COURT OF APPEALS

STATE OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK,

Appellant,

-against-

NO. 27

RAYMOND CRESPO, (Reargument)

Respondent.

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20 Eagle Street
Albany, New York
September 12, 2018

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUSTICE ALAN D. SCHEINKMAN

Appearances:

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CHIEF JUDGE DIFIORE: The next appeal on the calendar is appeal number 27, the People of the State of New York v. Raymond Crespo.

Counsel?

MR. KRESS: Good afternoon, Your Honor. I'd like to reserve two minutes for rebuttal.

CHIEF JUDGE DIFIORE: Yes, you may.

MR. KRESS: Thank you.

CHIEF JUDGE DIFIORE: You're welcome.

MR. KRESS: May it please the court. Stephen Kress on behalf of the People.

Both the C.P.L. and this court's own case law recognize the common-sense principle that jury selection is part of a jury trial. When you apply that principle in this - - -

JUDGE RIVERA: Wait counsel, why - - - why isn't this a settled question after McIntyre?

MR. KRESS: So McIntyre - - -

JUDGE RIVERA: What makes this an unsettled question, because that's where I have difficulty with your argument.

MR. KRESS: The fact that Mc - - - the trial in McIntyre took place when the Code of Criminal Procedure was still in effect. And the Code of Criminal Procedure said that trial commenced with the People's opening statement.

JUDGE RIVERA: Yeah, but that wasn't the sole citation, so I think you have a problem with that particular argument. It didn't say it only - - - it turned on that particular prior Code's language.

MR. KRESS: I don't think that the court was just - - -

JUDGE RIVERA: And that's certainly not how any court has understood it, has it? Is there any court who has actually adopted, rather than rejected, your view, your argument?

MR. KRESS: Not yet, Your Honor. However, I will say that it - - - it's not like we're asking for some sort of a sea change in the law. There have been only a handful of cases that have touched on this issue.

But going back to McIntyre's point, I don't think that McIntyre just pulled the People's opening statement out of thin air as a place where trial began. They got it from the Code of Criminal Procedure. That's the first thing that they cited to when they - - -

JUDGE RIVERA: But they had other citations. So let me ask you this. So let's say we disagree with this particular part of your argument. Now we're left with stare decisis. What - - - what's the basis not to apply stare decisis here?

MR. KRESS: I think the fact that over the last -

- - well, two things. One, this court said, in People v. Hobson, that when you're dealing with a statement that is just ipse dixit, you know, a sort of conclusory assertion of result, that particular precedent is entitled to less weight. And that would, at the very most, be what McIntyre's citation to the C.P.L. stands for.

JUDGE SCHEINKMAN: Can I ask you a question, counsel? It seems rather odd to me that it's taken forty-seven years for somebody to notice that the statutory language has changed. And if there was an opportunity for this court to address it, wouldn't that have come up in People against Smith where the timeliness issue was discussed in both the majority memorandum and in Judge Kaye's dissenting opinion?

MR. KRESS: Well, Your Honor, in Smith, the request actually - - - it wouldn't be untimely even under the rules in - - -

JUDGE SCHEINKMAN: No, but my question is: wouldn't, in the course of that discussion between the majority and the dissent, someone have pointed out that the statute had changed since McIntyre?

MR. KRESS: I mean, not necessarily, Your Honor. The dissenting opinion in that case just said it relied on McIntyre's general rule, which is that you have to announce your request to go, say, before the start of trial. It

didn't see the need to go any, you know, further beyond that and say that trial begins with the opening statement. I think it's very clear that, under the C.P.L., that's when trial began. And in fact, this court has said that several times since McIntyre so - - -

JUDGE WILSON: Well, what is the purpose of the timeliness requirement?

MR. KRESS: The purpose of the requirement is to prevent delay, wasting time, inconvenience to jurors and witnesses.

JUDGE WILSON: And is there a sea change in that consideration between the start of voir dire and the start of openings?

MR. KRESS: I think where you see the difference is that particularly in inconvenience to jurors and wasting time. If you require defendants to go to pro se at the start of jury selection, you're never going to have a scenario like you had in this case, for example, where you could have eleven jurors selected, and if the defendant says, well, I want to go pro se, and he's forced to be allowed to go pro se at that point, all of the time spent, you know, picking those jurors would have just been wasted, voir diring the other jurors who were not selected, all of that goes out the window.

So I think there is a meaningful difference - - -

JUDGE WILSON: You're assuming you'd have to start over?

MR. KRESS: Yes, and I think in most cases you - - - you would. And in fact, in People v. Stone - - -

JUDGE RIVERA: Where is that assumption coming from?

MR. KRESS: In People v. Stone, for example, which is a case that this court had in 2014, the court noted that the defendant made his request in the middle of jury selection. He was allowed to go pro se. And the court granted a mistrial and started jury selection over again.

And I think it comes from the idea that if the defendant is saying I - - - I want to represent myself, it's unlikely he's going to be satisfied with the jurors that his attorney has selected at that point. He'd probably want to - - -

JUDGE FAHEY: Has that been your experience?

MR. KRESS: I'm not a trial attorney, Your Honor.

JUDGE FAHEY: I was in city court for quite a while. That wasn't my personal experience where - - - where that was really a problem.

MR. KRESS: Well, to address that issue, Your Honor, I will say that if you can come up with a scenario where the defendant says, I want to represent myself, I

don't need to do jury selection over again, I'm ready to go right now, we don't have a problem with delay, the judge has discretion to, in that case, even if the request is untimely - - -

JUDGE FAHEY: The judge didn't make any inquiry at all here, did he, when the defendant decided to go pro se? What kind of inquiry was made?

MR. KRESS: Into - - - are you thinking of the so-called - - -

JUDGE FAHEY: Yeah.

MR. KRESS: - - - searching inquiry that was made? The judge in this case, he made subsequent statements afterwards. Like, he never actually explored the defendant's educational background and went through some of the things that this court has - - -

JUDGE FAHEY: Do you think it would have made a difference in this case?

MR. KRESS: In terms of whether he would be allowed to go pro se?

JUDGE FAHEY: Um-hum.

MR. KRESS: I think the judge says that he probably would have met the threshold to proceed pro se.

JUDGE RIVERA: Well, didn't he actually say if he had made - - - if he had made the request a week ago, I would have granted it? So hadn't the judge already decided

to foreclose this option, which is counter to the case law?

MR. KRESS: I'm not sure I - - -

JUDGE RIVERA: There are steps you have to go through under our case law.

MR. KRESS: I'm not sure I understand - - -

JUDGE RIVERA: Well, as I recall the record, the judge does say in open court, if he had made this request a week ago, I would have considered it, it would be timely.

MR. KRESS: Right, yes.

JUDGE RIVERA: And so doesn't that suggest that the judge already had a much wider period of time during which he would have considered it compared to what our case law says? There's nothing that foreclosed this from being timely if he had - - - let's go under your argument - - - the day before jury selection had started, right?

MR. KRESS: Right, and I think - - -

JUDGE RIVERA: It would have been timely at that point.

MR. KRESS: That's correct, yes.

JUDGE RIVERA: Okay. But the judge is saying, well, if it was a week before. So there is something, right, in this record that suggests the judge perhaps is not quite certain of what the law was that applied. I don't know how that is, but that seems to be the record.

MR. KRESS: I think the judge makes very clear,

when he denies the request as being untimely, he does say that, you know, a request at this juncture would be untimely. So I think he understood the - - - the law at that point. It's the - - -

JUDGE SCHEINKMAN: Counsel, can I request a clarification?

JUDGE RIVERA: I think he actually said I'm going to confirm.

MR. KRESS: Yeah, no, that's right.

JUDGE SCHEINKMAN: Didn't - - - isn't it true that eleven jurors had been selected and sworn before the defendant first select - - - decided he wanted to go pro se?

MR. KRESS: That's correct.

JUDGE SCHEINKMAN: That is, his requests prior to that were for a different assigned counsel?

MR. KRESS: That's correct, Your Honor. Yes, that's true. And once that request was rejected he then asked to proceed pro se. That's correct.

One thing that I do want to - - -

JUDGE SCHEINKMAN: So what do you make of the fact that the request came after eleven jurors had already been - - - not only selected but also were sworn?

MR. KRESS: In terms of the sincerity of the request? Is that what - - -

JUDGE SCHEINKMAN: In terms of the timeliness of the request. Is this a little different than if he had made the request at the very beginning of jury selection, as in Smith, where the request was made just as the judge was about to address the entire panel?

MR. KRESS: Yes, it's - - - it's very different. It's very different in terms of whether or not the trial has commenced, and also certainly in terms of whether or not he actually wanted to go pro se and was sincere in that, for sure.

One point that I do want to stress in this particular case is that what the court is faced with - - - under the C.P.L., if you look at the statute, as a whole, it's very clear that jury selection is a part of the trial. You start right with the language of Section 120.11, and it says that trial commences with the selection of the jury. That exact same phrase, "selection of the jury", is used elsewhere in the C.P.L., in Section 270.10 and 360.15, to refer to the jury selection process as a whole.

If you look at 260.30, that talks about the steps that you have in a jury trial. The first step is the selection and swearing of the jury. So there's a distinction drawn between those two things. So when - - -

JUDGE WILSON: And so is there anything in the history of the C.P.L. of that provision that would suggest

that the change was made either with regard to the Constitutional right to self-representation or to any Constitutional right?

MR. KRESS: There's nothing specific in the legislative history that talks about making a change for Constitutional purposes. What the legislative history reflects is that the C.P.L. drafters wanted to depart from what they considered - - - and this is the term they used - - - the distinctly archaic criminal code. And they wanted to expand the definition of trial.

JUDGE RIVERA: So what do you make of People v. Ayala where the court - - - this court held trial begins only after the jury is sworn?

MR. KRESS: The statement is pure dicta. It hasn't been followed by this court or by lower courts after Ayala. In fact, People v. Hughes, for example, is one case this court decided in 1998 where it specifically said that defendant's trial commenced with the selection of the jury on December 4th, 1995.

JUDGE RIVERA: But how does that conflict with only once the jury is sworn? One could think that that is referring to selection of the jury as sworn.

MR. KRESS: I think, if you looked at it in isolation, that might be true. But I think if you look at the statute as a whole, and those provisions of the C.P.L.

as - - -

JUDGE RIVERA: No, no, but I'm talking about our interpretation of the statute.

MR. KRESS: No, I - - - I understand that. I think when you're interpreting the statute - - -

JUDGE RIVERA: Um-hum.

MR. KRESS: - - - you have - - - you can't just look at one part of it; you have to read it as a whole. And if you look at - - -

JUDGE RIVERA: I understand. My - - - my point is that the court, in its prior cases, may have done that and come to the conclusion, as I think the McIntyre and Ayala point out, that the trial begins only after the jury is sworn.

MR. KRESS: But there's no one else - - -

JUDGE RIVERA: And that the case you point to is not in conflict with that, is all I'm saying.

MR. KRESS: But there's no explanation of that, whatsoever, in those decisions. They just outright say that sort of conclusory result. And as I mentioned before, that kind of a statement is not entitled, really, too much weight under this court's precedence.

JUDGE RIVERA: Other then that's what every court has done because no one's accepted your argument.

MR. KRESS: But again, it's - - - it's not like

we're talking about fifty courts over forty years. This - - -

JUDGE FAHEY: Well, but we are talking about a concept that's been batted around a lot lately, the concept of settled law. When is something settled law?

MR. KRESS: And the only settled law for McIntyre is that you have to ask to go pro se before the start of trial.

JUDGE FAHEY: And you would restrict it to that?

MR. KRESS: That - - - that is the rule that McIntyre announced.

JUDGE RIVERA: It seems that that would be a surprise to many a judge on the Appellate Divisions and perhaps even this court.

MR. KRESS: I - - - I think if you actually look at McIntyre's plain language, it talks about general principles that apply to going pro se. And it very specifically says we are applying these principles to the facts of this case. And then it concludes that the - - -

JUDGE RIVERA: McIntyre also drew a bright line, considering the interests of the defendant, and the statutory language, and the overall interest that the court has on some sensibility of - - - excuse me, of when the trial begins. And everything that you have raised was certainly on the radar for the McIntyre court at the time,

and yet they drew the line where they drew the line.

MR. KRESS: I - - - I don't know how we can make that conclusion when the only thing that McIntyre says is: this request was timely inasmuch as it came before the opening statement; see Code of Criminal Procedure.

JUDGE RIVERA: But that's not the only citation.

CHIEF JUDGE DIFIORE: Thank you, counsel.

JUDGE SCHEINKMAN: May I ask you another question?

CHIEF JUDGE DIFIORE: Yeah. No, no, no, go ahead. Continue.

MR. KRESS: Thank you. I'm sorry. Go ahead.

JUDGE SCHEINKMAN: There are two cases cited in which this court took a more expansive definition of the word "trial" under the Code. That's Anderson, and before that, Steckler. Are you aware of any case where this court issued an interpretation of a fundamental definition contained in the C.P.L. that was contrary to what is expressed in the C.P.L.?

MR. KRESS: I think the only cases that I'm aware of, where this court has, sort of, declined to adopt the C.P.L.'s definition, are in cases like Anderson or Steckler where the court said: if we follow the definition that's in the statute, that's not going to be in keeping with the purpose of whatever we're - - -

JUDGE SCHEINKMAN: But those are Code cases.

MR. KRESS: Yes.

JUDGE SCHEINKMAN: I'm asking, under the C.P.L., which came in, as we know, in 1971, is there a case in which a court has said, wait, the definition given in the C.P.L. either was not one that was appropriate for the legislature to make or it doesn't work for us so we're going to come up with a definition of our own?

MR. KRESS: Not that I'm yet aware of. And I think it makes perfect sense considering that the C.P.L., as this court has said, is a statute that applies broadly to all matters of criminal procedure. It's a statute that, as this court has said in a previous case, it's carefully designed to take into account a defendant's Constitutional rights and balance those against the other interests of the State.

So it makes perfect sense why this court would just follow the C.P.L. when it's trying to define a particular term. In fact this court did exactly that in People v. Blake. That's 35 N.Y.2d 331, a case that was issued the same year as McIntyre. In that case, the issue was when a defendant's right to counsel attaches. Well, it attaches at the commencement of the criminal proceeding. And the question was when does the criminal proceeding commence. And the court looked to the C.P.L., C.P.L.

Section 1.20(17). That says criminal action commences when an accusatory instrument is filed. So the court had a Constitutional right it was construing, it looked to the C.P.L.'s definition, and it adopted it. And it would make sense to do the exact same thing in this case.

CHIEF JUDGE DIFIORE: Thank you, counsel.

Counsel?

MS. SCHINDLER: May it please the court. Good afternoon. Molly Schindler for Raymond Crespo.

For the past forty years, New York has had a clear, workable rule that hasn't caused any widespread delay or disruption. Courts have followed the clear language in McIntyre that a defendant has the right to invoke his right to self-representation up until the prosecution's opening statement.

JUDGE SCHEINKMAN: Do you agree that the first time Mr. Crespo sought to go pro se was after eleven jurors had been selected and sworn?

MS. SCHINDLER: Yes, but it was prior to the empanelment of the jury, and it was prior to the prosecution's opening statement.

JUDGE SCHEINKMAN: But what about the argument that the People make in their brief that they've been prejudiced because, if they had known that he was going to go pro se, they would have asked prospective jurors about

their feelings about dealing with a pro se defendant.

MS. SCHINDLER: Well, in an individual case, if that's how they felt, then they could move for a mistrial, and jeopardy wouldn't have attached at that point, making it a particularly convenient point since jeopardy doesn't attach until the jury is selected and sworn.

And you'll find that Stone is actually the only example where there was any kind of delay or disruption of all the cases that we have that have followed this McIntyre rule. There aren't that many of them because this is not a situation that occurs very often or at least doesn't make it to the Appellate level that often. But in all of the other cases where a defendant's mid-jury selection request was granted, you're not seeing any reference to an adjournment request, an adjournment request being denied, a mistrial being either requested - - -

JUDGE STEIN: Well, but the court has the discretion, even if we say the rule is before the jury is - - - is selected, the judge has the discretion, even after that point, to allow a defendant to go pro se if all of those circumstances are as you describe; it won't cause any delay or disruption.

MS. SCHINDLER: That shifts the burden to the defendant of demonstrating that he can make out compelling circumstances warranting his - - - his ability to exercise

that right. And what we have here is a defendant's Constitutional right to invoke - - - to be able to represent himself. That right is broader than a - - - than a defendant's ability, for example, to change his assigned counsel as the defendant had requested to do here. You only - - - you only can do that with good cause. And if you're just not comfortable with the person who's representing you, you don't have the right to - - - to switch to somebody new unless you can retain that person. But you do have the right to - - - to represent yourself. And McIntyre recognizes that as one of the main reasons that a defendant may opt to go pro se.

JUDGE RIVERA: What, if anything - - -

MS. SCHINDLER: And that right - - -

JUDGE RIVERA: What, if anything, do you make of the judge's statement that, if he had requested it a week before the trial had started, it would have been timely?

MS. SCHINDLER: I think that the trial court didn't understand his obligations under McIntyre. That - - - that interpretation of McIntyre is not consistent with even what the People are arguing.

JUDGE SCHEINKMAN: Well, what about the fact that the judge was undoubtedly aware, at least at some point in time, that there were these Rikers Island tapes in which the defendant was purportedly recorded as indicating that

he needed to get a delay, that his hope was that the complainant wouldn't show up, and that the judge therefore could infer that this was, in effect, a delay tactic.

MS. SCHINDLER: Two things to that, Your Honor. One, there is a single tape, made eighteen months before the trial, in which the defendant discusses that perhaps it would be better for his case if the complainant didn't show up, which actually was almost the case here. It looked, certainly at the time that Mr. Crespo requested to go pro se, it appeared as though the complainant was not appearing and the - - - and the prosecution was able to go forward anyway.

But the second thing is that he - - - there is no evidence that his request was accompanied - - - his request to go pro se was accompanied by an adjournment request. And the prosecution is mistakenly conflating timeliness of a pro se request - - -

JUDGE SCHEINKMAN: Can't that be reasonably inferred?

MS. SCHINDLER: It cannot. And in fact that's why we don't see it in the other cases because it is not necessarily the case that an - - - an adjournment is necessary. And in many of the cases that we have, it appears that they have simply just gone forward with the rest of the trial - - -

JUDGE STEIN: Did the defendant - - -

MS. SCHINDLER: - - - sometimes with standby counsel - - -

JUDGE STEIN: I'm sorry; did the defendant give any reason for not wanting counsel to represent him?

MS. SCHINDLER: He was not comfortable with his attorney. He believed that there had not been sufficient communication. There - - - he wasn't comfortable with the attorney's strategy, or rather he had asked the attorney what the strategy was going to be, he wasn't satisfied with that answer.

JUDGE RIVERA: Well, that counsel sought to withdraw, had he not?

MS. SCHINDLER: And then counsel sought to withdraw.

JUDGE RIVERA: Counsel himself thought - - -

MS. SCHINDLER: Exactly.

JUDGE RIVERA: - - - we can't communicate.

MS. SCHINDLER: And this was - - - at the beginning of jury selection counsel made that request.

JUDGE SCHEINKMAN: Except that there was a two-day suppression hearing which the defendant attended. And there's no indication that defendant expressed any disappointment or dissatisfaction with counsel during the two days of suppression. And what defense counsel

explained on his application to be relieved was, look, the only defense that he thought was potentially viable, in view of the tapes, was self-defense, but for that he would need the defendant's cooperation and the defendant's testimony. And at that point the defendant wasn't coming to court let alone offering to testify.

MS. SCHINDLER: Well, the suppression hearing is significant because the transcript shows that the defense attorney rested on the record after the suppression hearing. He did not make any arguments, most likely because there was not a viable suppression issue in this case. Mr. Crespo watched that occur. He has already had misgivings, which are reflected on the record, for months before, and he finally said, look, I'm - - - I'm not comfortable with this attorney. I would like - - - I would like Your Honor to appoint me another attorney. And that's why it's crucial to allow defendants the opportunity to watch their attorney advocate for them during the jury selection process because that's exactly what the trial court responded here.

JUDGE STEIN: This particular defendant had been in court with this attorney dozen - - - more than a dozen times, right?

MS. SCHINDLER: Well, on a number of occasions, his appearance was actually waived. But even when he was

there in court, what you're doing in court is you're adjourning the case, you're either rejecting - - - you know, you're hearing what the plea offer is and you might be rejecting that. You don't have the opportunity for advocacy. And even at the suppression hearing he didn't have the opportunity to hear his counsel advocating for him.

JUDGE WILSON: So taking into account a lot of the evidence that - - - in record that - - - for example, the Rikers recordings or the conduct discretion hearing or the conduct when Mr. Crespo says - - - or the court says to him: if you're going to tell me when I bring the jury in you're going to jump up and disrupt the court proceedings and say he's not my lawyer, I'm not going to have that, and Crespo says that's exactly what's going to happen, are those the kind of things that can be taken into account in factor 3 under McIntyre?

MS. SCHINDLER: That is precisely what - - -

JUDGE WILSON: And - - -

MS. SCHINDLER: - - - McIntyre says, and in McIntyre there was a concern, or the trial court had a concern that the defendant was making this request to disrupt or delay the proceedings. And McIntyre was very clear that the court was obligated to get to the third prong. The Court - - -

JUDGE WILSON: And so here can we remit for that, based on the existing record?

MS. SCHINDLER: It's - - - it's my opinion that the record does not make out the third prong, or rather that the - - - and that's what the Appellate Division found out as well, that there is not sufficient evidence that Mr. Crespo's goal was to disrupt it. But at the very least, that's what the court should have done. They should have - - - the court should have conducted the searching inquiry and determined whether Mr. Crespo's behavior was designed to disrupt or delay, or rather it was - - - whether it was simply his only option at that point.

JUDGE RIVERA: Well, can one interpret the record or infer from the record, since the only thing the judge ever referred to was the timeliness and that it would slow down the trial, that the judge didn't think that the defendant had gone afar field of number 3?

MS. SCHINDLER: Yes, and as Your Honor pointed out, the court said that it would have granted that request if it had been made a week beforehand. The Court then said that it would reconsider the request after jury selection, and then apparently changed its mind and failed to do so.

The Court did not follow its obligations under McIntyre. And the McIntyre rule has been the rule, and there are practical reasons to make it the rule. The other

practical reasons is that the - - - the term "jury selection" is very unclear and what that moment is, where a defendant's right would be cut off in - - - in the prosecution's - - - in the prosecution's proposed rule. It's unclear exactly what point they're even referring to. Is it when the calendar is called that morning, the day that jury selection is supposed to begin? Is it when the first juror walks into the courtroom? Is it when the court first addresses the entire panel? Is it when the first group of prospective jurors are led into the box? There's a lot of uncertainty there, as well as the uncertainty behind this court's holding in Ayala and other lower courts' holdings about the trial begins when the jury is selected.

JUDGE SCHEINKMAN: If I can, why wouldn't that parade of horribles be at least mitigated by the facts presented here, where eleven jurors were sworn, not only selected, but were sworn before the defendant sought to go pro se?

MS. SCHINDLER: Because the jury panel had not yet been empaneled and sworn. And that's a specific term meaning the jury selection is complete and all of the jurors are sworn. And the - - - the rule that McIntyre set out that a defendant maintains this important Constitutional right until the prosecution's opening

statement avoids any confusion whatsoever. It's a very clear rule that has worked for the past forty years.

Thank you.

CHIEF JUDGE DIFIORE: Counsel?

MR. KRESS: Thank you, Your Honor. I'd like to first address this idea that it would be shifting the burden. If you draw the line at the start of jury selection you're shifting the burden to the defendant. So obviously the defendant has an interest in invoking his right to go pro se and enforcing his Constitutional rights. But that is absolutely not the only interest that's at play here. You also have the State's very legitimate interest in the efficient administration of justice.

And in fact, in People v. Arroyave - - - that's a case that we cited in our Appellate Division brief, but it's 49 N.Y.2d 264 - - - this court said that that administration of justice is a critical concern to society as a whole. And that case was very similar to this one in that you had the defendant making an eleventh hour request to have retained counsel - - -

JUDGE RIVERA: Those were all concerns that the McIntyre court was well aware of and yet drew this bright line rule. I'm still not really finding this argument compelling.

MR. KRESS: It drew the bright line rule because

that's when the Code said trial began. That's where the - - -

JUDGE RIVERA: But it's very clear from McIntyre that the court is looking to see how to balance these various concerns, what you've pointed out.

MR. KRESS: I - - - I - - - I just - - - I respectfully disagree. McIntyre doesn't set forth that analysis - - -

JUDGE RIVERA: It wouldn't have the rest of all of this writing if it just said we're compelled to make - - - to draw this rule based on the criminal procedure law in - - - in effect at that time, the Code at that time.

MR. KRESS: That's the only thing it says about its timeliness ruling. It talks about the general principles. And its one sentence is: this request was timely inasmuch as it came before the opening statement. And it cites the Code. I think, to me, that the only reasonable inference is - - -

JUDGE RIVERA: Can you address the argument that your rule is one that injects uncertainty where the bright line rule, if it starts with the summation, makes it a very clear rule?

MR. KRESS: Yes, I have two responses to that. The first is that you don't even need to actually answer that question in this case because no matter when jury - -

- there's no dispute the jury selection was underway in this case; eleven jurors had been selected. You don't have to decide it.

However, even if you were, C.P.L. 270.15 says that the court "shall initiate the examination of prospective jurors by identifying the parties and their respective counsel and briefly outlining the nature of the case to all of the prospective jurors". That seems like a pretty clear statement about when jury selection begins.

And in fact, Your Honor, in your own - - - Judge Rivera, in your own dissent, in People v. King, you wrote that "the judge began the jury selection process by telling prospective jurors the name of the case and describing jury selection as a process by which the judge and attorneys ask questions of prospective jurors". And that's very similar to - - -

JUDGE RIVERA: Sure, in that case her point is it may vary depending on what happens in any particular moment, as the jurors are coming up or jurors are sitting down, or anything could happen in the courtroom at a moment.

MR. KRESS: I think when the C.P.L. says the court shall initiate the examination by doing X, that's a very clear point at when the jury selection process would begin.

I would also like to respond - - -

JUDGE RIVERA: So as they're walking in the room, that's not jury selection, correct?

MR. KRESS: I think, under the language of the C.P.L., no, it wouldn't be when they're walking into the room; it would be when the judge initiates the examination, you can say jury selection, the process, has begun, the examination process has begun.

But to go back to the original point about shifting the burden, the State has an interest in the efficient administration of justice. And at the point when you have jury selection about to begin, the defendant's right to go pro se is not absolute. At some point it gives way to this other countervailing interest. And when you - - - it gives way at the point of jury selection because, from that point forward, if you allow defendants to go pro se, you will be thwarting the kinds of - - -

JUDGE RIVERA: But yet as Judge Stein has pointed out, a judge would have the discretion to do so even under your - - -

MR. KRESS: Yes, and - - -

JUDGE RIVERA: - - - reading of the statute and the rule. So the reality is it's still unsettled that way.

MR. KRESS: I don't think it's unsettled, no. The judge has discretion to do it. So in an appropriate

case - - -

JUDGE RIVERA: And the judge here could have granted his request, the defendant's request, correct?

MR. KRESS: If it had - - - yes, he could have, but in this case - - -

JUDGE RIVERA: You don't disagree that you would have had the option that counsel has pointed to that if he felt that there was some prejudice he could have moved for a mistrial?

MR. KRESS: No, that's - - - that's correct, but this case is actually a perfect example of why there are not - - - there were not compelling circumstances to grant the defendant's request. He had absented himself from jury selection. Even if there was no way - - - even if there was no request to delay the trial, it's - - - it's absurd to think that he would have been prepared to go to trial at that point.

So the fact that he didn't actually request an adjournment really doesn't matter. And in fact, two cases we cite in our brief, Hill and Cooper, make this point that even if you don't have a request for an adjournment, that doesn't mean that you can't reasonably infer that there's going to be delay. And there absolutely would have been delay in this case. There's no question about it.

Also, you can take - - - to go back to another

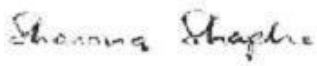
question that Judge Wilson was asking about the third prong of McIntyre and the defendant's promise to be disruptive, yes, that goes to the third prong of whether or not he's forfeited his right to go pro se, but it's also something you take into account when considering whether there are compelling circumstances that would - - - that would warrant granting an untimely request. So it's not exclusively relevant to the third prong. It also would be relevant to the timeliness inquiry, to the extent that you're looking for whether or not you could make an exception to - - - to the untimeliness of a request.

CHIEF JUDGE DIFIORE: Thank you, counsel.

(Court is adjourned)

C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of PEOPLE OF THE STATE OF NEW YORK v. RAYMOND CRESPO, No. 27, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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