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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

NO. 28

SPENCE SILBURN,

Appellant.

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20 Eagle Street  
Albany, New York  
February 8, 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 JUDGE PAUL FEINMAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The next matter on the  
2 calendar is Appeal number 28, the People of the State of  
3 New York v. Spence Silburn.

4 Good afternoon, counsel.

5 MS. ASCHER: Good afternoon, Your Honors. My  
6 name is Alexis Ascher, and I am here on behalf of Spence  
7 Silburn. I'd like to start by requesting my two minutes  
8 for rebuttal, please.

9 CHIEF JUDGE DIFIORE: You may.

10 MS. ASCHER: People v. McIntyre. I'm here for  
11 the other end of it: the part where the defendant's  
12 request to go pro se has to be deemed unequivocal. Forty-  
13 three years ago in McIntyre, this court characterized a  
14 request to proceed pro se with standby counsel as  
15 unequivocal.

16 CHIEF JUDGE DIFIORE: So let's go right to his  
17 language. He says, when the judge inquires, "In other  
18 words, you want to represent yourself?" And according to  
19 the transcript, the defendant responds, "Not" - - - "not  
20 just that rep my" - - - "represent myself but having  
21 limitation with my counsel."

22 MS. ASCHER: Yes. That was the first request.  
23 That means, not only do I want to steer my own ship and run  
24 this case, I want my attorney to be on the sidelines to  
25 help me with advice and guidance. That's two separate



1 requests. I want to proceed pro se; I want to take  
2 charge, and I still want him here for the technical stuff.  
3 That was a very unequivocal request to proceed pro se and a  
4 separate request for standby counsel. That's what McIntyre  
5 says. That's what happened in Mirenda. In Mirenda, the  
6 same kind of situation. The defendant requested to go pro  
7 se with standby counsel. The court did the inquiry,  
8 granted him the pro se request, but denied the standby  
9 counsel part.

10 This court was dismissive. This court said, I  
11 don't do that. You either sit there by yourself or you  
12 have your attorney represent you. Let's move on. And  
13 that's what it did the second time as well. It was  
14 dismissive and it was cursory and it didn't take  
15 appellant's request to take charge of his own case and  
16 request self-representation seriously.

17 JUDGE WILSON: So what I was - - -

18 JUDGE GARCIA: Let's say - - -

19 JUDGE WILSON: Yeah, go ahead.

20 JUDGE GARCIA: Let's say, he - - - same  
21 statement, and the judge instead says to the defendant, I  
22 don't do that; you either have to go pro se, meaning alone,  
23 or use your lawyer, no combination of that. Do you want to  
24 still go pro se? And the defendant says, I do, but I want  
25 my standby lawyer. At that point, is it equivocal?



1 MS. ASCHER: Well, that's a different situation  
2 not present here. But again, under the case law, I believe  
3 the court should take the pro se request separately and  
4 start doing the inquiry as to whether he can intelligently  
5 waive his right to counsel.

6 JUDGE GARCIA: And then he does the inquiry - - -  
7 or she does the inquiry in that case - - - and they get to  
8 the end and, okay, you can pro se. He says, now, I - - - I  
9 want my standby counsel. And the court says, you can't  
10 have it. He says, what - - - is now that equivocal? Do  
11 you undo the entire colloquy at that point and say, no, no,  
12 you really didn't make an unequivocal request, even though  
13 you've just gone through this whole thing, but you're still  
14 saying you want your standby counsel? At what point does  
15 it become equivocal?

16 MS. ASCHER: I'm going to point Your Honor to  
17 People v. Mirenda. In Mirenda, as I said before, the  
18 defendant requested to go pro se and for standby counsel.  
19 That court, like this court, said, no, I don't do standby  
20 counsel. As part of this step 2 inquiry, when the court  
21 was going through whether he can intelligently waive it, he  
22 included in that, look, I don't do standby counsel. Do you  
23 understand that if you go pro se, you're not having standby  
24 counsel?

25 So I submit the - - - the way to resolve that



1 kind of situation is for the standby counsel information,  
2 that's not my policy. Do you understand going forward, you  
3 know, you're not going to have standby counsel? That could  
4 be part of the waiver inquiry.

5 JUDGE STEIN: Well, in the fir - - - here, in the  
6 first inquiry, when the court said "I don't have legal  
7 advisors; you choose to represent yourself, you sit there  
8 by yourself. You want to have a lawyer, you have a lawyer.  
9 All right?" No answer on the record. So what - - - what  
10 was wrong with that colloquy?

11 MS. ASCHER: That's not enough. When Mr. Silburn  
12 requested to go pro se, the burden transferred to the court  
13 to make sure that he can do a valid inquiry of waiver.

14 JUDGE STEIN: But did he ever say - - - if he  
15 said "All right," and he said "All right, I'll do it by  
16 myself," then the court would go forward and make sure that  
17 - - - that all the conditions were met.

18 MS. ASCHER: Well, I submit that under the case  
19 law and under the - - - the cherished right that a  
20 defendant has to represent himself, that's putting too  
21 heavy of a burden on a criminal defendant. Let's remember  
22 who the players are in this courtroom. It's the court with  
23 all the power and the defendant, who already asserted very  
24 artic - - - very articulately, that I would like to know if  
25 I could proceed pro se, and the court, who shut him down



1 immediately, said all right and then didn't even give him  
2 an opportunity to respond and set the next date for  
3 conference.

4 I think that's putting too heavy of an onus on a  
5 criminal defendant. He already did his part. He said, I  
6 want to go pro se, and then the burden went to the court to  
7 do the inquiry of waiver. At the very least, the court, in  
8 this situation, which isn't the minority of courts in New  
9 York City, you know, just to make that clear to the court,  
10 what Ms. Silburn was requesting was probably what he  
11 thought was the norm.

12 JUDGE WILSON: So we don't actually know if the  
13 "all right" is delivered with a question mark, a period, or  
14 an exclamation, I think.

15 MS. ASCHER: That's right. We just have this  
16 written.

17 JUDGE WILSON: And when we - - - when we read - -  
18 - when I read - - - put the two transcripts together and I  
19 read them, at least the way it appears to me, is the judge  
20 clearly did not understand that the defendant was asking to  
21 represent himself without the assistance of counsel. I  
22 thought he'd said something different, but the defendant  
23 clearly believed - - - because he corrects the court, and  
24 said, "I didn't say that," when the judge says to him, you  
25 know, you said you didn't want to proceed without - - - you



1 know, if you couldn't have standby counsel. He says, "I  
2 didn't say that." So it seems like there's a complete lack  
3 of meeting of the minds.

4 MS. ASCHER: Well, I think what happened in this  
5 case is that the judge assumed that, if he couldn't have  
6 standby counsel, he didn't want to proceed pro se. But Mr.  
7 Silburn kept on protesting, and not only did he say, no, I  
8 never said that, he said, I don't want dual representation.  
9 When the court said, you want dual representation, he said,  
10 no, I don't. He said, I want to go pro se, and I want him  
11 to be standby counsel. And he proceeded to, you know, push  
12 the court on what the Constitution meant, but at the end of  
13 the day, this record is great because not only did he make  
14 his request to proceed pro se, he affirmatively said, I  
15 don't want dual representation.

16 And when the court misremembered what had  
17 happened at the prior proceeding and said, well, you said  
18 you didn't want standby counsel, he said, no, I didn't.  
19 And what did the court do? The court said, I'm denying  
20 your request. The court didn't even follow up then and  
21 say, oh, well, you didn't say that; do you still wish to go  
22 pro se, now knowing this? The court didn't do that. The  
23 court said, I'm denying your request, and if I'm wrong,  
24 take it up on appeal.

25 JUDGE RIVERA: I - - - I - - -



1 MS. ASCHER: And here we are.

2 JUDGE RIVERA: If I can just - - - I thought it  
3 was actually stronger than that. I thought the court said,  
4 "And you said you didn't want to represent yourself" He  
5 said, "I never said that."

6 MS. ASCHER: Yes, you're right, Your Honor. He -  
7 - - again, Mr. Silburn was very articulate in what he  
8 wanted, and the burden was on the court to do a waiver  
9 inquiry. Part of that waiver inquiry could have been,  
10 look, I don't do standby counsel; do you understand this?  
11 But this court did nothing. It didn't even say, now that  
12 you know this, do you still wish to proceed pro se? That's  
13 the very least that should be happening.

14 JUDGE RIVERA: You're saying it was at least one  
15 other question that should have been asked. I've now told  
16 you, you are either going to have a lawyer, or you  
17 represent yourself. No lawyer is going to be with you. Do  
18 you still want to go pro se without a lawyer helping you?

19 MS. ASCHER: Absolutely.

20 If the court has no further questions, I'd like  
21 to touch on the statutory issue that we raised in our  
22 brief. It does not apply in this case for the simple  
23 reason is a literal reading of the statute says it does not  
24 apply. Any other defense in conjunction with the defenses  
25 above, which are affirmative defenses of EED and insanity,



1 the rules of statutory interpretation that are cited in our  
2 brief means that those defenses have to be ones that go to  
3 your mental state at the commission of the crime.

4 Voluntariness regarding your Miranda statement is not one  
5 of those defenses.

6 JUDGE FEINMAN: Are you familiar with the Rossi  
7 case out of the Third Department? I know it's not cited.

8 MS. ASCHER: I am not, but if you would like to  
9 tell me.

10 JUDGE FEINMAN: If - - - if defendant is charged  
11 with a DWI, and toxicology shows that they were on drugs,  
12 and they want to introduce psychiatric evidence that shows  
13 that their behavior at the time of the arrest was due to a  
14 personality disorder as opposed to being on drugs or  
15 otherwise intoxicated. Do you have to give evidence - - -  
16 notice of your intent to introduce that?

17 MS. ASCHER: If it goes to the mental state of  
18 the defendant at the time of the crime and it concerns  
19 psychiatric evidence, then under the statute, it sounds  
20 like you do. But here that's not the case. Defense  
21 counsel wanted to put in the psychiatric evidence that he  
22 didn't even know about until trial to challenge the  
23 voluntariness of the Miranda statement. Meaning, his state  
24 of mind, when he sat down and spoke to the police, not his  
25 state of mind when he got out of the car.



1 JUDGE RIVERA: Let me ask you this. Let's say  
2 that - - - let me ask it a different way. Could the jury  
3 have rejected his arguments and found him guilty even if  
4 the evidence had gone in?

5 MS. ASCHER: It could have because - - -

6 JUDGE RIVERA: Does it go to the guilt?

7 MS. ASCHER: That's - - - that's a fact - - -  
8 it's a fact for the jury whether this statement was  
9 involuntary. I'm not sure I answered your question.

10 JUDGE RIVERA: Let's say they agreed with it.  
11 Could have still have found guilty? Let's say they have  
12 persuaded. It's not voluntary. Could they find him guilty  
13 anyway?

14 MS. ASCHER: Well, no, not on the facts of this  
15 case, because the statement was the most damaging evidence  
16 that was submitted here at trial. It included every single  
17 part of the court's Molineux decision, where the court  
18 aimed to keep all this stuff out. It came in and then with  
19 added bonuses, that I'll leave to the record for this court  
20 to resolve. But the - - - the statement was the most  
21 damaging piece of evidence against Mr. Silburn. And  
22 because of it, the jury couldn't fairly - - -

23 CHIEF JUDGE DIFIORE: So how does that not come  
24 under a defense? I - - - I'm - - - I'm not following that.

25 MS. ASCHER: The statute is very clear that it's



1 restricted in the type of defenses. The Miranda, the  
2 voluntariness, is a generic defense. It's not a defense  
3 that goes to your mental state at the commission of the  
4 crime, which is what 250.10 spells out.

5 CHIEF JUDGE DIFIORE: So that's your argu - - -  
6 that's your specific argument limited to that.

7 MS. ASCHER: Yes. The language is clear. We've  
8 laid that the legislative history is also - - -

9 JUDGE STEIN: I may be wrong about this, but my  
10 recollection of the legislative history was that - - - that  
11 - - - that first the rule was that you have to give notice  
12 in a case where you're claiming not guilty by reason of  
13 mental defect. Then they added the extreme emotional dis -  
14 - - disturbance defense.

15 MS. ASCHER: Yes.

16 JUDGE STEIN: And then they said, any other  
17 defense. So why - - - I don't understand why that wasn't  
18 just an indication of legislative intent to open it up and  
19 not necessarily tie it to those first two provisions.

20 MS. ASCHER: If I may, Your Honor, my time is up  
21 - - -

22 CHIEF JUDGE DIFIORE: Yes.

23 MS. ASCHER: - - - but I have a great answer to  
24 that question. Because the catchall provision of "C", any  
25 other defense, codified People v. Segal. And in People v.

1 Segal, it was psychiatric evidence that went in to prove  
2 the defendant couldn't act with the intent to commit the  
3 crime of perjury. So "C" codifies a specific mens-rea-type  
4 defense. In People v. Pitts, which is the companion case  
5 to People v. Almonor, this case also said that's a mens-  
6 rea-type defense that 1(c) seeks to capture.

7 So those two cases, and Segal, again, codifies -  
8 - - 1(c) codifies Segal, those two cases show that the  
9 statute is meant to be read very restrictively and the type  
10 of notice that is required. Any other defense, not only if  
11 you read it straight on its face, refers to the two  
12 defenses before it, so I don't even think, you know, we get  
13 to the legislative history to be quite honest. Not only is  
14 it perfectly clear, but if you look at the legislative  
15 history, it was only meant to apply to the defendant's  
16 state of mind.

17 If the - - -

18 CHIEF JUDGE DIFIORE: Thank you, counsel.

19 MS. ASCHER: If there's no further questions,  
20 thank you.

21 CHIEF JUDGE DIFIORE: Counsel?

22 MR. GOODMAN: May it please the court, my name is  
23 Howard Goodman for the respondent. The trial court twice  
24 told the defendant that he had to choose between  
25 representing himself or being represented exclusively by



1 counsel. Defendant never stated clearly and  
2 unconditionally that he wanted to represent himself without  
3 professional assistance. He always - - -

4 JUDGE RIVERA: But he says, "I want to go pro  
5 se," and it - - - and then his own counsel says pro se.  
6 What - - - what's - - - what's uncertain about that?  
7 What's unclear about that?

8 MR. GOODMAN: Well, he says he wants to go pro  
9 se, and the judge says, "You mean you want to represent  
10 yourself?" And that's where the defendant says, "Yes, with  
11 rep" - - - "with limitation of my counsel."

12 JUDGE RIVERA: And - - - and isn't it at that  
13 point that, since one can go pro se with the assistance of  
14 counsel, that that is still unequivocal and the judge at  
15 that point should make an inquiry. It might only be one  
16 more sentence, one more question rather.

17 MR. GOODMAN: Well, first of all, I would say  
18 that it is - - -

19 JUDGE RIVERA: I mean, you agree that we have  
20 said that it is possible still to be representing oneself,  
21 even though there's an attorney next to you, because you  
22 could've had standby counsel.

23 MR. GOODMAN: And that's defined as hybrid  
24 representation - - -

25 JUDGE RIVERA: And it match - - - no - - -



1 MR. GOODMAN: - - - by Miranda, yes.

2 JUDGE RIVERA: Well, McIntyre says that the  
3 defendant there was - - - let me - - - I'm sorry; let me  
4 get the exact language on that - - - "Had a lawyer as an  
5 advisor."

6 MR. GOODMAN: Correct. That would - - - I would  
7 say two things. One, this - - - this court subsequently in  
8 - - - in Payton and Kathleen K., defined more specifically  
9 than in McIntyre, the phrase, un - - - you know, an  
10 unequivocal request. And in Payton and Kathleen K., the  
11 court said that the defendant has to demonstrate a fixed  
12 intention of a desire to relinquish a benefit of counsel  
13 and proceed alone without professional assistance.

14 So I would say that although McIntyre - - - the  
15 defendant in McIntyre did say I want to be rep - - - I want  
16 pro se representation, but I want standby counsel, McIntyre  
17 never defined what unequivocal was. It just accepted that  
18 that was an unequivocal request. But subsequently in  
19 Payton and in Kathleen K., the court said that the request  
20 has to be - - - that the defendant is willing to represent  
21 himself alone.

22 And the reason for that, I think, is because the  
23 defendant has no right to standby counsel. And so - - -

24 JUDGE RIVERA: Well, the defendant has a right to  
25 self-representation, so why - - - why place that kind of



1           burden - - - why - - - you want to interpret this language  
2           about the defendant's statements being unequivocal to be a  
3           very high burden on a defendant. To basically say, I only  
4           mean pro se; I don't mean anything else. I don't know what  
5           anything else could mean, but I don't mean it.

6                     MR. GOODMAN: Well, McIntyre places the burden on  
7           the defendant at page 17 of that brief - - -

8                     JUDGE RIVERA: Right, and the defendant here  
9           said, I want to go pro se. And his own counsel said pro se  
10          there - - - counsel, by the way, didn't say, oh, he means  
11          pro se with standby counsel or he means pro se with - - -  
12          even his own counsel, a person who's - - - I hope - - -  
13          aware of the law, says pro se.

14                    MR. GOODMAN: Right, but defendant is always  
15          making - - - is always saying he wants representation with  
16          - - - with - - - with pro se counsel.

17                    JUDGE FAHEY: I guess - - -

18                    MR. GOODMAN: He's never saying - - -

19                    JUDGE FAHEY: The prob - - - the problem is - - -  
20          is - - - is the statute requires that the request be  
21          unequivocal, and so it seems we're being confronted with  
22          two choices for pro se rules. One to say, if you make a  
23          request, whether it's with standby counsel or not with  
24          standby counsel, that's an unequivocal request, and the  
25          court, at a minimum, has to do a further inquiry.



1                   Your rule is, if you've requested standby counsel  
2 that's clearly unequivocal - - - or excuse me, that's  
3 clearly equivocal, therefore, no need for any further  
4 inquiry, because it's all about the inquiry, isn't it?

5                   MR. GOODMAN: It's all about the inquiry, Judge -  
6 - -

7                   JUDGE FAHEY: Okay, so - - - so our - - -

8                   MR. GOODMAN: - - - but when you look at the - -  
9 -

10                  JUDGE FAHEY: Am I correct in clarifying those  
11 two choices? You're saying the pro se rule is boom. You  
12 ask - - - you ask for standby. I don't have to ask  
13 anything else. You're out; you don't get it - - - you  
14 don't get - - - you don't get pro se rule. You don't - - -

15                  MR. GOODMAN: I'm not saying that, Judge. I'm  
16 not saying the - - - the defendant has to say - - - has to  
17 say the words, I want to represent myself without  
18 professional assistance. You have to look at the colloquy  
19 as a whole. And I think if you look at the colloquy as a  
20 whole - - -

21                  JUDGE FAHEY: But wouldn't it better - - - let's  
22 - - - let's start about - - - forget about a rule for a  
23 second. Wouldn't the better practice have been for him  
24 just to simply ask the next question, which is, no, I don't  
25 mean that you can't represent yourself; you can. But I - -



1 - I can't - - - I - - - you don't have a right to an  
2 attorney to assist you. Do you understand that when you go  
3 pro se? That's the only - - - then we wouldn't be here if  
4 he asked that question, right?

5 MR. GOODMAN: That's correct.

6 JUDGE FAHEY: Okay.

7 MR. GOODMAN: That's absolutely right. We  
8 wouldn't be here, but - - -

9 JUDGE FAHEY: So - - - so we'll all admit that  
10 that would have been the better practice. So the question  
11 is, what should the rule be, then, if we don't have that  
12 better practice out there?

13 MR. GOODMAN: The rule, I think, has to be that  
14 you have to assess the entire colloquy and - - - and  
15 understand what the defendant wanted, because what - - -  
16 this part of the inquiry is in - - - is focused on one  
17 thing: What is the desire of the defendant. What does the  
18 defendant want? Here the defendant - - - the judge gave  
19 him his options right up front. He said you have option A,  
20 which is you can represent yourself alone. You have option  
21 B, which you could be - - - be represented by counsel.

22 Defendant at no time - - - and he was given three  
23 opportunities to do this. At no time did he say, I want to  
24 be rep - - - I don't want to represent my - - - I want to  
25 represent myself. I want option A.



1 JUDGE FAHEY: I don't remember the transcript as  
2 - - - as well as some of the rest. Did you - - - was he  
3 ever asked that question unequivocally or clearly? Was he  
4 ever asked the question: Do you want to just represent  
5 yourself by yourself?

6 MR. GOODMAN: No, he was never asked it. Well,  
7 he - - - he was not - - - he was not asked that question,  
8 but the judge on two occasions gave him the option of A and  
9 B. And defendant, instead of selecting either A and B, put  
10 forth, he wanted either option C, which representation with  
11 standby counsel, or option D, which was dual  
12 representation. And defendant wanted dual representation.

13 The fact when he says in his colloquy, I don't  
14 want dual representation, is absolutely wrong, because his  
15 lawyer said that he wanted dual representation, and the  
16 last part of the last colloquy was - - - it had to do with  
17 - - - you know, defendant was asking, well, if I - - - if -  
18 - - if my lawyer's asking questions that I don't want - - -  
19 that I don't want him to ask or I want to ask other  
20 questions, what do I do? And the judge says, you can - - -  
21 you can - - -

22 JUDGE FAHEY: Write them down.

23 MR. GOODMAN: - - - write them - - - write them  
24 down. And also - - - and one last - - - last point I want  
25 to make on this. You know, my adversary thinks that the



1 judge is - - - is - - - is giving the defendant some sort  
2 of the bum rush. And I think that's just not true. Judge  
3 Wilson, you asked the question when - - - when the court  
4 said "all right," was there a question mark at the end of  
5 it. There was a question mark at the end of it, at - - -  
6 at appendix, page 7. So that was an invitation to the  
7 defendant that he could make a choice of option A and B.  
8 Defendant never took either - - - either of those options.

9 Also the judge - - - the judge was - - -

10 JUDGE WILSON: The point of it is we don't know  
11 how that was delivered. That is, I'm a judge sitting  
12 there. I say "all right?" and that can be transcribed with  
13 a question mark but not inviting an answer at all.

14 MR. GOODMAN: You're right. It's ambiguous in  
15 the - - - it's ambiguous in the - - - in the transcript,  
16 but I would say this. I think we have to give - - -

17 JUDGE RIVERA: Especially since it's followed  
18 with August 7th for conference, August 13th for trial. And  
19 the two lawyers say, "Thank you, Your Honor."

20 MR. GOODMAN: Yes, Your Honor. It's a cold  
21 transcript. We don't know the length of time between "all  
22 right" and - - - and the next - - - and the next phrase.  
23 But I think we have to give the judge the benefit of the  
24 doubt here, because I think there's a presumption - - -

25 JUDGE RIVERA: Well, why is that?



1 MR. GOODMAN: Because I think - - -

2 JUDGE RIVERA: When it - - - when it's a  
3 Constitutional right and the defendant says, "I want to  
4 represent myself."

5 MR. GOODMAN: I think there's a presumption that  
6 the - - - that the - - - that the judge is going to take  
7 actions that are legal and legitimate and not arbitrary.  
8 And so I think we have to give him the benefit of the  
9 doubt. And also - - -

10 JUDGE RIVERA: Isn't it arbitrary to say I have a  
11 policy that you don't get standby counsel?

12 MR. GOODMAN: No, Your Honor, again, I don't  
13 think it is arbitrary. I think the judge was exercising  
14 his discretion, because I - - - I think - - -

15 JUDGE RIVERA: It's not discretion. It's a  
16 policy that applies across the board. It's a blanket  
17 policy.

18 MR. GOODMAN: The judge never - - -

19 JUDGE RIVERA: The judge is not saying, in your  
20 case, I will not appoint you standby counsel.

21 MR. GOODMAN: What the judge said is, I don't do  
22 that. And I think the way we have to look at that is the  
23 judge is saying, I have had experience with standby counsel  
24 in the past. It's not efficient; it doesn't work well.  
25 I'm not going to allow it. It's not an arbitrary policy.



1 JUDGE WILSON: But you're sort of rejecting the  
2 idea that - - - that courts should need - - - if somebody  
3 says the word pro se, that courts should ask a clear direct  
4 question in favor of a case-by-case examination of the  
5 entirety of the transcript, when we know that transcripts,  
6 as you say, are cold.

7 MR. GOODMAN: Right. And cu - - - transcripts  
8 could - - -

9 JUDGE WILSON: Wouldn't it better to have a rule  
10 that just required the court to say, look, here's what your  
11 choice is. Do you want to go forward with pro se counsel -  
12 - - I'm sorry - - - without pro se counsel, on your own, no  
13 assistance or not? That's your choice here.

14 MR. GOODMAN: I think the - - - I think the  
15 problem with that is - - - is these - - - is - - - is - - -  
16 this court has always said that in this area, we don't want  
17 to set up a catechism or a rigid standard of question and  
18 answer and, you know - - - a rigid response of question and  
19 answer to get a particular right. These colloquies are  
20 fluid. You know, the judge may ask the defendant a  
21 question. And the judge - - - and - - - and the defendant  
22 may give an un - - - an unexpected answer.

23 So my - - - my position is you have to look at  
24 the colloquy as a whole. You can't - - - it's not really  
25 the answer to just mandate a particular question and a



1 particular answer. I mean, it's certainly proper for the  
2 judge to have asked that question, but it was certainly not  
3 an error of law for the judge not to have asked this  
4 question in this case.

5 If I could just turn briefly to the second - - -  
6 CHIEF JUDGE DIFIORE: Please do.

7 MR. GOODMAN: - - - point? With - - - with  
8 regard to CPL 250.10, the primary purpose behind that rule  
9 was procedural fairness, to give the people the opportunity  
10 when pre - - - when presented with psychiatric evidence to  
11 conduct discovery in order to be able to challenge that  
12 evidence.

13 The rationale there - - - the rationale for the  
14 rule applies equally when you're talking about a defense,  
15 such as insanity or EED, as to the voluntariness of the  
16 defendant's statement. In order for the people to have a  
17 fair opportunity to - - -

18 JUDGE STEIN: Have - - - have there been cases in  
19 which the court has gone beyond those kind of mens rea  
20 defenses - - -

21 MR. GOODMAN: The - - - the Yates case out of the  
22 Third Department, which - - - which we cite in our brief,  
23 was a case in which they applied it to this particular  
24 situation, where that - - - in that case, what happened was  
25 they had the testimony of a psychopharmacologist, I



1 believe, who was going to testify that medications the  
2 defendant was taking would affect his vol - - - his ability  
3 to give a voluntary statement to the police. So that - - -  
4 that case is certainly an - - - a case that had expanded it  
5 there.

6 Really this issue is one of basic fairness. The  
7 - - - the prosecution needs to have the opportunity to  
8 conduct discovery in these types of cases.

9 JUDGE WILSON: Even when the evidence is in the  
10 prosecution's hands?

11 MR. GOODMAN: Not - - - if it's been in the  
12 prosecution's hand - - - cert - - -

13 JUDGE WILSON: This is - - - this is the  
14 psychiatrist - - -

15 MR. GOODMAN: But - - - but I - - - that's not  
16 this case, because we know when - - - when the - - - when  
17 the - - - when a defense says - - - well, first of all,  
18 there's no evidence in - - - in this case that the  
19 prosecution had all of the evidence it would have needed to  
20 challenge the - - - the psychiatric evidence here. It  
21 didn't have any of the defendant's medical records. It  
22 didn't - - - it didn't have - - - it didn't have any of his  
23 medical records. The - - -

24 JUDGE FEINMAN: Well, what - - - and also the  
25 point is, even if you had it, you have to know that they're



1 going to use it so that you can go prep whether it's to get  
2 the psychiatrist in line or to get a rebuttal psychiatrist  
3 or whatever it may be.

4 MR. GOODMAN: Exactly. And then - - - but on  
5 this record, the only thing we have with the defendant's  
6 medical records is the six or seven pages that the defense  
7 counsel used to refresh the doctor's recollection. And  
8 there's no indication in the record that the prosecution  
9 had that ahead of time. And these are - - - these are  
10 medical records. There are privileged records. The  
11 prosecutor can't just pick up the phone and tell the  
12 Department of Corrections or the police department, give me  
13 those records. They have to be subpoenaed.

14 And here, there is just no evidence that - - -  
15 that - - - that the prosecutor had this information because  
16 the judge instructed the defense counsel to show - - - for  
17 defense counsel to show those documents to the - - - to the  
18 prosecutor.

19 JUDGE RIVERA: Didn't the prosecutor prep the  
20 police officer who had this interaction with the defendant?

21 MR. GOODMAN: But not based on - - - not based on  
22 the - - - the medical records.

23 JUDGE RIVERA: Would not have - - - there  
24 wouldn't have been a discussion without revealing to  
25 counsel.



1 MR. GOODMAN: I - - - I don't what - - - I don't  
2 what the - - - what the - - -

3 JUDGE RIVERA: To know what went on.

4 MR. GOODMAN: They - - - they - - - the - - - the  
5 detective could testify as to what went on in the interview  
6 room. The detective, I don't - - - detective didn't know  
7 what happened to the defendant after he left the interview  
8 room, when he was taken - - -

9 JUDGE RIVERA: But - - -

10 MR. GOODMAN: - - - to the hospital.

11 JUDGE RIVERA: I'm sorry. Who - - - who - - -  
12 who ordered him to be sent to - - -

13 MR. GOODMAN: I'm not sure exactly. I mean, it  
14 would have been the police - - - would have referred him to  
15 the - - - to the hospital for a medical evaluation.

16 JUDGE RIVERA: Okay.

17 MR. GOODMAN: Yes.

18 Thank you, Your Honor.

19 CHIEF JUDGE DIFIORE: Thank you, counsel.  
20 Counsel?

21 MS. ASCHER: Briefly on the first issue. I want  
22 to be clear that the rule that we're looking for would  
23 apply to a minority of cases, because most courts allow a  
24 defendant to proceed with standby counsel if they request  
25 it. At the very least, as this court's own teaching show,



1 the court treats both requests separately. The reason why  
2 Mr. Silburn requested standby counsel is probably because  
3 he believed that he was entitled to it, because most people  
4 get it.

5 JUDGE FEINMAN: So - - - so if we adopt a  
6 framework similar to the Texas court, you know, that case  
7 that - - -

8 MS. ASCHER: Yes.

9 JUDGE FEINMAN: - - - Scarborough.

10 MS. ASCHER: Yes.

11 JUDGE FEINMAN: How does that play out on these  
12 facts?

13 MS. ASCHER: A very simple follow up. Mr.  
14 Silburn, now that you know that I don't allow pro se  
15 counsel, do you still wish to go pro se? So that was the  
16 first point that I wanted to make. This rule would not be  
17 earthshattering. It would only apply to a small minority  
18 of cases. And it would protect, again, the defendant's  
19 right to represent himself.

20 On the second issue, the People, you know, are  
21 talking about procedural fairness, but at the end of the  
22 day, if you read the statute, the statute is unambiguous.  
23 It does not apply to nondefenses. It does not apply to  
24 issues or claims, and that's what a Miranda voluntariness  
25 issue is at trial. It's a nondefense, especially on the



1 facts of this case.

2 As we pointed out in our brief, the 2000 - - -

3 CHIEF JUDGE DIFIORE: What if it's a confession  
4 case, where it's - - - it's a confession case, and you want  
5 to attack the voluntariness of the confession? That's the  
6 evidence in the case. Is that still your position?

7 MS. ASCHER: Absolutely, because again, you want  
8 to attack the defendant's state of mind at the time he gave  
9 his confession. You're not using the evidence to show that  
10 his state of mind at the time he committed the crime, it's  
11 - - - it's two different - - - it's two different issues.  
12 One goes to the mens rea, at - - - you know, your - - -  
13 your mental state at the time of the crime, and the other  
14 one pertains to your mental state when you were talking to  
15 the police. And again, it's - - -

16 CHIEF JUDGE DIFIORE: And that's the issue,  
17 right, whether or not he understood and voluntarily waived  
18 his Miranda - - -

19 MS. ASCHER: Waived his Miranda rights and  
20 therefore the jury could consider it.

21 The last point I want to make is that CPL 710.70,  
22 which is the statute that allows defendants who lose at the  
23 suppression hearing to attack their statements. It says  
24 you can do this at trial, and you can adduce evidence.  
25 That statute does not say, by the way, if you're going to



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use psychiatric evidence, then look at CPL 250.10. Nothing says that. So any practicing attorney in a New York City court who wants to attack a Miranda statement with psychiatric evidence would not know that this is something that they have to do.

If the court has no further questions, thank you very much.

CHIEF JUDGE DIFIORE: Thank you.

(Court is adjourned)



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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of People of the State of New York v. Spence Silburn, No. 28 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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