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ARTICLES

CRUMBS FROM THE MASTER'S TABLE: THE SUPREME COURT, PRO SE DEFENDANTS AND THE FEDERAL GUILTY PLEA PROCESS

*Julian A. Cook, III**

INTRODUCTION

In recent years, the United States Supreme Court has issued a series of significant rulings that have fundamentally set back the constitutional and statutory interests of defendants in the plea bargaining and guilty plea contexts. Though comparatively low-profile, each of these decisions has profoundly contributed to a conscious or subconscious design on the part of the Court to lessen defendant interests under both the United States Constitution and Rule 11 of the Federal Rules of Criminal Procedure[1]—the rule that governs judicial conduct and details defendant rights with respect to the entry, receipt, and withdrawal of guilty pleas—while preserving the efficiency of a guilty plea system through which approximately ninety-five percent of all federal cases are resolved.[2]

Among the more recent decisions—and a principal subject of this Article—is *Iowa v. Tovar.*[3] Decided in 2004, the Supreme Court held that the Sixth Amendment does not require that a defendant

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1 Fed. R. Crim. P. 11.

2 BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2001, at 2 (2001), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cfjs01.pdf.

3 541 U.S. 77 (2004).

who is contemplating entering a guilty plea be advised of two warnings deemed to be essential by the Iowa Supreme Court: namely, that "waiving the assistance of counsel in deciding whether to plead guilty [entails] the risk that a viable defense will be overlooked," and "that by waiving his right to an attorney he will lose the opportunity to obtain an independent opinion on whether . . . it is wise to plead guilty."[4] Instead, the Supreme Court held that the Sixth Amendment standard is satisfied merely by informing a defendant of three items: the nature of the charges, "his right to be counseled regarding his plea," and the permissible punishments attendant to the defendant's guilty plea.[5] In concluding that the more scripted admonitions urged by the Iowa court were unnecessary, the Supreme Court reasoned that its prior precedent required only a generalized comprehension of the consequences associated with a counsel waiver, and that the knowledge base required to effectuate a valid waiver is variable and necessarily dependent upon the facts and circumstances of each case.[6]

Despite the intimation that its decision should be narrowly construed,[7] the unanimity of the Court, the wholesale rejection of rather basic informational verbiage, and the greater context in which the decision was rendered, ensures that, barring remedial legislative action, *Tovar* will have ramifications that stand to adversely influence generations of defendants. Though a primary focus of this Article will be upon the *Tovar* decision and its impact upon prospective pro se litigants, this Article will also unveil how *Tovar* is but part of a more expansive effort on the part of the Supreme Court in recent years to delimit the interests of criminal defendants—regardless of representational status—in the guilty plea process. In so doing, this Article will describe a federal guilty plea structure characterized by rules and procedures that work together to limit a defendant's informational intake, while ensuring the efficiency of the guilty plea process. It will describe the Supreme Court's critical role in this process, and depict a Court seemingly bent upon ensuring the maintenance of an efficient federal guilty plea structure even if some of the most rudimentary constitutional interests of a defendant must be sacrificed in the process. It will further illuminate how *Tovar* fits neatly within this

4 *Id.* at 81.

5 *Id.*

6 *Id.* at 87–92. In addition, the Court took note of Tovar's failure to allege that he did not comprehend the nature of the charge or the range of allowable punishments, or assert that he was unaware of his right to counsel at the time of his arraignment. *Id.* at 92–93.

7 The Court stated that it was addressing only a narrow question: whether the two admonitions at issue were required by the Sixth Amendment. *Id.* at 91.

grander design and demonstrate how, through the setting up of informational roadblocks, defendants are not only indirectly encouraged to admit their guilt, but the systemic efficiency of the guilty plea structure is preserved.

To see this cohesiveness, this Article will commence with a review of the rather significant evolution of Rule 11, including a review of several pertinent Supreme Court decisions that have helped shape its current structure. Thereafter, the predominant judicial methodology for conducting Rule 11 hearings will be discussed. Specifically, this Article will take a brief but critical look at, inter alia, the examination techniques employed by the judiciary when conducting Rule 11 hearings, and conclude that the process typically employed inadequately assesses whether a defendant's guilty plea was entered into knowingly and voluntarily. Next, this Article will discuss two very recent Supreme Court decisions—*United States v. Vonn*,[8] decided in 2002, and *Bradshaw v. Stumpf*,[9] decided in 2005—that have substantially aggravated the already aggrieved Rule 11 hearing process described in the preceding section. More specifically, this Article will show how *Vonn* and *Bradshaw* have greatly eased an already fluid Rule 11 process for the judiciary by placing unrealistic and unjust burdens and obstacles upon the defendant when claiming judicial noncompliance with Rule 11. Thereafter, this Article will turn its attention to the 1997 Supreme Court case of *United States v. Hyde*,[10] and the accompanying 2002 amendment to Rule 11 which codified that Supreme Court decision. Through the employment of contract law principles, this Article will succinctly describe how the plea withdrawal rules unfairly bind unwary defendants to their guilty pleas (thereby preventing defendants from pursuing more optimal strategic alternatives) without providing a corresponding right to enforce the underlying plea agreement.

This Article will then undertake an in-depth review and critique of *Tovar*. In discussing *Tovar*, this Article will examine Supreme Court precedent as it has developed regarding the waiver of Sixth Amendment counsel rights and, in the end, argue that the Court's minimalist construction of the Amendment fails in its interpretation. It will further argue that the required admonitions delineated in *Tovar*, in conjunction with the standard practices across the various circuits, fail to illuminate the pitfalls and consequences associated with the guilty plea process as well as the benefits of counsel in the guilty plea context. Thereafter, this Article will conclude with a pro-

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8 535 U.S. 55 (2002).

9 125 S. Ct. 2398 (2005).

10 520 U.S. 670 (1997).

posal section. In it this Article will detail those admonitions that should be provided to defendants by virtue of the Sixth Amendment, as well as suggest additional warnings that should be part of a legislative remedy. Together the required admonitions, if ultimately adopted, will ensure that defendants contemplating such counsel waivers are better informed of the benefits of counsel and better equipped to gauge the consequences attendant to each choice.

I. RULE 11 AND THE FEDERAL GUILTY PLEA HEARING PROCESS

Prior to 1975, Rule 11 of the Federal Rules of Criminal Procedure rather simply and generally provided:

> A defendant may plead not guilty, guilty or, with the consent of the court, nolo contendere. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of nolo contendere without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.[11]

However, in response to the 1969 Supreme Court case of *Boykin v. Alabama*[12]—which held that a trial court could not accept a guilty plea absent some affirmative showing that it was entered knowingly and voluntarily[13]—Rule 11 underwent a massive restructuring. In place of the four sentences that characterized the pre-1975 version, the revised 1975 version of Rule 11 was notable not only for its sheer depth, but also for the extensive affirmative obligations it placed upon the district courts prior to the acceptance of a guilty plea.[14] The more generally stated expectations that characterized the earlier version of the rule were replaced with a detailed list of requirements.[15] For example, Rule 11 currently provides that a district court "*must* address the defendant personally in open court" and "*must* inform the defendant of, and determine that the defendant understands," inter alia, the nature of the charges, the various penalties associated with his plea of guilt, the array of constitutional trial-related rights that he is

11 FED. R. CRIM. P. 11 (1966) (amended 1975).

12 395 U.S. 238 (1969).

13 *Id.* at 242.

14 Amendments to Federal Rules of Criminal Procedure, 416 U.S. 1001, 1006–07 (1973).

15 *Id.*

necessarily forfeiting, as well as the rights that might be forfeited pursuant to any appellate waiver provision contained within a plea agreement.[16] In addition, the rule requires district courts to ensure that the guilty plea was entered voluntarily[17] and that there is a supporting factual basis.[18]

Despite the laudable intentions that presumably underlied the 1975 amendments, the promises of the new rule have been significantly undercut by the manner in which Rule 11 has been imple-

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16 FED. R. CRIM. P. 11. Subsection (b)(1) provides:

> Advising and Questioning the Defendant. Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:
>
> (A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;
>
> (B) the right to plead not guilty, or having already so pleaded, to persist in that plea;
>
> (C) the right to a jury trial;
>
> (D) the right to be represented by counsel—and if necessary have the court appoint counsel—at trial and at every other stage of the proceeding;
>
> (E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;
>
> (F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere;
>
> (G) the nature of each charge to which the defendant is pleading;
>
> (H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;
>
> (I) any mandatory minimum penalty;
>
> (J) any applicable forfeiture;
>
> (K) the court's authority to order restitution;
>
> (L) the court's obligation to impose a special assessment;
>
> (M) the court's obligation to apply the Sentencing Guidelines, and the court's discretion to depart from those guidelines under some circumstances; and
>
> (N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.

Id. R. 11(b)(1).

17 FED. R. CRIM. P. 11(b)(2) ("Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than the promises in a plea agreement.").

18 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.").

mented. Due, in large part, to the rule's plain language, the assessment of a plea's validity has too often been determined through a judicial colloquy strewn with leading and compound questions.[19] Though prohibited either outright or in part in the trial context,[20] there are no comparable evidentiary restrictions on their use during the Rule 11 process. Yet, the dangers that rationally justify the prohibitions at trial are equally present in the Rule 11 context. With respect to leading questions, for example, the commonality of interests that exists between the direct examiner and the witness at trial underlie the general prohibition of such questions on direct examination.[21] Yet, this same commonality is existent during the Rule 11 process. Like the witness at trial who views the direct-examiner as a means to a litigative end, the defendant-witness during the Rule 11 process views the examiner (the judge) in the same vein.[22] Just as a police officer considers the questions posed by a prosecutor as a

19 For a more thorough treatment of this contention, see Barajas v. Castro, No. C 00-04075 WHA, 2002 WL 202440, at *7 (N.D. Cal. Feb. 1, 2002) (noting that "compound questions are normal in plea colloquys [sic]"); Julian A. Cook, III, *Federal Guilty Pleas Under Rule 11: The Unfulfilled Promise of the Post-*Boykin *Era*, 77 NOTRE DAME L. REV. 597, 615–24 (2002).

20 FED. R. EVID. 611(c) (detailing the limits upon the employment of leading questions at trial); CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE § 6164, at 354 (3d ed. 1993) ("A compound question simultaneously poses more than one inquiry and calls for more than one answer. Such a question presents two problems. First, the question may be ambiguous because of its multiple facets and complexity. Second, any answer may be confusing because of uncertainty as to which part of the compound question the witness intended to address. Where a compound question has been posed, the court may require that its component questions be posed separately. Where a compound question has been posed and answered, the court may require that the answer be clarified so as to eliminate confusion. However, where the answer's content or context makes its meaning clear, no such clarification is needed. Further, even where there is confusion, the court has discretion under Rule 611(a) to deny objections on the ground the objecting party has the opportunity to clarify matters on cross-examination.").

21 *See* WRIGHT & GOLD, *supra* note 20, § 415, at 142–43 ("The use of leading questions is left very largely to the control of the court. They 'should not be used' on direct examination of a witness 'except as may be necessary to develop the witness testimony,' but a hostile witness, an adverse party, or a witness identified with an adverse party may be interrogated by leading questions. Leading questions are ordinarily to be permitted on cross-examination. Even when leading questions are permitted, they may not properly be put unless the inference, if drawn, would be factually true.").

22 Stumpf v. Mitchell, 367 F.3d 594, 603 (6th Cir. 2004) ("[T]he district court commented that 'the prosecuting attorney's explanation of the plea agreement was somewhat difficult to follow, and that criminal defendants in such situations will often answer questions posed by the trial court without a clear understanding of each and every term uttered especially if advised by counsel to do just that.'").

means through which the defendant's conviction can be achieved, the defendant-witness during a guilty plea hearing considers the Rule 11 colloquy as a means through which he can achieve the benefits of his negotiated bargain (e.g., sentencing reduction). Each witness has an equally compelling disincentive to contradict the questions posed by his examiner so long as the witness perceives that his litigative objectives are not being compromised. Thus, when asking such leading and compound questions, the court is no more effectively gauging a defendant's knowledge or voluntariness than a direct-examiner at trial would reliably be eliciting accurate and truthful testimony if permitted to lead his witness. Indeed, the judge's questions of the pleading defendant are less likely to elicit knowledgeable answers since a fact-witness at trial is more likely to understand his experiences to which he is testifying than a lay defendant is likely to understand the legalities of the charges to which he is pleading and the nature of the rights being waived.

It is certainly easy to empathize with the district courts charged with implementing Rule 11. Thrust with a host of affirmative obligations to inform, the plain text of Rule 11 leaves district courts little discretion but to employ such questioning techniques when fulfilling its statutory obligations. As a result, the employment of these questioning modes has effectively assisted in the stampeding of hordes of defendants through the Rule 11 plea process without providing a meaningful measurement of the plea's underlying validity.

Aside from the methodology issue, whether a district court's non-compliance with the various Rule 11 requirements warranted automatic reversal divided the circuits for years after the 1975 amendments. At the heart of the debate was the 1969 Supreme Court case of *McCarthy v. United States.*[23] Given the district court's failure in that case to discuss the elements of the charge (tax evasion) with the defendant,[24] *McCarthy* held that the court's neglect of this Rule 11 mandate required automatic reversal.[25] However, since that case addressed a district court's omission under the abbreviated pre-1975 version of Rule 11, the circuits were divided as to whether the automatic reversal sanction was required given the complexity of the more ex-

23 394 U.S. 459 (1969).

24 *Id.* at 463, 470. In light of the discussion of *United States v. Vonn*, 355 U.S. 55 (2002), *see infra* Part I.A., it should be noted that McCarthy failed to object to the court's failure to make inquiry of this matter. Yet this failure did not prevent the Court from finding that Rule 11 had been violated and that the defendant should be afforded the opportunity to plead anew. 394 U.S. at 461, 464, 471.

25 394 U.S. at 471–72.

pansive 1975 version of the rule.[26] Much of the controversy was settled in 1983, however, when Rule 11 was amended to include a harmless error provision.[27] That rule currently provides that "[a] variance from the requirements of this rule is harmless error if it does not affect substantial rights."[28] As a consequence of this amendment, the automatic reversal remedy was rendered obsolete. Nevertheless, as the next section demonstrates, yet another related issue continued to divide the circuit courts for years thereafter.

A. United States v. Vonn

Despite the enactment of the harmless error provision, the circuits continued to wrestle with a related, but unresolved, issue; namely, whether a defendant was subject to the plain error rule requirements if he failed to object to a judicial omission under Rule 11, or whether the burden should be carried by the prosecution to demonstrate that the judicial error was harmless. This issue was recently settled in 2002 when the Supreme Court decided *United States v. Vonn.*[29] There, during Vonn's guilty plea hearing—at which he had entered guilty pleas to armed bank robbery and a firearm charge—the court neglected to inform him that by pleading guilty he would be forfeiting his right to counsel at trial.[30] However, the defendant failed to object to this judicial omission.[31] Instead, after moving unsuccessfully to withdraw his guilty pleas, Vonn raised the issue of the judicial omission for the first time on direct appeal.[32] The Ninth Circuit held that, despite the defendant's failure to object, the government nevertheless bore the burden of demonstrating that the judicial error had no effect on the substantial rights of the defendant.[33] Finding that the government had failed to satisfy its burden, the Ninth Circuit vacated the defendant's convictions.[34]

The Supreme Court, however, reversed the Ninth Circuit.[35] The Court recognized that the harmless error provision contained in Rule

26 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 21.5, at 1020–21 (4th ed. 2004).

27 *See* FED. R. CRIM. P. 11(h) advisory committee's notes (1983 amend.).

28 FED. R. CRIM. P. 11(h).

29 535 U.S. 55.

30 *Id.* at 60.

31 *Id.* at 60–61.

32 *Id.* at 61.

33 United States v. Vonn, 224 F.3d 1152, 1155 (9th Cir. 2002), *vacated,* 535 U.S. 55.

34 *Id.* at 1155–56.

35 535 U.S. at 62.

11(h), a virtual mirror of the plain error rule found in Rule 52(a),[36] failed to include any language comparable to that found in Rule 52(b),[37] which places the burden of demonstrating judicial error upon the party who failed to raise the issue below.[38] Yet, it rejected Vonn's contention that this omission reflected a congressional intent that the government shoulder the burden of demonstrating harmlessness.[39] Instead, the Court held that a defendant who is silent as to a judicial omission under Rule 11 must bear the burden, like any other litigant alleging plain error, of demonstrating that his substantial rights were affected.[40] In rejecting the contention that Rule 52(b) "has no application to Rule 11 errors,"[41] the Court recognized, with respect to collateral review, that it is the defendant, not the government, who must demonstrate that "the Rule 11 proceeding was 'inconsistent with the rudimentary demands of fair procedure' or constituted a 'complete miscarriage of justice.'"[42] The Court also insisted that the omission of Rule 52(b) type language from Rule 11(h) is subject to variable interpretations, not just that proffered by Vonn. The Court suggested that it is equally plausible, for example, to interpret the omission as reflecting a congressional intent to preclude appellate review in its entirety whenever a defendant failed to lodge an objection during a Rule 11 hearing.[43]

In addition, the Court reasoned that its holding is consistent with the plea withdrawal rules which create a "near presumption" against the granting of such motions after the imposition of sentence.[44] Reflecting a pragmatic outlook, the Court declared that both the plea withdrawal rules and the rule announced in *Vonn* promote, inter alia, "the finality required in a system as heavily dependent on guilty pleas as ours."[45] The Court also reasoned that the adoption of Vonn's posi-

36 FED. R. CRIM. P. 52(a) ("Any error, defect, irregularity or variance that does not affect substantial rights must be disregarded.").

37 FED. R. CRIM. P. 52(b) ("A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."); *see Vonn*, 535 U.S. at 62–63 ("When an appellate court considers error that qualifies as plain, the tables are turned on demonstrating the substantiality of any effect on a defendant's rights: the defendant who sat silent at trial has the burden to show that his 'substantial rights' were affected.").

38 535 U.S. at 62–63.

39 *Id.* at 63.

40 *Id.*

41 *Id.* at 65.

42 *Id.* at 63–64 (quoting Hill v. United States, 368 U.S. 424, 428 (1962)).

43 *Id.* at 65–66.

44 *Id.* at 72.

45 *Id.*

tion would encourage defendants in the midst of a Rule 11 proceeding to engage in litigative gamesmanship. Specifically, the Court opined that Vonn's construction of the harmless error rule would create a disincentive among defendants to raise objections during the Rule 11 process:

> But the incentive to think and act early when Rule 11 is at stake would prove less substantial if Vonn's position were law; a defendant could choose to say nothing about a judge's plain lapse under Rule 11 until the moment of taking a direct appeal, at which time the burden would always fall on the Government to prove harmlessness. A defendant could simply relax and wait to see if the sentence later struck him as satisfactory; if not, his Rule 11 silence would have left him with clear but uncorrected Rule 11 error to place on the Government's shoulders. This result might, perhaps, be sufferable if there were merit in Vonn's objection that applying the plain-error standard to a defendant who stays mum on Rule 11 error invites the judge to relax. The plain-error rule, he says, would discount the judge's duty to advise the defendant by obliging the defendant to advise the judge. But, rhetoric aside, that is always the point of the plain-error rule: the value of finality requires defense counsel to be on his toes, not just the judge, and the defendant who just sits there when a mistake can be fixed cannot just sit there when he speaks up later on.[46]

Underlying the radical reformation of Rule 11 in 1975 was a congressional intention to ensure that defendants were informed of, and

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46 *Id.* at 73. The Court also cited with approval to the Advisory Committee's notes:

> We think . . . that the significance of Congress's choice to adopt a harmless-error rule is best understood by taking the Advisory Committee at its word. "It must . . . be emphasized that a harmless error provision has been added to Rule 11 because some courts have read *McCarthy* as meaning that the general harmless error provision in Rule 52(a) cannot be utilized with respect to Rule 11 proceedings." The Committee said it was responding simply to a claim that the harmless-error rule did not apply. Having pinpointed that problem, it gave a pinpoint answer. If instead the Committee had taken note of claims that "Rule 52" did not apply, or that "neither harmless-error nor plain error rule applied," one could infer that enacting a harmless error rule and nothing more was meant to rule out anything but harmless-error treatment. But by providing for harmless-error review in response to nothing more than the claim that harmless-error review would itself be erroneous, the Advisory Committee implied nothing more than it said, and it certainly did not implicitly repeal Rule 52(b) so far as it might cover a Rule 11 case.

Id. at 71 (citation omitted) (quoting FED. R. CRIM. P. 11 advisory committee's notes (1983 amend.)).

understood, certain information prior to acceptance of defendants' guilty plea. After all, as enunciated by the Supreme Court in *Boykin*, a defendant's comprehension and voluntariness could not be presumed absent some affirmative evidence on record.[47] When Rule 11 was revised the district courts, *not the litigating parties*, were charged with the responsibility to inform and ensure compliance with the various components of the new rule.[48] So seriously was the plain language of this rule considered, that most circuits followed *McCarthy* in the years immediately after the 1975 amendments.[49] Thus, despite the broad requirements imposed by the new rule, most circuits viewed each Rule 11 informational item, and an understanding of each such item, as so essential that judicial neglect with respect to a single item rendered a guilty plea invalid.[50]

Nowhere in Rule 11 is a defense attorney imposed with an affirmative obligation to ensure compliance with the rule. Rather, Rule 11 is a rule that imposes affirmative duties only upon the judiciary. Nevertheless, despite the plain verbiage of Rule 11, the Supreme Court in *Vonn* has now imposed a shared obligation. It is now incumbent upon both the court and the defendant to ensure compliance with Rule 11, and if the court neglects its duties under the rule then all is essentially forgiven unless the presumably uninformed defendant objects to the court's failure to inform. However unjust this new expectation, the *Vonn* standard can admittedly be satisfied with greater facility if a defendant is represented. After all, an attorney learned in the criminal law would presumably have some familiarity with the details of Rule 11 and be reasonably capable of recognizing a judicial omission under the rule. However, the same cannot be said for defendants who are proceeding in a pro se capacity. The inquisitorial methodologies routinely employed by the judiciary, coupled with the disincentives to contradict and the lack of familiarity among pro se defendants with the Rule 11 mandates, renders virtually nil the likelihood that a pro se defendant will either recognize or lodge an objection to a Rule 11 omission. As stated by Justice Stevens in his dissent, "To see the implausibility of this, imagine what such an objection would sound like: 'Your Honor, I object to your failure to inform me of my right to assis-

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47 Boykin v. Alabama, 395 U.S. 238, 242 (1969).

48 FED. R. CRIM. P. 11(b)(1) ("Before the court accepts a plea of guilty . . . the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands [various delineated items].").

49 *See, e.g.*, LAFAVE, *supra* note 26, § 21.5, at 1020–21.

50 *See id.*

tance of counsel if I proceed to trial.'"[51] Under the *Vonn* standard, pro se litigants will now be expected to meet such expectations, however improbably satisfied.

The onus of this heightened expectation stands to adversely impact defendants regardless of representational status, though the unrepresented—for the reasons just detailed—will certainly be tasked with a burden that will be virtually impossible to satisfy. As it stands, a guilty plea entered despite a court's neglect of virtually all of the Rule 11 requirements could still be salvaged provided the defendant failed to object and was unable to demonstrate that his "substantial rights" were affected. In the end, an already deeply flawed but fluid guilty plea acceptance process was sustained by a Supreme Court willing to sidestep the plain language requirements of Rule 11 and retreat from the ideals underlying *Boykin* and *McCarthy*. And, as demonstrated in the following discussion of *Bradshaw v. Stumpf*,[52] the Supreme Court's apparent preoccupation with greasing the wheels of the federal guilty plea process has only continued to manifest itself.

B. Bradshaw v. Stumpf

In 2005, the Supreme Court once again mollified judicial responsibility under Rule 11 in *Bradshaw v. Stumpf*.[53] The defendant, John David Stumpf, and two associates, Clyde Daniel Wesley and Norman Leroy Edmonds, were arrested in connection with the attempted murder of Norman Stout and the murder of his wife Mary Jane Stout. After traveling along an interstate in Edmond's car, the men stopped the car along the highway. In need of money (presumably to purchase gas), Stumpf and Wesley exited the vehicle and approached the Stout's home, which was approximately 100 yards away. Sometime after entering the home, both Norman and Mary Jane Stout were shot. After his arrest, Stumpf eventually admitted to firing the shots that struck Norman Stout, but denied shooting Mary Jane Stout.[54]

An indictment was returned against Stumpf charging him with "aggravated murder, attempted aggravated murder, aggravated robbery, and two counts of grand theft."[55] Stumpf eventually entered a guilty plea to the aggravated murder and attempted aggravated mur-

51 *Vonn*, 535 U.S. at 79 (Stevens, J., concurring in part and dissenting in part). Justice Stevens further observed that the majority approach assumes "a cunning defendant, who is fully knowledgeable of his rights" and who strategically fails to object to Rule 11 omissions in order to salvage a winning appellate issue. *Id.* at 78–80.

52 125 S.Ct. 2398 (2005).

53 *Id.*

54 *Id.* at 2402–03.

55 *Id.* at 2403.

der charges, and, with respect to the aggravated murder count, "to one of the three capital specifications."[56] Since he was still death penalty eligible, Stumpf argued during the contested penalty hearing that his role in the murder was comparatively minor because he had only participated in the scheme at the insistence of Wesley who actually fired the shots that killed Mary Jane Stout.[57] The government countered that it was Stumpf, not Wesley, who fired the fatal shots.[58] The government also argued that, irrespective of the identity of the principal actor in Mary Jane Stout's death, Ohio law allowed the death penalty to be imposed upon accomplices provided there was a specific intent to commit murder.[59] The sentencing panel ultimately imposed the death penalty.[60]

During Wesley's trial, however, the prosecution argued to the jury that it was Wesley, and not Stumpf, who fired the shots that killed Mary Jane Stout.[61] As a result of this variance in theory, Wesley, while still on direct appeal, filed an unsuccessful motion with the lower trial court to withdraw his guilty plea or vacate his death sentence.[62] On habeas review, however, the Sixth Circuit invalidated Stumpf's guilty plea on the grounds that it had not been entered knowingly and intelligently.[63] The court found, inter alia, that Stumpf's guilty plea to aggravated murder was made "without understanding that specific intent to cause death was a necessary element of the charge."[64] Given Stumpf's unwavering denial that he was the triggerman as well as the trial court's failure to discuss the element of specific intent, the Sixth Circuit concluded that his plea to an aggravated murder charge was uninformed.[65]

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56 *Id.* The Court dropped the remaining counts of the indictment as well as the remaining two capital specifications. *Id.*

57 *Id.*

58 *Id.*

59 *Id.*

60 *Id.*

61 *Id.* at 2404.

62 *Id.*

63 Stumpf v. Mitchell, 367 F.3d 594, 596 (6th Cir. 2004), *rev'd in part, vacated in part sub nom.* Bradshaw v. Stumpf, 125 S.Ct. 2398.

64 *Stumpf*, 125 S.Ct. at 2404.

65 367 F.3d at 607–08. The Sixth Circuit reached its holding, in part, based upon the following:

> Here, the trial judge, before accepting Stumpf's plea, had not informed the defendant that specific intent was an element of the crime to which he was pleading, nor had he inquired whether Stumpf had actually shot the victim or, if not, had specifically intended that she be killed. In the absence of some inquiry, Stumpf's express reservations of his ability to put on evidence of his version of the crime, along with his attorneys' arguments that

The Supreme Court, however, disagreed, finding that Stumpf had been sufficiently informed of the nature of the charges,[66] despite the trial court's failure to specifically admonish him that specific in-

he did not intend, and was not even present for, the killing of Mrs. Stout, should have put the trial court on notice that Stumpf was not aware of the true import of his plea.

> The district court did not focus on the question of intent. Rather, it found that Stumpf's position that he was not the shooter was consistent with the *specification* to which he pleaded guilty. However, in making this finding, the district court failed to recognize that Stumpf's position is inconsistent with the *charge* to which he also pleaded guilty. It is this inconsistency that gives rise to his claim that his plea was not validly entered.
>
> Generally, a reviewing court presumes that defense counsel has explained the elements of the crime to a defendant pleading guilty, even where the record does not reflect any statement by counsel to that effect. In this case, defense counsel did state to the court that they had informed Stumpf of the elements of the crime. In a typical case, such an assurance would prevent a reviewing court from finding that a plea was involuntary. In this case, however, the record clearly establishes that Stumpf sought to preserve his right to argue that he was not the shooter and thus counterbalances the assurances given by defense counsel that they had explained the elements to Stumpf.
>
> We recognize, of course, that Stumpf need not have been the "principal offender"—the actual shooter—in order to have specifically intended the death of Mary Jane Stout. Nevertheless, it is clear from the record of the factual basis hearing that the state's theory of guilt relied completely on Stumpf being the principal offender. The prosecution presented no evidence that Stumpf intended Mrs. Stout's death, other than arguing that he was the actual shooter. In the closing arguments at the evidentiary hearing, defense counsel, contending that the prosecution had not met its burden with regard to the basis for seeking the death penalty, effectively challenged the prosecution's proof as to specific intent to kill. The prosecutor responded that "[a]s to a purpose to kill, whoever shot Mrs. Stout didn't intend to do her any favors when he shot her four times. It seems to me that shooting a person four times shows what your intent was."
>
> Indeed, the three-judge panel, which presumably knew of the intent element, found, beyond a reasonable doubt, that Stumpf was "the principal offender" in the aggravated murder and made no other finding as to specific intent. Its conclusion in this regard indicates that the panel found that Stumpf's shooting of Mrs. Stout provided the requisite specific intent, as there was no other evidence in the record to satisfy this element. Given this finding, it is unlikely that Stumpf can be said to have knowingly conceded specific intent to kill by pleading guilty, when he continued to maintain throughout the proceedings that he had not been the one who actually shot the victim.

Id. (internal citations omitted).

66 *Stumpf*, 125 S. Ct. at 2405.

tent was a necessary element of aggravated murder.[67] In reaching this conclusion, the Court relied upon the in-court representations of Stumpf's counsel during the plea colloquy that they had explained the elements of aggravated murder to Stumpf, as well as the defendant's confirmation of this representation.[68] The Court explained that it had

> never held that the judge must himself explain the elements of each charge to the defendant on the record. Rather, the constitutional prerequisites of a valid plea may be satisfied where the record accurately reflects that the nature of the charge and the elements of the crime were explained to the defendant by his own, competent counsel. Where a defendant is represented by competent counsel, the court usually may rely on that counsel's assurance that the defendant has been properly informed of the nature and elements of the charge to which he is pleading guilty.[69]

Without debating the factual intricacies of the case, *Stumpf* is certainly the Court's most recent, and perhaps most forceful, pronouncement that the guilty plea hearing process is a shared responsibility. What *Stumpf* made clear is that defense counsel representations (accompanied by defendant affirmations) can effectively substitute for defects in the guilty plea colloquial process. Thus, if a defendant was advised of an informational item under Rule 11 in an *extra-judicial* setting, such conversations can serve as an effective substitute for errors that may occur during the *required judicial* process under Rule 11.[70] Moreover, as the facts in *Stumpf* reflect, the in-court representations regarding the extra-judicial conversations need not be sup-

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67 *Stumpf*, 367 F.3d at 607.

68 *Stumpf*, 125 S. Ct. at 2405.

69 *Id.* at 2405–06 (internal citations omitted).

70 When discussing the district court's failure in *McCarthy* to provide an explanation during the Rule 11 hearing to the defendant "of the knowing and willful state of mind charged as of the time of the tax violation," the Court in *Vonn* considered "the judge's indifference . . . an affront to the integrity of the judicial system." United States v. Vonn, 535 U.S. 55, 68–69 (2002). In making this observation, the *Vonn* Court recognized that the defendant, through his attorney, had openly contested this willful mental state at the subsequent sentencing hearing. *Id.* It should also be noted that McCarthy's attorneys represented to the trial court that the elements of the tax offense had been explained to the defendant. McCarthy v. United States, 394 U.S. 459, 470 (1969). Yet, three years later in *Stumpf*, the Court expressed a more tolerant view of such judicial neglect. Despite Stumpf's claims during the plea hearing and the subsequently held evidentiary hearing that he did not shoot Mary Jane Stout, 367 F.3d at 606–07, the Court held that the trial court's failure to discuss the specific intent element was cured by the admonitions provided outside the courtroom by his defense attorney, 125 S. Ct. at 2405–06.

ported with *any*, let alone any meaningful, evidentiary detail.[71] No judicial inquiry, for example, regarding what was said, when it was said, who was present, and the environment where the purported conversation occurred are required under the lax *Stumpf* standard. All that is required is a brief representation (which need only last a few seconds) to the court containing blanket and largely unsubstantiated assertions of extra-judicial explanations. Such short shrift commentary can now serve as a cure for judicial oversights during the Rule 11 process.

The road traveled by the Supreme Court since *McCarthy* has come almost full circle. *McCarthy* deemed the requirements of Rule 11 so significant that a court's failure to follow the dictates of the rule warranted automatic reversal. Indeed, even after the 1975 restructuring of the rule, with its many additional impositions upon the judiciary, most circuits continued to follow this principle. However, today if a court, after "leading" and "compounding" a defendant through the Rule 11 process, fails to inform a defendant of an item, or two, or three under Rule 11, such judicial neglect can now be cured extra-judicially. A defense counsel representation (and an affirmation by

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71 The most pertinent exchanges between the court and defense counsel and the defendant were included in the Sixth Circuit's opinion:

> JUDGE HENDERSON: Have you informed your client of the elements of the offenses with which he is charged, of all defenses which may be available to him and of all of his Constitutional rights, both State and Federal?
>
> TINGLE: Yes, we have.
>
> . . . .
>
> JUDGE HENDERSON: Stumpf, I'm going to ask you a number of questions and if you do not understand those questions you may inquire of your attorneys to better able [sic] you to understand everything that is being asked you. These have to do with the rights that you have as a person who has been accused of a crime. Do you understand that you have a constitutional privilege against self-incrimination?
>
> THE DEFENDANT: Yes, sir.
>
> JUDGE HENDERSON: With a full understanding that anything that you say may be used against you, are you willing then to answer questions with regard to your understanding of your rights?
>
> THE DEFENDANT: Yes, sir.
>
> JUDGE HENDERSON: Now, you heard the questions that I put to your attorneys, I believe, relative to their advice to you and their counseling of you, did you not?
>
> THE DEFENDANT: Yes, sir.
>
> JUDGE HENDERSON: Do you personally acknowledge that your attorneys have informed and advised you as they say they have?
>
> THE DEFENDANT: Yes, sir.

Stumpf, 367 F.3d at 604.

the defendant) that the omitted item had been explained outside the courtroom, without any additional evidentiary support, can now cure judicial neglect with respect to the Rule 11 mandates.

The following subpart will briefly discuss another important aspect of Rule 11, the plea withdrawal rules. It will describe how these rules work in conjunction with, and as a vital anchor to, the inequitable guilty plea processes just described. More specifically, it will explain how these rules essentially bind unwary defendants to their decisions to plead guilty, while depriving them of a corresponding ability to either enforce the underlying plea agreements or pursue other more favorable disposition alternatives.

C. United States v. Hyde *and the Plea Withdrawal Rules*

In December 2002, a plea withdrawal provision was added to Rule 11, which provides that a defendant may withdraw a plea of guilty that has been accepted by the court prior to sentencing if he can satisfy the court that a "fair and just reason" underlies his request.[72] This rule change was prompted by the 1997 Supreme Court case, *United States v. Hyde*,[73] in which the defendant sought to withdraw his guilty plea after it had been accepted, but before the court had accepted the accompanying plea agreement and imposed sentence.[74] When his effort proved to be unsuccessful, an appeal followed.[75] The Ninth Circuit found that Hyde was not bound by the "fair and just reason" constriction, under the then existing Rule 32(e),[76] and that he was, therefore, permitted to withdraw his guilty plea as a matter of right.[77] The court reasoned, in part, that the "inextricabl[e]" relationship between the guilty plea and the plea agreement meant that a court could not accept one without the other.[78] Therefore, until such time as both the plea of guilty and the plea agreement had been accepted, the defen-

72 Amendments to Federal Rules of Criminal Procedure, 535 U.S. 1157, 1996 (2001); *see also* FED. R. CRIM. P. 11(d)(2)(B). The rule also allows a defendant to withdraw a guilty plea without restriction if the court either has not accepted the guilty plea or if the court rejects the plea agreement. FED. R. CRIM. P. 11(d)(1), (d)(2)(A).

73 520 U.S. 670 (1997).

74 *Id.* at 671.

75 *Id.* at 671–72.

76 The plea withdrawal rule had previously been embodied in Rule 32(e) and contained the same "fair and just reason" standard currently found in Rule 11. FED. R. CRIM. P. 11(d); FED. R. CRIM. P. 32(e) (2000) (amended 2002).

77 United States v. Hyde, 92 F.3d 779, 780–81 (9th Cir. 1996), *rev'd.* 520 U.S. 670.

78 *Id.* at 780.

dant was entitled to freely withdraw his guilty plea.[79] However, the Supreme Court disagreed. The Court's principal rationale was textual—that the plain language of Rule 11 permits district courts to separately accept guilty pleas and plea agreements.[80] Given this allowance, the Court reasoned that once a guilty plea had been accepted a defendant could freely withdraw his plea only if the court rejected the proffered plea agreement.[81] Until such time, the Court determined that a defendant was subject to the fair and just reason standard.[82]

On the surface such a rule might appear just and reasonable. After all, a contrary rule would appear to be an invitation for litigative chaos. One could easily imagine defendants routinely entering and withdrawing guilty pleas on a whim, with the effect of disrupting the efficient administration of justice. However, as I have discussed in greater depth elsewhere, the only thing unjust about the process is the current rule prohibiting a defendant from freely withdrawing his guilty plea up until the time the court accepts the underlying plea agreement.[83] Consider the following sampling.

Plea agreements have traditionally been construed in accordance with contract law principles.[84] Contrary to the predominant perception that plea agreements are unilateral contracts[85] between the prosecution and defense, plea agreements are actually bilateral agreements involving three parties—the defendant and prosecution as joint offerors and the court as an offeree.[86] While it is true that the prosecution and the defense, upon the culmination of negotiations, enter into what is commonly referenced as a plea agreement, it is critical to understand that such an agreement, standing alone, has no binding effect whatsoever. In fact, absent assent on the part of the judiciary, it is *wholly impossible* for either party to enforce the pur-

79 *Id.* at 781.

80 520 U.S. at 673–76.

81 *Id.* at 676.

82 *Id.*

83 For a more in-depth discussion of the unjustness of the plea withdrawal rules and their adverse impact upon defendants who have completed the Rule 11 process, see Julian A. Cook, III, *All Aboard! The Supreme Court, Guilty Pleas, and the Railroading of Criminal Defendants*, 75 U. COLO. L. REV. 863 (2004).

84 *Id.* at 879.

85 This has been the predominant view among academics and the courts. *Id.* at 879–80. However, there is also some authority for the notion that plea agreements are contracts subject to a condition. The article also addresses, and rejects, these contentions. *Id.* at 893–99.

86 *Id.* at 880–92.

ported guilty plea contract.[87] *Even if signed*, the negotiated instrument is incapable of any independent significance and remains entirely dependent upon judicial acceptance for its enforceability.[88] In the end, a plea agreement is nothing more than a plea offer on the part of the prosecution and defense to resolve the case pursuant to the proffered terms in exchange for the court's assent to abide by the terms of the agreement. In other words, what is offered is a joint promise that the litigation will be resolved and a guilty plea will be tendered in exchange for the court's verbal promise that it will implement the agreement. This mutual promissory exchange is a classic example of a bilateral agreement.

Although the parties are tendering an offer in the form of a plea agreement to the court (and the defendant is rendering performance via the entry of his guilty plea), Rule 11 requires the defendant to keep his performance offer open and permit the court time to ponder the merits of the proffered settlement. Despite the absence of a judicial acceptance (or the tendering of any consideration), the "fair and just reason" standard effectively binds the defendant to his offer (and his performance) and prevents him from pursuing other more optimal litigative strategies. This bilateral reality for the criminal defendant stands in stark contrast to that faced by any other marketplace offeror. Whereas any other contractor is entitled to withdraw an unaccepted offer and pursue other more advantageous opportunities, the defendant is essentially bound to his offer without a corresponding authority to enforce the very plea agreement that prompted his performance (the entering of his guilty plea).[89]

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87 *Id.* at 881.

88 *See* United States v. Papaleo, 853 F.2d 16 (1st Cir. 1988) (rejecting the defendant's argument that a plea agreement was a binding contract between the prosecution and the defense when, prior to the court's approval of the agreement, the government had signed the agreement but then later sought to withdraw from the agreement).

89 Cook, *supra* note 83, at 885. The article further contends that this bilateral conception is consistent with the defendant's pre-plea expectations:

> When a defendant elects to waive [his Sixth Amendment jury trial right], among other constitutional protections, and enter a plea of guilty, it is typically prompted by the defendant's decision to pursue a negotiated disposition. In other words, the defendant has determined that it is in his optimal interest to waive his trial right and proceed with a guilty plea pursuant to the terms detailed in a proposed plea arrangement. It is the defendant's understanding that there is a "deal," and but for this contractual "deal" he would have persisted in enforcing his right. It is a promissory exchange—the promise of certain benefits, including possible penal compromises, in exchange for the defendant's promise to enter a guilty plea—that prompted his decision to change his plea.

The rules regarding plea withdrawal are yet another example of the various latent perils that await criminal defendants on the cusp of entering the guilty plea process. Defendants who enter this arena are subject to a set of rules and procedures that effectively lure them into binding admissions of guilt without providing a corresponding right to enforce the very agreement that prompted them to perform in the first place. It is notable that Rule 11's failure to require trial courts to inform defendants, and ensure their understanding, of the rules regarding plea withdrawal empowers the district courts to accept a defendant's guilty plea without any inquiry whatsoever regarding a defendant's knowledge of this very critical rule. Though some might contend that the represented could become learned of such consequences through their attorney-client conferences, the likelihood that the pro se defendant would become familiar with the complexities attendant to this rule is, without question, highly improbable. Whatever the exact probabilities, however, defendants, regardless of their representational status, are primed to enter guilty pleas with no requirement under Rule 11 that the courts make any inquiry regarding a defendant's knowledge of his restricted plea withdrawal rights.

The Rule 11 guilty plea hearing is a largely mechanistic colloquial procedure that effectively expedites the guilty plea process, yet does little to ascertain the extent of a defendant's knowledge and voluntariness. If during this process a court should fail to comply with the Rule 11 mandates, all is essentially forgiven provided the presumably uninformed defendant fails to object to the court's omission(s). In the event an objection is not lodged, the defendant is then saddled with the burden of demonstrating prejudice from the judicial omission in order to be afforded the opportunity to plead anew. Moreover, judicial oversights can also be cured if representations are made in court that the omitted information had been conveyed to the defendant in an extra-judicial setting.

Finally, once the Rule 11 process has been completed, the defendant is essentially bound to his guilty plea decision unless he can proffer a "fair and just reason" in support of a plea withdrawal request or the court ultimately rejects the proffered disposition. The very instrument that prompted him to ponder an out-of-court resolution—the plea agreement—served as the attractive enticement that caused him to forgo his Sixth Amendment jury trial protections and proceed with the Rule 11 process. Yet, upon completion of the guilty plea hearing, the defendant becomes effectively bound to his guilty plea decision

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Id. at 886.

without any corresponding ability to enforce the very agreement that led to his change of plea.

However troubling these pitfalls and consequences may be, they become all the more disturbing when defendants are on the cusp of proceeding down this pathway without the assistance of counsel. *Iowa v. Tovar*,[90] discussed in the next Part, considers the question of what judicial admonitions might be required by the Sixth Amendment for those litigants who stand on the brim of this guilty plea process.

II. *Iowa v. Tovar*

A. *The Supreme Court Decision*

Iowa v. Tovar,[91] decided by the Supreme Court in 2004, represents one of the High Court's most recent assaults upon defendant constitutional interests in the guilty plea context. At issue was whether two judicial admonishments proffered by the Iowa Supreme Court were required by the Sixth Amendment to be provided to defendants who seek to waive their right to counsel prior to entering a guilty plea.[92] Felipe Tovar had been convicted in Iowa state court in 1996, 1998,[93] and 2001 of operating a motor vehicle while under the influence of alcohol (OWI).[94] Though the 1996 and 1998 convictions were classified as misdemeanors, Iowa law classified any subsequent OWI offenses as class "D" felonies.[95] Thus, in an attempt to avoid this enhancement, Tovar, through his counsel, filed a Motion for Adjudication of Law in the 2001 litigation.[96] In it he argued that his 1996 conviction, which had been obtained via a guilty plea without representation of counsel, was not "full knowing, intelligent, and voluntary" because of the trial court's failure to fully advise him "of the dangers and disadvantages of self-representation."[97]

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90 541 U.S. 77 (2004).

91 *Id.*

92 *Id.* at 77, 81.

93 Tovar was represented by counsel when he was convicted in 1998. *Id.* at 85.

94 *Id.* at 84–86.

95 *Id.* at 85.

96 *Id.*

97 *Id.* At both his initial appearance and his arraignment in 1996, Tovar appeared without counsel. An Initial Appearance form indicated that he waived his right to have the assistance of counsel. At his arraignment Tovar affirmatively stated on the record that he wished to represent himself. At the same hearing, Tovar entered a plea of guilty to the OWI charge. At the time of his guilty plea, there were four other misdemeanor cases before the court that day. All five of the accused consented to have the court conduct a joint plea proceeding. In accordance with the Iowa Rules of Criminal Procedure, the court conducted a plea procedure in which

After the trial court denied his motion, Tovar entered a guilty plea to his third OWI offense.[98] His conviction was later affirmed by the Iowa Court of Appeals. Though the record plainly indicated that Tovar had been informed during his plea colloquy of the nature of the charges and of the sentencing consequences,[99] a deeply divided Iowa Supreme Court reversed and remanded his conviction, after finding that his 1996 guilty plea conviction had violated the Sixth Amendment:

> "[A] defendant such as Tovar who chooses to plead guilty without the assistance of an attorney must be advised of the usefulness of an attorney and the dangers of self-representation in order to make a knowing and intelligent waiver of his right to counsel . . . . [T]he trial judge [must] advise the defendant generally that there are defenses to criminal charges that may not be known by laypersons and that the danger in waiving the assistance of counsel in deciding whether to plead guilty is the risk that a viable defense will be overlooked. The defendant should be admonished that by waiving his right to an attorney he will lose the opportunity to obtain an independent opinion on whether, under the facts and applicable law, it is wise to plead guilty. In addition, the court must ensure the defendant understands the nature of the charges against him and the range of allowable punishments."[100]

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the court explained certain rights to Tovar that would necessarily be relinquished by him if he elected to enter a guilty plea. The court also informed Tovar that he would be forgoing his right to a speedy and public trial by jury, his right to be represented during the trial by an attorney who could assist him with jury selection, the presentation of evidence, the cross-examination of witnesses, the making of arguments to the jury and the court on his behalf, his right to remain silent at trial, his right to be presumed innocent of the criminal charges, and his right to subpoena witnesses and compel their testimony. The court further informed Tovar of maximum and minimum penalties attendant to a first OWI offense (to which he expressed an understanding). The court also informed him of the elements of the OWI offense and found that there was a supporting factual basis. The court then formally accepted Tovar's guilty plea. At his sentencing hearing, approximately forty days after the acceptance of his guilty plea, Tovar again appeared without counsel. Once again, and in response to a judicial inquiry, Tovar expressed his desire to represent himself. At his sentencing, he also was arraigned on a separate charge of driving with a suspended license. Again, and without the assistance of counsel, he entered a guilty plea to that charge as well. For the OWI offense, Tovar received a sentence of two days in jail (the minimum required sentence) and a $500 fine. *Id.* at 84–86.

98 *Id.* at 86. He was sentenced to 180 days imprisonment, with 150 days suspended, three years probation and a fine. *Id.*

99 *Id.* at 83–84.

100 *Id.* at 86–87 (quoting State v. Tovar, 656 N.W.2d 112, 121 (Iowa 2003), *rev'd*, 541 U.S. 77).

Thus, the Iowa Supreme Court found, in the guilty plea context, that the Sixth Amendment required two additional warnings: (1) that counsel might be able to uncover viable defenses to the charges at issue; and (2) that counsel can provide "an independent opinion" with respect to the wisdom of entering a guilty plea.[101] However, the United States Supreme Court unanimously disagreed, concluding that the Sixth Amendment did not encompass the two admonitions proffered by the Iowa Supreme Court. Instead, the Court held that the Sixth Amendment only requires that a defendant be informed of the nature of the charges, of his right to be counseled with respect to his guilty plea decision, and of the "range of allowable punishments attendant" to his guilty plea.[102]

In reaching its decision, the Court recognized that a defendant contemplating a pro se defense must be advised of the "dangers and disadvantages of self-representation" and that these admonitions must be "'rigorous[ly]' conveyed."[103] But it added that the required warnings are contextual, and thus varied, cautioning against the imposition of rigid and inflexible Sixth Amendment mandates.[104] For example, the Court drew a distinction between the warnings required at trial and those necessary at earlier stages of the litigation. At trial, the Court noted that counsel could provide meaningful assistance with respect to, inter alia, the rules of criminal procedure and evidence, the subtleties of voir dire, and the examination of witnesses.[105] However, the Court stressed that "less rigorous warnings" were required at earlier stages, "not because pretrial proceedings are 'less important' than trial, but because, at that stage, 'the full dangers and disadvantages of self-representation . . . are less substantial and more obvious to an accused than they are at trial.'"[106] Analogizing to waivers in alternative Sixth Amendment contexts, the Court added that a valid waiver demanded only a generalized cognizance of the consequences stemming from such a decision,[107] and that counsel waivers pursuant to *Miranda* are valid despite a "'full and complete appreciation of all of the consequences flowing'" from that decision.[108] Thus, the Court reasoned that the Iowa Supreme Court's more "scripted" interpretation of the Sixth Amendment's demands improperly discounted the

101 656 N.W.2d at 121.
102 541 U.S. at 81.
103 *Id.* at 89.
104 *Id.* at 88.
105 *Id.* at 89.
106 *Id.* (quoting Patterson v. Illinois, 487 U.S. 285, 289 (1988)).
107 *Id.* at 91–92.
108 *Id.* at 92 (quoting *Patterson*, 487 U.S. at 294).

principles of generality that typically govern waivers in this constitutional context.[109]

The following Part will undertake a review of some of the guiding principles relevant to counsel waivers under the Sixth Amendment and reveal how these rules, in conjunction with *Tovar*, have produced a judicial approach to the waiver issue that is both inconsistent and unjust. It will not only help explain *Tovar*'s erroneous constitutional construction and identify the apparent motivations underlying the Court's decision, but it will also demonstrate why defendants should be entitled to a more expansive set of judicial admonitions and how the absence of meaningful warnings help to maintain the efficiency of the current guilty plea structure.

B. *Critical Analysis*

The Sixth Amendment provides, in pertinent part: "In all criminal proceedings, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."[110] This right to counsel attaches whenever an individual is accused of a crime and is confronted with the possibility of imprisonment.[111] However, this right does not attach at every stage of the criminal process, but only at those stages, such as the guilty plea stage, that are deemed "critical."[112] In addition to the right of counsel that the Sixth Amendment explicitly affords, the Supreme Court has also held that this amendment implicitly affords the defendant the corresponding right to decline counsel and to represent himself.[113] While it may be generally stated that a defendant's waiver of his right to counsel must be knowing and voluntary, and that he must be made aware of the pitfalls associated with self-representation,[114] the Supreme Court, as noted earlier, has stressed that the requirements for a valid waiver are dependent upon the con-

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109 *Id.* at 92. The Court also made some case-specific findings. It noted that Tovar did not claim that he failed to understand the nature of the charges or the range of possible penalties. Nor did he identify what additional information counsel might have provided, or definitively assert any absence of knowledge of his right to counsel at the guilty plea stage. As to the latter claim, the Court observed that Tovar merely asserted that he "*may have been* under the mistaken belief that he had a right to counsel at trial, but not if he was merely going to plead guilty." *Id.* at 93 (emphasis added) (quoting Brief of Respondent at 16, *Tovar*, 541 U.S. 77 (No. 02-1541)).

110 U.S. CONST. amend. VI.

111 *Tovar*, 541 U.S. at 80.

112 *Id.* at 81.

113 Faretta v. California, 422 U.S. 806, 819 (1975).

114 *Tovar*, 541 U.S. at 86–87.

text in which the waiver is sought.[115] For example, in *Patterson v. Illinois*,[116] the Supreme Court considered whether, in the context of post-indictment interrogation, the provision of Miranda warnings to a defendant could also serve as a vehicle through which a defendant's Sixth Amendment counsel right could be waived. Answering in the affirmative, the Court explained that warnings regarding the dangers of proceeding pro se are contextual, with more extensive information required at the later trial stage than during earlier phases of the litigation:

> [W]e have taken a more 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.
>
> At one end of the spectrum, we have concluded there is no Sixth Amendment right to counsel whatsoever at a postindictment photographic display identification, because this procedure is not one at which the accused "require[s] aid in coping with legal problems or assistance in meeting his adversary." At the other extreme, recognizing the enormous importance and role that an attorney plays at a criminal trial, we have imposed 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. In these extreme cases, and in others that fall between these two poles, we have defined the scope of the right to counsel by a pragmatic assessment of the usefulness of counsel to the accused at the particular proceeding, and the dangers to the accused of proceeding without counsel. An accused's waiver of his right to counsel is "knowing" when he is made aware of these basic facts.
>
> . . . .
>
> Thus, we require a more searching or formal inquiry before permitting an accused to waive his right to counsel at trial than we require for a Sixth Amendment waiver during postindictment questioning—*not* because postindictment questioning is "less important" than a trial . . . but because the full "dangers and disadvantages of

115 *Id.* at 88.
116 487 U.S. 285 (1988).

self-representation," during questioning are less substantial and more obvious to an accused than they are at trial.[117]

Given the Supreme Court's reluctance to impose a precise mandate, the circuit courts, not surprisingly, have adopted differing approaches to ascertaining a valid counsel waiver under this amendment when a defendant seeks to represent himself at trial. Though some circuits strenuously focus their critique upon the precise warnings administered by a district court,[118] most circuits deemphasize this factor

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117 *Id.* at 298–99 (alteration in original) (citation omitted) (footnote omitted). The Court also stated in a footnote that "[f]rom the outset, then, this Court has recognized that the waiver inquiry focuses more on the lawyer's role during such questioning, rather than the particular constitutional guarantee that gives rise to the right to counsel at that proceeding." *Id.* at 299 n.12.

118 These circuits either require or suggest the conveyance of explicit warnings of the dangers associated with self-representation. Illustrative of this approach is the Third Circuit case of *United States v. Peppers*, 302 F.3d 120 (3rd Cir. 2002). There, the circuit detailed a "useful framework" for courts in its district to follow when assessing whether a defendant's decision to forgo counsel is knowing and voluntary. *Id.* at 136. Based largely upon the FED. JUDICIAL CTR., BENCHBOOK FOR U.S. DISTRICT COURT JUDGES, § 1.02, at 4–5 (4th ed. rev. 2000), the Third Circuit recommended that the following questions be posed:

> 1. Have you ever studied law?
>
> 2. Have you ever represented yourself in a criminal action?
>
> 3. Do you understand that you are charged with these crimes: [state the crimes with which the defendant is charged]?
>
> 4. Do you understand that the U.S. Sentencing Commission has issued sentencing guidelines that will be used in determining your sentence if you are found guilty?
>
> 5. Do you understand that if you are found guilty of the crime charged in Count 1, the court must impose an assessment of $ and could sentence you to as many as years in prison and fine you as much as $? [Ask defendant this question for each count of the indictment or information.]
>
> 6. Do you understand that if you are found guilty of more than one of these crimes this Court can order that the sentences be served consecutively, that is, one after another?
>
> 7. Do you understand that if you represent yourself, you are on your own? I cannot tell you—or even advise you—as to how you should try your case.
>
> 7a. Do you know what defenses there might be to the offenses with which you are charged? Do you understand that an attorney may be aware of ways of defending against these charges that may not occur to you since you are not a lawyer? Do you understand that I cannot give you any advice about these matters?
>
> 8. Are you familiar with the Federal Rules of Evidence?
>
> 8a. Do you understand that the Federal Rules of Evidence govern what evidence may or may not be introduced at trial and that, in representing yourself, you must abide by those rules?
>
> 9. Are you familiar with the Federal Rules of Criminal Procedure?

in lieu of a broader contextual approach.[119] For these courts, considerations such as "the defendant's age, mental condition, and prior ex-

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9a. Do you understand that these rules govern the way a criminal action is tried in federal court. Do you understand that you must follow these rules?
10. Do you understand that you must proceed by calling witnesses and asking them questions, and that, except when and if you yourself testify, you will not be permitted to tell the jury matters that you wish them to consider as evidence?
10a. Do you understand that it may be much easier for an attorney to contact potential witnesses, gather evidence, and question witnesses than it may be for you?
11. I must advise you that in my opinion a trained lawyer would defend you far better than you could defend yourself. I think it unwise of you to try to represent yourself. You are not familiar with the law. You are not familiar with court procedure. You are not familiar with the rules of evidence. I strongly urge you not to try to represent yourself.
12. Now, in light of the penalties that you might suffer if you are found guilty, and in light of all of the difficulties of representing yourself, do you still desire to represent yourself and to give up your right to be represented by a lawyer?
13. Are you making this decision freely, and does it reflect your personal desire?
14. Do you have any questions, or do you want me to clarify or explain further anything that we have discussed here?

If the answers to the foregoing questions satisfy the court that the defendant knowingly and voluntarily desires to proceed pro se, the court would then state the necessary conclusions, such as:

I find that the defendant has knowingly and voluntarily waived the right to counsel. I will therefore permit the defendant to represent himself (or herself).

As is evident from the follow-up questions, the purpose of inquiring as to the defendant's knowledge is only to ascertain the extent to which the defendant understands the procedure that is to be followed during the course of the trial, not to assess his legal knowledge or training to determine his ability to represent himself well.

Id. at 136–37; *see also* United States v. McBride, 362 F.3d 360, 366 (6th Cir. 2004) (finding valid waiver of counsel right when court asked all but one question from the *Benchbook*).

119 *See* Dallio v. Spitzer, 343 F.3d 553, 563 (2d Cir. 2003) ("[W]hile our court has strongly endorsed *Faretta* warnings as a factor important to the knowing and intelligent waiver of counsel we have, at the same time, also rejected rigid waiver formulas or scripted procedures . . . ." (citation omitted)); United States v. Akins, 276 F.3d 1141, 1147 (9th Cir. 2002) (recognizing that "[w]hen no waiver inquiry appears on the record, we must look to 'the particular facts and circumstances surrounding the case, including the background, experience and conduct of the accused' to determine whether the record as a whole supports a finding that the waiver was knowing and intelligent" (quoting Cooley v. United States, 501 F.2d 1249, 1252 (9th Cir.))); United States v. Edwards, 911 F.2d 1031, 1035 (5th Cir. 1990) (holding that a trial

perience with the criminal process, previous hearings in the case, . . . the general nature of the offense charged," and the reasons underlying his request to proceed pro se, are among the factors considered in conjunction with the judicial colloquy when making this assessment.[120]

Irrespective of the assessment methodology, however, once a valid waiver is found and a defendant proceeds to represent himself, the Supreme Court has permitted the courts to impose restrictions whenever a defendant attempts to freely exercise this constitutional right at trial. For example, district courts are empowered to impose standby counsel, even if its decision meets with a defendant's objection.[121] In this capacity, standby counsel may act so as to "to relieve the judge of the need to explain and enforce basic rules of courtroom protocol or to assist the defendant in overcoming routine obstacles" during the course of a trial, even if such participation "*somewhat undermines* the pro se defendant's appearance of control over his own defense."[122] Even when such actions occur in the jury's presence, the Supreme Court does not consider such conduct to be per se objectionable.[123] Though the Court acknowledges that such activities before a jury are "more problematic,"[124] it considers the critical inquiry to be whether an attorney's participation *seriously* undermines either a defendant's actual control over his defense or the appearance before the jury that he was representing himself.[125] Aside from the

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court's compliance with Rule 11 suffices not only as a valid waiver of a defendant's jury trial rights, but also as a valid waiver of his right to counsel).

120 LAFAVE, *supra* note 26, § 11.3, at 588; *see id.* § 11.5, at 597.

121 This allowance permits counsel to provide assistance during the course of a trial upon request of either the defendant or the court. Joseph A. Colquitt, *Hybrid Representation: Standing the Two-Sided Coin on Its Edge*, 38 WAKE FOREST L. REV. 55, 71 (2003); Lois Shepherd, *Dignity and Autonomy After* Washington v. Glucksberg*: An Essay About Abortion, Death, and Crime*, 7 CORNELL J.L. & PUB. POL'Y 431, 462 (1998) ("While *Faretta* recognized the defendant's right to self-representation, which 'must be honored out of "that respect for the individual which is the lifeblood of the law,"' it also permitted courts to appoint 'standby counsel' to aid the defendant in technical matters to keep the trial running smoothly." (quoting Faretta v. California, 422 U.S. 806, 834–36 (1975))); *see* LAFAVE, *supra* note 26, § 11.5, at 594–95.

122 McKaskle v. Wiggins, 465 U.S. 168, 184 (1984) (emphasis added).

123 *Id.* at 181.

124 *Id.*

125 *Id.* at 187. In *McKaskle*, the Court found that the defendant's Sixth Amendment rights were not violated when standby counsel, inter alia, examined witnesses during the course of a trial in order to lay an evidentiary foundation, tendered motions for mistrial, provided the defendant with advice regarding witness examination, and provided the court with information relevant to the location of witnesses. Given that the defendant maintained "actual control over his defense" and such participa-

authority to impose standby counsel, a court, even more obtrusively, may, on its own volition, terminate the defendant's exercise of this right altogether if the court determines that he has "engage[d] in serious and obstructionist misconduct."[126] This authority to terminate has been upheld in instances where, for example, a defendant has expressed dissatisfaction with a court's rulings and obstructed the progression of the pretrial litigative process,[127] and when a defendant has employed this right as a tactic for delay of a trial.[128]

Certainly a principal rationale underlying these limitations is the assurance that the trial process will proceed efficiently. Indeed, there is a perception among some that pro se litigants are disruptive and stand as impediments to this objective.[129] However, there is at least one additional rationale that presumably motivates these delimitations; namely, that a pro se litigant is simply better served when he can

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tion could not "reasonably be thought to have undermined [his] appearance before the jury," the Court reasoned that the defendant's Sixth Amendment interests were not compromised. *Id.* at 184–85.

126 Faretta v. California, 422 U.S. 806, 834 n.46 (1975) ("We are told that many criminal defendants representing themselves may use the courtroom for deliberate disruption of their trials. But the right of self-representation has been recognized from our beginnings by federal law and by most of the States, and no such result has thereby occurred. Moreover, the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct. Of course, a State may—even over objection by the accused—appoint a 'standby counsel' to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary. The right of self-representation is not a license to abuse the dignity of the courtroom." (footnotes omitted)).

127 *See* United States v. Brock, 159 F.3d 1077, 1080 (7th Cir. 1998).

128 *See* United States v. Flewitt, 874 F.2d 669, 680 (9th Cir. 1989).

129 *See* John F. Decker, *The Sixth Amendment Right To Shoot Oneself in the Foot: An Assessment of the Guarantee of Self-Representation Twenty Years After* Faretta, 6 SETON HALL CONST. L.J. 483, 597–98 (1996) ("All of these procedural concerns may pale by comparison to the practical problems and headaches that pro se defendants create for the nation's trial courts. Quite often, the pro se defendant is either a political extremist, a misfit, or an incorrigible career criminal with nothing to lose. Many times such defendants merely use their pro se status as a vehicle to advance a particular agenda, act out their insanity or thumb their nose at the justice system. Most trial judges will readily admit that even the best of pro se defendants are usually disruptive to the orderly processes of a trial court."); *The Supreme Court, 2000 Term—Leading Cases*, 115 HARV. L. REV. 306, 433 (2001) ("For example, if all civil litigants were suddenly to appear pro se, the disruption to the court system would be catastrophic. It is reasonable to assume that pro se litigants would be unable to frame issues suitably for judges, much less respond to questions about the constitutionality of a statute. As a result, the judiciary's ability to perform its job would be significantly impaired. Nevertheless, if the government did not provide lawyers for an indigent civil litigant, that failure would withstand due process scrutiny under the Court's precedents.").

avail himself of the assistance of counsel.[130] As the Supreme Court has acknowledged, "[T]he right of self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant."[131] Given the innumerable and complex procedural and evidentiary rules associated with the trial process, a trained defense attorney is unquestionably better suited than "even the most gifted layman" to navigate through these intricate trial waters.[132]

In the end, the rules respecting a defendant's constitutional right to self-representation in the trial context serve, at the very least, a dual purpose: they enable defendants to proceed in a pro se capacity, while affording them the opportunity to draw upon an attorney's expertise, and they preserve a structure through which the criminal trial process can efficiently proceed.[133] Nevertheless, the crafting of these rules comes at a cost, for it disables, to a certain extent, a defendant from freely exercising his constitutional right to self-representation. Indeed, in the trial context, the familiar refrain that courts should "'indulge every reasonable presumption against waiver of fundamental constitutional rights'"[134] seems to take on special meaning. By empowering the courts to impose standby counsel or to terminate a liti-

130 *See* Marie Higgins Williams, *The* Pro Se *Criminal Defendant, Standby Counsel, and the Judge: A Proposal for Better-Defined Roles*, 71 U. COLO. L. REV. 789, 805 (2000) ("Perhaps the most compelling justification for the practice of appointing standby counsel is that the defendant generally has not received a legal education. He is not familiar with trial procedures, the rules of evidence, or many fundamental principles of law. If standby counsel is made available to the defendant, he can obtain advice about representing himself. Such advice helps the defendant exercise his right of self-representation more effectively and begins to level the playing field in the courtroom.").

131 McKaskle v. Wiggins, 465 U.S. 168, 177 n.8 (1984).

132 *See* Patterson v. Illinois, 487 U.S. 285, 300 n.13 (1988) ("[A]t trial, counsel is required to help even the most gifted layman adhere to the rules of procedure and evidence, comprehend the subtleties of *voir dire,* examine and cross-examine witnesses effectively (including the accused), object to improper prosecution questions, and much more.").

133 *McKaskle*, 465 U.S. at 184 ("A defendant's Sixth Amendment rights are not violated when a trial judge appoints standby counsel—even over the defendant's objection—to relieve the judge of the need to explain and enforce basic rules of courtroom protocol or to assist the defendant in overcoming routine obstacles that stand in the way of the defendant's achievement of his own clearly indicated goals. Participation by counsel to steer a defendant through the basic procedures of trial is permissible even in the unlikely event that it somewhat undermines the *pro se* defendant's appearance of control over his own defense.").

134 Michigan v. Jackson, 475 U.S. 625, 633 (1986) (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

gant's pro se status altogether, this constitutional *right* seems to resemble more of a constitutional *privilege*.[135]

Yet, in the guilty plea context, the apparent necessity to erect comparable impediments to a defendant's ability to freely exercise this Sixth Amendment right is apparently no longer evident. In stark contrast to the trial context, where district courts are plainly encouraged to opine against proceeding in a pro se capacity,[136] and, in certain circumstances, to impose standby counsel or terminate a defendant's exercise of his right to self-representation altogether,[137] district courts are not even mildly encouraged to exercise any such discretion during the guilty plea phase. In fact, assuming a defendant's competency, there are no meaningful impediments whatsoever to a defendant's exercise of his constitutional right to self-representation in the guilty plea context.[138] Indeed, the failure of *Tovar* to find that the Constitution required even the most basic of admonitions—that counsel might be able to identify and uncover viable defenses to

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135 The Court has also held that a defendant has no constitutional right to self-representation on appeal. Martinez v. Court of Appeal of Cal., Fourth Appellate Dist., 528 U.S. 152, 153 (2000).

136 *See* United States v. Hoskins, 243 F.3d 407, 411 (7th Cir. 2001) (noting that the trial court "repeatedly warned Hoskins of the consequences of proceeding pro se and advised him against it"); United States v. Kneeland, 148 F.3d 6, 14 (1st Cir. 1998) (noting that the trial court "repeatedly advis[ed] Kneeland against proceeding pro se"); United States v. Pollani, 146 F.3d 269, 272 (5th Cir. 1998) (noting that the "magistrate judge tried to persuade Pollani against proceeding pro se"); United States v. Cunningham, 145 F.3d 1385, 1389 (D.C. Cir. 1998) (observing that the district court "repeatedly warned him against proceeding *pro se*"); United States v. Tracy, 12 F.3d 1186, 1192–93 (2d Cir. 1993) (noting that the district court advised the defendant against proceeding in a pro se capacity); Strozier v. Newsome, 926 F.2d 1100, 1104 (11th Cir. 1991) (noting that "the trial judge, at a pre-trial appearance in open court . . . three months before trial, had cautioned petitioner against proceeding pro se after petitioner had expressed dissatisfaction with Auld's performance as his lawyer"); United States v. Fant, 890 F.2d 408, 409 (11th Cir. 1989) (observing that the district court "recommended against" proceeding pro se); United States v. West, 877 F.2d 281, 285 (4th Cir. 1989) (noting that the trial court "exhort[ed]" the defendant "against trying to represent himself"); United States *ex rel.* Jenkins v. Dobucki, 12 F. Supp. 2d 827, 830 (N.D. Ill. 1998) (noting that "[t]he judge engaged in a substantial conversation with Jenkins about his constitutional right to counsel and advised him against proceeding *pro se*"); Gordon v. Taylor, 824 F. Supp. 492, 498 (D. Del. 1993) (noting that "the judge strongly cautioned Gordon numerous times against proceeding *pro se*").

137 *See supra* notes 122–29 and accompanying text.

138 This statement assumes that the defendant validly waived his Sixth Amendment right to counsel and is competent to enter a guilty plea. *See* Godinez v. Moran, 509 U.S. 389, 399–400 (1993) (holding that the competency standard to stand trial is the same as the standard to waive one's counsel right).

the criminal charges and render advice regarding the wisdom of pleading guilty—portends a pessimistic future for litigants in this context who seek solace in the Sixth Amendment. Consider the rather astonishing declaration in *Tovar* that additional warnings might actually confuse a defendant with respect to the value of counsel at this stage:

> Given "the particular facts and circumstances surrounding [this] case," it is far from clear that warnings of the kind required by the Iowa Supreme Court would have enlightened Tovar's decision whether to seek counsel or to represent himself. In a case so straightforward, the United States as amicus curiae suggests, the admonitions at issue might confuse or mislead a defendant more than they would inform him: The warnings the Iowa Supreme Court declared mandatory might be misconstrued as a veiled suggestion that a meritorious defense exists or that the defendant could plead to a lesser charge, when neither prospect is a realistic one. If a defendant delays his plea in the vain hope that counsel could uncover a tenable basis for contesting or reducing the criminal charge, the prompt disposition of the case will be impeded, and the resources of either the State (if the defendant is indigent) or the defendant himself (if he is financially ineligible for appointed counsel) will be wasted.[139]

No rational actor, regardless of context, would plausibly suggest that a consequential decision should be made absent the possession of sufficient information. This is precisely why Rule 11 evolved from its original rudimentary form to the complex structure that characterizes it today. To ensure that defendants were making their guilty plea decisions in an informed fashion, Rule 11 was radically overhauled to ensure that defendants were informed of basic information relevant to the guilty plea decision. There is no intimation in the rule that the provision of additional information might somehow confuse a defendant with respect to the wisdom of pursuing a guilty plea. In the same vein, it is utterly foolhardy to believe that the two admonitions at issue—or even the provision of additional warnings above and beyond those deemed necessary by the Iowa Supreme Court—could somehow confuse or mislead a defendant.

This result is all the more troubling in light of *Faretta v. California*.[140] There, "weeks before" trial was scheduled to commence, the defendant sought unsuccessfully to waive his Sixth Amendment right

139 Iowa v. Tovar, 541 U.S. 77, 93 (2004) (alterations in original) (citation omitted).

140 422 U.S. 806 (1975).

to counsel and to represent himself.[141] Finding that the trial court erred in assigning counsel against the defendant's will, the Supreme Court held that defendants contemplating a Sixth Amendment counsel waiver must be advised of the dangers associated therewith given that an accused is potentially forgoing "many of the traditional benefits associated with the right to counsel."[142] This should be done, according to the Court, so that "'his choice is made with eyes open.'"[143] Yet, *Tovar* seemingly rejects this charge. The Court's rejection of two rather basic admonitions—which are plainly relevant to the defense attorney task in the guilty plea context—and its refusal to require any admonitions beyond those already required by Rule 11 is an apparent repudiation of the *Faretta* expectation. Rather than requiring trial courts to precede the Rule 11 colloquy with a litany of admonitions designed to illuminate the benefits of counsel during the guilty plea phase, the Court, instead, refused to require the courts to inform a defendant of anything with respect to the attorney function. Instead, the Court required nothing of any substance beyond that already required by Rule 11.[144]

The environment in which plea bargaining occurs serves to further aggravate this situation. Criminal defendants, typically, must make an election between entering a guilty plea or pursuing a trial option, with both alternatives frequently requiring at least some term of incarceration. Aside from the uncertainty of outcome associated with trial, other factors may prompt the government to pursue out-of-court dispositions. For example, the high volume of cases that currently plague the criminal justice process render it virtually, if not entirely, impossible for a prosecutor to try each case.[145] Moreover, the strength of a prosecutor's case can greatly influence not only the decision whether to seek a plea bargain, but also the type of agreement

141 *Id.* at 835–36.

142 *Id.* at 835.

143 *Id.* (quoting Adams v. United States *ex rel.* McCann, 317 U.S. 269, 279 (1942)) (stating that a defendant "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'").

144 *Tovar*'s requirements that a defendant be informed of the nature of the charge and the sentencing ramifications associated with a plea of guilty, are duplicative of the requirements already a part of Rule 11. *See* FED. R. CRIM. P. 11(b)(1)(G)–(M).

145 Gerald E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2136 (1988) ("Like plea bargaining, prosecutorial discretion tends to be defended as a kind of unpleasant necessity. Just as there are too many criminal cases for all of them to be tried (necessitating plea bargaining), so there are too many crimes for all of them to become criminal cases in the first place. Limited resources inexorably require prosecutorial triage.").

that might be proffered.[146] A case characterized by solid evidence provides the prosecutor with less uncertainty with respect to a trial option, and will typically lessen the government's incentive to either pursue a plea agreement, or, at the very least, proffer more generous plea concessions. Conversely, a comparatively weaker case raises the level of uncertainty with respect to a trial option, thereby increasing the government's incentives to negotiate an out-of-court settlement and to offer more meaningful sentencing concessions as a carrot to induce an agreement.[147]

Nevertheless, given the enormous bargaining advantages routinely enjoyed by the government, defendants are typically poorly positioned to demand and extract meaningful concessions from the government during plea negotiations. Certainly a principal reason underlying this reality is that defendants have no right—constitutional, statutory, or otherwise—to a plea bargain.[148] Thus, whether a plea deal is ultimately realized is dependent, at least initially, upon the prosecution's agreement to even entertain negotiations. Assuming such assent, the government, generally, is superiorly positioned to dictate the contours of any subsequently agreed upon disposition. Consider, for example, the enormity of power conferred upon the government by virtue of its authority to indict. This ability to craft criminal charges provides the government with enormous flexibility with respect to not only trial strategy but plea negotiations as well. In this vein, the government is empowered to amend an indictment to include greater or less severe charges, or even to dismiss any or all parts of an indictment. Indeed, it is hardly atypical that a prosecutor,

146 *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2470–71 (2004) ("Apart from these considerations, plea bargains should depend only on the severity of the crime, the strength of the evidence, and the defendant's record and need for punishment. This ideal asks prosecutors to be perfectly selfless, perfectly faithful agents of the public interest. The reality is much more complex. The strength of the prosecution's case is the most important factor, but other considerations come into play. Trials are much more time consuming than plea bargains, so prosecutors have incentives to negotiate deals instead of trying cases. Prosecutors have personal incentives to reduce their workloads so that they can leave work early enough to dine with their families.").

147 *See id.* at 2473 ("The shadow-of-trial model, in short, predicts that most trials should involve weak cases. Self-interest, in contrast, pushes prosecutors toward trying the strongest cases. Prosecutors can discourage defendants in strong cases from pleading guilty by refusing to make any concessions, while they can make irresistible offers in weak cases.").

148 *See* Weatherford v. Bursey, 429 U.S. 545, 561 (1977) ("[T]here is no constitutional right to plea bargain; the prosecutor need not do so if he prefers to go to trial.").

in order to secure a plea to lesser charges, will either front-load an indictment with charges carrying significant penalties, or will threaten to indict on more serious charges in the event the government's proffered plea deal is refused.[149]

Though the Supreme Court has rejected the contention that this practice violates the Fifth Amendment's due process standard, the pressures faced by defendants confronted with such choices are undeniably enormous. This quandary is especially cumbersome for the factually innocent defendant,[150] and even more so for the factually innocent defendant who is proceeding pro se. The arguable human inclination, in such instances, to seek vindication in the courts is too often compromised by the enormous and variant risks that typically accompany the pursuit of a trial strategy. As noted by Professor John Barkai, a variety of influences, including, but not limited to, the dis-

149 *See* Erik Lillquist, *The Puzzling Return of Jury Sentencing: Misgivings About* Apprendi, 82 N.C. L. REV. 621, 664 (2004) ("[P]rosecutors may overcharge to extract better plea bargains . . . ."); Carolyn B. Ramsey, *Homicide on Holiday: Prosecutorial Discretion, Popular Culture, and the Boundaries of the Criminal Law*, 54 HASTINGS L.J. 1641, 1697 (2003) ("District attorneys often use inflated charges to pressure plea bargains, thus risking an outcome in which a guilty plea still overstates the defendant's culpability."); Robert E. Scott & William Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1963–64 (1992) (discussing how prosecutors enjoy a bargaining advantage given their authority to threaten defendants with harsh sentences).

150 *See* Albert Alschuler, *Straining at Gnats and Swallowing Camels: The Selective Morality of Professor Bibas*, 88 CORNELL L. REV. 1412, 1423–24 (2003) ("As I have emphasized, plea bargaining makes it advantageous for innocent defendants to plead guilty. It systematically confronts them with offers calculated to overbalance their chances of acquittal."); Nancy Amoury Combs, *Copping a Plea to Genocide: The Plea Bargaining of International Crimes*, 151 U. PA. L. REV. 1, 25–27 (2002) ("In sum, prosecutors, defense attorneys, and judges each have their own good reasons for favoring plea bargaining. Indeed, although they have largely divergent formal interests and role obligations, their mutual interest in processing cases efficiently exerts a potent pressure to cooperate and thus to subvert the conflict norms on which the adversary system is based. . . . A prosecutor's initial charging decisions depend not only on what crime the defendant is suspected of committing but on a host of other factors relevant to the bargaining that is expected to occur. Prosecutors commonly overcharge defendants, expecting to eventually withdraw some charges as part of a plea bargain. The concessions that prosecutors offer defendants during plea bargaining often depend less on penologically relevant factors, such as the gravity of the crime or the defendant's prior criminal record, than on factors related to bargaining. For instance, prosecutors typically offer the greatest concessions in the weakest cases. In other words, the more likely it is that a defendant will be acquitted, the more attractive the plea offer that he will receive. . . . Similarly, because factually innocent defendants tend to have stronger cases than those who are guilty, innocent defendants typically receive especially attractive plea offers.").

parity of comparative punishment ranges, ultimately cause many innocent defendants to negotiate their dispositions:

> A central concern of any system of criminal justice is to make certain that innocent defendants are not convicted. Because the American criminal justice system provides adversarial trials in which anyone accused of criminal activity may contest his guilt, a presumption arises that innocent defendants will in fact contest charges lodged against them. Innocent defendants may nonetheless offer pleas rather than contest their guilt at trial for several reasons. Innocent pleaders can be divided conceptually into two different subcategories. Those in the first group, because of the complexity of the criminal law, erroneously conclude that they have committed the crime charged although in fact they have not. The second group is comprised of individuals who, because of prior experiences or pressures applied to them as they are processed through the criminal justice system, conclude that it is in their best interest to plead guilty although they know they did not commit the crime with which they are charged.
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> . . . .
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> An innocent defendant who is aware that he did not commit the criminal act might nevertheless decide to plead guilty because of: (1) the potentially overwhelming nature of the evidence against him; (2) the disparity in punishment between conviction by plea and conviction at trial; (3) a desire to protect family or friends from prosecution; (4) the conditions of pretrial incarceration; (5) a concern that fuller inquiry at trial may result in disclosure of additional facts which could increase the sentence in the present case or result in additional prosecutions; (6) a desire to expedite the proceedings because of feelings of hopelessness, powerlessness, or despair when faced with the power of the state; (7) pressure from family, friends, or attorneys; and (8) "ignorance, deception, delusion, feelings of moral guilt, or self-destructive inclinations."[151]

This inherently coercive atmosphere that accompanies plea bargaining is mitigated, to some extent, by the presence of counsel.[152]

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151 John L. Barkai, *Accuracy Inquiries for All Felony and Misdemeanor Pleas: Voluntary Pleas but Innocent Defendants?*, 126 U. PA. L. REV. 88, 95–97 (1977).

152 The advantages that counsel can provide in this context are mitigated, however, by the many problems associated with the provision of legal services for the indigent:

> In 1988, for example, the ABA's Special Committee on Criminal Justice in a Free Society issued a report titled *Criminal Justice in Crisis*. The committee concluded that "[i]n the case of the indigent defendant, the problem is . . . that the defense representation is . . . too often inadequate because of underfunded and overburdened public defender offices." Further, the report

The defense attorney is in a position to provide guidance with respect to the propriety of a proposed plea as well as insight with respect to the advantages and disadvantages of pursuing a trial option. In this context, counsel can serve as an educator and advocate, as well as a useful conduit between the defendant and the prosecution. The defense attorney can, therefore, play a vital role in this process and can temper many of the inevitable uncertainties and pressures inextricably associated with the plea bargaining process. Yet, despite the advantages that counsel can confer in the plea bargaining context, *Tovar* streamlines the ability of litigants—including the factually innocent—to proceed down this pathway alone. By withholding basic information regarding the benefits of counsel in this context, the Court has eased the ability of defendants to expeditiously forfeit their Sixth Amendment counsel protections—thereby relieving the government of its burden of persuasion obligations—and sustained the efficiency of the existing guilty plea system.

Lastly, when considering the finality that accompanies the guilty plea process, *Tovar* becomes even more difficult to rationalize. When a guilty plea is entered, a defendant is sacrificing all of the rights and privileges that accompany his Sixth Amendment right to a jury trial. It is an indisputable fact, of course, that counsel, in the context of a trial,

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> observed that "as a society, [we are] depriving the system of the funds necessary to ensure adequate defense services." There also are numerous law review articles in which the deplorable state of indigent defense has been exposed, emphasizing the connection between lack of adequate funding and the quality of representation. The grossly inadequate funding for indigent defense in capital cases has been a special problem, and this story has been documented as well. The fees paid to assigned counsel for representation of defendants in capital and non-capital felony cases differ from state to state, although in all states the fees are quite modest, so that attorneys willing to represent the indigent accused are forced to do the work at a significant discount. Standard hourly billing rates for lawyers in private practice nationwide average $265 per hour for equity or shareholder partners; $247 per hour for non-equity partners; $179 per hour for associate lawyers; and $178 per hour for staff lawyers. Although fees at these levels are typically paid to private attorneys who represent the federal government in civil matters, they are not available in either federal or state criminal courts when a person's liberty is at stake. In state felony prosecutions—whether a death penalty case or a non-capital felony—the fees paid are normally much less than $90 per hour and funds are not provided to cover attorney overhead expenses. Many states, moreover, have caps on the amount that can be earned in a particular case.

Norman Lefstein, *In Search of* Gideon*'s Promise: Lessons from England and the Need for Federal Help*, 55 HASTINGS L.J. 835, 846–48 (2004) (alterations in original) (footnotes omitted).

can provide meaningful assistance with respect to evidentiary issues, jury selection, witness examination, and a whole host of other trial-related circumstances. Indeed, it is difficult to fathom an instance when it would be more beneficial for a defendant to proceed to trial in a pro se capacity. Yet, despite the compelling need for trained counsel in this context, and the relatively sparse application of evidentiary and criminal procedure rules in the guilty plea context, at no other juncture is there a greater need for an attorney than when a defendant is on the cusp of admitting his guilt and relieving the prosecution of its burden of persuasion.[153]

When a defendant elects to plead guilty, he is deciding to forgo the very rights and privileges that underlie many of the judicial admonitions routinely provided to defendants in the trial context. Though imprecisely defined, the Supreme Court has required that defendants who seek to forgo counsel at the trial stage be provided with admonitions more detailed than at earlier stages of the litigation.[154] At a minimum, this constitutional expectation demands that defendants be informed of the nature of the charges and the associated sentencing ramifications,[155] and be forewarned of the attendant dangers to proceeding to trial in a pro se capacity.[156] With respect to this latter requirement, federal court colloquies, despite wide variances both procedurally and substantively, have not uncommonly included a detailed listing of the various trial-related benefits that counsel can con-

153 *See* Williams v. Kaiser, 323 U.S. 471, 475–76 (1945) ("The decision to plead guilty is a decision to allow a judgment of conviction to be entered without a hearing—a decision which is irrevocable and which forecloses any possibility of establishing innocence. If we assume that petitioner committed a crime, we cannot know the degree of prejudice which the denial of counsel caused. Only counsel could discern from the facts whether a plea of not guilty to the offense charged or a plea of guilty to a lesser offense would be appropriate. A layman is usually no match for the skilled prosecutor whom he confronts in the court room. He needs the aid of counsel lest he be the victim of overzealous prosecutors, of the law's complexity, or of his own ignorance or bewilderment." (footnote omitted) (citing Glasser v. United States, 315 U.S. 60, 75–76 (1942))); United States v. Akins, 276 F.3d 1141, 1147 (9th Cir. 2002) ("Nowhere is counsel more important than at a plea proceeding.").

154 Iowa v. Tovar, 541 U.S. 77, 90 (2004); Patterson v. Illinois, 487 U.S. 285, 298–300 (1988).

155 Von Moltke v. Gillies, 332 U.S. 708, 724 (1948) ("The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter.").

156 Faretta v. California, 422 U.S. 806, 835–36 (1975).

fer at this stage of the litigation process. As previously referenced, both the Third and Sixth Circuits have suggested that the courts in their respective circuits adopt a colloquial approach modeled after that contained in the *Benchbook for U.S. District Court Judges.*[157] Included among the admonitions are queries pertaining to the defendant's familiarity with the Federal Rules of Evidence and the Federal Rules of Criminal Procedure, and whether the defendant is aware that an attorney can assist with the calling and examination of witnesses and the gathering of evidence.[158] Even among the majority of circuits that have declined to recommend the *Benchbook* approach, the practice of admonishing defendants regarding the various trial-related benefits of counsel is relatively commonplace.[159]

Certainly if an attorney's expertise is valued in the *execution* of these trial rights—thus, prompting the courts to detail the benefits of counsel in the context of a trial—it is undeniable that an attorney's advice should be even more valued when those rights are on the verge of being *sacrificed* altogether. Logic would dictate that whatever the admonition expectations are at the trial stage, those expectations should most assuredly be heightened during the guilty plea phase. Yet, the seeming inconsistency of *Tovar* can be explained, at least in part, by the systemic efficiency that it promotes.[160]

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157 *See supra* note 118.

158 United States v. Peppers, 302 F.3d 120, 136–37 (3d Cir. 2002).

159 United States v. Joseph, 333 F.3d 587, 590 (5th Cir. 2003) (finding valid waiver of right to counsel where the court informed the defendant, inter alia, that counsel could examine and cross-examine witnesses and introduce evidence on the defendant's behalf); United States v. Woodard, 291 F.3d 95, 109–10 (1st Cir. 2002) (finding valid waiver of counsel at trial where the trial court "described various substantive and procedural aspects of the trial, including empanelment, the government's burden of proof, opening and closing arguments, questioning of witnesses," and jury selection); United States v. Turner, 287 F.3d 980, 984 (10th Cir. 2002) (finding valid waiver of right to counsel at trial where the district court informed the defendant, inter alia, that he "would be required to follow the rules of evidence and other court rules without any assistance from the judge"); United States v. Avery, 208 F.3d 597, 601–02 (7th Cir. 2000) (finding valid waiver of right to counsel at trial when the defendant was queried about, inter alia, his knowledge of the Federal Rules of Evidence and the Federal Rules of Criminal Procedure); United States v. Farhad, 190 F.3d 1097, 1100 (9th Cir. 1999) (finding valid waiver of right to counsel at trial where the trial judge "informed Farhad about the 'core functions' of an attorney that he would be expected to perform at trial, as well as the superior ability of a lawyer to handle those tasks," which included the asking of questions and the observance of "the rules of evidence and courtroom procedure[s]").

160 *See* William J. Stuntz, *Waiving Rights in Criminal Procedure*, 75 VA. L. REV. 761, 831 (1989) ("[P]roviding counsel at guilty pleas and disfavoring waivers of counsel are very much like providing counsel and disfavoring waivers at trial. Counsel may obstruct the proper working of the system in both contexts, because guilty defendants

Despite the finality that a guilty plea entails, and the latent hazards associated with a deeply flawed Rule 11 process, *Tovar* provides the defendant who stands on the brim of this process with virtually nothing more than the meager protections that the Rule 11 process affords. The effect—whether or not by intentional design—is that the guilty plea process remains well oiled. *Tovar*, in conjunction with the Supreme Court's recent decisions in *Vonn*, *Stumpf*, and *Hyde*, has paved the way for defendants to exercise their Sixth Amendment right to self-representation and their privilege to plead guilty with almost unimpeded authority. In stark contrast to the trial context, where the impediments to free exercise are regularly invoked, the hindrances to free exercise in the guilty plea context are relatively indiscernible. When judicial economical objectives can be furthered, *Tovar* does not stand in the way of the defendant who seeks to contribute to this efficiency. In the end, *Tovar* is part and parcel of a disturbing trend in recent Supreme Court jurisprudence that reflects a willingness to dispense with basic constitutional protections in order to maintain an efficient guilty plea structure.

C. Sixth Amendment Construction and Requirements

The question remains regarding the proper analytical posture that the *Tovar* Court should have adopted when identifying the judicial admonitions required by the Sixth Amendment. *Strickland v. Washington*[161] is instructive in this regard. There, the Supreme Court addressed what standard the Sixth Amendment mandated when assessing whether a defense counsel's performance was so ineffective that a defendant's conviction or death sentence should be vacated.[162] In reaching its conclusion that a defendant must satisfy a two-pronged obligation—that his attorney's performance was deficient and that this deficiency was so serious that there was a "reasonable probability that . . . the result of the proceeding would have been different"[163]—the Court preliminarily observed that while the Due Process Clauses provide the basic guarantees of a fair trial, the details of that fair trial right are spelled out in the Sixth Amendment.[164] The Court noted that among the rights delineated in that Amendment is the right to

are less likely to plead guilty in advance of trial or to take the stand at trial once they are given lawyers.").

161 466 U.S. 668 (1984).

162 *Id.* at 683.

163 *Id.* at 694.

164 *Id.* at 684–85.

"the Assistance of Counsel for his defence."[165] In interpreting that phrase, the Court did not restrict itself to the corners of the Sixth Amendment text. Instead, it adopted a more expansive contextual posture.[166] Noting that "[t]he Sixth Amendment refers simply to 'counsel,' not specifying particular requirements of effective assistance," the Court concluded that the Amendment's expectations could be ascertained from "the legal profession's maintenance of standards."[167] In describing those standards, the Court outlined the basic duties of the defense attorney in the trial context. Though nonexhaustive, this contextual review undergirded the Court's conclusion that the Sixth Amendment right to counsel embodied an expectation that counsel's performance be effective and "reasonable considering all the circumstances"[168]:

> Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.[169]

In contrast to the contextual approach followed in *Strickland*, *Tovar*'s Sixth Amendment construct was noncontextual, thus producing a constitutional interpretation devoid of any meaningful consideration of the core defense attorney functions in the guilty plea context.

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165 *Id.*

166 *Id.* at 685 ("That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair. For that reason, the Court has recognized that 'the right to counsel is the right to the effective assistance of counsel.'" (quoting McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970)).

167 *Id.* at 688 ("The Sixth Amendment refers simply to 'counsel,' not specifying particular requirements of effective assistance. It relies instead on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions. The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.") (citing Michel v. Louisiana, 350 U.S. 91 (1955))).

168 *Id.*

169 *Id.* (citing Cuyler v. Sullivan, 446 U.S. 335, 346 (1980)).

As can be gleaned from *Strickland*, a meaningful review of the defense attorney function can not only provide a foundation upon which to interpret the Sixth Amendment's right to counsel provision when presented with an ineffectiveness claim, but it can provide a similar foundation when attempting to derive the Amendment's expectations regarding the waiver of that right. It is axiomatic that an accurate gauge of the Sixth Amendment's right to counsel clause should not infrequently include some level of review of the relevant counsel role. Thus, the meaning of the Amendment in the context presented in *Tovar* would seem to require an appreciation of the primary functions of the defense attorney at or about the time of the change of plea. In other words, to properly interpret the Sixth Amendment in formulating judicial admonitions with respect to the waiver of counsel in the guilty plea context necessarily requires an underlying appreciation of the core defense attorney functions during that phase of the litigation. Considering *Faretta*'s stated objective that defendants should make such waiver decisions with open eyes, it would follow that the courts should provide admonishments detailing the pertinent benefits of counsel in a given setting. The following subsection addresses this question and identifies the most relevant attorney duties during the guilty plea phase.

1. Relevant Defense Attorney Functions

The defense attorney performs a variety of critically important functions during the guilty plea process which fall within the following broadly-stated categories: the identification of relevant defenses, plea agreement strategies, and sentencing issues. As intimated by the Iowa Supreme Court, a core duty of any criminal defense attorney is to identify and assess the viability of possible defenses.[170] Whether at trial or when assessing a proposed negotiated resolution, the identification of possible defenses is an inextricable aspect of the defense attorney function that is equally relevant at all stages of the litigation process. Given the law's complexity, pro se defendants are typically ill-equipped to adequately comprehend the elements of an offense, assess the government's evidence in relation to those elements, and identify those defenses most pertinent to the charges.[171] As noted by

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170 State v. Tovar, 656 N.W.2d 112, 121 (Iowa 2003), *rev'd on other grounds*, 541 U.S. 77 (2004).

171 *See* Brief for National Ass'n of Criminal Defense Lawyers as Amici Curiae Supporting Respondent at 7, Iowa v. Tovar, 541 U.S. 77 (2004) (No. 02-1541), 2003 WL 23051967 [hereinafter National Ass'n Brief]. Professor Steven Duke provides additional examples of this type of analysis:

Professor William Stuntz, it necessarily follows that a defendant's conception of guilt might not necessarily correspond with the law's expectations:

> It is thus vitally important that there be some mechanism for checking the accuracy of pleas that protects the innocent to roughly the same extent as does the trial, with its adversary presentation of evidence and heavy burden of proof on the state. One might argue that the suspect's own disincentive to confess is a sufficient mechanism. But even aside from the problem of seemingly crazy confessions, accurately assessing his own guilt may be difficult for the defendant. Substantive criminal law contains many complexities—intent standards, jurisdictional provisions, defenses, and so forth. The defendant may be 'guilty' in a layman's sense, and so be willing to confess, and yet may have a viable defense that he ought to invoke, or may be pleading guilty to the wrong grade of crime. Thus, unlike police interrogation, the plea proceeding requires someone who is legally trained to check the accuracy of the defendant's confession.[172]

The defense attorney is also responsible for assessing the values of various plea agreement alternatives against the merits of pursuing a trial option. Absent the dismissal of a case, each criminal matter must necessarily culminate in either some form of plea agreement or by a conviction or acquittal at trial. Thus, an unavoidable, yet potentially intricate, aspect of any criminal defense attorney's work is to give appropriate weight to these disposition alternatives and tender a recommendation to a client who is relatively uninformed about the values of each option. An inevitable aspect of this analysis is to identify and consider the various types of guilty pleas and plea agreements that might be available. Aside from the standard guilty plea, where the

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> To suggest just a few situations where the absence of counsel would likely have a decisive impact, consider the following hypothetical cases: The defendant pleads guilty to driving while intoxicated without realizing that the results of his breathalyzer test are suppressible. An innocent defendant pleads guilty without realizing that he has an entrapment defense, a duress defense, or that his intoxication negates the specific intent required by the crime. The defendant pleads guilty to what he thinks is a nonserious theft without realizing that the consideration of his relevant conduct, including uncharged or acquitted conduct, will likely lead to a sentence at the high end of the statutory range. The defendant pleads guilty to a minor felony to resolve the case quickly and get on with his life without realizing that the conviction will lead to his deportation. An attorney's role at the guilty plea stage is vital and extensive.

Id. (footnote omitted).

172 Stuntz, *supra* note 160, at 830–31.

defendant simply pleads guilty to the charged offense(s), there exist three other types of guilty pleas. First is the conditional guilty plea. When a defendant enters a standard guilty plea, he necessarily forfeits his right to contest any alleged pre-plea constitutional breaches.[173] However, conditional guilty pleas were added to Rule 11 to allow defendants the opportunity to pursue agreed-upon constitutional issues without having to exercise his jury trial right in order to preserve this option.[174]

The other two available pleas—nolo contendere and *Alford* pleas—are far less common and more difficult to conceptualize. In essence, pleas of nolo contendere allow a defendant to accept punishment without having to admit or deny his guilt to the charged offense(s). Such pleas also preclude estoppel claims in subsequent litigations.[175] *Alford* pleas, on the other hand, involve defendants who assert their innocence, but admit that prosecution's evidence is likely sufficient to obtain a conviction.[176] Unlike pleas of nolo contendere, *Alford* pleas do not preclude subsequent estoppel arguments.[177]

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173 Tollett v. Henderson, 411 U.S. 258, 267 (1973) ("When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann*.").

174 FED. R. CRIM. P. 11(a)(2).

175 Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of* Alford *and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1370 (2003).

176 *Id.* at 1372.

177 *Id.* at 1373. Professor Bibas explains the differences between pleas of nolo contendere and *Alford* pleas:

> At common law, a defendant could ask the court to impose a merciful sentence without confessing guilt and without estopping himself from later pleading not guilty on the same facts. This procedure became the formal plea of nolo contendere, under which the defendant admits guilt for purposes of the present case but creates no estoppel. Today, the Federal Rules of Criminal Procedure allow defendants to plead nolo contendere with the permission of the court. Most states likewise allow nolo contendere pleas, which are sometimes called no contest pleas, although many of these states require the court's consent.
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> The *Alford* plea gives defendants another way to plead guilty without admitting guilt. In *North Carolina v. Alford*, Henry Alford was charged with the capital crime of first-degree murder and "faced . . . strong evidence of guilt." Rather than go to trial, he pleaded guilty to second-degree murder, a noncapital crime, while protesting his innocence. The U.S. Supreme Court held that defendants may knowingly and voluntarily plead guilty even while

In addition to the various types of guilty pleas, Rule 11 has also identified three different forms of plea agreements. One type is when the government agrees to dismiss, or not to pursue, certain criminal charges.[178] The other two pertain to the sentencing recommendation that the government will tender to the court. An agreement containing a nonbinding recommendation allows a court to impose sentence unencumbered by any sentencing requests,[179] while a binding recommendation obligates the court to impose a specific sentence upon the court's acceptance of the plea instrument.[180] Within the context of these agreements, it is not uncommon for defense counsel to negotiate an additional term obligating the defendant to provide the government with some form of cooperative assistance. Pursuant to this term, a defendant who assists the government in its investigative and litigative endeavors is eligible for a sentencing reduction beyond that typically available under a more ordinary guideline analysis.[181]

In weighing these strategies, a defense counsel must necessarily consider the sentencing ramifications associated with each option. Aside from advising a client about comparatively basic information, such as a defendant's maximum exposure under a statute, the attorney is in a position to detail the intricacies of the Federal Sentencing Guidelines, as well as any possible mandatory minimum penalties,

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> protesting their innocence if the judge finds "strong evidence of [the defendant's] actual guilt." . . . The Court noted that Alford's plea was similar to a plea of nolo contendere. It held that if a defendant can plead nolo contendere while refusing to admit guilt, he should also be able to plead guilty while protesting his innocence. . . . Although these pleas are not forbidden by the Constitution, neither are they required. Because defendants have no right to plead guilty, judges may refuse to accept *Alford* pleas and states may forbid them by statute or rule. Most states, however, have followed suit and permitted *Alford* pleas (sometimes called best-interests pleas).
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> *Alford* and nolo contendere pleas differ in two main ways: First, nolo contendere pleas avoid estoppel in later civil litigation, while *Alford* pleas do not. Second, defendants who plead nolo contendere simply refuse to admit guilt, while defendants making *Alford* pleas affirmatively protest their innocence.

Id. at 1370–73 (alterations in original) (footnotes omitted).

178 FED. R. CRIM. P. 11(c)(1)(A).

179 FED. R. CRIM. P. 11(c)(1)(B).

180 FED. R. CRIM. P. 11(c)(1)(C).

181 *See* Peter B. Krupp, *The Return of Judicial Discretion: Federal Sentencing Under "Advisory" Guidelines After* United States v. Booker, BOSTON B.J., Mar.–Apr. 2005, at 18, 20 ("In cooperation cases that do not involve a minimum mandatory penalty, sentences lower than the Guidelines range have been authorized under U.S.S.G. § 5K1.1, but only '[u]pon motion of the government' based on its finding that 'the defendant has provided substantial assistance' to the government." (alteration in original)).

which might influence a defendant's sentence.[182] Prior to *United States v. Booker*[183] and *United States v. Fanfan*,[184] the Federal Sentencing Guidelines provided a determinate sentencing structure that largely obligated district courts to impose sentences within specified ranges.[185] However, with the issuance of the *Booker* and *Fanfan* decisions in 2005, the Guidelines were rendered advisory,[186] thus freeing the district courts from the strictures that characterized the former system. Nevertheless, the courts were instructed that the Guidelines still had to be considered, and that sentences imposed would, thereafter, be reviewed for reasonableness.[187] How reasonableness is to be determined, however, remains an open question. In fact, that issue is but one of an array of issues that continue to linger in the wake of these decisions. Unanswered questions regarding the impact of *Booker* and *Fanfan* upon upward and downward departures, upon cooperation cases, and upon career offenders, and armed career criminals are but a sampling of the matters that still await a definitive judicial response.[188]

2. Recommendations

Each of these areas—the identification of relevant defenses, guilty plea strategies, and sentencing issues—are core functions of a defense attorney during the guilty plea process. Certainly, the Iowa Supreme Court was correct in its determination that the admonitions

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182 Professor Duke further notes that defense attorneys can also provide insight with respect to the collateral consequences associated with a plea of guilty:

> Defense counsel's job is to assure that the decision to plead guilty, if made, is desirable from the defendant's perspective. To give advice on the desirability of a plea, defense counsel needs to know an array of factual and legal considerations and possible consequences unrelated to the subject matter of the plea colloquy. Collateral consequences, for example, are not even alluded to in the plea colloquy yet they are a central concern in a great many guilty plea decisions, especially those involving driving under the influence of alcohol, which can carry with them loss of drivers' licenses, civil liability for damages, disqualification for employment or professional licensing, and can elevate subsequent convictions to felonies. A first time offender is very unlikely to be aware of these risks in pleading guilty. Only his attorney is likely to inform him of them. A defendant who lacks such advice cannot make an informed decision about the desirability of pleading guilty.

National Ass'n Brief, *supra* note 171, at 3.

183 543 U.S. 220 (2005).

184 543 U.S. 220 (consolidated with *Booker*).

185 *Id.* at 233.

186 *Id.* at 245–46.

187 *Id.* at 261.

188 *See* Krupp, *supra* note 181, at 20.

that it identified were pertinent to the identification of relevant defenses and plea agreement strategies. Moreover, *Tovar* rightly concluded that an attorney's advice with respect to sentencing consequences was mandated by the Sixth Amendment. Though the respective courts offer competing views of the compass of the Sixth Amendment, it is difficult to ascertain *Tovar*'s apparent constitutional distinction between an attorney's advice with respect to sentencing matters versus that of plea agreement strategies and possible defenses. Each of these functions are indispensable aspects of the attorney's function during the guilty plea stage. In fact, each aspect is so central to a defense attorney's function that it is impossible to prioritize these roles.

Thus, district courts should be required, via the Sixth Amendment, to inform a defendant that an attorney can help identify possible defenses, render advice regarding sentencing issues, and provide an educated opinion with respect to the wisdom of pursuing a particular plea deal in light of other possible dispute resolution options. Nevertheless, greater specification of the latter two categories is required if the Sixth Amendment is to have teeth in this context. To adopt a more generalized approach would unnecessarily risk a perfunctory recitation by the judiciary of these attorney functions and ultimately undercut the informative objectives which underlie the Sixth Amendment admonitions. Therefore, to effectively convey the significance that attends a decision to bypass attorney representation, and to better ensure that a defendant's waiver decision is knowing and intelligent, the Sixth Amendment must require courts to provide information that sufficiently, yet succinctly, describes the attorney function in the identified categories.

The benefits associated with a skilled attorney capable of rendering advice with respect to a proffered plea disposition are multifold. Not only, as referenced earlier, is a criminal defense attorney knowledgeable of the various plea and plea agreement options, as well as the appellate waivers that typically attend a plea of guilty, but he is also skilled in assessing the value of the various disposition alternatives, including the trial option.[189] In making these comparative assessments, and in tendering a recommendation to his client, the attorney would necessarily have to consider, among various other factors, the significant constitutional protections afforded a defendant who elects to go to trial. Constitutional rights such as the right to a jury trial, to be represented by counsel, to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify

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189 *See supra* notes 170–88 and accompanying text.

and present evidence, and to compel the attendance of witnesses are all part of the evaluative equation. Indeed, to understand and fully appreciate the value of a particular plea option one must understand and fully appreciate the value of the alternatives to that option. This necessarily includes an appreciation of the trial option and all its attendant benefits. Therefore, to better ensure that defendants contemplating the waiver of counsel fully comprehend the potential evaluative benefits of counsel in the guilty plea context, the Sixth Amendment should require that defendants be admonished that counsel can render advice regarding the array of available plea and plea agreement possibilities, the various appellate consequences that attach to most guilty pleas, as well as the constitutional protections outlined above that necessarily attach at trial. This admonition will inform defendants of the essential informational benefits that counsel can provide when performing this evaluative function, and, thus, better equip defendants to make an informed decision prior to pursuing a self-representation strategy.

Moreover, with respect to sentencing matters, the Sixth Amendment should require that courts advise defendants that, in addition to providing general advice regarding the sentencing ramifications associated with particular disposition alternatives, counsel can also explain how certain other sentencing features may adversely impact his sentence. As referenced earlier, complex sentencing guideline structures, mandatory minimum provisions, and recidivist statutes all stand to adversely influence a defendant's sentencing determination. For example, the Violent Crime Control and Law Enforcement Act, a federal recidivist law, mandates a life sentence for any individual who is convicted in federal court of a "serious violent felony" and who has at least two prior "serious violent felony" convictions or has "one or more serious violent felonies and one or more serious drug offenses."[190] The issue presented in *Tovar*, in fact, arose from an attempt to avoid a sentencing enhancement required by a recidivist statute that upgraded a third drunken driving conviction from a misdemeanor to a felony.[191] Mandatory minimum provisions contained in the Controlled Substances Act[192] and certain firearm offenses[193] subject defendants, irrespective of prior criminal history, to prison

190 18 U.S.C. § 3559(c)(1)(A) (2000).

191 *See supra* text accompanying note 95.

192 21 U.S.C. §§ 801–904 (2000).

193 *See, e.g.*, 18 U.S.C.A. § 924(c)(1)(A)(i) (West 2000 & Supp. 2005) (specifying that a five-year mandatory minimum applies to any individual who uses, carries, or possesses a firearm during and in relation to a crime of violence or a drug trafficking crime).

terms of at least five years. Given the potential complexities and serious ramifications that can manifest during the sentencing process, admonitions regarding each of these potential influences—sentencing guidelines, mandatory minimum statutes, and recidivist laws—as well as the maximum available penalties should also be included as part of the Sixth Amendment warning detail.

Finally, the Supreme Court should encourage district courts to explicitly caution defendants who are contemplating a guilty plea against proceeding in a pro se capacity. As noted, courts across virtually every circuit routinely provide this admonition whenever a defendant seeks to assert his right to self-representation in the trial context.[194] Furthermore, the Court should remind district courts of their authority to impose standby counsel, not only in the trial context, but presumably in the guilty plea context as well. Admittedly, depending on the circumstances, such an appointment might neither be practical nor feasible. Any number of factors might preclude such an assignment, including the limited time frame that often accompanies guilty plea decisions, the complexity of the litigation, and an attorney's unfamiliarity with a case. Nevertheless, by issuing this reminder, district courts will be implicitly encouraged to appoint standby counsel in appropriate instances, thereby affording pro se defendants the opportunity to consult with counsel prior to making such a critical election.

Conclusion

The procedural inadequacies and substantive unfairness that currently mar the federal guilty plea process greatly aggravate the uncertainty that naturally accompanies the admission of one's guilt. The leading and compound questioning that characterize Rule 11 hearings, coupled with the recent Supreme Court decisions in *Vonn*, *Stumpf*, and *Tovar*, work together with the plea withdrawal rules to prod defendants through the guilty plea process and keep their pleas intact. The established rules plainly reflect an unfortunate federal priority that seemingly values the fluidity of the guilty plea structure over the provision of information critical to a defendant's understanding and appreciation of his guilty plea rights as well as his rights under the Sixth Amendment.

Prior to entering this territory, defendants seeking to make an informed choice should be sufficiently learned about the various consequences that attend to a decision to waive their right to counsel. If

194 *See supra* note 136 and accompanying text.

adopted, the recommendations contained in this Article will provide the defendants with the basic information regarding the benefits of counsel in the guilty plea context. Perhaps many, or even most, defendants will discount the admonitions and persist in their desire to represent themselves. Irrespective of the ultimate percentage, however, the suggested admonitions will not only provide defendants with the information relevant to the benefits of counsel, but they will provide an appearance of propriety to a federal guilty plea process that is sorely in need of a facelift.