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### Court of Appeals of New York, People v. Arroyo

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## Court of Appeals of New York, People v. Arroyo

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## ASSISTANCE OF COUNSEL

*United States Constitution Amendment VI:*

*In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence.*

*New York Constitution Article I Section 6:*

*[I]n any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel . . . .*

## COURT OF APPEALS OF NEW YORK

People v. Arroyo<sup>1</sup>  
(decided June 11, 2002)

Michael Arroyo was convicted of robbery in the second degree and grand larceny in the fourth degree.<sup>2</sup> Arroyo was sentenced to concurrent terms of four to eight years in prison on the robbery charge, and one and one-third to four years on the grand larceny charge.<sup>3</sup> Arroyo appealed his conviction basing one of his claims on the constitutional right to counsel set forth in both the United States Constitution<sup>4</sup> and the New York State Constitution.<sup>5</sup> Arroyo argued that his sentence should be reduced on two grounds; that the victim did not sustain physical injury and

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<sup>1</sup> People v. Arroyo, 98 N.Y.2d 101, 772 N.E.2d 1154, 745 N.Y.S.2d 796 (2002).

<sup>2</sup> *Id.*

<sup>3</sup> People v. Arroyo, 279 A.D.2d 386, 720 N.Y.S.2d 33, (1st Dep't 2001), *rev'd*, 98 N.Y.2d 101, 772 N.E.2d 1154, N.Y.S.2d 796 (2002).

<sup>4</sup> U.S. CONST. amend. VI provides in pertinent part: "[I]n all criminal prosecutions the accused shall . . . have the Assistance of Counsel for his defence."

<sup>5</sup> N.Y. CONST. art. I, § 6 provides in pertinent part: "In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel."

that the trial court erred in granting his request to proceed *pro se*.<sup>6</sup> The Appellate Division, First Department, held that the evidence established the physical injury of the victim, and the trial judge's admonitions to Arroyo were sufficient to apprise him of the gravity of waiving counsel and proceeding *pro se*.<sup>7</sup> However, the New York Court of Appeals reversed the appellate division's ruling on the claim of error in granting Arroyo's request to proceed *pro se*.<sup>8</sup> The court held that although a defendant does have a right to represent himself, the trial court must not only make a "searching inquiry" as to the defendant's ability to represent himself, but must also specifically warn the defendant of the dangers of continuing his own representation.<sup>9</sup> Additionally, the court held that the record must reflect sufficient inquiry and warning to enable a basis for appellate review.<sup>10</sup>

Arroyo was arrested for the theft of a thick gold chain, which he physically pulled off his victim, causing the victim to suffer physical injury.<sup>11</sup> During the jury trial, Arroyo expressed dissatisfaction with his attorney and informed the trial court "of his desire to proceed *pro se*."<sup>12</sup> The judge allowed Arroyo to proceed, stating:

You have a right to do it because I don't think there's anything wrong with you. A person has a right to represent himself, but it is usually not a good idea . . . . I don't have to ask you any questions to know that you are sensible to some extent and have a right to represent yourself. I have to make sure that you're of sound mind and the rest of it and I'm convinced of that. But I would like to talk you out of it because [defense counsel is] going to make a better summation.<sup>13</sup>

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<sup>6</sup> *Arroyo*, 279 A.D.2d at 387, 720 N.Y.S.2d at 34 (claiming that the victim did not sustain physical injury is not relevant to the analysis of the subject of this article).

<sup>7</sup> *Id.*

<sup>8</sup> *Arroyo*, 98 N.Y.2d at 104, 772 N.E.2d at 1155, 745 N.Y.S.2d at 796.

<sup>9</sup> *Id.* at 104, 772 N.E.2d at 1156, 745 N.Y.S.2d at 798.

<sup>10</sup> *Id.* (citing *Faretta v. California*, 422 U.S. 806, 835 (1975)).

<sup>11</sup> *Arroyo*, 279 A.D.2d at 387, 720 N.Y.S.2d at 34.

<sup>12</sup> *Arroyo*, 98 N.Y.2d at 102-03, 772 N.E.2d at 1155, 745 N.Y.S.2d at 797.

<sup>13</sup> *Id.* at 103, 772 N.E.2d at 1155, 745 N.Y.S.2d at 797.

The appellate division affirmed the trial judge's decision to allow Arroyo to proceed *pro se*.<sup>14</sup> However, the New York Court of Appeals reversed, holding that "the constitutional right to counsel is fundamental to our system of justice."<sup>15</sup> The court reasoned that implicit in the right to counsel is the right to represent oneself and "forego the advantages of counsel."<sup>16</sup>

In its analysis, the New York Court of Appeals discussed the United States Supreme Court holding articulating the duality of the right to counsel.<sup>17</sup> Although not specifically enumerated, the right to self-representation has been found to be implicit in the federal constitutional right to counsel.<sup>18</sup> In 1942, the United States Supreme Court held that "the Constitution does not force a lawyer upon a defendant . . ."<sup>19</sup> Additionally, the New York Court of Appeals discussed its prior holdings, which held that the right to self-representation is clear and unambiguous under the New York Constitution.<sup>20</sup> Clearly, under both the Federal and State Constitutions, the right to self-representation reflects the deep-rooted ideal of autonomy and individuality in this country.<sup>21</sup>

Both the United States Supreme Court and the New York Court of Appeals have found that there are competing interests in the right to proceed *pro se*.<sup>22</sup> On the one hand, there is the ideal of our society that an individual has freedom of choice, and should not be forced to allow another to represent him against his will. However, there is also a deep-seated belief that the justice system of this country is rooted in fundamental fairness.<sup>23</sup> One could argue that allowing an inexperienced lay person to wage his own

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<sup>14</sup> *Arroyo*, 279 A.D.2d at 386-87, 720 N.Y.S.2d at 34.

<sup>15</sup> *Arroyo*, 98 N.Y.2d at 103, 772 N.E.2d at 1155, 745 N.Y.S.2d at 797.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 102, 772 N.E.2d at 1155, 745 N.Y.S.2d at 797.

<sup>18</sup> *Id.* at 103, 772 N.E.2d at 1155, 745 N.Y.S.2d at 797 (citing *Faretta*, 422 U.S. at 817).

<sup>19</sup> *Adams v. United States*, 317 U.S. 269, 279 (1942).

<sup>20</sup> *Arroyo*, 98 N.Y.2d at 103, 772 N.E.2d at 1155, 745 N.Y.S.2d at 797 (citing *People v. McIntyre*, 36 N.Y.2d 10, 15, 324 N.E.2d 322, 326, 364 N.Y.S.2d 837, 842 (1974)).

<sup>21</sup> *McIntyre*, 36 N.Y.2d at 14, 324 N.E.2d at 325, 364 N.Y.S.2d at 842.

<sup>22</sup> See, e.g., *Faretta*, 422 U.S. at 834 n.46; *McIntyre*, 36 N.Y.2d at 15, 324 N.E.2d at 326, 364 N.Y.S.2d at 843.

<sup>23</sup> *McIntyre*, 36 N.Y.2d at 14, 324 N.E.2d at 325, 364 N.Y.S.2d at 842.

battle in an unknown sea is fundamentally unfair.<sup>24</sup> There is also the tension between the defendant who truly believes it is in his best interest to represent himself, and the defendant who utilizes the right to represent himself as merely a tool to be used on appeal.<sup>25</sup> The right to proceed *pro se* is not as fundamental as the right to counsel; therefore the courts have held it unnecessary to advise every defendant of the right to proceed *pro se*.<sup>26</sup>

The Federal Constitution does not embody explicit language conferring a right to proceed *pro se*.<sup>27</sup> However, the right to represent oneself has a long history in federal jurisprudence. Prior to the ratification of the Constitution, the American colonists distrusted lawyers.<sup>28</sup> At one time, several colonies prohibited hiring another to plead one's case.<sup>29</sup> Fairness in the prosecution led some judges to allow criminal defendants to have counsel aid in their defense.<sup>30</sup> It was against this societal norm that the Sixth Amendment right to counsel was born. The Supreme Court has held that the right to counsel did not supersede the right to self-representation.<sup>31</sup> Rather, it augmented it, thereby allowing a defendant to choose to represent himself or be represented by counsel.<sup>32</sup> Because the Court reasoned that the amendment itself directs its benefits to the accused, it is the *accused* who has a personal right to make his defense.<sup>33</sup> The Sixth Amendment provides that the *accused* "must be informed of the nature and cause of the accusation,"<sup>34</sup> and the *accused* "must be confronted

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<sup>24</sup> See *Faretta*, 422 U.S. at 806 (Burger, Blackmun, Rehnquist, J.J., dissenting).

<sup>25</sup> *McIntyre*, 36 N.Y.2d at 16, 324 N.E.2d at 327, 364 N.Y.S.2d at 844.

<sup>26</sup> *Id.* at 17, 324 N.E.2d at 327, 364 N.Y.S.2d at 844.

<sup>27</sup> See *supra* note 4.

<sup>28</sup> See *Faretta*, 422 U.S. at 826.

<sup>29</sup> *Id.* at 827 (citing MASSACHUSETTS BODY OF LIBERTIES (1641) Art. 26).

<sup>30</sup> *Id.* (citing 2 Z. SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 398-99 (1796); H. RANKIN, CRIMINAL TRIAL PROCEEDINGS IN THE GENERAL COURT OF COLONIAL VIRGINIA 67, 89 (1965)).

<sup>31</sup> *Id.* at 829-30.

<sup>32</sup> *Id.* at 830.

<sup>33</sup> *Id.* at 832.

<sup>34</sup> U.S. CONST. amend. VI.

with the witnesses,”<sup>35</sup> and the Sixth Amendment, therefore, tacitly grants the right to proceed *pro se*.<sup>36</sup>

In *Faretta v. California*, the defendant was charged with grand theft.<sup>37</sup> Following a request to represent himself, the trial court questioned the defendant and found that he had represented himself in a prior criminal prosecution, had a high school education, and his reason for wanting to defend himself resulted from the heavy case load of the public defenders’ office.<sup>38</sup> The judge advised the defendant that he was “going to play with the same ground rules that anybody plays. And you don’t know those ground rules.”<sup>39</sup> After granting the request, the trial judge questioned the defendant as to particular rules of evidence.<sup>40</sup> Although the defendant knew the general substance of the rules, he did not know the exact code numbers.<sup>41</sup> Based on this inquiry, the judge forced the defendant to accept representation, claiming that the defendant “had not made an intelligent and knowing waiver of his right to the assistance of counsel, and had no constitutional right to conduct his own defense.”<sup>42</sup>

The United States Supreme Court reversed the defendant’s conviction, holding that not only does the Sixth Amendment imply a right of self-representation, but the provision refers to the assistance of counsel.<sup>43</sup> The Court held that “an assistant, however expert, is still an assistant.”<sup>44</sup> The Court found the defendant was literate, competent and understanding, and he was voluntarily exercising his informed free will.<sup>45</sup> The defendant’s technical, legal knowledge was not relevant to an assessment of his knowing exercise of the right to defend himself.<sup>46</sup> Therefore, the defendant does not have to be competent in the rules of law, but must be

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<sup>35</sup> *Id.*

<sup>36</sup> *Faretta*, 422 U.S. at 834.

<sup>37</sup> *Id.* at 807.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 808 n.2.

<sup>40</sup> *Id.* at 811.

<sup>41</sup> *Faretta*, 422 U.S. at 811.

<sup>42</sup> *Id.* at 809-10.

<sup>43</sup> *Id.* at 821.

<sup>44</sup> *Id.* at 820.

<sup>45</sup> *Id.* at 835.

<sup>46</sup> *Faretta*, 422 U.S. at 836.

competent enough to know the dangers of self-representation and the gravity of relinquishing a constitutional right.<sup>47</sup>

In *Faretta*, the Court recognized “[t]he right to defend is personal . . . . It is the defendant . . . who must be free personally to decide whether in his particular case counsel is to his advantage.”<sup>48</sup> The Court also recognized the enormity of relinquishing the right to counsel, and, therefore, held that the defendant must “knowingly and intelligently” give up this right.<sup>49</sup> The defendant must be made aware of the “dangers and disadvantages of self-representation” and the record must clearly establish that the defendant did, in fact, make an informed choice.<sup>50</sup>

The New York courts look to the United States Supreme Court’s standards regarding a defendant proceeding *pro se* and follow the same standards. The trial court must place the inquiry on the record, thereby establishing a sufficient basis for the granting of the waiver.<sup>51</sup> The New York Court of Appeals has interpreted the state constitutional clause enumerating the right to counsel to include a right to proceed without counsel.<sup>52</sup> The court has held that although this right exists, the right to proceed *pro se* is not unlimited.<sup>53</sup> Due to the gravity of relinquishing a constitutional right, the New York courts have held that “the court must be satisfied that [the waiver] was unequivocal, voluntary and intelligent.”<sup>54</sup> It is the responsibility of the trial court to make a “searching inquiry” of the defendant.<sup>55</sup> The court articulated the requirements to be met before a defendant may proceed in his or her own defense. The court held: “(1) the request [must be] unequivocal and timely asserted, (2) there [must be] a knowing and intelligent waiver of the right to counsel, and (3) the defendant [cannot] engage[] in conduct which would prevent the fair and

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 834.

<sup>49</sup> *Id.* at 835.

<sup>50</sup> *Id.*

<sup>51</sup> *Arroyo*, 98 N.Y.2d at 104, 772 N.E.2d at 1156, 745 N.Y.S.2d at 798.

<sup>52</sup> *See McIntyre*, 36 N.Y.2d at 15, 324 N.E.2d at 326, 364 N.Y.S.2d at 843.

<sup>53</sup> *Id.*

<sup>54</sup> *People v. Slaughter*, 78 N.Y.2d. 485, 491, 583 N.E.2d. 919, 923, 577 N.Y.S.2d 206, 210 (1991).

<sup>55</sup> *Id.*



orderly exposition of the issues.”<sup>56</sup> The New York courts have held a timely request to be before trial. Once the trial has begun, the defendant may proceed *pro se* only under compelling circumstances.<sup>57</sup> The knowing and intelligent waiver criterion is not as clear, and courts will look to the particular facts, on a case by case basis.<sup>58</sup>

The limitations enumerated by the New York courts on the right to proceed *pro se* are meant to ensure not only that it is in the defendant's best interest to proceed *pro se* but also to ensure that the defendant cannot subsequently claim that the court erred by granting the waiver of counsel.<sup>59</sup> These two competing interests require that for a waiver to be knowing and intelligent, the trial court must conduct a two-part analysis on the record. The New York Court of Appeals has held that the defendant must be protected from negative consequences of an uninformed decision, but the integrity of the justice system must be protected against a defendant who represents himself, not because he believes it is in his best interest, but rather to manipulate the justice system and set up a foundation for an appeal of his conviction.<sup>60</sup> The court must first make a sufficient inquiry as to the defendant's competence, and then must warn the defendant of the possible consequences of his decision.<sup>61</sup> An inquiry without a warning, or a warning without a sufficient inquiry, will not suffice. This ensures that should a defendant proceed *pro se* and be convicted, his or her only claim may be “that the proceedings were so unfair as to deny him due process when the trial viewed as a whole amounts to a travesty of justice.”<sup>62</sup> Each defendant possesses different knowledge, skill and expectations; it is up to the trial court to determine whether the waiver is appropriate for the particular defendant. Therefore, a court must examine the defendant's motivations for proceeding *pro se* to ensure that the defendant's request is well thought-out and not made to manipulate the justice system.<sup>63</sup> Such inappropriate

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<sup>56</sup> *McIntyre*, 36 N.Y.2d at 17, 324 N.E.2d at 327, 364 N.Y.S.2d at 844.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 15, 324 N.E.2d at 326, 364 N.Y.S.2d at 843.

<sup>59</sup> *Id.* at 17, 324 N.E.2d at 327, 364 N.Y.S.2d at 844.

<sup>60</sup> *Id.* at 16, 324 N.E.2d at 326, 364 N.Y.S.2d at 843.

<sup>61</sup> *Slaughter*, 78 N.Y.2d at 491, 583 N.E.2d at 923, 577 N.Y.S.2d at 210.

<sup>62</sup> *McIntyre*, 36 N.Y.2d at 18, 324 N.E.2d at 327, 364 N.Y.S.2d at 845.

<sup>63</sup> *Id.* at 15, 324 N.E.2d at 326, 364 N.Y.S.2d at 843.

motivations include: jury sympathy, a blind faith belief in the defendant's innocence, belief in the infallibility of the justice system, economic reasons, a desire to cause delay and confusion, an ability to influence the jury without having to testify, and creating a basis for appeal should there be a conviction.<sup>64</sup>

In *People v. McIntyre*, the defendant was convicted of murder and robbery.<sup>65</sup> After additional evidence was offered at a post-trial hearing, a new trial was ordered.<sup>66</sup> The defendant requested that he be permitted to represent himself at the second trial, and that counsel standby to advise him.<sup>67</sup> The trial judge admonished the defendant that his questions would be objected to, and the defendant would "start looking at the ceiling . . . and he won't know what to do."<sup>68</sup> The judge then addressed counsel that the defendant "thinks he's probably the greatest lawyer and God's gift to the legal profession . . . after talking with three or four jailhouse lawyers."<sup>69</sup> The judge refused to allow the defendant to address the judge directly, and ignored defendant's request completely.<sup>70</sup> In response, defendant angrily jumped to his feet and knocked over his chair.<sup>71</sup> The judge then ordered the defendant tied to his chair and handcuffed.<sup>72</sup> The judge denied defendant's request, "based on the defendant's outburst, the defendant's assertion that assigned counsel was very competent and the court's general inquiry."<sup>73</sup>

The Appellate Division, First Department, affirmed the conviction, but the Court of Appeals reversed, holding that although the request was unequivocally and timely asserted, "the court may not goad the defendant to disruptive behavior by conducting its inquiry in an abusive manner . . . . An outburst thus provoked will not justify the forfeiture of the right of self-

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<sup>64</sup> *Id.* at 16, 324 N.E.2d at 326-27, 364 N.Y.S.2d at 843-44.

<sup>65</sup> *Id.* at 12, 324 N.E.2d at 324, 364 N.Y.S.2d at 840.

<sup>66</sup> *Id.*

<sup>67</sup> *McIntyre*, 36 N.Y.2d at 12-13, 324 N.E.2d at 324, 364 N.Y.S.2d at 840.

<sup>68</sup> *Id.* at 13, 324 N.E.2d at 324, 364 N.Y.S.2d at 840.

<sup>69</sup> *Id.* at 13, 324 N.E.2d at 324, 364 N.Y.S.2d at 841.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 13, 324 N.E.2d at 325, 364 N.Y.S.2d at 841.

<sup>72</sup> *McIntyre*, 36 N.Y.2d at 13, 324 N.E.2d at 325, 364 N.Y.S.2d at 841.

<sup>73</sup> *Id.*

representation.”<sup>74</sup> The court held that the trial court’s lack of inquiry did not “elicit[] the information which might have warranted a denial of the motion.”<sup>75</sup>

In *People v. Slaughter*, the defendant was convicted of felony murder and attempted robbery in the first degree.<sup>76</sup> Prior to a suppression hearing, the defendant requested that he be assigned new counsel. The judge refused, asserting that the case was ready for hearing and advising the defendant that he would rehear his application after the hearing was concluded.<sup>77</sup> On the fifth and final day of the hearing, after numerous requests to proceed *pro se*, the defendant refused to cooperate with counsel.<sup>78</sup> The hearing court told the defendant he would not be assigned new counsel, and his only choice was to continue with present counsel or represent himself.<sup>79</sup> The judge told the defendant “he would get no assistance from the court in questioning witnesses nor with regard to his constitutional rights.”<sup>80</sup> The defendant proceeded *pro se*, and requested time to review recently proffered evidence. The court refused the request, denied suppression of the evidence at issue, and adjourned the hearing.<sup>81</sup>

The defendant, represented at trial by new counsel, was convicted.<sup>82</sup> The appellate division affirmed, holding the failure of the lower court to make a searching inquiry of defendant was harmless error.<sup>83</sup> The Court of Appeals reversed, holding that the “record amply demonstrated that the 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.”<sup>84</sup> The Court further held that such failure was not

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<sup>74</sup> *Id.* at 19, 324 N.E.2d at 328, 364 N.Y.S.2d at 846.

<sup>75</sup> *Id.*

<sup>76</sup> *Slaughter*, 78 N.Y.2d at 487, 583 N.E.2d at 921, 577 N.Y.S.2d at 208.

<sup>77</sup> *Id.* at 488, 583 N.E.2d at 921, 577 N.Y.S.2d at 208.

<sup>78</sup> *Id.* at 489, 583 N.E.2d at 921, 577 N.Y.S.2d at 209.

<sup>79</sup> *Id.* at 489, 583 N.E.2d at 922, 577 N.Y.S.2d at 209.

<sup>80</sup> *Id.* at 489, 583 N.E.2d at 922, 577 N.Y.S.2d at 209.

<sup>81</sup> *Slaughter*, 78 N.Y.2d at 489, 583 N.E.2d at 922, 577 N.Y.S.2d at 209.

<sup>82</sup> *Id.* at 490, 583 N.E.2d at 922, 577 N.Y.S.2d at 209.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 491-92, 583 N.E.2d at 923, 577 N.Y.S.2d at 210.

harmless error.<sup>85</sup> The case was remanded for a new suppression hearing, and if defendant prevailed, a new trial.<sup>86</sup>

In *People v. Smith*, the Court of Appeals held that although the defendant unequivocally indicated that it was his intention to remain mute during his self-representation, the court was still required to “conduct a thorough inquiry to determine whether the waiver was made intelligently and voluntarily.”<sup>87</sup> Without such inquiry, the trial court, in denying defendant’s request to proceed *pro se*, “denied defendant his constitutional right to present his own defense.”<sup>88</sup>

The Court of Appeals also held in (a later) *People v. Smith*, that the trial court did not conduct a proper inquiry of the defendant, who threatened his court appointed attorney with death.<sup>89</sup> Due to the death-threat, the attorney’s request to be relieved was granted by the trial judge.<sup>90</sup> The judge told the defendant that this was the only attorney he would be assigned, and because it appeared the defendant did not want the representation, the judge relieved the attorney and directed the defendant to proceed on his own, with counsel as only a legal advisor.<sup>91</sup> The Court of Appeals held that the 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.”<sup>92</sup> The court held there is a “need for the plainest examination of defendant’s understanding of the pertinent prerequisites before surrendering this counsel right.”<sup>93</sup>

Additionally, the Court of Appeals held, in the case of *People v. Allen*, that the trial court’s single inquiry of whether the defendant understood the charges against him was an insufficient

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<sup>85</sup> *Id.* at 493, 583 N.E.2d at 924, 577 N.Y.S.2d at 211.

<sup>86</sup> *Slaughter*, 78 N.Y.2d at 493, 583 N.E.2d at 922, 577 N.Y.S.2d at 211.

<sup>87</sup> *People v. Smith*, 68 N.Y.2d 737, 738, 497 N.E.2d 689, 690, 506 N.Y.S.2d 322, 323 (1986) (citing *McIntyre*, 36 N.Y.2d at 15, 324 N.E.2d at 326, 364 N.Y.S.2d at 842).

<sup>88</sup> *Smith*, 68 N.Y.2d at 739, 497 N.E.2d at 690, 506 N.Y.S.2d at 323.

<sup>89</sup> *People v. Smith*, 92 N.Y.2d 516, 518, 705 N.E.2d 1205, 1206, 683 N.Y.S.2d 164, 165 (1998).

<sup>90</sup> *Id.* at 520, 705 N.E.2d at 1207, 683 N.Y.S.2d at 165.

<sup>91</sup> *Id.* at 520, 705 N.E.2d at 1207, 683 N.Y.S.2d at 166.

<sup>92</sup> *Id.* at 522, 705 N.E.2d at 1208-09, 683 N.Y.S.2d at 167-68.

<sup>93</sup> *Id.* at 521, 705 N.E.2d at 1210, 683 N.Y.S.2d at 168.

inquiry to constitute the basis of a waiver.<sup>94</sup> The defendant in *Allen* was convicted of assault in the third degree, reckless endangerment in the second degree, possession of a weapon and promoting contraband in the second degree.<sup>95</sup> The Court of Appeals held this sole question did not constitute a knowing and intelligent waiver.<sup>96</sup> The court held that “[t]o establish a valid assertion of the constitutional right to represent oneself, the trial court must satisfy itself that the accompanying waiver of the right to counsel was competent, intelligent and voluntary.”<sup>97</sup>

In contrast, in *People v. Vivenzio*, the New York Court of Appeals held the waiver of representation adequate when the court determined that the defendant, convicted of attempted burglary in the third degree, “was an adult who had been involved in the criminal process before, that he had a lawyer with whom he had discussed his decision, who advised against it, and who was available as standby counsel . . . .”<sup>98</sup> In *Vivenzio*, the Court of Appeals held that an adequate warning consisted of telling the defendant “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.”<sup>99</sup> The Court of Appeals held this admonition on the record sufficiently demonstrated that the defendant’s decision was knowing and voluntary.<sup>100</sup>

Although the United States Constitution and the New York State Constitution both embody a right to counsel, the actual wording of each differs. The Federal Constitution states: “[T]he accused shall . . . have the Assistance of Counsel for his defence.”<sup>101</sup> The Federal Constitution implies no choice. The use of the word “shall” and no mention of the defendant’s personal

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<sup>94</sup> *People v. Allen*, 39 N.Y.2d 916, 917, 352 N.E.2d 591, 591, 386 N.Y.S.2d 404, 404 (1976).

<sup>95</sup> *Id.* at 918, 352 N.E.2d at 591, 386 N.Y.S.2d at 404.

<sup>96</sup> *Id.* at 917, 352 N.E.2d at 591, 386 N.Y.S.2d at 404.

<sup>97</sup> *Id.* at 918, 352 N.E.2d at 592, 386 N.Y.S.2d at 404.

<sup>98</sup> *People v. Vivenzio*, 62 N.Y.2d 775, 776, 465 N.E.2d 1254, 1255, 477 N.Y.S.2d 318, 318 (1984).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> See *supra* note 4.

choice implies that it is mandatory the defendant will have the assistance of counsel. The New York State Constitution states “[T]he party accused shall be allowed to appear and defend in person and with counsel . . . .”<sup>102</sup> The use of the word “allowed” embodied in the New York Constitution, implies that the defendant has a choice of whether he will defend himself. “Defend in person” is then qualified by “and with counsel,” implying a choice by the defendant to either defend himself or to defend with counsel. However, despite this difference in wording, both the United States Supreme Court and the New York Court of Appeals have interpreted the right to counsel to include a right to proceed without counsel. The Court of Appeals rooted its decision in the United States Supreme Court’s interpretation of the right to counsel.<sup>103</sup> Both the Federal and State Constitutions have been interpreted to require a searching inquiry on the record in order for the record to establish that the defendant knows what he is doing and his choice is made “with eyes open.”<sup>104</sup>

In conclusion, Federal and New York holdings are similar with respect to the interpretation of the right to counsel. Under both the Federal Constitution and the State Constitution, the right to counsel implicitly grants a right to proceed without counsel. The interpretation of the New York State Constitution goes one step further to expressly grant a right to proceed without counsel.<sup>105</sup> However, both federal and New York courts acknowledge that since the waiver of right to counsel could be of such grave consequence, limitations on the right are warranted. These limitations include a sufficient inquiry of the defendant on the record, and an adequate warning of the consequences of such action.<sup>106</sup>

There is no bright-line test of what constitutes a sufficient inquiry. The minimum requirement is the need for a knowing, voluntary and intelligent decision in determining if the waiver meets the requirement of a “searching inquiry.” Thus, the record

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<sup>102</sup> See *supra* note 5.

<sup>103</sup> See *Arroyo*, 98 N.Y.2d at 101, 772 N.E.2d at 1154, 745 N.Y.S.2d at 796.

<sup>104</sup> *Adams*, 317 U.S. at 279.

<sup>105</sup> *McIntyre*, 36 N.Y.2d at 15, 324 N.E.2d at 326, 364 N.Y.S.2d at 842.

<sup>106</sup> See *Faretta*, 422 U.S. at 806; *McIntyre*, 36 N.Y.2d at 10, 324 N.E.2d at 322, 364 N.Y.S.2d at 837.

must show that the defendant was adequately questioned to ensure he is making an informed choice.<sup>107</sup>

The New York Court of Appeals, applying the standards above, found that the trial judge in *People v. Arroyo* “failed . . . to evaluate adequately defendant’s competency to waive counsel, to warn him . . . .”<sup>108</sup> Therefore, at the very least, a trial judge in New York State must ensure that the record reflects a searching inquiry of the defendant’s competency to waive counsel, as well as a sufficient warning of the dangers of proceeding *pro se*. Should the trial judge fail to fulfill either one of these requirements, the conviction of a defendant who proceeded *pro se* will be reversed on appeal.

*Jean D'Alessandro*

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<sup>107</sup> *Slaughter*, 78 N.Y.2d at 491, 583 N.E.2d at 923, 577 N.Y.S.2d at 210.

<sup>108</sup> *Arroyo*, 98 N.Y.2d at 104, 772 N.E.2d at 1156, 745 N.Y.S.2d at 798.

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