

No. 19-01

IN THE
SUPREME COURT OF THE UNITED STATES

SPRING TERM 2019

MARY GULDOON,

Petitioner,

V.

STATE OF LACKWANNA BOARD OF PAROLE,

Respondent,

*ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT*

BRIEF FOR THE PETITIONER

HERBERT WECHSLER NATIONAL
CRIMINAL MOOT COURT COMPETITION

Team #10

QUESTIONS PRESENTED

- I. Whether the registration requirements and special conditions of parole required by Lackawanna's Registration of Sex Offenders Act violate Petitioner's rights under the First and Fourteenth Amendments to the United States Constitution.
- II. Whether the registration requirements and special conditions of parole required by Lackawanna's Registration of Sex Offenders Act and imposed on Petitioner constitute violations of the Ex Post Facto Clause of the United States Constitution.

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The opinion of the United States District Court for the District for the Middle District of Lackawanna is reported as *Mary Guldoon v. Lackawanna Board of Parole*, 999 F. Supp.3d 1 (M.D.Lack.2019).

The opinion of the United States Court of Appeals for the Thirteenth Circuit is reported as *Mary Guldoon v. Lackawanna Board of Parole*, 999 F.3d 1 (13th Cir. 2019).

STATEMENT OF THE CASE

Petitioner, Mary Guldoon was arrested in 2011 for having sexual relations with a minor, B.B.. (Compl. ¶ 6). Prior to the relationship, Ms. Guldoon suffered from severe post-partum depression while on maternity leave. (Aff. Mary Guldoon ¶ 5). Although she was prescribed medication, it did little to subside her mental illness. (Aff. Mary Guldoon ¶ 7). Regardless of her illness, she had to return to teach because her leave time had expired. (Aff. Mary Guldoon ¶ 8).

The minor was her student at Old Lackawanna High School, where Guldoon was a Computer Science teacher. (Aff. Mary Guldoon ¶ 4). The relationship began in October 2010 and lasted until Ms. Guldoon's arrest in December 2010. (P.S.R.) Throughout the relationship, B.B. met with Guldoon for help with computer science and other courses. (Aff. Mary Guldoon ¶ 10). Eventually, B.B. confided to Guldoon about stressors in his home. (Aff. Mary Guldoon ¶ 11, 12). Shortly after, their physical relationship began. (Aff. Mary Guldoon ¶ 14).

Ms. Guldoon plead guilty to one count of each crime in order to avoid the hardships of trial. (Aff. Mary Guldoon ¶ 16). When she began serving her sentence at Tonawanda Correction Facility, she was diagnosed with Bi-polar disorder for the first time. (Aff. Mary Guldoon ¶ 18). The psychiatrist determined that Prozac prescribed for her post-partum depression had unmasked her Bi-polar disorder and the crimes she plead guilty to were the result of a manic episode. (Aff. Mary Guldoon ¶ 21, 22). She was then treated for her manic depression that reduced her manic episodes. (Aff. Mary Guldoon ¶ 23). While serving her sentence, Ms. Guldoon had also completed a Master's Degree in Computer Programming through an on-line program. (Aff. Mary Guldoon ¶ 24).

After Mary Guldoon began serving her sentence, the State of Lackawanna enacted the Registration of Sexual Offenders Act (ROSA). (Aff. Mary Guldoon ¶ 25). The act imposed new sanctions and special conditions on her parole that were not previously imposed on those convicted of a sex crime. Specifically, all sex offenders were required to register with the state as a “sex offender” and sex offenders of a certain level were suspended from driving, banned from traveling near schools and similar facilities and banned from accessing “any commercial social networking site.” (Compl. ¶ 13, 14, 21).

Upon her release on parole, Ms. Guldoon returned to live with her family in their home. (Aff. Mary Guldoon ¶ 25). However, the special conditions made it incredibly difficult to reintegrate back into society. Mary Guldoon was barred from her previous career since she was not allowed to enter or be near school grounds. (Aff. Mary Guldoon ¶ 33). Her restriction on accessing commercial social networking sites also made it difficult to search for jobs since this is where many employment opportunities are posted. (Aff. Mary Guldoon ¶ 34). Her inability to drive further hampered her job search since public transportation is poorly managed in her rural town. This forced her to rely on her husband and miss potential job opportunities due to an inability to get to the interview. (Aff. Mary Guldoon ¶ 35).

Fortunately, Mary Guldoon was eventually able to secure a job working the night shift at a food plant. (Aff. Mary Guldoon ¶ 36). While the plant is only 3 miles from her home, it takes her 20 miles to get there in order to avoid being 1000 feet of any school ground or similar facility. (Aff. Mary Guldoon ¶ 38-41). Ms. Guldoon makes this trip twice a day by bicycle on a road with a speed limit of 65 miles per hour. (Aff. Mary Guldoon ¶ 43).

The special conditions also prevent her family from accessing the internet. Since she is not allowed to access “any commercial networking site,” her family is consequently barred and they cannot have access to Facebook, Twitter, Instagram, LinkedIn, Netflix, Hulu, etc. They are also restricted from any internet access in their home and do not have internet-capable phones. (Aff. Mary Guldoon ¶ 48). This imposes a burden on Ms. Guldoon’s husband since his job requires him to be available to his employer by phone, text, and email at all times. (Aff. Mary Guldoon ¶ 49). It further burdens her daughter who is unable to access the internet for school related assignments and social activities for children. (Aff. Mary Guldoon ¶ 50).

PROCEDURAL HISTORY

In 2011, Mary Guldoon pleaded guilty to one count of Rape in the Third Degree, one count of Criminal Sexual Act in the Third Degree, and one count of Sexual Misconduct in Lackawanna State Supreme Court. Mrs. Guldoon filed for declaratory and injunctive relief under 42 U.S.C. §1983 seeking to have her parole conditions declared unconstitutional. The United States District Court for the Middle District of Lackawanna denied the claim for failure to state a claim under 42 U.S.C. §1983. The Court further held that Mrs. Guldoon has “no protected liberty interest to be free from the special conditions of her parole.” Mary Guldoon v. Lackawanna Board of Parole, 999 F. Supp.3d 1 (M.D.Lack.2019). On appeal, the United States Court of Appeals for the Thirteenth Circuit affirmed the District Court’s judgment.

SUMMARY OF THE ARGUMENT

Mrs. Guldoon’s argument is grounded in four areas of constitutional law, namely the First Amendment, the Fourteenth Amendment, the Privileges and Immunities Clause, and the Ex Post Facto Clause. Mrs. Guldoon argues that the special conditions of ROSA violate the First Amendment insofar as the restriction of her internet access violates her freedom of speech. Mrs.

Guldoon argues that her Fourteenth Amendment right to due process under the law is violated by ROSA's overly restrictive and irrelevant conditions of her parole being enacted without regard to the nature of her crime, and that ROSA is sufficiently overbroad and vague to deprive her of her due process. Mrs. Guldoon asserts a fundamental right to travel under the privileges and Immunities Clause, of which she has been illegally deprived by ROSA as she has been required to forfeit her driver's license. Finally, Mrs. Guldoon argues that the legislature's purported application of additional restrictions to her parole, several years after her conviction, is a violation of the Ex Post Facto Clause of the Constitution.

ARGUMENT

I. THE REGISTRATION REQUIREMENTS AND SPECIAL CONDITIONS OF PAROLE REQUIRED BY LACKAWANNA'S REGISTRATION OF SEX OFFENDERS ACT ("ROSA") VIOLATE MRS. GULDOON'S RIGHTS UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. The Special Conditions of Parole Under ROSA violate Mary Guldoon's Freedom of Speech rights under the First Amendment.

The Supreme Court has previously held that a parolee's liberty interest can be implicated "where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and opportunity to be heard are essential." Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971). Similar to the case at hand, courts applied the "stigma-plus" test in cases where parolees were convicted of sex crimes and "and who, in the years after the passage of New York's Sex Offender Registration Act ("SORA"), were assessed a risk level and forced to comply with certain registry and notification requirements." Singleton v. Doe, 210 F.Supp 3d 359, 367 (2016). The test allowed offenders to invoke the due process clause if they "can establish both damage to reputation and the alteration of some more tangible interest such

as employment.” Id. at 368 (first citing Doe v. Pataki, 3 F. Supp. 2d 456, 467; and then quoting Paul v. Davis, 424 U.S. 693, (1976)).

Parole was established to be a positive alternative to incarceration for prisoners who demonstrated good behavior. The purpose of this program is to reduce recidivism, and “to help individuals reintegrate into society” Morrissey v. Brewer, 408 U.S. at 477. Mary Guldoon’s parole sanctions are so restrictive that they could likely have the opposite effect. By restricting her so severely, these sanctions are impeding Mrs. Guldoon’s reintegration into society, specifically with respect to her employment prospects. Her loss of opportunity for future employment clearly indicates that she is entitled to the protection of due process.

1. Internet Restriction

The First Amendment guarantees all persons the right to “have access to places where they can speak and listen, and then, after reflection, speak and listen one more.” Packingham v. North Carolina, 137 S. Ct. 1730, 1735 (2017). Today, one of the most important “places” is the internet. Id. (citing Reno v. American Civil Liberties Union, 117 S. Ct. 2329 (1997)). The case here concerns Mary Guldoon’s special condition of parole that bars her from accessing “any commercial networking site.” Given that the statute imposes a blanket limitation on parolees, the analysis requires intermediate scrutiny in which the law must be tailored to serve a significant governmental interest. Id. This statute is unconstitutionally vague and overbroad insofar as its nonspecific definition of “commercial networking site” could conceivably apply to almost any contemporary website, and Mrs. Guldoon therefore can have no adequate notice of what might constitute a breach of her parole. Accordingly, this Court must hold the additional ROSA restrictions unconstitutional as they have been applied to Mrs. Guldoon.

Furthermore, the purpose of ROSA is to protect the community from sexual predators whose actions “are characterized by repetitive and compulsive behavior” Lackawanna Public Law §1. Considering Mrs. Guldoon’s past mental health history, it is highly unlikely that she will act in a compulsive manner. Throughout the time that the sexual conduct occurred, Mrs. Guldoon was unaware that her Bi-Polar disorder was causing her compulsive behavior because she was neither diagnosed nor being treated for the disease. Since her diagnoses, she has received medication and experienced no further manic episodes. Unlike cases where a ban on internet access was appropriate because the past conduct involved the use of substantial internet access, the special condition here is arbitrarily imposed.

ROSA imposes special conditions whose effect is overly burdensome and violates the Guldoon family’s First Amendment rights. A ban on “any commercial networking site” is broad and vague. The statute fails to specify where access is allowed and thus prevents access to not only Guldoon, but also her family with whom she lives. Her husband is unable to access the internet for his job and her daughter is unable to use the internet for school related activities.

The Supreme Court has held: “Foreclosing access to social media altogether thus prevents users from engaging in the legitimate exercise of First Amendment rights. Even convicted criminals--and in some instances especially convicted criminals--might receive legitimate benefits from these means for access to the world of ideas, particularly if they seek to reform and to pursue lawful and rewarding lives.” *Id.* at 1732.

B. The Special Conditions of Parole Under ROSA violate Mary Guldoon’s Due Process rights under the Fourteenth Amendment.

The Fourteenth Amendment to the United States Constitution reads as follows: “No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” The recent imposition of arbitrary and capricious parole restrictions without any regard to past conduct for which Mrs. Guldoon was convicted has had the effect of depriving Mrs. Guldoon of her liberty without even the semblance of due process. The state legislature has allotted extraordinary discretion to the parole board when it determines whether a parolee’s parole conditions reasonably relate to her convictions. Mrs. Guldoon argues that this Court should strike down ROSA as unconstitutionally vague and overbroad.

The Sentencing Guidelines state that the conditions of supervised release must "involve no greater deprivation of liberty than is reasonably necessary for the purposes" of sentencing. 18 U.S.C. § 3582(d)(2). They must also be reasonably related to the parolee’s past conduct for which they were convicted. This is not the case for Mary Guldoon. The conditions of her parole have no reasonable relation to the misdeeds for which Mrs. Guldoon was convicted. Instead, it is patently apparent that ROSA has merely applied a broad set of restrictions to parolees without a Fourteenth Amendment due process analysis of the misconduct to which they purport to relate. At no time did the parole board reasonably consider whether these restrictions had any bearing on Mrs. Guldoon’s conviction.

The second circuit has held that “the imposition of conditions—whether imposed prior to or subsequent to release, by the parole board or a field parole officer—must be upheld as long as they are reasonably related to a parolee's past conduct, are not arbitrary and capricious, and are designed to deter recidivism and prevent further offenses” Robinson v. N.Y. State, 2010 U.S.

Dist. LEXIS 144553; *See Travis*, 236 A.D.2d at 167; *See also Gerena v. Rodriguez*, 192 A.D.2d 606, 607, 596 N.Y.S.2d 143 (2d Dep't 1993).

Mary Guldoon's convictions stem from a sexual relationship with a minor, B.B.. The conditions imposed on her parole however, are not predicated on her actions. Specifically, the ban on accessing "any commercial networking site." Guldoon's relationship with B.B. began and evolved in a teacher-student setting on school grounds and the sexual activity primarily occurred in the classroom. Further, the communications between them was largely in person, or through means that did not require use of the internet. While they did occasionally converse through email, there was no sexual conduct retrieved through those messages and email does not fall under the definition of a "commercial networking site." Hence, her conduct did not involve the use of any commercial networking sites.

C. The Special Conditions of Parole Under ROSA violate Mary Guldoon's fundamental right to travel.

1. Right to Travel

The Privileges and Immunities Clause contained in Article IV, Section 2 of the United States Constitution guarantees "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." It is a mainstay of Constitutional law that this clause guarantees to United States citizens an unenumerated set of rights including and in addition to those listed in the Bill of Rights. *E.g., Selevan v. New York Thruway Auth.*, 584 F.3d 82, 99 (2d Cir. 2009); *see also Crandall v. Nevada*, 73 U.S. 35 (1868) (finding fundamental rights in the Privileges and Immunities Clause, including a right to travel). The fourteenth amendment incorporates the constitutional protection of Mrs. Guldoon's fundamental right to travel against the individual states.

ROSA imposes several special conditions on individuals designated as sex offenders by the State of Lackawanna. Among these conditions is the requirement that sex offenders surrender their driver's license. Prior to the passage of ROSA, individuals designated as sex offenders were subject to significant restrictions on their fundamental right to travel in order to be eligible for parole. These standard restrictions on an individual's right to free travel include the following: (1) the requirement that parolees report regularly to their parole officers; and (2) the requirement that parolees forfeit their right to travel outside the state of Lackawanna.

2. Employment

Protection of her right to travel is especially important to Mrs. Guldoon in relation to her efforts to secure employment. Prior to ROSA, there were standard restrictions on travel for individuals with sex offense convictions which did not impinge on a parolee's constitutionally protected right to travel. Mrs. Guldoon argues that these long-established travel restrictions already curtail her ability to achieve employment, and that ROSA's new travel restrictions make it nearly impossible for her to begin making amends with society as a productive, gainfully-employed member of her community.

Ms. Guldoon has already surrendered her right to travel outside the State of Lackawanna as a condition of her parole. Accordingly, she is unable to seek employment outside of her home state. The inability to relocate outside of her home state for work severely limits Mrs. Guldoon's pool of potential employment prospects. In order to fully avail herself of the limited job prospects potentially open to her within the state, Mrs. Guldoon must be permitted to invoke her constitutional right to travel within her home state. In order to make full use of this imperative privilege, Mrs. Guldoon simply *must* be allowed to carry her driver's license again.

In addition to the revocation of Mrs. Guldoon's driver's license (which alone is sufficient evidence that the State has transgressed the constitutional limits of its governmental power), ROSA purports to add even *more* restrictions on Mrs. Guldoon's right to travel. These additional special conditions of ROSA limit Mrs. Guldoon's pool of potential occupations even further. Specifically, the prohibition against (1) having any contact with minors, and (2) having any employment in a facility where minors were present restrict Mrs. Guldoon from securing employment in any facility that serves the general public, e.g. any retail store or restaurant. For example, not only does ROSA restrict Mrs. Guldoon from working as a cashier at a retail clothing store, where she might come into contact with minors, but ROSA also prevents her from working in the storeroom of such a facility, or in any other employment position in any part that facility.

Even if there were no conceivable chance whatsoever of Mrs. Guldoon ever coming into contact with a minor in her position, she would still be barred by ROSA from working at a retail store, restaurant, or other facility even partially open to the public. For example, Mrs. Guldoon could not work in the archives of a museum, in any municipal building, or even as an overnight janitor due to ROSA's incredibly overbroad and vague prohibitions against working in a facility where a child could conceivably be present.

Beyond the barriers that ROSA erects in the path of general employment, Mrs. Guldoon humbly asks that this Court consider her own particular circumstances. Mrs. Guldoon happens to be highly skilled in working with technology. Prior to her incarceration, Mrs. Guldoon was employed by means of her significant computer science expertise. As a promising start to her continuing rehabilitation, Mrs. Guldoon was able to achieve a Master's Degree in Computer Programming through the University of Phoenix online program. As herein described in greater

detail, the parole board's proscription of her family's internet usage has made the likelihood that Mrs. Guldoon will prevail in securing employment in her vocational discipline virtually nonexistent.

Accordingly, these draconian restrictions on Mrs. Guldoon's employment limit her pool of prospective employers to a very select number of workplaces within the broad set of employment opportunities open to individuals designated as sex offenders at the time of Mrs. Guldoon's sentencing. Mrs. Guldoon's need to drive is drastically heightened by these restrictions, because it is wildly improbable that she will be able to secure employment within walking distance or even within the limited travel range afforded by public transportation.

3. Daily Life

Due to ROSA's additional restrictions on Mrs. Guldoon's parole conditions, Mrs. Guldoon cannot have a driver's license and must therefore travel by bicycle in her daily life. Against all odds, Mrs. Guldoon has secured a position working the night shift at a nearby plant. The plant is three miles from her home, and it ought to be a convenient commute via bicycle. However, ROSA has stepped in to make even this simple aspect of Mrs. Guldoon's life downright nightmarish.

Mrs. Guldoon cannot come w/in 1000 feet of a school where minors may be present. Due to this restriction, Mrs. Guldoon must travel 20 miles *twice* each day, *by bicycle*, down a two-lane highway in order to get back and forth from work. Not only is this requirement burdensome, it is clearly dangerous to Mrs. Guldoon's health and safety. Mrs. Guldoon is frequently forced off the road by speeding or distracted drivers.

Bizarrely, Mrs. Guldoon cannot even have reprieve from her daily brushes with death in the summer months, when school is not in session, out of the fear that she might violate the terms of her parole. Due to the unconstitutionally vague and overbroad wording of the statute, it is unclear when these prohibitions apply. Can Mrs. Guldoon come within 1000 feet of a school on the weekend? During the summer? May Mrs. Guldoon travel past a school in the evening, which would accommodate her schedule as a night shift employee? In violation of Mrs. Guldoon's due process rights under the Fourteenth Amendment, there is no way for her to clearly understand what actions would violate this condition of her parole. Accordingly, she is avoiding all schools all the time just to play it safe, at great risk to her personal safety..

II. THE REGISTRATION REQUIREMENTS AND SPECIAL CONDITIONS OF PAROLE REQUIRED BY LACKAWANNA'S REGISTRATION OF SEX OFFENDERS ACT AND IMPOSED ON PETITIONER CONSTITUTE VIOLATIONS OF THE EX POST FACTO CLAUSE OF THE UNITED STATES CONSTITUTION

Article I, Section 10 of the United States Constitution prohibits states from passing any ex post facto law. "The *ex post facto* prohibition forbids the Congress and the States to enact any law 'which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then described.'" Weaver v. Graham, 450 U.S. 24, 101 S. Ct. 960, 67 L.Ed.2d 17 (1981) (quoting Cummings v. Missouri, 4 Wall. 277, 325-26 (1867)).

When Mrs. Guldoon was sentenced, she was only aware of the special conditions associated with sex offender status that existed at that time. Namely, these special conditions consisted of the following: (1) the requirement that parolees report regularly to their parole officers; (2) the requirement that parolees forfeit their right to travel outside the state of Lackawanna; and (3) the requirement that parolees forfeit their right to keep firearms.

Accordingly, for the good of her family and in an attempt to mitigate the potential punishment that could be imposed upon her, Mrs. Guldoon pleaded guilty to one count of Rape (Third Degree), Criminal Sexual Act (Third Degree), and Sexual Misconduct. Had Mrs. Guldoon known the severe curtailment of her constitutionally protected freedoms that were to eventually result from this plea deal (to say nothing of the barriers to employment erected by the deal and the burden her altered parole conditions would later pose to her family), Mrs. Guldoon would in all likelihood never have considered accepting the prosecution's deal.

After the changes to her sentence made by ROSA, Mrs. Guldoon's punishment has been dramatically increased. The new parole conditions to which she is subject as a parolee with sex offender status are as follows: (1) Mrs. Guldoon has been forced to register as a Level II Sex Offender; (2) Mrs. Guldoon has been forced to surrender her driver's license; (3) Mrs. Guldoon may not have any contact with minors; (4) Mrs. Guldoon may not have any employment in a facility where minors are present; (5) Mrs. Guldoon may not come within 1000 feet of any school where minors may be present; and (6) Mrs. Guldoon may not access any social networking website.

The vague prohibition against accessing a social networking website is particularly burdensome to Mrs. Guldoon, as she is a computer expert who has made her living through interacting with computers and using technology deeply dependent on the internet. While the terms of her plea deal were very likely to have been different if they were negotiated under ROSA, it is a virtual *certainty* that Mrs. Guldoon would not have put such a concerted effort into boldly earning her Master's Degree in Computer Programming if she knew that her *ex post facto* punishment would render it absolutely worthless to her. Furthermore, it is manifestly unjust that the whole Guldoon family should be deprived of internet usage as a *de facto* punishment under

ROSA, especially when the family has already endured so much heartbreak from the tragedies and crimes accompanying Mrs. Guldoon's chronic mental illness. The *ex post facto* internet restrictions on the Guldoon family seem to have been imposed by the legislature for the sole purpose of punishing a class of socially outcast criminals, irrespective of whether they have already paid their debts to society. Ironically, Mrs. Guldoon enjoyed more freedom to use her intellect and expertise for social good while inside prison than she currently does in this social purgatory to which ROSA has subjugated her.

The severe additional punishments this statute imposed on individuals already convicted of sex offenses resulted in a grievous deprivation of Mrs. Guldoon's constitutionally protected rights under the *Ex Post Facto* Clause. Accordingly, Mrs. Guldoon has great confidence that this Court will grant her reprieve from ROSA insofar as it was retroactively applied to her during the course of her previously imposed sentence.

CONCLUSION

This case is about a woman in the throes of postpartum depression, deeply unbalanced by inappropriately prescribed antidepressants and latent bipolar disorder, who acted on the hypersexual urges of her mental illness. She accepted the State's punishment for her crimes. In her assiduous efforts to make amends for her manic impulses, she worked towards earning the parole her initial sentence indicated was possible, even achieving a Master's Degree in anticipation of giving back to the community she had harmed. Instead, the State rescinded the justice it had prescribed for her, and it deprived her of the constitutional rights she had depended on her entire life. Today, Mrs. Guldoon asks only that this Court reassert those rights, that she might have the chance to make amends with her community. To do so would give Mrs. Guldoon

the chance to raise her daughter with the serene knowledge that her child will also grow up in a land where those rights are sacrosanct.