



Registry Matters Podcast

Episode 183

Recorded 7-3-21

Andy 00:00

Registry Matters is an independent production. The opinions and ideas here are that of the hosts and do not reflect the opinions of any other organization. If you have a problem with these thoughts, fyp. Recording live from FYP Studios, east and west. Transmitting across the internet. This is Episode 183 of Registry Matters. Larry there is nothing going on tonight is there?

Larry 00:25

No, we should be out of here in just a few minutes I should say.

Andy 00:29

I should Yeah, like, figured we wouldn't leave anybody with not another week of no podcast. So we just show up. Say hello. And thanks, everybody for coming. Later. But seriously, what do we have going on tonight?

Larry 00:42

I've lost count of so many things we've got going on tonight. We've got listener questions. Unfortunately, I don't think we have any from behind the walls. But we've got some listener questions. We've got comments. We've got news from New Mexico. We're going to have a patron extra about Bill Cosby. And we're going to talk about a decision out of state of Colorado Supreme Court. And we've got a contribution from an advocate in South Carolina that has responded with an analysis of his own, which we're going to discuss

Andy 01:20

Outstanding. Man, Okay. And like 45 minutes, maybe, tops.

Larry 01:26

we should be able to do it in 15.

Andy 01:28

Sweet. Alright. Let us begin with a two-part question from Brent.

Brent (Recording) 01:37

Hey, Andy, and Larry, I appreciate so much that you guys answered my question last week about the detention hearing from my relative that was that had just been arrested by the FBI. So, I actually have two more questions, if you don't mind. So first, the detention hearing that I talked about, was actually postponed again. So, it never happened. And so, this is the second time that it was postponed. And we were wondering why they would do that.

Larry 02:09

Well, in terms of that question, the reason why the detention hearing is normally postponed is because the defense counsel asked that it be postponed. The government has sought detention this particular case and only have sketchy facts. But the defense attorney would want to build a compelling case or a more compelling case for some sort of release pending trial. And what I'm guessing would have happened is that they were unable to connect with the people who might provide the structure and supervision necessary. And pretrial services from the from the federal side, they're very thorough. And the defense attorney needs to have a compelling argument about how this person can be adequately supervised, to keep the community safe and to

assure his appearance. And my guess is that the attorney made the motion which the government's not going to oppose, because they've got him in detention. Why would you oppose an extension of the status quo, so the motion would have been unopposed. And the hearing is postponed in order to give the defense attorney a chance to put together a more compelling reason. As I said last week, please answer your phones. The hearing is actually scheduled for Tuesday. So there's really no more workdays left, Monday being a federal holiday. But hopefully they answered their phones and took all incoming calls. I know it's terrifying to people to do that. But these people may call you from numbers you don't recognize but you need to answer them. (Andy: Ready for part two?) Sure, let's do it.

Brent (Recording) 03:43

You know, and so the second question that I have, is that the person I'm asking about is a college student and has no prior criminal history at all. So, won't they go easy on him and give him probation?

Andy 04:04

Andy plays audio of hysterical laughter I'm gonna step out there, Larry, and say that that's going to be a no.

Larry 04:08

It would be most unlikely, I believe. Now, I don't have all the factual allegations in this case, I'm pretty sure that an underage image or two have changed hands. And I know that it was a chat room that was supposedly adults and they magically became minors. And I know enough about it, that this is not in the federal system. If he were in the state of New Mexico. If he were in our system, this is actually pending in Mexico federal court. If he were actually in the state system, there would be a very good chance he would get probation because no prior criminal history, but he's not in our state system. He's in the federal system. Only about 9% of people in the federal system receive probation as a sentence. Almost everyone goes to prison. Remember Martha Stewart? Remember that name? Does that ring a bell to you?

Andy 05:01

I do for sure.

Larry 05:06

Well, she misled a federal investigator about a stock trade. And that was so heinous that she had to serve time, it was a very brief amount of time, I think it's something on the order of six months. But if Martha Stewart served time, most of the offenses in the federal system that end up with probation would be like killing a migratory bird, or being on federal land that you shouldn't be on because you're in a protected wilderness area, and you shouldn't have been there. But these types of crimes that receive probation are far and few between. In this instance, he's likely looking at 40, 50, 60 months in federal prison. And that's just what I know about the case, there may be more serious charges that I don't know about. But it's a very, very disappointing thing to me. He's young, he's got his whole life ahead of him. And he's got to have this baggage, which is going to suppress his earnings, his ability to pay tax, his ability to be a productive citizen, it's just a tragedy. And when we talk about one of the terms I hate, which is defunding

the police, I hate that term. We're going to mention it more in the podcast about these little catchy phrases that they come up with. We're actually talking about reducing funding. And this is an example of where excessive funding permits them to do these types of things. They're very expensive. They require a lot of human capital to put these things together. And they are able to do these because they have a vast amount of resources. His family is going to be shocked at the resources they have because they tend to lean conservative and they think that the cops are overworked and understaffed and criminals have all the advantages. As this unfolds, they're going to see they're not so overworked and understaffed, and they're going to see that the criminal doesn't have all the advantages that they thought they had. It's going to be a real shock to them. But probation would be a very, very long shot.

Andy 06:54

Okie dokie. Um, let's move over to one from Jeff, Larry. To set it up, I think you have some comments about hovercrafts when people travel.

Larry 07:03

I do. We actually watch for them when you're traveling. I've spotted some in your proximity. When you're traveling, we have had to take evasive measures.

Andy 07:14

Okay, this is from Jeff.

Jeff (Voicemail) 7:16

Hey Registry Matters podcast, I was just calling to let you know about something I did over the weekend. My family and I got in our car and headed to Missouri. And I'm pretty sure in Missouri, you're not allowed to go to the museum if you are a PFR. But I went. Did anyone care? And strangely enough, the US Marshals didn't show up the hovercrafts weren't out. And me and my family had a great time. By the way, this is Jeff, Kentucky. And anyway, I was just letting you guys know, Larry's right. Helicopters and hovercrafts and US Marshals don't show up and didn't start emitting radiation when I stepped onto the, when I stepped into the museum. But anyway, you guys take care, thanks for what you do. And as always, fyp, goodbye.

Andy 08:07

I think we should probably give a little disclaimer, don't you think, Larry?

Larry 08:11

I do, I was gonna suggest, I don't recommend that anyone evade or disobey the law. What I do recommend is you don't over read the law and try to create obligations that are not there, which is what so many people attempt to do. They will insist that there's a requirement... I mean, we just read something from Cristian last episode, or the week episode before, where he contacted the feds about whether or not he had to give travel in order to get notification yet he's not required to register the state he lives in and then he's being listed on this website in Texas. Just don't overdo it. Don't imagine things that are there in the law that are not there.

Andy 08:56

And just for clarity, Jeff sent these in a couple weeks ago, and with the traveling and with all the new extra work that I have, it just completely slipped my mind. But here it is. So we got it. And Jeff has been a patron. He's like the second or third patron. He's been around for an incredibly long time. And I'm sorry that I forgot to bring these in. But so we also had a second question, or actually a question. The first one was just letting us know what's up. But here's a question from Jeff.

Jeff (Voicemail) 09:22

Hey, Andy, and Larry, this is Jeff from Kentucky again. I had one more thing I wanted to ask. So, in South Carolina, they ruled lifetime registration without due process unconstitutional. That's fantastic. What I wanted to know is in the state of Kentucky, if you have two or more offenses that are considered to be against a minor it is in the statute that you automatically have to register for life. And I had two counts of possession of illegal images. So that's considered to be two crimes against a minor that were sexual in nature. Therefore, it triggered an automatic lifetime registration. Since lifetime registration from my crime is in the statute, did I not get due process? Is that still not considered to be due process since it's in the statute that if you do this crime, it's lifetime automatically? Just wanted to hear what Larry had to say about that. And once again, fyp. You guys have a great Saturday. Take care. Goodbye.

Andy 10:19

Thank you, Jeff. How would that translate, do you think, Larry?

Larry 10:23

I love that question. It gives me a chance to talk about something we mention periodically. I have great trepidation with statutory schemes that consider it to be two convictions when it happened within the same case. And the way he phrased that he said, two counts, he didn't say two separate incidents. I'm believing that he had to two counts, within the same case, that that to me makes it a much more compelling case that he shouldn't be lifetime. And if I had the money, and I were inclined, I would make that challenge, depending on how many years he's been on the registry, we would need to look at that. If he's been of the registry for three weeks, it wouldn't be a compelling case. But if he's been on the registry for a number of years, the fact that they made him statutorily a lifetime for conduct that occurred within the same case, within the same window, within the same frame of criminal behavior, and he has had no further intervention, he could certainly make a compelling case that... the body of case law is building on this about lack of due process. We're going to talk about a Colorado case later that applies to juveniles who don't receive due process. This is a significant issue. I think he might be onto something there.

Andy 11:42

Thank you again, Jeff. I really appreciate it. Teresa also said PA also had automatic lifetime registration for more than one count. Fortunately, the PA Supreme Court said no, no, no. Do you remember how that went down Larry? Do you have anything to add to that?

Larry 11:56

I don't. But I know there's a body of case law building about no due process for lifetime registration.

Andy 12:05

So you're saying though, if somebody, you get captured, you get caught with having multiple images, that's one charge. And then a year later, something happens again, you're talking like that would be two separate incidents, not just finding images in one shot where they investigate your phone?

Larry 12:21

Correct. If you are committing a series of criminal acts, and they prosecute you, they intervene and they prosecute you, then you've had an intervention at that point. Any criminality that occurs subsequent to that would be indicative of the intervention not working. But if they look back and they find stuff that you had done, prior to the intervention, even if they throw another count at you, I would still make a compelling argument that intervention may have worked, but particularly when it's charged in the same case, and it's just an additional count. To me, it's despicable that you would say, well, they have to two counts within the same case. That could happen with the same victim on the same incident. You could have two counts depending on what you did.

Andy 13:14

I follow. I follow. I follow. Let's keep moving along. And a Patron over in our Discord server said Oh, Larry is being intellectually dishonest... This comes from something that was said I guess it was about a week ago, two weeks ago, where we played a voicemail message from someone that talked about don't vote for court packing or whatever the hell it was. You can go back in episode or two and find that voicemail. This is a response to the conversation that we had it says, oh, Larry is being intellectually dishonest. Stop it. No one is suggesting an increase to the Supreme Court because of complex casework. In fact, the justices are against an increase and believe nine is the appropriate number. Any more would make oral arguments and time allotments untenable. The suggestions to increase are coming from the far left. Biden put up a commission into study it. Largely to appease them, calling it a scare tactic of the right is partisan crap. Yes, the right is using it to drum up votes in elections. But it was a talking point handed them by the left. Yes, McConnell played a very political, legal but political games in blocking Garland and getting Kavanaugh appointed. And if Larry wants to suggest that packing the court would be a valid response to that, he can make that argument, but to be disingenuous to suggest there are practical reasons we should consider and that talk of court packing, it's just scare tactic. It's frankly false and he knows it.

Larry 14:42

So, actually, I don't know it. But I do appreciate the feedback because if he heard something, that's not what I intended to communicate, and I always believe if one person hears something that other people can hear the same thing. I will try to make it clear and break it down. The Supreme Court has been at a 100, what, 150 years or so at this magic number of nine. And we've got a graphic about how in the last 40 years, the number of cases review has dropped. And I'm going by the data. And for some reason, they're hearing fewer and fewer cases, but in the 40 year period that that our graphic goes back or more, the population has

gone up exponentially. The number of cases in the federal court system have gone up exponentially. So then we have to ask ourselves, why are they not able to hear as many cases? And I don't have the answer to that. I do not have the answer to that. I don't know what the factors are that's leading to fewer cases. But what I would like to do is to take all the politics out of the court as much as possible. You can't eliminate all the politics, but I would like to, just as they when they enlarge the federal judiciary at the circuit court level, which they do periodically. I think they did it in the Carter administration, they did it to get into George HW Bush, they added judgeships. At some point, we can have an intellectually honest discussion about the size of the Supreme Court. And if there was a way for more people that deserve to have their cases reviewed, and their day at the Supreme Court, if they can have them. I would not hesitate to criticize the reasoning of the left that says that we should do this, because we don't like the outcome. We should never change the number of Court justices because we don't like the outcome so that we can get our people on. I don't have any hesitation to say that. I wish the person who wrote this him would bring himself to say the same thing about the blocking of a well-qualified Circuit Court justice named Garland. That was unprecedented, that has not happened in our nation's history. And I would be happy to hear him call it call that out. That was behavior, that was politicization at its best. But anyway, I don't want to see the court packed, I want to have a thorough evaluation of what size the court should be at to make our court system work more efficiently. I bet if you asked a lot of the Attorney General offices around the country when they sought review of the case from Pennsylvania and from Michigan, they were disappointed that they didn't get their cert petitions granted. And they would probably be delighted if they had gotten cert granted by the Supreme Court. But the Supreme Court did not grant cert. They're granting what 80 petitions a year now roughly. 70 or 80 petitions a year, down from 150 back in the 60s, or 70s. So anyway, that's my point. I'm not for court packing. So please don't put that on me. I'm not for that. That is not what I said.

Andy 17:48

Just to toss this around for just a minute. Do you think that there would be like, as I understand it, aren't there multiple, multiple, I don't know the right term Larry, courts, so to speak, in the different circuits where there are three judge panels, if I'm not mistaken. And then they do what is called, if I'm not mistaken again, en banc. If they need to have the whole court review it. Couldn't they just let's just say it like if they split it between, let's say they're two five-Supreme-Court-Justice-courts. And they would just hear that maybe that would like, double the caseload that they could handle.

Larry 18:25

Absolutely. That is correct. That is in fact what they do. You may have depending on the size of the circuit, you may have 15, 20, 25 judges in a circuit, but all the cases that make their way up are decided first by a three-judge panel, and then the losing side, many times request full court review, which is seldom granted. And you could do the same thing with the Supreme Court. I don't have the magic answer. All I have is a data that shows the number of cases being granted review has gone down. And I don't know why. Is it because they're getting older, they can't produce the work. That's, I don't know if that has a factor in it. I don't know if the complexity of the litigation has a factor in it. I don't know the

answer to these things. I do not know. I do know this. I know that a well-qualified person was blocked by Mitch McConnell. And that was unprecedented. It had never been done before. I know that. And I know that a person was put through at the end of the Trump administration at rapid fire pace. That has never been done before. Those are the things I do know. I even was surprised that they did that with such short time left because normally the vetting process and the way they do the confirmation process, it takes many months. I do know those things. And those things have not happened before. Are they unconstitutional? No, they're not unconstitutional. All it did was change the decorum and the norms of how we had always done things, but there was nothing particularly unconstitutional about what happened.

Andy 19:56

Correct me if I'm wrong. Could we Amy Coney Barrett was already on, she had already been vetted and approved by the Senate and all that stuff to be on the circuit. I don't know what level she was at. But I'm pretty sure Garland was in the DC Circuit? (Larry: Correct) And that is often like the fast track to be the Supreme Court Justice. So they were both already in those kinds of positions. So to bring in Amy Coney Barrett in like 45 days or something like that, and then sit on Garland for 11 months. I'm just trying to draw parity between those two points.

Larry 20:29

There is no parity and that's what I'm calling out. There was a different standard for Garland. He was blocked deliberately. And the other one was fast tracked. They both were on Courts of Appeals. They both qualified. I have no problem with qualified people getting on the Supreme Court. I don't have the litmus test that everybody else has. I would like for us, I actually agree with Chief Justice Roberts, when he called out Trump, we don't have Obama judges or Bush judges, we have US judges. And I agree with the Chief Justice on that. The people are qualified. I may not agree with... I didn't agree with Ruth Bader Ginsburg on some of her stuff. But they do what they see as best they understand the law.

Andy 21:17

Very good. Let's move on from that. And we are going to move into , this is a message that starts with my name is Robert, I believe that's where we're gonna go or am I going somewhere else first?

Larry 21:29

You are correct.

Andy 21:31

Awesome. Good. I'm keeping up with things, man. All right.

My name is Robert. And I'm a member of NARSOL and I currently run a support group for PFRs and their family members and friends here in Kalamazoo, Michigan, called Fearless. And we work with the ACLU to help with advocacy and change, as well as the education to the community and a support group for the friends and family members of PFRs. I am currently in the process of purchasing a home in Truth or Consequences in New Mexico. So, I contacted the Department of Public Safety down there and let them know what's going on. They requested a copy of my judgment sentence or something like that. So, I sent them a copy

of my psi, and they said that was sufficient and they would be getting back with me. I just received a letter from them today. And I'm a bit concerned about the third paragraph because they have my child sexually abusive material translated to 30-6a-3, which is sexual exploitation of children. And they say that that is lifetime registration reporting every 90 days. But when I look up the law, I can't see where 30-6a-3 is lifetime registration. I'm hoping you can shed some light on this for me.

Being as this is in your neck of the woods, Larry, I would imagine you know this quite well.

Larry 22:45

I do. In fact, we reported some good news that from New Mexico that that blends right into this. We could just we could just move into the new segment and then I'll explain from there. But yes, I did review that. There was one part of the letter that's a little bit troubling. That section that they cite as the basis for lifetime registration, that's actually contributing to delinquency of a minor. But the title of the offense, the sexual exploitation of children is a lifetime offense. But I've got the great news. Why don't we let you be the great reader you are and read the great news from New Mexico?

Andy 23:24

Very well. It starts off with you people out in New Mexico reported some good news and I will read the first paragraph. Liberty Justice Coalition is delighted to report to you that registrants with non-New Mexico convictions will soon be entitled to due process before they are listed on the New Mexico's Department of Public Safety NMDPS website. This is a direct result of LJC's lawsuit and subsequent work. And it becomes effective today, July 1st, 2021. This is a monumental achievement, and we are grateful to Barry Porter and Ashley Cloud for their work in making this dream come true. We are not aware of a state that has such a robust process for those relocating from other states. The process does include the opportunity for judicial review for those who disagree with the equivalency determination. Unfortunately, we were unable to get this process applied retroactively, which may mean another lawsuit. I know you don't like to toot your own horn. But isn't this your baby?

Larry 24:24

Well, it is indeed. This is the first lawsuit that we chose when we had the resources here in New Mexico to do a lawsuit. We looked at the various things and there's so many that we wanted to go after. And we chose this one because we felt we had a compelling case. The law is clear. Our law is really strong in terms of what triggers a duty to register in New Mexico. One must be convicted of an offense that is equivalent to an offense on our list. Some states have language such as substantially similar and others just take categorical approaches you have to register if you have register there. But we don't do that here. It has to be equivalent. That's the strongest language. But yet, they weren't providing any process for those people to determine that equivalency. So we felt we could win that case. Unfortunately, we lost. We had plaintiffs that had been here for years and years, and the judge ruled that they were beyond the statute of limitations. So we took a voluntary dismissal. And we told the state we had a new group of plaintiffs, and we were ready to relaunch the case, because the judge had ruled in his prior to us dismissing the case, he had ruled

that we had a case. That it was clear, and we were going to win if we had the right plaintiffs. So we went forward, and this is what we ended up with.

Andy 25:48

What's wrong with that approach?

Larry 25:50

Well, well, you talking about if people have to register anywhere, they have to register here? That approach you're talking about? Yeah, what's wrong with it is that it violates the equal protection clause of the Constitution. When you become a resident of another state, you have the privilege and protections, the same as the person who was born there. So therefore, you can't say, well, you have to do that in the other state. Why don't we do that when you have taxes in another state. Why don't we say, Well, you know what, look at this. We have a New York, you have a city tax, and you also have a state tax, and ours is 4.9% here, but in New York, it's 8.5. Plus, you have the city tax, that'd be a 9-point. Why don't we do that? We don't, because you're entitled to pay the tax rates that are levied here. When you come here, if you've committed a registerable sex offense, if it translates to one of ours, according to the statute, that's what we register. We don't register you just because you have a conviction in another state and some other state is kooky enough to require you to register. That's what's wrong with it.

Andy 26:50

Okay, and you are particularly proud of a couple points. Let's go through one by one. First, the New Mexico Administrative Code now clarifies it is the Department of Public Safety who must make the determination, not the local sheriff. The fact that the determination is made by the DPS provides some insulation from a sheriff that believes a person should have to register here if the person was required to register in another jurisdiction. And that's 10.2.3.10(a) NMAC provides within 45 calendar days after the judgment receives the initial registration information, the out of state registrant is required under Section 29-1-1(a)-4 NMSA and those above to provide the sheriff. The department shall complete a translation and advise the out of state registrant and the sheriff whether the out of state registrant was convicted in another jurisdiction of a sex offense equivalent to one or more of those offenses. In subsection 1 of Section 29-1-1(a)-3, and is required to register as a sex offender in New Mexico. This is awesome. Larry, the way I read it is that the person still has to register when they arrive in New Mexico. Is that right?

Larry 28:03

That's correct, the person needs to register because there's a loop open when they left the other state. And they've notified that state that they're going to New Mexico theoretically. And they will be reported as missing in action and the feds will be looking for them. So you have to register. But the beauty of this is the person's registration will not be disseminated via the internet while the translation is pending. And that's under 10.2.3.10 subsection D of the New Mexico Administrative Code now. And that provides the protection for the registration. While the translation is pending, no information regarding the out of state registrant shall be entered into the public-facing portion of the local or state central registry. That means as an internet guru, you know that once it's out there, it's hard to take it back. (Andy: It's

very hard.) So we have protection. Now maybe make it clear, this is not because you feel like you're a good guy, and that you've done enough time in another state's registry and that you should have gotten off in that state. That's not what this is about. This is to determine if your crime is equivalent to one here. You don't get the benefit of if you come from another state that has more lax requirements, you don't get the benefit of that. This is to determine if your offense translates to one of ours. That's all this process is about. But you don't get it disseminated until the determination is made.

Andy 29:27

There are states that it doesn't matter the crime. I guess there's two ways to word it. But one of them is if you've registered in another state, doesn't matter whether you've been convicted or not. But if you've had to register in another state, you have to register here. (Larry: Correct.) Okay, and then what is the standard for determining if the offense is equivalent? Because I could see they would have all different kinds of ways to word urinating in public.

Larry 29:51

Well, that same section of Administrative Code that I just quoted, the standard to be used by the department is, is to be one of clear and convincing evidence. And that's a pretty good standard. That's just one step below reasonable doubt. So they have to show that this is an equivalent offense. Now, unfortunately, there's some responsibilities on the PFR. They have to provide documentation. And there's a lot of burden put on them. And the state made a compelling argument that they're not researchers, and that they would not agree to putting the entire burden on them. So if you come to this state, bring as much paperwork as you can with you, and make sure that's valid paperwork. When I say valid paperwork, don't take a copy of a copy of a copy of a copy, that's blurry. It's jacked up crossways. And it looks like that something that you may have invented. try to bring as clean copies that haven't got coffee spilled on them and all blurry, that look like they're legitimate documents. So they'll take them seriously. Bring as much documentation as you can to help them in making that determination. Because it may be that you did not commit an equivalent offense, or it may be that you committed an offense that might put you on a ten-year track rather than a lifetime track. So you need as much information as you can to help them make that decision. (Andy: Quick question, is this a Uhaul event?) What is a Uhaul event?

Andy 31:20

Is everyone going to move to New Mexico?

Larry 31:21

Oh, no, our registration list is broad enough that we're going to encompass most of the offenses that are registered everywhere. The only thing is that there are offenses that are not on our list. I always mention the obscene phone calls to a minor in Georgia. Those are not registerable here. And there are some, California has a really long list and some of those offenses in California, they're not registerable here. But in most instances, the basic universal sexual offenses, they're going to be registerable here. You're gonna end up having to register. But at least you can contest that. But focus your dispute on whether it's equivalent. You don't get to argue that you've done enough time already in

another state. It's not about how good of a person you are, that you've been rehabilitated, that is not a part of the analysis. It's whether or not that offense, had it been committed here, would have triggered a duty to register. That's all it's about.

Andy 32:19

All right. Well, congrats to you people in New Mexico. (Larry: Well, thank you.) And we can then move over to the response from the South Carolina advocate. And he posted to the Region Two, and Region Two is sort of like the eastern center of the United States, like the coast and up, but not New England, kinda like not there. Says an advocate from South Carolina posted in the Region Two NARSOL affiliates list, his analysis of the South Carolina case we discussed on Registry Matters. And I would like to discuss parts of that analysis with you, Larry. Don said, certainly creating a mechanism for removal will result in an immediate flood of petitions entering the court system. And that is something they will have to deal with because what you people fail to recognize in the podcast was the fact the failure to act will result in a similar flood potentially larger, simply based on the South Carolina decision. In fact, in that case, the problem is worse because those people don't even have to prove they aren't dangerous. The claim would be the Supreme Court already said the law, as it is, is unconstitutional. The legislature failed to act to terminate my unconstitutional registry requirement. What's wrong with that logic? And why would that not work?

Larry 33:39

Well, what's wrong with it? There's really nothing wrong with the logic if there were no other options for the state of South Carolina. But unfortunately, there's another option or two. Option one is they can file a cert petition, which would almost certainly put the brakes on anything until the Supreme Court decides whether or not it wishes to hear the case. And he did concede, we're not reading the entire analysis, he did concede that there's a five-month window, so that puts them out to November before they have to make that decision. So they've got five months to decide to submit a cert petition. Well, they've probably got four months to decide because they need to compose the thing. If they're going to submit it within the deadline, that'll take some time. So but they've got five months to submit that. If they submit that, that's immediately going to throw a monkey wrench and the brakes on everything. Because if I'm the Attorney General in South Carolina, I will say to my state Supreme Court we've decided to file a cert petition, and that's going to hold up everything because we need to wait to see what the Supreme Court is going to do. And the South Carolina Supreme Court is likely going to respect that. So therefore, you've gummed up the process. But option two is that they can maneuver with the legislature to have multiple proposals pending to deal with this. I know this sounds really farfetched to people who don't work in the legislature, but that's what they would logically do. They would have multiple proposals, confuse the issue as much as they can, and then they would work behind the scenes to make sure that none of those make it to the finish line. And at that point, the South Carolina Supreme Court would be facing a terrible political problem, since they themselves are elected in South Carolina. Do they simply say too bad, so sad? You did not fix this within the one-year timeframe and order the entire registry to be shut down? I think that that would be an extreme remedy, and highly unlikely. I say that because they did not determine that registration in of itself is unconstitutional. They

determined that lifetime registration without any due process for review of one's risk is unconstitutional, and removing all registrants by a broad judicial order would be an unprecedented action, and I think very, very dangerous and probably politically suicidal for those justices. They're not likely to do that.

Andy 35:49

Sure. And then Don also said, if no legislation passes in the remaining term, I'll be filing one of those petitions on June 10. I'll probably even put in the effort to submit proof of my non dangerousness just to be more persuasive. In fact, I'm intrigued by the idea of finding a couple of helpful attorneys who, for a small fee, would clone the paperwork a couple 100 times. But I do agree with Larry that filing these actions before the legislative session ends is futile, as the court will most certainly hold it in abeyance, as Larry said, or if they don't like you, they might just dismiss it outright and make you file again, after the year is up. Do you like that strategy?

Larry 36:31

Actually, I do like that strategy. I don't think you'll ever get a chance to implement it. But I do like it. It's a well thought out strategy. You would actually want to cause the legislature... one of the things that causes the legislature to work would be the judiciary saying that we can't handle this. And I think there's 14,000 or 18,000 on the registry. If you could generate a substantial deluge of petitions, that would be political pressure for them to act. So I like that. But I don't think you'll ever get to that. I think that other maneuvers will prevent that from happening. But if I'm wrong, that would be a really good strategy.

Andy 37:09

And Don moves on to say, Larry is right about Attorney General Wilson filing a cert petition with the Supreme Court attempting to overturn this, and that's the US Supreme Court, attempting to overturn this. It might just be an unfortunate error on the part of the petitioner's attorney that he didn't base his claim solely on the South Carolina constitution. That being said, I don't think Larry is right. First of all, someone noted in the podcast that South Carolina doesn't like the feds telling us what to do. True. If AG Wilson were to go to the US Supreme Court to ask them to overturn a unanimous opinion of the Supreme Court of South Carolina, it would have a similar effect on his election changes. What about that logic, Larry? Would the South Carolina AG not be taking a political risk if he asked the US Supreme Court to overturn a unanimous decision of our supreme court?

Larry 37:58

No, he would not. I mean, again, he's thinking logically, but he's not thinking politically. That would not be a risky thing. It would be actually risky not to do it. This would be a good opportunity to discuss the flip flopping that occurs when people espouse their views of keeping the big, bad federal authorities out of their lives. The average South Carolinian would be delighted to have what they believe to be a more conservative court, that's the US Supreme Court, come in and correct a runaway, out of touch state Supreme Court that handed down a horrible decision. The average South Carolinian is not going to be amused that potentially 14,000 people of all levels of dangerousness might be get off the registry. And most of us, I mean, you and me are intellectually dishonest in terms of what we want from our courts. Those who tend to lean to

the conservative side claim that they want judges to just simply interpret the law. Yet they're more than happy when the courts are activists when it's something they agree with. On the other hand, liberals are notorious in wanting courts to invent rights that're not in the Constitution. And they try to achieve those via the courts when they can't win those arguments in the political process. We're all intellectually dishonest at times. I tried my best not to be, but I'm only a human. And we all do that. The average South Carolinian, depending on how this plays in the press, all it's gonna take is one elected official who gets a complaint from a high dollar constituent saying I've got one of these kinds of people and I've got children and they're about to be off the registry, what are you gonna do? And that one grandstanding elected official can make a lot of noise and a lot of press coverage will come about and this is just gonna change the whole paradigm. I don't make these rules folks, I'm just telling you what they are.

Andy 39:42

Interesting. Okay. I don't have... this is kind of over my head. So I can't even really, like, this is almost like I completely respect your opinion there but he's just providing counterpoints and you're going back forth. I don't have anything to add or ask.

Larry 40:00

Well, he's really a good guy. And, and I like him a lot. He's, he's very intelligent. And he's very thoughtful. I don't think he has the political savvy that it takes, although he does work in the legislative process. But this has to be in your veins. And you have to been doing this for decades to really understand how this is likely to go down. I don't have a crystal ball. I actually hope I'm quite wrong. I hope they don't file a cert petition. I hope that within a year that they create a process. I don't think it's very likely they will within a year, I think we've got enough to look backwards on in other states. But I hope they do. And we'll come back a year from now and say South Carolina is launching this beautiful process. And we're shocked. And we're delighted that we were wrong.

Andy 40:46

He also became a patron just so that he could hear the analysis a couple days before the main podcast feed came out. Thank you, Don, and welcome. And I hope you're listening to this episode as well.

Larry 40:57

Did he come in at the \$3,200 level?

Andy 41:02

It was close to that, give or take? Yeah, we give or take a few \$1,000. (Larry: Alright.) Do me a favor, Larry, can you give us like a... so I am now teasing that Patreon extra so that people will go over and sign up on Patreon. We're getting really close to me having to play a sax solo. So I'm actually gonna have to start practicing for real. Can you give like a two-minute teaser on what this Cosby thing is that came out in the news this week, I believe it was?

Larry 41:29

Yeah, there's been ample coverage. But the Supreme Court of Pennsylvania, decided to overturn his conviction and ordered his immediate release last week. And they used very, very sound and

logical... I mean, you can't do any better than they did. I haven't read the decision, with the intensity I need. But I've relied on others in this instance, that are experts. And we were going to have some good chatter going back and forth about why they did what they did. And, and we're gonna have an audio clip to play and it's got to be great.

Andy 42:07

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.

And we're back everybody from our Patreon extra, be sure to go sign up over patreon.com to listen to the little Patreon extra that we put together for those people, not you people, but those people. And Larry, you people put a case in from the Colorado Supreme Court. The people of the state of Colorado in the interest of respondent cross petitioner TB, do I have the right, the court considered whether the mandatory lifetime PFR registration for offenders with multiple adjudication constitutes cruel and unusual punishment in violation of the Eighth Amendment to the US Constitution? Give us a thumbnail of this case.

Larry 43:34

Sure, this case was initiated by TB, who committed two sexual offenses as a minor and they were actually separate sexual offenses. The first was when he was 11 years old and the second when he was 15. Because he was a twice-adjudicated delinquent for unlawful sexual behavior, the Colorado sex offender registration act, CSORA, requires TB to register as a sex offender for the remainder of his natural life. TB sought review of the juvenile court's denial of his petition to deregister arguing that CSORA's mandatory life sex offender registration requirement for offenders with multiple adjudications violates the 8th Amendment's prohibition on cruel & unusual punishment. That's what he argued. (Andy: What was the outcome there?) The court concluded that the test articulated in *Kennedy v. Mendoza Martinez*... Now you've heard me talk about that over the last four years.

Andy 44:32

I have. It's something with seven tests and to make sure see if something is cruel and unusual punishment. If it's punishment or a civil regulatory scheme.

Larry 44:40

That's correct. That's the landmark case that determined those seven factors. So they decided under that test, particularly in *Kennedy v. Mendoza Martinez*, which is a 1963 case, that mandatory lifetime sex registration for offenders with multiple juvenile adjudications constitutes punishment. They used the same case that everybody says empowers registration, which I say it can be used in opposite. I say that because of the disabilities and restraints and all the different things that they said the reason why

they upheld Alaska scheme is since the states had done all those additional provisions that weren't a part of the Alaska analysis, that you could use the same case to argue. Therefore, now it's not constitutional. And they did that and lo and behold, poof, it worked. The court further concluded that such punishment is cruel and unusual. And I'm quoting from the opinion now, mandatory lifetime sex offender registration brands juveniles as irredeemably depraved based on acts committed before reaching adulthood.

Andy 45:47

I noticed that just below what you quoted, the court said but a wealth of social science and jurisprudence confirms what common sense suggests. Juveniles are different. Minors have tremendous capacity to change and reform as such, mandating lifetime PFR registration for juveniles without providing a mechanism for an individual assessment, or an opportunity to reregister upon a showing of rehabilitation is excessive and violates the Eighth Amendment. That is on page three of the opinion, Larry. This is powerful. Could this be the beginning of the end of lifetime registration? We are seeing more and more decisions that hold that there must be some periodic review of lifetime registration.

Larry 46:26

Yes, I don't even know why you need me here. You've got this.

Andy 46:30

oh, man, I'm on this, I don't need you. I was thinking about replacing you with me, I will like split myself up and use a voice changer. And I'll just go back and forth by myself.

Larry 46:38

That would be the way to do it. But even though I have not thoroughly analyzed this, it's a phenomenal decision. It is building the body of case law we just talked about from South Carolina. We had a patron mention about Pennsylvania. We're seeing this happening. And I'm hesitant to say this but in my less than thorough reading, I didn't see the compelling evidence of the cruel and unusual nature of the punishment. I'm not saying it's not there, I didn't spot it. So I'd like to come back to this probably in the next week or the episode after. I can go through it more thoroughly and see if the evidence is there because calling something and cruel and unusual doesn't meet that very tough test that the Constitution has. And as we've said before, if electrocuting people and putting them in the gas chamber, and firing squads is not cruel and unusual punishment, most things shy of that is difficult to meet that standard. But on the other hand, since we didn't have registration schemes in colonial times, maybe this is cruel and unusual punishment. I just don't know, I'd like to see, I'd like to analyze what evidence they had. The frightening thing to me is the judge Matsch decision, where he found that Colorado's registration scheme was cruel and unusual. And I said at the time, the evidence just isn't there to support this and guess what? The 10th circuit flipped him. Now this is the state Supreme Court. So we don't have the 10th circuit to flip, that will not be a factor here. The only factor would be here is if they wanted to take this to the US Supreme Court on petition for cert. And I don't know if they would do that or not. I think it's less likely on this particular case because there's more sympathy for juvenile offenders. I don't think that there would be the outrage that there would be, there's not as many of them, there's not 14,000, or whatever that number is in South Carolina. And the outrage

against juveniles will not be as bad. So, if they're considering a cert petition, the public pressure may be far less, but I truly don't know.

Andy 48:52

This seems to be to me a very distinguished line between what a child psychologist would say, and I'm probably going to get the exact term of the person that would be identifying, like, is it a psychologists, sociologist? Forgive me on not having that right term versus politicians and public outreach. That the social scientists would say that children, their brains aren't developed. They shouldn't necessarily be held accountable for life for someone they did when they were a kid. Then but politicians, they write laws that put people on the registry, as young as what, like 10 and 12 years old, and then depending on the state, then they're on the registry for life. And then they get reelected because they're keeping the kids safe, even though there's no evidence or anything of the sort that would back it up. And that to me, there's just a very distinguished line there - a very hard line between one side of the sociologists and psychologists versus politicians.

Larry 49:54

Well, there is. But the question I would ask you, and I hate to answer questions with questions. Are courts intended to be policymakers? Does the Colorado Supreme Court have the right to nullify the will of the people absent overwhelming evidence. Remember, the standard for overturning a law that's presumed constitutional is clear and convincing and overwhelming evidence depending on the jurisdiction, but it has to be asked to be compelling evidence. A judge not liking something and thinking there's a better way to do it does not render something unconstitutional. That's what they elected those people that go to Denver to do. So they need strong evidence that this is cruel and unusual punishment. I think they've got the evidence that it's punishment. That I think exists. All the disabilities & restraints, I think are clearly discernible. In the opinion, they went through all the local restrictions, there are no restrictions on where a PFR can live in Colorado imposed by the state. But they went through dozens of them or however many there were of local restrictions that are imposed, that directly flow from being required to register. That is a clear amount of disability & restraint, but cruel and unusual punishment is a very tough standard to meet. And I don't think that most people would want to delegate their lawmaking to judges. They would find that most revolting. Remember, we want judges to interpret the law, not make the law.

Andy 51:31

And just to hammer home a point. Judge Matsch in Colorado, they did all that on a shoestring budget without any, or at least minimal I think it was, any expert witness testimony like for sociologists, neuroscientists, pick your denomination there. Is that right, what I'm hearing you say?

Larry 51:51

That's what happened in the Matsch case. I'm not sure that happened this case. The opinion, I didn't spend enough time on it from the time it came out. I don't know what evidence they had. But in my limited review, I did not see the compelling evidence. I'm hoping it actually is there.

Andy 52:09

And we need that so that we don't we don't do summary judgment, where there's no discovery, and there's no evidence presented, and then people have the ability to go kick it up to the next court up. And then there's no discovery, there's no chance to go back and review it right?

Larry 52:22

That is correct. In this case, I do not know. I hope there is a strong evidentiary record that shows the cruel nature of this. I'm afraid there might not be and I realize I'm going on a limb a little bit because people get a little bit depressed when I say things, but I just have to look at what I have and right now, I didn't see it. So those who read all 50 or 60 pages, or however many it is, please point it out. And we'll come back to this next episode.

Andy 52:55

Well, help me out with one other thing before we jump out of here, we are now starting to run a hair long. Is there... like the South Carolina case I don't think came up on anybody's radar until Hey, the Supreme Court said this thing. But do we have some level of like... Teresa has a background in, this she's a PhD. Do we have people that can then help with these briefs, these cases that are going out that we could just deposit them into these cases? I don't know if I'm asking the right kind of question, that you can help explain it out. Almost like a psychologist sociologist on retainer to help with when these cases go out, provided we know about them.

Larry 53:37

That would be that the key if we know about them at the trial court level. You really don't get to build an evidentiary record on appeal. That's what people don't understand. The appellate court is reviewing the record, and they're interpreting the law. And this case at the Supreme Court, the facts are already handed to them. And that consternates people to know that the Supreme Court doesn't develop tax. They look at the facts as they're handed to them.

Andy 53:59

Teresa honed in the term just as expert witnesses. Is that right person that would provide... I mean, are these amicus briefs. Is that the right term? That we're friends of the court things is that who a Teresa-type person would submit to go along with these things, or is there even a higher evidence evidentiary standard?

Larry 54:19

You'd want to get it in at the trial court level. The amicus briefs are normally at the appellate level. But we we sometimes try to weave things in an amicus brief that was not a part of the record. That's the whole beauty of an amicus for another court. In an amicus brief, you can sometimes get evidence in that was not gotten in at trial. But the best place is to have a budget and to develop the record at trial.

Andy 54:44

Okay, I think we're done, Larry, I think. is there anything else that we need to go over before we jump out of here?

Larry 54:51

Other than our new patrons and our beautiful programs that are coming in the future, this is going to get better and better.

Andy 55:00

I'm glad to hear that I'm really happy. We had a very lively group in chat tonight night. I thank you all so very much. These are patrons and I'm they're very near and dear to my heart. They're all my good friends. Some of them I've met personally, and I love you all very much. Thank you all for hanging out. And I appreciate it because it's a Saturday night. So you know, like, what else you're going to do on a Saturday night, but come hang out with us. Of course, we're the best gig in town. But we did get a new patron. So Robert, if you send a message to you over on Patreon, be sure to link your Patreon account over on the discord side, and then you can come hang out with us on Saturday nights also. So Robert, again, thank you very much for becoming a new patron. No new mail subscribers, Larry, and I'm sad to hear that one.

Larry 55:41

I am, but we're getting lots of inquiries for sample transcripts. So they're coming.

Andy 55:46

That's pretty awesome. Otherwise, everyone, please feel free to go and check out the show notes, that has you can get a transcript of the show. If you want to like check out some words and things that I flubbed up. You can find all of that over at registry matters.co. Feel free to leave voicemail like Jeff did at 747-227-4477. Send emails at registrymatterscast@gmail.com and as I already said, support the podcast over at patreon.com/registrymatters. Follow us on Twitter, YouTube, we even have a Facebook page. Follow us on all those places, and I so very much appreciate it. Larry, you are the bomb. You are my hero, and you are the great explainer. Thank you so much.

Larry 56:26

I appreciate you having me back again this week.

Andy 56:30

Of course, of course, of course. Wouldn't have anybody else. So have a great Fourth of July weekend. By the time most of you are hearing this, it will be after the Fourth. But I hope you all had a great time. Stay safe and be happy and stay cool. Larry, thanks again. Talk to you soon.

Larry 56:45

Good night.

You've been listening to Registry Matters Podcast.

Registry Matters Podcast is a production of FYP Education.

More show transcripts are available at <https://RegistryMatters.co> (that's right... just C O with no M)

In prison and can't get the podcast? Have a loved one "subscribe" at <https://patreon.com/registrymatters> at the **\$15 level**, and include your prison address information. Or send a check to cover at least 3 months.

REGISTRY MATTERS
MAIL-IN SUBSCRIPTION FORM

Sign me up for _____ months X \$6 = \$ _____
(Minimum 3 months) * **We do accept books or sheets of stamps. No singles please.**

First Name

Last Name

Name of Institution

ID Number

Address

City

State

Zip Code

**Make check payable to FYP Education and send to RM Podcast,
Post Office Box 36123, Albuquerque, NM 87176**