No. _____

IN THE

Supreme Court of the United States

ELLIOT MORALES,

Petitioner,

v.

STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK APPELLATE DIVISION FIRST JUDICIAL DEPARTMENT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a criminal trial court violate *Iowa v. Tovar* in failing to advise a defendant, before he waives his right to trial counsel, of the sentencing exposure he faces upon conviction?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Elliot Morales respectfully petitions for a writ of certiorari to review the judgment of the New York State Appellate Division First Judicial Department.

OPINIONS BELOW

The decision of a judge of the New York Court of Appeals denying discretionary review, Pet. Appd'x. 1a, is published at 41 N.Y.3d 1020. The decision of the Appellate Division denying Petitioner's federal claim on the merits, Pet. Appd'x. 2a, is published at 225 A.D.3d 549 (N.Y. App. Div. 2024).

JURISDICTION

The judgment of the New York Court of Appeals was entered on June 4, 2024, Pet. Appd'x. 1a, making this petition due September 4, 2024. On September 4, 2024, Justice Sotomayor extended the time within which to file this petition to and including November 1, 2024. This Court has jurisdiction over the federal question presented under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the Constitution provides in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

INTRODUCTION

Criminal defendants have a Sixth Amendment right to forego counsel only if the waiver is knowing, voluntary, and intelligent, made with "full awareness of the 'dangers and disadvantages of self-representation'." *Arrendondo v. Neven*, 763 F.3d 1122, 1129 (9th Cir. 2014) (quoting *Faretta v. California*, 422 U.S. 806, 835 (1975)). The most important "danger" of proceeding to trial without an attorney is the sentencing range one may face upon conviction.

While this Court has stated that knowledge of the "range of allowable punishments" is a component of a proper waiver of counsel prior to a guilty plea, *Iowa v. Tovar*, 541 U.S. 77, 81 (2004), it has never opined on whether a court must provide that same sentencing information before a defendant waives trial counsel. The federal circuit courts, state courts, and the rules instructing the judiciary in both federal and state courts all diverge in their responses to that question.

This constitutional question had real-world implications for Petitioner Elliot Morales, who represented himself at trial without knowledge of his sentencing range. While the court warned him that he could be sentenced to 25 to life, he was sentenced to, and is now serving, a sentence of 40 years to life.

This Court should grant Mr. Morales' petition for certiorari to determine whether a defendant must know his sentencing exposure before he waives trial counsel. Consistent decision-making on this recurring constitutional question is needed to

ensure that all defendants' Sixth Amendment rights are protected equally, no matter the jurisdiction in which they are tried.

STATEMENT OF THE CASE

A. Relevant Factual and Procedural Background

1. In 2013, the State of New York indicted Petitioner Elliot Morales on second-degree murder as a hate crime and related offenses. When Mr. Morales notified the hearing court that he wanted to represent himself, the court assigned a fourth attorney instead, noting the seriousness of the case: Mr. Morales faced a minimum sentence of 20 years to life and a "maximum sentence [of] 25 years to life" and thus could face "life in jail." Pet. Appd'x. 8a. That sentencing range was incorrect. Mr. Morales represented himself at trial and was sentenced to 40 years to life – 15 years above the warning that the court provided.

2. Mr. Morales appealed to the Appellate Division First Judicial Department, arguing that his waiver of counsel was invalid because the court did not advise him of his sentencing exposure before he waived trial counsel. *See* Pet. Appd'x. 9a-13a.

3. The State contended that New York's "nonformalistic, flexible" approach to waivers of counsel meant that the court's warning was sufficient to make his waiver of counsel knowing and intelligent. Pet. Appd'x. 14a-21a.

4. The Appellate Division found that the court "satisfied its duty of ensuring that defendant was aware of the range of allowable punishments when it informed

defendant, multiple times, that he could face the maximum term of life imprisonment . . . ." Pet. Appd'x. 2a-6a (quotations omitted) (citing, *inter alia*, *United States v. Schaefer*, 13 F.4th 875, 887–888 (9th Cir. 2021); *United States v. Fore*, 169 F.3d 104, 108 (2d Cir. 1999)).

5. Mr. Morales sought permission to appeal to the Court of Appeals on the same issue. Leave to appeal was denied. Pet. Appd'x. 1a. This timely petition follows.

B. Applicable Law

1. A criminal defendant has a Sixth Amendment right to forego counsel "only if he acts 'knowingly and intelligently,' with full awareness of the 'dangers and disadvantages of self-representation'." *Arrendondo v. Neven*, 763 F.3d 1122, 1129 (9th Cir. 2014) (quoting *Faretta v. California*, 422 U.S. 806, 835 (1975)). Despite the common-sense view that a defendant's sentencing range is the most important risk he must weigh in deciding whether the proceed without counsel, it remains unsettled whether the potential sentence is one of these "dangers" requiring explication before a defendant may validly waive counsel. *Akins v. Easterling*, 648 F.3d 380, 399 (6th Cir. 2011) ("The Supreme Court has not defined the phrase 'range of allowable punishments'") (quoting *Iowa v. Tovar*, 541 U.S. 77, 81, 88 (2004) (stating that such a warning is required in plea cases); *accord Arrendondo*, 763 F.3d at 1130 ("[n]o clearly established Supreme Court case law requires trial courts to apprise defendants in any particular form of the risks of proceeding to trial pro se.").

2. *Iowa v. Tovar* held that the waiver of *plea* counsel is valid where "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[,]" yet declined to "prescribe[] any formula or script to be read to a defendant who states that he elects to proceed without counsel." 541 U.S. 77, 81, 88 (2004) (emphasis added). In *Tovar* though, the accused had been warned of the "range of allowable punishments" and thus this Court had no occasion there to squarely address whether a waiver is categorically invalid when such information is lacking. *Tovar* thus left open whether a defendant must be told of his sentencing exposure in an uncounseled plea, or whether the presence or absence of that advisal is just one factor in adjudging the waiver.

3. Moreover, *Tovar* does not specifically address waivers of the right to counsel at *trial*, but its analysis suggests that such waivers are subject to more rigorous standards than plea-counsel waivers. The *Tovar* Court specifically cautioned that at a plea, "a less searching or formal colloquy may suffice" because "the full dangers and disadvantages of self-representation . . . are less substantial and more obvious to an accused than they are at trial." *Tovar*, 541 U.S. at 89-90 (quoting *Patterson v. Illinois*, 487 U.S. 285, 299 (1988)); *see also United States v. Hamett*, 961 F.3d 1249, 1256 (10th Cir. 2020) (citing *Patterson*, 487 U.S. at 298); *United States v. Cash*, 47 F.3d 1083, 1088 (11th Cir. 1995) ("[t]he closer to trial an accused's waiver of the right to counsel is, 'the more rigorous, searching and formal the questioning of the trial judge should be.'") (quoting *Strozier v. Newsome*, 926 F.2d 1100, 1105 (11th Cir.1991)).

4. But the Court has never explained what that "something extra" required in trial cases might be, or whether a waiver of trial counsel converts *Tovar*'s sufficient

factors into required ones. As such, it is not clear whether the "range of allowable punishments" advisal is a necessary condition of a valid waiver of trial counsel.

REASONS FOR GRANTING THE WRIT

I. The courts are split on whether a defendant must be warned of his sentencing exposure before waiving trial counsel.

1. This case presents an important question of constitutional magnitude that this Court has not answered before: whether a criminal trial court violates *Tovar* in failing to advise a defendant, before he waives his right to trial counsel, of the sentencing exposure he faces upon conviction. Federal and state courts have diverged in their answers to this question. Even within some jurisdictions, there is disagreement. This Court should grant certiorari to provide guidance to courts adjudicating this significant and recurring issue.

2. There is a deep circuit split on the question presented. The dispute stems from a difference of opinion regarding whether *Tovar held* that a "range of allowable punishments" advisal is required or whether it only suggested as much in *dicta*. A second point of contention concerns whether waiving counsel *at trial* requires a sentencing advisal.

3. The Ninth Circuit has interpreted *Tovar* as clearly establishing the rule that "a defendant must have a general understanding of the potential penalties of conviction before waiving counsel to render that waiver valid." *Arrendondo v. Neven*, 763 F.3d 1122, 1130 (9th Cir. 2014) (emphasis omitted). *Tovar*'s "express holding"

was that a defendant "must be aware '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 1132, 1133 (emphasis in original).

That court also found that *Tovar*'s sentencing-advisal "requirement" applies to the waiver of trial counsel: "given the [Supreme] Court's express declaration [in *Tovar*] that the requirements for a guilty plea waiver of counsel are *less* rigorous than those applicable to a trial waiver," the Ninth Circuit wrote, "excising any of *Tovar's* requirements in the trial context would be an unreasonable interpretation of clearly established Supreme Court law." *Id.* at 1131-32. Other courts around the country have agreed. *See United States v. Hakim*, 30 F.4th 1310 (11th Cir. 2022) (waiver invalid where lower court gave incorrect information on sentencing); *United States v. Hamett*, 961 F.3d 1249, 1258-60 (10th Cir. 2020) (waiver invalid where court failed to advise defendant of possible penalties, "as required for a proper *Faretta* hearing"); *United States v. Erskine*, 355 F.3d 1161 (9th Cir. 2004) (same); *State v. Diaz*, 878 A.2d 1078, 1086 (Conn. 2005) (defendant's knowledge that he faced "substantial prison time" was insufficient).

4. *Pouncy v. Macauley*, on the other hand, rejected that reading of *Tovar* and deemed the "range of allowable punishments" language merely *dicta*. 546 F.Supp.3d 565, 592 (E.D. Mich. 2021), *appeal docketed*, No. 21-1811 (6th Cir. Dec. 17, 2021). Although *Tovar* seemed "[o]n first blush . . . to provide strong support for" Pouncy's claim that his waiver was invalid because he was not informed of his sentencing

exposure, "a careful review of *Tovar* reveals that this statement did not reflect the *holding* of the Supreme Court." *Id.* Noting *Arrendondo*'s position to the contrary, the court found that whether a sentencing advisal was required was not directly at issue in *Tovar*. *Id.* at 593 (quoting *Tovar*, 541 U.S. at 94) (emphasis in original). Thus, its "range of allowable punishments" language was not controlling "clearly established federal law." *Pouncy*, 546 F. Supp.3d at 593-94.

Other courts have likewise held that knowledge of sentencing exposure is not necessary for a valid waiver of trial counsel. *See Glass v. Pineda*, 635 F. App'x 207, 214 (6th Cir. 2015) (waiver valid despite no discussion of sentencing range); *United States v. Fore*, 169 F.3d 104 (2d Cir. 1999) (waiver valid where the court misinformed the defendant about his maximum sentence; an "explicit accounting" of the sentencing range was unnecessary); *People v. Blue*, No. 73, 2024 WL 4535819, at *3-4 (N.Y. Oct. 22, 2024) (New York's high court held that, under *Tovar*, a sentencing advisal is just one factor a court considers in assessing waiver colloquy);[1] *Depp v. Commonwealth*, 278 S.W.3d 615 (Ky. 2009) (where majority found waiver valid, two-justice dissent would have concluded that the waiver of trial counsel at requires knowledge of "the range of punishments."); *see also United States v. Schaefer*, 13 F.4th 875, 887-88 (9th Cir. 2021) (waiver valid because defendant "substantially understood the severity of his potential punishment . . . and the approximate range

[1] To the extent Mr. Blue petitions this Court for a writ of certiorari challenging the New York Court of Appeals' recent decision on this issue, Petitioner requests that *Morales* be consolidated so that this Court may review both cases together.

of his penal exposure" even though court provided sentencing information that "was certainly incomplete").

5. Even within jurisdictions, there is a split of authority on the question. *Compare United States v. Peppers*, 302 F.3d 120, 132, 135 (3d Cir. 2002) ("waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter") *with United States v. Thomas*, 357 F.3d 357, 364 (3d Cir. 2004) (describing the same factors as "illustrative examples of factors that courts might discuss, not a mandatory checklist of required topics"). State courts also suffer from a lack of coherent doctrine. *See People v. Rogers*, 186 A.D.3d 1046, 1048 (4th Dep't 2020) (noting split within New York); *People v. Fox*, 224 Cal. App. 4th 424, 438, n. 14 (2014) (noting split within California). Consequently, there is no uniformity in answering the question presented.

6. The Federal Benchbook, as well as state rules for the judiciary, encourage but do not mandate a sentencing advisal prior to acceptance of a defendant's waiver of counsel. Under the federal system, judges should ask, regarding each count in the indictment, "Do you understand that if you are found guilty of the crime charged in Count 1, the court must impose a special assessment of $100 and could sentence you to as many as __ years in prison, impose a term of supervised release that follows imprisonment, fine you as much as $__, and direct you to pay restitution?" Bench Book for United States District Judges 1.02 (6th ed. 2013), *available at*

https://www.govinfo.gov/content/pkg/GOVPUB-JU13-PURL-gpo36767/pdf/GOVPUB-JU13-PURL-gpo36767.pdf, last visited 2 Aug. 2024.

New York's model colloquy is similar but less demanding: it instructs judges to ask whether defendants "understand that [they] are charged with (specify) and, if convicted, may be sentenced to (specify)" New York State Unified Court System, Criminal Jury Instructions & Model Colloquies, Model Waiver of Counsel Colloquy, *available at* https://www.nycourts.gov/judges/cji/8-Colloquies/Waiver_of_Counsel.pdf last visited 2 Aug. 2024.

7. Thus, there is significant discord surrounding what *Tovar* means for defendants seeking to waive trial counsel. This Court should grant certiorari to settle this conflict in the nation's Sixth Amendment jurisprudence, the resolution of which is critical to the proper administration of the criminal justice system and the protection of the right to intelligently waive counsel.

II. The case is an ideal vehicle to address the split of authority, as Mr. Morales was sentenced to 15 years more than the mistaken maximum sentence the court warned him of, and the question presented was directly addressed, and wrongly decided, by the state court.

1. This case squarely presents the question raised in this petition, as Mr. Morales was not advised of his actual sentencing exposure before he waived his fundamental right to counsel. While the record shows that the court informed him he faced a sentence of 25 years to life, his maximum was in fact 78 years to life. He then received

a sentence of 40 years to life – a sentence with a minimum that was 15 years longer than the sentence about which he was "warned." *See Alleyne v. United States*, 570 U.S. 99, 108 (2013) (Sixth Amendment right to a jury applies "not only facts that increase the ceiling, but also those that increase the floor" as "[b]oth kinds of facts alter the prescribed range of sentences to which a defendant is exposed and do so in a manner that aggravates the punishment."). Thus, the resolution of this appeal turns on whether the Constitution requires a sentencing-exposure warning.

2. Mr. Morales did not know the number of years he could spend in prison upon conviction. Therefore, he cannot be deemed to have known the "range of potential punishments" in his case. Yet the highest court to have examined the issue, the Appellate Division First Judicial Department, found that the court's warning "that he could face the maximum term of life imprisonment if convicted on the top count of the indictment" was sufficient. Pet. Appd'x. 4a. But "life" was *not* Mr. Morales' maximum sentence; his maximum was 78 years to life, considering the potential for consecutive sentences on each count. The possibility that Mr. Morales could receive such a high sentence before becoming eligible for parole went unmentioned.

3. The distinction between Mr. Morales' actual sentence of 40 to life and the sentence he was warned about – a maximum of 25 to life – was important. Mr. Morales was 36 years old at the time of trial. If given a 20 to life sentence, the Parole Board would consider his release when he reached the age of 56. If he qualified for parole, he would spend the rest of his life at liberty, while on supervision. His actual sentence of 40 to life means his release will only be possible after he turns 76 –

essentially a sentence of life without parole given that the life expectancy of men in the United States in 74.8. Kenneth D. Kochanek et al., National Center for Health Statistics Data Brief, *Mortality in the United States, 2022*, 1 (2024). The difference between serving a minimum sentence of 20 years versus *never* getting the opportunity for release cannot be overstated, and was certainly the paramount danger of self-representation in this case. Thus, whether a defendant must be warned of the sentencing range he faces was squarely presented and wrongly decided here.

4. Finally, the issue presented is a single, clear-cut, and outcome-determinative question of what the Federal Constitution requires. This petition is also procedurally clean as the question presented was reached on the merits by the state court and then exhausted in the New York Court of Appeals.

Moreover, the prosecution below forcefully argued that no sentencing advisal was required prior to a defendant's waiver of trial counsel. Both sides have therefore joined issue on the question presented. And even better, the case arises on direct review, not federal habeas review, where deferential standards often interfere with the clean resolution of the merits of federal constitutional questions. 28 U.S.C. § 2254(d)(1).

5. Mr. Morales did not waive counsel with a "full awareness of the dangers of disadvantages of self-representation" because he was unaware of the "range of allowable punishments" he faced upon conviction. *Tovar*, 541 U.S. at 81; *Faretta*, 422 U.S. at 835. He is serving a sentence significantly longer than the one of which he

was warned. He deserved to know of that possibility before proceeding to trial without a lawyer.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 30, 2024