

2003

Justin Brent Peterson v. Sheriff Aaron D. Kennard; Chief Paul Cunningham, Salt Lake County Jail, and Taylorsville Justice Court : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JUSTIN BRENT PETERSON,

Petitioner and Appellant,

-VS-

SHERIFF AARON D. KENNARD,
CHIEF PAUL CUNNINGHAM, SALT
LAKE COUNTY JAIL, and
TAYLORSVILLE JUSTICE COURT,

Respondents and Appellees.

Case No. 20030264-CA

BRIEF OF THE TAYLORSVILLE JUSTICE COURT

**Appeal from the Order of the Honorable Sandra Peuler Dismissing
Appellant Justin Brent Peterson's Petition for Post-Conviction Relief**

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Respondents and Appellees.

Case No. 20030264-CA

JURISDICTIONAL STATEMENT

By order dated February 20, 2003 (the "Order"), the Third Judicial District Court, Salt Lake County, denied the petition of Appellant Justin Brent Peterson ("Peterson") for post-conviction relief. Peterson appeals from the Order. This Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(f) (2002).

ISSUES PRESENTED, STANDARD OF REVIEW AND PRESERVATION

Issue 1: Did Peterson have the burden of proof?

A. Standard of Review. The burden of proof is a legal issue which this Court reviews "for correctness." See Dep't of Human Services v. B.R., 2002 UT App 25, at ¶¶ 6, 11-12, 42 P.3d 390 (applying correctness standard to issue of proper standard of proof); Hansen v. Hansen, 958 P.2d 931, 933 (Utah Ct. App 1998) (same).

B. Preservation. Peterson did not preserve this issue. To the contrary, Peterson admitted that he had the burden of proof in the court below. See, e.g., R. 81.

Issue 2: Did Peterson meet his burden of proof?

A. Standard of Review. The standard of review for an appeal from a dismissal of a petition for post-conviction relief depends on the issue appealed. Conclusions of law are reviewed “for correctness.” Matthews v. Galetka, 958 P.2d 949, 950 (Utah Ct. App 1998); accord Seel v. Van Der Veur, 971 P.2d 924, 926 (Utah 1998). By contrast, findings of fact will only be modified on appeal if they are “clearly erroneous.” Id. Moreover, this Court surveys “the record in the light most favorable to the findings and judgment; and we will not reverse if there is a reasonable basis therein to support the trial court’s refusal to be convinced that the writ should be granted.”” Matthews, 958 P.2d at 950 (quoting York v. Shulsen, 875 P.2d 590, 593 (Utah Ct. App 1994) (quoting Butterfield v. Cook, 817 P.2d 333, 336 (Utah Ct. App 1991))); accord Seel, 971 P.2d at 926.

B. Preservation. Peterson preserved this issue in the proceeding below. See, e.g., R. 1-5.

TEXT OF SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime

shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

Peterson commenced this case by filing a petition for post-conviction relief (the "Petition") alleging that he was sentenced to jail in violation of the Sixth Amendment to the United States Constitution. R. 1-5. Peterson claimed in his Petition that he was not represented by counsel and did not waive his right to counsel. R. 1.

On December 12, 2002, The Taylorsville Justice Court ("Taylorsville") filed its Pre-Hearing Memorandum in response to the Petition. R. 60-67.¹ In its Pre-Hearing Memorandum, Taylorsville contended that Peterson waived his right to counsel, was not eligible for post-conviction relief because he failed to appeal his

¹ The other respondents named in the Petition, Sheriff Aaron D. Kennard, Chief Paul Cunningham, and the Salt Lake County Jail, were apparently made parties solely because Peterson was in their custody when the Petition was filed. These other respondents have not taken a substantive position with respect to the Petition. See R. 40-43.

sentence,² and did not meet his burden of proving his entitlement to post-conviction relief. Id.

On January 17, 2003, Judge Sandra N. Peuler of the Third District Court in and for Salt Lake County, State of Utah, conducted a hearing on the Petition. At the hearing, Taylorsville requested that the Petition be dismissed on the grounds that it was untimely under Utah Code Ann. § 78-35a-107 (2002) and that Peterson failed to request a trial de novo after the Taylorsville Justice Court issued its sentence. R. 145:2-5. The court below denied Taylorsville's request to dismiss the Petition on these grounds, and proceeded with the hearing on the Petition. R. 145:22-24.

After hearing the evidence on the substance of the Petition, Judge Sandra N. Peuler dismissed the Petition, finding that Peterson did not meet his burden of proof and that Peterson made a knowing, voluntary, and intelligent waiver of his right to counsel. R. 118. Peterson appealed the dismissal of his Petition. R. 132-33.

² In a Justice Court case, a criminal defendant is entitled to a trial de novo in the District Court if the defendant files a notice of appeal. See Utah Code Ann. § 78-1-120(1) (2002). This right to a trial de novo from a court not of record (like a Justice Court) is tantamount to an appeal. See, e.g., Draper City v. Roper, 2003 UT App 312, ¶5, 78 P.3d 631.

STATEMENT OF THE FACTS

A. Events Leading to Peterson's Guilty Plea

On or about February 24, 2000, Peterson was cited for possession of a controlled substance and possession of drug paraphernalia. Exhibit 8. Peterson has never challenged the substance of the charged offenses. See Exhibit 8; R. 145:11-12 ("We are not challenging the conviction in this case. We are solely challenging the sentence . . .").

On March 21, 2000, Peterson requested admission to the Taylorsville Substance Abuse Program. Exhibit 6; Exhibit 8. The Taylorsville Substance Abuse Program provides that upon acceptance and admission to the program that the applicant plead guilty and the guilty plea is held in abeyance pending successful completion of the program. See Exhibit 6. Upon completion of the program the plea will be withdrawn and charges dismissed. See id. Peterson signed, completed and submitted an "Application for Admission to City of Taylorsville Substance Abuse Court" (the "Application"). Exhibit 6. The Application included the following paragraph which Peterson initialed: "Counsel. I have the right to consult with and be represented by an attorney. If the judge were to determine that I am too poor to be able to hire a lawyer, then the judge could appoint one to represent me. I might later, if the judge determined I was able, be required to pay for the appointed lawyer's service to me." Id.

The Application also notified Peterson, among other things, of his right to a jury trial, that he was presumed innocent, that Taylorsville was required to prove the elements of his crime beyond a reasonable doubt, and that his conviction could be used to enhance penalties for any future convictions. Id.

Under the Taylorsville Justice Court's supervision, Peterson attended weekly drug court reviews from late March through late June 2000. Id.

On June 27, 2000, the Taylorsville Justice Court determined that Peterson could not participate further in the Taylorsville Substance Abuse Program, and his case was set for trial on July 20, 2000. Id. The docket from the Taylorsville Justice Court shows that Peterson appeared before Judge Michael W. Kwan ("Judge Kwan") at least seven times between March and June 27, 2000. Id.

On July 18, 2000 (two days before the scheduled trial), Peterson appeared voluntarily in the Taylorsville Justice Court to plead guilty to possession of a controlled substance and possession of drug paraphernalia. R. 145:40, 44; Exhibit 8. Peterson testified that he was familiar with Judge Kwan by the time Peterson appeared before him on July 18, 2000. R. 145:33. Peterson also acknowledged that he "had appeared numerous times in front of Judge Kwan" before July 18, 2000. R.145:41. Likewise, Judge Kwan was also very familiar with Peterson. R. 145:55, 59. Peterson had "been a defendant" in Judge Kwan's court "for probably over a year on other matters." R. 145:59.

The “other matters” to which Judge Kwan referred related to charges brought against Peterson for (i) failing to stop at a controlled intersection in 1999 (Exhibit 1); (ii) playing loud music in 1999 (Exhibit 3); and (iii) failing to pay the fine associated with the failure to stop at a controlled intersection charges, resulting in the issuance of a warrant for his arrest (Exhibit 1). On February 24, 2000 (six months before Peterson agreed to plead guilty on the charges at issue in this case) Peterson was arrested and brought to Judge Kwan’s court. Id. At this February 24, 2000 hearing, Judge Kwan advised Peterson of his Rule 11 rights, Peterson signed a “Defendant’s Waiver of Constitutional Rights” and pleaded guilty to the failure to stop charges. Exhibit 1; Exhibit 2; R. 145:31. Also on February 24, 2000, Peterson signed a separate “Defendant’s Waiver of Constitutional Rights” and pleaded guilty to charges against him for “loud music.” Exhibit 3. Peterson waived his right to counsel with respect to both of the charges to which he pleaded guilty on February 24, 2000. Exhibit 2; Exhibit 3.

Moreover, in June 2000, Peterson pleaded guilty in the Midvale Justice Court to (i) reckless driving, possession of a controlled substance and possession of paraphernalia, and (ii) driving on a denied driver’s license and failure to appear. Exhibit 4; Exhibit 5; R. 145:30. At this June 2000 hearing, the Midvale Justice Court advised Peterson of his rights and he waived his right to counsel in both of these cases. Exhibit 4; Exhibit 5.

B. Peterson's Guilty Plea

On July 18, 2000, Peterson appeared voluntarily in the Taylorsville Justice Court to plead guilty to the charges of possession of a controlled substance and possession of drug paraphernalia. R. 145:40, 44; Exhibit 8. Peterson entered Judge Kwan's courtroom, and remained there while Judge Kwan completed his afternoon calendar of about thirty to fifty cases. R: 145:59, 62.

Judge Kwan completed his calendar for that day and "was wondering why [Peterson] was sitting there." R. 145:64. Peterson said he wanted "to take care of" his case, and did not want to come back for his trial. R. 145:73. Judge Kwan told him to take the written Defendant's Waiver of Constitutional Rights (Exhibit 7) (the "Waiver") from the podium and "sit down and read it." R.145:74. Peterson "was not happy" that Judge Kwan made him read the Waiver. R.145:73.

Peterson acknowledged he signed the Waiver. R. 145:27, 41. The Waiver stated in part:

COUNSEL. I have the right to consult with and be represented by an attorney. If the judge were to determine that I am too poor to be able to hire a lawyer, then the judge could appoint one to represent me. I might later, if the judge determined I was able, be required to pay for the appointed lawyer's service to me.

Exhibit 7. Peterson signed his initials after this paragraph.

The Waiver further informed Peterson of, among other things, his right to a jury trial, his right to an appeal, that he was presumed innocent, that each element of the charged offense must be proven beyond a reasonable doubt, and

that by entering a plea he could face enhanced penalties for future convictions. Exhibit 7.

In addition to the Waiver, Peterson also executed a document entitled “Possession of Controlled Substance (marijuana).” Exhibit 9. This document explained the elements of the offense of possession of a controlled substance, described the applicable penalties for the crime, and the enhanced penalties that could apply to Peterson in the future. Id.

Judge Kwan remained on the bench while Peterson read and signed his Waiver. R.145:74. Judge Kwan waited for “[p]robably 10 to 15 minutes” while Peterson read the Waiver. R. 145:60. Judge Kwan testified that he knew “for a fact” that Peterson read the Waiver. R. 145:59.

After Peterson read and signed his Waiver, Judge Kwan went through his “typical” Rule 11 colloquy twice with Peterson. Id.; R.145:58. The reason Judge Kwan went through his Rule 11 colloquy twice on July 18, 2000, is that Peterson had two separate criminal cases pending against him in Taylorsville, and he chose to plead guilty in both cases on July 18, 2000. See R. 115.

The docket of the Taylorsville Justice Court confirms that Peterson was advised of his Rule 11 rights. Exhibit 8. Judge Kwan testified that his colloquy included the following:

Judge Kwan asked Peterson if he actually read the Waiver.

- Judge Kwan asked Peterson if he read and understood the English language.
- Judge Kwan asked Peterson if he understood that by entering a plea, Peterson would be giving up or waiving each of the constitutional rights listed on the Waiver.
- Judge Kwan informed Peterson that he could go to jail.
- Judge Kwan informed Peterson that if he wanted an attorney and could not afford one, “there was a process that we could go through to see if they qualified to have one appointed to them at little or no cost.”
- Judge Kwan asked Peterson if anybody promised him anything to induce him to enter his plea.
- Judge Kwan asked Peterson if anyone threatened him or forced him to enter his plea.

See R. 145:56-58. In addition, when Judge Kwan called his cases individually, he reads to the defendant “the charges, the date that it allegedly occurred, location.” R. 145:55.

Peterson admitted in his testimony that Judge Kwan advised him of most of these rights. R. 145:42-50. Specifically:

- Judge Kwan told Peterson “that by entering a guilty plea in this case that it could be used later on to enhance another conviction.” R. 145:42.
- Judge Kwan asked Peterson if he read and understood the English language. R. 145:49.
- Judge Kwan asked Peterson if he “understood that by entering a guilty plea, [he] was giving up” the rights listed on the Waiver. R. 145:50.
- Judge Kwan discussed with Peterson “the consequences of a guilty plea . . . the fact that you could be sentenced to jail.” R. 145:50.
- Judge Kwan explained to Peterson “how long [Peterson] could be sentenced to jail before [he] entered [his] guilty plea.” R. 145:50.
- Judge Kwan told Peterson that if he “couldn’t afford a lawyer and if [he] wanted one, the Court would appoint one for [him].” R. 145:42.
- Judge Kwan asked if Peterson wanted a lawyer, R. 145:49, and Peterson indicated that he did not want a lawyer. Id.

Based on Judge Kwan’s close familiarity with Peterson through this case and others, Judge Kwan concluded that Peterson “understood his rights.” R. 145:60. Indeed, Judge Kwan “wouldn’t have gone forward” had he “even suspected” that Peterson did not understand his rights. Id. Although Judge Kwan did not specifically recall whether he asked Peterson about his educational

level, by July 18, 2000 Judge Kwan “was comfortable that [Peterson] understood English and understood what we were talking about and he understood the consequences of what he was doing.” R. 145:74.

After being advised of and waiving his rights, Peterson entered a guilty plea to possession of a controlled substance and possession of drug paraphernalia. Exhibit 8. Peterson was sentenced to 360 days in jail, and the payment of a fine, but with the sentence suspended upon the completion of one year’s conditional probation. Id.; see also R. 145:109. One of the conditions of Peterson’s conditional probation was that he appear before Judge Kwan for regular reviews. See Exhibit 8. During one of these subsequent reviews, Judge Kwan found that Peterson violated his probation, imposed his original jail sentence and sent him to the Salt Lake County jail. Id. During subsequent months Judge Kwan suspended the balance of Peterson’s sentence, reinstated probation, placed Peterson on house arrest with electronic monitoring, issued a bench warrant for Peterson’s arrest, revoked Peterson’s probation and reinstated his sentence with credit for time served. Id.

SUMMARY OF ARGUMENT

The procedural context of this case is critical. Because this appeal arises out of Peterson's collateral challenge to his sentence, there is a strong presumption of regularity of the proceedings through which Peterson waived his rights. Moreover, in a post-conviction challenge to a sentence (as opposed to a direct appeal from a conviction), it is appropriate to consider any evidence demonstrating whether Peterson's waiver was knowing, voluntary, and intelligent.

This Court should affirm the dismissal of the Petition because Peterson adduced no evidence in the court below that his waiver of the right to counsel was not knowing, voluntary, and intelligent.

The most striking aspect of this case is that Peterson has never claimed that his waiver of the right to counsel was not knowing, voluntary, and intelligent. Peterson did not testify that his waiver was involuntary; quite the contrary, he testified that he appeared voluntarily to waive his rights. He has never claimed that he did not know what he was doing when he waived his rights, nor has he claimed that he lacked the intelligence to understand the consequences of waiving his right to counsel.

Peterson instead focuses on a rigid mantra that he contends that a trial conduct must recite for a waiver of the right to counsel to be effective. Peterson argues that because "there is no evidence" that the Taylorsville Justice Court recited certain portions of this mantra, his waiver was invalid. However, given the

presumption of regularity of the proceedings below, and Peterson's failure to claim that his waiver was not knowing, voluntary, and intelligent, the presumption of regularity prevails and the court below should be affirmed.

Nevertheless, even if this Court were to find that Peterson adduced sufficient evidence below to meet his burden to rebut the presumption of regularity, the court below should still be affirmed. Whether this Court were to apply the standard recently announced in Iowa v. Tovar, No. 02-1541, 2004 U.S. LEXIS 1837 (March 8, 2004), or the standards applied in Utah cases predating the Tovar decision, the evidence demonstrates that Peterson's waiver of his right to counsel was knowing, voluntary, and intelligent.

ARGUMENT

I. BECAUSE THIS APPEAL ARISES OUT OF PETERSON'S COLLATERAL ATTACK ON HIS SENTENCE, (A) THE BURDEN IS ON PETERSON TO SHOW THAT HIS WAIVER OF THE RIGHT TO COUNSEL WAS INVALID, AND (B) THIS COURT'S REVIEW IS NOT LIMITED TO THE RECORD OF THE PLEA HEARING.

The procedural posture of this appeal is critical. Peterson's appeal is from the denial of post-conviction relief, as opposed to a direct appeal from Peterson's conviction. There are two principal consequences of this procedural posture. First, a strong presumption of regularity attaches to Peterson's waiver of his right to counsel, and the burden is on Peterson to adduce evidence sufficient to overcome this presumption. Second, this Court's review is not limited to the record of the plea hearing. Peterson ignores this distinction in his brief. Virtually every case Peterson cites in his brief deals with a direct appeal from a conviction rather than an appeal from the denial of post-conviction relief.

The first principal consequence from this procedural posture is that the burden of proof is on Peterson, and there is a presumption of regularity of the Taylorsville proceedings. The Utah Supreme Court has acknowledged the burden on a person challenging a waiver of the right to counsel through post-conviction relief: "To obtain a writ of habeas corpus, a petitioner must show more than a violation of the prophylactic provisions of rule 11; he or she must show that the guilty plea was in fact not knowing and voluntary." Salazar v. Warden, 852 P.2d 988, 992 (Utah 1993) (emphasis added); see also State v. Triptow, 770 P.2d

146, 149 (Utah 1989) (finding in context of post-conviction challenge to unappealed conviction that presumption of regularity applies); Gardner v. Holden, 888 P.2d 608, 613 (Utah 1994) (burden is on petitioner seeking post-conviction relief). This Court recently reaffirmed this burden in a case involving a defendant's waiver of his Sixth Amendment right to counsel. Moench v. State, 2004 UT App 57, ¶17. A copy of the Moench decision is Addendum A.

Likewise, the United States Supreme Court recently ruled: "in a collateral attack on an uncounseled conviction, it is the defendant's burden to prove that he did not competently and intelligently waive his right to the assistance of counsel." Iowa v. Tovar, No. 02-1541, 2004 U.S. LEXIS 1837, at *30 (March 8, 2004). A copy of the Tovar decision is Addendum B. The United States Supreme Court has consistently adhered to the principle "deeply rooted in our jurisprudence: the 'presumption of regularity' that attaches to final judgments, even when the question is the waiver of constitutional rights." Parke v. Raley, 506 U.S. 20, 29 (1992); accord Daniels v. United States, 532 U.S. 374, 381 (2001) (recognizing presumption of regularity). This presumption of regularity applies regardless of the procedural context of the post-conviction challenge—whether in a habeas corpus proceeding or otherwise. Parke, 506 U.S. at 29-30.

By contrast, the burden is reversed in a direct appeal from a conviction. See State v. Heaton, 958 P.2d 911, 912, 917 (Utah 1998) (arising out of appeal of conviction; noting "presumption against waiver, and [that] doubts concerning

waiver must be resolved in defendant's favor"); State v. Arguelles, 2001 UT 1, ¶¶ 1, 70, 63 P.3d 731 (arising out of appeal of conviction; court stated that "we indulge every reasonable presumption against waiver of the right"). Peterson's argument in reliance on the presumption against waiver (see Brief of Appellant ("Peterson's Brief") at 14-15, 17, 32) is misplaced. In the context of a post-conviction challenge to a guilty plea, as opposed to a direct appeal from a conviction, the burden is on Peterson to adduce some evidence that he was denied his Sixth Amendment rights. Indeed, Peterson acknowledged that he had the burden of proof in the proceeding below. R. 81; 145:24.

The second primary consequence of the procedural posture of this case is the evidence considered. A court considering a post-conviction attack on a judgment "is not limited to the record of the plea hearing but may look at the surrounding facts and circumstances, including the information the petitioner received from his or her attorneys before entering the plea." Salazar, 852 P.2d at 992 (affirming denial of habeas corpus relief to prisoner alleging the denial of his right to counsel); see also Moench v. State, 2004 UT App 57, ¶17 (same); State v. Gutierrez, 2003 UT App 95, ¶ 11 (finding that it was appropriate to consider a "transcript, testimony regarding taking of the plea, a docket sheet, or other affirmative evidence" in a collateral attack on a guilty plea).

This Court acknowledged the distinction in evidence considered between a direct appeal and a collateral challenge in State v. Lehi, 2003 UT App 212, 73

P.2d 985. Lehi involved a direct appeal from a motion to withdraw a guilty plea. Id. at ¶ 1. In the procedural posture of Lehi, it was appropriate only to consider the plea record. Id. at ¶ 9 & n.3. By contrast, in a case involving a collateral attack on a judgment, it is appropriate to consider evidence outside of the plea record. Id.

In sum, because the case at bar is an appeal from the denial of post-conviction relief, Peterson bears the burden of proving that his waiver of the right to counsel was not knowing, voluntary, and intelligent. Further, it is appropriate to consider any available evidence that is probative in determining this issue. As will be demonstrated below, Peterson utterly failed to meet his burden of proof, and therefore the court below should be affirmed.

II. THE POST-CONVICTION COURT CORRECTLY FOUND THAT PETERSON DID NOT MEET HIS BURDEN TO PROVE THAT HIS WAIVER OF THE RIGHT TO COUNSEL WAS INVALID.

The Sixth Amendment to the United States Constitution guaranties the accused “[i]n all criminal prosecutions . . . the Assistance of counsel for his defense.” U.S. Const. Amend. VI. Nevertheless, the accused may waive the right to counsel if the waiver is “knowing, voluntary, and intelligent.” Iowa v. Tovar, No. 02-1541, 2004 U.S. LEXIS 1837, at *30 (March 8, 2004); see also State v. Heaton, 958 P.2d 911, 918 (Utah 1998) (finding that a defendant’s waiver of counsel must be “knowingly, intelligently, and voluntarily made”); State v.

Frampton, 737 P.2d 183, 187 (Utah 1987) (any waiver must be “a voluntary one which is knowingly and competently made”).

It is not disputed in this case that Peterson waived his right to counsel. However, Peterson contends that his waiver of this right was in violation of the Sixth Amendment to the United States Constitution. The proof Peterson adduced in the court below is strikingly devoid of any allegation that his waiver of counsel was not knowing, voluntary, or intelligent. Peterson has never claimed that his waiver was involuntary; or that he did not understand what he was doing when he waived his right to counsel, or that he lacked the intelligence to understand the consequences of the waiver of the right to counsel.³

Peterson’s Petition (R. 1) does not assert that his waiver was not knowing, voluntary, or intelligent. At most, the Petition asserts that Peterson “was sentenced to jail in violation of the Sixth Amendment.” Id. Likewise, not once in Peterson’s testimony did he claim that his waiver was not knowing, voluntary, or intelligent. See R. 145:25-51. Indeed, Peterson acknowledged twice that his plea was voluntary. R. 145:40, 43-44.

³ While Peterson’s counsel made statements to this effect in her opening statement, R. 145:15, 17, the statements of counsel have no evidentiary value. The evidence adduced by Peterson in the proceeding below (which consisted solely of Peterson’s testimony) does not contain any allegation that Peterson’s waiver was not voluntary, knowing, or intelligent.

Peterson's own Response to Taylorsville Justice Court's Pre-Hearing Memorandum (R. 78) accurately sets forth the extremely limited allegations Peterson offered below:

Under Utah Code Ann. § 78-35a-105, Mr. Peterson, as Petitioner in this matter "has the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle petitioner to relief." The Petition in this matter clearly sets out the facts necessary to entitle Mr. Peterson to relief. It has been plead and is not disputed that Mr. Peterson entered a guilty plea in the Taylorsville Justice Court without the assistance of counsel. It is further undisputed that Mr. Peterson was sentenced to 360 days [sic] jail in the underlying case. Mr. Peterson has also asserted in the Petition that he did not make a constitutionally valid waiver of counsel at the time the pleas was entered. As such, Mr. Peterson has met his burden in this matter.

R. 81. Peterson does not offer any actual facts to support his legal conclusion, instead relying on the bare assertion that his waiver was not "constitutionally valid" to meet his acknowledged burden.

The question is thus whether conclusory allegations of a constitutional violation are sufficient to meet Peterson's burden to demonstrate that his waiver of the right to counsel was invalid. The United States Supreme Court recently considered this issue in Iowa v. Tovar, No. 02-1541, 2004 U.S. LEXIS 1837 (March 8, 2004). Tovar, like the instant case, arose out of a "collateral attack on an uncounseled conviction." Id. at *30. The Court recognized that in this procedural context, "it is the defendant's burden to prove that he did not completely and intelligently waive his right to the assistance of counsel." Id. The

Court noted that the defendant “has never claimed that he did not fully understand the charge or the range of punishment for the crime prior to pleading guilty.” Id. Nor did the defendant “allege that he was unaware at the . . . arraignment of his right to counsel prior to pleading guilty and at the plea hearing.” Id. at *17 Instead, he maintained that his waiver of counsel was invalid because the trial court had inadequately warned him of the dangers and disadvantages of self-representation. Id. In a unanimous decision, the Supreme Court reversed the Iowa Supreme Court’s holding that the defendant’s waiver of his Sixth Amendment rights was invalid. Id. at *10.

Like the defendant in Tovar, Peterson has never claimed that his waiver of his right to counsel was not voluntary, knowing, or intelligent. In the absence of any affirmative allegation that Peterson’s waiver of counsel was not voluntary, knowing, or intelligent, Peterson has failed to meet his burden to prove his waiver of Sixth Amendment rights was invalid. Cf. Moench v. State, 2004 UT App 57, ¶¶1, 16-18 (considering merits of petition for post-conviction relief where Defendant claimed that he did not enter “a voluntary and knowledgeable guilty plea”).

This Court was presented with a situation similar to Tovar in State v. Gutierrez, 2003 UT App 95, 68 P.3d 1035. Like Tovar, Gutierrez involved a collateral attack on a guilty plea. The defendant offered no evidence other than a “self-serving affidavit asserting his plea was unconstitutional.” Id. at ¶ 12. This

Court held that this “affidavit is not sufficient to overcome the presumption of regularity established in Triptow. A defendant must demonstrate the involuntariness of his plea by some evidentiary method other than his own bare assertions.” Id.

The case at bar is identical with Gutierrez in that Peterson offered no evidence whatsoever in the record below, other than his own self-serving testimony. Peterson rested his case below after introducing only his own testimony. See R. 145:25-51 (Peterson’s case). Peterson did not offer a single document into evidence. As in Gutierrez, the presumption of regularity of the proceedings below cannot be rebutted with no evidence other than Peterson’s testimony.

At bottom, Peterson offers little more in support of his case other than arguments that “there is no evidence” that the Taylorsville Justice Court conducted a complete colloquy at the plea hearing. See, e.g., Peterson’s Brief at 26 (“The docket does not indicate that the judge made a determination that Mr. Peterson knowingly and voluntarily waived his right to counsel”); id. at 31 (“no indication in either the docket or the affidavit that the justice court judge advised Mr. Peterson that the right to self-representation is a distinct constitutional right”); id. at 38 (“There is no evidence that the justice court judge ascertained that Mr. Peterson possessed the intelligence and capacity to understand and appreciate the consequences of proceeding pro se.”).

The allegations in Guitierrez were similar. That case involved a collateral challenge to a guilty plea where defendant alleged “that the judge did not inform his of his right to counsel, that he was not offered the assistance of a public defender, that he did not read the papers before signing them, and that the judge did not explain his right to confront the witnesses against him or to call witnesses on his own behalf.” Guitierrez, 2003 UT at ¶9. This Court found these allegations insufficient to challenge the presumption of regularity of his guilty plea. Id. at ¶ 13.

Peterson has utterly failed to meet his burden to show that his waiver of the right to counsel was not knowing, voluntary, and intelligent. While Peterson often claims that “there is no evidence” that Judge Kwan conducted specific colloquies with Peterson, in the absence of evidence, the presumption of regularity of the Taylorsville proceedings prevails. Peterson has the acknowledged burden of introducing specific evidence that his waiver of counsel was not knowing, voluntary, and intelligent. He has admitted that his waiver was voluntary, and he had not testified or otherwise produced evidence to show that his waiver was not knowing or intelligent. The court below should be affirmed because Peterson did not meet his burden of proof.

III. EVEN IF THIS COURT WERE TO FIND THAT PETERSON ADDUCED EVIDENCE SUFFICIENT TO WARRANT CONSIDERATION OF HIS PETITION FOR POST-CONVICTION RELIEF, HIS WAIVER OF THE RIGHT TO COUNSEL WAS CONSTITUTIONALLY VALID.

A. Standards for Waiver of the Right to Counsel

Peterson's argument focuses on a rigid mantra that he claims a court must recite for a waiver of the right to counsel to be valid. The United States Supreme Court recently rejected a similar argument that a court must conduct a specific colloquy for the waiver of the right to counsel to be effective. See Iowa v. Tovar, No. 02-1541, 2004 U.S. LEXIS 1837, at *23 (March 8, 2004) ("We have not, however, prescribed any formula or script to be read to a defendant who states that he elects to proceed without counsel"). To the contrary, "[t]he information a defendant must possess in order to make an intelligent decision . . . 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." Id. at *23.

In the context of the waiver of counsel to enter a guilty plea, 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 entry of a guilty plea." Id. at *10. The United States Supreme Court clarified that a more searching colloquy is required where a defendant seeks to proceed through trial pro se. Id. at *24.

However, “at the earlier stages of the criminal process, a less searching or formal colloquy may suffice.” Id. This is so “not because pretrial proceedings are ‘less important’ than trial, but because, at that stage, ‘the full dangers and disadvantages of self-representation . . . are less substantial and more obvious to the accused than they are at trial.’” Id. at *26 (quoting Patterson v. Illinois, 487 U.S. 285, 299 (1988)).

Prior to the Tovar case, the Utah Supreme Court ruled that “before a defendant can waive the right to counsel, ‘the defendant “should be made aware of the dangers and disadvantages of self-representation, so that . . . he knows what he is doing and his choice is made with eyes open.”” State v. Arguelles, 2003 UT 1, 63 P.2d 731 (quoting State v. Frampton, 737 P.2d 183, 187 (Utah 1987) (quoting Faretta v. California, 422 U.S. 806, 835 (1975))). To establish the validity of a waiver of the right to counsel, trial courts should do the following:

“(1) advise the defendant of his constitutional right to the assistance of counsel, as well as his constitutional right to defend himself; (2) ascertain that the defendant possesses the intelligence and capacity to understand and appreciate the consequences of the decision to represent himself, including the expectation that the defendant will comply with technical rules and the recognition that presenting a defense is not just a matter of telling one’s story; and (3) ascertain that the defendant comprehends the nature of the charges and proceedings, the range of permissible punishments, and any additional facts essential to a broad understanding of the case.”

State v. Arguelles, 2003 UT 1, 63 P.2d 731 (2003) (quoting State v. Heaton, 958 P.2d 911, 918 (Utah 1998)).

Taylorsville contends that Tovar overruled Utah precedent to the extent Utah cases have required a more searching colloquy than Tovar. See Tovar, 2004 U.S. LEXIS 1837, at *10 (overruling Iowa Supreme Court's requirement of two specific warnings that were not necessary under the Sixth Amendment).⁴ However, as will be demonstrated below, even if the more detailed requirements of the pre-Tovar Utah precedent are applied, Peterson's waiver of his right to counsel was valid.

B. Peterson's Waiver of Counsel Was Valid Under the Tovar Court's Standards

Tovar enunciated the standard for a valid waiver of the right to counsel in the context of entering a guilty plea as follows: "The constitutional requirement 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." 2004 U.S. LEXIS 1837, at * 10. The constitutional requirement was satisfied in the case at bar.

First, Peterson was informed of the nature of the charges against him. It is undisputed that Peterson signed Exhibit 9, which indicates that Peterson was charged with possession of controlled substance. Moreover, when Judge Kwan

⁴ Peterson has not challenged his sentence on the basis of the Utah Constitution, instead, he has relied solely on the Sixth Amendment to the United States Constitution. See R. 1-5; Peterson's Brief at 1-2.

called Peterson's case, he read to Peterson "the charges, the date that it allegedly occurred, location." R. 145:55. It is also clear that Peterson knew the nature of the charges against him based on his executing the Waiver, which contained a handwritten notation (presumably Peterson's own handwritten notation) near the top of the Waiver "POCS + PODP," or possession of controlled substance and possession of drug paraphernalia. Exhibit 7. Moreover, Peterson has never contended that he did not understand the nature of the charges against him.

The docket of the Taylorsville Justice Court independently satisfies this requirement. The docket indicated that Peterson was advised of his Rule 11 rights. Exhibit 8. Further, the court below found that Peterson was advised of his Rule 11 rights twice on July 18, 2000. R. 115. Pursuant to Utah Code Ann. § 78-5-122 (2002): "Entries in a justice court judge's docket under Section 78-5-121, certified by the judge or his successor in office, are *prima facie* evidence of the facts stated." Utah R. Crim. P. 11(e) provides in part that a court may not accept a guilty plea unless the judge has found that "the defendant understands the nature and elements of the offense to which the plea is entered . . ." Utah R. Crim. P. 11(e)(4)(A). Accordingly, the docket constitutes prima facie evidence that Peterson was informed of the nature of the charges against him.

Second, Peterson was informed of his right to be counseled regarding his plea. Utah R. Crim. P. 11(e)(1) requires a judge to determine that "if the

defendant is not represented by counsel, he or she has knowingly waived the right to counsel and does not desire counsel.” Since the docket (Exhibit 8) indicates that Peterson was advised of his Rule 11 rights, the docket constitutes prima facie evidence that Peterson was informed of his right to be counseled regarding his plea.

The evidence in the court below was consistent with the docket entry. Peterson admitted in his testimony that Judge Kwan told him that if he “couldn’t afford a lawyer and if [he] wanted one, the Court would appoint one for [him].” R. 145:42. Peterson also conceded that Judge Kwan asked if Peterson wanted a lawyer, R. 145:49, and Peterson indicated that he did not want a lawyer. Id. Further, the Waiver Peterson executed advised him: “I have the right to consult with and be represented by an attorney. If the judge were to determine that I am too poor to be able to hire a lawyer, then the judge could appoint one to represent me. I might later, if the judge determined I was able, be required to pay for the appointed lawyer’s service to me.” Exhibit 7. Finally, Peterson also executed the Application (Exhibit 6) which also informed him of his right to counsel.

Third, Peterson was advised of the range of allowable punishments attendant upon the entry of a guilty plea. Utah R. Crim. P. 11(e)(5) requires a judge accepting a guilty plea to determine that “the defendant knows the minimum and maximum sentence, and if applicable, the minimum mandatory nature of the minimum sentence, that may be imposed for each offense to which

a plea is entered, including the possibility of consecutive sentences.” Since the docket indicates that Peterson was advised of his Rule 11 rights (Exhibit 8), the docket entry is prima facie evidence that Peterson was advised of the range of punishments he faced as a result of his guilty plea.

Again, the testimony in the proceeding below was consistent with the docket. Peterson admitted that Judge Kwan told him “that by entering a guilty plea in this case that it could be used later on to enhance another conviction.” R. 145: 42. Peterson also admitted that Judge Kwan discussed with him “the consequences of a guilty plea . . . the fact that you could be sentenced to jail.” R. 145:50. And Peterson acknowledged that Judge Kwan explained to him “how long [Peterson] could be sentenced to jail before [he] entered [his] guilty plea.” R. 145:50. Peterson also executed Exhibit 9, which explains the penalty and enhanced penalty applicable to possession of marijuana. Moreover, Peterson has never claimed that he did not understand the range of allowable punishments attendant to pleading guilty in this case.

In sum, even if this Court determines that Peterson presented sufficient evidence in the court below to overcome the presumption of regularity, the information and warnings the Taylorsville Justice Court conveyed to Peterson satisfied the Tovar standard.

C. Peterson's Waiver of Counsel Was Valid Under the Pre-Tovar Utah Precedent

Tovar implicitly overruled Utah precedent to the extent it required information in addition to the Tovar standard to be conveyed to a defendant pleading guilty without counsel. As an example, under pre-Tovar precedent, a judge is arguably required to inform a defendant waiving counsel that the defendant will need to comply with technical rules, such as the rules of evidence. See Arguelles, 2003 UT 1, ¶ 70, 63 P.3d 731. While this type of warning would make sense for a criminal defendant proceeding to trial pro se, it has no application to a defendant who is simply pleading guilty. Said another way, Tovar clarified that a wooden recitation of specific warnings which are irrelevant to pleading guilty is not required.

Nonetheless, even if the more exacting standards of Utah's pre-Tovar case law are considered, Peterson's waiver of his right to counsel was still valid.

1. Peterson Was Aware of the Dangers and Disadvantages of Self-Representation

Peterson was aware of the dangers and disadvantages of self-representation when he waived his right to counsel in this case. As stated by the Utah Supreme Court, a defendant “”should be made aware of the dangers and disadvantages of self-representation, so that . . . he knows what he is doing and his choice is made with eyes open.”” State v. Arguelles, 2003 UT 1, ¶ 70, 63

P.3d 731 (emphasis added) (quoting State v. Frampton, 737 P.2d 183, 187 (Utah 1987) (quoting Faretta v. California, 422 U.S. 806, 835 (1975))).

Here, Judge Kwan specifically testified that he “was comfortable that [Peterson] understood English and understood what we were talking about and he understood the consequences of what he was doing.” R: 145:74 (emphasis added). Judge Kwan formed this opinion based on his close familiarity with Peterson on several cases over the year before Peterson signed the Waiver. Indeed, Judge Kwan “wouldn’t have gone forward” had he “even suspected” that Peterson did not understand his rights. Id.

Peterson was also intimately familiar with the consequences of pleading guilty pro se as a result of his having done so in two cases before the Midvale Justice Court approximately six months before he waived his right to counsel in this case. Exhibit 4; Exhibit 5. Peterson had also pleaded guilty and waived counsel in connection with two separate cases in the Taylorsville Justice Court in 1999, the year before the guilty pleas in the instant case. Exhibit 2; Exhibit 3. Peterson was no novice to the criminal justice system and the consequences of waiving counsel and pleading guilty to crimes.

Given the above evidence that Peterson was intimately familiar with the dangers and disadvantages of proceeding without counsel, and the lack of evidence to the contrary, the court below’s finding that Peterson’s waiver of his

right to counsel was “knowing, voluntary, and intelligent” (R. 118) should be affirmed.

2. Peterson was Advised of His Right to Counsel, and Exercised His Constitutional Right to Defend Himself

It is undisputed that Judge Kwan advised Peterson of his right to counsel. Peterson testified that Judge Kwan asked if Peterson wanted a lawyer, R. 145:49, and Peterson indicated that he did not want a lawyer. Id. Peterson also testified that Judge Kwan told him that if he “couldn’t afford a lawyer and if [he] wanted one, the Court would appoint one for [him].” R. 145:42. The Waiver Peterson signed also explained Peterson’s right to an attorney, and that “[i]f the judge were to determine that I am too poor to be able to hire a lawyer, then the judge could appoint one to represent me.” Exhibit 7. Peterson also signed the Application (Exhibit 6) which informed Peterson of his right to counsel.

Peterson attempts on this appeal to make much of his claim that he was not advised of his right to self-representation. Peterson’s Brief at 31. But it is beyond dispute that Peterson knew of this right, since he in fact exercised it in this case (and other cases). It strains credulity for Peterson to suggest that his sentence should be overturned because he was not advised of a right that he not only knew of, but in fact exercised.

3. Judge Kwan Ascertained that Peterson Possessed the Intelligence and Capacity to Understand and Appreciate the Consequences of his Decision to Represent Himself

Judge Kwan was very familiar with Peterson and his capacity when Peterson entered his guilty plea on July 18, 2000. R. 145:55, 59. Indeed, Peterson had appeared before Judge Kwan at least seven times between March and June 27, 2000. Exhibit 8. Peterson testified that he was familiar with Judge Kwan by the time he appeared before him on July 18, 2000. R. 145:33. Peterson also acknowledged that he “had appeared numerous times in front of Judge Kwan” before executing the Waiver. R.145:41. Peterson had “been a defendant” in Judge Kwan’s court “for probably over a year on other matters.” R. 145:59. It is within the context of a defendant and a judge who were very familiar with each other that Peterson’s waiver of his right to counsel must be considered.

Judge Kwan remained on the bench while Peterson read and signed his Waiver. R.145:74. Judge Kwan testified that he knew “for a fact” that Peterson read the Waiver. Tr. 59. After completing his calendar on July 18, Judge Kwan remained on the bench for “[p]robably 10 to 15 minutes” while Peterson read the Waiver. R. 145:60.

After Peterson read and signed the Waiver, Judge Kwan asked Peterson if he actually read the Waiver, and asked Peterson if he read and understood the English language. R. 145:56. Peterson conceded that Judge Kwan asked Peterson if he read and understood the English language. R. 145:49.

Based on Judge Kwan's close familiarity with Peterson on several cases over the year before Peterson signed the Waiver, Judge Kwan concluded that Peterson "understood his rights." R. 145:60. Indeed, Judge Kwan "wouldn't have gone forward" had he "even suspected" that Peterson did not understand his rights. Id. Although Judge Kwan did not specifically recall whether he asked Peterson about his educational level, by June 18, 2000 Judge Kwan "was comfortable that [Peterson] understood English and understood what we were talking about and he understood the consequences of what he was doing." R. 145:74. Similarly, in Moench v. State, 2004 UT App 57, ¶ 19, this Court found that a defendant's waiver of counsel was valid based in part on testimony of defendant's attorney "that he was confident that Defendant understood the contents of the plea affidavit."

It is also noteworthy that Peterson was not a novice to the criminal justice system, and was not unfamiliar with the concept of pleading guilty and waiving his right to counsel. See State v. McDonald, 922 P.2d 776, 785 (Utah Ct. App 1996) (taking into account that "Defendant had previously been involved in a trial" in determining defendant intelligently waived his right to counsel); cf. State v. Valencia, 2001 UT App 159, 27 P.3d 573 (taking into consideration fact that defendant had "never experienced a jury trial"). Less than six months before Peterson appeared to plead guilty on the charges at issue in the instant case, Peterson had appeared before Judge Kwan, pleaded guilty, and waived his right

to counsel in connection with two separate cases. Exhibit 1; Exhibit 2; Exhibit 3. And about a month before Peterson pleaded guilty to the charges at issue in this case, Peterson appeared in two separate cases in the Midvale Justice Court, pleaded guilty, and waived his right to counsel. Exhibit 4; Exhibit 5.

Given Peterson's prior experiences in the Taylorsville Justice Court and other courts in waiving his right to counsel, Judge Kwan's close familiarity with Peterson, and the record in the proceeding below, it is apparent that Judge Kwan ascertained that Peterson had the intelligence and capacity to understand his decision to waive the right to counsel. Indeed, the court below found that "based upon the judge's familiarity and experience with Mr. Peterson, he determined that Mr. Peterson was able to represent himself." R. 110-11. Notably, Peterson has not claimed that he lacked the intelligence or capacity to understand what he was doing on July 18, 2000. Since there is evidence that Peterson's waiver was intelligent, and no evidence to the contrary, the court below did not err in finding that Peterson's waiver of the right to counsel was intelligent. R. 118.

4. Judge Kwan Ascertained that Peterson Comprehended the Nature of the Charges and Proceedings and the Range of Permissible Punishments

It is undisputed that Peterson was informed of the nature of the charges against him and the range of permissible punishments. Notably, Peterson does not make a contrary argument in Peterson's Brief.

The docket of the Taylorsville Justice Court alone satisfies this requirement. The docket indicated that Peterson was advised of his Rule 11 rights. Likewise, the court below found that Judge Kwan completed two Rule 11 colloquies with Peterson on July 18, 2000. R. 115. Utah R. Crim. P. 11(e) provides in part that a court may not accept a guilty plea unless the judge has found that “the defendant understands the nature of the elements of the offense to which the plea is entered . . .” Utah R. Crim. P. 11(e)(4)(A). This rule also requires the court to determine that “the defendant knows the minimum and maximum sentence, and if applicable, the minimum mandatory nature of the minimum sentence, that may be imposed for each offense to which a plea is entered.” Utah R. Crim. P. 11(e)(5). Since the docket entry constitutes prima facie evidence of the facts stated, Utah Code Ann. § 78-5-122 (2002), the docket is prima facie evidence that Peterson was advised of the nature of the charges against him and the range of permissible punishments.

Moreover, Peterson’s own testimony establishes that he knew of the range of punishments he could face by pleading guilty. Peterson admitted that Judge Kwan told him “that by entering a guilty plea in this case that it could be used later on to enhance another conviction.” R. 145: 42. Peterson also admitted that Judge Kwan discussed with him “the consequences of a guilty plea . . . the fact that you could be sentenced to jail.” R. 145:50. And Peterson acknowledged that Judge Kwan explained to him “how long [Peterson] could be sentenced to jail

before [he] entered [his] guilty plea.” R. 145:50. In addition to this colloquy, Peterson executed Exhibit 9, which explains the penalty and enhanced penalty applicable to possession of marijuana.

The evidence in the proceeding below also demonstrated that Peterson was informed of the nature of the charges against him. Peterson signed Exhibit 9, which indicates that Peterson was charged with Possession of Controlled Substance (marijuana). Moreover, when Judge Kwan called his cases, he reads to the defendant “the charges, the date that it allegedly occurred, location.” Tr. 145:55. It is also clear that Peterson knew the nature of the charges against him based on his executing the Waiver, which stated at the top that the charges against him were “POCS + PODP,” or possession of controlled substance and possession of drug paraphernalia. Exhibit 7.

In short, there was ample evidence to demonstrate that Peterson’s guilty plea was knowing, intelligent, and voluntary, even if the factors considered by pre-Tovar Utah decisions are considered. The court below correctly concluded that Peterson “made a knowing, voluntary and intelligent waiver of his right to counsel,” (R. 118), and therefore this Court should affirm the dismissal of Peterson’s Petition.

IV. EVEN ASSUMING THAT PETERSON MET HIS BURDEN OF PROVING THAT HIS WAIVER OF THE RIGHT TO COUNSEL WAS INVALID, THIS COURT SHOULD REMAND THIS CASE TO THE TAYLORSVILLE JUSTICE COURT FOR SENTENCING.

Taylorsville concurs with Peterson's Brief to the extent that it argues that if Peterson's waiver of his Sixth Amendment rights was invalid, the appropriate remedy is to invalidate only "the aspect of Mr. Peterson's sentence that imposes a suspended jail sentence." Peterson's Brief at 46. This is consistent with Peterson's position below that "Mr. Peterson, in his Petition does not challenge to [sic] underlying conviction only the Court's imposition of jail in violation of his Sixth Amendment right to Counsel." R. 82; see also R. 145:11-12 ("We are not challenging the conviction in this case. We are solely challenging the sentence . . ."); R. 80 ("Mr. Peterson challenges the legality of the sentence imposed.").

Indeed, the statute which provides for post-conviction relief suggests that the appropriate remedy here, where Peterson does not challenge his underlying conviction, is to remand this case for a new sentencing proceeding. See Utah Code Ann. § 78-35a-108(1) (2002) ("If the court grants petitioner's request for relief, it shall either: (a) modify the original conviction or sentence; or (b) vacate the original conviction or sentence and order a new trial or sentencing proceeding as appropriate."). Peterson has not requested a modification of his original conviction or sentence, and therefore alternative (a) of Utah Code Ann. § 78-35a-108(1) is not applicable. Similarly, Peterson has not challenged his conviction,

and therefore under alternative (b), the appropriate remedy is to “vacate the original . . . sentence and order a new . . . sentencing proceeding.” Id.

Accordingly, even if Peterson prevails on this appeal, his convictions in the Taylorsville Justice Court must stand, and this Court should remand the case to the Taylorsville Justice Court for a new sentencing proceeding.

CONCLUSION

Peterson failed to meet his burden to prove that his waiver of the right to counsel was not knowing, voluntary, and intelligent. Accordingly, this Court should affirm the dismissal of Peterson’s Petition.

Respectfully Submitted 31st day of March, 2004.

PARSONS KINGHORN HARRIS
A Professional Corporation

By:  _____

John N. Brems

George B. Hofmann

Attorneys for the Taylorsville Justice Court

ADDENDA

ADDENDUM A

LEXSEE 2004 UT APP 57

Andrew D. Moench, Plaintiff and Appellant, v. State of Utah, Defendant and Appellee.

Case No. 20030382-CA

COURT OF APPEALS OF UTAH

2004 UT App 57; 2004 Utah App. LEXIS 24

March 11, 2004, Filed

NOTICE: [**1] THIS OPINION IS SUBJECT TO REVISION BEFORE PUBLICATION IN THE OFFICIAL REPORTER.

PRIOR HISTORY: Third District, Salt Lake Department. The Honorable William Barrett. *Moench v. State*, 57 P.3d 1116, 2002 UT App 333, 2002 Utah App. LEXIS 99 (2002)

DISPOSITION: Affirmed.

LexisNexis (TM) HEADNOTES - Core Concepts:

COUNSEL: Bruce A. Jacques, South Jordan, for Appellant.

Mark L. Shurtleff and Christopher D. Ballard, Salt Lake City, for Appellee.

JUDGES: Judith M. Billings, Presiding Judge. WE CONCUR: James Z. Davis, Judge, Gregory K. Orme, Judge.

OPINIONBY: Judith M. Billings

OPINION: BILLINGS, Presiding Judge:

[*P1] Defendant Andrew D. Moench appeals the trial court's denial of his petition for post-conviction relief that challenged his conviction for aggravated assault with a gang enhancement, n1 a second-degree felony. Moench argues that he (1) was improperly sentenced under the gang enhancement statute, (2) did not enter a voluntary and knowledgeable guilty plea, and (3) received ineffective assistance of counsel. We affirm.

n1 The gang enhancement statute, see *Utah*

Code Ann. § 76-3-203.1 (2003), is more properly referred to as the "group criminal activity" statute. However, because Utah courts commonly refer to it as the "gang enhancement" statute, for purposes of consistency, we also refer to it as the gang enhancement statute.

[**2]

BACKGROUND

[*P2] On October 31, 1998, Defendant, a "Straight Edge" gang member, together with several gang associates, was involved in a fight with another group of men including the victim, Bernardo Repreza. During the fight, Defendant and Jason Cunningham chased Repreza while Sean Darger yelled at the two to "get him." Cunningham struck Repreza with an expandable police baton causing Repreza to fall. Defendant then struck Repreza in the head with a club or a bat resulting in serious bodily injury. Subsequently, while Repreza lay unconscious from the beating, a fourth person, Collin Ressor, stabbed Repreza, causing his death.

[*P3] Defendant originally was charged with murder, a first-degree felony, subject to a gang enhancement. However, the State, as part of plea bargain negotiations, offered to reduce the charge to aggravated assault, a second-degree felony, subject to a gang enhancement. In a separate paragraph, the second amended information stated that Defendant was subject to an enhanced penalty because the crime was committed in concert with two or more persons. The State also agreed that if the court sentenced Defendant to prison, the State would remain [**3] silent on a motion to reduce the degree of the offense to a third-degree felony.

[*P4] On October 20, 1999, Defendant accepted the State's plea offer and pleaded guilty to committing an

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aggravated assault in concert with two or more persons. In particular, Defendant's plea affidavit set forth the elements of Defendant's crime as "the actor commits an assault and intentionally causes serious bodily injury to another. He does so in concert with two or more people." Additionally, Defendant admitted to the following facts in his affidavit:

My conduct, and the conduct of other persons for which I am criminally liable, that constitutes the elements of the crime charged are as follows: On October 31, 1998, in Salt Lake County, Utah, I intentionally struck Bernardo Repreza in the head with a club. According to Dr. Leis[, an assistant medical examiner for the State of Utah], this resulted in serious bodily injury. Immediately prior to my striking him, Jason Cunningham struck him with a baton. We had been urged to chase and "get him" by a third person.

Defendant also stated in his plea affidavit, "I know that if I wish to contest the charge against me, I need only plead 'not [**4] guilty' and the matter will be set for trial. At the trial the State of Utah will have the burden of proving each element of the charge beyond a reasonable doubt."

[*P5] During the plea colloquy, Defendant's attorney stated that Defendant had read and understood the plea affidavit and that Defendant had signed it in his presence. When questioned by the court, Defendant indicated that he intended to plead guilty to the second amended information charging him with aggravated assault with a gang enhancement. Defendant stated that he was satisfied with the advice of his attorney. Defendant also admitted to the facts constituting the aggravated assault charge with a gang enhancement. Additionally, Defendant stated that he understood that by admitting and pleading to the charge, he was admitting to every element of the offense. Defendant further indicated that he understood that the penalty for the aggravated assault with the gang enhancement was six to fifteen years at the Utah State Prison. Defendant then pleaded guilty to the charge of second degree aggravated assault with a gang enhancement.

[*P6] On December 15, 1999, Defendant was sentenced to six to fifteen years [**5] at the Utah State Prison. The Findings of Fact, Conclusions of Law, and Order were entered on February 15, 2000. Defendant timely filed a petition for post-conviction relief on February 15, 2001, pursuant to *Utah Code Annotated* sections 78-35a-101 to -304 (1996) and Utah Rule of Civil Procedure 65C. The trial court dismissed Defendant's petition as frivolous on its face. On appeal, we held the trial court erred when it found the petition frivolous on its face, and we reversed and remanded directing the State to file a response and for the court to hold, if necessary, an evidentiary hearing.

[*P7] On December 4, 2002, the trial court ordered the State to respond to Defendant's petition, and on March 4, 2003, the trial court heard oral arguments. The trial court entered its Findings of Fact, Conclusions of Law, and Order denying Defendant's petition for post-conviction relief on March 31, 2003. Defendant appeals.

ISSUES AND STANDARD OF REVIEW

[*P8] Defendant argues that the trial court erred by denying his petition for post-conviction relief because he had (1) been sentenced improperly under the gang enhancement statute without every [**6] element of the crime having been established beyond a reasonable doubt, (2) not entered a voluntary and knowledgeable guilty plea, and (3) received ineffective assistance of counsel. "We review an appeal from an order dismissing or denying a petition for post-conviction relief for correctness without deference to the lower court's conclusions of law." *Rudolph v. Galetka*, 2002 UT 7, P4, 43 P.3d 467 (citing *Julian v. State*, 966 P.2d 249, 252 (Utah 1998)).

ANALYSIS

I. Gang Enhancement Statute

[*P9] Defendant argues that the trial court erred by sentencing him under the gang enhancement statute without having established each element of the gang enhancement statute beyond a reasonable doubt either (1) at a trial where the State proved the criminal liability of the others involved in the incident, or (2) through guilty pleas to identical crimes by the others involved in the incident. We disagree.

[*P10] The gang enhancement statute provides an increased penalty for certain crimes if committed "in concert with two or more persons." *Utah Code Ann.* § 76-3-203.1(1)(a) (1998). To be guilty of acting "in concert" [**7] under section 76-3-203.1(1)(a), the actors "must (i) have possessed a mental state sufficient to commit the same underlying offense and (ii) have directly committed the underlying offense or solicited, requested, commanded, encouraged, or intentionally aided one of the other two actors to engage in conduct constituting the underlying offense." *State v. Lopes*, 1999 UT 24, P8, 980 P.2d 191.

[*P11] The Utah Supreme Court addressed the constitutionality of section 76-3-203.1(5)(c) in *State v. Lopes*. As originally drafted, the statute required "the sentencing judge rather than the jury [to] decide whether to impose the enhanced penalty . . . contingent upon a finding by the sentencing judge that this section is applicable." *Utah Code Ann.* § 76-3-203.1(5)(c) (Supp. 1999). The supreme court stated that the gang enhancement statute "mandated imposition of an

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enhancement only upon proof of elements over and above those required for the crime of lesser consequence." *Lopes*, 1999 UT 24 at P 15. The court reasoned that because the statute created a separate offense apart from the underlying offense, each element must [**8] be found beyond a reasonable doubt by a jury rather than the trial judge. See *id.* at P 17. Thus, the court concluded that subsection (5)(c) violated Lopes's right to a jury trial under article I, section 12 of the Utah Constitution. See *id.*

[*P12] Defendant argues that the holding in *Lopes* prevents a defendant from pleading guilty to a gang enhancement without either (1) a trial where the State proves the criminal liability of the in-concert actors involved in the incident or (2) the actors pleading guilty to the identical crime. Defendant relies upon the following statement in *Lopes* to support this contention: "Even though Lopes pled guilty to the underlying offense, his plea did not establish the requisite mental state of the other actors, as is necessary to support imposition of the gang enhancement." *Id.* However, under the particular facts of *Lopes*, the defendant entered a conditional guilty plea to the gang enhancement, preserving his right to appeal the constitutionality of the statute. See *id.* at P 3. The defendant in *Lopes* "never conceded that all the elements of the enhancement statute were satisfied, i.e., that the other individuals [**9] shared the requisite mental state for murder." *Id.* at P 4 n.3.

[*P13] Unlike the defendant in *Lopes*, Defendant in this case entered an unconditional plea admitting that he had committed an aggravated assault "in concert with two or more people." Defendant admitted the elements of both the aggravated assault and the gang enhancement in his plea affidavit. In particular, Defendant admitted that he had committed an aggravated assault in concert with Cunningham, who had beat Repreza with an expandable police baton, and Darger, who had encouraged both Cunningham and Defendant to "get" Repreza.

[*P14] Furthermore, the supreme court indicated in *Lopes* that defendants may plead guilty to a crime with a gang enhancement without a finding by a jury of the requisite elements. *Id.* at P 22. In particular, the court stated in *Lopes* that "since the elements of the crime were not established against Lopes, either by his plea or by a jury trial, he was deprived of his due process rights as guaranteed by the federal and Utah constitutions." *Id.* (emphasis added).

[*P15] Therefore, we hold that the trial court properly sentenced Defendant under the [**10] gang enhancement statute because Defendant admitted every element of both the underlying crime and the gang enhancement. Thus, we affirm Defendant's sentence

under the gang enhancement statute.

II. Validity of Defendant's Plea

[*P16] Defendant contends the trial court erred in finding that Defendant's guilty plea was entered knowingly and voluntarily. Specifically, Defendant asserts that his guilty plea was invalid because the trial court did not comply strictly with rule 11 of the Utah Rules of Criminal Procedure when it failed to ascertain whether Defendant understood the nature and the elements of aggravated assault with a gang enhancement. Defendant further argues that his plea was insufficient to establish the factual basis for imposing the gang enhancement.

[*P17] "The purpose of rule 11 is to ensure that a defendant knows of his or her rights and thereby understands the consequences of a decision to plead guilty." *State v. Mora*, 2003 UT App 117, P 18, 69 P.3d 838 (quoting *State v. Martinez*, 2001 UT 12, P 22, 26 P.3d 203). "The findings mandated by rule 11 'may be based on questioning of the defendant on the record or, if [**11] used, an affidavit reciting these factors after the court has established that the defendant has read, understood, and acknowledged the contents of the affidavit.'" *State v. Visser*, 2000 UT 88, P 12, 22 P.3d 1242 (quoting Utah R. Crim. P. 11(e)(8)). While it is the responsibility of the trial judge to ensure that strict compliance with rule 11 is established, "strict compliance can be accomplished by multiple means so long as no requirement of the rule is omitted and so long as the record reflects that the requirement has been fulfilled." *State v. Penman*, 964 P.2d 1157, 1160 (Utah Ct. App. 1998) (quoting *State v. Maguire*, 830 P.2d 216, 218 (Utah 1991)). However, in post-conviction relief cases, "a failure to comply with Utah's rule 11 in taking a guilty plea does not in itself amount to a violation of a defendant's rights under either the Utah or the United States Constitution." *Salazar v. Warden*, 852 P.2d 988, 992 (Utah 1993). To obtain post-conviction relief, Defendant must show more than a violation of the prophylactic provisions of rule 11; he . . . must show that the guilty plea was in fact not knowing and voluntary. [**12] Further, a court considering such a claim is not limited to the record of the plea hearing but may look at the surrounding facts and circumstances, including the information [Defendant] received from his . . . attorney[] before entering the plea.

Id.

[*P18] Defendant argues that the trial court erred by accepting his guilty plea without verifying that he understood the nature and elements of aggravated assault and the gang enhancement. Defendant claims that he did not understand the elements of his crime because the trial

court never informed him during the plea colloquy that the gang enhancement could not be imposed unless the State had established accomplice liability. However, as addressed above, it is unnecessary for the State to prove beyond a reasonable doubt the guilt of the other participants; the gang enhancement may be imposed based solely on Defendant's guilty plea.

[*P19] Moreover, the record demonstrates that Defendant understood he was pleading guilty to aggravated assault with a gang enhancement. In particular, Defendant's plea affidavit set forth the elements of Defendant's crime as "the actor commits an assault and intentionally causes [**13] serious bodily injury to another. He does so in concert with two or more people." During the plea colloquy, Defendant's attorney indicated that he was confident that Defendant understood the contents of the plea affidavit. Upon questioning by the trial court, Defendant stated that he intended to plead guilty to the second amended information charging him with aggravated assault with a gang enhancement. Defendant admitted to facts constituting the elements of the aggravated assault with a gang enhancement in his plea affidavit and during the plea colloquy. Defendant also indicated he understood that the penalty for aggravated assault with a gang enhancement was six to fifteen years. Thus, we hold that the trial court properly concluded that Defendant's plea was knowingly and voluntarily entered.

III. Ineffective Assistance of Counsel

[*P20] Defendant argues that he received ineffective assistance of counsel because his attorney (1) persuaded him to enter a guilty plea when he knew or should have known that the State could not have proven its initial case of first-degree murder, and (2) allowed him to enter a guilty plea without a factual basis for the plea.

[*P21] [**14] To demonstrate ineffective assistance of counsel, Defendant must establish "that his counsel rendered deficient performance which fell below an objective standard of reasonable professional judgment and that counsel's deficient performance prejudiced him." *State v. Simmons*, 2000 UT App 190, P4, 5 P.3d 1228 (quoting *State v. Maestas*, 1999 UT 32, P20, 984 P.2d 376); see also *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984).

To prevail on the first prong, [Defendant] must overcome a strong presumption that counsel rendered adequate assistance. [Defendant] must identify specific acts or omissions demonstrating that counsel's representation failed to meet an objective standard of reasonableness. We give counsel wide latitude to make tactical decisions and will not question such decisions unless we find no reasonable basis for them.

Taylor v. Warden, 905 P.2d 277, 282 (Utah 1995) (quotations and citations omitted). In evaluating this prong, a court must make every effort to "eliminate the distorting effects of hindsight" and "evaluate the conduct from counsel's perspective [**15] at the time." *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065. "As to the second prong, [Defendant] must proffer evidence sufficient to support a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different." *Taylor*, 905 P.2d at 282 (quotations and citations omitted). Moreover, "where a defendant challenges a guilty plea on grounds of ineffective assistance of counsel, he or she must show 'a reasonable probability that, but for counsel's errors, he [or she] would not have pleaded guilty and would have insisted on going to trial.'" *Parsons v. Barnes*, 871 P.2d 516, 525 (Utah 1994) (alteration in original) (quoting *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203 (1985)).

[*P22] Defendant argues that his attorney's conduct fell below the objective standard of reasonable professional judgment and this allegedly deficient conduct prejudiced Defendant. Specifically, under Defendant's original charge of murder, Defendant asserts that the State could not have proven beyond a reasonable doubt that Defendant's conduct "created [**16] a grave risk to [Repreza] and thereby caused the death of [Repreza,]" or that he caused serious bodily injury to Repreza which caused his death. *Utah Code Ann. § 76-5-203(2)(b), (2)(c)* (1998). For this reason, Defendant concludes that a reasonably prudent attorney would have known that a jury could not have found Defendant guilty of murder because the evidence demonstrated that Defendant's blow to Repreza did not and would not have caused Repreza's death. Defendant further asserts that Darger's subsequent acquittal on the murder charge for the same incident demonstrates that Defendant likely also would have been acquitted of murder.

[*P23] The State argues that although the evidence might have established that Defendant did not directly cause Repreza's death, Defendant could have been convicted as an accomplice to murder pursuant to *Utah Code Annotated section 76-2-202* (1999). This statute provides that a person who possesses the requisite mental state and "solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense" may be convicted of the offense as [**17] an accomplice, even though that person did not directly commit the offense. *Id.* The State concludes that because the beating Defendant inflicted on Repreza rendered him unconscious, it provided Ressor the opportunity to stab and kill him. The State also asserts that the acquittal of Darger is a poor indicator for predicting what would have occurred had Defendant gone to trial because, as the trial court found, Darger was

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not as culpable as Defendant in that Darger never struck Repreza. The State further argues that comparing the outcome of Darger's trial with the hypothetical outcome of Defendant's trial is exactly the type of second-guessing hindsight prohibited by Strickland. See 466 U.S. at 689, 104 S. Ct. at 2065.

[*P24] We agree with the State. Defendant has not demonstrated that his counsel's conduct fell below an objectively reasonable standard if we "eliminate the distorting effects of hindsight." *Id.* at 689, 104 S. Ct. at 2065. Defendant has failed to "overcome the presumption that under the circumstances, the challenged action 'might be considered sound . . . strategy.'" *Id.* (citation omitted). Because Defendant has [*18] failed to establish the deficient-performance prong of the Strickland test, "counsel's assistance was constitutionally sufficient, and we need not address the other part of the test." *State v. Medina-Juarez*, 2001 UT 79, P14, 34 P.3d 187.

CONCLUSION

[*P25] We conclude that the trial court properly denied Defendant's petition for post-conviction relief because Defendant (1) was properly sentenced under the gang enhancement statute, (2) entered a voluntary and knowledgeable guilty plea, and (3) received effective assistance of counsel. Therefore, we affirm.

Judith M. Billings,

Presiding Judge

[*P26] WE CONCUR:

James Z. Davis, Judge

Gregory K. Orme, Judge

ADDENDUM B

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LEXSEE 2004 US LEXIS 1837

IOWA, PETITIONER v. FELIPE EDGARDO TOVAR

No. 02-1541

SUPREME COURT OF THE UNITED STATES

*124 S. Ct. 1379; 2004 U.S. LEXIS 1837; 72 U.S.L.W. 4241; 17 Fla. L. Weekly Fed.
S 190*

January 21, 2004, Argued
March 8, 2004, Decided

NOTICE: [*1]

The LEXIS pagination of this document is subject to change pending release of the final published version.

PRIOR HISTORY: ON WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA. *State v. Tovar*, 656 N.W.2d 112, 2003 Iowa Sup. LEXIS 32 (Iowa, 2003)

DISPOSITION: Reversed and remanded.

LexisNexis (TM) HEADNOTES - Core Concepts:

SYLLABUS: At respondent Tovar's November 1996 arraignment for operating a motor vehicle under the influence of alcohol (OWI), in response to the trial court's questions, Tovar affirmed that he wanted to represent himself and to plead guilty. Conducting the guilty plea colloquy required by the Iowa Rules of Criminal Procedure, the court explained that, if Tovar pleaded not guilty, he would be entitled to a speedy and public jury trial where he would have the right to counsel who could help him select a jury, question and cross-examine witnesses, present evidence, and make arguments on his behalf. By pleading guilty, the court cautioned, Tovar would give up his [*2] right to a trial and his rights at that trial to be represented by counsel, to remain silent, to the presumption of innocence, and to subpoena witnesses and compel their testimony. The court then informed Tovar of the maximum and minimum penalties for an OWI conviction, and explained that, before accepting a guilty plea, the court had to assure itself that Tovar was in fact guilty of the charged offense. To that end, the court informed Tovar of the two elements of the OWI charge: The defendant must have (1) operated a motor vehicle in Iowa (2) while intoxicated. Tovar confirmed, first, that on the date in

question, he was operating a motor vehicle in Iowa and, second, that he did not dispute the result of the intoxilyzer test showing his blood alcohol level exceeded the legal limit nearly twice over. The court then accepted his guilty plea and, at a hearing the next month, imposed the minimum sentence of two days in jail and a fine. In 1998, Tovar was again charged with OWI, this time as a second offense, an aggravated misdemeanor under Iowa law. Represented by counsel in that proceeding, he pleaded guilty. In 2000, Tovar was charged with third-offense OWI, a class "D" felony under [*3] Iowa law. Again represented by counsel, Tovar pleaded not guilty to the felony charge. Counsel moved to preclude use of Tovar's first (1996) OWI conviction to enhance his 2000 offense from an aggravated misdemeanor to a third-offense felony. Tovar maintained that his 1996 waiver of counsel was invalid -- not fully knowing, intelligent, and voluntary -- because he was never made aware by the court of the dangers and disadvantages of self-representation. The trial court denied the motion, found Tovar guilty, and sentenced him on the OWI third-offense charge. The Iowa Court of Appeals affirmed, but the Supreme Court of Iowa reversed and remanded for entry of judgment without consideration of Tovar's first OWI conviction. Holding that the colloquy preceding acceptance of Tovar's 1996 guilty plea had been constitutionally inadequate, Iowa's high court ruled, as here at issue, that two warnings not given to Tovar are essential to the "knowing and intelligent" waiver of the *Sixth Amendment* right to counsel at the plea stage: The defendant must be advised specifically that waiving counsel's assistance in deciding whether to plead guilty (1) entails the risk that a viable defense will be overlooked [*4] 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.

Held: Neither warning ordered by the Iowa Supreme

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Court is mandated by the *Sixth Amendment*. The constitutional requirement 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. Pp. 8-15.

(a) The *Sixth Amendment* secures to a defendant facing incarceration the right to counsel at all "critical stages" of the criminal process, see, e.g., *Maine v. Moulton*, 474 U.S. 159, 170, 88 L. Ed. 2d 481, 106 S. Ct. 477, including a plea hearing, *White v. Maryland*, 373 U.S. 59, 60, 10 L. Ed. 2d 193, 83 S. Ct. 1050 (*per curiam*). Because Tovar received a two-day prison term for his first OWI conviction, he had a right to counsel both at the plea stage and at trial had he elected to contest the charge. *Argersinger v. Hamlin*, 407 U.S. 25, 34, 37, 32 L. Ed. 2d 530, 92 S. Ct. 2006. Although an accused may choose to forgo representation, any waiver of the right to counsel must be knowing, voluntary, and [*5] intelligent, see *Johnson v. Zerbst*, 304 U.S. 458, 464, 82 L. Ed. 1461, 58 S. Ct. 1019. The information a defendant must possess in order to make an intelligent election depends on a range of case-specific factors, including his education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding. See *Johnson*, 304 U.S., at 464, 82 L. Ed. 1461, 58 S. Ct. 1019. Although warnings of the pitfalls of proceeding to trial uncounseled must be "rigorously" conveyed, *Patterson v. Illinois*, 487 U.S. 285, 298, 101 L. Ed. 2d 261, 108 S. Ct. 2389; see *Faretta v. California*, 422 U.S. 806, 835, 45 L. Ed. 2d 562, 95 S. Ct. 2525, a less searching or formal colloquy may suffice at earlier stages of the criminal process, 487 U.S., at 299, 101 L. Ed. 2d 261, 108 S. Ct. 2389. In *Patterson*, this Court described a pragmatic approach to right-to-counsel waivers, one that asks "what purposes a lawyer can serve at the particular stage of the proceedings in question, and what assistance [counsel] could provide to an accused at that stage." *Id.*, at 298, 101 L. Ed. 2d 261, 108 S. Ct. 2389. Less rigorous warnings are required pretrial because, at that stage, "the full dangers and disadvantages of self-representation . . . are less substantial and more obvious [*6] to an accused than they are at trial." *Id.*, at 299, 101 L. Ed. 2d 261, 108 S. Ct. 2389. Pp. 8-11.

(b) The *Sixth Amendment* does not compel the two admonitions ordered by the Iowa Supreme Court. "The law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply in general in the circumstances . . ." *United States v. Ruiz*, 536 U.S. 622, 629, 153 L. Ed. 2d 586, 122 S. Ct. 2450. Even if the defendant lacked a full and complete appreciation of all of the consequences flowing from his waiver, the State may nevertheless prevail if it shows that

the information provided to the defendant satisfied the constitutional minimum. *Patterson*, 487 U.S., at 294, 101 L. Ed. 2d 261, 108 S. Ct. 2389. The Iowa high court gave insufficient consideration to this Court's guiding decisions. In prescribing scripted admonitions and holding them necessary in every guilty plea instance, that court overlooked this Court's observations that the information a defendant must have to waive counsel intelligently will depend upon the particular facts and circumstances in each case, *Johnson*, 304 U.S., at 464, 82 L. Ed. 2d 1461, 58 S. Ct. 1019. Moreover, as Tovar acknowledges, [*7] in a collateral attack on an uncounseled conviction, it is the defendant's burden to prove that he did not competently and intelligently waive his right to counsel. Tovar has never claimed that he did not fully understand the 1996 OWI charge or the range of punishment for that crime prior to pleading guilty. He has never "articulated with precision" the additional information counsel could have provided, given the simplicity of the charge. See *Patterson*, 487 U.S., at 294, 101 L. Ed. 2d 261, 108 S. Ct. 2389. Nor does he assert that he was unaware of his right to be counseled prior to and at his arraignment. Before this Court, he suggests only that he *may have been* under the mistaken belief that he had a right to counsel at trial, but not if he was, instead, going to plead guilty. Given "the particular facts and circumstances surrounding [this] case," *Johnson*, 304 U.S., at 464, 82 L. Ed. 2d 1461, 58 S. Ct. 1019, it is far from clear that warnings of the kind required by the Iowa Supreme Court would have enlightened Tovar's decision whether to seek counsel or to represent himself. In a case so straightforward, the two admonitions at issue might confuse or mislead a defendant more than they would inform him, [*8] i.e., the warnings might be misconstrued to convey that a meritorious defense exists or that the defendant could plead to a lesser charge, when neither prospect is a realistic one. If a defendant delays his plea in the vain hope that counsel could uncover a tenable basis for contesting or reducing the criminal charge, the prompt disposition of the case will be impeded, and the resources of either the State (if the defendant is indigent) or the defendant himself (if he is financially ineligible for appointed counsel) will be wasted. States are free to adopt by statute, rule, or decision any guides to the acceptance of an uncounseled plea they deem useful, but the Federal Constitution does not require the two admonitions here in controversy. Pp. 11-15.

656 N. W. 2d 112, reversed and remanded.

JUDGES: GINSBURG, J., delivered the opinion for a unanimous Court.

OPINIONBY: GINSBURG

OPINION:

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JUSTICE GINSBURG delivered the opinion of the Court

The *Sixth Amendment* safeguards to an accused who faces incarceration the right to counsel at all critical stages of the criminal process *Maine v Moulton* 474 U S 159, 170, 88 L Ed 2d 481, 106 S Ct 477 (1985), *United States v Wade*, 388 U S 218 224 18 L Ed 2d 1149 87 S Ct 1926 (1967) [*9] The entry of a guilty plea, whether to a misdemeanor or a felony charge, ranks as a "critical stage" at which the right to counsel adheres *Argersinger v Hamlin* 407 U S 25 34 32 L Ed 2d 530, 92 S Ct 2006 (1972), *White v Maryland* 373 U S 59 60 10 L Ed 2d 193, 83 S Ct 1050 (1963) (*per curiam*) Waiver of the right to counsel, as of constitutional rights in the criminal process generally, must be a "knowing, intelligent act done with sufficient awareness of the relevant circumstances" *Brady v United States* 397 U S 742, 748, 25 L Ed 2d 747, 90 S Ct 1463 (1970) This case concerns the extent to which a trial judge, before accepting a guilty plea from an uncounseled defendant, must elaborate on the right to representation

Beyond affording the defendant the opportunity to consult with counsel prior to entry of a plea and to be assisted by counsel at the plea hearing, must the court, specifically (1) advise the defendant that "waiving the assistance of counsel in deciding whether to plead guilty [entails] the risk that a viable defense will be overlooked", and (2) "admonish" the defendant "that by waiving his right to an attorney he will lose the opportunity to obtain an independent opinion on [*10] whether, under the facts and applicable law, it is wise to plead guilty"? 656 N W 2d 112, 121 (Iowa 2003) The Iowa Supreme Court held both warnings essential to the "knowing and intelligent" waiver of the *Sixth Amendment* right to the assistance of counsel *Ibid*

We hold that neither warning is mandated by the *Sixth Amendment* The constitutional requirement 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

I

On November 2, 1996, respondent Felipe Edgardo Tovar, then a 21-year-old college student, was arrested in Ames, Iowa, for operating a motor vehicle while under the influence of alcohol (OWI) See *Iowa Code* § 321J 2 (1995) n1 An intoxilyzer test administered the night of Tovar's arrest showed he had a blood alcohol level of 0.194 App 24 The arresting officer informed Tovar of his rights under *Miranda v Arizona*, 384 U S 436, 16 L Ed 2d 694, 86 S Ct 1602 (1966) Tovar signed a form stating that he waived those rights and agreed to answer

questions Iowa State Univ Dept of Public [*11] Safety, OWI Supplemental Report 3 (Nov 2, 1996), Lodging of Petitioner, Iowa State Univ Dept of Public Safety, Rights Warnings (Nov 2, 1996), Lodging of Petitioner

n1 "A person commits the offense of operating while intoxicated if the person operates a motor vehicle in this state in either of the following conditions a While under the influence of an alcoholic beverage b While having an alcohol concentration of 10 or more " *Iowa Code* § 321J 2(1) (1995)

Some hours after his arrest, Tovar appeared before a judge in the Iowa District Court for Story County The judge indicated on the Initial Appearance form that Tovar appeared without counsel and waived application for court-appointed counsel Initial Appearance in No OWCR 23989 (Nov 2, 1996), Lodging of Petitioner The judge also marked on the form's checklist that Tovar was "informed of the charge and his rights and received a copy of the Complaint" *Ibid* Arraignment was set for November 18, 1996 In the interim, [*12] Tovar was released from jail

At the November 18 arraignment, n2 the court's inquiries of Tovar began "Mr Tovar appears without counsel and I see, Mr Tovar, that you waived application for a court appointed attorney Did you want to represent yourself at today's hearing?" App 8-9 Tovar replied "Yes, sir" *Id*, at 9 The court soon after asked "How did you wish to plead?" Tovar answered "Guilty" *Ibid* Tovar affirmed that he had not been promised anything or threatened in any way to induce him to plead guilty *Id*, at 13-14

n2 Tovar appeared in court along with four other individuals charged with misdemeanor offenses App 6-10 The presiding judge proposed to conduct the plea proceeding for the five cases jointly, and each of the individuals indicated he did not object to that course of action *Id*, at 11

Conducting the guilty plea colloquy required by the Iowa Rules of Criminal Procedure, see Iowa Rule Crim Proc 8 (1992), n3 the court explained that, if Tovar pleaded not guilty, [*13] he would be entitled to a speedy and public trial by jury, App 15, and would have the right to be represented at that trial by an attorney, who "could help [Tovar] select a jury, question and cross-examine the State's witnesses, present evidence, if any, in [his] behalf, and make arguments to the judge and jury on [his] behalf," *id*, at 16 By pleading guilty, the

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court cautioned, "not only [would Tovar] give up [his] right to a trial [of any kind on the charge against him], [he would] give up [his] right to be represented by an attorney at that trial." *Ibid*. The court further advised Tovar that, if he entered a guilty plea, he would relinquish the right to remain silent at trial, the right to the presumption of innocence, and the right to subpoena witnesses and compel their testimony. *Id.*, at 16-19.

n3 The Rule has since been renumbered 2.8.

Turning to the particular offense with which Tovar had been charged, the court informed him that an OWI conviction carried a maximum penalty [*14] of a year in jail and a \$ 1,000 fine, and a minimum penalty of two days in jail and a \$ 500 fine. *Id.*, at 20. Tovar affirmed that he understood his exposure to those penalties. *Ibid*. The court next explained that, before accepting a guilty plea, the court had to assure itself that Tovar was in fact guilty of the charged offense. *Id.*, at 21-22. To that end, the court informed Tovar that the OWI charge had only two elements: first, on the date in question, Tovar was operating a motor vehicle in the State of Iowa; second, when he did so, he was intoxicated. *Id.*, at 23. Tovar confirmed that he had been driving in Ames, Iowa, on the night he was apprehended and that he did not dispute the results of the intoxilyzer test administered by the police that night, which showed that his blood alcohol level exceeded the legal limit nearly twice over. *Id.*, at 23-24.

After the plea colloquy, the court asked Tovar if he still wished to plead guilty, and Tovar affirmed that he did. *Id.*, at 27-28. The court then accepted Tovar's plea, observing that there was "a factual basis" for it, and that Tovar had made the plea "voluntarily, with a full understanding of [his] rights, [*15] [and] . . . of the consequences of [pleading guilty]." *Id.*, at 28.

On December 30, 1996, Tovar appeared for sentencing on the OWI charge n4 and, simultaneously, for arraignment on a subsequent charge of driving with a suspended license. *Id.*, at 45-46; see *Iowa Code* § 321J.21 (1995). n5 Noting that Tovar was again in attendance without counsel, the court inquired: "Mr. Tovar, did you want to represent yourself at today's hearing or did you want to take some time to hire an attorney to represent you?" App. 46. n6 Tovar replied that he would represent himself. *Ibid*. The court then engaged in essentially the same plea colloquy on the suspension charge as it had on the OWI charge the previous month. *Id.*, at 48-51. After accepting Tovar's guilty plea on the suspension charge, the court sentenced him on both counts: For the OWI conviction, the court imposed the minimum sentence of two days in jail and a \$ 500 fine, plus a surcharge and costs; for the suspension

conviction, the court imposed a \$ 250 fine, plus a surcharge and costs. *Id.*, at 55.

n4 At that stage, it was still open to Tovar to request withdrawal of his guilty plea on the OWI charge and to substitute a plea of not guilty. See Iowa Rule Crim. Proc. 8(2)(a) (1992). [*16]

n5 In order to appear at the OWI arraignment, Tovar drove to the courthouse despite the suspension of his license; he was apprehended en route home. App. 50, 53.

n6 Prior to asking Tovar whether he wished to hire counsel, the court noted that Tovar had applied for a court-appointed attorney but that his application had been denied because he was financially dependent upon his parents. *Id.*, at 46. Tovar does not here challenge the absence of counsel at sentencing.

On March 16, 1998, Tovar was convicted of OWI for a second time. He was represented by counsel in that proceeding, in which he pleaded guilty. Record 60; see App. to Pet. for Cert. 24, n. 1.

On December 14, 2000, Tovar was again charged with OWI, this time as a third offense, see *Iowa Code* § 321J.2 (1999), and additionally with driving while license barred, see § 321.561. Iowa law classifies first-offense OWI as a serious misdemeanor and second-offense OWI as an aggravated misdemeanor. § 321J.2(2)(a)-(b). Third-offense OWI, and any OWI offenses thereafter, rank as class "D" felonies. § 321J.2(2)(c). Represented [*17] by an attorney, Tovar pleaded not guilty to both December 2000 charges. Record 55.

In March 2001, through counsel, Tovar filed a Motion for Adjudication of Law Points; then⁷ motion urged that Tovar's first OWI conviction, in 1996, could not be used to enhance the December 2000 OWI charge from a second-offense aggravated misdemeanor to a third-offense felony. App. 3-5. n8 Significantly, Tovar did not allege that he was unaware at the November 1996 arraignment of his right to counsel prior to pleading guilty and at the plea hearing. Instead, he maintained that his 1996 waiver of counsel was invalid -- not "full knowing, intelligent, and voluntary" -- because he "was never made aware by the court . . . of the dangers and disadvantages of self-representation." *Id.*, at 3-4.

n7 See Iowa Rule Crim. Proc. 10(2) (1992)

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("Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion."); *State v. Wilt*, 333 N.W.2d 457, 460 (Iowa 1983) (approving use of motions for adjudication of law points under Iowa Rule of Criminal Procedure 10(2) where material facts are undisputed). [*18]

n8 Tovar conceded that the 1998 OWI conviction could be used for enhancement purposes. Record 60.

The court denied Tovar's motion in May 2001, explaining: "Where the offense is readily understood by laypersons and the penalty is not unduly severe, the duty of inquiry which is imposed upon the court is only that which is required to assure an awareness of [the] right to counsel and a willingness to proceed without counsel in the face of such awareness." App. to Pet. for Cert. 36-37 (brackets in original). Tovar then waived his right to a jury trial and was found guilty by the court of both the OWI third-offense charge and driving while license barred. *Id.*, at 33. Four months after that adjudication, Tovar was sentenced. On the OWI third-offense charge, he received a 180-day jail term, with all but 30 days suspended, three years of probation, and a \$ 2,500 fine plus surcharges and costs. App. 70-71. For driving while license barred, Tovar received a 30-day jail term, to run concurrently with the OWI sentence, and a suspended \$ 500 fine. *Id.*, at 71.

The Iowa Court of Appeals affirmed, [*19] App. to Pet. for Cert. 23-30, but the Supreme Court of Iowa, by a 4 to 3 vote, reversed and remanded for entry of judgment without consideration of Tovar's first OWI conviction, 656 N.W.2d 112 (2003). Iowa's highest court acknowledged that "the dangers of proceeding pro se at a guilty plea proceeding will be different than the dangers of proceeding pro se at a jury trial, [therefore] the inquiries made at these proceedings will also be different." *Id.*, at 119. The court nonetheless held that the colloquy preceding acceptance of Tovar's 1996 guilty plea had been constitutionally inadequate, and instructed dispositively:

"[A] defendant such as Tovar who chooses to plead guilty without the assistance of an attorney must be advised of the usefulness of an attorney and the dangers of self-representation in order to make a knowing and intelligent waiver of his right to counsel The trial judge [must] advise the defendant generally that there are defenses to criminal charges that may not be known by laypersons and that the danger in waiving the assistance of counsel in deciding whether to plead guilty is the risk

that a viable defense will be overlooked. [*20] The defendant should be admonished that by waiving his right to an attorney he will lose the opportunity to obtain an independent 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." *Id.*, at 121. n9

n9 The dissenting justices criticized the majority's approach as "rigid" and out of line with the pragmatic approach this Court described in *Patterson v. Illinois*, 487 U.S. 285, 298, 101 L. Ed. 2d 261, 108 S. Ct. 2389 (1988). 656 N. W. 2d, at 122. They noted that, in addition to advice concerning the constitutional rights a guilty plea relinquishes, Tovar was "made fully aware of the penal consequences that might befall him if he went forward without counsel and pleaded guilty." *Ibid.*

We granted certiorari, 539 U.S. , 156 L. Ed. 2d 703, 124 S. Ct. 44(2003), in view of the division of opinion on the requirements the Sixth Amendment imposes for waiver of counsel [*21] at a plea hearing, compare, e.g., *United States v. Akins*, 276 F.3d 1141, 1146-1147 (CA9 2002), with *State v. Cashman*, 491 N.W.2d 462, 465-466 (S. D. 1992), and we now reverse the judgment of the Iowa Supreme Court.

II

The Sixth Amendment secures to a defendant who faces incarceration the right to counsel at all "critical stages" of the criminal process. See, e.g., *Maine v. Moulton*, 474 U.S., at 170, 88 L. Ed. 2d 481, 106 S. Ct. 477; *United States v. Wade*, 388 U.S., at 224, 18 L. Ed. 2d 1149, 87 S. Ct. 1926. A plea hearing qualifies as a "critical stage." *White v. Maryland*, 373 U.S., at 60, 10 L. Ed. 2d 193, 83 S. Ct. 1050. Because Tovar received a two-day prison term for his 1996 OWI conviction, he had a right to counsel both at the plea stage and at trial had he elected to contest the charge. *Argersinger v. Hamlin*, 407 U.S., at 34, 37, 32 L. Ed. 2d 530, 92 S. Ct. 2006.

A person accused of crime, however, may choose to forgo representation. While the Constitution "does not force a lawyer upon a defendant," *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279, 87 L. Ed. 268, 63 S. Ct. 236 (1942), it does require that any waiver of the right to counsel be knowing, voluntary, and intelligent, [*22] see *Johnson v. Zerbst*, 304 U.S. 458, 464, 82 L. Ed. 1461, 58 S. Ct. 1019 (1938). Tovar contends that his waiver of counsel in November 1996, at his first OWI plea hearing, was insufficiently informed, and therefore constitutionally invalid. In particular, he asserts that the trial judge did not elaborate on the value, at that stage of

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the case, of an attorney's advice and the dangers of self-representation in entering a plea. Brief for Respondent 15. n10

n10 The United States as *amicus curiae* reads our decision in *Scott v. Illinois*, 440 U.S. 367, 59 L. Ed. 2d 383, 99 S. Ct. 1158 (1979), to hold that a constitutionally defective waiver of counsel in a misdemeanor prosecution, although warranting vacation of any term of imprisonment, affords no ground for disturbing the underlying conviction. *Amicus* accordingly contends that the Constitution should not preclude use of an uncounseled misdemeanor conviction to enhance the penalty for a subsequent offense, regardless of the validity of the prior waiver. See Brief for United States as *Amicus Curiae* 11, n. 3. The State, however, does not contest the Iowa Supreme Court's determination that a conviction obtained without an effective waiver of counsel cannot be used to enhance a subsequent charge. See *ibid.* We therefore do not address arguments *amicus* advances questioning that premise. See also *id.*, at 29, n. 12.

[*23]

We have described a waiver of counsel as intelligent when the defendant "knows what he is doing and his choice is made with eyes open." *Adams*, 317 U.S., at 279, 87 L. Ed. 268, 63 S. Ct. 236. We have not, however, prescribed any formula or script to be read to a defendant who states that he elects to proceed without counsel. The information a defendant must possess in order to make an intelligent election, our decisions indicate, 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. See *Johnson*, 304 U.S., at 464, 82 L. Ed. 1461, 58 S. Ct. 1019.

As to waiver of trial counsel, we have said that before a defendant may be allowed to proceed *pro se*, he must be warned specifically of the hazards ahead. *Faretta v. California*, 422 U.S. 806, 45 L. Ed. 2d 562, 95 S. Ct. 2525 (1975), is instructive. The defendant in *Faretta* resisted counsel's aid, preferring to represent himself. The Court held that he had a constitutional right to self-representation. In recognizing that right, however, we cautioned: "Although a defendant need not himself have the skill and experience of a lawyer in order competently [*24] and intelligently to choose self-representation, he 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" *Id.*, at 835, 45 L. Ed. 2d 562, 95 S. Ct. 2525 (internal quotation marks omitted).

Later, in *Patterson v. Illinois*, 487 U.S. 285, 101 L. Ed. 2d 261, 108 S. Ct. 2389 (1988), we elaborated on "the dangers and disadvantages of self-representation" to which *Faretta* referred. "At trial," we observed, "counsel is required to help even the most gifted layman adhere to the rules of procedure and evidence, comprehend the subtleties of *voir dire*, examine and cross-examine witnesses effectively . . . , object to improper prosecution questions, and much more." 487 U.S., at 299, n. 13, 101 L. Ed. 2d 261, 108 S. Ct. 2389. Warnings of the pitfalls of proceeding to trial without counsel, we therefore said, must be "rigorously" conveyed. *Id.*, at 298, 101 L. Ed. 2d 261, 108 S. Ct. 2389. We clarified, however, that at earlier stages of the criminal process, a less searching or formal colloquy may suffice. *Id.*, at 299, 101 L. Ed. 2d 261, 108 S. Ct. 2389.

Patterson concerned postindictment questioning by police and prosecutor. At that stage of the case, we held, the warnings required [*25] by *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966), adequately informed the defendant not only of his *Fifth Amendment* rights, but of his *Sixth Amendment* right to counsel as well. 487 U.S., at 293, 101 L. Ed. 2d 261, 108 S. Ct. 2389. *Miranda* warnings, we said, effectively convey to a defendant his right to have counsel present during questioning. In addition, they inform him of the "ultimate adverse consequence" of making uncounseled admissions, *i.e.*, his statements may be used against him in any ensuing criminal proceeding. 487 U.S., at 293, 101 L. Ed. 2d 261, 108 S. Ct. 2389. The *Miranda* warnings, we added, "also sufficed . . . to let [the defendant] know what a lawyer could 'do for him,'" namely, advise him to refrain from making statements that could prove damaging to his defense. 487 U.S., at 294, 101 L. Ed. 2d 261, 108 S. Ct. 2389.

Patterson describes a "pragmatic approach to the waiver question," one that asks "what purposes a lawyer can serve at the particular stage of the proceedings in question, and what assistance he could provide to an accused at that stage," in order "to determine the scope of the *Sixth Amendment* right to counsel, and the type of warnings and procedures that should be required before a waiver [*26] of that right will be recognized." *Id.*, at 298, 101 L. Ed. 2d 261, 108 S. Ct. 2389. We require less rigorous warnings pretrial, *Patterson* explained, not because pretrial proceedings are "less important" than trial, but because, at that stage, "the full dangers and disadvantages of self-representation . . . are less substantial and more obvious to an accused than they are at trial." *Id.*, at 299, 101 L. Ed. 2d 261, 108 S. Ct. 2389 (citation and internal quotation marks omitted).

In *Tovar's* case, the State maintains that, like the *Miranda* warnings we found adequate in *Patterson*, Iowa's plea colloquy suffices both to advise a defendant of his right to counsel, and to assure that his guilty plea is

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informed and voluntary. Brief for Petitioner 20; Tr. of Oral Arg. 3. The plea colloquy, according to the State, "makes plain that an attorney's role would be to challenge the charge or sentence," and therefore adequately conveys to the defendant both the utility of counsel and the dangers of self-representation. Brief for Petitioner 25. Tovar, on the other hand, defends the precise instructions required by the Iowa Supreme Court, see *supra*, at 7-8, as essential to a knowing, voluntary, and intelligent plea stage [*27] waiver of counsel. Brief for Respondent 15.

To resolve this case, we need not endorse the State's position that nothing more than the plea colloquy was needed to safeguard Tovar's right to counsel. Preliminarily, we note that there were some things more in this case. Tovar first indicated that he waived counsel at his Initial Appearance, see *supra*, at 3, affirmed that he wanted to represent himself at the plea hearing, see *supra*, at 3, and declined the court's offer of "time to hire an attorney" at sentencing, when it was still open to him to request withdrawal of his plea, see *supra*, at 4-5, and n. 4. Further, the State does not contest that a defendant must be alerted to his right to the assistance of counsel in entering a plea. See Brief for Petitioner 19 (acknowledging defendant's need to know "retained or appointed counsel can assist" at the plea stage by "working on the issues of guilt and sentencing"). Indeed, the Iowa Supreme Court appeared to assume that Tovar was informed of his entitlement to counsel's aid or, at least, to have pretermitted that issue. See 656 N. W. 2d, at 117. Accordingly, the State presents a narrower question: "Does the *Sixth Amendment* [*28] require a court to give a rigid and detailed admonishment to a *pro se* defendant pleading guilty of the usefulness of an attorney, that an attorney may provide an independent opinion whether it is wise to plead guilty and that without an attorney the defendant risks overlooking a defense?" Pet. for Cert. i.

Turning on that question, we turn to, and reiterate, the particular language the Iowa Supreme Court employed in announcing the warnings it thought the *Sixth Amendment* required: "The trial judge [must] advise the defendant generally that there are defenses to criminal charges that may not be known by laypersons and that the danger in waiving the assistance of counsel in deciding whether to plead guilty is the risk that a viable defense will be overlooked," 656 N. W. 2d, at 121; in addition, "the defendant should be admonished that by waiving his right to an attorney he will lose the opportunity to obtain an independent opinion on whether, under the facts and applicable law, it is wise to plead guilty," *ibid*. Tovar did not receive such advice, and the sole question before us is whether the *Sixth Amendment* compels the two admonitions here in controversy. [*29] n11 We hold it does not.

n11 The Supreme Court of Iowa also held that "the court must ensure the defendant understands the nature of the charges against him and the range of allowable punishments." 656 N. W. 2d, at 121. The parties do not dispute that Tovar was so informed.

This Court recently explained, in reversing a lower court determination that a guilty plea was not voluntary: "The law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply *in general* in the circumstances -- even though the defendant may not know the *specific detailed* consequences of invoking it." *United States v. Ruiz*, 536 U.S. 622, 629, 153 L. Ed. 2d 586, 122 S. Ct. 2450 (2002) (emphasis in original). We similarly observed in *Patterson*: "If [the defendant] . . . lacked a full and complete appreciation of all of the consequences flowing from his waiver, it does not defeat the State's showing that the information it provided [*30] to him satisfied the constitutional minimum." 487 U.S., at 294, 101 L. Ed. 2d 261, 108 S. Ct. 2389 (internal quotation marks omitted). The Iowa Supreme Court gave insufficient consideration to these guiding decisions. In prescribing scripted admonitions and holding them necessary in every guilty plea instance, we further note, the Iowa high court overlooked our observations that the information a defendant must have to waive counsel intelligently will "depend, in each case, upon the particular facts and circumstances surrounding that case," *Johnson*, 304 U.S., at 464, 82 L. Ed. 1461, 58 S. Ct. 1019; *supra*, at 9.

Moreover, as Tovar acknowledges, in a collateral attack on an uncounseled conviction, it is the defendant's burden to prove that he did not competently and intelligently waive his right to the assistance of counsel. See *Watts v. State*, 257 N.W.2d 70, 71 (Iowa 1977); Brief for Respondent 5, 26-27. In that light, we note that Tovar has never claimed that he did not fully understand the charge or the range of punishment for the crime prior to pleading guilty. Further, he has never "articulated with precision" the additional information counsel could have provided, given the simplicity of the [*31] charge. See *Patterson*, 487 U.S., at 294, 101 L. Ed. 2d 261, 108 S. Ct. 2389; *supra*, at 4. Nor does he assert that he was unaware of his right to be counseled prior to and at his arraignment. Before this Court, he suggests only that he "may have been under the mistaken belief that he had a right to counsel at trial, but not if he was merely going to plead guilty." Brief for Respondent 16 (emphasis added).

n12

n12 The trial court's comment that Tovar appeared without counsel at the arraignment and

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the court's inquiry whether Tovar wanted to represent himself at that hearing, see App. 8-9, hardly lend support to Tovar's suggestion of what he "may have" believed. See also *id.*, at 46 (court's inquiry at sentencing whether Tovar "wanted to take some time to hire an attorney"); Iowa Rule Crim. Proc. 8(2)(a) (1992) ("at any time before judgment," defendant may request withdrawal of guilty plea and substitution of not guilty plea).

Given "the particular facts and circumstances surrounding [this] case," see *Johnson*, 304 U.S., at 464, 82 L. Ed. 2d 1461, 58 S. Ct. 1019 [*32] it is far from clear that warnings of the kind required by the Iowa Supreme Court would have enlightened Tovar's decision whether to seek counsel or to represent himself. In a case so straightforward, the United States as *amicus curiae* suggests, the admonitions at issue might confuse or mislead a defendant more than they would inform him: The warnings the Iowa Supreme Court declared mandatory might be misconstrued as a veiled suggestion that a meritorious defense exists or that the defendant could plead to a lesser charge, when neither prospect is a realistic one. If a defendant delays his plea in the vain hope that counsel could uncover a tenable basis for contesting or reducing the criminal charge, the prompt disposition of the case will be impeded, and the resources of either the State (if the defendant is indigent) or the

defendant himself (if he is financially ineligible for appointed counsel) will be wasted. Brief for United States as *Amicus Curiae* 9, 28-29; Tr. of Oral Arg. 20-21.

We note, finally, that States are free to adopt by statute, rule, or decision any guides to the acceptance of an uncounseled plea they deem useful. See, e.g., Alaska Rule Crim. Proc. 39(a) [*33] (2003); *Fla. Rule Crim. Proc. 3.111(d)* (2003); Md. Ct. Rule 4-215 (2002); Minn. Rule Crim. Proc. 5.02 (2003); *Pa. Rule Crim. Proc. 121*, comment (2003). We hold only that the two admonitions the Iowa Supreme Court ordered are not required by the Federal Constitution.

* * *

For the reasons stated, the judgment of the Supreme Court of Iowa is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

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