State of New York
Court of Appeals

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NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

Week of February 6 thru February 8, 2018

State of New York Court of Appeals

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To be argued Tuesday, February 6, 2018

No. 19 Matter of Abdur-Rashid v New York City Police Department
Matter of Hashmi v New York City Police Department

In 2012, after a series of Associated Press articles revealed that the New York Police Department had been conducting covert surveillance of Muslim communities in New York and New Jersey in the wake of the Sept. 11, 2001 terror attacks, Talib Abdur-Rashid and Samir Hashmi filed separate Freedom of Information Law (FOIL) requests with the NYPD seeking any records relating to surveillance or investigation of them personally or of organizations with which they were affiliated. Abdur-Rashid was Imam at the Mosque of Islamic Brotherhood in Manhattan; Hashmi was a student at Rutgers University and an officer of its Muslim Student Association. The NYPD rejected both requests -- without saying whether any such records existed -- on the ground that the information would be shielded from disclosure under FOIL's law enforcement and public safety exemptions.

Abdur-Rashid and Hashmi sued to challenge the denials of their FOIL requests, arguing the NYPD failed "to provide specific and particularized justification" for withholding the records. The NYPD moved to dismiss both suits, arguing the courts should adopt and apply the federal Glomar doctrine, which permits agencies to deny requests under the federal Freedom of Information Act (FOIA) without confirming or denying that the records exist. The doctrine was established in Phillippi v CIA (546 F2d 1009 [D.C. Circuit 1976]), which upheld on national security grounds the denial of a journalist's request for information from the Central Intelligence Agency about the Hughes Glomar Explorer, a vessel built secretly for the CIA to try to recover a sunken Soviet nuclear-armed submarine in 1974. Federal agencies may issue a Glomar response where the fact that records do or do not exist falls within a FOIA exemption.

In Abdur-Rashid's case, Supreme Court dismissed his suit and ruled the Glomar doctrine could be invoked in response to FOIL requests under New York law. The NYPD had shown that disclosing whether the requested records existed could undermine other investigations by revealing information about its "operations, methodologies, and sources of information" and might pose a threat to the safety of undercover officers and informants, the court said. While "FOIA is not intended for state agencies," it said, the Glomar doctrine had "a rational basis in the law and its application "was in keeping with the spirit of similar appellate" rulings on FOIL.

In Hashmi's case, Supreme Court denied the motion to dismiss, saying adoption of the Glomar doctrine "would effect a profound change to a statutory scheme that has been finely calibrated by the legislature" and "would build an impregnable wall against disclosure of any information concerning the NYPD's anti-terrorism activities." It said the NYPD has in the past been able to prevent the disclosure of sensitive information "within the existing procedures that FOIL currently provides" and any decision to adopt Glomar should be left to the legislature.

The Appellate Division, First Department, adopting the Glomar doctrine, affirmed the dismissal of Abdur-Rashid's suit and dismissed Hashmi's suit. It said the "doctrine is 'consistent with the legislative intent and with the general purpose and manifest policy underlying FOIL' ..., since it allows an agency to safeguard information that falls under a FOIL exemption." The NYPD "showed that answering petitioners' inquiries would cause harm cognizable under the law enforcement and public safety exemptions" in FOIL.... The affidavits submitted by NYPD's Chief of Intelligence establish that confirming or denying the existence of the records would reveal whether petitioners or certain locations or organizations were the targets of surveillance, and would jeopardize NYPD investigations and counterterrorism efforts."

For appellants Abdur-Rashid and Hashmi: Omar T. Mohammedi, Manhattan (212) 725-3846
For respondents NYPD and Kelly: Assistant Corporation Counsel Devin Slack (212) 356-0840

State of New York Court of Appeals

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To be argued Tuesday, February 6, 2018

No. 21 People v Michael Johnson

In May 2009, a chauffeur returning to his home in Queens was approached by a masked gunman, who grabbed the key fob to his employer's BMW sedan. When the victim began to resist, the gunman shot him twice in the torso and drove away in the BMW. Three days later, NYPD detectives who were tailing Michael Johnson as a suspect in the shooting stopped him for traffic infractions and arrested him for driving without a valid license. They recovered two BMW key fobs, about $2,000 in cash, and a forged airport ID card from JFK, among other things. At the precinct, they learned that the SUV he was driving had been stolen; that one of the key fobs belonged to the BMW stolen in Queens and the other to a vehicle stolen in Suffolk County; and that much of the currency appeared to be counterfeit because the bills had the same serial number. While Johnson was being held at the precinct, Secret Service agents interviewed him about the counterfeit currency, Suffolk County police officers interviewed him about the BMW stolen in their jurisdiction, and Port Authority police officers interviewed him about the fake JFK ID card. As that was underway, an NYPD detective went to the hospital to show a photo array to the victim, who identified Johnson as the shooter. The detective returned to the precinct and Johnson, about 25 to 28 hours after his arrest, waived his Miranda rights and admitted he was involved in the robbery as a driver, but said another man was the shooter. He was arraigned about 29 to 33 hours after his arrest. Supreme Court denied his motion to suppress his statement as involuntary. Johnson was convicted of numerous crimes, including second-degree attempted murder, first-degree robbery, and possession of a forged instrument, and was sentenced to 32 1/2 years in prison.

The Appellate Division, Second Department affirmed on a 3-1 vote, finding no evidence that Johnson's statements were involuntary. It said that "the delay in arraigning the defendant was attributable to a thorough and necessary police investigation," which involved coordinating "with three other law enforcement agencies" and conducting a photo array at the hospital "when the victim became available." Although the prosecution did not offer affirmative proof that he was given food, drink, and access to a restroom while he was held at the precinct, the majority said Johnson "did not testify that he was denied any of these necessities, and his counsel did not offer any other proof of such deprivation." It said the trial court "providently exercised its discretion in denying his request for a missing witness charge as to the victim's son," who had estimated the shooter was about 5 inches taller than the descriptions given by other witnesses. "In light of the extensive and well-corroborated identification evidence in this case, the testimony of the victim's son as to the narrow issue of the defendant's height would have been immaterial." It said Johnson was not entitled to a mistrial after a cooperating witness testified that he had committed multiple uncharged crimes with Johnson, since "any prejudice to the defendant was ameliorated when the Supreme Court sustained his objection to the improper testimony, struck that portion of his testimony, and provided a curative instruction...."

The dissenter said Johnson's statements should have been suppressed as involuntary. "Where, as here, there is a delay of up to 33 hours between the time a defendant is arrested and arraigned, and where that defendant is interrogated by multiple law enforcement agencies, it is my view that the People must present evidence to demonstrate that the defendant was provided access to food, water, a bathroom, and sleep, in order to establish that any statements ... were made voluntarily." She said the trial court's "curative instruction was insufficient to ameliorate the prejudice" caused by the improper testimony about uncharged crimes; and Johnson was entitled to a missing witness charge regarding the victim's son, whose description of the shooter "went directly to a material issue.... [T]hese cumulative errors cannot be considered harmless, as the evidence of guilt was not overwhelming" in a case where "the assailant wore a mask concealing his entire face except for his nose and eyes."

For appellant Johnson: De Nice Powell, Manhattan (212) 693-0085
For respondent: Queens Assistant District Attorney Nancy Fitzpatrick Talcott (718) 286-6696

State of New York Court of Appeals

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To be argued Tuesday, February 6, 2018

No. 20 Keyspan Gas East Corporation v Munich Reinsurance America, Inc.

Keyspan Gas East Corporation, facing millions of dollars in costs to clean up environmental contamination at the sites of now-closed manufactured gas plants owned by Keyspan's predecessor, the Long Island Lighting Company (LILCO), brought this action to recover its costs from insurance companies that issued general liability policies to LILCO. The contamination occurred gradually and continuously as hazardous wastes from the manufacturing process leached into soil and groundwater over more than a century, beginning around 1900.

Century Indemnity Company issued first-layer excess policies covering LILCO's gas plants in Rockaway Park, Queens, and Hempstead, Long Island, for a 16-year period from 1953 to 1969. The Century policies state that they provide coverage for accidents, occurrences, or property damage that occurs "during the policy period." Northern Assurance Company of America issued upper-layer excess policies, effective from 1960 to1962 and 1964 to 1966, covering a third LILCO gas plant in Bay Shore, Queens. Northern's policies follow form to the underlying excess policies issued by Century.

Supreme Court agreed with Century that liability for the long-term contamination should be allocated on a pro rata basis, which requires each insurer to bear a share of the cost in proportion to the amount of time its policy was in force and requires Keyspan to bear its share of the cost for periods when it chose not to buy insurance. However, it adopted an "availability" exception to pro rata allocation based on the Second Circuit decision in Stonewall Ins. Co. v Asbestos Claims Management Corp. (73 F3d 1178). The trial court held that, except for the period from 1971 to 1982 when the Insurance Law prohibited the sale of pollution liability insurance, liability for periods when insurance for contamination was unavailable should be allocated to Century.

The Appellate Division, First Department ruled the unavailability exception to pro rata allocation does not apply to Century's policies, which limit coverage to damage that occurs "during the policy period." Consolidated Edison Co. v Allstate Ins. Co. (98 NY2d 208) and M/O Viking Pump Inc. (27 NY3d 244) "make it abundantly clear" that, in resolving insurance disputes, "courts are required to look first at the language of the policies involved." It said the unavailability exception is "inconsistent with policy language restricting coverage to the policy period.... There are no express contract provisions requiring the insurer to cover damages outside of the policy period when insurance is otherwise unavailable in the marketplace."It said the exception would subject insurers to "risks beyond those contemplated by the parties when the policies were purchased."

Keyspan argues, "In allocating liability to the policyholder for periods when insurance was unavailable, the Appellate Division departed from two decades of New York case law applying the availability approach to pro-rata allocation, i.e., allocating only to periods when insurance was available." It urges the Court to adopt "Stonewall's availability approach," in which liability for long-term damage is allocated only "across years in which ... insurance was available. Insurers are responsible for the share of liability allocated to the periods in which they issued policies, while policyholders are responsible for periods in which they voluntarily self-insured." Keyspan also argues that, based on "anti-stacking language" in it policies, liability must be apportioned on an all sums basis, which would permit it to recover all of its clean-up costs under policies triggered in any one year and leave those insurers to seek contribution from other insurers whose policies covered the same risks.

For appellant Keyspan: Robert A. Long, Washington, DC (202) 662-6000
For respondent Century Indemnity: Jonathan D. Hacker, Washington, DC (202) 383-5300
For respondent Northern Assurance: Robert F. Walsh, Manhattan (212) 244-9500

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To be argued Wednesday, February 7, 2018

No. 22 Gilbane Building Co./TDX Construction Corp. v St. Paul Fire and Marine Insurance Co.

Gilbane Building Co./TDX Construction Corp., a joint venture, was retained by the Dormitory Authority of the State of New York (DASNY) in 2001 to serve as construction manager for the construction of a 15-story forensic laboratory for New York City's Office of the Chief Medical Examiner on the Bellevue Hospital Campus in Manhattan. By separate contract, DASNY hired Samson Construction Co.as the prime contractor for excavation and foundation work. In its contract with DASNY, Samson agreed to obtain general liability insurance that covered "the construction manager," among others, as additional insureds. Samson obtained its liability policy from Liberty Insurance Underwriters. The policy contained an "Additional Insured - By Written Contract" clause, which provided that Liberty would cover "as an insured any person or organization with whom you have agreed to add as an additional insured by written contract...."

Beginning in 2003, Samson's excavation work allegedly caused an adjacent building to settle, causing significant structural damage. In 2006, DASNY sued Samson and the project architect for negligence. In 2010, the architect brought a third-party action against Gilbane/TDX and its member companies, alleging the construction manager had been negligent in supervising Samson's work. Gilbane/TDX sought defense and indemnification from Liberty as an additional insured under its policy with Samson. Liberty denied coverage on the ground that Gilbane/TDX did not qualify as an additional insured and did not provide timely notice of the third-party claim. Gilbane/TDX brought this action seeking a declaration that Liberty was obligated to provide coverage. Liberty moved for summary judgment, arguing Gilbane/TDX was not entitled to coverage because it did not have a written contract with Samson to make it an additional insured.

Supreme Court denied Liberty's motion and declared that Gilbane/TDX was an additional insured under the policy. The court said the policy's "Additional Insured - By Written Contract" clause "requires only a written contract to which Samson is a party" and it found this requirement was met by Samson's contract with DASNY, which required Samson to obtain insurance naming the construction manager as an additional insured.

The Appellate Division, First Department reversed on a 4-1 vote, holding that "the language in the 'Additional Insured - By Written Contract' clause of the Liberty policy clearly and unambiguously requires that the named insured execute a contract with the party seeking coverage as an additional insured. Since there is no dispute that Samson did not enter into a written contract with [Gilbane/TDX], Samson's agreement in its contract with DASNY to procure coverage for [Gilbane/TDX] is insufficient to afford [Gilbane/TDX] coverage as an additional insured under the Liberty policy."

The dissenter said the additional insured clause "is poorly drafted in terms of syntax," but should be read "to cover any party the policyholder agreed by written contract to cover.... By entering into just such a written contract with the property owner, DASNY, which included an agreement that Samson would obtain a [liability] policy naming Gilbane as an additional insured, Samson both triggered the provisions of the 'additional insured' endorsement of the Samson-Liberty policy ... and acted in conformity with those terms."

For appellants Gilbane/TDX: Richard W. Brown, Trumbull, CT (203) 287-2100
For respondent Liberty Insurance Underwriters: George R. Hardin, Manhattan (212) 571-0111

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To be argued Wednesday, February 7, 2018

No. 23 Gravano v Take-Two Interactive Software, Inc.
No. 24 Lohan v Take-Two Interactive Software, Inc.

Lindsay Lohan and Karen Gravano brought these actions against video game makers Take-Two Interactive Software, Inc. and its subsidiary, Rockstar Games, each alleging the companies violated her right to privacy under Civil Rights Law §§ 50 and 51 by incorporating her image, voice, and persona into the game Grand Theft Auto V, which was released in 2013. Section 50 makes it a misdemeanor to use "for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person...." Section 51 allows any person "whose name, portrait, picture or voice is used" in violation of section 50 to sue "to prevent and restrain the use thereof" and to recover damages. Lohan, an actress and celebrity, claims the character "Lacey Jonas" depicts her in the game, including references to her personal history. Images of the "Jonas" character were also used in advertising materials and on merchandise. Gravano is the daughter of Gambino underboss Sammy "The Bull" Gravano, who testified as a government witness against John Gotti and other mob figures. She starred in the television series "Mob Wives" and wrote a best-selling memoir about growing up with her infamous father. Gravano claims the character "Antonia Bottino" depicts her in the game and makes references to her background as the daughter of a mobster who became a government witness.

Supreme Court denied motions by Take-Two and Rockstar to dismiss the suits, ruling that both plaintiffs had sufficiently alleged violations of Civil Rights Law §§ 50 and 51 and that documents offered by the defendants to show that images of the game characters were not those of the plaintiffs "were vehemently and factually contested" by the plaintiffs, raising questions of fact.

The Appellate Division, First Department dismissed both suits, saying the plaintiffs' claims under section 51 "must fail because the defendants did not use [their] 'name, portrait or picture,'" did not use either plaintiff "as an actor for the video game," and did not use any photographs of them. Even if the game characters could be considered representations of the plaintiffs, it said, their "claims should be dismissed because this video game does not fall under the statutory definitions of 'advertising' or 'trade'.... This video game's unique story, characters, dialogue, and environment, combined with the player's ability to choose how to proceed in the game, render it a work of fiction and satire." Rejecting Lohan's argument that her image was used in advertising materials for the game, the court said, "The images are not of Lohan herself, but merely the avatar in the game that Lohan claims is a depiction of her."

The plaintiffs argue that they pled viable claims for invasion of privacy under the Civil Rights Law. Lohan says the defendants' "unauthorized deliberate use of [her] recognizable image on billboards and disc packaging solely to advertise and promote their video game violates" section 51. She says the First Department "erred in holding that 'portrait' or 'picture' does not include a reasonably recognizable digital image," and she contends the use of the image in advertising violated the statute because it was not merely ancillary to the permitted use in the game itself. Gravano argues "the First Amendment does not afford video games an absolute protection" against privacy claims because the games are primarily commercial.

For appellant Gravano: Thomas A. Farinella, Manhattan (917) 319-8579
For appellant Lohan: Frank A. Delle Donne, Brooklyn (718) 872-0533
For respondents Take-Two and Rockstar Games: Jeremy Feigelson, Manhattan (212) 909-6000

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To be argued Wednesday, February 7, 2018

No. 25 People v Nicholas Brooks

Nicholas Brooks was charged with murdering his girlfriend, Sylvie Cachay, after hotel staff found her body submerged in the bathtub of their room at the SoHo House in Manhattan in December 2010. The tub's faucet was running. Brooks was at a bar when the body was found and he was arrested when he returned to the room less than an hour later. The prosecution contended that Brooks strangled and drowned Cachay because she intended to break up with him, and that he left her in the tub and went to the bar in an attempt to create an alibi. Brooks contended that, after he left, Cachay accidentally drowned in the tub due to the combined sedative effects of five prescription medications found in her system during the autopsy. In support, he offered expert testimony by a former chief medical examiner for Suffolk County. After granting the prosecution's motion for a Frye hearing to challenge the scientific basis for the expert's theory, the court allowed him to testify with limits on the scope of his testimony. The court also allowed prosecutors to call 11 of Cachay's friends to testify about the mercurial nature of their relationship, Cachay's low views of Brooks' character, and her attempts to break up with him. Brooks was convicted of second-degree murder and sentenced to 25 years to life in prison.

The Appellate Division, First Department affirmed, saying the trial court properly granted the Frye hearing. "Defendant's forensic pathologist was not an expert in toxicology and could provide no authority to support his theory that five prescription drugs found in the victim's system interacted with one another so as to heighten their sedative effect and cause the victim to die accidentally, either directly from overdose or secondarily through accidental drowning ... as a result of unintended drug-induced incapacitation. Defendant's claim that he was prejudiced by the mere fact that a hearing was held is unsubstantiated." It said the testimony of Cachay's friends was properly admitted. "Proof of the 'murder victim's espoused intention to terminate her relationship with, and stay away from, defendant' was admissible to show the 'victim's state of mind' and was 'relevant to the issue of the motive of defendant, who was aware of the victim's attitude, to kill the victim'.... Hence, the background information about the couple's 'strife and unhappiness' was admissible as 'highly probative of the defendant's motive and [was] either directly related to or inextricably interwoven with the issue of his identity as the killer'...."

Brooks argues the trial court erred in granting the Frye hearing "because the expert's testimony did not involve a novel scientific theory or procedure," and further erred in "permitting it to become a discovery tool that the People exploited to prepare for trial." He says the court "permitted the People essentially to 'depose' [his expert] at great length on subjects far afield from a proper Frye inquiry. The hearing went on for four days and consumed over 500 transcript pages." He argues the erred in allowing "inadmissible, prejudicial hearsay" testimony by Cachay's friends that "portrayed Brooks as a lazy, lascivious, marijuana-smoking, contemptible bum, who patronized prostitutes, visited adult websites, and once ... threatened to kill her. The testimony served no proper purpose and conveyed to the jury that Brooks had a bad character and a propensity to do bad things."

For appellant Brooks: Susan C. Wolfe, Manhattan (212) 885-5000
For respondent: Manhattan Assistant District Attorney David M. Cohn (212) 335-9000

State of New York Court of Appeals

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To be argued Thursday, February 8, 2018 (arguments begin at noon)

No. 26 E.J. Brooks Company, d/b/a TydenBrooks v Cambridge Security Seals

E.J. Brooks Company, doing business as TydenBrooks, is the nation's largest manufacturer of plastic security seals, which are used to detect tampering with containers ranging from mail bags to chemical drums to first aid kits and other medical supplies. Cambridge Security Seals (CSS) was founded in 2010 and began manufacturing plastic security seals in competition with TydenBrooks at the end of 2011. In 2012, TydenBrooks brought this federal action for misappropriation of trade secrets, unfair competition, and unjust enrichment against CSS and three former TydenBrooks employees who went to work for CSS, alleging that CSS copied its automated process for manufacturing the security seals. As for damages, TydenBrooks pursued an "avoided costs" theory in which damages would be measured by the total costs CSS avoided by copying TydenBrooks's manufacturing process instead of developing its own.

U.S. District Court instructed the jury that damages could be based on CSS's avoided costs and explained the jury would have to compare CSS's actual costs in setting up its production lines "with the costs it would have incurred to produce the same products without the use and knowledge of [TydenBrooks's] manufacturing process." It told the jury to consider whether CSS "realized savings in research and development costs," whether CSS "gained a competitive advantage" by being able to bring its security seals to market earlier, and whether it realized any savings in operating costs due to the efficiencies of TydenBrooks's design.

The jury found in favor of TydenBrooks and awarded it $3.9 million on its trade secrets, unfair competition, and unjust enrichment claims. TydenBrooks then moved to amend the judgment to include prejudgment interest at 9% per year from February 2011, a total of nearly $1.5 million. District Court denied the motion, saying it instructed the jury to assess damages "from the date of the misappropriation ... through the date on which the verdict is given," which would make prejudgment interest for the same period "a windfall double recovery."

The U.S. Court of Appeals for the Second Circuit, regarding CSS's appeal, said there is no New York precedent that makes clear whether damages in a trade secret case may be based on avoided costs, or whether damages must "bear some connection to the plaintiff's losses." Regarding TydenBrooks's appeal of the denial of prejudgment interest, it said CPLR § 5001(a) "uses language suggesting that prejudgment interest is mandatory in cases involving misappropriated property." However, it said, "In a case in which the damages awarded are not clearly compensatory..., we find it hard to square the mandatory language of section 5001 with the import of the New York decisions ... that suggest that prejudgment interest under the statute is not mandatory where a windfall is the likely result." It is asking this Court to resolve both issues in a pair of certified questions: "1. Whether, under New York law, a plaintiff asserting claims of misappropriation of a trade secret, unfair competition, and unjust enrichment can recover damages that are measured by the costs the defendant avoided due to its unlawful activity. 2. If the answer ... is 'yes,' whether prejudgment interest under [CPLR] § 5001(a) is mandatory where a plaintiff recovers damages as measured by the defendant's avoided costs."

For appellant-respondent TydenBrooks: Daniel B. Goldman, Manhattan (212) 715-9100
For respondent-appellant CSS (Cambridge): Howard W. Schub, Manhattan (212) 506-1700

State of New York Court of Appeals

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To be argued Thursday, February 8, 2018 (arguments begin at noon)

No. 27 People v Raymond Crespo

Raymond Crespo was arrested in January 2013 after he allegedly stabbed a man during a street fight in East Harlem in January 2013. Prior to the start of jury selection for his trial, Crespo's attorney moved to withdraw, telling Supreme Court that Crespo would no longer speak with him. The court denied the motion. During jury selection, Crespo told the court that he did not want his appointed lawyer to represent him and that he wanted to defend himself. The court denied his request, saying it was "too late to make that request." A short time later, Crespo again told the court that he wanted to represent himself, and the court again denied the request as untimely. Crespo was convicted of first-degree assault and weapon possession, and was sentenced to 20 years to life in prison.

The Appellate Division, First Department reversed and remanded for a new trial, ruling the trial court violated Crespo's right to self-representation. "Contrary to the trial court's finding, defendant's requests to proceed pro se, made during jury selection, were timely asserted" because they were made before the prosecution's opening statement, it said, citing People v McIntyre (36 NY2d 10 [1974]. "We reject the People's argument that the request to proceed pro se must be made before jury selection...."

The prosecution says McIntyre held only that requests to proceed pro se "are timely if they are made 'before the trial commences.'" The trial in McIntyre was held under the former Code of Criminal Procedure, which provided that a trial commenced with the prosecution's opening statement. The prosecution argues that the adoption of the Criminal Procedure Law to replace the Criminal Code in 1971 changed the meaning of the term 'trial' to include jury selection, and thus a request to proceed pro se must be made prior to jury selection in order to be timely.

For appellant: Manhattan Assistant District Attorney Stephen J. Kress (212) 335-9000
For respondent Crespo: Ben A. Schatz, Manhattan (212) 577-2523 ext. 544

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To be argued Thursday, February 8, 2018 (arguments begin at noon)

No. 28 People v Spence Silburn *(papers sealed)*

Police officers arrested Spence Silburn in Brooklyn in August 2011 when they saw him driving a car that had been stolen at gunpoint the day before. They found a loaded pistol in his jacket and took him to their precinct, where he waived his Miranda rights and admitted he had stolen the car. He also said he planned to shoot "some guys" who had shot at him days earlier. He became increasingly agitated, calling himself "a killer" and threatening to kill a detective, and finally he was taken to a hospital for a mental exam. A psychiatrist diagnosed him as having bipolar disorder with psychotic features and delusions.

At two pre-trial appearances, Silburn asked to proceed pro se with standby counsel, saying he wanted to question witnesses himself with the assistance of an attorney, "someone who acts like an aide." Supreme Court denied the request, saying, "[Y]ou have a right to represent yourself without an attorney. Or you have the right to have an attorney.... [Y]ou can't have dual representation." During the trial, Silburn's appointed counsel learned of the mental examination conducted on the day of his arrest and sought to introduce the psychiatrist's testimony or medical records reflecting the diagnosis of bipolar disorder. Defense counsel said he would use the evidence only to challenge the voluntariness of Silburn's Miranda waiver and confession. The court precluded the evidence for failure to comply with CPL 250.10. The statute requires a defendant to give prosecutors pre-trial notice of his intention to present "psychiatric evidence," which it defines as evidence "of mental disease or defect ... to be offered in connection with" affirmative defenses of insanity, extreme emotional disturbance, or "any other defense." Silburn was convicted of third-degree criminal possession of a weapon and unlicensed operation of a vehicle. He was sentenced to 12 years in prison.

The Appellate Division, Second Department affirmed, finding his request to represent himself was equivocal. "A 'defendant's request to proceed pro se must be based on a knowing, voluntary, and intelligent waiver of the right to counsel'.... Here, the Supreme Court did not violate the defendant's right to self-representation, since the defendant made no such waiver.... [H]e never asserted a desire to proceed pro se at trial, but only asked to 'go pro se with standby counsel,' a request that was properly denied...." It said the court did not err in precluding his psychiatric history, "as the defendant did not provide actual, timely notice of his intent to present psychiatric evidence" under CPL 250.10. "In any event..., the proffered psychiatric evidence would not have established that [he] had been unable to knowingly and voluntarily waive his right against self-incrimination at the time of his apprehension."

Silburn says his request for standby counsel did not render his request to proceed pro se equivocal, but instead "reflected a recognition that he could benefit from an attorney's technical assistance" and procedural advice. "It did not establish that he wished to share control of the case and essential strategic choices with an attorney." He says the trial court violated his right to self-representation by summarily denying his request without "any inquiry as to whether he still wished to represent himself if he could not have standby counsel." He says his psychiatric history was improperly precluded because the notice requirement of CPL 250.10 "applies only when psychiatric evidence is offered to support a defense to the charged crime," not when its "sole purpose" is to support his claim that his Miranda waiver was unknowing and involuntary. He also claims the court abused its discretion in refusing to accept late notice where "the People had knowledge of [his] mental health issues almost immediately after the crime and had themselves generated the psychiatric evidence in issue."

For appellant Silburn: Alexis A. Ascher, Manhattan (212) 693-0085
For respondent: Brooklyn Assistant District Attorney Howard B. Goodman (718) 250-2512