HE WHO REPRESENTS HIMSELF HAS A FOOL FOR A CLIENT: THE RIGHT TO COUNSEL AND THE RIGHT TO SELF-REPRESENTATION IN NEW YORK

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I. INTRODUCTION

The old adage that he who represents himself has a fool for a client,[1] has been brought into sharp focus with the recent motion by

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[1] Although the actual origin of this adage remains uncertain, the saying has been attributed to Benjamin Franklin, Abraham Lincoln and others. *See A Man Who Is His Own Lawyer Has a Fool for a Client*, QUOTE INVESTIGATOR, https://quoteinvestigator.com/2019/07/30/lawyer/ [https://perma.cc/D4JM-HEUX]. It has survived in various permutations since at least the late 1600's. *See, e.g.*, WILLIAM DE BRITAINE, HUMANE PRUDENCE, OR, THE ART BY WHICH A MAN MAY RAISE HIMSELF AND FORTUNE TO GRANDEUR § 18, at 57 (Early English Books Online) (1682). A similar version can be found in a collection of fables from that era recounting a tale of a wealthy Dutchman who rejects the advice of physicians, thereby exemplifying the related moral of "He that Consults his Physician, and will not Follow his Advice, must be his Own Doctor: But let him take the Old Adage along with him. He that Teaches Himself has a Fool to his Master." Sir Roger L'Estrange, *Fable CCCXIII*, *in* FABLES OF AESOP AND OTHER EMINENT MYTHOLOGISTS: WITH MORALS AND REFLECTIONS 274, 275 (1692).

In 1744, the adage "[h]e who will take no Advice, but be always his own Counsellor, shall be sure to have a Fool for his Client" appeared in a collection of similar wisdom. *See Counsels*, *in* THE RULE OF LIFE: IN SELECT SENTENCES 258, 267 (2d ed. 1744). The first mention of the term "lawyer" in this saying is believed to be in a book review from 1795:

> It is an old law adage, copied from the Italian proverb of Che s'insegna, &c. that the man who is his own lawyer has a fool for a client. If he undertakes, of choice, to become so in making his will, he seems to us to verify the proverb in the most obvious and striking instance. For the ill consequences of his ignorance fall upon those whom he loves best, and wishes to benefit most.

British Catalogue, *in* 11 THE BRITISH CRITIC: A NEW REVIEW 302, 310 (1795).

In 1815, a London periodical published the following: "He was aware too of the hacknied observation, that he who pleaded his own cause had a fool for his client, and assured his Lordship that, if by legal artifices he had been made to suffer in a legal point of view, he should

disgraced attorney Michael Avenatti to relieve his counsel and represent himself in his criminal trial in federal court in California.[2] Avenatti's desire to represent himself in defending against charges which include wire and bank fraud and client embezzlement[3] demonstrates the tension that always exists between a defendant's constitutional right to self-representation[4] and that defendant's right to counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and most state Constitutions as well.[5]

In Avenatti's case, the judge presiding over the case, the Honorable James V. Selna, United States District Judge for the Central District of California, initially denied Avenatti's request to serve as co-counsel with his existing attorney,[6] but, after conducting a thorough colloquy with Avenatti which spanned more than thirty pages of transcript, allowed Avenatti to represent himself with assigned counsel to serve as stand-by counsel.[7] During the colloquy, the court discussed at length Avenatti's legal training and legal experience.[8] Avenatti told the court that he had received some legal training in criminal law

patiently have borne the evil . . . ." *Court of Chancery, Earl Carhampton v. Miss Lawley*, THE OBSERVER (London), Dec. 10, 1815, at 2. In 1924, a Montana newspaper reiterated the sentiment in less refined language: "for a man who attempts that is a good deal in the same position as the lawyer who tries his own case, and who under such circumstances is impolitely said to have a jackass for a client." *Anybody's Guess*, BUTTE MINER, June 23, 1924, at 4.

In 1966, an episode of the popular television series "Bewitched" depicted Benjamin Franklin magically transported from the past contending "the man who defends himself in court has a fool for a lawyer and a jackass for a client," to which the character of Aunt Clara replied "Abraham Lincoln said that," eliciting Benjamin Franklin to reply, "Abraham who? Whoever, he stole it from me." *Bewitched: Samantha for the Defense* (ABC television broadcast Dec. 15, 1966).

Ten years later, a Spokane, Washington newspaper also credited Abraham Lincoln with the saying, see *House of Properties, Inc.: Real Estate Facts! For Sale by Owner?*, SPOKESMAN-REV., Oct. 31, 1976, at E4, as did a Cincinnati newspaper in 2002, see also Marie McCain, *More Defendants Face Judges and Juries Alone*, CIN. ENQUIRER, Aug. 26, 2002, at 1A. *See generally A Man Who Is His Own Lawyer Has a Fool for a Client*, *supra*.

[2] S*ee, e.g.*, Meghann M. Cuniff, *Michael Avenatti Will Represent Himself in His Client Theft Trial*, RECORDER (California) (July 20, 2021), https://www.law.com/therecorder/2021/07/20/michael-avenatti-will-represent-himself-in-his-client-theft-trial/ [https://perma.cc/2YVN-V8FY].

[3] *See id.*

[4] *See, e.g.*, Faretta v. California, 422 U.S. 806, 836 (1975).

[5] *See infra* notes 17–21 and accompanying text.

[6] *See* Transcript of Proceedings at 4–5, United States v. Avenatti (C.D. Cal. July 20, 2021) (No. SACR-19-00061-JVS) [hereinafter Transcript].

[7] *See id.* at 32–33. The federal district court determined that Avenatti had been "adequately advised of the risks of representing [himself] and . . . ha[d] knowingly, intentionally, and voluntarily assumed those risks, and that [he was] qualified to represent [himself]." *Id.*

[8] *See id.* at 8–10.

twenty years ago and had appeared as an attorney in "less than five" criminal cases, acknowledged his lack of expertise in criminal law and conceded that he had never participated in a criminal trial as an attorney.[9] He also acknowledged that he had recently been sentenced as a defendant in another criminal case,[10] that he had only "[v]ery, very minimal familiarity" with Sentencing Commission Guidelines,[11] and that the prosecuting attorney was an experienced trial lawyer with twenty years' experience.[12] The court's colloquy also included, inter alia, a discussion of the elements of the charges, potential sentencing exposure and the dangers and disadvantages of self-representation, including the difficulties in preparing the case while incarcerated and the hazards of serving as his own counsel while emotionally involved.[13]

Although Avenatti's decision to represent himself and the court's decision to accept Avenatti's waiver of his right to counsel took place within a California federal courtroom, the tension between the right to self-representation and the right to counsel plays out regularly in courtrooms in New York with both famous and less well known defendants.[14] In New York, courts will allow a defendant to exercise

[9] *Id.*

[10] *See* United States v. Avenatti, (S1) 19 Cr. 373 (PGG), 2021 U.S. Dist. LEXIS 125442, at *1–3 (S.D.N.Y. July 6, 2021) (denying defendant's motion for a judgment of acquittal or a new trial after conviction, upon a jury verdict, on charges of, inter alia, Hobbs Act extortion); Transcript, *supra* note 6 at 9, 13.

[11] Transcript, *supra* note 6 at 13.

[12] *See id.* at 11–12.

[13] S*ee id.* at 13, 15–17, 19–31.

[14] *See, e.g.*, John T. McQuiston, *Lawyers in Rail Slayings File for Insanity Defense*, N.Y. TIMES, Sept. 20, 1994 at B5. New York is not without its own high-profile defendants who waived their right to counsel and represented themselves at trials. One such notorious defendant who received significant press coverage is Colin Ferguson—convicted in 1995 of six counts of murder in the second degree, nineteen counts of attempted murder in the second degree, criminal possession of a weapon in the second degree and reckless endangerment in the first degree. *See* People v. Ferguson, 670 N.Y.S.2d 327, 327 (App. Div. 1998). Ferguson was found guilty of opening fire on a Long Island Rail Road commuter train on December 7, 1993, wherein he killed six people and injured nineteen others. *See* McQuiston, *supra*, at B5. Among the victims were the husband and son of Carolyn McCarthy who was later elected to serve as the United States Representative for New York's 4th Congressional District from 1997 to 2015. *See 20 Years Later: Long Island Rail Road Shooting Remembered as Day Killer Colin Ferguson Went Off the Rails*, N.Y. DAILY NEWS, (Dec. 6, 2013, 6:48AM), https://www.nydailynews.com/new-york/lirr-bloodbath-remembered-20-years-article-1.1539603 [hereinafter *20 Years Later*]; *McCarthy, Carolyn*, HIST., ART & ARCHIVES, https://history.house.gov/People/Detail/17705 [https://perma.cc/AJ8M-SCE7]. Ferguson fired his defense attorneys who wanted to proffer a "black rage" insanity defense, stating he wanted no part in claiming that racial persecution triggered violence and that "he would rather be convicted than judged insane." *20 Years Later*, *supra.* Ferguson served as his own lawyer throughout his trial which took place in Nassau County District Court in January and February of 1995. *See* Tom Smith, *Colin Ferguson Trial: 1995*, JRANK,

his or her right of self-representation upon a valid waiver of the right to counsel.[15] This Article reviews the current state of the law in New York as to what constitutes a valid waiver of a defendant's right to counsel at trial by examining Court of Appeals precedent and significant cases in the four departments of the appellate division of the New York supreme court.[16]

II. CONSTITUTIONAL RIGHTS

The constitutional right to the assistance of counsel in a criminal trial is set forth in both the United States and New York

https://law.jrank.org/pages/3671/Colin-Ferguson-Trial-1995.html [https://perma.cc/9MJG-PZM6]. The Los Angeles Times reported at that time that the now-deceased Nassau County Court Judge Donald Belfi, who presided over the trial, strongly advised Ferguson against representing himself and stated in court that Ferguson was "doing a foolish thing." *Defendant in Long Island Train Massacre to Represent Self at Trial*, L.A. TIMES (Dec. 10, 1994), https://www.latimes.com/archives/la-xpm-1994-12-10-mn-7180-story.html [https://perma.cc/RVX5-6CJZ]. In 2013, Judge Belfi recalled in an interview that Ferguson "knew . . . what he did and could understand right from wrong . . . . He showed sufficient intelligence." *20 Years Later*, *supra*. Judge Belfi further recalled that thirty or forty judges from around the country questioned his decision to permit Ferguson to proceed pro se, see *id.*, a decision which was affirmed on appeal in 1998. *See Ferguson*, 670 N.Y.S.2d at 328. Ferguson's convictions and his sentence of six consecutive terms of imprisonment of twenty-five years to life in prison were also affirmed. *See id*; *20 Years Later*, *supra*.

[15] *See* People v. McIntyre, 324 N.E.2d 322, 327 (N.Y. 1974).

[16] Notably, in February of this year, in *People v. Duarte*, No. 9, 2022 N.Y. LEXIS 163 (Feb. 15, 2022), the New York Court of Appeals rejected a contention by a defendant that his right to represent himself at trial pursuant to both the New York and United States Constitutions was violated when the trial court ignored his comment "I would love to go pro se" following his complaints about his court appointed attorney, *id.* at *1. There, the Court of Appeals determined that, considering all of the circumstances, the defendant's statement "'d[id] not reflect a definitive commitment to self-representation' that would trigger a searching inquiry by the trial court." *Id.* (quoting People v. LaValle, 817 N.E.2d 341, 349 (N.Y. 2004)) (citing People v. Gillian, 861 N.E.2d 92, 94 (N.Y. 2006); *McIntyre*, 324 N.E.2d at 328). In contrast, the dissent determined that "[t]he import of [the defendant's statement] is obvious: defendant wanted to represent himself," *id.* at *1 (Rivera, J., dissenting), and found that the trial court's failure to inquire as to whether the defendant's decision was made knowingly and intelligently was reversible error. *See id.* at *2 (citing People v. Smith, 497 N.E.2d 689, 690 (N.Y. 1986)). Nonetheless, cases such as *Duarte*, where a defendant alleges that his or her right to proceed pro se was wrongfully denied, see 2022 N.Y. LEXIS 163 at *1; see also *People v. Silburn*, 98 N.E.3d 696, 699–702 (N.Y. 2018) (no unequivocal request which would trigger the trial court's duty to make a searching inquiry as to the defendant's right to self-representation where defendant's requests to proceed pro se were conditioned on his request to proceed with "standby counsel"), or where the trial court's failure to explore a defendant's mental capacity to proceed pro se is a primary issue, see, e.g., *People v. Stone*, 6 N.E.3d 572, 576–77 (N.Y. 2014) (trial court's failure to sua sponte inquire into the defendant's mental capacity to represent himself prior to granting application to proceed pro se did not deprive defendant, later diagnosed with mental health problem, of his constitutional right to counsel), are outside the ambit of this Article.

Constitutions and is fundamental to our system of justice.[17] The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.[18]

In 1963, the United States Supreme Court in *Gideon v. Wainwright*[19] clarified that the right of an indigent defendant to have the assistance of counsel in a criminal case was essential to a fair trial, and that the Sixth Amendment right to counsel was extended to the states through the Fourteenth Amendment.[20] The Fourteenth Amendment provides, in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[21]

The right to counsel is also expressly guaranteed by New York's Constitution: "[i]n any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him or her."[22]

Concomitantly, the right to represent oneself in a criminal trial has also been determined to be constitutionally guaranteed. In 1974, in

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[17] *See* U.S. CONST. amend. VI; N.Y. CONST. art. I, § 6; *see also* People v. Arroyo, 772 N.E.2d 1154, 1155 (N.Y. 2002).

[18] U.S. CONST. amend. VI.

[19] Gideon v. Wainwright, 372 U.S. 335 (1963).

[20] *See id.* at 342–45. There, the Supreme Court relied in part on its earlier case in *Powell v. Alabama*, which traced the evolution of the right to the assistance of counsel from common law through colonial times, examining the state constitutions of the original thirteen colonies. *See Gideon*, 372 U.S. at 344–45 (quoting Powell v. Alabama, 287 U.S. 45, 68–69 (1932)); *Powell*, 287 U.S. at 60–65.

[21] U.S. CONST. amend. XIV, § 1.

[22] N.Y. CONST. art. I, § 6.

People v. McIntyre,[23] the New York Court of Appeals first considered the issue of whether a defendant has a constitutional right to represent him or herself in a criminal trial by analyzing "the nature and extent of a criminal defendant's right to conduct his [or her] own defense."[24] In *McIntyre*, the defendant was charged with murder in the first degree and robbery in the first degree arising out of the robbery of a Brooklyn grocery store.[25] The defendant asked the trial court to allow him to try the case himself and that his counsel serve as his adviser.[26] The trial court inquired into the defendant's background and learned that the defendant had attended one year of college and was employed as a furniture designer.[27] The court asked the defendant if he thought counsel was competent to represent him, and after the defendant told him that counsel was very competent, the court ordered the defendant to sit down and denied the application.[28] Thereafter, the defendant was convicted.[29] On appeal, the Appellate Division, Second Department, affirmed the conviction, finding that the trial court was justified in denying the defendant's motion to represent himself "in light of the defendant's inability to maintain self-control."[30] Thereafter, the defendant appealed to the

[23] People v. McIntyre, 324 N.E.2d 322 (N.Y. 1974).

[24] *Id.* at 324–25. Although the Court previously had recognized "the defendant's right to conduct his own defense," see *id.* at 326, *People v. McIntyre* is the first case in which the Court expressly determined that New York's Constitution protects a defendant's right to proceed pro se. *See id.*

[25] *Id.* at 324.

[26] *Id.*

[27] *Id.*

[28] *Id.* at 324–25. In denying the defendant's motion, the trial court engaged in the following colloquy:

> The Court: Of course you know exactly what I mean. You know exactly what's going to happen. The defendant will start questions, there will be an objection, objection sustained. The defendant will start looking at the ceiling and looking at the wall, and he won't know what to do.
>
> Defendant: I wouldn't.
>
> The Court: He thinks he's probably the greatest lawyer and God's gift to the legal profession. That comes after talking with three or four jailhouse lawyers. But you and I, . . . [defense counsel] know that he's not a lawyer.
>
> [Defense Counsel]: The defendant asks for permission to speak to you himself as to why he wants to represent himself.
>
> The Court: No, he can talk through you.

Id. at 324. Thereafter, the defendant reacted by using profanity: "F*** the jury. I'm not going to trial." *Id.* at 325. The defendant then jumped up and knocked his chair over. *Id.*

[29] *See id.*

[30] *See id.*

Court of Appeals.[31] There**,** the court reversed the conviction, observing that the right of self-representation is "deeply ingrained in our common law,"[32] and that it "embodies one of the most cherished ideals of our culture; the right of an individual to determine his [or her] own destiny."[33] The court then quoted the Second Circuit Court of Appeals in *United States ex rel. Maldonado v. Denno*[34] finding that: "even in cases where the accused is harming himself by insisting on conducting his own defense, respect for individual autonomy requires that he be allowed to go to jail under his own banner if he so desires and if he makes the choice 'with eyes open.'"[35] Notably, the court did not reach the issue of whether the right to proceed pro se was guaranteed by the United States Constitution, holding that the right was "clearly recognize[d]" by the New York State Constitution and criminal procedure statute.[36]

Shortly after *McIntyre* was decided, in 1975, the United States Supreme Court in *Faretta v. California* expressly held that the right to represent oneself in a criminal proceeding is a constitutionally guaranteed right.[37] In *Faretta*, the defendant was charged in California state court with grand theft auto and sought to represent himself at trial.[38] The court denied the application, finding that the defendant had no constitutional right to conduct his own defense.[39] After a jury trial, the defendant was convicted.[40] His state court appeals were denied on the same basis (that no constitutional right to represent oneself exists) and he filed a writ of certiorari for review before the United States Supreme Court on the grounds that denial of his application to represent himself at trial violated the United States Constitution.[41]

In finding that Faretta's constitutional right to proceed without counsel had been violated, the Supreme Court examined English and colonial jurisprudence regarding both the right to assistance of

[31] *See id.* at 324.
[32] *Id.* at 325, 328.
[33] *Id.* at 325.
[34] United States *ex rel.* Maldonado v. Denno, 348 F.2d 12 (2d Cir. 1965).
[35] *McIntyre*, 324 N.E.2d at 325 (quoting *Denno*, 348 F.2d at 15).
[36] *Id.* at 326.
[37] *See* Faretta v. California, 422 U.S. 806, 807, 836 (1975).
[38] *See id.* at 807.
[39] *See id.* at 809–10.
[40] *See id.* at 811.
[41] *See id.* at 811–12.

counsel and the right of self-representation.[42] The Supreme Court reversed the conviction and remitted the action for further proceedings, determining that the Sixth and Fourteenth Amendments to the United States Constitution guarantee that a criminal defendant in a state criminal trial possesses "a constitutional right to proceed without counsel when he voluntarily and intelligently elects to do so."[43] The Supreme Court observed that the counsel provision within the Sixth Amendment speaks to the *assistance* of counsel:

> To thrust counsel upon the accused, against his [or her] considered wish, thus violates the logic of the [Sixth] 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.[44]

In *Faretta*, the Supreme Court set forth the requirements for invoking the right to self-representation:

> When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself [or herself], the accused must "knowingly and intelligently" forgo those relinquished benefits. Although a defendant need not himself [or herself] have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he [or she] should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he [or she] knows what he [or she] is doing and his [or her] choice is made with eyes open."[45]

[42] *See generally id.* at 818–32. The Supreme Court noted that the constitutions of thirty-six states explicitly confer on a defendant the right to represent himself in any criminal case and that in federal courts, the right of self-representation has been protected by statute since the beginnings of the nation. *Id.* at 812–13.

[43] *Id.* at 807, 836.

[44] *Id.* at 820.

[45] *Id.* at 835 (citations omitted).

III. COURT OF APPEALS PRECEDENT

In New York, the Court of Appeals has recognized that "[t]he right to counsel and the right to forego counsel are 'inherently antagonistic' ideals; [thus,] in order to best promote the orderly administration of justice and insulate convictions from claims of deprivation of fundamental fairness, the right to self-representation is necessarily a qualified right."[46]

"[B]efore proceeding pro se a defendant must make a knowing, voluntary and intelligent waiver of the right to counsel,"[47] and "[f]or such a waiver to be effective, the trial court must be satisfied that it has been made competently, intelligently and voluntarily."[48]

In 2011, in *People v. Crampe*, the Court of Appeals reviewed its prior case law on this issue and reiterated that, in order "[t]o ascertain whether a waiver is knowing, voluntary and intelligent, a [trial] court must undertake a 'searching inquiry' designed to 'insur[e] that the defendant [is] aware of the dangers and disadvantages of proceeding without counsel.'"[49] There, the court decided two cases under a single caption and determined that the trial courts' inquiries were deficient in both cases.[50]

In the case involving the defendant Alexander Crampe, Crampe was charged with a misdemeanor—criminal possession of a controlled substance in the seventh degree.[51] The trial court granted Crampe's application to proceed pro se, finding that Crampe had validly waived his right to counsel; the jury subsequently returned a verdict of guilty.[52] Thereafter, Crampe appealed contending, inter alia, that his purported waiver of counsel was invalid because he had not knowingly waived the right.[53] The appellate term affirmed the verdict, determining that the defendant's waiver of his right to

[46] People v. Arroyo, 772 N.E.2d 1154, 1155–56 (N.Y. 2002) (citing People v. McIntyre, 324 N.E.2d 322, 325–27 (N.Y. 1994)).

[47] *Id.* at 1156 (citing People v. Slaughter, 583 N.E.2d 919, 923 (N.Y. 1991)); *accord* People v. Crampe, 957 N.E.2d 255, 262 (N.Y. 2011), *cert. denied sub nom.* New York v. Wingate, 565 U.S. 1261 (2012).

[48] *McIntyre*, 324 N.E.2d at 327 (citing Johnson v. Zerbst, 304 U.S. 458, 468 (1938)); *accord Crampe*, 957 N.E.2d at 262; *see also* People v. Smith, 705 N.E.2d 1205, 1208 (1998) (quoting *Faretta*, 422 U.S. at 835) ("To pass muster, a 'searching inquiry' must reflect record evidence that defendants know what they are doing and that choices are exercised with 'eyes open.'").

[49] *Crampe*, 957 N.E.2d at 262 (quoting People v. Providence, 813 N.E.2d 632, 634 (2004)).

[50] *See id.* at 256 (citing *Arroyo*, 772 N.E.2d at 1156; *McIntyre*, 324 N.E.2d at 327).

[51] *See id.* at 256.

[52] *See id.* at 257–58.

[53] *See id.* at 258.

counsel was voluntary.[54] The appellate term found that the trial court had adequately warned the defendant about self-representation.[55] The appellate term concluded that, based on the defendant's prior arrest record and conviction, it was "apparent[]" that he was "not unfamiliar with the operation of the criminal justice system."[56] The Court of Appeals reversed and remitted for a new trial.[57] The court noted that the trial judge simply read aloud a form that "pointed out that proceeding pro se brought with it the danger of conviction—a risk that . . . exist[ed] even when the accused [was] represented by counsel—and that criminal trials and proceedings [were] complicated."[58] The court contrasted the terse colloquy by the *Crampe* trial court with the trial court's colloquy in *People v. Vivenzio*,[59] an earlier case in which the court found that the colloquy regarding the defendant's waiver of his right to counsel was sufficient.[60]

The second case reviewed by the Court of Appeals under the *People v. Crampe* caption involved the defendant Blake Wingate.[61] Wingate was charged with criminal possession of stolen property in the fourth degree, a felony, and criminal possession of a controlled substance in the seventh degree, a misdemeanor.[62] During pretrial appearances, Wingate told the hearing court that he was dissatisfied with the two attorneys, assigned sequentially, to represent him.[63] Thereafter, the hearing court asked Wingate if he wanted to represent himself at the suppression hearing.[64] Wingate responded that he did, but that he "need[ed] co-counsel."[65] The court denied his request for hybrid representation, and, after a very brief colloquy, permitted Wingate to represent himself at the hearing.[66]

At a jury trial five months later before a different supreme court Justice, who explored with Wingate whether he had "considered legal representation," Wingate again represented himself and was

[54] *See Crampe*, 957 N.E.2d at 258 (quoting People v. Crampe, 907 N.Y.S.2d 102 (N.Y. App. Term. 2010)).

[55] *See id.* (quoting *Crampe*, 907 N.Y.S.2d at 102).

[56] *Id.* (quoting *Crampe*, 907 N.Y.S.2d at 102).

[57] *Id.* at 265.

[58] *Id.* at 263.

[59] People v. Vivenzio, 465 N.E.2d 1254 (1984)).

[60] *See id.* (citing *Vivenzio*, 465 N.E.2d at 1255); *see infra* notes 85–91 and accompanying text.

[61] *Id.* at 258.

[62] *See id.*

[63] *See id.*

[64] *Id.*

[65] *Id.*

[66] *See id.*

convicted of all charges.[67] The Second Department modified the verdict, vacating the conviction of possession of stolen property and dismissing that count of the indictment, but otherwise affirmed, holding that, although the suppression court did not conduct a proper waiver colloquy, "the record as a whole demonstrate[d] that the defendant made a knowing, voluntary, and intelligent decision to waive his right to counsel and proceed pro se."[68]

Thereafter, the Court of Appeals granted leave to appeal and modified—remitting the case for a new suppression hearing—on the grounds that the colloquy that had been conducted by the suppression court "was deficient for the same reason [Crampe's waiver was deficient]—the court's inquiry did not direct [the] defendant's attention to the dangers and disadvantages of self-representation beyond the risk of a felony conviction."[69] Although the supreme court Justice who presided over Wingate's trial had subsequently "engaged in an extensive colloquy with the defendant, drawing his attention to the many challenges that he would face if he proceeded pro se rather than avail himself of legal representation," the Court of Appeals concluded that "the trial court's warnings were incapable of retrospectively 'curing' the suppression court's error."[70] The court reached this result notwithstanding its observation that

> certainly, it may logically be inferred . . . that nothing the suppression court might have said would have dissuaded defendant from representing himself at the pretrial hearing: he was impervious to the trial court's later repeated and thorough explanations of the perils of defending himself at trial and the importance of counsel, and was dissatisfied with [assigned counsel] and, ultimately, with standby counsel.[71]

Nevertheless, the court remitted the case to the supreme court for new proceedings, including a new suppression hearing, finding that the subsequent warnings could not cure the deficiencies that occurred when the defendant made the decision to waive his right to counsel.[72]

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[67] *Id.* at 259, 262.

[68] People v. Wingate, 892 N.Y.S.2d 867, 867–68 (App. Div. 2010) (citing People v. Providence, 813 N.E.2d 632, 634–35 (N.Y. 2004); People v. Bailey, 810 N.Y.S.2d 365 (App. Div. 2006) (mem)), *modified sub nom*. People v. Crampe, 957 N.E.2d 255 (N.Y. 2011).

[69] *Crampe*, 957 N.E.2d at 263, 265.

[70] *Id.* at 263–64.

[71] *Id.* at 264.

[72] *See id.* at 264–65.

Significantly, in *Crampe*, the Court of Appeals reviewed and reaffirmed its longstanding requirement that there must be an affirmative showing that a defendant who waives the right to counsel understands "the perils of defending him[] [or herself] at trial and the importance of counsel."[73] Significantly, "a waiver of the right to counsel will not be deemed ineffective simply because a trial judge does not ask questions designed to elicit each of the specific items of information recited in *[People v.] Arroyo*" bearing on whether a waiver is "competent, intelligent, [and] voluntary."[74] Indeed, "a reviewing court may look to the whole record, not simply to the waiver colloquy, in order to determine if a defendant effectively waived counsel."[75]

Although the Court of Appeals has:

> eschewed application of any rigid formula and endorsed the use of a nonformalistic, flexible inquiry, the [trial] court's record exploration of the issue "must accomplish 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."[76]

[73] *See id.* at 263–64; *see also* People v. Arroyo, 772 N.E.2d 1154, 1156 (N.Y. 2002)) (reversing conviction and remitting for new trial where trial court failed to make required "searching inquiry" of defendant because "trial court neither tested defendant's understanding of choosing self-representation nor provided a reliable basis for appellate review" (quoting People v. Slaughter, 583 N.E.2d 919, 923 (N.Y. 1991)) (citing People v. Allen, 352 N.E.2d 591, 591–92 (N.Y. 1976))); People v. Smith, 705 N.E.2d 1205, 1207–09 (N.Y. 1998) (upholding reversal of conviction and remittal for new trial where trial court "failed to explore and expose the key admonition that is designed to pointedly alert a defendant of potential *pro se* representation pitfalls and responsibilities"); *Slaughter*, 583 N.E.2d at 923 (waiver of right to counsel ineffective where "hearing court failed to make the required searching inquiry of defendant to insure that he was aware of the dangers and disadvantages of proceeding without counsel" and trial court "made no inquiry but merely informed defendant that he would get 'no assistance from the [c]ourt'"); People v. Kaltenbach, 457 N.E.2d 791, 792 (N.Y. 1983) (new trial required where court's "precautionary inquiry . . . failed to adequately warn defendant of the 'risks inherent in representing himself' or apprise him of 'the value of counsel'" (quoting People v. Harris, 445 N.Y.S.2d 801, 803 (App. Div. 1981)) (citing People v. Sawyer, 438 N.E.2d 1133, 1138 (N.Y. 1982); People v. White, 436 N.E.2d 507, 512 (N.Y. 1982))); *Sawyer*, 438 N.E.2d at 1138 (new trial required where court's "precautionary inquiry . . . was woefully inadequate").

[74] People v. Providence, 813 N.E.2d 632, 635 (N.Y. 2004) (quoting *Arroyo*, 772 N.E.2d at 1156).

[75] *Id.*

[76] *Arroyo*, 772 N.E.2d at 1156 (quoting *Smith*, 705 N.E.2d at 1208).

Thus, a trial court must provide appropriate warnings and admonitions and must affirmatively explore whether the defendant's waiver of the right to counsel is knowing, voluntary, and intelligent.

For example, in upholding the waiver in *People v. Providence*, the Court of Appeals noted that the "[d]efendant concedes, and the record establishes, that the trial court adequately fulfilled its responsibility to make him 'aware of the dangers and disadvantages of self-representation,'"[77] and that "nothing in the lengthy colloquies in this record calls into question defendant's ability to understand the trial judge's detailed warnings regarding self-representation."[78] There, the defendant was convicted, upon a jury verdict, of two felonies—criminal possession of a controlled substance in the third degree and criminal possession of a controlled substance in the fifth degree.[79] The First Department determined that the supreme court "more than adequately explained the risks of self-representation and the critical importance of utilizing the services of a trained lawyer in a criminal prosecution. . . . compar[ing] self-representation in such a proceeding to performing surgery on one's own body," among other warnings.[80] The First Department affirmed, holding that, although the supreme court had not asked specific questions to elicit the factual information referenced in *People v. Arroyo*, the record evidence adequately reflected the defendant's pedigree information, prior criminal experience, and competence to waive the right to counsel.[81] The Court of Appeals agreed, finding that the trial court "repeatedly and adequately warned [the defendant] of the dangers of self-representation" and that the court's colloquies demonstrated a valid waiver of the defendant's right to counsel.[82] Notably, there, the only inquiry missing from the extensive colloquy by the trial court was any question regarding the defendant's pedigree information and previous exposure to legal procedures.[83] The Court of Appeals referred to the extensive colloquies and noted that the record that

[77] *Providence*, 813 N.E.2d. at 634 (quoting Faretta v. California, 422 U.S. 806, 835 (1975)).

[78] *Id.* at 635–36.

[79] *See* People v. Providence, 764 N.Y.S.2d 32, 36 (App. Div. 1st Dep't 2003), *aff'd*, 813 N.E.2d 632 (N.Y. 2004).

[80] *Id.* at 34–35.

[81] *See id.* at 35–36. Notably, one associate justice on the First Department dissented, contending that the trial court's inquiry did not comport with *People v. Arroyo*. *See id.* at 37 (Tom, J., dissenting).

[82] *See Providence*, 813 N.E.2d at 634, 636.

[83] *See id.* at 635.

was before the trial court included pedigree information and thus found the defendant's waiver of his right to counsel valid.[84]

Similarly, in *People v. Vivenzio*, the Court of Appeals found valid the defendant's waiver based on the record before the trial court, including, inter alia, pedigree information and the trial court's warnings to the defendant.[85] There, the defendant had been convicted of attempted burglary in the third degree and possession of burglar's tools, and a divided Fourth Department had reversed and remitted for a new trial, finding inadequate the trial court's inquiry regarding the defendant's age, education, and previous exposure to legal procedures.[86] The Court of Appeals reversed and upheld the conviction, noting that "[t]he court warned defendant forcefully that he did not have the training or knowledge to defend himself, that others who had done so had been unsuccessful and that if he insisted upon appearing *pro se* he would be held to the same standards of procedure as would an attorney" and determined that the record demonstrated that the defendant previously had been involved in the criminal process and had discussed his decision with assigned counsel, who had advised against it and remained available as standby counsel throughout the trial.[87]

Significantly, the trial court had warned the defendant that his assigned counsel had been trained in the law, which the defendant had not, and referenced the "old adage that a man who represents himself has a fool for a client."[88] The Court of Appeals held:

> Regardless of his lack of expertise and the rashness of his choice, defendant could choose to waive counsel if he did so knowingly and voluntarily. A criminal defendant is entitled to be master of his own fate and "respect for individual autonomy requires that he be allowed to go to jail under his own banner if he so desires and if he makes the choice 'with eyes open.'"[89]

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[84] *Id.* at 635–36 (quoting People v. Arroyo, 772 N.E.2d 1154, 1156 (N.Y. 2002)).

[85] *See* People v. Vivenzio, 465 N.E.2d 1254, 1255 (1984).

[86] *See* People v. Vivenzio, 465 N.Y.S.2d 350, 350–51 (App. Div. 4th Dep't 1983) (quoting People v. McIntyre, 324 N.E.2d 322, 327 (N.Y. 1974), *rev'd*, 465 N.E.2d 1254 (1984)).

[87] *Vivenzio*, 465 N.E.2d at 1255.

[88] *Vivenzio*, 465 N.Y.S.2d at 351 (Hancock, Jr. & Moule, JJ., dissenting).

[89] *Vivenzio*, 465 N.E.2d at 1255 (quoting United States *ex rel.* Maldonado v. Denno, 348 F.2d 12, 15 (2d Cir. 1965)) (citing Faretta v. California, 422 U.S. 806, 835 (1975); People v. Landy, 452 N.E.2d 1185, 1189 (N.Y. 1983); *McIntyre*, 324 N.E.2d at 327)).

The Court of Appeals in *Vivenzio* clarified that the validity of a defendant's waiver of the right to counsel is not dependent on his or her education or skills, as long as the defendant knows what he or she is doing and the choice is made with "eyes open."[90] Therefore, although a defendant's education and prior experience with the criminal justice system are proper factors for a trial court to consider in determining whether a defendant's waiver of his or her right to counsel is knowing, voluntary, and intelligent, such considerations do not supplant the trial court's obligation to ensure that a defendant is aware of the risks and disadvantages of proceeding pro se.[91]

As illustrated by the Court of Appeals' determination in *People v. Sawyer*,[92] when a trial court fails to adequately warn a defendant of the risks inherent in proceeding pro se and apprise him or her of the "singular importance of the lawyer in the adversarial system,"[93] reversal of the conviction will result. In *Sawyer*, the Court of Appeals found that the trial court's "declarations that defendant was 'facing a very serious charge' and that 'your own best interests are probably served by having a lawyer represent you' simply did not satisfy the duty to make a 'searching inquiry.'"[94] In its determination, the Court of Appeals recited the colloquy that occurred between the trial judge and the defendant:

> The Court: And do you want a lawyer?
>
> Defendant: Yes, Your Honor.
>
> The Court: Then, you have the Public Defender, and I am asking you how you plead to this charge?
>
> Defendant: I cannot plead now, Your Honor, because I cannot accept the Public Defender's office as counsel.
>
> The Court: I hold him in contempt of Court. The Public Defender—either you are your own lawyer, or the Public Defender is your lawyer. Now, which? Which?
>
> Defendant: I don't want the Public Defender, Your Honor.
>
> The Court: Then, you are your own lawyer. I enter a plea of not guilty, on your behalf, and I give you 30 days in which to make motions on your behalf.

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[90] *See id.*; *see also* People v. Arroyo, 772 N.E.2d 1154, 1156 (N.Y. 2002) ("A defendant need not have the professional skills and experience of an attorney to choose self-representation.").

[91] *See infra* notes 131–136 and accompanying text.

[92] *See* People v. Sawyer, 438 N.E.2d 1133, 1136, 1139 (N.Y. 1982).

[93] *Arroyo*, 772 N.E.2d at 1156 (quoting People v. Smith, 705 N.E.2d 1205, 1208 (N.Y. 1998)).

[94] *Sawyer*, 438 N.E.2d at 1138.

> Mr. Carpenter: [Public Defender] I take it, an order is entered relieving the Public Defender of representing [the defendant] at this time? Thank you, Your Honor.
>
> * * *
>
> The Court: * * * I don't know how you are going to make your own motions. It's up to you. You have chosen to be your own lawyer, since you will not accept the lawyer I have assigned—
>
> Defendant: I have not chosen—
>
> The Court: You have chosen. I am giving you another chance. You may make your choice. One, represent yourself. Two be represented by the Public Defender. You have no other choice. You are facing a very serious charge. If guilty and convicted, a mandatory sentence is life imprisonment. I strongly suggest you stop playing games with this Court and look out for your own best interests. Your own best interests are probably served by having a lawyer represent you. You will not have me assign anybody, or accept the Public Defender. Now, I know you've been talking with another lawyer. I do not know whether or not he has given you any advice, but if he has given you any advice that is contrary to what the Courts of this State say, obviously it isn't good advice. Now, if you want the Public Defender, I will re-appoint him; otherwise, you have no lawyer.
>
> Defendant: I want to put on the record, I am not competent to defend myself, Your Honor.
>
> The Court: In that case, I assign the Public Defender again to represent you, and I will not hear you say anything one way or the other. You have a lawyer, or you don't have.[95]

The Court was not swayed by the argument presented in the dissenting opinion:

> [D]efendant at the time of trial was . . . by no means unfamiliar with the criminal justice system. . . . [for] [n]ot only had he served time on prior felony charges, but he was involved in a lengthy extradition proceeding in the State of

[95] *Id.* at 1135. Thereafter, the defendant was denied bail. *See id.* at 1136. At that time, a similar colloquy between the court and the defendant ensued wherein the court posed to the defendant only two choices: that he accept the services of the Public Defender or represent himself. *See id.* at 1136. The court then relieved the Public Defender and noted that "[the defendant] is his own counsel as such." *Id.*

> Maine which ended in his return to this State to face the present murder charges. On both these occasions, defendant was represented by counsel and, as a result, fully exposed to the role played by an attorney in the course of a criminal proceeding.[96]

The Court of Appeals affirmed the Fourth Department order granting a new trial based on its determination that the record did not demonstrate that the trial court had ascertained that "the defendant appreciated the risks of self-representation."[97]

Similarly, in *People v. Harris*,[98] the Court of Appeals affirmed the Second Department's determination reversing the defendant's judgment and ordering a new trial.[99] The Second Department had determined that "[a]t no point after the defendant's request to proceed pro se did the [trial] court attempt to apprise him of the risks inherent in representing himself or the value of counsel," and that the trial court's "perfunctory inquiry" as to whether counsel had any difficulty with the defendant and whether the defendant understood what his counsel had spoken to him about "d[id] not satisfy the standards which have been established to protect the fundamental constitutional right to counsel."[100] The Second Department thus concluded that,

> Although the defendant was not a newcomer to the criminal justice system, his prior record and counsel's assurances did not vitiate the court's duty to explain the consequences of self-representation, nor did they supplant the need for a careful allocution to insure that the defendant's waiver was being knowingly and intelligently made.[101]

This decision rejected the dissenting justice's view that "a defendant who has intimate familiarity with the criminal justice

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[96] *Id.* at 1139 (Jasen, J., dissenting). The dissent added, "[n]or is there any possibility that further dialogue between the court and the defendant concerning the dangers of self-representation would have altered defendant's unyielding position concerning [his assigned counsel's] assistance at trial." *Id.* at 1140.

[97] *Id.* at 1137, 1139.

[98] People v. Harris, 444 N.E.2d 1008 (N.Y. 1982).

[99] *See id.* at 1008; People v. Harris, 445 N.Y.S.2d 801, 802 (App. Div. 1981), *aff'd*, 444 N.E.2d 1008 (N.Y. 1982).

[100] *Harris*, 445 N.Y.S.2d at 804.

[101] *Id.* (citing Johnson v. Zerbst, 304 U.S. 458, 464–65 (1938)).

system should not be allowed to escape the consequences of a conviction by asserting that he did not know the ramifications of his decision to represent himself."[102] The Court of Appeals agreed, and affirmed on the same grounds as had been found by the Second Department.[103]

IV. APPELLATE DIVISION PRECEDENT

Although the determinations of the four departments of the appellate division largely agree as to the analysis for determining whether a waiver of right to counsel is valid, as noted below, the Fourth Department takes a different approach when a record fails to demonstrate that a defendant was warned about potential sentencing exposure.[104] The following is a discussion of significant appellate division cases from each department.

A. The First Department

In the oft-cited *People v. Cole*,[105] the defendant was convicted of burglary in the second degree, upon a jury verdict, after the trial court granted the defendant's application to proceed pro se.[106] The First Department reversed the conviction on the ground that the trial court failed to conduct the requisite "searching inquiry."[107] The First Department found that where "[t]he court gave nothing more than generalized warnings, and completely failed to advise defendant of the benefits of being represented by counsel," the defendant's waiver of his right to counsel was not valid.[108] According to the First Department:

> The court's statements to defendant that it was in his "interest" to continue with counsel; that "[g]enerally, [self-representation] is a very bad idea"; and that there were "all kinds of dangers in doing this," its sole example being that defendant would have to give the opening statement himself, failed to insure "that the dangers and disadvantages of giving

[102] *Id.* at 805 (Weinstein, J., dissenting).
[103] *See Harris*, 444 N.E.2d at 1008.
[104] *See infra* notes 194–201 and accompanying text.
[105] People v. Cole, 987 N.Y.S.2d 373 (App. Div. 2014).
[106] *See id.* at 375, 379.
[107] *Id.* at 379.
[108] *Id.* at 378–79.

> up the fundamental right to counsel [had] been impressed on . . . defendant."[109]

Moreover, the First Department also noted that the trial "court . . . failed to advise the defendant about the 'importance of the lawyer in the adversarial system of adjudication.'"[110] The First Department noted that "[i]n addition to insuring that the defendant is aware of the dangers and disadvantages of proceeding pro se, a searching inquiry 'encompasses consideration of a defendant's pedigree,'" and "should also include the nature of the charges and the range of allowable punishments."[111] Thus, the court reversed the conviction and ordered a new trial,[112] consistent with other First Department cases where waiver colloquy was found to be inadequate.[113]

In *People v. Rodriguez*,[114] the First Department considered a purported waiver of the defendant's right to counsel where a defendant had been permitted to represent himself at the suppression and *Sandoval*[115] hearings and was later convicted, upon a jury verdict, of burglary in the second degree.[116] After the hearings, the defendant had attempted to delay the proceedings and caused numerous disruptions, ultimately leaving the courtroom, at which point the defendant's stand-by counsel took over.[117] Later, "[i]n the middle of jury selection, [the] defendant returned to the courtroom and stated that he wanted to represent himself," but the court denied his request and had him removed from the courtroom.[118] Although the First Department affirmed the judgment of conviction, it addressed in detail the defendant's challenge to the defendant's

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[109] *Id.* at 379 (quoting People v. Crampe, 957 N.E.2d 255, 262 (N.Y. 2011)).

[110] *Id.* (quoting *Crampe*, 957 N.E.2d at 263).

[111] *Id.* at 375 (quoting *Crampe*, 957 N.E.2d at 263) (citing United States v. Fore 169 F.3d 104, 108 (2d Cir. 1999)).

[112] *Id.* at 379.

[113] *See, e.g.*, People v. Herbin, 78 N.Y.S.3d 110, 111 (App. Div. 2018) ("Neither a defendant's expression of a strong desire to proceed pro se, nor elicitation of information demonstrating the defendant might be relatively capable of doing so, is a substitute for the two . . . essential components of a searching inquiry."); People v. Wells, 14 N.Y.S.3d 6, 7 (App. Div. 2015) ("In the absence of adequate warnings, it does not avail the People to rely on any other factors, such as that the defendant was in his 40s and had previously represented himself . . . particularly in light of defendant's history of mental illness and substance abuse.").

[114] People v. Rodriguez, 66 N.Y.S.3d 488 (App. Div. 2018).

[115] People v. Sandoval, 314 N.E.2d 413 (N.Y. 1974).

[116] *See Rodriguez*, 66 N.Y.S.3d at 492, 494, 496.

[117] *See id.* at 493–94.

[118] *Id.* at 494.

waiver of his right to counsel colloquy.[119] The First Department observed that the trial court's waiver colloquy was consistent with the New York model colloquy[120] and that it made the defendant "aware of the risks inherent in proceeding pro se and . . . apprised [him] of the singular importance of the lawyer in the adversarial system of adjudication."[121] Specifically, the First Department noted that the trial court "drew [the] defendant's attention to numerous tasks for which he would be responsible," referenced some of the specialized knowledge required for jury selection, and advised that "he was susceptible to making bad decisions both because of 'emotion' that would result from being personally involved in the case and because of 'lack of legal training.'"[122] According to the First Department, the record was "clear" that the defendant "had a clear understanding of the pitfalls of self-representation and the benefits of counsel."[123] Nevertheless, in its evaluation of the defendant's purported waiver of counsel, the First Department determined that the trial court's "failure to ensure that defendant was aware of his sentencing exposure mandates the conclusion that defendant's waiver of the right to counsel was invalid."[124] According to the First Department, the People argued that several statements by the defendant regarding plea negotiations "reflect[ed] [the] defendant's understanding that he faced considerably more time in prison if he did not plead guilty."[125] The First Department rejected the People's argument, finding that "even if this indicates that defendant was aware that he faced a term of incarceration longer than seven or eight years, it does not sufficiently demonstrate that defendant was aware of his actual sentencing exposure of 15 years."[126] Nonetheless, the First Department affirmed the judgment of conviction, finding that a new suppression hearing would serve no purpose because it was clear beyond a reasonable doubt that "the evidence overwhelming proved

[119] *See id.* at 495–96, 498.

[120] *Id.* at 495. Model colloquies are available online, see generally *Waiver of Counsel Colloquy*, N.Y. CTS. (Aug. 2016), https://nycourts.gov/judges/cji/8-Colloquies/Waiver%20of%20Counsel.pdf [https://perma.cc/7GR3-TRJJ], and in the Bench Book. *See generally* ASS'N OF JUSTICES OF THE SUP. CT. OF THE STATE OF N.Y., BENCH BOOK FOR TRIAL JUDGES—NEW YORK, § 10:1(B) (2022 ed.); *id.* § 4:4 (explaining some of the "specialized knowledge" required for jury selection).

[121] *Rodriguez*, 66 N.Y.S.3d at 495 (citing People v. Arroyo, 772 N.E.2d 1154, 1156 (N.Y. 2002)).

[122] *Id.*

[123] *Id.*

[124] *Id.* at 496.

[125] *Id.*

[126] *Id.*

[that the] defendant knowingly and unlawfully entered the complainant's apartment with the intent to take property."[127]

Relying on its analysis in *Rodriguez* in examining the factors that must be explored in order for a waiver of the right to counsel to be valid, the First Department in *People v. Jackson*[128] recently determined that a defendant's purported waiver of his right to counsel was invalid because the record did not "sufficiently demonstrate that [the] defendant was aware of his actual sentencing exposure."[129] There, the defendant, who had represented himself at trial, was convicted, upon a jury verdict, of auto stripping in the first degree, among other charges, and sentenced to an aggregate term of imprisonment of twelve to twenty-four years.[130] The First Department reversed the judgment of conviction, citing *Crampe* that subsequent warnings about sentencing could not retrospectively cure the court's error.[131] Moreover, the First Department determined that neither "[s]tatements made in court more than four months before the [purported] waiver" nor statements made "at defendant's arraignment more than a year before the [purported] waiver . . . adequately apprise[d] defendant of his sentencing exposure."[132] The First Department also held that the trial court should not have "granted defendant's request to proceed pro se without first conducting a searching inquiry regarding defendant's mental capacity to waive counsel."[133]

These cases illustrate that, in the First Department, a trial court's inquiries and admonitions, together with statements by a defendant on the record, determine whether a waiver of the right to counsel is valid, not the defendant's ability (or inability) to represent himself or herself or speculation as to what he or she may or may not know.

Indeed, even a defendant's formal legal training will not alter a New York trial court's core obligation to conduct a searching inquiry to ensure that the defendant's waiver of his or her right to counsel is knowing, intelligent, and voluntary.[134] Thus, in affirming the criminal conviction of a suspended Canadian immigration attorney

[127] *Id.* at 497–98.

[128] People v. Jackson, 148 N.Y.S.3d 204 (App. Div. 2021).

[129] *Id.* at 206 (quoting *Rodriguez*, 66 N.Y.S.3d at 496).

[130] *See id.*

[131] *Id.* (quoting People v. Crampe, 957 N.E.2d 255, 264 (N.Y. 2011)).

[132] *Id.*

[133] *Id.* (quoting People v. Zi, 117 N.Y.S.3d 21, 23 (App. Div. 2019), *lv. denied*, 158 N.E.3d 522 (N.Y. 2020)).

[134] *See supra* notes 87–97 and accompanying text.

and finding that her waiver of the right to counsel was valid, the First Department in *People v. Codina*[135] examined whether the trial court had conducted "a sufficiently searching inquiry" even though the defendant was a trained attorney.[136] There, the trial court denied the defendant's "day-of-trial motion to reassign trial counsel" based on strategic differences the defendant had with assigned counsel, offering the defendant "the option of proceeding pro se, or continuing with assigned counsel on the condition that she waive her right to seek a declaration that counsel's assistance was ineffective" based on two specified strategic disagreements with counsel.[137] The defendant proceeded pro se and was convicted "after a jury trial, of scheme to defraud in the first degree," together with multiple counts of grand larceny and "practicing or appearing as an attorney-at-law without being admitted and registered."[138]

On appeal, the First Department in *Codina* rejected the defendant's contentions "that she did not make a true voluntary waiver of counsel, and that the [trial] court failed to conduct the requisite 'searching inquiry' to determine that she had accepted the risks of proceeding pro se."[139] The First Department determined that the trial court's "inquiry into whether defendant, who was a Canadian lawyer, appreciated the risks of giving up the right to counsel was sufficient," noting that "[t]he court reminded her of those risks and she acknowledged them."[140]

B. The Second Department

The Second Department's jurisprudence on the validity of waivers of the right to counsel demonstrates that the Second Department finds dispositive the issue of whether the trial court affirmatively ascertained that the defendants understood what they were giving up.[141]

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[135] People v. Codina, 972 N.Y.S.2d 247 (App. Div. 2013).

[136] *See id.* at 251–52, 256.

[137] *Id.* at 255–56.

[138] *Id.* at 251, 256.

[139] *Id.* at 255.

[140] *Id.* at 256. The appellate division also described the trial court's action in refusing to allow the defendant to proceed with challenged counsel as "merely an effort to thwart defendant's attempt at gamesmanship." *Id.*

[141] *See, e.g.*, People v. Griffin, 47 N.Y.S.3d 739, 740–41 (App. Div. 2017) (reversing and remitting for new trial where trial court, inter alia, "did not explain the risk inherent in proceeding pro se or the advantages of representation by counsel"); People v. Bristol, 958 N.Y.S.2d 215, 216, 218 (App. Div. 2013) (reversing and remitting where trial court discussed potential sentence and obtained certain pedigree information, including level of education and

For example, in *People v. Lemmo*,[142] the trial court granted the defendant's application to proceed pro se.[143] "After a jury trial, the defendant was convicted of criminal mischief in the third degree, petit larceny, and criminal possession of stolen property in the fifth degree."[144] The Second Department reversed and remitted for a new trial, determining that, although the trial court had "obtained certain pedigree information from the defendant, it failed to ascertain that [he] was aware of the risks inherent in proceeding without an attorney and the benefits of having counsel represent him at trial."[145] Moreover, the Second Department noted, the trial court "failed to discuss the potential sentence that could be imposed," citing the First Department's decision in *Cole*.[146]

The Second Department recently invalidated another purported waiver of counsel in *People v. Crispino*,[147] reversing and remitting for a new trial where the trial court "failed to provide the defendant with any warnings or make any inquiry as to the defendant's understanding of the dangers and disadvantages of proceeding without counsel."[148] There, the defendant, "a disbarred attorney, was convicted, after a jury trial," of multiple counts of grand larceny in the second degree and "related charges in connection with several fraudulent financial schemes" wherein the defendant held himself out as an attorney.[149] The Second Department noted that no "specific litany" was required and a reviewing court could look at the whole

criminal history, but "failed to conduct a sufficiently searching inquiry of the defendant to be reasonably certain that he understood the dangers and disadvantages of self-representation" (citing People v. Crampe, 957 N.E.2d 255, 263 (N.Y. 2011); People v. Slaughter, 583 N.E.2d 919, 923 (N.Y. 1991); People v. Rafikian, 951 N.Y.S.2d 226, 228 (App. Div. 2012); *In re* Casey N., 873 N.Y.S.2d 343, 347 (App. Div. 2009))). The Second Department has reversed and remitted a case for a new trial where waiver of counsel could not be deemed knowing and voluntary, even though the "suppression court advised the defendant that it would be an 'extraordinary' decision to proceed without counsel, that to do so would be 'extraordinarily dangerous,' and that most defendants who represent themselves are not successful." *Rafikian*, 951 N.Y.S.2d at 227–28. In *Rafikian*, the appellate division found that the suppression court advised the defendant of the "potential sentences that could be imposed, [but] did not advise the defendant of the importance of the role of the attorney in the adversarial system, nor as to the 'dangers and disadvantages' of self-representation," and the "trial court made no inquiry as to defendant's decision to represent himself at trial." *Id.* (quoting People v. Providence, 813 N.E.2d 632, 634 (N.Y. 2004)).

142 People v. Lemmo, 141 N.Y.S.3d 711 (App. Div. 2021).

143 *Id.* at 711.

144 *Id.*

145 *Id.* at 711–12 (citing *Crampe*, 957 N.E.2d at 263; *Griffin*, 47 N.Y.S.3d at 741).

146 *Id.* at 712 (citing People v. Cole, 987 N.Y.S.2d 373, 375 (App. Div. 2014)).

147 People v. Crispino, 153 N.Y.S.3d 502 (App. Div. 2021).

148 *Id.* at 503.

149 *Id.*

record.[150] Nonetheless, the Second Department concluded that, although the trial court was aware of the defendant's pedigree information, including his status as a disbarred attorney, "there [was] nothing in the record that demonstrate[d] that the dangers and disadvantages of self-representation were known by the defendant."[151]

Although many Second Department cases upholding waivers of the right to counsel do not include extensive discussion of the records at issue, they do reference the trial courts' affirmative actions—colloquies, inquiries, warning, and admonitions.[152] For example, in *People v. Smith*, the Second Department found valid the defendant's waiver of the right to counsel, noting that the trial "court questioned the defendant as to his education, occupation, legal knowledge and experience, and prior exposure to the criminal justice system."[153] The Second Department also determined that the trial court's colloquy was "sufficient to ensure that the defendant was aware of the drawbacks of self-representation," noting that the trial court, inter alia, "adequately informed the defendant of the risks inherent in proceeding pro se, drew the defendant's attention to the many challenges that he would face if he proceeded pro se, and apprised him of the benefits and the singular importance of representation by counsel in the adversarial system of adjudication."[154] There, the supreme court granted the defendant's application to represent himself at a pretrial hearing and, after further colloquy prior to the start of trial, to represent himself at trial and sentencing.[155] After a jury trial, the defendant was convicted, inter alia, of burglary in the first degree, robbery in the second degree, and related charges.[156] Although the Second Department modified the judgment on other grounds, it rejected the defendant's contention on appeal that his waiver of his right to counsel was invalid.[157]

Similarly, in *People v. Ball*,[158] the Second Department upheld the waiver of counsel by the defendant, who represented himself at his

[150] *Id.* at 504.

[151] *Id.* (citing *Lemmo*, 141 N.Y.S.3d at 712).

[152] *See infra* notes 153–161 and accompanying text.

[153] People v. Smith, 132 N.Y.S.3d 431, 435 (App. Div. 2020).

[154] *Id.* (first citing People v. Marrow 39 N.Y.S.3d 232, 234 (App. Div. 2016); and then citing People v. Crampe, 957 N.E.2d 255, 263 (N.Y. 2011); People v. Cucchiara, 105 N.Y.S.3d 531, 532 (App. Div. 2019); People v. Wright, 56 N.Y.S.3d 465, 465 (App. Div. 2017)).

[155] *Id.* at 434.

[156] *See id.*

[157] *See id.* at 435, 437.

[158] People v. Ball, 78 N.Y.S.3d 225 (App. Div. 2018).

jury trial and was thereafter convicted of two counts of robbery in the second degree, assault in the third degree, and criminal possession of stolen property in the fifth degree.[159] The Second Department determined that "[t]he trial court's extensive inquiry established the defendant's ability to represent himself and emphasized the dangers and disadvantages of proceeding without counsel."[160]

Many other Second Department cases succinctly follow the same analysis.[161]

[159] *See id.* at 225–26.

[160] *Id.* at 226 (citing People v. McCord, 20 N.Y.S.3d 98, 99 (App. Div. 2015); People v. Zalevsky, 918 N.Y.S.2d 790 (App. Div. 2011); People v. Damon, 911 N.Y.S.2d 127 (App. Div. 2010)).

[161] *See, e.g.*, People v. Cucchiara, 105 N.Y.S.3d 531, 532 (App. Div. 2019) ("The court adequately informed the defendant of the risks inherent in proceeding pro se, drew the defendant's attention to the many challenges that he would face if he proceeded pro se, and apprised him of the benefits and the singular importance of representation by counsel in the adversarial system of adjudication."); People v. Bynum, 98 N.Y.S.3d 641, 642 (App. Div. 2019) ("The [trial court] conducted the requisite 'searching inquiry' and 'warned [the] defendant forcefully that he did not have the training or knowledge to defend himself, that others who had done so had been unsuccessful and that if he insisted upon appearing *pro se* he would be held to the same standards and procedure as would an attorney.'" (first quoting People v. Silburn, 98 N.E.3d 696, 700 (N.Y. 2018); and then quoting People v. Vivenzio, 465 N.E.2d 1254, 1255 (N.Y. 1984)) (citing People v. Andrades, 828 N.E.2d 599, 602 (N.Y. 2005))); People v. Sutton, 76 N.Y.S.3d 570, 571–72 (App. Div. 2018) ("The court adequately informed the defendant of the risks inherent in proceeding pro se, drew the defendant's attention to the many challenges that he would face if he proceeded pro se, and apprised him of the benefits and the singular importance of representation by counsel in the adversarial system of adjudication."); People v. Stroud, 40 N.Y.S.3d 910, 911 (App. Div. 2016) ("Both the hearing court and the trial court undertook sufficiently searching inquiries of the defendant to be reasonably certain that the dangers and disadvantages of giving up the fundamental right to counsel were impressed upon him." (citing *Vivenzio*, 465 N.E.2d at 1255; People v. Dashnaw, 983 N.Y.S.2d 681, 689 (App. Div. 2014); People v. Anderson, 942 N.Y.S.2d 561, 565 (App. Div. 2012); People v. Hall, 856 N.Y.S.2d 360, 362 (App. Div. 2008); People v. Trivino, 699 N.Y.S.2d 60, 61 (App. Div. 1999))); People v. Morrow, 39 N.Y.S.3d 232, 234 (App. Div. 2016) ("The court engaged in the requisite searching inquiry . . . . The colloquy was sufficient to ensure that the defendant was aware of the drawbacks of self-representation." (first citing People v. Providence, 813 N.E.2d 632, 635 (N.Y. 2004); People v. Lindsey, 993 N.Y.S.2d 164, 165 (App. Div. 2014); and then citing *Vivenzio*, 465 N.E.2d at 1255; People v. Guzman, 982 N.Y.S.2d 908, 909 (2014); People v. Allison, 892 N.Y.S.2d 516, 518 (App. Div. 2010))); *McCord*, 20 N.Y.S.3d at 99 ("The trial court adequately warned the defendant of the risk inherent in proceeding pro se, and apprised him of the singular importance of the lawyer in the adversarial system of adjudication." (citing People v. Crampe, 957 N.E.2d 255, 263 (N.Y. 2011); People v. Smith, 705 N.E.2d 1205, 1207–08 (N.Y. 1998); People v. Arroyo, 772 N.E.2d 1154, 1156 (N.Y. 2002))); *Lindsey*, 993 N.Y.S.2d at 165 ("The court's 'searching inquiry' accomplished 'the goals of adequately warning [the] defendant of the risks inherent in proceeding pro se, and apprising [him] of the singular importance of the lawyer in the adversarial system of adjudication.'" (quoting *Crampe*, 957 N.E.2d at 263) (citing *Providence*, 813 N.E.2d at 635; *Arroyo*, 772 N.E.2d at 1156)).

C. The Third Department

The Third Department typically upholds as valid a waiver of right to counsel where there is a robust colloquy by the trial court.[162] Often the determinations of the Third Department describe the colloquies at issue.[163] For example, in *People v. Oshintayo*,[164] the Third Department found that the trial court "repeatedly warned [the defendant], in detail" and explained, inter alia, "the many pitfalls of representing oneself at a criminal trial."[165] There, the defendant was charged with "robbery in the first degree, menacing in the second degree, assault in the second degree, and resisting arrest."[166] After his request for substitute counsel was denied by the County Court, the defendant moved to represent himself at the ensuing jury trial.[167] Among other things, the Third Department noted that the County Court had "advised him that he would be held to the same standards as an attorney and warned him that electing to represent himself at

[162] *See, e.g.*, People v. Jackson, 74 N.Y.S.3d 661, 663–64 (App. Div. 2018) (trial court conducted "sufficient 'searching inquiry'" where, inter alia, court engaged defendant in multiple discussions of the risk of self-representation, advice included "several important warnings" and "defendant fully acknowledged his understanding" of same); *Dashnaw*, 983 N.Y.S.2d at 690 (affirming conviction where trial court "repeatedly and in great detail—apprised defendant of the perils and pitfalls of proceeding pro se and went to great lengths to dissuade defendant from doing so").

[163] For example, in *Jackson*, the Third Department noted:

> Among other things, the [trial] court advised defendant of the dangers of self-representation and discussed the differing roles of counsel and criminal defendants. This advice included several important warnings: that it would be difficult to prepare for trial while incarcerated, that defendant might unknowingly do or say something that would be detrimental, that a trial was an evidentiary proceeding that involved matters in which defendant had little experience and required more than making a speech or an argument, that self-representation could be emotional and subjective, while an attorney could provide objective professional guidance and advocacy, and that the same rules of evidence and decorum that applied to an attorney would apply to defendant. The court ascertained that defendant had previous experience in the criminal justice system, but had never previously represented himself, and that he had studied business administration in college and wished to represent himself because he did not trust the local public defenders. Further, defendant fully acknowledged his understanding that he would be held to the same standards as an attorney and that he unequivocally wished to represent himself.

Jackson, 74 N.Y.S.3d at 664. The Third Department concluded that the trial court "sufficiently 'apprised defendant of the perils and pitfalls of proceeding pro se' and properly determined that he acted knowingly and intelligently in exercising his right to self-representation." *Id.* (quoting Dashnaw, 983 N.Y.S.2d at 690) (citing *Providence*, 813 N.E.2d at 635; *Vivenzio*, 465 N.E.2d at 1255; People v. Yu-Jen Chang, 939 N.Y.S.2d 596, 599 (App. Div. 2012)).

[164] *See* People v. Oshintayo, 82 N.Y.S.3d 223 (App. Div. 2018).

[165] *Id.* at 226.

[166] *Id.* at 225.

[167] *See id.* at 226.

a trial that was scheduled to commence in only 30 days was the 'worst decision' he could make."[168] The Third Department also observed that the "County Court adjourned consideration of [the] defendant's request" to proceed pro se in order "to allow defendant the opportunity to consider the consequences of proceeding pro se" and that,

> [a]t an appearance two days later, the court again advised defendant of the advantages that his experienced counsel could provide at trial and repeated its warning that it would be a "huge mistake" for him to proceed pro se before ultimately granting his request to represent himself and dismissing counsel.[169]

"At a subsequent pretrial conference, [the court] explained to [the] defendant how the trial would be conducted and, at [the] defendant's request, reappointed his original counsel as standby counsel."[170] The defendant was thereafter convicted of all charges except for robbery in the first degree, and he appealed, arguing, inter alia, that the trial court erred in allowing him to proceed pro se.[171] The Third Department affirmed the conviction noting, inter alia, that the trial court's colloquy and warnings were sufficient and the defendant's waiver of his right to counsel was valid.[172]

Similarly, in *People v. Grays*,[173] the Third Department affirmed the defendant's conviction, after he represented himself at a jury trial, for conspiracy in the second degree, and criminal solicitation in the second degree, concluding that the trial court "went to great lengths to impress upon [the] defendant the dangers and disadvantages of self-representation."[174] There, the trial court granted the defendant's application to proceed pro se only after it "thoroughly tested" the defendant's knowledge and understanding of criminal law and procedure, pointed out "several areas in which [the defendant's] knowledge and understanding were lacking," and warned the defendant that self-representation was "fraught with peril."[175]

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168 *Id.*
169 *Id.*
170 *Id.* at 226–27.
171 *See id.* at 225.
172 *See id.* at 226, 228.
173 People v. Grays, 79 N.Y.S.3d 711 (App. Div. 2018).
174 *Id.* at 713, 715, 717.
175 *Id.* at 715.

In contrast, where a trial court has not met its affirmative duty to undertake a searching inquiry, the Third Department has found purported waivers of the right to counsel invalid.[176] For example, in *People v. Myers*,[177] the Third Department determined that, although the trial court had asked the defendant a series of questions relating to his background and pedigree, the court's "belated searching inquiry fell short; the court neither 'tested defendant's understanding of choosing self-representation,' nor warned of 'the risks inherent in proceeding *pro se*.'"[178] There, the defendant was convicted of two counts of criminal contempt in the first degree and four counts of criminal contempt in the second degree after proceeding pro se at the trial.[179] The Third Department reversed the conviction and remitted for a new trial finding that "[a]t no point . . . did the court address the dangers and disadvantages of self-representation or impress upon the defendant the 'singular importance' of being represented by counsel."[180] The Third Department noted:

> The absence of the requisite searching inquiry may be the inadvertent product of County Court's familiarity with defendant. However, County Court's history and prior dealings with defendant does not relieve it of its obligation to conduct—and create a record of—the required inquiry, for this inquiry serves the vital purpose of ensuring that defendant

[176] *See, e.g.*, People v. Guarnieri, 996 N.Y.S.2d 776, 779 (App. Div. 2014) (reversing conviction and remitting for new trial where trial court inquired as to pedigree information and the defendant's familiarity with certain legal concepts but failed, inter alia, to "sufficiently advise him of 'the "dangers and disadvantages" of proceeding pro se and the value of trained trial counsel knowledgeable about criminal law and procedure'" (quoting People v. Yu-Jen Chang, 939 N.Y.S.2d 596, 598 (App. Div. 2012))); People v. Middlemiss, 3 N.Y.S.3d 771, 773–74 (App. Div. 2015) (reversing determination in Sex Offender Registration Act (SORA) proceeding and remitting for new hearing upon a finding that the Supreme Court erred in relieving counsel after the defendant was disruptive, told counsel she was "fired" and ultimately left the hearing, which continued without him). In *Middlemiss*, the lower court "did not make any attempt to apprise [the] defendant of the risks inherent in proceeding pro se of the importance of counsel's role, and there is no indication on the record . . . that [the] defendant acted with full knowledge and appreciation of the panoply of constitutional protections that would be adversely affected by counsel's inability to participate." *Id.* at 774 (quoting People v. Henriquez, 818 N.E.2d 1125, 1129 (2004)).

[177] People v. Myers, 74 N.Y.S.3d 394 (App. Div. 2018).

[178] *Id.* at 399 (quoting People v. Arroyo, 772 N.E.2d 1154, 1156 (2002)).

[179] *Id.* at 396.

[180] *Id.* at 399 (quoting People v. Smith, 705 N.E.2d 1205, 1208 (N.Y. 1998); *Arroyo*, 772 N.E.2d at 1156).

> knew "what [he was] doing" and made the choice to forego counsel with his "'eyes open.'"[181]

In addition, the Third Department concluded, "neither [the] County Court's statements regarding its prior experience with [the] defendant, nor its laudatory comments regarding defendant's prior pro se performance, provide[d] a reliable basis upon which" the appellate court could determine that the purported waiver "was knowing, voluntary and intelligent, particularly given [the] defendant's statement that he had never before represented himself at trial."[182]

D. The Fourth Department

Although the Fourth Department does not delve into factual recitations in many of its determinations about the validity of waivers of the right to counsel, its holdings are largely consistent with those of the other departments of the appellate division. For example, in *People v. Wagoner*,[183] the Fourth Department found valid the defendant's waiver of counsel where the trial court undertook a searching inquiry into the defendant's background, pedigree, and familiarity with legal system.[184] Although the Fourth Department modified the judgment of conviction by dismissing the defendant's conviction of rape in the third degree and promoting prostitution in the second degree on other grounds and reduced the sentences on the other counts for which the defendant was convicted, it rejected the defendant's contention that her decision to represent herself was not knowing, intelligent, and voluntary.[185] The Fourth Department noted that the court and defense counsel warned the defendant of risks associated with proceeding pro se, which ensured that the defendant's decision to proceed pro se was knowing, voluntary, and intelligent.[186]

Likewise, in *People v. Abdullah*,[187] the Fourth Department affirmed the defendant's conviction for, inter alia, criminal

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[181] *Id.* at 400 (quoting *Smith*, 705 N.E.2d at 1208) (citing People v. Termotto, 547 N.Y.S.2d 777 (App. Div. 1989)).

[182] *Id.*

[183] People v. Wagoner, 150 N.Y.S.3d 851 (App. Div. 2021).

[184] *See id.* at 855, 858.

[185] *Id.* at 853–84, 855.

[186] *Id.* at 855.

[187] People v. Abdullah, 146 N.Y.S.3d 704 (App. Div 2021).

possession of a weapon in the third degree after determining that, based on a review of whole record, the trial court conducted the requisite searching inquiry and "fulfilled its obligation to ensure that the defendant was 'aware of the dangers and disadvantages of self-representation.'"[188] Similarly, in *People v. Barksdale*,[189] the Fourth Department held that the trial court did not err in granting the defendant's mid-trial request to proceed pro se prior to summations.[190] There, the court held that the record established that the defendant's request "reflect[ed] a purposeful decision to relinquish the benefit of counsel and proceed singularly" and that waiver of counsel was knowing and voluntary.[191] Other cases in the Fourth Department follow the same analysis in upholding[192] or invalidating waivers.[193]

Notwithstanding the Fourth Department's general consistency with the other departments in its analysis of the validity of waivers of right to counsel, it has deviated from the other departments in its jurisprudence in one area of the waiver of right to counsel analysis. In *People v. Rogers*,[194] the Fourth Department declined to invalidate a waiver of right to counsel where the trial court failed to address the

[188] *Id.* at 706 (quoting People v. Providence, 813 N.E.2d 632, 634 (N.Y. 2004); People v. Chandler, 971 N.Y.S.2d 778, 779 (App. Div. 2013)).

[189] People v. Barksdale, 141 N.Y.S.3d 608 (App. Div. 2021).

[190] *Id.* at 612.

[191] *Id.* (quoting *In re* Kathleen K., 953 N.E.2d 773, 777 (N.Y. 2011)).

[192] *See, e.g.*, People v. Chess, 79 N.Y.S.3d 433, 436–37 (App. Div. 2018) (holding that waiver of right to counsel was knowing, voluntary, and intelligent where trial court conducted requisite searching inquiry); People v. Brooks, 32 N.Y.S.3d 408, 409–10 (App. Div. 2016) (affirming conviction where trial court conducted requisite searching inquiry and inquired sufficiently to ensure the defendant was aware of dangers and disadvantages of proceeding pro se); People v. Whitfield, 982 N.Y.S.2d 242, 243 (App. Div. 2014) (holding that trial court conducted requisite searching inquiry and repeatedly warned the defendant of risks associated with proceeding pro se); People v. Chandler, 971 N.Y.S.2d 778, 779 (App. Div. 2013) (upholding waiver of right to counsel where trial court conducted requisite searching inquiry during which the "defendant stated, inter alia, that he had successfully represented himself at trial in a prior case" and court fulfilled obligation to ensure defendant was aware of dangers and disadvantages of self-representation).

[193] *See, e.g.*, People v. Allen, 951 N.Y.S.2d 822, 824 (App. Div. 2012) (holding trial court erred in failing to conduct searching inquiry before allowing defendant to proceed pro se during resentencing); People v. Wilson, 960 N.Y.S.2d 276, 277–78 (App. Div. 2013). In *Wilson*, the Fourth Department reversed a determination in a SORA classification proceeding where the supreme court failed to conduct the requisite searching inquiry. *See Wilson*, 960 N.Y.S.2d at 277. The only statement the lower court made regarding the danger of proceeding pro se was that the defendant "might be better served by going with [his] original impulse to have . . . counsel represent [him]." *Id.* at 278. The court failed to inquire about background, pedigree and exposure to legal systems or to "explain the risk inherent in proceeding pro se or the advantages of representation by counsel." *Id.*

[194] People v. Rogers, 129 N.Y.S.3d 227 (App. Div. 2020).

potential maximum sentence that the defendant faced and the nature of the crimes charged despite the contrary holding in the First Department in *Rodriguez*.[195] In *Rogers*, the Fourth Department affirmed the defendant's conviction of criminal possession of a controlled substance in the third degree and related charges after a jury trial.[196] The Fourth Department rejected the defendant's assertion that the trial court had erred in allowing him to proceed pro se for a portion of the pretrial proceedings.[197] The defendant contended on appeal "that his waiver of the right to counsel is automatically invalid given the court's failure to specifically discuss, during the [waiver of counsel] colloquy, the potential maximum sentences and the 'nature' of the crimes charged."[198] The Fourth Department disagreed and explained:

> the Court of Appeals in *Providence* explicitly held that the trial judge's failure to mention any specific piece of information was not dispositive of the sufficiency of the requisite searching inquiry, and that a trial court's failure to perfectly align its colloquy with best practices would not invalidate the subsequent waiver so long as the court adequately discharged its core obligation to warn and apprise the defendant of the dangers and pitfalls of self-representation.[199]

[195] *Id.* at 230 (citing People v. Rodriguez, 66 N.Y.S.3d 488, 495–96 (App. Div. 2018)). After the Fourth Department decided *Rogers*, the First Department reiterated the position it had taken in *Rodriguez*. *See* People v. Jackson, 148 N.Y.S.3d 204, 206 (App. Div. 2021); *see also supra* notes 114–133 and accompanying text. The Second Department also addressed the issue after Rogers was decided. *See* People v. Lemmo, 141 N.Y.S.3d 711, 712 (App. Div. 2021). Although the Second Department did not expressly hold that a failure by a trial court to discuss the potential sentence and nature of the charges with the defendant was dispositive in rendering a purported waiver of right to counsel invalid, the *Lemmo* court pointed to the absence of record evidence of a discussion with the defendant about the potential sentence and nature of the charges in its description of the deficiencies of an invalid waiver. *See id.*; *see also supra* text accompanying notes 138–140.

[196] *Rogers*, 129 N.Y.S.3d at 229.

[197] *See id.* at 230.

[198] *Id.*

[199] *Id.* In fact, the Court of Appeals in Providence based its holding not on talismanic warnings, but rather pointed to and relied upon the "whole record, not simply . . . the waiver colloquy," to determine that the trial court in that case was aware of the defendant's pedigree information and that "nothing in the lengthy colloquies in this record call[ed] into question [the] defendant's ability to understand the trial judge's detailed warnings regarding self-representation." People v. Providence, 813 N.E.2d 632, 635–36 (N.Y. 2004).

In *Rogers*, the Fourth Department then "respectfully decline[d] to follow the First Department's contrary holding" in *Rodriguez*.[200] There, the Fourth Department did not indicate whether the record in Rogers disclosed that the defendant was otherwise aware of the potential maximum sentences and the nature of the crimes charged.[201]

By describing the First Department's holding in *Rodriguez* as "contrary" to its holding and omitting any discussion as to whether the defendant in *Rogers* demonstrated any on-the-record awareness of his sentencing exposure, the Fourth Department leaves open the possibility that, in that department, a waiver colloquy could be found valid even without any record evidence that a defendant understood his or her sentencing exposure.[202]

V. PRACTICAL CONSIDERATIONS FOR COURTS AND COUNSEL

Notwithstanding the different analyses undertaken by the First and Fourth Departments regarding waiver colloquies that do not specify a defendant's sentencing exposure, the direction posited by the Court of Appeals in 1998 in *People v. Smith*[203]—and reaffirmed on multiple subsequent occasions[204]—informs trial courts that they

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[200] *Rogers*, 129 N.Y.S.3d at 230 (citing *Rodriguez*, 66 N.Y.S.3d at 495–96); *see supra* notes 114–127 and accompanying text (discussing *Rodriguez*). Notably, the First Department in *Rodriguez* did not look only to the trial court's colloquy in determining that the record failed to demonstrate the defendant's awareness of his sentencing exposure—nor did the *Jackson* court. *See Rodriguez*, 66 N.Y.S.3d at 495 (citing *Providence*, 813 N.E.2d at 633); *Jackson*, 148 N.Y.S.3d at 206 (quoting *Rodriguez*, 66 N.Y.S.3d at 496). Instead, both First Department cases referenced other portions of the record in determining that the respective waivers at issue were invalid. *See Jackson*, 148 N.Y.S.3d at 206; *Rodriguez*, 66 N.Y.S.3d at 495–96; *see also supra* notes 128–133 and accompanying text.

[201] *See Rogers*, 129 N.Y.S.3d at 230–31.

[202] *See id.* at 230. In addressing the defendant's further contention—that his refusal to abandon his request for self-representation demonstrated that he did not understand or accept the risks of that course—the Rogers court concluded:

> So long as the trial court fulfills its duty to ensure that the defendant is "made aware" of the risks of self-representation—and there is no dispute that the court did so here—then the constitutionally protected "respect for individual autonomy requires that [the defendant] be allowed to go to jail under his [or her] own banner," even when he or she is "harming himself [or herself] by insisting on conducting his [or her] own defense."

Id. at 230–31 (first quoting Faretta v. California, 422 U.S. 806, 835 (1975); and then quoting People v. McIntyre, 324 N.E.2d 322, 325 (N.Y. 1974)).

[203] *See* People v. Smith, 705 N.E.2d 1205, 1207–08 (N.Y. 1998).

[204] *See, e.g.*, People v. Arroyo, 772 N.E.2d 1154, 1156 (N.Y. 2002); People v. Crampe, 957 N.E.2d 255, 263–64 (N.Y. 2011).

should make full and complete records at the time they rule on a defendant's request to proceed pro se.

Indeed, although the Court of Appeals has refused to require a particular script for a trial court's "searching inquiry" when a defendant wishes to proceed without counsel,[205] it has also consistently rejected purported waivers of the right to counsel where such inquiry failed to reflect that the defendant was aware of the drawbacks of self-representation and the value of counsel.[206] As a practical matter, the leading precedents on this issue do not, however, impose a burden on a trial court to invent a new colloquy in every case that a defendant seeks to waive his or her right to counsel and represent him or herself. There are, in fact, significant resources readily available to assist a trial court in ensuring that a defendant's waiver of the right to counsel is knowing, voluntary, and intelligent—which, in turn, will increase the likelihood that the waiver will be upheld on appeal. In addition to the colloquy described at length and with approval by Court of Appeals in *Crampe*,[207] the Bench Book for New York Judges provides a template for trial judges that can be specifically adapted to any particular case in which a defendant seeks to assert his or her right to self-representation.[208] Ensuring that a searching inquiry is properly conducted not only protects the important constitutional rights of the defendant, but also reduces the likelihood of a reversal of a conviction on appeal on these grounds which, in turn, promotes judicial efficiency and economy by minimizing the concomitant necessity for a new trial upon such reversal.

[205] *See Crampe*, 957 N.E.2d at 264 ("[W]hile the inquiry conducted by the trial judge in *Wingate* was exemplary, we do not mean to suggest that the colloquy there has created a template to be followed in every instance where a defendant seeks to proceed pro se."); *Arroyo*, 772 N.E.2d at 1156 ("[W]e have eschewed application of a rigid formula and endorsed the use of a nonformalistic, flexible inquiry . . . .").

[206] *See, e.g.*, *Crampe*, 957 N.E.2d at 263–64; *Arroyo*, 772 N.E.2d at 1156.

[207] *See Crampe*, 957 N.E.2d at 258–63. As noted, *supra* notes 69–72 and accompanying text, although the Court of Appeals described the colloquy undertaken by the trial judge in defendant Wingate's case as "exemplary," the court found that it nonetheless could not retrospectively cure the suppression court's failure to make an adequate inquiry. *Crampe*, 957 N.E.2d at 264.

[208] Model colloquies are available on Westlaw, *see* ASS'N OF JUSTICES OF THE SUP. CT. OF THE STATE OF N.Y., BENCH BOOK FOR TRIAL JUDGES—NEW YORK, § 10:1(B) (2022 ed.); *id.* § 4:4, and on the New York Courts website, *see Waiver of Counsel Colloquy*, *supra* note 120.