. From the outset of the proceedings Mr. Lenoir was represented by Reed Mandelko from the Missoula Office of the State Public Defender. (Doc. 14-3.) On February 1, 2017, Mr. Lenoir filed a motion, through

1. See also, (Doc. 16.)

counsel, requesting he be able represent himself. (Doc. 14-5.) On February 21, 2017, a hearing was held on Mr. Lenoir's motion. See generally, 2/21/17 Hrg. Trns. (Doc. 14-44.) At the conclusion of the hearing, Mr. Lenoir was allowed to proceed pro se and Mr. Mandelko was appointed as stand-by counsel.

It appears that Mr. Lenoir's decision to represent himself was not a result of difficulty with Mr. Mandelko.[2] To the contrary, Mr. Mandelko regularly communicated with Lenoir and supplied him with books and other materials prior to trial. See e.g., (Doc. 14-1 at Filing Nos. 30, 37, 40, and 53.) Mr. Mandelko apparently advised Mr. Lenoir of his belief that it was a difficult case and Mr. Lenoir likely would not be successful at trial, based upon the facts of the matter and an incriminating interview Mr. Lenoir gave to law enforcement. See e.g., Or. (Doc. 14-29 at 15-16)(citing 4/16/18 Hrg. Trns.). Mr. Lenoir acknowledged he was aware of his right to counsel throughout the proceedings, but that it was his desire to represent himself. *Id.* at 16. The original April 2017 trial date was continued to allow Mr. Lenoir adequate time to prepare his defense.

Prior to trial, Mr. Lenoir filed various documents pro se, including a motion *in limine*, a motion challenging application of Montana's Rape Shield Law, motions to compel discovery, responses to the State's motions, jury instructions, and objections to the State's proposed

2. See e.g., (Doc. 14-44 at 8:6-12)(Lenoir advised the trial court he was not seeking substitute counsel, but rather wanted to represent himself); see also, *id.* at 15:4-7; 16:2-3.

instructions. See e.g., (Doc. 14-1 at Filing Nos. 24, 38, 50, 52, 61, 70, and 71.) Prior to trial, Mr. Lenoir also filed a writ of supervisory control with the Montana Supreme Court challenging the trial court's denial of his motion in limine and setting forth parameters surrounding the questioning of the complaining witness. The petition was ultimately denied. See, *Lenoir v. 4th Jud. Dist. Ct.*, 389 Mont. 541, 403 P.3d 1239, 2017 WL 8727832, at *1 (Mont. 2017).

Mr. Lenoir's trial began on August 4, 2017. On the second day of trial, upon the arrival of the complaining witness, D.T., in the courtroom, Mr. Lenoir made an inquiry to the prosecution to see if a prior plea offer was still available. The trial proceedings were suspended while Mr. Lenoir, with assistance from Mr. Mandelko, engaged in plea discussions. Mr. Lenoir ultimately pled guilty to Sexual Intercourse without Consent; in exchange the two remaining counts were dismissed. See e.g., (Doc. 14-29 at 11-14)(summarizing prior proceedings). The district court accepted Mr. Lenoir's guilty plea and the jury was dismissed from the courtroom. A condition of the plea agreement was that the parties' recommendation was not binding upon the court. See, Plea Agreement (Doc. 14-22 at 2); see also, 8/7/17 Hrg. Trns. (Doc. 14-48 at 6-7) (court advised parties it would not accept an appropriate disposition plea agreement).

Following the change of plea hearing, Mr. Lenoir requested that Mr. Mandelko be reinstated as his attorney. See, 8/7/17 Hrg. Trns. (Doc. 14-48 at 30:11-23.) Prior to sentencing, Mr. Mandelko filed a Notice advising the court that Mr. Lenoir wished to withdraw his guilty

plea. (Doc. 14-23.) The parties briefed the issue and during this period Mr. Lenoir was appointed new counsel, Leta Womack of the Missoula Conflict Office of the State Public Defender. See, (Docs. 14-26, 14-27, and 14-28.)

Mr. Lenoir generally argued that due to his autism and the stress of trial preparation, he did not recall entering his plea of guilty or the impact of that decision, thus, asserting his guilty plea was not voluntary or entered knowingly and intelligently. See e.g., (Doc. 14-26 at 3-4.)[3] Notably, Mr. Lenoir argued that it was always his intention to proceed to trial and that he "even request[ed] that his then stand-by counsel print out caselaw two days before trial commenced [and he] practic[ed] voir dire and argument with standby counsel," and that these acts demonstrated his "consistent desire and preparation" to try his case to the jury. (Doc. 14-26 at 3.)

On April 16, 2018, the Court held a hearing on Mr. Lenoir's motion to withdraw. See generally, 4/16/18 Hrg. Trns. (Doc. 14-43.) At that hearing, Clinical Psychologist Laura Kirsch testified, as did Mr. Lenoir. *Id.* Of note, Dr. Kirsch believed Mr. Lenoir did not have autism, *id.* at 13:17-18; see also, *id.* at 26-27, but that he may have begun developing a psychotic disorder triggered by prior drug use. *Id.* at 27-28. The trial court also discussed the sequence of events leading up to Mr. Lenoir's change of plea with Dr. Kirsch, including his self-representation and participating in the first day of trial. Dr. Kirsch opined

3. Mr. Lenoir also raised a speedy trial claim, that is not pertinent to the instant proceedings. See e.g., (Doc. 14-26 at 7-8.)

that Mr. Lenoir is of average intelligence and that there was nothing about any of the proceedings that suggested he could not grasp or understand what was occurring. *Id.* at 30-31.

The trial court denied Mr. Lenoir's motion to withdraw and the matter proceeded to sentencing. See, (Doc. 14-29 & 14-31.) At the sentencing hearing, the Court declined to follow the parties' recommendations and committed Mr. Lenoir to the Montana State Prison for 70 years. See, Judg. (Doc. 14-32); see also, 5/7/18 Hrg. Trns. (Doc. 14-46 at 8-13.) Following review of his sentence, the Montana Sentence Review Division of the Montana Supreme Court reduced Mr. Lenoir's prison sentence from 70 to 50-years. See, SRD Ord. (Doc. 14-39.)

II. Analysis of *Faretta* claim

The Sixth Amendment of the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. The Sixth Amendment affords a criminal defendant the right to be represented by counsel at critical stages of the prosecution *and* the right to self-representation at trial See, *Faretta*, 422 U.S. at 807, 819; see also, *United States v. Farias*, 618 F. 3d 1049, 1051 (9th Cir. 2010)(observing not only the right to counsel under the Sixth Amendment, but also the converse right to proceed without counsel). Specifically, *Faretta* held, without qualification, that a defendant who makes an unequivocal and timely request to represent himself has a Sixth Amendment right to self-

representation, and that a denial of self-representation, in the face of such a request, is a violation of that right. 422 U.S. at 835-36.

In order to validly waive the right to counsel, a defendant "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" *Id.* at 806, citing *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279, 63 S. Ct. 236, 87 L. Ed. 268 (1942). A defendant who elects to forgo representation must do so knowingly and intelligently. *Faretta* at 835, citing *Johnson v. Zerbst*, 304 U.S. 458, 464-65, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938). While a defendant must be warned of the dangers and disadvantages of self-representation, the Supreme Court has not "prescribed any formula or script to be read to a defendant who states that he elects to proceed without counsel." *Iowa v. Tovar*, 541 U.S. 77, 88, 124 S. Ct. 1379, 158 L. Ed. 2d 209 (2004); see also, *McCormick v. Adams*, 621 F. 3d 970, 977 (9th Cir. 2010)(no "meticulous litany" that must be employed by a trial court in relation to a *Faretta* waiver); see also, *United States v. French*, 748 F. 3d 922, 929 (9th Cir. 2014)(noting there is no "set formula or script"). "[T]he law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply in general in the circumstances-even though the defendant may not know the *specific detailed* consequences in invoking it. *Tovar*, 541 U.S. at 92 (quoting *United States v. Ruiz*, 536 U.S. 622, 629, 122 S. Ct. 2450, 153 L. Ed. 2d 586 (2002)(emphasis in original). Finally, it is the criminal defendant's burden

to prove that he "did not competently and intelligently waive" his right to the assistance of counsel. *Id.*

Mr. Lenoir argues that although the trial court did hold a hearing and engaged in a colloquy regarding his rights and the waiver of counsel, the colloquy was insufficient because the trial court did not adequately advise him of the dangers of self-representation. See, (Doc. 9 at 28-30.) Mr. Lenoir points to the suggested script the Ninth Circuit formulated and set out in *United States v. Hayes*, 231 F. 3d 1132, 1138-39 (9th Cir. 2000),[4] and asserts that the colloquy provided by the trial court

4. Specifically, the Circuit has suggested that district courts provide defendants with the following instruction during a *Faretta* hearing:

> The court will now tell you about some of the dangers and disadvantages of representing yourself. You will have to abide by the same rules in court as lawyers do. Even if you make mistakes, you will be given no special privileges or benefits, and the judge will not help you. The government is represented by a trained, skilled prosecutor who is experienced in criminal law and court procedures. Unlike the prosecutor you will face in this case, you will be exposed to the dangers and disadvantages of not knowing the complexities of jury selection, what constitutes a permissible opening statement to the jury, what is admissible evidence, what is appropriate direct and cross examination of witnesses, what motions you must make and when to make them during the trial to permit you to make post-trial motions and protect your rights on appeal, and what constitutes appropriate closing argument to the jury.

Hayes, 231 F.3d at 1138-39

did not meet these requirements. But Mr. Lenoir also acknowledges that the *Hayes* instruction is not meant to be mandatory or to be followed verbatim. (Doc. 9 at 29.) Specifically, Mr. Lenoir argues he should have been informed that he would face an experienced and skilled prosecutor and that he should have been warned about the difficulties he would encounter during jury selection and during the examination of witnesses, in addition to other complex tasks that would need to be undertaken throughout trial. See, (Doc. 17 at 7.)

In response, Respondents argue that *Faretta* and its progeny do not require any particular colloquy regarding the "dangers and disadvantages" of self-representation. (Doc. 14 at 46-47.) Particularly, Respondents point out that a specific colloquy regarding the dangers and disadvantages is not mandated by *Faretta* and such a procedural framework cannot be imposed upon the state courts because it is not compelled by the constitution. *Id.* at 47, citing, *Lopez v. Thompson*, 202 F. 3d 1110, 1117 (9th Cir. 2000)(en banc), *cert. denied*, 531 U.S. 883, 121 S. Ct. 198, 148 L. Ed. 2d 138 (2000). Further, Respondents assert the colloquy in which the trial court engaged in satisfied *Faretta's* requirements and sufficiently demonstrated that Mr. Lenoir's waiver of counsel was unequivocal and made voluntarily and intelligently. *Id.* at 48-50. Respondents argue the trial court properly applied and incorporated the Montana Supreme Court's decisions adopting the rule of *Faretta* into the hearing on Lenoir's motion to proceed pro se. *Id.* at 50-51. Finally, Respondents claim that even though the trial court did not need to advise Mr. Lenoir of the specific and particular dangers and disadvantages

of self-representation, the record establishes it did so, nonetheless. *Id.* at 52-57.

The Court agrees with Respondents. This court may entertain a petition for writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). As set forth above, *Faretta* mandated no specific litany or formula to ensure that waiver of counsel are knowing and intelligent, rather the decision provides that in order to "knowingly and intelligently" relinquish the benefit of representation by counsel, a defendant "should be made aware of the dangers of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with open eyes.'" *Lopez*, 202 F. 3d at 1117 (quoting *Faretta*, 422 U.S. at 835.) The Ninth Circuit has held, in the context of a petitioner convicted in state court seeking federal habeas relief, that: "[n]either the Constitution nor *Faretta* compels the district court to engage in a specific colloquy with the defendant. Because we cannot impose a procedural framework on state courts unless compelled by the Constitution, we need not address whether the suggested colloquy was followed here." *Lopez*, 202 F. 3d at 1117 (citing *Smith v. Phillips*, 455 U.S. 209, 221, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982)("Federal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension.")).

Lopez, like the instant case, was brought under Section 2254. The Circuit found that in this particular

context a federal habeas court need only consider whether the state trial court made the defendant "aware of the dangers and disadvantages of self-representation. *Lopez*, 202 F.3d at 1117 (quoting *Faretta*, 422 U.S. at 835). Or, as Mr. Lenoir concedes, there is no constitutional mandate requiring state courts to provide a more in-depth colloquy such as that suggested by *Hayes*. The Circuit additionally construed *Faretta* as a rule of general application requiring examination of the "record as a whole" in analyzing the § 2254 claim. *Id.* at 1118; *see also Edwards v. Arizona*, 451 U.S. 477, 482, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981) (determination that a waiver was knowingly and intelligently made "depends in each case upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused"; (citations and quotations omitted); *McCormick v. Adams*, 621 F.3d 970, 979 (9th Cir.2010) ("a defective waiver colloquy will not necessitate automatic reversal when the record as a whole reveals a knowing and intelligent waiver") (citation and internal quotations omitted). When reviewing the record as a whole, it is apparent that Mr. Lenoir not only wanted to waive his right to counsel, but also understood the risks of doing so.

The trial court began its hearing on Mr. Lenoir's motion to proceed pro se by advising Mr. Lenoir that he would be asked a series of questions because "the U.S. Supreme Court and the Montana Supreme Court require that I make sure you understand the obstacles in representing yourself." (Doc. 14-44 at 5:1-4.) It is undisputed that the court advised Mr. Lenoir of the charges and maximum penalties; confirmed he was not

under the influence of any substances or suffering from any mental or physical disabilities; and, established that he could read and write and had graduated from high school and completed some college. See, *Id.* at 14-15, 17. In response to the court's questioning, Mr. Lenoir advised that "of course" he knew he had the right to an attorney. *Id.* at 15:4-7.

The Court further advised Mr. Lenoir that he would be expected to follow the rules of evidence and would be responsible for making timely objections. *Id.* at 5:5-13. Mr. Lenoir indicated he understood he would be required to comply. *Id.* Upon Mr. Lenoir's inquiry, the court agreed to provide him access to the law library at the jail. *Id.* at 5-6. The court informed Mr. Lenoir that he would have to follow the same rules of courtroom decorum expected of everyone else, and that if he became frustrated for not knowing a rule of law, he could request the assistance of standby counsel, but that he could not be disruptive. *Id.* at 7. Mr. Lenoir was advised he would need to prepare his own jury instructions; he indicated he understood the requirement. *Id.* at 8-11. The court explained the parameters surrounding closing arguments. *Id.* at 11-12. Mr. Lenoir indicated he did not fully appreciate the nuances involved but indicated "with the help of the law library and the resources" he had, he would be ready for trial. *Id.* at 12:11-14. Mr. Lenoir stated he understood he had the right to testify in his own defense. *Id.* at 15-17. The court also informed Mr. Lenoir that it could not provide him with legal advice and would have to treat him as an attorney; Mr. Lenoir stated he understood. *Id.* at 17:3-15. Following this colloquy, Mr. Lenoir affirmatively endorsed

that he was waiving his right to counsel. *Id.* at 18:19-22. Upon the court agreeing to allow Mr. Mandelko to act as standby counsel, Mr. Lenoir verified he was waiving his right to counsel voluntarily and intelligently. *Id.* at 18-19. Mr. Lenoir was also advised that he would not be able to raise a claim of ineffective assistance of counsel against Mr. Mandelko. *Id.* at 19:9-16.

Implicit in this entire exchange between the trial court and Mr. Lenoir was the fact that Mr. Lenoir would be facing the State and its prosecutor and would be doing so pro se. And although the court did not specifically discuss voir dire or the examination of witnesses, it did inform Mr. Lenoir: he would be expected to follow the technical and substantive rules of law and evidence, he would need to prepare jury instructions, he would have to make a decisions regarding whether or not to testify on his own behalf, he would have to decide what to include in his arguments to the court and jury, and he would be required to make timely challenges to proffered evidence. Further, Mr. Lenoir was informed he would not receive special treatment or assistance from the court and would have to follow the same rules and requirements as any attorney. Accordingly, the colloquy in question adequately ensured Mr. Lenoir made the decision to represent himself knowingly and intelligently "with awareness of the dangers and disadvantages of self-representation." See, *Faretta*, 422 U.S. at 835.

Further, at the hearing surrounding the voluntariness of Mr. Lenoir's guilty plea, there was no indication that he did not understand or appreciate the associated difficulties of self-representation, nor did he express a desire to have

counsel reappointed at any time prior to the entry of his guilty plea. For example, the following exchange occurred:

> Q: And so is it fair to say that you were incarcerated on September 20th, 2016, and on February 21st of 2017, you petitioned the court to represent yourself?
>
> A: Yes, ma'am.
>
> Q: And you decided that that's what you wanted to do, correct?
>
> A: Yes, ma'am.
>
> Q: And at the same time, you requested a continuance of the trial date, which, at that point, was April 10th of 2017, so that you would have a chance to prepare your case for trial.
>
> A: Yes, ma'am.

(Doc. 14-43 at 50:7-25 to 51:1-6.) Mr. Lenoir explained the steps he took to prepare for trial which included legal research at the law library, preparing motions, petitioning the Montana Supreme Court, and consulting with Mr. Mandelko regarding trial preparation. *Id.* at 51-55, 66, 71-72, and 78. Both the trial court and the prosecution noted Mr. Lenoir filed competent and in-depth motions and briefs in support. See, *Id.* at 32:18-22; 40:5-6; 66:12; 69:15-23; 71:23-24; 72:21-23; 78:17-18; 79:6-7, and, 84:14-15 Mr. Lenoir also acknowledged he was aware of his right to

counsel, but that it was his wish, throughout the pendency of the proceedings, to represent himself. *Id.* at 73: 10-21.

There is nothing in the record before this Court to suggest that at any time following his *Faretta* hearing, Mr. Lenoir expressed ambivalence or confusion regarding his waiver of counsel. The record before this Court reveals that Mr. Lenoir competently and intelligently waived his right to counsel. Accordingly, he cannot meet his burden of establishing a constitutional violation occurred. The petition will be denied.

III. Certificate of Appealability

"The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Rule 11(a), Rules Governing § 2254 Proceedings. A COA should issue as to those claims on which the petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The standard is satisfied if "jurists of reason could disagree with the district court's resolution of [the] constitutional claims" or "conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003) (citing *Slack*, 529 U.S. at 484).

Lenoir has not made a substantial showing that he was deprived his Sixth Amendment right to counsel. Accordingly, there are no close questions and there is no reason to encourage further proceedings in this Court. A certificate of appealability is denied.

Based on the foregoing, the Court enters the following:

ORDER

1. The Amended Petition (Doc. 9) is denied for lack of merit.

2. The Clerk of Court is directed to enter by separate document a judgment in favor of Respondents and against Petitioner.

3. A certificate of appealability is DENIED.

DATED this 4th day of March, 2022.

/s/ Kathleen L. DeSoto
Kathleen L. DeSoto
United States Magistrate Judge

APPENDIX C — RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS STATUTORY AND CONSTITUTIONAL AUTHORITY INVOLVED

This matter involves the Sixth Amendment to the United States Constitution, the Eighth Amendment to the United States Constitution, the Fourteenth Amendment to the United States Constitution, Title 28 United States Code Section 2253 – Appeal, and Title 28 United States Code Section 2254 - State Custody.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U. S. CONST. amend VI.

The Eighth Amendment to the United States Constitution provides:

Appendix C

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U. S. CONST. amend VIII.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U. S. CONST. amend XIV.

28 U.S.C. §2253, states:

> (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
>
> (b) There shall be no right of appeal from a final order in a proceeding to test the validity of a

warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from-

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2). *28 U.S.C. §2253.*

28 U.S.C. §2254, states:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to

the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that-

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts

of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court

proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that-

(A) the claim relies on-

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by

order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

28 U.S.C. §2254.