

Respondent's Appendix

1 recovered it.

2 Officer Warner was given the job of being the
3 arresting officer and when the defendant was transported to
4 the precinct he removed the defendant's clothing, which had
5 substantial amount of blood on it.

6 These are my conclusions of law.

7 The police had probable cause to arrest the
8 defendant based upon what they saw and what they were told
9 by the crowd. There is little dispute as to that, it seems
10 to me.

11 There really should not have been a hearing
12 ordered as to the knife, it seems to me, since the knife was
13 not recovered on the defendant and there is no allegation
14 that he discarded it in response to unlawful police action.
15 But to the extent that is at issue, there was no unlawful
16 police action so, to the extent the defendant is alleged to
17 have possessed a knife and discarded it, that would not
18 result in suppression in any event.

19 The clothes were taken from him at a time where he
20 was under arrest, so that is a search incident to a lawful
21 arrest and obviously they can take relevant evidence in the
22 case since they were blood soaked.

23 So that is it. So let's assume that we are going
24 to proceed to trial on Wednesday since Mr. Conza is not
25 available on Monday. In the event that you are unable to

1 way that he gets another attorney then he is not gonna come
2 to court.

3 THE COURT: Well --

4 MR. CONZA: So I am hoping that perhaps a
5 discussion will help that.

6 THE COURT: Why don't we have the discussion.

7 Let me say this, Mr. Crespo. You have the right
8 to hire anybody you want to to try your case and that is
9 always your right, but this case is now close to two years
10 old. It is my oldest case except for two cases, one which
11 is currently on appeal in the Court of Appeals and the other
12 which, as I mentioned, is a murder case that was represented
13 to the grand jury. This is a very, very old case, so I am
14 not delaying the trial any longer. The trial's going to
15 proceed on Wednesday, so it will go Wednesday with Mr. Conza
16 as your attorney unless you hire another attorney, that is
17 the way it works. If you hire another attorney he's got to
18 be ready to try the case on Wednesday because Wednesday will
19 be the trial date.

20 As I mentioned to you earlier, I'd like you to be
21 in court because it is in your interest to be present in
22 court. If you decide not to come to court, then the trial
23 proceeds in your absence. What that means is the jury sees
24 an empty chair rather than you. It means you can't be
25 present to assist your attorney in helping him try your

1 case, which is a very, very important thing to have happen.
2 You will give up the right to be present. It is also not to
3 your advantage for the jury to see an empty chair rather
4 than you, that can't possibly help, but, again, that is a
5 decision that you get to make. If you choose not to be
6 present there is very little I can do. I mean, I can compel
7 your presence, but I doubt that I will do that if your
8 decision is not to be present unless I need to for any
9 reason.

10 All right, why don't you take some time to speak
11 to him back there and we will resume.

12 THE DEFENDANT: I won't talk, I won't talk.

13 Your Honor, I want to say something. Your Honor,
14 I am trying to behave myself and conduct myself. I
15 understand English and I could talk English, but not the way
16 that I, that other people do.

17 THE COURT: I get it.

18 THE DEFENDANT: So there are a few words that I
19 don't understand. The beginning of this, of my arrest I
20 have been having misunderstanding with my lawyer from the
21 beginning. I trying to force myself to understand my
22 lawyer. I don't have a full understanding what is going on
23 sometime. He doesn't explain to me what is going on. You
24 see lately I go back to my cell and he go back to his job,
25 he don't even come back there and tell me this is what

1 happened, this is what is going on, this is what we are
2 going to do, nothing. I am just lost. So yesterday I went
3 to the law library and shared somebody about my situation
4 and they ask, they told me that I have the right to ask
5 question to the officer through my lawyer. I didn't know
6 that.

7 THE COURT: That is not --

8 THE DEFENDANT: So there is a lot of things that I
9 haven't done because I didn't know about it. So me and my
10 lawyer -- me, personally, I don't got a full understanding
11 what is going on. Sometime I am lost. I don't even know
12 that I was going to go to pretrial. There is a lot of
13 things that I don't understand.

14 THE COURT: We will take as much time as we need
15 to to have you understand everything that is going on but
16 let me suggest that people you listen to in prison at the
17 law library are not necessarily giving you true advise. For
18 example, you don't have the right, when you are represented
19 by counsel, to ask questions. You have the right -- I
20 mean, obviously your lawyer will talk to you and find out if
21 there is anything you want to ask if you ask him to, however
22 he still has to ask the questions in a legally proper manner
23 and they have to be relevant questions. So you have to
24 understand that what we just did, this pretrial hearing, was
25 a very, very limited hearing. It doesn't go to whether

1 you're guilty or not guilty, it just goes to whether the
2 police had the right to arrest you and recover the property
3 they recovered. So basically the police have the right to
4 arrest you if somebody says that man stabbed somebody, even
5 if it's not true, all right? So if a reasonable person in
6 the police's situation would believe that a crime had been
7 committed and the officer testified, for example, that they
8 see you standing over somebody punching him, even if you are
9 not stabbing him, and somebody says that man stabbed him or
10 he has a knife, they've got the right to arrest you and
11 recover your clothes which have blood on them, there is
12 really not much of an issue about that. Sometimes there is
13 an issue, in this case there is not much of an issue. But
14 what I was suggesting that we do is give you a chance to go
15 back there and spend as much time as you want with your
16 lawyer. I am not in any rush, I've got all day today and if
17 you want Monday as well. We are not starting the jury
18 selection till Wednesday.

19 THE DEFENDANT: I just don't feel comfortable,
20 Your Honor, with my lawyer at all. I just don't feel
21 comfortable.

22 THE COURT: Unfortunately --

23 THE DEFENDANT: I am forcing myself to try to get
24 along with the man that is going to represent me to go to
25 court. I try, I try and force myself, but I can't, I can't,

1 I don't know, I just can't. I try for 18 months from the
2 beginning that I got arrested, three months later said I
3 don't feel comfortable with you representing me and I tried
4 again to get along with him I still don't feel comfortable,
5 I still feel the same way.

6 THE COURT: I recall you telling me back in April
7 that you wanted to hire an attorney, right?

8 THE DEFENDANT: That is what I was trying to get a
9 lawyer, different lawyer because I didn't feel comfortable,
10 so I was forcing my family to get me a lawyer, which they
11 didn't have enough money to get another lawyer so I didn't
12 have no other choice, so I said let me try again, let me
13 humble myself so I'd be able to understand him. I don't, I
14 just can't. The reason why I feel like that is because he
15 came to visit me telling me I got bad news, you are admitted
16 to the phone that you did this, you did that, I did that. I
17 said how I could? That is what you said, what plan we are
18 gonna have to go to trial or what other plan do you have?
19 He didn't say nothing at all. Like he was, like, well there
20 ain't much you can do.

21 THE COURT: Mr. Crespo.

22 THE DEFENDANT: There ain't much I can do to help
23 you.

24 THE COURT: I don't want to discuss the facts of
25 your case because --

1 THE DEFENDANT: I am saying a little bit why me
2 and him have a misunderstanding.

3 THE COURT: You have to understand that what
4 happened is that the district attorney got hold of the calls
5 that you made at Rikers Island, right? So I haven't heard
6 them, so I don't know what they say on them.

7 You have heard them, right?

8 So what your lawyer's saying when he says he's got
9 bad news for you is that the DA says that there is a
10 tape-recording of you admitting that you killed somebody and
11 negating the self-defense, right? So that is bad news if
12 it's true. It is your lawyer's job to speak to you and to
13 tell you what it is that's happening in your case. It is
14 his job to vigorously represent you. But vigorously
15 representing you doesn't mean that he is supposed to be
16 hiding negative facts from you. He's got to say, hey, this
17 is gonna make it tough for me, you know. We didn't have a
18 complaining witness, that is good news, right? The People
19 can't find the man who was stabbed. But if you are
20 confessing to the crime, that is bad news. So these are
21 just, this is part of your lawyer's job to be talking about
22 these things with you because he's got to talk to you about
23 whether you go to trial at all, whether you plead guilty or
24 whether you go to trial, these are things that people in
25 your position have to talk to the lawyers about. It is not

1 his fault the case is the way the case is, so he is there
2 talking to you. I mean, I have no reason to relieve him at
3 this point. You have a right to retain somebody, but
4 nothing you have told me suggests that Mr. Conza's not doing
5 his job. And he is an experienced lawyer who's been before
6 me many, many times and he's got a whole organization behind
7 him to help him, so it is really to your advantage to work
8 with him.

9 Take some time and talk with him right now and if
10 we can't resolve the Antommarchi issue then we will have the
11 sidebar conferences in open court, either at the table or up
12 here, we will make it work.

13 All right, we will recess for half an hour.

14 COURT CLERK: Judge, he said he is not going to
15 talk to his lawyer.

16 THE COURT: Go back.

17 (WHEREUPON, THERE WAS A BRIEF RECESS IN THE
18 PROCEEDINGS)

19 COURT OFFICER: He refuses.

20 THE COURT: He refuses to come out?

21 COURT OFFICER: He says I am not coming to court.
22 I said are you coming to court. He said why are you here.
23 I said I am here to take you to court. He said no. He was
24 laying on the floor.

25 THE COURT: So the defendant, I understand, is

1 would make you an offer in this case if you were interested
2 in it which I hadn't heard before. That would be a plea to
3 the, I guess the attempted assault one and the minimum
4 sentence which would be 16 to life. It is less than 20 to
5 life, which is the minimum I could give you on the B felony
6 assault in the first degree. Just something for you to talk
7 to your lawyers about if you want to.

8 So that is where we stand now. I don't know if
9 there is anything you want to say now or you want to speak
10 to Mr. Butchen or anything else, Mr. Conza.

11 (WHEREUPON, THERE WAS A PAUSE IN THE PROCEEDINGS)

12 THE DEFENDANT: (In English) Your Honor, I am
13 going to try my best to say in English. I appreciate your
14 concern and I appreciate what you just said to me. I just,
15 like I said before, I just don't feel comfortable with my
16 lawyer. I don't be having a full understanding what is
17 going on with my charge. I don't communicate with my lawyer
18 the way I am supposed to. I mean, I understand I am not
19 paying my lawyer for his service, but I just, I just, I just
20 don't, there is a lot of thing that I don't understand. I
21 want to be present at my trial, I really want to be present
22 and I want to go to trial, but I don't feel comfortable
23 going to trial with my lawyer, I just don't feel
24 comfortable.

25 THE COURT: You know, I really want you to feel

1 comfortable and I want people in your position, particularly
2 facing the sentences that you face, to feel comfortable, but
3 you have to understand that part of a lawyer's job is to
4 tell you the facts, his honest assessment of where you are.
5 You know, there are a lot of lawyers, I have known them all
6 my life, who just go in and they tell their clients we are
7 going to beat this, I will be on your side, no problem, they
8 charge you all kinds of money and then, you know, you get
9 convicted and that is it. He is not doing his job. I mean,
10 you want your lawyer to be on your side, you want him to
11 aggressively represent you, but he is not doing his job if
12 he's not telling you the good and the bad.

13 So what I have been saying to you, I have always
14 told you of course you had the right to hire an attorney if
15 you want and if you gave me a reason why I should replace
16 Mr. Conza, I mean a real, like he wasn't doing his job, I
17 would have replaced him earlier on. Lawyers come -- for
18 example, people in your situation come to me all the time
19 and say my lawyer never visits me, he doesn't come to see
20 me, he doesn't talk to me, you know, and the lawyer will say
21 to me something like, you know, Judge, I have to tell you,
22 although I am fully up on the case, I have been on trial for
23 three months and I haven't visited my client in three
24 months. Then I will understand, you know, okay, I
25 understand why a client's upset not to see his lawyer for

1 three months. But Mr. Conza, for example, and maybe that is
2 not your issue with him, he's been here every single time
3 your case is on. A lot of lawyers don't even come every
4 time the case goes on. He's visited you, is that correct,
5 or had video conferences?

6 MR. CONZA: Both, both.

7 THE DEFENDANT: (In English) I seen my lawyer one
8 time. The second time that I remember I refusing. Only one
9 time I saw my lawyer that I recall. I don't remember seeing
10 my lawyer three, four, five time.

11 THE COURT: Well, he was here in court for you
12 every time the case was on.

13 THE DEFENDANT: (In English) Exactly, but it
14 doesn't make no sense being here and then me being going
15 back to the cell and he go back to work and I don't
16 understand what is going on with my charge. I am lost.
17 That is one of the reason why I don't got a full
18 understanding what is going on, what I should do, what I
19 can't do. I am lost, I am just lost. They did a hearing
20 last week, I didn't even know it was a hearing. I was lost.
21 So I appreciate they into consideration to change my lawyer,
22 but I am not, I don't want you to feel that I want to do
23 what I want to do. I am not coming out to court with the
24 same lawyer. I need a different lawyer. I just don't feel
25 that he is doing his job at all.

1 THE COURT: You know, I mean, he's actually put a
2 whole lot of work into your case.

3 THE DEFENDANT: (In English) But there is
4 something going on before, from before. This is not
5 something that just came up. Like three months ago I
6 mention him that I was trying to get a private lawyer
7 because I am trying to get my money together, get a private
8 lawyer because I didn't feel comfortable with the job he is
9 doing.

10 THE COURT: But you haven't been able to get a
11 private lawyer, right?

12 THE DEFENDANT: (In English) He said that my
13 client is trying to get a private lawyer. He didn't mention
14 about me and him about had a misunderstanding, that we are
15 not getting along and he is not going to mention, so I left
16 it alone. Like I said before, I force myself to try to
17 understand my lawyer and try to get along with my lawyer.
18 Doesn't make no sense me talk to my lawyer like nothing and
19 then he gotta represent me at trial. He is gonna deal with
20 some motion no matter what. He is gonna feel some type a
21 way because, you know, like the way I talk to him like right
22 now he feel some type of way because I don't want him to
23 represent me, so doesn't make no sense me going to trial
24 with him and he thinking, well, he feel I am not helping him
25 so now I am not going to help him the way I am supposed to

1 help him. That is the way I feel. He is not going to admit
2 it.

3 THE COURT: But that is not true. I know you
4 might think that, but he is a professional person. This
5 isn't the first time that someone will have been unhappy
6 with him or happy with him. Every lawyer who works here has
7 issues with his clients. What he wants to do is win your
8 case if he can, guarantee that is what he wants to do, he
9 wants to do the best, get you the best possible result you
10 can get, and he doesn't, he is not taking it personally that
11 you want him to be relieved. He told me, look, if he wants
12 me relieved, I am happy for you to relieve me, that is okay,
13 get him a new lawyer. This is really me at this point
14 because this case has been on 19 times and the district
15 attorney now has their witnesses here and we are ready to go
16 and it is my oldest case. So it is not Mr. Conza who is
17 saying, you know, Judge, absolutely not, I insist on
18 representing him, it is me, it is me. And, you know, if
19 this had happened like a year ago and you had a valid reason
20 for me to replace him, I would. I replace people all the
21 time.

22 THE DEFENDANT: (In English) That is not -- I
23 apologize. That is not on me because I was always locked
24 up, I was always in jail, so I am always available. So you
25 took 18 months because you want to take 18 months, not

1 because of me. He never put a motion to go to trial in six
2 months neither, so you telling me he represent me the right
3 way? I am going to be done with this case six months or
4 seven months ago.

5 THE COURT: I am not blaming you for the delay.

6 THE DEFENDANT: (In English) Exactly. So now that
7 I don't feel comfortable because a lot of issues going on
8 between me and my lawyer, I am not feeling comfortable going
9 to trial with him.

10 THE COURT: That is the thing. I mean, I want you
11 to be comfortable, but it is really not, you know, in your
12 position you don't get to choose your lawyer. You can hire
13 a lawyer, but unless you gave me a real reason why he is not
14 doing his job then I can't relieve him, particularly not on
15 the eve of trial when everything is ready to go.

16 THE DEFENDANT: (In English) I mean, like what
17 other reason I can give you? 18 months he never put a
18 motion to go to trial and 18 month I, he visited me two
19 times maybe, if I can remember. The third time I force him
20 to come and see me because I said how come you never come
21 and see me, how come you never explain to me what happened
22 as to court like everybody else do. You finish with court,
23 go into the tombs, talk to you five minute. You understand
24 what happened in court? You have a question? You want me
25 to do something for you? Nothing like that. So I am lost.

1 I am definitely lost and that is one of my main reason why I
2 don't feel comfortable because, like I said before, I don't
3 got a full understanding what is going on with my case right
4 now.

5 MR. CONZA: What I would like to add is, you know,
6 if anything, you know, the reasons --

7 THE INTERPRETER: I am sorry, before you guys go
8 any further, do you prefer to have an interpreter or not?

9 THE DEFENDANT: Yeah.

10 THE INTERPRETER: So you want me to interpret what
11 is being said?

12 THE DEFENDANT: (In English) There is a lot of
13 word I don't understand.

14 MR. CONZA: I think, you know, the things that I
15 stated on the record this morning in my application to be
16 relieved have been confirmed and that Mr. Crespo's
17 willingness to cooperate with the proceedings and to
18 cooperate with his attorney is all predicated on who his
19 attorney is. And, like I said, regardless of how we got
20 here and when we got here, I realize it is, the People are
21 ready, and while I am prepared, I am --

22 THE COURT: I want to give you a chance to comment
23 on the not visiting him because that was not my impression
24 that you had only seen him once or twice and never went back
25 to speak to him afterwards.

1 MR. CONZA: Well, I can tell you that after
2 looking at my file I did appear on this case every time it
3 was on. There were a couple of occasions where Mr. Crespo
4 was not produced, so I obviously didn't see him on those
5 times. I did see him in court, we definitely had video
6 conferences and we had one counsel visit in person at MDC
7 that was successful and then there was one that was
8 unsuccessful this past Tuesday. But also, you know, based
9 upon even the conversation that Mr. Butchen had with Mr.
10 Crespo earlier, that there is a complete breakdown of
11 communication and trust and, like I said, if his --

12 THE COURT: But it is not based on anything, that
13 is my concern, it is not based on anything that you have
14 actually done. That is not, not right?

15 MR. CONZA: I agree, but what I said this morning
16 I think still holds true. The fact at this point is
17 irrelevant because what we have is an accused who is not
18 communicating with his attorney, cannot be prepared for
19 trial if he does wish to testify or thinks he needs to
20 testify, and now we have, now even with this plea offer of
21 16 to life, Mr. Butchen can correct me if I am wrong, but I
22 think his words were Mr. Crespo is so focused on this issue
23 of representation that he wouldn't even discuss whether or
24 not the plea was something like, you know, maybe this is a
25 good decision or me or not a good decision for me, couldn't

1 even engage in that conversation, and that is one of the
2 most important or the most important decision an accused
3 makes is whether to negotiate a plea or to go to trial and
4 if he's not willing to have that conversation because he is
5 so focused on the issue of representation, then that is a
6 real problem, it is a real problem, it would be a real
7 problem in any case and it is certainly a problem in a case
8 where there is a life sentence at stake.

9 THE COURT: The thing is that if you were able to
10 hire somebody, anybody else, of course you'd have the right
11 to hire somebody. All that I can do would be to appoint
12 another lawyer for you and the effect, the only effect that
13 that would have would be that the trial would then be
14 delayed for another six months or something before we got
15 another lawyer who was prepared to try your case and do the
16 work that Mr. Conza's put into it and there is no guarantee
17 that you would like a lawyer that I appoint you anymore than
18 you would like Mr. Conza. Indeed, my best guess is, based
19 on the lawyers I have available to appoint you, you might
20 like him or her even less. But what I was hearing from you
21 yesterday was, Friday, I am sorry, my lawyer only brings me
22 bad news.

23 THE DEFENDANT: (In English) I was using that as
24 an example. Like, I didn't mean he was always giving me bad
25 news because I understand bad news is going to come, this is

1 bad news me being locked up, I was using that as an example
2 because --

3 THE COURT: Just let me stop you for one second.
4 I don't want you to talk about the facts of the case.

5 THE DEFENDANT: (In English) No, because you
6 mention it. So I didn't mean he's going to come and see me
7 and give me all the time good news, you going home tomorrow,
8 you going home next month, what I means is that if you got
9 some bad news, if you are a lawyer, behind the bad news you
10 gotta be a motivation to say, well, it is bad news, but we
11 could work this out, we could do something about it, we
12 going to do something about it. So when he told me that and
13 I said, well, what is the good news and I expect he said we
14 are going to fight it, we are going to do this, this is my
15 plan, because you, he gotta share with me, I am the one
16 facing the time, and when he mention nothing he said, well,
17 the only choice you got is 12 years, basically, like, take
18 some time, take 12 years or 16 years, that is what I
19 recommend you.

20 THE COURT: I don't want to get involved with
21 exactly what he is saying to you, but you have to
22 understand, and please don't discuss the facts of the case,
23 so his job would be to say to you things like, look, you
24 heard the testimony at the hearing, you heard police
25 officers say they saw you standing over somebody making

1 punching-type motions, you heard that they recovered the
2 knife, now we hear that they have you on tape from Rikers
3 Island admitting the crime, so these things he has to tell
4 you because the jury is going to hear those things and if he
5 doesn't tell you those kind of things he is not doing his
6 job. He may also tell you, okay, look, they don't have the
7 complainant here, that is good. He can explain to you if,
8 for example, please, again, make sure you don't say
9 anything, don't respond to me, if your defense is
10 self-defense, not that I didn't do it, you know, there is a
11 way to do that, but this is what you have to show and he has
12 to discuss with you the pros and cons with this kind of
13 defense and he has to say to you if you want to mount that
14 defense, for example, you may have to testify. This is what
15 Mr. Conza is telling me he would want to do with you. Not
16 those specific facts, but talk with you to discuss the issue
17 of your testifying to help defend you. That is what a
18 lawyer is going to do. Nobody I appoint you is going to do
19 anything different. So if I appoint a new lawyer I am going
20 to be in the position, this has happened to me many times,
21 where you don't like the new lawyer. Either you are even in
22 a worse position or I can give you somebody who just tells
23 you what he thinks you want to hear. I've got lawyers like
24 that. After four, five lawyers I have appointed sometimes
25 for people and I give them somebody who just goes in, they

1 have a great relationship with him, but they end up getting
2 convicted and that is not a good thing or they end up not
3 taking a plea where they should have taken a plea or they
4 end up taking a plea where they shouldn't have taken a plea.
5 So if I were you I'd give Mr. Conza another chance. Go back
6 with him and talk with him. If you want to take the
7 afternoon to try and see if that works out better, I won't
8 start your case till tomorrow. See if you can reestablish
9 some kind of communication. It is important to do that.

10 THE DEFENDANT: (In English) I don't feel
11 comfortable talking to my lawyer.

12 THE COURT: Just give it a try.

13 THE DEFENDANT: (In English) I already tried for
14 18 months. The little bit time I got to know him I didn't
15 feel comfortable. I didn't feel the vibe. I not doing it,
16 Your Honor. I don't mean to disrespect you.

17 THE COURT: I don't take it as disrespect.

18 THE DEFENDANT: (In English) I don't know what I
19 gonna do, but I don't feel comfortable with my lawyer. I
20 don't want to talk to him no more.

21 THE COURT: Look, I don't take it as disrespect.
22 I understand.

23 THE DEFENDANT: (In English) I don't want to be
24 rude that you feel like this guy trying to talk to him, he
25 don't want to get in his head that he's a good lawyer. I

1 don't feel comfortable.

2 THE COURT: I don't take it that way. My only
3 reason for talking to you is that I want to do what is in
4 your interest. What your lawyer is telling me is that, in
5 his view, in order to mount, to defend your case you may
6 well have to testify in this case and you can't testify
7 unless you speak to your lawyer. I mean, that would be
8 foolish. So, and you can't testify if you are not here. So
9 that is my reason to have you out here because there is no
10 point -- I mean, I am a Judge, I feel kind of stupid if I
11 sit here and have a trial where they are looking at an empty
12 chair and they don't hear what you have to say if it's
13 important that you say something. And, remember, you have
14 the right not to testify, absolutely 100 percent right, but
15 sometimes it is to your advantage to have you testify. It
16 doesn't do any good to have the people see an empty chair
17 and if you have a case you have to present you not be here.

18 Look, it is your decision, that is what I said to
19 you. I am not going to bring you out here and talk to you
20 again. I will ask your lawyer to go and speak to you and
21 see if you want to come out. If you don't want to come out
22 or speak to him, that is your option, that is all I am going
23 to say at this point. Do you want to be taken back this
24 afternoon?

25 THE DEFENDANT: (In English) I don't want to talk

1 to my lawyer at all. That is it, I don't want to talk to my
2 lawyer at all. I need a new lawyer.

3 THE COURT: Okay, sorry to hear that. So you are
4 not going to come out again?

5 THE DEFENDANT: (In English) I am not, I am not.

6 THE COURT: Okay, I accept that for today. We
7 will hear that every day, but I won't even talk to you
8 again. If you tell the officers you don't want to come out
9 I will respect that.

10 Okay. Anybody need to say anything?

11 MR. MCMAHON: Your Honor, the only thing I'd like
12 to add is the 16 to life that I discussed today with Mr.
13 Conza and Mr. Butchen was an offer I made today in light of
14 these circumstances. That is not an offer -- my intention,
15 if it's not accepted today, is to go to trial, it is not
16 something I leave open.

17 THE COURT: I hear what you say.

18 So the district attorney is saying he is willing
19 to make you an offer of 16 to life today. If you want to
20 speak with your lawyer about that, you can.

21 MR. BUTCHEN: Or if he wanted to speak to me.

22 THE COURT: If you want to speak to Mr. Butchen
23 about it we will bring you back for the afternoon. You want
24 to think about it, have Mr. Butchen --

25 THE DEFENDANT: (In English) I made a decision. I

1 don't want my lawyer represent me and I am not taking the 16
2 years. I am going to trial, that is my decision.

3 THE COURT: All right.

4 THE SERGEANT: Judge, is the force order being
5 cancelled?

6 THE COURT: Yeah, we don't need it. I won't need
7 to speak to him again.

8 (WHEREUPON, THE DEFENDANT EXITS THE COURTROOM)

9 (WHEREUPON, A LUNCHEON RECESS WAS TAKEN
10 AT THIS TIME)

11 * * *
12 A F T E R N O O N S E S S I O N

13 * * *

14 THE COURT: Okay, so I was not going to do
15 Sandoval because he is not here. He is entitled to have
16 that done, if necessary, but perhaps we can just wait and
17 see if he shows up because then we can do it in front of
18 him, which might be helpful anyway, and if he doesn't show
19 up then there is no point of doing Sandoval because he is
20 not going to testify, right?

21 MR. CONZA: Right.

22 THE COURT: But that is up to you.

23 MR. CONZA: No, that is fine, it is fine to do it
24 that way.

25 THE COURT: You have the right to do it before

1 have him come out and hear what he has to say and if it
2 turns out to be something we need to have a further
3 discussion on, then we will do that.

4 Could you step outside and tell the jurors we have
5 another five minutes? Just because I don't want to start
6 off on a bad --

7 (WHEREUPON, THERE WAS A PAUSE IN THE PROCEEDINGS) .

8 (WHEREUPON, THE DEFENDANT IS NOW PRESENT)

9 THE COURT: All right, Mr. Crespo, I understand
10 you wanted to say something to me and I am happy to see you,
11 sir.

12 THE DEFENDANT: What was that again, sir? I
13 didn't hear you.

14 THE COURT: I am sorry. I said the officers told
15 me that you wanted to speak to me about something --

16 THE DEFENDANT: Yeah.

17 THE COURT: -- explain something and I said of
18 course I would see you.

19 THE DEFENDANT: I just, just for the record, I
20 still don't understand why I can't change my lawyer. I
21 still don't understand that. I don't want to refuse to, to
22 go my trial, I don't want to refuse to pick my own jury, I
23 just don't want my lawyer represent me and I don't
24 understand why I am being forced to stay with my lawyer. I
25 just don't understand that part.

1 THE COURT: Okay. I think -- I can't say
2 anything more than that I have already said except to say
3 this. The way our system works is you can hire any attorney
4 that you want. If you can't afford an attorney then we
5 assign one to you. If there is something that happens
6 between you and your attorney that indicates to me that he
7 is not representing you effectively and you want a new
8 attorney, then I will give you a new attorney, particularly
9 if it's at the beginning of the trial, particularly if you
10 are facing as much time as you're face go now, but you
11 haven't said anything to me substantively about Mr. Conza's
12 representation that leads me to think at all that he is not
13 effectively representing you. So you don't get to choose
14 your attorney if we assign the attorney to you, you just get
15 to have the attorney replaced if he's not doing the job that
16 he is supposed to be doing for you. And I have watched Mr.
17 Conza representing you and I know what he's done on this
18 case and I can't say that he hasn't been doing it. And
19 particularly now, on the eve of trial, right when the jury's
20 outside, I have already spoken to them, I can't be in the
21 position of saying, okay, the case is finally coming to
22 trial, everybody is ready for trial, the case has been going
23 on for two years, I am going to give you a new attorney and
24 delay the trial for four or five months, I can't do that,
25 that is what is happening.

1 THE DEFENDANT: So you are going to force me to go
2 to trial with somebody that I don't get along with, that I
3 don't understand him, that I feel that he is not doing the
4 right thing for me? I just don't understand that part.
5 Maybe you see it different. I not seeing it that way. I
6 feel that he is not helping me to the fullest. I feel that
7 he is not helping me for my, for my, for my best benefit. I
8 feel that way.

9 THE COURT: I know you do and I am sorry.

10 THE DEFENDANT: And I don't refuse to go to trial
11 and, like I said, I am going to keep saying the same thing
12 over and over. If you all going to let the lawyer stay with
13 me I am going to come up here, I am going to say over and
14 over that I don't feel comfortable with my lawyer and I am
15 just going to go back to my pen and you're all just going to
16 have to go to trial without me, but every single day I am
17 going to come here and say I don't feel comfortable with my
18 lawyer.

19 THE COURT: I am willing to do it that way and I
20 am hoping you change your mind, but if you don't --

21 THE DEFENDANT: I already in the process of
22 getting a different lawyer. I haven't got opportunity to
23 talk to my lawyer because I am in court almost every day and
24 when I go back I can't even use the phone because it's
25 already nine o'clock.

1 THE COURT: I am going to send you back right now,
2 okay? So you can use the phone whenever you want to.

3 THE DEFENDANT: But just for the record, I want to
4 make sure that when the jury come through I am gonna say
5 over and over that I don't feel comfortable with my lawyer
6 at all. I don't.

7 THE COURT: Okay, all right, so I am going to take
8 you back then to the pens.

9 (WHEREUPON, THE DEFENDANT EXITS THE COURTROOM)

10 (WHEREUPON, THERE WAS A PAUSE IN THE PROCEEDINGS)

11 THE COURT: Okay, let's bring the jury in.

12 (WHEREUPON, THE PANEL OF PROSPECTIVE JURORS

13 ENTERED THE COURTROOM)

14 THE COURT: Can I see the lawyers, please?

15 (DISCUSSION AT BENCH)

16 THE COURT: Welcome back, folks. That is the
17 problem with a 10 minute break, which is why I try not to
18 take them, is 10 minutes is never just 10 minutes. We are
19 ready to proceed.

20 So the next stage is -- we should have actually
21 administered the oath before we broke. I assume we have
22 everybody here by now.

23 (WHEREUPON, THERE WAS A PAUSE IN THE PROCEEDINGS)

24 THE COURT: Even if I take longer than I said, we
25 still don't have everybody back.

1 we will have to work around that, literally.

2 The defendant is produced. I plan to proceed with
3 the jury selection, but we will speak to him when he comes
4 down and if by some chance he wants to come out we will talk
5 about it. At this point I think it would be peculiar for
6 him to come out while we are doing the jury selection, but,
7 certainly, we are almost done anyway.

8 Okay, let's bring our jurors in. Just bring them
9 around the side this way.

10 THE SERGEANT: He is coming out.

11 THE COURT: Coming out for what?

12 THE SERGEANT: For the trial.

13 MR. CONZA: Well, I am not clear if he's coming
14 out just to say the same thing or if it's to say the same
15 thing and then stay here for the trial.

16 THE COURT: Okay.

17 COURT OFFICER: He says he wants to come out to
18 tell you that he doesn't want him as a lawyer.

19 THE COURT: And then he wants to go back in?
20 Bring him out.

21 MR. CONZA: That is what is not clear about
22 whether or not he wants to go back in.

23 (WHEREUPON, THE DEFENDANT IS NOW PRESENT)

24 THE COURT: Good morning, Mr. Crespo. I brought
25 you out. It wasn't clear to me what you wanted to say, but

1 do you wish to be here now for the trial?

2 THE DEFENDANT: I want to be here present for the
3 trial and I want to let the people know that I don't want my
4 lawyer to represent me and I told you yesterday I am going
5 to be saying the same thing, but I want everybody to know
6 that I am being forced to go to court with a lawyer that I
7 don't, that I don't --

8 THE COURT: That you are not going to be able to
9 say because you are not going to be able to speak, only your
10 lawyer gets to speak till you testify, if you wish to
11 testify. Of course you don't have to testify.

12 THE DEFENDANT: I don't want my lawyer to
13 represent me, so I don't want him to say nothing, so that is
14 the case I represent myself. I am entitled to represent
15 myself.

16 THE COURT: You are not entitled -- that you
17 could have done at an earlier stage of the trial, but it is
18 too late to make that request now in the middle of trial.
19 At least at this stage of the proceeding. If you want me to
20 consider whether after we complete the jury selection I will
21 pause for a second and allow you to represent yourself and
22 go pro se, I can do that.

23 THE DEFENDANT: That is exactly what I want to do.

24 THE COURT: So do you want to stay here for the
25 rest of the jury selection or do you want to -- my view is

1 that it is most likely too late, but I want to check on that
2 to make sure that that is the situation.

3 THE DEFENDANT: Right now I don't even know what
4 you all doing? You all say I am supposed to pick my jury
5 and now you say that I am in the middle of the trial. I
6 don't understand what is going on now.

7 THE COURT: You keep saying that, but we have
8 given you every opportunity to let you know what is going
9 on. This is the jury selection process now. I explained to
10 you exactly in open court with the interpreter.

11 THE DEFENDANT: That is what I want to know
12 because the court officer said that they are in the process
13 to pick my jury and the other court officer said you are
14 going to trial, so I don't know what is going on.

15 THE COURT: We have the 11 jurors out of 12
16 selected. We have 14 jurors in the box. The lawyers are
17 now going to ask them questions to complete the jury
18 selection process and then we are going to have a jury. We
19 plan to start the actual trial at 10:30 this morning.

20 THE DEFENDANT: What you mean that the jury had
21 the knowledge that I have a problem with my lawyer?

22 THE COURT: They do not have that knowledge and
23 they will not have that knowledge.

24 THE DEFENDANT: Why not?

25 THE COURT: Because that is not relevant to

1 anything that we are doing in this proceeding.

2 THE DEFENDANT: So that mean that I don't be able
3 to be here, able to be here because my lawyer's not helping
4 me to, to the best of my knowledge he is not helping me, so
5 the jury doesn't know that I have an issue with my lawyer?

6 THE COURT: That is correct, they don't know that.
7 They know that you have a right --

8 THE DEFENDANT: They not supposed to know that
9 neither?

10 THE COURT: That is correct.

11 THE DEFENDANT: See, that means that I can go back
12 there and they could feel, well, he don't want to come out,
13 he wants to be absent, that is basically what he is saying,
14 right?

15 THE COURT: The jury has been told that you have a
16 right to be present, that you have a right not to be
17 present, that they are not to hold it against you or hold it
18 against the People, they are to draw no inferences
19 whatsoever from your decision to be present or not present
20 and they are not to speculate about what, why you are not
21 here, that is what I told them and if you had been here you
22 would have heard your lawyer.

23 THE DEFENDANT: I want to be present because the,
24 I want the jury to know that you all force me to go to trial
25 with a lawyer that I not able to understand him and he is

1 not really able to understand me and he is not helping me.

2 THE COURT: That -- look, they have already seen
3 your lawyer helping you and asking questions, so that --

4 THE DEFENDANT: That is what you said that he is
5 helping me. That is not, that is not what I see. That is
6 not what I see.

7 THE COURT: So what I am telling you is that you
8 are not going to be allowed to speak and tell the jurors
9 that. Do you still wish to be present or not be present?

10 THE DEFENDANT: I want to be present and I want to
11 represent myself. I don't need a lawyer then.

12 THE COURT: Okay, that is not happening at this
13 stage. So we are going to complete the jury selection now
14 because we have 14 jurors.

15 THE DEFENDANT: So why doesn't happen now at this
16 state, why not?

17 THE COURT: Because we are in the middle of the
18 round of jury selection.

19 THE DEFENDANT: That is not my fault. This is
20 something he should say before because I complain my lawyer
21 about this before this issue.

22 THE COURT: This is not a timely request.

23 THE DEFENDANT: So you still force me to go to
24 trial with a lawyer that I don't get along with and now you
25 deny me the right to represent myself because you saying

1 that I am in the middle of the grand --

2 THE COURT: This is the first time you have asked
3 to represent yourself in the middle of the trial.

4 THE DEFENDANT: Because I don't have the
5 knowledge, so I gotta go to law library and research myself
6 and try to find out about the law. But I didn't went to
7 school for the law, so I am trying to do my best and trying
8 to read the best I can because I don't read English and I
9 don't understand a lot of English and I don't, there is a
10 lot of thing that I don't know how to do by myself and this
11 is why they always give you a lawyer, so I got to go to the
12 law library and find out through people what I could do
13 about this.

14 THE COURT: But this is the first time that you
15 have asked to represent yourself and that is --

16 THE DEFENDANT: It is because I don't have the
17 knowledge that I could represent myself. I didn't -- if
18 that could be the case I would have been represent myself.

19 THE COURT: So that is not happening at this stage
20 of the trial. You are not going to be able to represent
21 yourself because we are in the middle of jury selection, we
22 are about to start the trial in less than half an hour. So
23 do you wish to be here or not?

24 THE DEFENDANT: Yeah.

25 THE COURT: Okay.

1 You understand you cannot talk till such time as
2 the, till such time as you testify, if you decide to
3 testify?

4 THE DEFENDANT: I don't want my lawyer represent
5 me, so I want to represent myself, so I am interrupting the
6 trial, I guess, because I don't want the, my lawyer to
7 represent me.

8 THE COURT: If you speak then I am going to have
9 to take the jury out and bring you out because you are not
10 allowed to speak in front of the jury.

11 THE DEFENDANT: That is exactly what is going to
12 happen because I not going to trial with a lawyer that is
13 not helping me.

14 THE COURT: All right, if you are going to, if you
15 are going to tell me that you are going to disrupt the
16 proceedings --

17 THE DEFENDANT: You forcing me to go to trial with
18 somebody that I don't want to go to trial with.

19 THE COURT: -- I am going to bring you back.

20 THE DEFENDANT: You are talking about interrupting
21 the proceeding, but you, you violated me, my right, because
22 I am entitled to --

23 THE COURT: I am going to bring you back and if
24 you ever determine that you can sit quietly then you are
25 welcome to come to trial. Anytime you want to do that and

1 tell me that you will not disrupt the proceedings then you
2 can come and sit down. Otherwise you can't.

3 THE DEFENDANT: I am not interrupting the
4 proceeding. I want to represent myself, that is what I
5 mean.

6 THE COURT: What I am telling you is you cannot
7 represent yourself at this point in the trial.

8 THE DEFENDANT: Because they didn't give me the
9 knowledge of what I could represent myself when I was
10 complaining about my lawyer, you all never gave me the
11 knowledge that I got the right to represent myself.

12 THE COURT: Can I make a suggestion?

13 THE DEFENDANT: I had to research it myself, so
14 you never told me that I could represent myself.

15 THE COURT: Can I make a suggestion, Mr. Crespo?
16 Why don't you sit here for a little while and watch Mr.
17 Conza representing you.

18 THE DEFENDANT: Because I don't want to do that.
19 I already have a lot -- you already got the knowledge, 18
20 months locked up, he visit me one time only, so what kind of
21 help he doing? What is he doing for me? I want to know
22 what he is doing for me.

23 THE COURT: Is that true that you visited him one
24 time only, Mr. Conza?

25 MR. CONZA: In person?

1 THE COURT: Yeah.

2 MR. CONZA: Yes, there was one time in person and
3 there was one time in person that he refused and then --

4 THE DEFENDANT: That was four days ago.

5 MR. CONZA: There were video conferences.

6 THE COURT: How many video conferences?

7 MR. CONZA: Two or three maybe.

8 THE COURT: Okay. And then, and you were here 19
9 appearances.

10 MR. CONZA: I was here every court appearance.

11 THE COURT: There is not much more a lawyer can
12 do.

13 THE DEFENDANT: I don't see no proof that he came
14 to see me three or four times.

15 THE COURT: He didn't say he came to see you three
16 or four times, he said he was in court.

17 THE DEFENDANT: He said video conference. I never
18 went to no video conference.

19 MR. CONZA: He did it in my actual office.

20 THE COURT: In your office?

21 MR. CONZA: Yes. We have, like, a cubical.

22 THE COURT: I am not going to go through this.

23 THE DEFENDANT: This is a fact, I am talking about
24 facts, he is not helping me. So 18 months of being locked
25 up and he only came to visit me one time and the second time

1 it was, I refuse it.

2 THE COURT: Every time we talk things change. I
3 mean, I am sorry that I suggested to you possible reasons
4 why it is that you might be entitled to have a new lawyer
5 because I heard what you said when you first came out, he is
6 only bringing me bad news, and at this stage I can only look
7 at this as manipulation. I am sorry that you don't get
8 along with him, but at this point he is going to be your
9 lawyer and it is too late to ask to represent yourself. So
10 what I suggest you do is sit there and watch him represent
11 you and make your determination as to whether he is actually
12 helping you and then we can discuss it further, but if you
13 are going to tell me that when I bring the jury in you're
14 going to jump up and disrupt the court proceedings and say
15 he is not my lawyer, I am not going to have that.

16 THE DEFENDANT: That is exactly what's going to
17 happen because he is not going to help me for my -- he
18 ain't helping me so right now I don't got the knowledge that
19 I was going in the middle of, I didn't have no knowledge
20 that he was speaking to the jury by himself and he is not
21 telling me nothing, nothing is going on with my case,
22 nothing, I am lost.

23 THE COURT: All right, take him back, please.

24 (WHEREUPON THE DEFENDANT EXITS THE COURTROOM)

25 THE COURT: At this point, frankly, this is just

1 simple manipulation. I mean, I understand he is frustrated,
2 but he keeps coming out all of a sudden you never visit him,
3 you are not telling him anything, things that he heard with
4 an interpreter in open court, and it is just nonsense that
5 he didn't know that a jury was being selected at this point.
6 Now, their obviously isn't much that you can tell him when
7 he refuses to see you, so, you know, so there is very little
8 I can say. It is a very unfortunate situation, but I can't
9 have him step in and represent himself at this stage of the
10 proceeding. What would he do? He doesn't know what
11 questions were asked of the jurors. He can stand up and
12 talk to them and just say he is forced to represent himself
13 pro se. It is not a timely request and a request to be pro
14 se has to be timely, among other things. I will look into
15 request to go pro se in the middle of trial, but I am
16 reasonably certain that that is the law.

17 Let's bring our jury in and finish the jury
18 selection.

19 (WHEREUPON, THE PANEL OF PROSPECTIVE JURORS
20 ENTERED THE COURTROOM)

21 THE COURT: All right, folks, there should be
22 three groups of jurors here. The jurors who are being
23 questioned, which we are about to continue; the jurors who
24 have not been questioned; and the jurors who were actually
25 selected. If you have been selected as a juror then you

1 MR. CONZA: I wanted to address that too, Judge.
2 You haven't kicked him out, but I feel like the record this
3 morning, which was vague and a little murky, was that Mr.
4 Crespo indicated he did want to participate, but he did also
5 want to communicate that he didn't want me as his attorney
6 and wanted to go pro se and that he would come out and say
7 as much and, so, to me, then the Court basically
8 preemptively barred him from coming out here thinking that,
9 well, he is gonna be disruptive should he come out. He has
10 yet to be disruptive, fortunately, and so I think having him
11 in a position where he can see what is happening here
12 addresses both of those issues. It addresses the issue of
13 waiting for him to be disruptive before barring him and it
14 addresses the issue of him being aware of what is happening
15 without being here.

16 THE COURT: Okay, well, this is a
17 mischaracterization, with all due respect, as people say to
18 me, of what happened this morning. First of all, it is
19 clear to me at this point that the defendant is simply going
20 back talking to people and finding new ways to disrupt the
21 proceedings, I don't mean physically disrupt, and be
22 manipulative. He comes back with a different idea every
23 time. There is no clear and unequivocal request for him to
24 go pro se, by the way. This is only in the context in my
25 not being willing to assign him new lawyer, a new lawyer on

1 openings and then says he wants to go pro se and, you know,
2 the law's pretty clear on this. This is a manipulative
3 request. It is not made because he wants to represent
4 himself, it is made in the context of his dissatisfaction
5 with my refusing for no good reason to reassign counsel on
6 the eve of trial. So this is not a timely request, it is
7 not an unequivocal request and it is made in the context of
8 his dissatisfaction with counsel and the law is pretty clear
9 that under those circumstances I should not be letting him
10 go pro se. It would be a travesty to let somebody go pro se
11 in those circumstances on the day the trial was supposed to
12 commence. So that is where we are.

13 MR. MCMAHON: Your Honor, just the, what I am
14 going to submit to the Court is seven copies of the
15 transcripts from these phone calls. The recording number on
16 the first page of each call has the year, the month, the
17 day, the hour, the minute and the seconds. It is a call
18 that defendant placed on February 2nd, which was prior to
19 indictment. Defendant was arrested on the 21st. Because of
20 the arranging the defendant's testimony in the end of the
21 grand jury term there was a waiver of time till the
22 following week, so at the time of this phone call the
23 defendant had not yet been indicted and he says on page six
24 to, the person he is speaking to he calls mom, but I don't
25 actually believe is his mother, defendant says, no, I have

1 MR. MCMAHON: No, that is not our position, but
2 one I am reasonably confident he will fall short of it.

3 THE COURT: The standard of that is so low that I
4 am reasonably confident that he could do that, he could pass
5 it.

6 MR. MCMAHON: I defer to Your Honor then.

7 THE COURT: I am not sure he would pass the
8 conduct himself in a manner that is appropriate, part of the
9 test is to comport himself in the way that we expect a
10 lawyer to do, but historically I let a lot of people go pro
11 se when the requests are timely and unequivocal, it seems
12 the right thing. If he asked to go pro se the week before
13 trial, before jury selection, I would have allocuted him,
14 told him about the dangers, let him go pro se. But in this
15 context, no, I am not going to do that. And there is no
16 point in allocuting him because I am not going to let him go
17 pro se even if I find he is able to do that at this point.
18 We are in the middle of a trial. What am I going to do,
19 grant a mistrial and let him go pro se? That would be
20 crazy. This does not come from your Appeals Division?

21 MR. MCMAHON: It did not.

22 (WHEREUPON, THERE WAS A PAUSE IN THE PROCEEDINGS)

23 THE COURT: If we have the jurors let's bring them
24 in.

25 COURT CLERK: Last I checked we were missing

Sentence

1 THE COURT: Mr. Crespo, would you like to
2 say anything?

3 THE DEFENDANT: There is no decision. I
4 do what I have to do.

5 I didn't attend trial because I have so
6 many things on my mind. I was not trying to be
7 rude to nobody here. It's your decision. It's up
8 to you, you know.

9 What else can I say?

10 I just want my trial minutes and every
11 single paper that I could get from my trial because
12 I was not present. I would like to receive it.
13 It's up to you.

14 THE COURT: Well, there will, of course,
15 be an appeal of the case and the minutes will be
16 provided through the appeal process.

17 This was a vicious stabbing. It was
18 unprovoked. Whether or not Mr. Crespo was the
19 person who actually started the fight with words
20 it's not clear to me that he didn't start it even
21 though the so-called witness who was the only
22 witness who was not interested, as Mr. Conza puts
23 it, heard the victim speak the first words. She
24 only saw a portion of the incident.

25 It's also true that Mr. Crespo has an

**DISTRICT ATTORNEY
COUNTY OF NEW YORK
ONE HOGAN PLACE
New York, N. Y. 10013
(212) 335-9000**



CYRUS R. VANCE, JR.
DISTRICT ATTORNEY

December 14, 2016

The Honorable Leslie E. Stein
Judge of the Court of Appeals
New York Court of Appeals
20 Eagle Street
Albany, New York 12207

Re: People v. Raymond Crespo
N.Y. Co. Indictment No. 519/2013

Dear Judge Stein:

The People respectfully submit this letter in support of their application for leave to appeal in the above-referenced case. This case concerns a criminal defendant's right to self-representation, as limited by People v. McIntyre, 36 N.Y.2d 10 (1974). There, this Court held that trial courts have discretion to deny untimely motions to proceed pro se. Id. at 17. A motion to proceed pro se is timely, McIntyre explained, if it is made "before the trial commences." Id. In this case, defendant first asked to represent himself near the end of jury selection. The question that the People ask the Court to resolve is: Does a jury trial "commence" at the start of jury selection for purposes of deciding the timeliness of a motion to proceed pro se?

This is a question of statewide importance. It has been 30 years since this Court last decided whether a motion to proceed pro se made around the time of jury selection was timely. See People v. Smith, 68 N.Y.2d 737, 738-39 (1986) (finding, by a 4-3 margin, that a pro se motion made when a venire panel was in the courtroom was timely, and noting that the motion came "[p]rior to jury selection"); but see id. at 743 (Kaye, J., dissenting) (motion was untimely because it came "at the commencement of trial"). Significantly, this Court has never explicitly addressed the timeliness of a mid-jury selection request to proceed pro se in a case where the Criminal Procedure Law—which states that "[a] jury trial commences with the selection of the jury" (CPL § 1.20[11])—applied. Indeed, as noted above, in Smith the defendant made the request before jury selection, and, in finding the request timely, the Court simply cited to McIntyre. However, as explained below, in McIntyre the Court was interpreting the now-defunct Code of Criminal Procedure, and, subsequently, there have been significant changes in the relevant legal landscape. Accordingly, decisions from lower

DISTRICT ATTORNEY COUNTY OF NEW YORK

Hon. Leslie E. Stein

2

March 29, 2017

courts in this State as to when a jury trial “commences” for purposes of evaluating the timeliness of a pro se motion are in tension with: the CPL’s plain terms; the rationale behind McIntyre’s rule requiring that pro se motions be made before trial; this Court’s own post-McIntyre statements that jury selection is a component of a jury trial; and the decisions of nearly two dozen state and federal courts holding that pro se motions made after the start of jury selection are untimely. Therefore, the Court should grant leave to appeal to clarify when a motion to proceed pro se in a jury trial is timely. More generally, the Court has recognized that “the multifaceted problems generated by a motion to proceed pro se make the task of the trial court exceedingly difficult.” People v. Crampe, 17 N.Y.3d 469, 483 (2011) (brackets and ellipsis omitted). Thus, the Court’s guidance in this particular area of the law would be especially beneficial.

Factual and Procedural Background

On January 21, 2013, defendant stabbed Pedro Garcia in the back after an altercation outside of a Manhattan restaurant. A police officer arrested defendant after seeing him repeatedly thrust his hand into Garcia’s torso, then flee. Garcia spent three weeks in the hospital, having suffered a partially collapsed lung and a broken rib.

On February 11, 2013, a grand jury charged defendant with one count each of Attempted Murder in the Second Degree (Penal Law §§ 110.00, 125.25[1]), Assault in the First Degree (id. § 120.10[1]), and Criminal Possession of a Weapon in the Third Degree (id. § 265.02[1]). On February 26, 2013, defendant was arraigned in Supreme Court and assigned counsel. As detailed in the People’s Brief before the Appellate Division, pp. 9-13, about 20 months later, immediately after a hearing at which the trial court denied defendant’s motion to suppress physical evidence, defendant requested new counsel, later claiming that he “didn’t feel the vibe” with his attorney. When the court denied this request, defendant vowed to disrupt the trial and absented himself from portions of the ensuing proceedings, including most of jury selection. On October 24, 2014, after eleven jurors had been selected and sworn, defendant—for the first time—stated that he wished to represent himself. The trial court denied the motion to proceed pro se as untimely. The court later added that the motion was “simply manipulation” and, in light of defendant’s request for new counsel, it was not a “clear and unequivocal request” to go pro se (People’s Brief, pp. 17-18). The court completed jury selection and proceeded to opening statements that day.

On October 30, 2014, the jury acquitted defendant of attempted murder but convicted him of first-degree assault and third-degree weapon possession. On December 19, 2014, defendant was sentenced, as a persistent violent felony offender, to an aggregate term of twenty years to life imprisonment.

DISTRICT ATTORNEY COUNTY OF NEW YORK

Hon. Leslie E. Stein

3

March 29, 2017

Defendant appealed to the Appellate Division, First Department. On appeal, he argued that the trial court violated his right to self-representation. The Appellate Division agreed and reversed the judgment “on the law.” People v. Crespo, 40 N.Y.S.3d 423, 424 (1st Dep’t 2016). As relevant here, the Appellate Division, relying on McIntyre, held that defendant’s application to proceed pro se was timely because he made it before the People’s opening statement. Id. at 425. The Appellate Division rejected the People’s argument that a timely motion to proceed pro se in a jury trial must be made before the start of jury selection. Id.

Timeliness

McIntyre recognized that a criminal defendant’s right to self-representation “is not absolute but subject to certain restrictions” designed “to promote the orderly administration of justice and to prevent subsequent attack on a verdict claiming a denial of fundamental fairness.” 36 N.Y.2d at 17. One such restriction is that a request to go pro se must be “timely asserted.” Id. McIntyre laid down a rule for determining the timeliness of motions to go pro se: “[W]e deem a Pro se application to be timely interposed when it is asserted before the trial commences.” Id. “Prior to the commencement of the trial,” the Court reasoned, “the potential for obstruction and diversion is minimal,” as “[a]t that juncture the court may conduct a thorough inquiry thereby averting delay and confusion.” Id. But “[o]nce the trial has begun,” the Court warned, the right to proceed pro se “is severely constricted and will be granted in the trial court’s discretion and only in compelling circumstances.” Id. In McIntyre, the Court found that the defendant’s motion to proceed pro se, which was made “[a]fter the jury had been drawn but not yet impaneled,” was timely, “having been interposed prior to the prosecution’s opening statement.” Id. at 12, 18.

At the time of the trial at issue in McIntyre, the since-superseded Code of Criminal Procedure was still in effect (see People’s Brief, p. 29). Section 388 of the Criminal Code governed “[i]n what order [the] trial [was] to proceed,” and the first subsection provided: “1. The district attorney, or other counsel for the people, must open the case” (id.). Citing the Criminal Code, this Court held in People ex rel. Steckler v. Warden of City Prison, 259 N.Y. 430 (1932), that “‘trial’ covers only so much of a criminal prosecution as begins with the opening of the case to the jury and ends with the verdict,” and “does not include the ... formation of the trial jury.” McIntyre cited both the Criminal Code and Steckler to support its finding that the defendant’s request to go pro se was timely because it came before the People’s opening statement. McIntyre, 36 N.Y.2d at 18. Apart from citations, McIntyre offered no explanation for its conclusion that the trial at issue in that case began with the People’s opening. Thus, McIntyre drew the line at the People’s opening because,

DISTRICT ATTORNEY COUNTY OF NEW YORK

Hon. Leslie E. Stein

4

March 29, 2017

at the time the defendant in that case was convicted, “trial” began with the People’s opening statement as a matter of law.

That is no longer the case. Effective September 1, 1971, the CPL replaced the “distinctly archaic” Criminal Code (Commission Staff Comment for Chapter 11-A, Consolidated Laws Service: Criminal Procedure Law [1971], p. 1-18; see L.1970, ch. 996, § 5). Section 1.20 of the CPL included a “partial lexicography” (Commission Staff Comment for CPL § 1.20, p. 1-24). The commentary to Section 1.20, prepared by the Temporary Commission on Revision of the Penal Law and Criminal Code, explained that “[s]ome of the instant definitions are deliberately designed to change the meanings which certain terms have or are construed to have under the Criminal Code” (id.). The commentary identified CPL § 1.20(11), defining the term “Trial,” as one such definition (id.). CPL § 1.20(11) stated then, as it does now, that “[a] jury trial commences with the selection of the jury.” Critically, the commentary observed that “Subdivision 11 probably changes the meaning of the word ‘trial,’ at least with respect to a jury ‘trial.’ A jury trial, under the Criminal Code, commences with the people’s opening address and concludes with the court’s charge. Under the proposed section, it encompasses everything from the selection of the jury through the verdict” (Commission Staff Comment for CPL § 1.20, pp. 1-24–1-25) (citations omitted). Section 260.30 of the CPL, which supplanted Section 388 of the Criminal Code as the provision governing “in what order [a jury trial is] to proceed,” likewise included jury selection within the meaning of “jury trial.” See CPL § 260.30 (“The order of a jury trial, in general, is as follows: 1. The jury must be selected and sworn.”).

Since McIntyre, this Court, too, has recognized that jury selection is a stage of “trial.” In that regard, People v. Mullen held that a defendant’s right to be “personally present during the trial of an indictment” (CPL § 260.20) included the right to be present for “the impaneling of the jury.” 44 N.Y.2d 1, 4 (1978). In People v. Martin, this Court wrote that a defendant’s right to a “public trial” “extends to the voir dire portion of a trial.” 16 N.Y.3d 607, 611 (2011). And, notably, just two years ago in People v. Stone, the Court described the defendant’s request to go pro se—which he made “while voir dire was underway”—as having been made “[a]t his jury trial.” 22 N.Y.3d 520, 522-23 & n.1 (2014).¹

Despite all of this, the Appellate Division here, and other courts in this State, have wrongly relied on McIntyre to hold that a jury trial begins with the People’s

¹ The issue in Stone, however, was “whether defendant’s constitutional rights were violated by the trial court’s failure to sua sponte inquire into his mental capacity to represent himself prior to granting his application to proceed pro se.” 22 N.Y.3d at 522.

DISTRICT ATTORNEY COUNTY OF NEW YORK

Hon. Leslie E. Stein

5

March 29, 2017

opening statement. See Crespo, 40 N.Y.S.3d at 425 (citing cases).² Tellingly, not one of those cases explains how allowing a defendant to go pro se in the middle of jury selection furthers the objectives behind McIntyre's rule requiring that pro se motions be made before trial. This failure is unsurprising, because deeming pro se motions made during jury selection to be timely undercuts the very reasons why pro se motions must be made before trial in the first place—namely, to “avert[] delay and confusion” and to “promote the orderly administration of justice.” McIntyre, 36 N.Y.2d at 17; accord id. (“Prior to ... trial, the potential for obstruction and diversion is minimal.”); United States v. Dunlap, 577 F.2d 867, 868 (4th Cir. 1978) (purpose of timeliness rule is “to minimize disruptions, to avoid inconvenience and delay, to maintain continuity, and to avoid confusing the jury.”).

In that regard, a number of courts have noted that granting a request to go pro se during, or even just before, jury selection necessarily entails delay. See, e.g., Hill v. Curtain, 792 F.3d 670, 681 (6th Cir. 2015); State v. Christian, 657 N.W.2d 186, 192-93 (Minn. 2003) (quoting Robards v. Rees, 789 F.2d 379, 382 [6th Cir. 1986]). Indeed, in Stone, after the trial court granted the defendant's mid-jury selection request to go pro se, the court declared a mistrial, dismissed the jurors that had been sworn, and began voir dire anew. 22 N.Y.3d at 523 n.1. Delay is all but certain, courts have explained, because granting a request to go pro se without granting a continuance results in juror confusion, see State v. Hardy, 4 A.3d 908, 917 (Md. 2010) (“[B]ecause defense counsel's trial strategy may affect the questions and challenges posed during voir dire, jurors may be confused when a defendant's motion to discharge counsel is granted and defendant embarks on abrupt and apparent change to that strategy.”), and a disorderly trial bungled by “an unprepared defendant,” State

² Although McIntyre cited CPL §§ 1.20(11) and 260.30, in addition to the Criminal Code and Steckler, in finding the defendant's pro se motion timely, McIntyre, 36 N.Y.2d at 18, the citation to the CPL does not mean the Court considered the CPL to be “supporting authority for the [] holding that ... the juncture at which the ‘trial’ commences is prior to the prosecution's opening statement.” People v. Matsumoto, 2 Misc.3d 130(A), at *1 (App. Term. 2d Dep't 2004). As explained above, the CPL—by “deliberate[] design[]”—changed the meaning of “jury ‘trial’” to include “the selection of the jury” (Commission Staff Comment for CPL § 1.20, pp. 1-24–1-25). Moreover, when the defendant in McIntyre asked to represent himself, “the selection of the jury” had already been completed, see People v. McIntyre, 41 A.D.2d 776, 777 (2d Dep't 1973) (Hopkins, J., dissenting) (noting that pro se request came “after the jury had been chosen”), meaning that his request would have been untimely applying the CPL's definition of “trial.” Thus, the idea that McIntyre read the CPL as supporting its timeliness ruling is untenable. The only plausible explanation for McIntyre's citation to the CPL using the signal “see” is that the Court was distinguishing the CPL from the Criminal Code and Steckler, the authorities upon which it actually relied.

DISTRICT ATTORNEY COUNTY OF NEW YORK

Hon. Leslie E. Stein

6

March 29, 2017

v. Gomez, 863 S.W.2d 652, 656 (Mo. App. 1993). Thus, no matter what course of action a trial court takes when faced with a mid-jury selection request to proceed pro se, the court's decision will thwart the objectives of the timeliness rule. See generally People v. Tineo, 64 N.Y.2d 531, 536 (1985) (trial court's discretion is "especially broad when the defendant's actions ... place the court in the dilemma of having to choose between undesirable alternatives, either one of which would theoretically provide ... a basis for appellate review"). As the court in Gomez put it: "Allowing an untimely motion to proceed pro se would either require a continuance, which is not the intended use of the right, or would require the proceedings to proceed as scheduled which would not be fair to the parties involved, especially an unprepared defendant."³ 863 S.W.2d at 656 (citation omitted). In sum, the notion that a request to go pro se during jury selection is timely is fundamentally incompatible with the rationale underlying the rule that pro se requests must be made before trial.

Given the inevitable delay, disorder, or juror confusion flowing from granting a mid-jury selection motion to go pro se, it is understandable that the "consensus" among courts is that "meaningful trial proceedings" start "as soon as the selection of jurors begins," rendering subsequent requests to go pro se untimely. Commonwealth v. El, 977 A.2d 1158, 1163 (Pa. 2009); accord United States v. Walker, 142 F.3d 103, 108 (2d Cir. 1998) (motion to proceed pro se made "just after the start of jury selection was a motion made after the start of trial" and, thus, untimely) (citation and internal quotation marks omitted); State v. Cornell, 878 P.2d 1352, 1364 (Ariz. 1994) ("It is uniformly held that all motions for pro per status made after jury selection has begun are untimely.") (brackets omitted); Christian, 657 N.W.2d at 192-93; Robards, 789 F.2d at 382; Hardy, 4 A.3d at 917; Gomez, 863 S.W.2d at 656; United States v. Oakey, 853 F.2d 551, 553 (7th Cir. 1988); United States v. Wright, 682 F.3d 1088, 1090 (8th Cir. 2012); People v. Valdez, 82 P.3d 296, 299 (Cal. 2004); State v. Pires, 77 A.3d 87, 106 (Conn. 2013); Muto v. State, 843 A.2d 696, at *1-2 (Del. 2004); Moore v. State, 557 N.E.2d 665, 669 (Ind. 1990); State v. Cuddy, 921 P.2d 219, 223 (Kan. 1996); Commonwealth v. Chapman, 392 N.E.2d 1213, 1217 (Mass. 1979); People v. Hill, 773 N.W.2d 257, 257 (Mich. 2009), habeas denied, Hill, 792 F.3d at 681; Lyons v. State, 796 P.2d 210, 214 (Nev. 1990), abrogated on other grounds by Vanisi v. State, 22 P.3d 1164 (Nev. 2001); State v. Holmes, 2012 WL 4093559, at *5

³ It bears noting that allowing a defendant to begin representing himself in the middle of jury selection creates a substantial risk of prejudice to the People. A defendant's pro se status could certainly affect the questions that the People ask during voir dire, the jurors they select, and, ultimately, the People's trial strategy. See Commonwealth v. Vaglica, 673 A.2d 371, 373 (Pa. Super. Ct. 1996) ("A defendant's trial strategy can influence the jurors selected, and the jurors selected can determine trial strategy.").

DISTRICT ATTORNEY COUNTY OF NEW YORK

Hon. Leslie E. Stein

7

March 29, 2017

(N.J. Super. Ct. App. Div. Sept. 19, 2012); State v. Cassano, 772 N.E.2d 81, 91 (Ohio 2002); State v. Abernathy, 2005 WL 3447672, at *4 (Tenn. Crim. App. Dec. 14, 2005); State v. Sheppard, 310 S.E.2d 173, 189-90 (W. Va. 1983); State v. Cooper, 2016 WL 5922839, ¶¶ 23-28 (Wis. Ct. App. Oct. 12, 2016); Scott v. State, 278 P.3d 747, 752-53 (Wyo. 2012).

In short, the idea that a mid-jury selection motion to proceed pro se is timely not only clashes with the plain terms of CPL and undermines the rationale behind the timeliness rule, it also runs counter to the weight of authority on the issue.

* * *

For the reasons set forth above, the People respectfully request leave to appeal the Appellate Division's decision reversing defendant's convictions for first-degree assault and third-degree weapon possession.

Respectfully submitted,



Stephen J. Kress
Assistant District Attorney
(212) 335-9607

cc: Ben A. Schatz, Esq.
Center for Appellate Litigation
120 Wall Street
New York, New York 10005