No. 02-1541

In the Supreme Court of the United States

STATE OF IOWA, PETITIONER

v.

FELIPE EDGARDO TOVAR

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether respondent's uncounseled plea of guilty to a state-law misdemeanor offense was invalid because the trial court failed to provide respondent with sufficient information and advice about the potential advantages of representation by counsel.

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INTEREST OF THE UNITED STATES

The issue in this case is whether respondent's uncounseled plea of guilty to a state-law misdemeanor offense was obtained in violation of the Sixth Amendment because the trial judge failed to provide respondent with sufficient information and advice about the potential advantages of representation by counsel. The resolution of that issue will affect the nature of the colloquy that must be conducted when an uncounseled defendant enters a guilty plea in federal court. This Court's disposition of the case may also affect the use of prior uncounseled guilty pleas as predicates for federal offenses in which a prior conviction is an element of the crime (see, *e.g.*, 18 U.S.C. 922(g)(1) and (9)), or for recidivist enhancements imposed on federal defendants under statute (see, *e.g.*, 18 U.S.C. 924(e)), or the Sentencing Guidelines. The United States therefore has a substantial interest in this case.

STATEMENT

1. In November 1996, respondent Felipe Edgardo Tovar was charged in Iowa state court with operating a vehicle

while intoxicated (OWI), in violation of Iowa Code Ann. § 321J.2 (West 1997). Under Iowa law, a person is guilty of an OWI offense if he operates a motor vehicle within the State either (a) "[w]hile under the influence of an alcoholic beverage or other drug or a combination of such substances," or (b) "[w]hile having an alcohol concentration * * * of .10 or more." *Id.* § 321J.2(1)(a) and (b).

On November 18, 1996, respondent appeared before the Story County district court along with four other individuals charged with misdemeanor offenses. J.A. 11; Pet. App. 4. The trial court noted at the outset of the hearing that respondent had waived application for appointed counsel, and respondent confirmed that he wished to represent himself at the plea proceeding. J.A. 8-9. The court proposed to conduct plea proceedings for the five cases jointly, and each of the individuals indicated that he did not object to that course of action. J.A. 11. Respondent stated that he was 21 years old and a student in college; that he could read and write the English language; that he was not under the influence of drugs or alcohol; and that he had not been promised anything or threatened in any way in order to induce him to plead guilty. J.A. 12-13.

During the plea colloquy, the trial court explained to the defendants as a group the rights that they would be giving up if they entered pleas of guilty. The court first explained that "[i]f you enter a plea of not guilty, you would be entitled to a speedy and a public trial by jury. But, if you plead guilty, you give up your right to have a trial of any kind on your charge." J.A. 15. The court next informed the defendants that a person who pleaded not guilty and went to trial "would have a right to be represented by an attorney at that trial, including a court appointed attorney. That attorney could help you select a jury, question and cross-examine the State's witnesses, present evidence, if any, in your behalf, and make arguments to the judge and jury on your

behalf. But, if you plead guilty, not only do you give up your right to a trial, you give up your right to be represented by an attorney at that trial." J.A. 16. The court further explained that a defendant who pleaded not guilty "would have a privilege against self-incrimination" and could neither be forced to testify nor have his refusal to testify used against him, but that a defendant who pleaded guilty would be required to admit his guilt in the course of the plea proceeding. J.A. 16-17. The court explained in addition that a defendant who pleaded not guilty would be presumed innocent unless and until his guilt was proved beyond a reasonable doubt, and would have the right to subpoena witnesses and compel their testimony at trial. J.A. 17-18. Respondent confirmed that he understood each of the rights that he would surrender by entering a guilty plea. See J.A. 15-19.

The trial court next addressed the defendants individually about the particular offense with which each was charged. The court informed respondent (and one other defendant charged with the same offense) that an OWI conviction "carries a maximum penalty of up to a year in jail and up to a $1,000.00 fine and the mandatory minimum fine [sic] of two days in jail and a $500.00 fine." J.A. 20. Respondent stated that he understood those penalties. *Ibid.*

The trial court then stated that, before it could accept a guilty plea, it needed "to be satisfied that you are in fact guilty of the offense you are pleading guilty to," and that it intended to assure itself of the defendants' guilt by "explain[ing] to you what the elements are and determin[ing] whether or not you committed those elements." J.A. 21-22. The court informed respondent that the OWI charge

> just has two elements to the offense. The first element is that on the date listed on the trial information you were operating a motor vehicle in the State of Iowa. The second element of the offense is that when you did so,

> you were intoxicated. Now, under the law of the State of Iowa, there are two definitions of intoxication and you may fit one or both of those definitions. One way to be intoxicated is to have had a blood or breath alcohol concentration of .10 percent or more in your body at the time you were driving. The other way to be intoxicated is to be under the influence of alcohol, which means that the consumption of alcohol has affected your judgment [or] your reasoning or your faculties or it has caused you to lose control in any manner or to any degree of the actions or motions of your body.

J.A. 23. Respondent confirmed that on November 2, 1996, he had operated a motor vehicle in Ames, Iowa, after consuming alcohol. J.A. 23-24. Respondent stated that he had not felt any effects of the alcohol on the night in question, but that he did not dispute the results of an intoxilyzer test administered that night, which showed his blood alcohol level to be .194. J.A. 24. Respondent thereafter confirmed that he wished to enter a plea of guilty. J.A. 27-28.

The trial court accepted respondent's guilty plea, finding that the plea had been entered voluntarily and with a full understanding of respondent's rights and of the consequences of the plea. J.A. 28. The court further found that there was a factual basis for the plea. *Ibid.*

On December 30, 1996, respondent was sentenced on the OWI conviction. At the same proceeding, respondent pleaded guilty to a subsequent charge of driving with a suspended license. See J.A. 45-51. In the course of the plea colloquy on the driving-under-suspension charge, the trial court noted that respondent had applied for a court-appointed attorney, but that appointed counsel had been denied because respondent was dependent on his parents. J.A. 46. Respondent chose to represent himself at the proceedings. *Ibid.* On the OWI conviction to which respondent had previously pleaded guilty, the court imposed the

mandatory minimum sentence of two days in jail and a $500 fine. J.A. 54.[1]

2. On December 14, 2000, respondent was charged with OWI, third offense, a class D felony under Iowa law. Pet. App. 2. The enhancement of the OWI charge to a class D felony was based on respondent's 1996 OWI conviction and a second OWI conviction entered in 1998. *Ibid.*; *id.* at 24 n.1.[2] Respondent contended that his 1996 conviction could not be used to enhance the current charge because he had not knowingly and intelligently waived his right to counsel at the 1996 plea hearing. *Id.* at 2-3. The trial court rejected that contention. *Id.* at 35-37. Respondent waived his right to a jury trial and was found guilty by the court of the OWI third offense. *Id.* at 33-34. He was subsequently sentenced to a 180-day jail term, with all but 30 days suspended, and to three years of probation and a $2500 fine plus surcharges. J.A. 70-73.

The Court of Appeals of Iowa affirmed. Pet. App. 23-30. The court found that respondent had "validly waived his right to counsel prior to entry of the 1996 uncounseled guilty plea." *Id.* at 29-30. The court explained that respondent "was advised of his right to counsel and made sufficiently aware of what counsel could do for him at trial," and that he "was informed of the ultimate adverse consequences he could suffer as he was advised of the maximum possible penalties for the offense." *Id.* at 30.

3. The Supreme Court of Iowa reversed by a 4-3 vote. Pet. App. 1-22. The court acknowledged that "because the dangers of proceeding pro se at a guilty plea proceeding will

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[1] The court imposed the minimum $250 fine on the driving-under-suspension charge. J.A. 54.

[2] Petitioner pleaded guilty to the 1998 OWI offense, Pet. App. 24 n.1, and he has not challenged the validity of that plea in the current proceedings.

be different than the dangers of proceeding pro se at a jury trial, the inquiries made at these proceedings will also be different." *Id.* at 13. The court nevertheless held that the colloquy preceding respondent's 1996 guilty plea had been constitutionally inadequate. The court stated that "[a]lthough a layperson can readily understand what it means to drive while intoxicated, he or she will most likely be unaware of the prerequisites for invoking implied consent and the other statutory and constitutional restrictions on police action that might provide a basis for suppression of the evidence of intoxication, which is usually the only meaningful defense available." *Id.* at 15.

The Iowa Supreme Court accordingly concluded that for a defendant to plead guilty without counsel, the court must advise the defendant of the advantages of having counsel and of the risks of proceeding pro se. While the trial court should not attempt to perform the role of counsel, the Iowa Supreme Court held, the trial court must generally inform the defendant that laypersons may not know of defenses to criminal charges and that the danger in pleading guilty without counsel is that "a viable defense [may] be overlooked." Pet. App. 18. The Iowa Supreme Court further held that the trial court must admonish the defendant that "by waiving his right to an attorney he will lose the opportunity to obtain an independent [legal] opinion" on the wisdom of pleading guilty. *Ibid.* Finally, the Iowa Supreme Court held, the judge must tell the defendant about the "nature of the charges" and the "range of allowable punishments," so that the defendant can make an intelligent decision on whether to forgo counsel. *Ibid.*

Applying that test, the Iowa Supreme Court concluded that the record was insufficient to support a finding that respondent had knowingly and intelligently waived his right to counsel. Pet. App. 18-19. There was no showing, the court stated, that the trial judge had advised respondent of

the dangers and disadvantages of proceeding without counsel. *Ibid.* The Iowa Supreme Court therefore concluded that respondent's 1996 OWI conviction could not be used to enhance his current charge to a third-offense OWI. *Id.* at 19.

Justice Carter, joined by two other members of the court, dissented. Pet. App. 19-22. The dissenting justices explained that respondent was advised at the 1996 plea colloquy of the rights he would surrender by pleading guilty, and of the maximum and minimum sentences to which he would be subject. *Id.* at 21. They concluded that respondent "was therefore made fully aware of the penal consequences that might befall him if he went forward without counsel and pleaded guilty." *Ibid.* The dissenting justices viewed the majority's "speculation concerning unidentified potential defenses that an able lawyer might have advanced" as an inadequate basis for "ignor[ing] the consequences of a voluntary guilty plea." *Ibid.*

SUMMARY OF ARGUMENT

In order for a defendant pleading guilty to make a valid waiver of his Sixth Amendment right to counsel, the defendant must be sufficiently informed about the consequences of his actions and the nature of his rights. Through the 1996 plea colloquy, respondent received sufficient information in both categories so as to enable him to make an informed choice between his alternatives.

A. At respondent's 1996 arraignment for a first-offense OWI, the trial court made clear that a guilty plea, if accepted, would result in conviction of the charged offense without a trial of any kind. The trial court further informed respondent of the statutory minimum and maximum sentences applicable to the charge to which the plea was entered. Respondent was thereby provided constitutionally sufficient information about the consequences of the course

of action—representing himself at the arraignment and entering a plea of guilty—that he proposed to take.

Different and more extensive warnings may be required when a criminal defendant proposes to plead not guilty and then to act as his own attorney at trial. Cf. *Faretta* v. *California*, 422 U.S. 806 (1975). An individual who is unfamiliar with criminal trial procedure may need more information about the risks he faces and the consequences of self-representation to ensure that his decision to represent himself reflects a knowing and intelligent waiver of the right to counsel. But when a defendant enters a plea of guilty, he is told about the trial rights he is surrendering and is informed that, upon acceptance of his plea, he will be convicted without a formal trial proceeding and subjected to punishment within a defined statutory range. There is no basis for heightened concern that a defendant who receives that information does not adequately comprehend the likely consequences of his proposed course of action. And there are often sound reasons for a defendant to forgo an attorney and enter a prompt plea, particularly to an uncomplicated misdemeanor offense with limited and frequently predictable penalties.

B. The Supreme Court of Iowa erred in holding that respondent received constitutionally insufficient information about the assistance that an attorney could provide in pursuing a possible alternative strategy to entry of a guilty plea. Advice about the likely benefits of contesting a criminal charge, when a defendant wishes to plead guilty, is inherently speculative—and so too is advice about the likely benefits of counsel at a hypothetical proceeding contesting guilt or the prosecution's evidence. Such advice is not necessary to a valid waiver of counsel. Indeed, a guilty plea may be valid even though the defendant acts on the basis of incomplete or even inaccurate information concerning the consequences of proceeding to trial. Here, the trial court

informed respondent of the constitutional protections to which he would be entitled if he pleaded not guilty, and of the services that an attorney could provide at trial. The plea colloquy thus gave respondent constitutionally sufficient information about the available alternatives to his intended course of action.

The Supreme Court of Iowa held that the trial court was required to inform respondent that an attorney might be aware of legal defenses that are unknown to the layperson, in order to ensure respondent's awareness of the "dangers and disadvantages of self-representation." But in the context of post-indictment questioning of defendants, this Court has held that the government need only alert the defendant to the "ultimate adverse consequence" that waiver of the right to counsel may entail—namely, the potential use against him in criminal proceedings of any statements that he might choose to make. *Patterson* v. *Illinois*, 487 U.S. 285, 293 (1988). Similarly here, respondent was sufficiently informed of the "dangers and disadvantages of self-representation" at the plea hearing in this case, where he was told that a plea of guilty would result in a conviction without trial and the imposition of sentence within a specified range.

C. Affirmance of the Iowa Supreme Court's decision could have significant adverse practical consequences. Every expansion of the required guilty plea colloquy beyond the information that is truly fundamental to the defendant's choice of plea will make the colloquy less concise and thus less accessible to the defendant. The warning required by the Iowa Supreme Court, moreover, may be misconstrued by some defendants as a veiled suggestion that a meritorious defense exists in a particular case, thus creating an artificial disincentive to the expeditious resolution of the underlying prosecution. The disruptive effects of additions to the required plea colloquy will be particularly great if (as the Supreme Court of Iowa concluded) a trial court's omission of

the newly-mandated warnings exposes the defendant's prior conviction to collateral attack in a subsequent recidivist prosecution. The Constitution does not require those disruptive effects.

ARGUMENT

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence." To determine whether a criminal defendant's Sixth Amendment rights were violated when he was unrepresented by counsel during a particular phase of the investigative or prosecutorial process, two distinct questions must be answered: (1) whether the individual is entitled to the assistance of counsel at a given stage of the proceedings, and (2) if so, whether the individual made a voluntary and intelligent waiver of that right. This Court has taken a "pragmatic approach to the waiver question—asking 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—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 of that right will be recognized." *Patterson* v. *Illinois*, 487 U.S. 285, 298 (1988).

Respondent was entitled under the Sixth Amendment to the assistance of counsel in his 1996 OWI misdemeanor prosecution because it culminated in a two-day sentence of imprisonment. See *Argersinger* v. *Hamlin*, 407 U.S. 25, 37 (1972) ("[A]bsent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."). It is also clear that respondent's Sixth Amendment right extended to the hearing at which his guilty plea was made and accepted by the court. See *id.* at

34. The sole question before this Court is whether respondent's express waiver of his right to the assistance of counsel was voluntary and intelligent.[3]

The information provided to respondent at his 1996 arraignment falls into two distinct categories. Certain items (the minimum and maximum punishments for the OWI offense, and the fact that there would be no trial if respondent pleaded guilty) clarified the legal consequences that would ensue if respondent adhered to his stated intention of representing himself at the arraignment and entering a guilty plea. Other aspects of the plea colloquy (the enumeration of constitutional protections) informed respondent of his trial rights if he chose to plead not guilty. Together, that information, which parallels the information required in the plea colloquy for a federal defendant under Federal Rule of Criminal Procedure 11, provided respondent with the necessary considerations to choose intelligently between the available alternatives.

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[3] An indigent defendant charged with a misdemeanor has no constitutional right to appointed counsel if no sentence of imprisonment is actually imposed. See *Scott* v. *Illinois*, 440 U.S. 367, 373-374 (1979). Under *Scott*, a constitutionally defective waiver of the right to counsel in a misdemeanor prosecution provides a basis for vacating any term of imprisonment, but it should afford no ground for disturbing the underlying conviction. See, *e.g.*, *United States* v. *Ortega*, 94 F.3d 764, 769 (2d Cir. 1996) ("The appropriate remedy for a *Scott* violation * * * is vacatur of the invalid portion of the sentence, and not reversal of the conviction itself."). That being the case, the Constitution should not preclude the use of an uncounseled misdemeanor conviction to enhance the penalties for a subsequent offense, regardless of the validity of the prior waiver. That question is not at issue in this Court, however, because the State has not challenged the Iowa Supreme Court's determination (see Pet. App. 19) that, if respondent's waiver of counsel at the 1996 plea colloquy was invalid, the 1996 conviction cannot be used to enhance respondent's current charge to a third-offense OWI.

A. The Plea Colloquy In The 1996 OWI Prosecution Gave Respondent Complete And Accurate Information About The Manner In Which The Case Would Be Resolved If He Pleaded Guilty

1. Respondent was informed that, if he pleaded guilty, he would be convicted without trial and sentenced within a specified range

At the 1996 plea hearing, respondent was fully and precisely informed of the manner in which the OWI prosecution would be resolved if he entered a plea of guilty. The trial court informed the five defendants who appeared at the plea hearing that "if you plead guilty, you give up your right to have a trial of any kind on your charge," and respondent confirmed that he understood that consequence of the plea. J.A. 15. Respondent also confirmed his understanding of the trial court's admonition that "if you plead guilty, you give up th[e] presumption that you are innocent and by the admissions that you make in court today, you will be proving your guilt beyond a reasonable doubt." J.A. 17. The trial court further informed respondent of the minimum and maximum sentences for the first OWI offense, and respondent stated that he understood the applicable sentencing range. J.A. 20. After verifying the factual basis for respondent's plea, see J.A. 23-24, the trial court asked respondent whether he still wished to plead guilty, and respondent confirmed that he did, J.A. 27-28.

Thus, at the time his plea was entered and accepted by the trial court, respondent clearly understood that if he pleaded guilty to the 1996 OWI charge, a judgment of conviction would be entered without further inquiry and the court would sentence him within the statutory range. Indeed, the Iowa Supreme Court did not suggest that respondent was or reasonably could have been in any way surprised by the

ultimate disposition of the 1996 OWI prosecution.[4] And while the manner in which the case would be resolved was presented in the colloquy as a consequence of the guilty plea, rather than as a consequence of respondent's waiver of the right to counsel, there is, in this context, no meaningful distinction between the two. The results of entering an unconditional guilty plea to a criminal charge are precisely the same whether or not the defendant is represented by an attorney. In either event, a judgment of conviction is entered and the defendant is subject to punishment within the range allowed by law. So long as respondent was adequately informed of the consequences of his guilty plea, his decision to appear at the arraignment without counsel had no additional legal or practical effect beyond that of the plea itself. The plea colloquy therefore sufficiently informed him about the consequences of what was, in every practical respect, a single, indivisible course of action.

The consequences that would follow from respondent's plea were indeterminate only to the extent that the trial court retained discretion to impose any sentence within the statutory range. See J.A. 21 (trial court advises defendants before final entry of their pleas that "no matter what you ask for at the time of sentence and no matter what the State recommends, your sentencing is up to me and I can impose any penalty from the mandatory minimum on up to the maximum sentence"). But so long as respondent was correctly informed of the statutory minimum and maximum sentences, his lack of certainty about the precise sentence

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[4] Respondent was clearly informed at the 1996 plea hearing that a plea of guilty would result in a conviction without trial. Respondent was not specifically informed that his conviction might be used to enhance the applicable penalties for any subsequent offense. This Court has made clear, however, that the Constitution does not require the provision of such a warning, which "would merely tell [the defendant] what he must surely already know." *Nichols* v. *United States*, 511 U.S. 738, 748 (1994).

that would actually be imposed did not prevent him from entering a knowing and intelligent guilty plea.[5] In the 1996 OWI prosecution, moreover, respondent received the statutory minimum sentence (see J.A. 54), so his decision to plead guilty could not have been influenced by the hope or expectation of receiving a sentence less severe than the one that was ultimately imposed.

A defendant's waiver of counsel in entering a guilty plea does not forfeit his right to seek the assistance of counsel in connection with sentencing. See *Mempa* v. *Rhay*, 389 U.S. 128 (1967) (Sixth Amendment right to counsel applies at sentencing); cf. *Carter* v. *Illinois*, 329 U.S. 173, 178-179 (1946) (finding valid waiver of counsel at guilt stage while noting that trial judge appointed counsel at sentencing). But respondent's sole challenge here is to the waiver of counsel in connection with the entry of his guilty plea. Respondent does not challenge his uncounseled sentencing in the 1996 prosecution (in which he received, in any event, the minimum sentence allowed by law).

2. Self-representation in pleading guilty raises significantly different issues, and requires significantly different information, than does self-representation at trial

This Court has stated in dictum that the Constitution "impose[s] the most rigorous restrictions on the information that must be conveyed to a defendant, and the procedures that must be observed, before permitting him to waive his right to counsel at trial." *Patterson*, 487 U.S. at 298. In

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[5] See Fed. R. Crim. P. 11(b)(1)(H) and (I) (before court may accept a plea of guilty in a federal criminal prosecution, court must inform the defendant of "any maximum possible penalty" and "any mandatory minimum penalty"); cf. Fed. R. Crim. P. 11(c)(1)(C) and (d)(2)(A) (defendant and the government may condition guilty plea upon an agreement that a specific sentence is appropriate, and defendant may withdraw his plea if the court rejects the agreement).

Faretta v. *California*, 422 U.S. 806, 835 (1975), the Court stated (also in dictum) that a defendant who expresses the desire to represent himself at trial "should be made aware of the dangers and disadvantages of self-representation" in order to ensure that his decision is knowing and intelligent. The Court also noted that the trial judge in that case "had warned Faretta that he thought it was a mistake not to accept the assistance of counsel, and that Faretta would be required to follow all the 'ground rules' of trial procedure." *Id.* at 835-836.[6]

A criminal defendant's decision to plead not guilty and to represent himself at trial, however, implicates quite different considerations than does the decision to enter an uncounseled guilty plea. Because the legal and practical consequences of a guilty plea do not vary depending on whether the defendant is represented by counsel at the time the plea is entered, a colloquy that adequately informs an uncounseled defendant of the consequences of the plea will also provide constitutionally adequate information about the consequences of waiving the right to counsel. See p. 13, *supra*. There is, by contrast, a substantial legal and practical differ-

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[6] Neither *Faretta* nor *Patterson* identifies specific information or advice that must be provided to a criminal defendant who states his intent to plead not guilty and to represent himself at trial. No specific colloquy should be required in all such cases. See *United States* v. *Hill*, 252 F.3d 919, 928 (7th Cir. 2001) ("[T]he question is not whether the district judge used a checkoff list but whether the defendant understood his options."), cert. denied, 536 U.S. 962 (2002). The trial court's ultimate duty is to ensure that the defendant's decision is voluntary, knowing, and intelligent —that in choosing self-representation the defendant "knows what he is doing and his choice is made with eyes open." *Faretta*, 422 U.S. at 835 (quoting *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 279 (1942)). In some cases (as where the defendant has participated or even represented himself in prior criminal trials), the requisite understanding of what self-representation entails may reliably be inferred even without an elaborate on-the-record colloquy.

ence between contesting a criminal charge with the assistance of counsel, and contesting the charge by acting as one's own attorney. And nothing in the standard colloquy that precedes a not guilty plea is likely to clarify the distinct consequences of choosing the latter alternative.

Even after a defendant has entered an informed not guilty plea, he may have little understanding of the specific responsibilities—*e.g.*, voir dire of potential jurors, cross-examination of witnesses, introduction of documentary or physical evidence, preservation of objections to adverse trial-court rulings—that self-representation at trial entails. Indeed, a defendant might in some instances be misled by the relative informality of the plea proceeding to believe that a subsequent trial would present a fairly straightforward opportunity for him to "tell his story." A probing colloquy specifically directed at the consequences of self-representation may be necessary to ensure that a defendant who pleads not guilty and proposes to represent himself at trial has a constitutionally sufficient understanding of the potential effects of such a decision. No similar uncertainty attended respondent's decision to represent himself at the 1996 arraignment and to plead guilty to the OWI offense: respondent was clearly informed at the plea colloquy that upon acceptance of his plea, he would be convicted without further inquiry into his guilt or innocence and would be subjected to punishment within a defined statutory range.

In another respect as well, a defendant's statement of intent to plead not guilty and to represent himself at trial differs significantly from a decision to enter a guilty plea. Although a criminal defendant has the constitutional right to forgo the assistance of counsel at trial, there exists a strong consensus within the legal community that self-representation at trial is rarely in the defendant's interest. See *Faretta*, 422 U.S. at 834 ("It is undeniable that in most criminal prosecutions defendants could better defend with

counsel's guidance than by their own unskilled efforts."); *McKaskle* v. *Wiggins*, 465 U.S. 168, 177 n.8 (1984) (observing that "the right of self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant"). While this Court has held that such a consensus provides no basis for overriding the considered preference of a competent and informed defendant, see *Faretta*, 422 U.S. at 834; *Martinez* v. *Court of Appeal of Cal.*, 528 U.S. 152, 165 (2000) (Scalia, J., concurring in the judgment), the likelihood that self-representation will jeopardize the defendant's interests may create grounds for concern that an individual who expresses the desire to act as his own attorney does not adequately comprehend the likely consequences of such a decision. That concern may justify a searching inquiry to ensure that the defendant's choice of self-representation is knowing and intelligent.

By contrast, a criminal defendant's decision to plead guilty is neither suspect nor anomalous. The vast majority of federal criminal convictions are obtained as a result of pleas of guilty.[7] "If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities." *Santobello* v. *New York*, 404 U.S. 257, 260 (1971). A variety of legitimate and wholly understandable

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[7] Out of 70,882 total federal criminal convictions during the 12-month period ending September 30, 2002, more than 95% were obtained through pleas either of guilty (67,856) or of nolo contendere (332). See *Judicial Business of the United States Courts*, *Annual Report of the Director Leonidas Ralph Mecham*, Table D-4 (2002) (available at <http://www.uscourts.gov/judbus2002/contents.html>). We are informed by the Administrative Office of the United States Courts that during fiscal years 2000-2002, approximately 3.5-4% of federal guilty pleas were entered by uncounseled defendants. The large majority of the uncounseled pleas were to misdemeanor (approximately 3% of total guilty pleas) and petty (approximately .3 to .5%) offenses, with uncounseled pleas to felony offenses accounting for approximately .1% of total federal guilty pleas.

considerations may prompt a criminal defendant to acknowledge his guilt and thereby effect a prompt resolution of the charges against him rather than put the State to its burden of proof at trial. See, *e.g.*, *Tollett* v. *Henderson*, 411 U.S. 258, 263-264 (1973).

There are also good reasons that a defendant may choose to plead guilty without first soliciting the advice of counsel, particularly when the charged offense is a misdemeanor whose elements are easily comprehensible by the layman, and whose penalties are limited and often predictable. Even if the defendant qualifies for appointed counsel, he may reasonably desire to resolve the charges as quickly as possible, and may conclude that consultation with an attorney would delay the process and impede his efforts to put the matter behind him. And a defendant who is financially ineligible for appointed counsel (as respondent appears to have been at the time of his 1996 guilty plea, see J.A. 46) may reasonably determine that the (perhaps remote) chance of uncovering a viable defense to a charge carrying minor penalties is not worth the cost of retaining an attorney. Thus, while a trial court must verify that a defendant's plea of guilty is knowing and intelligent before the court may accept the plea, an uncounseled defendant's stated desire to plead guilty should not, in and of itself, give rise to a suspicion that the defendant fails to appreciate the consequences of his intended course of action.[8]

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[8] Federal Rule of Criminal Procedure 11(b)(1)(D) requires every defendant pleading guilty in federal court to be advised of his right to representation by counsel "at trial and at every other stage of the proceedings." In construing essentially the same language in the version of Rule 11 before its amendment in 2002, this Court observed that "[a] defendant's right to counsel on entering a guilty plea is expressly recognized in Rule 11(c)(2)." *United States* v. *Vonn*, 535 U.S. 55, 73 n.10 (2002). (Former Rule 11(c)(2) stated that, "if the defendant is not represented by an attorney, the court must inform the defendant that he has the right to

B. Respondent Was Provided Constitutionally Sufficient Information About The Available Alternatives To Entering A Plea Of Guilty

The Supreme Court of Iowa did not suggest that respondent received insufficient information about the consequences that would follow from his chosen course of action—appearing pro se at the arraignment and entering a guilty plea. The court held, however, that the plea colloquy in this case was deficient because the trial court did not adequately advise respondent concerning the assistance that an attorney could provide in exploring possible alternative strategies. That holding is erroneous.

1. A defendant's attempt to predict the course and outcome of a hypothetical trial is inherently speculative

Although a constitutionally valid guilty plea requires that the defendant possess basic information about certain rights that he would possess at trial, the defendant need not be given a precise and detailed description of how his case would unfold if he chose to contest the criminal charges.

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be represented by an attorney at every stage of the proceeding." See *Vonn*, 535 U.S. at 60 n.2 (internal quotation marks omited). Neither the current version of Rule 11 nor any predecessor, however, has provided for any further colloquy with an unrepresented defendant to ensure that his waiver of counsel is voluntary, knowing, and intelligent.

The Court in *Vonn* did comment that an unrepresented defendant is required to object to a Rule 11 error, on pain of having appellate review be confined to the strictures of the plain-error rule, because "when a defendant chooses self-representation after a warning from the court of the perils this entails, see *Faretta* v. *California*, 422 U.S. 806, 835 (1975), Rule 11 silence is one of the perils he assumes." 535 U.S. at 73 n.10. But no issue was presented in *Vonn* on what colloquy was required to satisfy applicable standards, and the Court did not analyze whether waiver of counsel at a guilty plea implicated the same considerations that were discussed in *Faretta*.

Any such requirement would be unworkable. A guilty plea is intended to ensure prompt and relatively certain disposition of a criminal prosecution. If the trial court accepts the defendant's guilty plea, no trial occurs and a judgment of conviction follows automatically: the only uncertainty typically involves the specific sentence that the court will select within the range authorized by law. By contrast, it is inherently more difficult to predict the course and outcome of the criminal trial that will occur if the defendant pleads not guilty. That is so both in the sense that a range of ultimate bottom-line dispositions (from conviction of the charged offense, to conviction of a lesser-included offense, to acquittal) is possible, and in the sense that a variety of subsidiary uncertainties (*e.g.*, who will sit on the jury, what witnesses will be called and how they will testify, what rulings of law the trial judge will issue, etc.) will inevitably exist at the time the plea is entered.

As this Court recently observed,

> 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. A defendant, for example, may waive his right to remain silent, his right to a jury trial, or his right to counsel even if the defendant does not know the specific questions the authorities intend to ask, who will likely serve on the jury, or the particular lawyer the State might otherwise provide.

United States v. *Ruiz*, 536 U.S. 622, 629-630 (2002). Indeed, a plea of guilty may be knowing and intelligent even when the defendant receives *inaccurate* information about the consequences of proceeding to trial. In *Brady* v. *United States*, 397 U.S. 742, 756-757 (1970), for example, the Court

held that the defendant's guilty plea was intelligently made despite his reasonable but mistaken belief, at the time the plea was entered, that if tried and convicted he would be subject to a possible sentence of death. The Court observed that the considerations relevant to a defendant's choice of plea "frequently present imponderable questions for which there are no certain answers; judgments may be made that in the light of later events seem improvident, although they were perfectly sensible at the time." *Ibid.* It held that "[t]he rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision." *Id.* at 757; see *Ruiz*, 536 U.S. at 630 (The Constitution "permits a court to accept a guilty plea, with its accompanying waiver of various constitutional rights, despite various forms of misapprehension under which a defendant might labor.").

2. Respondent received adequate information about the services an attorney could provide

The advice given in this case adequately apprised respondent of the role that counsel could play. At the 1996 plea hearing, the trial court advised respondent concerning the various functions that an attorney could perform at trial if respondent chose to plead not guilty. See J.A. 16 (explaining that an "attorney could help you select a jury, question and cross-examine the State's witnesses, present evidence, if any, in your behalf, and make arguments to the judge and jury on your behalf"). The Supreme Court of Iowa found the trial court's explanation of counsel's potential role to be inadequate because the trial court did not describe the contributions an attorney could make at the plea hearing itself. See Pet. App. 18 ("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."). More specifically, the Supreme Court of Iowa held that, when an uncounseled defendant expresses an intent to plead guilty, the trial judge should "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." *Ibid.* The trial court's failure to convey the admonitions identified by the Supreme Court of Iowa does not render respondent's guilty plea invalid.

a. In *Patterson*, this Court held that, where a suspect had been given *Miranda* warnings before custodial interrogation, see *Miranda* v. *Arizona*, 384 U.S. 436 (1966), his subsequent waiver of his Sixth Amendment right to counsel during post-indictment questioning was knowing and intelligent. 487 U.S. at 292-300. The defendant in *Patterson* was informed "that he had a right to remain silent; that anything he might say could be used against him; that he had a right to consult with an attorney; that he had a right to have an attorney present during interrogation; and that, as an indigent, the State would provide him with a lawyer if he so desired." *Id.* at 288 n.1. This Court held that the *Miranda* warnings, although specifically designed to protect Fifth Amendment rights implicated by custodial questioning,

> also served to make [Patterson] aware of the consequences of a decision by him to waive his Sixth Amendment rights during postindictment questioning. [Patterson] knew that any statement that he made could be used against him in subsequent criminal proceedings. This is the ultimate adverse consequence [Patterson] could have suffered by virtue of his choice to make uncounseled admissions to the authorities. This warning also sufficed * * * to let [Patterson] know what a lawyer could "do for him" during the postindictment questioning: namely,

> advise [Patterson] to refrain from making any such statements. By knowing what could be done with any statements he might make, and therefore, what benefit could be obtained by having the aid of counsel while making such statements, [Patterson] was essentially informed of the possible consequences of going without counsel during questioning. If [Patterson] nonetheless 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 to him satisfied the constitutional minimum.

Id. at 293-294 (footnote omitted); see *id.* at 299-300 (*Miranda* warnings are sufficient to make the accused "aware of the 'dangers and disadvantages of self-representation' during postindictment questioning") (quoting *Faretta*, 422 U.S. at 835).

b. Respondent clearly understood that he had the right to be represented by counsel at the plea proceeding. At the outset of the hearing, the trial court stated: "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?" J.A. 8-9. Respondent replied: "Yes, sir." J.A. 9.

In *Patterson*, this Court held that the *Miranda* warnings, by informing the suspect that he had a right to have counsel present during interrogation, and that anything he said could be used against him, were sufficient "to let [Patterson] know what a lawyer could 'do for him' during the postindictment questioning: namely, advise [Patterson] to refrain from making any such statements." 487 U.S. at 294. Similarly here, respondent's awareness of his right to the assistance of counsel at the arraignment necessarily encompassed an understanding that an attorney could advise him as to the plea that he should enter. No meaningful purpose would have been served by informing respondent of the obvious

fact that, if he chose to be represented by counsel at the plea proceeding, his attorney could provide "an independent opinion on whether, under the facts and applicable law, it is wise to plead guilty." Pet. App. 18.

c. The Iowa Supreme Court also concluded that the trial court must refer specifically to attorneys' superior ability to discern potential legal defenses in order to ensure that an uncounseled defendant understands "the dangers of self-representation." Pet. App. 18; see *id.* at 16 ("[T]here was no colloquy with [respondent] that alerted him to the dangers and disadvantages of entering a guilty plea without the advice of counsel," because "the [trial] court did not warn [respondent] that he might have legal defenses to the charge that he, as a layperson, would not recognize.").

The state court's analysis is inconsistent with this Court's decision in *Patterson*. That decision makes clear that, in order to obtain a valid waiver of a suspect's Sixth Amendment right to the assistance of counsel during post-indictment questioning, police are *not* required to inform the suspect that an attorney may be better able than the suspect himself to assess the relative advantages and disadvantages of answering particular questions. Rather, so long as the suspect is informed of "the ultimate adverse consequence" that a waiver of counsel may entail—*i.e.*, the use of his statements against him in subsequent criminal proceedings, see 487 U.S. at 293—he has adequately been "made aware of the dangers and disadvantages of self-representation," *id.* at 299-300 (internal quotation marks omitted), and his waiver of the right to counsel is knowing and intelligent. Similarly here, respondent was sufficiently informed of the "dangers and disadvantages of self-representation" at the plea hearing in this case, where he was told that a plea of guilty would result in a conviction without trial and the imposition of sentence within a specified range. See Pet. App. 30 (Iowa Court of Appeals states that respondent "was informed of

the ultimate adverse consequences he could suffer as he was advised of the maximum possible penalties for the offense.").[9]

d. The apparent implication of the Iowa Supreme Court's Sixth Amendment analysis is that a waiver of the right to counsel in the guilty-plea context will be deemed valid only if the trial court actively raises doubts about the defendant's ability to proceed intelligently without counsel, or at least suggests that consultation with counsel would be the wiser option. As *Patterson* makes clear, however, a criminal defendant who seeks to proceed without counsel may adequately be apprised of the "dangers and disadvantages of self-representation" without being told that self-representation is a mistake. With respect to other constitutional rights as well, the government's duty (when the government is required to provide warnings at all) is simply to convey neutral, objective information, not to *evaluate* the competing options or to identify the choice that a "reasonable" individual

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[9] In addition to informing respondent of the minimum and maximum penalties for the charged offense, and of the various constitutional protections to which he would be entitled if he chose to plead not guilty, the trial court inquired into the factual basis for respondent's plea in order "to be satisfied that you are in fact guilty of the offense you are pleading guilty to." J.A. 21-22; cf. Fed. R. Crim. P. 11(b)(3) ("Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea."). Respondent confirmed that on November 2, 1996, he had operated a motor vehicle in Ames, Iowa, after consuming alcohol. J.A. 23-24. Although respondent stated that he had not felt any effects of the alcohol on the night in question, he did not dispute the results of an intoxilyzer test administered that night, which showed his blood alcohol level to be .194. J.A. 24. Those admissions were sufficient to establish both elements of the OWI offense. See Iowa Code Ann. § 321J.2(1) (West 1997); J.A. 23. The factual basis inquiry provided an additional safeguard against the entry and acceptance of a guilty plea made by a defendant whose conduct was not actually prohibited by the relevant criminal law. See *McCarthy* v. *United States*, 394 U.S. 459, 467 (1969).

would make. Thus, although "proceeding without counsel in custodial interrogation, or confessing to the crime, usually works to the defendant's disadvantage," *Martinez*, 528 U.S. at 165 (Scalia, J., concurring in the judgment), a suspect in that setting may validly waive his Fifth Amendment rights without receiving warnings analogous to those required by the Iowa Supreme Court in this case. Rather, "[o]ur system of laws generally presumes that the criminal defendant, after being fully informed, knows his own best interests and does not need them dictated by the State." *Ibid.*[10]

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[10] The plea colloquy in this case appears to have been at least as extensive as that held constitutionally sufficient in *Carter* v. *Illinois*, 329 U.S. 173 (1946), which involved a guilty plea entered by an uncounseled defendant charged with murder. See *id.* at 174. The trial court judgment in *Carter* stated:

> And the said defendant * * * having been duly arraigned and being called upon to plead expresses a desire to plead guilty to the crime of murder as charged in the indictment. Thereupon the Court fully explained to the Defendant * * * the consequence of such plea and of all his rights in the premises including the right to have a lawyer appointed by the Court to defend him and also of his right to a trial before a jury of twelve jurors sworn in open Court and of the degree of proof that would be required to justify a verdict of guilty against him under the plea of not guilty but the defendant * * * persists in his desire to plead guilty and for a plea says he is guilty in manner and form as charged in the indictment.

Id. at 177. This Court rejected Carter's challenge to the resulting conviction, explaining that "[a] fair reading of the judgment against Carter indicates a judicial attestation that the accused, with his rights fully explained to him, consciously chose to dispense with counsel." *Ibid.*

C. Affirmance Of The Iowa Supreme Court's Decision Could Significantly Complicate Both The Process By Which Guilty Pleas Are Entered And Accepted, And The Enforcement Of Recidivism Statutes

1. The guilty plea colloquy should be sufficiently concise that the defendant can understand it

This Court's "cases make absolutely clear that the choice to plead guilty must be the defendant's: it is *he* who must be informed of the consequences of his plea and what it is that he waives when he pleads, and it is on his admission that he is in fact guilty that his conviction will rest." *Henderson* v. *Morgan*, 426 U.S. 637, 650 (1976) (White, J., concurring) (citation omitted); see *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983) (recognizing that a criminal defendant "has the ultimate authority to make certain fundamental decisions regarding the case, [including] whether to plead guilty"). In order for the colloquy that precedes a guilty plea to serve its intended purpose, it must therefore be sufficiently concise that a layperson can understand it. And that is likely to be true only if the colloquy focuses on those items of information that are *fundamental* to the defendant's choice of plea. A virtually limitless range of information about the criminal process might be regarded as (a) true and (b) conceivably relevant to a defendant's decision whether to plead guilty; but the colloquy would quickly become unmanageable if all such information were required to be conveyed to the defendant. Although no single item of additional information is likely to overwhelm the defendant, any expansion of the required colloquy beyond what is truly central to the plea decision will render the colloquy at least marginally less accessible to its lay audience. Cf. *Libretti* v. *United States*, 516 U.S. 29, 50 (1995) (declining to "expand upon the

required plea colloquy" to include advice about waiver of rule-based jury trial rights at sentencing).[11]

2. The plea colloquy should not artificially discourage defendants from pleading guilty

In explaining the responsibilities of trial courts when conducting plea colloquies with uncounseled defendants, the Supreme Court of Iowa stated that "the court is not expected to assume the role of an attorney, discussing with the defendant the various defenses that might be available. Rather, the trial judge need only 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." Pet. App. 18. If a defendant understands that such an admonition is simply a general statement about the superior legal expertise of attorneys as a class, the warning is unlikely to tell him anything he does not already know. There exists a potential danger, however, that a defendant may misinterpret such a warning as a veiled suggestion that a meritorious defense actually exists in his own case. If that misimpression creates an artificial inducement for the defendant to consult with an attorney, even though in fact there is no viable basis for contesting the criminal charges, the prompt and efficient disposition of the case will be impeded, and the resources of either the State (if the defendant is

[11] This is not to say that the court in a plea colloquy must limit itself to those admonitions that have previously been held to be constitutionally required, or even to those that are mandated by applicable federal or state rules. Exercising its sound discretion, the trial court may supplement the colloquy required by Federal Rule of Criminal Procedure 11 or its state counterpart. See *Libretti*, 516 U.S. at 50. That such supplementation may be thought desirable in particular circumstances, however, does not make it constitutionally required.

indigent) or the defendant himself (if he is financially ineligible for appointed counsel) will be wasted.

3. Any additions to the required plea colloquy will be especially disruptive if they give rise to collateral attacks on prior convictions

The disruptive effects of indiscriminate additions to the required plea colloquy will be particularly great if (as the Supreme Court of Iowa concluded) omission of the newly-mandated warnings exposes the defendant's prior conviction to collateral attack in a subsequent recidivist prosecution.[12]

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[12] This Court has held that a conviction obtained in violation of *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), may not be used "either to support guilt or enhance punishment for another offense." *Burgett* v. *Texas*, 389 U.S. 109, 115 (1967). The Court subsequently concluded that, "with the sole exception of convictions obtained in violation of the right to counsel," a defendant in a federal sentencing proceeding may not collaterally attack the validity of prior state convictions used to enhance his sentence under the Armed Career Criminal Act of 1984, Pub. L. No. 98-473, Tit. II, §§ 1801-1803, 98 Stat. 2185. *Custis* v. *United States*, 511 U.S. 485, 487 (1994); see *id.* at 490-497. The Court explained, *inter alia*, that "failure to appoint counsel at all will generally appear from the judgment roll itself, or from an accompanying minute order," while resolution of other constitutional challenges to a prior conviction could "require sentencing courts to rummage through frequently nonexistent or difficult to obtain state-court transcripts or records that may date from another era, and may come from any one of the 50 States." *Id.* at 496.

It is not altogether clear how *Burgett* and *Custis* apply to a defendant's claim, in a recidivist prosecution or sentencing, that his prior conviction was invalid because his waiver of the right to counsel was not knowing and intelligent. On the one hand, failure to obtain a valid waiver might plausibly be regarded as the constitutional equivalent of a failure to provide counsel at all, bringing the case within the rule announced in *Burgett*. On the other hand, to permit collateral attacks on the validity of prior waivers of counsel will "require sentencing courts to rummage through" records of earlier plea colloquies, and thus will pose precisely the difficulties of administration that the Court in *Custis* sought to avoid. The question is not directly presented in this case, however, since the State

Cf. *United States* v. *Akins*, 276 F.3d 1141, 1145 (9th Cir. 2002) (explaining that a defendant charged under 18 U.S.C. 922(g)(9) with possession of a firearm after a misdemeanor domestic violence conviction is authorized by statute to challenge the validity of the guilty plea through which the predicate conviction was obtained). If a particular legislative body or rules committee concludes that the admonitions identified by the Supreme Court of Iowa should be provided to all uncounseled defendants who contemplate a plea of guilty, it is free to impose that requirement for future plea colloquies within the relevant jurisdiction. If this Court holds that such warnings are required by the Constitution, however, its decision may call into question the use of a multitude of *prior* convictions in current and future recidivist prosecutions. For the reasons discussed above, such a holding is not required by the Constitution.

CONCLUSION

The judgment of the Supreme Court of Iowa should be reversed.

Respectfully submitted.

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has not challenged the determination of the Supreme Court of Iowa that respondent's 1996 conviction may be collaterally attacked in the current recidivist prosecution. See also note 3, *supra*.