UNITED STATES SUPREME COURT
March 13, 2019

MARY GULDOON, *Petitioner*,	)	
VS.	)	19-CV-0001(O)
LACKAWANNA BOARD OF PAROLE, *Respondent*.	)	

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS THIRTEENTH CIRCUIT
FOR THE AFFIRMED OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

BRIEF FOR RESPONDENT

Team 35

QUESTIONS PRESENTED

1. Whether the requirement to register as a sex offender and the restrictions required under Lackawanna's Registration of Sex Offender Act, violate their First and Fourteenth Amendment rights of Free Speech and Due Process when the restrictions are narrowly tailored to serve a compelling governmental interest?
2. Whether the registration requirements and special conditions of parole required under Lackawanna's Registration of Sex Offender Act, which was imposed on Petitioner violates the Ex Post Facto Clause of the United States Constitution?

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STATEMENT OF THE FACTS

[¶ 1] In 2011, Petitioner pleaded guilty to one count each of rape in the third degree (Lackawanna Penal Law § 130.25); criminal sexual act in the third degree (Lackawanna Penal law § 130.40); and sexual misconduct (Lackawanna Penal Law § 130.20.) R. at 2. At the time, Respondent recommended she be sentenced to a period of incarceration of no less than twenty years, followed by a period of probation of at least ten years. Id. Respondent recommended that Petitioner be eligible for parole, with no recommendation for any special conditions, after a period of ten year of incarceration. Id. In accordance with Respondent's Pre-sentence Report, Petitioner was given a sentence of ten to twenty years, to be followed by probation. Id. Petitioner began serving her sentence in 2011. Id.

[¶ 2] In 2016, the Lackawanna Senate and Assembly passed the Registration of Sex Offenders Act (hereinafter referred to as "ROSA"), which was signed by the governor, while Petitioner was incarcerated. Id. ROSA imposed new registration requirements and new conditions of parole on certain offenses. Id. Specifically, those convicted of "sex crimes," at the term was defined in ROSA, were required to register with the state as "sex offenders." Id. The new parole conditions for "sex offenders" made mandatory suspension of driving privileges, bans travel near schools, and bans on accessing the internet. Id. Prior to ROSA there were no mandatory conditions of parole, however, Petitioner was released on parole in 2017 and returned home to live with her family. Id.

[¶ 3] Petitioner, under ROSA, was required to surrender her driver's license to Respondent, could not travel within 1000 feet of any school or similar facility, and was barred from any "commercial social networking website." R. at 3. ROSA defines a "commercial social networking

site" as, "any business, organization or other entity operating a website that permits persons under eighteen years of age to be registered users for the purpose of establishing personal relationships with other users." Id.

[¶ 4] Petitioner plead guilty to two class E felonies. R. at 47. Petitioner committed the sex acts against her student "dozens of times" at the school, in her car, and at her home. R. at 5. Petitioner deleted files from her phone and email account. R. at 6. Petitioner's general parole conditions allowed for the Parole Officer to inspect person, residence, and property. R. at 8. Petitioner would have to discuss changes to her residence, employment, and program status. R. at 8. Petitioner is not authorized to fraternize with persons that have criminal records, unless with permission from a Parole Officer. R. at 8-9. Petitioner may receive limited authorization to enter a school with written permission from Parole Officer and superintendent. R. at 24. Petitioner may be authorized to use the internet to talk to a person under the age of eighteen if the offender is the parent of a minor and not prohibited from communicating with that child. R. at 25. Petitioner may use a vehicle with written authorization from her parole officer and commissioner of the department of motor vehicles. R. at 26.

[¶ 5] The legislature found the danger of recidivism posed by sex offenders and the protection of the public from sex offenders a paramount concern. R. at 19. ROSA changes the definitions of terms, such as "sex offender", "sex offense", and "predicate sex offender". R. at 27-28. ROSA enacts procedures for the court, parole board, and offenders to comply with dealing with any sex offender. R. at 30-44. ROSA gives procedures for Petitioner to retain their driver's license, enter within 1000 feet of a school, and access the internet. R. at 23-26.

STANDARD OF REVIEW

[¶ 6] We review de novo the district court's denial of a motion to dismiss an indictment on constitutional grounds. As a part of out de novo review, however we must presume that the statute is constitutional. That deference requires a plain showing that Congress has exceeded its constitutional bounds. U.S. v. Brune, 767 F.3d 1009, 1015 (10th Cir. 2014). Whether application of a law violates ex post facto is also reviewed de novo. Flemming v. Oregon Bd. Of Parole, 998 F.2d 721, 723 (9th Cir. 1993).

SUMMARY OF ARGUMENT

[¶ 7] The Thirteen Circuit Court was correct when it granted summary judgement for the Respondent that upheld the constitutionality of Lackawanna's Registration of Sex offenders Act (ROSA). Petitioner challenged the constitutionality of ROSA under the First and Fourteenth Amendment.

[¶ 8] Under the First Amendment free speech rights were not violated because it meets all of the prongs of the time, place, or manner test. It is content neutral because it is applied to all of the offenders that are on parole, restriction serves a significant government interest by keeping the public safe and trying to prevent offenders from reoffending, and the state leaves open ample alternative channels for communication for the Petitioner to use, this is not a matter of convenience for the Petitioner, but there are other options available. Under the Fourteenth Amendment due process rights were not violated because the restriction to her liberties, if the liberties were fundamental, were narrowly tailored to serve a compelling governmental interest. If the liberties were anything less than fundamental rights the restrictions were reasonable related to a legitimate state interest.

[¶ 9] Therefore, it is not unconstitutional for Lackawanna to restrict the freedoms of sex offenders that are out on parole because the restrictions are tailored to fit the governmental interest of protecting the community from criminals that have a history of sexual crimes, and to help support the Petitioner from being a repeat offender.

[¶ 10] For a new law to be considered Ex Post Facto the Petitioner must show ROSA was retrospective and disadvantaged the Petitioner. ROSA was not retrospective due to the law being enacted against all "sex offenders." The legislature may enact new laws to protect public safety.

ROSA did not disadvantage the Petitioner since there are no additional punishment for her crimes. The new provisions of parole are merely in place for greater oversight over "sex offenders" so they may be free from prison. ROSA allows for Petitioner to regain the privileges that were lost. The mandatory requirements of the Petitioner's parole are not a punishment, but to deter recidivism. ROSA only defines terms and lays out the procedure for the court, parole board, and offenders as to requirements for parole, and ability challenge program placement.

ARGUMENT

I. THE REGISTRATION REQUIREMENT AND SPECIAL CONDITIONS REQUIRED BY LACKAWANNA'S REGISTRATION OF SEX OFFENDERS ACT DID NOT VIOLATE PETITIONER'S RIGHTS UNDER THE FIRST AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

[¶ 11] The requirements that are imposed on a convicted sex offender under ROSA, do not violate the Petitioner's rights because of the limited amount of restraint that is put on her freedoms. The public's interest of keeping track of convicted sex offenders to protect the public safety and prevent recidivism. It is clear that parolees are not without constitutional rights. United States ex rel Sperling v. Fitzpatrick, 426 F.2d 1161, 1164 (2d Cir. 1970). Just like how the government is allowed to restrict normal citizens' rights, the parole board may impose restriction on the rights of a parolee so long as those restrictions are reasonably related to government interests. Mohammed v. Evans, 2014 WL 4232496 at 9 (S.D.N.Y. 2014). If the limitations on the offender's free speech is content neutral, then it is subject to intermediate scrutiny. People v. Minnis, 67 N.E.3d 272, 279, (Ill. 2016). With ROSA restricting the Petitioner from accessing all social media ROSA is not restricting what can be said, but how the Petitioner can say it. This is a time, place, manner restriction; not a content restriction.

[¶ 12] Even if ROSA has deprived Petitioner of a liberty interest, due process does not entitle him to a hearing to establish a fact-that he is not currently dangerous that is not material under that statute. Connecticut Dept. of Public Safety v. Doe, 538 U.S. 1, 2 (2003). Connecticut's Megan's Law applies to all persons convicted of criminal offenses against a minor, violent and nonviolent sexual offenses, and felonies committed for a sexual purpose. Id. at 4. Just like Connecticut's Megan Law was up held by the Supreme Court, so should ROSA because it is applied to all sexual offenders equally. While fundamental liberty interests require that any state infringement of these rights be narrowly tailored to serve a compelling state interest. Washington v. Glucksberg, 521 U.S. 702, 722 (1997). State actions that implicate anything less than a fundamental right require only that the government demonstrate a reasonable relation to a legitimate state interest to justify the action. Id.

A. The state is allowed to put restrictions on speech protected by the first amendment when it is content neutral, in certain time, places, or manners.

[¶ 13] ROSA should be up held by the court because ROSA does not violate the First Amendment because the restrictions that are imposed on the Petitioner are content neutral. The restrictions are part of Petitioner probation and applies to all offenders that are on probation whether they are violent offenders or nonviolent offenders.

[¶ 14] In the case Ward v. Rock Against Racism, Rock Against Racism was having a concert in the cities outdoor bandshell, there were numerous complaints about the excessive noise at the concert from other users of the park and nearby areas. After many requests from the city to lower the volume at one of the concerts the power was shut off. Ward v. Rock Against Racism, 491 U.S. 781, 781 (1989). Originally this case was found to be constitutional because of the three-part test judging the constitutionality of governmental regulations of the time, place, and manner of protected speech. Id. The court of Appeals reversed on the grounds that such

regulations method and extent must be the least intrusive upon the freedom of expression as is reasonably necessary to achieve the regulations' purpose. Id. The court found that there were various less restrictive means the city could have used. Id. The Supreme Court held that the city's guideline is valid under the First Amendment as a reasonable regulation of the Place and Manner of protected speech. Id.at 782. The city's guideline was applied to everyone using the bandshell, so the guideline is content neutral, since it is justified without reference to the content of the regulated speech. Id. The city wanted to control the noise in order to keep the other areas of the park enjoyable and to avoid intrusion into residential areas. Id. Neither of these two objectives have anything to do with the content and does not render the guideline content based as an attempt to impose subjective standards. Id.

[¶ 15] In the case People v. Minnis, defendant was convicted of the offense of criminal sexual abuse. The court sentenced him to 12 months' probation, and defendant had to render himself a sex offender pursuant to the Registration Act. People v. Minnis, 67 N.E.3d 272, 279, (Ill. 2016). Defendant reported to the Normal police department to register, on his first sex offender registration form, defendant disclosed his two e-mail addresses and his Facebook account. Id. The Registration Act required defendant to report thereafter at least once per year. Id. at 279. After a few years the defendant did not report his Facebook page; the police noticed that he had activity on his public Facebook page, and he was arrested for failing to register as a sex offender. Defendant challenged arguing that the internet disclosure provision of the Registration Act was overbroad and vague in violation of the United States Constitution. Id. at 280.

[¶ 16] The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a

regulation of speech because of disagreement with the message it conveys. Ward v. Rock Against Racism, at 791. Government regulation of expressive activity is content neutral so long as it is justified without reference to the content of the regulated speech. Id. The city's sound guideline is narrowly tailored to serve the substantial and content-neutral governmental interests of avoiding excessive sound volume and providing sufficient amplification within the bandshell concert ground Id. Accordingly, it is valid under the First Amendment as a reasonable regulation of the place and manner of expression. Id. at 803.

[¶ 17] All statutes are presumed to be constitutional. The party challenging the constitutionality of a statute has the burden of clearly establishing its invalidity. People v. Minnis, 67 N.E.3d at 283. A court must construe a statute so as to uphold its constitutionality, if reasonably possible. Id. at 283. The First Amendment protections for speech extend fully to communications made through the medium of the internet. Id. The Illinois Supreme Court agreed with their appellate court that the first amendment right to speak anonymously extends to those expressing views on the internet, nevertheless "it is well understood that the right of free speech is not absolute at all times and under all circumstances." Id. "It must be remembered that under intermediate scrutiny, a content-neutral statute is not overbroad when it burdens speech, but only when it burdens substantially more speech than necessary to advance its substantial governmental interest." Id. at 290. (*quoting* Turner Broadcasting System, Inc. v. F.C.C., 512 U.S. 622, 662 (1994)). "Similarly, First Amendment overbreadth is ultimately found only when a substantial number of a statute's applications to protected speech are unconstitutional in relation to the statute's plainly legitimate sweep." Id. at 290. (*quoting* Virginia v. Hicks, 539 U.S. 113, 199-20 (2003)).

[¶ 18] In our case the Petitioner plead guilty to one count each of rape in the third degree, criminal sexual act in the third degree, and sexual misconduct in 2011. In 2016, while Petitioner was incarcerated at Tonawanda the Lackawanna Senate and Assembly passed, and the Governor signed, ROSA. ROSA imposed new registrations requirements for those convicted of sex crimes. Offenders were required to register with the state as sex offenders and new parole conditions were imposed including bans on accessing the internet. Petitioner claims that this is a violation of her First Amendment rights. Just like in Ward and Minnis the restriction is content neutral. It is not what the Petitioner is saying, it is the method of how she is saying it that the government wishes to restrict. Using the test, a restriction on the time, place, or manner of expression would be justified when it is neutral as to content, serves a significant government interest, and leaves open ample alternative channels of communication.

[¶ 19] The first prong is whether the content is neutral as to what is being restricted. Under the Lackawanna Correction Law § 168 all of the duties and restrictions are laid out for all of the sex offenders. Including § 168-f Duty to register and to verify, and § 259-C paragraph 15 where it is laid out the restriction of internet use that is imposed on all offenders violent and non-violent alike. The first prong of the test should be met because since the restrictions are imposed on all sex offenders on parole it has to be held as content neutral.

[¶ 20] The second prong is whether the restriction serves a significant government interest. In Ward it was to keep the volume of the sound from disrupting the neighborhood nearby. Similarly, like in Minnis, restrictions were put in place to keep track of the offenders' internet activity, in order to better protect the citizens of their community and protect against recidivism. Lackawanna passed ROSA to protect and inform their citizens, and to protect the Petitioner from reoffending. In the Lackawanna Executive Law, "it is a condition of parole that

offender shall be prohibited from using the internet to access pornographic material, access a commercial social networking website, communicate with other individuals or groups for the purpose of promoting sexual relations with persons under the age of eighteen." Lackawanna Executive Law §259-C. This statute provision is to further the governmental interest of sex offenders from having communication with minors where the offender would be able to hide how old or who they really are. This is a significate interest that should be upheld under intermediate scrutiny and shows that the state has met the second prong.

[¶ 21] The third prong in the test is whether the restriction leaves open ample alternative channels for communication. Petitioner claims that she is unable to search for work because she is barred from accessing any social networking site. However, if you look at the definition of social networking website under Lackawanna Executive Law § 259-C any website that permits persons under eighteen years of age to be registered users for the purpose of establishing personal relationships with other users… the key phrase here in the definition is establishing personal relationships. With the permission of her Parole Officer she would be able to use sites like Indeed, or LinkedIn because they are not for establishing personal relationships, they are for looking for employment. There are also help wanted ads in the newspaper and she can contact employers directly. There are ample alternative channels for Petitioner to access job searches, just because they may not be the easiest they are not restrictive, but they are available alternatives for the petitioner to use.

[¶ 22] Therefore, ROSA does not violate the Petitioner's First amendment rights because it is meets all of the prong of the time, place, or manner test. It is content neutral because it is applied to all of the offenders that are on parole, restriction serves a significant government

interest by keeping the public safe and trying to prevent offenders from reoffending, and the state leaves open ample alternative channels for communication for the Petitioner to use.

B. The Fourteenth Amendment due process was not violated because Petitioner was able to defend herself from the original charges that led to the registration requirement and the restrictions were narrowly tailored to serve a compelling governmental interest.

[¶ 23] The Petitioner's Fourteenth Amendment due process was not violated because she was able exercise her due process when she defended herself from the original charges. The Petitioner was given Due Process when she was first charged with the crimes, ROSA just set out new requirements and restrictions when the sex offenders are on parole. Just like in Connecticut Dept. of Public Safety v. Doe, due process does not require the opportunity to prove a fact that is not material to the State's statutory scheme.

[¶ 24] Connecticut's sex offender registry law, Megan's Law, was challenged that it deprived the offenders of due process because they were not given a hearing to determine if they were a violent offender. The Court of Appeals upheld the offenders' summary judgement because the Connecticut law implicated a liberty interest because of the law's stigmatization of respondent by implying that he is currently dangerous. Connecticut Dept. of Public Safety v. Doe, 538 U.S.1, 6 (2003). In the Court of Appeals' view this liberty interest arose an obligation to give respondent an opportunity to demonstrate that he was not likely to be currently dangerous. Id. at 6. The Supreme Court found it unnecessary to reach the question of whether the injury to reputation constitutes the deprivation of a liberty interest because due process does not entitle him to a hearing to establish a fact that is not material under the Connecticut statute. Id. at 7.

[¶ 25] The Ninth Circuit has also weighed in on whether requiring sex offenders to have to register would violate the due process rights, in Doe v. Tandeske, because it would deprive them of substantive due process and protected liberty interests without notice or the right to be heard. "The Supreme Court has described the fundamental rights protected by substantive due process as those personal activities and decisions that this Court has identified as so deeply rooted in our history and traditions, or so fundamental to our concept of constitutionally ordered liberty that they are protected by the Fourteenth Amendment." Doe v. Tandeske, 361 F.3d 594, 596 (9th Cir. 2004) (*quoting* Washington v. Glucksberg, 521 U.S. 702, 727 (1997)). The Ninth Circuit using Glucksberg concludes that persons who have been convicted of serious sex offenses do not have a fundamental right to be free from the registration and notification requirement set forth in the Alaska Statute.

[¶ 26] While fundamental liberty interests require that any state infringement of these rights be narrowly tailored to serve a compelling state interest, state actions that implicate anything less than a fundamental right require only that the government demonstrate a reasonable relation to a legitimate state interest to justify the action. Glucksberg, 521 U.S. at 722.

[¶ 27] In Connecticut, the respondent seeks to prove that he is not currently dangerous. This is of no consequence under Connecticut's Law, the law's requirements turn on an offender's conviction alone. Connecticut, 538 U.S. at 7. Unless respondent can show that the substantive rule of law is defective any rearing on current dangerousness is a bootless exercise. Id. at 7-8. There was no need for a new trial because the respondent would have to register whether he was a violent or a nonviolent sex offender. Going through the process of having a trial would not change the outcome because it is based off the conviction of his pervious crime.

There was an opportunity for the respondent to defend himself in court when the charges were originally brought.

[¶ 28] Here the state has met the Petitioners due process rights. Under the law set out in Glucksberg, fundamental liberty interests can be infringed upon if the state has narrowly tailored the infringement to serve a compelling state interest. Anything less than a fundamental liberty the state has to demonstrate a reasonable relation to legitimate state interests. None of what is being taken away from the Petitioner is a fundamental liberty. The only restriction that would be close to taking away a fundamental liberty would be her restriction from working in the career field of her choice. However, the state did not take away Petitioners right to choose her profession, the state restricted her access to schools, which is where she committed her crime against her student. It is narrowly tailored that Petitioner is not allowed within 1000 feet of school grounds to serve the compelling state interest of protecting the community's children from abuse and to help Petitioner to not reoffend. The other restrictions on the Petitioner, such as restricting her driving and social media access are all reasonably related to the legitimate state interest of protecting the community and preventing Petitioner recidivism.

[¶ 29] Therefore, Petitioners Due Process rights under the Fourteenth Amendment were not violated because she had access for procedural due process. Petitioner was able to defend herself from the original charges, and the registration to the sex offenders list is a consequence of her previous conviction. The Petitioner also had substantive due process because the restriction to her liberties were narrowly tailored to serve a compelling governmental interest, and the rights were less than fundamental, the restrictions would be reasonably related to legitimate state interest.

[¶ 30] In conclusion the Petitioners First Amendment free speech rights were not violated because it is meets all of the prongs of the time, place, or manner test. It is content neutral because it is applied to all of the offenders that are on parole, restriction serves a significant government interest by keeping the public safe and trying to prevent offenders from recidivism, and the state leaves open ample alternative channels for communication for the Petitioner to use. The Petitioners Fourteenth Amendment due process rights were not violated because the restriction to her fundamental liberties were narrowly tailored to serve a compelling governmental interest or these reasons and the rights were less than fundamental, the restrictions would be reasonably related to legitimate state interest. The Court should uphold ROSA as constitutional and affirm summary judgement for the Respondent.

II. THE ENACTMENT OF ROSA WAS A PROCEDURAL CHANGE THAT WAS NOT RETROSPECTIVE AND DID NOT HAVE A DETRIMENTAL EFFECT ON THE PETITIONER.

[¶ 31] The Constitution of the United States, article 1, section 9, prohibits the Legislature of the United States from passing any ex post facto law. Calder v. Bull, 3 U.S. 386, 389 (1798). Additionally, section 10 goes on to state, "that no state shall pass any ex post facto law." Id. 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 prescribed." Weaver v. Graham, 450 U.S. 24, 28 (1981). Also, there are two critical elements that must be present for a criminal or penal law to be ex post facto. Id. at 29. Moreover, the law must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it. Id. at 29. Additionally, the court will look at the effect, not the form, of the law that determines whether it

is ex post facto. Id. at 31. ROSA fulfills the two-prong test because it is not retrospective and did not disadvantage Petitioner.

A. ROSA does not violate the Ex Post Facto Clause when the new law was not retrospective.

[¶ 32] The critical question is whether the law changes the legal consequences of acts completed before its effective date. Id. Additionally, critical to relief under the Ex Post Facto Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated. Id. at 30. Also, the court has recognized that a prisoner's eligibility for reduced imprisonment is a significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed. Id. at 32. Moreover, the court's inquiry looks to the challenged provision, and not to any special circumstances that may mitigate its effect on the particular individual. Id. at 33.

[¶ 33] In Lindsay, the effect of the new statute is to make mandatory what was before only the maximum sentence. Lindsey v. Washington, 301 U.S. 397, 400 (1937). Also, petitioners might have been sentenced to fifteen years under the old statute. Id. at 401. Moreover, the ex post facto clause looks to the standard of punishment prescribed by a statute, rather than to the sentence actually imposed. Id.

[¶ 34] In Doe, New York enacted SOAR, a statute that required sex offenders, after serving their sentences, to register with law enforcement officials, and provides for various degrees of public notification of the identity and address of these offenders. Doe v. Pataki, 120 F.3d 1263, 1265. (2d. Cir. 1997). The court acknowledged that the seriousness of the harm that sex offenders' actions cause to society and the perception, supported by some data, that such

offenders have a greater probability of recidivism than other offenders. Id. at 1266. Also, the legislature articulated two goals addressed by the SORA. Id. First, protecting members of the community, particularly their children, by notifying them of the presence of individuals in their midst who may present a danger. Id. Second, enhancing law enforcement authorities' ability to investigate and prosecute future sex crimes. Id.

[¶ 35] In the case here, Petitioner pleaded guilty in 2011 to rape in the third degree, criminal sexual act in the third degree, and sexual misconduct. Petitioner was placed on parole in January of 2017. The legislature found the danger of recidivism posed by sex offenders and the protection of the public from sex offenders a paramount concern. Furthermore, persons who have committed a sex offense have a reduced expectation of privacy because of the public's interest in safety and effective operation of the government. Petitioner committed the sex acts against her student "dozens of times" at the school, in her car, and at her home. Additionally, Petitioner deleted files from her phone and email account. Petitioner must surrender her driver's license, not travel within 1000 feet of a school, and bared from accessing any "commercial social networking website." Moreover, a statutory scheme that serves a regulatory purpose "is not punishment even though it may bear harshly on one affected." Doe, 120 F.3d 1279. (*quoting* Flemming v. Nestor, 363 U.S. 603, 614 (1960)). Therefore, the court should find that ROSA was not retrospective because ROSA was enacted to protect public safety and applied to all "sex offenders."

[¶ 36] The Dobbert court stated that fair warning cannot be the touchstone for two reasons. Dobbert v. Florida, 432 U.S. 282, 307 (1977) (J. Stevens dissenting). First, "fair warning" does not provide a workable test for deciding particular cases. Id. (J. Stevens dissenting). Second, fair notice is not the only important value underlying the constitutional

prohibition. Id. (J. Stevens dissenting). Additionally, the Ex Post Facto Clause also provides a basic protection against improperly motivated or capricious legislation. Id. (J. Stevens dissenting). Moreover, the "fair warning" test would allow government action that is just the opposite of impartial. Id. (J. Stevens dissenting). Also, the "fair warning" rationale will defeat the very purpose of the Clause. Id. (J. Stevens dissenting).

[¶ 37] In this case here, Petitioner had a warning that her parole would entail general conditions of parole. Additionally, the Lackawanna Board of Parole laid out what would be required of the Petitioner under her general condition of release. Therefore, the court should disregard the fair warning test because the fair warning test would defeat the purpose of the Ex Post Facto Clause.

B. The enactment of ROSA did not have a detrimental effect on Petitioner.

[¶ 38] It is axiomatic that for a law to be ex post facto it must be more onerous than the prior law. Dobbert v. Florida, 432 U.S. 282, 294 (1977). A statute is ex post facto which, by its necessary operation and in its relation to the offence or its consequences, alters the situation of the accused to his disadvantage. Thompson v. Missouri, 171 U.S. 380, 386 (1898). Additionally, a statute is not of that class unless it materially impairs the right of the accused to have the question of his guilt determined according to the law as it was when the offence was committed. Id.

[¶ 39] In Morales, the court held the amendment did not violate the Ex Post Facto Clause. Cal. Dep't of Corr. V. Morales, 514 U.S. 499, 514 (1995). Also, the court established that the Constitution "forbids the application of any new punitive measure to a crime already consummated." Cal. Dep't of Corr. V. Morales, 514 U.S. 499, 505 (1995). (*quoting* Lindsey v. Washington, 301 U.S. 397, 401 (1937)). Additionally, the court must determine whether the

amended law produces a sufficient risk of increasing the measure of punishment attached to the covered crimes. Id. at 509.

[¶ 40] In Dobbert, the court stated that one is not barred from challenging a change in the penal code on ex post facto grounds simply because the sentence he received under the new law was not more onerous than that which he might have received under the old. Dobbert, 432 U.S. 300. Additionally, under the new law a defendant must receive a sentence which was under the old law only the maximum in a discretionary spectrum of length. Id. Moreover, under the new statute a convict could be admitted to parole at a time far short of the expiration of his mandatory sentence, the Court observed that even on parole he would remain "subject to the surveillance" of the parole board and that his parole itself was subject to revocation. Id. at 299-300. (*citing* Lindsey v. Washington, 301 U.S. 397 (1937)).

[¶ 41] In the case here, Petitioner's general parole conditions allowed for the Parole Officer to inspect person, residence, and property. Also, Petitioner would have to discuss changes to her residence, employment, and program status. Additionally, Petitioner is not authorized to fraternize with persons that have criminal records, unless with permission from a Parole Officer. Petitioner may receive limited authorization to enter a school with written permission from Parole Officer and superintendent. Petitioner may be authorized to use the internet to talk to a person under the age of eighteen if the offender is the parent of a minor and not prohibited from communicating with that child. Petitioner may use a vehicle with written authorization from her parole officer and commissioner of the department of motor vehicles. Therefore, the court should find that ROSA did not have a detrimental effect on Petitioner because she was allowed out of prison early, and there were provisions that allowed Petitioner to regain lost privileges.

C. ROSA made procedural changes to the law; not substantial

[¶ 42] There may be procedural changes which otherwise affect him in such a harsh and arbitrary manner as to fall within the constitutional prohibition. Beazell v. Ohio, 269 U.S. 167, 170 (1925). Furthermore, the constitutional limitation may be transgressed by alterations in the rules of evidence or procedure. Id. Moreover, any statute which punishes as a crime an act previously committed, which makes more burdensome the punishment for a crime, after its commission is prohibited as ex post facto. Id. at 169-170. Additionally, even though it may work to the disadvantage of a defendant, a procedural change is not ex post facto. Dobbert v. Flordia, 432 U.S. 282, 293 (1977). Also, "Just what alterations of procedure will be held to be of sufficient moment to transgress the constitutional prohibition cannot be embraced within a formula or stated in a general proposition." Id. at 171.

[¶ 43] In Miller, the court explained, "The distinction between substance and procedure might sometimes prove elusive, here the change at issue appears to have little about it that could be deemed procedural." Miller v. Florida, 482 U.S. 423, 433 (1987).

[¶ 44] In Hopt, the court maintains that the public has an interest in the accused's life and liberty. Hopt v. Utah, 110 U.S. 574, 579 (1884). Furthermore, the citizen holds to the public, and the object of punishment for public wrongs, the legislature has deemed it essential to the protection of one whose life or liberty is involved in prosecution of a felony. Id. Moreover, if the accused are deprived of life or liberty, such deprivation would be without that due process of law required by the Constitution. Id. The court held that modes of procedure only, in which no one can be said to have a vested right, and which the State, upon grounds of public policy, may regulate at pleasure. Id. at 590.

[¶ 45] In Kring, the court explained that so long as the judgment rendered on a plea remained in force, or after it had been executed, the defendant was liable to no further prosecution for any charge found in that indictment. Kring v. Mo., 107 U.S. 221, 234 (1882). Additionally, pleading guilty under an agreement for ten years' imprisonment, both the accused and the prosecuting attorney and the court all knew that the result would be an acquittal of all other charges, but that of murder in the second degree. Id.

[¶ 46] In the case here, Petitioner plead guilty to two class E felonies. Also, ROSA changes the definitions of terms, such as “sex offender”, “sex offense”, and “predicate sex offender”. ROSA enacts procedures for the court, parole board, and offenders to comply with dealing with any sex offender. Moreover, ROSA gives procedures for Petitioner to retain their driver’s license, enter within 1000 feet of a school, and access the internet. Therefore, the court should see the new law of ROSA as procedural and not substantial.

CONCLUSION

[¶ 47] In conclusion the Petitioners First Amendment free speech rights were not violated because it is meets all of the prongs of the time, place, or manner test. It is content neutral because it is applied to all of the offenders that are on parole, restriction serves a significant government interest by keeping the public safe and trying to prevent offenders from recidivism, and the state leaves open ample alternative channels for communication for the Petitioner to use. The Petitioners Fourteenth Amendment due process rights were not violated because the restriction to her fundamental liberties were narrowly tailored to serve a compelling governmental interest or these reasons and the rights were less than fundamental, the restrictions would be reasonably related to legitimate state interest. The Court should uphold ROSA as constitutional and affirm summary judgement for the Respondent.

[¶ 48] Furthermore, ROSA was not retrospective because the law was concerned with public safety and recidivism of sex offenders. Additionally, ROSA did not disadvantage the Petitioner because while the requirements for sex offenders under ROSA were harsh, they were not a punishment, but a way for offenders to be released on parole. Moreover, Rosa was a procedural change because the new law defines meanings and outlines procedures for the court, parole board, and the offender.

[¶ 49] For these reasons The Supreme Court of the United States should uphold ROSA as constitutional and affirm summary judgement for the Respondent.

Respectfully Submitted, this 13th day of March 2019

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