No. 14-1763

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

LADERIAN MCGHEE,
Petitioner-Appellant,

v.

MICHAEL A. DITTMANN, Warden,
Respondent-Appellee.

Appeal from the United States District Court
for the Eastern District of Wisconsin
Case No. 2:12-cv-00320-NJ
The Honorable Nancy Joseph, United States Magistrate Judge

BRIEF AND CIRCUIT RULE 30(a) APPENDIX FOR PETITIONER-APPELLANT LADERIAN MCGHEE

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ORAL ARGUMENT REQUESTED

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Appellate Court No: 14-1763

Short Caption: McGhee v. Dittmann

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The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Laderian McGhee

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Mayer Brown LLP (James Tierney and Charles Rothfeld).

The following information is new: Mr. McGhee was represented in the Wisconsin state courts by attorneys Richard E. Thomey II, Timothy A. Provis, James R. Lucius, Bradley J. Lochowicz, and Amelia L. Bizarro.

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

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Attorney's Signature: s/ James F. Tierney Date: 1/26/2015

Attorney's Printed Name: James F. Tierney

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

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INTRODUCTION

This case is an appeal from the denial of a petition for a writ of habeas corpus. Before his state trial began, Petitioner-Appellant Laderian McGhee repeatedly sought to discharge his appointed defense counsel, and asked that he be permitted to respond to the state's case by "speak[ing] up for [him]self." The trial court denied the motion for withdrawal of counsel, and did not address McGhee's request for self-representation. Even though the trial court thereby violated the Sixth Amendment, McGhee's appellate counsel did not pursue that argument in his direct appeal. The Wisconsin Court of Appeals denied McGhee's subsequent claim that appellate counsel was ineffective in failing to do so, reasoning that McGhee had not sufficiently invoked his right of self-representation.

The district court should have granted the writ of habeas corpus, because the state court of appeals committed several objectively unreasonable errors. It erred at the outset by unreasonably applying *Faretta v. California*, 422 U.S. 806 (1975), in which the Supreme Court warned that technical legal knowledge is irrelevant to whether a criminal defendant may be permitted to represent himself. The only basis for the state court of appeals' conclusion would be that McGhee did not use magic words like "pro se" in making his request, but such a rule is flatly inconsistent with *Faretta*. The court of appeals also erred in a different way: by that McGhee had not clearly and unequivocally sought self-representation, the state court unreasonably determined the facts in light of the record before the trial court, which confirms that McGhee had sought to discharge his attorney and proceed alone. Because the state court of appeals committed unreasonable error in deciding McGhee's underlying

self-representation claim, it could not have reasonably denied McGhee's claim that appellate counsel was ineffective for failing to raise the argument. McGhee's federal habeas petition should be granted.

JURISDICTIONAL STATEMENT

McGhee filed a *pro se* petition for a writ of habeas corpus in the United States District Court for the Eastern District of Wisconsin pursuant to 28 U.S.C. § 2254. R. 1.[1] At the time, McGhee was in the custody of the Wisconsin Department of Corrections at the Columbia Correctional Institution in Portage, Wisconsin, where he remains incarcerated today.[2] McGhee consented to the entry of final judgment by a magistrate judge on April 5, 2014 (R. 5), and Respondent provided his consent on July 10, 2012 (R. 12). The court had jurisdiction over McGhee's petition pursuant to 28 U.S.C. §§ 1331 and 2254.

The district court entered judgment on February 19, 2014. A1. McGhee filed a timely notice of appeal on March 10, 2014. R. 41; *see* Fed. R. App. P. 4(a)(1)(A), (7)(A). On April 4, 2014, this Court dismissed that appeal because McGhee did not timely pay the docketing fee. R. 48. But on March 19, 2014, McGhee had placed in the Columbia Correctional Institution's mail system another notice of appeal, application for certificate of appealability, and application to proceed *in forma*

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[1] In record citations, "A__" refers to page numbers in the Circuit Rule 30(a) Appendix attached to this brief. "SA__" refers to page numbers in the Circuit Rule 30(b) Separate Appendix filed concurrently with this brief. "R. __" refers to entries on the district court's docket. "Doc. __" refers to entries on this Court's docket.

[2] When McGhee filed his petition, the named respondent, Michael Meisner, was the Warden at that facility. Respondent-Appellee Michael Dittmann has since replaced Meisner as Warden, and has therefore been substituted in the caption. *See* Fed. R. Civ. P. 25(d); Fed. R. App. P. 43(c)(2).

pauperis; these documents never left the institution's mail system, however, and they were returned to McGhee. Consistent with the prison-mailbox rule, McGhee again filed these documents on April 3, 2014, by delivering them to the institution's mail system; they were not docketed until April 9, 2014. R. 58 at 1-2; *see* R. 51-1. This Court suspended briefing, reasoning that the second notice of appeal was untimely. Doc. 2. The district court construed McGhee's April 3 explanation for the delay (R. 51-1) as a motion for extension of time to file his notice of appeal, which it granted on April 15, 2014. R. 58 at 2. It also granted leave to proceed in forma pauperis. R. 60. This Court then lifted its suspension order. Doc. 6.

McGhee filed a brief (Doc. 11) that this Court construed as an application for a certificate of appealability, which it granted and issued as to McGhee's claim that the Wisconsin state courts denied him "his constitutional right to self-representation" (Doc. 19). Because this appeal is from a final judgment that disposes of all parties' claims and this Court issued a certificate of appealability, this Court has jurisdiction over McGhee's appeal under 28 U.S.C. §§ 1291 and 2253(c).

STATEMENT OF THE ISSUES PRESENTED

In *Faretta v. California*, 422 U.S. 806 (1975), the Supreme Court held that once a criminal defendant clearly and unequivocally asserts a desire to waive assistance of counsel and represent himself, a court must grant the request if a colloquy with the defendant confirms that the waiver is knowing and voluntary. McGhee repeatedly requested that his counsel be allowed to withdraw, so that he could "speak for himself." The trial court failed to conduct a *Faretta* colloquy.

McGhee's state *habeas* petition claimed ineffective assistance of appellate counsel for failing to raise the *Faretta* claim. The state court of appeals rejected the claim that appellate counsel was ineffective, reasoning that McGhee had not sufficiently asserted his *Faretta* rights in the trial court.

The question presented is whether the Wisconsin court's decision that McGhee had not clearly and unequivocally asserted his desire to represent himself was an unreasonable application of clearly established federal law, or was based on an unreasonable determination of the facts.

STATEMENT OF THE CASE

A. McGhee's Trial.

In the early morning hours of April 9, 2004, two adults were approached on the street in Milwaukee, Wisconsin, and their purses were taken from them. A vehicle was also taken from the street and driven to another location. Police arrested McGhee in connection with the offenses. R. 17 at 32-34 (criminal complaint).

Laderian McGhee was brought to trial before the Circuit Court of Wisconsin for Milwaukee County in August 2004. After a four-day trial, a jury found McGhee guilty of armed robbery with threat of force (Wis. Stat. § 943.32(2)), theft of movable property from a person (*id.* § 943.20(1)(a)), and driving or operating vehicle without the owner's consent (*id.* § 943.23(3)). R. 20 at 326; *see also* R. 17 at 37-39. The prosecution's primary evidence in the case was testimony by the three victims. R. 20 at 209-239. Three police officers also testified about their involvement in the

investigation of those crimes and in McGhee's apprehension. R. 20 at 149; *see id.* at 158-89, 197-209.

Appointed counsel, Richard E. Thomey II, represented McGhee in the trial despite McGhee's and counsel's requests that he be permitted to withdraw, and despite McGhee's repeated requests to represent himself.

1. The morning that *voir dire* was set to begin, McGhee and counsel asked the court that counsel be allowed to withdraw. *See* SA46, 48, 52. Several days earlier, McGhee had advised defense counsel that he wished to present an alibi defense. SA43-44. At a hearing that morning, counsel explained that "Mr. McGhee advised me this morning that ***he wished to discharge me as his attorney***"; as a result, counsel had "prepared" and "filed" a "motion to withdraw." SA45-46 (emphasis added).

To assist the defense that McGhee wanted to present, counsel asked that the "15-day rule for the filing of alibi notices" be waived. SA44. He told the court that he had not been aware that McGhee wanted to present an alibi defense, and that they had met "[a]bout four [times] face-to-face." SA44. McGhee disputed the number of times they had met (SA44-46), and the court directed McGhee to "sit there" and "be quiet" (SA45). When given a chance to speak, McGhee stated that in the two times he had met with defense counsel, they "had no conversation about what my defense would be or he had no defense for me." SA46. Although McGhee had insisted on putting the government to its proof at trial, he said, the "[o]nly thing" defense

counsel had "been talking about is getting a plea." SA47. He told the court that his appointed counsel was "not in my best interest whatsoever." SA47.

Turning to the motion to withdraw, defense counsel explained that McGhee's request was a basis for termination under the applicable rules. He explained that he disagreed with McGhee's proposed defense, and described it as "imprudent" and having raised "certain ethical problems." SA48. The court denied the withdrawal motion, reasoning that "[a]t this point the matter is set for trial," the case was old, and the witnesses were ready for trial. SA50. The court also denied the motion to waive the rule requiring notice for an alibi defense. SA50-51.

After the court ruled on the withdrawal motion, McGhee sought to speak:

The Defendant: Okay. Can I speak now, Your Honor?

The Court: I've addressed all of those issues.

The Defendant: Okay. Well, first of all, the man never — my attorney never asked me about no alibi. So how can I address him with my alibi if I never even seen him? I called his office several times. He doesn't return my phone calls to come see me. How can I tell him I have a alibi if I can't get in touch with him? I'm in the prison. I'm incarcerated. He's my attorney. He supposed to come see me. He doesn't come see me.

Second of all, for him to sit up here and say something about my witnesses as far as perjury or anything of that nature, that's a bunch of BS also. I don't know where that came from. And for you to sit up and try to tell me this man going to be my attorney 'cause of the 15 day thing, the man didn't tell me nothing about that. ***I'm withdrawing him as my attorney. That's the bottom line of that***.

The Court: All right. You wanted me to discharge him. Do you understand today we're going to trial today?

The Defendant: We — I ain't going to no trial today.

The Court: We're going to trial.

The Defendant: You might be going to trial. I ain't.

SA51-52 (emphasis added).

Defense counsel renewed the motion to withdraw, "asking the Court to reconsider" its earlier denial. SA53. McGhee again said that his counsel "***ain't got my best interest at heart***," and that he didn't want to "go to trial with a man who already got me convicted before the damn jury even get in." SA53 (emphasis added). To give McGhee the "opportunity to calm down," the court ordered him "remove[d] . . . from the courtroom," explaining that he could return "before the jury comes back." SA53. Immediately before recessing prior to *voir dire*, the court directed defense counsel to "go back and talk to your client and again try and get him to cooperate and come back into the courtroom." SA55-56.

2. During *voir dire*, McGhee again stated that he did not want defense counsel to represent him, and instead wished to speak on his own behalf. After counsel told prospective jurors that McGhee would be the only defense witness, McGhee asked, "[w]hat happened to my [alibi] witnesses?" SA57. He continued: "[M]y witnesses can't come, ***you won't let me fire my attorney***. My attorney done tried to withdraw his self from the case, and you steady trying to make me go through with this case." SA58 (emphasis added).

Shortly afterward, McGhee explained to the court that counsel "told you he is not trying to defend," and expressed frustration that the court wouldn't let him "call none of my witnesses in front of all these people." SA59. He doubted that anyone

else in the courtroom would "sit up here with no lawyer that sat there and told you he not going to defend you." SA59. After the court excused the jury, McGhee expressed his desire to speak for himself:

The Court: I'm going to give you a chance, Mr. McGhee, to be quiet an sit there during the course of this trial, selection of the jury.

The Defendant: You expect me to sit here ***and not say nothing in my own defense***? You expect me— ***This man ain't speak up for me. Somebody got to speak up for me. If I don't do it, who going to do it?***

SA60-61 (emphasis added). The court did not respond directly to McGhee's request, but rather warned McGhee not to renew the request:

The Court: All right, Mr. McGhee, sit there and be quiet. At this point you made your comments, and we're not—this isn't your opportunity to begin—

The Defendant: It ain't my opportunity? ***I'm the one going to jail***. ***What you mean it ain't my opportunity?***

SA62 (emphasis added).

Defense counsel had argued that the jury was "tainted" from having heard McGhee's comments about the court's ruling on the motion for defense counsel to withdraw. SA62. The court disagreed, reasoning that McGhee had elected to raise his dissatisfaction, and the court would not "bring[] over another whole panel" for voir dire. SA62-63. Defense counsel continued:

Mr. Thomey: I'd like to renew my motion to withdraw then. As everyone in this room can see, this attorney/client relationship no longer exists. It is completely—

The Defendant: Thank you.

Mr. Thomey: —broken. And I don't know to what extent I can count on his cooperation at all for what I want to do here during this trial.

The Court: And if he doesn't cooperate with you, that's a decision he's making on his own. State have any comment?

Mr. Simpson: No.

SA63. After McGhee's counsel again addressed his renewed motion to withdraw (SA66-67), the court again denied the motion (SA67-68).

McGhee responded with another request that he be permitted to proceed without his appointed counsel:

The Defendant: … I'm not being represented like I supposed to. ***And I demand and the man*** [counsel] ***asked to withdraw from the case to you three, four times. What attorney do you know does that?*** And I don't know, for some reason you just got it in your head that ***you just going to make me keep him as an attorney, make him***—I don't know, I don't know, maybe it's something, but I don't know.

SA68-69 (emphasis added). The court agreed with defense counsel's observation that McGhee was "doing a good job" of "mak[ing] a record . . . for appealable issues in the future." SA69.

The court again denied "the motion to withdraw or an adjournment of the trial," reasoning that McGhee's request to allow his attorney to withdraw was "an attempt to delay the trial which is scheduled for today." SA70. McGhee expressly denied that he sought to delay trial or proceed at any other time: "***I'm not trying to adjourn trial***." SA71 (emphasis added). Instead, he renewed his objection to his attorney's representation, observing that his attorney never gave him the "chance

to, you know, come up with no defense." SA70. That failure was fatal to his ability to present his defense:

> **The Defendant**: You going to send me to trial, ***and I don't have nobody to speak up on my behalf***. ***But I'm supposed to sit here in front of the four, five other people*** [witnesses] ***come up here, say what they got to say.*** Nobody — ***I can't say nothing***. I'm just sitting there just like sitting here to see, you know, waiting out 'til when you get ready to give me the sentence. You might as well just sentence me now. Doesn't make sense.

SA71 (emphasis added).

Immediately prior to summoning the jurors for the remainder of *voir dire*, McGhee and the court had the following discussion:

> **The Court**: … Anyone want to raise anything? All right.
>
> Hearing nothing, Mr. McGhee, again I'm just going to warn you, if you become disruptive and you shout out once again, we'll have to remove the jury and remove you from the courtroom and complete the —
>
> **The Defendant**: Okay. ***Well, just give me a chance to speak like everybody else. That's all I ask. If I can speak, we'll have no problems***.
>
> **The Court**: Sir, you're going to speak through your lawyer.
>
> **The Defendant**: I can't speak to my lawyer as you already know. I don't know why you keep saying that. We wouldn't have this problem—
>
> **Mr. Thomey**: Do you mean you want to speak throughout the trial or speak when it's your turn to be a witness?
>
> **The Defendant**: I mean speak ***when they saying something***. You going to speak up for it. ***I'm going to speak up for myself it somebody got to say it.*** Judge ain't going to say it for me.

Mr. Thomey: I can't tolerate putting on that kind of defense. I'm going to have a second chair.

The Court: I'm not going to allow it. If he engages in that, I'm going to remove him from the courtroom.

The Defendant: You're telling me I can't tell my attorney to speak up for me?

The Court: You can talk to your lawyer and not shout it out for everybody to hear in the courtroom.

The Defendant: Ain't talking about shout it out.

The Court: During the course of the trial, you'll have opportunities to speak with your lawyer. If you become disruptive, you interrupt the questioning of the jury, you interrupt the questioning of any witnesses, we'll remove you from the courtroom.

The Defendant: If he don't—You know what, go ahead with the trial.

SA72-73 (emphasis added).

After the Court denied McGhee's final request to present his own defense without assistance from counsel, the trial continued. Defense counsel called McGhee as the defense's only witness. R. 20 at 243; *see id*. at 245-68. During the state's presentation, McGhee asked his attorney whether he was going to object or "say something." *See, e.g., id*. at 268, 270.

After the evidence closed, during a hearing outside the jury's presence, the court directed the bailiff to "let [McGhee] talk to his lawyer." R. 20 at 271. McGhee responded: "what the hell I need a lawyer for if he ain't going to say nothing." *Id*.

The jury returned a guilty verdict on each count. R. 20 at 326. McGhee received three concurrent sentences producing a 17-year term of imprisonment,

followed by a period of 10 years extended supervision. *Id*. at 343-346; *see* SA37-41. On direct appeal, the Wisconsin Court of Appeals affirmed his convictions. SA28-36. The Wisconsin Supreme Court dismissed McGhee's petition for review of that decision as having been untimely filed. SA27; *see also, e.g.,* R. 19 at 56 (explanation for untimely filing).

McGhee moved in the state court of appeals to reinstate his Wis. Stat. § 809.30 direct-appeal deadlines, asserting claims for ineffective assistance of trial and appellate counsel. R. 18 at 81. The court of appeals denied that motion, reasoning that those claims could be pursued for trial and appellate counsel respectively in collateral proceedings under Wis. Stat. § 974.06 and *State v. Knight*, 484 N.W.2d 540 (1992).[3] SA23-24.

B. State Court Collateral Proceedings.

In the state trial court, McGhee filed a motion for post-conviction relief under Wis. Stat. § 974.06 and *State ex rel. Rothering v. McCaughtry*, 556 N.W.2d 136 (Wis. App. 1996). R. 17 at 44-63. He also filed a request invoking *Knight*, claiming ineffective assistance of appellate counsel. Among other claims that he presented, McGhee argued that the trial court had "erred in not allowing Mr. McGhee's request for substitution of counsel." *Id.* at 55-57. The state circuit court denied that motion, observing that "[t]he reasons for the court's determination" not to allow "substitution of counsel" were "set forth in the record." R. 17 at 70. Because McGhee

[3] *Knight* petitions "involve[] a collateral attack based on a claim of ineffective assistance of appellate counsel," and must be "filed in the court that considered the direct appeal." *McGee v. Bartow*, 593 F.3d 556, 561 n.2 (7th Cir. 2010).

had filed his *Knight* petition in the trial court, the court declined to consider the issue in the first instance, observing that "[w]hether [direct appeal] postconviction counsel was ineffective for failing to pursue this issue on appeal must be addressed to the appellate court under *Knight*." *Id.*

The state court of appeals affirmed the denial, reasoning that McGhee had not yet adequately presented his ineffective assistance claim related to the Sixth Amendment violation, because he did not "file a *Knight* petition in the appellate court. SA17. The Wisconsin Supreme Court denied discretionary review. SA14. In that round of appellate review, McGhee's appointed post-conviction appellate counsel did not raise the issue of McGhee's requests for his attorney to withdraw and for self-representation. *See* R. 18 at 90-147.

McGhee filed a writ of habeas corpus before the U.S. District Court of the Eastern District of Wisconsin in October 2009. R. 1 at 16. The court granted McGhee's motion to voluntarily dismiss that petition in order to pursue reinstatement of his appellate rights in the direct appeal (R. 1-1 at 47-48), which the Wisconsin Supreme Court had denied in 2005 as untimely filed (SA28). Returning to the state supreme court, he filed a petition for an original writ of habeas corpus seeking to have his appellate rights reinstated. *See* R. 19 at 1-20. The Wisconsin Supreme Court granted the writ, reinstated and deemed timely filed the petition for review in his direct appeal, and denied the writ. SA10-11.

McGhee then filed a petition for an original writ of *habeas corpus* before the Wisconsin Court of Appeals under *Knight*. R. 19 at 118-46. In his *Knight* petition,

McGhee challenged his appellate counsel's failure to "present" the issue "[w]hether the trial judge erred in denying McGhee's timely request to dispense with his Court appointed attorney and represent him[self]." *Id*. at 119. Invoking *Faretta*, McGhee contended that he had "clearly and unequivocally declared to the Trial Judge that he wanted to represent himself," and that he was entitled to do so. *Id.* at 128; *see id*. at 127-33. He argued that *Faretta* contemplates a colloquy to ascertain knowing and voluntary waiver "not only when a cooperative defendant affirmatively invokes his right to self-representation, but also when an uncooperative defendant rejects the only counsel to which he is Constitutionally entitled." *Id*. at 128. Recognizing that "the right to represent oneself" derives from the "Sixth Amendment to the United States Constitution," he contended that the trial court erred by failing to "engage [him] in a colloquy specifically addressing" whether his "waiver of counsel was knowing and voluntarily made." *Id*. at 129, 131.

The Wisconsin Court of Appeals denied McGhee's *Knight* petition in an *ex parte* order. SA3-9. The state court characterized McGhee's argument as challenging his conviction under state rather than federal law. Under *State v. Darby*, 766 N.W.2d 770 (Wis. Ct. App. 2009), it observed, "a defendant must 'clearly and unequivocally' declare a desire to proceed *pro se*." SA7. The court of appeals described McGhee's request "to have his trial attorney withdraw from the case" as one seeking appointment of replacement counsel, and distinguished these statements from "declaring a desire to proceed *pro se*." SA6. The court concluded that McGhee's request was not "clear and unequivocal." SA7. As a result, the court

held, McGhee "did not preserve the issue for purposes of appeal," and thus "appellate counsel cannot be faulted for not arguing this issue." SA7. The state appellate court rejected McGhee's other grounds for asserting ineffective assistance of post-conviction appellate counsel, and affirmed the state trial court's judgment. *See* SA7-9. It denied reconsideration. SA2.

McGhee petitioned the Wisconsin Supreme Court for leave to appeal based on three points of error, including that his "right to discharge counsel and 'speak for himself' (by appearing pro se)" had been "violated." R. 19 at 225. As he explained, "[o]nce McGhee attempted to discharge Thomey and 'speak for himself,' McGhee had sufficiently asserted his right to self representation under *Faretta*." *Id*. at 252. His "assertion that he wished to 'speak for himself,'" he said, was a clear and unambiguous invocation of his *Faretta* rights—as clear "as possible without using the legal jargon terms 'self-representation' or 'pro se.'" *Id*. at 227. Thus, he argued, the trial court could not have declined to hold a colloquy to determine whether his waiver was knowing and voluntary. *Id*. at 252. The Wisconsin Supreme Court denied McGhee's *pro se* petition. SA1.

C. Federal Court Proceedings.

McGhee filed his *pro se* petition for the writ of habeas corpus asserting four grounds for relief. R. 1. As the second ground, he alleged a violation of his "right to discharge counsel and 'speak for himself' (by appearing pro se)," resulting from the

state trial court's failure to "allow McGhee to discharge" his trial attorney and "refus[al] to allow McGhee 'to speak for himself.'" *Id.* at 11-13.[4]

Respondent's answer argued that each claim advanced in McGhee's petition had not been exhausted, was procedurally barred, or lacked merit. R. 15. As to McGhee's claim that his Sixth Amendment rights had been violated, Respondent argued that McGhee "did not fairly present this claim 'through one complete round of state-court review'" because he initially "asserted a claim of ineffective assistance of appellate counsel in the Wisconsin Court of Appeals, then switched to a claim of judicial error in the Wisconsin Supreme Court." *Id.* at 29. As a result, Respondent said, "McGhee also procedurally defaulted [that] claim." *Id.* at 32.

In a brief opposing McGhee's habeas petition, Respondent raised two merits arguments with respect to McGhee's Sixth Amendment claim. R. 18. He argued that McGhee never "clearly and unequivocally" asserted his right to self-representation. *Id.* at 18. He also contended that McGhee could have "forfeit[ed] by conduct" his Sixth Amendment right, because "the trial court could have … denied the request because of [McGhee]'s disruptive conduct." *Id.* at 17-18 (capitalization altered). In his brief, Respondent did not renew the argument that the Sixth Amendment claim was procedurally defaulted. *See id.*

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[4] In the remaining grounds for relief, McGhee argued that the state court should have applied *State v. Dubose*, 699 N.W.2d 582 (Wis. 2005), retroactively in his case; that the state court denied his right to present a defense by refusing to allow him to present alibi witnesses; and that the prosecutor's peremptory challenge to the only black juror violated *Batson v. Kentucky*, 476 U.S. 79 (1986). R. 1 at 14-15.

The district court reached McGhee's *Faretta* argument on the merits, holding that he had not procedurally defaulted that claim: "courts in this district have addressed the substance of the underlying constitutional claims raised in *Knight* petitions." A14. In light of the "principles of comity underlying habeas review and the exhaustion requirement[s]," the district court reasoned, a federal habeas petitioner who files a "*Knight* petition" and a "'petition for review of the . . . decision denying [that] petition,'" exhausts his claims by "'afford[ing] the Wisconsin courts a full and fair opportunity to address' the constitutional claim underlying his ineffective assistance of appellate counsel claim." A14.

On the merits, the district court rejected McGhee's Sixth Amendment claim. The court recognized that once a defendant has invoked the right of self-representation, "[u]nder *Faretta*, the court is to determine whether a defendant waived his right to counsel knowingly and voluntarily." A16. But the court found McGhee's statement to be ambiguous. A16. The court concluded that "McGhee's self-representation claim must be denied" (A16), and denied the petition for a writ of habeas corpus (A26).[5]

McGhee filed an initial notice of appeal. R. 41. This Court dismissed that appeal for failure to timely pay the docketing fee required under Cir. R. 3(b). R. 48. Within the time remaining to appeal the original judgment, McGhee delivered a new notice of appeal, application for certificate of appealability, and application to proceed in forma pauperis with the prison mail system, but the delivery of these

[5] The court denied McGhee's other claims for relief. *See* A7-13, 17-24. The court also denied a certificate of appealability. A24-25.

documents was delayed, and they did not arrive at the district court until April 9, 2014. R. 58 at 1-2; *see* R. 51-1, ¶ 4.

After this Court suspended briefing due to the untimely notice of appeal (Doc. 2), the district court construed McGhee's explanation as a motion for extension of time to file his notice of appeal, which it granted. R. 58 at 2. The district court then granted leave to proceed in forma pauperis. R. 60. This Court lifted its suspension order. Doc. 6. This Court construed McGhee's *pro se* brief (Doc. 11) as an application for a certificate of appealability, which it granted and issued as to McGhee's claim that the Wisconsin state courts denied him his constitutional right to self representation. Doc. 19. The Court then appointed counsel to represent McGhee. Doc. 20.

SUMMARY OF ARGUMENT

In *Faretta*, the U.S. Supreme Court established that once a criminal defendant declares his desire to waive the right to counsel and represent himself, the Sixth Amendment to the U.S. Constitution requires the state to honor that choice. Thus, when a defendant has clearly and unequivocally asserted a desire for self-representation, the court must hold a colloquy to ensure that the decision is a knowing and voluntary one. 422 U.S. at 835-36.

1. The Wisconsin Court of Appeals denied McGhee's *Knight* petition on the ground that his request to represent himself was not clear and unequivocal. But in reaching that conclusion, the state court of appeals committed precisely the kinds of unreasonable errors that warrant issuing the writ of habeas corpus. Congress has authorized federal courts to issue the writ when a state law has unreasonably

applied U.S. Supreme Court precedent to the case, or has unreasonably determined the facts in light of the evidence presented to the state court. 28 U.S.C. § 2254. Under either standard, the writ should be granted here.

In the first instance, the state court of appeals' adjudication on the merits of his *Faretta* claim was an unreasonable application of clearly established Federal law. The Supreme Court established almost 40 years ago in *Faretta* that "where the defendant will not voluntarily accept representation by counsel," the Sixth Amendment requires a court to "honor[]" that choice to "conduct his own defense" by engaging in a colloquy. *Faretta*, 422 U.S. at 834. A court cannot avoid that duty—let alone deny the request—on the grounds that the defendant lacks "technical legal knowledge." *Id*. at 836.

Contrary to the court of appeals' finding, McGhee repeatedly stated his desire to discharge appointed defense counsel and speak on his own behalf. He expressed frustration that his counsel had not adequately prepared a defense consistent with McGhee's stated goals of the representation. Although McGhee lacked legal training, he told the court that his counsel was not going to protect his rights, and that only he was in a position to do so. Moreover, McGhee invoked the same themes that the Supreme Court held in *Faretta* required the right of self-representation: insisting that he did not want his appointed counsel to represent him, requesting that he be permitted to make statements and ask questions of witnesses, and observing that only he would suffer the consequences of speaking on his own behalf. The state court of appeals implicitly required that McGhee use technical

knowledge—employing the term "pro se" or something like it—in order for his request to be clear and unequivocal. By concluding that McGhee had not adequately invoked his *Faretta* rights based on that implicit requirement, the state court unreasonably applied *Faretta* in deciding McGhee's *Knight* petition.

For much the same reason, the Wisconsin Court of Appeals' decision erred unreasonably in rejecting McGhee's ineffective-assistance claim because, it found, McGhee had not clearly and unequivocally invoked his right of self-representation. The record before the trial court confirms that McGhee repeatedly asked that his counsel withdraw and that he be permitted to proceed by representing himself. The court of appeals' finding to the contrary was based on its unreasonable determination of facts in light of the evidence presented.

2. Several consequences flow inexorably from the conclusion that the state court was unreasonable in finding that McGhee did not clearly and unequivocally waive the right to counsel.

To begin with, after McGhee asked to represent himself, the trial court failed to grant the request—or even to engage in a *Faretta*-compliant colloquy. These Sixth Amendment violations were structural errors requiring automatic reversal.

In addition, and contrary to the court of appeals' finding, McGhee preserved the argument for direct appeal. In denying McGhee's ineffective-assistance claim, the court relied solely on its finding that McGhee had not made a clear and unequivocal request. Because it was unreasonable in so concluding, the failure-to-preserve finding based on that premise was equally unreasonable.

Finally, McGhee's appellate counsel's failure to pursue the issue was ineffective assistance. Appellate counsel performed deficiently by failing to pursue a viable Sixth Amendment argument; and if that is so, there can be no dispute that McGhee was prejudiced by that deficient performance because the error here was structural.

The district court should have granted the writ under 28 U.S.C. § 2254.

STANDARD OF REVIEW

This Court reviews the district court's denial of McGhee's habeas petition *de novo*. *Julian v. Bartley*, 495 F.3d 487, 491 (7th Cir. 2007).

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") authorizes a federal court to grant the writ of habeas corpus for a state court decision that is "at such tension with governing U.S. Supreme Court precedents, or so inadequately supported by the record" as to be unreasonable. *Ward v. Sternes*, 334 F.3d 696, 703 (7th Cir. 2003) (internal quotation marks omitted). It makes little difference whether a federal habeas challenge "rais[es] an issue of pure fact, pure law, or a mixed question of law and fact," for in any event the writ should be granted where "the [state] court committed unreasonable error." *Id.* at 704.

This Court may set aside a state court decision under 28 U.S.C. § 2254(d)(1) if it 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); *see Shaw v. Wilson*, 721 F.3d 908, 914 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 2818 (2014). Under this prong of AEDPA, the writ should be granted "if the state court correctly identified the governing Supreme Court precedent, but unreasonably

applied it to the unique facts of the prisoner's case." *Ward*, 334 F.3d at 703; *accord* *Williams v. Taylor*, 529 U.S. 362, 407 (2000). As the Supreme Court has explained:

> a state-court decision also involves an unreasonable application of th[e] [Supreme] Court's precedent if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.

Williams, 529 U.S. at 407.

In addition, this Court may set aside a state court decision if it "was based on an unreasonable determination of the facts in light of the evidence presented." 28 U.S.C. § 2254(d)(2). Under this prong, "[a] state court decision that rests upon a determination of fact that lies against the clear weight of the evidence is, by definition, a decision so inadequately supported by the record as to be arbitrary and therefore objectively unreasonable." *Ward*, 334 F.3d at 704 (internal quotation marks omitted).

ARGUMENT

I. The Wisconsin Court Of Appeals Was Objectively Unreasonable In Finding That McGhee Did Not Clearly And Unequivocally Seek To Represent Himself.

The writ of habeas corpus should be issued here because the Wisconsin Court of Appeals failed to recognize that McGhee had asserted his *Faretta* rights—and that, as a result, post-conviction appellate counsel was ineffective for failing to pursue the issue.[6] The federal district court denied McGhee's habeas petition on the

[6] The state appellate court's decision denying McGhee's *Knight* petition is the "last reasoned decision" addressing his claims. *Ylst v. Nunnemaker*, 501 U.S. 797, 804 (1991).

merits with respect to this issue, however, reasoning that the state "court of appeals' determination that McGhee had not made a clear and unequivocal declaration that he wanted to proceed *pro se* was not contrary to established federal law, nor was it [an] unreasonable determination of the facts." A16. That ruling was error.

A. *Faretta v. California* requires habeas relief here.

In *Faretta*, the U.S. Supreme Court held that the Sixth Amendment to the U.S. Constitution protects a criminal defendant's right to represent himself at trial. Once a defendant clearly, unequivocally, and timely declares his desire to represent himself, the state may not force him to accept an attorney. *Faretta*, 422 U.S. at 835-36. A close reading of *Faretta* demonstrates that once a defendant declares that he does not want counsel and wants to represent himself, the trial court is bound by the Sixth Amendment to engage in a colloquy with the defendant. Even though McGhee explained repeatedly that he desired to discharge his attorney and present his own defense, the trial court failed to engage in a *Faretta*-compliant colloquy.

In *Faretta*, petitioner Anthony Faretta had been charged with grand theft and was appointed a public defender to represent him at his trial. He told the court, however, that "he did not want to be represented by the public defender because he believed that that office was 'very loaded down with . . . a heavy case load." *Faretta*, 422 U.S. at 807. The trial judge established on the record "that Faretta wanted to represent himself and did not want a lawyer." *Id.* at 808. He initially ruled that Faretta could proceed *pro se*, but reserved the ruling. *Id.* After a second colloquy, "the judge ruled that Faretta had not made an intelligent and knowing waiver of his

right to the assistance of counsel, and also ruled that Faretta had no constitutional right to conduct his own defense." *Id.* at 809-10. The court thus "required that Faretta's defense be conducted only through the appointed lawyer from the public defender's office." *Id.*

The Supreme Court held that the Sixth Amendment provides criminal defendants a "right to self-representation—to make one's own defense personally." *Faretta*, 422 U.S. at 819; *see id.* at 833 (rejecting the argument that "a State may compel a defendant to accept a lawyer he does not want"). Linking its rule to the "personal character" of the "right to make a defense," the Supreme Court reasoned that "[t]o thrust counsel upon the accused" is to eliminate the accused's agency in authorizing his counsel to "make binding decisions of trial strategy." *Id.* at 820. "An unwanted counsel 'represents' the defendant only through a tenuous and unacceptable legal fiction." *Id.* at 821. The result of "forc[ing] a lawyer on a defendant," the Court concluded, is to "lead him to believe that the law contrives against him." *Id.* at 834.

In *Faretta*, the Court was concerned primarily about the "traditional benefits associated with the right to counsel" that an accused would forgo upon "choos[ing] self-representation." 422 U.S. at 835. The Court therefore required that when a defendant states his desire to proceed without counsel and represent himself, a court must engage in a colloquy with the defendant. The purpose of the mandatory colloquy is two-fold. *First,* a colloquy ensures that "an accused" who seeks to "manage[] his own defense . . . 'knowingly and intelligently' forgo[es] th[e]

relinquished benefits" of representation by counsel. *Id.*; *see also Johnson v. Zerbst*, 304 U.S. 458, 468 (1938)). *Second*, it permits a "record" to be made that the defendant "'knows what he is doing and his choice is made with eyes open.'" *Faretta*, 422 U.S. at 835. Because the defendant in *Faretta* had "clearly and unequivocally declared to the trial judge that he wanted to represent himself and did not want counsel," the Supreme Court concluded, it was a violation of the Sixth Amendment to force him "to accept against his will a state-appointed public defender." *Id.* at 835-36. Accordingly, the Court held that Faretta was entitled to a writ of habeas corpus. *Id.* at 836.

Faretta controls here. McGhee repeatedly explained that he wished to discharge his attorney and represent himself. *See* pages 5-11, *supra*. As courts have recognized, "[a] defendant need not 'recite some talismanic formula hoping to open the eyes and ears of the court to his request' to invoke his/her Sixth Amendment rights under *Faretta.*" *Buhl v. Cooksey*, 233 F.3d 783, 792 (3d Cir. 2000). Any such requirement would be facially inconsistent with the Supreme Court's warning in *Faretta* that a defendant's "technical legal knowledge" is "[*ir*]*relevant* to an assessment of" the accused's "knowing exercise of the right to defend himself." 422 U.S. at 836 (emphasis added). It is not necessary that the accused "have the skill and experience of a lawyer in order competently and intelligently to choose self-representation." *Id.* at 835.

Thus, in forgoing any requirement that the accused have "technical legal knowledge" (*Faretta*, 422 U.S. at 836), the Supreme Court precluded state courts

from denying *Faretta* waivers where the defendant has not used magic words such as "pro se" and "self-representation." If using of such terms were a necessary prerequisite to pursuing self-representation, the invocation of *Faretta* rights "would then be conditioned upon [the accused's] knowledge of the precise language needed to assert it" (*Buhl*, 233 F.3d at 792), rather than knowledge of the consequences of waiving the right to counsel. All *Faretta* requires, then, is "an affirmative, unequivocal, request." *Id.*

Although McGhee made exactly the sort of request that *Faretta* requires, the state trial court failed to engage in a *Faretta*-compliant colloquy. The United States Supreme Court has not required state courts to recite any "formula or script" to an accused seeking to represent himself. *Iowa v. Tovar*, 541 U.S. 77, 88 (2004). But *Faretta* and its progeny confirm that a colloquy of *some* kind is mandatory. A *Faretta*-compliant colloquy requires the trial judge to determine (1) whether the defendant is competent to waive the right to counsel (if competence is at issue), and (2) whether the defendant's "waiver of his constitutional rights is knowing and voluntary." *Godinez v. Moran*, 509 U.S. 389, 400-01 (1993). As in determining whether a request has been made at all, a defendant's "'technical legal knowledge'" is "'not relevant'" to the question of competency. *Id.* at 400 (quoting *Faretta*, 422 U.S. at 836).

There can be no dispute that the state trial court neither cited *Faretta* nor conducted a colloquy compliant with that decision. Meanwhile, the state court of appeals cited *Faretta* for its holding that "[t]he Sixth Amendment impliedly

guarantees the right to represent oneself" (SA6), but otherwise failed to apply *any* "clearly established Federal law, as determined by the Supreme Court of the United States" (28 U.S.C. § 2254(d)(1)), in evaluating whether McGhee clearly and unequivocally invoked his right to represent himself. Instead, the state court of appeals referenced a series of state decisions. SA6-7.

Because the Wisconsin state court of appeals denied McGhee his constitutional right to discharge counsel and represent himself based on its unreasonably erroneous finding that he did not clearly and unequivocally invoke that right, McGhee is entitled to habeas relief.

B. McGhee's invocation of his right to represent himself was clear and unequivocal.

The Wisconsin Court of Appeals made an objectively unreasonable error in concluding that McGhee had not clearly and unequivocally invoked his *Faretta* rights—and, as a result, had not preserved the claim for his appellate counsel. The state court reached that conclusion based on an implicit finding that McGhee did not employ certain "technical legal knowledge" in making the request. Because that was an unreasonable error, the state court of appeals' decision was an unreasonable application of *Faretta*.

McGhee's requests easily meet the requirement that the accused clearly and unequivocally invoke his right to represent himself. It was apparent from the record before the trial court that McGhee desired to proceed without the assistance of his appointed counsel; he repeatedly expressed as much, in clear and unequivocal language. Before trial started, McGhee stated through his counsel that "he wished

to discharge" the attorney. SA45-46. And in a discussion with the trial court, McGhee explained matter of factly that because his attorney did not have his "best interest at heart" (SA53), "I'm withdrawing him as my attorney. That's the bottom line of that" (SA52). Even after the trial court had denied the withdrawal motion, McGhee's appointed counsel repeatedly renewed the request—throughout the proceedings—observing the difficulty that he and McGhee would have in "cooperat[ing] in conducting his defense" and that "this attorney/client relationship no longer exists." SA53, 63.

McGhee also explained to the trial court that it was impossible that he could be "expect[ed] . . . to sit here and not say [any]thing in [his] own defense." SA60. That is because, he said, his counsel would not "speak up for me. Somebody got to speak up for me. If I don't do it, who going to do it?" SA61. During a recess in *voir dire*, outside the jurors' presence, McGhee explained: "[***J***]***ust give me a chance to speak like everybody else. That's all I ask. If I can speak, we'll have no problems.***" SA72 (emphasis added). McGhee's appointed counsel clarified his affirmative request:

> **Mr. Thomey**: Do you mean you want to speak throughout the trial or speak when it's your turn to be a witness?
>
> **The Defendant**: ***I mean speak when they saying something***. You going to speak up for it. I'm going to speak up for myself if somebody got to say it. Judge ain't going to say it for me.

SA72-73. McGhee thus explicitly disclaimed that he was asking only for a chance to appear as a witness, and thereby present his testimony in his own words. Instead,

he requested that he be permitted to responding to the state's presentation of its witnesses and evidence, in lieu of his appointed counsel doing so. At that point, there could be no question that McGhee was requesting to represent himself.

McGhee's requests admit no other interpretation. To be certain, he was not seeking "hybrid representation," a "disfavor[ed]" form of self-representation in which some criminal defendants seek to "serve[] as co-counsel during the course of trial." *United States v. Kosmel*, 272 F.3d 501, 506 (7th Cir. 2001). From the outset, McGhee insisted that he wanted to "withdraw[]" his attorney, who did not have his "best interest at heart." SA51-52. He also insisted that his attorney would not "speak up for" him, and "[i]f I don't do it, who going to do it?" SA61. McGhee's statements reflect that he was seeking to represent himself, ***without*** any involvement from counsel.[7]

McGhee's requests were, moreover, unequivocal. Once McGhee invoked his request to "speak for himself," he did not waver from that position. The court warned him that he could not proceed without his attorney because trial was set for that day. But McGhee explicitly denied that he wanted to delay trial or proceed at any other time: "I'm not trying to adjourn trial." SA70. And he repeated that he wanted his attorney to withdraw. SA68. Because an accused who is "given several

[7] McGhee's counsel's stray suggestion that he could not present a defense with McGhee serving as a "second chair" (SA73) does not support any inference that McGhee's request was for hybrid representation. The court had already made clear that it was denying McGhee's and his counsel's joint requests to permit counsel to withdraw (SA50, 68), but McGhee and his counsel continued to renew their requests to allow withdrawal and permit McGhee to speak for himself. Counsel's remark should be understood in the context of the court's earlier decision to deny McGhee's request to waive his right to counsel and proceed by representing himself.

options, and turn[s] down all but one," is concluded to have "selected the one [he] didn't turn down" (*Smith v. Grams*, 565 F.3d 1037, 1045 (7th Cir. 2009)), the only reasonable conclusion is that McGhee sought to proceed by representing himself—not with the assistance of counsel, and not another day with another attorney.

The conclusion that McGhee clearly and unequivocally expressed a desire to represent himself is bolstered by his repeated invocation of the principles that animated the Supreme Court's concern in *Faretta*. When the accused "employ[s] language from *Faretta* itself," that weighs strongly in favor of a finding of a clear and unequivocal invocation. *Batchelor v. Cain*, 682 F.3d 400, 408 (5th Cir. 2012). Here, the Supreme Court had observed in *Faretta* that the Sixth Amendment forbade states from prohibiting self-representation because "[t]he defendant, and not his lawyer or the State, will bear the personal consequences of a conviction." 422 U.S. at 834. McGhee made that very observation in a discussion with the trial court. After being warned that he had to "sit there and be quiet," because it "[was]n't [his] opportunity" to speak, McGhee explained: "It ain't my opportunity? I'm the one going to jail. What you mean it ain't my opportunity?" SA62.

In addition, the Supreme Court had noted that when a state "forc[es] a lawyer on a defendant," the result is that he may "believe that the law contrives against him." *Faretta*, 422 U.S. at 834. For his part, McGhee expressed doubt about the fairness and neutrality of a system that would not let him withdraw his counsel, prevented him from "say[ing] nothing" on his own behalf, and provided him with "nobody to speak on [his] behalf." SA71. He said that if he had to proceed with the

assistance of his counsel—and could not speak for himself—the trial was already over, as far as he was concerned: the court "might as well just sentence me now. Doesn't make sense." SA71.

Taken together, therefore, McGhee's requests to discharge his attorney and speak for himself at the imminent trial were more than enough to put the trial court on notice that he wanted to proceed by representing himself. Once McGhee explained that he wanted to speak for himself, the context shifted for his (and his counsel's) requests to permit counsel to withdraw. The court was then required to discern whether, by forgoing the "benefits associated with the right to counsel," McGhee was instead "choos[ing] self-representation." *Faretta*, 422 U.S. at 835. And because McGhee explicitly disclaimed any interest in delaying trial (SA70)—as would be necessary if he were requesting substitute counsel—his request could only mean that he wished to assert his *Faretta* rights. There was nothing else in the record that would have authorized the court to pretermit a *Faretta* colloquy.

To be sure, the Supreme Court in dicta in *Faretta* observed that "the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct." 422 U.S. at 834 n.46. But that has no bearing here. The trial court interpreted McGhee's request as one for *withdrawal or adjournment*, and denied that request on the grounds that it was "an attempt to delay the trial." SA70. But as far as counsel is aware, there has never been any suggestion that the court's failure to conduct a *Faretta*-compliant colloquy was *in fact* the product of any finding that McGhee had engaged in forbidden "misconduct."

For his part, Respondent contended below that "the trial court *could have* … denied the request for that reason" (R. 29 at 17-18 (emphasis added)), but that only confirms that the trial court reached its conclusion on other grounds. The trial court misapplied clearly established Federal law by failing to recognize that McGhee was triggering his *Faretta* rights by declaring that he did not want to be represented by counsel—and instead wanted to conduct his own defense by "speak[ing] up for [him]self." SA73.[8]

What is more, the trial judge here failed to conduct any type of inquiry—let alone a *Faretta*-compliant colloquy—into whether McGhee's request to discharge his attorney and speak for himself was a knowing and voluntary waiver of his Sixth Amendment rights. After McGhee stated that "all [he] ask[ed]" was for the court to "just give me a chance to speak like everybody else," his appointed counsel sought to clarify whether he "want[ed] to speak throughout the trial," or just preserve his right to take the stand as a witness. SA72. McGhee confirmed that he wanted to "speak when they"—the state and its witnesses—"saying something. . . . I'm going

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[8] In addition, even had the trial court made and the state appellate court affirmed a finding of "misconduct"—and again, no such finding was ever made—it would have been unreasonable in light of the evidence presented at the state proceeding. *See* 28 U.S.C. § 2254(d)(2); *see also* pages 33-35, *infra*. After the trial court instructed McGhee that he would be removed if he became disruptive, McGhee said: "Okay. Well, just give me a chance to speak like everybody else. That's all I ask. If I can speak, ***we'll have no problems***." SA72 (emphasis added); *see also* SA73 ("***Ain't talking about shout it out***.") (emphasis added). Indeed, McGhee's statements reflected that any disruptions observed by the Court were the sole product of McGhee's frustration with the ongoing denial of his Sixth Amendment right to terminate his appointed counsel and represent himself. SA56, 58-65. McGhee disclaimed interest in engaging in disruptive conduct, and confirmed that he sought only to speak on his own behalf. *See* SA72-73.

to speak up for myself if somebody got to say it." SA73. The court responded by denying McGhee's motion. SA73. But the trial court never responded by inquiring whether McGhee had knowingly and voluntarily decided to waive his right to counsel. Nor did the court ever attempt to inform McGhee of the risks of following that course of action. Rather, the trial court's only response to McGhee's invocation of his *Faretta* rights was to deny the request.

The state court of appeals therefore unreasonably applied *Faretta* in finding that McGhee had not clearly and unequivocally waived the assistance of counsel and sought to proceed *pro se*.

C. The Wisconsin Court of Appeals made an unreasonable determination of the facts necessary to apply *Faretta*.

Section 2254(d)(2) provides for habeas relief where a state court's decision was based on an unreasonable determination of the facts in light of the evidence presented. Although AEDPA requires federal courts to defer to state courts' factual findings, "'deference does not imply abandonment or abdication of judicial review,' nor does it 'by definition preclude relief.'" *Ward*, 334 F.3d at 704 (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003)).

Here, the Wisconsin Court of Appeals determined the factual issue of whether McGhee clearly and unequivocally sought to represent himself contrary to the clear and convincing weight of the evidence, and in doing so committed an unreasonable error. The Wisconsin Court of Appeals misunderstood the nature of McGhee's request to such an extent that its conclusion was an objectively unreasonable determination of fact. Where, as here, a habeas petitioner can show

that "that the state court determined the underlying factual issue against the clear and convincing weight of the evidence, the petitioner has not only established that the court committed error in reaching a decision based on that faulty factual premise, but has also gone a long way towards proving that it committed unreasonable error." *Ward*, 334 F.3d at 704.

The Wisconsin Court of Appeals conceded that McGhee "clearly sought to have his trial attorney withdraw from the case and preserved these objections on the record." SA6. But the state concluded that it was "not clear whether McGhee sought to have his attorney withdraw so that he could have new counsel appointed or whether he sought to proceed *pro se*." SA6. The state court recognized that McGhee had stated that he had wanted "'a chance to speak like everybody else,'" and concluded that this was "the closest iteration of a desire to proceed *pro se* that we can find." SA6.

The state court of appeals' decision was based on an unreasonable determination of whether McGhee's request for withdrawal of counsel entailed substitution or self-representation. The record before the trial court unambiguously establishes that trial would proceed that very day. The trial court recognized the discharge request, but warned: "Do you understand today we're going to trial today?" SA52. When the court ruled that an adjournment would not be forthcoming, McGhee explicitly denied that he wanted to go to trial a different day. SA70. And he stated repeatedly that he wanted to speak for himself, because his counsel would not "speak up for [him]." He asked, "If I don't do it, who going to do it?" SA61.

McGhee's statements belie any finding that he was requesting withdrawal so that substitute counsel could be appointed. As detailed above (at 27-33), those statements confirm that McGhee was seeking to represent himself. Thus, the Wisconsin Court of Appeals' conclusion that McGhee had "not clearly and unequivocally declar[ed] his desire to represent himself" (SA7) was "against the clear and convincing weight of the evidence" and was an objectively unreasonable determination of fact. *Ward*, 334 F.3d at 704.

D. The district court should have granted the writ.

McGhee is entitled to a writ of habeas corpus because—whether analyzed as a finding of fact or a conclusion of law—the state court of appeals' finding that McGhee did not clearly and unequivocally invoke his *Faretta* rights was an unreasonable error. Here, the district court should have found that the "presumption against waiver of the constitutional right to counsel" (*Smith*, 565 F.3d at 1044), has been rebutted.

It makes no difference that the state court decided the question in the context of an ineffective-assistance claim presented in McGhee's *Knight* petition, rather than the underlying Sixth Amendment claim. As the district court correctly noted here, it is appropriate to "address[] the substance of the underlying constitutional claims raised in *Knight* petitions," because *Knight* petitions satisfy the "principles of comity underlying habeas review and the exhaustion requirement." A14; *see also, e.g., Searcy v. Clements*, 2012 WL 719002, at *3 (E.D. Wis. Mar. 5, 2012); ("This procedure appears to best satisfy the comity rationale underlying the exhaustion requirement whereby the petitioner has given the state courts through one complete

round of appellate proceedings the 'opportunity to pass upon and correct alleged violation of its prisoners' federal rights . . . ."); *McGee v. Bartow*, 2007 WL 1062175, at *4 (E.D. Wis. Apr. 3, 2007) (observing that a *Knight* petition, coupled with a "petition for review of the Court of Appeal's decision denying [that] petition, afforded the Wisconsin courts a full and fair opportunity to address" the underlying constitutional claim that appellate counsel was allegedly ineffective for failing to raise).

The state court of appeals' unreasonable error with respect to the underlying *Faretta* violation ran throughout its decision denying the portion of McGhee's *Knight* petition addressing that violation. With respect to McGhee's *Faretta* claim, the state court denied the petition on the ground that his counsel could not have been ineffective because McGhee had not preserved the argument by clearly and unequivocally seeking to waive counsel and represent himself. SA7. But the court erred unreasonably in reaching that predicate finding, and so too did it err unreasonably in denying McGhee's *Knight* petition. That is true for three reasons.

First, McGhee's clear and unequivocal waiver of counsel and invocation of the desire to represent himself meant that the court of appeals should have recognized the Sixth Amendment violation that occurred in the trial court. Once the trial court heard McGhee's invocation, clearly established federal law required it to engage in a colloquy to determine whether the waiver of the right to trial counsel was knowing and voluntary.

Faretta itself requires a colloquy so that "the record will establish that [the accused] knows what he is doing and his choice is made with eyes open." 422 U.S. at 835; *see Godinez*, 509 U.S. at 400-01. Indeed, the U.S. Supreme Court has long recognized that "[a] judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made *only from a penetrating and comprehensive examination* of all the circumstances under which such a plea is tendered." *Von Moltke v. Gillies*, 332 U.S. 708, 724 (1948) (plurality) (emphasis added). That obligation to conduct a colloquy applies to state as well as federal judges because *Faretta* requires it as a matter of federal constitutional law. *Cf. Buhl*, 233 F.3d at 791.

For that reason, this Court recently recognized the "need for a thorough and formal inquiry in which the court 'asks the necessary questions and imparts the necessary information'" in response to an invocation of *Faretta* rights. *United States v. Clark*, — F.3d —, 2014 WL 7235648, at *3 (7th Cir. Dec. 19, 2014); *see also, e.g., Speights v. Frank*, 361 F.3d 962, 964 (7th Cir. 2004) (rejecting a purported right to a warning about the dangers of self-representation on appeal, and noting that "waiver of the right to the assistance of counsel *at trial* … may require an oral inquiry to ensure that the defendant chooses with knowledge of his entitlements and his eyes open to the dangers of self representation").

Here, the trial court failed to respond to McGhee's clear and unequivocal request to waive counsel and represent himself. Its failure to address the request for what it is—let alone to conduct a full *Faretta*-compliant colloquy to determine

whether the waiver was knowing and voluntary—violated the Sixth Amendment. That alone would have been structural error, requiring reversal and a new trial. *See United States v. Gonzalez-Lopes*, 548 U.S. 140, 148-49 (2006) (observing that "the denial of the right of self-representation" is a "structural defect"). Because structural errors are *per se* prejudicial, convictions tainted by structural error are "subject to automatic reversal." *Neder v. United States*, 527 U.S. 1, 8 (1999); *cf. Flanagan v. United States*, 465 U.S. 259, 267-68 (1984) (observing that a petitioner need not make "a showing of prejudice" in order to "[o]btain[] reversal for violation of" rights such as "the Sixth Amendment right to represent oneself"). So too here.[9]

Because McGhee "asserted his right, and the trial court failed to honor that right[,] [t]his ends the analysis." *Gaddie v. Hanks*, 2000 WL 689343, at *7 (S.D. Ind. Mar. 7, 2000) (observing that the "erroneous denial of the right to self-representation … requires automatic reversal of a criminal conviction").

Second, the court of appeals rejected McGhee's *Knight* petition with respect to this claim because it concluded that McGhee had not adequately preserved the *Faretta* argument, so "appellate counsel cannot be faulted for not arguing this issue." SA7. But the sole underlying premise of the court's preservation finding was its conclusion that McGhee had not made a clear and unequivocal request (SA7);

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[9] In particular, McGhee's claim that he was denied the right to represent himself is not subject to harmless error analysis under *Chapman v. California*, 386 U.S. 19 (1967), or *Brecht v. Abrahamson*, 507 U.S. 619 (1993). As the Supreme Court has held, "the right of self-representation … is not amenable to 'harmless error' analysis. The right is either respected or denied; its deprivation cannot be harmless." *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984).

because it was unreasonable in so concluding, the waiver finding based on that premise was equally unreasonable.

Finally, McGhee's appellate counsel's failure to pursue the issue was ineffective assistance under *Strickland v. Washington*, 466 U.S. 668 (1984). Because the trial court's failure to conduct a *Faretta* colloquy violated the Sixth Amendment, appellate counsel performed deficiently by "'fail[ing] to present [that] significant and obvious issue[] on appeal.'" *Mason v. Hanks*, 97 F.3d 887, 893 (quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986). McGhee's *Faretta* claim was, moreover, "clearly stronger than those presented" in his direct appeal. *Id.* That is evidenced by this Court's order issuing a certificate of appealability on that issue alone (Doc. 19), but not on the alibi or peremptory strike issues that were raised on direct appeal *and* in this federal habeas petition. *Compare* R. 1 at 14-15, *with* R. 18 at 1-13. In addition, appellate counsel's performance was prejudicial to McGhee because a Sixth Amendment violation is structural error requiring automatic reversal. *See Neder*, 527 U.S. 8. For *Strickland* purposes, appellate counsel's failure to raise a meritorious claim of structural error would "inevitably 'undermine[] confidence in the outcome of a proceeding.'" *Winston v. Boatwright*, 649 F.3d 618, 632 (7th Cir. 2011). The state courts therefore erred unreasonably in denying McGhee's claim of ineffective assistance of appellate counsel.

CONCLUSION

For the foregoing reasons, McGhee respectfully requests that this Court reverse the judgment of the district court with directions to issue the writ of habeas corpus.

Dated: January 26, 2015

Respectfully submitted,

/s/ James F. Tierney

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CIRCUIT RULE 30(A) APPENDIX

TABLE OF CONTENTS TO APPENDIX

United States District Court

Eastern District of Wisconsin

JUDGMENT IN A CIVIL CASE

LADERIAN T. McGHEE,

Petitioner,

v. **Case No. 12-CV-320**

MICHAEL MEISNER,

Respondent.

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came before the court, the issues have been decided and a decision has been rendered.

NOW, THEREFORE, IT IS ORDERED that the petitioner's petition for a writ of habeas corpus (Docket # 1) be and hereby is **DENIED**.

IT IS FURTHER ORDERED that this action be and hereby is **DISMISSED**.

IT IS FURTHER ORDERED that a certificate of appealability is **DENIED**.

Approved: *s/Nancy Joseph*
NANCY JOSEPH
United States Magistrate Judge

Dated: February 19, 2014

JON W. SANFILIPPO
Clerk of Court

s/ Diane Dimiceli
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

LADERIAN T. McGHEE,

Petitioner,

v. **Case No. 12-CV-320**

MICHAEL MEISNER,

Respondent.

DECISION AND ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS AND DISMISSING CASE

Laderian T. McGhee ("McGhee"), a Wisconsin prisoner, petitions for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He challenges his Milwaukee County convictions for armed robbery with threat of force, theft of movable property from person, and drive or operate a vehicle without owner consent in Milwaukee County case number 2004CF001962. (Exh. to Answer, Docket # 17 at 1, 7; Pet. for Habeas Corpus, Docket # 1 at 2.) The respondent answered and the parties subsequently briefed the petition. For the reasons stated below, the petition for a writ of habeas corpus will be denied and dismissed.

BACKGROUND

This case has a long procedural history. On August 11, 2004, McGhee was convicted of armed robbery with threat of force, theft of movable property from person, and drive or operate a vehicle without owner consent in Milwaukee County case number 2004CF001962. (Exh. to Answer, Docket # 17 at 1, 7; Pet. for Habeas Corpus, Docket # 1 at 2.) On September 16, 2004, he was sentenced to twenty-seven years—seventeen years of initial confinement and ten years of extended supervision—on count one (Judg. of Conv. for Cts. 1 & 2, Docket # 17 at 30); on count two, he was

sentenced to ten years—five years of initial confinement and five years of extended supervision—to run concurrent to counts one and three (*id.*); and on count three, McGhee was sentenced to serve twelve months, and the sentence was to run concurrent to counts one and two (Judg. of Conv. for Ct. 3, Docket # 17 at 29). (Docket # 17 at 7-8; Docket # 1 at 2.) McGhee filed a notice of intent to pursue post-conviction relief on September 24, 2004. (Docket # 17 at 8.)

On May 23, 2005, McGhee filed his first appeal, in which the court of appeals affirmed the trial court. (Docket # 17 at 9, Docket # 18 at 1.) McGhee then filed a petition for review with the Wisconsin Supreme Court. The Wisconsin Supreme Court dismissed it as untimely. (Docket # 17 at 9; Order Denying Pet. for Rev., Docket # 18 at 78.) Subsequently, McGhee filed a motion to reinstate his Wis. Stat. § 809.30 deadlines, arguing in particular that both trial and appellate counsel were ineffective for failing to raise the issue of "arguably impermissibly suggestive identification procedures" under *State v. Dubose*.[1] (Docket # 18 at 81.) The court of appeals denied the motion, instructing McGhee that he could pursue the claims by filing a post-conviction motion pursuant to Wis. Stat. § 974.06 or by filing a *Knight*[2] petition with the court of appeals. (Docket # 18 at 88-89.)

On November 1, 2007, McGhee filed a motion for post-conviction relief pursuant to Wis. Stat. § 974.06. (Mtn. for Post-Conviction Relief, Docket # 18 at 44-63; Docket # 17 at 10.) The circuit court denied the motion on February 18, 2008. (Order Denying Mtn. for Post-Conviction Relief, Docket # 18 at 64-72; Docket # 17 at 10.) McGhee filed a notice of appeal on March 6, 2008. (Docket # 17 at 10.) The court of appeals affirmed the circuit court on April 14, 2009 in case number 2008AP000610. (Court of Appeals Dec. in 2008AP610, Docket # 18 at 407-414; Docket # 17 at 11.)

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[1] 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582.

[2] *State v. Knight*, 168 Wis. 2d 509, 484 N.W.2d 540 (1992).

McGhee filed a petition for review with the Wisconsin Supreme Court (Docket # 18 at 415-440), which it denied on June 18, 2009 (Docket # 18 at 531; Docket # 17 at 11).

On October 26, 2009, McGhee filed a petition for a writ of habeas corpus in this District in case number 09-CV-1011. (Docket # 1 at 16.) He later moved to voluntarily dismiss the petition in order to reinstate his appellate rights in his first appeal—2005AP504-CR, which was granted. (*See* Order in Case No. 09-CV-1011, Docket # 1-1 at 43-46.) He then filed a petition for a writ of habeas corpus in the Wisconsin Supreme Court (case number 2011AP514-W) seeking to have his appellate rights in his original appeal, case 2005AP504-CR, reinstated. (Docket # 17 at 11.) The supreme court granted the writ, reinstated and deemed timely filed the petition for review in 2005AP504-CR. (*Id.*) The court then denied the reinstated writ. (*Id.*)

McGhee then filed a petition for a writ of habeas corpus in the Wisconsin Court of Appeals, which was denied on September 22, 2011. (*Id.*) The court of appeals denied the motion for reconsideration on October 21, 2011. (*Id.*) McGhee filed a petition for review with the Wisconsin Supreme Court, which was denied on February 29, 2012. (*Id.*) He then filed the instant petition for a writ of habeas corpus.

STANDARD OF REVIEW

McGhee's petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254, which provides in pertinent part:

> 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.

28 U.S.C. § 2254(d).

This provision entitles federal courts acting within their jurisdiction to interpret the law independently, but requires them to refrain from "fine tuning" state court interpretations. *Lindh v. Murphy*, 96 F.3d 856, 870-77 (7th Cir. 1996), *rev'd on other grounds*, 521 U.S. 320 (1997). "Thus, although this Court reviews the state court's legal conclusions and mixed questions of law and fact de novo, that review is 'tempered by AEDPA's deferential constraints.'" *Hereford v. McCaughtry*, 101 F. Supp. 2d 742, 746 (E.D. Wis. 2000) (quoting *Sanchez v. Gilmore*, 189 F.3d 619, 623 (7th Cir. 1999)).

A state court's decision is "contrary to . . . clearly established Federal law as established by the United States Supreme Court" if it is "substantially different from relevant [Supreme Court] precedent." *Washington v. Smith*, 219 F.3d 620, 628 (7th Cir. 2000) (quoting *Williams v. Taylor*, 120 S.Ct. 1495, 1519 (2000)). The court of appeals for this circuit recognized the narrow application of the "contrary to" clause:

> [U]nder the "contrary to" clause of § 2254(d)(1), [a court] could grant a writ of habeas corpus . . . where the state court applied a rule that contradicts the governing law as expounded in Supreme Court cases or where the state court confronts facts materially indistinguishable from a Supreme Court case and nevertheless arrives at a different result.

Washington, 219 F.3d at 628. The court further explained that the "unreasonable application of" clause was broader and "allows a federal habeas court to grant habeas relief whenever the state court

'unreasonably applied [a clearly established] principle to the facts of the prisoner's case.'" *Id.* (quoting *Williams*, 120 S.Ct. at 1523).

To be unreasonable, a state court ruling must be more than simply "erroneous" and perhaps more than "clearly erroneous." *Hennon v. Cooper*, 109 F.3d 330, 334 (7th Cir. 1997). Under the "unreasonableness" standard, a state court's decision will stand "if it is one of several equally plausible outcomes." *Hall v. Washington*, 106 F.3d 742, 748-49 (7th Cir. 1997). In *Morgan v. Krenke*, the court explained that:

> Unreasonableness is judged by an objective standard, and under the "unreasonable application" clause, "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable."

232 F.3d 562, 565-66 (7th Cir. 2000) (quoting *Williams*, 120 S.Ct. at 1522), *cert. denied*, 532 U.S. 951 (2001). Accordingly, before a court may issue a writ of habeas corpus, it must determine that the state court decision was both incorrect and unreasonable. *Washington*, 219 F.3d at 627.

Furthermore, a federal court may not entertain a petition from a prisoner being held in state custody unless the petitioner has exhausted his state remedies. 28 U.S.C. § 2254(b)(1)(a). A claim is not considered exhausted if the petitioner "has the right under the law of the State to raise, by any available procedure, the question presented." 28 U.S.C. § 2254(c). With some exceptions, a petition for writ of habeas corpus should be dismissed if state remedies have not been exhausted as to any one of the petitioner's federal claims. *See Rhines v. Weber*, 544 U.S. 269, 277-78 (2005); *Cruz v. Warden of Dwight Corr. Ctr.*, 907 F.2d 665, 667 (7th Cir. 1990). For a constitutional claim to be fairly presented to a state court, both the operative facts and the controlling legal principles must be submitted to that court. *Verdin v. O'Leary*, 972 F.2d 1467, 1474 (7th Cir. 1992). Also, the petitioner must invoke one

complete round of the normal appellate process, including seeking discretionary review before the state supreme court. *McAtee v. Cowan*, 250 F.3d 506, 508-09 (7th Cir. 2001).

If state court remedies are no longer available because the prisoner failed to comply with the deadline for seeking state court review or for taking an appeal, those remedies are technically exhausted; however, exhaustion in this sense does not automatically entitle the habeas petitioner to litigate his or her claims in federal court. *Woodford v. Ngo*, 548 U.S. 81, 93 (2006). A habeas petitioner who has exhausted his state court remedies without properly asserting his federal claim at each level of state court review has procedurally defaulted that claim. *Lewis v. Sternes*, 390 F.3d 1019, 1026 (7th Cir. 2004). A procedural default will bar federal habeas relief unless the petitioner can demonstrate both cause for and prejudice stemming from that default or he can establish that the denial of relief will result in a miscarriage of justice. *Id.* (citing *Wainwright v. Sykes*, 433 U.S. 72, 86-87 (1977)).

ANALYSIS

In his petition for habeas corpus, McGhee raises four grounds for relief. First, McGhee argues that the Wisconsin Supreme Court's decision in *State v. Dubose*, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582, should apply retroactively to his case. Second, McGhee argues that the state court violated his right to discharge his attorney and proceed *pro se*. In his third claim, McGhee argues that his right to present a defense was denied when he was not allowed to present his alibi witnesses. Finally, McGhee claims that the State's peremptory challenge to the only black juror violated *Batson* and Equal Protection. I will address each argument in turn.

1. The Dubose Decision

McGhee argues that he is entitled to the benefit of the *State v. Dubose*, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582, decision and that it should apply retroactively to his case. (Pet. Br., Docket

22 at 4-6.) The respondent characterizes McGhee's *Dubose* claim as having two component parts: first, that the *Dubose* decision should apply retroactively to his case; and second, that the show-up identification was illegally and impermissibly suggestive and that his counsel was ineffective for failing to move to suppress it.[3] As to the first component of the argument, the respondent argues that the retroactivity claim concerns only state law and is therefore not appropriate for habeas review. (Resp. Br., Docket # 29 at 13-15.) He also argues that McGhee's *Dubose* claim is procedurally defaulted; more particularly, he argues that McGhee has failed to exhaust his retroactivity claim. (*Id.* at 12-13.) As to the second argument, the respondent argues that McGhee procedurally defaulted the claim and that even if there was a violation, the error was harmless. I will address both components of the petitioner's argument.

1.1 Retroactive Application of the *Dubose* Decision

McGhee argues that he is entitled to have the *Dubose* decision apply retroactively to his case. In *Dubose*, the Wisconsin Supreme Court held that show-up identifications are "inherently suggestive" and are not admissible "unless, under the totality of the circumstances, the procedure was necessary." 2005 WI 126, ¶ 33, 285 Wis. 2d at 165-66, 699 N.W.2d at 593-94. McGhee claims that the identification in his case should be examined, and ultimately suppressed, under the *Dubose* standard. The claim is not appropriate for federal habeas review.

McGhee's retroactivity claim does not present a question of federal law. In deciding *Dubose*, the Wisconsin Supreme Court relied on the Wisconsin Constitution. *See Dubose*, 2005 WI 126, ¶¶ 39-45, 285 Wis. 2d at 172-77, 699 N.W.2d at 596-99. Particularly, the Wisconsin Supreme Court relied

[3] The respondent also includes a third claim that pertains to a claim that the prosecutor's statements about a cellphone retrieved in the vicinity of McGhee's arrest denied him Due Process. However, I will treat this as a separate claim.

on the Due Process Clause in Article I, Section 8 of the Wisconsin Constitution. *Id.* at ¶ 39, 285 Wis. 2d at 172, 699 N.W.2d at 596. Therefore, the *Dubose* decision does not concern rights conferred by the United States Constitution. *See, e.g.*, *Limehouse v. Thurmer*, No. 09-C-0071, 2012 WL 1069034, * 9 (E.D. Wis. Mar. 29, 2012) (explaining that the petitioner who raised a *Dubose* argument "is not entitled to habeas relief because in the end he does not present to this court any violation of federal law."); *King v. Grams*, No. 05-C-928, 2006 WL 1598679, * 17 (E.D. Wis. Jun. 2, 2006) (explaining that "*Dubose* has no implication on [the petitioner's] rights under the United States Constitution."). "This court may grant a petition for a writ of habeas corpus based upon only a decision of the United States Supreme Court interpreting or applying federal law." *Whitehead v. Endicott*, No. 06-C-956, 2008 WL 426493, * 11 (E.D. Wis. Feb. 13, 2008) (discussing the petitioner's *Dubose* claim and determining it did not raise an issue of federal law (citing 28 U.S.C. § 2254(d)).

McGhee attempts to ground his argument in federal law by arguing that the Wisconsin courts misapplied the Supreme Court's decisions in *Griffith v. Kentucky*, 479 U.S. 314 (1987) and *Teague v. Lane*, 489 U.S. 288 (1989). However, neither *Griffith* nor *Teague* creates precedent binding on state courts in applying their own precedent. As explained in *Danforth v. Minnesota*, "*Teague* is based on statutory authority that extends only to federal courts applying a federal statute," and therefore "cannot be read as imposing a binding obligation on state courts." 552 U.S. 264, 278-79 (2008). This is true even though Wisconsin has adopted the *Teague* framework for resolving questions of retroactivity on collateral review that involve "new rules of constitutional criminal procedure" and "new rule[s] based on a statutory right." *State v. Lagundoye*, 2004 WI 4, ¶ 14, 268 Wis. 2d 77, 89, 674 N.W.2d 526, 532. Adopting the *Teague* framework does not make *Teague* itself controlling precedent for state courts. Similarly, *Griffith* "only requires that state courts apply new *federal* constitutional rules

to defendants whose cases are on direct appeal at the time of the decision." *Stewart v. Lane*, 60 F.3d 296, 304 (7th Cir. 1995) (emphasis added). Because *Dubose* created a new rule based on the Wisconsin Constitution and not the United States Constitution, the Wisconsin state courts were not obligated under *Griffith* to apply *Dubose* retroactively to McGhee's case. In sum, McGhee's retroactivity claim does not raise an issue of federal law and is therefore denied.

1.2 Show-up Identification and Ineffective Assistance of Counsel

McGhee also argues that his Due Process rights were violated by the show-up identification conducted in his case. He further argues that his counsel was ineffective for failing to raise the issue.

As to the Due Process portion of this claim, McGhee has failed to exhaust and procedurally defaulted. McGhee did not make a Due Process argument on direct appeal. In his post-conviction § 974.06 motion, McGhee argued that his counsel was ineffective for failing to raise the issue of the unduly suggestive nature of the show-up identification. He also argued that the show-up identification was unduly suggestive. He argued the same issues in his appeal from the denial of his § 974.06 motion. In his petition for review to the Wisconsin Supreme Court, however, he did not argue that his Due Process rights were violated by the show-up identification. In his *Knight* petition, McGhee argued to the court of appeals, in the context of ineffective of appellate counsel, that the out-of-court show-up identification was impermissibly suggestive, violating Due Process. In his petition for review with the supreme court, however, McGhee did not argue this issue in the context of Due Process. Therefore, despite engaging in multiple rounds of state court review, McGhee did not exhaust his Due Process claim, and because it does not appear that further relief is available to him in state court, he has therefore procedurally defaulted the claim.

As noted above, McGhee also appears to argue that he was denied the effective assistance of counsel because neither his trial, post-conviction, nor appellate counsel moved to suppress or challenged the show-up identification. The court of appeals explained that McGhee's counsel could not be found ineffective because "[t]here is no case law to support the contention that trial or postconviction counsel should have a crystal ball to predict the future." (Ct. App. Dec. No. 2008AP610, Docket # 18 at 411-12.) The court of appeals relies on *Lilly v. Gilmore*, 988 F.2d 783, 786 (7th Cir. 1993), which says, "[t]he Sixth Amendment does not require counsel to forecast changes or advances in the law." This is not contrary to or an unreasonable application of *Strickland v. Washington*, 466 U.S. 688 (1984), which governs ineffective assistance of counsel claims. *Strickland* explains that "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689. Here, as the court of appeals explained, trial counsel did not have the benefit of the *Dubose* decision, which was issued in July of 2005. In turn, neither appellate nor post-conviction counsel could be ineffective for failing to allege that trial counsel's failure to pursue the show-up identification issue was ineffective assistance. Therefore, McGhee's ineffective assistance of counsel claim must fail as the court of appeals properly applied federal law to the facts of his case.

2. The Cellphone Claim

McGhee includes within his *Dubose* arguments that his Due Process rights were violated when the jury heard about a cellphone found in the vicinity of where he was arrested. (*See* Docket # 22-1 at 26-28.) He argues that the prosecutor's statements, which were not corroborated by the introduction of the cellphone into evidence, unduly influenced the jury. (*See id.* at 27.) McGhee also

seems to argue that his trial counsel was ineffective for failing to object to the prosecutor's statements. (*See id.*) The respondent argues that McGhee never exhausted this claim. (Docket # 29 at 16.)

McGhee has procedurally defaulted the Due Process component of his cellphone claim. Though he went through one round of state court review on both direct appeal and on a post-conviction § 974.06 motion, he did not raise a Due Process argument regarding the prosecutor's remarks about the cellphone in either his direct appeal or post-conviction motion. (*See* App. Br. in 2005AP504-CR, Docket # 18 at 73-102; Pet. for Review in 2005AP504-CR, Docket # 18 at 133-49; § 974.06 Motion, Docket # 17 at 44-63; App. Br. in 2008AP610, Docket # 18 at 90-149; Pet. for Review in 2008AP610, Docket # 18 at 415-50.) McGhee did make an argument about the cellphone in his *Knight* petition in the court of appeals, but he did not include it in his petition for review to the Wisconsin Supreme Court. Therefore, McGhee has failed to exhaust this portion of his cellphone claim, and because no other state court remedies appear to be available to him, he has also procedurally defaulted it.

To the extent that McGhee is raising an ineffective assistance of trial counsel claim, he has not properly exhausted the claim and is in procedural default. Though he raised ineffective assistance of counsel claims in his § 974.06 motion and subsequent appeal, his claims did not concern the cellphone or his attorney's failure to object to the prosecutor's statement. Therefore, even though McGhee went through one round of state review on direct appeal and then again following the denial of his § 974.06 motion, he did not present the claim to each level of the state courts. As noted above, he did raise the issue in his *Knight* petition in the court of appeals. However, he did not raise it in his petition for review. Therefore, McGhee has therefore procedurally defaulted this portion of his cellphone claim as well. *See, e.g.*, *Limehouse v. Thurmer*, No. 09-C-0071, 2012 WL 1069034, * 6 (E.D.

Wis. Mar. 29, 2012) (explaining that "[p]rocedural default occurs . . . when a petition to the federal court includes . . . claims that the petitioner failed to raise at the state level.").

3. Right to Discharge Counsel and Self-Representation

Next, McGhee argues that the state trial court violated his right to discharge his attorney and "speak for himself." (Docket # 22 at 7.) Particularly, McGhee argues that his trial attorney should have been allowed to withdraw, especially after citing "ethical considerations" as the reason for moving to withdraw (Docket # 22-1 at 30), and that because he made clear he wished to "speak for himself," the trial court erred in not conducting a colloquy with him (*id.* at 30-33). McGhee did not raise the self-representation/discharge of counsel issue in his direct appeal. In his post-conviction § 974.06 motion, McGhee argued that the trial court erred in not allowing for a substitution of counsel. (Docket # 17 at 55-57.) However, he did not raise the issue at the court of appeals when he appealed from the circuit court's denial of his motion (*see* App. Br. in 2008AP610, Docket # 18 at 90-149) or in his petition for review in the Wisconsin Supreme Court (*see* Pet. for Review in 2008AP610, Docket # 18 at 415-50).

McGhee's *Knight* petition in the Wisconsin Court of Appeals included an argument that the trial court erred in denying his request to discharge his attorney and proceed *pro se* (Pet. for Writ of Habeas Corpus, Docket # 19 at 127-29), as well as an argument that the trial judge erred by not engaging the petitioner in a waiver-of-counsel colloquy (*id.* at 129-33). He also raised the issue in his petition for review to the Wisconsin Supreme Court. By nature of the *Knight* petition, these arguments were made in the context of an overarching argument that his appellate counsel was ineffective, particularly for failing to raise and pursue the issue. *Knight* petitions are a mechanism by

which a defendant can challenge the effectiveness of his appellate counsel. *See State v. Knight*, 168 Wis. 2d 509, 519-22, 484 N.W.2d 540, 544-45 (Wis. 1992).

I recognize that other courts in this district have addressed the substance of the underlying constitutional claims raised in *Knight* petitions. For example, in *McGee v. Bartow*, the court found that the petitioner's "state petition for habeas corpus [his *Knight* petiton], along with his petition for review of the . . . decision denying his petition, afforded the Wisconsin courts a full and fair opportunity to address" the constitutional claim underlying his ineffective assistance of appellate counsel claim. No. 06-CV-1151, 2007 WL 1062175, * 4 (E.D. Wis. Apr. 3, 2007). Similarly here, I find that the principles of comity underlying habeas review and the exhaustion requirement are satisfied and will assess McGhee's self-representation claim on the merits. *See Searcy v. Clements*, No. 09-CV-382, 2012 WL 719002, * 3 (E.D. Wis. Mar. 5, 2012) ("This procedure appears to best satisfy the comity rationale underlying the exhaustion requirement whereby the petition has given the state courts through one complete round of appellate proceedings the 'opportunity to pass upon and correct alleged violation of its prisoners' federal rights . . . .") (internal citation omitted).

Turning to the merits of the claim, in rejecting McGhee's claim that appellate counsel was ineffective for failing to argue that the trial court denied his right to self-representation, the Wisconsin Court of Appeals explained that the "Sixth Amendment impliedly guarantees the right to represent oneself," citing *State v. Darby*, 2009 WI App 50, ¶ 16, 317 Wis. 2d 478, 766 N.W.2d 770 and *Faretta v. California*, 422 U.S. 806, 819 (1975). Under *Darby*, a defendant must declare his desire to proceed *pro se* "clearly and unequivocally." 2009 WI App 50, ¶ 24, 317 Wis.2d at 494, 766 N.W.2d at 778.

At trial, McGhee made several statements about his counsel. The judge explained that McGhee would have to speak to his lawyer, to which McGhee replied "I can't speak to my lawyer

as you already know." (*Id.*) This, however, the court of appeals explained, "[fell] short of the showing required under *State v. Darby* . . . ." (*Id.*) McGhee made other statements before the trial began, including: "[M]y witnesses can't come, you won't let me fire my attorney. My attorney done tried to withdraw his self from the case, and you steady trying to make me go through with this case." (Partial Transcript of Jury Trial, Attachment to Pet. Br. in Support, Docket # 22-2 at 12.) Later, McGhee said, "You expect me to sit here and not say nothing in my own defense? You expect me -- This man ain't speak up for me. Somebody got to speak up for me. If I don't do it, who going to do it?" (*Id.* at 31-32.) Before bringing the jury in, McGhee said "I'm going to speak up for myself if somebody got to say it. Judge ain't going to say it for me." (*Id.* at 34.) The judge explained to McGhee that he could not shout what he wanted to say but that he could talk quietly to his lawyer, to which McGhee responded "Ain't talking about shout it out." (*Id.*) McGhee's attorney did move to withdraw, citing ethical considerations. (*Id.* at 27.)

The court of appeals found that the statement most closely resembling a request to proceed *pro se* occurred when McGhee said, "[J]ust give me a chance to speak like everybody else. That's all I ask. If can speak, we'll have no problems." (Ct. App. Dec. In 2011AP1718-W, Docket # 19 at 211.) It held that this was not enough to make the showing required by *Darby*. The court of appeals found that McGhee did not make a clear and unequivocal declaration that he wished to proceed *pro se*.

McGhee argues that *Darby* should not apply to his case because it was not decided until 2009 and he was convicted five years earlier, in 2004. This argument misses the mark. On federal habeas review, the task is to determine whether the court of appeals decision was contrary to federal law or relied on an unreasonable determination of the facts. *Faretta*, which the court of appeals cited, recognizes the Sixth Amendment right to self-representation, 422 U.S. at 819, and it requires that a

defendant relinquish the benefits of the right to counsel "knowingly and intelligently," *id.* at 835. Under *Faretta*, the court is to determine whether a defendant waived his right to counsel knowingly and voluntarily. However, "*Faretta* does not require a more searching inquiry whenever a defendant makes ambiguous, equivocal statement that could potentially be construed as indicating a desire for self-representation." *Duncan v. Schwartz*, 337 Fed. Appx. 587, 593 (7th Cir. 2009). Accordingly, the court of appeals' determination that McGhee had not made a clear and unequivocal declaration that he wanted to proceed *pro se* was not contrary to established federal law, nor was it unreasonable determination of the facts. McGhee's further argument that the court should have engaged in the colloquy required by *State v. Klessig*, 211 Wis. 2d 194, 564 N.W.2d 716 (Wis. 1997), is also unavailing as it does not raise an issue of federal law. Again, *Faretta* requires an unequivocal statement to trigger further inquiry from the court. *See Duncan*, 337 Fed. Appx. At 593. Therefore, the Wisconsin Court of Appeals' decision is in accordance with federal law, and it was not an unreasonable determination of the facts to find that McGhee's statements did not constitute a "clear and unequivocal" desire to proceed *pro se*. Therefore, McGhee's self-representation claim must be denied.

4. Alibi Witnesses

McGhee argues that he was denied the right to present a defense when the circuit court refused to allow his alibi witnesses to testify. He also argues that his trial counsel was ineffective for failing to advise him of the alibi notice statute and failing to investigate the possibility of an alibi. McGhee has procedurally defaulted the former part of his claim, but I will consider the ineffective assistance of counsel portion of his claim on the merits.

In his direct appeal to the Wisconsin Court of Appeals, McGhee argued that he was denied his constitutional right to present a defense when he was not permitted to present his alibi witnesses

based on his failure to provide the requisite statutory notice under Wis. Stat. § 971.23(8)(a) (2003-04).[4] (*See* App. Br. in 2005AP504-CR, Docket # 18 at 11-12.) However, in his petition for review to the Wisconsin Supreme Court, McGhee did not raise this claim. (*See* Pet. for Rev. in 2005AP504-CR, Docket # 18 at 61-77.) Therefore, McGhee's appellate review did not exhaust his right to present a defense claim, nor did he raise or exhaust an ineffective assistance of counsel claim.

McGhee's post-conviction motion and subsequent appeal did not exhaust the due process portion of his alibi claim. In the circuit court, McGhee argued that his trial counsel was ineffective for failing to investigate an alibi defense and/or for failing to provide the requisite notice in his post-conviction motion. (Docket # 17 at 50-53.) McGhee then raised the claim when he appealed from the denial of his § 974.06 motion. (*See* App. Br. in 2008AP610, Docket # 18 at 129-38.) In his petition for review to the Wisconsin Supreme Court, however, McGhee presented the issue differently. He urged the supreme court "to determine whether a defendant is entitled to notification of statutory time limits for disclosure of alibi witnesses where a defense of mistaken identity is at issue." (Pet. for Review in 2008AP610, Docket # 18 at 439; *see id.* at 438-39.) McGhee did not fully and fairly present the due process aspect of his alibi claim to the supreme court, but I find that his presentation of the issue in his petition for review is sufficient to exhaust the ineffective assistance of counsel portion of this claim.

In denying McGhee's claim that his post-conviction counsel was ineffective for failing to argue that trial counsel was ineffective for failing to file a timely notice of an alibi defense, the Wisconsin Court of Appeals explained that McGhee did not tell his attorney about an alibi until two

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[4] Wis. Stat. § 971.23(8)(a) (2003-04) required a defendant to give notice of his intent to present alibi witnesses to the district attorney either at the arraignment or at least 15 days before trial. Under the current version of the alibi notice statute, the defendant must give the district attorney at least 30 days notice. Wis. Stat. § 971.23(8)(a) (2011-12).

days before trial. The court also notes that trial counsel did raise the defense but the trial court denied its use because it was not timely disclosed as required by statute. The court of appeals then explained that even if it assumed that trial counsel was deficient, "McGhee's argument fails the prejudice test, since he completely fails to tell the court what the alibi witnesses would have said. He presented no affidavits from them, and he failed to provide any facts to prove that he was prejudiced." (Docket # 18 at 412-13.)

The court of appeals' decision is not contrary to or an unreasonable application of federal law. As noted above, *Strickland* governs ineffective assistance of counsel claims. A petitioner must show both "that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687. To satisfy *Strickland's* performance prong, the petitioner must identify "acts or omissions of counsel that could not be the result of professional judgment." *United States ex rel. Thomas v. O'Leary*, 856 F.2d 1011, 1015 (7th Cir.1988) (citing *Strickland*, 466 U.S. at 690). Indeed, *Strickland* itself requires "that the defendant affirmatively prove prejudice." 466 U.S. at 693. It was therefore not contrary to or an unreasonable application of federal law for the court of appeals to find that McGhee failed to prove he was prejudiced by his counsel's performance, assuming counsel was ineffective. Therefore, this aspect of his alibi claim must be denied.

5. Cause and Prejudice

McGhee has procedurally defaulted four of his claims: the Due Process argument regarding the show-up identification; both the Due Process and ineffective assistance of counsel claims pertaining to the introduction of evidence regarding a cellphone; and the Due Process portion of his alibi witnesses claim. In order to overcome his procedural default, McGhee must either demonstrate both cause for and prejudice stemming from his procedural default or be able to establish that the

denial of relief will result in a miscarriage of justice. *Lewis*, 390 F.3d at 1026 (citing *Wainwright v. Skyes*, 433 U.S. 72, 86-87 (1977)). The cause and prejudice exception requires that the petitioner show "that some type of external impediment prevented [him] from presenting his federal claim to the state courts" to prove cause. *Id.* (citing *Murray v. Carrier*, 477 U.S. 478, 495-96 (1986)). In order to establish prejudice, the petitioner must show that "the violation of [his] federal rights 'worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.'" *Lewis*, 390 F.3d at 1026 (citing *United States v. Frady*, 456 U.S. 152, 170 (1982) (emphasis in original)). The miscarriage of justice exception requires that the petitioner "show that he is actually innocent of the offense for which he was convicted, i.e., that no reasonable juror would have found him guilty of the crime but for the error(s) that he attributed to the state court." *Lewis*, 390 F.3d at 1026 (citing *Schlup v. Delo*, 513 U.S. 298, 327-29 (1995)).

Though McGhee discusses the prejudice he believes the discussion of the cellphone had on the jury (*see* Docket # 22-1 at 28), he presents no evidence of any "external impediment" that prevented him from raising the issue on direct appeal or when he filed his § 974.06 motion. Similarly, McGhee does not provide any reasons for failing to raise the Due Process portion of his claim regarding the show-up identification until filing his *Knight* petition and then not pursue it at the Wisconsin Supreme Court. Further, McGhee does not offer a reason for failing to exhaust the Due Process portion of his alibi claim. Similarly, McGhee presents no evidence that he is actually innocent of the offenses for which he was convicted. Therefore, he cannot overcome procedural default, and he is not entitled to habeas relief on these claims.

6. Batson Claim

McGhee's final claim is that the prosecutor's peremptory challenge to the only black juror violated his right to equal protection, as outlined in *Batson v. Kentucky*, 476 U.S. 79 (1986). The respondent agrees that the claim has been exhausted but argues that the Wisconsin Court of Appeals did not unreasonably apply the Supreme Court's clear precedent nor did the decision rest on an unreasonable determination of the facts. (Resp. Br., Docket # 29 at 25.)

In *Batson*, the Supreme Court explained that "[p]urposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure" and therefore, "the State's privilege to strike individual jurors through peremptory challenges [] is subject to the commands of the Equal Protection clause." *Batson*, 476 U.S. at 86, 89. *Batson* creates a three-step process for evaluating a defendant's claim that improper racial considerations motivated the State's peremptory strike of a juror. First, the defendant must make a *prima facie* showing that the State engaged in purposeful discrimination in selection of the jury.[5] *Id.* at 96-98. Second, once the defendant makes a *prima facie* showing, "the burden shifts to the State to come forward with a neutral explanation" for striking the juror(s). *Id.* at 97. This explanation "need not rise to the level justifying exercise of a challenge for cause," but the prosecutor may not rely on the assumption that the juror would be sympathetic to the defendant because they are the same race, nor may the prosecutor simply say that he did not have a discriminatory purpose in striking the juror. *Id.* at 97-98. Instead, the prosecutor is required to provide a "neutral explanation

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[5] For a defendant to make a *prima facie* showing of purposeful discrimination, the defendant must show three things: first, that "he is a member of a cognizable racial group" and that the State used peremptory strikes to remove potential jurors of the same racial group; second, the defendant may "rely on the fact . . . that peremptory challenges constitute a jury selection practice that permit 'those to discriminate who are of a mind to discriminate'"; and third, the defendant must show that "these facts and any other relevant circumstances raise an inference that the prosecutor use that practice" to remove potential jurors because of their race. *Batson*, 476 U.S. at 96 (internal citations omitted).

related to the particular case to be tried." *Id.* at 98. Third, and finally, the trial court must "determine if the defendant has established purposeful discrimination." *Id.*

The Seventh Circuit has explained that direct review of a *Batson* claim is subject to deference to the trial court's findings of fact, given that the trial court is in the best position to determine credibility. *Harris v. Hardy*, 680 F.3d 942, 950 (7th Cir. 2012). "On federal habeas review, however, the standard is even more demanding." *Id.* (citing *Miller-El v. Dretke*, 537 U.S. 322, 339-40 (2003)). In short, a federal habeas court "may grant the habeas petition only 'if it was unreasonable [for the state court] to credit the prosecutor's race-neutral explanations for the *Batson* challenge.'" *Id.* (quoting *Rice v. Collins*, 546 U.S. 333, 338 (2006)).

In this case, it was not unreasonable for the state court to credit the prosecutor's proffered reason for striking the only African American juror from the jury pool. The circumstances surrounding McGhee's *Batson* claim began when McGhee had an outburst in front of the prospective jurors. As the trial court asked prospective jurors about any potential relationship they may share with the prosecutor, defense counsel, or the judge, McGhee began to protest the trial court's decision to not allow his alibi witnesses to testify. (*See* Transcript of Trial, August 9, 2004, Docket # 20 at 32-34.) He then began to protest the court's decision to not allow his attorney to withdraw:

> THE DEFENDANT: First of all, my witnesses can't come, you won't let me fire my attorneys. My attorney done tried to withdraw his self from the case, and you steady trying to make me go through with this case.
>
> THE COURT: All right. Mr. McGhee, we've gone through this before. You have an opportunity - -
>
> THE DEFENDANT: But you - - Evidently you not understanding. If the man don't want to represent me, the man got me as guilty already, why would I sit up here, go to trial in front of all these people? The man sat here and told you out his own mouth that he is not trying to defend me. That doesn't make any sense.

(*Id.* at 34, lines 10-23.) McGhee went on, returning to his feelings on the court's decision to not allow his attorney to withdraw and his frustration with not being allowed to call his alibi witnesses. (*Id.* at 35, lines 4-11 and 14-18.) The trial court then excused the jury. (*Id.* at lines 22-23.) When the jury returned, the court, the prosecutor, and defense counsel conducted *voir dire*. (*See id.* at 55-88; 88-99; 99-108.) During defense counsel's *voir dire*, he asked the prospective jurors whether, given McGhee's outburst earlier in the day, they had already made decisions about McGhee's "character or about his guilt or innocence" and asked if they felt they could still be fair. (*Id.* at 105, lines 3-16; 21-23.)

In response to counsel's question, four jurors raised their hands. (*Id.* at 105-07.) Among the four was the only African American prospective juror, Faye Evans, who responded, "I feel like we can make a partial [sic] decision on the case and everything. But can you [defense counsel] do a partial [sic] representing?" (*Id.* at 107, lines 3-5.) The prosecutor struck Evans. (*See id.* at 116, lines 1-13.) Defense counsel raised a *Batson* objection to the prosecutor's peremptory strike of Evans. (*Id.* at 119, lines 3-7.) The court conducted a *Batson* hearing the next morning, at which time the court stated, "At this point conceivably the State struck the only African-American that was on the panel . . . . That might constitute a prima facie proof. The burden would shift to the State." (Transcript of Trial, August 10, 2004 (morning), Docket # 20 at 130:3-8.) The court then asked the prosecutor for an explanation for striking the juror. (*Id.* at 130:9-10.) The prosecutor explained as follows:

> Judge, as you recall, the question that the juror responded to was the question objected to by the State and the objection was overruled. The question was, how do you feel about his outburst. I felt that it was overbroad [sic] and invited the jurors to speculate about some things.
>
> Interestingly, this juror [Evans] didn't answer that question but choose [sic] to answer a question which reflected a view that this defendant might be represented by inadequate counsel. In other words, she assumed merit to some of the things the defendant said, did not respond to the question about how she felt about the outburst,

> whether she could still sit and hear the evidence against him fairly. She decided to address her concern to this defendant's attorney.
>
> I know from personal experience that there's a great deal of suspicion that one of the problems with the system is inadequate representation by white males for black defendants. And so to the extent race was even relevant at all, it was that there was a - - in the juror's response, there was an impression on my part of her statement that she suspected that this defendant might not be adequately defended. That increases my burden not only to produce the evidence against the defendant, but to somehow make sure the jury gets the impression - - certainly there's one juror - - the impression that the defendant is receiving an adequate defense. I can't do both of those jobs nor should I be expected to.
>
> This was a proffered statement on her part, not directly in response to anything that was asked. But it was occasioned by a general statement of the defense or general question by the defense.
>
> The defendant also made some statement regarding not allowing witnesses to appear. And the juror responded and may have believed that somehow there's some unfairness in witnesses not being able to appear, first of all, to conclude that he has any and, secondly, that they're being unfairly excluded.
>
> There is, in my belief, a reason to exclude a person who is prepared to take the word of someone who won't even wait 'til it's his turn, won't even comply with the general rules of the Court and would give weight and merit to that kind of outburst. And that clearly is what she did. I can't rehabilitate that. I can't even go down that road. My turn to voir dire was gone. My options at the point were to hope that somehow I could do both jobs, only one of which is mine or, secondly, to use my peremptory strike, which I did.

(*Id.* at 130:23-132:23.) The trial court then found that the prosecutor presented a "reasonable, rational basis to exercise a peremptory challenge" against Evans. (*Id.* at 135:5-6.) Particularly, the trial court found that the juror "clearly express[ed] sympathy towards the defendant the State need[ed] not accept." (*Id.* at 135:4-5.)

On appeal, the Wisconsin Court of Appeals affirmed the trial court. (Ct. App. Dec. in 2005AP504-CR, Docket # 18 at 52-60.) Applying the *Batson* framework, the court of appeals explained that it would not revisit the first inquiry in a *Batson* challenge—whether the defendant

made a *prima facie* showing that the State struck the prospective juror because of her race—because the trial court proceeded to the second and third steps. (*Id.* at 59.) The court of appeals found that Evans' comments, "which the prosecutor interpreted as demonstrating a predisposition to believe McGhee's version of events, meets the requirement that the State proffer a plausible, non-discriminatory reasons for its strike." (*Id.*) The court went on, finding that "[t]here is no basis in the record before us to conclude that the court should have disbelieved the State's explanation or rejected it as a pretext." (*Id.* at 60.) The court of appeals also noted the deference owed to the trial court as explained in the *Batson* case; the trial court is in the best position to make a credibility determination. (*Id.*)

The court of appeals did not unreasonably apply the Supreme Court's precedent from *Batson*, nor did the court of appeals' ruling result in a decision that is contrary to *Batson*. Rather, the court of appeals properly employed the *Batson* framework to affirm the trial court. Similarly, the court of appeals' decision does not demonstrate an unreasonable determination, or application, of the facts. Although McGhee emphasizes just a portion of the prosecutor's remarks, given the entirety of the prosecutor's remarks, as well as the deference owed to the trial court, it was not unreasonable for the court of appeals to find that the facts supported a finding that the prosecutor had a neutral, non-discriminatory reason for striking Evans from the jury panel. Therefore, McGhee is not entitled to habeas relief on his *Batson* claim.

CERTIFICATE OF APPEALABILITY

According to Rule 11(a) of the Rules Governing § 2254 Cases, the court must issue or deny a certificate of appealability "when it enters a final order adverse to the applicant." A certificate of appealability 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). To make a substantial showing of the denial of a constitutional right, the petitioner must demonstrate 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 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893, and n. 4).

When issues are resolved on procedural grounds, a certificate of appealability "should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* Each showing is a threshold inquiry; thus, I need only address one component if that particular showing will resolve the issue. *Id.* at 485.

For the reasons set forth in this decision denying McGhee's habeas petition, McGhee's procedurally defaulted claims do not warrant a certificate of appealability. Whether McGhee is procedurally defaulted is a straightforward issue, and I do not believe that a reasonable jurist would find it debatable whether I erred in resolving this procedural question. Because this finding alone is sufficient grounds to deny a certificate of appealability, I need not determine whether the petition states a valid constitutional question that jurists of reason would find debatable. As to McGhee's non-procedurally defaulted claims, reasonable jurists would not find the court's decision to deny the petition on substantive grounds.

Thus, the court will deny a certificate of appealability as to all of McGhee's claims. Of course, McGhee retains the right to seek a certificate of appealability from the Court of Appeals pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure.

ORDER

NOW, THEREFORE, IT IS ORDERED that the petitioner's petition for a writ of habeas corpus (Docket # 1) be and hereby is **DENIED**.

IT IS FURTHER ORDERED that this action be and hereby is **DISMISSED**.

IT IS ALSO ORDERED that a certificate of appealability shall not issue.

IT IS ALSO ORDERED that the petitioner's letter demanding discovery and requesting an evidentiary hearing (Docket # 35) is **DENIED AS MOOT.**

FINALLY, IT IS ORDERED that the Clerk of Court enter judgment accordingly.

Dated at Milwaukee, Wisconsin this 19th day of February, 2014.

BY THE COURT

s/Nancy Joseph
NANCY JOSEPH
United States Magistrate Judge

CERTIFICATE OF COMPLIANCE WITH RULE 32

I certify that the foregoing Brief and Circuit Rule 30(a) Appendix of Petitioner-Appellant Laderian McGhee:

1. complies with the type-volume limitation in Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because it contains 10,797 words, including footnotes and excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii); and

2. complies with typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) & (6) and Circuit Rule 32(b) because it was prepared in a proportionally spaced typeface using Microsoft Word 2007, in 12-point Century Schoolbook for both the text and footnotes.

Dated: January 26, 2015

/s/ James F. Tierney

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CIRCUIT RULE 30(d) CERTIFICATION

I, the undersigned, counsel for the Petitioner-Appellant, Laderian McGhee, hereby state that all of the materials required by Circuit Rules 30(a) and 30(b) are respectively included in the Appendix bound with this brief, and the Separate Appendix filed concurrently with this brief.

Dated: January 26, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on January 26, 2015, I caused the Brief and Circuit Rule 30(a) Appendix for Petitioner-Appellant Laderian McGhee and the Circuit Rule 30(b) Separate Appendix of Petitioner-Appellant Laderian McGhee to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit using the CM/ECF system. I certify that that service will be accomplished by the CM/ECF system, which will send notice to all users registered with CM/ECF:

I further certify that I have caused the foregoing to be placed in the mail for delivery within three days to the following users who are not registered for CM/ECF:

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/s/ James F. Tierney

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