NO. 23-6187

# 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

## REPLY BRIEF OF PETITIONER

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In his Petition for Writ of Certiorari, Appellant Jamar Green submitted the following 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 nature and consequences of the charges, and the perils of proceeding *pro se* in a federal criminal case.

The United States concedes that "a guilty plea to a felony charge entered without counsel and without waiver of counsel is invalid." *See* Brief in Opposition at 14 (quoting *Brady v. United States*, 397 U.S. 742, 748 n.6 (1970)). The United States further concedes that the Fourth Circuit erred in refusing to consider this issue on appeal. *See* Br. in Opp. at 14; *see also* Question Presented No. 2, *infra*. Notwithstanding these concessions, the United States contends that this Court should affirm the Fourth Circuit by denying Mr. Green's Petition for Writ of Certiorari, instead of reviewing the issue of waiver or reversing the Fourth Circuit and remanding the issue for consideration, thereby preventing Mr. Green from any appellate review. Mr. Green submits in his Argument below that he was not properly warned of the perils of proceeding *pro se* and that he was entitled to a substantive appeal where the Fourth Circuit actually considered this issue on appeal.

> 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.

The United States concedes Mr. Green's point that the Fourth Circuit's holding was in error and that Mr. Green's *pro se* guilty plea did not waive consideration on appeal of whether he validly waived counsel. *See* Br. in Opp. at 13-15.

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.

The United States does not deny that there is a circuit split on this issue. *See* Br. in Opp. at 21-22.

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?

The district court had no discretion or authority to award federal pretrial sentencing credit in this case. Mr. Green should have been alerted to that mandatory consequence of his plea.

The United States attempts to repackage this issue as being controlled by a sentencing court's discretion to order consecutive sentences. In doing so, the United States fails to capture the true crux of the matter, which is related to presentence time-served credit, not consecutive versus concurrent sentences. An issue which has a split among the circuits.

## ARGUMENT IN REPLY

### I. The United States Agrees that the Fourth Circuit Plainly Erred by Finding that Mr. Green's Uncounseled Guilty Plea Waived Consideration of Whether His Waiver of Counsel Was Valid. The United States then Incorrectly Argues that this Court Should Make Its Own Findings that Mr. Green Validly Waived His Right to Counsel.

The United States agrees with Mr. Green that an uncounseled defendant's felony guilty plea does not waive consideration on direct appeal of whether the defendant's purported waiver of counsel was valid. Br. in Opp. at 13-15.

The United States agrees that the Fourth Circuit plainly erred when it held that:

> "Green waived [this challenge] 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."

*United States v. Green*, 21-4336, *3 (4th Cir. Aug 10, 2023).

Given that the United States concedes plain error, Mr. Green submits that this Court should employ its supervisory authority and review this case and grant certiorari. The Fourth Circuit's marked departure from the accepted and usual course of judicial proceedings is in disregard of Mr. Green's right to appellate review.

While the case of *United States v. Green*, 21-4336 (4th Cir. Aug 10, 2023) is unpublished, the fact remains that it is a recent Fourth Circuit opinion that is clearly wrong and readily appears in any legal database of opinions or internet searches.

Mr. Green is entitled to a plenary appellate review - especially on an issue such as whether he was lawfully deprived of his right to an attorney and then pleaded guilty to a felony and was sentenced without a lawyer. Not only has Mr. Green been

denied his fair right to an appeal of this issue, but the Court should correct this clear error by hearing his case and determining whether Mr. Green waived his rights or by returning the case to the Fourth Circuit with instructions to fully review the matter.

## II. There Is an Undisputed Circuit Split as to the Appellate Standard of Review for Determining Whether a Pro Se Defendant has Validly Waived Counsel. This Issue Should Be Decided and the Fourth Circuit Informed on Remand of the Proper Standard.

In his Petition for Writ of Certiorari, Mr. Green detailed the split between the circuits on this issue. *See* Pet. for Writ at 17. In its Opposition Brief, the United States does not deny that there is such a split. *See* Br. in Opp. at 21-22.

While Mr. Green would contend that the proper standard is *de novo*, and that the United States is correct that current Fourth Circuit precedent would require a *de novo* review, the issue should be decided now as it is ripe for decision and may well become relevant to Mr. Green's future proceedings in the event of remand.

## III. Mr. Green Did Not Validly Waive Counsel.

The United States, without citation to any particular authority, contends that instead of remand, this Court should decide the issue of whether Mr. Green validly waived counsel.

Mr. Green asserts that his purported waiver of counsel before the trial court was not properly informed, clear, and unequivocal. The United States' Brief in Opposition supports Mr. Green's position.

While Mr. Green stated at various times during the pendency of the three (3) indictments that he wanted to represent himself (perhaps satisfying the "voluntary"

element of waiver), a review of the United States's citations to the record below demonstrates Mr. Green's waiver of counsel was not a "knowing" and "intelligent" decision.

Before Mr. Green was permitted to be a *pro se* litigant, the magistrate judge held two *Faretta* hearings and, on both occasions, found that Mr. Green did not validly waive counsel. *See* Br. in Opp. at 4-5.

None of Mr. Green's statements quoted by the United States show he had any real understanding of the dangers of proceeding without an attorney or the nature and consequences of what such waiver would entail. There is a substantial difference between a defendant's voluntary statement that he does not want a lawyer, versus the further requirement that the defendant have the proper knowledge and intelligence to make such a decision.

Mr. Green's statements in the district court are replete with phrases such as:

> "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." *See* Br. in Opp. at 4.

> "I don't want a lawyer, but I don't want to represent myself *pro se*, and I don't waive my rights." *See Id.*

> "[D]o you wish to go without a lawyer in this case? THE DEFENDANT: In propria persona." *See Id.*

The district court eventually entered an order granting Mr. Green's purported request to proceed *pro se*. But Mr. Green filed a "Notice of Motion" in response to the Order in which he 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. "Mr. Green cannot help but recognize the Court's trying to cover its tracks. . . .". *Id.*

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.

At the hearing that resulted in the district court's order for Mr. Green to proceed *pro se*, the United States agrees that much of that time was devoted not to warning Mr. Green of the nature of the charges, the consequences for such charges, the rules he would need to follow for trial, or any of the specific dangers of acting *pro se*. *See* Br. in Opp. at 7-9. That time was devoted instead to discovery and a particular discovery protective order.

The United States combed the record to find the times when Mr. Green may have been instructed of the nature and consequences of the charges he was facing. *See* Br. in Opp. at 18 (referencing arraignments, status conferences, and general "hearings". The United States does not cite to any identifiable colloquy where Mr. Green was advised of the nature of the charges, the consequences for such charges, the rules he would need to follow for trial, or any of the specific dangers of acting *pro se*.

At the actual hearing that the district court held where Mr. Green was permitted to proceed *pro see*, the trial court did not conduct any inquiry of Mr. Green's

understanding of the nature or consequences of the charges, the perils of proceeding *pro se,* or the difficulties of self-representation. This is contrary to this Court's standard requiring that defendants receive vigorous warnings. Referencing prior general hearings from different indictments related to different indictments and unrelated hearings, without identifying what factually occurred on the record, does not sufficiently fill in the gaps.

Analogously, if a defendant wanted to enter a guilty plea, but on two occasions did not understand the questions at the plea colloquy, on the third attempt the court still would not permit that defendant to enter a guilty plea without properly conducting a full-scale hearing. Similarly, reviewing Mr. Green's three year record as a whole and trying to cherry pick places where the defendant may have demonstrated some basic understanding does not substitute for an actual *Faretta* hearing where the defendant waives his right to counsel and at that hearing demonstrates a knowing, intelligent, and voluntary waiver.

## IV. There Is a Circuit Split Regarding Whether a Defendant Must Be Informed, Before Pleading Guilty, that He Would Not Receive Federal Credit for His Pretrial Detention.

In its Brief in Opposition, the United States confuses this issue with whether a defendant must be informed that a district has discretion to run its federal sentence consecutively or concurrently with an ongoing state sentence.

The inquiry that has caused a split among the circuits is whether a defendant must be informed that he will not receive federal credit for his pre-sentence federal detention.

In support of his position, Mr. Green relies upon the Ninth Circuit case of *United States v. Myers*, 451 F.2d 402 (9th Cir. 1972), in which the Ninth Circuit held that Myers's plea was not knowing where the defendant was not informed that the calculation of his federal time would not begin until his California state sentence had concluded. *Myers*, 451 F.2d at 403-404.

Under 18 U.S.C. § 3585(b), this Court has held that a sentencing court has no authority to award presentence detention credit. *See United States v. Wilson*, 503 U.S. 329, 333-34 (1992) ("computation of the credit must occur after the defendant begins his sentence. A district court, therefore, cannot apply § 3585(b) at sentencing.").

Moreover, this Court held that "Congress made clear [in § 3585(b)] that a defendant could not receive a double credit for his detention time." *See Wilson*, 503 U.S. at 337.

It was mandatory in Mr. Green's case that he would not, and could not, receive credit for his presentence detention, which occurred while he was serving a Virginia state sentence. Pursuant to the rationale in *United States v. Myers*, 451 F.2d at 403-404 (9th Cir.), he was required to be informed of that fact which would necessarily effect his total time of incarceration, regardless of whether his sentences were ordered to run consecutively or concurrently. Given that the other courts of appeals disagree with this rule, this Court should resolve the split.

## CONCLUSION

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

and provide such other relief as the interests of justice require.

Dated: April 29, 2024

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