

**[J-149-2003]**  
**IN THE SUPREME COURT OF PENNSYLVANIA**  
**EASTERN DISTRICT**

COMMONWEALTH OF PENNSYLVANIA,	:	No. 379 CAP
	:	
Appellee	:	
	:	Appeal from the Judgment of Sentence
v.	:	imposing death entered on January 3,
	:	2002 by the Court of Common Pleas of
	:	Lancaster County at Criminal No. 2324 of
	:	2000
TEDOR DAVIDO,	:	
	:	Argued: December 2, 2003
Appellant	:	

**CONCURRING OPINION**

**MR. JUSTICE SAYLOR**

**DECIDED: February 25, 2005**

I join the majority opinion, subject to a modest difference in the approach to Appellant's claim related to his request to proceed pro se at trial. In concluding that Appellant's assertion of his desire for self-representation was equivocal, the majority relies on three factors: 1) that the request was posed in the alternative to a request for substitute counsel; 2) that Appellant did not further pursue the request subsequent to its denial by the trial court at a pre-trial hearing; and 3) that Appellant ultimately withdrew the request. See Majority Opinion, slip op. at 10. Respecting the first ground, the prevailing view in other jurisdictions, with which I concur, is that the conditional aspect of the assertion of a desire to proceed pro se, posed as an alternative to a request for

substitute counsel, does not render the request equivocal.<sup>1</sup> The second factor, that Appellant failed to pursue his request for self-representation after the trial court had specifically and unambiguously denied it, seems to me to carry very little (if any) weight. In my view, as of the time that the trial court made its initial ruling, Appellant presented a sufficiently clear and unequivocal (albeit conditional) request for self-representation to implicate the constitutional concerns identified in Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525 (1975).

Indeed, I believe that the only circumstance cited by the majority that undercuts Appellant's present position is his affirmative withdrawal of the self-representation request on the eve of trial, in the following exchange:

THE COURT: . . . And I thought that, after you started seeing what was going on in the case, you would probably agree that you would be far better off having attorneys to represent you rather than you representing yourself. So at this time, do you still wish to represent yourself, or do you want Mr. Gratton and Mr. Spahn [the public defenders] to represent you at this time?

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<sup>1</sup> See, e.g., Wilson v. Walker, 204 F.3d 33, 38 n.3 (2d Cir. 2000) (“[A] defendant is not deemed to have equivocated in his desire for self-representation merely because he expresses the view in the alternative, simultaneously requests the appointment of new counsel, or use[s] it as a threat to obtain private counsel.” (quoting Williams v. Bartlett, 44 F.3d 95, 100 (2d Cir. 1994))); Adams v. Carroll, 875 F.2d 1441, 1445 (9th Cir. 1989) (same); State v. Blom, 682 N.W.2d 578, 613 (Minn. 2004) (“[A] motion for self-representation is not equivocal simply because it is made as an alternative plan in case the court does not grant a defendant’s motion for a different attorney.”); Gallego v. State, 23 P.3d 227, 236 (Nev. 2001) (same, and opining that the correct procedure is for the trial court to deny the request for substitute counsel (where warranted) and ascertain whether the defendant’s wish to represent himself remains extant in light of the fulfillment of the condition); State v. Brown, 676 A.2d 513, 519 n.5 (Md. 1996); State v. Richards, 456 N.W.2d 260, 264 (Minn. 1990) (“The case law is clear that ‘[a] request to proceed pro se is not equivocal merely because it is an alternative position, advanced as a fall-back to a primary request for different counsel.’” (citations omitted)).

[Appellant]: Your Honor, you were correct in allowing me to keep Mr. Gratton, and I wish him to represent me.

N.T. 11/28/01 at 2. In my view, this withdrawal brings the matter squarely within a line of the abandonment/waiver decisions,<sup>2</sup> which I find to be the preferable rationale to support the disposition here.

As noted, I join the balance of the majority's reasoning relative to the remaining issues presented.

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<sup>2</sup> See, e.g., Wilson, 204 F.3d at 37-39 (finding waiver subsequent to a clear and unequivocal assertion of the right of self-representation); Brown v. Wainwright, 665 F.2d 607, 610 (5th Cir. 1982) ("The present case presents an example of waiver through subsequent conduct after an initial request."); United States v. Kennedy, 564 F.2d 1329, 1340 (9th Cir. 1977) (holding, in a similar situation, that "the request [to proceed pro se] was withdrawn and the right consciously and knowingly waived"); cf. Williams v. State, 655 P.2d 273, 275 (Wyo. 1982) (finding waiver of a prior assertion of the right of self representation through continued use of counsel); Tucker v. State, 553 P.2d 951, 954 (Nev. 1976) (recognizing that a defendant waives his right to self-representation where he accepts and acquiesces in representation by a court-appointed attorney).