State of New York
Court of Appeals

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NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

October 5 thru October 7, 2021

State of New York
Court of Appeals

To be argued Tuesday, October 5, 2021 (arguments begin at 2 p.m.)

No. 59 White v Cuomo

The State Legislature amended the Racing, Pari-Mutual Wagering and Breeding Law in 2016 by enacting a new article 14 to permit interactive fantasy sports (IFS) contests, in which players pay entry fees to an IFS provider, select fantasy teams of real-world athletes, and compete against other players for cash prizes based on the performances of their chosen athletes in actual sporting events. Article 14 declares that IFS contests do not constitute gambling as defined in Penal Law § 225, thereby eliminating criminal penalties for IFS; and it provides for consumer safeguards, minimum standards and the registration, regulation and taxation of IFS providers. Jennifer White and three other plaintiffs brought this action against then-Governor Cuomo and the State Gaming Commission to strike down article 14 as unconstitutional. They contend its authorization of IFS contests violates article I, section 9 of the State Constitution, which states that "no lottery or the sale of lottery tickets, pool-selling, book-making, or any other kind of gambling ... shall ... be authorized or allowed within this state," except for state run lotteries, pari-mutual betting on horse races, and state authorized casinos.

Supreme Court granted partial summary judgment to the plaintiffs, ruling that article 14's authorization for IFS contests violates the constitutional prohibition of gambling. It relied on Penal Law § 225, which defines "gambling" as a person betting on "a contest of chance or a future contingent event not under his control or influence; and defines "contest of chance" as any game "in which the outcome depends in a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein." While IFS players may employ skill in choosing their teams, the court said, "IFS involves, to a material degree, an element of chance, as the participants win or lose based on the actual statistical performance of groups of selected athletes in future events not under the contestants' ... control or influence." However, it upheld the portion of article 14 that eliminates criminal penalties for IFS contests.

The Appellate Division, Third Department upheld, on a 4-1 vote, the finding that the statutory authorization of IFS violates the constitutional ban on gambling. The Constitution does not define "gambling," but the majority said "the current Penal Law definition comports with the common understanding of the meaning of the constitutional prohibition" and encompasses IFS contests. "[A]lthough participants in IFS contests may use their skill in selecting teams, they cannot control how the athletes on their IFS teams will perform in the real-world sporting events.... In other words, the skill level of an IFS contestant cannot eliminate or outweigh the material ... role of chance in IFS contests." It modified the judgment by striking down the decriminalization of IFS contests, saying the Legislature would not have wanted to leave them entirely unregulated.

The dissenter argued that "our judicial inquiry is limited to deciding whether the Legislature rationally determined, after hearing and considering evidence, that IFS contests are not 'gambling' as defined under Penal Law § 225.00.... [A]rticle 14 was constitutionally enacted because the legislative record supports that the outcome in an IFS contest neither depends (1) to a 'material degree upon an element of chance' nor (2) upon 'a future contingent event not under [the contestants'] control or influence...." He said the Legislature "concluded that the proper focus is not on the participants' influence over the real world events and a specific athlete's performance, but the participants' unquestionable influence on winning the contest by making skillful choices in assembling a fantasy roster."

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State of New York
Court of Appeals

To be argued Tuesday, October 5, 2021 (arguments begin at 2 p.m.)

No. 22 People v Howard Powell

Howard Powell was arrested in Queens in March 2010 while in possession of crack cocaine and a pipe. He was 51 years old and had an intellectual disability, a history of psychiatric illnesses and seizures which he treated with several prescribed medications, and also a history of drug abuse. Officers took him to the 114th Precinct and questioned him about several recent robberies. Powell denied any involvement and was detained at Central Booking for the night. He was returned to the precinct the next morning and ultimately admitted in signed statements that he robbed two women at knife-point in separate incidents days before his arrest. Both victims then identified him in lineups. He was charged with two counts of first-degree robbery. Contending at a pre-trial hearing that his confessions were false, Powell said he had not taken his prescription medications on the day of his arrest, but had used cocaine and heroin. He also testified that officers retrieved his medications from his home after his arrest, but refused to give him access to them until after he confessed the next day.

At trial, Powell sought to introduce testimony of Dr. Allison Redlich, a research psychiatrist, as an expert on "the phenomena of false confession." Supreme Court denied the request after a Frye hearing, saying, "Dr. Redlich's testimony did not convince this court that an expert's testimony on the issue of false confessions is scientifically reliable." Further, the court said, "Dr. Redlich never personally examined this defendant.... [T]his court will not allow the defendant to call a witness in the area of false confessions to testify about the general nature of and situations where an individual is likely to render a false confession. This court will only permit a witness in this area to testify who has personal knowledge of this case, the circumstances under which the defendant made these alleged confessions, and this defendant's mental infirmities." The jury convicted Powell of one count of first-degree robbery, he pled guilty to the second count a short time later, and he was sentenced to 25 years to life in prison.

The Appellate Division, Second Department affirmed. "With regard to expert testimony on the phenomenon of false confessions, in order to be admissible, 'the expert's proffer must be relevant to the particular [defendant] and interrogation before the court,'" it said, citing People v Bedessie (19 NY3d 147). "Here, the defendant failed to establish that his proffered expert testimony was relevant to the specific circumstances of this case...."

Powell argues that the scientific reliability of research into false confessions was established in New York law by Bedessie, which said belief that "the phenomenon of false confessions is genuine has moved from the realm of startling hypothesis into that of common knowledge, if not conventional wisdom." Bedessie also said "in a proper case expert testimony on the phenomenon of false confessions should be admitted." Powell says Dr. Redlich established the relevance of her testimony by proposing "to testify that appellant ... exhibited a number of situational factors rendering him vulnerable to false confession: a lifelong history of psychiatric illness, profound ... cognitive impairments; and longstanding polysubstance abuse;" as well as "the 24-hour length of the custody and interrogation."

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For respondent: Queens Assistant District Attorney Danielle M. O'Boyle (718) 286-7046

State of New York
Court of Appeals

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To be argued Tuesday, October 5, 2021 (arguments begin at 2 p.m.)

No. 60 People v Don Williams

When Rochester police officers executed a search warrant at the home of Don Williams's girlfriend in May 2013, they found a loaded semi-automatic handgun and small baggies containing cocaine. Williams admitted to them that the gun and cocaine were his, though he later testified at trial that he was unaware a gun or drugs were in the apartment.

During deliberations, the jury sent a note asking for "instruction relating to definitions of the law," and a deputy told the judge a juror told him they wanted the law placed on an overhead projector so it could be read. After the jury clarified its request, the judge and attorneys agreed on which portions of the instructions would be re-read to the jury. However, defense counsel objected to projecting the instructions, which included the text of Penal Law statutes governing the charges, on a screen for the jurors to read. "I don't believe that placing it on the visualizer is really different from handing them a written copy," he said. "I think that once we start handing them instructions in written form, whether it is visually or physically, that they then start having the ability to interpret based on how they see the words...." Supreme Court had the instructions projected on a screen and scrolled through as he read them aloud. Williams was convicted of one count each of second-degree weapon possession and third-degree drug possession and was sentenced to seven years in prison.

On appeal, Williams contended the court's decision to project the instructions for the jury over his objection violated CPL 310.30, which concludes, "With the consent of the parties and upon the request of the jury for instruction with respect to a statute, the court may also give to the jury copies of the text of any statute which, in its discretion, the court deems proper."

The Appellate Division, Fourth Department affirmed. Noting that the jury had asked the court to project the instructions on a screen and that "the jury was not supplied with a physical copy of the court's instructions," the Appellate Division said, "Under these circumstances, we conclude that the court did not err inasmuch as '[t]he projected charge was substantially the same as the oral charge, and the process took place entirely in the courtroom under the court's supervision and guidance. In short, there was no danger that the jurors would be left to interpret the law themselves'...."

Williams argues the trial court committed reversible error "by providing the jurors with a copy of the text of the statute by displaying the jury instruction without the consent of defense counsel." He says CPL 310.30 "expressly prohibits providing jurors with a copy of the text of any statute without consent of the parties. The phrase 'give a copy' as used in the statute was not limited in any way by the legislature and should be read as an umbrella term, encompassing the provision of both physical and electronic reproductions of the text. The consent requirement ensures that if such copies are to be provided, this only occurs in a manner that is fair to and agreed upon by all parties." He also argues the procedure denied him a fair trial by emphasizing the elements of the charges against him, which were projected on the screen, while "other instructions, such as the burden of proof or presumption of innocence," were not displayed.

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State of New York
Court of Appeals

To be argued Wednesday, October 6, 2021 (arguments begin at 2 p.m.)

No. 61 J.P. Morgan Securities Inc. v Vigilant Insurance Company

In 2006, the Securities and Exchange Commission (SEC) began a civil enforcement action against The Bear Stearns Companies and its J.P. Morgan affiliates, alleging they facilitated illegal late trading and deceptive market timing for customers, predominantly large hedge funds, enabling them to earn hundreds of millions of dollars at the expense of mutual fund shareholders. Bear Stearns replied that it played a passive role in processing its customers' trades and did not receive any special benefit from the trades, which it said generated $16.9 million in commissions and fees. Bear Stearns negotiated a settlement and consented to a March 2006 SEC order, "solely for the purpose of" SEC proceedings and without admitting the findings, in which it agreed to pay "disgorgement" of $160 million and civil penalties of $90 million. The SEC order censured Bear Stearns for "willfully" violating securities laws.

Bear Stearns sought coverage of the disgorgement payment from its primary insurer, Vigilant Insurance Co., and six excess insurance carriers. It argued that it could recover $140 million of the disgorgement, representing the profits its clients made on the illegal trades, while the remaining $20 million was a "high side" estimate of the revenue it received. The professional liability policies covered any "Loss" Bear Stearns incurred as a result of "any Wrongful Act." The term "Loss" includes compensatory damages and settlements, but not "fines or penalties imposed by law" or costs that are legally uninsurable. The policies also exclude claims based on Bear Stearns "gaining in fact any personal profit or advantage to which [it] was not legally entitled." When the insurers disclaimed coverage on the ground that the disgorgement was not an insurable loss as a matter of public policy or was excluded from coverage as illegal profits, Bear Stearns filed this breach of contract action.

Supreme Court denied the insurers' motion to dismiss, saying the SEC order did not establish that the disgorgement was based on Bear Stearns' own illegal gains rather than profits that went to its clients. The Appellate Division, First Department reversed and dismissed the suit, saying "disgorgement of ill-gotten gains ... does not constitute an insurable loss." The Court of Appeals reversed the First Department and reinstated the suit in 2013 (21 NY3d 324), saying the SEC order did not "conclusively demonstrate that Bear Stearns ... had the requisite intent to cause harm" to render the payment uninsurable, nor did it establish that the disgorgement "was predicated on moneys that Bear Stearns itself improperly earned as a result of its securities violations."

After further proceedings, Supreme Court granted summary judgment to Bear Stearns, ruling that $140 million of the disgorgement was a covered loss, that it was not uninsurable as ill-gotten gains and was not "excluded under the personal profit exclusion." The court cited "extensive evidence" that the disgorgement "actually represented the gains of its customers rather than its own gains."

The First Department again reversed, ruling the disgorgement was an "uninsurable penalty," not a "loss" covered by the policy. It relied on the U.S. Supreme Court's 2017 decision in Kokesh v SEC (137 S Ct 1635), which it said "establishes that disgorgement is a penalty, whether it is linked to the wrongdoer's gains or gains that went to others" because "it punishes a public wrong, and its purpose is deterrence, whether you are remitting your own ill-gotten gains or those you generated for your customers through violations of the securities law...."

Bear Stearns contends its disgorgement payment was a covered loss under the policy, arguing the First Department misinterpreted Kokesh, which focused on a federal statute of limitations issue, and contradicted this Court's 2013 decision in the case.

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For respondents Vigilant et al: Daniel M. Sullivan, Manhattan (646) 837-8151
For respondents Certain Underwriters at Lloyd's et al: Edward J. Kirk, Manhattan (212) 710-3900
For respondent Travelers: David F. Abernethy, Manhattan (212) 248-3140

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To be argued Wednesday, October 6, 2021 (arguments begin at 2 p.m.)

No. 62 People v Donovan Buyund

Donovan Buyund was charged with multiple felonies, including sex offenses, for entering a woman's Brooklyn apartment as she slept and sexually assaulting her in June 2014. He pled guilty to first-degree burglary as a sexually motivated felony (Penal Law §§ 140.30[2]; 130.91) in satisfaction of all charges, in exchange for a promised sentence of 11 years in prison and a requirement that he register as a sex offender under the Sex Offender Registration Act (SORA). Supreme Court certified Buyund as a sex offender at sentencing.

On appeal, Buyund argued for the first time that his certification as a sex offender was illegal because first-degree burglary as a sexually motivated felony is not among the crimes listed in Correction Law § 168-a(2)(a) as registerable sex offenses under SORA.

The Appellate Division, Second Department agreed and modified the sentence by vacating the requirement that Buyund register as a sex offender. It said the "clear and unambiguous" language of Correction Law § 168-a(2)(a)(iii) "defines a sex offense as 'a conviction of or a conviction for an attempt to commit any provisions of [subparagraphs (i) and (ii) of the statute] committed or attempted ... as a sexually motivated felony defined in section 130.91 of [the Penal Law].'" Since first-degree burglary under Penal Law § 140.30 is not one of the Penal Law sections listed in Correction Law § 168-a(2)(a)(i) and (ii), it said Buyund's conviction was not a registerable sex offense under SORA. "While this may not have been the intent of the legislature, the omission of a critical grammatical signpost or a parenthetical number preceding 'as a sexually motivated felony' clearly limits the qualifying sexually motivated felony offenses only to those enumerated in subparagraphs (i) and (ii).... '[W]here a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded.'" Rejecting a prosecution claim that Buyund failed to preserve his challenge to his sex offender certification, the court said the certification "violated his right to be sentenced as provided by law.... Thus, the defendant was not required to preserve his argument for appellate review."

The prosecution argues, "[T]he self-evident legislative intent behind the language at issue was to make all sexually motivated felonies registrable offenses. This intent is apparent from the language of the statute (poorly phrased though it may be) when read in the context of the purpose of SORA and SOMTA, and is explicitly stated in the relevant legislative history. Consequently, the Second Department erred by reading the statute literally, ignoring the absurdity of the resulting rule, and arbitrarily curtailing the class of registrable offenses under SORA." The prosecution also contends Buyund's claim should be rejected because he failed to preserve it by raising it in Supreme Court. "Contrary to the conclusion of the Appellate Division, a defendant's certification pursuant to SORA is not part of the sentence, and thus a challenge to the defendant's SORA certification does not fall within the illegal-sentence exception to the preservation requirement."

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State of New York
Court of Appeals

October 6, 2021 (arguments begin at 2 p.m.)

No. 26 Ortiz v Ciox Health LLC

This federal class action hinges on whether Public Health Law § 18, which gives patients in New York a right of access to their medical records, provides a private right of action for patients to seek damages for alleged violations of the statute. More specifically, the question raised is whether there is an implied private right of action for damages when medical providers violate section 18(2)(e) of the statute, which allows them to impose a "reasonable charge" for paper copies of medical records, but limits the charge to no more than 75 cents per page. The U.S. Court of Appeals for the Second Circuit is asking this Court to resolve the issue in a certified question.

In 2016, Vicky Ortiz requested through her attorney copies of her medical records from The New York and Presbyterian Hospital (NYPH) for use in a negligence lawsuit against her former nursing home. NYPH had contracted with a predecessor of Ciox Health LLC to fulfill requests for records and bill the patients. The company provided the records to Ortiz, but charged her $1.50 per page. Her attorney informed NYPH that the Public Health Law limited the copying fee to a maximum of 75 cents per page. Ortiz paid the overcharge because she needed the records for her lawsuit, then she filed this action against Ciox and NYPH. Shortly after the filing, Ciox refunded the amount it had charged her beyond the statutory maximum.

U.S. District Court dismissed the suit, finding the statute provides neither an express nor implied private right of action. It said Ortiz satisfied the first prong of the three-part test for determining whether the Legislature intended to provide such a right because she was a member of the class for whose benefit the statute was enacted, but not the remaining two prongs. While "the Legislature clearly intended to control patient costs" by limiting the price per page for copies, the court said "it is debatable whether recognition of a private right of action would promote the legislative purpose" because the threat of "civil lawsuits against health care providers ... would likely add to the growth in medical costs." As for the third prong, it found "a private right of action would not be consistent with the legislative scheme." The Legislature authorized the state health commissioner "to impose substantial fines for violations" of the Public Health Law and authorized private parties to compel compliance with the law through article 78 actions. In light of those remedies, the court said it is likely the Legislature considered and rejected a private right of action.

The plaintiff argues that a private right of action is implied in section 18(2)(e) because all three prongs of the test are satisfied. The statute "has no extensive enforcement mechanism. The existing methods of enforcement expressly were not intended to be exclusive and do not address Appellant's direct and personal harm. An implied private right of action to enforce the statutory limit of $0.75 per page for medical records furthers the legislative goal and coalesces smoothly with the existing statutory scheme." The plaintiff cites an unpublished State Supreme Court ruling that section 18 provides a private right of action, which was upheld, without analysis, by the Appellate Division, First Department in Feder v Staten Island Univ. Hosp. (273 AD2d 155).

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State of New York
Court of Appeals

To be argued Thursday, October 7, 2021 (arguments begin at noon)

No. 63 People v Tyrone Wortham

When New York City police officers executed a search warrant at a Brooklyn apartment in May 2011, Tyrone Wortham and his two young children were the only civilians present. Wortham was handcuffed and, while other officers conducted the search, a detective asked him for his name, address, and other pedigree information without administering Miranda warnings. Wortham responded that his girlfriend let him stay at the apartment, where he slept on a bed in the living room. The search ultimately recovered two loaded weapons, an assault rifle and a pistol, as well as crack cocaine, drug packaging materials, and ammunition.

Wortham moved to suppress his statement that he lived in the apartment, arguing that the pedigree exception to Miranda does not apply when a pedigree question is likely to elicit an incriminating response. Since he was not being questioned in a routine booking process at a precinct, but in a targeted apartment where officers were searching for contraband, he said the police should have known that asking where he lived was likely to elicit an incriminating response. He also sought a Frye hearing to determine whether the medical examiner's Forensic Statistical Tool (FST), a new method of analyzing mixed DNA samples that was used to link him to one of the guns, is accepted as reliable in the relevant scientific community.

Supreme Court denied the motion to suppress, saying Wortham was questioned in accordance with NYPD procedure, in which "every adult inside the apartment must be handcuffed and pedigree taken" when a search warrant is executed. "Under the general rule, even if a defendant is arrested inside the apartment and handcuffed, he can be asked pedigree questions.... This defendant was not under arrest. In fact, there was no evidence, according to [the detective's] testimony, that anything had been recovered at the time the defendant spoke to the detective. So clearly the questions in this case were not designed to elicit an incriminating response from the defendant. And no ulterior motive can be attributed to [the detective] since he wasn't even aware at the time he spoke to the defendant whether there was any contraband in the apartment." The court also denied his request for a Frye hearing.

Wortham was found guilty of multiple counts of weapon and drug possession and endangering the welfare of a child. He was sentenced to nine years in prison.

The Appellate Division, First Department affirmed. "Although defendant acknowledged that he resided in the apartment where contraband was found, he was responding to a routine administrative question that was not a 'disguised attempt at investigatory interrogation' (People v Rodney, 85 NY2d 289 ...) and was not designed to elicit an incriminating response...."

Wortham argues that, in refusing to suppress his statement, "the courts below applied an erroneous legal standard, focusing on the detective's subjective intent. The hearing court found that his question was not 'designed to elicit an incriminating response' and had 'no ulterior motive.' The Appellate Division affirmed on the same improper basis.... Applying the correct objective standard pursuant to Rodney, appellant's statements should have been suppressed, because the detective's question was reasonably likely to elicit an incriminating response." He cites a line of Fourth Department cases, which has suppressed statements in similar circumstances when a pedigree question about a defendant's residence, while "facially appropriate," was "likely to elicit an incriminating admission." He also contends the refusal to grant him a Frye hearing violated his due process rights.

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State of New York
Court of Appeals

To be argued Thursday, October 7, 2021 (arguments begin at noon)

No. 64 Matter of Verneau v Consolidated Edison Co. of New York, Inc.
No. 65 Matter of Rexford v Gould Erectors & Riggers, Inc.

The question raised by these appeals is whether Workers' Compensation Law (WCL) § 25-a(1-a), a 2013 amendment to phase out a special fund that pays benefits to injured workers whose cases are closed and later reopened, prohibits imposing liability on the Special Fund for Reopened Cases for death benefit claims filed after the cut-off date where liability for the deceased workers' underlying disability cases was transferred to the Special Fund prior to the cut-off date. The amendment (subdivision 1-a) provides, "No application by a self-insured employer or an insurance carrier for transfer of liability of a claim to the [special] fund for reopened cases shall be accepted by the [Workers' Compensation Board] on or after" January 1, 2014.

In case No. 64, Frances Verneau's husband was diagnosed with asbestos-related lung disease and, after the disease was found to be a result of his work, he established a claim for disability benefits as of June 1, 2000. In 2011, before the January 1, 2014 cut-off date in subdivision 1-a, liability for his claim was transferred from his self-insured employer, Consolidated Edison Co., to the Special Fund. He died in 2017 and Verneau applied for workers' compensation death benefits after the statutory cut-off date. ConEd denied coverage of the claim, contending the Special Fund remained liable for the case.

In Case No. 65, Kristen Rexford's father established a lifetime workers' compensation claim as a result of a heart attack he suffered in 1987 while working for Gould Erectors & Riggers, Inc., which was insured by the State Insurance Fund (SIF). In 1997, before the statutory cut-off date, liability for his claim was transferred from SIF to the Special Fund. He died of cardiac arrest in 2016 and Rexford applied for death benefits, alleging the 1987 heart attack contributed to his death. The SIF argued the Special Fund remained liable after the cut-off date.

The Workers' Compensation Board (WCB) ruled in both cases that the employer or its insurer was liable for the death benefits, not the Special Fund. It cited American Economy Ins. Co. v State of New York (30 NY3d 136), in which this Court rejected a constitutional challenge to the 2013 amendment.

The Appellate Division, Third Department reversed, saying in Verneau "the imposition of liability on the Special Fund ... is not precluded by the [2013] statutory amendment, given that liability was transferred to the Special Fund in December 2011, well before the January 1, 2014 closure date." It cited its prior decision in M/O Misquitta v Getty Petroleum (150 AD3d 1363) which held that, while a consequential death claim is separate and distinct from a decedent's original claim, "where ... liability for a claim has already been transferred ... to the Special Fund and the employee thereafter dies for reasons causally related to the original claim, the Special Fund remains liable for the claim for death benefits." It said American Economy "does not compel a contrary result" because "[t]he only issue before the Court ... was the constitutionality of the 2013 amendment."

The WCB and Special Fund argue that WCL § 25-a(1-a) bars imposing liability on the Special Fund for death benefit claims filed after January 1, 2014. Such claims "constitute new claims that are distinct from any related awards made during a worker's lifetime" and therefore require a new transfer of liability, which is barred by the "plain language" of the statute, they say, and the Appellate Division's decisions "undermine the Legislature's goal to close the Special Fund as promptly as possible."

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