No. 23-6187

IN THE SUPREME COURT OF THE UNITED STATES

JAMAR GREEN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record

NICOLE M. ARGENTIERI
Principal Deputy
Assistant Attorney General

WILLIAM A. GLASER
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether petitioner validly waived his right to counsel.

2. Whether the court of appeals correctly determined that the district court did not plainly err in accepting petitioner's guilty plea without informing him that his federal sentence might run consecutively to his state sentence, and that most of his pretrial detention would be credited to his state sentence, rather than his consecutive federal sentence.

IN THE SUPREME COURT OF THE UNITED STATES

No. 23-6187

JAMAR GREEN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is not published in the Federal Reporter but is available at 2023 WL 5125092.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 2023. The petition for a writ of certiorari was filed on November 8, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of Virginia, petitioner was convicted of conspiring to possess with intent to distribute MDMA, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C) and 846. Pet. App. A2. He was sentenced to 78 months of imprisonment, to be followed by three years of supervised release. C.A. App. 260-261. The court of appeals affirmed. Pet. App. A1-A4.

1. a. Between 2013 and 2016, petitioner and various co-conspirators distributed MDMA in and around Hampton Roads, Virginia. C.A. App. 18, 217-218. In 2018, a grand jury indicted petitioner on one count of conspiring to distribute and possess 1000 grams or more of heroin, five kilograms or more of cocaine, 28 grams or more of cocaine base, and an unspecified amount MDMA, in violation of 21 U.S.C. 841(a)(1), (b)(1)(A), (B), and (C), 846; and one count of possessing and discharging a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A). C.A. Supp. App. 17, 33 (Second Superseding Indictment).

Between August 2018 (when he was first appointed counsel) and his guilty plea under a Third Superseding Indictment in March 2021, petitioner was represented by three different court-appointed attorneys. See C.A. App. 5; C.A. Supp. App. 4, 7. His first attorney withdrew after petitioner refused to meet with him and sent several letters to the court stating that he would prefer a

different lawyer. See Gov't C.A. Br. 3-7; C.A. Supp. App. 114-115, 118. A second lawyer was appointed in March 2019, but in October 2019 that lawyer filed a motion on petitioner's behalf to proceed pro se, explaining that petitioner had sent him a letter instructing him to inform the court immediately that petitioner wished to represent himself. C.A. Supp. App. 166 & n.1.

A magistrate judge held a hearing pursuant to Faretta v. California, 422 U.S. 806 (1975), on petitioner's motion. See C.A. Supp. App. 173. At the hearing, the magistrate judge informed petitioner of petitioner's "constitutional right to the assistance of counsel," id. at 176, warned petitioner that "[p]roceeding pro se is a proposition fraught with problems," and explained that petitioner's counsel was willing to continue representing him, id. at 177 (emphasis omitted). When the judge asked petitioner what relief he was seeking, petitioner stated that he was not the person named in the indictment because the name on the indictment was in upper case, and "upper case letters mean the person is either dead or a corporation." Id. at 178. He then criticized his attorney for filing motions that petitioner had not "asked for" on behalf of the "fiction" named on the indictment. Id. at 179.

In response to the judge's more specific questions about whether petitioner wished to proceed pro se, petitioner said that he wanted to "proceed per persona." C.A. Supp. App. 180. When the judge asked if that meant petitioner wished to proceed pro se, explaining that "pro se means you go forward without a lawyer,"

petitioner responded, "I don't want a lawyer, but I don't want to represent myself pro se, and I don't waive my rights." Ibid. (emphasis omitted). The magistrate judge found that petitioner had "not clearly and unequivocally waived [his] right to counsel." Ibid. The hearing ended with petitioner saying, "I'm not going to work with counsel because I don't desire to have counsel on my case," id. at 181.

After petitioner filed a pro se letter asserting that his attorney "seems delusional," C.A. Supp. App. 185, the attorney moved to withdraw on the ground that petitioner refused to communicate with him, id. at 188-189. Petitioner filed another pro se letter saying, "I do not want any Counsel[']s representation[;] it is my right to not have Counsel." Id. at 195. The magistrate judge then conducted a second Faretta hearing, at which petitioner failed to answer direct questions about whether he wanted to represent himself. See id. at 211 ("[D]o you wish to go without a lawyer in this case? THE DEFENDANT: In propria persona."), id. at 212-213 ("Yes or no? Do you wish to proceed without an attorney? THE DEFENDANT: If I'm representing myself proper, the flesh of a living human man.").

After repeated failed attempts to get petitioner to make clear whether he "want[ed] a lawyer involved in [his] case," C.A. Supp. App. 220-221, the magistrate judge stated his belief that petitioner was "express[ing] an intent to muddy the waters," by refusing to "affirmatively declare" that he was waiving his right

to counsel, id. at 221. The judge explained that in these circumstances, he could not find that petitioner had made "a knowing and intelligent waiver" because "the Supreme Court has made clear, the default position is always that a defendant should have counsel." Id. at 221-222. The magistrate judge therefore found that petitioner should continue to be represented by his then-current counsel. Id. at 222-223.

b. In January 2020, the government moved to dismiss the pending indictment, D. Ct. Docs. 488, 489 (June 6, 2020), and a grand jury returned the Third Superseding Indictment, charging petitioner with one count of conspiring to distribute and possess with intent to distribute cocaine and MDMA, in violation of 21 U.S.C. 846 and 841; one count of possessing with intent to distribute cocaine, in violation of 21 U.S.C. 841(a)(1); one count of possessing a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c) (2006); two counts of attempting to tamper with a witness, in violation of 18 U.S.C. 1512; and one count of obstructing justice, in violation of 18 U.S.C. 1503. C.A. App. 17-26.

Petitioner's counsel moved to withdraw after learning that he represented a witness likely to testify against petitioner on one of the witness-tampering counts. C.A. Supp. App. 339-341. The district court granted that motion and appointed a third attorney. Id. at 316, 433.

Over the next several months, petitioner filed 20 pro se pleadings, including filings stating that he had "fired" his attorney and intended to "represent the named defendant." C.A. Supp. App. 343-344, 350. His counsel moved to withdraw on the ground that petitioner was not communicating with him. Id. at 458. The district court held a hearing on that motion and the filings by petitioner that could be construed as a request to "proceed pro se." C.A. App. 55.

At the hearing, petitioner gave a lengthy statement, parts of which explained his reasons for seeking to proceed without an attorney. C.A. App. 70-72. Petitioner explained that he and his current counsel had "conflicts" because counsel had declined to give petitioner access to certain discovery materials. Id. at 71; see id. at 70. Petitioner also stated that, while his current lawyer "seems like a very good guy," his experience with prior attorneys led him to conclude that "dealing with the lawyers and the bar, they only can go but so far, and they must yield in the administration of justice." Id. at 71.

Petitioner also expressed frustration that the courts had not considered the numerous motions he had filed "on his own behalf" so far. C.A. Supp. App. 71. Petitioner informed the district court that he had "researched" the law, and that a defendant "has a right to self-representation at the heart of the Sixth Amendment and a right to conduct his defense as he sees fit and present his case in his own way with or without the attorney." Ibid.

Petitioner concluded by saying that "[t]oday I come here because I would like to represent the named defendant, and I don't want any more counsels appointed for the case because the motions that I'm filing are not being respected. They [are] basically falling on deaf ears, so to say. So I feel if I represent the named defendant, I would be entitled to my discovery, and I would be able to have everything on my own, and everything would get accomplished the way that I need to get it done." C.A. App. 72.

After that speech, the district court asked petitioner if it was correct that "you wish to proceed and represent yourself in this case, and you do not wish to have counsel appointed to represent you or assist you?" C.A. App. 72. After petitioner said "[y]es," the court stated that it wanted to "talk" to petitioner about the discovery concern that petitioner had raised with respect to his third lawyer, because "the Supreme Court has repeatedly counseled judges to be very careful before moving from representation of a defendant to self-representation." Id. at 72-73.

The district court then explained that the reason counsel had not been able to share certain discovery material was a protective order entered by the court that allowed petitioner to review certain material with his attorney, but did not allow him to retain it. C.A. Supp. App. 73; see D. Ct. Doc. 516 (Mar. 16, 2020) (protective order). After petitioner's counsel confirmed that he had sent the order to petitioner along with a letter asking

petitioner to call him to set up an interview, C.A. App. 74, petitioner denied having received the order and stated that, regardless, it did not "negate the fact that I didn't receive discovery." Id. at 75.

The district court told petitioner that it was struggling with how to proceed because "[s]o important is the right to counsel that the Supreme Court has instructed courts to indulge in every reasonable presumption against its waiver." C.A. App. 75 (citation omitted). The court cautioned petitioner that "I would not want you to assert" the right to self-representation "based on any mistake about what has occurred," emphasizing again that petitioner's attorney was not improperly withholding any discovery from him and was instead acting in accordance with the court's protective order. Id. at 76. The court stated that "[i]f the reason you want to represent yourself is so that you can see discovery, there is not going to be any difference between what you can see and read and review between you representing yourself and [counsel] representing you." Id. at 77. And later in the colloquy, the district court repeated the point, explaining that "before we go down this road of self-representation," the court "want[ed] to make sure that" petitioner understood that representing himself would not increase his access to discovery. Id. at 79. The court then went over the terms of the protective order again. Id. at 84.

At the conclusion of the discussion, the district court said, "But if you are still of the view that you clearly and unequivocally want to represent yourself --," and before the district court could finish, petitioner interjected "I do." C.A. App. 84. The court concluded its sentence by saying "-- you have that right to do so," after which petitioner repeated "Yes, sir, and I do." Ibid. The court then had a lengthy exchange with petitioner and government counsel exploring how petitioner could access discovery while representing himself without violating the protective order. Id. at 84-104. During that exchange, the court stated that it thought petitioner had "clearly and unequivocally said he wants to represent himself," but asked whether petitioner might have expressed interest in representing himself while "hav[ing] an attorney represent [him] at the same time." Id. at 104-105. Petitioner responded by saying "I never said that," and reiterating that he wanted "to represent the named defendant." Id. at 105.

After the hearing, the district court entered a written order granting petitioner's request to proceed pro se. C.A. Supp. App. 360-367. The order observed that, during the hearing, the court had "inquired on numerous occasions as to [petitioner's] desire to proceed pro se in order to ensure that [petitioner's] waiver was 'clear and unequivocal.'" Id. at 363. And it explained that "[a]lthough [petitioner] at times employed what may be described as unusual phrasing, he was entirely unwavering and certain in his

conviction that: (1) he did not want an attorney representing him; and (2) he wanted to represent himself." Ibid. The court retained petitioner's attorney as standby counsel. C.A. App. 107-109.

2. In March 2021, petitioner pleaded guilty to the first count (the MDMA and cocaine conspiracy count) of the 2020 indictment. See C.A. App. 214. As part of the plea agreement, the government agreed to dismiss the five other counts and to ask for a sentence within the parties' calculated Guidelines range of 70 to 87 months. Id. at 227. Petitioner also waived his right "to appeal the conviction and any sentence within the maximum provided in the statute of conviction." Ibid.

At the plea hearing, the district court confirmed that petitioner received a GED, could read English, understood what the court was saying, had never been treated for mental illness, and "underst[ood] the nature of the charge in Count One and [its] essential elements," as well as "the seriousness of the penalty provided by law." C.A. App. 191; see id. at 187-190. During the hearing, the district court repeatedly offered petitioner the opportunity to consult with standby counsel, which he declined. See id. at 185, 190, 197, 206, 213, 215. Petitioner said that he had discussed the Sentencing Guidelines and the statutory sentencing factors in 18 U.S.C. 3553(a) with the prosecutor in connection to the plea agreement. Id. at 208.

The district court accepted petitioner's plea and later sentenced him to 78 months of imprisonment, to be served

consecutively to his undischarged state sentence for discharging a firearm in a public place. C.A. App. 251-252. Petitioner did not object to the consecutive sentence. See id. at 252-257. But roughly seven months after judgment was imposed, petitioner filed a pro se letter asserting that the district court had "deceived" him by imposing a consecutive sentence without telling him that his pretrial detention would not be counted toward his federal sentence. Id. at 267. Under 18 U.S.C. 3585(b), a defendant receives credit for time spent in pretrial detention "as a result of the offense for which the [federal] sentence was imposed" only if that time "has not been credited against another sentence." And here, the Bureau of Prisons apparently credited much of petitioner's time in federal pretrial detention toward his state sentence in order to effectuate the consecutive sentence imposed by the district court. C.A. App. 270.

3. Petitioner filed a counseled appeal, and the court of appeals affirmed in part and dismissed in part in an unpublished per curiam opinion. Pet. App. A1-A4. The court first rejected, on plain-error review, petitioner's argument that his guilty plea was invalid based on the district court's failure "to advise him that credit for time spent in pretrial detention would not be applied to his federal sentence" and would instead be "credited to an undischarged state sentence pursuant to 18 U.S.C. § 3585(b)." Id. at A3. The court of appeals explained that the district court was not required to advise petitioner of this possibility because

the application of Section 3585(b) did "not affect the length or nature of the federal sentence." Ibid. (citation omitted).

Next, the court of appeals rejected petitioner's claims that "the district court erred in allowing him to represent himself without properly advising him of the risks of proceeding without the assistance of counsel," as well as his claim that the district court "needed to readmonish him when the court learned that [petitioner] had entered plea negotiations with the Government." Pet. App. A3. The court took the view that petitioner "waived these nonjurisdictional challenges when he entered his valid, unconditional guilty plea." Ibid. (citing United States v. Moussaoui, 591 F.3d 263, 279 (4th Cir. 2010)). And it determined that petitioner's guilty plea was valid even though it was uncounseled. Ibid.

Finally, the court of appeals took the view (Pet. App. A3-A4) that petitioner's appeal waiver barred his claims that the district court "erred in calculating his Sentencing Guidelines range" and that the pretrial delay "violated his Sixth Amendment right to a speedy trial." Id. at A2. The court dismissed the appeal with respect to those two claims and "affirm[ed] as to the remainder of the appeal." Id. at A4.

ARGUMENT

Petitioner contends (Pet. 14-20) that the court of appeals erred in rejecting his claim that his waiver of the right to counsel was invalid. Before the court of appeals, the government

mistakenly asserted that this argument was barred by his guilty plea, Gov't C.A. Br. 38-40, and the court of appeals accepted that erroneous argument, Pet. App. A3. But further review of the court's unpublished, per curiam order is unnecessary because, as the government further explained in its court of appeals briefing, the record demonstrates that petitioner's waiver was knowing and intelligent. Gov't C.A. Br. 40-58.

Petitioner also contends (Pet. 20-21) that the court of appeals erred in determining that his guilty plea was valid, where the district court did not warn him that his pretrial detention would be credited to his state (rather than his federal) sentence. But that claim is subject only to plain error review, and the district court did not plainly err. The court of appeals' per curiam decision does not implicate any conflict among the courts of appeals, and further review is unwarranted.

1. Petitioner first contends (Pet. 14-18) that the court of appeals erred in concluding that his guilty plea foreclosed his challenge to the validity of his waiver of the right to counsel. Although the court of appeals erred in accepting the government's mistaken contention that petitioner's right-to-counsel claim was waived, further review is unwarranted because petitioner's waiver of counsel was intelligent and voluntary. Cf. Thigpen v. Roberts, 468 U.S. 27, 30 (1984) ("[W]e may affirm on any ground that the law and the record permit and that will not expand the relief granted below.").

a. The Sixth Amendment guarantees a criminal defendant the right to the assistance of counsel but also allows him to waive that right and to represent himself. See Faretta v. California, 422 U.S. 806, 818-821, 835 (1975). Before allowing a defendant to represent himself, a district court must ensure that the defendant's waiver of counsel is "intelligent and voluntary." Godinez v. Moran, 509 U.S. 389, 402 (1993). The "defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation"; "he should," however, "be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open." Faretta, 422 U.S. at 835 (citation and internal quotation marks omitted).

The court of appeals erred by accepting the government's argument that petitioner's guilty plea foreclosed any inquiry into the validity of his waiver of counsel. This Court has observed that "a guilty plea to a felony charge entered without counsel and without waiver of counsel is invalid." Brady v. United States, 397 U.S. 742, 748 n.6 (1970). And the government has elsewhere taken the position that "[d]eprivation-of-counsel * * * claims are not relinquished by an unconditional guilty plea because the presence of effective counsel itself helps ensure that the plea was made 'knowingly.'" See Br. in Opp. at 14, Dewberry v. United States, No. 19-1052 (Apr. 24, 2020), cert. denied June 1, 2020.

The court of appeals' reliance on its decision in United States v. Moussaoui, 591 F.3d 263 (4th Cir. 2010), was misplaced because Moussaoui involved a claim that the defendant was denied the right to represent himself, id. at 279-280, not (as here) that he was denied the right to be represented by counsel.

Nevertheless, further review is unwarranted because, as the government explained to the court of appeals, Gov't C.A. Br. 40-58, petitioner validly waived his right to counsel. This Court has never "prescribed any formula or script to be read to a defendant who states that he elects to proceed without counsel." Iowa v. Tovar, 541 U.S. 77, 88 (2004). Instead, "[t]he information a defendant must possess in order to make an intelligent election, * * * will depend on a range of case-specific factors, including the defendant's education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding." Ibid. In the context of a guilty plea, "[t]he constitutional requirement is satisfied when the trial court informs the accused of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments attendant upon the entry of a guilty plea." Id. at 81.

Here, petitioner had three Faretta hearings, at which he was repeatedly informed of his right to counsel and warned of the dangers of proceeding pro se. At the first Faretta hearing, the magistrate judge told petitioner that "[p]roceeding pro se is a

proposition fraught with problems" and that the "default position * * * is that counsel should be provided for every defendant under these circumstances." C.A. Supp. App. 177 (emphasis omitted). At the second hearing, the magistrate judge reiterated that he could not grant petitioner's request to represent himself unless petitioner clearly and unequivocally waived his right to counsel because "the Supreme Court has made clear, the default position is always that a defendant should have counsel." Id. at 221-222.

At the third hearing, before a district judge, the court engaged in a lengthy colloquy with petitioner to ensure that he wished to "clearly and unequivocally" waive his right to counsel. C.A. App. 76. The court began the colloquy by telling petitioner that "the Supreme Court has repeatedly counseled judges to be very careful before moving from representation of a defendant to self-representation." Id. at 73. The court later quoted precedents emphasizing that "[s]o important is the right to counsel that the Supreme Court has instructed courts to indulge in every reasonable presumption against its waiver." Id. at 75 (citation omitted). And at the end of the colloquy, after offering a detailed explanation of why self-representation would not give petitioner a benefit in viewing discovery, the court stated that "if you are still of the view that you clearly and unequivocally want to represent yourself * * * you have that right to do so." Id. at 84.

Receiving those warnings, petitioner unequivocally waived counsel multiple times. After his first Faretta hearing, petitioner filed a pro se letter asserting that he did "not want any Counsel[']s representation," that it was his "right to not have Counsel," and that he was "entitled to self litigation methods according to the Six[th] Amendment." C.A. Supp. App. 195. When the magistrate judge twice found that his waivers of counsel were insufficient, petitioner continued to refuse to work with appointed counsel and to file documents pro se, asserting in these documents that he had "fired" his attorney. C.A. Supp. App. 343-344, 350. And in his third Faretta hearing, petitioner repeatedly and unequivocally asserted his desire to proceed without the aid of counsel. See C.A. App. 72 ("Today I come here because I would like to represent the named defendant, and I don't want any more counsels appointed for the case because the motions that I'm filing are not being respected."); id. at 84 ("But if you are still of the view that you clearly and unequivocally want to represent yourself -- THE DEFENDANT: I do."); id. at 90 ("I don't want a standby counsel nor do I desire a standby counsel. I will do this on my own."); id. at 105 ("THE COURT: * * * But you definitely want to represent yourself? THE DEFENDANT: I want to represent the named defendant, Jamar Green, whose name appears clearly on the docket, yes, I do.").

b. Several additional "case-specific factors" support the district court's finding that petitioner knowingly and voluntarily

waived his right to counsel. Tovar, 541 U.S. at 88. First, as the district court explained, petitioner was "advised on several occasions of both the content and severity of the charges that he faces -- including the potential penalties -- during hearings, status conferences, and arraignments." C.A. Supp. App. 364; see id. at 307-309 (initial appearance); id. at 40-42 (arraignment); 331-333 (arraignment on new indictment); see also id. at 277 (counsel's statement at pretrial hearing). Petitioner was therefore able to consider the nature of the charges against him in waiving his right to counsel.

Second, petitioner's pro se filings demonstrate his understanding of the charged offenses and the legal system more generally. While still represented by counsel, petitioner moved pro se to dismiss the Section 924(c) charge in his first indictment, correctly reciting the elements of the offense. C.A. Supp. App. 239. And after securing pro se status, petitioner filed a motion to dismiss that addressed each count in the new indictment. Id. at 397-401. As the district court observed, petitioner "cited to caselaw, statutes, regulations, and even the local bar rules" in his pro se filings or in open court, demonstrating his familiarity with the law. Id. at 365; see id. at 85, 113, 164, 185-186, 237-239, 346-347; C.A. App. 79.

Third, this case was not petitioner's first experience with the judicial system. In 2004, while represented by counsel, petitioner was convicted in the Eastern District of Virginia of

two offenses of the same nature as those charged here: conspiring to distribute a controlled substance, in violation of 18 U.S.C. 846, and carrying a firearm during and in relation to a drug-trafficking offense, in violation of 18 U.S.C. 924(c). 4-cr-14 D. Ct. Doc. 5 (Feb. 19, 2004); 4-cr-14 D. Ct. Doc. 30 (Oct. 21, 2004). And about a year before his federal charges in this case, he was convicted in state court for using a firearm in commission of a felony, in violation of Va. Code Ann. § 18.2-53.1 (2004), and discharging a firearm in a public place, in violation of Va. Code Ann. § 18.2-280. See Green v. Commonwealth, No. 344-17-1, 2018 WL 828183 at *1 (Va. Ct. App. Feb. 13, 2018). Courts of appeals routinely cite that kind of prior experience with the legal system as corroborating the knowing nature of a waiver of counsel. See, e.g., United States v. Underwood, 88 F.4th 705, 711 (7th Cir. 2023) ("[Defendant]'s experience with the legal system, including two prior felony convictions and one murder acquittal by a jury, indicates he possessed knowledge of the complexities of procedure and trial sufficient to make him aware of the task he was undertaking."); United States v. Vann, 776 F.3d 746, 763 (10th Cir.) ("[T]he true test for an intelligent waiver[] turns not only on the state of the record, but on all the circumstances of the case, including * * * his previous experience with criminal trials[.]" (citation omitted), cert. denied, 577 U.S. 968 (2015).

Fourth, the record suggests that petitioner waived his right to counsel in order to advance a strategy of asserting an argument

that he is a sovereign citizen not subject to prosecution. See United States v. Harrington, 814 F.3d 896, 900 (7th Cir. 2016) ("A defendant who waives his right to counsel for strategic reasons tends to do so knowingly."), cert. denied, 582 U.S. 921 (2017). From the beginning of the case, petitioner was dissatisfied with his counsel's different strategy, and he said he wanted to represent himself so "everything would get accomplished the way that [he] need[ed] to get it done." C.A. App. 72. For example, petitioner asserted a variety of arguments commonly associated with sovereign citizens, claiming that the person named in the indictment was "a fiction" or "a corporation" because the name was "in upper case letters," C.A. Supp. App. 178, and that the district court was "an admiralty jurisdiction," id. at 209. When explaining his desire to represent himself, petitioner also asserted that "pleas to the jurisdiction of the court must be plead in propria persona because if pleaded by attorney, they admit the jurisdiction as an attorney is an officer of the court." Id. at 219. The Seventh Circuit has found a knowing waiver in similar circumstances, involving a defendant who "fired his trial counsel (at least in part) in order to make his sovereign-citizen defense that the court lacked jurisdiction over him." United States v. Banks, 828 F.3d 609, 615 (2016), cert. denied, 580 U.S. 1139 (2017).

Given those circumstances, the multiple warnings petitioner received regarding the importance of counsel, and petitioner's

repeated and unequivocal assertions of the desire to represent himself, petitioner cannot establish that his waiver of counsel was invalid.

c. Petitioner briefly advances two additional reasons why review of his waiver of counsel claim is warranted. Neither has merit.

First, petitioner asserts (Pet. 14) that the district court had a duty to repeat its warnings about the hazards of proceeding pro se before petitioner "enter[ed] into uncounseled plea negotiations and plead[ed] guilty without counsel." But petitioner does not cite any cases in which a court has held that such renewed warnings are required before a defendant enters into a plea agreement. Furthermore, at the change-of-plea hearing, the district court repeatedly offered petitioner the opportunity to consult with standby counsel, which petitioner declined. See C.A. App. 185, 190, 197, 205-206, 213, 215. And as explained above, the entire record showed that petitioner understood the benefits of representation, which would include representation in any plea negotiations, yet knowingly waived those protections. See pp. 15-17, supra.

Second, petitioner contends (Pet. 19) that certiorari is warranted to clarify the standard of review that applies when a defendant claims on appeal that his "waiver of counsel was invalid." Petitioner asserts (Pet. 19-20) that the First Circuit has applied abuse of discretion review in this context, while other

circuits review the clam de novo. But this case does not present an opportunity to consider any such disagreement because the Fourth Circuit has long held the view petitioner favors, under which the validity of a waiver of counsel is reviewed de novo. See United States v. Ziegler, 1 F.4th 219, 227 (2021) ("Whether a defendant waived his right to counsel is a legal question we review de novo."); United States v. Ductan, 800 F.3d 642, 648 (4th Cir. 2015) (per curiam); United States v. Singleton, 107 F.3d 1091, 1097 n.3, cert. denied, 522 U.S. 825 (1997). And the court of appeals' non-precedential decision here did not address the standard of review for such claims.

2. Petitioner also contends (Pet. 20) that review is warranted because the district court erred in accepting his guilty plea without informing petitioner that his sentence might be ordered to run consecutively to the state sentence he was then serving, and that his time served in pretrial detention might be credited to his state rather than his federal sentence. The court of appeals found the underlying claims reviewable only for plain error because petitioner did not preserve them by moving to withdraw his plea or objecting at sentencing. Pet. App. A2-A3; see Fed. R. Crim. P. 52(b). Petitioner does not challenge that standard of review, and he cannot satisfy it because petitioner cannot show any error, much less a "clear or obvious" error that "affected [his] substantial rights." Puckett v. United States, 556 U.S. 129, 135 (2009).

When imposing a federal sentence, a district court may order the sentence to run concurrent with or consecutive to an undischarged term of imprisonment on a state offense. 18 U.S.C. 3584(a); Setser v. United States, 566 U.S. 231, 234-239 (2012). Here, the district court ordered petitioner's federal sentence to run consecutive to his sentence in Newport News Circuit Court for discharging a firearm in a public place.* C.A. App. 251-252, 288.

Although petitioner had been in federal pretrial detention since August 2018, C.A. App. 289, he did not receive credit toward his federal sentence for most of that time because the time was instead credited to his state sentence, id. at 270. Under 18 U.S.C. 3585, a defendant receives credit for time spent in pretrial detention "as a result of the offense for which the [federal] sentence was imposed" only if that time "has not been credited against another sentence." 18 U.S.C. 3585(b). And here, the Bureau of Prisons apparently credited much of petitioner's time in federal pretrial detention toward his state sentence in order to effectuate the consecutive sentence imposed by the district court. C.A. App. 270.

Contrary to petitioner's claim, the district court was not required to advise petitioner at the plea hearing of the possibility of a consecutive sentence or to which sentence his

* According to petitioner (Pet. 12) that five-year state sentence (imposed for conduct that occurred in March 2016) was complete by the time of petitioner's federal sentencing in June 2021.

pre-trial time would be credited in the event of a consecutive sentence. The courts of appeals agree that a district court, when accepting a guilty plea, is "not required to advise [the defendant] that his federal sentence might be imposed to run consecutive to his undischarged state sentence." United States v. Henry, 702 F.3d 377, 381 (7th Cir. 2012); see, e.g., United States v. Ocasio-Cancel, 727 F.3d 85, 90 (1st Cir. 2013); United States v. Hurlich, 293 F.3d 1223, 1231 (10th Cir. 2002); United States v. Hernandez, 234 F.3d 252, 256-257 (5th Cir. 2000) (per curiam); United States v. Parkins, 25 F.3d 114, 119 (2d Cir.), cert. denied, 513 U.S. 1008 (1994); United States v. Ferguson, 918 F.2d 627, 630-631 (6th Cir. 1990) (per curiam). The courts of appeals have reasoned that the possibility of a consecutive sentence is not "a direct consequence of the defendant's guilty plea." Ocasio-Cancel, 727 F.3d at 90; see Brady v. United States, 397 U.S. 742, 755 (1970) (explaining that a defendant pleading guilty must be "aware of the direct consequence[]" of the plea) (citation omitted).

Petitioner errs in asserting (Pet. 20) that the Ninth Circuit has reached a different conclusion. Before this Court's decision in Setser v. United States, the Ninth Circuit took the view, in United States v. Neely, 38 F.3d 458 (9th Cir. 1994), that a "federal court lacks discretion to order a concurrent sentence" where the state-court sentence has not yet been imposed, and therefore stated that the defendant should "be advised of the court's lack of discretion before he can enter a voluntary plea of

guilty." United States v. Neely, 38 F.3d 458, 461 (9th Cir. 1994) (per curiam); see United States v. Myers, 451 F.2d 402, 403-404 (9th Cir. 1972) (same). But Setser clarified that district courts have discretion to make a federal sentence run either concurrently or consecutively to a state-court sentence that has not yet been imposed. Setser, 566 U.S. at 234-243. Setser therefore undermined the reasoning in Neely. And the Ninth Circuit has recognized that, where "the district judge ha[s] discretion to impose either a consecutive or concurrent sentence," that sentence is "not a 'direct consequence' of [the defendant's] plea" about which he must be warned. United States v. Wills, 881 F.2d 823, 827 (1989) (emphasis added). Neely thus neither indicates a circuit conflict, nor provides support for finding a clear or obvious error in this case, which does not even involve (as Neely did) a not-yet-imposed state sentence.

Petitioner is also unable to show that the alleged error affected his substantial rights. By pleading guilty, petitioner secured the dismissal of five of the six counts in the indictment, including a charge under 18 U.S.C. 924(c) that exposed him to a mandatory consecutive 25-year prison sentence (because of his prior conviction, in 2004, under the same statute). 18 U.S.C. 924(c)(1)(C)(i) (2018). He has not attempted to show, nor could he show, a reasonable probability that, had he known his 78-month federal sentence would run consecutive to his state sentence and that his pretrial detention would be credited toward the state

sentence, he would have rejected the favorable plea agreement and proceeded to trial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

NICOLE M. ARGENTIERI
Acting Assistant Attorney General

WILLIAM A. GLASER
Attorney

APRIL 2024