

Court of Appeals

STATE OF NEW YORK

——
SARA MYERS, STEVE GOLDENBERG,

Plaintiffs,

and

ERIC A. SEIFF, HOWARD GROSSMAN, M.D., SAMUEL C. KLAGSBRUN, M.D.,
TIMOTHY E. QUILL, M.D., JUDITH K. SCHWARZ, PH.D.,
CHARLES A. THORNTON, M.D., and END OF LIFE CHOICES NEW YORK,

Plaintiffs-Appellants,

against

ERIC SCHNEIDERMAN, in his official capacity as
ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Defendant-Respondent,

(Caption Continued on the Reverse)

BRIEF FOR *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PLAINTIFFS-APPELLANTS

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Date Completed: April 20, 2017

and

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Defendants.

RULE OF PRACTICE 500.1(f) DISCLOSURE STATEMENT

The National Association of Criminal Defense Lawyers is a nonprofit organization with no parents, subsidiaries or business affiliates.

TABLE OF CONTENTS

	Page
RULE OF PRACTICE 500.1(f) DISCLOSURE STATEMENT	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
INTEREST OF <i>AMICUS CURIAE</i>	1
INTRODUCTION.....	2
ARGUMENT	3
A. The Lower Courts Erred by Considering Only the Dictionary Definition of the Word “Suicide” and Ignoring Other Important Rules of Statutory Construction	3
1. The Appellate Division Failed to Consider Whether Its Interpretation of the Statute Was Consistent with Legislative Intent.....	4
2. The Appellate Division Failed to Construe the Statute in Accordance with the Rule of Lenity	6
B. In the Alternative, the Appellate Division’s Interpretation Should Be Rejected Because the Assisted Suicide Statute, As Applied to Physician Appellants, Would Be Unconstitutionally Vague.....	8
CONCLUSION	12
CERTIFICATE OF COMPLIANCE	13

TABLE OF AUTHORITIES

Cases	Page(s)
<i>People v. Berck</i> , 32 N.Y.2d 567 (1973)	11
<i>People v. Bright</i> , 71 N.Y.2d 376 (1988)	11
<i>People v. Coe</i> , 71 N.Y.2d 852 (1988)	4
<i>Compassion in Dying v. State of Wash.</i> , 79 F.3d 790 (9th Cir. 1996).....	10
<i>Eichner v. Dillon</i> , 73 A.D.2d 431 (2d Dep’t 1980)	9
<i>People v. Golb</i> , 23 N.Y.3d 455 (2014)	6
<i>In re Meyer</i> , 209 N.Y. 386 (1913)	4
<i>Myers v. Schneiderman</i> , 140 A.D.3d 51 (1st Dep’t 2016)	<i>passim</i>
<i>Myers v. Schneiderman</i> , 2015 N.Y. Slip Op. 31931(U), (Sup. Ct. N.Y. Cnty. Oct. 16, 2015).....	9
<i>N.Y. State Bankers Ass’n v. Albright</i> , 38 N.Y.2d 430 (1975)	4
<i>People v. N.Y. Trap Rock Corp.</i> , 57 N.Y.2d 371 (1982)	8, 9, 10, 11
<i>Matter of Storar</i> , 52 N.Y.2d 363 (1981)	9
<i>People v. Stuart</i> , 100 N.Y.2d 412 (2003)	8, 10

<i>Sutka v. Conners</i> , 73 N.Y.2d 395 (1989)	4
<i>People v. Thompson</i> , 26 N.Y.3d 678 (2016)	7
<i>Vacco v. Quill</i> , 521 U.S. 793 (1997)	9
<i>Washington v. Glucksberg</i> , 521 U.S. 702 (1997)	10
Statutes	
Ark. Code Ann. § 5-10-106(b) (2007)	11
Idaho Code Ann. §§ 18-4017(1), (3) (2011)	11
N.Y. Penal Law § 5.00 (McKinney 1965)	5
N.Y. Penal Law § 70.04 (McKinney 1975)	7
N.Y. Penal Law § 120.30 (McKinney 1965)	1
N.Y. Penal Law § 125.15 (McKinney 1965)	1
N.Y. Penal Law § 156.05 (McKinney 2006)	6
S.C. Code Ann. § 16-3-1090(G) (1998)	11
Other Authorities	
Denzer & McQuillan, Practice Commentary, 39 McKinney’s Consol. Laws of N.Y. (1967)	5
N.Y. State Task Force on Life & the Law, <i>When Death is Sought: Assisted Suicide and Euthanasia in the Medical Context</i> 59 (1994)	10

INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous *amicus* briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

NACDL has a particular interest in this case because it is committed to combatting over-criminalization and to promoting clear standards for the imposition of criminal liability. Yet the Appellate Division's broad reading of New York Penal Law §§ 120.30 and 125.15(3) (together, the "Assisted Suicide Statute") threatens to criminalize the good faith conduct of physicians beyond the intention of the legislature and without sufficient notice. And, as discussed below,

the decision ignores established rules discouraging over-broad reading of criminal statutes.

INTRODUCTION

NACDL submits this brief as *amicus curiae* in support of appellants, who seek to reverse the Appellate Division's decision interpreting the Assisted Suicide Statute to impose criminal penalties on physicians who provide aid-in-dying to patients at the end of life.

Relying entirely on the dictionary definition of the word "suicide," the Appellate Division read the Assisted Suicide Statute to impose criminal liability on physicians who assist terminally ill patients with one particular end-of-life option: the prescription of lethal medication. The Appellate Division's statutory interpretation reflects a troubling tendency to focus solely on the literal meaning of select words in criminal statutes, even where the result would lead to criminalization of conduct beyond the clear intent of the legislature, and without constitutionally required notice to ordinary citizens.

The Appellate Division's statutory interpretation should be rejected for two independent reasons. First, the court ignored important rules of statutory construction by limiting its analysis to the dictionary meaning of the word "suicide." As a result, the Appellate Division failed to even consider legislative intent, and ignored the rule of lenity applicable to the interpretation of criminal statutes.

Second, under the Appellate Division’s mechanical interpretation, the Assisted Suicide Statute would be constitutionally void for vagueness as applied to appellant physicians. Because other comparable end-of-life options—such as removal of ventilators, terminal sedation, and withdrawal of nutrition or hydration—are indistinguishable from the conduct at issue here, the Assisted Suicide Statute does not give fair notice to physicians that certain aid may expose them to arbitrary and discriminatory criminal penalties.

This Court should therefore reverse the Appellate Division’s decision.

ARGUMENT

A. The Lower Courts Erred by Considering Only the Dictionary Definition of the Word “Suicide” and Ignoring Other Important Rules of Statutory Construction

The Appellate Division erred by focusing solely on the dictionary meaning of the word “suicide” in finding that the Assisted Suicide Statute is unambiguous. On that basis, the court affirmed the trial court’s holding that an analysis of legislative history was “unnecessary.” *See Myers v. Schneiderman*, 140 A.D.3d 51, 55, 57–58 (1st Dep’t 2016). As explained immediately below, the Appellate Division erred because it: (1) failed to consider legislative intent; and (2) ignored the rule of lenity applicable to the interpretation of criminal statutes. Its decision should therefore be reversed.

1. The Appellate Division Failed to Consider Whether Its Interpretation of the Statute Was Consistent with Legislative Intent

Instead of fully considering the meaning of the Assisted Suicide Statute, the Appellate Division held that “there [was] no room for [judicial] construction” due to the “straightforward meaning” and “literal description” of the word “suicide.” 140 A.D.3d at 57. Yet this Court has instructed the exact opposite: “[w]hile the statutes may appear literally ‘unambiguous’ on their face, the absence of ambiguity facially is never conclusive.” *N.Y. State Bankers Ass’n v. Albright*, 38 N.Y.2d 430, 434 (1975). This is because “[i]n matters of statutory interpretation generally . . . legislative intent is the great and controlling principle.” *Sutka v. Conners*, 73 N.Y.2d 395, 403 (1989) (internal quotation marks omitted). Indeed, this Court explained over a century ago that “[u]ncertainty of sense . . . does not spring alone from uncertainty of expression.” *In re Meyer*, 209 N.Y. 386, 389 (1913). If results would be “unjust or unreasonable . . . from the standpoint of the literal sense of its language, . . . an obscurity of meaning exists, calling for judicial construction.” *Id.* at 389.

The need to examine “clear legislative intent” is particularly compelling in connection with criminal statutes. *People v. Coe*, 71 N.Y.2d 852, 855 (1988). The Penal Law itself instructs that “the provisions herein must be construed according

to the fair import of their terms to promote justice and effect the objects of the law.” N.Y. Penal Law § 5.00 (McKinney 1965).

The Appellate Division acknowledged appellants’ argument that a literal construction was inappropriate because “aid-in-dying reflect[ed] a starkly different choice” for terminally ill patients—not between life and death within the meaning of “suicide,” but between two kinds of deaths, one that is “quick and painless” and another that is not just certain but also “unbearably painful.” *Myers*, 140 A.D.3d at 57. But because the Appellate Division stopped at the “straightforward meaning” of the word “suicide,” *id.* at 57, it failed to consider whether the literal interpretation would lead to a result that the legislature intended, and draw within the statute conduct not intended to be characterized as criminal.

Critically, the legislative history of the Assisted Suicide Statute does not contain a single reference to aid-in-dying. *See* Appellants’ Br. at 26. Yet the Appellate Division did not even consider the appellants’ argument that, when the statute was enacted in its current form in 1965, aid-in-dying was a little considered concept. *See Myers*, 140 A.D.3d at 56; *see also* R61 (no reference to physicians in Denzer & McQuillan, Practice Commentary, 39 McKinney’s Consol. Laws of N.Y. (1967)). In that light, there is no evidence and little likelihood that the legislature intended to criminalize such conduct. Because the Appellate Division ignored the

rule of construction *requiring* judicial inquiry into legislative intent, its decision should be reversed.

2. The Appellate Division Failed to Construe the Statute in Accordance with the Rule of Lenity

The Appellate Division also erred because it disregarded the rule of lenity, the importance of which has been reaffirmed in recent decisions by this Court. Under that rule, “[i]f two constructions of a criminal statute are plausible, the one more favorable to the defendant should be adopted” *People v. Golb*, 23 N.Y.3d 455, 468 (2014).

In *Golb*, this Court vacated a defendant’s conviction under Penal Law § 156.05. That statute provides that “[a] person is guilty of *unauthorized* use of a computer when he or she knowingly uses, causes to be used or accesses a computer, computer service, or computer network without authorization.” 23 N.Y.3d at 468 (emphasis added). The defendant, an NYU alumnus, had used NYU computers to send fake emails to NYU students and administrators as a part of an internet campaign against certain scholars. *Id.* The prosecutor argued that using a computer to commit a crime could not be “an authorized use” under the statute. *Id.* This Court rejected that interpretation based on (1) the rule of lenity and (2) legislative history indicating that the statute was intended to reach only hackers. *Id.*

Only last year, this Court similarly reversed an Appellate Division interpretation of a sentencing statute for failing to apply the rule of lenity. *See*

People v. Thompson, 26 N.Y.3d 678 (2016). At issue in that case was whether the ten-year look-back period applicable to a second violent felony offense would be governed by the date of the original sentencing or the later resentencing date. In interpreting the term “sentence” in Penal Law § 70.04, this Court held that “to the extent this is an instance in which a reasonable mind could conclude” that two constructions of the statute were “plausible,” the more lenient interpretation should be adopted. *Id.* at 687.

Here, the Appellate Division, at minimum, should have analyzed whether the rule of lenity was applicable because there were at least two reasonable constructions of the term “suicide”: (1) the dictionary meaning based on “direct causative link between the medication . . . and . . . patients’ demise” that the Appellate Division adopted; and (2) the traditional meaning that appellants advocated, “a person’s conscious choice favoring death over life.” *Myers*, 140 A.D.3d at 57. The Appellate Division recognized that “[t]he issue before us unquestionably presents a host of legitimate concerns on both sides of the debate.” *Id.* at 64. Yet the Appellate Division did not even consider whether the latter meaning would be acceptable to a “reasonable mind” and stopped at the “plain meaning of the term suicide.” *Id.* at 58. As a result, the Appellate Division violated the rule of lenity and criminalized conduct not covered by the statute.

B. In the Alternative, the Appellate Division’s Interpretation Should Be Rejected Because the Assisted Suicide Statute, As Applied to Physician Appellants, Would Be Unconstitutionally Vague

In the alternative, the Appellate Division’s statutory interpretation should be rejected because it would be unconstitutionally vague as applied to physicians who treat terminally ill patients.

This Court has held that every criminal statute must meet “the constitutional requisite that a statute be informative on its face to assure that citizens can conform their conduct to the dictates of the law.” *People v. N.Y. Trap Rock Corp.*, 57 N.Y.2d 371, 378 (1982) (internal quotation marks omitted). A statute that fails to satisfy that requirement either on its face or as applied—i.e., “under the facts of the case”—may be challenged as being unconstitutionally vague. *People v. Stuart*, 100 N.Y.2d 412, 421 (2003). A statute is void for vagueness if it meets a two-part test: (1) the statute is not “sufficiently definite to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden;” and (2) it does not provide “clear standards for enforcement [and] delegates basic policy determinations to the police (and eventually to judges and juries) for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.” *Id.* at 420–21 . As applied to physician appellants, the Assisted Suicide Statute meets both parts of the test.

First, the statutory term “suicide” does not give “adequate warning of what the law requires” to physicians who treat terminally ill patients. *N.Y. Trap Rock Corp.*, 57 N.Y.2d at 378. To begin, suicide itself has been decriminalized in New York since 1890. *Eichner v. Dillon*, 73 A.D.2d 431, 467 (2d Dep’t 1980). More importantly, the term “suicide” does not warn physicians that one end-of-life option—the prescription of lethal medication—is illegal, while similar options—for example, the removal of ventilators—are legal. As the trial court acknowledged, “[i]n New York, as in most States, it is a crime to aid another to commit or attempt suicide, but patients may refuse lifesaving medical treatment.” *Myers v. Schneiderman*, 2015 N.Y. Slip Op. 31931(U), at *3 (Sup. Ct. N.Y. Cnty. Oct. 16, 2015). As a result, physicians who care for terminally ill patients routinely and openly provide a variety of end-of-life care options such as removal of ventilators, terminal sedation, and withdrawal of nutrition or hydration without fear of criminal prosecution. *See* R36-37; *see, e.g., Vacco v. Quill*, 521 U.S. 793, 808 n.11 (1997) (recognizing widely accepted practice of terminal sedation in New York where the goal is to alleviate pain even if it “hasten[s] the patient’s death”); *Myers*, 140 A.D.3d at 60 (“the Court of Appeals upheld an order granting the appointment of a representative to carry out the expressly stated wish of a person not to be kept on life support” (citing *Matter of Storar*, 52 N.Y.2d 363 (1981))).

To add to the confusion, “[t]here are no reported convictions in New York State for [aid-in-dying], and the scope of liability under this provision is therefore not entirely clear.” N.Y. State Task Force on Life & the Law, *When Death is Sought: Assisted Suicide and Euthanasia in the Medical Context* 59 (1994). In fact, one court observed that “[t]here is no reported *American* case of criminal punishment being meted out to a doctor for helping a patient hasten his own death.” *Compassion in Dying v. State of Wash.*, 79 F.3d 790, 811 (9th Cir. 1996), *as amended* (May 28, 1996), *rev’d on other grounds sub nom. Washington v. Glucksberg*, 521 U.S. 702 (1997) (emphasis added). Under such circumstances, the statutory term “suicide” fails to provide adequate notice to physicians that the end-of-life option at issue here—the prescription of lethal medication—is illegal.

Second, because the Assisted Suicide Statute does not contain a clear standard for enforcement, “arbitrary and discriminatory” application is likely. *N.Y. Trap Rock Corp.*, 57 N.Y.2d at 378. As this Court has explained, the second test regarding the risk of arbitrary enforcement is “closely related to the first” because “[i]f a statute is so vague that a potential offender cannot tell what conduct is against the law, neither can a police officer.” *Stuart*, 100 N.Y.2d at 420–21. The Assisted Suicide Statute, as applied to physicians, does not provide “objective standards to guide” which end-of-life option falls under the term “suicide,” and thereby allows law enforcement officers to apply the law “based upon their own

personal, subjective idea of right and wrong.” *People v. Bright*, 71 N.Y.2d 376, 383 (1988). Because the statutory language does not give physicians adequate notice as to which end-of-life options are legal and which are illegal, it gives enforcement officers “virtually unfettered discretion” to single out individual physicians for punishment. *N.Y. Trap Rock Corp.*, 57 N.Y.2d at 379.

Because the Appellate Division’s interpretation of the term “suicide” would fail to “advise the citizen in sufficiently clear and unambiguous terms of the distinction between conduct calculated to harm and that which is essentially innocent,” it is unconstitutionally vague as applied to physicians.¹ *People v. Berck*, 32 N.Y.2d 567, 570 (1973) (internal quotation marks omitted).

¹ Other states that criminalize aid-in-dying avoid unconstitutional vagueness by explicitly prohibiting physicians from aid-in-dying. *See, e.g.*, Ark. Code Ann. § 5-10-106(b) (2007) (making illegal the act of a “physician or health care provider to commit the offense of physician-assisted suicide by (1) [p]rescribing any drug, compound, or substance to a patient with the express purpose of assisting the patient to intentionally end the patient’s life”); Idaho Code Ann. §§ 18-4017(1), (3) (2011) (applying the assisted suicide statute to “a health care professional”); S.C. Code Ann. § 16-3-1090(G) (1998) (explicitly applying the assisted suicide criminal statute to “a licensed health care professional who assists in a suicide”).

CONCLUSION

For the reasons stated above, the decision of the Appellate Division should be reversed and the case remanded to the Supreme Court, New York County.

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Respectfully Submitted,



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CERTIFICATE OF COMPLIANCE

Court Rule 500.1 & 500.13(c)(1)

I hereby certify that the total number of words in the brief, inclusive of headings and footnote and exclusive of the brief cover, disclosure statement, table of contents, table of authorities, signature block, and certification of compliance is 2,553.

I also certify that the body of this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman and the footnotes are printed in 12-point Times New Roman.

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April 20, 2017


Steven C. Schwartz