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What are we Searching For? Conditions, Elements, and Requirements for a Valid “Searching Inquiry” in the State of New York - *People v. Crampe*

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Cover Page Footnote

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**WHAT ARE WE SEARCHING FOR?: CONDITIONS,
ELEMENTS, AND REQUIREMENTS FOR A VALID
“SEARCHING INQUIRY” IN THE STATE OF NEW YORK**

NEW YORK COURT OF APPEALS

People v. Crampe¹
(decided Oct. 13, 2011)

There is a long historical struggle between the Sixth Amendment right to counsel and a criminal defendant’s right to self-representation. Although not explicitly written, the right of a criminal defendant to represent himself has deep roots in common law and has been found by the United States Supreme Court to be implied by the Sixth Amendment of the United States Constitution.² The tension between these two cornerstones of criminal procedure requires both a balance between a criminal defendant’s option to waive his right to counsel, and the court’s responsibility to make him aware of the consequences and dangers of proceeding without the assistance of an attorney. These warnings by the court are often referred to as a “searching inquiry,”³ indicating that the court must make an inquiry into the defendant’s ability to make a knowing, voluntary, and intelligent waiver of his or her right to counsel.⁴ There is no rigid formula to this colloquy, and states are free to codify requirements in statutory schemes, but basic information must be given to the defendant and the inquiry must be made at every critical stage of a criminal proceeding.⁵

In *People v. Crampe*, a consolidated opinion, the New York Court of Appeals considered what constitutes a “searching inquiry”

¹ 957 N.E.2d 255 (N.Y. 2011).

² *Faretta v. California*, 422 U.S. 806, 821 (1975).

³ *People v. Providence*, 813 N.E.2d 632, 634 (N.Y. 2004).

⁴ *People v. Slaughter*, 583 N.E.2d 919, 923 (N.Y. 1991).

⁵ *Iowa v. Tovar*, 541 U.S. 77, 92-94 (2004).

and when such an inquiry should be made.⁶ In *Crampe*, the court held that a town justice did not make the defendant aware of the disadvantages of self-representation, resulting in an insufficient “searching inquiry,” and ordered a new trial.⁷ In *People v. Wingate*, the court held that a sufficient colloquy was held by the trial judge, but because the inquiry must be made at every critical stage of a criminal proceeding, the trial judge’s warnings could not “retrospectively [cure] the suppression court’s” deficient searching inquiry and therefore a new suppression hearing was ordered.⁸ These decisions were a product of federal principles of the United States Supreme Court and Constitution, as well as the common law of New York and the New York State Constitution.⁹

I. CRAMPE

The defendant, Alexander Crampe, was arrested and charged with criminal possession of the controlled substance phencyclidine, commonly known as PCE.¹⁰ Crampe appeared at the Justice Court without an attorney, and when he was asked by the town justice if he intended to proceed pro se, he answered “I guess[] so, your Honor.”¹¹ The judge handed Crampe a pretrial order and reviewed the document with the defendant by reading it aloud to him.¹² The order described some basic rights, including the defendant’s right to counsel, and the apparent drawbacks of proceeding without an attorney.¹³ Crampe signed the order and the case was adjourned.¹⁴ As the defendant left the court the judge said, “[b]e here with a lawyer or without a lawyer, as you choose. I advise you to get a lawyer, sir.”¹⁵ Crampe did not follow the judge’s advice; he was convicted and sentenced to six months in jail.¹⁶

⁶ *Crampe*, 957 N.E.2d at 256-57.

⁷ *Id.* at 263, 265.

⁸ *Id.* at 263-65.

⁹ *Id.* at 257, 262.

¹⁰ *Id.* at 257.

¹¹ *Crampe*, 957 N.E.2d at 257.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 257-58.

¹⁶ *Crampe*, 957 N.E.2d at 258.

The defendant appealed, claiming that the warning given by the town justice was insufficient and did not make him fully aware of the consequences of continuing without counsel.¹⁷ The Appellate Term affirmed the lower court's decision, stating that the "Justice Court adequately warned defendant of the importance of legal representation and the risks associated with proceeding pro se."¹⁸ The court also stated that due to the "defendant's prior arrest and conviction record [he was] not unfamiliar with the operation of the criminal justice system."¹⁹

The Court of Appeals ultimately overturned the Appellate Term's holding and found that the town justice did not make a sufficient inquiry.²⁰ The judge did not warn the defendant of the "drawbacks of self-representation before allowing [him] to go [pro se]."²¹ The basic form that was read to Crampe stated that "proceeding pro se brought with it the danger of conviction—a risk that also exists when the accused is represented by counsel—and that criminal trials and proceedings are complicated."²² This did not give Crampe the full knowledge that he needed to make a valid waiver.²³

II. WINGATE

The defendant, Blake Wingate, was arrested for criminal possession of stolen property and a controlled substance.²⁴ The police found Wingate in a stolen van with a crack pipe in his possession.²⁵ After the appointment of two different attorneys who Wingate believed did not have his best interests in mind, the defendant requested to represent himself with an attorney available to assist him.²⁶ When the judge explained to Wingate "that he was not entitled to hybrid representation," the defendant expressed his wish to proceed pro se.²⁷

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 263.

²¹ *Crampe*, 957 N.E.2d at 263.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 258.

²⁵ *Id.*

²⁶ *Crampe*, 957 N.E.2d at 258.

²⁷ *Id.*

The judge had a brief conversation with Wingate, inquiring about the defendant's understanding of the penalties he faced and the limits of self-representation.²⁸ After affirming his understanding, the judge allowed Wingate to represent himself at the hearings.²⁹ The suppression hearing was held in front of a judicial hearing officer who recommended that Wingate's "motion to suppress the physical evidence (the crack pipe) and statements made to police" should be denied and "referred the case back to Supreme Court for determination."³⁰ "The Supreme Court adopted the hearing officers findings" and denied Wingate's motion.³¹

The case continued to trial where the trial judge independently explored Wingate's wishes to represent himself.³² The judge made an in-depth inquiry into the defendant's knowledge of the charges and sentence that he faced.³³ After reviewing that the defendant had rejected a plea bargain of one and one half to three years in prison, the judge strongly urged Wingate to reconsider obtaining an attorney, stating it was his:

good faith belief that it is a mistake to represent yourself. Areas of law can be complicated and a person, not even another lawyer [should] engage in self-representation. So I strongly urge you to get a lawyer, and if you cannot afford one, a lawyer will be appointed for you. That is my honest heartfelt belief. Because of the exposure that you may be facing in terms of incarceration, should you lose and the intricacies involved in self-representation and legal matters, you should seriously get a lawyer to represent you.³⁴

Wingate confirmed that he understood what the judge had expressed and the judge reiterated that it was against the defendant's best interest to continue without a lawyer due to the period of incarceration that he faced if convicted.³⁵ The judge continued the con-

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 258-59.

³¹ *Crampe*, 957 N.E.2d at 259.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

versation with the defendant by asking him about his educational background and his experience in the legal field;³⁶ Wingate had a two-year college education and worked various jobs including periods as a paralegal and a law librarian.³⁷ Along with his experience in the legal field, the defendant explained that he had been studying law for the last ten or twelve years.³⁸ The judge vehemently expressed that the defendant should obtain a lawyer, but Wingate, indicating that he had considered the matter, insisted on self-representation because he was not willing to give up control to an attorney.³⁹ The judge finally said there was “[n]o reason for any further explanation,” and had an attorney on standby to assist Wingate.⁴⁰

After all the warnings and probing of the defendant’s understanding, the judge went further, asking Wingate if he had “sufficient time to reflect on [his] decision to represent [him]self” to which he answered “[y]es.”⁴¹ Inquiring about the defendant’s knowledge of the legal system and its procedures, the judge specifically wished to know whether Wingate had any familiarity with the rules of evidence.⁴² There was little doubt that the defendant had minimal knowledge of the basic rules.⁴³ In the judge’s last attempt to convey the risk of self-representation, he told Wingate that “almost all pro se representations are unsuccessful . . . that he would be held to the same legal standards as an attorney; [and] that he would ‘receive no advantage or assistance from [the] court’”⁴⁴ With the defendant’s last affirmations that he understood all that was explained to him, the judge was satisfied that he had asked all the “relevant questions to determine if [Wingate understood] the consequence[s] and the pitfalls of self-representation.”⁴⁵

After trial, the jury found Wingate guilty on both counts and sentenced him to “2 to 4 years on the stolen property charge, and one

³⁶ *Crampe*, 957 N.E.2d at 259.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 259-60.

⁴⁰ *Id.* at 260.

⁴¹ *Crampe*, 957 N.E.2d at 260.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 261.

⁴⁵ *Id.* at 261-62.

year on the drug possession charge.”⁴⁶ The Appellate Division modified Wingate’s conviction by vacating and dismissing the possession of stolen property count and affirming the drug possession charge.⁴⁷ The court acknowledged that the “searching inquiry” made during the suppression hearing was not sufficient but “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.”⁴⁸ Wingate was granted an appeal claiming that his waiver of counsel during the suppression hearing was not valid because there was an improper colloquy and the inquiry made by the trial judge could not retroactively validate earlier deficiencies.⁴⁹

The Court of Appeals held that the inquiry made by the suppression court was deficient.⁵⁰ Like the inquiry in *Crampe*, the suppression court in *Wingate* did not adequately “direct the defendant’s attention to the dangers and disadvantages of self-representation beyond the risk of a felony conviction.”⁵¹ The court added that the trial court’s extensive conversation with Wingate about the challenges he faced by proceeding pro se were sufficient to show that he made a valid decision to represent himself at trial.⁵² However, the court stated that this did not retrospectively solve the deficient inquiry at the suppression hearing because a valid waiver *must* be made at every stage of a criminal proceeding.⁵³

III. FEDERAL PERSPECTIVE: SELF-REPRESENTATION AS A CONSTITUTIONAL RIGHT

The Sixth Amendment of the United States Constitution gives a criminal defendant certain guaranteed rights, including the right to an attorney in criminal cases.⁵⁴ *Crampe* turns on the issue of a criminal defendant’s right to waive the right to counsel and proceed by

⁴⁶ *Crampe*, 957 N.E.2d at 262.

⁴⁷ *Id.* at 262.

⁴⁸ *Id.*

⁴⁹ *Id.* at 262-63.

⁵⁰ *Id.* at 263.

⁵¹ *Crampe*, 957 N.E.2d at 263.

⁵² *Id.* at 263-64.

⁵³ *See id.* at 264.

⁵⁴ U.S. CONST. amend. VI.

self-representation.⁵⁵ A valid waiver can only be made if it is done knowingly, intelligently, and voluntarily.⁵⁶ There is a major conflict between a criminal defendant's Sixth Amendment right to counsel and his right to self-representation. Determining whether a defendant has made a valid waiver is often a difficult decision for courts, which is the major cause of problems when dealing with the pro se issue. A criminal defendant may suffer major consequences if convicted and proceeding pro se may increase that risk.

A. *Faretta v. California*

The right to self-representation is not found in the text of the United States Constitution and was not considered a guaranteed right until *Faretta v. California*.⁵⁷ In *Faretta*, the defendant was accused of grand theft, and at a pretrial hearing he requested to represent himself.⁵⁸ After being warned of the risks of proceeding pro se, the judge granted his request.⁵⁹ Before trial the judge reversed his decision, forced the defendant to have counsel represent him during trial, and would only allow Faretta to conduct his defense through the appointed lawyer from the public defender's office.⁶⁰ The Supreme Court held that criminal defendants have the constitutional right to represent themselves and a state may not force a lawyer upon a defendant who wishes to defend himself.⁶¹ It concluded that the right was implicitly found in the combination of the language of the Fifth and Sixth Amendments, the Judiciary Act of 1789, and English common law.⁶²

The Court began its discussion by stating "the right of self-representation has been protected by statute since the beginnings of our Nation."⁶³ Before the Bill of Rights was proposed, Congress executed the Judiciary Act of 1789⁶⁴ and the statute provided, among

⁵⁵ *Crampe*, 957 N.E.2d at 256-57.

⁵⁶ *See Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

⁵⁷ 422 U.S. 806, 807 (1975).

⁵⁸ *Id.*

⁵⁹ *Id.* at 807-08.

⁶⁰ *Id.* at 807-10.

⁶¹ *Id.* at 836.

⁶² *Faretta*, 422 U.S. at 812-13, 817, 821.

⁶³ *Id.* at 812.

⁶⁴ *Id.* at 812-13.

other things, that “ ‘in all the courts of the United States, the parties may plead and manage their own cases personally or by the assistance of such counsel.’ ”⁶⁵ The Court believed this showed that the right to self-representation had a history in our nation and was intended by the founders of our country to be a right given to the people.⁶⁶ Further, the Court recognized that many states have codified the right in their own constitutions and that numerous state courts have “expressed the view that the right is also supported by the Constitution of the United States.”⁶⁷

Introducing its argument that the right of self-representation is implicitly held in the Sixth Amendment, the Court began with a discussion of *Adams v. United States ex rel. McCann*.⁶⁸ *Adams* “held that the Constitution did not force a lawyer upon a defendant.”⁶⁹ The Court in *Adams* suggested that the Sixth Amendment right to counsel “implicitly embodies a correlative right to dispense with a lawyer’s help.”⁷⁰ In other words, if a criminal defendant has the right to the assistance of counsel then he also has the right to the converse. *Adams* stated that “an accused, in the exercise of a free and intelligent choice, and with the considered approval of the court . . . [may] waive his Constitutional right to assistance of counsel.”⁷¹

The Court in *Faretta* heavily relied on the reasoning given in the Second Circuit case of *United States v. Plattner*.⁷² In *Plattner*, the court held that implicit in the Fifth and Sixth Amendments is the right of a criminal defendant to personally manage and conduct his own defense at trial.⁷³ *Faretta* expanded on the idea that the rights embodied in the Sixth Amendment are particularly personal in nature and stated that “[t]he Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused per-

⁶⁵ *Id.* at 813 (quoting the Judiciary Act of 1789).

⁶⁶ *Id.* at 813-14.

⁶⁷ *Faretta*, 422 U.S. at 813-14.

⁶⁸ 317 U.S. 269 (1942); *Faretta*, 422 U.S. at 814.

⁶⁹ *Faretta*, 422 U.S. at 814-15 (citing *Adams*, 317 U.S. at 279).

⁷⁰ *Id.* at 814 (quoting *Adams*, 317 U.S. at 279).

⁷¹ *Adams*, 317 U.S. at 275.

⁷² *Faretta*, 422 U.S. at 817; 330 F.2d 271 (2d Cir. 1964).

⁷³ *Plattner*, 330 F.2d at 273-74. The court emphasized that the Sixth Amendment right to the assistance of counsel was intended to support the rights of the accused and not to interfere with the “absolute and primary right to conduct one’s own defense in propria persona.” *Id.* at 274. It is the right of the accused to present his own defense whether he has help from an attorney. *Id.*

sonally the right to make his defense.”⁷⁴ The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails and although not explicitly stated in the Sixth Amendment “the right to self-representation—to make one’s own defense personally—is thus necessarily implied by the structure of the Amendment.”⁷⁵ If a defendant has the right to personally defend himself and does not wish to have the help of counsel, then forcing an attorney “violates the logic of the Amendment.”⁷⁶ “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.”⁷⁷

The holding in *Faretta* was a monumental decision and established the essence of the issues involved in *Crampe*. The finding that self-representation is a constitutional right was very important, but the decision in *Iowa v. Tovar*⁷⁸ went to the heart of the issues in

⁷⁴ *Faretta*, 422 U.S. at 819.

⁷⁵ *Id.*

⁷⁶ *Id.* at 820.

⁷⁷ *Id.* The majority’s last major point in *Faretta* dealt with the historical nature of the right of self-representation. *Id.* at 821. The Court indicated that the right has been a long withstanding principle dating back to the early periods of British criminal jurisprudence. *Faretta*, 422 U.S. at 821. In the sixteenth and seventeenth centuries, English common law required the accused to “appear before the court in his own person and conduct his own cause in his own words.” *Id.* at 823. A defendant was required to represent himself, without the assistance of counsel, and although this is not proof of a right to self-representation, it is an indication that the principle has existed for centuries. *Id.* at 823-24. The Court also discussed the presence of the principle in the early American Colonies. *Id.* at 826. Under fear that appointed counsel was representing the best interest of the Crown and not the accused, many defendants chose to represent themselves. *Id.* at 826-27. These historical discussions were meant to give support to the notion that the founders of our Nation and framers of our Constitution wished to include the right of self-representation and not disturb its centuries of recognition. *Faretta*, 422 U.S. at 828-29, 832. In a strongly delivered dissenting opinion, Justice Burger argued that the majority’s “ultimate assertion that [the right of self-representation] is tucked between the lines of the Sixth Amendment is contradicted by the Amendment’s language and its consistent judicial interpretation.” *Id.* at 837 (Burger, J., dissenting). The dissenters’ main argument was that the right to self-representation is not found in the text of the Constitution and is incorrectly implied by the majority. *Id.* In Justice Blackmun’s dissenting opinion, he refers to *Singer v. United States*, 380 U.S. 24 (1965), stating that just because a defendant has “the ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right.” *Faretta*, 422 U.S. at 847 (Blackmun, J., dissenting) (quoting *Singer*, 380 U.S. at 34-35). A criminal defendant can waive a constitutional right, including the right to counsel, but the dissent argued that it does not follow that a criminal defendant has the constitutional right to not have the assistance of counsel. *Id.*

⁷⁸ 541 U.S. 77 (2004).

Crampe.

B. *Iowa v. Tovar*

In *Tovar*, the Supreme Court considered what is constitutionally required by a trial court when a defendant wishes to waive his Sixth Amendment right to counsel.⁷⁹ The defendant was convicted of operating while intoxicated (“OWI”) and driving while licensed barred.⁸⁰ This was Tovar’s third conviction of OWI, which would result in a much heavier fine and lengthier jail sentence.⁸¹ On appeal Tovar argued that his first conviction in 1996 should not be used against him because he pleaded guilty without the assistance of counsel and was not adequately warned about the risks of proceeding pro se.⁸² The Iowa Court of Appeals affirmed the trial court’s decision but the Supreme Court of Iowa “reversed and remanded for entry of judgment without consideration of Tovar’s first OWI conviction.”⁸³

The Supreme Court of Iowa stated that the risks of “proceeding pro se at a guilty plea proceeding will be different than the dangers of proceeding pro se at a jury trial” and therefore the colloquy between the judge and the defendant should include certain mandated warnings.⁸⁴ The highest court in Iowa claimed that before accepting a guilty plea a trial judge must:

- (1) advise the defendant that “waiving the assistance of counsel in deciding whether to plead guilty [entails] risk that a viable defense will be overlooked”; and (2)
- “admonis[h]” a defendant “that by waiving his right to an attorney he will lose the opportunity to obtain an independent opinion on whether, under that facts and applicable law, it is wise to plead guilty[.]”⁸⁵

“The Iowa Supreme Court held that both [of these] warnings [were] essential to the knowing and intelligent waiver of the Sixth Amend-

⁷⁹ *Id.* at 81.

⁸⁰ *Id.* at 85.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Tovar*, 541 U.S. at 86 (citing *State v. Tovar*, 656 N.W.2d 112, 113 (Iowa 2003)).

⁸⁴ *Id.*

⁸⁵ *Id.* at 81.

ment right to the assistance of counsel.”⁸⁶

The Supreme Court of the United States granted certiorari and “h[e]ld that neither warning is mandated by the Sixth Amendment.”⁸⁷ The Court further stated that the Constitution only requires that the “trial court inform[] the accused of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments attendant upon the entry of a guilty plea.”⁸⁸ There is no rigid formula to the warnings that must be given to a criminal defendant when he wishes to waive his right to assistance of counsel.⁸⁹ Moreover, the Court suggested that the warnings required by the Iowa court were more damaging to both the criminal defendant and the justice system as a whole if they were mandatory.⁹⁰ If the Iowa warnings were given to every criminal defendant, it might suggest that there is a legitimate defense or opportunity to plead to a lesser charge when that prospect does not exist.⁹¹ This false hope could result in delays of a plea, draining the resources of the State and the defendant himself.⁹²

A waiver of counsel is intelligent when the defendant “knows what he is doing and his choice is made with eyes open.”⁹³ The Court in *Tovar* reasoned that there is no formula or script to determine the defendant’s intelligence when deciding to proceed without counsel.⁹⁴ “The information a defendant must possess in order to make an intelligent” decision to waive his or her constitutional right “will depend on a range of case-specific factors, including the defendant’s education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding.”⁹⁵ The Court also indicated that the dialogue to determine a “knowing and intelligent” waiver is different and less formal “at earlier stages of the criminal process” than at trial.⁹⁶

⁸⁶ *Id.* (internal quotations marks omitted).

⁸⁷ *Id.*

⁸⁸ *Tovar*, 541 U.S. at 81.

⁸⁹ *Id.* at 88.

⁹⁰ *Id.* at 93.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Adams*, 317 U.S. at 279.

⁹⁴ *Tovar*, 542 U.S. at 88.

⁹⁵ *Id.*

⁹⁶ *Id.* at 89 (citing *Patterson v. Illinois*, 487 U.S. 285, 299 (1988)).

The *Tovar* Court also discussed the Supreme Court's decision in *Patterson v. Illinois*,⁹⁷ which found a "pragmatic approach to the waiver question" and established that a less rigorous warning was required during the pretrial phase because "the full dangers and disadvantages of self-representation . . . are less substantial and more obvious to an accused than they are at trial."⁹⁸ Following the reasoning in *Patterson*, the Court in *Tovar* rejected the Iowa Supreme Court two-pronged requirement: "If [the defendant] . . . lacked a full and complete appreciation of all of the consequences flowing from his waiver, it does not defeat the State's showing that the information provided to him satisfied the constitutional minimum."⁹⁹ This observation, and the fact that the Court in *Tovar* believed that the Iowa Supreme Court overlooked the principle that an intelligent waiver "depend[s], in each case, upon the particular facts and circumstances surrounding that case,"¹⁰⁰ cemented the reasoning for overturning the decision made by Iowa's highest court.¹⁰¹

The decisions in *Faretta* and *Tovar* formed the basic foundation for the issues in *Crampe*. The Court in *Faretta* made a major finding that the right to self-representation was a constitutionally held right implicitly found in the Sixth Amendment of the United States Constitution.¹⁰² The decision in *Tovar* is a bridge from the federal and constitutional issues of *Faretta* and *Patterson* to the state issues that are the main focus of the decision in *Crampe*.

IV. NEW YORK STATE PERSPECTIVE: THE "SEARCHING INQUIRY": WHEN, WHERE, AND WHY?

Unlike the United States Constitution, the New York State

⁹⁷ *Id.* at 89-90; 487 U.S. 285 (1988).

⁹⁸ *Patterson*, 487 U.S. at 298-300. The Court in *Patterson* held that the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966), adequately informed the defendant not only of his Fifth Amendment rights but of his Sixth Amendment right to counsel. *Tovar*, 541 U.S. at 89. The Court indicated that the *Miranda* warnings effectively expressed to the defendant that he has the right to counsel during questioning and of "the ultimate adverse consequence of making uncounseled admissions." *Id.* (internal quotation marks omitted). The Court added that "[t]he *Miranda* warnings . . . also sufficed . . . to let [the defendant] know what a lawyer could do for him, namely, advise him to refrain from making statements that could prove damaging to his defense." *Id.* at 90 (internal quotation marks omitted).

⁹⁹ *Id.* at 92.

¹⁰⁰ *Johnson*, 304 U.S. at 464.

¹⁰¹ *Tovar*, 541 U.S. at 90-91.

¹⁰² *Faretta*, 422 U.S. at 817.

Constitution codifies the right to self-representation in Article I, Section VI.¹⁰³ The question then, is what constitutes a “searching inquiry?” In determining whether a waiver is valid “the court should undertake a searching inquiry of the defendant.”¹⁰⁴ The “searching inquiry” should consider a “defendant’s pedigree since such factors as age, level of education, occupation and previous exposure to the legal system may bear on a waiver’s validity.”¹⁰⁵

In *Crampe*, the court analyzed the “searching inquiry” through the two seminal New York Court of Appeals cases: *People v. McIntyre*¹⁰⁶ and *People v. Arroyo*.¹⁰⁷ The court in these cases discussed the right of criminal defendants to waive their constitutional right to counsel and proceed pro se.

A. *McIntyre*

In *McIntyre*, the defendant was charged with robbery and murder in August 1966.¹⁰⁸ Before the trial began, the defendant asked the judge if he would be permitted to try the case on his own.¹⁰⁹ The trial court began a colloquy, asking about the defendant’s background.¹¹⁰ The trial judge asked the defendant if he believed that counsel was not competent to defend him.¹¹¹ After a brief discussion with the judge about the defendant’s lack of knowledge and skills required to conduct his own trial, the defendant had an outburst, which caused the judge to deny his request to represent himself.¹¹² The case continued to trial and the jury convicted McIntyre of robbery and murder in the first degree.¹¹³ The Appellate Division affirmed, holding that the defendant’s pro se motion was denied due to his “inability to maintain self-control.”¹¹⁴

The Court of Appeals reversed and remanded for a new trial,

¹⁰³ N.Y. CONST. art. I, § 6.

¹⁰⁴ *People v. Arroyo*, 772 N.E.2d 1154, 1156 (N.Y. 2002).

¹⁰⁵ *Crampe*, 957 N.E.2d at 773 (citing *Arroyo*, 772 N.E.2d at 1156).

¹⁰⁶ 324 N.E.2d 322 (N.Y. 1974).

¹⁰⁷ 772 N.E.2d 1154 (N.Y. 2002); *Crampe*, 957 N.E.2d at 766-67.

¹⁰⁸ *McIntyre*, 324 N.E.2d at 324.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 324-25.

¹¹³ *McIntyre*, 324 N.E.2d at 325.

¹¹⁴ *Id.*

holding that the trial court should not have denied the defendant's motion based on his outburst.¹¹⁵ A criminal defendant may choose to defend pro se if: "(1) the request is unequivocal and timely asserted, (2) there has been a knowing intelligent waiver of the right to counsel, and (3) the defendant has not engaged in conduct which would prevent the fair and orderly exposition of the issues."¹¹⁶

The trial court and the Appellate Division both relied on the fact that McIntyre's outburst was a violation of the third prong and, therefore, a proper denial of his right to self-representation was made.¹¹⁷ However, the Court of Appeals rejected that theory, stating that a denial could not be based on a party's outburst after receiving an unfavorable ruling.¹¹⁸ The court further said that even if the outburst was prior to the denial, the court could not provoke disruptive behavior from the defendant by "conducting its inquiry in an abusive manner calculated to belittle a legitimate application. An outburst thus provoked will not justify the forfeiture of the right of self-representation."¹¹⁹ Finally, the court stated that the trial court did not conduct a proper inquiry to "[elicit] the information which might have warranted a denial of the motion"; therefore, a new trial should have been conducted.¹²⁰

McIntyre established the three factors that must be met in order to invoke one's right to self-representation.¹²¹ These factors provide a framework for criminal defendants to follow in order to protect their right to defend pro se.

B. *Arroyo*

The defendant was convicted of second degree robbery and fourth degree grand larceny.¹²² During the trial, Arroyo made a request to continue pro se because of his dissatisfaction with his counsel.¹²³ The judge made little inquiry into the defendant's background,

¹¹⁵ *Id.* at 328.

¹¹⁶ *Id.* at 327.

¹¹⁷ *Id.* at 325.

¹¹⁸ *McIntyre*, 324 N.E.2d at 328.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at 327.

¹²² *Arroyo*, 772 N.E.2d at 1155.

¹²³ *Id.*

education, or occupational history, and was sufficiently convinced that Arroyo was capable of representing himself.¹²⁴ He continued the case pro se, was convicted, and the Appellate Division affirmed.¹²⁵

The Court of Appeals held that the “trial court failed to secure an effective waiver of counsel necessary to allow defendant to represent himself”; therefore, the conviction was reversed and a new trial was ordered.¹²⁶ The court explained that in order to represent oneself, “a defendant must make a knowing, voluntary and intelligent waiver of the right to counsel.”¹²⁷ In determining whether a defendant has properly made a waiver of his right to counsel, a court must make a “searching inquiry” of the defendant.¹²⁸ This inquiry should make the defendant “aware of the dangers and disadvantages of self-representation” and a record should be made that the “trial court has delved into [the] defendant’s age, education, occupation, previous exposure to legal procedures and other relevant factors bearing on a competent, intelligent, voluntary waiver.”¹²⁹ The court also pointed out that there is no formula to the inquiry but it “ ‘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.’ ”¹³⁰ The trial court in *Arroyo* failed to make any inquiry at all and, therefore, “the court failed, at the outset, to evaluate adequately defendant’s competency to waive counsel, to warn him of the ‘risks inherent in proceeding pro se’ and to apprise him of the ‘importance of the lawyer in the adversarial system of adjudication.’ ”¹³¹

V. ANALYZING *CRAMPE*

At first look the decision in *Crampe* does not seem to add any significant wrinkles to the issues involved in waiving the right to counsel and self-representation. The court discussed the same basic

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 1156.

¹²⁷ *Arroyo*, 772 N.E.2d at 1156 (citing *People v. Slaughter*, 583 N.E.2d 919, 923 (N.Y. 1991)).

¹²⁸ *Id.* (quoting *Slaughter*, 583 N.E.2d at 923).

¹²⁹ *Id.* (quoting *People v. Smith*, 705 N.E.2d 1205, 1208 (N.Y. 1998)).

¹³⁰ *Id.* (quoting *Smith*, 705 N.E.2d at 1208).

¹³¹ *Id.* (quoting *Smith*, 705 N.E.2d at 1208).

principles and procedures that have been discussed since *Faretta*. Criminal defendants have a qualified right to represent themselves and in order to invoke that right they must make a knowing, intelligent, and voluntary waiver.¹³² Even the lengthy discussion about the “searching inquiry” is an aged issue. One must look deep within the decision to invoke what it is really about and what it adds to this historic concept.

On the surface, *Crampe* is a basic case about an insufficient “searching inquiry.” The town justice made little effort to develop the information needed for a defendant to make a knowing and intelligent waiver. The standard form given to Crampe and read by the judge was nothing more than basic information that could have been ascertained by almost any layperson.

The major aspect in *Crampe* is the actual colloquy itself. The Court of Appeals sought to ensure that the “searching inquiry” does not become some basic formality. To waive one’s constitutional rights is a major decision. This decision is critical in a criminal defendant’s case and can dramatically affect the rest of his or her life. A judge plays a significant role in the inquiry. He should convey the dangers and disadvantages of proceeding pro se in a thorough discussion with the defendant, not with simple form that cannot truly express the importance of the decision to be made. A dialogue between the judge and the defendant is the only effective way to provide the important information needed to make a truly knowing and intelligent waiver of constitutional rights. This seems to be the major principle that should be taken away from the decision.

People v. Wingate is less simplistic than *Crampe*, but still embodies the same principle found in many previous cases. “The Sixth Amendment safeguards to an accused who faces incarceration the right to counsel at all critical stages of the criminal process.”¹³³ Because the right to counsel is guaranteed at every critical stage, the right to forego counsel is also available at every critical stage. This is why the court decided that even though the trial judge made a sufficient inquiry, his inquiry could not be used retrospectively in order to fix the error made by the suppression-hearing officer.

In very basic terms, *Wingate* is based on the principles stated above, but if one would indulge in a deeper examination, it would re-

¹³² *Adams*, 317 U.S. at 275.

¹³³ *Tovar*, 541 U.S. at 80-81.

veal that the court had a larger goal in mind when deciding the case. The inclusion of the trial court's colloquy is particularly important. Historically, courts have said that there should be no formula to the searching inquiry and flexibility should be maintained. But because of that very theory many cases with the same issues find their way back to the high courts. The inclusion of the trial court colloquy should be viewed as the Court of Appeals' attempt to give a framework to the "searching inquiry." Without saying that it is the only way to conduct a sufficient inquiry, the court gives a thorough example of a model colloquy¹³⁴:

The opinion provided the following colloquy:

This judge first confirmed with defendant that he had turned down an offer of a minimum sentence of 1 ½ to 3 years; warned him that he faced a sentence of 15 years to life if convicted and sentenced as a discretionary persistent felon; and stressed that, "based on [his] many years of experience," it was his:

good faith belief that it is a mistake to represent yourself. Areas of law can be complicated and a person, not even another lawyer [should] engage in self-representation. So I strongly urge you to get a lawyer, and if you cannot afford one, a lawyer will be appointed for you. That is my honest heartfelt belief. Because of the exposure that you may be facing in terms of incarceration, should you lose and the intricacies involved in self-representation and legal matters, you should seriously get a lawyer to represent you. Do you understand that?

Defendant responded that he understood.

After reiterating that defendant "could be facing a long time in jail, up to life," the trial judge cautioned that it was "a big mistake to go it alone." The judge then asked defendant if he had any legal training, and defendant replied that he had been studying law for the last 10 or 12 years "in the street and different libraries" and was "not a paralegal [but] just received legal

¹³⁴ *Crampe*, 957 N.E.2d at 259-62.

research certificates.” When the judge inquired if he was a college graduate, defendant responded that he held a two-year associate’s degree in labor studies from Empire State College, and was “a law librarian, library clerk in the facility” where he worked.

Again, the trial judge “strongly urge[d]” defendant “with all the sincerity that [he could] muster that [defendant] must” get a lawyer. As the judge put it, “I say that because obviously the decision is yours, but I use the term ‘must’ get a lawyer. You are facing too much in this case. Once it’s over, it’s over. So you should seriously consider that.” Before sending the case to the trial-ready part for disposition of defendant’s pro se speedy trial motion, the judge reiterated that defendant should think twice before representing himself:

THE COURT: You think about what I told you. This case may be disposed of. You may be back here or not. Whatever you do, you may seriously think about what I am telling you. I can’t tell you in [any] stronger terms[:] get a lawyer. Don’t play with this.

THE DEFENDANT: I requested an assistant.

THE COURT: Listen to me. Get a lawyer. Don’t play with this. You will end up in jail for the rest of your life and that’s ridiculous.

THE DEFENDANT: I appreciate it.

THE COURT: You insist that a lawyer represent you.

After defendant’s speedy trial motion was denied and his case was recalled for trial, the trial judge “reiterate[d]” that he had “indicated to [defendant] before the matter was referred back [to the trial-ready part] that [he] should seriously consider getting a lawyer.” When the judge asked defendant whether he had “done that,” defendant replied “Yes, I have considered it, your Honor.” He explained that “the reason why I am persistent now is because I had attorneys. I am going this by myself. I appreciate what you said. I asked for an attorney to assist me, but I am not going

to let them take control because that's why I am persistent." At that point, the judge said there was "[n]o reason for any further explanation," and appointed standby counsel to assist defendant, as he had requested.

. . . The judge first looked into defendant's age and competency in English; he explored whether defendant was taking or had ever taken medications that might compromise his understanding; he confirmed that defendant did not suffer from any mental or physical condition that might impair his ability to follow what was happening in court. The judge inquired if defendant had been afforded "sufficient time to reflect on [his] decision to represent [him]self." When defendant responded affirmatively, the judge asked "And having reflected on this decision, you are now desirous of continuing to represent yourself?" Defendant answered "Yes."

The trial judge then reviewed defendant's schooling, work history and knowledge of the criminal justice system, eliciting that defendant had achieved an "A" average at Empire State College; had worked as an electrician, a cook, and a legal clerk; was not a stranger to the criminal justice system; had experienced some success representing himself in this case in the past; and had appeared in court with a lawyer, although he ultimately did not get along with either of his two assigned attorneys. The judge followed up by establishing that defendant had never represented himself at trial, and examining whether he knew anything about the rules of evidence. (He ultimately announced that he was "convinced" that defendant knew next to nothing about this topic.) The judge looked at whether defendant had been coerced or threatened or in any way influenced to request to represent himself.

The trial judge probed defendant's comprehension of the charges against him, the plea offer that had been made (and that he would have "minimal time" left if he accepted it) and the length of the sentence he might

receive if convicted. In response to the judge's questions, defendant claimed to understand his lawyers' explanations of court procedures and legal issues related to the charges. When asked to explain to the judge exactly why he wished to waive his right to counsel, defendant asserted that, otherwise, he would not know about "things . . . going on between [his attorney] and the DA," wanted to "eliminate the middle person" and believed he was "better off just representing [him]self."

The trial judge pursued whether defendant knew the functions of the court and the jury, and defendant answered that the "jury would be the triers of the facts" and would decide the case "based on the facts . . . presented . . . and the instructions." When the judge called upon defendant to explain his role and the prosecutor's role, defendant responded that the "prosecutor's role is . . . to seek justice not just convictions. Her duty is to present her case . . . and to do it fairly. My job is to protect, preserve the rights of myself . . . , and to present the same information or evidence that I have to contradict what is being stated by the witnesses . . . that [the] prosecution presents."

The trial judge observed to defendant that "[t]he law recognizes the right of a person to defend himself or herself. However, the law also recognizes such a choice may not be a wise one. Let me alert you now to some of the [dangers] of self-representation so that you will be aware of them before you finally decide whether you wish to give up your right to be represented by a lawyer. Please listen to me carefully. Even the most intelligent and educated layman has small and sometimes no skills in the field of law. Left without the assistance of counsel, he or she may be put on trial without a proper charge and convicted upon incomplete[], irrelevant, or inadmissible evidence. Often the layman lacks the skill [or] knowledge to adequately prepare his or her defense, even though he may have a good one. Without counsel, though an ac-

cused may not be guilty, he faces the danger of conviction because he does not know how to adequately protect his legal rights. Lawyers are both generally college and law school trained before they are permitted to take the bar examination. Only those who pass the bar are licensed to practice law. The number who become trial lawyers [is] small. In order to adequately represent a client, a trial lawyer needs a comprehensive knowledge of the rules of evidence, which I believe you do not possess, as well as an understanding of the art of jury selection and the art of cross-examination . . . [M]ost non-lawyers do not have such education and training. Did you understand what I just said?"

Defendant answered "Yes."

The trial judge then asked defendant if he understood that almost all pro se representations are unsuccessful; that by choosing to represent himself he was not entitled to a lawyer, although the judge would appoint a lawyer to "sit next to [him] and give [him] legal advice"; that he would be held to the same legal standards as an attorney; that he would "receive no advantage or assistance from [the] court" because "[e]ven in those cases where [he] show[ed] a lack of complete knowledge of how to represent [himself], [the court couldn't] jump in the middle" and help him out; that when defendant did "something wrong," the judge was going to "call [him] on it" and he had to "live with that"; that he risked not being able to understand legal terms of art used in court proceedings, the "case names used and what they stand for" and potentially applicable rules or theories of criminal law; that he would be subject to the same rules of evidence as an attorney and chanced not being able to introduce evidence because of his ignorance of these rules; that his examination of witnesses would be held to the same standards as those expected of an attorney; that he would have to make his own opening and closing statements to the jury; that the assistant district attor-

ney presenting the case against him was trained in the law and was familiar with criminal law principles, and would not “go ‘easy’ on” him because he was representing himself; that by waiving his right to counsel he was giving up the “benefit of [an] attorney’s ability, training, and past experiences in speaking to a jury”; and that he would be expected to “conduct [himself] appropriately in the courtroom.” Defendant indicated that he understood all of these things, and “[w]ithout a doubt” still wished to represent himself.

The trial judge elaborated on his admonition to defendant that “self-representation [was] not a license to abuse” the courtroom’s “dignity and decorum,” cautioning him that if he did not conduct himself properly he might lose his right to be present at trial. Again, defendant said that he understood. With that representation, the judge pronounced himself satisfied that he had asked defendant the “relevant questions to determine if [he understood] the consequence[s] and the pitfalls of self-representation.”¹³⁵

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¹³⁵ *Id.*

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