NO._____

In The
Supreme Court of the United States

JAMAR GREEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Cary S. Greenberg (VSB 27456)
Counsel of Record
GREENBERGCOSTLE, PC
10565 Lee Highway, Suite 205
Fairfax, Virginia 22030
Tel: (703) 448-3007
Fax:(703) 821-1144
csg@greenbergcostle.com

Counsel for Appellant

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477

QUESTIONS PRESENTED FOR REVIEW

1. Whether an uncounseled felony guilty plea is Constitutionally valid when the defendant was not properly warned by the trial court of the perils of proceeding *pro se* in a federal criminal case.

2. Whether, as the Fourth Circuit held in this case, an uncounseled defendant's felony guilty plea itself waives consideration on direct appeal of whether the defendant's purported waiver of counsel was valid.

3. Whether there is a *de novo* standard of review of a defendant's purported waiver of counsel on direct appeal; or, if not, what is the standard of review of a defendant's purported waiver of counsel.

4. Whether a knowing and voluntary plea to a felony charge requires that the Defendant be warned that one of the consequences of his plea is that he will not receive federal credit for pretrial detention and will face mandatory consecutive federal sentencing following an ongoing state sentence?

LIST OF PARTIES IN THE COURT OF APPEALS

United States of America

Jamar Green

PROCEEDINGS RELATED TO THIS CASE

United Staes v. Jamar Green, 4:17-cr-00111-MSD-LRL-12 (E.D. Va. Jan. 6, 2020)

United States v. Jamar Green, 4:20-cr-00001-MSD-LRL-1 (E.D. Va. Jun. 21, 2021)

United States v. Jamar Green, No. 21-4336 (4th Cir. Aug. 10, 2023)

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IN THE
SUPREME COURT OF THE UNITED STATES

No.:

JAMAR GREEN,
***Petitioner*,**

v.

UNITED STATES OF AMERICA,
***Respondent*.**

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

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PETITION FOR WRIT OF CERTIORARI

Mr. Jamar Green respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit rendered and entered in case number 21-4336 on August 10, 2023 in the case of *United States v. Green*, which affirmed his felony conviction on the ground that a *pro se* guilty plea waived appellate review of the knowingly and voluntary nature of such plea. On this ground, the Fourth Circuit departed from this Court's precedent and that of the other circuits and refused to review the issues of whether Mr. Green validly waived counsel or knowingly and intelligently entered into his plea, despite it being uncounseled and despite the failure of the district court to provide adequate warning to Mr. Green of the perils of self-representation, or the fact that Mr. Green was not advised during his plea

colloquy that he would not get credit against his federal sentence for pretrial detention.

OPINION BELOW

The decision of the United States Court of Appeals for the Fourth Circuit, which affirmed the judgment of the United States District Court for the Eastern District of Virginia, is contained in the Appendix.

JURISDICTIONAL STATEMENT

On August 10, 2023, the United States Court of Appeals for the Fourth Circuit issued a written opinion affirming Petitioner's felony conviction as a single count of felony conspiracy to possess with intent to distribute MDMA (18 U.S.C. §§ 846 and 841(a)(1) and (b)(1)(C)). Petitioner did not file a request for a rehearing and no request was made, or order entered, granting an extension of time to file a petition for a writ of certiorari.

This Petition is timely filed on November 8, 2023, within 90 days of the date of the Court of Appeals' August 10, 2023 judgment.

The district court had jurisdiction because the Petitioner was charged with violations of federal criminal laws. The Fourth Circuit Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that the courts of appeals shall have jurisdiction from all final decisions of the United States district courts.

This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional provisions and statutes are involved in this case:

U.S. CONST. AMEND. VI:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

FED. R. CRIM. P. 11(B):

(1) *Advising and Questioning the Defendant.* . . . Before the court accepts a plea of guilty . . . the court must inform the defendant of, and determine that the defendant understands, the following:

> (D) the right to be represented by counsel—and if necessary have the court appoint counsel—at trial and at every other stage of the proceeding . . .
>
> (G) the nature of each charge to which the defendant is pleading;
>
> (H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;

(2) Ensuring That a Plea Is Voluntary. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).

(3) Determining the Factual Basis for a Plea. Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

STATEMENT OF THE CASE

I. THE ORIGINAL INDICTMENT - MR. GREEN IS TAKEN INTO FEDERAL CUSTODY.

Mr. Green was initially indicted in the Eastern District of Virginia in July of 2018 and taken into federal custody on August 3, 2018. JA 302, 272, 289[1]. The multi-count Indictment charged Mr. Green with violating the following federal criminal statutes (JA 17-26):

Count 1: 18 U.S.C. §§ 846 and 841 (conspiracy to distribute and possess with intent to distribute cocaine and MDMA);

Count 2: 18 U.S.C. § 841(a)(1) (possession with the intent to distribute cocaine);

Count 3: 18 U.S.C. § 924(c) (possess firearm during drug trafficking);

Counts 4 & 5: 18 U.S.C § 1512 (attempted witness tampering); and

Count 6: 18 U.S.C. § 1503 (obstruction of justice).

During the course of the initial prosecution, Mr. Green was one of several co-defendants. Mr. Green repeatedly demanded a speedy trial; however, trial was not ultimately scheduled until January 7, 2020. JA 29.

On January 6, 2020, a day before the trial, after all other co-defendants pleaded guilty, the trial court dismissed the initial Indictment against Mr. Green on motion of the government.

II. THE SUBJECT INDICTMENT - MR. GREEN IS REINDICTED AND IS HELD IN CUSTODY FOR A TOTAL OF OVER 31 MONTHS.

On January 8, 2020, two days later, the government reindicted Mr. Green.

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[1] Mr. Green cites to the Joint Appendix filed in the Fourth Circuit Case, *United States v. Jamar Green*, 21-4336.

JA 17. Mr. Green remained in the federal pretrial detention that began on August 3, 2018. A trial date was scheduled for March 22, 2021.

The district court and the government were repeatedly made aware of Mr. Green's continuous objections to his lengthy detention and lack of speedy trial. For example, at the January 9, 2020 status conference, Mr. Green addressed the Court:

> "My I ask a question? I have a question concerning the fact that I've been in the United States custody of the Marshals Service since August of 2018, which would be like 17 months and some change, and I'm trying to figure out, like, how to go from about to start trial to me being removed from a count or say some part of the indictment to the indictment being dismissed and then me being reindicted on multiple charges, with some of the same, which is the 924(c), and nothing has been brought up about the Sixth Amendment Speedy Trial right. Like, I don't understand, like -- fair is fair, Your Honor, and I know you're a chief judge and I'm trying to figure out, like, what point would that be brought up, do you understand what I'm saying? Like throughout this whole entire duration, like I've been patient -- it's frustrating, but I've been patient, do you understand what I'm saying? And I don't understand it. Like, I just don't." JA 49.

The district court explained to Mr. Green that for a myriad of reasons, his case had been continued and pointed out that Mr. Green's counsel had objected to the initial indictment being dismissed without prejudice and that the court had denied that motion. JA 49-50.

At a July 23, 2020 hearing, Mr. Green further noted that he was in state custody when he was initially indicted, but was arrested on the federal warrant as of August 2018; he argued that he began raising Speedy Trial Act and due process speedy trial claims as early as October 2018. JA 67-68.

As noted below, the district court specifically referenced its acknowledgment that Mr. Green spent approximately three years in pretrial detention.

III. THE DISTRICT COURT PERMITS MR. GREEN TO PROCEED *PRO SE*.

In the preceding indictment, Mr. Green, through counsel, had already filed a motion to proceed *pro se*. *See United States v. Burnett, et al.*, No. 4:17cr-111-MSD-LRL-12, Dkt. No. 376 (E.D. Va. Oct. 8, 2019). That motion was denied as not being knowingly and intelligently made. *Id.*

Later, on July 23, 2020, the district court orally permitted Mr. Green to proceed *pro se* under the new indictment. JA 72-107.

Mr. Green wanted to proceed without his court appointed counsel because he wanted to review discovery without going through his attorney. *Id.* Mr. Green requested that he keep all discovery documents with him to review in his cell, which the district court would not permit. *Id.*

Despite the prior denial of Mr. Green's request to proceed *pro se* as not being knowing and intelligent, the district court later found that Mr. Green wanted to proceed *pro se*, but the district court did not warn Mr. Green of the serious nature of the charges against him and did not specifically warn him of the dangers and disadvantages of self-representation except on the limited issue of whether he would be entitled to obtain discovery and keep it in his cell. JA 79-85. The trial court warned Mr. Green that self-representation would not enable him to review protected discovery materials in his cell. *Id.* The court meticulously, and at length, discussed the legal reasons for a discovery protective order. The court provided no other inquiry, at any time, as to Mr. Green's understanding, nor did the court warn him of the perils of self-representation. *Id.* When the court asked the government if any further inquiry of Mr. Green was necessary, the government responded in the negative. JA 85.

IV. MR. GREEN OBJECTS TO THE COURT'S ORDER PERMITTING HIM TO PROCEED PRO SE.

On July 28, 2020, the district court entered an order granting Mr. Green's purported request to proceed *pro se*. On August 10, 2020, thirteen days later, Mr. Green filed a "Notice of Motion" in response to the Order in which Mr. Green stated "[n]ot at one time during the Court's proceedings did Mr. Green's beneficiary consent to being a *pro se* defendant." JA 374. In doing so, he submitted that "Mr. Green cannot help but recognize the Court's trying to cover its tracks. . . ." He further went on to explain his belief that his prior counsel was not properly representing him according to certain court and ethical rules. JA 375-76.

Mr. Green wrote to the district court in his "Notice of Motion" that:

> "The controlling rule is that 'absent a knowing and intelligent waiver, nor person may be imprisoned for any offense . . . unless he was represented by counsel. . . This is the reason Judge Davis has tried to place, or has placed on the record that on July 23, 2020 Mr. Green made a clear an unequivocal response to the Court . . . how can such a thing happen when Mr. Green's 'beneficiary' . . . reserved all his rights prior to the [convening] of the hearing." JA 377.

Despite this filing by Mr. Green, the district court held no further hearing to clarify Mr. Green's status of self-representation or warn Mr. Green of the dangers of proceeding uncounseled. Mr. Green was *pro se* for the remainder of the case.

V. AFTER *PRO SE* PLEA NEGOTIATIONS WITH THE PROSECUTOR, THE PARTIES SIGNIFY TO THE DISTRICT COURT THEY HAVE HAD A BREAKTHROUGH; THE DISTRICT COURT DID NOT ENGAGE IN FURTHER RIGOROUS COLLOQUY REGARDING SELF-REPRESENTATION.

The district court held a pretrial conference on February 26, 2021.

Immediately before convening the pretrial conference, Mr. Green and the prosecutor met at the courthouse and engaged in plea discussions without counsel.

During the plea discussions, the prosecutor pointed out to Mr. Green that he had already been in custody for a significant period of time (it had been almost 31 months) and that Mr. Green would likely spend less time in prison by taking the offered plea than by trying his case. The prosecutor told Mr. Green that he was indicted on 6 counts and that the government would likely win at least one of those counts. He submitted to Mr. Green that even if that one count was ultimately overturned on appeal and remanded for a new trial, the time to go through that process would exceed the 70-87 months being offered in the plea, especially because Mr. Green had already served significant time since his arrest on the federal charges, implying significant credit for pretrial detention. Whether it was intentional or not, the implication by the government and the belief of Mr. Green was that he would receive credit for time served on pretrial detention and would not have much time left to serve under a plea agreement.

Mr. Green, who was uncounseled, relied upon these discussions and believed that he had nearly three years pretrial credit and that a plea agreement with a sentencing range between 70 and 87 months would provide a benefit since he believed he had already served almost half the potential sentence. The nature of the plea discussions implied to Mr. Green that he could expect credit for his federal pretrial incarceration. Unbeknownst to Mr. Green, as a matter of law he would not receive any credit for his pretrial detention, as that time was credited toward a state sentence. *See* 18 U.S.C. § 3585(b).

At the February 26, 2021 pretrial conference, the prosecutor alerted the district court of plea discussions:

> "Mr. Green and I had what appears to be a very fruitful conversation this morning and we are talking back and forth about some matters,

> and we hope to let the Court know probably the week of the 8th of March whether or not this case will need a trial." JA 174.

Mr. Green reiterated these sentiments to the court:

> "[J]ust like [the prosecutor] just expounded upon, I would like to say that I don't think that we're going to probably make it [to a trial], because what he was talking about this morning, it really resolves the issue. And I don't -- with all due respect, I don't even want to waste any more of your time, because this has been dragged on -- I know you're like, Mr. Green, you're a pain, but it should be -- you know I'm just making a joke. But it should be resolved before then, because I'm going to write him. But he said he's been not getting my mail. Burt [sic] yeah, ain't really too much to deal with today because we just came up this morning with this information, and beneficial for me too. For both parties, to be exact." JA 175.

Despite being alerted to the existence of *pro se* plea negotiations, the district court did not engage in any dialogue that warned Mr. Green of the dangers of negotiating and entering into a plea agreement without counsel, nor did the court specifically inform Mr. Green of the advantages having counsel assist understanding the consequences of entering a plea, i.e., federal sentencing guidelines, prison computations, potential credit for time served. JA 175-181.

VI. MR. GREEN PLEADS GUILTY WITHOUT COUNSEL AND IS NOT INFORMED THAT HE WILL NOT RECEIVE CREDIT FOR HIS TIME SPENT IN FEDERAL PRETRIAL DETENTION.

On March 11, 2021, Mr. Green and the prosecutor submitted a signed Plea Agreement to the district court. JA 225-232.

On that same date, before accepting a plea, the district court engaged in a plea colloquy with Mr. Green. JA 183-224 (transcript of plea hearing). The district court discussed the consequences of a guilty plea with Mr. Green, including that:

(a) there is no possibility of parole;

(b) the court's requirement to calculate an advisory guideline range and consider the sentence recommended by the guidelines as well as

potential departures under the guidelines along with the agreed recommendation on the advisory guideline and sentence;

(c) the court has the authority to impose a sentence above or below the advisory guideline range;

(d) the court will consider the Section 3553(a) statutory sentencing factors;

(e) the court would give great weight to the parties' agreement;

(f) a presentence report will be prepared and considered;

(g) relevant conduct would be considered;

(h) Mr. Green may be required to pay restitution, forfeiture, and a special assessment;

(i) Mr. Green may forfeit rights such as those to vote, hold public office, serve on a jury, or possess a firearm;

(j) the cost of prosecution, incarceration, and supervised release could be assessed against him;

(k) there was a minimum period of supervised release of at least three years.[2]

The district court did not advise Mr. Green that he may not, or, in his case, would not receive credit for time spent in federal custody dating back to his initial pretrial detention in August 2018. The district court did not explain that the Bureau of Prisons shall make the decisions about credit and any estimate or guess by the court or the government was just that, a guess.

[2] While there is no prescribed formula about what cautions should be given a defendant proceeding *pro se*, Mr. Green submits that understanding the items listed here demonstrate why an attorney is needed; or a least, a warning about the dangers of entering into plea discussions and a plea without counsel is hazardous.

Moreover, the district court did not inform Mr. Green about the possibility, or in his case, the mandate, that his sentence must run consecutively with a state sentence and that he would not begin serving his sentence until his state sentence expired.

Mr. Green was thus not informed of the direct consequences of his plea – the maximum time of imprisonment he could expect, nor was he advised of the dangers he would face by continuing to a plea and sentencing without counsel.

VII. MR. GREEN IS SENTENCED TO 78 MONTHS, TO RUN CONSECUTIVE WITH A STATE SENTENCE.

On June 21, 2021, the district court held the sentencing hearing and made several corrections to the PSR, including the deletion of references to distribution of cocaine, as Mr. Green only pleaded guilty to a conspiracy to distribute MDMA. JA 240-41.

The Plea Agreement prepared by the government and signed by Mr. Green incorrectly attributed a drug weight of 450 kilograms.

Although the Presentence Report noted this error, Mr. Green was sentenced based upon the incorrect 450 kilogram amount, which increased the guideline range.

The district court specifically stated that "the Court will adopt the factual statements contained in the presentence report as its findings of fact in this case", which would include by reference, that the actual converted drug weight for the MDMA involved was 127.58 kilograms, and not the 450 kilograms stated in the Plea Agreement. JA 242.

Although the district court corrected and clarified a few errors in the PSR related to cocaine, it failed to address the probation officer's independent findings

related to the actual converted drug amount of MDMA involved in the offense.

In its argument, the government conceded "Mr. Green's very limited involvement in this much larger conspiracy." JA 245.

In considering an appropriate sentence, the district court specifically considered, among other relevant factors, that

> "Mr. Green has been in custody in this matter for nearly three years, with defendant's trial date being rescheduled several times due to multiple defense counsel withdrawals as well as the COVID-19 pandemic. So as reflected on the cover page -- I'll work my way through the presentence report. As reflected on the cover page, Mr. Green has been detained in custody since August 3, 2018 . . ." JA 247.

The district court ultimately sentenced Mr. Green to 78 months imprisonment, to run consecutively to a state sentence. JA 259-60. By the date of sentencing, however, Mr. Green's state sentence had finished, and, therefore, there could be no consecutive time.

Before pronouncing the sentence, no mention had been made by either party of whether the sentence would, or could, run consecutively with a state sentence or what effect his pretrial detention could have on the amount of time he would serve.

VIII. MR. GREEN IS INFORMED THAT HE WILL NOT RECEIVE CREDIT FOR HIS PRETRIAL DETENTION TIME DATING BACK TO AUGUST 2018.

When Mr. Green was remanded to the Bureau of Prisons, he was informed that although he was in pretrial detention since August 3, 2018, he would only receive credit for his detention starting in January 2021. JA 267-71.

REASONS FOR THE GRANTING OF THE WRIT

Mr. Green proceeded *pro se* in a case involving a complicated federal indictment – one in which, according to the government, he was a minor participant. He was not given proper warnings from the court about the perils of self-representation. Consequently, he incorrectly believed that he would receive full credit for his pretrial detention and was not told during his Rule 11 plea colloquy that as a matter of law, he would not receive such credit. When sentenced, he did not know, nor did the trial court, that there was a significant mistake in the guideline calculation, according to the probation officer, that would have resulted in a lesser sentencing range and he did not have an attorney to advise him otherwise.

The Fourth Circuit's Opinion held that he waived the right to appeal upon entry of his uncounseled guilty plea, despite the failure of the trial court to warn him against the perils of self-representation or to inform him that he would not receive credit for his pretrial detention.

The Fourth Circuit's Opinion is inconsistent with this Court's holdings and the opinions of every other circuit that an improperly, uncounseled plea is void, as is the waiver of appeal.

Mr. Green did not understand that he was precluded, as a matter of law, from receiving credit for the nearly three years he served incarcerated pretrial. The Constitution requires that a defendant understand the nature and consequences of his charges. Mr. Green must be informed during the plea colloquy of the consequences of his plea, especially when he is proceeding *pro se.*

This matter should be accepted for any one of three reasons: 1) the Fourth Circuit's holding that a guilty plea waives appellate consideration of the validity of the plea itself is out of sync with all other circuits, all of which provide for appellate review, either *de novo* or abuse of discretion, of the sufficiency of a waiver of counsel; and/or 2) there is a circuit split regarding whether a defendant must be warned about mandatory consecutives federal and state sentences; and/or 3) the Court's supervisory role is needed in this particular circumstance given the Fourth Circuit's departure from established precedent and failure to consider reviewing the sufficiency of Mr. Green's *pro se* guilty plea.

I. The Fourth Circuit's Decision that Mr. Green Waived the Right to Have Appellate Review of His Purported Waiver of Counsel by Pleading Guilty While *Pro Se* Is Contrary to this Court's Precedent As Well as Precedent from Every Other Circuit.

In his direct appeal, Mr. Green claimed that the district court erred by permitting him to proceed without counsel without sufficiently warning him of the dangers of proceeding *pro se*. He further argued on appeal that when the district court was later informed that Mr. Green was engaging in *pro se* plea negotiations and thereafter intended to plead guilty without counsel, the district court had the duty to warn him of the dangers of entering into uncounseled plea negotiations and pleading guilty without counsel.[3] The government needed a page extension in its Fourth Circuit brief to argue why Mr. Green's uncounseled plea was valid; however, nowhere in the government's brief could it point to where the district court warned Mr. Green of the perils of proceeding without counsel.

[3] The Probation Officer calculated the drug weight to be lower than the agreement of the parties. The trial court accepted the Probation Officer's report as accurate. The true guideline range was lower than was used by the court, but the defendant did not understand this and did not have counsel to advise him or the court of the mistake. JA 277

On Mr. Green's direct appeal, the Fourth Circuit departed from this Court's precedent and the precedent of each other circuit, deciding these important constitutional issues without any consideration, deeming them to have been waived by Mr. Green's uncounseled guilty plea:

> "We conclude, however, that Green waived these nonjurisdictional challenges when he entered his valid, unconditional guilty plea; Green's assertion that his guilty plea was invalid because it was not counseled is without merit. *See United States v. Moussaoui*, 591 F.3d 263, 279 (4th Cir. 2010)."

It is paramount that an appellate court must review whether a guilty plea was knowing, voluntary, and intelligent; but even more so in cases such as this, where the plea was uncounseled without the proper warnings from the trial court.

In *Brady v. United States*, 397 U.S. 742 (1970), this Court stated the importance of appellate review of the issues raised by Mr. Green:

> Since an intelligent assessment of the relative advantages of pleading guilty is frequently impossible without the assistance of an attorney, this Court has scrutinized with special care pleas of guilty entered by defendants without the assistance of counsel and without a valid waiver of the right to counsel. *See Pennsylvania ex rel. Herman v. Claudy*, 350 U.S. 116, 76 S.Ct. 223, 100 L.Ed. 126 (1956); *Von Moltke v. Gillies*, 332 U.S. 708 and 727, 68 S.Ct. 316 and 325, 92 L.Ed. 309 (1948) (opinions of Black and Frankfurter, JJ.); *Williams v. Kaiser*, 323 U.S. 471, 65 S.Ct. 363, 89 L.Ed. 398 (1945). Since *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), it has been clear that a guilty plea to a felony charge entered without counsel and without a waiver of counsel is invalid. *See White v. Maryland*, 373 U.S. 59, 83 S.Ct. 1050, 10 L.Ed.2d 193 (1963); *Arsenault v. Massachusetts*, 393 U.S. 5, 89 S.Ct. 35, 21 L.Ed.2d 5 (1968).
>
> The importance of assuring that a defendant does not plead guilty except with a full understanding of the charges against him and the possible consequences of his plea was at the heart of our recent decisions in *McCarthy v. United States*, *supra*, and *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). *See* nn. 3 and 4, supra.

See Brady v. United States, 397 U.S. 742, n. 6 (1970).

In *Von Moltke v. Gillies*, 332 U.S. 708 (1948), this Court had held that:

> "The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused.' To 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. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with 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. 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, 332 U.S. at 723-24. "It is the solemn duty of a federal judge before whom a defendant appears without counsel to make a thorough inquiry and to take all steps necessary to insure the fullest protection of this constitutional right [to counsel] at every stage of the proceedings . . . This duty cannot be discharged as though it were a mere procedural formality." *Von Moltke*, 332 U.S. at 722.

"A waiver of the constitutional right to the assistance of counsel is of no less moment to an accused who must decide whether to plead guilty than to an accused who stands trial." *Von Moltke*, 332 U.S. at 721.

This Court has since clarified that in cases of an uncounseled guilty plea, the plea itself does not waive subsequent challenges to knowing, intelligent, and voluntariness of the plea. *See Mann v. Richardson*, 397 U.S. 759, 767 (1970) ("It is not disputed that in such cases a guilty plea is properly open to challenge.").

Under this jurisprudential backdrop, each circuit has held that there is appellate review of whether a defendant's waiver of counsel has been adequately assured by the trial judge – almost every circuit having considered the issue holds there is *de novo* review, but there is a split between the circuits. *See United States v. Erskine*, 355 F.3d 1161, 1166 (9th Cir. 2004) (*de novo*); *United States v. Garrett*, 42 F.4th 114, 119 (2nd Cir. 2022) (*de novo*); *United States v. Manuel*, 732 F.3d 283, 290 (3rd Cir. 2013) (plenary review); *United States v. Sanchez Guerrero*, 546 F.3d 328, 331 (5th Cir.) (structural error not harmless error); *United States v. Johnson*, 24 F.4th 590, 600 (6th Cir. 2022) (*de novo*, with detailed discussion of sister circuits' opinions); *United States v. Thomas*, 833 F.3d 785, 792 (7th Cir. 2016) (recognizing intra circuit split on *de novo* vs. abuse of discretion standard); *United States v. Conklin*, 835 F.3d 800, 802 (8th Cir. 2016) (*de novo*); *United States v. Hansen*, 929 F.3d 1238, 1248 (10th Cir.) (*de novo*); *United States v. Hakim*, 30 F.4th 1310, 1318-19 (11th Cir. 2022) (*de novo*); *compare Manjarrez*, 306 F.3d 1175, 1179 (1st Cir. 2002) (abuse of discretion).

None of the aforesaid courts of appeals have held that a defendant waives the right to seek review of the sufficiency of his purported waiver of counsel by pleading guilty while acting *pro se*. To hold as much would be in violation of this Court's Constitutional directives. *See Brady*, *supra*.

Pro se defendants are not realistically expected to be able to object to a district court's inadequate warnings before being permitted to proceed *pro se* - it is the district court's "solemn duty" (*see Von Moltke*, *supra*) - not a *pro se* defendant's - to ensure that such warnings are properly conveyed. This is the persuasive reasoning of the collective courts of appeals.

The Fourth Circuit's decision below not only discards *de novo* review, but discards any appellate review whatsoever, holding that an uncounseled guilty plea waives appellate review of the sufficiency of a defendant's waiver of counsel.

II. The Court's Supervisory Authority Is Needed to Correct a Substantial Departure by the Fourth Circuit From Clear Constitutional Precedent Requiring Scrutinized Review of an Uncounseled *Pro Se* Guilty Plea to a Felony.

It is beyond cavil that a defendant has the right to seek appellate review of his uncounseled guilty plea to determine whether his purported waiver of the right to counsel was valid and, therefore, whether the guilty plea was valid.

This Court should employ its supervisory authority to correct the Fourth Circuit's clear departure from decades of constitutional precedent related to the Sixth Amendment right to counsel. The only authority cited by the Fourth Circuit in its conclusion that Mr. Green waived appellate review is a citation to its own court opinion in *United States v. Moussaoui*, 591 F.3d 263, 279 (4th Cir. 2010). *Moussaoui,* however, contradicts the Fourth Circuit's holding in Mr. Green's case because the court in *Moussaoui* conducted a detailed plenary review of the record in making its determination that Moussaoui's plea was voluntarily and intelligently made.

The *Moussaoui* opinion goes on to clarify, in accordance with well-established law throughout the nation, that "[i]n sum, Moussaoui, having pled guilty, has waived all nonjurisdictional errors leading up to his conviction **except those affecting the adequacy of his plea. It is to those claims, affecting the adequacy of his plea, that we now turn**." *Moussaoui*, 591 F.3d at 280 (4th Cir. 2010) (emphasis supplied).

The *Moussaoui* court cited relevant case law, precedent which was seemingly ignored by the Fourth Circuit in the instant case. The *Moussaoui* court held:

> Since *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), it has been clear that a guilty plea to a felony charge entered without counsel and without a waiver of counsel is invalid." *Brady*, 397 U.S. at 748 n. 6, 90 S.Ct. 1463; *see Broce*, 488 U.S. at 569, 109 S.Ct. 757 ("[W]hen the judgment of conviction upon a guilty plea has become final and the offender seeks to reopen the proceeding, the inquiry is ordinarily confined to whether the underlying plea was both counseled and voluntary."); *see McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970) ("[A] defendant pleading guilty to a felony charge has a federal right to the assistance of counsel."). The waiver of constitutional rights accompanying a guilty plea has to be a "knowing, intelligent act[ ] done with sufficient awareness of the relevant circumstances and likely consequences," *Brady*, 397 U.S. at 748, 90 S.Ct. 1463, and "an intelligent assessment of the relative advantages of pleading guilty is frequently impossible without the assistance of an attorney," id. at 748 n. 6, 90 S.Ct. 1463.

Moussaoui, 591 F.3d at 288.

The *Moussaoui* court then described in detail how Moussaoui's argument of constructive deprivation of counsel argument was defeated because Moussaoui's plea was not actually uncounseled. *Id.* at 288-90.

As such, Mr. Green submits that this Court should use its supervisory authority and remand his case to the Fourth Circuit for consideration of his claims.

III. The Court Should Clarify the Standard of Review on Direct Appeal of a Claim that a *Pro Se* Defendant's Waiver of Counsel Was Insufficient.

As detailed above, there is a split in the circuits as to the proper standard of review when an appellant-defendant claims on direct appeal that their claimed waiver of counsel was invalid. The vast majority of circuits employ a de novo standard of review, while the First Circuit uses an abuse of discretion standard. *See*, e.g., *Erskine*, 355 F.3d at 1166 (9th Cir.) (de novo), *compare Manjarrez*, 306

F.3d at 1179 (1st Cir.) (abuse of discretion); *see also Thomas*, 833 F.3d at 792 (7th Cir.) (recognizing intra circuit split within the Seventh Circuit); *see also Johnson*, 24 F.4th at 600 (6th Cir.) (discussing varying viewpoints between the appellate courts).

The Court should grant this petition and decide that de novo review is appropriate. As aptly stated by the Sixth Circuit in collecting various viewpoints and determining to employ a de novo standard of review:

> It would be nonsensical to require that a prospective *pro se* defendant object to the district court's inquiry into the defendant's rationale and ability to proceeding *pro se*. To preserve the issue, defendants would have to recognize their own inability to represent themselves and object to their own request to proceed *pro se*.

United States v. Johnson, 24 F.4th at 601 (6th Cir. 2022).

IV. There Is a Circuit Split as to Whether a Defendant Must Be Informed as to Mandatory Consecutive Federal Sentencing to an Undischarged State Court Sentence.

Mr. Green was not advised before his guilty plea that he would not begin serving his federal sentence until he had completed an ongoing state court sentence and that he would receive no federal credit for his pretrial detention. The law provides that the district court had no authority to run his federal sentence concurrently with his ongoing state sentence. *See* 18 U.S.C. § 3585(b).

In the Ninth Circuit, the court's failure to advise Mr. Green of this situation before his plea would result in an invalid plea because the mandatory consecutive sentencing necessarily determines the total amount of imprisonment that he could face. *See United States v. Myers*, 451 F.2d 402, 403-404 (9th Cir. 1972).

In the Fourth Circuit, as well as several others, such a failure to advise the defendant of the mandatory consecutive nature of federal and state sentencing does

not invalidate a plea because it is deemed a collateral, rather than direct, consequence. *See Cobb v. United States*, 583 F.2d 695 (4th Cir. 1978). Other circuits have followed the Fourth Circuit's reasoning. *See also United States v. Degand*, 614 F.2d 176, n. 4 (8th Cir. 1980) (collecting different circuits' opinions and recognizing the circuit split); *see also United States v. Ray*, 828 F.2d 399, 417-18 (7th Cir. 1987) (concurring with the Eighth Circuit's analysis).

The Court should grant this petition to resolve the circuit split.

CONCLUSION

For the reasons set forth herein, the petition for certiorari should be granted.

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/s/ Cary S. Greenberg
Cary S. Greenberg (VSB 27456)
Counsel of Record
GREENBERGCOSTLE, PC
8200 Greensboro Drive, Suite 250
McLean, Virginia 22102
Tel: (703) 448-3007
Fax: (703) 821-1144
csg@greenbergcostle.com
Counsel for Appellant