No. _____

In The
Supreme Court of the United States

DONALD HERRINGTON,

Petitioner,

v.

CHADWICK DOTSON,
Director of the Department of Corrections,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fourth Circuit erred by holding, in conflict with other circuits and a plurality opinion of this Court, that a criminal defendant can validly waive his or her right to counsel without being informed (at least) 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." *Von Moltke v. Gillies*, 332 U.S. 708, 721-24 (1948) (plurality op.).

2. Whether the Fourth Circuit erred, in conflict with decisions of other circuits, by holding that Petitioner was not entitled to relief on the basis of a conflict between his Fifth and Sixth Amendment rights.

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JURISDICTIONAL STATEMENT

Petitioner Donald Herrington is a Virginia prisoner seeking a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The published opinion of the Fourth Circuit is reproduced at Pet.App.1, and is reported at 99 F.4th 705. The district court had jurisdiction pursuant to 28 U.S.C. §§ 2241, 2254. The court of appeals granted a certificate of appealability, and had appellate jurisdiction pursuant to 28 U.S.C. §§ 1291, 2253. The court of appeals issued its opinion on April 30, 2024 and denied Mr. Herrington's timely petition for rehearing and rehearing *en banc* on June 4, 2024, making his petition for certiorari due on September 2, 2024. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides that "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 defence."

INTRODUCTION

Petitioner Donald Herrington chose to represent himself in a complex felony trial due to cruelly unfair circumstances. He faced several felony counts of obtaining money by false pretenses, and in representing himself he understandably planned his defense around the fact that he did not obtain any money. But the trial court failed to tell Mr. Herrington that under Virginia law juries can convict a defendant of *attempting* to commit any crime charged in the indictment, as a lesser included offense. Mr. Herrington did not learn that crucial information until the jury instruction conference—when it was too late to put on any defense to the crime of attempt.

In *Von Moltke v. Gillies*, a plurality opinion of this Court explained that a self-represented defendant must be told at least "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." 332 U.S. 708, 721–24 (1948) (plurality op.) (emphasis added). The Third and Tenth Circuits have held for decades that before allowing a criminal defendant to represent himself a trial court must, in normal circumstances, conduct a formal colloquy involving a "penetrating and comprehensive examination of all the circumstances," *United States v. Peppers*, 302 F.3d 120, 131 (3d Cir. 2002), to ensure that the defendant understands all of the "*Von Moltke* factors," *United States v. Hamett*, 961 F.3d 1249, 1255-57 (10th Cir. 2020). Several other circuits also require, under varying formulations, a real substantive inquiry into

whether the defendant truly understood the nature of the charges and potential defenses. The Fourth Circuit and several others, by contrast, maintain that trial courts are "not required to detail every risk or explain every potential defense or lesser included offense of a particular charge," but only "to ensure that [the defendant] was aware of the risks of self-representation" in a general sense. Pet.App.26-27.

This circuit split has been acknowledged by the Fourth Circuit and by Justices of this Court for decades. *See, e.g., McDowell v. United States*, 484 U.S. 980 (1987) (White and Brennan, JJ., dissenting from the denial of certiorari); *United States v. Gallop*, 838 F.2d 105, 109-110 (4th Cir. 1988) ("The circuit courts have split on the type of record necessary to establish whether a defendant's waiver of counsel is knowing and intelligent."); *United States v. Ductan*, 800 F.3d 642, 649 (4th Cir. 2015) ("We have held that a 'searching or formal inquiry,' while required by some of our sister circuits, is not necessary."). The split is cleanly presented by this case, important, arises frequently, and merits review.

This case also presents an opportunity to address a common dilemma faced by tax defendants, on which the circuits have taken different approaches. Mr. Herrington chose to represent himself because he believed he was unable to sign a financial disclosure affidavit for appointment of counsel without incriminating himself on five perjury charges, all of which were specifically about whether he had omitted income from a prior application for appointment of counsel. The Fourth Circuit interpreted ambiguous statements in the exchange between Mr. Herrington and the trial court as foreclosing any federal habeas relief for that dilemma. But Mr. Herrington's

articulation of his dilemma was much more clear than statements that have been held sufficient in the Third Circuit, and the trial court's offer supposedly alleviating that dilemma was far more ambiguous than what has been required by the Third and Eighth Circuits. The trial court also had before it a record of Mr. Herrington's indigency that, in the Fifth Circuit at least, would have mandated further inquiry. Those conflicts also merit review, or consideration for summary reversal.

STATEMENT OF THE CASE

I. Proceedings in state court

As the Fourth Circuit's opinion explains, Mr. Herrington was charged with several minor drug charges in Virginia state court in 2008. Pet.App.3. He filled out an indigency affidavit and was appointed counsel. Mr. Herrington was acquitted of those charges. *Id.*

Three years later, the Commonwealth charged him with five counts of perjury, three counts of obtaining money by false pretenses, three counts of filing false or fraudulent income tax returns, two counts of failure to file an income tax return, and two counts of drug possession. *Id.* "The perjury counts all related to Herrington's failure to disclose certain rental income in the indigency forms that he filled out in order to receive appointed counsel for his 2008 charges." *Id.* The Commonwealth alleged that Mr. Herrington failed to disclose "that he owned a large, single-family home located at 1304 Washington Drive, Stafford, Virginia, that he purchased in 2007 for $650,000," and "that he had rental income from

tenants" in that house from 2007 to 2012. *See* Commonwealth's Brief in Opposition to Petition for Appeal in the Supreme Court of Virginia Record No. 140286 (May 13, 2014), at 4-5, available in Dkt. 13 (state court record).

The Fourth Circuit's opinion quotes most of the exchanges between the trial court and Mr. Herrington over a period of several months, culminating in his decision to represent himself. *See* Pet.App.4-12. Mr. Herrington repeatedly and consistently explained that he would like to hire an attorney but could not afford one—because he was unemployed and his bond conditions did not allow him to work, and because the police had seized everything valuable from his house. He also repeatedly explained that he did not feel qualified to represent himself, *see, e.g.,* Pet.App.6, 9, but that he "would rather represent myself" than fill out the indigency application for appointment of counsel because "all those perjuries are from getting a Public Defender," Pet.App.4, and "that's what all these perjuries are for is that I did not consider that [rental income] in my last time for obtaining an attorney," Pet.App.10. When asked directly whether he was unwilling to file an indigency affidavit because "these charges are arising out of prior applications that you made" for appointment of counsel, Mr. Herrington answered "Absolutely." Pet.App.10. The Virginia trial court's response was "All right. I understand that. So that leaves us with two options and that is either for you to hire an attorney or for you to go forward and represent yourself." *Id*. Mr. Herrington represented himself.

Three of the felony charges against Mr. Herrington were for obtaining money by false

pretenses under Virginia law. As the Fourth Circuit succinctly acknowledged:

> After both sides finished presenting evidence, Herrington realized that Virginia treats the attempt of a crime as a lesser included offense of every substantive charge and that he could therefore be convicted of an attempt to obtain money by false pretenses even though he was charged only with the completed crime of obtaining money by false pretenses. Because he did not know that prior to the close of evidence, he had not prepared a defense to attempt, arguing only that he never received any money. And, at that point, it was too late to make such a defense.

Pet.App.12. To be clear, Mr. Herrington did not just spontaneously "realize" that he could be convicted of an uncharged attempt crime; the court and the prosecution informed him of that fact, but simply waited until the charge conference to do so. *See* JA 344-45, 341-42.[1]

The jury acquitted Mr. Herrington of the two drug possession charges and one perjury charge; convicted him of three counts of attempting to obtain money by false pretenses (acquitting him of the completed offense); and convicted him of the remaining charges. The trial court then sentenced him to twelve years' imprisonment. Pet.App.13.

On direct appeal, appointed counsel argued only that the trial court had abused its discretion in

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[1] JA citations refer to the joint appendix filed in the Fourth Circuit.

sentencing, and filed an *Anders* brief stating that there were no other meritorious issues and asking permission to withdraw. JA 104, 114-115. The Court of Appeals of Virginia denied Mr. Herrington's petition for appeal and for rehearing and granted counsel's motion to withdraw. JA 117-120. The following year, the Supreme Court of Virginia denied Mr. Herrington's pro se petition for appeal and petition for rehearing. JA 134. The Supreme Court of Virginia also dismissed Mr. Herrington's subsequent habeas corpus petition, holding that nearly all of Mr. Herrington's claims were procedurally barred under its decision in *Slayton v. Parrigan*, 205 S.E.2d 680 (Va. 1974), because appointed counsel had not raised them on direct review. JA 45, 166-173.

II. Federal habeas proceedings

Mr. Herrington filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Virginia in Alexandria. JA 8. The district court dismissed the petition and denied a certificate of appealability, relying on the state-law procedural default identified by the Supreme Court of Virginia. JA 179-185.

The Fourth Circuit vacated and remanded for reconsideration. It recognized that as a matter of Virginia law the *Slayton* rule applies only to non-jurisdictional errors, and reasoned that "'[i]f the accused . . . is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty.'" JA 200 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938)).

Therefore "the adequacy of *Slayton* as applied [to this claim] is debatable." JA 200. On remand, the district court rejected Mr. Herrington's claims on the merits, JA 425, 477, and again denied a certificate of appealability, JA 483.

The Fourth Circuit granted a certificate of appealability limited to Mr. Herrington's claims (1) that his waiver of the right to counsel at trial was invalid, and (2) that his appellate counsel was ineffective for failing to raise both that issue and certain deficiencies in the 2009 failure-to-file tax conviction. On appeal, the Commonwealth changed its position and conceded that Mr. Herrington was factually innocent of that failure-to-file tax charge and that he had received ineffective assistance of appellate counsel at least to that extent.[2] The Fourth Circuit remanded that issue to the district court with instructions to grant the writ unless, within a reasonable period of time, Mr. Herrington was afforded a new appeal in state court. Pet.App.33-34. The Commonwealth recently filed a motion asking the Virginia Court of Appeals to authorize a delayed appeal, limited to the 2009 tax filing charge.

On the question of whether Mr. Herrington's waiver of his right to counsel was knowing and intelligent, the Fourth Circuit acknowledged that Mr. Herrington was not informed that, in Virginia, attempt is treated as an included offense of every

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[2] Tax filing was required under Virginia law that year only if a person's income exceeded $11,250. The Commonwealth's evidence, and the trial court's instructions, invited the jury to conclude that Mr. Herrington exceeded that threshold due to $16,736 in unemployment income. But that income should have been excluded from the calculation as a matter of law. *See* Pet.App.32.

charge in the indictment. Pet.App.12; Va. Code § 19.2-286. The panel acknowledged that Mr. Herrington's failure to understand that fact until the end of trial prejudiced his ability to present a defense to obtaining money by false pretenses. *Id*. It also acknowledged the *Von Moltke* plurality's statement that self-represented defendants must be informed of, *inter alia*, all "statutory offenses included within" the crimes explicitly listed in the indictment. Pet.App.26-27 n. 7. But the panel held that more recent precedents disclaim any "searching or formal inquiry" and require only that a defendant must "be informed of the charges and possible punishments and 'made aware that he will be on his own in a complex area where experience and professional training are greatly to be desired.'" *Id.* (citations omitted). The panel reasoned that Mr. Herrington's waiver was knowing and voluntary because he was "repeatedly warned … of the dangers of self-representation" and also warned that he would "be taking on all the responsibilities and the role that an attorney would have." Pet.App.26 (quoting JA 248, 250). The panel explicitly held that "[t]he trial court was not required to detail every risk or explain every potential defense or lesser included offense of a particular charge" but only "had to ensure that Herrington was aware of the risks of self-representation" in a general sense. Pet.App.26-27.

The Fourth Circuit also held that Mr. Herrington's waiver was not tainted by his concerns about self-incrimination, for two reasons. First, the court of appeals emphasized Mr. Herrington's statement early in the proceedings that "all those perjuries are from getting a Public Defender, and I'm too scared to fill out that form for this fact that she's

going to give me a perjury charge." Pet.App.4 (quoting JA 225-26). The Fourth Circuit reasoned that Mr. Herrington's statement indicated a concern about "new perjury charges unrelated to his underlying charges," and that any danger on that front could be avoided simply by telling the truth. Pet.App.22.

Second, the Fourth Circuit pointed to the trial court's statement that "I would have to think that there is at least a chance that you would qualify [for court-appointed counsel], *or that this Court would appoint counsel if you want it on these charges*, but you do not want that?" Pet.App.23-24 (quoting JA 319) (emphasis in the panel's opinion). The panel reasoned that "[t]he court's use of the word 'or' indicates that the court would have appointed Herrington counsel regardless of whether he was entitled to appointed counsel," and also "indicates that Herrington could have received court-appointed counsel without filling out the indigency form"—which the panel assumed, without record evidence, "is what apparently occurred" in a different case Mr. Herrington was involved in around the same time. *Id.*

REASONS FOR GRANTING THE WRIT

I. THE FOURTH CIRCUIT'S DECISION FURTHER ENTRENCHES AN IMPORTANT CIRCUIT SPLIT ABOUT THE REQUIREMENTS FOR A KNOWING AND INTELLIGENT WAIVER OF THE RIGHT TO COUNSEL

In *Von Moltke v. Gillies*, a plurality opinion of this Court reaffirmed that a criminal defendant's decision to proceed *pro se* must be knowing and intelligent. 332

U.S. at 726. Noting the trial judge's "serious and weighty responsibility" to assess the validity of a defendant's waiver, the *Von Moltke* plurality instructed lower courts to ensure, at a minimum, that the defendant be aware 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 723–24 (emphasis added). In subsequent cases this Court has made clear that it has not "prescribed any formula or script," and that "[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." *Iowa v. Tovar*, 541 U.S. 77, 88 (2004). But when (as here) the defendant is waiving the assistance of counsel *at trial*, this Court has emphasized that "before a defendant may be allowed to proceed *pro se*, he must be warned specifically of the hazards ahead." *Id.* at 88-89. This Court emphasized that the defendant in *Tovar* was specifically informed of "the nature of the charges against him and the range of allowable punishments." *Id.* at 92 n.11 (cleaned up).

The Circuits have split over both the process district courts must follow and the information the defendant must be aware of prior to making a decision to waive counsel. Only a few circuits have heeded the *Von Moltke* plurality's admonition that a defendant must be aware of the nature of the charges, including lesser included offenses and available defenses. Several circuits affirm waivers as valid where the

defendant has been cautioned about the dangers of self-representation in *abstract* terms, but where there is no evidence that the defendant has sufficient understanding of the charges and viable defenses to comprehend what he is giving up and what effectively representing himself would actually require.

The Fourth Circuit has acknowledged this circuit split for decades. *See, e.g., Gallop*, 838 F.2d at 109-110 ("The circuit courts have split on the type of record necessary to establish whether a defendant's waiver of counsel is knowing and intelligent."); *Ductan*, 800 F.3d at 649 ("We have held that a 'searching or formal inquiry,' while required by some of our sister circuits, is not necessary."). So have Justices of this Court. *See McDowell*, 484 U.S. 980 (White and Brennan, JJ., dissenting from denial of certiorari) (noting that "[t]his conflict among the Courts of Appeals has now gained the attention of, and been a source of confusion to, the state courts as well."). The split is deep and entrenched, and the issue is important and frequently recurring. Review is warranted.

A. The Fourth Circuit And Several Others Require At Most Basic Knowledge Of The Charges And Possible Penalties, Plus A General Awareness of The Dangers Of Self-Representation

The Fourth Circuit and several others hold that a knowing and intelligent waiver requires *at most* basic knowledge of the charges and potential penalties, plus highly general warnings about the dangers of self-representation. These circuits do not require evidence that the defendant genuinely understood the *nature* of

the charges, potential defenses, or lesser-included offenses, and frequently affirm waivers based on findings that the defendant understood in a general sense what he was getting into.

The Fourth Circuit's holding in this case is consistent with its longstanding rule that "no particular interrogation of the defendant is required…" as long as the court ensures the defendant understands "the dangers of self-representation" and makes his choice "with his eyes open." *United States v. King*, 582 F.2d 888, 890 (4th Cir. 1978). The Fourth Circuit affirms waivers when the trial court failed to conduct *any* inquiry into the defendant's actual understanding of the charges and possible defenses. In *United States v. Singleton*, for example, the trial judge merely informed the defendant that he should "think long and hard" about his decision. 107 F.3d 1091, 1098 (4th Cir. 1997). The Fourth Circuit inferred that the defendant was sufficiently aware of the "gravity of the charges against him" because the indictments had been read to him previously and he had attempted to escape after a superseding indictment was issued. *Id*. at 1098.

The First Circuit has held that a defendant must understand "'the magnitude of the undertaking and the disadvantages of self-representation, . . . [and] the seriousness of the charge and of the penalties he may be exposed to.'" *United States v. Robinson*, 753 F.3d 31, 43 (1st Cir. 2014) (quoting *Maynard v. Meachum*, 545 F.2d 273, 279 (1st Cir. 1976)). That understanding *usually* requires "'an awareness that there are technical rules governing the conduct of a trial, and that presenting a defense is not a simple matter of telling one's story.'" *Id.* But in *Robinson* the trial judge basically just told the defendant that he was "making

a huge mistake" because he was "not trained in the law" and did not know the rules of court. *Id.* at 44. The First Circuit approved the waiver, even though "the trial judge did not discuss with Robinson the possibility that he may have legal defenses of which he was not aware" or "convey in concrete terms the sentencing range [he] would likely face if he were convicted." *Id.* It was enough that Robinson "knew just what he was getting into" because he was "no stranger to the federal criminal justice system,'" and because (unlike Mr. Herrington) he had been represented by counsel for a year prior to his waiver. *Id.* at 44-45. *See also United States v. Francois*, 715 F.3d 21, 30 (1st Cir. 2013) (collecting cases affirming waiver on the ground that the defendant's background indicated awareness of the seriousness of the decision).

Similarly, the Second Circuit has explained that a *Faretta* hearing "normally includes 'the nature of the charges, the range of allowable punishments, and the risks of self-representation.'" *United States v. Fore*, 169 F.3d 104, 108 (2d Cir. 1999) (citation omitted). But the Second Circuit affirmed a waiver where the judge told the defendant that he had competent counsel available to handle his case, that his lack of legal training would likely result in a conviction and possible prison sentence, and that it was, in most cases, "devastating" for criminal defendants to proceed without counsel. *Id.* at 108–09. The Second Circuit explicitly "decline[d] to create" any requirement for "an explicit accounting of the potential punishment in a *Faretta* discussion," let alone any detailed explanation of the charges and potential defenses. *Id.* at 108. *See also Islam v. Miller*, 166 F.3d 1200 (2d Cir. 1998) (*Faretta* inquiry

adequate where judge asked about the defendant's legal background and whether his request was the result of any pressure, and advised that representing oneself is a foolish decision).

Although courts in the Fifth Circuit must hold a colloquy on the record, see *United States v. Virgil*, 444 F.3d 447, 453 (5th Cir. 2006), that court affirms waivers of counsel as valid so long as defendants are told with adequate specificity of the dangers of proceeding on their own, regardless of whether the *Von Moltke* factors are satisfied. See *United States v. Joseph*, 333 F.3d 587 (5th Cir. 2003). In *Joseph*, the trial judge merely gave the defendant a "serious" and "strong" recommendation that he proceed with counsel, and "discourag[ed]" him from proceeding *pro se*. *Id*. at 590. The Fifth Circuit held that those warnings and the fact that Joseph had made comments about the superseding indictment and the severity of the sentence he faced were enough to confirm his awareness of "nature of the charges against him and the consequences of the proceedings." *Id*.

In a later case, the Fifth Circuit suggested that lower courts follow a guide from the Benchbook for U.S. District Court Judges. *See United States v. Jones*, 421 F.3d 359, 363 & n.3 (5th Cir. 2005). Concerning the nature of the charges, that guide only requires the judge to "state the crimes with which the defendant is charged." *Id.* at 363 n.3. There is no requirement that the judge explain the nature or elements of those crimes, possible defenses, or lesser included offenses. *Id.* And even then the Fifth Circuit emphasized that "[t]his court require[s] no sacrosanct litany for warning defendants against waiving the right to counsel, and has approved warnings much less

thorough than the guidelines presented in the bench book." *Id.* at 363-64. (internal citations omitted).

The Sixth Circuit has endorsed those same questions from the Benchbook. *See United States v. McDowell*, 814 F.2d 245, 250 (6th Cir. 1987), abrogated on other grounds by *Godinez v. Moran*, 509 U.S. 389 (1993). And, like the Fifth Circuit, the Sixth does not even require consistent adherence to that already deficient colloquy. *See, e.g., United States v. Bankston*, 820 F.3d 215, 223–24 (6th Cir. 2016).

Decades ago the Eighth Circuit reversed lower courts when they failed to explain the *Von Moltke* factors. *See, e.g., Wilkins v. Bowersox*, 145 F.3d 1006, 1012 (8th Cir. 1998); *Shafer v. Bowersox*, 329 F.3d 637, 652-53 (8th Cir. 2003). Now, however, the Eighth Circuit upholds waivers as valid when "the record shows either that the court adequately warned [Plaintiff] or that, under all the circumstances, [Plaintiff] knew and understood the dangers and disadvantages of self-representation.'" *United States v. Miller*, 728 F.3d 768, 774 (8th Cir. 2013) (quoting *United States v. Turner*, 644 F.3d 713, 722 (8th Cir. 2011)). In *United States v. Kiderlen*, the Eighth Circuit upheld a waiver as valid despite the district court's failure to explain the possible defenses or the lesser included offenses, and its failure to look into the defendant's background adequately. 569 F.3d 358, 367 (8th Cir. 2009). The court of appeals held that a waiver need not "exhibit all of the features discussed in *Wilkins* before it is deemed knowing and voluntary," because "neither the Supreme Court nor this court … has adopted the *Von Moltke* plurality opinion in all of its particulars…". *Id.*

The D.C. Circuit has held that a "model" *Faretta* inquiry would discuss (1) the seriousness of the

charges, (2) the judge's inability to assist the defendant, (3) the application of the Federal Rules of Evidence, and (4) the disadvantage of proceeding without an attorney. *See United States v. Brown*, 823 F.2d 591, 599 (D.C. Cir. 1987). But the D.C. Circuit does not require any discussion of the elements, possible defenses, or lesser included offenses. Indeed that court has affirmed waivers when the trial judge affirmatively misled the defendant by understating the potential sentence. *See United States v. Bisong*, 645 F.3d 384, 395-96 (D.C. Cir. 2011).

B. Several Circuits Require An Understanding Of The *Nature* Of The Charges, And Often Defenses And Lesser-Included Offenses As Well

By contrast, several circuits look explicitly to the factors identified by the *Von Moltke* plurality as a guide to the information a defendant must understand in order to make a knowing and intelligent decision to waive the right to counsel. Others at least require a genuine understanding of the nature of the charges, not just their mere recitation.

The Third Circuit has long insisted that a valid waiver ordinarily requires a colloquy going through every factor identified by the *Von Moltke* plurality. *See, e.g., United States v. Peppers*, 302 F.3d 120, 135 (3d Cir. 2002) ("[E]ven [if] the colloquy skips just one of the [relevant] factors," "an accused's protection under the Sixth Amendment Right to Counsel is not satisfied…"); *United States v. Jones*, 452 F.3d 223, 231 (3d Cir. 2006) (internal citations omitted) (same);

United States v. Booker, 684 F.3d 421, 426 (3d Cir. 2012) (same).

For example, in *United States v. Welty* the trial judge pressed upon the defendant the serious nature of the bank robbery charge and explained that proceeding without counsel was inadvisable. 674 F.2d 185, 189-90 (3d Cir. 1982). The Third Circuit ordered a new trial, holding that a waiver is valid only if "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." *Id*. at 188–89 (citation omitted). The court of appeals held that Welty's status as "an experienced litigant" did not lessen the trial judge's responsibility to ensure that his waiver was knowing and intelligent. *Id*. at 191.

The Tenth Circuit similarly "hold[s] that the trial judge should conduct an inquiry sufficient to establish a defendant's knowledge and understanding of the factors articulated in *Von Moltke*." *United States v. Padilla*, 819 F.2d 952, 959 (10th Cir. 1987). In *Padilla*, the Tenth Circuit granted a new trial where the district court "did not inform Mr. Padilla of the nature of the charges against him, the statutory offenses included, or the possible range of punishment…. and [t]here was no discussion of possible defenses or mitigating factors…" *Id.* at 957. The Tenth Circuit noted that because the defendant elected to fire his appointed lawyer and represent himself on the eve of trial, he was "undoubtedly aware of the charges against him and possible defenses." *Id*. at 958–59. Nevertheless, the court of appeals reversed because the district judge failed to *confirm* his understanding

of the *Von Moltke* factors. The fact that he was an "experienced litigant" did not affect this analysis, given the other circumstances at play. *Id.*

In *United States v. Hamett*, the Tenth Circuit reiterated that "[a] proper *Faretta* hearing apprises the defendant of the nature of the charges, the statutory offenses included within them, [and] possible defenses to the charges." 961 F.3d 1249, 1255 (10th Cir. 2020). The Tenth Circuit reversed because the district court "failed to confirm on the record" that Mr. Hamett understood "the nature of the charges against him" specifically including "the elements of each of the offenses" and "possible defenses." 961 F.3d at 1257-59. "The government . . . point[ed] . . . to a general warning the district court gave to Mr. Hamett about the dangers he faced by waiving his right to counsel," but the Tenth Circuit rejected those arguments, *inter alia*, because Mr. Hamett was not warned of "the precise charges he would be required to defend against" or "potential defenses against those charges." *Id.* at 1259.

Similarly, in *United States v. Hansen* the district court made explicit findings that the defendant "fully underst[ood] the risks," that he was "capable because of [his] education, intelligence, and prior experience" to represent himself, and that "the risks of doing so have been fully explained to [him]." 929 F.3d 1238, 1246 (10th Cir. 2019). While the government pointed "to general warnings the district court gave to Mr. Hansen about the dangers he faced by waiving his right to counsel," the Tenth Circuit concluded that those "general warnings" did not dispel its "concern about whether the district court's communications with Mr. Hansen properly warned him about one important, specific obligation of self-representation—

the obligation to personally adhere to federal procedural and evidentiary rules." *Id.* at 1262.

The Tenth Circuit has recognized that there is no "'formula or script,'" and that the information needed by a defendant "'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.'" *Hansen*, 929 F.3d at 1251 (quoting *Tovar*, 541 U.S. at 88). That "pragmatic approach" does not "mandate a formalistic and rigid adherence to *Von Moltke*-related inquires as the *sole* means for determining whether a defendant's waiver of the right to counsel is knowing and intelligent." *Id.* at 1255. But the Tenth Circuit has reaffirmed that "the best" and "tried-and-true method" to ensure a knowing and intelligent waiver of the right to counsel is a "thorough and comprehensive formal inquiry of the defendant on the record" covering the "*Von Moltke* factors." *Id.* at 1249-50. And it has held a *Von Moltke* inquiry unnecessary only in unusual cases, such as when the defendant has been to law school or when his pre-trial filings demonstrate a robust understanding of the case. *See Hamett*, 961 F.3d at 1255-57; *Hansen*, 929 F.3d at 1263-66.

Ninth Circuit law is less stringent, but still requires that the "defendant must be aware of the nature of the charges against him, the possible penalties, and the dangers and disadvantages of self-representation." *United States v. Balough*, 820 F.2d 1485, 1487 (9th Cir. 1987). That inquiry "must focus on what the defendant understood, rather than on what the court said and understood." *Id.* at 1487-88. In *United States v. Forrester*, for example, "the district court clearly apprised Forrester of the 'dangers and disadvantages of self-representation' at the *Faretta*

hearing," and "unequivocally" and "strongly" advised him not to waive his right to counsel. 512 F.3d 500, 507 (9th Cir. 2008). The Ninth Circuit nonetheless reversed because the district court "failed to advise Forrester of the 'nature of the charge[] against him.'" *Id.* In particular the transcript contained no mention of the conspiracy charge, "let alone any indication that the court sought to ensure that Forrester understood the charge and grasped that conspiracy is a particularly complex and confusing allegation to defend against." *Id.* The trial court also misstated the sentencing range. *Id.* 596.

Similarly, in *United States v. Crowhurst* the Ninth Circuit reversed when the district court "discussed, with laudable care and patience, the general disadvantages to an accused of waiving counsel and undertaking to represent himself," but "did not discuss the nature of the charges and the possible penalties involved." 596 F.2d 389, 390 (9th Cir. 1979). *See also, e.g., United States v. Erskine*, 355 F.3d 1161, 1171 (9th Cir. 2004) (new trial required where the judge failed to correct the defendant's misunderstanding of the maximum possible penalty); *United States v. Hayes*, 231 F.3d 1132, 1136–38 (9th Cir. 2000) (new trial required where the judge did not adequately discuss the dangers of proceeding without knowledge of courtroom procedure).

Like the Tenth Circuit, the Ninth Circuit recognizes a "limited exception" whereby a district court's "failure to discuss each of the elements in open court will not result in automatic reversal when the record as a whole reveals a knowing and intelligent waiver." *Balough*, 820 F.2d at 1488. But that exception "is meant to be applied only in 'rare cases.'" *Forrester*, 512 F.3d at 508 (citation omitted).

The Seventh Circuit similarly requires "a thorough inquiry with a defendant that probes his age, education, and understanding of the charges against him and the potential consequences should he be found guilty," while recognizing that the failure to conduct a formal hearing does not necessarily require reversal when other evidence strongly showed that the defendant had the education and experience to understand "the complexity of a criminal case and its potential consequences," "was well acquainted with the charges," and could "explain[] his theory of his defense." *United States v. Nichols*, 77 F.4th 490, 500-01 (7th Cir. 2023). *See also, e.g., United States v. Johnson*, 980 F.3d 570, 577 (7th Cir. 2020) (criticizing district court for "failing to confirm Johnson's understanding of the charges against him or the severe penalties that could flow from a conviction," but affirming because of a more robust pre-trial colloquy).

Finally, the Eleventh Circuit considers eight factors in determining whether a defendant's waiver of counsel was valid if the district court failed to conduct a *Faretta* hearing. *Nelson v. Alabama*, 292 F.3d 1291, 1297 (11th Cir. 2002) (citing *Fitzpatrick v. Wainwright*, 800 F.2d 1057 (11th Cir.1986)). One of them is "the defendant's knowledge of the nature of the charges, possible defenses, and penalties." *United States v. Owen*, 963 F.3d 1040, 1049 (11th Cir. 2020). And while the Eleventh Circuit does not require every factor to be satisfied to find a knowing waiver, it has held that "at the very minimum a defendant must understand not only the nature of the charge but the seriousness of the penalties the law prescribes for the violation." *United States v. Hakim*, 30 F.4th 1310, 1323 (11th Cir. 2022), cert. denied, 143 S. Ct. 776

(2023). The Eleventh Circuit specifically noted the *Von Moltke* plurality's instruction that "to be valid, [a] waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, [and] *the range of allowable punishments thereunder*… .". *Id.* at 1322–23 (emphasis in original).

Mr. Herrington would have been entitled to a new trial in any of those circuits. He was never given a genuine understanding of the *nature* of the charges against him, let alone of the available defenses, because he was never told that the crime charged in the indictment subsumed, as a matter of Virginia law, an attempt crime nowhere mentioned in that document. Mr. Herrington's background certainly did not equip him to understand that trap. His earlier criminal trial was for a handful of minor drug offenses, and he was represented by counsel. He had no legal training. Pet.App.6. He repeatedly expressed that he did not feel qualified to represent himself on serious felony charges. Pet.App.6, 9.

C. This Conflict Is Important, Arises Frequently, And Merits Review

As the cases discussed above demonstrate, the circuits have been divided for decades about the proper standard for evaluating waivers of the right to counsel under *Faretta.* That conflict encompasses both how formal the colloquy must be and what information it must cover. The split has been acknowledged both by the lower courts and by Justices of this Court. The issue arises constantly, whenever a defendant waives his right to counsel.

It also is deeply important. Without a robust understanding of the nature of the charges, the

statutory offenses included within them, the potential defenses available, and the sentencing range for the crimes charged, a defendant cannot possibly make a knowing and intelligent decision to forego the assistance of counsel. The Fourth Circuit and others essentially find it sufficient if the defendant has been given an opportunity to read the indictment and has been warned, sternly, that self-representation is usually a bad idea. That is not nearly sufficient to guarantee an informed choice, as this case illustrates. The defendant may, as here, make a decision to represent himself without an appreciation of what he is actually charged with. When lower court judges provide such minimal guidance to defendants, "hollow compliance with the mandate of the Constitution" can leave defendants feeling as though "a waiver of [the] right to counsel [is] no great loss – just another legalistic formality." *Von Moltke*, 332 U.S. at 723 (plurality op.). Certainly, no single "formula or script" can capture the wide range of scenarios that may be presented. *Tovar*, 541 U.S. at 88. But a court's brief warning that self-representation is a mistake is not the "penetrating and comprehensive examination of all the circumstances" that the *Von Moltke* plurality contemplated, nor can it satisfy the trial judge's "weighty and serious responsibility" of protecting the right to counsel. *Id.* at 723–24.

The form and substance of protection for this critical constitutional right should not continue to vary from circuit to circuit. Review is warranted, and long overdue.

II. THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THE THIRD, FOURTH, AND EIGHTH CIRCUITS CONCERNING HOW JUDGES SHOULD ALLEVIATE SELF-INCRIMINATION DILEMMAS

This Court also should review the Fourth Circuit's holdings that Mr. Herrington failed to adequately identify a self-incrimination dilemma and, in the alternative, that the trial court appropriately mitigated any dilemma that existed.

Mr. Herrington was facing five perjury charges specifically for omitting income and assets from a prior application for appointed counsel. He told the court that concerns about self-incrimination were "absolutely" why he was reluctant to file a new financial affidavit to apply for counsel again. This is a common problem in tax prosecutions and, as the panel recognized, several circuits have held that defendants facing such dilemmas must be given an opportunity to seek counsel without a financial affidavit, or to file an affidavit *in camera*. *See, e.g.,* Pet.App.18-23.

The Fourth Circuit acknowledged those precedents, but held that they were inapposite or irrelevant here for two reasons. First, the panel reasoned that Mr. Herrington was only concerned about exposing himself to future perjury charges rather than incriminating himself on the currently pending charges—and therefore could avoid all jeopardy simply by telling the truth. Second, the panel reasoned that in any event the trial court offered to appoint counsel without an indigency affidavit. Neither holding is remotely fair to the record of this case, and neither can be reconciled with the approach

taken in other circuits. Those holdings also merit review, particularly if the Court decides to review the first question presented. Summary reversal also merits consideration.

A. The Fourth Circuit's Holding That Mr. Herrington Failed To Adequately Identify A Danger Of Self-Incrimination On His Current Charges Conflicts With Decisions Of Other Circuits

The Fourth Circuit held that "nothing in the record suggests that Herrington chose not to apply for court-appointed counsel due to a fear of providing the Commonwealth with incriminating evidence regarding his then-pending charges," and that "[h]e instead expressed only a fear of his financial information being used against him to support future perjury charges." Pet.App.20-21. But Mr. Herrington identified a self-incrimination dilemma far more clearly and specifically than, for example, the defendant in *Gravatt* did.

As the panel's opinion acknowledges, "[t]he perjury counts all related to Herrington's failure to disclose certain rental income in the indigency forms that he filled out in order to receive appointed counsel for his 2008 charges." Pet.App.3. In the critical colloquy with the trial court about his self-incrimination concerns, Mr. Herrington explained that "I have some rental income that I do receive" and that "that's what all these perjuries are for is that I did not consider that [rental income] in my last time for obtaining an attorney." Pet.App.10 (quoting JA 254). The trial court immediately responded "So these charges," *i.e.*, the

current charges, "are arising out of prior applications that you made … and that is why you are declining to fill out an application?" *Id*. Mr. Herrington responded "Absolutely." *Id*.

The Fourth Circuit correctly noted that *earlier* in the proceedings Mr. Herrington had stated that "all those perjuries are from getting a Public Defender, and I'm too scared to fill out that form for this fact that she's going to give me a perjury charge." Slip op. Pet.App.3 (quoting JA 225-26). That statement did suggest a concern about new perjury charges. But at the later critical juncture Mr. Herrington expressed a concern that he has "rental income that I do receive" and "that's what all these perjuries are for is that I did not consider that [rental income] in my last time for obtaining an attorney." Pet.App.10 (quoting JA 254) (emphasis added). Mr. Herrington was referring to *these perjuries*—the charges he presently faced—not some additional future charges. And that is how the trial court understood him, because the court clarified that his concern was about "these charges." *Id*.

Compare the Fourth Circuit's holding in this case to the Eighth Circuit's holding in *United States v. Gravatt*, 868 F.2d 585 (3d Cir. 1989). In *Gravatt*, a tax evasion defendant informed a magistrate judge's clerk by letter that he desired appointment of counsel but could not complete a financial affidavit both because it inaccurately identified the charges and "because disclosure of the requested information would violate his Fifth Amendment privilege against self-incrimination." *Id.* at 587. At a later pretrial hearing before the trial court, the following exchange took place:

> DEFENDANT: My rights, what about my rights? You ain't protecting my rights at all. I asked for a court appointed attorney because I couldn't find one. I don't have no attorney; here I'm standing in a criminal case.
>
> THE COURT: Mr. Gravatt, you refused to file the necessary affidavit.
>
> DEFENDANT: Because it was a mistake on it.
>
> THE COURT: You refused to file the necessary affidavit requesting—
>
> DEFENDANT: I can't perjure myself because somebody in the court made a mistake.
>
> THE COURT: There being nothing further to come before the Court at this time, we'll adjourn.

Id. at 587-88. Despite Mr. Gravatt's failure to identify any self-incrimination concern about disclosure of financial information in that colloquy, the Third Circuit held that, because of his *earlier* letter to a law clerk making a "colorable assertion that disclosure of the income information requested on the CJA 23 would violate his Fifth Amendment rights," the trial court "erred in failing to conduct a further inquiry into [his] eligibility for appointed counsel." *Id.* at 588. The Third Circuit held that trial courts could respond to such conflicts "in either of two ways:" by offering the defendant an opportunity to submit the required financial information *in camera*, or by offering the

defendant use immunity for his testimony at an open hearing. *Id.* at 590.

The Eighth Circuit required only a "colorable assertion" of a self-incrimination problem, and it was willing to look backwards to concerns expressed in a letter to a law clerk even though those concerns were not mentioned in open court. *Id.* at 587-88. In this case the Fourth Circuit disregarded Mr. Herrington's clearly-expressed concerns about self-incrimination on the pending charges, on the record in open court, because at an earlier hearing he had expressed a different concern about attracting *new* perjury charges. Those approaches are irreconcilable. More broadly, the Fourth Circuit's holding means that self-incrimination concerns must be raised by *pro se* criminal defendants in a much clearer way than Mr. Herrington did here. But Mr. Herrington actually did quite a good job, for a non-lawyer, of recognizing the conflict between his Fifth and Sixth Amendment rights in this case and bringing it to the court's attention—much better than what the Eighth Circuit held sufficient in *Gravatt*.

B. The Fourth Circuit's Holding That The Trial Court Made A Sufficient Offer Of Appointment Of Counsel Conflicts With Decisions Of Other Circuits

The Fourth Circuit's alternative holding that the trial court made a sufficient offer to alleviate Mr. Herrington's self-incrimination dilemma also is inconsistent with precedent from other circuits.

That holding rests entirely on the trial court's statement that "I would have to think that there is at

least a chance that you would qualify [for court-appointed counsel], or that this Court would appoint counsel if you want it on these charges, but you do not want that?" Pet.App.23 (quoting JA 319) (emphasis in the panel's opinion). The Fourth Circuit reasoned that "[t]he court's use of the word 'or' indicates that the court would have appointed Herrington counsel regardless of whether he was entitled to appointed counsel." Pet.App.23-24.

That is far too ambiguous to constitute a sufficient response to a defendant's serious self-incrimination concerns. The Fourth Circuit unjustifiably equated a "chance" that the court would appoint counsel "regardless of whether he was entitled" to counsel as a financial matter with an offer to appoint counsel *regardless of whether he was even willing to fill out an affidavit*. That does not follow at all, and it is inconsistent with what the trial court actually did when Mr. Herrington requested counsel for post-trial motions and appeal after his conviction rendered his self-incrimination concerns moot. At that point the court responded:

> THE COURT: . . . Mr. Herrington, you do understand that in order for me to consider your request for court-appointed counsel that you are going to have to fill out a financial statement. You do understand that.
>
> DEFENDANT HERRINGTON: I understand that.
>
> THE COURT: . . . I'm going to grant your request to have it considered. What we need to do, first of all, Mr. Herrington, is have you fill

> out a financial statement. So I'm going to ask you to stand up and be sworn by the clerk if you would, please.

JA 357-358.

This holding also cannot be reconciled with the precedent from other circuits. In *United States v. Anderson*, for example, the Eighth Circuit ordered a new trial for a defendant who declined to file a financial affidavit citing self-incrimination concerns. 567 F.2d 839, 840 (8th Cir. 1977). The court of appeals held that "the trial court should have given Anderson an opportunity to disclose the required financial information to the trial court for it to review in camera," and that any other holding "would force Anderson to choose between his Sixth Amendment right to counsel and his Fifth Amendment right against self-incrimination." *Id.* Similarly, in *Gravatt* the Third Circuit held that trial courts could respond to such conflicts "in either of two ways:" by offering an *in camera* review, or by offering the defendant use immunity. *Gravatt*, 868 F.2d at 590. The trial court made neither offer to Mr. Herrington. For both the Third and Eighth Circuits, the critical point is that the defendant should be told clearly that there is a way to obtain counsel without filing an affidavit that could be used against him. Telling Mr. Herrington that there was "a chance" that the court would appoint counsel *regardless of whether he was entitled to it* is not consistent with those decisions and does not remotely alleviate his dilemma.

Putting its two alternative holdings together, the Fourth Circuit holds that defendants in these situations must turn square corners and be 100% clear, whereas ambiguous statements by trial courts

get a maximally generous interpretation. That is not remotely fair, and it is not consistent with the approach in other circuits.

C. The Fourth Circuit's Holding Conflicts With the Holding Of Other Circuits That Trial Courts Have An Affirmative Obligation To Probe More Deeply When Evidence Of Indigency Exists

Finally, in *United States v. Moore*, the Fifth Circuit held in a similar situation that it had no need to reach the constitutional issue because the defendant had stated in open court that he did not have money to pay a lawyer, and did not own a house or an automobile. 671 F.2d 139, 140-41 (5th Cir. 1982). In addition, the court had evidence that his income was $6551 in 1975 and 1976. The Fifth Circuit reasoned that that information "laid most of a foundation to establish sufficient evidence for a finding that the accused could not afford to hire counsel," and that the district court should have inquired further rather than insisting on a financial affidavit. *Id.* at 141.

This case presents all the same features that caused the Fifth Circuit to hold that it was unnecessary to even reach the constitutional issue in *Moore*. Just as in *Moore*, the charging documents themselves told the court Mr. Herrington's income: $9,543 in rental income and $16,736 in unemployment benefits. JA 335; Pet.App.32. The trial court knew that he was unemployed and could not obtain work because his union was based in Maryland and these charges prevented him from leaving Virginia. Pet.App.9. The trial court knew that his ability to

privately retain an attorney for this complex criminal trial rested on his hope that a $5000 tax refund might be forthcoming, Pet.App.6, and his desire to sell some personal possessions that prosecutors had seized from his house, Pet.App.6, 9 ("everything of value [was] taken from me so I can't really sell anything to get an attorney because the Commonwealth has it").

This is exactly the sort of record that (fairly adjusted for inflation) caused the Fifth Circuit to hold in *Moore* that the trial court had an affirmative obligation to probe deeper into the defendant's financial circumstances rather than blindly requiring a financial affidavit for appointment of counsel. The Third Circuit similarly held in *Gravatt* that "the defendant's burden [of establishing eligibility] does not relieve the district court of its responsibility, once on notice of the defendant's inability to retain private counsel, to make further inquiry into the defendant's financial condition," and "the court may not adopt an unconditional requirement that the defendant complete [a financial affidavit] before his application for appointment of counsel will be considered." 868 F.2d at 588-89; *see also, e.g., United States v. Barton*, 712 F.3d 111, 117 (2d Cir. 2013) ("We do not suggest that a defendant's failure to submit a financial affidavit or otherwise furnish evidence of his eligibility relieves a district court of its responsibility to inquire into the defendant's financial status."); *United States v. Auen*, 846 F.2d 872, 878–79 (2d Cir. 1988) ("[W]e observe that conditioning the assignment of court-appointed attorneys on the execution of financial affidavits has been found to be improper."). Mr. Herrington obviously did not have the resources to hire private counsel for a complex felony trial. Other circuits would have required the trial court to

probe more deeply before accepting self-representation.

CONCLUSION

This Court should grant the petition and hear the case on the merits or summarily reverse.

Respectfully submitted,

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