

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

AUG 24 2023

FOR THE NINTH CIRCUIT

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

JACOB SMITH,

Petitioner-Appellant,

v.

ISIDRO BACA, Warden; ATTORNEY
GENERAL FOR THE STATE OF
NEVADA,

Respondents-Appellees.

No. 20-15278

D.C. No.

3:14-cv-00512-MMD-CLB

MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Miranda M. Du, Chief District Judge, Presiding

Submitted August 21, 2023**
San Francisco, California

Before: BUMATAY, KOH, and DESAI, Circuit Judges.

Nevada state inmate Jacob Smith appeals the district court's denial of his 28 U.S.C. § 2254 habeas corpus petition challenging his conviction for first-degree murder. A screening panel of this court granted Smith's application for a certificate

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

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

of appealability with respect to his claim that the state justice court violated his right to self-representation at his preliminary hearing under *Faretta v. California*, 422 U.S. 806 (1975), and whether that claim was properly exhausted. We did not previously grant a certificate of appealability regarding Smith’s self-representation claim stemming from the state district court. We review de novo the district court’s denial of a habeas corpus petition. *Stanley v. Schriro*, 598 F.3d 612, 617 (9th Cir. 2010). We have jurisdiction under 28 U.S.C. § 2253, and we affirm.

1. Assuming that Smith properly exhausted his claim, the federal district court correctly held that Smith cannot show that the state court’s decision was contrary to federal law. *See* 28 U.S.C. § 2254(b)(2) (“An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.”); *see also Cassett v. Stewart*, 406 F.3d 614, 624 (9th Cir. 2005) (“[A] federal court may deny an unexhausted petition on the merits only when it is perfectly clear that the applicant does not raise even a colorable federal claim.”). Under the Antiterrorism and Effective Death Penalty Act, habeas relief is warranted only if the state court’s decision was “contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court,” or if the decision “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).

Here, Smith challenges the justice court's decision to not allow him to proceed *pro se* during the preliminary hearing. He cannot show that this decision was contrary to clearly established Federal law because the Supreme Court has not spoken on whether *Faretta* rights apply at a preliminary hearing. Smith identifies no dispositive Supreme Court case on this point. While *Faretta* established the right to self-representation *at trial*, 422 U.S. at 834, no Supreme Court case extends that right of self-representation to a preliminary hearing. Accordingly, we cannot say that the justice court's decision was contrary to Federal law under *Faretta*.

2. Under Circuit Rule 22-1(e), we construe Smith's briefing on the uncertified issues regarding *Faretta* rights at trial before the state district court, prosecutorial misconduct,¹ and burden of proof as a motion to expand the certificate of appealability. After considering Smith's amended arguments, we deny the motion. Smith cannot make a substantial showing of the denial of a constitutional right. *Pham v. Terhune*, 400 F.3d 740, 742 (9th Cir. 2005) (quoting *Nardi v. Stewart*, 354 F.3d 1134, 1138 (9th Cir. 2004)).

AFFIRMED.

¹ On August 16, 2023, the court received Smith's *pro se* motion to amend his opening brief to amend his uncertified issues to include prosecutorial misconduct. Dkt. No. #76. We **GRANT** the motion and accept Smith's amended arguments regarding uncertified issues. Dkt. No. #77.