No. 18-13445

In the Supreme Court of the United States

Tyrone William Holland,

Petitioner

V.

Governor of Georgia,

Respondent

MOTION TO DIERCT THE CLERK TO FILE PETITION FOR WRIT OF CERTIORARI OUT OF TIME TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Pursuant to this Court's Rules 13.5 and 30.2, I, petitioner Tyrone William Holland submits there was extraordinary circumstances in preventing him from timely filing his writ of certiorari and based on the set of facts that follows prays that said writ of certiorari be filed.

1. Opinion Below

On August 7, 2019, the United States Court of Appeals for the Eleventh Circuit entered its decision in affirming the district court ruling that provision (e)(3) of Georgia statute O.C.G.A. 42-1-12 was not impermissibly retroactive. The Court of Appeals' decision is contained in Appendix

A. of the petitioner's writ of certiorari. Pursuant to this Court's Rules 13.1, 13.3, and 30.1, the petitioner's writ of certiorari was due on or before November 5, 2019. See (Ex. 1).

2. Reason for Granting Out of Time Motion

a. Procedural History

On May 24, 1996, I was convicted of a sexual assault offense and sentence to a 20 year confinement in Georgia State Prison. Approximately months before my release from prison I was informed by my prison counselor that I would be required to register as a sex offender upon my release. I filed a 42 U.S.C. 1983 application in the Northern District challenging this requirement in submitting that in accordance with the language of provision (e)(3) of O.C.G.A. 42-1-12 my constitutional rights were violated because this requirement to register was impermissibly retroactive. The district court denied relief on this claim and the 11th circuit court of appeals affirmed.

b. Grounds for Certiorari Exist

In accordance with this Court's precedence in both Lindh v. Murphy, 521 U.S. 320 (1997) and Landgraf v. USI film Products, 511 U.S. 244 (1994), Georgia Code section O.C.G.A. 42-1-12, provision (e)(3) is not permissibly retroactive and is, instead, predicated off of a prospective element in triggering compliance. This case presents an issue worthy of presentation to this Court in a writ of certiorari, and to do so would prevent a fundamental miscarriage of justice.

3. The need for out of time motion because of extraordinary circumstances

My writ of certiorari petition was due before or on November 5, 2019. During this time in between the 11th circuit's decision on August 7th, my 73 old stepfather got ill and had to be

rushed to the hospital. Upon this incident we learned that the pacemaker that was inserted into his chest by the Veterans Affairs ("V.A.") Hospital gave him some type of an infection called MRSA. My stepfather was admitted on August 26th. (Ex.2).

Prior to this incident, me and my brother, Kevin Byrd, made the decision to move my stepfather out of the apartment he was staying alone towards us all putting in together in purchasing a home. One of the decisions to do so was based off the health and well-being of my stepfather because of him living alone so that it would be easier to be there to assist him. Not even weeks after we all have moved into our home, and only weeks after the "VA" had inserted that pacemaker into his chest did we think that the hardship of having a love one in the hospital fighting for his life would put such a strain on us as a unit. It was the constant worrying of whether he was going to live or die, the constant visits to the hospital by me and my brother when we both had to take turns to go see him based on our work schedule, and, for the petitioner, his school schedule as well, which he attends, ironically, for Legal Studies. (Ex.3). Another concern and hardship due to this incident was the strain of me and my brother not having access to my stepfather's income from his payee of his "V.A." funds to help cover his half of the mortgage. This money instead was being held in going towards my stepfather's hospital stay and/or bill. Because of this, me and my brother had to work overtime on our individual jobs a number of days to not only cover the mortgage, but all of the other expenses that comes with being homeowner. Though it was first believed that the my stepfather was going to get better, and actually did, momentarily, the infection from the pacemaker had caused other medical issues which took a turn for the worst when my stepfather died on October 25th. (Ex. 4). There was hardly any time to do anything with so much going on out of

necessity to the situation and this trend continued throughout my stepfather's continuous stay until his death.

After my stepfather's death there were other issues concerning this matter that took up even more time in causing the late filing of my writ of certiorari. One was trying to determine how we was going to bury him because, though there was some funds left over to be split among his biological children, there was not enough left over to bury him without added funds so my brother came to the decision to have him cremated instead. This decision didn't sit too well with his family members in South Carolina who wanted him to have a "proper" burial and funeral there. After going back and forth with his family members there in explaining why the cremation was a necessary option, it was concluded that they would make up the difference in money in taking over the funeral arrangements in having it in South Carolina where he is originally from. So we had to arrange for his body to be flown there (Ex.5), make arrangements to attend ourselves, and come back afterwards. It was just a lot of stuff going on, not to mention looking for an attorney to obtain (which we are still doing) in holding the V.A. liable for his death.

Through it all though, along with going to school and working long hours to help cover the mortgage voided by my stepfather's hospitalization, I still managed to be diligent in having my writ of certiorari petition mailed to this Court within 90 days. I sent my petition to this Court on November 8th through the overnight mail processing system and actually thought that I was on time. (Ex.6). I had no idea that it was supposed to be 90 days as opposed to three months.

Wherefore, the Applicant-Petitioner requests and pray that an Order be entered in directing the Clerk to file out-of-time motion in which Applicant-Petitioner can have his writ of certiorari heard and determined on its merits

Respectfully submitted.

Tyrone William Holland
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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-13445
Non-Argument Calendar

D.C. Docket No. 1:15-cv-01867-TWT

TYRONE WILLIAM HOLLAND,

Plaintiff-Appellant,

versus

GOVERNOR OF GEORGIA,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

(August 7, 2019)

Before WILSON, JILL PRYOR and BLACK, Circuit Judges.

PER CURIAM:

Tyrone William Holland, proceeding *pro se*, appeals the district court's dismissal of his 42 U.S.C. § 1983 action for failure to state a claim. He argues the district court erroneously determined that subsections (e)(1) and (e)(3) of Georgia's sex offender registry statute, O.C.G.A. § 42-1-12, were not contradictory. According to Holland, (e)(1) exempted him from the registration requirement because his conviction was entered on May 24, 1996 (before July 1, 1996), and thus, he was not subject to (e)(3)'s requirement that all individuals who were previously convicted of a sex offense and released after July 1, 1996, must register. He asserts that requiring him to register under (e)(3), despite his exemption under (e)(1), violated his rights to substantive due process and equal protection under the Fourteenth Amendment to the U.S. Constitution, and also amounted to cruel and unusual punishment in violation of the Eighth Amendment. He also contends that (e)(3) only has prospective application because it is not unambiguously retroactive. After review,[1] we affirm the district court.

[1] We review *de novo* a dismissal for failure to state a claim upon which relief may be granted, "accepting the allegations in the complaint as true and construing them in the light most favorable to the plaintiff." *Leib v. Hillsborough Cty. Pub. Transp. Comm'n*, 558 F.3d 1301, 1305 (11th Cir. 2009). We also review questions of statutory interpretation and constitutional law *de novo*. *U.S. ex rel. Osheroff v. Humana, Inc.*, 776 F.3d 805, 809 (11th Cir. 2015) (statutory interpretation); *Nichols v. Hopper*, 173 F.3d 820, 822 (11th Cir. 1999) (constitutional law).

I. DISCUSSION

A. Whether subsections (e)(1) and (e)(3) of O.C.G.A. § 42-1-12 are contradictory

We begin the process of statutory interpretation by looking at a statute's plain language. *Brown v. Budget Rent-A-Car Systems, Inc.*, 119 F.3d 922, 924 (11th Cir. 1997). "As a general rule, the use of a disjunctive in a statute indicates alternatives and requires that those alternatives be treated separately. Hence, language in a clause following a disjunctive is considered inapplicable to the subject matter of the preceding clause." *Id.* (quotations omitted). In other words, disjunctive language establishes alternative means of violating or triggering a statutory provision. *Rine v. Imagitas, Inc.*, 590 F.3d 1215, 1224 (11th Cir. 2009).

Georgia's sex offender registration statute lists eight categories of individuals who must register as a sex offender. O.C.G.A. § 42-1-12(e)(1)-(8). These categories include any individual who:

> (1) Is convicted on or after July 1, 1996, of a criminal offense against a victim who is a minor; [or] . . .
>
> (3) Has previously been convicted of a criminal offense against a victim who is a minor and may be released from prison or placed on parole, supervised release, or probation on or after July 1, 1996.

Id. § 42-1-12(e)(1), (e)(3).

The district court did not err in concluding that subsections (e)(1) and (e)(3) of § 42-1-12 were not contradictory because the statute lists the categories of

offenders required to register in the disjunctive. The statute, by its plain language, is disjunctive because it separates the eight categories of covered individuals with "or." *See Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1141 (2018) (stating the word "or" is almost always disjunctive). Thus, the statute establishes alternative means by which a sex offender is required to register, and the fact that Holland's conviction is excluded by (e)(1) does not preclude him from registration under (e)(3). *Brown*, 119 F.3d at 924; *Rine*, 590 F.3d at 1224. By arguing that (e)(1) renders him exempt from registration given his May 24, 1996, conviction, Holland misunderstands the nature of the statute's disjunctive categories: (e)(1) is entirely separate and has no bearing on (e)(3)'s registration requirement for offenders who were released from prison on or after July 1, 1996, following a previous conviction. *Rine*, 590 F.3d at 1224. The district court did not err in concluding the categories listed under § 42-1-12(e) were stated in the disjunctive and thus (e)(1) did not prohibit (e)(3) from applying to Holland.

B. Whether O.C.G.A. § 42-1-12(e)(3) is retroactive and, if so, whether it violates the Ex Post Facto *Clause*

A statute's language "is ambiguous if it is susceptible to more than one reasonable interpretation, and a forced meaning does not create ambiguity." *Villarreal v. R.J. Reynolds Tobacco Co.*, 839 F.3d 958, 970 (11th Cir. 2016) (*en banc*) (quotations and citation omitted). In testing for ambiguity, we examine "the

language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Bankston v. Then*, 615 F.3d 1364, 1367 (11th Cir. 2010) (quotations omitted). Statutes are presumed to have only prospective application, unless the legislature unambiguously directs retroactive application. *Vartelas v. Holder*, 566 U.S. 257, 265-66 (2012).

Section 42-1-12(e)(3) applies retroactively. There is no ambiguity as to the statute's application: it applies to those who have "previously been convicted" of certain crimes, defined by the statute, who will be released after a particular date. *Then*, 615 F.3d at 1367. The "previously been convicted" language clearly establishes the statute's retroactive application, while the specific cut-off date limits the group of offenders covered by that retroactive application. *See Vartelas*, 566 U.S. at 267 (noting that provisions of IIRIRA that applied to convictions "entered before, on, or after" the enactment date were expressly retroactive). Holland's forced reading of the provision does not create ambiguity where none exists. *Villarreal*, 839 F.3d at 970.

The *Ex Post Facto* Clause prohibits Congress and state legislatures from enacting "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." *United States v. W.B.H.*, 664 F.3d 848, 852 (11th Cir. 2011)

(quotations omitted). This prohibition applies only to criminal laws, not to civil regulatory regimes. *Id.*

In *Smith v. Doe*, the Supreme Court held that Alaska's sex offender registration statute did not violate the *Ex Post Facto* Clause because it established a civil regulatory scheme and did not impose punishment. 538 U.S. 84, 105-06 (2003). Following *Smith*, we upheld the Sex Offender Registration and Notification Act (SORNA) against an *Ex Post Facto* challenge. *W.B.H.*, 664 F.3d at 860. SORNA imposed similar requirements on offenders as the Alaska statute, including the requirement that all offenders covered by the statute must register and verify their information in person and must provide their name, social security number, address, and vehicle description when registering. *Id.* at 852. These requirements did not impose a punitive restraint or disability. *Id.* at 856-58.

Section 42-1-12(e)(3) does not violate the *Ex Post Facto* Clause because, like the registration statutes that have been upheld by both the Supreme Court and this Court, it imposes a civil regulatory regime rather than punishment. Like the registration statutes upheld in *Smith* and *W.B.H.*, § 42-1-12 requires various categories of sex offenders to provide personal information to the state, keep that information updated, and the state to publish that information. O.C.G.A. § 42-1-12 (a)(16), (f), (i); *Smith*, 538 U.S. at 90; *W.B.H.*, 664 F.3d at 852. Such a scheme

does not implicate the *Ex Post Facto* clause because it is civil and regulatory in nature.

We reject Holland's argument that *Vartelas*, 566 U.S. at 261, is controlling. There, the Supreme Court addressed the question of whether a lawful permanent resident convicted of a crime before the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) was subject to a provision of that act that could have denied him reentry to United States. The provision at issue in that case did not expressly apply retroactively, which the Court noted was in contrast to other provisions of IIRIRA that were clearly retroactive because they applied to convictions entered "before, on, or after" the enactment date. *Id.* at 266-67. Further, the provision imposed a new, severe, disability because it potentially barred permanent residents from reentry into the United States. *Id.* at 267-68. Accordingly, because the IIRIRA provision applied a disability that Congress did not expressly intend to apply retroactively, the Supreme Court found that it did not retroactively apply to the resident's previous conviction. *Id.* at 272. In contrast, the provision at issue here does not impose a new punitive restraint or disability and it expressly applies retroactively. *See W.B.H.*, 664 F.3d at 856-57. Accordingly, the district court did not err in concluding that § 42-1-12(e)(3) unambiguously applied retroactively to require Holland's registration.

C. Due Process, Equal Protection, and Cruel and Unusual Punishment

Even construed liberally, Holland's complaint does not state any valid constitutional claims. *See Jones v. Fla. Parole Comm'n*, 787 F.3d 1105, 1107 (11th Cir. 2015) (stating *pro se* pleadings are "held to a less stringent standard" than those drafted by attorneys and are "liberally construed"). Holland's constitutional claims are based on his erroneous reading of the registry statute. He argues that (e)(1) gives him and other similarly situated offenders the right to be free from the registration requirement, and applying (e)(3) violates that right. However, Holland did not fall under (e)(1) because he was convicted before July 1, 1996. Rather, he was required to register under the independent category of (e)(3) because he was released from prison on September 23, 2015, following a previous conviction for a sex offense.

Holland does not state any valid constitutional claims. His due process claim is without merit because Georgia's registration statute is substantively similar to those that have been upheld under the same challenge. *See Doe v. Moore*, 410 F.3d 1337, 1345-46 (11th Cir. 2005) (upholding Florida's sex offender registry statute under rational basis review after an offender challenged it on substantive due process grounds). Holland's equal protection clam is based on an incorrect reading of the statute and his proposed group—similarly situated sex

offenders who are excluded by (e)(1) but forced to register by (e)(3)—does not exist because the statute does not create such a group. Finally, Holland has not stated a valid claim under the Eighth Amendment. Section 42-1-12 does not impose cruel and unusual punishment as the statute, in requiring sex offenders to submit personal information and the state to publish that information, is similar to the registration statutes that the Supreme Court and this Court have determined to be civil and regulatory in nature, rather than punitive. *See Smith*, 538 U.S. at 93 (holding in general, the imposition of restrictive measures on sex offenders, including requiring registration on a public database, is not punitive); *W.B.H.*, 664 F.3d at 860 (determining registration requirement under SORNA was not punitive).

II. CONCLUSION

Because the provisions of § 42-1-12(e) are listed in the disjunctive, they are not contradictory and (e)(1) did not preclude Holland from registration under (e)(3). Thus, his constitutional claims based on this alleged contradiction are without merit. Further, the plain language of (e)(3) requires retroactive application of that provision. Accordingly, we affirm.

AFFIRMED.

Additional material from this filing is available in the Clerk's Office.