

No.
IN THE
SUPREME COURT OF THE UNITED STATES

EUGENE WRIGHT, Petitioner,
-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Illinois

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

This case presents an opportunity for this Court to resolve a split in the federal and state courts regarding whether a criminal defendant must be informed of the sentencing range he faces for his waiver of counsel to be knowing. The Sixth Amendment guarantees a defendant a right to counsel but also allows him to waive this right and to represent himself without counsel. *Faretta v. California*, 422 U.S. 806, 820 (1975). The Constitution mandates that a defendant's waiver of counsel be knowing and voluntary and the trial court has the burden of establishing a valid waiver. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). This Court has never prescribed a specific script that courts must follow and the lower courts are divided as to what information the defendant must have for there to be a knowing waiver of counsel. Some federal and state courts have held that the defendant must know the sentencing range he faces while others have held that knowledge of the sentencing range is not necessary for a knowing waiver of the right to counsel.

In this case, the trial court misinformed Wright of the sentencing range by understating the maximum sentence he faced by 15 years. The Illinois Supreme Court held that misstatement did not render Wright's waiver of counsel unknowing because it concluded that it did not impact Wright's decision to represent himself. 2017 IL 119561 ¶¶ 55-56. This case presents an opportunity for this Court to resolve a conflict in authority on whether a defendant must be aware of the allowable punishments for there to be a knowing waiver of counsel. This case also presents the related question that has divided the lower courts: under what circumstances can there be a knowing waiver when the trial court provides deficient or erroneous admonishments.

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The petitioner, Eugene Wright, respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The decision of the Illinois Appellate Court vacating Wright's conviction for armed robbery with a firearm (Appendix A) is reported at 33 N.E.3d 781; 2015 IL 123496, and is published.

The decision of the Illinois Supreme Court (Appendix B) is reported at *People v. Wright*, ___ N.E.3d ___; 2017 IL 119561 (September 21, 2017), and is published.

JURISDICTION

On September 21, 2017, the Illinois Supreme Court issued an opinion. (Appendix B) A petition for rehearing was timely filed and denied on November 20, 2017. (Appendix C) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment of the Constitution provides in relevant part: “In all criminal prosecutions, the accused shall enjoy the right . . .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.” U.S. Const. amend. VI.

The Fourteenth Amendment of the Constitution provides in relevant part: “No State shall . . . deprive any person of life, liberty, or property, without due process of law.” U.S. Const., amend. XIV

STATEMENT OF THE CASE

Wright was charged with several counts of armed robbery while armed with a firearm. He proceeded *pro se* at a jury trial and was convicted of two counts of armed robbery while armed with a firearm.

Waiver of Counsel

After speaking with his appointed public defender, Wright told the trial court that he wanted to represent himself because his attorney was not ready for trial and Wright wanted to demand a speedy trial. (R Supp I. B-4-5) The trial judge informed Wright that he had a right to an appointed attorney, but he also had the right to represent himself. (R Supp I. B-6) The trial court told Wright that he would be held to the same standard as a licensed attorney and would not be able to allege ineffective assistance of counsel on appeal. (R Supp I. B-6-7) The judge also informed Wright that he could be eligible for an extended-term sentence with a range of 21 to 60 years' imprisonment. (R Supp I. B-15) Wright stated that he wanted to represent himself and the judge accepted his waiver of counsel. (R Supp I. B-7-9)

Three weeks later, the trial court again questioned Wright about his decision to proceed *pro se* and informed Wright that he faced a sentencing range of 21 to 60 years. (R Supp I. C-6-7) Wright stated that he had two years of college and experience with the criminal justice system and that he wanted to represent himself. The trial court accepted Wright's waiver of counsel and he represented himself at trial and at sentencing. (R Supp I. C-9-10)

Trial

The manager of a Baker's Square restaurant, a waiter, and a waitress testified

that two men robbed the restaurant shortly before closing on December 26, 2010. (R. FF19-31) One of the men lifted his sweatshirt and the witnesses saw what looked like a handgun in his waistband. (R. FF22, 29; FF71-72) This man took the manager to the office and made him open the safe. (R. FF26-28) The two men left with the contents of the safe, which included a deposit bag containing cash and rolls of coins. (R. FF28)

Officers were conducting surveillance of the Bakers Square that night because of reports of robberies at other Bakers Square restaurants in the Chicago area. (R. FF-89-91) An officer yelled at two men as they exited the restaurant because they fit the description of the prior robberies. The two men ran in different directions. (R. FF92-94) The man who had gun in his waistband was arrested after a short footrace and was in possession of the deposit bag from the safe. He did not have a gun in his possession. (R. 97-99) The other man was arrested in a black van a short distance from the restaurant. (R. FF195) Rolls of coins were found inside the van as well as a vest that matched a vest worn by the perpetrator of a prior Bakers Square robbery. (R. GG17) Officers searched the area for the gun, but did not find it that night, possibly because there was a lot of snow on the ground that night. (R. FF99-100) Witnesses identified codefendant Michael Morgan as the man who had the gun in his waistband and Wright as his accomplice. (R. FF132-35)

The State introduced evidence of the robbery of another Bakers Square to show *modus operandi* and identification. (R. GG149) An employee of the restaurant testified that Wright and Morgan robbed the restaurant around closing time on December 11, 2010. (R. GG177-94)

Wright introduced evidence that a week after the robbery, after the snow melted,

a BB gun was found in the area where Morgan fled. (R. GG84-88) Wright testified that he was not involved in the robbery and speculated that he was pulled over because he was driving a van that was similar to one the robbers drove in another robbery. (R. HH66-68) Wright attempted to call Morgan, but Morgan exercised his Fifth Amendment right not to testify. (R. HH3) The jury found Wright guilty of two counts of armed robbery with a firearm. (R. II87)

Sentencing

At the sentencing hearing, the State informed the trial court for the first time that Wright's sentencing range was 21 to 75 years. Armed robbery normally carries a sentencing range of six to 30 years, but Wright had a prior conviction that made him eligible for an extended term of six to 60 years. In addition, the fact that the jury found the robbery was committed with a firearm mandated a 15-year add-on to the sentence.⁷²⁰ ILCS 5/18-2(b) (West 2010). (R. LL129-34) The trial court sentenced Wright to 50 years' imprisonment. (R. LL137)

Direct appeal

On appeal, Wright argued *inter alia* that his waiver of counsel was invalid because the trial court did not comply with Illinois Supreme Court Rule 401(a), which governs waiver of counsel. Specifically, Wright argued that the misstatement about the sentencing range rendered his waiver of counsel unknowing. The trial court told Wright the maximum sentence was 60 years and it was not until the sentencing hearing that Wright learned he actually faced a maximum sentence of 75 years. The Illinois Appellate Court, First District, agreed and reversed his conviction on the grounds that the trial court's incorrect admonishments regarding the maximum

sentence rendered his waiver unknowing. *People v. Wright*, 33 N.E.3d 781, 798-801 (Ill. App. Ct. 1st Dist. 2015) Appendix A). The Illinois Supreme Court reversed the appellate court's decision and affirmed Wright's conviction holding that the trial court substantially complied with Rule 401(a) and the erroneous admonishments did not impact Wright's decision to waive counsel. *People v. Wright*, ___ N.E.3d ___ (Ill. September 21, 2017); 2017 IL 119561 ¶¶ 52-57 (Appendix B). Wright filed a timely petition for rehearing, which the Illinois Supreme Court denied on November 20, 2017. (Appendix C)

REASON FOR GRANTING CERTIORARI

The Illinois Supreme Court's decision finding a knowing waiver of counsel when the trial court understated the maximum sentence Wright faced by 15 years provides this Court with the opportunity to resolve a split in authority on whether the defendant must be aware of the sentencing range for there to be a valid waiver of counsel.

The Illinois Supreme Court acknowledged that the trial court misinformed Wright of the correct sentencing range he faced when it understated the maximum range by 15 years, but concluded that Wright's waiver of counsel was valid. *People v. Wright*, ___ N.E.3d ___; 2017 IL 119561 (September 21, 2017). The *Wright* court found that because Wright was informed of the nature of the charges and of his right to counsel, his waiver was voluntary, knowing, and intelligent. *Wright*, 2017 IL 119561, ¶¶ 53-56. The court specifically held that the misstatement regarding the sentencing range did not render Wright's waiver unknowing. *Id.* The federal and state courts are divided on whether knowledge of the applicable sentencing range is required for a knowing waiver of counsel. Thus, this case presents an ideal opportunity to resolve a conflict in authority on whether knowledge of the sentencing range is required for a knowing waiver of counsel.

A. The lower courts are divided on whether knowledge of the sentencing range is required for a knowing waiver of counsel.

When a defendant seeks to represent himself at trial, he must knowingly and intelligently waive the right to counsel, aware of the dangers and disadvantages of self-representation and the record must establish that "he knows what he is doing and his choice is made with eyes open." *Faretta v. California*, 422 U.S. 806, 835 (1975). This Court has declined to prescribe a specific formula that the trial court must follow before accepting a waiver of counsel and the federal and state courts are divided as to

what information the defendant must have for his waiver to be valid. Some courts have held that the trial court must ensure that the defendant understands 1) the nature of the charges against him, 2) the possible penalties, and 3) the dangers and disadvantages of self-representation. *United States v. Forrester*, 512 F.3d 500, 506 (9th Cir. 2008). Other courts have held that knowledge of the sentencing range is not a requirement for a knowing waiver of counsel. *People v. Turner*, 644 F.3d 713, 722 (8th Cir. 2011).

In *Forrester*, 512 F.3d at 507, the district court informed the defendant that he faced 10 years to life in prison whereas he actually faced a potential prison term of zero to 20 years. The district court also failed to inform him of the nature of the charges against him. *Id.* The State argued that there was no Sixth Amendment violation because the district court overstated the penalties that the defendant faced. *Id.* The Ninth Circuit Court of Appeals declined to speculate on the affect of the erroneous sentencing range and held that the court failed to fulfill its obligation to ensure that the defendant was aware of the possible penalties when he waived counsel. His waiver was therefore not knowing and intelligent. *Id.* at 507-09.

Similarly, in *United States v. Erskine*, 355 F.3d 1161, 1164-64 (9th Cir. 2004), the district court engaged in a lengthy colloquy about the dangers and disadvantages of self-representation. Near the end of the exchange, the court asked the defendant if he understood the potential penalties and he replied that he faced one year in prison. The actual maximum sentence was five years. *Id.* at 1165. On the first day of trial, the prosecutor stated that the maximum possible sentence was five years, but the trial court did not advise the defendant of the maximum penalty or ask him if he wanted to

reconsider his decision to proceed *pro se* in light of the new information. *Id.* The Ninth Circuit Court of Appeals in *Erskine* found that because the defendant did not understand the possible penalties he faced at the time he waived counsel, he did not intelligently and knowingly waive his right to counsel and his conviction could not stand. *Id.* at 1170-71.

The Eighth Circuit Court of Appeals reached a different conclusion in *United States v. Turner*, 644 F.3d 713 (8th Cir. 2011). There, the defendant contended the district court erred by not addressing the statutory minimum and maximum sentences he faced, or conveying a more in-depth explanation of trial procedures. *Id.* at 721. The court in *Turner* held that knowledge of the sentencing range constituted “technical legal knowledge” that was not relevant to his knowing waiver of counsel. *Id.* at 722 citing *Faretta*, 422 U.S. at 836. The Second Circuit Court of Appeals also held that an explicit accounting of the potential punishment is not required for a valid waiver of counsel. *United States v. Fore*, 169 F.3d 104, 108 (2d Cir. 1999). *See also United States v. Bisong*, 645 F.3d 384, 395 (D.C. Cir. 2011) (colloquy where district court misstated the potential sentence as 70-87 months instead of 159 months that defendant ultimately received did not make waiver of counsel unknowing). Thus, the federal courts are divided as to whether an accurate accounting of the sentencing range is required for a knowing waiver of counsel.

State courts are also in conflict as to whether knowledge of the sentencing range is required for a knowing waiver of counsel. In contrast to the Illinois Supreme Court’s decision here, other states require the defendant to be informed of the allowable punishments for a valid waiver of counsel. For instance, in *State v. Diaz*, 274 Conn.

818, 827 (2005), the defendant proceeded *pro se* after the trial court informed him of his constitutional right to counsel and of the limited role of standby counsel. The court also recited in detail the numerous procedures relating to the conduct of a trial. *Id.* The Connecticut Supreme Court held that the defendant's waiver of counsel was not knowing and intelligent because the trial court did not admonish him of the sentencing range. *Id.* at 831. *See also Hudson v. Nevada*, 2017 WL 448636, at *1 (Nev. App. Jan. 23, 2017) (defendant did not knowingly, intelligently, and voluntarily waive his right to assistance of counsel when he sought to represent himself at trial because he was not made aware of the possible penalties he faced if he lost at trial and was adjudicated a habitual criminal); *State v. Howard*, 2017 WL 5712277, at *5 (Wash. Ct. App. Nov. 28, 2017) (trial court's failure to inform defendant of the maximum penalty for the charged crimes and the absence of anything in the record showing that he was otherwise aware of the maximum penalty meant that his waiver of the right to counsel could not be knowing and intelligent).

Thus, there is a clear split of authority in the lower courts on whether the defendant must be aware of the sentencing range when he waives his right to counsel. Resolution of this conflict is important as the right to counsel is among the most fundamental of rights as it is through this right that all of the other rights of the accused are protected. *Penson v. Ohio*, 488 U.S. 75, 84 (1988); U.S. Const. Amend. VI, XIV.

B. This Court's precedent shows that knowledge of the sentencing range is necessary for a knowing waiver of counsel for a trial.

While this Court has declined to prescribe specific admonishments the trial court must follow to ensure a knowing waiver of counsel for a trial, its precedent strongly

suggests that the defendant must be aware of the sentence he faces for there to be a valid waiver of counsel. In *Johnson v. Zerbst*, 304 U.S. 458, 460 (1938), the defendants never requested counsel and were not appointed counsel. This Court rejected the notion that the defendant's waiver could be found from a silent record stating that, "courts indulge every reasonable presumption against waiver' of fundamental constitutional rights." *Id.* at 464. This Court placed the duty of ensuring a knowing waiver on the trial court and admonished that the process of accepting a defendant's waiver of counsel should be on the record. *Id.* at 465.

In *Faretta v. California*, 422 U.S. 806, 819, 835 (1975), this Court held that the Sixth Amendment embodies the right of a criminal defendant to refuse appointed counsel and proceed *pro se* as long as the defendant competently and intelligently waives counsel. This Court reiterated its waiver of counsel standard stating that the defendant "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" *Id.* at 835 citing *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942).

In *Von Moltke v. Giles*, 332 U.S. 708 (1948), this Court evaluated the requirement of a knowing waiver of counsel. The defendant in that case, whose native language was German, initially entered a plea of not guilty. *Id.* at 711, 713. The defendant was unable to retain her own counsel and decided to change her plea to guilty. *Id.* at 717. After initially declining to accept the plea because the defendant was unrepresented, the trial judge accepted her waiver after five minutes of routine questioning when the defendant stated she understood the charges. *Id.* A plurality of

this Court held the waiver was invalid and reiterated the duty of the judge to ensure that the waiver of the right to counsel is made intelligently, which can only be determined after a thorough inquiry. *Id.* at 722. The plurality then set out a list of the requirements for a valid waiver of the right to counsel:

To be valid such 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.

Id. at 724.

While *Von Moltke* was a plurality opinion, a majority of this Court addressed waiver of counsel at a guilty plea hearing in *Iowa v. Tovar*, 541 U.S. 77 (2004). In *Tovar*, the Iowa Supreme Court held that a defendant's waiver of counsel was not valid because the trial court failed to give two warnings the court held were essential to a knowing waiver of counsel. The trial court should have informed the defendant that waiving counsel's assistance in deciding whether to plead guilty (1) entails the risk that a viable defense will be overlooked and (2) deprives him of the opportunity to obtain an independent opinion on whether, under the facts and applicable law, it is wise to plead guilty. *Id.* at 81. While this Court held these warnings were not required for a valid waiver of counsel, it reiterated what the plurality had held in *Von Moltke*: "The constitutional requirement of a knowing waiver of counsel is satisfied when the trial court informs the accused of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments attendant

upon the entry of a guilty plea.” Id. (emphasis added)

The above cases establish that the trial court must ensure that a defendant’s waiver of counsel is knowing and voluntary and that a valid waiver will not be presumed from a silent record. In the context of a guilty plea, the defendant must be made aware of the sentence he faces for there to be a valid waiver. The issue this case presents is whether the defendant must be informed of the sentencing range before he waives counsel for a trial. Because the need for counsel is greatest at a trial, this Court should apply the rule of *Tovar* to waiver of counsel for a trial.

In *Patterson v. Illinois*, 487 U.S. 285, 298 (1988), this Court noted that the type of warnings and procedures that should be required before a waiver of the right to counsel depends upon the purposes a lawyer can serve at the particular stage of the proceedings in question. In *Patterson*, the defendant waived his right to counsel during postindictment questioning after being read his *Miranda* warnings and signing a waiver. *Id.* at 287-89. This Court held that these warnings were sufficient to inform the defendant of his rights and the dangers and disadvantages of giving up those rights during questioning by the police. *Id. Id.* at 298. This Court, however, recognized that waiver of counsel for a trial would require much more extensive admonishments stating, “we have imposed the most rigorous restrictions on the information that must be conveyed to a defendant, and the procedures that must be observed, before permitting him to waive his right to counsel at trial.” *Id.*

Thus, the precedent from this Court establish that a defendant must know of the sentencing range he faces at the time he waives counsel for a trial. The importance of counsel is never greater than at a criminal trial. If knowledge of the sentencing range

is necessary for a valid waiver before a guilty plea, it is certainly necessary for waiving counsel for a trial. Lawyers in criminal courts are necessities, not luxuries, and reviewing courts indulge in every reasonable presumption against waiver. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963); *Brewer v. Williams*, 430 U.S. 387, 404 (1977).

This Court has held that the information a defendant must possess in order to make an intelligent waiver of counsel 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. *Johnson*, 304 U.S., at 464. One factor that is not case-specific is the fact that every conviction carries a corresponding sentencing range. The defendant will be made aware of the sentencing range at the sentencing hearing and there is no reason that this knowledge should not be imparted to the defendant when he waives counsel. Because this case will allow this Court to resolve a split in authority on waiver of the fundamental right to counsel, this Court should grant review.

C. This Court should grant review to resolve a split in authority on whether a reviewing court can find a knowing waiver of counsel when the trial court provides erroneous or deficient admonishments regarding the sentence and the record does not otherwise establish that the defendant knew the correct range.

This case also presents an issue that has divided the lower courts regarding under what circumstances can the reviewing court find a knowing waiver of counsel when the trial court provides deficient or erroneous admonishments. Some courts have held that when the trial court misinforms the defendant about the sentencing range he faces, the reviewing court should not find a knowing waiver unless the record affirmatively shows the defendant knew the correct sentencing range in spite of the

erroneous admonishment. *United States v. Forrester*, 512 F.3d 500 (9th Cir. 2008). The Illinois Supreme Court here speculated as to the effect the incorrect sentencing range had on the Wright's decision to waive counsel. *People v. Wright*, ___ N.E.3d ___; 2017 IL 119561 ¶¶ 55. This case presents an opportunity for this Court to resolve the conflict in the lower courts on when the reviewing court can find a knowing waiver of counsel in the face of erroneous admonishments by the trial court.

In this case, the Illinois Supreme Court ruled that Wright's waiver of counsel was knowing because the erroneous admonishments did not impact Wright's decision to waive trial counsel. *Wright*, 2017 IL 119561, at ¶¶ 55. The court opined that Wright waived counsel because of speedy trial concerns. *Id.* at ¶ 55. Thus, the court reasoned that the erroneous admonishments did not affect Wright's decision to waive counsel.

In contrast to *Wright*, in *United States v. Forrester*, 512 F.3d 500 (9th Cir. 2008), the Ninth Circuit Court of Appeals rejected the position adopted by the Illinois Supreme Court. In *Forrester*, the district court warned the defendant that he faced 10 years to life in prison whereas he actually faced a potential prison term of zero to 20 years. *Id.* at 507. The government argued that there was no Sixth Amendment violation because the district court overstated the penalties that the defendant faced and he would have been more likely to waive that right had he known the actual, lower penalties he faced. *Id.* The *Forrester* court rejected the State's argument finding it irrelevant as to whether the trial court understated or overstated the applicable sentence. The court acknowledged that it could look at the entire record to determine if the defendant's waiver of counsel was knowing, but only as the record related to the defendant's actual knowledge of the sentencing range. *Id.* at 508. The *Forrester* court

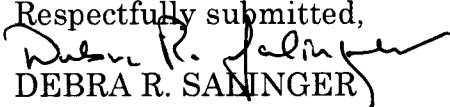
declined to weigh the possible impact of the erroneous admonishments on the defendant's decision to waive counsel finding that to be an improper harmless error analysis. *Id.*

This case and *Forrester* present two distinct approaches to situations where the trial court has provided inaccurate information regarding the sentencing range. The approach taken by the Illinois Supreme Court is to examine the record and speculate on the impact of the incorrect information on the defendant's decision to waive counsel. The other approach, adopted by the Ninth Circuit Court of Appeals, is to look to the record only to determine if it shows the defendant knew the actual sentencing range despite the erroneous admonishments. Thus, the lower courts are in need of this Court's guidance.

This Court should grant review because this case will allow the resolution of two important issues regarding a defendant's waiver of counsel: 1) is knowledge of the applicable sentencing range necessary for a knowing waiver of counsel, and 2) where the trial court misstates the sentencing range and the record does not establish that the defendant otherwise knew the correct sentencing range, can the reviewing court find a knowing waiver of counsel.

CONCLUSION

For the foregoing reasons, petitioner, Eugene Wright, respectfully prays that a writ of certiorari issue to review the judgment of the Illinois Supreme Court.

Respectfully submitted,

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