

SUPREME COURT OF THE UNITED STATES

MARVIN LEE ELLIS

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

Case No.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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I. QUESTIONS PRESENTED FOR REVIEW

1. In light of the United States Sentencing Guidelines' grouping rules, is a defendant who is entitled to resentencing on a conspiracy for drug distribution also entitled to resentencing on related convictions involving the same determinations of drug quantity?

2. If the trial court fails to inform him of the maximum possible sentences he could face, has the defendant knowingly and voluntarily waived his right to counsel when he elected to proceed pro se?

II. LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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IV. OPINION BELOW

The opinion of the Tenth Circuit, as to which certiorari is sought, is reported as *United States v. Ellis*, 868 F.3d 1155 (10th Cir. 2017). On October 20, 2017, the Tenth Circuit issued an order denying Petitioner Ellis's Petition for Rehearing. The Tenth Circuit's Order denying rehearing is not published.

V. BASIS OF JURISDICTION IN THIS COURT

The Tenth Circuit's opinion affirming in part and reversing in part the convictions and sentences of Petitioner Ellis was filed on August 24, 2017. The Tenth Circuit granted the parties' extensions of time to file petitions for rehearing. On October 10, 2017, the Petitioner filed a timely Petition for Rehearing. On October 20, 2017, the Tenth Circuit denied Mr. Ellis's Petition for Rehearing.

Mr. Ellis files this Petition for a Writ of Certiorari within ninety days of the Tenth Circuit's October 20, 2017 Order denying his Petition for Rehearing, as required by Supreme Court Rule 13.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(a). In the federal district court proceedings, an indictment charged Mr. Ellis with offenses against the United States. Accordingly, the district court had jurisdiction pursuant to 28 U.S.C. § 3231. Mr. Ellis filed a timely notice of appeal from the district court's Judgment of Conviction and Sentence. As a result, the Tenth Circuit had appellate jurisdiction over this case pursuant to 28 U.S.C. § 1291.

VI. STATUTORY PROVISIONS INVOLVED

Section 3D1.2(c) and (d) of the United States Sentencing Guidelines in effect at the time of Mr. Ellis's initial sentencing provide that

All counts involving substantially the same harm shall be grouped together into a single Group. Counts involve substantially the same harm within the meaning of this rule:

* * * *

(c) When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts.

(d) When the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.

Offenses covered by the following guidelines are to be grouped under this subsection:

* * * *

§§2D1.1, 2D1.2.

VII. STATEMENT OF THE CASE

Petitioner Marvin Ellis was convicted by a federal court jury of drug and firearm felonies. “The most serious charge against Ellis was for his conspiring with 49 other persons to manufacture, distribute, or possess with the intent to distribute at least 5 kilograms of powder cocaine and 280 grams of crack cocaine.” Ellis, 868 F.3d at 1159.

The district court imposed consecutive sentences on Mr. Ellis for the cocaine-conspiracy count and a firearm count and concurrent sentences for the remaining counts. The court imposed a sentence of life without release on the cocaine-conspiracy count (after applying a sentencing enhancement under 21 U.S.C. § 851 for his two earlier felony-drug-offense convictions), a mandatory-minimum five-year term for possession of a firearm in furtherance of a drug-trafficking crime under § 924(c), and statutory maximum sentences on all remaining counts.

Petitioner Ellis appealed some of his convictions and sentences. The Tenth Circuit affirmed all of the convictions. However, as to the conspiracy conviction, the Tenth Circuit reversed Mr. Ellis’s life sentence.

The court held that “[1] the jury never found that Ellis was individually responsible for the charged amounts of powder or crack cocaine, either from his own acts or the reasonably foreseeable acts of his coconspirators; and [2] the government’s evidence d[id] not show that omitting this element was harmless beyond a reasonable doubt.” Ellis, 868 F.3d at 1159.

The Tenth Circuit made conflicting statements about the scope of resentencing on remand. On the one hand, in explaining its decision, the court said, “ We remand to the district court for a full resentencing, subject to resentencing on the

cocaine-conspiracy count under 21 U.S.C. § 841(b)(1)(c).” 868 F.3d at 1160 (emphasis added).

The Tenth Circuit also noted Mr. Ellis’s arguments (a) that he had not knowingly waived his Sixth Amendment right to counsel when, at sentencing, the district court ruled that he should proceed pro se and (b) that, as a result, he was entitled to resentencing on all the counts of which he was convicted. The court stated

Ellis . . . argues that the district court violated his Sixth Amendment right to counsel when it refused to appoint substitute counsel at sentencing and when it found that Ellis had knowingly waived his right to counsel. He asks us to vacate the sentences on all convictions and remand for resentencing after appointment of substitute counsel. Because we remand for a full resentencing, and now order that Ellis receive different counsel to assist him at the resentencing, we conclude that these claims are moot and address them no further.

868 F.3d at 1180-81 (emphasis added).

On the other hand, the Court stated,

[W]e reverse Ellis's conspiracy sentence and remand for a full resentencing, subject to the cocaine-conspiracy conviction being resentenced under 21 U.S.C. § 841(b)(1)(C). We affirm all of Ellis’s other convictions and sentences.

868 F.3d at 1181 (emphasis added).

Significantly, both Mr. Ellis and the government sought rehearing and requested the Tenth Circuit to clarify the scope of resentencing. The Tenth Circuit denied rehearing. See Appendix, at 50.

This Court should now grant certiorari to clarify that (1) in light of the United States Sentencing Guidelines grouping rules, Mr. Ellis is entitled to resentencing on all the drug quantity counts, and (2) Mr. Ellis is also entitled to a resentencing on all

the counts of conviction because he did not knowingly and voluntarily waive his right to counsel

A. Drug Quantity Determinations Applicable to Petitioner Ellis

The presentence report made the following determinations of the drug quantity attributable to Mr. Ellis:

106. In deciding whether drug transactions are part of relevant conduct, the essential components when applying U.S.S.G. § 1B1.3(a)(2) are similarity, regularity, and temporal proximity. In this case, Marvin Ellis and Ataven Tatum were involved in jointly undertaken criminal activity that included purchasing cocaine from Djuane Sykes and selling crack cocaine at various locations together in the community and from 921 Haskell Street. Their jointly undertaken criminal activity is also demonstrated by Tatum's phone being utilized to arrange a sale that was later consummated by Marvin Ellis, and Marvin Ellis accompanying and assisting Tatum with drug deals.

107. Ellis is assessed cocaine base in the amount of approximately 27 ounces purchased from Sykes (average 3/4 ounce per week for approximately 9 months -- August 2011 through mid-May 2012).

108. Ellis is also assessed cocaine attributed to Tatum for the approximate 8 month period in which Marvin Ellis was involved with Tatum (ending mid-April 2012): An average of 2.5 ounces, six times per month for 8 months results in 120 ounces of cocaine.

109. Since the defendant and Tatum were selling crack cocaine, the amounts discussed herein are calculated as cocaine base. The agents in this case knew that when individuals were cooking powder cocaine into crack cocaine (cocaine base) they obtained a 1:1 ratio or more, because a higher yield of crack cocaine from the starting amount of powder cocaine resulted in increased profits. The total drug quantity is 147 ounces or 4,167 grams of cocaine base.

Rec. Vol. II, at 124-25.

Based on these drug quantity findings, the presentence report arrived at a base offense level of 36 for "Count Group 1." *Id.* at 126. It imposed two additional enhancements and found the adjusted offense level to be 40. *Id.* For this group of

counts, the report said, the Guideline range was 360 months to life, but the statutorily mandated sentence was life. See *id.* at 150.

B. Pro Se Proceedings at Sentencing.

After the jury convicted Mr. Ellis, his trial counsel filed a motion to withdraw. Mr. Ellis's counsel reported that his relationship with Mr. Ellis had deteriorated and he could no longer represent him effectively. The district court allowed Mr. Ellis's trial counsel to withdraw. However, it denied Mr. Ellis's request that the court appoint new counsel, informing him that could hire new counsel or proceed pro se.

Mr. Ellis elected to proceed pro se. However, in allowing him to do so, the district court never informed Mr. Ellis of the maximum penalties he would face at sentencing. See Appendix, at 59-73. In its appellate brief, the government acknowledged that the district court did not inform Mr. Ellis of these penalties. See Aplee's Br. at 52 (acknowledging that "the district court did not review the penalties that Ellis faced on each count" but still contending that "Ellis was fully informed of the risks of proceeding pro se") (emphasis added).

Mr. Ellis's pro se status substantially impeded the full and fair adjudication of the complex issues involved in drug conspiracy sentencing. For example, Mr. Ellis submitted no written objections to the presentence report. As a result, the district court noted, it was not able to meaningfully assess the presentence report's findings:

So it would have been helpful -- you know, we have a procedure once you get a copy of the presentence report, if you have objections, you are required to make them in a timely way in writing so that the Court knows what your objections are, so the prosecutor knows what your objections are, and so the probation officer knows what the objections are. Then we have a chance to sort through all of this in advance and consider any authorities that you want us to look at.

And, you know, because you didn't follow that procedure, we're really spinning our wheels here. And it's not a very productive use of anybody's time.

Rec. Vol. V, at 1683.

The district court adopted the presentence report's findings. Rec. Vol. II, at 157 ("The court adopts the presentence report without change"). It imposed a life sentence on the conspiracy count and the statutory maximum on the remaining counts in "Count Group 1" (360 months on Counts 79, 82, 83, 87, 88, and 103; 240 months on Count 100; and 120 months on Count 105). Rec. Vol. V. at 1692-93.

The Tenth Circuit's observations demonstrate that Mr. Ellis would have benefitted from the assistance of competent counsel at sentencing: the government's drug quantity contentions were suspect and could have been challenged.

For example, the Tenth Circuit noted that the government had failed to establish that more than 5 kilograms of crack cocaine should be attributable to Mr. Ellis:

Despite the government's cartel-heavy presentation at trial, it has abandoned that approach on appeal. And when those cartel amounts—hundreds of kilograms—are stripped away, the government cannot show that the Alleyne [*v. United States*, — U.S. —, 133 S.Ct. 2151 (2013)] error was harmless beyond a reasonable doubt. Ellis contested his liability for at least five kilograms of powder cocaine, and the government didn't introduce overwhelming evidence to prove that this amount was individually attributable to him. Even the presentence report, applying a preponderance standard, fell short of this mark.

868 F.3d at 1172-73.

As to the government's allegation that more than 280 grams of crack cocaine should be attributed to Mr. Ellis, the Court observed that the evidence was neither "uncontested" nor "overwhelming." 868 F.3d at 1174. It added that "the jury did not

make a finding of the cocaine quantities charged , let alone those quantities that were reasonably foreseeable to Ellis.” *Id.* at n. 21.

Because of the government’s cartel-heavy presentation to the jury, and its failure during closing argument or rebuttal closing even to mention 280 grams of crack cocaine, we have doubts whether the jury convicted him of a crack-cocaine conspiracy of the aggravated crime under 21 U.S.C. § 841(b)(1)(A).

Id. at 1173 at n.18.

VIII. REASONS FOR GRANTING THE WRIT

A. The Court Should Grant Certiorari to Clarify That Mr. Ellis is Entitled to Resentencing on All of the Convictions in “Count Group 1.”

The Court should grant certiorari to clarify that Mr. Ellis is entitled to resentencing on all of convictions in “Count Group 1”—Counts 1,79, 82, 83, 87, 88, 100, 103, and 105.

Typically, on remand, resentencing is *de novo*. However, “an appellate court may limit the district court’s discretion pursuant to the mandate rule.” *United States v. Keifer*, 198 F.3d 798, 801 (10th Cir. 1999). In the Tenth Circuit, “the scope of the mandate on remand . . . is carved out by exclusion: unless the district court’s discretion is specifically cabined, it may exercise discretion on what may be heard.” *United States v. West*, 646 F.3d 745, 749 (10th Cir. 2011). The district court must look to the appellate court’s mandate “for any limitations on the scope of remand and, in the absence of such limitations, exercise discretion in determining the appropriate scope.” *Id.*

Here, there are some indications in the Tenth Circuit’s opinion that the scope of Mr. Ellis’s resentencing should be limited to the life sentence imposed on the

conspiracy count and that sentences on the other “Count Group 1” counts (79, 82, 83, 87, 88, 100, 103, and 105) should not be reexamined. See *Ellis*, 868 F.3d at 1181 (“[W]e reverse *Ellis*’s conspiracy sentence and remand for a full resentencing, subject to the cocaine-conspiracy conviction being resentenced under 21 U.S.C. § 841(b)(1)(C). We affirm all of *Ellis*’s other convictions and sentences.”).

Resentencing should not be so limited. On remand, after Mr. *Ellis*’s new counsel and the government have had a full and fair opportunity to address the factual and legal issues, the district court should resentence Mr. *Ellis* on all the “Count Group 1” counts.

The proper scope of resentencing is established by the presentence report. The presentence report concluded that “Counts 1, 79, 82, 83, 87, 88, 100, 103, and 105 are grouped for guideline calculation purposes.” *Rec. Vol. II* at 125, ¶ 115. That grouping determination was a proper application of U.S.S.G. § 3D1.2(c) and (d), (2013).

Sections 3D1.2(c) and (d) provide:

All counts involving substantially the same harm shall be grouped together into a single Group. Counts involve substantially the same harm within the meaning of this rule:

* * * *

(c) When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts.

(d) When the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.

Offenses covered by the following guidelines are to be grouped under this subsection:

* * * *

§§2D1.1, 2D1.2.

Section 2D1.1 is the drug quantity table, which sets various offense levels based on the quantity of drugs involved. After determining the amount of drugs attributable to Mr. Ellis (147 ounces or 4,167 grams of cocaine base), the presentence report determined the base offense for all the “Count Group 1” counts to be 36. Rec. Vol. II, at 126. It then increased the offense level four additional points based on two additional enhancements. *Id.*

For several reasons, the Tenth Circuit’s decision to vacate Mr. Ellis’s life sentence on the conspiracy count, warrants resentencing on the other related counts.

First, the resentencing on the conspiracy count will require the sentencing court to determine the amount of powder and/or crack cocaine attributable to Mr. Ellis. The court will be required to apply the relevant conduct provision of the Guidelines, U.S.S.G. § 1B1.1(a)(1). “Relevant conduct includes ‘all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant’ and ‘all reasonably foreseeable acts and omissions of others in furtherance of [a] jointly undertaken criminal activity.’” *United States v. Figueroa-Labrada*, 720 F.3d 1258, 1265 (10th Cir. 2013) (quoting U.S.S.G. § 1B1.3(a)(1)(A), (B)).

“The scope of the agreement and reasonable foreseeability are independent and necessary elements of relevant conduct under § 1B1.3(a)(1)(B).” *Id.* (quoting *United States v. Green*, 175 F.3d 822, 837 (10th Cir. 1999) (alterations omitted)). In light of

the Guidelines' grouping rules, the district court's relevant conduct determination on the conspiracy count will establish the offense level for the related counts.

In addition, in Mr. Ellis's initial sentencing, the presentence report's drug quantity determination as to each count was not necessary to determine Mr. Ellis's sentence. The prosecutor told the court:

Mr. Ellis was subjected to a double 851 enhancement under the statute which subjects him to a life sentence automatically because he does have two or more prior felony convictions, felony drug convictions. So all of these guideline calculations, even objections to the criminal history are really irrelevant because they don't affect the sentence in this case.

His sentence is driven by a life sentence on the Count 1, which has the 851 enhancement. And then there's a consecutive 60 month sentence statutorily for the 924(c) charge. So all of these guideline calculations are – even if he were to win on everything, it would not affect his sentence in the end.

Rec. Vol. V, at 1665 (emphasis added).

As a result, in the initial sentencing, the district court simply sentenced Mr. Ellis to the statutory maximum on all of the “Count Group 1” convictions. It relied on the drug quantity involved in the overall conspiracy. There is no indication that it considered the specific drug quantity attributable to Mr. Ellis in determining his sentence.

Moreover, even the more specific findings in the presentence report, do not establish that the proper inquiry was ever undertaken. The presentence report states that the essential components of the relevant conduct inquiry are “similarity, regularity, and temporal proximity.” Rec. Vol. II, at 124, ¶ 106. Neither the presentence report nor the district court discussed or applied the principle that only drug quantities reasonably foreseeable to Mr. Ellis could be attributable to him.

Some of the presentence report's discussion even suggests (improperly) that reasonable foreseeability is not required. For example, the report seeks to justify the 1-to-1 ratio of powder to crack cocaine used to calculate drug quantity by discussing what law enforcement agents believed—not what Mr. Ellis actually knew or did. See, e.g., Rec. Vol. II, at 124-25, ¶ 109 (“The agents in this case [not Mr. Ellis himself] knew that when individuals were cooking powder cocaine into crack cocaine (cocaine base) they obtained a 1:1 ratio or more, because a higher yield of crack cocaine from the starting amount of powder cocaine resulted in increased profits.”) (emphasis added).

Finally, the district court itself expressed frustration with the fact that Mr. Ellis was proceeding pro se at sentencing and that there were no written objections to the presentence report. It told Mr. Ellis that “because you didn’t follow that procedure” [submitting written objections to the presentence report)] “we’re really spinning our wheels here. And it’s not a very productive use of anybody’s time.” Rec. Vol. V, at 1683.

For all of those reasons, this Court should grant certiorari to clarify that the district court should be allowed to resentence Mr. Ellis on all the “Count Group 1” counts (1, 79, 82, 83, 87, 88, 100, 103, and 105). Such a resentencing will permit Mr. Ellis’s new counsel to examine the grounds for attributing specific drug quantities to Mr. Ellis on the related counts. After considering the evidence and the parties’ arguments, the district court will be able to correctly apply the Guidelines’ relevant conduct and grouping principles and make proper findings on the drug quantities attributable to Mr. Ellis.

B. The Court Should Grant Certiorari so that Mr. Ellis is Afforded the Sixth Amendment Right to Counsel on Resentencing.

Before the Tenth Circuit, Mr. Ellis argued that, by refusing to appoint substitute counsel for sentencing and by finding that he knowingly waived his right to counsel, the district court violated his Sixth Amendment right to counsel at sentencing. He asked the Court to remand this case for resentencing and direct the sentencing court to appoint counsel to assist him unless, after proper inquiry, he waived that right.

In its opinion, the Tenth Circuit noted this argument but then stated, “Because we remand for a full resentencing, and now order that Ellis receive different counsel to assist him at the resentencing, we conclude that these claims are moot and address them no further.” Ellis, 868 F.3d at 1181 (emphasis added).

Mr. Ellis respectfully submits that the Court’s mootness holding is correct only insofar as Mr. Ellis and his new counsel are allowed to present arguments regarding the appropriate sentence on all of the “Count Group 1” counts—not merely the sentence on the conspiracy conviction. As set forth above, the sentences on these related counts were based on the same drug quantity determination on which the sentence on the conspiracy conviction was based.

Because Mr. Ellis was not represented by counsel and because the government and the district court focused on the conspiracy-wide drug quantity, the drug quantity that could be specifically attributable to Mr. Ellis was never subjected to meaningful adversarial testing. Mr. Ellis, his new counsel, and the district court should be allowed to address that fundamental issue now.

This Court’s prior cases have concluded that a valid waiver of counsel requires “an apprehension of . . . the range of allowable punishments.” See *Von Moltke v. Gillies*, 332 U.S. 708, 724 (1948) (plurality opinion). Thus, in *Iowa v. Tovar*, 541 U.S. 77, 81 (2004), the Court stated that “[t]he constitutional requirement [of a knowing waiver of the right to counsel under the Sixth Amendment] 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.” (Emphasis added).

Nevertheless, some courts have noted an uncertainty as to how specific the warnings about pro se representation must be. See, e.g., *United States v. Turner*, 644 F.3d 713, 722 (8th Cir. 2011) (stating that “neither the Supreme Court nor this court has ever adopted a list of essential points that must be conveyed to a defendant in order for a waiver of counsel to be deemed knowing and voluntary”); see also *United States v. Francois*, 715 F.3d 21, 30 (1st Cir. 2013) (explaining that “the court did tell [the defendant] that self-representation would be a ‘terrible idea’ and a ‘catastrophic mistake,’” but that “the court did not go beyond these dire generalizations to give a specific example of the consequences of self-representation that might enhance a layman's understanding of the significance of the decision to proceed without counsel” but nevertheless holding that the waiver was knowing and voluntary). In *Faretta v. California*, 422 U.S. 806 (1975), the Court did not specifically address the defendant's awareness of his possible punishments.

In light of this uncertainty, this case offers the Court the opportunity to clarify the need for specific statements about the possible punishments that a defendant is

facing if he proceeds pro se. And here, Mr. Ellis is entitled to a full resentencing because the district court did not ensure that he voluntarily and knowingly waive his right to counsel.

There is a strong presumption against the waiver of the right to counsel. *Sanchez v. Mondragon*, 858 F.2d 1462, 1465 (10th Cir.1988), rev'd in part on other grounds by *United States v. Allen*, 895 F.2d 1577 (10th Cir. 1990). In order to be valid, such a waiver must be both (1) voluntary; and (2) knowing and intelligent. *United States v. Taylor*, 113 F.3d 1136, 1140 (10th Cir. 1997).

A waiver is voluntary if the defendant exercised a free choice between two options: (a) representation by an attorney who can competently represent him and (b) proceeding pro se. For the waiver to be knowing and intelligent, the district court must conduct a “penetrating and comprehensive examination” into the defendant’s “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.” *United States v. Padilla*, 819 F.2d 952, 956-57 (10th Cir. 1997) (quoting *Von Moltke v. Gillies*, 332 U.S. 708, 723-24 (1948)). The inquiry must appear in the record. *United States v. Gipson*, 693 F.2d 109, 112 (10th Cir. 1982).

The validity of a waiver of the right to counsel is considered de novo. *United States v. Turner*, 287 F.3d 980, 983 (10th Cir. 2002). If a trial court allows a defendant to proceed pro se without ensuring that he voluntarily and knowingly waived his right to counsel, its error is structural and may not be reviewed for harmlessness. *Allen*, 895

F.2d at 1579-80 (holding that “[Supreme Court precedent] precludes application of harmless error analysis to waiver of counsel cases”).

In order to knowingly and intelligently waive his right to counsel, “[a] defendant must know[] what he is doing” and make his choice “with eyes open.” *Faretta v. California*, 422 U.S. 806 (1975) (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942)). Supreme Court and Tenth Circuit precedent states the factors of which the defendant must be aware: “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.” *Allen*, 895 F.2d at 1578 (quoting *Von Moltke*, 332 U.S. at 723); see also *Sanchez*, 858 F.2d at 1467; *Padilla*, 819 F.2d at 956.

Here, after allowing Mr. Ellis’s trial counsel to withdraw, the district court asked Mr. Ellis about his legal knowledge. It also summarized the allegations of the second superseding indictment. However, it never informed Mr. Ellis of the “range of allowable punishments”—particularly the crucial fact that he could receive a life sentence on the conspiracy charge (in light of the enhancements that the government sought pursuant to 21 U.S.C. § 851, see 21 U.S.C. § 841(a)(1)). See Appendix, at 54-73.

The failure to inform Mr. Ellis of the maximum sentences that he could face is error. In *United States v. Silkwood*, 893 F.2d 245, 248 (10th Cir. 1989), the trial court told the defendant that his sentence could be “enhanced up to fifteen years and a substantial fine.” 893 F.2d at 249. The Tenth Circuit observed: “[t]his statement is not only inadequate but also incorrect. In fact, the trial court sentenced Mr. Silkwood

to twenty-five years without parole.” *Id.* On the basis of that erroneous statement, the Court held that the defendant’s waiver of his right to counsel was neither voluntary, nor knowing, nor intelligent. *Id.* It remanded the case for resentencing and the appointment of counsel, unless, after a proper inquiry, the defendant waived that right.

Similarly, in *Padilla*, the Tenth Circuit observed that the trial court had failed to inform the defendant of “the nature of the charges against him, the statutory offenses included, or the possible range of punishment.” 819 F.2d at 957 (emphasis added). As in *Silkwood*, this Court concluded that the defendant had not validly waived his right to counsel. *Id.* at 959.

Under *Silkwood* and *Padilla*, Mr. Ellis did not knowingly waive his right to counsel. As in those cases, the district court never informed Mr. Ellis of the maximum sentences that could be imposed and, as a result, Mr. Ellis did not waive his right to counsel “with eyes open.” *Faretta*, 422 U.S. at 835 (citation omitted).

Accordingly, this Court should grant certiorari to clarify that defendants like Mr. Ellis must be informed of the entire range of punishments that they may face if they elect to proceed pro se.

IX. CONCLUSION

For the reasons set forth above, the Court should grant certiorari to (a) clarify that defendants like Mr. Ellis who are entitled to resentencing on a conspiracy count are also entitled to resentencing on all other counts involving related determinations of drug quantity; and (b) hold that a defendant, like Mr. Ellis, who is not informed of the range of possible punishments, cannot knowingly and voluntarily waive his right to counsel under the Sixth Amendment.

Respectfully submitted this 18th day of January, 2018.

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SUPREME COURT OF THE UNITED STATES

MARVIN LEE ELLIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

Case No.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of January 2018, a copy of the foregoing Petition for Writ of Certiorari was mailed via U.S. Mail, postage prepaid, to all counsel of record:

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XI. APPENDIX

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petition\certpetition-draft-Ellis.wpd