

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COURT OF APPEALS

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Appellant,

-against-

No. 54

ARTHUR W. ELLIS, JR.,

Respondent.

20 Eagle Street
Albany, New York
June 5, 2019

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

KATHRYN M. MORYL, ADA
ESSEX COUNTY DISTRICT ATTORNEY'S OFFICE
Attorney for Appellant
7559 Court Street
P.O. Box 217
Elizabethtown, NY 12932

NOREEN MCCARTHY, ESQ.
LAW OFFICES OF NOREEN MCCARTHY
Attorney for Respondents
P.O. Box 756
Keene Valley, NY 12943

Sharona Shapiro
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The next appeal on this
2 afternoon's calendar is appeal of the State of New York v.
3 Arthur Ellis.

4 Counsel?

5 MS. MORYL: May it please the court. Kathryn
6 Moryl, Assistant District Attorney, on behalf of the
7 appellant, Essex County District Attorney, the Honorable
8 Kristy Sprague.

9 At this point I'd like to request two minutes for
10 rebuttal.

11 CHIEF JUDGE DIFIORE: Two minutes?

12 MS. MORYL: Yes, ma'am.

13 CHIEF JUDGE DIFIORE: You may.

14 MS. MORYL: Thank you.

15 CHIEF JUDGE DIFIORE: Counsel, the defendant
16 requested in this case, I believe, a bill of particulars,
17 but I don't think that there was one that was served. So
18 talk us through internet identifier.

19 MS. MORYL: Yes, ma'am. It's appellant's
20 position that in acting - - - in the legislative enacting
21 the Electronic Security and Targeting of Online Predators
22 Act, e-STOP, that - - - that the intent was made clear that
23 social networking by - - - and - - - and social networking
24 websites and the use of those in the hands of sexual
25 predators create and present a clear and present danger - -



1 -

2 JUDGE GARCIA: What would you have this defendant
3 disclose that he didn't disclose?

4 MS. MORYL: Yes, Your Honor. Well, I think that
5 brings it to the legislative intent. So if the court looks
6 at Correction Law, Section 168 - - -

7 JUDGE GARCIA: But before we get to that, what
8 information do you think should have been on his disclosure
9 form that wasn't there?

10 MS. MORYL: Sir, under Section (16), Facebook:
11 disclose your Facebook account, disclose your site - - -
12 Skype account.

13 JUDGE GARCIA: So what does that mean, though, in
14 terms of practically, what should this defendant have put
15 on that line?

16 MS. MORYL: So on that line, Facebook account,
17 which is, under (16), the authorized internet entity, which
18 the Third Department held Facebook is, and - - - and which
19 appellant agrees with. But also, under Section (18), the -
20 - - the internet identifier.

21 JUDGE GARCIA: Yeah, internet identifier.

22 MS. MORYL: Right.

23 JUDGE GARCIA: So as I understand that, that's an
24 email or a screen name. And I - - - looking at his
25 disclosure forms, it seems like those were disclosed. So I



1 wonder what else could he have disclosed.

2 MS. MORYL: Specifically, his designation, so not
3 - - - not his email address, but his designation.

4 JUDGE FAHEY: So when you say his designation,
5 I'm a little unclear. What do you mean? He disclosed his
6 name, and on his Facebook account he uses "Arthur Ellis,
7 Jr.". e-STOP is to identify those who use some
8 abbreviation or some pseudonym, and - - - and to allow the
9 authorized internet agent or - - - or account to place
10 their account, to identify those people that are sex
11 offenders. Here he gave his name. And what - - - what he
12 - - - there's no better information that he could have
13 given than his name.

14 JUDGE GARCIA: And the email he used to open the
15 Facebook account, so I thought the idea of the statute was
16 that can then be harvested by the Facebook or other
17 providers to identify accounts, and then they have the
18 option of removing those accounts from the site. So what
19 else does he need to disclose?

20 MS. MORYL: He needs to disclose, as - - - as
21 required by the legislature, sir, the intent is: who are
22 you representing yourself to be on that social network
23 site?

24 JUDGE FAHEY: But he did; he said Arthur Ellis,
25 Jr. Aren't you really saying that he needs to disclose not



1 the internet identifiers but his Facebook account itself?

2 MS. MORYL: Respectfully, both, sir. And if the
3 court - - -

4 JUDGE FAHEY: Okay. So let's stay with the
5 second one, that he needs to disclose his Facebook account.
6 Is that required?

7 MS. MORYL: Yes, under the statute, it is, Your
8 Honor.

9 JUDGE WILSON: Then why doesn't he have to
10 disclose his Amazon account?

11 MS. MORYL: Because under subsection (18), if he
12 were using that Amazon account for the purposes of
13 communication or any other inter - - - internet entity, as
14 defined in subdivision (16), he would be required to
15 disclose that.

16 JUDGE FAHEY: Well, what about an account like
17 WhatsApp or Snapchat that are both under - - - I'm told by
18 my child that they're both under your text - - - under your
19 telephone account and not under your direct internet
20 account. So you - - - you would simply text on those.
21 There's no requirement for you to disclose those.

22 MS. MORYL: I think, sir, that the - - - that the
23 intent of the legislature in enacting this is to encompass
24 all of those entities that are defined in (16) where the
25 user is interacting, and so - - -



1 JUDGE RIVERA: Okay. But let's go back for one
2 moment. When you say "account", what do you mean, that he
3 was supposed to write on this form "Facebook"?

4 MS. MORYL: Yes, ma'am.

5 JUDGE RIVERA: I think that's what Judge Garcia
6 was trying to get to in - - -

7 MS. MORYL: Yes.

8 JUDGE RIVERA: - - - the very first question.

9 MS. MORYL: And so - - -

10 JUDGE RIVERA: And then Twitter or WhatsApp or
11 any of these, which you seem to say he's got to reveal
12 everything?

13 MS. MORYL: Yes, because if - - - if the court
14 looks at subdivision (16) and (18), it's the People's
15 position that you can't parse them out. And so in
16 interpret - - - in interpreting a statute or statutory
17 interpretation, the fact that the Third Department looked
18 at Section (16) without considering Section (18) together
19 renders the statutory intent meaningless because under
20 Section - - -

21 JUDGE GARCIA: I thought the intent was not - - -
22 it seems like if you had that requirement, the intent would
23 be, okay, I list Facebook, and then someone is going to go
24 to Facebook and say, hey, by the way, can we see this or -
25 - - I thought the intent of the statute was to provide



1 access by Facebook or what - - - whatever the provider, to
2 say once they get this information they can do their own
3 check. And the way - - - and then they can take whatever
4 action they deem appropriate, including delisting or taking
5 the site down.

6 So that was the identifier because that's what
7 Facebook is going to use to find the accounts. You know,
8 it's going to be the name, email, the screen name, and
9 that's what was disclosed here. So I don't see what - - -
10 again, going back to my original question, what wasn't
11 disclosed that would be required to effectuate the purpose
12 of the disclosure statute, because putting Facebook down
13 there, if you put nothing else, isn't really going to do
14 anything.

15 MS. MORYL: Exactly. Just putting down: I have
16 a Facebook account, I have a Skype account, I have - - -

17 JUDGE GARCIA: But putting the other thing,
18 without putting Facebook, gives them enough information to
19 do what the statute intends. So I have a hard time seeing
20 how you could charge this defendant with not putting down
21 information that isn't necessary for the purposes of the
22 statute - - -

23 MS. MORYL: And - - -

24 JUDGE GARCIA: - - - and isn't listed.

25 MS. MORYL: And so the People note that the



1 Appellate Division found that looking at the DCJS form,
2 there was no specific requirement that you have to list out
3 a Facebook account. And - - - and they looked at it in - -
4 - in an exclusionary fashion. But it's appellant's
5 position that that language and that form is inclusionary,
6 and it's supposed to be broad encompassing as the statute
7 is.

8 JUDGE STEIN: But The terms identifier and - - -
9 and the internet access provider, that's all defined.

10 MS. MORYL: Yes, ma'am.

11 JUDGE STEIN: And you - - - do you agree that
12 what you're suggesting, Facebook, for example, doesn't fall
13 within an authorized internet entity?

14 MS. MORYL: We agree with the Appellate Division
15 that yes, it is in fact an authorized internet entity. But
16 the fact that somebody has a Facebook account without - - -

17 JUDGE STEIN: I'm sorry; you're right.

18 MS. MORYL: - - - providing who - - - who they
19 are, who they're represent - - - representing themselves to
20 be is of no meaning to the statute.

21 JUDGE STEIN: But the form doesn't ask the
22 offender to indicate the - - - the authorized internet
23 entity. And it - - - it seems to me, maybe - - - I assume
24 that you've looked at the statutes of other states, you've
25 looked at how SORNA addresses this, that they're very clear



1 when they want to require an internet identifier and the
2 corresponding websites or - - - or internet entities. And
3 there's nothing on the form that would make that clear. So
4 it seems to me, if it was so important, either the
5 legislature or the creator of the form would make that
6 explicit and that - - - an offender who's registering
7 wouldn't have to guess at that.

8 MS. MORYL: Respectfully, the - - - the
9 legislature, in enacting this law, specifically stated that
10 the existing law couldn't keep up with the ever-evolving
11 nature of the internet. And so to the effect that the form
12 would require: please list your Facebook account, please
13 list your Skype account - - -

14 JUDGE STEIN: No, no, no, no, just say that you
15 have to - - - you have to list all accounts in which you
16 are engaging in this social networking on the - - - on the
17 internet. It doesn't have to list the specific names. But
18 - - - but on the form itself it clearly says "Service
19 provider", right? And he lists Time Warner Cable and Road
20 Runner. That's - - - that's accurate, as far as we know,
21 right?

22 MS. MORYL: Correct.

23 JUDGE STEIN: And then it says "Screen name", and
24 he lists two screen names under that. And then it says
25 "Email address", and he lists that.



1 MS. MORYL: But he also - - -

2 JUDGE STEIN: Where does it ask for an account on
3 which you're on the - - - you're using the internet?

4 MS. MORYL: The inclusion of the word "including"
5 before "Screen names", "Email accounts", and "Internet
6 service providers", is - - - is inclusive and it's not
7 exclusive, which brings me to - - - to my next point that -
8 - - I see that my time is up.

9 JUDGE FAHEY: Isn't the - - - if the judge will
10 allow me. At its core, isn't your argument that a Facebook
11 account is equated with an internet identifier? You're
12 saying they're the same thing?

13 MS. MORYL: No, sir. I'm saying that we can't
14 read subdivision (16) without (18). So the fact that
15 somebody may have an account is of no meaning to law
16 enforcement and is of no meaning to these authorized
17 internet entities if we cannot ascertain who somebody is
18 designating themselves to be in - - -

19 JUDGE RIVERA: Yeah, but the problem is that the
20 statute says that they've got to register internet accounts
21 with internet access providers. Facebook is not an
22 internet access provider.

23 MS. MORYL: We agree with the Appellate Division,
24 Your Honor, that Facebook falls under the sub - - -
25 subdivision (16) - - -



1 JUDGE RIVERA: Okay.

2 MS. MORYL: - - - an authorized internet entity,
3 but that you cannot have (16) without also having (18),
4 which, in turn, has a requirement that you not only
5 disclose your Facebook account but who you are representing
6 yourself to be in as many versions of yourself.

7 JUDGE FEINMAN: So more specifically, the
8 language in 168-a(18) where it says: "and designations
9 used for the purposes of chat, instant messaging, social
10 networking"; that's the language that you're relying on?

11 MS. MORYL: Yes, sir. And the Third Department
12 specifically found that Facebook was not a designation, and
13 that is where we - - -

14 JUDGE RIVERA: So - - -

15 MS. MORYL: - - - we, respectfully, disagree.

16 JUDGE RIVERA: You think Facebook is a
17 designation?

18 MS. MORYL: That's right.

19 JUDGE RIVERA: This is your position?

20 MS. MORYL: Yes.

21 JUDGE RIVERA: Okay. So then what is his name?

22 MS. MORYL: His name would be - - -

23 JUDGE RIVERA: When he uses his Facebook account,
24 what would that be?

25 MS. MORYL: So under Facebook, Your Honor, you



1 have your account, and you use your email address or
2 whatever alias you're using to sign up. And so the
3 Facebook itself is that internet entity by itself. There's
4 no interaction; there's no customer signing up. It is when
5 an individual takes a proactive stance to sign up for
6 services and creates a representation of themselves,
7 whether it's real or whether it's fictitious, and portrays
8 that out into the internet realm.

9 JUDGE RIVERA: And you say that's not the name?

10 MS. MORYL: It is whatever - - -

11 JUDGE RIVERA: I mean, in this case he used a
12 name. You're saying but that is not the identifier?

13 MS. MORYL: In this case, he did not disclose
14 that he had, a month prior, opened up a Facebook account.

15 JUDGE RIVERA: No, no, no, no. I'm asking you
16 what's his name.

17 MS. MORYL: His name would be, Your Honor,
18 whatever he represents himself to be as a result of having
19 that - - -

20 JUDGE RIVERA: But with - - - vis-a-vis the
21 statute. He's got a Facebook account. He claims - - -

22 MS. MORYL: Whatever - - -

23 JUDGE RIVERA: He claims his name is the way,
24 right, he's known on this account.

25 MS. MORYL: And in - - -



1 JUDGE RIVERA: So I'm asking the People, what's
2 your position as to what is his name with respect to the
3 Facebook account vis-a-vis the language of the statute.

4 MS. MORYL: His name would be whatever he
5 chooses. If it's his real name, Arthur Ellis, Jr., that's
6 who I'm representing myself to be in the world - - -

7 JUDGE RIVERA: Right.

8 MS. MORYL: - - - because I signed up for this
9 service with my - - - with my email account. So in that
10 instance, with respect to this defendant, that would be his
11 designation.

12 CHIEF JUDGE DIFIORE: Thank you, counsel.

13 MS. MORYL: Thank you.

14 CHIEF JUDGE DIFIORE: Counsel?

15 MS. MCCARTHY: May it please the court. My name
16 is Noreen McCarthy, and I represent Arthur Ellis, the
17 respondent.

18 Arthur Ellis, as you know, was not on parole
19 anymore. He had served his time.

20 JUDGE RIVERA: Counsel, isn't the intent and the
21 spirit of the statute to be informed, to have the
22 individual reveal their social media presence? And that
23 would encompass Facebook.

24 MS. MCCARTHY: It's a good question. I think
25 that the purpose of the statute - - - and I think we've



1 been going around it a little bit on what the purpose is -
2 - - is clearly to make sure that the internet is not used
3 in a predatory fashion.

4 I think that the most recent Supreme Court case,
5 the Packingham case that came out, told us to be very
6 careful about this, that we don't want to burden people by
7 saying every time you want to send a message, regardless of
8 what vehicle it is, you have to run down to the police
9 station and register that.

10 JUDGE GARCIA: Counsel, I thought that - - - the
11 purpose of this part of the statute was fairly
12 straightforward, and it was, instead of the government
13 getting involved in that problematic area, they were going
14 to kick this to the provider. So enough information would
15 be given and disclosed so that the provider could make a
16 decision on whether or not to allow that site or whatever
17 page to continue.

18 MS. MCCARTHY: That's absolutely right, and we
19 agree with that a hundred percent, Your Honor. Facebook -
20 - -

21 JUDGE GARCIA: So my question comes back to:
22 what else could your client have disclosed that would allow
23 Facebook to do that?

24 MS. MCCARTHY: Nothing. He disclosed - - - my
25 understanding of this, and the underlying documents at the



1 trial level were a little bit confusing, but my
2 understanding is that his email address is what he used to
3 access Facebook. He never hid who he was. He never hid
4 any of this information. And the fact that he had a
5 Facebook account, nothing asked him to disclose that. And
6 so you're absolutely right. The purpose was - - -

7 JUDGE GARCIA: This is broader, in effect,
8 because any provider, any Facebook can use this identifying
9 information, putting aside cell phone number for the moment
10 - - - but can use this to identify an account rather than
11 have the defendant - - - the person list their - - - their
12 sites that they're on.

13 MS. MCCARTHY: That's absolutely right. So let's
14 say you use your email address to access Facebook and
15 Twitter and everything else. Maybe you use the same
16 identifier. That's what they want to know. Because
17 Facebook knows that Arthur Ellis has an account with them.
18 That's a no-brainer. What they want to do is be able to
19 get into his account and make sure he's not doing anything
20 wrong. And I think the government understood that they
21 couldn't actually regulate that. They couldn't say - - -
22 they couldn't overburden Arthur Ellis about how many
23 disclosures he had to make about the different social
24 networking sites that he accessed, just how do you access
25 them, and then we're going to turn it over. When Facebook



1 asks us, we will give him, Facebook, your internet
2 identifier so they can go troll through their files because
3 we don't want to do that.

4 And - - - and I think the statutory frame is set
5 up perfectly for that, and they carefully tailored that
6 statutory scheme. I don't think this court needs to
7 demolish that statutory scheme. I think it works. I think
8 that - - -

9 JUDGE FAHEY: Can I back you up a second and look
10 at the language of the indictment itself.

11 MS. MCCARTHY: Yes.

12 JUDGE FAHEY: Let's just address that for a
13 second. The language of the indictment simply parrots the
14 statute - - -

15 MS. MCCARTHY: Well - - -

16 JUDGE FAHEY: - - - except for Facebook internet
17 identifier account, right?

18 MS. MCCARTHY: Yes.

19 JUDGE FAHEY: All right. So certainly parroting
20 of the statute does not make it jurisdictionally defective.

21 MS. MCCARTHY: Well, it depends on what you're
22 asking then. That was always - - -

23 JUDGE FAHEY: Well, but as a general legal
24 principle, I don't think you can really argue that.
25 Haven't the People here conceded that the issue really



1 comes down, in prior arguments, to whether or not the
2 Facebook identifier - - - internet identifier account is
3 what he's being charged with. And if such a thing exists,
4 then there may be a violation of law. But if such a thing
5 doesn't exist, failing to register something that doesn't
6 exist can't be a crime. Isn't that the core of the
7 argument here? There either was a crime that existed or a
8 crime that didn't exist.

9 MS. MCCARTHY: Exactly. So a Facebook internet
10 identifier account, we never knew quite what that meant.

11 JUDGE FAHEY: Right.

12 MS. MCCARTHY: If the government said you have to
13 register your Facebook because your - - - and that is what
14 they said, that your Facebook is your internet identifier,
15 well, I think that the statute - - - the definitions just
16 don't support that at all. No definition supports that.

17 If they said that you failed to list your
18 internet identifier, well, then, factually, they were wrong
19 because he did, and so - - -

20 JUDGE FAHEY: So that would mean that we - - - by
21 "we" I mean the Court of Appeals - - - really is restricted
22 to the concession that the issue is the Facebook internet
23 identifier account.

24 MS. MCCARTHY: There is - - - I don't think there
25 is any such thing. And so I think it was a poorly drafted



1 - - -

2 JUDGE FAHEY: I know that; that's the core of
3 your argument.

4 MS. MCCARTHY: Right. Right.

5 JUDGE FAHEY: So there wasn't a crime, right?
6 Yeah, I got that.

7 MS. MCCARTHY: So but I think what they're asking
8 you to say is that Facebook falls under definition (18) and
9 is an internet identifier, which just simply makes no
10 sense. Why would you have three separate - - -

11 JUDGE FAHEY: Right.

12 MS. MCCARTHY: - - - definitions in the statute
13 and - - - and I think that then you run afoul of Packingham
14 if that happens.

15 JUDGE FAHEY: I just read the plea this afternoon
16 before I came down again, and he pleas to both the statute
17 and he pleas that it's a Facebook internet identifier
18 account.

19 MS. MCCARTHY: I think his attorney astutely had
20 recognized that there was a problem here and tried to
21 preserve his right to appeal that. But as you well know,
22 that - - -

23 JUDGE FAHEY: Well, he clearly did reserve his
24 right to appeal.

25 MS. MCCARTHY: Right.



1 JUDGE FAHEY: There's no question.

2 MS. MCCARTHY: And he had no choice as to what
3 language the government was going to put into this, but he
4 did have a choice about how long he was going to sit in
5 jail waiting for his case to be heard, and so I think he
6 did what he could in that situation. But it doesn't cure
7 that - - - the problem here in that he did what he was
8 supposed to do, and there's no question about that, I
9 think.

10 JUDGE FEINMAN: But on that - - - typically, when
11 you plead, haven't you waived certain things and - - - I
12 know there's an express effort here to try to preserve it
13 beyond the plea, but I have some concern about that.

14 MS. MCCARTHY: Well, I hear what you're saying.
15 The agreement was by both sides. And if you recall, during
16 the discussion, the assistant district attorney, at the
17 time, said we welcome him to appeal that issue because it
18 has not yet been addressed. And so both sides actually
19 wanted the appellate courts to address this issue. But
20 then you leave this man - - -

21 JUDGE FEINMAN: But really I guess what I'm
22 getting at is that, in a way, what you're really
23 challenging is the sufficiency of the evidence at the grand
24 jury proceeding. And that, classically, is waived once you
25 enter a guilty plea. Am I - - -



1 MS. MCCARTHY: I don't think that is - - -

2 JUDGE FEINMAN: - - - incorrect about that?

3 MS. MCCARTHY: No, I don't think that's what he
4 is challenging, because I think what he's challenging is
5 it's a facially defective indictment. You can't - - -
6 regardless, you can't still have somebody - - -

7 JUDGE FEINMAN: So you are saying that your
8 challenge is not to the sufficiency of the grand jury
9 evidence, and the fact that that doesn't show that he
10 committed a crime, but to the four corners of the
11 instrument.

12 MS. MCCARTHY: I think at this point we can focus
13 on the four corners. I think certainly - - -

14 JUDGE FAHEY: Aren't you saying that there was
15 not a crime here?

16 MS. MCCARTHY: Exactly. There was never - - -

17 JUDGE FAHEY: Right.

18 MS. MCCARTHY: - - - a crime. And so regardless
19 of whether you - - -

20 JUDGE FAHEY: Because Judge Feinman's right, if
21 it's about sufficiency, you really can't be here.

22 MS. MCCARTHY: Right. It - - -

23 JUDGE FAHEY: You're only left with the
24 jurisdictional defect.

25 MS. MCCARTHY: Right. And I raised that in my



1 brief about the grand jury because it - - - it shows what
2 the problem is. I mean, what was presented to that grand
3 jury, and how could they have returned an indictment
4 charging him with a crime when in fact there really was no
5 crime here? So the point is really not whether he waived
6 it or not; the point is do we have somebody sitting in jail
7 because he didn't commit a crime, and there's a kind of a
8 skewered way of looking at the statutes and a gymnastic way
9 of reading this.

10 And - - - and then, if you come down to the very
11 end of it, the question would be, regardless of how you
12 interpret the statute, did this man have notice, because if
13 a - - - if the appellate court couldn't - - - came out with
14 their interpretation and said that you do not - - - the
15 statute doesn't require you to register your Facebook, how
16 would a lay person know that they were supposed to do that?
17 And so - - -

18 JUDGE FAHEY: Well, the problem you have there, I
19 think, is no notice is forfeited by the plea, and then you
20 have an unconstitutionally vague argument, but that is not
21 forfeited by the plea, but it was unpreserved. Those are
22 two problems with that one. It doesn't vitiate, though,
23 your jurisdictional defect argument if we take the language
24 that he actually uses. I see.

25 MS. MCCARTHY: Thank you, Your Honor.



1 CHIEF JUDGE DIFIORE: Thank you, counsel.

2 MS. MCCARTHY: Thank you.

3 CHIEF JUDGE DIFIORE: Counsel?

4 MS. MORYL: Your Honor, the very name of the act
5 that we're here talking about includes the intent, which is
6 targeting, targeting of online predators. And we're not
7 just talking about a general citizen; we're talking about a
8 convicted sex offender who forfeits his or her rights by
9 way of having that conviction. So we can't target if we
10 don't have the right information.

11 The mere fact that somebody says I have a
12 Facebook account does not help law enforcement, and it
13 doesn't help those social network entities that are
14 interested in protecting their users. So to merely say I
15 have a Facebook account, without providing that
16 designation, does not further the intent of this statute.
17 And - - -

18 JUDGE STEIN: Well, the question is is what the
19 designation is. If we think that the designation means the
20 email address, the name, the - - - you know, whatever, then
21 - - - then is your argument - - - does that fail?

22 MS. MORYL: No, Your Honor, because when the
23 court looks at principles of statutory interpretation,
24 subsection (16), subsection (17), and subsection (18),
25 there is a clear delineation between purely email addresses

1 and a designation or an internet identifier with which a
2 person uses to communicate - - -

3 JUDGE STEIN: I'm not suggesting that it be
4 limited to an email address. It could be any kind of
5 identifier. I just used that as - - - as an example. It
6 could be a pseudonym - - -

7 MS. MORYL: Correct.

8 JUDGE STEIN: - - - or anything, right?

9 MS. MORYL: Correct.

10 JUDGE STEIN: Yeah.

11 MS. MORYL: But there is a distinction because -
12 - -

13 JUDGE STEIN: But to me that's what identifier
14 is. And you're trying to bring that back up into
15 subdivision (16) which I think addresses something
16 different and is not what is requested to be disclosed.

17 MS. MORYL: Respectfully, the Third Department
18 found, when it looked at internet identifier, you had the
19 part that addressed the email addresses, the Third
20 Department said no, that's not a designation. We agree.
21 But then it found - - - when it parsed out the second part
22 of subdivision (18), it found that Facebook is not a
23 designation, and that's where our analysis departs.

24 And I'd just like to briefly discuss in closing
25 another purpose of this statute is not just to monitor - -



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

-

JUDGE RIVERA: Okay. I'm not - - - so let me just understand designation. So your argument is that when it says "designations used for the purposes", you're reading that as Facebook is used for this purpose of social networking, and therefore it is a designation.

MS. MORYL: Yes, ma'am. A Facebook screen name or however - - - however else a - - - a person - - -

JUDGE RIVERA: Recognizing, of course, that merely saying that is generic and there's nothing particular to any individual when one says that, right?

MS. MORYL: Exactly, but I think that's why the - - - the court needs to consider that in conjunction with subsection (16) which is merely the definitional part of what that authorized internet - - -

JUDGE GARCIA: Counsel, is there some - - - I'm sorry, may I, Chief?

CHIEF JUDGE DIFIORE: Yes.

JUDGE GARCIA: Is there some other name or identifier, other than just the term Facebook, that you believe this individual hasn't disclosed?

MS. MORYL: Sir, for purposes of this case, we know that he opened up a Facebook account a month prior and failed to disclose that. So on the facts - - -

JUDGE GARCIA: Right. But was there anything he



1 used in opening that account, some type of identifier, a
2 name, a nickname, that you believe wasn't disclosed, other
3 than the fact that I went on Facebook and I opened an
4 account?

5 MS. MORYL: So in order to open up a Facebook
6 account, you would, one, have to provide your email
7 address. But then, once you sign up for the services that
8 that entity provides, under subsection (16), you have to
9 create your name, how you want to represent yourself. So
10 there are three folds - - -

11 JUDGE GARCIA: He disclosed screen names, right?

12 MS. MORYL: But he didn't disclose his Facebook
13 account, and it is not clear, sir, whether that screen name
14 is - - -

15 JUDGE GARCIA: Again, I'm sorry I'm being thick
16 here, but what is that thing? I mean, is it a name? Is it
17 - - - other than Facebook, is there some other identifier
18 that he was using on the Facebook account that's not
19 disclosed?

20 MS. MORYL: So he did provide a screen name.

21 JUDGE GARCIA: Right.

22 MS. MORYL: But he did not say I have a Facebook
23 account and I represent myself on Facebook with this
24 particular screen name. So they could be two different
25 screen names, and that's - - - that's the problem, and



1 that's why disclosure of not only - - -

2 JUDGE RIVERA: And where would he have written
3 that on the form?

4 MS. MORYL: That would be on the DCJS form,
5 ma'am, where - - -

6 JUDGE RIVERA: No, no, where on the form?

7 MS. MORYL: I believe appellant's Appendix A34 -
8 - -

9 JUDGE RIVERA: All right.

10 MS. MORYL: - - - requests notifying DCJS of any
11 internet accounts including screen names. There is a block
12 for a list for a sex offender to provide what social
13 networking entities he - - - he or she is using and what
14 screen name he or she is operating under so that it can
15 effectuate the purpose of this statute which is to not only
16 monitor sex offenders, but there's also a recidivism
17 component of this statute as well, which hasn't been really
18 addressed in the Third Department's decision or today, but
19 the fact that the internet has this cloak of secrecy and is
20 designed - - -

21 JUDGE GARCIA: Let's assume for a minute he was
22 using one of the - - - I think he disclosed two screen
23 names here, right, on the form. Let's say he was using one
24 of those as his Facebook name. Would there still be a
25 violation here?



1 MS. MORYL: If he fully disclosed, sir, I have
2 one Facebook account or two Facebook accounts, and I have -
3 - - and he was candid with how many names he is operating
4 under, then no, there would not, because he would be
5 complying with the - - - the statute under 168.

6 JUDGE GARCIA: I guess my question is if he
7 disclosed the screen names and not the fact that I'm using
8 that screen name on Facebook, would there be a violation?

9 MS. MORYL: There would be because the
10 legislative purpose of this statute is to also enable those
11 internet entities, under subdivision (16), to protect their
12 users. So merely just providing a screen name under (18)
13 doesn't effectuate this purpose because we don't know what
14 entity is responsible - - -

15 JUDGE STEIN: But can't the individual entity
16 then go through their records to see if anybody using that
17 screen name is there?

18 MS. MORYL: They - - -

19 JUDGE STEIN: Isn't that exactly what - - - what
20 was intended by DCJS?

21 MS. MORYL: I think what was intended by DCJS was
22 to fill this grey hole between requiring sex offenders to
23 list and be candid about - - -

24 JUDGE STEIN: But my question is is wouldn't that
25 accomplish the same thing?



1 MS. MORYL: It - - -

2 JUDGE STEIN: Maybe it could have been done a
3 different way, as you suggest, but doesn't that accomplish
4 the same purpose, as long as Facebook knows every way that
5 this person identifies themselves, and can go search for
6 that, and if that's not there, can be assured, if the
7 person is being truthful, that they're not - - - they're
8 not using - - -

9 MS. MORYL: Respectfully - - -

10 JUDGE STEIN: - - - Facebook inappropriately.

11 MS. MORYL: Respectfully, no, it's on the burden
12 of the sex offender who also has to disclose addresses,
13 where you work, where you go to school. It's just another
14 component of a digital presence that places an obligation
15 on that convicted sex offender - - -

16 JUDGE STEIN: But you don't disagree that the
17 same result could be reached if Facebook were to search its
18 records?

19 MS. MORYL: Tangibly, I think it could, but under
20 the purpose of this statute, that requirement for sex
21 offender, convicted sex offender to be candid about that
22 information is exactly what the legislature intended.

23 CHIEF JUDGE DIFIORE: Thank you, counsel.

24 MS. MORYL: Thank you, ma'am.

25



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of The People of the State of New York v. Arthur W. Ellis, Jr., No. 54, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

Signature: _____

Agency Name: eScribers

Address of Agency: 352 Seventh Avenue
Suite 604
New York, NY 10001

Date: June 10, 2019

