

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 IOWA, :

4 Petitioner :

5 v. : No. 02-1541

6 FELIPE EDGARDO TOVAR.

7 - - - - - X

8 Washington, D. C.

9 Wednesday, January 21, 2004

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 11:10 a.m.

13 APPEARANCES:

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

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

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

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P R O C E E D I N G S

(11:10 a.m.)

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

General Miller, we'll hear from you.

ORAL ARGUMENT OF THOMAS J. MILLER

ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

21 MR. MILLER: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

23 MR. MILLER: Yes.

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

1 MR. MILLER: Yes.

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

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

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

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

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

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

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

15 QUESTION: And collateral consequences, yes.

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

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

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

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

14 QUESTION: Yes.

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

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

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

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

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

9 QUESTION: I --

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

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

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

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

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

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

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

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

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

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

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

25 MR. MILLER: Well, I think that question was

1 really did you change your mind. I mean --

2 QUESTION: Well, of course --

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

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

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

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

16 MR. MILLER: Yes, Your Honor.

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

19 QUESTION: But that you knew.

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

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

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

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

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

19 MR. MILLER: Yes. Yes, Your Honor.

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

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

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

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

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

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

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

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

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

11 QUESTION: That was at the sentencing.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4 QUESTION: Very well, General Miller.

5 Mr. Stewart, we'll hear from you.

6 ORAL ARGUMENT OF MALCOLM L. STEWART

7 ON BEHALF OF THE UNITED STATES,

8 AS AMICUS CURIAE, SUPPORTING THE PETITIONER

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

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

17 I think it may be helpful to look first at the
18 precise language that the Iowa Supreme Court employed in
19 announcing the warnings that it thought were
20 constitutionally required, and if the Court looks at page
21 18 of the appendix to the certiorari petition, that's the
22 paragraph of the Iowa Supreme Court's opinion that's
23 entitled Summary and Disposition. And it --

24 QUESTION: Page 18 of what?

25 MR. STEWART: Of the appendix to the certiorari

1 petition.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4 QUESTION: Thank you, Mr. Stewart.

5 MS. Wilson, we'll hear from you.

6 ORAL ARGUMENT OF THERESA R. WILSON

7 ON BEHALF OF THE RESPONDENT

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

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

21 QUESTION: Where is it --

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

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

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

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

1 8.1. The American Bar Association recognizes that to many
2 defendants the word counsel may not necessarily have any
3 clear meaning.

4 QUESTION: Did they say how they knew that?

5 MS. WILSON: No, Your Honor.

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

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

23 MS. WILSON: No.

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

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

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

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

17 (Laughter.)

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

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

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

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

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

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

25 MS. WILSON: Correct.

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

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

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

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

24 QUESTION: Are you making it now?

25 MS. WILSON: I am indicating that the record

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

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

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

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

19 MS. WILSON: Correct.

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

25 MS. WILSON: Correct.

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

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

11 MS. WILSON: Yes.

12 QUESTION: Is that right?

13 MS. WILSON: Yes.

14 QUESTION: And they can decide it.

15 MS. WILSON: Correct, Your Honor.

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

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

21 QUESTION: Send it back.

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

25 MS. WILSON: No, Your Honor.

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

3 MS. WILSON: No, Your Honor.

4 QUESTION: Why should we do it here?

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

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

10 MS. WILSON: No.

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

12 MS. WILSON: No.

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

15 MS. WILSON: No.

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

24 MS. WILSON: Correct.

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

1 I don't know.

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

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

7 MS. WILSON: Correct.

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

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

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

25 MS. WILSON: And then the appropriate response

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

5 QUESTION: But the attorney is going to cost me
6 \$200 an hour. Give me a break. Let me know whether it's
7 going to be worth it or not. And the judge will say,
8 sorry, I can't say anything about that.

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

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

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

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

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

1 parents as a college student.

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

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

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

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

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

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

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

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

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

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

18 MS. WILSON: Federal circuits.

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

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

23 QUESTION: Any other circuits?

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

1 attention to that brief.

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

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

16 It --

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

22 MS. WILSON: Correct.

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

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

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

5 QUESTION: And which one dropped the ball?

6 (Laughter.)

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

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

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

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

1 time-barred from challenging it now.

2 The --

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

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

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

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

1 would be waived.

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

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

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

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

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

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

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

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

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

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

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

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

3 MS. WILSON: Correct.

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

6 MS. WILSON: Correct.

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

10 MS. WILSON: Correct, but unfortunately --

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

13 MS. WILSON: Um-hum.

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

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

20 MS. WILSON: No.

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

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

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

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

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

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

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

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

8 (Laughter.)

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

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

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

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

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

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

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

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

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

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

18 MS. WILSON: Yes.

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

20 MS. WILSON: Correct. They could do that.

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

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

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

4 QUESTION: Thank you, Ms. Wilson.

5 General Miller, you have 4 minutes remaining.

6 REBUTTAL ARGUMENT OF THOMAS J. MILLER

7 ON BEHALF OF THE PETITIONER

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

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

19 CHIEF JUSTICE REHNQUIST: Thank you, General
20 Miller.

21 The case is submitted.

22 (Whereupon, at 12:06 p.m., the case in the
23 above-entitled matter was submitted.)
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25