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PRO SE REPRESENTATION: USUALLY A BAD IDEA

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INTRODUCTION:

Experienced criminal defense attorneys, especially those who handle felony cases, are very familiar with uncooperative, obstreperous and "know-it-all" clients who go through multiple assigned lawyers like termites on a two-by-four. While most clients work with counsel toward common goals and heed counsel's advice, some of them, whether by dint of a contrary and suspicious nature or protracted exposure to self-appointed jailhouse lawyers, butt heads with their attorneys at every turn and eventually decide to go it alone.

Never mind Willian De Britaine's cautionary warning in 1862 that one who represents himself has a fool for a client (from "Humane Prudence, or, The Art by Which a Man May Raise Himself and Fortune to Grandeur"). Despite knowing little to nothing about substantive law, criminal procedure or the rules of evidence, some defendants insist on galloping headlong into battle against experienced, well-armed prosecutors like Custer at the Little Big Horn, usually to disastrous results.

Even though the decision to represent oneself may be ill advised, the law recognizes the right of every accused person to proceed with or without counsel (6th Amendment NY Const Art 1, sec 6), no matter how foolhardy the latter choice may be, as long it represents an informed one.

As noted in *People v McIntyre* (36 NY2d 10 [1974]), even when the accused is harming him/herself by insisting on conducting his/her own defense, RESPECT FOR INDIVIDUAL AUTONOMY requires that he/she be "allowed to go to jail under his/own banner" if he/she so desires if the choice is made with eyes wide open (see also *Godinez v Moran*, 509 US 389 [1993]: Criminal defendants, no matter how uninformed of the law, are entitled to blunder trough on their own if they wish, so long as they are competent to stand trial").

PRO SE DEFENDANTS PRESENT A SPECIAL CHALLENGE TO JUDGES

Judges typically don't have much patience or tolerance for defendants who seek to represent themselves because they know that while the defendant may be familiar with the facts of the case, they generally have little to no acquaintance with the rules of evidence, procedure and decorum that govern trials.

Consequently, the trial may get bogged down and the judge winds up either bending over backwards to accommodate the defendant's lack of legal sophistication or summarily cutting him/her off when he/she goes off on tangents or flies off the handle. Maintaining a proper balance between patience and intolerance for brinkmanship (whether intended or out of ignorance) is no small challenge.

In *People v McIntye*, supra, the defendant who was retried after a mistrial for armed robbery and murder of an elderly grocery store clerk, advised the court after the jury was drawn (but not yet empaneled) that he wanted to try the case himself with his lawyer as standby adviser. The court inquired of his background, and he replied that he had one year of college and last worked as a furniture designer. The court then asked if he thought his lawyer was incompetent and the defendant said that he was "very competent" whereupon the court directed him to sit down.

The court then stated that the defendant would be lost if objections to his questions were sustained (the defendant denied this would occur) to which the court snapped, "he probably thinks he's the world's greatest lawyer, God's gift to the legal profession after talking to three or four jailhouse lawyers, but you (defense counsel) and I both know he's not a lawyer."

Defense counsel said that the defendant wanted to explain his reasoning, but the court said, "no, he can talk through you. He said he has an obligation to defend himself which is not true." The court then called for the jury.

At that point, the defendant said, "Fuck the jury. I'm not going to trial," whereupon he got up and knocked over his chair. After admonishing the defendant about courtroom decorum, the court denied the defendant's request to represent himself. The denial was based on the defendant's outburst and his expressed opinion of his lawyer's competence to represent him. The defendant was later found guilty as charged.

The Appellate Division affirmed the defendant's conviction, reasoning that the defendant's demonstrated inability to maintain self-control justified the denial of his motion to proceed pro se.

The Court of appeals REVERSED, finding that the trial court erred in denying the defendant's request which was timely (i.e., before openings statements), and unequivocal, and the defendant's outburst was either a reaction to the court's ruling and/or comments which incited him to explode as he did. In the court's view, the trial judge should have conducted a dispassionate inquiry into the defendant's reasons for seeking self-representation rather than provoke him with snide comments about his perceived lack of legal ability.

The Court noted that the right of self-representation (i.e. to determine one' own fate) is "one of (our) most cherished ideals, (*Maldonado v Denno*, 348 F.2d 12 [2nd Cir. 1965]) and even (when) the defendant is harming himself … respect for individual autonomy requires that he be allowed to go to jail under his own banner if he so desires and if he makes the choice with eyes open" (citing *Argersinger v Hamilton*, 407 U.S. 25 [1972], *People v Koch*, 299 NY 378 [1949]).

While such right has long been recognized at common law, (see, for example, *People v Price*, 262 NY 410 [1933]), the Court cautioned that it was not unbridled inasmuch as the court must balance the defendant's rights against the need to preserve the orderly administration of justice and prevent subsequent challenges to guilty verdicts by dubious claims of denial of fundamental fairness.

Consequently, the Court held that a defendant may invoke the right to self-representation if:

1. The request is UNEQUIVOCAL and TIMELY asserted.
2. The defendant KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY waives his/her right to counsel, and

3. The defendant has not engaged in conduct that would impair the fair and orderly exposition of the issues.

A request to proceed pro se is deemed to be UNEQUIVOCAL when it represents an "actual or fixed intention" (i.e., a purposeful decision) to proceed without counsel (see *People v Silburn*, 31 NY3d 144 [2018]). It is considered TIMELY when it is made "before trial commences" which the *McIntyre* court interpreted to mean BEFORE THE PROSECUTION'S OPENING STATEMENT. (CPL 1.20 [11] states that a jury trial commences after the jury has been selected and a bench trial begins when the first witness is sworn).

In contrast, in *People v Crespo* (32 NY3d 176 [2018]), the Court determined that the trial commences at the BEGINNING OF JURY SELECTION.

The reason that the motion must precede commencement of trial is to minimize delay and avoid disruption of the trial itself (*People v Spohn*, 43 AD2d 843 [2nd Dept 1974]) by permitting a full and fair inquiry beforehand. Once the trial commences, the right is SEVERELY CONSTRICTED and may be granted as a matter of judicial discretion only upon a showing of COMPELLING CIRCUMSTANCES.

For example, In *People v Hassan*, (159 AD3d 1390 [4th Dept 2018]), the Fourth Department affirmed the defendant's murder conviction, finding inter alia, that the trial court did not abuse its discretion in granting the defendant's mid-trial motion to proceed pro se (with standby counsel) after the defendant burned through three prior lawyers, demonstrated unrealistic expectations of counsel's role in the proceedings, and counsel advised the court that despite midtrial efforts to reach an understanding, he could not ethically abide by some of the defendant's requests.

The Court in *McIntyre* also noted that the defendant's waiver of the right to representation by counsel must be knowingly, voluntarily, and intelligently made. In other words, the court must apprise the defendant of the potential perils and pitfalls of defending him/herself so that his/her decision, however foolish, will withstand scrutiny (citing, inter alia, United States v Terranova, 309 F.2d 365 [1962]).

For example, while there is no particular formula, the court might well remind the defendant of the nature and severity of charges (including sentence exposure in the event of conviction), and inform him/her that trying a case requires legal skills (which he/she likely lacks) and a series of legal and tactical decisions regarding jury selection, opening and closing statements, examination of witnesses, making and responding to objections and properly preserving the record for purposes of appeal.

PROSECUTORS DON'T CARE FOR PRO SE DEFENDANTS EITHER

For their part, most prosecutors would prefer not to tangle with pro se defendants because of the awkwardness and imbalance of abilities (and perceived power) that might force them to forebear from objecting to objectionable questions (for fear of looking like a bully, especially if the defendant comes off as sympathetic), or cause them to lose their cool or appear to be exploiting the defendant's inexperience. (There may also be an unspoken fear of embarrassment in the unlikely event of an acquittal).

THE RIGHT TO PRO SE REPRESENTATION CAN BE FORFEITED BY BAD BEHAVIOR

Just as a defendant can lose the right of confrontation (for example, if he/she tampers with a witness who testified previously and procures their absence from trial), a defendant who engages in disruptive or obstreperous conduct can relinquish the right to represent him/herself (*Mayberry v Pennsylvania*, 400 U.S. 455 [1971]): When the defendant's conduct is calculated to undermine, upset, or unreasonably delay the trial, he forfeits his right to self-representation).

The dissenting judge (Gabrielli, J.) in *McIntyre* argued that there was no reason to afford this accused murderer of an elderly woman a third trial when the record showed that the defendant's outburst was not so much a reaction to an adverse ruling but to the court's inquiry whether the prospective jurors were on their way back into the courtroom. And while the trial court could have handled the matter less brusquely, it did not amount to reversible error where the evidence of the defendant's guilt was overwhelming. Also, the trial court did make inquiry of the defendant's education level, occupation, and familiarity with the facts of the case before making its decision. In any event, in the dissenter's view, the defendant waived his right to proceed pro se by engaging in disruptive conduct (citing *United States v Dougherty*, 473 F.2d 1113 [D.C. Cir. 1972]).

LAWYER OR NOT: NO HYBRID REPRESENTATION

In *People v Silburn* (31 NY3d 144 [2018]), the Court affirmed the defendant's weapons possession and AUO 3rd convictions, concluding that the trial court properly denied his request because it was neither unequivocal nor unconditional. The defendant, in essence, was asking to serve as co-counsel to question prospective jurors and examine witnesses after his lawyer was through questioning them. In the Court's view, the right to proceed with or without counsel is a "one-or-the -other" proposition and the defendant must, therefore, choose one option but not both.

After the defendant was pulled over for driving with a revoked license the police found a loaded handgun in his jacket pocket. He said, "good thing you drew your gun so fast, or I would have shot you." Later, following *Miranda* warnings at the police station, he added that he had stolen the car at gunpoint. He then became agitated and was taken to a psychiatric facility for an evaluation. Following CPL 730 examinations and a hearing, the defendant was found to be competent to proceed to trial.

Two weeks before trial, the defendant informed the court that he wanted to proceed pro se. When the court asked him, "is that what you want,", he replied, "not only that, but having "limitation" with my counsel." (Why the court didn't ask him to clarify his response is not clear). The court then told him, "You either have a lawyer or not. If your choice is to represent yourself then you will sit there by yourself. If you want to have a lawyer, then have a lawyer." When the court asked if he said understood his options, the defendant remained silent. Counsel remained in the picture.

During jury selection, the defendant advised the court that he wanted to question prospective jurors and then to question witnesses following his lawyer. The court repeated its earlier admonition. The defendant argued that the Sixth Amendment guarantees him assistance of counsel and the court told him that the law does not permit "dual" or "hybrid" representation. The defendant then said that he wanted to ask questions that counsel may fail to ask, and the court said, "no." The defendant was found guilty of the charges and the Appellate Division affirmed (145 AD3d 216 [2nd Dept 2016]).

At the Court of Appeals, the defendant argued that the trial court erred in denying his application (to proceed pro se with standby counsel) without undertaking a searching inquiry to ensure that such request was knowing, voluntary and intelligent.

The Court, citing *Faretta v California* (422 US 806 [1975]), and *People v McIntyre*, supra, noted the three-step approach requiring a timely and unequivocal request followed by a searching inquiry and a determination that the defendant was not just engaging in conduct calculated to delay the proceedings or confound the orderly exposition of the relevant issues in the case.

The Court concluded that the defendant's application was not unequivocal but a mixed-bag request to serve as co-counsel to his lawyer. While the law may permit counsel to sit sidecar as a silent adviser to the defendant during trial on procedural matters, the law does not allow the accused to drive his own bus with the active participation of counsel (citing *People v Mirenda*, 57 NY2d 261 [1982]). As stated in *People v Rodriguez*, (94 NY2d 497 [2000]), "to choose one means to forego the other."

In the Court's assessment, since the defendant never asked to proceed without a lawyer, his request to proceed pro se was hardly unequivocal which meant that there was no need to proceed to the second step in the inquiry. And while the trial court should probably have clarified that the defendant did not wish to ride alone, the failure to do so was not considered fatal.

See also *People v Duarte* (37 NY3d 1218 [2022]) where the Court of Appeals found that the defendant's statement, "I'd love to go pro se," made on the heels of the trial court's denial of his second request to remove his assigned counsel for alleged ineffectiveness, did not amount to a clear and unequivocal request to proceed without a lawyer. The dissenting judge (Hon. Jenny Rivera) argued that the defendant's remark was clear enough to warrant further inquiry to determine whether the request was genuine (and knowingly and intelligently made) or just an attempt to delay the proceedings.

MENTAL COMPETENCY AND PRO SE REPRESENTATION

In People v Zi, (178 AD3d 591 [1st Dept 2019]) the Court reversed the defendant's convictions for Scheme to Defraud and related crimes stemming from a sophisticated scheme to transfer expensive real estate by fraudulent deeds and then transfer them to other corporate entities.

The defendant requested permission to represent himself and explained that as an experienced real estate broker, he was better able to defend himself rather than rely on counsel who, in his estimation, had no such background. The court granted his motion finding that he was reasonably intelligent and showed no signs that he was not mentally capable of waiving his right to representation in a knowing, voluntary, and intelligent manner.

Unbeknown to the trial judge, the defendant had undergone a competency evaluation ordered by a prior judge on the case, and the psychiatric evaluators who deemed him fit to proceed, reported some evidence of possible delusional thinking (subject to further information). For example, the defendant reportedly stated that he had committed no crime and claimed that the prosecution of him represented a Jewish conspiracy of which the court was a part. He also alleged that the warrants issued in the case were forged. (Why no one informed the trial judge of these findings is a mystery).

The Court of Appeals concluded while a psychiatric history, by itself, does not warrant denial of a pro se request, where, as here, there are RED FLAGS indicating the possibility of serious mental illness, the trial

court should make a PARTCULARIZED ASSESSMENT of the defendant's mental capacity (citing *People v Stone*, 22 NY3d 520 [2014]). Under the circumstances, the Court suggested that a further CPL 730 exam was in order (citing *People v Malone*, 119 AD3d 1352 [4th Dept 2014]).

The dissenting judge argued that while the defendant had previously made some peculiar comments, during the court colloquy, he revealed no signs of serious mental illness that warranted a deeper inquiry, and the tentative and speculative conclusions of the psychiatric examiners were not enough to compromise the court's inquiry or conclusions regarding the defendant's ability to waive counsel and proceed pro se.

PRO SE REPRESENTATION IN FAMILY COURT PROCEEDINGS

In *Matter of Kathleen K* (17 NY3d 380 [2011]), the Court, assuming but not resolving whether a party in a Family Court proceeding (for neglect and termination of parental rights) has a right to self-representation, held that the respondent (father of two daughters forfeited to adoption) failed to make a timely and unequivocal request to proceed pro se to warrant any further inquiry.

Following a neglect proceeding based on allegations of physical and mental abuse, the court issued a temporary no-contact order of protection except for supervised visitation. The order was later converted to a permanent one and the children were placed in foster care while the defendant was directed to undergo a mental health evaluation and counselling.

After the respondent failed to comply with the court's conditions, the court ordered DSS to file a petition seeking termination of the respondent's parental rights. (The mother previously surrendered her rights).

Prior to trial, respondent's counsel moved to withdraw from the case, alleging that the respondent refused to discuss the discuss the case or participate in trial preparation. (See RPC ethical rule 1.16[7]: which permits a lawyer to seek removal from the case where the client fails to cooperate or renders it unreasonably difficult for counsel to provide effective representation). Counsel did not mention that the respondent wanted to represent himself. For his part, the respondent stated that he wanted counsel off the case and would represent himself as a last resort

The respondent then went off on tangents, talking about medical and financial issues. He then requested an adjournment which was denied. Counsel was directed to continue the representation.

After the first witness was called, the respondent objected to which the court responded, "you can't object, you have a lawyer." The respondent said, "I asked for her to be terminated." The court then asked, "are you ready to proceed on your own?" The respondent answered, "if I have to." The court said, "you can't proceed on your own. You don't know the law." The respondent later asked, "so you're denying me an assigned lawyer?" The court reminded him that he had a lawyer.

After the hearing, the court relieved the respondent of his parental rights and the Appellate Division affirmed (71 AD3d 1146 [2nd Dept 2010]).

The Court of Appeals affirmed, finding that the respondent's request was neither timely nor unequivocal on either occasion. In the Court's view, the respondent's requests did not reflect an affirmative desire for self-representation and suggested at most that it was a last resort (citing *People v Gillian*, 8 NY3d 85

[2006]). The second request, made after a witness was sworn, was deemed to be too late (citing, inter alia, *People v Jenkins*, 45 AD3d 864 [2nd Dept 2007]).

The concurring judge (Smith, J.,) found no equivocation in the defendant's request, and the statement "if I have to" (represent myself) was hardly conditional since, based on the court's order to proceed with trial, he clearly had to do so (or stay with a lawyer whom he did not want and who wanted off the case).

This judge concluded, however, that unlike criminal defendants who can only harm themselves by self-representation, respondents in Family Court proceedings can also do serious damage to their children by blundering along on their own (citing *Goding v Moran*, 509 U.S. 389 [1993]). Therefore, it is essential for their protection, that both sides have competent legal representation. So, in the dissenter's view, the court was right to tell the respondent that he could not proceed on his own.

WHEN IS THE PRO SE REQUEST TIMELY?

In *People v Crespo*, supra, the Court of Appeals reversed the Appellate Division's order (which had overturned the defendant's conviction for Assault 2nd degree and Weapon Possession) because the trial court, in the higher court's view, did not err in failing to conduct a searching inquiry of the defendant's pro se request which was untimely.

Several months before trial, the defendant expressed dissatisfaction with his lawyer and requested a new one. The request was denied. A second such request was also denied.

On day one of jury selection, defense counsel moved to withdraw, stating that there was no communication between him and his client. The defendant said that he was not comfortable with counsel. When the court denied the defendant's request for new counsel, the court ordered that the case proceed with the same lawyer. At that point, the defendant left the courtroom in a huff.

The defendant returned to court on day two (after 11 jurors had been sworn) and declared that he wanted to represent himself. The court replied that it was too late and ordered that jury selection proceed to conclusion followed by the trial. The defendant left the courtroom and remained absent for the trial.

After several witnesses had testified, the prosecutor asked the court to revisit the defendant's pro se request which the court deemed to be futile. The defendant was acquitted of Manslaughter and convicted of the assault and weapon possession charge.

The Appellate Division reversed, finding the defendant's pro se request to be unequivocal and timely because it was made BEFORE COMMENCEMENT OF TRIAL which occurs with the opening statement of the prosecution (144 AD3d 46 [1st Dept 2016]).

The Court of Appeals took a different view, concluding that trial commences AT THE START OF JURY SELECTION, and since the defendant first requested to proceed pro se after jury selection was nearly completed, there was no need for the trial court to conduct a searching inquiry into the voluntariness of and reasons for such request (citing, inter alia, *People v McIntyre*, supra at 17).

The Court noted that jury selection constitutes a critical stage of the proceedings at which the defendant has a right to be present (to size up potential jurors, and proof cannot begin until that process is completed (citing *People v Ayala*, 75 NY2d 422 [1990]). Consequently, since the trial commenced when

the jury panel was first seated, the defendant's right to proceed pro se, in the Court's estimation, was now SEVERELY CONSTRICTED and need only be granted as a matter of discretion upon a showing of compelling circumstances. As such, there was no need for further inquiry by the court.

The dissenting judge (Rivera J.) faulted the majority for departing from long-standing precedent interpreting the commencement of trial as the point where opening statements are made (citing, inter alia, *People v Herman*, 78 AD3d 1686 [4th Dept 2010]): defendant's pro se request was timely made before opening statements.

The dissenter also noted that the defendant's pro se request in *McIntyre* supra, was deemed to be timely after the jury had been drawn but not yet empaneled. As the dissenter saw, the majority only created ambiguity and undermined the importance of pro se representation.

FINAL THOUGHT:

While pro se defendants can cause headaches for trial courts and prosecutors, courts cannot dismiss requests for self-representation out-of-hand. Rather, if the request is timely and clear, the court must indulge the defendant with a proper inquiry to determine whether he/she is making the decision with eyes wide open rather than bumbling blindly into a mine field.

However tempting it may be, defense lawyers who represent pugnacious clients should not be too quick to run for the exit unless and until it is clear that the defendant will not cooperate or intends to engage in (or have counsel agree to) frivolous or unethical conduct

Even then, if the defendant's wish is granted, counsel should consider offering to serve as silent adviser if only to protect the defendant from him/herself and provide guidance when he/she gets lost, and the judge runs out of patience. Beyond patience and preparation, criminal defense work often requires a thick skin and a willingness to help those clients who seem hell bent on self-sabotage.