No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Scott Ray Bishop,
Petitioner,

v.

United States of America,
Respondent

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Von Moltke v. Gillies*, this Court laid out a series of advisements that a defendant must understand before a waiver of the Sixth Amendment right to counsel can be deemed knowing and intelligent. 332 U.S. 708, 724 (1948). Additionally, in *Johnson v. Zerbst*, this Court held that all courts must "indulge every reasonable presumption against waiver" of Sixth Amendment rights. 304 U.S. 458, 464 (1938).

The questions presented in this case are whether the *Von Moltke* advisements remain prerequisites for a knowing and intelligent waiver of the right to counsel and whether this Court continues to require courts to apply "every reasonable presumption" against such a waiver.

TABLE OF CONTENTS

Page

Appendices

TABLE OF AUTHORITIES

Page

Cases

Statutes

PETITION FOR WRIT OF CERTIORARI

Petitioner Scott Ray Bishop respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINION BELOW

On May 25, 2017 the district court entered judgment on Mr. Bishop's criminal conviction in Case No. 16-CR-00662-DBB-1. Mr. Bishop appealed, and the Tenth Circuit Court of Appeals affirmed in *United States v. Bishop*, 926 F.3d 61 (10th Cir. 2019). Mr. Bishop then collaterally attacked his conviction through 28 U.S.C. 2255.

On May 5, 2021 the district court denied Mr. Bishop's *pro se* § 2255 motion and denied him a certificate of appealability (COA) in Case No. 2:20-CV-00777-DBB (D. Utah). This order is unpublished and is attached as Appendix B. On April 4, 2022, the Tenth Circuit granted Mr. Bishop a COA, Case No. 21-4085, and appointed him counsel. This order is attached as Appendix C. On December 9, 2022, the Tenth Circuit affirmed the district court's denial in an unreported decision, *United States v. Bishop*, 2022 WL 17543908, No. 21-4085 (10th Cir. 2022), which is attached as Appendix A.

JURISDICTION

The Tenth Circuit entered judgment on December 9, 2022. Appendix A. Under this Court's rules, Mr. Bishop has 90 days to file this petition creating a deadline of date March, 9 2023. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY OR CONSTITUTIONAL PROVISIONS INVOLVED

There are no statutory provisions involved in this case. This case concerns the knowing and voluntary nature of a defendant's waiver of his or her Sixth Amendment right to counsel. The Sixth Amendment provides:

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

U.S. Const. amend. VI

STATEMENT OF THE CASE

A jury found Scott Bishop guilty of one count of unlawfully manufacturing machineguns, in violation of 26 U.S.C. § 5861(a), and one count of unlawfully possessing or transferring machineguns, in violation of 18 U.S.C. § 922(o). Vol. IV at 94.[1] Mr. Bishop had elected to represent himself at trial. He unsuccessfully appealed and ultimately filed a motion to vacate his convictions.[2] Relevant here, Mr. Bishop claimed that his conviction should be vacated because he did not voluntarily, knowingly, and intelligently waive his right to trial counsel.

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[1] All "Vol. __" citations are to the record on appeal filed in the Tenth Circuit in *United States v. Bishop*, Case No. 21-4085.

[2] The district court sentenced Mr. Bishop to 33 months' imprisonment, followed by 36 months' supervised release. Vol. I at 121-22.

The district court denied Mr. Bishop's motion to vacate and denied Mr. Bishop a COA. The Tenth Circuit Court of Appeals granted Mr. Bishop a COA on the issue presented herein but, ultimately, affirmed the district court's denial of the § 2255 motion.

Mr. Bishop now seeks this Court's review as the Tenth Circuit's decision conflicts with this Court's precedent and deepens a circuit split on the protections afforded to criminal defendants seeking to proceed *pro se*. Due to the exceptional importance of the issue presented herein, this case calls out for additional review.

I. Mr. Bishop's *Faretta* hearing.

Mr. Bishop asked to represent himself at trial. Thus, before trial, the district court held a hearing held pursuant to *Faretta v. California*, 422 U.S. 806 (1975) to determine whether Mr. Bishop's waiver of his right to counsel was knowing and intelligent. The hearing was meandering, unfocused, and did not adequately establish that Mr. Bishop had knowingly and intelligently waived his right to counsel. First, the trial judge discussed why Mr. Bishop wanted to represent himself:

> THE COURT: Tell me, if you will, why it is that you want to handle your own defense.
>
> MR. BISHOP: Your Honor, I believe that I have the ability and maybe the more clear vision of my defense and how I would like to proceed on that. My counsel have been great. They have been very good to work with, but I think there are things that I would like to present that I am not sure that they can present in the way that I would like to.

Vol. III at 4. Without any follow-up, the judge then advised Mr. Bishop that he had to comply with court rules, the rules of evidence and the rules of procedure, but did not actually confirm that Mr. Bishop understood this obligation before moving on to a different topic—the wisdom of self-representation.

> THE COURT: You're aware of the fact that you will be required, acting as your own counsel, if that is what you in the end decide to do, you will be required to comply with all of the court rules and the Rules of Procedure and the Rules of Evidence and all of the rules and procedures that pertain in a jury trial? You're not a trained lawyer so you're at a disadvantage sometimes when you don't have that kind of knowledge.
>
> Do you understand the disadvantages those pose to someone who is representing himself and who is not trained in those procedures?
>
> MR. BISHOP: I believe I do, Your Honor.

Id. Next, the judge discussed Mr. Bishop's experience with the legal system (he had no formal training but had represented himself in a traffic court case previously, *id.* at 5-6), and Mr. Bishop's mental and physical health (both good, *id.* at 6-7). The judge asked Mr. Bishop's lawyers whether Mr. Bishop would have a right to testify in his defense if he was also representing himself under applicable federal law. *Id.* at 7-8.

Finally, before appointing the Federal Public Defenders office as standby counsel, Mr. Bishop was asked whether he had any concerns about his lawyers, and Mr. Bishop said that he was satisfied with the representation that he had received. *Id.* at 10-

11. The trial judge then discussed the logistics of standby counsel. *Id.* at 11-14. And, with that, the judge determined that Mr. Bishop "knowingly and voluntarily wishes to waive his right to have appointed counsel and to represent himself in the upcoming trial." Vol. III at 15.

II. The District Court's order on Mr. Bishop's § 2255 motion.

After Mr. Bishop's appeal became final, he filed a § 2255 motion. Relevant here, he argued that his waiver of his right to counsel was not knowing and intelligent.

To that end, Mr. Bishop made several arguments. First, he argued that he didn't properly understand his obligations to comply with the rules of the court, including the rules of evidence, procedure, and other court rules. Vol. III at 35. The district court disagreed and concluded that Mr. Bishop generally "acknowledged that he would be required to comply with all of the court rules and the Rules of Procedure and the Rules of Evidence and all of the rules and procedures that pertain in a jury trial." Vol. IV at 86 (internal quotation marks omitted).

Mr. Bishop next argued that he wasn't properly advised of the elements of the charges against him or notified of which statutes he was charged with offending. The district court rejected Mr. Bishop's arguments because it said that "the court explained that there were two counts in the indictment and described those counts in easy-to-understand language." *Id.* at 87.

Finally, Mr. Bishop argued that he was not "apprised of possible defenses to the charges and circumstances in mitigation thereof or any other facts essential to a broad understanding of the whole matter." Vol. IV at 89 (internal quotation marks omitted). The district court also rejected this argument because defense counsel represented that he had been "meeting with Mr. Bishop often to prepare for his defense." *Id.* at 89.

Mr. Bishop filed a *pro se* brief appealing the denial of his § 2255 motion on the same grounds that were presented to the district court.

III. Tenth Circuit Ruling

The Tenth Circuit granted a COA on whether "Mr. Bishop voluntarily, knowingly, and intelligently waived his right to counsel at trial." *United States v. Bishop*, 2022 WL 17543908, *1 (10th Cir. 2022). The court also appointed Mr. Bishop appellate counsel. *Id.* Counsel argued that Mr. Bishop's waiver was not knowingly and intelligently made because the district court did not advise Mr. Bishop of the information articulated by this Court in in *Von Moltke v. Gillies*, 332 U.S. 708 (1948). *See id.* at *4.

In *Von Moltke* this Court established a "solemn duty" for federal judges to ensure the protection of a defendant's right to counsel "at every stage of the proceedings." *Von Moltke*, 332 U.S. at 722. This duty is not a "mere procedural formality," but is a "serious and weighty responsibility." *Id.* In order "[t]o discharge this duty properly in light of the strong presumption against waiver of the constitutional right to counsel, a judge must

investigate as long and as thoroughly as the circumstances of the case before him demand." *Id.* at 723-24.

Thus, to constitute a valid waiver, a judge is required to ensure that the defendant understands "the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter." *Id.* at 724. As this Court would later observe, *Von Moltke* outlined "the information that *must be conveyed* to a defendant, and the procedures that must be observed." *Patterson v. Illinois*, 487 U.S. 285, 298 (1988) (emphasis added). In short, courts must adhere to *Von Moltke* before permitting a defendant to "waive his right to counsel at trial."

Here, while the Tenth Circuit acknowledged *Von Moltke*, it did not faithfully apply it. The Tenth Circuit expressly found that the district court did not convey to Mr. Bishop all of the *Von Moltke* advisements during the *Faretta* hearing. *Bishop*, 2022 WL 17543908, *5-6 (10th Cir. 2022). But, in the court's view, this was not dispositive. *Id.* at *4-7. Instead, the court applied a presumption in favor of waiver which it dubbed a "pragmatic approach." *Id.* at *4.

While the court agreed with Mr. Bishop that the trial judge only read to him the charging language contained in the indictment, it held that *Von Moltke* did not require a court "to provide a detailed explanation of the meaning of statutory terms and to

ensure the defendant's understanding of and ability to apply those terms." *Id.* at *5. All that is required, in the court's view, is that the indictment be read to the defendant. *Id.*

Moreover, as to *Von Moltke*'s recognition that a court must inform the defendant of potential defenses, the Tenth Circuit again agreed that this information had not been conveyed to Mr. Bishop during the *Faretta* hearing. *Id.* at *6. But this was of no moment because, in the court's view, the "pragmatic approach" did not demand as much. *Id.* The court held that Mr. Bishop had already "settled on a specific strategy" by the time he decided to proceed *pro se*, and he had "resisted [unknown] alternative strategies proposed by counsel." *Id.* Thus, the court believed it could simply presume that Mr. Bishop had been made aware of all the potential defenses. *Id.*

Finally, as to possible punishments, the Tenth Circuit also acknowledged that the trial judge omitted this information from its *Faretta* colloquy. *Id.* But, "given [the] pragmatic approach," the court again found that this omission was immaterial. *Id.* The court simply presumed that Mr. Bishop remembered this information when it was provided to him at his initial hearing. *Id.* Thus, the court "conclude[d] that the waiver was knowing and intelligent." *Id.*

Mr. Bishop now seeks this Court's review.

REASONS FOR GRANTING THE WRIT

This Court's review is warranted and needed. As this Court has made clear, the *Von Moltke* advisements "must be conveyed" to a defendant, and, when omitted, render a Sixth Amendment waiver invalid. *Patterson*, 487 U.S. at 298; *Von Moltke*, 332 U.S. at

724. Given the established "presumption against waiver," this requirement makes good sense. *Von Moltke*, 332 U.S. at 723. If a *Von Moltke* advisement is omitted during a *Faretta* hearing, the presumption against waiver prohibits a court from simply assuming that the information was provided to the defendant elsewhere. After all, it is the solemn duty of the trial judge, and no one else, to ensure that the defendant's waiver of counsel is knowing and intelligent. *Id.* at 722.

But, as the Tenth Circuit's decision in this case demonstrates, some courts have determined that compliance with *Von Moltke* is hortatory rather than mandatory. This, in turn, has driven a rift between the circuits. This Court's intervention is needed to fix this split and make clear that *Von Moltke* advisements are a necessary prerequisite to a valid waiver of counsel.

I. The Tenth Circuit's decision conflicts with this Court's precedent.

This Court has been clear that the *Von Moltke* advisements are mandatory, and a trial judge must ensure that a defendant understands these advisements before permitting a defendant to proceed *pro se*. *Patterson*, 487 U.S. at 298; *Von Moltke*, 332 U.S. at 724.The Tenth Circuit's opinion in this case, however, renders the *Von Moltke* advisements essentially meaningless. In the Tenth Circuit's view, so long as one can "pragmatically" say that the Sixth Amendment waiver was knowing and intelligent, the *Von Moltke* advisements need not be given. *Bishop*, 2022 WL 17543908, *4-6. Certiorari is needed to re-align the Tenth Circuit with this Court's controlling case law.

In *Von Moltke*, this Court fixed a "solemn duty" upon trial judges to ensure the protection of a defendant's right to counsel "at every stage of the proceedings." *Von Moltke*, 332 U.S. at 722. This duty is a "serious and weighty responsibility" and it "cannot be discharged as though it were a mere procedural formality." *Id.* at 722-724. In order "[t]o discharge this duty properly in light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances of the case before him demand" before permitting a defendant to waive their Sixth Amendment rights. *Id.* at 723-24. In short, a trial judge is required to engage in "a penetrating and comprehensive examination" before accepting such a waiver. *Id.*

As part of this penetrating examination, the "information that must be conveyed to the defendant" includes "the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter." *Patterson*, 487 U.S. at 298; *Von Moltke,* 332 U.S. at 724. These advisements are needed in order to overcome the "presumption against waiver." *Von Moltke*, 332 U.S. at 723; *see also Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (noting that this Court does not "presume acquiescence in the loss of fundamental rights").

The Tenth Circuit opinion in this case conflicts with this Court's precedent on several fronts. First, contrary to this Court's holding in *Von Moltke*, the Tenth Circuit held that a trial judge does not need to explain the "nature of the offense" to the defendant, so long as the indictment is read to them. *Bishop*, 2022 WL 17543908, *5. But, in *Von Moltke* this Court explicitly stated that a defendant must apprehend "the statutory offense," in addition to "the nature of the charges." *Von Moltke*, 332 U.S. at 724. If, as the Tenth Circuit believes, apprehension of the statutory charging language suffices for an understanding of the nature of the offense, there would be no reason for this Court to expressly differentiate the two.

In the Tenth Circuit's view, informing the defendant of the statutory offense always conveys to the defendant the nature of the charges. *Bishop*, 2022 WL 17543908, *5. But as this Court's precedent makes clear, the Tenth Circuit is wrong. Understanding the nature of the offense means more than understanding the statutory charging language. As this Court expressly acknowledge in *Von Moltke,* fully understanding the information contained in a "complex legal indictment is seldom a simple and easy task for a laymen, even though acutely intelligent." *Id.* at 721. Because of the potential misunderstandings that can arise from considering the charging language alone (*id.* at 721-22), a court must ensure that the defendant understands not only the statutory charges but the actual nature of those charges. After all, "that which is simple, orderly, and necessary to the lawyer—to the untrained laymen—may appear intricate, complex, and

mysterious." *Johnson*, 304 U.S. at 463. The Tenth Circuit opinion in this case conflicts with this Court's precedent because it does not require a trial judge to ensure that a defendant understands the nature of the offense.

Second, the Tenth Circuit's decision conflicts with *Von Moltke* because it does not adhere to the requirement that a trial judge convey to the defendant the potential defenses to the charged crime. The Tenth Circuit acknowledged that the trial judge never informed Mr. Bishop of his potential defenses. *Bishop*, 2022 WL 17543908, *6. However, the Tenth Circuit deemed this fact legally irrelevant and, instead, simply presumed Mr. Bishop was aware of these defenses. *Id.* This presumption was based on the fact that Mr. Bishop said he had a defense strategy, and that he discussed the case with his counsel. *Id.* But, importantly, it is not known whether the discussions with counsel touched on possible defenses nor is it known whether Mr. Bishop's defense strategy was legally valid. *See id.*

Simply stating that Mr. Bishop had *one* potential defense in mind, does nothing to prove that Mr. Bishop was made aware of *all* potential defenses. Moreover, it is wholly unknown whether Mr. Bishop's desired defense was even legally valid. As is well-known, many non-lawyers concoct defenses that are not legally valid. Common examples of this include the "everyone else does it" defense, or claimed ignorance of the law. Surely, when this Court spoke of advising defendants of potential defenses, it

meant legally viable defenses. The fact that a defendant had a, potentially unviable, defense strategy in mind, cannot serve as a substitute for this Court's requirement that a defendant be made aware of the potential legally viable defenses before waiving the Sixth Amendment right to counsel. *Von Moltke*, 332 U.S. at 724. This Court has held that a trial judge "must convey" to the defendant the potential defenses before permitting a defendant to proceed *pro se*. *Patterson*, 487 U.S. at 298. The Tenth Circuit decision renders this requirement a dead letter.

Third, the Tenth Circuit decision conflicts with this Court's precedent because it holds that a defendant need not be informed of the possible penalties at the *Farretta* hearing, so long as such penalties were provided to the defendant during the initial arraignment. *Bishop*, 2022 WL 17543908, *6. But this Court's focus in *Von Moltke* was on the defendant's awareness at the time the decision is made to proceed *pro se*. *See Von Molkte*, 332 U.S. at 723-24. In other words, the critical question in *Von Moltke* was whether the defendant was aware of the possible penalties at the time she decided to waive her right to counsel. *Von Moltke* does not permit a court to assume the defendant apprehend the possible penalties at that pivotal time, simply because the defendant was informed of the possible penalties at some point in the past.

Finally, this Court applies a "strong presumption against waiver," and does not "presume acquiescence in the loss of fundamental rights." *Von Moltke*, 332 U.S. at 723; *Johnson*, 304 U.S. at 464. Contrarily, the Tenth Circuit employs a presumption *for* waiver.

For example, the Tenth Circuit excused the trial judge's failure to inform Mr. Bishop of the nature of the charges by presuming that Mr. Bishop would glean this information from the statutory charging language. *Bishop*, 2022 WL 17543908, *5. The Tenth Circuit excused the trial judge's failure to inform Mr. Bishop of the potential defenses by presuming that Mr. Bishop's counsel informed him of such. *Id.* at *6. And the Tenth Circuit excused the trial judge's failure to inform Mr. Bishop of the possible penalties by presuming that Mr. Bishop remembered this information from his initial arraignment. *Id.* As this Court has clearly established, all reasonable presumption must be made *against* waiver of the right to counsel. *Von Moltke*, 332 U.S. at 723; *Johnson*, 304 U.S. at 464.

The Tenth Circuit cloaked its presumption for waiver in the guise of a "pragmatic approach." *Bishop*, 2022 WL 17543908, *4. But, problematically, this "pragmatic approach" arises from a misreading of this Court's decision in *Patterson*. In *Patterson*, this Court noted that it would take a "pragmatic approach to the waiver question" when determining whether the interrogation of [a defendant] after his indictment violated his Sixth Amendment right to counsel. *Patterson*, 487 U.S. at 298. To that end, this Court remarked that it pragmatically considers "what purposes a lawyer can serve at the particular stage of the proceedings in question, and what assistance he could provide to an accused at that state—to determine the scope of the Sixth Amendment right to counsel, and the type of warnings and procedures that should be required before a waiver of that right will be recognized." *Id.* As this Court noted in *Patterson*, at the extreme end of the

spectrum, an attorney plays an "enormous . . . role" at a criminal trial, and, as a result, this Court has "imposed the most rigorous restrictions on the information that must be conveyed to a defendant, and the procedures that must be observed, before permitting him to waive his right to counsel at trial." *Id.* (citing *Faretta*, 422 U.S. at 835-836; *Von Moltke*, 332 U.S. 723-724).

The "pragmatic approach" does not apply when determining whether a court can fail to comply with *Von Moltke* when allowing a defendant to represent themselves at trial. As *Patterson* stated, the *Von Moltke* advisements are part of the information that "must be conveyed" to a defendant. *Patterson*, 487 U.S. at 298. The "pragmatic approach" applies when determining whether the *Von Moltke* requirements apply to other pre-trial proceedings. *See id.* Thus, the Tenth Circuit erroneously interpreted *Patterson* by adopting a "pragmatic approach" when analyzing non-compliance with *Von Moltke* in the trial context. This Court's review is warranted to re-align the Tenth Circuit with this Court's binding precedent.

II. This Court's review is needed to cure a circuit split among federal courts of appeals.

As this Court held in *Von Moltke*, and reiterated in *Patterson*, a trial judge, before permitting a defendant to proceed *pro se*, must convey "the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter." *Von Moltke*, 332

U.S. at 724; *Patterson*, 487 U.S. at 298. Moreover, this Court has repeatedly made clear that courts are required to apply every reasonable presumption against waiver when determining whether such a waiver is knowing and intelligent. *Von Moltke*, 332 U.S. at 723; *Johnson*, 304 U.S. at 464. But an entrenched split has developed over whether this Court actually meant what it said—*i.e.*, that the *Von Moltke* advisements are mandatory, and that a presumption against waiver applies.

On one side of the split, the Eighth and Third Circuit Courts of Appeals follow *Von Moltke* and apply the appropriate presumption against waiver. On the other side, the Fifth, Seventh, Tenth, and the Eleventh Circuit Courts of Appeals conflict with *Von Moltke* and inappropriately apply a presumption for waiver.

First, in *Shafer v. Bowersox*, the Eighth Circuit Court of Appeals considered a 28 U.S.C. § 2254 motion claiming that the Missouri Supreme Court unreasonably applied established federal law when it ruled that the defendant's waiver had been knowing and intelligent. 329 F.3d 637 (8th Cir. 2003). The Missouri Supreme Court had held that the "trial court's failure to discusses available defenses or lesser included offenses before allowing Shafer to plead guilty was not dispositive because such information made no difference to him at the time." *Id.* at (internal quotation marks omitted). The Eighth Circuit held that the "state supreme court unreasonably applied clearly established federal law when it determined that Shafer's . . . waiver[] of counsel were knowing, voluntary, and intelligent." *Id.* at 653.

In reaching its decision, the court looked directly at *Von Moltke* and held that it was clearly established that "a valid waiver requires an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges, and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter." *Id.* at 647. The Eighth Circuit described these advisements as "essential elements of the required colloquy." *Id.* at 652. Because the court omitted some of these "essential elements" in its colloquy with the defendant (available defenses and lesser included offenses), it violated clearly established law when it permitted the defendant to proceed *pro se*. *Id.* at 653. In short, the Eighth Circuit views the *Von Moltke* advisements as essential, necessary requirements. *Id.* at 651-53; *see also Wilkins v. Bowersox*, 145 F.3d 1006, 1013 (8th Cir. 1998) (holding that a wavier of counsel was invalid when "[t]he record reveals that at no time did the state court explain to [the defendant] his possible defenses to the charges against him, nor did the court inform him of lesser included offenses or the full range of punishments that he might receive").

Likewise, in *United States v. Peppers*, the Third Circuit Court of Appeals also treated the *Von Moltke* advisements as mandatory perquisites for a valid waiver of counsel. 302 F.3d 120 (3d 2002). In the Third Circuit, "a core responsibility" of a trial judge is to "inquire as thoroughly as needed" in order to make certain that the "defendant understands the nature of the charges, the range of possible punishment, potential defenses,

technical problems that the defendant may encounter, and any other facts important to a general understanding of the risks involved" with self-representation. *Id.* at 132. Thus, "[a]s a matter of constitutional law," the Third Circuit has established a "clear and unambiguous obligation upon a trial judge" to, at minimum, provide the *Von Moltke* advisements before granting a request to proceed *pro se*. *Id.* at 135 (citing *United States v. Welty*, 674 F.2d 185, 188 (3d Cir. 1983)). As the Third Circuit has expressly acknowledged, "an accused's protection under the Sixth Amendment Right to Counsel is not satisfied" even when the trial judge "skips just one of the [*Von Moltke*] factors." *Id.*

On the other side of the split, the Fifth, Seventh, Tenth and Eleventh Circuits do not treat the *Von Moltke* advisements as mandatory requirements. Instead, each of these circuits have created their own distinct standard for determining the constitutionality of a waiver of counsel. For example, the Fifth Circuit requires no specific "a hearing or dialogue" before a defendant can be deemed to have knowingly and intelligently waived his right to counsel. *United State v. Wahl*, 44. F.3d 1005, * 2 (5th Cir. 1995) (unpublished) (citing *Neal v. Texas*, 870 F.2d 312, 315 n. 3 (5th Cir. 1989)). While the Fifth Circuit recognizes that "a colloquy between a defendant and a trial judge is the preferred method for ascertaining that a waiver is voluntary, knowing, and intelligent," it has expressly held that such a colloquy is not constitutionally required. *Id.* (citing *Wiggins v. Procunier*, 753 F.2d 1318, 1320 (5th Cir. 1985)). Instead, courts in the Fifth Circuit simply "evaluate the circumstances of each case as well as the background of the defendant"

to determine whether the defendant "effectively waived his right to counsel." *Id.* (citing *Wiggins*, 753 F.2d at 1320-21).

The Seventh Circuit also does not require a formal hearing or any rigid inquiry but has stated that "its strong preference" is that a trial court "conduct a formal inquiry in which the defendant is informed fully of the risks of proceeding pro se and is explicitly advised against self-representation." *United States v. Bell*, 901 F.2d 574, (7th Cir. 1990). But when such an inquiry is omitted or is insufficient, the Seventh Circuit applies a four-factor test to determine whether a waiver of counsel is knowing and intelligent. *Id.* at 576-79. Those four factors are: (1) whether there was a formal inquiry; (2) whether other record evidence established that the defendant understood the dangers and disadvantages of self-representation; (3) the background and experience of the defendant; and (4) the context of the defendant's decision to proceed *pro se*. *Id.*

Similarly, the Eleventh Circuit also recommends that trial judge "conduct a pretrial hearing at which the accused is informed of the charges, basic trial procedures, and hazards of self-representation." *United States v. Cash*, 47 F.3d 1083, (11th Cir. 1995). But, this recommendation is not a requirement. Instead, the Eleventh Circuit applies an

eight-factor test for determining the validity of a Sixth Amendment waiver. *Id.* at 1088-89.[3]

And, finally, as this case demonstrates, the Tenth Circuit has developed *a sui generis* "pragmatic approach" as to the matter. *Bishop*, 2022 WL 17543908, *4-6. The Tenth Circuit determines whether all the *Von Motlke* advisements were given and, in the event of an omission, considers whether it can presume the information was provided elsewhere. *See id.*

In light of this above-described split, this Court's review is needed to establish national uniformity as to the protections safeguarding the Sixth Amendment. As former Justices White and Brennan observed almost forty years ago, there is nationwide confusion over how to balance the "right of self-representation" with "insuring that a waiver of a defendant's right to counsel is only made when knowing and intelligent and

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[3] These factors are:

> (1) the defendant's age, educational background, and physical and mental health; (2) the extent of defendant's contact with lawyers prior to trial; (3) the defendant's knowledge of the nature of charges, possible defenses, and penalties; (4) the defendant's understanding of rules of procedure, evidence, and courtroom decorum; (5) the defendant's experience in criminal trials; (6) whether standby counsel was appointed and the extent to which that counsel aided the defendant; (7) any mistreatment or coercion of defendant; and (8) whether the defendant was trying to manipulate the events of the trial.

Cash, 47 F.3d at 1088–89.

with eyes wide open." *McDowell v. United States*, 108 S.Ct. 478, 478 (1987) (White, J., dissenting) (internal quotation marks omitted). As the entrenched split demonstrates, this confusion remains. Accordingly, this Court should grant a writ of certiorari and make clear that *Van Moltke* remains controlling.

III. This case is an ideal vehicle for addressing a question of exceptional importance.

While courts are divided as to the degree of protection surrounding the waiver of Sixth Amendment rights, there is broad consensus that the issue is one of exceptional importance. "The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not still be done." *Johnson*, 304 U.S. at 462. Thus, this Court has deemed the right to counsel "necessary to insure fundamental human rights of life and liberty." *Id.* The Sixth Amendment right to counsel "embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel." *Id.* at 462-63.

Because of the amendment's great importance, this court has been "particularly solicitous" to ensure that the right is carefully preserved. *Von Moltke*, 332 U.S. at 321. To that end, it has placed a "solemn duty" upon federal judges to ensure that the right is only waived upon a full understanding of the risks of proceeding pros se, and has placed "rigorous restrictions on the information that must be conveyed to a defendant,

and the procedures that must be observed, before permitting him to waive his right to counsel at trial." *Id.* at 722; *Patterson*, 487 U.S. at 299. These restrictions have been several eroded by the `circuits that have held that *Von Moltke* advisements are not necessary and, by implication, have failed to apply every presumption against the waiver of Sixth Amendment rights. The erosion of these rigorous restrictions is undoubtedly an issue of exceptional importance.

Finally, the fact that the Tenth Circuit opinion in this case is unpublished does not undercut Mr. Bishop's request for certiorari. As the Tenth Circuit noted in its opinion, its "pragmatic approach" and its holding that compliance with the *Von Moltke* advisements is not required are sourced in already established Tenth Circuit law. *Bishop*, 2022 WL 17543908, *4 (citing *United States v. Hansen*, 929 F.3d 1238, 1251 (10th Cir. 2019)). Thus, despite the fact that this case is unpublished, it still concerns established Tenth Circuit law, and, as such, presents a proper vessel for considering the issue presented.

As the issue was adequately preserved in the district court, and squarely decided by the Tenth Circuit, this case presents an ideal vehicle for this Court to make clear that the presumption against waiver continuous and *Von Moltke* remains controlling. Accordingly, Mr. Bishop respectfully requests that this Court grant his petition for a writ of certiorari.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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