



Registry Matters Podcast

Episode 181

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Andy 00:00

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Larry 00:22

Fantastic, but it is a little bit warm here. My thermometer shows 99.

Andy 00:32

99? Oh my God, that's pretty damn hot. That's all but you have what, 2% humidity?

Larry 00:37

Probably in the five to 7% range. I'm guessing.

Andy 00:41

I was being silly. And I'm not far off. Okay, I think it is 99% humidity where I am. And it's in the it's probably not in the 90s anymore. It's in the 80s. So, I'm not sure. I think my temperature might exceed yours. The feel-like temperature.

Larry 00:55

Oh, what do we have going on tonight?

Andy 00:59

Oh, you want me to do this? I was gonna ask you that question.

Larry 01:01

You're gonna ask me that. Okay.

Andy 01:03

Larry, what do we have going on this evening?

Larry 01:08

Well, we have a landmark case out of South Carolina that we're going to talk about dealing with PFRs and the constitutionality of the registry. And we have a lead in case we're going to talk about the arm career crime act or whatever it is, ACCA. We're going to talk about a Supreme Court decision. And we've got a prisoner contribution. And we've got a NARSOL member contribution from the website. And I think we've got a patron question, and we've got all sorts of good things. We're gonna be here trying to jam pack all this into a one-hour podcast.

Andy 01:47

Very, very well. I think we should probably get going. And let's go for the Patreon question right out of the bat. This is longtime patron Mike in New Jersey, him and I have been having conversations back and forth lately. And he says, Hey, a quickie for Larry. Can the international Megan's Law be valid? Shouldn't something like that go through the treaty process? Super neat question, Larry, that I wanted to, I thought it was good enough to throw on the show.

Larry 02:11

Well, he is correct, if it were treaty, but it isn't. If it were a treaty between nations. But what this is, as I understand it, and I have never professed myself to be an expert. But on this, as I understand it, this is a model law, that that has been offered to different countries. And if they adopt this, something similar to this, it's a choice that the nation makes. So, the country of Zimbabwe might not make the same choice of how to implement their version because their technology may be different. Their criminal records keeping may be different, their sentencing schemes may be different. And you would have different variations on the exchange of information. But the international component is that nations have been urged to communicate with one another about people who have been convicted of sexual offenses in order to preclude them from traveling with the intent of engaging in further criminality. And the thought goes that if you have a prior conviction, that that might enhance the odds that you would be engaging in travel for sexual exploitation purposes. That's the that's the theory behind it. It's not a good theory, but that's the theory behind the international Megan's law. Okay.

Andy 03:28

I mean, why, why? Let's see. I'm trying to even dig into this a little bit. So, it's just a law that got made, but it is something of a reciprocal law, I guess. I mean, is there an equivalent IML type framework, let's just say in the UK, pick, pick random country, that... the treaty would be some sort of compact between multiple countries agreeing to this thing, and they all have signed on to some sort of thing. Like, we've talked, we've heard about treaties recently, where it's the, like the trade treaties and things like that to push back. But so, we created our own IML, then does Germany and UK have their own whatever they would be called IML there to force the notification on that stuff in the other direction?

Larry 04:14

I don't know which nations have created something that approximates a sharing of information on those convicted of sexual offenses. I don't know if Germany has such a thing. Countries have, in fact, I was on a flight traveling to a criminal defense lawyers meeting. And I ended up sitting next to a seat of a person who was in the Foreign Service of one of the African nations which name is escaping me. I don't remember if it was Nigeria or whatever and she asked me what I was doing there. And I told her I was talking about the issues related to our people in the sex offender registry. And she says, unfortunately, that's coming into our country as well. She said we're under enormous pressure to crack down and make information available and to receive information, particularly from the more affluent countries, so that we don't have people come in and doing bad things to our children. And so what I'm what I'm trying to communicate is that the United States is probably to my, to my recollection, the instigator of, of the version of international Megan's Law that we have. The US has been encouraging other nations to do similar things, to adopt similar laws. How close they are to being the United States, I don't know. But I know that information is being sought. It's a two-way flow. We do receive reports from foreign nations about people who have convictions that have similar laws in place. Americans don't hear a lot about that, because the people who are not allowed in our country, we don't think a whole

lot about. We only think about when we're being denied entry to another country.

Andy 05:57

Yeah, sure. Okay, Charles says the UK can give a travel ban to the offender if there is a risk, but a judge makes the decision. He says it's very rare to be used. It's case by case basis. I've got nothing to add to that just relaying it.

Larry 06:11

Well, the United States has no travel ban, you can go anywhere you want to.

Andy 06:14

That's true. We're just going to tell where you're going that you're coming.

Larry 06:18

That's correct. There's nothing in international Megan's law that prohibits you from traveling. The prerequisite is, though, is the notice if you're covered. And it's not even clear who is required to give that notice because of the nuances of our 50 state registered schemes, some don't have that requirement, and then that it's not totally clear as to who all must give that notice to, at least to me anyway. But there's nothing that prohibits you from traveling, you can go anywhere you like. They just may not admit you when you get there.

Andy 06:46

Yeah, yeah. All right. Let's move over from that. Go ahead. Finish.

Larry 06:51

Yeah, that's all I'm saying. There's the people keep saying there's a travel ban. There isn't a travel ban. You can go. But what right do you have to enter a foreign nation?

Andy 07:02

Absolutely. Alright, so we're gonna move over to this, this post, it's Jeremy in Indiana posted on the NARSOL website. And it says I'm very curious as to what this means. And if it will have any policy effect at all. My eyes did perk up when I saw that ALI, American Law Institute, seven member were judges from different appeals courts around the country, and that their recommendations have been highly regarded by lawmakers in the past. My worry, though, is that RSOs, let's call them PFRs, are literally the most hated demographic in the entire world. And any effort by any politician to change these laws on this recommendation is going to cause a negative media sensation and potentially be political suicide for those politicians. I've asked in the past that NARSOL avoid taking political sides on the spectrum. But this is probably the only time having a democratic majority in Washington might actually benefit. If Republicans were to pass this, the media would crucify them. But since the mass media is controlled by Democrats, they will let this change happen with little fanfare. Unfortunately, with the political divide. I'm a little worried that conservative news outlets may try to crucify the Dems for the same reason. Luckily, the Dems have always been the standard bearers for criminal justice reform, so I do have high hopes. Interesting. I don't think that the Dems control the media like that, mass media, it's just don't think that's accurate.

Larry 08:24

Well, I don't agree with that. I liked where he was headed until he got to the part about the republicans would be vilified. First of all, the Republican can't pass it because they're not in a majority right now. They don't have a Senate Majority. So they couldn't pass it. They would need some democratic votes. But I split with him when he said the Republicans would be vilified. I'm going to widen my challenge. I have had a challenge for a long time that no one has actually answered yet to show me a Democratic candidate vilifying a republican on criminal justice matters on positive reforms. So I'm gonna widen the challenge. Send me a media clip where the Republican Party is being vilified for criminal justice reform. We will play it on this podcast. And we will bash that that media outlet whoever it is, but that's just simply not true that that the republicans would be bashed if they did that. The media and this is going to cause people to roll their eyes. The media is a reflection device, they don't generate much of the of the sensationalism. They receive a press release from an organization, or they receive a phone call from an organization or from a candidate or from a party official, whatever, from a citizen. But there's someone agitating them. They're not that bright to go out and figure out you know, we're gonna bash the republicans, we're going to bash the democrats today. They're looking for something that will drive ratings, or paper sales or magazine sales and controversy does that They respond. They're merely a reflection pool of public opinion. And I don't believe that they shape public opinion as much as people think they do. I think that talk radio does a lot more of the shaping of public opinion. But just standard news reporting, I don't think shapes public opinion that much.

Andy 10:17

I would agree. And when you move that into the Rachel Maddows and the Tucker's which are very much just an opinion piece, person, opinion person, that definitely gets people riled up. And that would shape a lot of the public opinion of things. Rush Limbaugh being certainly the biggest example recently deceased.

Larry 10:37

Absolutely. Well, that is for the shaping public opinion have when you have the talk show apparatus, whichever side, which is more dominated by conservatives, by far, but you have lived in the state of Georgia for quite a number of years now. (Andy: Yes) And Georgia did a significant amount of criminal justice reform under two Republican governors, Nathan Deal and more Deal, but somewhat under Purdue, and how much vilification did they get for that?

Andy 11:06

I don't recall, I went and sat in on a meeting of justice reform people and someone said, Yeah, he's really big Nathan Deal that is, was really big on giving people second chances. And I was like, really, and I mean, I didn't know at that point. I was brand new in the movement. But I had never heard of a governor being like pro this or that. I was like, Wow, that's really neat. I was kind of on board with him as a governor, just at least from that regard.

Larry 11:32

Well, I don't recall any vilification. Same thing with... the vilification now, we go back to the presidential contest when a former governor of Arkansas ran for President, Mike Huckabee. He did get vilified for his pardons, but he got vilified from within his

party. It was his opponents that were seeking the Republican nomination that said that he was too soft on crime. And the media merely reported that. I mean, that was to his opponents. What are they supposed to do not report the news? But he was vilified by his opponents for his... he was pretty generous for handing out sentence commutations and pardons. I mean, I have to give the guy credit. He actually did believe in redemption. I mean, he was one of those born again Christians, and he wore that on his sleeve. But he actually did practice it and the governor's office. So we have to be fair with him that he believed it and he practiced it.

Andy 12:31

The one other point that I want to make about this is the being news driven or excuse me, like ratings driven, unless you remove that from your business model, then you can report on things in a different fashion, your incentive structure is different. And I would be referring to the PBS NewsHour and NPR, they get their funding mostly from listener donations, and then they have other kinds of sponsorship money, but that takes the whole ratings thing out of the equation that people they provide incredibly, incredibly accurate, non-biased, slightly, I mean, a twinge like pull a hair out of your head that much it's left biased, but not very much at all. And I'm a big fan.

Larry 13:09

I would think that if you were to poll your audience, you'd find out that most people think that PBS is very liberal bias and that they would not agree with you on that.

Andy 13:20

I know but if you are all the way over to the right than anything left of that you would be "well you're just a lefty bias person" and the same would go if you're an NBC watcher, like anything else is going to be right leaning, I'm just saying from a panel that I saw that does this kind of rating thing of where do things fall as far as accuracy and bias. That those two things USA Today I think was very much very highly accurate like a source of news information and also just slightly left bias. Just that that's what I have researched to find out because I'm very interested in finding an NPR-type thing that's right leaning and I can't find anything remotely close to something that would give me a right slant on things that is highly accurate doesn't scream at people, etc.

Larry 14:04

Well, I agree that I would consider them a reliable source but I'm saying the average person when they think about that, it's it's a lefty communists organization,

Andy 14:15

Haha, Yes, I know.

Andy 14:19

Okay, well then let's move on. I think we're just here at the main event. I think we're ready to just jump over into this South Carolina court case?

Larry 14:28

We have we have the listener contributions. From the prisoner to be read.

Andy 14:37

Let me find it real quick. I don't want to do editing later. I didn't pull that one up. Let me get that out of the Dropbox folder. To be read. do doo Oh, I do have that pulled up. Sorry to be read. I got it. Um, it says:

Listener Comment

Dear Andy and Larry. This is from a Douglas in a building up in St. Louis Missouri, says I'm writing in response to requests for testimonials on the reliability of transcript arrival that appeared in Episode 178. Recorded 5-22-21. I am a state PFR prisoner in Michigan Department of Corrections and I generally receive the transcript the Friday after it was recorded. Note the date of this letter. Sometimes it may come the following week on Monday or Tuesday. But considering the Michigan Department of Corrections recently started giving us copies of our mail instead of the originals, I would say that the delivery time is excellent. I would like to attest to the reliability of transcript reception, and the information you guys provide to us still on the inside has been greatly appreciated. Thank you. I would also like to subscribe to another six months of the Registry Matters transcripts attached to the envelope sent to the Michigan Department of Corrections disbursement for 36 bucks plus a political Michigan tax... Keep going through that whole section too Larry?

Larry 15:54

I think that we covered the most salient point. But he did mention something about his conviction. And he's got some post-conviction action going he says that I brought my ineffective assistance of counsel claim before the court. And they actually assigned a state attorney to file it. My claim has merit as my attorneys let me plead to 20 year felonies when I committed a four year felony while having a mental health factor exhibited throughout. If that is anything approximating accuracy, and sometimes there's a misunderstanding, but if you plead to a crime that didn't exist, that conviction is void on its face. There has to be subject matter jurisdiction for the court to enter a judgment. If they take a plea for a crime that didn't happen, then that that conviction is void because there was not subject matter jurisdiction of the court to start with. So, Douglas, I'm very interested in hearing more as this progresses, because there's not enough information in the letter to tell us precisely what you're saying. And we don't have the time on the podcast to really unpack that. But if you plead to something, that's why they do a factual basis when you're ready to do a change of plea from not guilty to guilty. That's why they have a factual basis laid out. So, the prosecution generally will say, on or about this date, the defendant did this within the county of and then they'll go through laying the foundation. And in violation of this particular section of law, they'll name the section of the statute that was violated. And at conclusion of that factual basis, the judge will ask the defense attorney, have you discussed this with your client, this plea? Does your client understand? Do you agree that's a factual basis. That's not precisely what they're gonna say. But the judge will ascertain that there is a factual basis, you can't take a plea unless a crime was committed. Isn't that amazing that you can't take a plea unless a crime occurred?

Andy 18:16

I mean, sure, that sounds about right. Doesn't it?

Larry 18:21

But people say all the time they think that they pled guilty when there was no evidence. When the factual basis is presented, you agree in front of the judge, that there was a factual basis, that a crime did occur. If they cannot lay out a factual basis to support the plea, a plea can't be accepted.

Andy 18:44

To close out his letter says, By the way, I'm distributing the copies of the past RM transcripts around to other PFR housing units to spread the word and maybe spark some more subscriptions for you. It is difficult because this facility has been on COVID lockdown for what seems like for forever, but I am taking the advice offered in the April/May issue of NARSOL's, the Digest doing what I can from the inside. Oh, it was nice to read about Michigan's registry changes in the insider section. The guy who wrote it, James is a good friend of mine and actually helped me file a motion for the court to get the state attorney mentioned about assigned to me and thank you Registry Matters for everything you do. It is appreciated. And thank you very much for all of that, Doug. Very cool.

Larry 19:24

All right. So now we can go to the to the two court cases, we have the *Supreme Court of the United States and Borden v. United States* which shouldn't take too terribly long. And then we're gonna go into the case from the great state of South Carolina.

Andy 19:39

Awesome. And it looks like it's 69 pages and Larry, I'd like suffered my way through it, including the dissenting opinions, and I see no relevance to this. I think we should just toss it in the garbage. (Larry: Why should we do that?) Because it has no relevance.

Larry 20:00

Well it does have some relevance, it has to do with textual interpretation. And how the conservative block on the court tried to read beyond the text to interpret the ACCA to permit enhanced sentences.

Andy 20:13

Tell me again, what ACCA is, please what the hell is that?

Larry 20:18

Oh, I apologize. Sometimes I forget to explain the acronyms ACCA is the armed career criminal act, which mandates a 15-year minimum sentence for persons found guilty of illegally possessing a firearm who have three or more prior convictions for a, quote, violent felony. The issue before the court was, is a violent felony required by the ACCA in order for a person to be subject to enhancement? The liberals joined the conservatives, two conservative justice Gorsuch and Justice Thomas. And they held that we should actually follow the law that there should be a violent felony before you can be subject because that's what the language of the law says. Imagine that Andy? Following the law. (Andy: Wait a minute, so they write down that you got to do a thing and then they punish you for not doing a thing?) Right, you have to you have to commit a violent felony and you have to have three or more of them to be subject to the ACCA. And (Andy: okay.) so there's four conservatives who do not really think that it has to be a violent felony, but two conservatives joined. So those

conservatives are justice Gorsuch. And for the first time in recent memory, Justice Thomas found a criminal law that he found something, he found some disagreement with.

Andy 21:36

Alright, so according to the syllabus, petitioner Charles Borden Jr. pleaded guilty to a felony and possession charge and then the government sought to enhance the sentence under the ACCA. One of the three convictions alleged as predicates for the enhancement was reckless, aggravated assault in violation of Tennessee law. Borden argued that this offense is not a violent felony under ACCA elements clause because a mental state of recklessness for conviction. In his view, only purposeful or knowing conduct satisfy the clause demand for use of force against the person of another. By a slim five-four majority, the Supreme Court reversed the lower court's decision. Okay. So what did the the conservative dissenting judges argue?

Larry 22:26

Well, they argued that three convictions only required a mental state of reckless, which is what was in the Tennessee law. But see reckless is like the accident I had a few weeks ago, that person never left home intending to hurt me.

Andy 22:43

Sure, just distracted or whatever.

Larry 22:45

Yes, he was distracted. So armed career crime act was, was intended and written specifically to require an intentional, violent felony. So therefore, reckless isn't an intentional, violent felony. I mean, it's really straightforward. But the reason why I put this in here, and we don't need to spend a lot of time on it is because, you know, the conservatives pride themselves and how they're textual, you know, and everything. Well, the text of the law is pretty clear. But they contorted it and they twisted trying to figure out a way to allow for longer prison sentences. So that that's why I put it in.

Andy 23:26

Alright, and says you if, if you have nothing further than let's move on to the next case. This case has been talked about quite a bit over the past few days. The name of it is *Dennis J. pal Jr. Versus Mark Keel*, Chief State Law Enforcement Division and the state of South Carolina appellants. It's not a super long opinion. So I read it myself. Larry, can you briefly tell us what Mr. Powell, what put Mr. Powell on the registry?

Larry 23:53

I can on February 23, 2008, Powell was arrested for criminal solicitation of a minor under a section of South Carolina law for engaging in anonymous internet chat room conversations which were graphically sexual in nature, with undercover police officer posing as a 12 year old girl. But he didn't just stop with graphic conversation, which I would argue is protected. But in their final conversation, Powell and the teenage girl arranged to meet at a skating rink in Lexington. Thereafter, he drove by the meeting place and was pulled over by law enforcement at a traffic stop and was subsequently arrested.

Andy 24:33

Sure, I see it's one of those sting operations. Well, before we get into the details of the case, I know that you have a great angst about statutes dealing with internet communications and graphic conversations. And I also know that you did a deep study of all the solicitation statutes across the United States about 10 years ago, which is a tool you provide attorneys all over the United States. How does South Carolina's compare and are there constitutional issues with the statute in your opinion?

Larry 25:00

Actually, you're right. I did do that study. And I think I put it in the folder for anybody who wants to look at it. I've got a compendium of all the 50 states. And it was, it was great when I did it, there could have been changes and the laws would have been changed to make them less favorable than they would have been 10 years ago. But actually, their statute is very much constitutional. I wish I could say that it isn't. But it is very well constructed. And I can't find any constitutional flaws.

Andy 25:28

No constitutional flaws? Why do we have you here, then? Let's see here. So what in particular makes their statute better than others, then?

Larry 25:38

Well, if you look at it, well, let's just read the statute. When you look at section § 16-15-342 Carolina law, a person 18 years of age or older commits the offense of criminal solicitation of a minor if he knowingly contacts or communicates with or attempts to contact or communicate with a person who is under the age of 18. So, let's stop there for a moment. So he has to knowingly be doing that, communicating or contact a person under 18. So we've got the first threshold, we've got the, we've got the what I talk about as scienter, he has to know that he's talking to a minor, it can't be an accident, or a person that he reasonably believes to be under age 18, but it doesn't stop there. So this is where my graphic argument, you can have graphic conversation, because you can have fantasies, and that's protected. But he has to do that for the purpose of with the intent of persuading and do the thing or enticing or coercing the person to engage in or participate in a sexual activity as defined in South Carolina law or a violent crime. So therefore, we've got the knowing. And then we got the intentional, and we have a clear intent of sexual activity, and sexual activity, it's not protected speech for the minor. So you've just shot all the constitutional issues that I have out the window, because I can fantasize about all the money in the vault. And I can tell you, I wish I had every dollar of it. But I cannot attempt to make any effort to retrieve that money from the vault. But the fantasy is just fine. And so therefore, if you're having a conversation with someone who's 12 years old, it's untasteful. And maybe there should be a law that says you can't have graphic conversation. And that would be, that would be a different law. But if you're going to prosecute a person for soliciting, to have sex, you should have to prove that they're intending to have sex. And that's what this law requires in South Carolina, so therefore, I would be very challenged to come up with a constitutional argument that would have any chance of success on the construction of this statute. The construction makes it clear that words are not being criminalized. The state must prove that you knowingly communicated with an underage individual and they

must prove intent to engage in something illegal. Having a fantasy is not sufficient to convict.

Andy 28:11

I remember hearing that you and I can talk about robbing the bank all we want. But then when somebody goes to rent the van, that's when things get hairy.

Larry 28:20

Well, we got to be careful how much talk about robbing because then then then again, it's illegal to rob banks is. So if I'm talking about getting to plan on the actual... If I say, Gee, I wish I had all the money in the bank, that's not illegal to wish you have the money. But if I say if I start saying I would like to rob the bank, what about you? Then I'm I'm pretty close to a solicitation because you can't solicit someone to engage in something that would be unlawful if they did it. And I can pretty well assure you that asking you if you would like to do something that's unlawful, that would put you in jeopardy of prosecution, so I can't go there. Because I've at least done a solicitation.

Andy 29:01

Do you want to rob that bank. I'm just asking, nobody's listening just between you and me.

Larry 29:06

No, I don't think so.

Andy 29:09

Ready to be a part of Registry Matters? Get links at registrymatters.co. If you need to be all discreet about it, contact them by email at registrymatterscast@gmail.com. You can call or text a ransom message to (747)227-4477. Want to support Registry Matters on a monthly basis? Head to patreon.com/registrymatters. Not ready to become a patron? Give a five-star review at Apple podcasts for stitcher or tell your buddies that your treatment class about the podcast. We want to send out a big heartfelt support for those on the registry. Keep fighting. Without you, we can't succeed. You make it possible.

Okay. Well, I noticed that the case was decided on Mr. Powell's motion for summary judgment. Boy, do you like those. I know you people have generally expressed reservations about summary judgment. So let me rib you on that. So, summary judgment can't be all bad?

Larry 30:12

You're correct on all points. We will address summary judgment later on. After we explained the issues. The issues that were in play. This appeal was from the circuit courts grant of summary judgment in favor of Mr. Powell, on his claims and he challenged the internet publication and lifetime registration. And he was granted a summary judgment in his favor. And the Circuit Court, which is the trial court, held that South Carolina's Registration Act lifetime registration requirement is punitive under the Eighth Amendment and violates his rights to due process and equal protection. The circuit court also determined that SORA does not permit publication of the state Sex Offender Registry on the internet. So, he won in the trial court on both, of two significant claims.

Andy 31:09

I like that internet one. I'm guessing that the state of South Carolina has appealed.

Larry 31:15

They did appeal. That's how we got here. They did the appeal. Mark Keel, Chief of the State Law Enforcement Division ("SLED"), and the State of South Carolina. And the South Carolina Supreme Court held that SORA lifetime registration requirement is unconstitutional absent any opportunity for judicial review to assess risk of reoffending. This means he won on that claim. Unfortunately, he lost on the internet dissemination issue. The Supreme Court held, and that's the South Korean Supreme Court held that subsection 23-3-490(E) permits the dissemination of the state Sex Offender Registry information on the internet. That that is constitutional, which gets me back to my distaste for summary judgment.

Andy 31:59

Hmm, how so? If they won at the trial court on both issues? Is it the attorney's fault that the Supreme Court was reversed?

Larry 32:08

Well, not necessarily. They did win at the trial court. But where that comes into the problem. I think if you reflect back to the 10th circuit, when I said, we don't have evidence to support what Judge Matsch did, you remember that? (Andy: Right. I do. I do.) Okay, well, that's the same situation here. The trial judge can hate the internet dissemination all he or she wants to. But you have to pull it on evidence to show... see we've got a Supreme Court decision in 2003 that says that the state of Connecticut that's Connecticut, state of Connecticut, Doe versus department of Connecticut, department of public safety... I'll get it right in a moment. But the Supreme Court has said that, that you have every right to disseminate this information. But see, since 2003, there's a lot more information being disseminated that wasn't. The internet has much broader reach than it did in 2003. And it has far more debilitating consequences than it did in 2003. And the required information that's disseminated is far greater. As the Supreme Court said in 2003, the mere fact that you're convicted of a sexual offense, it's already a matter of public record. And the registry is merely disseminating what's already public. Now 20 years later, 18, 20 years later, we have a whole different scenario. We have the internet disseminating the vehicle you drive, where you work, where your attend school. And I can go on and on with information they disseminate about you. In some instances, your internet identifiers. And different states disseminate different information. And I don't know exactly what all is disseminated in South Carolina. But in order to develop that, and to show the debilitating effects of this, of that dissemination, you will need a trial unless you could get the state to stipulate that all these all these debilitating conditions exist. And that would be unlikely you'd be able to get them to stipulate to those facts. Therefore, in summary judgment, the record is going to be very thin. And it was very thin.

Andy 34:15

Not only that, the number of people that are on the internet using that as their primary vehicle of getting information is radically different than it was 20, whatever, 19 years ago,

Larry. 34:25

Yep.

Andy 34:29

Um, so where do we go from here? What's the next step?

Larry 34:37

Well, I think I've got, I've lost my notes, and I was the one who put these together. So what page are we on here?

Andy 34:44

We are at the very top of the second. So what I'm going to do is I'm going to cite the legal standard for overturning the law. Says the court said, this Court has limited scope of review in cases involving a constitutional challenge to a statute because all statutes are presumed constitutional and, if possible, will be construed to render them valid. And then they said a legislative act will not be declared unconstitutional unless it's repugnance to the Constitution is clear and beyond a reasonable doubt, and I'm doing that from memory.

Larry 35:18

Well, yeah, that is actually in the opinion and say you've got a great memory, or did you read the opinion or both?

Andy 35:25

All of the above

Larry 35:27

All of the above? Well, so you see, I don't make this stuff up. But we've mentioned this legal standard countless times on the podcast. That the presumption goes in favor of the law being constitutional and, I think this is the first time that I've seen the term repugnant, is that actually in there? Does it say that? (Andy: Yes, it does, actually.) Okay, so, well, I tell you, I don't make this stuff up and that is in fact the legal standard. Says that you start with a presumption and the burden is on the challenging party, and it's a very significant burden that must be overcome.

Andy 36:09

All right, well, South Carolina requires any person regardless of age who has been convicted of an enumerated crime on their list to register as a PFR for life. The Act also provides judges with the discretion to order as a condition of sentencing a person convicted of an offense not listed in the statute to be included in this PFR registry if good cause is shown by the prosecutor. As I read the decision, Larry, the requirement for registration for life with no opportunity for removal is the problem. Do I have that right?

Larry 36:39

You absolutely do. That is precisely what the court said. And I will quote now, notably, SORA does not provide any judicial review for registrants to demonstrate their individual risk recidivism and seek removal from the registry. You don't really need me here tonight, because it seems like you've got this covered. Further the court said we agree with the respondent. And that would be Powell that SORA's lifetime registration requirement without judicial review violates due process. That's what the court said.

Andy 37:11

And as I understand it, the 14th amendment provides that no state shall blah, blah, blah, deprive any person of life, liberty, or property without due process of law. All states have a similar clause in their constitution. Explain the significance to me, Larry, of the fact that this case was decided based on the US Constitution, but in the past, you've said that some states provide greater protection. I believe that Maryland is one of those. Is that a potential issue here?

Larry 37:39

It is a potential issue. And since the South Carolina constitution, to my knowledge, has not been interpreted to provide greater protections for its citizens than the US Constitution, that means that this case could ultimately be decided by the United States Supreme Court. And that was not the case when you look at the Pennsylvania decision, or the Maryland decision, either one of those. The Supreme Court for those states that you can look at this all you want to but we're deciding it on our Constitution, and Maryland has that very great clause about no disadvantages can be imposed retroactively. And I can't recite the clause in Pennsylvania because I was not actively working on that particular challenge. But the Pennsylvania Constitution and the Maryland constitution provide greater protections. New Mexico's constitution does as well. But since this is a US constitutional question, this opens the door to the United States Supreme Court review.

Andy 38:34

But then, since 2003, *Packingham*, whatever, we've been wanting to get cases to get to the Supreme Court to try and chip away at this stuff. So why is this such a bad thing? Isn't this what we've been trying to get to for so many years?

Larry 38:48

Are you talking about overturning *Smith versus Doe*?

Andy 38:52

All of the above. Yes, *Smith* was when I said 2003. That's what I was referring to *Smith versus Doe*. And then just all the cases that we try and funnel up there to try and chip away at this whole thing. But so why is this such a bad thing?

Larry 39:03

Well, I don't know what you mean, when you say the term we, because I certainly have never been a big proponent of getting this issue back before the US Supreme Court. I have little confidence that they would actually render a favorable decision. Why do you think that the Michigan ACLU was so adamantly opposed to Michigan's, the state of Michigan cert petition in the *Does v. Snyder* case? If they had been confident of a favorable outcome, they would, they would have not opposed the cert petition. It would have been more money for them for legal fees, and it would have meant that will become the case law of the entire country. They didn't have that confidence, nor do I.

Andy 39:36

Damn it Larry, there you go again being negative. Let me ask the question differently. Do you expect that the South Carolina will change their law in the next 12 months as the court has recommended?

Larry 39:49

No. I actually don't think that they will do that. (Andy: Why not?) Well, it's really not as complicated to explain. The status quo is in place. As a result of this, nothing changes. Mr. Powell gets off the registry, but the status quo will remain in place for the next 12 months, which the Supreme Court extended the legislature an invitation to incorporate a removal process. But there's no date certain that would compel the legislature to legislate, which would mean taking a political risk that would make things better for PFRs. Can you imagine what would happen to a legislator who dared to risk putting forth a proposal that would allow PFRs to be removed from the registry? How would that go over with the average resident in South Carolina?

Andy 40:37

Well, that puts us back to the other option if they're not likely to change the law. So this is similar to Michigan, would it not be logical to anticipate a cert petition? Would that not buy them time because they could credibly say that the matter is still in litigation?

Larry 40:51

That's exactly what it would do. That's brilliant. That's exactly what it would do. Because if you're being afforded a 12 month opportunity to legislate, and you know that legislation is not likely, because you're not going to support it, as the state attorney general is not likely to support the legislation. That would give them exactly what you said. The credibility would say, well, this matter is still... there's a Supreme Court cert petition. I think they have in normal circumstances, three months to file it. And I think that's been extended during the pandemic. I think it's like a five-month time, so we really won't know right away if they're going to file a petition unless they announce that publicly. But it would be more likely that not in my opinion that they would file cert petition.

Andy 41:34

So Larry, I've legit just had a like terrible flashback way back to the case that was decided below and that it would be an issue that this case was decided on motion for summary judgment, which means that there's no trial to develop facts below. Will that be a potential problem if SCOTUS then goes and decides the case? Oh, I see. Yeah.

Larry 41:55

It would, it would, it would potentially be, but I don't think it would be as big a risk in this particular instance, because the issue that would be going up did not need as much factual development, because unless they were to seek cert on the internet component that they lost, which I don't... The winning party Powell, he's not going to seek cert. He's not going to file for cert, right? He's happy, he's off registry. So, he's not going to file. Well, that issue that was not decided to his favor, is no longer relevant here. This is going to be a state of South Carolina cert petition if there were to be one. And they're not going to ask the Supreme Court to review an issue that they won. So, the issue they lost is where they're going to be asking for review on, which is the lifetime registration without due process. And this is really a straightforward issue. The Supreme Court would be deciding not whether persons required to register for life, it is whether they can be required to register for life without any due process, or with

the due process that was afforded them in their original conviction, is that sufficient? And the South Carolina Supreme Court has now recognized that registration implicates a Liberty interest, and a person cannot be deprived of life, liberty, or property without due process of law. The question would be was the original due process sufficient for lifetime registration and deprivation of that Liberty? And I have no idea what the Supremes would say on that. I'm very concerned, because you did have some form of due process at the time of your original conviction. And what if five of the nine were to say that is sufficient, then what?

Andy 43:40

Okay, so let's go at this from another angle. Let's assume that the legislature in South Carolina has an epiphany, and they wish to provide some level of due process because they respect the decision of the higher court. I'm not nearly as skeptical as you, why wouldn't they? **Hysterical Laughter** Obligatory laugh there Larry.

Larry 44:07

Haha, oh, I love that laugh. Well, for three reasons. First, the status quo has not been disturbed by this decision. Remember, only Powell is off the registry. Second, it would be a very risky political move, to want to make things better for a PFR. So let's do the calendar. 2021 June, the decision came out from the state Supreme Court. They said please, legislative within 12 months. Their assembly doesn't convene until January and according to my contact in South Carolina, they'll run through toward late May of 2022. Guess what happens in 2022? An election. A significant number of those legislators are up for reelection as is the South Carolina Attorney General. So that's a risky political move in an election year to want to do things that helps PFRs. And again, folks, please, I don't make these rules. I'm just helping you analyze what the considerations are. And third, and significantly important, due process cost money. Expanding public resources on PFRs is not a politically popular position. If you're going to give anybody meaningful due process, it's going to require money.

Andy 45:28

Alright, you and I were chatting about this. And you did mention one point that you really felt was important about that decision, you noted that the South Carolina Supreme Court recognized there was no, let me let me put this in quotes. There's no federal registry. Can you explain that, please?

Larry 45:43

They did. They quoted and I love it. They said, Congress enacted SORA, which is South Carolina's federal counterpart, the sexual offender registration notification act, which contains a provision seeking to require states to make their sex offender registries available to the public on the internet. Each jurisdiction again, quoting shall make available on the internet in a manner that is readily available to all jurisdictions as well as the public all information about each sex offender in the registry. The jurisdiction shall maintain the internet site in a manner it will permit the public to obtain relevant information for each sex offender by a single query for any given zip code or geographic radius set by the user. And I'm going to ask you to read the most relevant report from the court opinion, the quote there.

Andy 46:33

Alright, so it says However, we do not believe this provision of SORA's is dispositive of the statutory interpretation issue before the court. Indeed, the federal law does not require states to implement its provisions because it was an acting pursuant to Congress's spending power by placing conditions of the receipt of federal funds.

Larry 46:56

Okay, so we can conclude from that quote, that a unanimous Supreme Court is either not able to understand what I've been saying for many years, that there's not a federal registry, or I don't know how else to explain it. Folks, there isn't a federal registry.

Andy 47:14

That is the language, the writing, Larry is like dispositive. Like, could you translate that into dumb for me, please?

Larry 47:22

Well, there was an argument about... the state of South Carolina was arguing that even though our statute is a little unclear at the state level about the authority and the requirement to disseminate the information, we're required to do this by federal law. They fell back on the federal argument, you know, we want to be in compliance with the big old bad federal government that we hate. Typically, you know, most conservative states, they decry the federal government, except when it's something that they like. So they argued that, and the state Supreme Court unanimously and I have to assume that in a republican dominated state, there's some conservatives on that Supreme Court, I can't imagine a bunch of liberal pointy heads got elected in South Carolina to the Supreme Court. They have said what I has said is that it's only the power of the purse. If you want those precious federal dollars, you will do these things. But you're not required to do this. You could turn your registry off tomorrow. And there would be nothing that federal government could do about it other than withhold your money.

Andy 48:24

Burns funds? Is that is B-U-R-N? How do you spell that word?

Larry 48:30

I believe it's B-Y-R-N-E.

Andy 48:32

Okay, and that's Byrne grant money, I believe.

Larry 48:37

Yep. 10% of that.

Andy 48:39

Okay, and so I noticed another footnote where they said to the extent this opinion conflicts with Hendrix v. Taylor, 353 S.C. Is that South Carolina?

Larry 48:52

South Carolina? Yes.

Andy 48:54

Okay. And then 542, 579 S.E.2d 320 (2003). Good grief. Dude, I don't know where they come up with this notation, because no

human can actually understand it. But it says it's hereby overruled. Is that significant?

Larry 49:09

Okay, now since you brought that up, we'll dissect this. So what this means, if you were in a law library, and you were looking up this case, which nobody does anymore, but if you were in a law library, and you were looking at the these two, the 353 S.C. that's South Carolina reports, there'd be a South Carolina reporter on the shelving in the library. So, you'd go to volume, you'd go to volume 353. So there'd be rows after row of the South Carolina reports and you would go to page 542. And that case would appear on it. And then if you were in another state like I am, we're not gonna have South Carolina reports here. So I would go to the south eastern report, which we would have, I think they still carry the books for the South. So I'd go to page 579 of the southeastern second edition and I would find this case starting on page 320. That's what that means.

Andy 50:04

Okay, dude, I guess it's the Dewey Decimal System for legal pointy-head people.

Larry 50:09

No, it's not that complicated. You just go down the rack looking for volume for that volume number, then you flip to that page number. That's where the decision is but....

Andy 50:19

okay, Larry, we'll start talking about computers and routing and ports and IP addresses. And we'll see how uncomplicated is for you. So is that significant though?

Larry 50:26

But it is what in that case, the *Hendrix v. Taylor* is the equivalent at the state level of *Smith v. Doe*, at the US Supreme Court level. So this means that they have recognized as their sister courts across the country have also concluded that they're now agreeing that that the registry has gone too far. And it took them a long time. But it means that they've joined their sister courts around the country that have begun to say, Hey, this is too much. But again, the lawmakers just really can't help themselves. So they keep piling on and piling on it, they end up in this position because of their own choices.

Andy 51:07

Certainly, alright. Well, we've been doing this for really like more than 30 minutes, I think. And let me ask what everyone wants to know, will anyone other than Powell get off the registry as a result of this case? And how soon? So who else does this impact?

Larry 51:24

Right now, no one other than Powell will get off. And if they did the part that we hoped they would do, which would be to legislate a due process within a year, that it would take some time for that process to be implemented, because you've got to design it. And you've got to get the directions out to how to implement the process. So, you're talking about a longer-term project, if they were to take the course of action. So let's just say that they have the epiphany that you talked about, would be two years before anybody would get off. If they take the more likely course of

action, which is to file the cert petition. And even if the cert petition is denied, let's say it takes three months to file the cert petition, if that's the deadline, because that's the normal deadline, without the extension of the pandemic. If they follow a cert petition, of course, Powell is going to file a response, and possibly other entities such as NARSOL would file a response, saying there's no need to grant cert, this is a brilliant decision, and it needs to stay on. It would be very dangerous for it to be reviewed. So Powell would not want it to be reviewed. He likes his he likes his victory. So if it were to go that direction, you'd be talking about several years because the Supreme Court, if they were to grant cert, then they have to order briefing. And then they have to schedule oral arguments, they have to hold oral arguments, they generally announce their decisions at the end of the term that they grant the cert petition. So if they were to grant a cert petition, anytime before the end of 2021, which would be a really rapid movement, but they wouldn't have a decision until 2022. And so then from that point, depending on what the decision was, you're talking about long-term. Folks don't plan to get the registry anytime soon. Because of this, it's highly unlikely, but we can hope for it. The epiphany is what we hope for. That the Attorney General will dismiss any concerns about his reelection, and that he will advise the legislature that they should have due process, that they will discount any concern they have about the cost because, you're going to these petitions, you got 1000s of people on the registry. And without some precise guidance, if everyone's eligible, there'd be a rapid number of petitions. So you'd have to set up something where there would be some criteria for being eligible to file a petition after a certain amount of time on the registry. And then you've got to figure out who gets served the petition, who the responding party is, they have to have additional resources to investigate the petition, depending on what's required. I mean, all this stuff is going to cost money. Are you going to provide any help for the indigent people? Or is this just going to be a petition that's available to those who have financial resources like typically it is in the states that provide a removal process. There's just so much involved in this. So it's gonna be it's gonna be long, long term, this is not an instantaneous thing that's gonna provide relief.

Andy 54:15

But let's just say there's somebody that is a very similar case to this individual Powell. This is persuasive decision, don't they get to then cite this and next week, they're filing a court challenge, doesn't this just then apply to them almost identically?

Larry 54:31

You're absolutely right. That that's also brilliant observation. That's exactly what you would do. And what I would do. If I were tasked for representing South Carolina, what I would do is I would ask in response to that petition, because that would not be filed in Supreme Court that would be filed at a trial court somewhere in South Carolina. What I would do is I would file a response to that and say, this petition is premature, because the year hasn't passed yet and we do not know if they're going to legislate or not. Therefore, since the Supreme Court has said they have a year and they're encouraged, since they're the best situated to legislate a remedy, this is premature. So just sit on it. And I would put forth that argument. I don't know if it would be successful or not. It could be that if they were as favorable as this Powell was, he has had had that one case, and he had successfully completed

treatment. And he had done everything right, no additional encounters with the law. And they determined that he was a good candidate for removal, so that, I don't know if that would be the outcome. But if I can think of putting up that argument, trust me, I'm not letting the rabbit out of the hat. They can think of that. And that's what they would argue. They would say that this, this is premature, we need to let the process be developed. And we need to not jump the gun here. We want to make sure that we're letting off the people that should be getting off. And therefore, we would ask you to hold this petition in abeyance. And I just about bet that that's what the judge would do would hold the petition at abeyance.

Andy 56:00

And I'm going to repeat back what you just said is if I file that same thing, I'm exactly like this, this Powell guy, they're going to say, hey, come back to us after the legislature has done their work? They're just going to kick me out saying hang on, come back later?

Larry 56:14

Well, like I say, my request to the court would be that it be held in abeyance until we see if the legislature is going to legislate. I don't know if the court would grant that. But that would be my response. Because when you file a petition, there's going to be a response filed. And that would be my response. I would do a flip flop just like what they're going to do. Right now, I would argue that we're likely to get something out of the legislature even knowing that you're not likely going to get anything out of the legislature. But I would say that it's quite likely, because of the strong encouragement of the Supreme Court, that the legislature will create something, and therefore, we don't want to jump the gun and try to legislate from the bench. We want to let this process work, even though it's not gonna work. But that's what you would argue. And you would ask not that the petition be dismissed, but it be held in abeyance until the legislature legislates. They're not going to legislate folks.

Andy 57:04

And because I don't know this word at all, what does abeyance mean?

Larry 57:11

It would be that they just would not make any decision on it. It would just sit there while we're waiting for this year to pass.

Andy 57:18

Okay, the definition from Google as the condition of being temporarily set aside suspension. Okay. Not really familiar with that word. But it says it's a legal term. Larry, you got to define these things for us dumb people here.

Larry 57:31

Well, they can think of that, if I can think of that, because I've never professed to be brilliant. And that's what they would likely argue.

Andy 57:38

Sure. And so you said it's going to take to even like, on the optimistic side, it takes a year for them to go to legislative stuff, and it doesn't take some time for that to go through before that whole legislative process would be done. And then you got to wait

for the governor to sign it. And there's got to be some sort of implementation mechanism, you're talking two or three years before anything would happen for the people that are just waiting, that might have something else applied to them where they could get off the registry?

Larry 58:03

Well, with the epiphany that you're hoping for, and that I'm hoping for, they decide something in the 2022 session, and it takes effect July 1, that's a really optimistic thing that they could make it effective that fast, because they don't have this and they're creating it from scratch. So they're probably going to set an effective date, maybe January 1, 2022. So they can gear up for it. So you've got you've got a process at the very most optimistic thing is going to become available and operational January 1, 2022.

Andy 58:37

For clarity, that's like six months from now, do you mean '23 by chance?

Larry 58:42

Yes, I mean 2023.

Andy 58:44

Okay, good, good, good. Good, because I was like, they're not in session now. I assume that's already out. You're talking like special sessions. And I guarantee that's not happening,

Larry 58:51

But yeah, so we were we were looking at January, 2023 before it be up and operational, then you got to file your petition, you've got to serve it, you got to let the responding party, whoever they determine. It's more likely going to be the prosecutor in the county of conviction, or in the county of your residence if you have an out of state conviction, and then they have to respond. And then there's going to have to be a hearing set. If they design it for hearings, hearings take time and cost money, they consume court judicial resources, so all this stuff is going to take time. There're no instant answers.

Andy 59:30

Okay, and with your usual pessimism, you just can't even help yourself, can you?

Larry 59:38

I don't know if it's a question or not being able to help myself. I can't help myself to tell people things that I don't really believe to be the case and I don't believe that this is gonna do anything anytime soon to help folks. It's a fabulous decision, but I don't think we're going to see any relief anytime in the immediate future.

Andy 59:57

I can tell you that over on Reddit. It has been burning up the sex offender support channel over there. And then there was a massive conversation going over on our Discord server yesterday or day before I think, pretty sure was yesterday. Just I mean, there's five or six, seven people talking about it for like two hours almost, just beating around going back and forth. This has definitely lit up our universe as far as people having conversations

and postulating about what's going to happen with this whole thing.

Larry 1:00:27

Well, I'd be interested to hear what some of the comments are, is that gonna bring the registry down next week? Is that what they're saying?

Andy 1:00:33

That would certainly be one of those things. (Larry: Wow.) All right, well, we are almost like exactly at an hour. Larry, is there anything else? Do we have any articles that you want to touch on before we scoot on out of here?

Larry 1:00:53

Well, let's see on these articles. I think that there was not anything that I really had a passion for. I was putting them in in case we didn't have anything. But we had these two decisions.

Andy 1:01:04

Yep, I'm with you. And those will all be in the show notes if you want to find a PDF of them that Larry has provided for us, which is super awesome, as usual. But of course, we need to thank, we got a new patron this week. Larry, tell me quickly about this new patron this new patron is Kay. how did Kay find us?

Larry 1:01:23

Kay found us because of our discussion of revocation of supervision on the interstate offenders who have been transferred in due process. Those probable cause hearings, and she has a loved one who's needing a probable cause hearing. And somehow you can explain that about how those keywords search, but it popped, it popped up and they listened to our episodes, and they found them fascinating. So I ended up talking to Kay at great length, as a matter of fact.

Andy 1:01:54

But the point is, is Kay is not a PFR-related person, this is some other kind of crime that was committed.

Larry 1:02:00

That is correct. I omitted that but yes, that has nothing to do with our issue. It's the process that we explained. And she said they listened to those episodes multiple times, because they felt that no attorney they could speak with could explain the interstate compact the way we did.

Andy 1:02:19

Fantastic. Thank you very much, Kay for joining up and look forward to communicating with you in the future. And then we also had positive, like one that we may have forgotten to mention,

but so I have a podcast transcript person from inside the walls. And Jason, we may have forgotten to mention that individual. And then also a new one is Lindsay. So, Jason is Indiana and Lindsay is in Illinois. That's super stellar. Please pass that around to your folks behind the walls there and stay safe. And again, thank you so very much. Anything else before we shut everything down Larry?

Larry 1:02:52

In terms of the transcript, it is possible... this episode will go out on schedule, it is possible to the next episode may be late because I could be traveling. And I'm integral to the production and creation and distribution of the transcript. But I'm not sure yet. But I could be traveling so you will get it, it just may be late.

Andy 1:03:13

Yeah. And actually let me mention that if you are traveling, then our schedule of recording could be off. It could be Friday or could even be pushed back to Sunday. Who knows where all of us will be at what time because I have to bring Larry equipment to record a podcast. But, Larry, with all of that you can find show notes over at registrymatters.co You find the latest episode on all of our back issues you can leave voicemail at 747-227-4477. Email registrymatterscast@gmail.com. Of course, the best way to support show is patreon.com/registrymatters. Larry, I thank you so very much. You are the explainer in chief for all things PFR-registry-related stuff. And I hope you have a fantastic week, and I will talk to you soon.

Larry 1:04:01

Thank you so much. That is why I am here.

Andy 1:04:04

Oh wait, I can play that for you here. 1-2-3.

F. Roosevelt, MacArthur Movie Clip 1:04:09

That is why I am here.

Andy 1:04:11

Oh, you were supposed to do it in sync. Try that again some time. All right, Larry. Have a great night. I will talk to you soon.

Larry 1:04:15

Good night.

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