IN THE SUPREME COURT OF THE UNITED STATES

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IOWA, :

Petitioner :

v. : No. 02-1541

FELIPE EDGARDO TOVAR. :

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Washington, D.C.

Wednesday, January 21, 2004

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:10 a.m.

APPEARANCES:

THOMAS J. MILLER, ESQ., Attorney General, Des Moines, Iowa; on behalf of the Petitioner.

MALCOLM L. STEWART, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Petitioner.

THERESA R. WILSON, ESQ., Des Moines, Iowa; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(11:10 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 02-1541, Iowa v. Felipe Edgardo Tovar.

General Miller, we'll hear from you.

ORAL ARGUMENT OF THOMAS J. MILLER

ON BEHALF OF THE PETITIONER

MR. MILLER: Mr. Chief Justice, and may it please the Court:

The modern guilty plea colloquy, by focusing on and clearly articulating the consequences of pleading guilty, paralleling the Patterson case, clearly constitute the -- the intelligent and knowing waiver of counsel in this particular context. In the modern guilty plea context, among other things, the defendant is told the elements of the crime, the range of the sentence, the factual bases developed between the judge and the defendant to assure that his guilt, and in addition, the --

QUESTION: Well, if someone is going to plead guilty, I guess the question may boil down to whether he has a right to be told the he could be represented by an attorney in making the decision to plead and that it might be useful to him to have an attorney's advice in making that decision.

MR. MILLER: Yes, Your Honor. You know, we --

QUESTION: It's a guilty plea. It wasn't a going to trial and he was told certainly of all the things that could be involved in a trial and how an attorney would be helpful but was not told, I guess, expressly that if you plead guilty, you can be represented by counsel and the attorney might give you useful advice.

MR. MILLER: Separating the -- the two issues, first, the question of whether he was explicitly told in this proceeding that he had a right to counsel at this proceeding. He was not told in that many words. But, you know, there's -- there's a presumption of regularity here based on the Johnson case.

QUESTION: My goodness, he wasn't told. You're conceding that he wasn't told he had a right at the plea stage. I thought what they said to him right off the bat was, Mr. Tovar, you're without counsel. I see you waived application for a court-appointed attorney. You want to represent yourself at today's hearing. So what I thought the State was saying is that that's sufficient.

MR. MILLER: Yes.

QUESTION: And I didn't even think that was an issue in this case. I didn't see it in the petition. I didn't see it in the response to the petition. Maybe it would be an issue for the lower court. So I'm not sure

what to do with that. I can see it's ambiguous, but if you want to concede it, that's fine with me.

MR. MILLER: What -- what I'm saying, Your Honor, is -- is this, that in -- in the total context, he clearly knew that he had a right to counsel and, indeed, that really is the -- the words that submit that --

QUESTION: I mean, nobody is really -- at least, is that an issue in front of us?

MR. MILLER: You know, I -- I don't -- I don't think -- I don't think it should be, Your Honor.

QUESTION: I thought it was very much the issue before the Iowa Supreme Court because that court said what was missing here was information about the utility of a lawyer at the plea stage before you enter the plea with you at that hearing. And here, all of the statements made relate to what you're giving up by pleading guilty and not going to trial.

Now, I thought, as Justice Breyer did, from that opening colloquy there was information to the defendant that he could consult with a lawyer before entering the plea. And I wondered particularly about the form that he signed. Tovar signed a form waiving counsel before the plea hearing, but that form is nowhere in the record or the lodging. Does it exist?

MR. MILLER: Your -- Your Honor, I -- I don't

think he actually signed a form. What -- what did happen is that he was informed at the -- informed at the arrest through the Miranda warnings that he had a right to counsel. And then he went for a initial appearance, and this is -- this is the part that -- that I think we focus on.

At the initial appearance, the judge marked the form saying application for court-appointed counsel, and then wrote waived. In other words, he had given the opportunity at this initial appearance for counsel. Going forward, there -- there was no reason to -- to interrupt the initial appearance and having to have counsel at -- at initial appearance. It was going forward.

And then the words that Justice Breyer referred to, when he went to -- went to the plea hearing, the judge said, you know, I see that you've -- you've waived counsel, and then he says I assume that you want to proceed to represent yourself.

So we think that -- that that really satisfies the requirement --

QUESTION: But do we have the transcript of the -- of that initial hearing where he waived counsel?

MR. MILLER: The initial hearing -- the checklist is in -- is in the documents that -- that were given -- given to this Court.

QUESTION: Well, that wasn't the basis. I -- I didn't understand that to be the basis of our decision here. The -- the Supreme Court of Iowa did, indeed, focus on whether he was advised at -- about how useful counsel could be --

MR. MILLER: Yes, Your Honor, that --

QUESTION: -- in -- in connection with the guilty plea --

MR. MILLER: Yes, Your Honor. That's --

QUESTION: -- not that he wasn't advised that he had a right to counsel. The problem here is he was told he had a right to counsel, but it wasn't said, boy, you know, you'd really be stupid to turn it down. That -- that wasn't done. Right?

MR. MILLER: That -- that's exactly right. That's what the Iowa Supreme Court held. You know, it wasn't -- it wasn't raised at the district court level. It wasn't raised in the opposition to the cert petition.

QUESTION: So what is your -- what everybody I think is trying to do is ask you what is your argument on the point that we thought was why we granted the case, or at least I thought why.

MR. MILLER: Yes.

QUESTION: What -- what is the reason that the Iowa court is wrong --

MR. MILLER: Yes.

QUESTION: -- on -- on the point just as Justice Scalia put it?

MR. MILLER: Yes, Your Honor. I think -- I think the -- the point is this, that in the plea setting it is very analogous to the Patterson setting and not analogous to the Faretta setting at -- at going to trial without counsel. And -- and the reason for that is, Your Honor, that going through the plea and hearing the elements and going through the factual basis and knowing the punishments, that's something a person can comprehend and can make a decision on, just like the Court held in Patterson that the decision to answer a question under interrogation or not under interrogation is something someone could do.

But in -- in the trial setting, it is just so difficult for a person to represent himself in terms of the rule of evidence, in terms of strategy, witnesses, choosing the jury. Those are the kinds of things that it is just so difficult. What we do is two things. We inform the defendant of all those difficulties and by informing him as -- with a -- with an authority figure like a judge, we're -- we're pushing him towards counsel.

QUESTION: Well, but -- but in -- in the context of entering a plea, it certainly would be useful for the

defendant to know that if he had an attorney, the attorney might take a look at -- at the sobriety tests. He might talk with the prosecutor about a plea to the lesser charge, reckless driving. He might talk to the judge about a reduced sentence. It didn't happen here because he got the minimum.

But just as -- as a general matter, your brief seems to suggest that there's -- there's not really much role for the attorney at -- in entering a guilty plea. I -- I suggest that there -- there's a very important role for him.

MR. MILLER: Well, Your Honor, I think -- I think there are a number of useful -- useful functions, the ones you described, also collateral consequences.

QUESTION: And collateral consequences, yes.

MR. MILLER: But -- but generally in exercising these rights and describing these rights, you give the general -- the general right, not -- not the specific services. The -- the Ruiz case indicates that. And in the Patterson setting, the -- you know, the things that a lawyer could do about strategy on the questions or make sure that you weren't tripped up on the questions, that was not required by Patterson. It's the -- it's the main consequences. It's the direct consequences that Patterson requires and that this requires.

And, Your Honor, if we go into all the useful things that an attorney can do -- and -- and certainly there are many -- then it's -- it's almost an endless list. It's a fairly long list. And then we're cluttering up the -- the colloquy. It's already a -- a rather long colloquy.

QUESTION: This -- this comes after, I take it, General Miller, the discussion between the judge and the defendant as to whether or not the elements of the offense are present?

MR. MILLER: It would -- it would have -- I guess it would have to come after that. I mean, I think -- I think the factual basis is really the key here.

QUESTION: Yes.

MR. MILLER: The -- because that's -- that's the -- that's our -- that's our real assurance that guilty --

QUESTION: Well, and if -- if the defendant represents to the court that the factual basis for the plea is there, that he committed the offense charged, why is there any great interest in trying to persuade him not to do that?

MR. MILLER: You know, I -- I don't think there is a great interest, Your Honor, and I don't -- I don't think -- I don't think the -- the system is served here particularly what -- what the Iowa Supreme Court required

that, you know, a -- and a lawyer can give you an independent assessment of -- of whether it's wise to plead guilty. Obviously, that's something that -- that we know about lawyers.

And also really subsumed in that, to some extent, is the -- the question of defenses, but it's not a -- it's not a particularly helpful litany that they developed.

QUESTION: I --

QUESTION: Well, the Iowa court made rather a long laundry list of requirements. I suppose you wouldn't have to go along with all of those things, but I am interested to know whether you think there is a baseline requirement that the court advise the defendant in making a plea that he has a right to counsel and the attorney could be helpful in making that decision.

MR. MILLER: Well, I -- I think that -- that he has to know that he has -- has the right -- right to counsel. But --

QUESTION: You don't think he has to know that counsel would be helpful.

MR. MILLER: The -- he knows that counsel is -- would be helpful.

QUESTION: He doesn't have to be told that counsel would be helpful.

MR. MILLER: He doesn't have to be told. An individual knows that -- that -- it certainly follows much like in Patterson -- knows that the counsel would advise him whether to ask -- answer the questions or not. But that's something someone --

QUESTION: But you do agree that he's -- you do agree that the advice should include explicit advice that he has a right to counsel at the plea hearing.

MR. MILLER: He should -- he should know at the plea hearing that he had a right to counsel.

QUESTION: But he doesn't have to be told by the judge that he has a right to counsel at the -- he was not -- this -- in this case he was not told by the judge he had a right to counsel at that hearing.

MR. MILLER: The -- the judge said, you know, I -- I see you -- you made application, which would have been for this hearing, for -- you -- you did not make application --

QUESTION: Well, why -- why is it clear that it would be for this hearing because the judge followed up, after saying that, did you want to represent yourself at today's hearing, which would seem to me to imply that the judge did not know whether or not he had already decided not to have counsel at that hearing?

MR. MILLER: Well, I think that question was

really did you change your mind. I mean --

QUESTION: Well, of course --

MR. MILLER: -- you made -- you made a decision at the initial hearing going forward towards this hearing that you wouldn't have counsel. Have you changed your mind?

QUESTION: Maybe -- maybe you -- you should say that he should be advised of his right to counsel, but if he isn't, it is a harmless mistake if it is clear from the record that he knew it.

MR. MILLER: That -- that certainly would --

QUESTION: Even -- even if there is a -- a -- an absolute right to have the judge tell you you're entitled to counsel, if it's clear on the record at least that you were told, there's -- there's no foul.

MR. MILLER: Yes, Your Honor.

QUESTION: But it's not clear on this record, though.

QUESTION: But that you knew.

MR. MILLER: Yes. You know, I -- I think it is. You know, this -- every -- every presumption is -- is in our favor in this kind of collateral setting.

QUESTION: Well, if you draw -- draw presumptions, maybe it is. You presume everything was regular. Why sure, then it is. But if you just look at

what was said to him at the hearing itself, it's not clear that he knew that he had -- he had waived application for a court-appointed attorney. He didn't necessarily say he wanted to represent himself.

MR. MILLER: Well, I -- I think, Your Honor, in -- in the context of the discussion at the initial appearance and then drawing that towards the -- forward into the -- the plea -- plea hearing, that -- and -- and certainly indulging the -- the presumptions here, that -- that that -- that he did know. And indeed, to this date he's not asserted that he didn't know.

QUESTION: Well, but the -- all I'm saying is the record doesn't establish it, and we've been -- in some situations been rather meticulous about what ought to be on the record because then you solve all the problems of collateral attack if the record does disclose it rather than relying on presumptions and inferences. That's the point.

MR. MILLER: Yes. Yes, Your Honor.

QUESTION: Where did this case come out of? A justice court? It was a misdemeanor, wasn't it, an OWI, operating without a --

MR. MILLER: It -- it was, Your Honor. It would be associate district court. It would be a situation where there -- there would be a -- would be a judge and --

who, you know, went through a -- you know, a long colloquy with the -- with -- went through a colloquy concerning representation.

QUESTION: But that was basically the rule -- what would be in the Federal system, a rule 11 colloquy, and it's all canned. I mean, the -- as the transcript shows, he -- he went through the -- almost precisely the same litany on both times. So --

MR. MILLER: Yes, Your Honor. It -- it parallels rule 11. It's -- our rule 8 is -- is very similar to -- to rule 11. And at the -- at the plea hearing, of course, he was asked three times whether he wanted to plea or whether he wanted to -- to go forward and -- and contest the case and that's -- in that setting.

QUESTION: He does have a right to counsel at the plea hearing. He does have a right if he asserts it to consult with counsel before the hearing takes place, but I -- I think your argument is he doesn't even have to be told that bare information, never mind the -- the continuing spiel about how much a lawyer would be worth to him, but just the simple statement before you enter this plea, you're entitled to consult a lawyer. And if you want a lawyer to be with you at the hearing, you're entitled to that too.

MR. MILLER: What -- what we're saying, Your

Honor, is that -- that that was covered by the -- the words that Justice Breyer mentioned at -- at the outset, that you know, I -- I see you waived application for counsel at -- at the prior -- it would have been at the prior proceedings, which would have been for this proceeding, and do you -- you know, do you continue to want to represent yourself.

QUESTION: But I think there's something important afterwards. It's or did you want to take some time to hire an attorney to represent you, which --

QUESTION: That was at the sentencing.

QUESTION: -- certainly one inference is that to represent you at this kind of proceeding.

MR. MILLER: Yes, yes, Your Honor. The -- the --

QUESTION: That -- that was not said at -- at his plea hearing. That was said at his sentencing hearing when he pled to another crime that he had committed in the interim.

But at -- the lines of what went on at the plea hearing is I see, Mr. Tovar, you waived application for a court-appointed attorney. Did you want to represent yourself at today's hearing? Period. That was it.

MR. MILLER: That -- that was at -- at that proceeding, and -- and we argue that that -- those are the

-- those are the key words that really -- really wrap up this issue, that he was told before he had a right to counsel at this hearing. There's a referral back. It was reaffirmed that he wanted to represent himself at -- at the hearing.

As I say, that -- that -- you know, it was not raised by the -- by the defendant at the trial court level or in the -- or in the resistance to the cert petition. And to this day, they -- they've not asserted that he didn't know that he had the right to counsel at the -- at the plea -- at the plea hearing.

QUESTION: The States seem to take various positions on this. Do you know if any of them have taken it as a matter of their own constitution rather than the Federal Constitution?

MR. MILLER: The State has -- has not on this -- on this particular issue.

QUESTION: Iowa hasn't, but have other States?

MR. MILLER: Not -- not that I know of, Your Honor.

QUESTION: This -- this being? This being the issue on which we granted cert or the issue of whether you have to advise him of his right to counsel?

MR. MILLER: I -- I was assuming on -- on the matter that was before the Court as -- as a matter of the

cert petition, that -- that I do not know of other jurisdictions that decided solely on -- on State grounds.

Your Honor, I'd like to reserve my time.

QUESTION: Very well, General Miller.

Mr. Stewart, we'll hear from you.

ORAL ARGUMENT OF MALCOLM L. STEWART

ON BEHALF OF THE UNITED STATES,

AS AMICUS CURIAE, SUPPORTING THE PETITIONER

MR. STEWART: Mr. Chief Justice, and may it please the Court:

The plea colloquy conducted at respondent's 1996 prosecution adequately informed respondent of the dangers and disadvantages of proceeding without counsel. Respondent's waiver of counsel and the guilty plea itself were therefore knowing and intelligent. The judgment of the Iowa Supreme Court should be reversed.

I think it may be helpful to look first at the precise language that the Iowa Supreme Court employed in announcing the warnings that it thought were constitutionally required, and if the Court looks at page 18 of the appendix to the certiorari petition, that's the paragraph of the Iowa Supreme Court's opinion that's entitled Summary and Disposition. And it --

QUESTION: Page 18 of what?

MR. STEWART: Of the appendix to the certiorari

petition.

And if you -- if you look in -- in the middle of the page, the Iowa Supreme Court in summarizing its holding said, rather, the trial judge need only advise the defendant generally that there are defenses to criminal charges that may not be known by lay persons and that the danger in waiving of the assistance of counsel in deciding whether to plead guilty is the risk that a viable defense will be overlooked. The defendant should be admonished that by waiving his right to an attorney, he will lose the opportunity to obtain an -- an opinion on whether under the facts and applicable law it is wise to plead guilty.

In addition, the court must ensure the defendant understands the nature of the charges against him and the range of allowable punishments.

But the third paragraph is -- is more -- the third sentence is more or less irrelevant because there's no dispute here that the defendant was informed of the nature and -- of the charge and the applicable punishments, and that would be done in any standard plea colloquy. So it's really just the previous two sentences that are at issue, and I think there are some noteworthy points about these.

The first is that the warnings mandated by the Iowa Supreme Court don't contain any declarative sentence

to the effect that you have a right to represented by counsel at this plea proceeding. The Iowa Supreme Court I think took it as given that respondent had been made adequately aware that he had a right to counsel and that what was missing was adequate information about the services that counsel could perform in connection with the plea decision.

The second thing is that there's no reference in these warnings to case-specific issues such as possible suppression of evidence or the potential for plea bargaining. The -- the warnings are designed to be warnings that could be given in every single case. And in our view, the warnings are either vacuous or misleading, depending on how they're interpreted.

If they are accurately interpreted as generalizations about the criminal justice process, they really say nothing more than that as a class lawyers know more about the law than people who are not lawyers, and it's at least possible that consulting with a lawyer would improve your chances in this criminal prosecution. And I think any defendant who is aware that he has the right to counsel would be aware of those facts, would be aware of at least the possibility that a lawyer could help him and the certainty that a lawyer would know more about the charges than he would.

On the other hand, if the defendant misunderstands these warnings as directed to him personally as availed suggestion that there is actually a meritorious defense in his own case, then the defendant may be given an artificial disincentive to plead guilty and in the case of a non-indigent defendant may be led to spend his own funds consulting with a lawyer when in fact no valid defense exists.

QUESTION: Would a Miranda warning be sufficient to advise the -- the defendant that you have a right to counsel? Period. It's pretty obvious to me that if you have a right to counsel at interrogation, you certainly have a right to one at the plea bargain. Would that be sufficient?

MR. STEWART: I think it would be constitutionally sufficient, but it's certainly better practice to make sure that the defendant understands that the right extends beyond the questioning itself. And I think that was done in the initial appearance. The defendant -- there's -- there's a form. The defendant is represented as having waived his right to application for appointed counsel. I suppose that still leaves open the possibility that he could have retained counsel if he had chosen to. But I think that certainly apprised the defendant of the right -- of -- of the fact that his right

to counsel extended beyond the initial questioning itself and would continue for the duration of the proceedings.

And we'd also point out that because this is a collateral challenge, the defendant bears the burden of establishing that no knowing and intelligent waiver occurred. And to the extent that there's a gap in the record on this point, I think the defendant is properly chargeable with that.

I'd also like to return to the point that Justice Kennedy made earlier about the possibility that in some cases an attorney might be able to obtain suppression of incriminating evidence or might be able to negotiate with the prosecution about possible plea bargains. I think first it's noteworthy that the standard rule 11 colloquy mentions several constitutional rights that an individual gives up by pleading guilty, but it doesn't mention the possibility of suppressing evidence and it doesn't mention the possibility of plea bargaining. So it would be odd to think that you could have a constitutionally valid waiver even though the defendant was not informed of those substantive possibilities but would, nevertheless, have to be informed of the assistance that a lawyer might provide in connection with those --

QUESTION: Mr. Stewart, do you know what the general practice is in Federal courts? Are there

instructions given to prosecutors to make sure, for example, that the defendant at a guilty plea is told that maybe the -- that he has a right to a lawyer and he might be helpful?

MR. STEWART: Well, as to the -- it does -- Federal Rule of Criminal Procedure 11 in its current form says that if the defendant appears at the plea hearing without counsel, he is to be informed that he has a right to counsel at trial and at every other stage of the proceedings. So there's clearly a requirement that the defendant be made aware that he has a right to counsel at the plea hearing.

Neither the Federal Rules of Criminal Procedure nor the bench book for U.S. district judges requires that the defendant be given additional information about the services that an attorney might provide or the likelihood that an attorney could be helpful by --

QUESTION: Do you know the practice in -- in other States generally?

MR. STEWART: My sense is that there is probably a great deal of variation not only from State to State, but among different courts within different States I think, and I think that's probably the -- the likelihood in the Federal system as well.

QUESTION: Well, I -- I suppose my comment was

in response to the argument that, well, it really doesn't make any difference, which is the -- the intimation I -- I saw in -- in the brief. And I suppose it doesn't make any difference because we assume that anybody knows this stuff?

MR. STEWART: I don't think we would assume that any -- necessarily any layperson would be aware of the potential for suppressing evidence or the possibility of negotiating a plea arrangement. I think any defendant knows more generally that lawyers have legal expertise that lay people lack.

But I think if -- if we try to -- to think about how warnings about suppression and plea bargaining might work, I think we realize why the Iowa Supreme Court shied away from something like that because, on the one hand, if this Court instructed, as a matter of constitutional law, that whenever an uncounseled person pleads guilty, he has to be informed that in some cases it may be possible to suppress incriminating evidence and in some cases it may be possible to negotiate with the prosecution for a reduced charge, a lot of defendants are going to be given false hope because the possibility that those modes of procedure might succeed would vary enormously.

QUESTION: Why -- why wouldn't the same argument apply to all of the rights that you're going to lose if

you plead guilty? Why -- why wouldn't rule 11 be really largely unnecessary under your view?

MR. STEWART: Well, I -- I think those rules really do focus on things that will actually happen in any criminal trial if the defendant decides not to plead guilty. That is, the defendant is informed if you plead guilty, you are waiving the right either to testify or not testify on your own behalf. You're giving up the right to counsel. You're giving up the right to cross-examine witnesses. The defendant really is being told about things that are likely to occur in virtually any criminal trial, and I think that's -- that's the idea of a standardized plea colloquy.

On -- on the other hand, if you're talking about suppression of evidence or talking about plea bargaining, if you give that advice in every case, it's often going to be misleading. A trial judge is going to find himself in the position of saying you might be able to bargain with the prosecution over a reduced charge even though he knows that the policy of the prosecutor is not to engage in plea bargaining with respect to a category of cases that includes that one.

QUESTION: Mr. Stewart, as I understand your argument, you're -- you're arguing not only are these warnings not constitutionally mandated, you're also saying

they're probably unwise in a number of situations. Are you arguing that they're so unwise that we should tell, as a matter of Federal law, a State judge could not give these warnings?

MR. STEWART: No, I don't think there would be any Federal law barrier to States requiring warnings such as these. And I -- I think the -- the vacuous warnings, the warnings we regard as vacuous, that were mandated by the Iowa Supreme Court are less likely to be harmful than more specific warnings about --

But the other point I wanted to make is if the Court decided that it wouldn't be a good idea to warn about suppression of evidence or plea bargaining in every case but maybe it would be advisable to do that in some cases, that would really be thrusting trial judges in an untenable position because the point of having a standardized plea colloquy is to give judges a -- a safe harbor, to give them some assurance that if they provide standardized advice in every case, that's going to be enough. And if a trial judge had to decide is the likelihood of a successful plea negotiation sufficiently great in this particular case that the defendant should be advised about it or do I see a viable basis for asking for suppression of evidence, it would really make the trial judge's life much more difficult. And if the Court were

to hold, as a matter of constitutional law, that the trial judge is required to do that and can be reversed for failure to, it would really cause disruption.

QUESTION: Thank you, Mr. Stewart.

Ms. Wilson, we'll hear from you.

ORAL ARGUMENT OF THERESA R. WILSON

ON BEHALF OF THE RESPONDENT

MS. WILSON: Mr. Chief Justice, and may it please the Court:

Before a court may accept a guilty plea from an uncounseled defendant, the Constitution requires that the defendant be advised of the following: of his right to have counsel present prior to and during entry of the guilty plea, including appointed counsel if necessary; that by waiving counsel, he will lose an independent opinion of his case and on the wisdom of pleading guilty; and that by waiving counsel, he risks overlooking potential defenses that he as a layperson may not recognize. These are the minimal standards required for a waiver of plea counsel.

QUESTION: Where is it --

QUESTION: That -- that isn't what the Supreme Court of Iowa required in this case, is it? I mean, the -- their warning, as read by Mr. Stewart, was not nearly that specific.

MS. WILSON: Correct. The Iowa Supreme Court applied the rules of Patterson and Faretta, determining that a uncounseled defendant who chooses to plead guilty must be given a meaningful discussion regarding the usefulness of counsel at the plea proceeding and the dangers of proceeding pro se. The court determined that the best way to fulfill that obligation is to advise the defendant of the risks of overlooking potential defenses and of the loss of an independent opinion regarding his case.

QUESTION: My -- I guess the difficulty that I have with that is no -- no question about the -- the soundness of those general statements, but they are so general that they -- they raise the question whether there are really very many defendants that don't know that to begin with and whether there is a real utility in requiring those warnings and hence paying the price in the mistaken cases when they're not given. Do -- do defendants really need this?

MS. WILSON: Yes. We simply cannot infer from the fact that a defendant is told that he has counsel or has a right to counsel that he necessarily understands the sort of assistance counsel could provide. The American Bar Association has discussed this particular problem in their criminal justice standards, specifically part 5,

8.1. The American Bar Association recognizes that to many defendants the word counsel may not necessarily have any clear meaning.

QUESTION: Did they say how they knew that?

MS. WILSON: No, Your Honor.

QUESTION: Did they say -- did they -- I mean, I'm -- I am impressed by the fact that rule 11(b), which is a product of the rulemaking process and presumably, I'm sure, it reflects the experience of trial lawyers, which is not my experience, and -- and they try to get in things like the ABA. Yet, they do not require that you tell the lawyer how useful -- you tell the -- the individual how useful the lawyer will be. They do require that you tell the defendant how -- that he has a right to a lawyer at every stage of the proceeding. So I took from the fact that the ABA and everybody else lobby nonstop for this kind of thing that they felt it was very desirable but not so important that you had to actually include it in the colloquy. Otherwise, it would be there in rule 11(b).

So now, what -- what does the ABA say? Do they say it's a constitutional requirement? Do they try to change even the rule? No. I don't think they do.

MS. WILSON: No.

QUESTION: But you're -- you're saying that the Constitution requires the thing that the lawyers

themselves through their groups have felt is desirable but not important enough to put in the rules. Wouldn't we go to the rules first?

MS. WILSON: Not necessarily. Under -- under Patterson, under Faretta, even as -- back as far as Johnson v. Zerbst, this Court has required that any waiver of a constitutional right be a voluntary, knowing, and intelligent abandonment or relinquishment of a known right or privilege.

QUESTION: But, Ms. Wilson, you know, as to how much that requires, when we invented the Miranda warning, we -- we simply required that -- that the defendant be told you have a right to counsel. We didn't -- we didn't say that he be told, and by the way, the first thing counsel will tell you is to shut up, which would be very good advice.

(Laughter.)

QUESTION: We didn't require that. We just said you have a right to counsel. And -- and you want us to -- to elaborate upon the Miranda warning as well?

MS. WILSON: The -- those particular warnings were used both in the Miranda case and in the Patterson case, Sixth Amendment right to counsel at post-indictment questioning. In both of those cases, a defendant still has other alternatives even if he does make statements to

the police. He can attempt to recant his statement. He may have other available defenses. If a defendant appears before a court to enter a guilty plea uncounseled, that admission is going to be conclusive proof of guilt, leading to a final conviction that isn't revocable.

QUESTION: Why -- even on this very record, when he came for the sentencing, the judge did say, as Judge Kennedy -- Justice Kennedy pointed out, that are you sure you don't want more time to consider having counsel. And one of the questions I was going to ask you is given that the judge was so solicitous at the sentencing hearing, could the defendant at that point have said, judge, I've thought about what I did at the plea hearing and I'd really like to withdraw my plea? I think you're right. I need more time to consult a lawyer.

MS. WILSON: He -- the defendant would have been able to file a motion in arrest of judgment. I do not recall off the top of my head if that deadline had passed by the time of his sentencing. I believe it needs to be filed within 5 days of sentencing. So he may not have been able to do that procedurally.

QUESTION: But the judgment is entered only after the sentence, I would assume. Is that correct in Iowa?

MS. WILSON: Correct.

QUESTION: So it -- it just seemed to me that a judge, being so solicitous about this crime that didn't carry any jail time, would -- would certainly say the one that does carry jail -- jail time, yes, you think you want to talk to a lawyer? It's okay. We'll hold it in abeyance and you talk to your lawyer.

MS. WILSON: Correct. The -- the discussion that the court had with Mr. Tovar was very abbreviated at the arraignment. At the time the court gave its discussion, I see you're appearing here today without counsel, do you wish to proceed pro se, the district court had no idea whether Mr. Tovar was going to enter a plea of guilty or not guilty. And unfortunately, a defendant in that situation may come into a court believing that he does not have a right to counsel simply because he's going to plead guilty. Nothing that district court would have told him up to that point would have dissuaded him from such a belief.

QUESTION: Is -- is there any allegation in this case that the defendant didn't know he had a right to appointed counsel for the plea? That allegation has not been made before, has it?

MS. WILSON: No, and I do want to address that.

QUESTION: Are you making it now?

MS. WILSON: I am indicating that the record

simply doesn't show whether the defendant had any knowledge of the right to plea counsel, and unfortunately --

QUESTION: No, but that's not an issue in this case, is it?

MS. WILSON: It is and -- and the -- the State did say that this issue was not addressed in the Iowa Supreme Court. And it may be an error on my part I did not raise it as a denial of counsel case. But in fact, in the brief filed before the Iowa Supreme Court and the Iowa Court of Appeals, I did raise the fact that Mr. Tovar was not informed that he had a right to plea counsel, that the only discussion of the right to counsel at that plea hearing was in the context of the right to counsel at trial he was waiving.

QUESTION: But in any case, you -- you didn't cross petition and you didn't raise this in the brief in opposition I take it.

MS. WILSON: Correct.

QUESTION: We're -- all of this -- it goes back to a prior conviction not his most recent one I take it, and all the facts we're talking about were at -- those associated with the prior conviction, not this more recent one.

MS. WILSON: Correct.

The -- the reason that the issue of whether he was informed of plea counsel is important is because that is the first requirement for a valid waiver of counsel. The first requirement is an intentional relinquishment of a known right. This means that a defendant must be made aware that he has a constitutional right. According to Miranda v. Arizona, the only way to ensure that is to tell the defendant that he has the right.

QUESTION: All right. So if we agree with you about that, the thing to do is send it back.

MS. WILSON: Yes.

QUESTION: Is that right?

MS. WILSON: Yes.

QUESTION: And they can decide it.

MS. WILSON: Correct, Your Honor.

QUESTION: I mean, we can't decide it. I mean, we could decide it but I guess it's not really fairly raised, is it?

MS. WILSON: Correct. That -- that is an option for the Court, Your Honor. Correct.

QUESTION: Send it back.

QUESTION: Do we usually do that, send -- say, you know, search the record for other possible failures of the lower court --

MS. WILSON: No, Your Honor.

QUESTION: -- that haven't been raised and then send the thing back?

MS. WILSON: No, Your Honor.

QUESTION: Why should we do it here?

MS. WILSON: Again, it -- it was raised below. Unfortunately, the Iowa Supreme Court did not directly address it. And it is part of the waiver analysis.

QUESTION: Well, but you didn't cross -- as Justice Souter --

MS. WILSON: No.

QUESTION: -- you didn't cross-petition.

MS. WILSON: No.

QUESTION: You didn't put it in your brief in opposition.

MS. WILSON: No.

QUESTION: Well, I guess if we just -- what we'd normally do here is we say -- suppose we didn't agree with your -- on your basic argument. We say, well, you lose on that one. Now we send it back from appropriate proceedings, whatever is appropriate. I don't know. At that point, I guess you'd go back to the Iowa court and you'd say you didn't address this other issue which I had in my brief.

MS. WILSON: Correct.

QUESTION: Is there a reason we can't do that?

I don't know.

MS. WILSON: No, Your Honor. There -- there's no -- I don't see any reason why this Court couldn't do that.

QUESTION: The -- the Court usually remands for proceedings not inconsistent with this opinion.

MS. WILSON: Correct.

QUESTION: And -- and if the Court just addresses what's before them, whether the sentences that Mr. Stewart read to us whether the -- if the Court decides it, that's not what the Constitution requires, then it vacates or reverses and remands and Iowa could take it from there.

MS. WILSON: Correct, Your Honor, but the -- the point at which the Iowa Supreme Court did decide is -- is still a valid point, that regarding whether there needs to be a brief discussion regarding the usefulness of counsel and the dangers of proceeding pro se.

QUESTION: So how do you deal with the question that was posed that it raises a false hope, and if you tell a defendant a lawyer might know defenses that you don't know, but wouldn't the defendant then ask the judge, Judge, would you please tell me what those defenses might be?

MS. WILSON: And then the appropriate response

from the court would be, I can't advise you. I'm not your attorney. If you believe anything I've said here raises some doubts, speak with an attorney. Otherwise, we could proceed with the guilty plea if you wish.

QUESTION: But the attorney is going to cost me $200 an hour. Give me a break. Let me know whether it's going to be worth it or not. And the judge will say, sorry, I can't say anything about that.

MS. WILSON: That's exactly correct, Your Honor.

QUESTION: You ought to know that attorneys are useful. That's -- that -- do you think that's a considerable help? You ought to know that attorneys are useful?

MS. WILSON: It at least indicates that the defendant has been given some warning regarding how an attorney may assist him. And again, the -- the ABA says that the fact that you just merely tell a defendant that he has a right to counsel, it doesn't necessarily help.

QUESTION: Was it in this case that the judge told the defendant he was not entitled to free counsel because he was dependent on his parent where he was going to Ames or something like that?

MS. WILSON: That was at the sentencing hearing. Mr. Tovar did make an application for court-appointed counsel that was denied because he was dependent upon his

parents as a college student.

This case essentially falls into a -- a gap between Patterson and Faretta. Both of those cases require some discussion regarding the usefulness of counsel and the dangers of proceeding pro se. The Iowa Supreme Court attempted to fill that gap by requiring these particular admonishments. But these admonishments reflect the core responsibility of defense counsel at a plea proceeding and also are responsibilities this Court has recognized in previous cases.

QUESTION: Do you know any other jurisdiction that has required such a -- a litany of warnings before a plea could be accepted?

MS. WILSON: Specific litany? No. I do believe Pennsylvania rules do provide a -- a six-point litany, I believe.

But I would direct the Court's attention to the brief filed by the National Legal Aid and Defender -- yes -- National Legal Aid and Defender Association in this case that outlines the various requirements in both the circuits and the States. The majority -- about half of the jurisdictions in this Nation have not discussed this particular issue, waiver of counsel at a plea proceeding. Of those that have, the majority have either required or preferred a Faretta type colloquy for waiver of counsel at

a plea proceeding. All the Federal circuits that have discussed this issue have applied that standard. 18 States --

QUESTION: You say applied that standard. You mean imposed it as a constitutional requirement?

MS. WILSON: Have either required or preferred a discussion of the dangers of proceeding pro se at a plea proceeding.

QUESTION: When you say preferred, what do you mean by that?

MS. WILSON: It -- the failure to use those particular standards may create a rebuttable presumption, but the other factors in the case may show that a defendant did validly understand or did understand the right to counsel.

QUESTION: And did the -- you're talking about now Federal courts of appeals?

MS. WILSON: Federal circuits.

QUESTION: And -- and they held this as a matter of Federal constitutional law?

MS. WILSON: I -- I believe so. I believe the Ninth Circuit did.

QUESTION: Any other circuits?

MS. WILSON: I can't remember off the top of my head. Again, I would -- I would direct the Court's

attention to that brief.

Only 10 States that have considered this issue do not require a Faretta type colloquy. Some of those do use the -- the plea colloquy.

But I guess it -- it's -- this issue, though it hasn't been directly addressed in the brief, but obviously it's a concern of the States whether this may have retroactive effect or whether it's prospective effect as far as its effect on recidivist statutes. Mr. Tovar would argue that these standards, if adopted, could be applied prospectively because they do create a new rule. Although they are certainly inspired by Patterson and by Faretta, these particular admonishments are not required by those cases, and again, those cases do not address the particular context of a plea proceeding.

It --

QUESTION: In your brief, Ms. Wilson -- let me make sure I've got the right one. Yes. In your table of authorities, you have a number of cases from this Court and then you have a number of State cases which seem to be mostly Iowa cases.

MS. WILSON: Correct.

QUESTION: And then you don't cite any Federal -- Federal cases such as the ones I presume you were referring to. Was there some reason, if -- if they

support you, why you didn't put them in your brief?

MS. WILSON: It was a cooperative effort between my office and the National Legal Aid and Defender Association.

QUESTION: And which one dropped the ball?

(Laughter.)

MS. WILSON: I -- I can't honestly answer that, Your Honor.

But even assuming other jurisdictions do not use these particular standards, the burden upon the State will be alleviated for a number of reasons.

First, if for example, Iowa wanted to use a guilty plea from another jurisdiction for enhancement, a defendant would have the burden of proof on a collateral attack. If these standards were not used, that may create a presumption that the waiver was invalid. However, the State could certainly attempt to prove the validity of the waiver through other means.

In addition, if the other jurisdiction does not use these standards -- some of the claims are simply going to be time-barred. For example, in Iowa after direct appeal, there is a 3-year window of opportunity for a defendant to apply for post-conviction relief. So Mr. Tovar, who did not apply for a direct appeal of his guilty plea and did not for a post-conviction relief, would be

time-barred from challenging it now.

The --

QUESTION: Now, what if under -- under Iowa law you have a case like the present one? When this case -- the -- Tovar pleaded -- rather, he -- he pleaded not guilty. He went to trial, didn't he? And supposing that the prior conviction is 4 years old, can he not challenge that under Iowa law when he appeals as -- as an enhancing factor?

MS. WILSON: Do you -- can you rephrase the question. I'm not quite sure.

QUESTION: Yes. What -- what I'm concerned with, take the -- the present case. The defendant pleads not guilty, goes to trial, the jury finds him guilty. And one of the bases for sentencing is that 4 years ago he pleaded guilty to a similar crime but didn't get these waivers. Under Iowa law, could he challenge that 4-year-old conviction as an aggravating -- or whatever you want to call it on appeal from his present conviction?

MS. WILSON: I -- I would assume so, Your Honor. There's also a procedure in -- in Iowa law, Iowa Rule of Criminal Procedure 2.19(9) that would actually permit a defendant to challenge the use of that prior conviction prior to the sentencing enhancement. Now, the State may have an argument if he did not do that. Then the argument

would be waived.

QUESTION: Is there any limit on how many years back you go for enhancing prior convictions?

MS. WILSON: It depends on the particular statute, Justice Ginsburg. In -- in Iowa for the OWI, it's 12 years. For domestic abuse, it's 6 years. For harassment, it is 10 years. There's habitual offender sentencing enhancement that does not contain any deadline for use of prior convictions.

QUESTION: What was the sentence imposed in this case for the -- for the third offense?

MS. WILSON: Third offense. It's -- the -- the particular sentence in this case was 180 days, all but 30 suspended, and a $2,500 fine. The maximum permitted by statute would be 5 years in prison.

Also, I do want to address a point that I believe Justice Kennedy raised earlier regarding how counsel may have been useful here given that he -- given that Mr. Tovar received the mandatory minimum for a conviction in his 1996 guilty plea.

It is true Mr. Tovar did receive the mandatory minimum for his conviction for OWI first. Unfortunately, under the statute in effect at the time, Mr. Tovar also would have been eligible for a deferred judgment. This is something apparently the prosecutor did not offer to Mr.

Tovar and it's something the district court did not advise him regarding. It is something that had counsel been present, it would have benefitted Mr. Tovar who would have been a prime candidate for a deferred judgment.

Also, I want to address the contention that a -- the factual basis discussion inherent in a guilty plea helps to ensure that a defendant is pleading guilty to the correct crime. Unfortunately, that's not always the case and I can provide an analogy.

Defendant is charged with forgery for writing checks on another person's account. The district court holds a factual basis colloquy with the defendant, asks the defendant did you make out these checks, and before doing this, advises the defendant that it cannot accept his guilty plea unless it has a factual basis to support the conviction. The court asks the defendant, did you make out these checks? Defendant says, yes.

Minutes of testimony don't indicate whether he signed his name or the other person's name. The defendant himself does not say at the guilty plea whether he signs his name or the other person's name. Under Iowa law, in order to be guilty of forgery, a person must do an act purporting to be the act of another. If defendant signs his own name to that check, it's not forgery.

QUESTION: Well, that would be the judge's fault

then in -- in not assuring that he was aware of all of the elements of the crime.

MS. WILSON: Correct.

QUESTION: I mean, all you're saying is the judge can make a mistake.

MS. WILSON: Correct.

QUESTION: But I mean, even if we grant what you want in this case, judges will still be able to make mistakes.

MS. WILSON: Correct, but unfortunately --

QUESTION: If he doesn't make a mistake, he would know all the elements of the crime. Right?

MS. WILSON: Um-hum.

And unfortunately, in -- in the situation of an uncounseled defendant, as in that case, the defendant wouldn't know that he's not legally guilty, that there was no factual --

QUESTION: But in this case -- this case I don't think you can raise any such --

MS. WILSON: No.

QUESTION: -- thing because it was a -- a blood alcohol test that did him in, and he didn't dispute the results of that test.

MS. WILSON: Correct. There may have -- in an OWI case, your mostly likely defenses are going to be

suppression, implied consent. Mr. Tovar didn't make any of those challenges in this case. He may have had them.

QUESTION: Well, I'll ask you the same question I -- I asked of General Miller. If in fact the defendant here, Mr. Tovar, says, yes, I was guilty of driving under the influence and I know that the test said that and I don't disagree with it, what public policy is there to try to get him to change his mind because you might have suppressed some of that evidence?

MS. WILSON: We're not attempting to make defendants change their mind. What Mr. Tovar and the Iowa Supreme Court is hoping to do is to ensure that a defendant knows exactly what they're getting into when they plead guilty, that they know that they have the availability of counsel and the basic services counsel can provide, and therefore they will be pleading guilty uncounseled with their eyes open.

The -- the plea colloquy suggested -- or the waiver colloquy suggested by the Iowa Supreme Court is not unduly burdensome.

QUESTION: Can I ask? Like the Chief, I'm -- I'm not sure that as a matter of public policy I -- I even -- even like what -- what you're suggesting even if it were made very, very simple. That is to say, we've gone through the elements of the crime and you acknowledge that

you've committed all of them. What you ought to know, however, is that if you got an attorney, he might find some gimmick that would allow you not to be convicted of this crime even though you have committed it. You should know that because it's your right, you know, to know that you can get off even where you're guilty. Now, is this something that we really want to encourage?

(Laughter.)

QUESTION: So long as you've told the individual these are the elements, are you sure you did it, why -- why isn't that all that the State should require? We want to encourage people to -- to confess. We want to encourage people, when they're guilty, to pay what used to be called their just debt to society. Why do we want to encourage them to -- to hire a lawyer so that they'll get off on a -- on an irrelevancy?

MS. WILSON: It is doubtful that these -- these -- well, I'll rephrase that.

The colloquy suggested by the Iowa Supreme Court is certainly not going to prevent anyone from pleading guilty. The State speaks of the defendant who wants to expeditiously accept responsibility. That person is more than likely going to plead guilty regardless of the length of the colloquy given by the court. However, what -- the only person that may possibly be deterred by this sort of

a colloquy is the defendant who's already experiencing doubts as to -- to his decision of whether to plead guilty.

QUESTION: Do you think it would be valuable in California to have somebody there to say, by the way, this is the second time you've stolen a chicken and if you plead guilty and do it again, you may go to jail the rest of your life? Or if you're in, say, Alaska, this seems to be an assault case but it's connected, in fact, with the charge of sexual assault. So if you plead guilty, the rest of your life you're going to have to be registered as a sex offender. Or to say, for example, if you're immigrant, you know, it may not seem to be important to you because it just happened to be hitting your child or something, you know, a slap or something like that, but you're going to be deported likely if you plead guilty. Would it be useful to have a lawyer there to tell them that?

MS. WILSON: Absolutely, Your Honor, because the district court isn't necessarily required to tell the defendant such things and we're seeing in cases like Lockyear v. Andrade, Ewing v. California where petty offenses, because they are tied in with recidivist statutes, are creating life sentences. And it would make sense to have an attorney. If we're going to have this

robust system of recidivist statutes, then we should also have a robust system of safeguards to ensure that a defendant's due process rights are protected.

The -- the plea -- the waiver colloquy suggested by the Iowa Supreme Court is not going to inhibit the plea process. Again, it's adding a few lines to the colloquy that's already required for the acceptance of guilty pleas.

Furthermore, such a standard would actually assist the State in the long run. These standards places the waiver colloquy on the record for all to see. This assists not only the initial court in making the waiver decision as an initial decision, but it also assists any future court that may have to make a determination of the validity of the waiver.

QUESTION: Well, if the Iowa Supreme Court thinks so, it could put it in the Iowa rules.

MS. WILSON: Yes.

QUESTION: And that -- that's how it would be.

MS. WILSON: Correct. They could do that.

QUESTION: In this case, the Iowa Supreme Court is projecting what it would be law for the Nation.

MS. WILSON: Correct. It was making an interpretation of -- of Patterson and Faretta to the plea context. That's correct.

But for all these reasons, we would respectfully request that this Court affirm the decision of the Iowa Supreme Court.

QUESTION: Thank you, Ms. Wilson.

General Miller, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF THOMAS J. MILLER

ON BEHALF OF THE PETITIONER

MR. MILLER: I would just pick up on -- on Justice Ginsburg's question or comment there that in terms of usefulness of counsel, there's a -- you know, we've explored a lot of difficulties and cross currents here today. What should happen is the States, as a matter of -- of the legislature or as a matter of the -- the court, making rules that -- that deal with these issues, rather than having a constitutional mandate for the whole country.

With that, I would close except if there are other questions from the Court.

CHIEF JUSTICE REHNQUIST: Thank you, General Miller.

The case is submitted.

(Whereupon, at 12:06 p.m., the case in the above-entitled matter was submitted.)