No. _____

IN THE

Supreme Court of the United States

VLADIMIR DUARTE,

Petitioner,

v.

STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When a defendant makes an "unequivocal" request for self-representation, the court must, under *Faretta v. California,* 422 U.S. 806, 835-836 (1975), permit self-representation upon finding that the defendant has knowingly and voluntarily waived the right to counsel with "eyes open." The question presented is whether, when assessing whether the self-representation request is unequivocal, does a court assess only the plain language of the self-representation request, or must the court also determine whether, given the entire record, it appears that the defendant sincerely desires self-representation?

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The opinion of the New York Court of Appeals (App. 1a) is reported at 183 N.E.3d 1205. The opinion of the Appellate Term, Supreme Court of New York, First Judicial Department is unpublished and can be found at 134 N.Y.S.3d 123 (Table) (2020). App. 15a. The relevant proceedings and order from the trial court are unpublished.

JURISDICTION

The judgment of the New York Court of Appeals was entered on February 15, 2022, making this petition due May 16, 2022. This Court has jurisdiction over the federal question presented under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISION

The Sixth Amendment to the Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." U.S. CONST. AMEND. VI.

INTRODUCTION

Decades ago, *Faretta v. California,* 422 U.S. 806 (1975), recognized that the Sixth Amendment guarantees a "fundamental" and "basic" right to self-representation. *Id.* at 817, 832-34. *Faretta* accordingly held that when a defendant "clearly and unequivocally declare[s] . . . that he want[s] to represent himself," a court must let the defendant proceed without counsel if that decision is made knowingly and voluntarily with "eyes open." *Id.* at 835-36. Lower appellate courts have therefore read *Faretta* to mandate a two-step analysis: (1) the defendant must unequivocally

request self-representation and (2) the court must, through inquiry, determine whether the defendant is knowingly and voluntarily waiving the right to counsel.[1]

But the federal circuit courts and state courts of last resort are split on how to assess whether a request is unequivocal. Numerous courts, including the Third, Sixth, Seventh, and Eleventh Circuits, employ a simple approach, inquiring whether the *words* of the defendant's request are unequivocal. *E.g.*, *Dorman v. Wainwright*, 798 F.2d 1358, 1366-67 (11th Cir. 1986), *cert denied* 480 U.S. 951 (a defendant "must do no more than state his request, either orally or in writing, unambiguously to the court so that no reasonable person can say that the request was not made"). In turn, step two of the analysis is triggered, and the court inquires into the knowing and voluntary nature of the request.

On the other hand, several federal circuit courts, such as the Fourth and Tenth Circuits, have rejected this plain-language approach. Instead, those courts permit the trial court, before ever reaching the Step 2 inquiry, to dismiss a defendant's facially unequivocal pro se request if it appears to stem from "insincere" motives, such as an effort to delay proceedings or seek new counsel.

The New York Court of Appeals applied this sincerity approach here. Before trial, Petitioner clearly asserted, "I would love to go pro se." But the court ignored his

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[1] *E.g.*, *United States v. Cano*, 519 F.3d 512, 516 (5th Cir. 2008); *United States v. Peppers*. 302 F.3d 120, 132 (3d Cir. 2002), *cert denied* 537 U.S. 1062; *Cross v. United States*, 893 F.2d 1287, 1290 (11th Cir. 1990), *cert denied* 498 U.S. 849; *United States v. McDowell*, 814 F.2d 245, 249 (6th Cir. 1987), *cert denied* 484 U.S. 980; *Johnstone v. Kelly*, 808 F.2d 214, 216 (2d Cir. 1986), *cert denied* 482 U.S. 928 (1987); *People v. McIntyre*, 36 N.Y.2d 10, 17 (1974); Wayne R. LaFave, 3 Crim. Proc. § 11.5(c) (4th ed.).

request, effectively forcing him to proceed with assigned counsel at trial, where he was convicted. The New York Court of Appeals held that Mr. Duarte's request "d[id] not reflect a definitive commitment to self-representation" based on the "record as a whole," the "surrounding circumstances," and Mr. Duarte's "demeanor." App. 3a. Instead, Petitioner's real motive, the Court found, was to secure new counsel. *Id.* (citing *People v. Gillian*, 8 N.Y.3d 85, 88 (2006) and *People v. LaValle*, 3 N.Y.3d 88, 106 (2004)). The Court also speculated as to the trial court's perceptions of Mr. Duarte's sincerity, finding that "the record demonstrates that [as] the court did not clearly deny the purported request," "the request was not considered genuine in the first instance." App. 3a n*.

In considering the sincerity of Petitioner's "commitment" to self-representation, and not merely the clarity of the words he employed, the Court of Appeals "graft[ed]" a "sincerity criterion" onto the "factors governing waiver of the right to counsel." *United States v. Frazier-El*, 204 F.3d 553, 567 (4th Cir. 2000) (Murnaghan, J., dissenting), *cert denied* 531 U.S. 994. But this sincerity approach ignores that a defendant's "motivations . . . for stating a pro se request . . . have nothing to do with the request's clarity and unequivocality." *Id.* At the unequivocal-request stage of the inquiry, *Faretta* requires a clear *request*, not, in addition, a clear *motivation*. *Faretta*, 422 U.S. at 835-36.

This Court should grant this petition to resolve the split and reject the speculation required by the "sincerity" approach, perfectly exemplified by the New York Court of Appeals' decision below. That approach's insistence on speculation about a

defendant's true desires leaves arbitrary discretion in the trial judge's hands and has no place in the context of fundamental rights. *See, e.g., Blakely v. Washington*, 542 U.S. 296, 308, 313 (2004). The defendant's real reasons for requesting self-representation may bear on whether the defendant is in fact voluntarily and knowingly seeking self-representation. *Buhl v. Cooksey*, 233 F.3d 783, 788 (3d Cir. 2000). But, as the Third Circuit has confirmed, courts should address these waiver concerns after conducting Step 2 of the *Faretta* analysis, where a complete record can be developed about the waiver's knowing and voluntary nature. *United States v. Welty*, 674 F.2d 185, 189 (3d Cir. 1982).

Lacking guidance from this Court on this critical and constantly recurring equivocality question, our nation's courts have split and confusion has ensued. This Court should settle this debate once and for all here.

STATEMENT OF THE CASE

A. The Trial-Court Record

"I would love to go pro se." These seven words, asserted by Petitioner prior to the commencement of a pre-trial suppression hearing on June 2, 2017, several days before his misdemeanor trial, were ignored by the New York criminal court judge. The court did not address the request but simply moved forward with the hearing. App. 101a.

This proceeding was Mr. Duarte's first appearance before this judge. App. 12a, 55a-63a. At the onset of the hearing, Mr. Duarte expressed his dissatisfaction with appointed counsel. App. 100a. He indicated that counsel was ineffective, had never

met with him, and believed he was guilty. App. 100a. Mr. Duarte added that he "wished for [counsel] not to represent me at all because he's ineffective and he doesn't believe that I did not do this." App. 100a. The court denied that request and Mr. Duarte objected to the court denying him effective counsel. App. 101a. The court then said, "call the first [pretrial hearing] witness." App. 101a.

Mr. Duarte immediately declared, "I would love to go pro se." App. 101a. The court ignored the request, *id.*, and Mr. Duarte was represented by counsel at his bench trial. Mr. Duarte was convicted of the misdemeanor charges of forcible touching and second-degree sexual abuse. App. 15a. He was sentenced to one year in jail. App. 27a.

B. Appellate Proceedings

On appeal, Mr. Duarte argued that his statement, "I would love to go pro se," was a clear and unequivocal self-representation request, thus requiring an inquiry into whether the waiver of the right to counsel was knowing and voluntary under *Faretta v. California*, 422 U.S. 806 (1975). App. 28a.

The New York intermediate appellate court rejected this argument, finding, upon "[v]iewing the record as a whole," that Mr. Duarte's request to proceed pro se was insufficient "to express the 'definitive commitment to self-representation' that would trigger the need for a full inquiry by the court." App. 16a (quoting *People v. LaValle*, 3 N.Y.3d 88, 106 (2004)). The court reasoned that, "[r]ather than being unequivocal, [Mr. Duarte]'s expression of a desire to represent himself came within the context of his complaints about his counsel." App. 16a-17a (citing *People v. Gillian*, 8 N.Y.3d 85, 88 (2006)).

Before the New York Court of Appeals, Mr. Duarte again argued that "once the unequivocal request has been made," a *Faretta* inquiry was required. App. 31a-32a. "[T]he mere fact that a defendant's pro se request 'came within the context of his complaints about his counsel'" did not "render[ ] it equivocal." App. 41a. Although the trial court "was not required to grant the pro se request[,] if it determined, upon its inquiry, that [Petitioner] was not making a knowing waiver of counsel or was engaged in conduct 'calculated to undermine' [trial]," the "summary denial of an explicit pro se request without any inquiry was reversible error." App. 43a-44a.

The State answered that Mr. Duarte's "isolated remark … made immediately after the trial judge rejected his second application for substitution of his appointed counsel amount[ed] to an equivocal request." App. 54a. Characterizing the request as "flippant," the State contended that, "[w]hen viewed in its proper context, it is plain [Mr. Duarte's] remark was simply part of a larger attempt to persuade the trial court to replace [ ] his appointed attorney. At a minimum, it was nothing more than a tongue-in cheek comment." App. 75a. The State divined that "defendant's only goal was to convince the trial court to discharge [defense counsel] and provide him with a new attorney." App. 76a.

In reply, Mr. Duarte argued that under the State's approach, a "court must mine" the record "to assess whether a facially-unequivocal [*Faretta* request] was actually something else." App. 87a. This "hindsight-oriented standard" invites "trial courts [to] speculate about the inner workings of a defendant's mind to determine whether they can summarily ignore [the request]," thus "prioritiz[ing] subjective inferences

over a defendant's plain words." App. 87a. Even "if the trial court did believe [Mr. Duarte's] words were 'tongue-in-cheek' or manipulative as [the State] argues, it was still obligated to" conduct an inquiry. App. 88a n.2.

C. The Majority Opinion

A divided Court of Appeals affirmed. The Court explained that Petitioner "referenced the unsuccessful application to relieve his assigned counsel at his prior appearance, and he renewed that application, claiming that counsel was 'ineffective.'" App. 2a-3a. Thus, the "defendant's [subsequent] retort, 'I would love to go pro se,' immediately after the court's denial of his applications 'did not reflect a definitive commitment to self-representation' that would trigger a searching inquiry by the trial court." App. 3a (citing *LaValle*, 3 N.Y.3d at 106; *Gillian*, 8 N.Y.3d at 88).

The Court added that "[w]hether defendant's statement was an unequivocal request in the context of the Sixth Amendment is determined by the facts of the surrounding circumstances in the case as well as defendant's conduct, including manner of expression, demeanor, and word choices." App. 3a at n.* (citing, among other authority, *Fields v. Murray*, 49 F.3d 1024, 1029-1032 (4th Cir. 1995)). The Court found that because the trial court did not address Mr. Duarte's request, the trial court apparently did not consider it "genuine in the first instance." *Id.*

In *LaValle* and *Gillian*, relied upon by the majority, the defendants requested self-representation.[2] But the New York Court of Appeals held that both requests did not

[2] *See Gillian*, 8 N.Y.3d at 87 (defendant "advised the court that he wanted to proceed pro se" because counsel had "'done nothing' for him" and later "moved in writing for reassignment of counsel or, in the alternative, the opportunity to proceed

reflect a "definitive commitment to self-representation" because the defendant's actual motive appeared to be substitution of counsel, not self-representation. As *Gillian* held, the defendant's request was equivocal because "defendant raised the argument for self-representation as a way of obtaining the dismissal of his first assigned counsel"; defendant's "objections . . . were made not because defendant wanted to proceed pro se, but because he was dissatisfied with [counsel]." 8 N.Y.3d at 88. And as *LaValle* put it two years earlier, the defendant's self-representation request appeared to be a "means of procuring" new counsel and was thus not unequivocal. 3 N.Y.3d at 106-07.

D. The Dissent

Highlighting this "consequential" constitutional issue, App. 7a, Judge Jenny Rivera, joined by Judge Rowan Wilson, dissented. Judge Rivera's dissent concluded that Petitioner clearly and unequivocally requested self-representation, thus triggering the need for an inquiry. App. 4a-5a. The court "need only read the words on the page," App. 7a, because the "[d]efendant's words do not lend themselves to any other interpretation." App. 9a. "To the extent there was any uncertainty about [his] sincerity, the proper course was for the court to confirm his intent rather than ignore

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pro se"); *LaValle*, 3 N.Y.3d at 105-106 (defendant disagreed with counsel's strategy regarding conceding some elements of the State's case and told the court, "Your Honor, if you are telling me that I have to respect and listen to my lawyers[']views on how to attack this case, I would have to disagree with you. I would ask that you would dismiss my lawyers and if I could represent myself. . . . The only thing I see and that's my last option is to represent myself, not that I want to, I don't know [anything] about the law, but at least I have a chance to prove my innocence.").

him. Something as simple as 'Are you asking to represent yourself?' would have eliminated any possible doubt as to whether defendant meant what he said and guaranteed protection of defendant's constitutional right." App. 9a-10a. The majority had "complicat[ed]" a "straightforward judicial task: When a defendant says they want to represent themselves, a court must inquire into that request to ensure it is made knowingly and intelligently, and that the request is not merely an attempt to undermine or delay the proceedings." App. 13a.

This timely petition follows.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to settle a deep split in our nation's courts: when assessing whether a self-representation request is "unequivocal" under *Faretta*, 422 U.S. at 835-36, does a court focus solely on whether the words of the request are unequivocal ("plain-language approach"), or must a court also determine whether a facially clear request is motivated by a sincere desire for self-representation ("sincerity approach"). The decision below, applying the sincerity approach, deepens the long-standing conflict over whether the plain language of a defendant's self-representation request controls the unequivocal-request analysis. Given the critical implications of this debate for the "dignity of individual choice" and the right to be "master of [one's] fate rather than a ward of the State," *Indiana v. Edwards*, 554 U.S. 164, 186-187 (2008) (Scalia, J., dissenting), the petition should be granted.

I. Our nation's courts have split over the question presented.

Faretta addressed whether the Sixth Amendment guarantees a right to self-representation. 422 U.S. at 812-34. Holding that the self-representation right was firmly anchored in the text and purpose of the Sixth Amendment, as well as the history of our nation, *Faretta* held that the Sixth Amendment guaranteed the right. *Id.* In turn, *Faretta* found a Sixth Amendment violation because the trial court did not permit self-representation after Mr. Faretta "clearly and unequivocally declared to the trial judge that he wanted to represent himself." *Id.* at 835. *Faretta* further confirmed that the trial court must ensure that a defendant's waiver of the right to counsel is knowing, voluntary, and made with "'eyes open.'" *Id.* at 807, 835 (citing *Johnson v. Zerbst*, 304 U.S. 458, 464-65 (1938) and quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942)); *see also Von Moltke v. Gillies*, 332 U.S. 708, 723-24 (1948) (plurality op.) (court must conduct a searching inquiry into a waiver of the right to counsel).

But since *Faretta* was decided almost 50 years ago, this Court has never clarified how a court must determine whether a self-representation request is "unequivocal." *See Edwards*, 554 U.S. 164 and *Godinez v. Moran*, 509 U.S. 389 (1993) (both analyzing the interplay between competency to stand trial and competency to waive the right to counsel); *Iowa v. Tovar*, 541 U.S. 77 (2004) (self-representation right at the guilty-plea stage); *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.*, 528 U.S. 152 (2000) (self-representation right on appeal); *McKaskle v. Wiggins*, 465 U.S. 168 (1984) (appointment of stand-by counsel).

In filling the void left in *Faretta*'s wake, courts have split over the proper methodology for determining whether a self-representation request is sufficiently unequivocal. Two disparate approaches have emerged: the sincerity approach and the plain-language approach.

A. The Sincerity Approach

In analyzing whether a defendant has unequivocally requested self-representation, many appellate courts apply a sincerity analysis. Under that approach, a court must assess whether a defendant's self-representation request genuinely reflects a real desire to proceed without counsel. Only if a court finds that the defendant has a genuine and sincere desire for self-representation—as opposed to some other goal—do these courts find the request "unequivocal" under *Faretta*. *See Frazier-El*, 204 F.3d at 567 (Murnaghan, J., dissenting) (referring to this approach as the "sincerity thesis").

The Fourth Circuit endorsed the sincerity approach in *United States v. Bush,* 404 F.3d 263 (4th Cir. 2005), *cert denied* 546 U.S. 916. *Bush* held that, although the defendant's self-representation request was clear on its face, no *Faretta* inquiry was required because it appeared, from the "record as a whole," that the defendant was "engaged in an effort to manipulate and distort the trial process." *Id.* at 271-272. There, after expressing dissatisfaction with assigned counsel, the defendant stated: "I would rather be my own sacrificial pig and just go before the court on my own, by going pro se. I have that right, and I want to exercise it." *Id.* at 268. The District Court concluded that the defendant lacked a "genuine and sincere wish to represent

himself" because he seemed to really "want" something else, such as "a further postponement of the trial of this case," or "[a new] lawyer, someone he can control, someone who will do exactly what he says." *Id.* at 269. The defendant, the District Court claimed, "wants to make a mockery of these proceedings. That's what [he] wants." *Id.*

The Fourth Circuit affirmed the District Court's finding that "[the defendant] did not clearly and unequivocally assert the right" and thus there was no duty to inquire into defendant's request. *Id.* at 271. "[A] district court can," the Fourth Circuit held, "deny a request for self-representation when the request is made for purposes of manipulation because, in such cases, the request will not be clear and unequivocal. 'A trial court must be permitted to distinguish between a manipulative effort to present particular arguments and a sincere desire to dispense with the benefits of counsel.'" *Id.* at 271 (citing and quoting *Frazier-El,* 204 F.3d at 558).

Reviewing the "record as a whole," the Fourth Circuit reasoned that the defendant's clear request was equivocal because, given the circumstances and the "defendant's background," it was "made for purposes of manipulation." *Id.* at 271. Citing the defendant's decision to wear his orange jumpsuit to court, his reference to himself as a "sacrificial pig," and his dismissal of prior counsel because he would not file requested motions, the Fourth Circuit held that the District Court "was permitted to find that [the defendant] was engag[ing] in an effort to manipulate and distort the trial process." *Id.* at 272.

Bush found that the Tenth Circuit's decision in *United States v. Mackovich*, 209 F.3d 1227 (2000), *cert denied* 531 U.S. 905, provided "a helpful comparison." *Bush*, 404 F.3d at 272. There, defense counsel informed the court that the defendant was "attempting to represent himself" and the defendant personally asserted that he wanted a "continuance to represent [him]self or to seek other counsel." *Id.* at 1235-1236. The District Court conducted no *Faretta* inquiry.

The Tenth Circuit found no *Faretta* violation because, even assuming the defendant's request was facially unequivocal, his prior conduct—including his (1) "utiliz[ation] [of] appointed counsel," (2) basing his pro se request on counsel's refusal to file motions, and (3) threatening to "stand mute" and "withhold his participation" when the court denied his request for a continuance—"adequately support[ed] [a] finding that [the defendant] asserted his right to self-representation in an attempt to delay the trial and abuse the judicial process." *Id.* at 1237-38 & 1237 n.5.

The New York Court of Appeals employed the same subjective approach below. The Court did not find that Mr. Duarte's *words*—"I would love to go pro se"—were equivocal. Nevertheless, because, in the Court of Appeals' view, Mr. Duarte did not mean what he said and really just wanted new counsel, his request was equivocal. App. 3a & 3a n.* (citing *LaValle*, 3 N.Y.3d at 106 (assessing the defendant's motive); *Gillian*, 8 N.Y.3d at 88 (same)).

Other circuit courts and state supreme courts have similarly held that courts can, in assessing equivocality, looks through a defendant's otherwise clear words and

assess sincerity.[3] The Nebraska Supreme Court recently found a facially clear request equivocal because, among other factors, the "defendant's recognition that he lacked the legal knowledge to effectively represent himself casts considerable doubt on any notion that he *actually wanted* to represent himself in the absence of counsel to advise him." *State v. Ely*, 945 N.W.2d 492, 502 (Neb. 2020) (emphasis added). "Where there is doubt as to whether a defendant actually desired to waive his right to counsel and invoke his or her right to self-representation, the request cannot be fairly described as clear and unequivocal." *Id.*

The North Dakota Supreme Court has followed a similar pattern. In *State v. Torkelsen*, 752 N.W.2d 640, 655-56 (N.D. 2008), the defendant "insist[ed] that . . . I

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[3] *United States v. Kelly*, 787 F.3d 915, 918 (8th Cir. 2015), *cert denied* 577 U.S. 877 (defendant stated that since the court would not provide new counsel, "I would like to move for the court to allow me to represent myself;" Eighth Circuit held that "[c]onsidering the totality of the circumstances, we agree with the district court that [the defendant's] request was [not] unequivocal[,]" but "was a 'manipulative effort to present particular arguments' rather than 'a sincere desire to dispense with the benefits of counsel.'"); *Burton v. Collins*, 937 F.2d 131, 133-134 (5th Cir. 1991), *cert denied* 502 U.S. 1006 (court refused to discharge counsel and defendant said, "May I represent myself?"; request found equivocal because it "indicated dissatisfaction with his attorney."); *Commonwealth v. Davido*, 868 A.2d 431, 439-440 (Penn. 2005), *cert denied* 546 U.S. 1020 (finding, upon "a review of federal case law, "that the courts generally consider a myriad of factors in concluding whether a request was unequivocal," and then holding that, "based on the totality of the circumstances," defendant's request was "a bargaining device," not "a clear demand for self-representation."); *People v. Marshall*, 931 P.2d 262, 272-73, 275 (Cal. 1997) (a "motion for self-representation made in passing anger or frustration, an ambivalent motion, or one made for the purpose of delay or to frustrate the orderly administration of justice may be denied" as equivocal; here, defendant's "statements did not represent an unequivocal and sincere invocation of the right of self-representation, [as] they were made for the purpose of delay rather than in a sincere effort to secure self-representation").

alone sit here and be allowed to [question a witness] so I'm not tugging on [counsel's'] sleeve and being ignored . . . Now either [counsel is] going to ask [certain questions] or I'll sit here and ask him. It will take me longer in between questions, but at least . . . there will be some thought put into each question." Instead of analyzing whether the defendant, through his words, "clearly and unequivocally declared" that he "wanted to represent himself," *Faretta*, 422 U.S. at 835-36, the North Dakota Supreme Court found the request equivocal because, viewed in "context," it was "an impulsive, emotional response to his frustration with his attorney." 752 N.W.2d at 656.

In so holding, the North Dakota Supreme Court relied upon the Eighth Circuit's decision in *Reese v. Nix*, 942 F.2d 1276, 1280-1281 (8th Cir. 1991), *cert denied* 502 U.S. 1113, which also focused on whether the defendant's request appeared to be an "expression of frustration." *See id.* (defendant's statement that "I don't want no counsel then" was equivocal because it was "an expression of frustration over the trial court's decision to deny his request for new counsel").

For its part, the Second Circuit cannot settle on an approach. On one hand, that Court has held that a request is not "equivocal" because a defendant appears to principally desire new counsel. *Williams v. Bartlett*, 44 F.3d 95, 100-01 (2d Cir. 1994).

On the other hand, the Second Circuit has more recently held just the opposite, holding that a "letter which contained a motion 'to proceed pro se'" and was "clearly styled as a motion for self-representation" was equivocal because defendant's principal concern appeared to be obtaining new counsel. *United States v. Abdur-*

Rahman, 512 Fed.Appx. 1, *3-4 (2d Cir. 2013), *cert denied* 571 U.S. 1170. The Second Circuit has even suggested that the unequivocal-request inquiry may require a frequency analysis—only *two* clear and unequivocal requests will suffice to satisfy the sincerity requirement. *See id.* at *4 (citing *Wilson v. Walker*, 204 F.3d 33 (2d Cir. 2000), *cert denied* 531 U.S. 892).

B. The Plain-Language Approach

Unlike the speculative approach summarized above, the Third, Sixth, Seventh, and Eleventh Circuits, as well as the Maryland and New Jersey courts review the plain words comprising the self-representation request to determine whether the request is facially unequivocal. If so, these courts find a *Faretta* inquiry necessary without examining the defendant's apparent motives.

The Eleventh Circuit has demanded an objective assessment of the defendant's words: "petitioner must do no more than state his request . . . unambiguously to the court so that no reasonable person can say the request was not made." *Dorman v. Wainwright*, 798 F.2d 1358, 1366 (11th Cir. 1985). A defendant "does not need to recite some talismanic formula hoping to open the eyes and ears of the court to his request." *Id.*; *Stano v. Dugger*, 921 F.2d 1125, 1143-44 (11th Cir. 1991), *cert denied* 502 U.S. 835. Then, at the Step 2 inquiry, a court assesses whether the defendant's motives are genuine or are instead efforts to "manipulate the events of the trial." *Stano*, 921 F.2d at 1144-45 (internal quotation marks omitted).

The Sixth Circuit has also held that the *Faretta* inquiry must be "direct[] or prompt[ ]" upon a clear request, regardless of the defendant's apparent motive. *Moore*

v. Haviland, 531 F.3d 393, 402-403 (6th Cir. 2008), *cert denied* 558 U.S. 933. In *Jones v. Jamrog,* the defendant explicitly requested self-representation because defense counsel did not, and apparently could not (due to a local policy), provide him with discovery. 414 F.3d 585, 587-588 (6th Cir. 2005). The defendant stated that, although he preferred an attorney's representation, self-representation was the only way to secure access to discovery. *Id.* at 588-589. Although defendant's "remarks to the judge were not brief" and "he expounded on the constitutional right to represent oneself," the trial court found the request "equivocal" because it was motivated by a discovery concern and not a genuine desire for self-representation. *Id.* at 588-589.

After both the Michigan appellate court and the District Court (on habeas review) agreed with that analysis, the Sixth Circuit reversed, finding that the state court's decision was "unreasonable." *Id.* at 592; *see* 28 U.S.C. § 2254 (d)(1). "[A]n interpretation of *Faretta* that attaches determinative weight to an otherwise competent defendant's reason for wanting to proceed pro se is unreasonable." *Id.* The state courts' equivocality determination "perplexe[d]" the Sixth Circuit because "Jones did not equivocate any more than Faretta did; each defendant acknowledged he would have preferred the assistance of counsel under different, but ultimately hypothetical, circumstances. [Still,] [t]he Supreme Court described Faretta's request to represent himself as 'unequivocal[ ].'" *Id.* at 594 n.6. "Irrelevant hypotheticals" under which Jones "would have preferred a lawyer" were just that—irrelevant. *Id.* at 594.

The Third Circuit has similarly, in numerous decisions, barred courts from speculating about a defendant's apparent sincerity when analyzing unequivocality. Instead, the Third Circuit addresses "[in]sincere" self-representation requests that appear aimed at "sabotage[ing] a criminal proceeding" by "relying upon information gained during the [Step 2] inquiry" to "prevent such tactics from succeeding." *United States v. Stubbs*, 281 F.3d 109, 121 n.10 (3d Cir. 2002), *cert denied* 535 U.S. 1028; *Buhl v. Cooksey*, 233 F.3d 783, 793-94, 796-97 (3d Cir. 2000); *United States v. Welty*, 674 F.2d 185, 189 (3d Cir. 1982) ("[E]ven well-founded suspicions of intentional delay and manipulative tactics can provide no substitute for the inquiries necessary to protect a defendant's constitutional rights."); *Alongi v. Ricci*, 367 Fed.Appx. 341, 346-347 (3d Cir. 2010) (whether defendant "was motivated to proceed pro se because he was dissatisfied with retained counsel is of only passing consequence, at most, under *Faretta*" because it "is not usually relevant to whether that defendant's request is clear and unequivocal.").

Under this approach, motives may matter, but they only bear on the Step 2 inquiry of whether the defendant is making a knowing and voluntary waiver with "eyes open"—not the threshold question of whether the request is unequivocal. *Buhl*, 233 F.2d at 798. The Step 2 "inquiry into a defendant's motives . . . helps the trial court determine if the purported waiver of counsel is voluntary, knowing, and intelligent. For example, it allows a court to determine if a defendant is truly asserting the right of self-representation, or merely seeking alternative counsel. It also assists the court

in determining if the request is merely an attempt to [obstruct], as opposed to a genuine attempt (no matter how ill-advised) to conduct one's own defense." *Id.*

The Seventh Circuit also focuses on the defendant's words rather than apparent motive when analyzing unequivocality. *Freeman v. Pierce*, 878 F.3d 580, 588-590 (7th Cir. 2017); *McGhee v. Dittmann*, 794 F.3d 761, 770 (7th Cir. 2015). The Seventh Circuit's inquiry focuses on whether the "statements . . . clearly and unequivocally communicate a desire for self-representation." *Dittmann*, 794 F.3d at 771. Thus, the Seventh Circuit has granted habeas relief, again under deferential review, where a defendant clearly requested self-representation but also complained about counsel and sought his replacement. *Freeman*, 878 F.3d at 588-590. Unlike the sincerity camp, the Seventh Circuit has concluded that apparent motive, such as replacement of counsel, does not render an otherwise clear request equivocal. *See id.* at 589 ("Freeman did not open himself up to equivocation by requesting that Foster be removed or replaced as counsel.").

Maryland law follows the same approach. Soon after *Faretta*, Maryland's high court explained that *Faretta* "enunciated no guidelines as to what minimum '[unequivocal] declaration' was sufficient," and thus the Maryland Court of Appeals set its own, holding that "any statement by the defendant from which the court could reasonably conclude that the defendant desired self-representation [is] sufficient." *Snead v. State*, 406 A.2d 98, 101-102 (Md. 1979); *Leonard v. State*, 486 A.2d 163, 171 (Md. 1985). Such an "indicat[ion]" triggers the "appropriate inquiry [to] determine whether he 'truly wants to do so.'" *Snead,* 406 A.2d at 101; *see also Pickney v. State*,

46 A.3d 413, 424 (Md. 2012) ("In *Snead,* we explained in detail the process for a trial judge's analysis of a defendant's assertion of the right to self-representation").

Likewise, New Jersey appellate courts have found a "clear and unequivocal" request following a denial of substitute counsel, where the defendant stated: "I'll go pro se. I'll put in a motion to go pro se. I'm not going to court with him purposely trying to sell me out." *State v. Rose*, 206 A.3d 995, 1001 (N.J. App. 2019). *Rose* reasoned that a "request to proceed pro se is not equivocal because it is an alternative position" and thus "the court was obliged to conduct a *Faretta* hearing." *Id.* at 1005-1006 & 1005 n.4. Given the "dignity and autonomy" rationale underlying the self-representation right, "New Jersey has required a stringent inquiry following an unequivocal request to ensure the waiver of counsel is knowing and intelligent. *State v. King*, 40 A.3d 41, 50-51 (N.J. 2012).

* * *

Existing essentially since *Faretta* was decided, *see*, *e.g., Snead*, 406 A.2d at 101-102, the conflict over the correct methodology for assessing whether a self-representation request is unequivocal is deeply entrenched. *See Fields,* 49 F.3d at 1044 (Ervin, C.J., dissenting) (noting the divergence between the objective "rule of the Eleventh Circuit" and the Fourth Circuit's subjective sincerity approach). Only this Court can resolve the issue.

II. The question presented is important to the fair administration of justice.

The constantly recurring question presented goes directly to the fair administration of justice in our courts, governs a defendant's access to a fundamental

right, and implicates the finality of criminal judgments. Judges and litigants have a compelling interest in the resolution of the question presented.

A. The sincerity approach imposes an arbitrary and powerful obstacle to the fundamental right to self-representation.

The Sixth Amendment's self-representation right, which "finds support in the structure of the Sixth Amendment, as well as . . . English and colonial jurisprudence," is just as "fundamental" as the right to counsel. *Faretta*, 422 U.S. at 817-818, 832. As this Court recently reiterated, "[a]t common law, self-representation was the norm." *McCoy v. Louisiana*, 138 S.Ct. 1500, 1507 (2018). The common-law standard envisioned that "no person charged with a criminal offence can have counsel forced upon him against his will." *Faretta*, 422 U.S. at 826 (citation omitted).

"Supported by centuries of consistent history," the "Framers selected in the Sixth Amendment a form of words that necessarily implies the right of self-representation." *Id.* at 832. *Faretta* found "no evidence that the colonists and the Framers ever doubted the right of self-representation, or imagined that this right might be considered inferior to the right of assistance of counsel. To the contrary, [they] always conceived of the right to counsel as an 'assistance' for the accused, to be used at his option, in defending himself. The Framers selected in the Sixth Amendment a form of words that necessarily implies the right of self-representation." *Id.* at 832.

"To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment. In such a case, counsel is not an assistant, but a master; and the right to make a defense is stripped of the personal character upon which the Amendment insists." *Id.* at 820; *accord McCoy*, 138 S.Ct. at 1508 (citing *Martinez v.*

Court of Appeal of Cal., Fourth Appellate Dist., 528 U.S. 152, 165 (2000) (Scalia, J., concurring in judgment) ("Our system of laws generally presumes that the criminal defendant, after being fully informed, knows his own best interests and does not need them dictated by the State.")).

Thus, *Faretta* placed self-representation in its rightful position among the other fundamental Sixth Amendment guarantees. Just like the "rights to notice, confrontation, and compulsory process," which "guarantee that a criminal charge may be answered in a manner now considered fundamental to the fair administration of American justice," the self-representation right is equally integral to a fair adversarial process. *Faretta*, 422 U.S. at 818.

But the sincerity approach, with its focus on subjective motivations instead of plain language, imposes an arbitrary and powerful obstacle to the *Faretta* right. Under that approach, a court can summarily foreclose the fundamental self-representation right based on speculation about a defendant's "real" desires. Two levels of "paternalistic[] second-guessing [of] a defendant's desire to proceed pro se" (at both the trial and appellate level) are now not only permissible, but, under the sincerity approach, the norm. *Frazier-El*, 204 F.3d at 571 (Murnaghan, J., dissenting).

As with most subjective and arbitrary standards, courts have little trouble blocking self-representation under the sincerity approach. Trial judges, hardly eager to preside over trials involving pro se litigants, and/or concerned that self-representation is foolish, can easily articulate a basis to conclude that the defendant's

real desire is to delay or obtain new counsel. *See*, *e.g.*, *Faretta,* 422 U.S. at 852 (Blackmun, J., dissenting) (noting the adage that "one who is his own lawyer has a fool for a client"); *Frazier-El*, 204 F.3d at 571 573 (Murnaghan, J., dissenting) (explaining that the *Faretta* right is "disfavored" and often viewed as a "nuisance and a constitutional anachronism that courts should curtail wherever possible"); *Fields*, 49 F.3d at 1032 ("some state courts may prefer, for the sake of efficient administration of the trial, that the defendant proceed with counsel"). This arbitrary "framework" fails "to provide meaningful protection" of this core Sixth Amendment right. *Crawford v. Washington*, 541 U.S. 36, 63 (2004).

Under the sincerity analysis, defendants suffer real harm. In applying that approach, courts often determine, as below, that because the defendant has complained about counsel, the "real" reason for the self-representation request was to coerce the court into assigning new counsel. As a result, perhaps the most common reason for pursuing self-representation—negative experiences with overworked assigned counsel[4]—paradoxically justify *denying* the *Faretta* right. *Buhl*, 233 F.3d at 794; *accord* App. 10a (Rivera, J., dissenting).

A sincerity approach locks defendants in a word-game maze. They must make an elaborate request that not only "unequivocally" seeks self-representation but dispels all other ulterior motives. Thus, where the record indicates (as it so often does) dissatisfaction with counsel, a defendant seeking to represent himself must

[4] Mr. Faretta's stated reason for requesting self-representation was that assigned counsel was "very loaded down" with "heavy case loads." See *Faretta*, 422 U.S. at 807.

apparently not only "clearly and unequivocally" declare "I want to go pro se." *Faretta*, 422 U.S. at 835. Instead, the defendant must apparently add, "Your Honor, I promise that I want to proceed pro se and that is not because I am to trying get a different lawyer, delay, or create issues for appeal." While *Faretta* held that "legal knowledge" is not a prerequisite for self-representation, extensive legal knowledge of the "intricacies" of unequivocal-request doctrine *is* required to represent oneself in many jurisdictions. *Faretta,* 422 U.S. at 835-836; *Fields*, 49 F.3d at 1044 (Ervin, C.J., dissenting) ("Absent a Zen-like persistence in uttering a single mantra, or the ability to spout crisp legalese with full citation to binding authority, a defendant's desire to represent himself will not be respected."); *see also People v. Dawson*, 2022 W.L. 1216195, *6 (New York Court of Appeals April 26, 2022) (Wilson, J.) ("Today's holding is like several others in which out Court has imposed a high and unrealistic linguistic burden on criminal defendants—where the intent is clear, but some better choice of words can be imagined, often finding ambiguity in deferential language. . . . Despite our eschewing the need for 'magic words,' we seem to require them in practice.") (citing *Duarte*, App. 3a (decision below)).

B. There is a compelling need for guidance.

Our nation's trial judges need guidance here. *Faretta* did not elaborate on the unequivocal-request requirement and merely held, with one sentence, that the defendant's self-representation right was violated because he "clearly and unequivocally declared . . . that he wanted to represent himself." 422 U.S. at 835-36. Although this issue repeatedly arises in our trial courts and has spawned hundreds

of appellate decisions, this Court has never clarified the unequivocal-declaration requirement. Confusion has filled that void. Trial courts need guidance so they can successfully navigate this difficult terrain. *Imani v. Pollard*, 826 F.3d 939, 944 (7th Cir. 2016) ("By invoking his *Faretta* right, an accused simultaneously exercises his right to represent himself and waives his right to counsel. *Faretta* is therefore challenging for trial courts to administer."); *Fields*, 49 F.3d at 1029 ("A trial court evaluating a defendant's request to represent himself must traverse a thin line") (cleaned up).

C. The sincerity approach undermines finality.

The arbitrary sincerity approach to the Step 1 *Faretta* inquiry also undermines the finality of criminal judgments. The frequency with which habeas petitions are granted on the grounds that the state court unreasonably assessed unequivocality, often by assessing apparent sincerity, confirms the point. *E.g.*, *Finch v. Payne*, 983 F.3d 973 (8th Cir. 2020); *Freeman v. Pierce*, 878 F.3d 580 (7th Cir. 2017); *Jones v. Jamrog,* 414 F.3d 585 (6th Cir. 2005); *Buhl v. Cooksey*, 233 F.3d 783 (3d Cir. 2000).

This frequent habeas relief is a predictable result of arbitrary unequivocal-declaration standards. After state courts block the *Faretta* right on the subjective grounds that a defendant who requested self-representation appeared to want something else, defendants can either (1) attack this flawed methodology itself; or (2) challenge the trial court's sincerity speculation on its own terms. *E.g.*, *Jamrog*, 414 F.3d 585. Trials are supposed to be the "main event." *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977). But, due to sincerity speculation in the *Faretta* context, they often are

a "'tryout on the road' for what will later be a determinative federal habeas hearing." *Id.*

III. This case serves as an ideal vehicle for resolving the split.

Four aspects of this case make it perfect for resolving the question presented.

1. The question presented is squarely and cleanly presented. It was raised and addressed at every stage of the proceedings below: before the Appellate Term, App. 16a-17a, and before the New York Court of Appeals. App. 2a-3a. The equivocality issue was the sole basis for the Court of Appeals' decision under review here. App. 3a. And this issue comes before this Court on direct review, without any of the complications that sometimes arise on collateral review.

2. Mr. Duarte's words, "I would love to go pro se," were, on their face, clear and unequivocal. The Court of Appeals majority opinion does not, because it could not, dispute that Mr. Duarte's *words* were unequivocal. These clear words stated the request "unambiguously . . . so . . . no reasonable person can say the request was not made." *Dorman*, 798 F.2d at 1366.

3. The decision below frames the sole "narrow but consequential" issue presented in this case. App. 7a (Rivera, J., dissenting). The Court of Appeals' majority opinion employs the sincerity approach, speculating about the apparent motives underlying Petitioner's clear self-representation request instead of, as the plain-language approach would require, assessing that issue at the inquiry stage.

The solution here is precisely the solution proposed by courts in the plain-language camp: If the trial judge thought Mr. Duarte did not sincerely want to

represent himself but instead aimed to pressure the court to appoint new counsel, that concern had to be addressed through a Step 2 inquiry.

4. The circumstances here epitomize the typical case. Mr. Duarte made his self-representation request in the context of his continued dissatisfaction with appointed counsel and the court's refusal to discharge counsel. And yet, the Court of Appeals reasoned that because Mr. Duarte had expressed dissatisfaction with counsel and had requested new counsel, his otherwise clear request for self-representation was equivocal. App. 3a. This case therefore allows this Court to review the question presented in the typical scenario in which it arises.

IV. The Court of Appeals' decision violates the Sixth Amendment.

The Court of Appeals found that Mr. Duarte's clear request for self-representation—"I would love to go pro se"—was equivocal because Mr. Duarte was not sincerely seeking self-representation but was instead seeking new counsel. App. 3a. That decision violated the Sixth Amendment right to self-representation. *Faretta*, 422 U.S. at 835-36.

A. The unequivocal-request inquiry focuses on whether the defendant's request is clear, not whether his motive appears "sincere."

Faretta held that a court must address a defendant's request for self-representation when the defendant "clearly and unequivocally declare[s] to the trial judge that he want[s] to represent himself." *Faretta*, 422 U.S. at 835-36. *Faretta* thus focuses on whether the defendant's "declaration" is "clear and unequivocal," not whether the sincerity of his desire is "clear and unequivocal" too. "Grafting" a

"sincerity" requirement onto the unequivocal-request inquiry misreads *Faretta*'s plain language. *Frazier-El*, 204 F.3d at 567 (Murnaghan, J., dissenting). And it leaves the ancient self-representation right subject to the discretionary and subjective whims of trial and appellate courts.

In conflating an unequivocal-declaration requirement with an unequivocal-desire requirement, the sincerity approach replaces an inquiry courts *can* perform (assessing plain language) with an impossible and speculative inquiry they *cannot* perform (guessing motive without inquiry). Questions about the defendant's internal state of mind can only logically and consistently be addressed through an inquiry, not without one. *Stubbs*, 281 F.3d at 121 n.10; *Buhl*, 233 F.2d at 798. Thus, at Step 1 of the *Faretta* analysis, "a court need look only to the character of the *assertion*." *Raulerson v. Wainwright*, 469 U.S. 966, 970 (1984) (Marshall, J., dissenting from denial of certiorari) (emphasis added).

Allowing judges to bar a fundamental right based on ad hoc and arbitrary determinations about a defendant's state of mind is difficult to square with this Court's more recent Sixth Amendment jurisprudence. In *Apprendi v. New Jersey*, 530 U.S. (2000), *Crawford v. Washington*, 541 U.S. 36 (2004), and *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2008), this Court held that Sixth Amendment rights must be protected with clear and categorical rules, not subjective discretionary analyses that leave far too much control in the hands of trial judges. *See, e.g., Crawford*, 541 U.S. at 67-68 (holding that the "[Framers] were loath to leave too much discretion in judicial hands"); *id.* (holding that "[v]ague standards are manipulable"

and that, "[b]y replacing categorical constitutional guarantees with open-ended balancing tests, [courts] do violence to their design"); *Blakely v. Washington*, 542 U.S. 296, 308, 313 (2004) (the Sixth Amendment jury right bars leaving discretion in the hands of judges). Nothing could violate that basic principle more than a rule conditioning access to a fundamental right on the court's capacity for mind reading.

Recognizing that autonomy is the "lifeblood of the law," *Faretta* intended the self-representation choice to remain with the accused—not the court. *Faretta*, 422 U.S. at 834. Allowing judges to serve as gatekeeper to this right by speculating about the defendant's apparent sincerity turns that rule on its head.

B. Assessing motive at *Faretta*'s unequivocal-request stage does not protect against involuntary waivers.

The sincerity approach cannot be defended on the grounds that, given the purported "primacy" of the right to counsel, courts must "indulge" every "presumption" against waiver of the right to counsel by protecting defendants from inadvertently waiving counsel. *Bush*, 404 F.3d at 271; *Frazier-El*, 204 F.3d at 558 (finding "[t]he particular requirement that a request for self-representation be clear and unequivocal is necessary to protect against an inadvertent waiver [through] occasional musings on the benefits of self-representation"). That theory has doctrinal and logical flaws.

Faretta held that, while the "basic thesis" of some of this Court's prior precedents is that counsel assures a "fair trial," there "is no evidence that the colonists and the Framers ever doubted the right of self-representation or imagined that this right might be considered inferior to the right of the assistance of counsel." 422 U.S. at 832.

This Court has never adopted the theory that the Sixth Amendment creates an "inferior" self-representation right that is "presumptively" trumped by the right to counsel. *Moore*, 531 F.3d at 401 (while the Sixth Amendment guarantees the right to counsel, "the Constitution also affords—with equal importance—the right to self-representation.") (citing *Faretta*, 422 U.S. 806)); *United States v. Garey*, 540 F.3d 1253, 1264 n.4 (11th Cir. 2008), *cert denied* 555 U.S. 1144.

In any event, summarily denying a *Faretta* request is not necessary to prevent an "inadvertent waiver." *Frazier-El*, 204 F.3d at 558. Courts can ensure that "flippant" comments, "occasional musings," or emotional reactions do not result in an unknowing and involuntary waiver by assessing that concern at the Step 2 inquiry stage. *Faretta*, 422 U.S at 835; *Von Moltke*, 332 U.S. at 723-24; *Johnson*, 304 U.S. at 464-65. This is not a "gotcha" game, whereby a defendant's facially unequivocal request mandates that the trial court summarily permit self-representation. Instead, a court can prevent an unintentional relinquishment of the right by, after receiving a plain request, assessing sincerity during the Step 2 inquiry.

That is the simple beauty of the "plain language" approach: it assesses subjective questions of desire, sincerity and motive where they should be assessed: at the Step 2 inquiry. App. 9a (dissenting op.) ("to the extent there [is] any uncertainty about [a] defendant's sincerity, the proper course is for the court to confirm his intent rather than ignore."). Thus, in Mr. Duarte's situation, "[s]omething as simple as 'Are you asking to represent yourself?' would have eliminated any possible doubt as to whether [Mr. Duarte] meant what he said." App. 9a-10a.

Faretta confirmed that courts cannot "imprison a man in his privileges" by denying self-representation requests. *Faretta,* 422 U.S. at 815 (quotation marks omitted). Defendants should not be imprisoned in word games and judicial guesswork either.

We would expect no less in other areas of our lives. Suppose, for instance, an ill patient chooses a particular medical procedure over another. No doctor would ignore the request based on a determination that the patient's choice does not reflect a sincere desire to protect health but instead stems from some ulterior motive, such as a desire to justify a malpractice suit. Instead, the doctor would inquire into the reasons for the patient's request. That same common-sense approach should govern the fundamental right to self-representation. Fundamental rights are worth a simple follow-up inquiry.

* * *

The sincerity approach, as adopted by the New York Court of Appeals, invites confusion, contravenes this Court's precedent, and violates basic logic. The summary dismissal of a defendant's unequivocal self-representation without inquiry violates the Sixth Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

By: 

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APPENDIX

State of New York
Court of Appeals *Remittitur*

Present, Hon. Janet DiFiore, *Chief Judge*, ***presiding***.

The People &c.,
Respondent,
v.
Vladimir Duarte,
Appellant.

Appellant in the above entitled appeal appeared by Robert S. Dean, Center for Appellate Litigation; respondent appeared by the Hon. Alvin Bragg, New York County District Attorney.

The Court, after due deliberation, orders and adjudges that the order is affirmed, in a memorandum. Chief Judge DiFiore and Judges Garcia, Singas and Cannataro concur. Judge Rivera dissents in an opinion, in which Judge Wilson concurs. Judge Troutman took no part.

The Court further orders that this record of the proceedings in this Court be remitted to the Criminal Court of the City of New York, New York County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

Heather Davis
Deputy Clerk

Court of Appeals, Clerk's Office, Albany, February 15, 2022

State of New York Court of Appeals

MEMORANDUM

No. 9
The People &c.,
Respondent,
v.
Vladimir Duarte,
Appellant.

Molly Schindler, for appellant.
R. Jeannie Campbell-Urban, for respondent.

MEMORANDUM:

The order of the Appellate Term should be affirmed. The intermediate appellate court correctly concluded that defendant did not clearly and unequivocally request to proceed pro se. During a colloquy with the trial court, defendant referenced the

unsuccessful application to relieve his assigned counsel made at his prior appearance, and he renewed that application, claiming that counsel was "ineffective." The court denied the application and rejected defendant's renewed attempt to read aloud from what defendant had previously referred to as "my testimony." Upon review of the record as a whole,[*] defendant's retort, "I would love to go pro se," immediately after the court's denial of his applications "d[id] not reflect a definitive commitment to self-representation" that would trigger a searching inquiry by the trial court (*People v LaValle*, 3 NY3d 88, 106 [2004]; *see People v Gillian*, 8 NY3d 85, 88 [2006]; *People v McIntyre*, 36 NY2d 10, 17 [1974]).

[*]Contrary to the dissent's assertion, the relevant facts are in dispute (*see* dissenting op at 2). Whether defendant's statement was an unequivocal request in the context of the Sixth Amendment is determined by the facts of the surrounding circumstances in the case as well as defendant's conduct, including manner of expression, demeanor, and word choices (*see Williams v Bartlett*, 44 F3d 95, 100 [2d Cir 1994]; *cf. People v Glover*, 87 NY2d 838, 839 [1995]; *Fields v Murray*, 49 F3d 1024, 1029-1032 [4th Cir 1995]). This record demonstrates that the court did not clearly deny the purported request, and neither defendant nor defense counsel sought any decision on that issue from the court at any point in the proceedings. Both factors suggest that the request was not considered genuine in the first instance by those present in the courtroom who heard the statement.

RIVERA, J. (dissenting):

"I would love to go pro se."

That's exactly what defendant said in open court. The import of these seven words is obvious: defendant wanted to represent himself. Under *People v McIntyre* (36 NY2d 10 [1974]), this clear and unequivocal statement required an inquiry by the court into defendant's request. Here, that inquiry could have been as brief as asking defendant a single question confirming that he meant what he said. Contrary to the majority's suggestion, defendant, unlike the court, did not need to say or do anything else (*see* majority op at 2 n). Once defendant invoked his constitutional right to self-representation, it was for the court to inquire whether his decision was made knowingly and intelligently (*id.* at 17). The court's failure to do so constitutes reversible error (*People v Smith*, 68 NY2d 737, 738-739 [1986]). Therefore, I dissent and would reverse and order a new trial. And in case there is any doubt as to my intent, let me repeat: I dissent, unequivocally and without hesitation.

***

The relevant facts are not in dispute and the record is crystal clear. During a suppression hearing in defendant Vladimir Duarte's criminal prosecution, the court and defendant, appearing with counsel, engaged in the following colloquy:

> "Defendant: This is an ineffective counsel. I had made that clear on my last appearance with him. He's not effective at all. This is the first time I've spoken with him actually this close about my case. He's never told me—day one when I met him he believes I did this.
>
> Court: That doesn't mean that he is—that he is not effective.

Defendant: It's not true, because you're not going to say it to her. He told it to me.

Counsel: I never said that.

Court: Mr. Duarte—

Defendant: So I wish for him not to represent me at all because he's ineffective and he doesn't believe that I did not do this.

Court: That's denied. People, will you please call your first witness? This is a Wade/Huntley?

Defendant: I would like to read—

Court: You can't speak.

Defendant: I object to your denying me ineffective counseling here.

Court: Please call the first witness.

Defendant: I would love to go pro se.

Court: This is going to be a Huntley/Wade/Dunaway?

Prosecutor: That's correct.

Court: Please call your first witness."

There was no further discussion of defendant's request. After a bench trial, the court found defendant guilty as charged and sentenced him to one year in jail.

The Appellate Term affirmed **(***People v Duarte*, 69 Misc 3d 148[A] [NY App Term 2020]). The court concluded that defendant did not make a clear and unequivocal request at the suppression hearing to represent himself because his request was presented in the

context of his complaints about his attorney and, in the alternative, that he abandoned his request (*id.*).

The issue before us on appeal is narrow but consequential. Defendant argues that his constitutional right to represent himself was denied when the court failed to properly inquire into his request to proceed pro se. The District Attorney unpersuasively counters that defendant's repeated outbursts in open court—particularly his statements suggesting dissatisfaction with his attorney—render his statement equivocal because they demonstrate that defendant was simply seeking replacement of assigned counsel. We need only read the words on the page to conclude that defendant's statement that he "would love to go pro se" was a clear and unequivocal request to self-represent, which triggered the need for a judicial inquiry into his request. It is undisputed that the court made no inquiry, and, in accordance with our precedent, this error requires reversal and a new trial.

Under both the Federal and New York State Constitutions, defendants have the right to represent themselves (*see* US Const, 6th Amend; *Faretta v California*, 422 US 806, 820 [1975] [explaining that, under the Federal Constitution, a defendant "must be free personally to decide whether in (defendant's) particular case counsel is to (defendant's) advantage . . . (a)nd . . . (defendant's) choice must be honored"]; NY Const art I, § 6 ["In any trial in any court whatever the party accused shall be allowed to appear and defend in person . . . "]; *McIntyre*, 36 NY2d at 15; *see also* CPL 180.10 [5] ["If the defendant desires to proceed without the aid of counsel, the court must permit (them) to do so if it is satisfied that (they) made such decision with knowledge of the significance thereof . . . "]). This

right "embodies one of the most cherished ideals of our culture; the right of an individual to determine [their] own destiny" (*McIntyre*, 36 NY2d at 14; *accord People v Crespo*, 32 NY3d 176, 178 [2018]). The right stands even if it sets defendant on a perilous course to representation without the benefit of a counsel trained and experienced in the law. As the Court has explained, "even in cases where the accused is harming [themselves] by insisting on conducting [their] own defense, respect for individual autonomy requires that [they] be allowed to go to jail under [their] own banner if [they] so desire[] and if [they] make[] the choice with eyes open" (*McIntyre*, 36 NY2d at 14 [internal citation and quotation marks omitted]; *id.* at 16).

In order to determine whether a defendant has properly invoked this right and thus waived the right to counsel, a court must determine whether: "(1) the request is unequivocal and timely asserted, (2) there has been a knowing and intelligent waiver of the right to counsel, and (3) the defendant has not engaged in conduct which would prevent the fair and orderly exposition of the issues" (*id.* at 17). "Denial of the right of self-representation is not subject to harmless error analysis" and requires reversal (*People v LaValle*, 3 NY3d 88, 106 [2004]).

Only the unequivocal nature of defendant's request under the first prong is at issue on this appeal.[1] That first prong is established by reference to the suppression hearing colloquy during which defendant stated, plainly, "I would love to go pro se."

[1] Contrary to the District Attorney's argument, defendant's statement was made before the start of trial and was, therefore, timely by any measure, as defined by this Court (*see McIntyre*, 36 NY2d at 17; *Crespo*, 32 NY3d at 182).

Deconstructing the statement is simple. Defendant used the verb "would," indicating his desire for the specific action mentioned (*see* Merriam-Webster Online Dictionary, would [https://www.merriam-webster.com/dictionary/would] ["used in auxiliary function to express plan or intention"]). That action was expressed through his use of the Latin term "pro se"—a phrase meaning to act on one's own behalf without a lawyer (*see* PRO SE, Black's Law Dictionary [11th ed 2019] ["For oneself; on one's own behalf; without a lawyer"]). Defendant's words do not lend themselves to any other interpretation.

The clarity of those words forecloses any suggestion of hesitance or uncertainty in defendant's articulation of his request. Indeed, "would" is a form of the auxiliary verb "will" and is used "to express [the speaker's] plan or intention" (*see* Merriam-Webster Online Dictionary, would). Nevertheless, the District Attorney argues that defendant's use of the verb "would" somehow renders his statement conditional. This argument is meritless for two reasons. First, defendant simply did not stipulate any actual condition by saying, for example, that he would "love to go pro se *if he didn't receive a new attorney*." Second, a speaker's use of verbs in the conditional mood, such as "could" and "would"—particularly in formal contexts, such as when a defendant (or an attorney) is speaking to a judge—is merely a means of polite speech that does not obscure the clarity of an otherwise obvious request. To the extent there was any uncertainty about defendant's sincerity, the proper course was for the court to confirm his intent rather than ignore him. Something as simple as "Are you asking to represent yourself?" would have eliminated any possible

doubt as to whether defendant meant what he said and guaranteed protection of defendant's constitutional right.[2]

Contrary to the Appellate Term's conclusion, the fact that this request was made in the context of expressing defendant's dissatisfaction with counsel did not make the request any less clear or suggest equivocation on defendant's part. In fact, the record supports only the opposite conclusion. Defendant's claims of ineffectiveness were tied to his request that counsel no longer represent him, and the court expressly rejected both the merits of defendant's claim and his request to relieve counsel. When defendant sought to further address the court on that matter, the court told him, "You can't speak." Only after the court dispensed with the claims about counsel did defendant invoke his right to represent himself.

It is also unsurprising that defendant's request came on the heels of the court's rejection of his complaints about his lawyer. As the Court in *McIntyre* recognized, "[f]requently, the pro se defendant is motivated by dissatisfaction with the trial strategy of defense counsel or a lack of confidence in [their] attorney" (36 NY2d at 16). No less so where, as here, the defendant is convinced that counsel—the one person who stands before the court on defendant's behalf—does not believe in his innocence. Indeed, the choice to

[2] The majority turns our precedent on its head, relieving the trial court of any obligation to inquire into an unambiguous expression of desire to "go pro se" by recasting the court's silence in the face of such a request as a determination that defendant was not being "genuine" (*see* majority op at 2 n). The majority's approach is not grounded in our abundantly clear case law, and, unsurprisingly, it cites not a single case in support of its claim that an explicit request for self-representation is subsequently rendered equivocal because the court failed to fulfill its duty under *McIntyre* or because defendant did not renew his request in response to that failure (*see id.*).

self-represent may be "influenced by a blind faith belief in [a pro se defendant's] innocence and the infallibility of justice" in vindicating that belief (*id.* [internal citations omitted]).

Matter of Kathleen K., *People v Gillian*, and *People v LaValle* are distinguishable and do not control here. Unlike in those cases, and particularly the defendant in *Kathleen K.*, defendant's demand was not intended as leverage for his request for substitution of counsel because defendant did not request another lawyer *at all.* (*see* 17 NY3d 380, 384 [2011] [finding equivocation when defendant "turned . . . down" the lawyer he was provided and affirmatively "asked for (his attorney) to be terminated"]). Nor did defendant intimate that his request to self-represent was an alternative to substitution, as in *Gillian* (*see* 8 NY3d 85, 87 [2006] [noting that "defendant . . . moved in writing for reassignment of counsel or, *in the alternative*, the opportunity to proceed pro se"] [emphasis added]). The court here also did not deny substitution of counsel, with defendant raising the prospect of self-representation solely because he had no choice but to proceed pro se, as in *LaValle* (3 NY3d at 105-106 [noting defendant's statement "The only thing I see and that's my last option is to represent myself, not that I want to, I don't know (anything) about the law, but at least I have a chance to prove my innocence"]). The record refutes this interpretation; on prior occasions defendant had stated he was dissatisfied with counsel but never sought substitution. And again, at the suppression hearing, he only requested that counsel no longer represent him (as opposed to demanding a new attorney) because, in defendant's view, counsel was ineffective for failing to meet with him and because he did not believe in defendant's innocence.

It is worth noting that the trial court never actually denied defendant's request. Rather, the court simply ignored it, leaving the record utterly devoid of any hint as to why (or even *if*) the court found the request equivocal. Nothing in *McIntyre* or its progeny permit inferring ambiguity from a cold record containing solely an unambiguous statement of intent "to go pro se." Even if we infer that defendant sought appointment of new counsel, defendant's response indicating that he wished to proceed pro se in no way provided a basis for the *additional* inference that he was "threatening" to act as his own lawyer if the court did not assign him new counsel, as defendant did not link the two.

Further, the District Attorney's reliance on defendant's actions at previous court appearances is misplaced because this was defendant's first appearance before the suppression hearing judge. Thus, the judge here did not have any basis, other than what was said at the suppression hearing, to consider defendant's request. Nor may defendant's actions after his request to self-represent—which the majority apparently considers as part of its review of the "whole record"—serve as a ground for concluding that his statement was equivocal. *McIntyre* does not support that approach. Absent an express disavowal of the request—which goes directly to whether a request has been unequivocally made in the first instance—a "court may not validate an erroneous denial of a pro se motion on the basis of a postruling outburst" (36 NY2d at 18). If a court may not excuse its error based on a defendant's subsequent courtroom outbursts, neither may a court avoid a mandatory inquiry based on a defendant's postruling silence or acquiescence to the court's denial of the request to self-represent.

The effect of the majority's affirmance here is to complicate what has been a straightforward judicial task: When a defendant says they want to represent themselves, a court must inquire into that request to ensure it is made knowingly and intelligently, and that the request is not merely an attempt to undermine or delay the proceedings (*see McIntyre*, 36 NY2d at 17; *Crespo*, 32 NY3d at 178). Any concern that defendant's request is not genuine is already addressed by the second and third prongs of the *McIntyre* test (*see* 36 NY2d at 19 ["Where a court feels that the motion is a disingenuous attempt to subvert the overall purpose of the trial . . ., the proper procedure is to conduct a dispassionate inquiry into the pertinent factors"]). As our Court has recognized, the best way to assess voluntariness and uncover gamesmanship is through an inquiry into defendant's request and *not* by appellate review without the benefit of defendant's responses and the lower court's on-the-record assessment of defendant's statements and actions at the time of the request.

Although the decision below strays far afield from *McIntyre*, that error appears to be an aberration, as the courts of this state have had little difficulty applying that case's central holding. In doing so, they have safeguarded "one of the most cherished ideals of our culture" (*McIntyre*, 36 NY2d at 14). The reasoning of *McIntyre* has stood the test of time. The majority's memorandum cannot.

Order affirmed, in a memorandum. Chief Judge DiFiore and Judges Garcia, Singas and Cannataro concur. Judge Rivera dissents in an opinion, in which Judge Wilson concurs. Judge Troutman took no part.

Decided February 15, 2022

SUPREME COURT, APPELLATE TERM, FIRST DEPARTMENT

November 2020 Term

Cooper, J.P., Higgitt, McShan, JJ.

The People of the State of New York,
Respondent,

NY County Clerk's No. 570601/17

- against -

Vladimir Duarte,
Defendant-Appellant.

Calendar No. 18-132

Defendant appeals from a judgment of the Criminal Court of the City of New York, New York County (Ann E. Scherzer, J.), rendered July 31, 2017, after a nonjury trial, convicting him of forcible touching and sexual abuse in the second degree, and imposing sentence.

Per Curiam.

Judgment of conviction (Ann E. Scherzer, J.), rendered July 31, 2017, affirmed.

The verdict convicting defendant of forcible touching (*see* Penal Law § 130.52[1]) and sexual abuse in the second degree (*see* Penal Law § 130.60[2]) was supported by legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). There is no basis for disturbing the court's credibility determinations, including its evaluation of the [redacted] testimony. While defendant claims that the

victim's testimony was incredible because she initially lied to the police about the precise street location of the forcible touching/sexual abuse suffered at the hands of defendant, a stranger to her, [redacted] explained her reasons for so doing, and the trial court, as the trier of fact, was free to accept or reject the explanation offered (*see People v De Tore*, 34 NY2d 199 [1974], *cert denied* 419 US 1025 [1974]; *People v Lussier*, 205 AD2d 910 [1994], *lv denied* 83 NY2d 1005 [1994], *cert denied* 513 US 1078 [1995]). Furthermore, the victim's trial testimony was corroborated by her classmate and school safety officer, to whom she reported the crime shortly after it occurred, and by video surveillance footage showing defendant and the victim in the same area at the time of the incident, with defendant wearing the distinctive gold-framed glasses described by the victim.

Viewing the record as a whole, we conclude that defendant did not make a clear and unequivocal request to proceed pro se, sufficient to express the "definitive commitment to self-representation" that would trigger the need for a full inquiry by the court (*People v LaValle*, 3 NY3d 88, 106 [2004]). Rather than being unequivocal,

defendant's expression of a desire to represent himself came within the context of his complaints about his counsel (*see People v Gillian*, 8 NY3d 85, 88 [2006]; *People v Payton*, 45 NY2d 300, 314 [1978], *revd on other grounds* 445 US 573 [1980]; *People v Little*, 151 AD3d 531 [2017], *lv denied* 30 NY3d 951 [2017]). In any event, defendant abandoned his request by proceeding with the scheduled suppression hearing and subsequent trial without expressing any further desire to represent himself (see *People v Gillian*, 8 NY3d at 88; *People v Berrian*, 154 AD3d 486, 487 [2017], *lv denied* 30 NY3d 1103 [2018]; *People v Cornelius*, 132 AD3d 495 [2015], *lv denied* 26 NY3d 1087 [2015]).

Defendant failed to preserve his present contention that the trial court's actions deprived him of his constitutional right to a fair trial (see *People v Kello*, 96 NY2d 740 [2001]; *People v Charleston*, 56 NY2d 886 [1982]; *People v Williams*, 63 Misc 3d 148[A], 2019 NY Slip Op 50721[U][App Term, 1st Dept 2019]), and we decline to review it in the interest of justice. As an alternative holding, we reject this claim on the merits. The court was "entitled to question [the] witness... to clarify testimony and to facilitate the progress of the trial and to elicit

relevant and important facts" (*People v Williams*, 107 AD3d 1516, 1517 [2013], *lv denied* 21 NY3d 1047 [2013][internal quotation marks omitted]), and we conclude that it did not improperly "take[] on either the function or appearance of an advocate" when dealing with the [redacted] (*People v Arnold*, 98 NY2d 63, 67 [2002]; *see People v Yut Wai Tom*, 53 NY2d 44, 57-58 [1981]). In any event, since this was a bench trial, there was no risk of improper influence as a result of the court's questions since there was no jury to influence (*see People v Byrd*, 152 AD3d 984, 988 [2017], and the court was presumed to have made "an objective determination based on appropriate legal criteria, despite awareness of facts which cannot properly be relied upon in making the decision" (*People v Kachadourian*, 184 AD3d 1021, 1029 [2020][internal citation omitted]; *see People v Pabon*, 28 NY3d 147, 157 [2016]).

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

I concur I concur I concur

Oral Argument of 15 minutes requested by
MOLLY SCHINDLER

Court of Appeals

State of New York

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

APL-2021-00037

- against -

VLADIMIR DUARTE,

Defendant-Appellant.

DEFENDANT-APPELLANT'S BRIEF

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MOLLY SCHINDLER
Of Counsel
June 14, 2021

COURT OF APPEALS
STATE OF NEW YORK

----------X

THE PEOPLE OF THE STATE OF NEW YORK, :

Respondent, :

-against- :

VLADIMIR DUARTE, :

Defendant-Appellant. :

----------X

PRELIMINARY STATEMENT

By permission of Hon. Jenny Rivera, Associate Judge of the Court of Appeals, appellant Vladimir Duarte appeals from a November 27, 2020 order of the Appellate Term, First Department (A003-006), affirming a July 31, 2017 judgment of the Criminal Court of New York County (dkt. 2017NY020774). That judgment convicted Mr. Duarte, after a bench trial, of forcible touching (Penal Law § 130.52) and sexual abuse in the second degree (Penal Law § 130.60), and sentenced him to a jail term of one year (Scherzer, J.).

On April 29, 2021, this Court granted appellant's motion to assign Robert S. Dean, Center for Appellate Litigation, as counsel.

Appellant has completed his sentence. He had no co-defendants below.

QUESTION PRESENTED

Did the trial court's failure to conduct an inquiry after Appellant's unequivocal and timely request to represent himself by stating to the trial court that he "would love to go pro se" violate his right to self-representation?

JURISDICTION AND REVIEWABILITY

This Court has jurisdiction to hear this appeal because it is an appeal of an adverse order by the Appellate Term, see C.P.L. § 450.90(1), which presents a question of law. C.P.L. § 470.35(1).[1]

SUMMARY OF ARGUMENT

Shortly before his suppression hearing began, Appellant Vladimir Duarte unconditionally informed the trial court that he "would love to go pro se" (A040). The court then denied his request for self-representation without any inquiry, directing the prosecution to call its first hearing witness (id.). The court's failure to conduct a searching inquiry into Mr. Duarte's unequivocal request to represent himself violated this Court's longstanding precedents.

In People v. McIntyre, 36 N.Y.2d 10, 14 (1974), this Court formally recognized the constitutional right to self-representation and set forth a three-pronged approach

[1]Whether a defendant made a valid invocation of the right to self-representation is a question of law within this Court's review. See, e.g., People v. Gillian, 8 N.Y.3d 85 (2006) (considering whether defendant's pro se request was unequivocal or abandoned).

to its exercise: once a defendant has made a timely and unequivocal request to proceed pro se, satisfying the first prong, the trial court must conduct a searching inquiry to determine whether his waiver of counsel is knowing and intelligent (prong two) and whether he would engage in conduct that would prevent the fair and orderly exposition of the issues (prong three). Id. at 17. The failure to conduct an inquiry into the second and third prongs upon a timely and unequivocal request is reversible error. People v. Smith, 68 N.Y.2d 737 (1986).

Here, the trial court rejected Mr. Duarte's timely and unequivocal request "out of hand," see id. at 739, without any inquiry whatsoever. But rather than reversing his conviction, the Appellate Term devised two unfounded and unconstitutional rules of law to affirm it. The Appellate Term held that (1) Mr. Duarte's request was not unequivocal because he made it after expressing dissatisfaction with his attorney (A004-005), one of the most common reasons a defendant chooses to proceed pro se; and, in the alternative, (2) Mr. Duarte had abandoned his pro se request solely because he did not repeat it (A005), thereby waiving his constitutional right to self-representation through his silence rather than any affirmative action. Neither of these new rules comports with this Court's precedent or the constitutional principles that animate it.

The Appellate Term's first new rule, that an expression of dissatisfaction with counsel renders a pro se request equivocal, is contrary to this Court's consistent holdings, which have recognized that unhappiness with an attorney is one of the primary reasons defendants wish to represent themselves. See McIntyre, 36 N.Y.2d at

16. Although the Court has held that a pro se request may be equivocal if it is accompanied by an *alternative* request for new counsel, even "conditioning [one's] request for new counsel with a request for self-representation [does] *not* necessarily render the latter request equivocal." People v. Gillian, 8 N.Y.3d 85, 88 (2006); People v. LaValle, 3 N.Y.3d 88, 107 (2004) (emphasis added). In this case, Mr. Duarte's pro se request was not made in the alternative to nor conditioned on any other desire; indeed, he never once asked for new counsel. The mere fact that he raised concerns about his attorney before requesting to represent himself did not change the clear and unconditional nature of his request. Affirming the Appellate Term's holding would require this Court to overturn decades of consistent precedent and would result in the forfeiture of a constitutional right for nearly all defendants who wish to exercise it.

The Appellate Term's second new rule, that Mr. Duarte abandoned his request by failing to repeat it, is both legally and functionally unsound. A defendant's unequivocal invocation of a constitutional right cannot be abandoned, or waived, without an "affirmative showing" of the defendant's intent to knowingly and intelligently do so. See, e.g., People v. Fiumefreddo, 82 N.Y.2d 536, 543 (1993) (citing Boykin v. Alabama, 395 U.S. 238, 243 (1993)). Because "we do not presume acquiescence in the loss of fundamental rights," see Johnson v. Zerbst, 304 U.S. 458, 464 (1938), abandonment through silence occurs only when the defendant has accepted an alternative remedy from the court or has been put on notice that waiver will result absent further action. See, e.g., People v. Gillian, 8 N.Y.3d 85 (2006) (defendant

abandoned his pro se request when the court granted his alternative request and he did not refer again to self-representation); People v. Epps, 37 N.Y.2d 343 (1975) (defendant waived his right to be present when he was warned his failure to appear would constitute a waiver). Neither of these scenarios occurred here. The Appellate Term instead invented the new rule that Mr. Duarte had abandoned his unequivocal pro se request merely by failing to repeat it. In addition to violating fundamental constitutional precepts, this novel abandonment theory would foster precisely the confusion and uncertainty the McIntyre Court sought to avoid.

To affirm the Appellate Term's decision would require the adoption of new rules that defy precedent and unlawfully constrict the self-representation right. Mr. Duarte's clear pro se request was not rendered equivocal by his expression of dissatisfaction with his attorney, and it was not abandoned by his failure to repeat it. The trial court's only obligation upon Mr. Duarte's self-representation request was to conduct a searching inquiry into it. The failure to do so mandates reversal.

STATEMENT OF FACTS

PRO SE REQUEST

On June 2, 2017, Vladimir Duarte, his attorney, and the prosecution appeared before Justice Ann Scherzer, the trial court, for a suppression hearing (A038-039). Before the hearing began, Mr. Duarte informed the court that he would "love to go pro se":

> Mr. Duarte: This is an ineffective counsel. I had made that clear on my last appearance with him.[2] He's not effective at all. This is the first time I've spoken with him actually this close about my case. He's never told me – day one when I met him he believes I did this.
>
> The court: That doesn't mean that he is – that he is not effective.
>
> Mr. Duarte: It's not true, because you're not going to say it to her. He told it to me.
>
> Defense Counsel: I never said that.
>
> The court: Mr. Duarte—
>
> Mr. Duarte: So *I wish for him not to represent me at all* because he's ineffective and he doesn't believe that I did not do this.

---

[2] During a pretrial appearance before Justice Phyllis Chu on May 10, 2017, the last time Mr. Duarte had personally appeared in court alongside his attorney, Mr. Duarte expressed his desire to "speak in [his] own defense" (A020-021). When the court directed him to speak to defense counsel instead of addressing the court himself, Mr. Duarte declined, stating, "No ma'am. I am not going to. I have the right to speak to you as a man. I have that right[.]" (A021). Again urged to speak to his lawyer, Mr. Duarte responded that he understood his right to counsel as well as his right to "speak to you in court today…. I wish to speak on my own behalf. I don't want him representing me no more" (id.). Mr. Duarte then explained the reasons why he preferred to proceed without the assigned attorney, adding that he "would like to say something in my defense here, please" (A021-22). The court and defense counsel stopped Mr. Duarte from speaking further (A022). While the case was being adjourned for trial, Mr. Duarte continued attempting to address the court on his own behalf, including making an objection (A023-024).

The court: That's denied. People, will you please call your first witness? This is a Wade/Huntley?

Mr. Duarte: I would like to read—

The court: You can't speak.

Mr. Duarte: I object to your denying me ineffective counseling here.

The court: Please call the first witness.

Mr. Duarte: *I would love to go pro se.*

The court: This is going to be a Huntley/Wade/Dunaway?

The prosecutor: That's correct.

The court: Please call your first witness.

(A039-040) (emphasis added).

The suppression hearing then commenced without reference to Mr. Duarte's pro se request (A040 et seq.).

CONVICTION AND APPEAL

Mr. Duarte is convicted after a bench trial.

Mr. Duarte was convicted, after a bench trial, of the misdemeanor charges of forcible touching and sexual abuse in the second degree (A001). The prosecution's case relied on the testimony of the complainant, [redacted] who stated that a man [redacted] over her clothes while she was walking to school on April 5, 2017. Although video surveillance shows multiple individuals passing through the area at the same time as the complainant (People's Exhibit 3-B), there were no eyewitnesses to the alleged

assault, nor was it captured on video. The footage depicted only one man walking in the opposite direction as the complainant while she passed through a location not covered by cameras (People's Exhibit 3-B). The complainant identified this man, Vladimir Duarte, as the suspect (A259).

The defense did not present a case, arguing on summation that the complainant's credibility had been irreparably harmed by her admitted lie about a critical aspect of her allegation (A178, 180-184). As three different witnesses testified, the complainant had initially told them the alleged assault had occurred in a particular location she had passed moments before running into the close friend to whom she made her first report (A203, 307, 315). Unable to corroborate her claim with video surveillance, the investigating detective confronted her twice to clarify the location. (A244, 245, 247-48). The first time, the complainant became even more specific in her report about where it had allegedly occurred (A245-246); the second time, however, she stated that she had intentionally lied in all her previous accounts and it had actually happened several blocks away, in a spot not covered by video footage (A189, 255). Counsel argued that the complainant's word could not be relied upon to convict Mr. Duarte beyond a reasonable doubt in light of the lack of other supporting evidence (A180-184).

The court rendered a verdict on June 8, 2017, convicting Mr. Duarte of both charges (A343). On July 31, 2017, the court sentenced him to one year in jail (A351-352).

The Appellate Term affirms the conviction.

On appeal to the Appellate Term First Department, Mr. Duarte argued, inter alia, that the trial court violated his right to self-representation because it failed to conduct an inquiry when he requested to "go pro se" on June 2, 2017.

The court affirmed (A003), concluding that he had not made a "clear and unequivocal request to proceed pro se" for two reasons (A004). First, it held that, "[r]ather than being unequivocal, [Mr. Duarte]'s expression of a desire to represent himself came within the context of his complaints about his counsel" (A004-005). Alternatively, Mr. Duarte "abandoned his request by proceeding with the scheduled suppression hearing and subsequent trial without expressing any further desire to represent himself" (A005). The court cited People v. Gillian, 8 N.Y.3d 85 (2006), as support for both propositions.

A Judge of this Court granted Mr. Duarte permission to appeal (A002).

ARGUMENT

POINT

THE TRIAL COURT'S FAILURE TO CONDUCT AN INQUIRY AFTER APPELLANT'S UNEQUIOVCAL AND TIMELY REQUEST TO REPRESENT HIMSELF BY STATING TO THE TRIAL COURT THAT HE "WOULD LOVE TO GO PRO SE" VIOLATED HIS RIGHT TO SELF-REPRESENTATION. U.S. CONST. AMEND. V; N.Y. CONST. ART. I, § 6.

When Mr. Duarte timely and unconditionally informed the trial court that he "would love to go pro se" (A040), he activated the trial court's obligation to conduct an inquiry into his request for self-representation. Under a long line of caselaw following this Court's decision in People v. McIntyre, 36 N.Y.2d 10 (1974), the failure to do so violated Mr. Duarte's state and federal constitutional rights and constituted reversible error.

A. MR. DUARTE'S TIMELY AND UNEQUIVOCAL REQUEST TO REPRESENT HIMSELF TRIGGERED THE TRIAL COURT'S OBLIGATION TO CONDUCT AN INQUIRY.

1) The Failure to Conduct a Searching Inquiry Into a Defendant's Pro Se Request is Reversible Error.

"'The right to self-representation embodies one of the most cherished ideals of our culture; the right of an individual to determine his…own destiny.'" People v. Crespo, 32 N.Y.3d 176 (2018) (quoting People v. McIntyre, 36 N.Y.2d 10, 14 (1974)). Both state and federal courts have recognized that "counsel, like the other defense tools guaranteed by the [Sixth] Amendment, shall be an aid to a willing defendant—not an

organ of the State interposed between an unwilling defendant and his right to defend himself personally." Faretta v. California, 422 U.S. 806, 820 (1975). However ill-advised a defendant's choice to represent himself may be, he "must be free personally to decide whether in his particular case counsel is to his advantage…[a]nd…his choice must be honored." Id. at 834.

The right of a criminal defendant to represent himself is protected by the Sixth Amendment to the United States Constitution as well as the New York State Constitution. See U.S. Const. Amend. VI; Faretta, 422 U.S. 806; N.Y. Const., Art. I, §6; McIntyre, 36 N.Y.2d at 15. While the federal right is merely implicit, New York's right to self-representation is "explicit and unambiguous" in the text of the state constitution. People v. Rosen, 81 N.Y.2d 237, 243 (1993); N.Y. Const., Art. I, §6 ("In any trial in any court whatever the party accused shall be allowed to appear and defend in person…"). As such, this Court has consistently buttressed a defendant's right to proceed pro se since McIntyre formally recognized it in 1974.

The McIntyre Court established a three-pronged test for the trial court to determine whether a criminal defendant is properly waiving his right to representation by counsel and invoking his right to self-representation: (1) the pro se request must be unequivocal and timely asserted, (2) the defendant must knowingly and intelligently waive his right to counsel, and (3) he must not engage in conduct that would prevent the fair and orderly exposition of the issues. 36 N.Y.2d at 17. This Court recently

affirmed that the McIntyre test remains "the standard by which the right of a criminal defendant to conduct his or her own defense is considered." Crespo, 32 N.Y.3d at 181.

When a defendant's pro se request is timely and unequivocal, satisfying the first McIntyre prong, the trial court is constitutionally obligated to conduct an inquiry into his request to determine whether he will satisfy the second and third prongs. McIntyre, 36 N.Y.2d at 19. Indeed, once the unequivocal request has been made, "the *only obligation* of the court [i]s to insure that he [i]s aware of the dangers and disadvantages of self-representation before allowing him to proceed." People v. Vivenzio, 62 N.Y.2d 775 (1984) (emphasis added). The failure to conduct this inquiry is reversible error. Id.[3]

In People v. Smith, 68 N.Y.2d 737, 739 (1986), for example, the trial court had denied "defendant's timely request to proceed pro se without determining whether it was knowingly or intelligently made or whether it was a good-faith attempt to exercise his right" to self-representation. On appeal, this Court held that "reject[ing the request] out of hand" denied the defendant his right to represent himself, requiring reversal. Id.

In the decades since Smith, the Court has frequently reiterated the rule that a defendant's unequivocal request to represent himself triggers the searching-inquiry obligation. See, e.g., People v. Crampe, 17 N.Y.3d 469 (2011) (reversing convictions

[3] In this regard, the McIntyre steps are similar to those required when a defendant requests new counsel: once he makes a "seemingly serious request" for new counsel that "proffers specific allegations" the court must conduct a "minimal inquiry" into the request. See People v. Porto, 16 N.Y.3d 93, 100, 101 (2010). The failure to conduct this inquiry violates the right to counsel and requires reversal. People v. Sides, 75 N.Y.2d 822, 824 (1990).

where courts' inquiries into defendants' self-representation requests were inadequate); People v. Smith, 92 N.Y.2d 516, 521 (1998) (the trial court's determination that defendant wished to waive counsel "triggered a 'searching inquiry' prerequisite"); People v. Slaughter, 78 N.Y.2d 485, 491 (1991) (new suppression hearing required where trial court granted mid-hearing pro se request without any inquiry); People v. Sawyer, 57 N.Y.2d 12, 20 (1982) (same, where defendant's pro se request, the fact of which "called upon the court to give the defendant appropriate warnings," was granted without sufficient inquiry).

The trial court's duty to conduct the inquiry is mandatory. Even if the court believes the defendant will not satisfy the second or third prong of the McIntyre test, it is still required to conduct the inquiry once the request has been made. McIntyre, 36 N.Y.2d at 19 (adherence to this procedure is compulsory even "[w]here a court feels that the motion is a disingenuous attempt to subvert the overall purpose of the trial"). The proper time for the trial court to determine whether an unequivocal pro se request is duplicitous or genuine is during the requisite searching inquiry, not before. Id. Thus, the inquiry may determine not only whether the defendant understands the consequences of proceeding without counsel, but also the request's veracity or any other factor that may be in doubt. This Court has repeatedly "endorsed the use of a nonformalistic, flexible inquiry" rather than adherence to a rigid formula, provided the trial court "accomplish[es] the goals of adequately warning a defendant of the risks inherent in proceeding pro se, and apprising a defendant of the singular importance of

the lawyer in the adversarial system of adjudication." Crampe, 17 N.Y.3d at 482 (citations omitted).

To activate the trial court's obligation to inquire, the defendant's request to proceed pro se must satisfy the first prong of the McIntyre test by being timely and unequivocally asserted. 36 N.Y.2d at 17. A request for self-representation is timely if it is made before the commencement of trial, as defined by the Criminal Procedure Law. Crespo, 32 N.Y.3d at 182. A nonjury trial "commences with the first opening address," while a jury trial begins at the start of jury selection. Id.; C.P.L. § 1.20(11).

A pro se request is unequivocal when it is "clearly and unconditionally presented to the trial court," McIntyre, 36 N.Y.2d at 17, thus expressing a "definitive commitment to self-representation." People v. LaValle, 3 N.Y.3d 88, 106 (2004). The unequivocal requirement is not herculean: a "petitioner must do no more than state his request, either orally or in writing, unambiguously to the court so that no reasonable person can say that the request was not made. …[T]he court must then conduct a hearing on the waiver of the right to counsel[.]" Dorman v. Wainwright, 798 F.2d 1358, 1366 (11th Cir. 1986).

The failure of the trial court to conduct a searching inquiry in the face of a timely and unequivocal request is a constitutional defect immune from harmless-error analysis. See LaValle, 3 N.Y.3d at 106; McKaskle v. Wiggins, 465 U.S. 168, 177 n.8 (1984).

2) Mr. Duarte's Unequivocal Request to Represent Himself Triggered the Searching-Inquiry Obligation.

Here, Mr. Duarte triggered the trial court's obligation to conduct an inquiry when he made a timely and unequivocal request to represent himself, satisfying the first prong of the McIntyre test. Before the suppression hearing began, he stated to the trial court "I would love to go pro se" (A040). His request was timely, having been made well before the opening address of his bench trial. See C.P.L. § 1.20(11). His request was also unequivocal: the plain meaning of his words, as interpreted by any reasonable person, see Dorman, 798 F.2d at 1366, is that he wished to represent himself. The request was not conditional as it did not express a wish to be fulfilled only *if* something else did or did not happen;[4] it was not accompanied by an alternative request; and it was not followed by a "but…", a caveat, or some other negation of his words. See A039-040; cf. LaValle, 3 N.Y.3d at 105 (defendant's request not unequivocal when he explicitly conditioned it on the court's denial of his request to remove his attorney, while

[4] The conditional tense in English requires the inclusion of a condition on which the action relies, which is typically expressed using a dependent "if" clause. See "Clarifying the Conditional Tense," The Blue Book of Grammar and Punctuation, available at https://www.grammarbook.com/blog/definitions/clarifying-the-conditional-tense/ (last visited June 3, 2021); see also THE CHICAGO MANUAL OF STYLE ONLINE ¶ 5.228 (17th ed. 2017) (defining a conditional clause as "an adverbial clause, typically introduced by *if* or *unless* (or…another subordinating conjunction), establishing the condition in a conditional sentence."). An example of the conditional tense is: "If you were going to the store, I would ask you to pick up eggs." In contrast, a polite request in English employs the same modal verb form ("would" or "could") without a condition attached. See, e.g., Cristobal Gomez, "How to Be Polite in English," Kaplan International Languages (Feb. 2, 2021), available at https://www.kaplaninternational.com/blog/working-internationally/eng/how-to-be-polite-english. For example, "I would like some water," or "Could you hand me that paper?"

stating, "not that I want to [represent myself]"). Instead, Mr. Duarte clearly and unconditionally expressed his desire to "go pro se" (A040).

This timely and unequivocal request triggered the court's searching-inquiry obligation. But rather than conducting the requisite inquiry, the trial court rejected the request "out of hand" and proceeded to the suppression hearing (A040); Smith, 68 N.Y.2d at 739. Under this Court's consistent holdings, this was a denial of Mr. Duarte's constitutional right to represent himself. Id.; McIntyre, 36 N.Y.2d 10.

B. THIS COURT SHOULD REJECT THE APPELLATE TERM'S NEW RULES—WHICH REDEFINE THE UNEQUIVOCAL STANDARD AND IMPOSE AN UNPRECEDENTED WAIVER DOCTRINE—BECAUSE THEY VIOLATE THIS COURT'S PRECEDENTS AND UNREASONABLY BURDEN THE RIGHT TO SELF-REPRESENTATION.

In holding that the trial court did not err in failing to inquire into Mr. Duarte's request for self-representation because it was equivocal and abandoned, the Appellate Term created two new rules of law that have no basis in this Court's precedents nor the sound logic of this Court's longstanding jurisprudence.

Of course, the Appellate Term did not suggest that Mr. Duarte's statement that he "would love to go pro se" was, on its face, conditional or ambiguous. Nevertheless, it illogically held that these plain words were not unequivocal because, before requesting self-representation, Mr. Duarte raised an issue that often motivates a desire for self-representation: he complained about his attorney. The Appellate Term mistakenly rooted its rule that an expression of dissatisfaction about counsel will render a pro se request equivocal in People v. Gillian, 8 N.Y.3d 85 (2006) (A004-005).

Next, inventing a second new rule of law, the Appellate Term found that even if Mr. Duarte's request was unequivocal, it was "abandoned" merely because he did not repeat it (A005). For this holding, too, the court erroneously relied on Gillian to invent a requirement that a defendant reiterate an unequivocal request or else waive his right to self-representation.

Contrary to the Appellate Term's view, these new rules not only violate precedent and have no basis in Gillian, but are irrational and unworkable. The court's new approach contravenes this Court's clear three-step protocol in McIntyre, substituting longstanding clarity with needless confusion. This Court should reject the Appellate Term's new rules and affirm established law.

1) This Court's Holdings in People v. Gillian and People v. LaValle Do Not Support the Lower Court Decision.

The Appellate Term misunderstood this Court's decision in People v. Gillian, 8 N.Y.3d 85, 87 (2006), as to both of its holdings. In Gillian, the defendant made a request to proceed pro se "in the alternative" to his written motion for reassignment of counsel, the second time he had asked for new counsel. The trial court appointed him a new attorney, and the defendant objected to the new counsel due to a specific conflict of interest but did not refer to his previous pro se request. Id. The court then appointed him a third attorney, and the defendant neither objected nor reasserted his desire to proceed pro se. Id.

This Court held that the defendant had not made an unequivocal request for self-representation because he had raised it only as an alternative request "as a way of obtaining the dismissal of his first assigned counsel." Id. at 88. This finding was further supported by his failure to bring up the pro se issue once the court had granted his alternative request of a new attorney, thus abandoning the issue by making it clear he had preferred new counsel over self-representation all along. Id.

People v. LaValle, 3 N.Y.3d 88, 106 (2004), is to the same effect. There, too, the defendant couched his desire to go pro se as an alternative request, explaining that he only wished to proceed pro se— and reluctantly, at that— if the court would not remove one of his defense attorneys:

> Your Honor, *if* you are telling me that I have to respect and listen to my lawyers' views on how to attack this case…[then] *I would ask* that you dismiss my lawyers and if I could represent myself. … The only thing I see and that's my last option is to represent myself, *not that I want to*, I don't know anything about the law. … [if the court would] deny me the right to represent myself, maybe [consider] appointing two new lawyers.

Id. at 105 (emphasis added). Once the court granted his request to remove his attorney, the defendant did not refer again to self-representation. As in Gillian, this Court found that the defendant's silence after his alternative request had been granted indicated that he was "satisfied" with the result he had preferred all along, and his failure to raise the pro se issue following this outcome constituted an abandonment. Id. at 107.

The lower court's decision in the instant case is an unfounded distortion of this Court's holdings in Gillian and LaValle. These cases do not hold that a self-

representation request made "within the context of complaints about his counsel" is rendered equivocal (A004-005)—on the contrary, both cases say the opposite. Gillian, 8 N.Y.3d at 88 and LaValle, 3 N.Y.3d at 107 (both cautioning that "conditioning a request for new attorneys with a request for self-representation d[oes] not necessarily render the latter request equivocal[.]"). Nor do they hold that any defendant who does not repeat his request, outside of the limited context where an alternative request has been granted, will be found to have abandoned it (A004). As will be detailed infra, the new rules adopted by the Appellate Term are not only inconsistent with this Court's holdings but also unconstitutional and unnecessary.

2) The Expression of Dissatisfaction with Counsel Does Not Render a Clear Pro Se Request Equivocal.

The Appellate Term's first new rule, a novel interpretation of the unequivocal-request requirement, is deeply flawed and unsupported by Gillian. In holding that Mr. Duarte's pro se request was unequivocal because it "came within the context of his complaints about his counsel" (A004-005), the Appellate Term ignored the fact that, as this Court has recognized, a self-representation request is often motivated by dissatisfaction with counsel and does not render a clear request equivocal. An endorsement of the Appellate Term's holding in this case would result in the forfeiture of a fundamental right for nearly all defendants who wish to exercise it. Here, given that Mr. Duarte did not even ask for new counsel, his plain words requesting to proceed

pro se cannot be interpreted as anything other than what they were: an invocation of his self-representation right that triggered the need for a McIntyre inquiry.

As a preliminary matter, the instant case is distinct from many because, although Mr. Duarte expressed dissatisfaction with his attorney on two occasions, including immediately before asking to proceed pro se, he never actually asked to be assigned new counsel (A021-024, 039-040). His request that the assigned attorney "not represent me at all" (A039) is fully consistent with a desire—the desire he went on to express directly—to proceed as his own counsel (A040). In another respect, then, this case is distinguishable from Gillian, where the defendant "moved in writing for reassignment of counsel," and asked in the alternative to proceed pro se. 8 N.Y.3d at 87. As Mr. Duarte did not even request a new attorney, it cannot be inferred from the record that he only "raised the argument for self-representation as a way of obtaining" one. Id. at 88.

In any event, Mr. Duarte's dissatisfaction with his assigned counsel does not render his pro se request equivocal regardless of whether he also asked for new counsel. This Court has long recognized that many defendants wish to represent themselves *because* they are unhappy with their attorney. The McIntyre Court described this as one of the most common motivations to proceed pro se. 36 N.Y.2d at 16 ("Frequently, the Pro se defendant is motivated by a dissatisfaction with the trial strategy of defense counsel or a lack of confidence in his attorney"). In People v. Rosen, 81 N.Y.2d 237, 244 (1993), for example, the Court noted that "defendant was motivated [to conduct

his own defense] by dissatisfaction with his counsel's performance." The Rosen defendant had unsuccessfully requested assignment of new counsel because of a loss in confidence in his attorney, then later "informed the court that he wished to represent himself for the remainder of the trial *because of his counsel's numerous factual mistakes and inadequate cross-examination*." Id. at 241 (emphasis added).

For this reason, this Court has not hesitated to describe pro se requests that came in the context of complaints about assigned counsel as unequivocal. In People v. Sawyer, 57 N.Y.2d 12, 17-18 (1982), the defendant had repeatedly requested removal of his assigned counsel in favor of an attorney who was not from the public defender's office. Although he explained that he "desired counsel," he could not "consent to have [the public defender's office] assigned to him," which the trial court informed him would be considered a request for self-representation. Id. at 18. This Court determined that the trial court was required to provide the defendant with the requisite McIntyre warnings, because his choice to proceed pro se "was unequivocal," "whatever his displeasure at having to make [it]." Id. at 20. And in People v. Stone there was no question the defendant's pro se request was unequivocal even though he "expressed distrust of his lawyer" and complained that his lawyer did not have his "best interest at heart' and wanted to sell him out." 22 N.Y.3d 520, 522, 528 (2014) (noting defendant's complaints about his attorney "cannot fairly be described as 'red flags' that should put

the court on notice of a severe mental illness since defendants who wish to proceed pro se often express similar views.").[5]

In contrast, as in Gillian and LaValle, a pro se request that is expressly conditioned on an *alternative* request for new counsel may well be equivocal. See Gillian, 8 N.Y.3d 85; LaValle, 3 N.Y.3d at 107; see also p. 17-19, supra.[6] Even in those cases, however, the Court noted that "defendant's conditioning of his request for new counsel with a request for self-representation did *not* necessarily render the latter request equivocal[.]" 8 N.Y.3d at 88; 3 N.Y.3d at 107 (emphasis added).

The Appellate Term erred in holding, then, that the mere fact that a defendant's pro se request "came within the context of his complaints about his counsel" rendered it equivocal (A004-005). Unless expressly conditioned on the denial of an alternative request for new counsel, an explicit request to exercise one's right to self-representation cannot be said to be equivocal simply because the defendant has expressed one of the most common motivations to do so. See McIntyre, 36 N.Y.2d at 16.

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[5] See also People v. Lewis, 114 A.D.3d 402, 403-04 (1st Dep't 2014) (reversing conviction where trial court denied pro se request "without any inquiry whatsoever" because it had decided request was a means to receive a new attorney; "the fact that defendant's request to proceed pro se had been preceded by an unsuccessful request for new counsel did not render [it] equivocal"); People v. Chess, 162 A.D.3d 1577, 1579 (4th Dep't 2018) (pro se request not equivocal simply because it was preceded by unsuccessful requests for new counsel).

[6] Similarly, the Court found a pro se request equivocal in In re Kathleen K., where the attorney had asked the trial court "to be relieved from this case" without reference to a pro se request, and the client made clear he sought reassignment rather than self-representation when he told the court "that's why I want a different counsel." 17 N.Y.3d 380, 386 (2011). The client's conditional response of "If I have to" to the court's question "You're ready to proceed on your own?" was not sufficient to "reflect an affirmative desire for self-representation" rather than his concurrently expressed desire for a new attorney. Id. at 387.

Interpreted correctly, this Court's decisions and LaValle and Gillian are readily distinguishable. Here, unlike those cases, the record contains no indication that Mr. Duarte's explicit pro se request was a pretext to obtain new counsel. Unlike in LaValle and Gillian, he did not express his request as an alternative to receiving a new attorney; nor did he use self-representation as a threat or unwanted outcome to the denial of that request. Cf. In re Kathleen K., 17 N.Y.3d 380, 386 (2011) (party only wanted to proceed pro se "if I have to," if his primary request for new counsel was not granted). There is no question that Mr. Duarte was dissatisfied with the attorney, a fact he expressed on two occasions (A021-024, 039-040). On neither occasion, however, nor at any other time in the record, did he request reassignment of counsel (id.). And at each appearance in which he expressed concerns about his attorney, he displayed an affirmative desire to address the court himself rather than through counsel,[7] ultimately asking the court to permit him to "go pro se" (A040). Cf. Kathleen K., 17 N.Y.3d at 387. Moreover, even if Mr. Duarte had made a request for new counsel, it would not render a subsequent invocation of the right to self-representation equivocal unless the invocation was expressly conditioned on the request for new counsel. Like many pro se defendants before him, Mr. Duarte was entitled to decide that representing himself was a better option than continuing with his assigned attorney. See Rosen, 81 N.Y.2d

[7] See A20-22 (asking to "speak in my own defense" and declining the court's invitation to speak through his attorney).

at 244 (when defendant's request for new counsel was denied, he concluded "his interests would be furthered by self-representation" instead).

Regardless of whether the Court interprets Mr. Duarte's prior statements as an implicit request for new counsel, his self-representation request was unquestionably explicit. On its face, the sentence "I would love to go pro se," neither preceded nor followed by a condition or caveat, is an unambiguous request for self-representation that "no reasonable person could say…was not made." See Dorman v. Wainwright, 798 F.2d 1358, 1366 (11th Cir. 1986). To describe these words as equivocal necessitates leaping to inferences not present in the plain language of the record, and then favoring those inferences *over* the record.

Mr. Duarte's "clear and unconditionally presented" request to "go pro se" (A040) obligated the trial court to inquire further. See McIntyre, 36 N.Y.2d at 17. And if the court questioned whether Mr. Duarte truly meant the words he had uttered, it should have asked those questions during the requisite "nonformalistic, flexible inquiry" into the unequivocal request. See People v. Crampe, 17 N.Y.2d 469, 482 (2011). The court was not required to *grant* the pro se request if it determined, upon its inquiry, that Mr. Duarte was not making a knowing waiver of counsel or was engaged in conduct "calculated to undermine, upset or unreasonably delay the progress of the trial." See McIntyre, 36 N.Y.2d 10, 18 (1974). But its summary denial of an explicit pro se request without any inquiry was reversible error that deprived Mr. Duarte of his right

to self-representation. See People v. Smith, 68 N.Y.2d 737, 739 (1986) (reversing conviction for summary denial of unequivocal pro se request).

To affirm the Appellate Term's holding that Mr. Duarte's pro se request was equivocal would require this Court to overturn decades of precedent to create a rule that is unwarranted and unconstitutional—a rule that would subvert a defendant's right to self-representation merely because his clear pro se request was preceded by complaints about his attorney, even if he never once requested new counsel. Such a rule would essentially redefine "unequivocal" to no longer mean the words spoken by the defendant expressing his plain intent, but to include an assessment of his motivation as well, based solely on the court's inferences rather than the required inquiry or even the record. Moreover, this approach would render decisive a motivation that is constitutionally *irrelevant*—a defendant's "lack of confidence in his attorney," see McIntyre, 36 N.Y.2d at 16—spurning the realities that commonly drive a defendant's desire for self-representation. Id. Nor is a new rule warranted by the record in this case, where Mr. Duarte's plain language made clear to the trial court that he wished to invoke his right to proceed pro se, thus triggering the need for an inquiry. The summary denial of this request cannot be affirmed.

3) A Pro Se Request is Not Abandoned if Not Made More Than Once.

The Appellate Term's second new rule is equally erroneous: there is no obligation nor practical need for a defendant to repeat an unequivocal pro se request or else forfeit his right to self-representation, and Mr. Duarte cannot be said to have

"abandoned" his clear request here because he made it only once (cf. A004). The Appellate Term erred in concluding that a constitutional right that has been expressly invoked must be repeated or else waived, thereby adding an unworkable prerequisite that unduly constricts the right to self-representation.

As discussed supra, the trial court's obligation to inquire into the second and third McIntyre prongs is triggered by the defendant's "timely and unequivocal" request. There is no doubt that the McIntyre Court, which repeatedly referred to "the Pro se request" in the singular, intended to impose a requirement of a *single* request that was "clearly and unconditionally presented." 36 N.Y.2d at 17; see also People v. Crespo, 32 N.Y.3d 176, 185 (2018) ("[W]e hold that, in accordance with McIntyre, *a request* to represent oneself in a criminal trial is timely where *the application* to proceed pro se is made before the trial commences.") (emphasis added). And no subsequent decision by this Court has added a requirement to the three McIntyre prongs—essentially, inserting a prong (1)(a)—that the defendant repeat his timely and unequivocal request some unspecified number of times before activating the court's obligation to inquire.

The Appellate Term's repetition requirement also violates the fundamental principle that the unequivocal invocation of a constitutional right cannot be abandoned or, put another way, waived without an affirmative indication of the defendant's intent to do so. Because a waiver is "an *intentional* relinquishment or abandonment of a known right or privilege," Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (emphasis added), the Supreme Court has made clear that "presuming waiver from a silent record is

impermissible." See Carnley v. Cochran, 369 U.S. 506, 516 (1962); see also Barker v. Wingo, 407 U.S. 514, 525 (1972) ("Such an approach, by presuming waiver of a fundamental right from inaction, is inconsistent with this Court's pronouncements on waiver of constitutional rights."); Aetna Ins. Co. v. Kennedy to Use of Bogash, 301 U.S. 389, 393 (1937) ("[C]ourts indulge every reasonable presumption against waiver [of fundamental rights]"). This Court, too, has affirmed that "a record that is silent will not overcome the presumption against waiver by a defendant of constitutionally guaranteed protections." People v. Harris, 61 N.Y.2d 9, 17 (1983) (citations omitted). Instead, the record "must show, or there must be an allegation and evidence which show, that an accused intelligently and understandingly rejected his constitutional rights. Anything less is not waiver." People v. Tyrell, 22 N.Y.3d 359, 365-66 (2013) (quoting Carnley, 369 U.S. at 516) (other citations omitted).

For this reason, the Court has held, for example, that a defendant cannot be found to have validly waived his Boykin rights during a guilty plea based on a silent record, which is not sufficient to constitute "an affirmative showing on the record that the defendant waived his constitutional rights." Tyrell, 22 N.Y.3d at 365 (citations omitted). In other constitutional contexts, too, courts have rejected the theory of waiver-by-silence. See, e.g., People v. Esposito, 32 N.Y.2d 921, 923 (1973) (defendant's failure to remind the court of the plea agreement the court did not keep was not a waiver of his right to a knowing and intelligent guilty plea); People v. LeMieux, 51 N.Y.2d 981, 983 (1989) (jury charge issue was not forfeited by the lack of a post-charge

exception, because defendant "had not demonstrated a clear intent to waive a position already preserved"); Chang v. United States, 250 F.3d 79, 84 (2d Cir. 2001) ("We…agree with those circuits that have refused to find a waiver or forfeiture [of defendant's right to testify] solely from a defendant's silence at trial."); see also People v. Slaughter, 78 N.Y.2d 485, 492 (1991) ("declin[ing] to hold that, of itself, the lack of a request to reopen [the hearing in which a pro se request was improperly granted] constitutes an abandonment of defendant's preserved constitutional claim.").

Because "we do not presume acquiescence in the loss of fundamental rights," see Zerbst, 304 U.S. at 464, there is only a limited context in which a defendant will be found to have implicitly waived or abandoned a clear request for self-representation. This context is characterized by an "affirmative showing" of a knowing and intelligent waiver, see Tyrell, 22 N.Y.3d at 365, which makes it abundantly clear the defendant has chosen to waive the pro se right he has already invoked.

The first scenario in which a defendant abandons a pro se request is where he has requested self-representation *in the alternative* to a different request, such as for different counsel, and the court *grants* the latter request. Under those circumstances, a defendant who does not repeat the pro se request will be presumed to be satisfied with having received the other outcome he had requested. See, e.g., Gillian, 8 N.Y.3d 85, LaValle, 3 N.Y.3d at 107 (defendant stated "I'm ready to proceed with [the alternate attorney]"). This conclusion is not only logical, but also consistent with general preservation precepts. See, e.g., People v. Alvarez, 239 A.D.2d 263 (1st Dep't 1997)

("Since defendant expressly agreed to the remedy fashioned by the court, and implicitly abandoned any prior objections, he has not preserved for appellate review his argument[.]"); People v. Heide, 84 N.Y.2d 943, 944 (1994) (trial court gave curative instruction after defendant's objection to prejudicial summation remarks; lack of further objection left unpreserved the appellate claim that the curative instruction was an insufficient remedy).

Second, a defendant's pro se request is abandoned where the court has not denied but *deferred* it, instructing him to renew it at a later time; when he does not, he makes clear that he has changed his mind. See, e.g., People v. Little, 151 A.D.3d 531, 531-32 (1st Dep't 2017). This exception is also consistent with principles of preservation and abandonment, which hold that an objection that was overruled due to prematurity or denied subject to renewal must be renewed in order to be raised on appeal, because the defendant was put on notice that further action was needed. See, e.g., People v. Russell, 71 N.Y.2d 1016, 1017-18 (1988) (defendant's severance motion was denied as premature and without prejudice to renew; neglect to do so "at the appropriate time" failed to preserve it); see also, e.g., People v. Epps, 37 N.Y.2d 343 (1975) (where defendant was warned that he would waive his right to be present if he did not appear in court, his failure to appear was sufficient to establish a knowing waiver).

Neither scenario of implicit waiver is present here. As discussed supra at p. 20, 23-24, the court did not remove Mr. Duarte's attorney in response to his complaints or

grant some alternative request. Cf. Gillian, 8 N.Y.3d 85, LaValle, 3 N.Y.3d at 107. Nor did the court direct him to renew his pro se request at a later time, or otherwise put him on notice that he would waive his right to self-representation if he did not invoke it a second time. Cf. Russell, 71 N.Y.2d at 1018. Yet the Appellate Term concluded that Mr. Duarte had "abandoned his request by proceeding with the scheduled suppression hearing and subsequent trial without expressing any further desire to represent himself" (A005). In other words, merely because he did not repeat it—relying solely on his silence rather than any "affirmative showing" of a knowing and intelligent waiver—the court found that Mr. Duarte had abandoned his unequivocal pro se request. This was error that requires reversal.

Affirming the lower court's holding would require this Court to adopt a second new rule: a defendant must make not one unequivocal request, but two (or perhaps more), or else be deemed to have waived the right to self-representation he had already invoked even though there was no "affirmative showing" of a waiver. This rule would impermissibly burden a defendant's right to proceed pro se in violation of the long-standing constitutional principles that repudiate waiver through mere silence.

The imposition of a repetition requirement is also inconsistent with the distinct but parallel preservation doctrine.[8] It is well-settled that a litigant need only raise an

[8] See People v. Ahmed, 77 N.Y.2d 307, 311 (1985) ("Waiver and preservation are separate concepts, although they are often inextricably intertwined. Waiver connotes the intentional relinquishment or abandonment of a known right.") (citations omitted).

issue once in order to preserve it for appeal, without the need to repeat it. As this Court reaffirmed in People v. Finch, 23 N.Y.3d 408, 412 (2014), "once is enough" to preserve a point. The preservation statute reinforces the point as it obligates the party to "ma[k]e his position…known to the court" without imposing a repetition requirement. C.P.L. § 470.05(2). Indeed, the Criminal Procedure Law expressly rejects such a rule, as it states that "a party who without success has…sought or requested a particular ruling or instruction, is deemed to have hereby protested the court's ultimate disposition of the matter or failure to rule or instruct accordingly sufficiently to raise a question of law[.]" Id. If even a lawyer is not required to repeat herself to preserve a claim, a heightened standard should not be imposed on a lay individual who seeks to represent himself without the benefit of counsel—particularly when that individual is invoking a constitutional right.

In addition, the new rule implemented by the Appellate Term is unnecessary and unworkable. In the decades since McIntyre, a defendant has been required to make one unequivocal request for self-representation. 36 N.Y.2d at 17. The requirement that the request be unequivocal ensures that the court is put on notice of its obligation to conduct an inquiry. And the condition that the request be timely, raised before the trial has commenced, minimizes "the potential for obstruction and diversion," and "avert[s] delay and confusion." Id.; see also People v. Crespo, 32 N.Y.3d 176 (2018). Adding a repetition requirement would insert precisely the diversion and confusion this Court sought to avoid, encouraging defendants to continue interrupting the trial proceedings

to reiterate a request the court has already rejected, and muddying the clear standard of the timeliness requirement.[9] In contrast, the longstanding McIntyre rule provides clarity and minimizes the potential for disruption and uncertainty.

A single, unequivocal invocation is an appropriate burden to place upon a defendant to trigger the trial court's obligation to inquire. A lay defendant should not have to do anything additional to make his position known to the trial court, as Mr. Duarte did here when he stated, "I would love to go pro se" (A040). Requiring the defendant to repeat his request before the court must even begin the inquiry adds an undue burden that has no foundation in law.

In sum, the Appellate Term's decision here creates a rule that presumes waiver of a fundamental right without any affirmative showing thereof. See Zerbst, 304 U.S. at 464. This rule is not only unconstitutional and inconsistent with this Court's precedent and federal law, but also impractical and unnecessary. This novel theory should be rejected.

[9] For example, if a defendant made an unequivocal request for self-representation before the trial began, but did not fulfill the new repetition requirement until after the start of jury selection, would his pro se request be considered timely? And how many reiterations will be sufficient to avoid abandonment; at what point may he safely cease repeating his request?

CONFIDENTIAL

Pursuant to Civil Rights Law § 50-b, the identities of the victims, who are the victims of sex offenses, shall be confidential, and this document shall not be made available for public inspection.

APL-2021-00037

To be argued by
R. JEANNIE CAMPBELL-URBAN
(15 MINUTES REQUESTED)

Court of Appeals

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against -

VLADIMIR DUARTE,

Defendant-Appellant.

BRIEF FOR RESPONDENT

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OCTOBER 14, 2021

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-against-

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Defendant-Appellant.

BRIEF FOR RESPONDENT

PRELIMINARY STATEMENT

By permission of the Honorable Jenny Rivera, granted on March 3, 2021, defendant Vladimir Duarte appeals from a November 27, 2020 order of the Appellate Term, First Department, unanimously affirming his July 31, 2017 judgment of conviction of the Criminal Court, New York County (Ann E. Scherzer, J.). By that underlying judgment, defendant was convicted, after a bench trial, of Forcible Touching (Penal Law § 130.52[1]) and Sexual Abuse in the Second Degree (Penal Law § 130.60[2]) and sentenced to concurrent, definite terms of one year. Defendant has served his sentence.

QUESTION PRESENTED

Under the New York and Federal Constitutions, criminal defendants have the right to waive their fundamental entitlement to representation by counsel and to elect,

instead, to represent themselves at trial. N.Y. Const. Art. I, § 6; Faretta v. California, 422 U.S. 806 (1975); People v. McIntyre, 36 N.Y.2d 10 (1974). But the right to self-representation is not absolute. In People v. McIntyre, this Court held that, among other requirements, a defendant's request to proceed pro se must be unequivocal, in that it be "clearly and unconditionally presented to the trial court." 36 N.Y.2d at 17. The Court fashioned this prerequisite to guard against attempts by "convicted defendants" to "pervert the system by subsequently claiming a denial of their pro se right[.]" Id.

In light of the foregoing, did defendant's isolated remark, "I would love to go pro se[,]" which he made immediately after the trial judge rejected his second application for substitution of his appointed counsel, amount to an unequivocal request to exercise his right to self-representation?

The Appellate Term, First Department unanimously concluded that defendant's comment was not a clear and unequivocal request to proceed pro se.

INTRODUCTION

On the morning of April 5, 2017, [redacted], was walking to school, traveling downtown on St. Nicholas Avenue near the intersection of [redacted]. Defendant, who was walking uptown on the same sidewalk and was wearing a pair of rectangular, gold-framed glasses, [redacted], and then fled. [redacted] walked to school and immediately reported defendant's conduct to a classmate and a school safety officer.

Although no surveillance cameras captured defendant's sexual assault of [redacted] video footage established that he had walked northbound on St. Nicholas Avenue, from West 172nd Street and toward West 173rd Street, just moments before the crime. The footage also showed that [redacted] had walked southbound on the same sidewalk, from [redacted], about ten seconds later, immediately after the sexual abuse had occurred. In addition, footage from defendant's apartment building, which was on the northwest corner of [redacted], established that he had arrived home only minutes after the crime was committed. [redacted] reviewed some of the video footage with a detective and identified defendant as her assailant. On April 10, 2017, police officers apprehended defendant, who was wearing the rectangular, gold-framed glasses. That same day, [redacted] identified him as her assailant in a lineup identification procedure.

By New York County Docket Number 2017NY020774, a misdemeanor complaint filed on April 10, 2017 charged defendant with one count of forcible touching and one count of second-degree sexual abuse. The following day, defendant appeared in Criminal Court for his arraignment on the complaint. Douglas Lyons, an attorney from the Legal Aid Society, was assigned to represent him.

On May 10, 2017, defendant and Lyons appeared in Criminal Court for a calendar call. Defendant interrupted the proceedings to lodge a litany of complaints about Lyons and "object[ed]" to the court's assurance that Lyons was acting as a

zealous advocate. The judge denied defendant's implicit request to substitute new counsel for Lyons.

Three weeks later, on June 2, 2017, defendant and Lyons appeared before the Honorable Ann E. Scherzer for a suppression hearing. Defendant repeated his application for substitution of counsel, pronouncing Lyons "ineffective" and complaining that Lyons did not believe in defendant's innocence. After assuring defendant that Lyons's alleged beliefs did not render him ineffective, the court expressly denied what it reasonably interpreted as a request for a new attorney and instructed the People to call their first witness. Defendant said, "I would love to go pro se." The court did not respond to defendant's remark and instead repeated that the People should call their first witness. The prosecutor did so, and the suppression hearing commenced. Defendant never again mentioned the issue of self-representation.

On June 5, 2017, defendant, with counsel by his side, waived his constitutional right to a jury trial and proceeded to a bench trial before Justice Scherzer. On June 8, 2017, the court found defendant guilty of both charges and, on July 31, 2017, it sentenced him as described above.

On appeal to the Appellate Term, First Department, defendant claimed, among other things, that the trial court had erred by failing to conduct a searching inquiry into his purported request to proceed pro se. The reviewing panel of the Appellate Term unanimously affirmed the judgment of conviction. In relevant part, the court

found that the record as a whole established that defendant had not made an unequivocal request to proceed pro se. The court reasoned that defendant's reference to self-representation had come within the context of his complaints about his attorney and concluded that he had not expressed the definitive commitment to self-representation necessary to trigger an inquiry by the trial court. The court also found, in the alternative, that defendant had abandoned his pro se request by proceeding with the suppression hearing and subsequent trial without expressing any further desire to represent himself. A003-06 (People v. Duarte, 69 Misc.3d 148(a) [1st Dept. App. Term 2020]).

Defendant now appeals to this Court.

THE RELEVANT RECORD

Defendant repeatedly disrupts his pre-trial court appearances, but never mentions any desire to represent himself.

On April 11, 2017, defendant appeared in Criminal Court for his arraignment on the misdemeanor complaint. In their bail application, the People stated that defendant was accused of grabbing a [redacted] while on a public street.[1] Douglas Lyons, the attorney from the Legal Aid Society who was assigned to represent defendant, informed the court that his client denied the charges "outright" and would be unable to make "any" bail. Defendant interrupted and, disregarding the

[1] The People also noted that defendant had multiple convictions for criminal contempt, which, they argued, demonstrated his history of refusing to abide by orders of the court (A002 [April 11, 2017 Minutes: 2]).

court's instructions to speak only to Lyons, said, "I want a DNA test. I want a lab test and all of that, your Honor." The court set bail and adjourned the case (A007-10 [April 11, 2017 Minutes: 1-4]; A356 [Complaint]).

Three days later, defendant and Lyons appeared in court again. After the People provided the victim's supporting deposition, Lyons requested a motion schedule and, considering defendant's ongoing incarceration, readily agreed with the court's suggestion of expediting motion practice. The court set a motion schedule and adjourned defendant's case (A011-13 [April 14, 2017 Minutes: 1-3]; A364 [Supporting Deposition]).

Lyons filed and served his omnibus motion and a Brady demand letter on April 17, 2017, several days before the deadline set by the court (A417-40 [Lyons Omnibus Motion]; A365-97 [Brady Demand Letter]; A012 [April 14, 2017 Minutes: 2]).

At defendant's next court appearance, on April 25, 2017, the People filed and served their omnibus motion response, which argued that Lyons's written request for a suppression hearing should be denied. After Lyons reminded the court that a lineup identification procedure had taken place, the court ordered a Wade/Huntley hearing (A014-15 [April 25, 2017 Minutes: 1-2]; A398-407 [People's Omnibus Response]).

The People stated that, if defendant was willing to plead guilty, they would recommend a 9-month jail sentence. Lyons asked the court to offer a shorter sentence. The court declined and inquired whether defendant wanted to accept the 9-month jail sentence. Lyons said no, at which point defendant interjected and said,

"Not at all." Disregarding Lyons's advice to "[j]ust say no[,]" defendant elaborated, stating, "I'm not guilty of what I'm being charged of." A moment later, he interrupted the judge to remark that he wanted to be transferred to the Manhattan Detention Complex because, at his current housing facility in Brooklyn, he had been "attacked because of this case[.]" The court said, "Okay[,]" and then worked with the lawyers to select a date for hearings and trial (A015-17 [April 25, 2017 Minutes: 2-4]).

Before the court adjourned defendant's case, Lyons requested a bail reduction, pointing to the time that had elapsed since defendant's arraignment and arguing that his bail was "too high" for a "one witness" misdemeanor case. The People opposed this application. The court denied Lyons's request and adjourned the case. After the court issued its ruling, defendant interjected, "This should be bias, Judge. Everything here. You're not giving me a break on bail or nothing? DA gets it all? Everything?" (A017-18 [April 25, 2017 Minutes: 4-5]).

The calendar court rejects defendant's first application for substitution of counsel.

At defendant's May 10, 2017 court appearance, the People answered not ready for trial and explained that the case needed to be reassigned to another assistant district attorney.[2] Lyons, who was ready for trial, immediately asked for a bail reduction. He pointed out that defendant was incarcerated and argued that since the

[2] It appears that defendant interrupted the People while they were providing this information to the court. The transcript reflects that, in the midst of the People's explanation for why the case would be reassigned, the judge stated, "I am listening to the prosecutor. You have to stop talking" (A020 [May 10, 2017 Minutes: 2]).

court could not "make" the People ready for the trial that his client was "entitled to[,]" it should lower his bail (A020 [May 10, 2017 Minutes: 2]).

Before the judge could rule on Lyons's request, defendant interrupted and said he wanted to "speak in [his] defense[.]" The court warned defendant of the perils of speaking on the record and repeatedly instructed him to "protect [his] rights" by speaking to Lyons. Defendant declined, replying, "No, ma'am. I am not going to. I have the right to speak to you as a man." Defendant added that he "underst[oo]d" his rights "very well" and believed he could "speak on [his] own behalf" because he was "part of the 'we'" in the phrase "In God We Trust" (A021 [May 10, 2017 Minutes: 3]).

Defendant then informed the judge he did not want Lyons "representing [him] no more." He complained that Lyons did "nothing" for him and did "not even talk" to him. He accused Lyons of conspiring with the District Attorney's Office and treating defendant "like a detective" (A021-22 [May 10, 2017 Minutes: 3-4]).

Addressing Lyons next, defendant said, "Sir, you are my lawyer." He then attempted to read an unidentified document into the record "in [his] defense[.]"[3] At that point, the court instructed defendant to "stop" talking and "use" his attorney. Defendant asked whether "[his] lawyer" would read the document on his behalf (A022, A024 [May 10, 2017 Minutes: 4, 6]).

[3] Defendant subsequently referred to this document as his "testimony" (A024 [May 10, 2017 Minutes: 6]).

Lyons did not read the document into the record and instead detailed his efforts to be a "zealous advocate" for his client. These efforts included speaking to defendant and his family, investigating the case, and reviewing the People's evidence. He concluded by stating he did not know "what" defendant was "saying" to the court. While Lyons spoke, defendant repeatedly interjected to assert that he had "never heard" about Lyons's work on his behalf (A022-23 [May 10, 2017 Minutes: 4-5]).[4]

The judge told defendant that Lyons appeared to have been "zealously representing" him since his arrest, noting in particular that Lyons had not caused any delay in the resolution of the case. Defendant replied, "I object." The court declined to relieve Lyons from his representation of defendant, denied the application to reduce defendant's bail, and adjourned the case. While the judge was speaking, defendant continued to interject, remarking that he was "ready and willing today[,]" that he was being held in jail, that he wanted to know "[w]ho" was "accusing" him, and that he was supposed to have received a copy of an order of protection (A023-24 [May 10, 2017 Minutes: 5-6]).[5]

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[4] The court repeatedly told defendant not to interrupt his attorney. At one point, a court officer told defendant that if he did not "stop" talking, he would be taken back to the holding cell (A022-23 [May 10, 2017 Minutes: 4-5]).

[5] Defendant was not produced for his next two court dates, May 18 and 31, 2017. On each occasion, the People answered not ready for trial. Each time, Lyons responded that he wanted to proceed to trial as soon as possible because defendant was "still in jail." As a result, the court adjourned defendant's case to June 2, 2017 (A025-26 [May 18, 2017 Minutes: 1-2]; A029-33 [May 31, 2017 Minutes: 2-6]).

Immediately after the trial court denies his second application for substitution of counsel, defendant retorts that he would "love to go pro se."

On June 2, 2017, defendant, Lyons, and the People appeared before Justice Scherzer for a suppression hearing and trial. After confirming that the parties were ready to begin the hearing, the judge asked defendant to confirm that he did not wish to plead guilty and accept her offer of a 7-month jail sentence. Defendant did not answer the court's question. Instead, he complained again about Lyons, stating, "This is an ineffective counsel. I had made that clear on my last appearance with him. He's not effective at all." Defendant claimed that Lyons had failed to meet with him to discuss the case. Defendant concluded by stating that he "wish[ed] for [Lyons] not to represent [defendant] at all because he's ineffective" and did not believe defendant "did not do" the crime (A038-39 [June 2, 2017 Minutes: 1-2]).[6]

Justice Scherzer denied defendant's application and instructed the People to call their first hearing witness. Defendant began to interject, stating, "I would like to read --". The court instructed defendant not to speak, to which he replied, "I object to your denying me ineffective counseling here." The court repeated that the People should call their first witness. Defendant said, "I would love to go pro se." Justice Scherzer did not respond to defendant's remark. Instead, she confirmed that the hearing was "a Huntley/Wade/Dunaway" and, for the third time, instructed the

[6] For his part, Lyons denied having told defendant that he believed defendant was guilty (A039 [June 2, 2017 Minutes: 2]).

People to call their first witness. The prosecutor did so, and the hearing commenced (A040-41 [June 2, 2017 Minutes: 3-4]).[7]

Defendant is represented by appointed counsel at the suppression hearing, trial, and sentencing. He repeatedly disrupts these proceedings, but never again references self-representation.

During the suppression hearing and subsequent bench trial, at which defendant was represented by Lyons, defendant continued to interrupt the proceedings with on-the-record interjections and other disruptions. For instance, after Justice Scherzer posed a question to one of the People's hearing witnesses, defendant interrupted to say that he "object[ed] to leading on the witness[.]" During a break in the trial testimony, defendant said to the court, "Judge, I must say I love you." And, after the trial court found him guilty of both charges, defendant "object[ed]" to the verdict and then, addressing Lyons, said, "You as my lawyer are not objecting so I might as well do it" (A042, A046-47, A055 [June 2, 2017 Minutes: 5, 9-10, 18]; A146, A213 [June 7,

[7] During a break in the suppression hearing testimony, defendant said to Justice Scherzer, "I want to do this trial by judge, not jury, please." When the parties next appeared in court, the judge asked Lyons if he had spoken to defendant regarding his desire to waive his right to a jury trial. Lyons responded that he had and that defendant still wished to proceed in that fashion. Later that day, Justice Scherzer engaged defendant in a colloquy regarding his understanding of his waiver of his right to a jury trial, and defendant also executed a written waiver to that effect (A055 [June 2, 2017 Minutes: 18]; A112, A137-39 [June 5, 2017 Minutes: 57, 82-84]; A363 [Defendant's Written Jury Trial Waiver]).

2017 Minutes: 5, 72]; A260, A277, A291, A343-44 [June 8, 2017 Minutes: 119, 136, 150, 202-03]).[8]

At sentencing, defendant "strongly" endorsed Lyons's remarks to the court on his behalf, which had included an application to set aside the verdict. When Justice Scherzer imposed sentence, defendant "object[ed]" and accused her of being "totally biased" (A346-51, A354 [July 31, 2017 Minutes: 2-7, 10]).[9]

Throughout defendant's suppression hearing, bench trial, and sentencing, he never again referenced the issue of self-representation.

POINT

THE TRIAL COURT DID NOT DEPRIVE DEFENDANT OF HIS RIGHT TO SELF-REPRESENTATION (Answering Defendant's Brief).

Prior to the commencement of the suppression hearing, defendant repeatedly interrupted the proceedings to complain about the performance of his assigned counsel. In each of the two appearances where that occurred, the court fairly interpreted defendant's complaints as a request to relieve counsel and substitute a new

[8] Justice Scherzer repeatedly admonished defendant for his disruptive conduct and twice warned him that she would remove him from the courtroom if he did not control his behavior (A042, A047, A054-55 [June 2, 2017 Minutes: 5, 10, 17-18]; A057 [June 5, 2017 Minutes: 2]; A146 [June 7, 2017 Minutes: 5]; A260 [June 8, 2017 Minutes: 119]).

[9] At sentencing, the People relayed that defendant's "extensive" criminal record, comprising two felony convictions and ten misdemeanor convictions, included convictions for criminal contempt, assault, menacing, and weapons possession. They noted, in particular, that eight days prior to sexually assaulting [redacted], defendant had been convicted of contempt for an incident in which he had attacked his [redacted] in violation of an order of protection (A347-48 [July 31, 2017 Minutes: 3-4).

attorney. After the second of those requests was denied, defendant made a flippant remark that he "would love to go pro se." The judge did not respond to defendant's comment. Instead, the parties proceeded to defendant's suppression hearing, bench trial, and, ultimately, his sentencing. Despite being an extremely vocal litigant, defendant never once mentioned the issue of self-representation during any of these subsequent proceedings. Under these circumstances, his single, isolated reference to proceeding pro se did not amount to an unequivocal request to exercise his constitutional right to self-representation.

A. THE RELEVANT LAW

1. People v. McIntyre and the Constitutional Right to Self-Representation

In People v. McIntyre, this Court recognized, as a matter of state constitutional law, a criminal defendant's right to conduct his own defense. McIntyre, 36 N.Y.2d 10, 15 (1974); see Faretta v. California, 422 U.S. 806, 807 (1975) (recognizing the federal constitutional right to self-representation). Because the right to proceed pro se was "largely undefined" at the time, the Court also addressed "the nature and extent" of that right. McIntyre, 36 N.Y.2d at 14-15.

The Court acknowledged that the right to self-representation "embodies one of the most cherished ideals of our culture; the right of an individual to determine his own destiny." Id. at 14; see People v. Crespo, 32 N.Y.3d 176, 178 (2018), cert. denied, 140 S.Ct. 148 (2019). It also cataloged some of the reasons why a defendant might be "motivated" to proceed pro se. Id. at 15-16. For instance, the Court posited that some

defendants hope to "evoke the jury's sympathy for a lone defendant pitted against the Goliath" of the state, while others pursue self-representation out of their "blind faith belief" in their "innocence and the infallibility of justice[.]" Id. The Court further acknowledged that a defendant may wish to proceed pro se in order to "secure various tactical advantages[,]" such as the ability to "influence the jury" without having to take the witness stand. Id. at 16. It also recognized that a defendant may choose to represent himself because of his "dissatisfaction" with defense counsel, whether due to a disagreement over trial strategy, a general lack of confidence in the attorney, or a view that counsel is an "extension of the oppressive system" the defendant distrusts. Id.; see People v. Stone, 22 N.Y.3d 520, 528 (2014); People v. Davis, 49 N.Y.2d 114, 119 (1979).

Whatever the motivation, however, the Court, in McIntyre, expressly acknowledged the "dangers inherent in th[e] choice" to pursue self-representation. Id. at 15. First, because proceeding pro se is tantamount to a "decision to disavow the constitutional right to counsel[,]" it requires a defendant to relinquish all the protections attendant to that "fundamental" right. Id. at 17; People v. Arroyo, 98 N.Y.2d 101, 103 (2002). The Court conceded that such a result is "ironic" in light of the "long and uniform" recognition of the preeminent right to counsel in criminal proceedings. Id. at 14; see Faretta, 422 U.S. at 832-33; see also People v. Garcia, 69 N.Y.2d 903, 904 (1987). It is axiomatic that the right to counsel is the means through which a defendant's other constitutional rights, such as the privilege against self-

incrimination and the guarantee of due process, are best secured. People v. Shanks, -- N.Y.3d --, 2021 N.Y. Slip Op. 05450 at 1-2 (Oct. 12, 2021); People v. White, 56 N.Y.2d 110, 115 (1982); People v. Hobson, 39 N.Y.2d 479, 485 (1976); People v. Donovan, 13 N.Y.2d 148, 151-52 (1963); see United States vs. Cronic, 466 U.S. 648, 653-54 (1984). Indeed, the right to counsel is a crucial safeguard precisely because the "average defendant does not have the professional legal skill to protect himself" in a situation where his liberty is at stake. Johnson v. Zerbst, 304 U.S. 458, 462-63 (1938); see Faretta, 422 U.S. at 834; People v. Settles, 46 N.Y.2d 154, 160-61 (1978); Hobson, 39 N.Y.2d at 485.

Beyond its essential role in protecting the interests of individual defendants, the right to counsel also functions as a way to ensure fairness in our adversarial system of criminal justice, the "very premise" of which is that "partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." Cronic, 466 U.S. at 655-56; Herring v. New York, 422 U.S. 853, 862 (1975); Shanks, 2021 N.Y. Slip Op. 05450 at 1-2. Put differently, the right to counsel is "the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing[,]" which, in turn, increases the probability of a just and reliable result. Cronic, 466 U.S. at 656-57; see Strickland v. Washington, 466 U.S. 668, 684 (1984); White, 56 N.Y.2d at 115. Accordingly, in McIntyre, this Court recognized that, because the right to self-representation requires a relinquishment of the right to counsel, it is "inherently antagonistic" to the "equally

powerful ideal that our criminal justice system must determine the truth or falsity of the charges in a manner consistent with fundamental fairness." McIntyre, 36 N.Y.2d at 14, 17-18. It was undoubtedly with all these reasons in mind that the Court, in McIntyre, held that it was not necessary for the trial court to affirmatively inform a defendant of his right to self-representation. Id. at 17. The Court aptly emphasized that the pro se right "lacks the force and urgency" of the right to counsel. Id.

The second danger inherent in the decision to pursue self-representation, as identified by this Court in McIntyre, is the likelihood that a defendant's exercise of the right will interfere with the orderly administration of criminal trials and subsequent appellate review. Id. at 17. The Court pointed out that delay and confusion are "foreseeable by-products" of a pro se defense. Id. at 16; see Crespo, 32 N.Y.3d at 181-82. It also expressed concern that "experienced and wily defendant[s]" will pursue self-representation in order to "lay the foundation" for a mistrial or a later attack on the conviction. Id. at 16-17; see Faretta, 422 U.S. at 845-46 (Burger, C.J., dissenting).

For these reasons, the Court was "hesitant to sanction the unfettered exercise" of the right to self-representation. Id. at 15; see Crespo, 32 N.Y.3d at 178. Ultimately, "[i]n light of the manifold and conflicting principles permeating the assertion of [the] right to defend pro se," the Court concluded that it "is not absolute but subject to certain restrictions." Id. at 16-17. "Such limitations," the Court explained, "must be

implemented in order to promote the orderly administration of justice and to prevent subsequent attack on a verdict claiming a denial of fundamental fairness." Id. at 17.[10]

The Court thus articulated a three-part test for invoking the right to self-representation:

> A defendant in a criminal case may invoke the right to defend pro se provided: (1) the request is unequivocal and timely asserted, (2) there has been a knowing and intelligent waiver of the right to counsel, and (3) the defendant has not engaged in conduct which would prevent the fair and orderly exposition of the issues.

Id. The Court then discussed each element of this test in more detail. Id. at 17-18.

In the decades since McIntyre, this Court has repeatedly confirmed that its three-part test is the method by which courts must determine whether a criminal defendant may invoke the right to self-representation. See, e.g., Crespo, 32 N.Y.3d at 178; People v. Crampe, 17 N.Y.3d 469, 481 (2011); People v. Ryan, 82 N.Y.2d 497, 506 (1993). Similarly, this Court has frequently reiterated the principle that the pro se right "is not absolute" due to its "inherent conflict" with the right to counsel and the risk it poses to the orderly administration of justice. See, e.g., Crespo, 32 N.Y.3d at 178; Arroyo, 98 N.Y.2d at 102-03; see also People v. Kelly, 60 A.D.2d 220, 223 (1st Dept. 1977), aff'd, 44 N.Y.2d 725, 727 (1978) (a defendant has a constitutional right

[10] This Court also acknowledged that, "[i]n light of the multifaceted problems" generated by a request to proceed pro se, the task of the trial court in adjudicating such an application is "exceedingly difficult." McIntyre, 36 N.Y.2d at 14.

to choose whether to proceed with counsel or proceed pro se, "[b]ut there is a more difficult qualification on the latter right").

2. The Unequivocal Request Requirement

As just described, the first component of McIntyre's three-part test is that a defendant's request to proceed pro se must be unequivocal and timely asserted. McIntyre, 36 N.Y.2d at 17. Of particular pertinence here, this Court has repeatedly stressed that the "unequivocal" aspect of this rule exists to prevent "convicted defendants" from "pervert[ing] the system by subsequently claiming a denial of their pro se right[.]" Id.; see People v. Silburn, 31 N.Y.3d 144, 150-51 (2018); In re Kathleen K., 17 N.Y.3d 380, 386-87 (2011); People v. Gillian, 8 N.Y.3d 85, 88 (2006); People v. LaValle, 3 N.Y.3d 88, 106 (2004).

In clarifying what it means to make an unequivocal request to proceed pro se, this Court has emphasized that a defendant's request "must be clearly and unconditionally presented to the trial court." Id.; see Silburn, 31 N.Y.3d at 150-51. The defendant must demonstrate an "actual fixed intention and desire to proceed without professional assistance in his defense to the charges[.]" Silburn, 31 N.Y.3d at 150 (quoting People v. Payton, 45 N.Y.2d 300, 314 [1978], rev'd on other grounds, 445 U.S. 573 [1980]); see LaValle, 3 N.Y.3d at 106. A request for self-representation "does not require the recitation of '[a] talismanic formula' to alert a trial court," but the application "must reflect a purposeful decision to relinquish the benefit of counsel

and proceed singularly." Kathleen K., 17 N.Y.3d at 386 (quoting Dorman v. Wainwright, 798 F.2d 1358, 1366 [11th Cir. 1986]); see Silburn, 31 N.Y.3d at 150-51.

3. Requests for Substitution of Counsel and Alternative Requests for Self-Representation

Significantly, this Court has repeatedly expressed skepticism of purported pro se requests that, far from reflecting a true commitment to exercising this right, are instead "used as leverage to compel dismissal of assigned counsel." Kathleen K., 17 N.Y.3d at 386-87. To be sure, "conditioning" a request for a new attorney with a request for self-representation does "not necessarily" render the latter request equivocal. Gillian, 8 N.Y.3d at 88; LaValle, 3 N.Y.3d at 107; see Davis, 49 N.Y.2d at 119 (noting that the defendant's "lack of confidence in his assigned counsel" was "consistent with his desire to represent himself"). But, in cases where the record showed that the defendant raised the issue of self-representation as a means of prevailing on an "underlying request for substitution of counsel[,]" this Court has held that the purported request was equivocal. Kathleen K., 17 N.Y.3d at 386-87, see Payton, 45 N.Y.2d at 314 (the defendant's statements as to "being his own lawyer" were not unequivocal because they "were associated with references to discharging his assigned counsel and securing new representation" and, in addition, were "always overshadowed" by applications for adjournments).

For instance, in People v. LaValle, the Court held that the defendant had not unequivocally invoked his right to proceed pro se where the record established that he

had "raised the specter of self-representation as a means of procuring the dismissal" of one of his lawyers. In that case, the trial court declined the defendant's initial application to replace his defense team. Months later, he renewed his complaints, alerting the judge to a severe disagreement with his lawyers over trial strategy. In the midst of this discussion, the defendant said, "Your Honor, if you are telling me that I have to respect and listen to my lawyers . . . I would ask that you would dismiss my lawyers and if I could represent myself."[11] Then, in response to the judge's attempt to discourage him from going pro se, the defendant said that if the court was going to "deny" him the right "to represent [him]self, maybe take into consideration appointing two new lawyers." The trial court replaced the defendant's lead attorney a week later, after which the defendant agreed to work with his new defense team and "never" said another "word" about wanting to represent himself. LaValle, 3 N.Y.3d at 104-07.

In holding that the above-described references to self-representation were equivocal, this Court found that the defendant had not "assertively" stated a desire to proceed pro se and, in fact, had given "the impression that he was not committed to self-representation." The Court characterized the defendant's initial remark, in which he said he "would" ask to represent himself "if" the judge forced him to work with

[11] The defendant added that he did not "want" to represent himself but considered it his "last" option. LaValle, 3 N.Y.3d at 105.

his current lawyers, as a "conditional" statement. Similarly, it found that his subsequent comment had "couched" self-representation "as a hypothetical" outcome, in addition to including an "alternative" request for new lawyers. These remarks, the Court found, "d[id] not reflect a definitive commitment to self-representation." On the contrary, they made "clear" that the defendant's true goal had been to procure the dismissal of his lead attorney. The Court further found that the defendant's subsequent silence on the prospect of proceeding pro se demonstrated that the issue of self-representation "was closed" once the defendant was "satisfied" with the dismissal of his lead attorney. LaValle, 3 N.Y.3d at 106-07.

This Court reached a similar result two years later in People v. Gillian. In that case, the trial court denied the defendant's initial application to replace his attorney, after which he announced that he wanted to proceed pro se because his lawyer had "done nothing" for him. The defendant elaborated that the trial judge should not allow a lawyer who was going to "sell [the defendant] out" to represent him. He then filed a motion requesting reassignment of counsel or, "in the alternative," the opportunity to proceed pro se. Ultimately, the trial court replaced the defendant's initial lawyer with a second—and later, a third—attorney, after which he never "reassert[ed] his desire" to proceed pro se. Gillian, 8 N.Y.3d at 86-88.

On that record, this Court held that the defendant's request to represent himself "was not clear and unequivocal." On the contrary, the record showed that the defendant had "raised the argument for self-representation as a way of obtaining the

dismissal of his first assigned counsel" and had done so "only because" the trial court initially refused to replace his attorney. Further, this Court held that the defendant's statements were equivocal because they had been made "in the alternative" to his request for a new lawyer. Finally, the Court held that "[e]ven if it could be argued" that the defendant "did not equivocate" when he raised the issue of self-representation, any error had been cured by the trial court's decision to replace the defendant's lawyer, an outcome over which he "voiced no dissatisfaction" and with which he was "seemingly satisfied[.]" Gillian, 8 N.Y.3d at 87-88.

This Court reaffirmed these principles once again in In re Kathleen K., a case in which the appellant had discussed the possibility of proceeding pro se in the midst of a colloquy with the trial judge regarding his application to replace his attorney.[12] As in LaValle and Gillian, the Court found that the record did not reflect any "affirmative desire for self-representation" and thus did not establish that the appellant had made an unequivocal request to proceed pro se. The Court instead concluded that the "gravamen" of the appellant's "complaint stemmed from dissatisfaction with counsel, and the tenor of [his] initial application indicate[d] that self-representation was reserved as a final, conditional resort[.]" Kathleen K., 17 N.Y.3d at 383-87.

[12] Kathleen K. arose from a Family Court petition to terminate the appellant's parental rights; this Court assumed, without deciding, that the McIntyre right to self-representation applied to that type of proceeding. In re Kathleen K., 17 N.Y.3d at 386.

B. ANALYSIS

Judged by these standards, defendant's solitary comment that he "would love to go pro se" did not remotely amount to a clear and unconditional request to represent himself. When viewed in its proper context, it is plain that defendant's remark was simply part of a larger attempt to persuade the trial court to replace Lyons, his appointed attorney. At a minimum, it was nothing more than a tongue-in-cheek comment by a disruptive defendant who, although rarely inclined to withhold any self-serving thought, never raised it again.

On May 10, 2017, defendant interrupted a routine calendar appearance and repeatedly complained about Lyons in what could only be interpreted as a studied effort to replace him. He informed the judge that he did not want Lyons "representing [him] no more" and ranted that Lyons did "nothing" for him, did "not even talk" to him, and was conspiring with the District Attorney's Office. See A021-22. Of course, as defendant does not dispute, the calendar judge correctly denied this request. The right of an indigent criminal defendant to the services of a court-appointed lawyer "does not encompass a right to appointment of successive lawyers at defendant's option[,]" and defendant's vague and conclusory complaints about Lyons did not even entitle him to a "minimal inquiry" on the matter, let alone amount to a showing of "good cause" that would have warranted a substitution of counsel. See People v. Sides, 75 N.Y.2d 822, 824-25 (1990); People v. Medina, 44 N.Y.2d 199, 207 (1978). Nevertheless, defendant received a de facto inquiry because, in response

to defendant's outburst, Lyons took it upon himself to detail for the court his many efforts to be a "zealous advocate" on behalf of his client. See A022-23.[13]

More to the point, after defendant's initial attempt to dispatch his attorney failed, he continued his efforts to bring about that result. After May 10th, defendant did not appear in court until June 2nd, when he appeared before the trial judge for the first time. Tellingly, on that date defendant immediately resumed what was plainly a campaign to replace Lyons. When the trial court asked defendant to confirm that he did not wish to plead guilty, he did not to respond the court's question. Instead, he launched into a diatribe in which he declared that he did not want Lyons to represent him because Lyons was "an ineffective counsel." It was only on the heels of the court's denial of this second application to replace Lyons that defendant said flippantly he "would love" to go pro se. See A039-40.[14]

This record establishes that defendant's only goal was to convince the trial court to discharge Lyons and provide him with a new attorney. As in LaValle and

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[13] It goes without saying that replacing Lyons would have delayed the resolution of defendant's case. Relatedly, the record shows that Lyons—recognizing that his incarcerated client wanted his day in court—solicitously endeavored to avoid any unnecessary delay in moving the case forward. Indeed, he succeeded in bringing defendant's case to trial within two months of the commission of the crime.

[14] It bears note that defendant's reference to self-representation, while technically timely (see Crespo, 32 N.Y.3d at 182), was relatively belated, having been made only after the trial court instructed the People to call their first hearing witness to the stand. Moreover, had defendant actually made a genuine request to represent himself, the trial court would have been constrained to take into account his persistently disruptive and obstreperous conduct, which might well have prevented the fair and orderly exposition of the issues. See Silburn, 31 N.Y.3d at 150; McIntyre, 36 N.Y.2d at 17.

Gillian, it conclusively demonstrates that defendant "raised the specter of self-representation" not because he actually wanted proceed pro se, but because he believed that mentioning the issue of self-representation would give him "leverage" in his quest to replace his lawyer. LaValle, 3 N.Y.3d at 106-07; Kathleen K., 17 N.Y.3d at 386-87; see Gillian, 8 N.Y.3d at 88. In other words, defendant raised the prospect of representing himself "only because" he was unhappy with the court's "refus[al] to replace" his lawyer. See Gillian, 8 N.Y.3d at 86-88.[15]

Even if it could somehow be said that defendant's isolated reference to the pro se right did not amount to a pretextual attempt to manipulate the trial judge into giving him a new lawyer, it still was not an unequivocal request to pursue self-representation. Contrary to his present contention (Defendant's Brief: 23), the record reflects that defendant's reference to proceeding pro se was, at best, presented to the

[15] Before this Court, defendant raises a newfound factual dispute regarding whether he made an application for substitute counsel. Notably, before the Appellate Term, defendant admitted that his complaints about Lyons were "requests for the court to assign him a new attorney" (Defendant's Opening Brief to the Appellate Term: 17; Defendant's Reply Brief to the Appellate Term: 2). Now, in a transparent attempt to distinguish the facts of his case from those in LaValle and Gillian, defendant disclaims this previous interpretation, asserting instead that he never actually requested a new lawyer (see Defendant's Brief: 20, 23). This contention is meritless. The only reasonable conclusion to draw from the record of defendant's comments about Lyons—which included the type of garden-variety grievances that comprise the vast majority of requests for substitution of counsel—was that defendant wanted the court to give him another attorney. Indeed, that was certainly how the calendar judge, the trial judge, and Lyons himself interpreted defendant's words. It comes as no surprise that defendant embraced the same conclusion before the intermediate appellate court.

judge as an "alternative" request to his primary application for substitution of counsel. At worst, defendant's comment that he "would love to go pro se" was, on its face, simply too glib to reflect a serious wish to waive his right to counsel and represent himself. Either way, under a straightforward application of this Court's precedent, these circumstances "d[id] not reflect a definitive commitment" to proceeding pro se and instead gave "the impression that [defendant] was not committed to self-representation." LaValle, 3 N.Y.3d at 106; see Kathleen K., 17 N.Y.3d at 387; Gillian, 8 N.Y.3d at 88.

Beyond the immediate context of defendant's attempts to replace his lawyer, the balance of the record confirms that defendant never demonstrated an "actual fixed intention" to exercise his right to self-representation. See Silburn, 31 N.Y.3d at 150-51; Payton, 45 N.Y.2d at 314. As detailed supra (pp. 5-9), defendant attended four court appearances before appearing before the trial judge. The transcripts for all but one of these dates reflect that defendant interrupted the proceedings and, in addition to offering other incidental comments, made a variety of applications. These included a request to take a DNA test (A009), a request for a transfer to a different housing facility (A016), and a request for the court to lower his bail (A018). Throughout these repeated interjections, however, defendant never once mentioned any desire to proceed pro se.

The same can be said for defendant's suppression hearing, trial, and sentencing, all of which followed his passing reference to the pro se right. As described supra (pp.

11-12), although defendant repeatedly disrupted these proceedings with on-the-record interjections and other interruptions, he never once revisited the issue of self-representation, even though he was still represented by Lyons. Moreover, at sentencing, defendant "strongly" endorsed Lyons's remarks to the court on defendant's behalf. See A349-51. This was yet more proof that defendant never evinced a definitive commitment to self-representation.[16]

Defendant suggests that some of the remarks he made during his various outbursts (such as his statement, on May 10th, that he wanted to "speak in [his] defense" [A021] and his comment, on June 2nd, that he did not want Lyons to represent him "at all" [A039]) are evidence that he had been contemplating self-representation all along. See Defendant's Brief: 20, 23. The record does not support defendant's hindsight interpretation of these disruptions. For example, defendant neglects to mention that on May 10th, the day he asked to speak to the judge "in [his] defense[,]" he also repeatedly referred to Lyons as "my lawyer" (A022)—hardly the words of a person intending to disavow the right to counsel. More to the point, the

[16] Once his suppression hearing began in earnest, defendant not only failed to revisit the issue of self-representation, but he also never revived his earlier attempts to replace Lyons with another attorney, despite remaining a vocal participant throughout the subsequent proceedings. The only conclusion to draw from these circumstances is that—like the issue of self-representation—the substitution of counsel issue "was closed[,]" with defendant "seemingly satisfied" with Lyons's continued representation. See Gillian, 8 N.Y.3d at 88; LaValle, 3 N.Y.3d at 107. Indeed, given that the record of the suppression hearing, bench trial, and sentencing reflect that Lyons did an excellent job of advocating on his client's behalf (see, e.g., A101-11, A192-207, A320-25, A349-50), it is no surprise that defendant ultimately assented to his continued representation.

record as a whole compels the conclusion that defendant repeatedly interrupted his Criminal Court proceedings not because he wanted to represent himself, but because he was beset by a near-total inability to control his impulses.

Defendant contends that the Appellate Term redefined the unequivocal request requirement by holding that a defendant's pro se request is automatically equivocal if it is expressed within the context of airing his dissatisfaction with his attorney. See Defendant's Brief: 3, 16-19, 22. But defendant mischaracterizes that court's decision, which simply found that, under the particular circumstances of defendant's case, the "record as a whole" did not support his assertion that he had made an unequivocal request to proceed pro se, especially in light of the fact that he had referenced the issue of self-representation in the context of his complaints about Lyons. See A004-05. This fact-specific, highly individualized finding was completely consistent with this Court's prior decisions.[17]

Equally unavailing is defendant's argument that the Appellate Term contravened the spirit of McIntyre's pronouncement that defendants frequently pursue self-representation out of their dissatisfaction with defense counsel. See Defendant's Brief: 17, 19-21. It remains as true today as it was in the era of McIntyre

[17] Indeed, this Court's decisions in LaValle, Gillian, and Kathleen K.—in which it took pains to detail each defendant's references to the pro se right and the context in which those references occurred—themselves demonstrate that the question of whether a defendant made an unequivocal request to proceed pro se is a quintessentially fact-specific inquiry.

that some defendants commit themselves to self-representation because of their abject unwillingness to work with the defense bar. But as this Court has repeatedly recognized, there is a difference between that scenario and one in which a wily and experienced defendant threatens the trial court with the prospect of self-representation "as leverage to compel dismissal of assigned counsel." Kathleen K., 17 N.Y.3d at 386-87. As detailed above, the Appellate Term correctly found that defendant was in the latter category. Put differently, he is a "convicted defendant[ ]" attempting to "pervert the system by subsequently claiming a denial of [his] pro se right"—the exact scenario that this Court, in designing the unequivocal request requirement, sought to prevent. See Silburn, 31 N.Y.3d at 150-51; McIntyre, 36 N.Y.2d at 17.

Defendant also takes issue with the Appellate Term's finding that, "by proceeding with the scheduled suppression hearing and subsequent trial without expressing any further desire to represent himself[,]" defendant abandoned his pro se request (A005). See Defendant's Brief: 3-5, 16-17. Even if the Court were to disagree with the Appellate Term's holding that this conduct constituted abandonment, reversal is not warranted here. As noted, this Court has recognized that a defendant's failure to revisit the issue of self-representation is a relevant consideration in determining whether an earlier reference to the pro se right constituted an unequivocal request to represent himself. See Gillian, 8 N.Y.3d at 88; LaValle, 3 N.Y.3d at 107. In any event, the Appellate Term did not institute a sweeping

requirement that all defendants must make more than one unequivocal request to proceed pro se, as defendant claims. See Defendant's Brief: 16-17, 31-32. The court merely held, under the particular facts of defendant's case, that defendant's failure to revisit the issue of self-representation laid to rest any claim that his remark was a genuine request to forego counsel entirely and proceed pro se.

It remains only to address two final arguments advanced by defendant. First, defendant strains to argue that his use of the word "would" in his remark should not be construed as conditional. In LaValle, this Court found the defendant's reference to self-representation to be conditional when he informed the trial court he "would" ask to represent himself if it forced him to work with his current attorneys. 3 N.Y.3d at 106. As defendant sees it now, although he also used the word "would[,]" his statement was not conditional because it "did not express a wish to be fulfilled only if something else did or did not happen[.]" See Defendant's Brief: 15, 24. On the contrary, to the extent that defendant's statement reflected any interest at all in self-representation, it was "couched [ ] as a hypothetical" and indicated only that he "would" be interested in proceeding pro se if the court persisted in its refusal to substitute counsel. See LaValle, 3 N.Y.3d at 106. Beyond that, defendant has no choice but to leave unexamined his use of the verb "love[,]" which served only to inject even more ambiguity into the proceedings. After all, defendant later professed his "love" for the trial judge (see A213), a use of the word "love" that no reasonable person would conclude was either genuine or sincere. All told, defendant's comment

cannot fairly be construed to "reflect a purposeful decision to relinquish the benefit of counsel and proceed singularly." Kathleen K., 17 N.Y.3d at 386.

Indeed, any doubt on that score is put to rest by the record as a whole. Defendant, whose prior convictions (see supra, p. 12 n.9) demonstrated his abundant familiarity with the workings of the criminal justice system, was persistently vocal throughout the proceedings and had no difficulty conveying a clear preference when he had one. For instance, defendant's initial request to waive his right to a jury trial, which he made on the same day as his ambiguous reference to self-representation, showed that he knew how to alert the trial judge to his desire to waive a constitutional right. To make that request, defendant simply informed the court, "I want to do this trial by judge, not jury, please." See A055. Unlike his mention of the pro se right, this declaration was unquestionably explicit, leaving no doubt that defendant was committed to proceeding to a bench trial in lieu of a jury trial. Moreover, the record reflects that the trial judge recognized this unequivocal request for what it was and took appropriate action, first by confirming that defendant had discussed his decision with Lyons and then by engaging defendant in a detailed colloquy regarding his decision to waive this particular constitutional right. See A112, A137-39.

Finally, defendant maintains on appeal that if the trial court questioned whether he "truly meant the words he had uttered[,]" it should have endeavored to clarify his intention during a McIntyre step two inquiry regarding his understanding of his waiver of the right to counsel. See Defendant's Brief: 24. Although defendant may

have preferred this approach, it certainly was not constitutionally required, see generally Silburn, 31 N.Y.3d at 153; People v. Rodriguez, 95 N.Y.2d 497, 502 (2000), and, indeed, is bad policy. As this Court recognized in McIntyre, the "dangers inherent in th[e] choice" to pursue self-representation compel the conclusion that a defendant should be required to unequivocally express his desire to proceed pro se before the trial court is obliged to review with him the ramifications of that decision. See McIntyre, 36 N.Y.2d at 15.

In any event, here the trial court was "confronted with a defendant attempting to abuse the process" by manipulating it into granting his meritless application for a new lawyer. See People v. Henriquez, 3 N.Y.3d 210, 215 (2004). In that regard, defendant's conduct was precisely the type of gamesmanship that this Court, in implementing McIntyre's three-part test, sought to prevent. See McIntyre, 36 N.Y.2d at 17. The trial court, recognizing defendant's manipulation for what it was, acted reasonably in proceeding to the suppression hearing without attempting to clarify the meaning behind his offhand reference to self-representation.

* * *

In sum, defendant's fleeting reference to self-representation, made immediately after his failed application to replace his defense attorney, did not amount to an unequivocal request to proceed pro se. Accordingly, the Appellate Term correctly determined that defendant's remark did not trigger the need for a full inquiry into defendant's purported desire to waive his right to counsel.

Oral Argument of 15 minutes requested by
MOLLY SCHINDLER

Court of Appeals

State of New York

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

APL-2021-00037

- against -

VLADIMIR DUARTE,

Defendant-Appellant.

DEFENDANT-APPELLANT'S REPLY BRIEF

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November 15, 2021

ARGUMENT IN REPLY

POINT

THE TRIAL COURT'S FAILURE TO CONDUCT AN INQUIRY AFTER APPELLANT'S UNEQUIVOCAL AND TIMELY REQUEST TO REPRESENT HIMSELF BY STATING TO THE TRIAL COURT THAT HE "WOULD LOVE TO GO PRO SE" VIOLATED HIS RIGHT TO SELF-REPRESENTATION. U.S. CONST. AMEND. V; N.Y. CONST. ART. I, § 6 (Responding to RB 23-32).

Mr. Duarte's timely and unequivocal invocation of his right to proceed pro se triggered the trial court's constitutional duty to inquire.[1] People v. McIntyre, 36 N.Y.2d 10 (1974). He declared, clearly and unconditionally, "I would love to go pro se." (A040). This statement evinced a "desire to proceed without professional assistance in his defense to the charges," see People v. Payton, 45 N.Y.2d 300, 314 (1978), which obligated the trial court to conduct an inquiry to "determin[e] …whether it was a good faith attempt to exercise his right to self-representation." See People v. Smith, 68 N.Y.2d 737, 739 (1986). The summary denial of his request without any inquiry was reversible error. Id.

Nevertheless, Respondent advocates for this Court to disregard Mr. Duarte's pro se invocation and thereby abandon its straightforward unconditional request rule, along with the rest of the McIntyre prongs, in favor of what amounts to a totality-of-the-

[1] Respondent's characterization of Mr. Duarte's pro se request as "relatively belated" (RB 24 n.14) is baseless, as he raised the issue before the suppression hearing had even begun, well before the opening statements of the bench trial that began days later. See C.P.L. § 1.20(11); People v. Crespo, 32 N.Y.3d 176, 182 (2018).

circumstances standard based on the "record as a whole" (RB 28). After attempting an unavailing dispute about the unconditional nature of Mr. Duarte's self-representation request, Respondent lands on its central contention: even if a pro se request is unequivocal on its face, the court should engage in a "fact-specific" and "highly individualized" assessment of the *totality* of the record (RB 23-32). Under this new standard, a court must mine what occurred before and after a facially-unequivocal self-representation request to assess whether it was actually something else, such as a "pretextual attempt to manipulate the trial judge into [assigning] a new lawyer" (RB 25). Rather than simply conducting the constitutionally-required McIntyre inquiry, Respondent would have trial courts speculate about the inner workings of a defendant's mind to determine whether they can summarily ignore it. Although Respondent does not endorse the novel rules created by the Appellate Term in its current brief, its new position is similarly unworkable and unconstitutional: a hindsight-oriented standard unfounded in this Court's precedent that prioritizes subjective inferences over a defendant's plain words.

This Court should reject Respondent's novel and inherently speculative standard, just as it should reject the Appellate Term's new rules. Instead, this Court should reaffirm the long-standing, simple, and workable McIntyre rule: when a defendant makes a pro se request that is unequivocal on its face and not expressly conditioned on some other desire, the court must conduct an inquiry. Here, the trial court's summary

denial of Mr. Duarte's plain, unconditional statement, "I would love to go pro se," without any inquiry whatsoever, violated his constitutional rights and mandates reversal.

A. MR. DUARTE'S PRO SE REQUEST WAS CLEAR AND UNCONDITIONAL ON ITS FACE.

Contrary to Respondent's creative characterizations, Mr. Duarte's pro se request was unequivocal on its face. He did not condition his statement on, or make it in the alternative to, any other request. Instead, he simply declared his desire to the court: "I would love to go pro se." (A040).

Respondent variously describes Mr. Duarte's pro se request as, inter alia, "flippant" (RB 13, 24), "tongue-in-cheek" (RB 23), and "glib" (RB 26). But these subjective characterizations do not erase the fact that Mr. Duarte unequivocally stated his desire to "go pro se" (A040). And Respondent can point to no *objective* evidence that the statement was not serious. Cf. People v. LaValle, 3 N.Y.3d 88, 105 (2004) (after colloquy about self-representation in which defendant stated, "if the court was going 'to deny me [the right] to represent myself, maybe take into consideration appointing two new lawyers,'" the court noted "Let the record reflect, he does have a smile on his face.").[2]

[2] As this Court has held, however, even if the trial court did believe Mr. Duarte's words were "tongue-in-cheek" or manipulative as Respondent argues, it was *still* obligated to proceed to a McIntyre inquiry before it could determine that Mr. Duarte did not mean exactly what he said: "I would love to go pro se." See infra, Section B.2, p. 12-14.

Respondent also misstates Mr. Duarte's words amid its efforts to define his request as equivocal. In a transparent attempt to fit this case among those in which a defendant's pro se request was expressly conditioned on the denial of new counsel, Respondent claims Mr. Duarte said "he 'would' be interested in proceeding pro se *if* the court persisted in its refusal to substitute counsel" (RB30) (emphasis added). But Mr. Duarte did not condition his request on anything; he just said that he "would love to go pro se." He did not say, as in LaValle, "*if* you are telling me that I have to respect and listen to my lawyers' views… [then] I *would* ask that you dismiss my lawyers and if I could represent myself…. *not that I want to*." 3 N.Y.3d at 106 (emphasis added). Nor, as in In re Kathleen K., did he say he only wished to represent himself "*If* I have to"; then clarifying, "So you're refusing me [substitution] of counsel," to make clear which option he was seeking. 17 N.Y.3d 380, 386 (2011) (emphasis added). And he did not state, as in People v. Gillian, that he was only requesting self-representation "in the alternative" to a new attorney. 8 N.Y.3d 85, 87 (2006).

Rather, because it was not conditioned on a denial of new counsel or any other event, Mr. Duarte's statement that he "would love to go pro se" was a polite request for self-representation. English grammar permits the non-conditional use of the word "would" to express politeness: for example, "I would like some soda, please"; "I would love to accept your invitation"; or "I would request two minutes for rebuttal." See MB 15 n.4. When the word "would" lacks an accompanying conditional clause, English-speaking listeners understand that the speaker is being polite rather than hypothetical.

This principle holds true in court as well as in regular conversation. See, e.g., People v. Pacquette, 17 N.Y.3d 87, 96 (2011), quoting People v. Ramos, 40 N.Y.2d 610, 618 (1976) (the statement "I would like a lawyer" was sufficient to "g[i]ve testimony to [defendant's] need and desire for legal advice from a lawyer representing his interests"); Peretz v. United States, 501 U.S. 923, 925 (1991) (when court asked if there was "any objection to picking the jury before a magistrate," counsel responded "I would love the opportunity.").[3]

Notwithstanding Respondent's unsupported characterizations and invented clauses, the plainest interpretation of the sentence "I would love to go pro se." is an unequivocal invocation of the right to self-representation that triggered the trial court's obligation to conduct a McIntyre inquiry.

B. THE SUMMARY DENIAL OF MR. DUARTE'S UNEQUIVOCAL PRO SE REQUEST WITHOUT ANY INQUIRY WAS REVERSIBLE ERROR.

In the face of such a clear and unconditional invocation of the self-representation right, Respondent's focus on the "context" of Mr. Duarte's statement and its one-sided interpretations of the "balance of the record" fall flat (RB 23, 26). Respondent's current attempt to avoid reversal by creating a novel standard based on the "record as a whole"

[3] Indeed, as Respondent points out (RB 31), Mr. Duarte employed other elements of polite speech when making direct requests of the court, such as when he waived his right to a jury trial: "I want to do this trial by jury, not judge, please" (A055). Similarly, Respondent notes that Mr. Duarte tended to exaggerate his feelings of "love" (RB 30), making it unsurprising that he would choose the more emphatic version of a polite request: "would love" instead of "would like."

is unconstitutional, unworkable, and inconsistent with this Court's long-standing precedent, including the three-pronged McIntyre standard.

1) **Contrary to the Appellate Term's Novel Rules and Respondent's Unworkable Totality-of-the-Circumstances Standard, the "Record As a Whole" Did Not Render Mr. Duarte's Unconditional Pro Se Request Equivocal.**

Both the Appellate Term and Respondent would have this Court abandon settled law regarding the requirement of a McIntyre inquiry in favor of a hindsight-oriented approach—unworkable for a trial court deciding in the moment whether it must conduct an inquiry—that would require courts to review the entire record to speculate whether a defendant's true intention was something other than what he plainly stated. But this Court's current rule is simple and provides clear guidance to trial courts: when a defendant makes a plain request for self-representation that is not expressly conditioned on any other desire, the trial court must conduct an inquiry. Despite both Respondent's and the Appellate Term's attempts to rework the McIntyre standard, Mr. Duarte's unconditional and facially unequivocal pro se request triggered the trial court's obligation to inquire. The remainder of the record cannot render its summary denial retroactively permissible.

As a preliminary matter, Respondent attempts to brush the Appellate Term's sweeping holdings in its decision below under the rug by mischaracterizing them as "fact-specific" despite their broad language. The Appellate Term held:

> Rather than being unequivocal, defendant's expression of a desire to represent himself came within the context of his complaints about his counsel. In any event, defendant abandoned his request by proceeding with the scheduled suppression hearing and subsequent trial without expressing any further desire to represent himself.

A005 (citations omitted). Contrary to Respondent's belated attempts to limit this language to Mr. Duarte's case (see RB 28, 29-30), future courts reading this decision will conclude the following: a) a defendant's pro se request will be considered equivocal if made in the same discussion as complaints about one's attorney; and b) a defendant must repeat a pro se request or else he abandons it. For the reasons laid out in Appellant's opening brief, both rules are unsound, unconstitutional, and inconsistent with this Court's prior holdings (MB 19-32).

Both Respondent and the Appellate Term are wrong that the "record as a whole" (A004)—a standard that has no basis in this Court's precedent—overcame Mr. Duarte's clear, unconditional words to the trial court in this case. Relying on a flurry of factual claims and subjective characterizations from before, during, and well after the pro se request, Respondent insists that the totality of the record "conclusively demonstrates" that Mr. Duarte's "only goal" was to replace his attorney with another (RB 24, 25)—that even though he said "I would love to go pro se," he was really trying to achieve the distinct, unstated goal of obtaining a new lawyer.

Of course, Respondent neglects to acknowledge that the only *express* request Mr. Duarte made to the trial court on this topic was to "go pro se." While he clearly did not wish to be represented by Lyons, he never once made an explicit request for the

court to replace Lyons with another attorney. Respondent's claim that the record "c[an] only be interpreted" as a "campaign to replace" Lyons (RB 23, 24) is wishful thinking, as Mr. Duarte's statements on May 10 and June 2 are consistent with both types of requests: for a new lawyer or no lawyer at all (A020-022, A039-040). But, whether or not he wanted a new lawyer, the only one of these two possibilities that he stated explicitly was to proceed pro se (A040). Yet, under Respondent's reasoning, this Court should nonetheless find that Mr. Duarte was requesting new counsel but *not* asking to go pro se—even though the words in the record show just the opposite.[4]

Even if Mr. Duarte had explicitly asked for new counsel, of course, it is well-settled that a request for substitution of counsel does not render a subsequent pro se request equivocal. See MB 20-22; see also RB 25 n.15 (citing to Appellant's Appellate Term briefs, which detailed this argument). But in Respondent's view even the *inference* that a defendant has, at some point, desired new counsel is enough to overcome an express pro se request. Ultimately, Respondent is advocating for the same erroneous proposition that the Appellate Term adopted: a pro se request, no matter how explicitly and unconditionally conveyed, is "equivocal" when made in the same discussion as complaints about one's attorney. This is an unprecedented constriction of the constitutional right to self-representation. See MB 24-25.

[4] Indeed, the fact that Mr. Duarte did not explicitly ask for a new lawyer is inconsistent with Respondent's claim that he "had no difficulty conveying a clear preference when he had one," which Respondent employs as proof that Mr. Duarte did not mean his pro se invocation (RB 31).

Respondent appears to concede that the Appellate Term's second holding—that Mr. Duarte's pro se request was "abandoned" because he proceeded with the suppression hearing and trial without repeating it (A005)—was erroneous. Notably absent from Respondent's brief is a request for this Court to adopt the "must-repeat" rule Respondent advocated in the Appellate Term.[5] But Respondent continues to argue that Mr. Duarte's "failure to revisit the issue of self-representation laid to rest any claim that this remark was a genuine request to forego counsel" (RB 30), even going so far as to call it "proof" that the request was equivocal (RB 27). Under the guise of an unsupportable totality-of-the-circumstances approach, Respondent's current arguments amount to the same proposition as the Appellate Term's second holding. Both would require a defendant to repeat his pro se invocation or else it will be retroactively considered equivocal—and thereby waived. As explained in Appellant's opening brief, this finding cannot be upheld because it conflicts with the well-settled doctrine that a defendant does not waive the invocation of a constitutional right through silence. See MB 25-32.[6]

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[5] Compare RB 29 with Respondent's Appellate Term Brief, p. 28 ("[E]ven if defendant's solitary comment could possibly be construed as an unequivocal request to proceed pro se, the record establishes that he abandoned any such request… defendant 'did nothing to call the court's attention to its failure to rule' on his purported application… [which] was clear proof that he had abandoned any such request and had acquiesced in [counsel's] continued representation.") (citations omitted).

[6] Respondent's continued reliance on People v. Gillian, 8 N.Y.3d 85 (2006), and People v. LaValle, 8 N.Y.3d 88, 106 (2004) (RB 29), is unavailing for the reasons detailed in Appellant's opening brief, see MB 17-19, which Respondent declines to address. In those cases, the defendant's pro se request was abandoned because it had been expressly conditioned on the denial of a request for new counsel, which was granted. Then, when the defendant did not bring up his alternative request of self-

Moreover, outside of the narrow and inapplicable context of abandonment (see MB 28-29; see also p. 10-11 n.5, supra), the statements a defendant makes *after* the summary denial of an unequivocal pro se request do not bear on the question of whether the trial court erred in denying it. A trial court confronted with a pro se request must determine in the moment, based on the information available to it at the time, whether to conduct a McIntyre inquiry. This decision is not rendered retroactively erroneous by information that comes out later. See People v. Stone, 22 N.Y.3d 520, 528 (2014) (determination of whether court erred in failing to inquire into a defendant's mental health before permitting him to go pro se hinges exclusively on the information available at the time of the ruling, not information uncovered later on). Nor can the failure to conduct a McIntyre inquiry be rendered retroactively *correct*; this rule would essentially apply a harmless error standard. See LaValle, 3 N.Y.3d at 106 (noting the denial of the right to self-representation "is not subject to a harmless error analysis).[7]

representation again, it was clear he was satisfied with the outcome he had received: new counsel. See id. Here, unlike in Gillian and LaValle, (1) Mr. Duarte did not expressly condition his request on the denial of new counsel and (2) the trial court simply denied Mr. Duarte's unconditional request without granting any relief.

[7] Even if Mr. Duarte's post-request conduct were relevant to the question before this Court, however, it is worth noting that Respondent employs a similar form of tunnel vision in its interpretation of these events as with those that preceded his request. Although no subsequent pro se request appears on the record—many of Mr. Duarte's statements were not transcribed; the record instead contains a number of indications that he was speaking without transcriptions of his words, see, e.g., A046, 260, 277, 291—Mr. Duarte's interjections that were transcribed can also support an interpretation that he was attempting to advocate for himself rather than through his lawyer. For example, he made an objection to "leading the witness" during the trial testimony (A047), he made another objection after the court announced its verdict (A343), and he attempted to read a formal statement to the court at least one other time (A055). Nor is this interpretation defeated by Mr. Duarte's single reference to

Contrary to both the Appellate Term's and Respondent's preferred approaches, what is relevant to the trial court's duty to conduct a McIntyre inquiry is the information in front of it: the defendant's words. Regardless of Respondent's subjective interpretations of irrelevant prior and subsequent events, Mr. Duarte's words, "I would love to go pro se," were unconditional and explicit on their face. He thus evinced a "desire to proceed without professional assistance in his defense to the charges" that was sufficient to obligate the trial court to inquire further. See People v. Payton, 45 N.Y.2d 300, 314 (1978).

2) Respondent's Unworkable "Totality" Approach Would Overturn the Three-Pronged McIntyre Standard and This Court's Long-Standing Precedent.

Finally, Respondent asserts that no inquiry was needed when Mr. Duarte requested to proceed pro se because "the Appellate Term correctly found" — based on its review of "the record as a whole" (RB 28; A004)— that he was a "wily and experienced" defendant merely "attempting to pervert the system" (RB 29).[8] This

Lyons as "my lawyer," a description that was an incontrovertible fact unless the court granted the request to remove him. Cf. RB 27.

[8] In this regard, Respondent creates a false dichotomy between defendants who request self-representation because they have an "abject unwillingness to work with the defense bar" and those who "threaten the court with the prospect of self-representation as leverage to compel dismissal of assigned counsel" (RB 29). This position ignores, however, the many indigent defendants who lack confidence in the attorney who has been assigned to them, cannot afford to retain counsel, and therefore believe they have no other choice but to represent themselves. Here, the trial court told Mr. Duarte he had to go to trial with a lawyer whom Mr. Duarte believed thought he was guilty (A039). With his freedom at stake, it is no surprise that Mr. Duarte would consider self-representation instead.

position essentially advocates, however, for courts to ignore the three-pronged analysis laid out in McIntyre, 36 N.Y.2d 10, and recently reaffirmed in People v. Crespo, 32 N.Y.3d 176, 178 (2018). Respondent's proposal was expressly rejected by this Court in McIntyre, and no subsequent cases have supported it.[9] It is therefore meritless.

Conflating the first and third McIntyre steps, Respondent argues that if the trial court believed Mr. Duarte was "attempting to abuse the process" in making a pro se request, the court was permitted to reject it out of hand. See RB 32; see also RB 24 n.14 (the trial court "would have been constrained to take into account [Mr. Duarte's] persistently disruptive and obstreperous conduct" when considering his pro se request). Similarly, in Respondent's view, appeals courts can conduct a hindsight review of the record to come to the same conclusion (RB 29), thereby avoiding an unwanted reversal.

As the Court emphasized in McIntyre, however,

> Where a court feels that the motion is a disingenuous attempt to subvert the overall purpose of the trial… *the proper procedure is to conduct a dispassionate inquiry into the pertinent factors*. Here the trial court denied the motion without eliciting the information which might have warranted a denial of the motion.

[9] Respondent's reliance on People v. Silburn, 31 N.Y.3d 144 (2018) (RB 32), for example, is misplaced, because it does not support the assertion that a court may summarily deny an unequivocal pro se request without any inquiry. The defendant in Silburn asked if he could "proceed as pro se"—prompting the trial court to confirm whether he wanted to represent himself. Id. at 148. When he clarified that he actually sought standby counsel and did not want to represent himself on his own, this Court held that no "*further* inquiry" was needed, because there is no right to dual representation. Id. at 151 (emphasis added). There can be no dispute, however, that when the defendant initially asked if he could "proceed as pro se," the trial court was constitutionally obligated to inquire into this statement rather than ignore it. See A040.

36 N.Y.2d at 19 (emphasis added). Indeed, the McIntyre Court explicitly rejected the prosecution's contention that the defendant's "inability to maintain self-control justified the court's denial." Id. at 18; see RB 28 (Mr. Duarte "was beset by a near-total inability to control his impulses"). It is well-settled, then, that the trial court may not simply ignore a pro se request that it views as "manipulative" (RB 32), or that it thinks may not satisfy the third McIntyre prong (RB 24 n.14), without actually conducting the requisite inquiry. Respondent's contrary position is not only unsupported by the record in this case, which does not contain any explanation for the trial court's summary denial of Mr. Duarte's request, but would eviscerate the three-pronged McIntyre analysis this Court has repeatedly upheld.

In the end, the trial court was not permitted to deny Mr. Duarte's clear and unconditional pro se request without any inquiry, whether or not the court believed it may have been "a disingenuous attempt to subvert the overall purpose of the trial." McIntyre, 36 N.Y.2d at 19. Although *granting* Mr. Duarte's pro se request was not constitutionally required, see MB 24; RB 14-16 (detailing the dangers inherent in self-representation), the court had no discretion to reject it "out of hand," "without determining …whether it was a good faith attempt to exercise his right to self-representation." See People v. Smith, 68 N.Y.2d 737, 739 (1986). Because this error violated Mr. Duarte's constitutional right to self-representation, reversal is required.

CRIMINAL COURT OF THE CITY OF NEW YORK

COUNTY OF NEW YORK: PART JP 13

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

VLADIMIR DUARTE,

Defendant.

DOCKET NO.2017NY020774

100 Centre Street
New York, New York 10013
June 2, 2017

B E F O R E:

THE HONORABLE ANN SCHERZER, Judge.

A P P E A R A N C E S:

OFFICE OF CYRUS VANCE, ESQ.
DISTRICT ATTORNEY - NEW YORK COUNTY
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Assistant District Attorney
For the People

LEGAL AID SOCIETY
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New York, New York 10013
BY: DOUGLAS LYONS, ESQ.
For the Defendant

SAMANTHA SCUOTTO
Official Court Reporter

COURT OFFICER: 2017NY020774, Vladimir Duarte.

MR. LYONS: We're ready to proceed. I have explained to Mr. Duarte the Court's offer of seven months in jail. He understands that, he rejects it.

THE COURT: You know, Mr. Duarte, that the maximum sentence in this case is one year, correct?

THE DEFENDANT: Correct.

THE COURT: Okay, and the People's recommendation is nine months and as soon as the first witness walks in the door I will not go below the People's recommendation.

THE DEFENDANT: This is an ineffective counsel. I had made that clear on my last appearance with him. He's not effective at all. This is the first time I've spoken with him actually this close about my case. He's never told me -- day one when I met him he believes I did this.

THE COURT: That doesn't mean that he is -- that he is not effective.

THE DEFENDANT: It's not true, because you're not going to say it to her. He told it to me.

MR. LYONS: I never said that.

THE COURT: Mr. Duarte --

THE DEFENDANT: So I wish for him not to represent me at all because he's ineffective and he doesn't believe that I did not do this.

THE COURT: That's denied. People, will you please call your first witness? This is a Wade/Huntley?

THE DEFENDANT: I would like to read --

THE COURT: You can't speak.

THE DEFENDANT: I object to your denying me ineffective counseling here.

THE COURT: Please call the first witness.

THE DEFENDANT: I would love to go pro se.

THE COURT: This is going to be a Huntley/Wade/Dunaway?

MS. LITRENTA: That's correct.

THE COURT: Please call your first witness.

MS. LITRENTA: For the record I've served a witness list, the Rosario, Prosecutor's Information and notice of immigration consequences on Defense Counsel.

THE COURT: Let's arraign him on the Prosecutor's Information.

COURT OFFICER: Defendant now stands charged with the crime of forcible touching in violation of Penal Law 130.52(1) and the crime of sexual abuse in the second degree in violation of Penal Law 130.62(2).

Counsel, did you receive a copy of the Prosecutor's Information?

MR. LYONS: I have.

COURT OFFICER: Do you waive the reading of the