

2003

Justin Brent Peterson v. Sheriff Aaron D. Kennard, Chief Paul Cunningham, salt Lake County Jail, and Taylorsville Justice Court : Unknown

Utah Court of Appeals

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Debra M. Nelson, Heather Brereton; Salt Lake Legal Defender Association; Attorneys for Appellant.
John N. Brems, George B. Hofmann; Parsons Kinghorn Harris; Attorneys for Appellees.

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March 15, 2004

**FILED
UTAH APPELLATE COURTS**

MAR 15 2004

Ms. Paulette Stagg
Clerk of the Court
Utah Court of Appeals
450 South State, 5th Floor
P.O. Box 140230
Salt Lake City, Utah 84114-0230

Dear Ms. Stagg:

Re: Peterson v. Kennard, et al
Case No. 20030264-CA

Pursuant to Rule 24(i), Utah Rules of Appellate Procedure, Appellant Justin Brent Peterson submits this letter of supplemental authority. A copy of the United States Supreme Court decision in Iowa v. Tovar, No. 02-1541, 2004 U.S. Lexis 1837, issued March 8, 2004, is attached.

Sincerely,



Debra M. Nelson
Appellate Attorney

cc: Karl L Hendrickson
John N. Brems

IOWA, PETITIONER v. FELIPE EDGARDO TOVAR

No. 02-1541

SUPREME COURT OF THE UNITED STATES

2004 U.S. LEXIS 1837

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 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:

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 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) ("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 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 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 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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March 15, 2004

**FILED
UTAH APPELLATE COURTS**

MAR 15 2004

Ms. Paulette Stagg
Clerk of the Court
Utah Court of Appeals
450 South State, 5th Floor
P.O. Box 140230
Salt Lake City, Utah 84114-0230

Dear Ms. Stagg:

Re: Peterson v. Kennard, et al
Case No. 20030264-CA

Pursuant to Rule 24(i), Utah Rules of Appellate Procedure, Appellant Justin Brent Peterson submits this letter of supplemental authority. A copy of the United States Supreme Court decision in Iowa v. Tovar, No. 02-1541, 2004 U.S. Lexis 1837, issued March 8, 2004, is attached.

Sincerely,



Debra M. Nelson
Appellate Attorney

cc: Karl L Hendrickson
John N. Brems

IOWA, PETITIONER v. FELIPE EDGARDO TOVAR

No. 02-1541

SUPREME COURT OF THE UNITED STATES

2004 U.S. LEXIS 1837

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 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:

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 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) ("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 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 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.

Training 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 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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JOHN N. BREMS

jnb@pkhlawyers.com

PARSONS KINGHORN HARRIS

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

111 East Broadway, 11th Floor

Salt Lake City, Utah 84111

Phone 801 363 4300

Fax 801 363 4378

www.pkhlawyers.com

April 6, 2004

Paulette Stagg
Clerk of the Court
UTAH COURT OF APPEALS
450 South State, 5th Floor
P.O. Box 140230
Salt Lake City, UT 84114-0230

Re: *Peterson v. Kennard, et al.*
Utah Court of Appeals, Case No. 20030264-CA

Dear Ms. Stagg:

Pursuant to Rule 24(i) of the Utah Rules of Appellate Procedure, Appellee Taylorsville Justice Court submits this letter of supplemental authority. A copy of Lucero v. Kennard, et al, 2004 UT App 94, issued April 1, 2004, is enclosed. The Lucero case is relevant to page four of the Taylorsville Justice Court's brief, and is material to the Peterson v. Kennard, et al. appeal because it is pertinent to the Court's subject matter jurisdiction to consider this appeal.

Very truly yours,

PARSONS KINGHORN HARRIS
A Professional Corporation



JOHN N. BREMS

JNB:bwt

Enclosure

cc: Joan C. Watt
Karl L. Hendrickson

***This opinion is subject to revision before
publication in the Pacific Reporter.***

IN THE UTAH COURT OF APPEALS

-----ooOoo-----

Benjamin Frank Lucero,
Petitioner and Appellant,

v.

Sheriff Aaron D. Kennard, Chief Paul Cunningham, Salt Lake County
Jail, and Murray City Justice Court,

Respondents and Appellees.

OPINION
(For Official Publication)

Case No. 20020984-CA

F I L E D
(April 1, 2004)

| |
|----------------|
| 2004 UT App 94 |
|----------------|

Third District, Salt Lake Department

The Honorable Glenn K. Iwasaki

Attorneys: Heather Brereton and Joan C. Watt, Salt Lake City, for
Appellant

Karl L. Hendrickson and Scott Daniels, Salt Lake City, for Appellees

Before Judges Greenwood, Jackson, and Orme.

GREENWOOD, Judge:

¶1 Benjamin Frank Lucero (Petitioner) appeals the district court's dismissal of his petition for post-conviction relief. He argues that while he was before the Murray City Justice Court (Justice Court), he was not properly advised of his constitutional right to counsel, and consequently did not knowingly and voluntarily waive his right to counsel before pleading guilty to driving under the influence of alcohol (DUI) in violation of Utah Code Annotated section 41-6-44 (Supp. 2003). Petitioner argues that the record in the Justice Court is insufficient to allow a determination of whether the required colloquy between the Justice Court and Petitioner occurred and that the trial court should not have considered evidence outside the record.

¶2 The Justice Court responds by first arguing that neither the district court nor this court has jurisdiction to hear this case because Petitioner failed to file a timely appeal to the district court for a trial de novo. The Justice Court further argues that if there is jurisdiction there was sufficient evidence on the record and through proffered and sworn testimony, for the district court to conclude that Petitioner was advised of his rights, and properly waived his right to counsel. We affirm the district court's decision, but on other grounds.

BACKGROUND

¶3 Petitioner was charged in the Justice Court⁽¹⁾ with DUI, a class B misdemeanor, in violation of Utah Code Annotated section 41-6-44 (Supp. 2003), and improper usage of lanes, a class C misdemeanor, in violation of Utah Code Annotated section 41-6-61 (1998). At a bench trial, Petitioner appeared pro se. After pleading guilty to DUI, the charge of improper usage of lanes was dismissed. On June 4, 2002, Petitioner was sentenced to a jail term of 180 days, ordered to pay a fine, and placed on probation for eighteen months. Petitioner did not file an appeal of his conviction to the district court within the thirty days required by law. See Utah Code Ann. § 78-5-120(1) (2002). However, on August 1, 2002, Petitioner filed, in the Third District Court, a Petition for Post-Conviction Relief or, in the alternative, Motion to Correct Illegally Imposed Sentence under Rules 65B and 65C of the Utah Rules of Civil Procedure. This petition sought an extraordinary writ granting his immediate release on the grounds that Petitioner was not represented by counsel, had not waived his right to counsel, and was sentenced in violation of the Sixth Amendment.

¶4 The Justice Court held a review hearing on September 10, 2002,

where it suspended Petitioner's remaining jail sentence and released him from custody. Six days later, in the Third District Court, a hearing took place on Petitioner's petition for post-conviction relief. At this hearing, rather than challenging his plea or conviction, Petitioner requested that his suspended sentence be vacated.

¶5 After testimony from Petitioner, proffered testimony of the Justice Court judge, and submission of affidavit testimony of two Justice Court clerks, the district court entered Findings of Fact and Conclusions of Law stating that Petitioner knowingly and voluntarily waived his right to be represented by counsel when he entered his plea. Petitioner filed a timely appeal to this court for review of the district court's order.

ISSUES AND STANDARD OF REVIEW

¶6 Petitioner challenges the district court's dismissal of his petition for post-conviction relief, claiming the record was insufficient. The Justice Court asserts the district court lacked jurisdiction to consider the petition. In addition, the Justice Court argues the district court properly found no violation of Petitioner's Sixth Amendment rights. "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, ¶4, 43 P.3d 467.

ANALYSIS

I. Appellate Review of Justice Courts

¶7 We first discuss the Justice Court's argument that the district court lacked jurisdiction to hear the petition because Petitioner did not first appeal to the district court for a trial de novo. Rule 65C (g)(1) of the Utah Rules of Civil Procedure directs the district court, upon receiving a petition for post-conviction relief, to first review the petition to ensure that the claims have not been previously adjudicated, or that the claims are not frivolous. If the court finds that the petition is not properly raised, the court is required to summarily dismiss the claims. See Utah R. Civ. P. 65C(g)(1). Additionally, Utah Code Annotated section 78-35a-106(1)(c) (2002) precludes post-conviction relief when a claim "could have been but was not raised at trial or on appeal." Id. In Hutchings v. State, 2003 UT 52, ¶14, 84 P.3d 1150, the Utah Supreme Court noted that rule 65C complements section 78-35a-106 and is "designed to balance the 'requirements of fairness and due process against the public's interest in the efficient adjudication . . . of post-conviction

relief cases.'" Id. (quoting Utah R. Civ. P. 65C(g)(1)). Therefore, a district court has jurisdiction over a petition for post-conviction relief in order to determine its procedural correctness.

¶8 In this case, it is unclear from the record whether the district court conducted this preliminary review required by rule 65C. It is clear, however, that the district court did not summarily dismiss the petition under rule 65C, but held a hearing on the merits, received evidence, and entered its Findings of Fact and Conclusions of Law dismissing the petition.⁽²⁾ As a result, the district court correctly assumed jurisdiction over Petitioner's petition. The remaining question is whether the district court should have summarily dismissed the petition for failure to comply with rule 65C and section 78-35a-106.

¶9 The Justice Court argues that Petitioner was required to pursue a direct appeal before seeking post-conviction relief.⁽³⁾ The Utah Constitution provides: "In criminal prosecutions the accused shall have . . . the right to appeal in all cases." Utah Const. art. I, § 12. For criminal cases originating in justice courts, a defendant is provided an appeal through "a trial de novo in the district court." Utah Code Ann. § 78-5-120(1) (2002). In a trial de novo, the district court is "not acting in a typical appellate capacity." State v. Hinson, 966 P.2d 273, 276 (Utah Ct. App. 1998). Because justice courts are not courts of record, "the 'appeal' does not involve a review of the justice court proceedings." Id. at 275. Through a trial de novo in the district court, "the parties essentially get a fresh start," and the case is tried again as if it originated there. Dean v. Henriod, 1999 UT App 50, ¶9, 975 P.2d 946 (quotations and citation omitted). The district court's judgment after trial de novo is final and may not be appealed either to this court or the Utah Supreme Court absent an issue regarding the constitutionality of a statute or ordinance. See Utah Code Ann. § 78-5-120(7); Hinson, 966 P.2d at 276. "[I]n Utah, . . . it is settled that the right to an 'appeal' from a court not of record is satisfied by provision for a trial de novo in a court of record." City of Monticello v. Christensen, 788 P.2d 513, 516 (Utah 1990).

¶10 In this case, after being sentenced, Petitioner chose not to appeal his plea or conviction to the district court for a trial de novo. It is clear, however, that a trial de novo would have remedied any constitutional defects suffered by Petitioner in the Justice Court. Instead, nearly two months after sentencing in the Justice Court, Petitioner filed his Petition for Post-Conviction Relief with the district court.

¶11 "A petition for post-conviction relief is a collateral attack on a conviction and sentence and is not a substitute for direct appellate review." Rudolph v. Galetka, 2002 UT 7, ¶5, 43 P.3d 467. The

Post-Conviction Remedies Act, Utah Code Annotated sections 78-35a-101 to -110 (2002), precludes post-conviction relief when a claim "could have been but was not raised at trial or on appeal." Utah Code Ann. § 78-35a-106(1)(c). The Utah Supreme Court has reiterated this prohibition, but with one exception. "[I]ssues that were not addressed on direct appeal but could have been raised may not be raised for the first time in a post-conviction relief proceeding absent unusual circumstances." Rudolph, 2002 UT 7, at ¶5 (emphasis added). The supreme court further defined unusual circumstances as those that "show that there was an obvious injustice or a substantial and prejudicial denial of a constitutional right." Carter v. Galetka, 2001 UT 96, ¶15, 44 P.3d 626 (quotations and citation omitted); see also Webster v. Jones, 587 P.2d 528, 530 (Utah 1978) (stating that exigent circumstances exist where there "has been such unfairness or failure to accord due process of law that it would be wholly unconscionable not to re-examine the conviction" (footnote omitted)).

¶12 Petitioner argues that his inability to have the Justice Court's denial of counsel reviewed by the district court on a direct appeal is unique and presents "unusual circumstances" with an "obvious injustice or a substantial and prejudicial denial of a constitutional right" warranting review. Carter, 2001 UT 96 at ¶15 (quotation and citations omitted). However, we are not persuaded that Petitioner, in fact, suffered from an obvious injustice. To the contrary, the structure of Utah's justice court system ensures that when a defendant believes he or she has been deprived of a constitutional right by a justice court, that individual is entitled to a new trial in the district court. See Utah Code Ann. § 78-5-120 (1) (2002); Henriod, 1999 UT App 50 at ¶9. Voluntarily eschewing the opportunity to remedy a constitutional violation through a trial de novo does not create unusual circumstances permitting a petition for post-conviction relief. By rejecting a trial de novo, Petitioner acceded to any undesired result of the Justice Court's sentence.⁽⁴⁾ Therefore, we hold that Petitioner did not suffer a "substantial and prejudicial denial of a constitutional right," Carter, 2001 UT 96 at ¶15 (quotations and citations omitted), because he had the opportunity to remedy his alleged denial of counsel, and chose not to pursue that opportunity.⁽⁵⁾ Because we conclude that the unusual circumstances exception does not apply in this case, Petitioner was precluded under Utah Code Annotated section 78-35a-106 from obtaining relief through a petition for post-conviction relief. Given our holding that the district court should have dismissed Petitioner's petition for post-conviction relief and our disposition of this case on that ground, we do not address the correctness of the trial court's findings and conclusions.

CONCLUSION

¶13 Petitioner failed to file a timely appeal to the district court for a trial de novo. A trial de novo would have remedied any constitutional violations Petitioner may have suffered in the Justice Court. After obtaining counsel, or properly waiving his right to counsel, Petitioner could have either pleaded guilty again, or challenged the charges in a trial. Defendant has not demonstrated unusual circumstances consisting of "an obvious injustice or substantial prejudicial denial of a constitutional right." Carter, 2001 UT 96 at ¶15. Thus, he has not established an exception to the rule prohibiting post-conviction relief when the petitioner has not first sought relief by direct appeal. We accordingly affirm the result of the district court, but for the reasons explained above.

Pamela T. Greenwood, Judge

¶14 I CONCUR IN THE RESULT:

Gregory K. Orme, Judge

JACKSON, Judge (dissenting):

¶15 I respectfully dissent from the majority's opinion.

I. The District Court's Jurisdiction to

Hear a Petition for Extraordinary Relief

¶16 It is unquestionably true that a defendant's right to appeal a justice court conviction to a district court for a trial de novo satisfies the various state and federal constitutional guarantees relating to due process and the right to appeal. See, e.g., North v. Russell, 427 U.S. 328, 337, 96 S. Ct. 2709, 2713 (1976); City of Monticello v. Christensen, 788 P.2d 513, 516 (Utah 1990). The question before us, however, is not one of constitutional propriety, but is instead a question of statutory interpretation. Specifically, the question of whether the district court had jurisdiction to hear Lucero's petition for post-conviction relief hinges upon our reconciliation of two different statutory provisions. The first is

Utah Code Annotated section 78-5-120 (Supp. 2002), which dictates the manner by which defendants can appeal justice court convictions. That section is entitled "Appeals from justice court," and provides that, "[i]n a criminal case, a defendant is entitled to a trial de novo in the district court." Id. § 78-5-120(1). The second is Utah Code Annotated section 78-35a-106 (1996), which establishes the means by which a defendant can petition for post-conviction relief under the Post-Conviction Remedies Act. See generally Utah Code Ann. §§ 78-35a-106 to -110 (1996). Section 78-35a-106(1) states that "[a] person is not eligible for relief under this chapter upon any ground that: (a) may still be raised on direct appeal or by a post-trial motion." (Emphasis added.) The question before us, then, is whether a trial de novo qualifies as a "direct appeal." Id. The majority concludes that it does, and therefore rules that Lucero's failure to file for a trial de novo precludes him from petitioning for post-conviction relief under the Post-Conviction Remedies Act. I disagree.

¶17 I first examine the meaning of the phrase "direct appeal." There is no provision in the Post-Conviction Remedies Act that specifically defines what constitutes a "direct appeal" for purposes of section 78-35a-106, nor is there a provision anywhere in the Utah Code defining that specific phrase for purposes of any other particular statutory scheme.⁽¹⁾ Accordingly, we must interpret the meaning of this phrase using the accepted rules of statutory interpretation. "When interpreting statutes, we determine the statute's meaning by first looking to the statute's plain language, and give effect to the plain language unless the language is ambiguous." Dick Simon Trucking, Inc. v. Utah State Tax Comm'n, 2004 UT 11, ¶17, 84 P.3d 1197. As I see it, a party receives a "direct appeal" when an appellate tribunal conducts a case-specific, ruling-specific review of the lower court proceedings. This understanding comports with the limited discussion that this phrase has received in various Utah courts. See, e.g., Collins v. Sandy City Bd. of Adjustment, 2002 UT 77, ¶¶18-19, 52 P.3d 1267 (referring to a "direct appeal" as a "direct review"); see also State v. Hamilton, 2003 UT 22, ¶25, 70 P.3d 111 (distinguishing "direct appeals" from collateral attacks). Accordingly, Utah courts have used the phrase "direct appeal" to refer to a variety of situations in which appellate tribunals undertook a case-specific, ruling-specific review of the proceedings below. See, e.g., Hutchings v. State, 2003 UT 52, ¶16, 84 P.3d 1150 (referring to an appellate review of a probation revocation as a "direct appeal"); Thomas v. State, 2002 UT 128, ¶6, 63 P.3d 672 (stating that such issues as the validity of a search warrant, the admissibility of a confession, and the correctness of a bindover order are reviewable on "direct appeal"); Salazar v. Utah State Prison, 852 P.2d 988, 991 n.6 (Utah 1993) (referring to an appellate review of a denial of a motion to withdraw a guilty plea as a "direct appeal"). Applied to the present case, a trial de novo would therefore only constitute a "direct appeal" of the justice court conviction if it provided the district court with the opportunity to

conduct a case-specific, ruling-specific review of the justice court proceedings.

¶18 I now turn to the scope of review provided by a "trial de novo." In Pledger v. Cox, the Utah Supreme Court noted that "[t]he words 'de novo' . . . have at least two possible interpretations when applied to judicial review . . . : '(1) A complete retrial upon new evidence; and (2) a trial upon the record made before the lower tribunal.'" 626 P.2d 415, 416 (Utah 1981) (quoting Denver & R.G.W.R. Co. v. Public Serv. Comm'n, 98 Utah 431, 436, 100 P.2d 552 (1940)). Though "[t]he meaning of 'trial de novo' in each statute is obviously dictated by the wording and context of the statute in which it appears," id., a trial de novo that is conducted following a defendant's justice court conviction follows the first definition--that of a "complete retrial upon new evidence." Id. This comports with the definition offered by Black's Law Dictionary, wherein "trial de novo" is defined as "[a] new trial on the entire case--that is, on both questions of fact and issues of law." Black's Law Dictionary 1512 (7th ed. deluxe 1999). Thus, "[b]ecause a justice of the peace court in this state is not a court of record, an appeal from that court is by way of a trial de novo in the district court, rather than a review of the justice's rulings." Wisden v. District Ct., 694 P.2d 605, 606 (Utah 1984).

¶19 Because it acts "as if there had been no trial in the first instance," Black's Law Dictionary 1512 (7th ed. deluxe 1999), a district court conducting a trial de novo "is not confined to the record before the justice court and need not defer to the justice court's findings and determinations. The district court neither reverses nor affirms the judgment of the justice court, but renders a new, distinct, and independent judgment." State v. Hinson, 966 P.2d 273, 276 (Utah Ct. App. 1998). When a district court conducts a trial de novo review of a justice court conviction, "the case [stands] precisely as it would have at that stage of the proceedings if it had begun in that court in the first instance." Id.; accord Dean v. Henriod, 1999 UT App 50, ¶9 n.1, 975 P.2d 946.⁽²⁾

¶20 When confronted with possible statutory conflicts that might preclude a defendant from seeking post-conviction relief, "any ambiguity that may exist . . . should be resolved in favor of a criminal defendant." Smith v. Cook, 803 P.2d 788, 791 (Utah 1990). Against this backdrop, I think that the majority's decision to deny Lucero post-conviction relief based on his failure to request a trial de novo is simply incorrect. Had Lucero requested a trial de novo, the district court would have been required to act as if "the proceedings had begun in that court in the first instance." Hinson, 966 P.2d at 276. As such, Lucero would not have had the opportunity

to focus his "appeal" on the particular legal conclusions or factual findings of the justice court that he believed were erroneous. Lucero's trial de novo would not have been a framed, particularized proceeding that was directed at the review of specific alleged errors; instead, the district court conducting the trial de novo would have acted as a broad, general tribunal that would have examined the charges anew. Insofar as this avenue of appeal would simply not have given Lucero the opportunity to directly challenge any alleged errors below, I think it clear that the trial de novo cannot be regarded as a "direct appeal."⁽³⁾

¶21 As I see it, the plain language of the statutory scheme thus provides a defendant who has been convicted in a justice court proceeding with two separate avenues of relief. First, the defendant can exercise his statutory right to file for a trial de novo. The advantages of this course would be clear: though the defendant would not have the opportunity to have the trial court review any potential errors that occurred below, the defendant would have the opportunity under this fresh start to try and persuade a new finder of fact of his or her innocence. Should the defendant choose not to file for a trial de novo, however, the defendant is still allowed to petition a district court for post-conviction relief under the Post-Conviction Remedies Act. In this hearing, the trial court would have the authority to directly review the proceedings in the justice court to determine whether any constitutional error occurred.⁽⁴⁾ In this case, Lucero properly and validly chose the second option, and the trial court correctly determined that it did have jurisdiction to hear the merits of Lucero's petition for post-conviction relief. I would accordingly conclude that the majority's reversal of that threshold determination is in error.

II. Lucero's Petition for Post-Conviction Relief

¶22 Because of my conclusion that Lucero did have a right to petition for post-conviction relief, I think that we are obligated to review the district court's determination that Lucero's waiver of the right to counsel at the justice court proceeding was constitutionally valid. Having reviewed the record and the applicable law, I would conclude that Lucero did not validly waive his right to counsel and that the district court's denial of Lucero's petition for post-conviction relief should accordingly be reversed.

¶23 "The right to have the assistance of counsel in a criminal trial is a fundamental constitutional right which must be jealously protected by the trial court." State v. Heaton, 958 P.2d 911, 917 (Utah 1998). "Because of the importance of the right to counsel and the heavy burden placed upon the trial court to protect this right, there is a presumption against waiver, and doubts concerning waiver

must be resolved in the defendant's favor." Id. However, because the right to assistance of counsel is "personal in nature," State v. Frampton, 737 P.2d 183, 187 (Utah 1987), the right "may be waived by a competent accused if the waiver is 'knowingly and intelligently' made." Id. (citation omitted); see also State v. Bakalov, 849 P.2d 629, 633 (Utah Ct. App. 1993). Further, the relevant Utah cases establish that there is a distinction between the "knowingly" and the "intelligently" prongs of the waiver test.

"Intelligent" in this context means "only that the defendant has been provided with adequate information on which to make his or her self-representation choice. Because such a choice is seldom, if ever, a wise one, 'intelligent' does not carry that meaning here." "Knowing" refers to a defendant's competence to waive the right to counsel, similar to a defendant's competence to stand trial

State v. McDonald, 922 P.2d 776, 779 (Utah Ct. App. 1996) (citations omitted).

¶24 Before determining that a defendant has knowingly and intelligently waived his or her right to counsel, a trial court has an affirmative duty to "conduct a thorough inquiry of the defendant" in order to ensure "that the defendant's waiver of counsel is knowingly, intelligently, and voluntarily made." Heaton, 958 P.2d at 918. Though a colloquy on the record is not required, see State v. Valencia, 2001 UT App 159, ¶¶20-22, 27 P.3d 573, it is "the preferred method of ascertaining the validity of a waiver because it insures that defendants understand the risks of self-representation." Frampton, 737 P.2d at 187. "Where there is no colloquy, [appellate courts] 'will look at any evidence in the record'" created in the district court in order to ascertain whether the district court has fulfilled its duty of inquiry. Valencia, 2001 UT App 159 at ¶22 (quoting Frampton, 737 P.2d at 188).⁽⁵⁾

¶25 In explaining the contours of this required inquiry, the United States Supreme Court has stated that the defendant "should be made aware of the dangers and disadvantages of self-representation" prior to the trial court's acceptance of a waiver of the right to counsel. Faretta v. California, 422 U.S. 806, 835, 95 S. Ct. 2525, 2541 (1974). In accordance with the United States Supreme Court's unquestioned authority over questions of federal constitutional law, Utah courts have long enforced the Faretta directive as part of the Sixth Amendment analysis. See Heaton, 958 P.2d at 918; Frampton, 737 P.2d at 188; State v. Ruple, 631 P.2d 874, 875-76 (Utah 1981); State v. Dominguez, 564 P.2d 768, 769-70 (Utah 1977); State v. Petty, 2001 UT App 396, ¶8, 38 P.3d 998; Valencia, 2001 UT App 159 at ¶22; McDonald, 922 P.2d at

779; Bakalov, 849 P.2d at 633.⁽⁶⁾

¶26 The proper scope of the Faretta directive was recently addressed by the United States Supreme Court in Iowa v. Tovar, 541 U.S. , 124 S. Ct. 1379, 2004 U.S. Lexis 1837, * (2004).⁽⁷⁾ In Tovar, the defendant was arrested for operating a motor vehicle while under the influence of alcohol. See id. at *10. An intoxilyzer test administered the night of the defendant's arrest showed that he had a blood alcohol level that was well above the legal limit. See id. At his arraignment, the defendant informed the court that he wished to waive his right to counsel and that he wished to plead guilty. See id. at *12. The court accordingly conducted a plea colloquy in which the court explained that the defendant had the right to be represented at trial by an attorney who "could help [the defendant] 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 *12-13 (second and third alterations in original). After receiving this and other warnings, the defendant affirmed his wish to waive his right to counsel and to plead guilty. See id. at *14.

¶27 Several years later, the defendant was arrested for a third DUI offense, and accordingly sought to challenge his prior guilty plea as a means of avoiding a recidivist sentence enhancement. See id. at *16-17. After proceeding through the lower Iowa courts, the Iowa Supreme Court ruled that the original waiver was constitutionally invalid due to the fact that the defendant had not been informed of "the dangers of self-representation." Id. at *19 (quotations and citation omitted).

¶28 On appeal, however, the United States Supreme Court reversed. See id. at *33. In reversing, the Court held that "[t]he information a defendant must possess in order to make an intelligent election . . . 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 (emphasis added). While the Faretta directive is still required before a court accepts a waiver of counsel before trial, see id. at *23-24, "at the earlier stages of the criminal process, a less searching or formal colloquy may suffice." Id. at *24. Quoting prior precedent, the Court explained that "[w]e require less rigorous warnings pretrial . . . 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 *26 (quotations and citations omitted).

¶29 Endorsing a "pragmatic approach to the waiver question," id. at *25 (quotations and citations omitted), the Court ultimately

concluded that the inquiry must rest on "the particular facts and circumstances" of each case. See id. at *3. Analyzing the Tovar litigation, the Court concluded that there was not a "realistic" "prospect" that a "meritorious defense" would have existed for Tovar at trial or that the defendant could have pled "to a lesser charge." Id. at *32. Because "the admonitions at issue might confuse or mislead a defendant [in such a scenario] more than they would inform him," id., the Court ultimately concluded that the lower court did not err by failing to inform Tovar of the dangers and disadvantages of self-representation.

¶30 Counsel for the Murray City Justice Court argues that Tovar mandates affirmance in the present case. I disagree with that proposition. While it may be true that Tovar will require a reexamination of our "dangers and disadvantages" jurisprudence, at least as applied to waivers at a plea hearing, the facts of the present case do not require such a reexamination here. As discussed above, the Tovar ruling was expressly predicated on the unquestioned evidence that Tovar would have had no "realistic" alternatives to pleading guilty. Id. at *32. Further, the trial court in Tovar did conduct an on-record colloquy in which the court advised Tovar of some of the advantages that having an attorney would have offered. See id. at *13. In the present case, however, there is a complete absence of evidence from which we could similarly conclude that Lucero lacked a realistic prospect of success at trial or in negotiations with prosecutors. There is likewise no evidence that Lucero was informed by the justice court of any of the advantages of having counsel present at the hearing. Our supreme court has previously held that "there is a presumption against waiver." Heaton, 958 P.2d at 917. Given this presumption, I think that we are obligated to conclude that Lucero was not informed of how the right to counsel would have applied "in general in the circumstances," Tovar, 2004 U.S. Lexis 1837 at *29 (emphasis omitted), and that Lucero's waiver of the right to counsel was thus invalid. As such, I would reverse the district court's dismissal of Lucero's petition for post-conviction relief.

Norman H. Jackson, Judge

1. Under Utah Code Annotated section 78-5-101 (2002), justice courts are courts "not of record."

2. The Justice Court likewise argues that this court does not have jurisdiction over this case. However, the court of appeals has jurisdiction to review a district court's denial of a petition for post-conviction relief pursuant to Utah Code Annotated section 78-2a-3(2)(f) (2002). See also Utah R. Civ. P. 65C(o).

3. Petitioner argues that because the Justice Court did not raise this issue before the district court, it is now barred because it would constitute an alternative ground for affirmance not apparent on the record nor sustainable by the factual findings. See State v. Topanotes, 2003 UT 30, ¶9, 76 P.3d 1159. However, "[j]urisdictional issues may be raised for the first time on appeal." M.M.J. v. R.N.J., 908 P.2d 345, 347 (Utah Ct. App. 1995). Moreover, Petitioner's argument is moot because we have determined the district court had jurisdiction.

4. Through his post-conviction relief petition, Petitioner does not challenge the Justice Court plea or conviction. Instead, for reasons not apparent to this court, he seeks only a dismissal of the remaining suspended sentence.

5. The Justice Court also argues that Petitioner should be precluded from bringing a petition for post-conviction relief because he did not explain why he failed to take a direct appeal. In support of this argument, it cites Summers v. Cook, 759 P.2d 341, 343 (Utah Ct. App. 1988), and Wells v. Shulsen, 747 P.2d 1043, 1044 (Utah 1987), where the courts held that in addition to showing an obvious injustice, the defendants were required to explain why they did not take a direct appeal. However, Summers and Wells were both decided prior to the enactment of the Post-Conviction Remedies Act, Utah Code Annotated sections 78-35a-101 to -110 (2002), which does not require such an initial showing of why a direct appeal was not taken. We note that even though a defendant is not required to explain why he did not bring a direct appeal, such an explanation may be helpful in showing extraordinary circumstances.

1. Black's Law Dictionary defines a "direct appeal" as "[a]n appeal from a trial court's decision directly to the jurisdiction's highest court, thus bypassing review by an intermediate appellate court." Black's Law Dictionary 94 (7th ed. deluxe 1999). A review of the Utah cases, however, indicates that this strict definition is not followed by our courts. In Pascual v. Carver, for example, the Utah Supreme Court referred to the defendant's prior appeal, which had been heard in the Utah Court of Appeals, as a "direct appeal" of the conviction. 876 P.2d 364, 366 (Utah 1994). Similarly, in State v. Lara, we referred to an appeal of a bindover order that was heard in this court as a "direct appeal." 2003 UT App 318, ¶20, 79 P.3d 951.

2. Given this construct, Utah courts have insisted that though a district court exercises its "appellate jurisdiction" when conducting a trial de novo, State v. Hudecek, 965 P.2d 1069, 1071 (Utah Ct. App. 1998), the trials de novo that are held before the district courts must not be characterized in the same manner as a standard appeal which is held before the court of appeals or supreme court. In State v. Hinson, this court clearly drew this distinction, therein declaring that certain rules governing a case filed "[i]n a

conventional appeal environment . . . [have] no place in an appeal from a justice court judgment." 966 P.2d 273, 275-76 (Utah Ct. App. 1998). Similarly, we emphasized in Dean v. Henriod that there is a distinction between a "traditional appeal" and "an appeal from justice court." 1999 UT App 50, ¶9 n.1, 975 P.2d 946. Thus, when a district court conducts a trial de novo, the district court is "not acting in a typical appellate capacity." Hinson, 966 P.2d at 276. In a related context, the Utah Supreme Court has declared that, because a district court has the authority to make findings of fact in its trial de novo review of Industrial Commission decisions, the district court should be viewed "as an independent fact finder and not as an intermediate appellate court." University of Utah v. Industrial Comm'n, 736 P.2d 630, 633 (Utah 1987) (emphasis omitted).

3. There is some confusion as to whether Murray City Justice Court's argument is predicated on Utah Code Annotated section 78-35a-106(1)(a) (1996) (precluding relief under the Post-Conviction Remedies Act where the petition is based on a ground that "may still be raised on direct appeal") or whether it is instead predicated on Utah Code Annotated section 78-35a-106(1)(c) (1996) (precluding relief under the Post-Conviction Remedies Act where the petition is based on a ground that "could have been but was not raised at trial or on appeal"). Though Murray City Justice Court's brief did not specify which of these subsections its argument was predicated on, the brief did directly discuss Utah Code Annotated section 78-35a-102(1) (1996), which states that relief is appropriate where a defendant has "exhausted all other legal remedies, including a direct appeal." (Emphasis added.) Given this reference, and given the repeated references throughout the remainder of the brief to Lucero's failure to exercise his rights to a "direct appeal," I think it clear that any specific argument arising under Utah Code Annotated section 78-35a-106(1)(c) is not properly before us.

Even were we to consider the subtle differences embodied by section 78-35a-106(1)(c), however, I think that the result here would be the same. As discussed above, though the trial de novo is considered to be the form by which a defendant can "appeal" his or her justice court conviction, it is still nevertheless true that the district court conducting the trial de novo cannot consider any particular claims of error that might have arisen below. Thus, insofar as the defendant in such circumstances cannot "raise" any issues in his "appeal," I think that the result under either section 78-35a-106(1)(a) or section 78-35a-106(1)(c) would be the same.

4. At oral argument, Murray City Justice Court argued that allowing defendants who are convicted in justice court to have two separate avenues of appellate relief is unnecessary and duplicative. This concern, however, is misplaced. Instead, I think that there is a certain degree of logic present in allowing a defendant to bypass the trial de novo stage and instead directly appeal for post-conviction relief. The financial costs and emotional tolls that are involved in

having to prepare for and go through a trial de novo can be heavy. In situations where a defendant has suffered a clear constitutional wrong at the justice court level, it would seem patently unjust to require the defendant to pay for and endure a full trial before allowing the defendant any access to direct appellate review. Instead, I think that our statutory scheme is wise in allowing defendants in such situations to immediately petition a court for redress under the Post-Conviction Remedies Act, while at the same time allowing defendants who are willing to proceed to trial the opportunity to pursue that course of action instead. Regardless, I again note that this appears to be the statutorily created system. Thus, I see no option but to conclude that, as presently constituted, the Utah Code does allow a defendant to choose between these two different forms of relief.

5. In its brief and again at oral argument, counsel for Lucero asserted that, insofar as justice court proceedings are not conducted on the record, our review of this case should be limited to the information contained in the justice court docket or filings. The cases state, however, that an appellate court reviewing a waiver of that right must be able to look at "any evidence in the record" in order to determine whether the right was properly waived. State v. Valencia, 2001 UT App 159, ¶22, 27 P.3d 273 (emphasis added) (quoting State v. Frampton, 737 P.2d 183, 188 (Utah 1987)); accord State v. Heaton, 958 P.2d 911, 919 (Utah 1998); State v. McDonald, 922 P.2d 776, 780 (Utah Ct. App. 1996).

Similarly, I also note my disagreement with Lucero's assertion that the trial court in this case should not have received testimony from witnesses in its efforts to ascertain whether the waiver proceedings at the justice court were constitutionally valid. In State v. Gutierrez, the defendant sought to challenge the application of a repeat offender DUI enhancement statute to his case, therein arguing that his prior convictions were each invalid. See 2003 UT App 95, ¶¶2-5, 68 P.3d 1035. As part of his challenge, the defendant argued that one of his prior guilty pleas, entered at a justice court, had been involuntary. See id. at ¶9. In upholding the use of the justice court guilty plea by the trial court, we concluded that Gutierrez had failed to prove involuntariness. See id. at ¶12. Addressing Gutierrez's concerns about how he could have established such proof where the justice court keeps no official record, we noted that "Gutierrez could have produced testimony from those who were present regarding the taking of his plea, the court's docket sheet, or other affirmative evidence." Id. In spite of this clear holding, Lucero suggests that there is a distinction between the trial court's use of such testimony for purposes of sentence enhancement and for use when the trial court reviews a petition for post-conviction relief. I disagree with that attempted distinction. In both situations, the trial court is simply exercising its authority to review the lower proceedings in order to determine whether they were constitutionally valid. Given the important nature of this solemn

responsibility, I see no reason why the trial court should be limited in its ability to inquire as to what occurred in the justice court proceedings. Accordingly, I would conclude that the trial court's use of testimony and extrinsic evidence in this case was proper.

6. Counsel for Murray City Justice Court points us to language in McDonald, wherein we stated that "a recommendation by the court against self-representation is not necessary for a defendant to intelligently waive the right to counsel." 922 P.2d at 785. Murray City Justice Court argues that this language obviates the duty of inquiry discussed above. I disagree. A careful reading of the precedent discussed above indicates that the trial court's specific duty here is to ensure that the defendant understands the "dangers and disadvantages" of self-representation. Heaton, 958 P.2d at 918 (emphasis added); accord McDonald, 922 P.2d at 779. Though subtle, there is a clear distinction between a rule requiring the court to inform a defendant of the dangers and disadvantages of self-representation and one requiring the court to take the further step of actually advising the defendant not to represent himself or herself. The former is simply a fulfillment of the court's duty to ensure that the defendant has the proper information; the latter would put the trial court into the role of advisor to the defendant, a role that would clearly be impermissible. As discussed below, a subsequent decision by the United States Supreme Court may indicate that a warning of the dangers and disadvantages of self-representation is not required at all stages of litigation. However, I would stress here that our statement in McDonald regarding the lack of a "recommendation" requirement does not remove the duty of inquiry from trial courts before accepting a counsel waiver at the trial setting.

6. Though Tovar was concededly decided after the events at issue here took place, it is a "long standing traditional rule . . . that the law established by a court decision applies both prospectively and retrospectively, even when the decision overrules prior case law." Carter v. Galetka, 2001 UT 96, ¶26, 44 P.3d 626 (quotations and citations omitted).