



Registry Matters Podcast

Episode 190

Recorded 8-21-21

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Andy 00:18

Recording live from FYP Studios, east and west. Transmitting across the internet. This is episode 190 of Registry Matters. Good evening, Larry. How are you Saturday night? Back again I see.

Larry 00:30

Well, I'm here. Thanks for inviting me back.

Andy 00:34

You've lived yet another week.

Larry 00:38

I suppose you could look at it that way.

Andy 00:43

You know, what's really important when you actually publish the podcast, Larry? (Larry: What's that?) That you actually put the mp3 file and attach it to the episode. I didn't notice that it wasn't even in the episode until a few days later. Hey, it just went out. So, if you're listening to this, then you probably just got the last one even anyway. Hey, I screwed up. And I'm just sharing with you that I screwed up. (Larry: Alrighty.) Um, I wanted to ask you a quick question. So, we are both familiar with a couple people in a particular state that have been taken into custody on, I guess we can say alleged probation violations. And really, what I want to ask you about is it seems that one of them is in a much more populated area. And he has violations that seem to be like directly targeted to specific special conditions due to his crime, I suppose, I think. And I'm kinda like piecing together things that I believe are real, or believe are factual. The other person is in a very, very unpopulated area. And he has violations that seemed to be against like the general just like, here's the blanket rules that everyone has to follow. The differences in the sentences that they're trying to - or the revocation, the amount of time that they're trying to take - the one that's in the very highly populated area, the one that has the very targeted violations is something of a couple or three years, which I'm not saying that's not a lot of time, that's certainly a lot of time. But the person in the other area that's very sparsely populated, they're asking for like, seven years. They're like asking for every all of his time left that he would have on probation. And it seems like a huge disparity based on to me, it seems like the one with the less time got a much shorter sentence, but a higher magnitude offense versus the other one that seems to be getting a whole crap ton more time but just like generally violated. Did I did I characterize that? And can you talk about that for a minute.

Larry 02:44

You did characterize it correctly. There are some things we don't know about these two, we don't know, on the two offenders if one had criminal history, outside of the sex offense, which could cause a prosecutor to be more aggressive. But as a general rule, not always, but as a general rule, the urban areas tend to be a

little more lenient. They have a higher flow of cases. They need to resolve them and put them through the system. And they tend to be much more willing to make a deal to resolve the violation. The county that the person is in is a very small county. I think the population is like 17,000 total. (Andy: Yep. Yep.) And, and they do not have a high volume of cases. And they need to make an example of a person who violates probation more so than an urban center does. And that can explain some of the difference. I would strongly suggest to people: when you're thinking about moving, rural areas are generally not going to be your friend.

Andy 03:54

Alright, so note to self if, if you're still dealing with like a switchboard operator, then that's probably not where you would want to live.

Larry 04:04

If you're still dealing with a switchboard operator?

Andy 04:06

Where you'd have to pick up the phone and ask the switchboard operator to connect you to 351 Main Street, and they're gonna patch cables together. Sorry, it was an old person joke.

Larry 04:17

So, it's not always the case, though. But as a general rule, urban areas have more program options for people. They invest in alternatives to incarceration more so than a rural area. I mean, simply just the funding isn't there. So, you're not going to have as many sentencing options on the table to begin with. So, prison is more prevalent in the rural settings. But in this case, I don't know if there are other variables in play, but we're generalizing without information, but you do have it correct. That is what's going on here. One person violated, is alleged to have violated the condition of not looking at images that were all adults, as far as we can tell. The other person was accused of violating by accessing social media which was specifically prohibited based on the underlying offense, which was an internet offense. And those were much more appropriate conditions for that individual. Those blanket bans for internet access are problematic. But if they're narrowly tailored and related to the underlying offense and that offender, they're much more able to withstand a constitutional challenge.

Andy 05:33

Is there any way that we can discuss the other item of the person. The rural county without, like spilling all the beans?

Larry 05:42

I don't know. It depends on what you want to discuss.

Andy 05:45

I want to talk about the extra piece of equipment that they found. Would you recommend that anybody have one of these?

Larry 05:56

Well, depends on what the equipment was.

Andy 05:59

You know what it is? Can we talk about it? (Larry: I think we can talk about it.) So is there any reason that a PFR should actually go online or in person if you could find one, and buy a polygraph machine?

Larry 06:15

I can't think of a reason that the average person is going to need to acquire ownership of one of those devices. But as the attorney has eloquently pointed out, there's no law against owning it nor is there a condition of supervision that prohibits possessing a polygraph machine. Now, there may be that condition added going forward, but it's not a violation of supervision to have one.

Andy 06:45

What do you think probation's response would be if they come in for their like random check? Forget that they're doing a specific kind of like, they're looking for a contraband kind of search, and they walk in and they see with the kabuki machine in your shack.

Larry 07:02

They would be very disturbed about it, because the first thing that would go through their mind would be, unless you had that in your background that you had been a polygraph examiner, they would assume that you were using it to try to practice and rehearse evasion. And they would not be amused by a person trying to evade detection of violations of supervision.

Andy 07:26

My issue, Larry, is that the polygraph is a kabuki machine. And all it is, is it's almost like an old school Fitbit that's tracking your heart rate and your breathing and stuff like that. And as far as the detecting whether you're lying or not, it doesn't detect whether you're lying. It detects whether you have like a response to a thing, a question, and I don't see that you could do this at home. I don't think that you could figure this one out. So I think we discussed earlier this week that if you were to get one, like maybe you would ask your neighbor or your best friend or somebody that's not on supervision to hold on to it for you.

Larry 08:01

I don't know if I would want to recommend that. But I would say having anything of that nature around is going to be extremely problematic for a home visit from your supervising officer. Therefore, you might not want to have one in your possession.

Andy 08:17

I think I agree with you. Okay. I completely forgot to even ask you what are we doing tonight? So, can you go back through and tell us what we're doing tonight?

Larry 08:28

We have some listener questions as typical from inside and outside. And we have a very complicated case. It's been meandering around the courts for about five plus years now. And it has been a victory, followed by a victory, followed by defeat. And it's going to take some time to unpack that case out of Indiana from the Seventh Circuit Court of Appeals.

Andy 08:53

All right, okay. Well, then let's begin with a question that is to be read, or statement to be read. Hey, guys love the podcast. And I look forward to seeing your transcript every week. I want to comment about the iPhone NCMEC topic that was discussed on episode 188. That's impressive, Larry, that you were able to get that thing in there. So this is only two episodes ago. And then concerning when the transcript takes time, and then mailing and all that stuff. So it's only like 10 days ago, that the person is responding to us. The duty to report mandate Title 18, US Code 22589(a) allows Apple and other ISPs to report illegal content if they see it on their platform. I think there's a difference between coming across something and searching, obtaining and providing that criminal evidence for criminal prosecution. At what point do these companies become quasi government agents? Do you want to stop there and talk about that? Where does the line get drawn? I guess like I mean, if you were in Walmart and you dropped your whole stash of underage photos, is Walmart like duty-obligated to then notify authorities that they found this stuff attached to this person that walked through the store?

Larry 10:06

That was a question that was better suited for an attorney. And I asked Ashley if she was able to come today, but she was not. She just got back from a week-long trip to a CLE or something across the country. And she didn't feel like being here. But we can double back on this. But there are some clear dividing lines on where an agent of the state, agent of the prosecution where that kicks in. And I don't know if I'm really qualified enough to articulate where that dividing line is.

Andy 10:37

And I think I'll jump in and listening to a whole bunch of tech podcasts that I did during the week. As far as I understand it, institutions like Facebook has reported hundreds and hundreds of 1000s of naughty images, whereas Apple has reported hundreds. Like a three-digit number versus a six or larger number, six-digit number or longer. So, they have obviously not done anything as far as searching your content up to this point, and that's episode 188 where we were talking about where they are going to start looking at that stuff. Um, but then the writer continues, when they do find this illegal content. They don't just report it, they report your name, IP address, MAC address, timestamps, port numbers, router, info and any other metadata they have. The Stored Communications Act, Title 18, US code 2701 etc., I guess, is confusing to me when dealing with content and records. But what I think they have in common is that ISPs can't give the content records to a government agent/entity without a warrant, but they can give it to NCMEC, right? And I don't know the answer that one. So NCMEC isn't a government agency, but I believe it's propped up by government? I think it's a private institution. But maybe it's a nonprofit, but it's government propped up. Do you know about that side of it?

Larry 12:01

My understanding of it is that it was a nonprofit, but they approached the government for funding. You know, everybody hates the government, but they get their funding, a lion's share of their funding from the government to do this work. But again, I'm not sure that I've got it right. But that's what I understand it to be.

Andy 12:17

Yeah, I think you're right on that one. Because I know that it's not a government entity. It's not one of the three letter agencies or anything like that. But it could be just a nonprofit, and then the government funds it for them to do this work. So but what if NCMEC was a government agent or entity? Those two statutes would be at odds, would they not? And I don't quite follow the issue that he's saying if they had the stored information of... I didn't follow that. Anyway, And then there was NCMEC. The cyber tip line is run by NCMEC. And when it first came out, it uses a 501(c) nonprofit agency. But that has since changed. In 2013, *US v. Keith 19*, it was ruled to be a government agent. In *US vs. Ackerman*, the circuit judge who wrote this comprehensive decision said it wasn't just a government agent, but a government entity. That circuit judge was Neil Gorsuch. Wow. The now Supreme Court justice. I didn't mean to rant. Let me know what you guys think. And you guys are the best. Appreciate that very much. Oh, interesting. So, Neil Gorsuch, I guess if I'm reading this back, said that NCMEC is a government entity, not just an agent of the government?

Larry 13:41

Yes, we need to actually read that case, that citation, follow it and see if we can get Ashley on to do a better job of explaining this. But he raises some great questions. That's why I put it in here.

Andy 13:51

Okay. That's why it was also to be read and not like, we're going to ask questions and answer them. Cool. Yeah. So we'll circle back that would be interesting to talk about. Then you posted this question. Somebody wrote in, says:

Listener Question

Hello, someone mentioned that you guys might be able to answer some questions about the registry. So, I was hoping you could help me. I release in roughly two months. I have a lifelong GPS and registry to look forward to. (Andy: Excellent. That's good for you. They're very fun. It's almost like a birthday party.) Is that normal for someone who has two counts of CP or just another broken Wisconsin thing? Don't get me wrong, I know my offense is horrible, but I feel like I'm being treated exactly the same as someone with a much more serious offense would have. Are other states more lax when it comes to GPS and registry? I think it may make sense for GPS while on extended supervision. But on lifetime registry seems so overkill. Do I get to enjoy the rest of my life being seen as a monster? I've asked our social worker for a copy of the registry rules but still haven't seen them. Any information would be greatly appreciated.

Oh boy, Larry. Go ahead and tell this person about how much fun the registry and GPS monitoring is.

Larry 15:05

Well, there's some questions buried in here that he didn't actually ask. But in terms of Wisconsin, it is somewhat of an overkill. Other states do that. But I guess he feels like his non-contact defense should not warrant that level of treatment. Unfortunately, non-contact offenders get treated much more harshly than what you would ever imagine. Because the theory goes, that they're grooming and they're escalating, and they're moving up. And if we had not caught them, it's no telling what would have happened

next. But in terms of his GPS monitoring, when you leave Wisconsin, if that's a registry requirement, it won't go with you. The registry requirements are what the state requires where you're registering. So if you leave Wisconsin, and it's merely a requirement of registration, and again, I've done no research, I don't know this, but I'm putting forth the best answer I can. The registry requirements won't go with you. Having said that, Wisconsin is the one state that tries to continue to assert jurisdiction over people after they leave. They tell you that you need to continue to update your registration. And you need to pay the \$100, I believe it is, annual fee. And failure to do so can result in a prosecution. We don't know the answer to that, to my knowledge, I know that there's been some case law. But I remember when I looked at the cases, there were some distinguishing factors about that case that the person cited to, the listener of the podcast. So, we don't know, on full appellate review, if Wisconsin can assert a continued control over you and tell you to pay the \$100 and send the form in. We don't know the answer to that. But in terms of your extended supervision, if it's a requirement of your supervision, that requirement will go with you to the next state. So, if you have a GPS requirement part of your supervision, it will go with you.

Andy 17:17

That's lots of fun. All right. Yeah, yeah, I was gonna ask you that, to remind me is Wisconsin the one that does the continued registration fee, even after you've left the state.

Larry 17:29

And as for more reasonable states, are they lax? Yes. But if it's a part of your supervision that laxity will not benefit you because those states are bound by the interstate compact for adult offender supervision to carry forward with the requirements that were imposed on you in the state that sentenced you. So therefore, if you have a GPS requirement in Wisconsin as a part of your supervision, and you go to a great state, like maybe Florida, or Alabama, or one of these delightful southern states, where the people are so much more brilliant and have more common sense than folks do in these wacky states, you will find that that condition will accompany you there. Now how aggressively they enforce it, that I can't tell you. It could be that after some period of time on supervision, they might decide that you don't need that level of scrutiny. And they may pay lip service to the GPS, and you may have to be fitted with it. And they may never call you when it shows you're out of compliance. They may never admonish you. I mean, I can't tell you that. But they're they can't just cut you loose from it. As I've said many times before, wouldn't it be a great country, if you could get sentenced in one of our states, and you could jettison those conditions of a sentence you didn't like by moving to another state? Wouldn't that be fantastic?

Andy 19:03

That'd be great. And should circle back real quick. You talked about the southern states, the southern states are generally like really atrocious, generally speaking, versus the northeastern states.

Larry 19:13

That is correct generally. Wisconsin had you know, people forget that they were under a regime of Governor Walker. And Wisconsin is not like it once was. A lot of changes were made in how

Wisconsin runs things. They went through the looney tune of the wrestler who became governor Jesse Ventura.

Andy 19:33

No, that's Minnesota.

Larry 19:36

Oh, yep, yep, whoops. But they certainly went through Scott Walker. (Andy: Scott Walker was exceptional.) So they've taken a conservative direction in Wisconsin. So, things are not like they might have been in Wisconsin 30 years ago. It's not the same state.

Andy 19:56

Okay, then. Let's roll right along. I snagged this one off of Reddit. There's a PFR support. It's like SOS support, not quite like that. It's sex offender support something or another. If you type in that, you'll find it over on Reddit. But somebody posted a pretty good question. And I asked Larry, if I thought it was good question. And Larry said, yes. So this is questions about lifetime supervision from Nevada. I am the long-term girlfriend of a PFR that was sentenced in Nevada in the past two years. I'm making this post on his behalf. He was sentenced to five years' probation eligible for release at the halfway mark once he completes his PFR treatment. He is a tier three, has never served any of that time in prison, nor does he have any prior offenses. There is an addendum in his core paperwork that says he is required to complete lifetime supervision - I have a question about that one, Larry - even after he is released from regular probation. We have questions about this. How does regular probation and lifetime supervision differ? Is it the same set of conditions he has now? He's originally not from the state he was convicted in, but he is serving his sentence in Nevada currently. How does this affect his ability to move back to the state that he lived in prior to the conviction and sentencing? Will he have to go through the ISC? Which I'm assuming is the interstate compact thing. Is he eligible to go back after release of regular probation or do we have to wait 10 years post-conviction and petition for release of lifetime supervision? First of all, how do you complete lifetime supervision if not by dying?

Larry 21:30

Well, they're early termination from lifetime supervision. Courts don't keep people - unless the statute requires a lifetime, without the release - but frequently people petition off lifetime. We talked about that just in the last episode about the case where the state didn't object of him getting off lifetime supervision, the New Jersey case. But they did object to him getting off the registry. This is a great question. I don't know if anyone's answered it on Reddit, but I can give the answers. Some of them will not be popular, but I can give the answers to all of these.

Andy 22:08

Okay, and yes someone did answer. Someone that is in our chat room actually answered the question, if I'm not mistaken.

Larry 22:15

So I don't know how lifetime supervision differs in Nevada versus regular supervision. In theory, it should differ because once you've gotten off of your rigorous supervision, where they're really monitoring you, the lifetime should be more of a check in type, more like supervision. My antidotal evidence suggests that that's

certainly not true. But that's what it should be. So remember, should be versus is be. I haven't said that for a long time.

Andy 22:48

Not for a long time.

Larry 22:50

But if it says it should be, it would be somewhat more relaxed, but there would still be a reporting duty to a supervising officer. So that gets to his last series of questions about can he go to another state? Yes, he can. He would have to go through the interstate compact. Remember the test for going through the interstate compact. If you have any reporting requirements whatsoever, the compact covers you. So in order to escape the compact, there has to be probation with no reporting requirements, or parole with no reporting requirements. You can't be cute and say well, check in by phone. That's a reporting requirement. You can't be cute and say mail a form to us. That's a reporting obligation. You have to tell the person go away, sin no more. So without that, he will have to go through the interstate compact to go to another state, even under lifetime supervision. Those cases are transferable under the compact. Lifetime supervision is transferable. If it were come to our state, they would treat it with absolutely no difference. He would get treated exactly like a beginning person on supervision here. And their goal would be to make him want to leave this state. That would be their intent. And they would treat him no differently. What other states will do, I don't know. Some states might do it right. They might look at Nevada's records of supervision and the fact that he was totally compliant with no issues, and they might not put him through that. But I can speak for our state, it would make no difference here. So, he does not have to wait 10 years to move to another state. But if Nevada law requires you to wait 10 years to petition off lifetime supervision, then that's a Nevada thing. Regardless of what state he's in, remember another state can't remove you from supervision that's imposed, so therefore, if he were to go to the most lenient state in the country, whatever, wherever that might be, they cannot release him from that supervision because they didn't impose it.

Andy 25:10

All they would then do is just follow however long it is, whether it's 10 years, 100 years or whatever, they're going to then follow those rules. But the supervision, part of it might be where, whatever, we don't care about what you did. So, we're not really gonna monitor you that hard, but we can't release you early.

Larry 25:28

And that is correct. And they could recommend termination. They seldom do that. But I have seen it in a limited number of cases. So, it would be possible. Now you remember, you've always pontificated about nobody gets probation. Here we have another example of a person who got probation. I know it's a foreign concept of people. But a lot of folks never go to jail for committing sexual offenses.

Andy 25:53

And also there in the beginning of the story piece of it, it says he is a tier three. Generally, tier three is bad. Does Nevada have it worded backwards that level ones are the bad people and tier three are the easy people?

Larry 26:07

No. Nevada has a categorical approach. They went with the AWA recommendations, so it's based on your offense. And in some cases, many states put people in tier three that don't need to be. But that's merely a categorical approach. It has nothing to do with him being risk assessed, they use it merely: this is an offense, they look at the list, you're a tier three, but it has nothing to do with any personalization.

Andy 26:34

And then it says, is he eligible to go back after release? So, he is from another state besides Nevada. As far as him doing the ICAOS transfer, the interstate compact, isn't he more favored to transfer there assuming that that's where family is? Whether that's mom and dad, or whether that's siblings or children or something like that? Doesn't that give him a higher eligibility or like, looked upon to transfer?

Larry 27:02

Well, assuming that Nevada has not taken the New Mexico approach. New Mexico would say, No, you're stuck with us. But logically, you'd want to get rid of all you can. I don't understand that. Of course, funding goes with it here because they have very low caseloads for people that are under this type of supervision. So, the more they can have, the more that translates to budget line item for POs. But you would want to get rid of all you can, because I don't care what the level of recidivism is. If you can offload 100 PFRs to another state, and that magic 1%, 2%, 3%, whatever it is, wouldn't you rather than be doing their reoffences in those states versus yours?

Andy 27:45

Yeah, your recidivism rate would be zero if they're not here.

Larry 27:49

So, I mean, ultimately, you would have to deal with them again, because if they reoffended and committed a new sexual offense, that state's gonna prosecute them, they have first rights to them. So, they may be tied up in that state for a long time. But eventually, if they live long enough, you're going to have to deal with them again. But by then, they may be so old, they're not a threat anymore. But you would want to offload all you can. Folks, I don't understand why this is complicated. You want to get rid of all the offenders of all types you can. You much prefer them to be offending someplace else.

Andy 28:23

One other piece of that is, it seems Larry that probation is supposed to be about rehabilitation and family, blah, blah, blah. I'm gonna do all the lip service stuff. It's supposed to help you rehabilitate. So, if you were closer to family, wouldn't that help you? Shouldn't that be what they're interested in?

Larry 28:39

Well, should be and is be. Yes. They should be interested in that. They're not interested in that, they have other agendas. But like I say, by, if I'm ever administering probation or parole, our policy will be to get rid of as many as we can.

Andy 28:57

Just rubber stamp, say approved, approved, approved. You get your transfer, you get your transfer, you get your transfer.

Larry 29:08

Why would you want to hold a person back?

Andy 29:11

I don't know. Other than to be just a jerk. Like, I don't know why you would want to hold somebody back. Okay. Anything else on this one before you would want to move on?

Larry 29:21

Well, it was a great series of questions. And I love trying to help people like this because not only does it help this person, it helps remind folks about transferring interstate compact. We've had a mini conversation about interstate compact today bringing up some of the key points again, and that's a very popular item that we talk about. We get positive feedback every time we talk about interstate compact.

Andy 29:46

It's really complicated Larry. It seems. To me it is. But that's why we have you. You're the Master Blaster of ICOTS. I think then Larry, unless you have something else you want to go over, we can go over this Indiana case.

Larry 30:02

I think we're ready to move to it. Let's do it.

Andy 30:06

All right.

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Andy 30:58

Well, you people wrote an article back in July describing a fantastic victory in Indiana, when a US District Judge Richard Young ruled in favor of PFRs. The case is *Brian Hoff vs. Commissioner of Indiana Department of Correction*. I think, Larry, that we talked about the judge's decision on the podcast. I checked into archives and we did talk about it on episode 160. So that's, what, 30 episodes ago. That's a little bit like right around six months ago when the United States Court of Appeals for the Seventh Circuit affirmed the trial court. Now we are back on this case again, because the Seventh Circuit granted Indiana's request for en banc review. So we get to talk about that here first. It appears that the victory you gloated about back in January has been snatched away. I want to briefly touch on what en banc review is before we dig into the case. What does that term mean?

Larry 31:44

Sure. Appellate courts typically in order to function, they sit in panels of three. And I think you can figure out why three because you wouldn't have a tie vote. So they sit in panels. And if the losing party disagrees with the three judge panel, they can request a review by the entire Court, which means all the judges would hear the case. And they could affirm or reverse the panel. In this instance, they did reverse. And requests for en banc review are routinely denied. Unfortunately, this one was granted. And here we are.

Andy 32:21

Alright, um, when the trial judge issued the decision back in 2019, you wrote the United States District Court of the Southern District of Indiana recently handed down a fantastic decision that has the potential to help many similarly situated offenders who were convicted in other states and moved to Indiana or were convicted in Indiana, moved away, and returned again. It is not known whether the state plans to appeal the Seventh Circuit, but the likelihood is that they will because they can't stand losing. Your prophetic because the state did appeal. In fact, they appealed twice. They appealed the district judge, and they appealed the three-judge panel. Let's go back and refresh the listeners on what this case was about.

Larry 33:06

Sure. This case was brought on behalf of six named plaintiffs who asserted that the imposition of Indiana's SORA is unconstitutional as applied to them. Plaintiffs Hope and Snider filed their joint complaint in October of 2016 - so, we're talking about five years now - alleging that SORA violated their right to travel, equal protection and violated the federal Ex Post Facto Clause. Plaintiffs Standish join the case later and 2016. Plaintiffs Rice, Bash, and Rush filed their complaint in December of 2017. The court ultimately consolidated the cases. Plaintiffs sought a preliminary injunction which was granted. All but one of the six committed their offenses prior to the enactment of Indiana's registration law, and five of the six committed their offenses in other states and subsequently moved to Indiana.

Andy 33:59

The plaintiffs argued that Indiana's SORA violates their fundamental right to travel, their right to equal protection of the laws and the right to be free from retroactive punishment. The court examined two important cases. First, the court looked at *Smith v. Doe*, 538 U.S. 84 (2003), which is the landmark case from the US Supreme Court. What did judge Young decide back in 2019 in response to the state's assertion that this was already settled case law based on *Smith v. Doe*?

Larry 34:29

Well, Judge Young found that the case was distinguishable because none of the disabilities imposed by Indiana scheme were required by Alaska. Second, and even more relevant was the case of *Wallace v. State*, which those legal beagles, that's 905 N.E.2d at 371. And it was decided in 2009. In *Wallace*, the offense was committed in 1988. He pled guilty in 1989 and completed probation in 1992. After he failed to register in 2003, a jury found him guilty. He appealed and prevailed. Judge Young rejected all of Indiana's arguments. And they did put forth some very interesting theories. I said at the time that Judge Young's legal analysis is one

of the best I've ever seen, which will make it extremely difficult for the Seventh Circuit to reverse. It's now clear that I was wrong.

Andy 35:20

Well, you said it was difficult, you didn't say it was impossible. We're planning to spend some time today explaining the procedural nuances of the case, since it was somewhat unique in that en banc review was even granted. This full court review resulted in a reversal of the previous favorable opinion of the three-judge panel, which is terrible for the PFRs. I know it drives you over the edge when I ask you about the political leanings of judges, so I decided to do my own analysis this case, Larry. The panel is composed Judges Rovner, Wood, and St. Eve. Judge St. Eve dissented in that decision. And now she wrote the opinion for the full court here. Isn't that ironic? She was on the losing end of the first decision, and she ultimately wrote the opinion for the full court. How did that happen Larry?

Larry 36:09

Well, I guess it happened because the Chief Judge assigned her, designated her to write for the court, but I mean, it is ironic. So, you're actually admitting that something's funny finally?

Andy 36:22

Finally, yes. It's hard for me to admit anything as funny, but this one that's actually kind of funny. I'm going to take a path you people may not like here. I counted 11 judges of the Seventh Circuit Court. Of that number, only three were appointed by democratic presidents. Of those three, one did not participate in the decision. The two that did participate in the decision both voted to affirm the three-judge panel, which would have been magnificent for our side. Of the eight appointed by Republican Presidents, only Judge Rovner voted to affirm the three-judge panel. Can you not admit finally that which President making these Judicial Appointments is a reasonable predictor of how they will vote? I've heard of being in denial, but this is pretty obvious. Don't you think Larry?

Larry 37:07

No, I don't. But I mean, I commend your analysis. It's spot on. But as we learned with appointments from Eisenhower with the supreme court with his chief justice, and we learned with H. W. Bush with the justice he appointed from New Hampshire, we can't necessarily see what they're going to do. Now, I admit those were appointments made a long time ago before the internet made everything about a person readily available at the click of the mouse. But judges are not necessarily going to do what the person who appointed them would like them to do. Would you not agree that we saw President Trump handed a defeat by the Supreme Court that he thought that he owned in terms of the election? I mean, didn't that happen?

Andy 38:00

Yeah, but I don't think it's fair to say that just because a judge comes from a red or blue president that you could always predict, but I bet ya' you could lean in that direction and have a fairly good gauge of them going in that direction.

Larry 38:16

Well, I mean, I've actually made similar comments to what you're talking about over the year years, in terms of the judges. I've just

cautioned that it's not always a predictor you might think. Conservative judges do tend to be extremely deferential to laws that have that have been made in the criminal justice arena. In fact, the conservative majority had to really contort themselves in this case to reverse the three judge panel. Having said that, we're only able to impact the federal courts through our voting at the presidential level and at the United States Senate level. Our people tend to vote consistently for conservative candidates for those offices. They believe that the quote small government rhetoric, which they hear, and they have enormous faith in conservative judges, that they will find such laws repugnant and unconstitutional. Unfortunately, they're generally wrong, which means we have to do a better job of enlightening our folks in terms of how important their votes are for US Senate and for President. So that's why I really appreciate the analysis you did because it's quite thorough.

Andy 39:16

Alright, well, let's get back to the case, though. According to Judge St. Eve, by the virtue of the state Supreme Court's construction of the Indiana constitution, Indiana's Ex Post Facto Clause prohibits retroactive application of SORA to offenders convicted before its enactment unless the marginal effects of doing so would not be punitive. She cited *Wallace v. State*, 905 N.E.2d 371 (Ind. 2009) and *Jensen v. State*, 905 N.E.2d 384 (Ind. 2009). She went on to say if an offender was under no registration requirements prior to SORA's passage, imposing a registration requirement in the first instance is impermissibly punitive. And again, she relied on *Wallace* at 371. Then comes the nuance. She went on to say the Indiana Supreme Court has held, however, that if another state previously subjected a pre SORA offender to registration requirements, requiring him to register in Indiana is not punitive, relying on *Tyson v. State*, 51 N.E.3d 88 (Ind. 2016). I'm confused here.

Larry 40:30

While you're not the only one. So am I. It appears that Indiana case law permits a state to treat similarly situated offenders differently based on solely whether the offender had an out of state registration obligation. And I was not aware of the *Tyson* decision from 2016 when I pontificated that the Seventh Circuit would be hard pressed to overturn judge Young. So I did not know that that decision existed that sets up that different situation.

Andy 40:58

You are admitting that you missed it?

Larry 41:02

Yep, I'm afraid so.

Andy 41:04

All right. Well, Indiana, like most states has amended its registration requirements, as all of them have. According to the document on pages four and five, following its enactment, SORA underwent several expansions. Indiana broadened the list of crimes that trigger registration requirements, and it amended SORA to require registration for individuals convicted of substantially similar offenses in another state. The key here is that on July 1, 2006, the General Assembly extended SORA's requirements to any person who is required to register as a sex offender in any jurisdiction. See *Indiana Statute* § 11- 8-8-5(b)(1).

In its current form, SORA requires offenders to register if they were: (1) convicted of an enumerated Indiana criminal offense, (2) convicted of a substantially similar offense in another jurisdiction, or (3) required to register by another state. It would seem to me Larry, that SORA covers any offender who fits within these categories, regardless of his date of conviction. So why are we here? A purely textual interpretation means it's black letter law.

Larry 42:12

Are you a textualist now all of a sudden?

Andy 42:14

I am when it's convenient. Well, not necessarily but many people claim to be so I thought I'd throw that out there. So how did they overturn judge Young in the three-judge panel?

Larry 42:25

Well, apparently *Wallace* did not foreclose all retroactive application of SORA. On the same day that the state Supreme Court decided *Wallace*, they issued an opinion in *Jensen v. State*, and unlike *Wallace*, Jensen had pleaded guilty in 2000, which was after SORA's enactment. And by the way, those that want to look at that case, that's 905 N.E.2d at page 388. At the time of Jensen's conviction, SORA required he register as a PFR for only 10 years. Before the expiration of his 10 year registration requirement, the assembly amended SORA to mandate that offenders like him register for life. He argued that the extension, as applied to him violated Indiana's Ex Post Facto Clause. Unfortunately, Indiana Supreme Court disagreed. This is in contrast to *Wallace* who had no obligations before the legislature amended SORA to make it cover him.

Andy 43:21

I noticed that the court stated the broad and sweeping disclosure requirements were in place and applied to Jensen at the time of his guilty plea in January of 2000. Nothing in that regard was changed by the 2006 amendments. They found that merely increasing the length of an existing registration obligation did not rise to the level of punishment such that it violated the Indiana constitution. It appears to me that this case was decided in favor of Indiana based on the fact that these challengers were either required to register by another state or that the person was already required to register due to an already existing registration requirement. They found that any increase of an existing registration requirement is not unconstitutional. Did I get that right?

Larry 44:04

You do indeed. And that's why I'm wondering, why do you even need me here? You've got it.

Andy 44:08

I've been thinking about firing you to begin with, but we're not quite there yet. But we need to, we need to get out of here and on page 32 the court stated: at best, the plaintiffs have shown that SORA partially resembles one historical punishment and may play some affirmative restraints or disabilities on them. The remaining factors including the laws' rational relation to a non-punitive purpose all support Indiana. The plaintiffs have not carried their heavy burden of proving that SORA is so punitive in effect as to override the Indiana legislature's intent to enact a civil law. To me

it appears that they disregarded judge Young's analysis and simply deferred to the legislature stated intent, which they say is not punitive.

Larry 44:51

That's exactly what they did. And it's sad but they did concede that while SORA goes farther than Alaska law in some respects, it is not so far afield as to warrant a different outcome than *Smith v. Doe*. And that's in the opinion on page 32. So we have lost a spectacular victory. And I'm very saddened by this.

Andy 45:24

I don't see how you have the registry that we have... Like, I mean, I don't know how to even make an average of the 50 states and to see what goes what, where. But if they have, I don't know, Indiana I would assume they have some sort of living and work restriction. Maybe these people didn't have that applied to them. But like that is a massive disability. Having to go, maybe go into the Popo office annually isn't really that much of an inconvenience. But generally, the registry is kind of a pain in the ass. How did they see it as not being punitive?

Larry 45:56

Well, they saw it not being punitive if you already had these requirements. As they said, merely increasing the length of a registration... if you already had a registration, it seems like to me, like I say they contorted themselves to try to get to the outcome they wanted, which was to overturn the three-judge panel. And they did that with a lot of effort. But they concluded. I don't know that the proof was lacking. I generally am very critical of summary judgment. This case was decided with pretty decent evidentiary record and judge Young wrote a very well – I mean, he wrote a spectacular analysis. So this was just an outcome that they wanted. So folks, I don't mean to sound a little bit rude here, but this is what you're likely to get with registration out of a conservative court, more than likely. And there's one more stop that this case can go to Andy. You know where that is, right?

Andy 46:55

I think that would be the Supreme Court.

Larry 46:58

That is correct.

Andy 46:59

This is the Seventh Circuit, right?

Larry 47:02

Yes, there's nowhere else to go with the the Seventh Circuit. You could ask them to reconsider. When you lose this badly, that would not go very well. And then you would file a cert petition within five months, it used to be three, but I don't think they've changed it back to the three that it normally is. So, there's either three or five months to file a cert petition with the Supreme Court. But now let's make sure we understand what we're dealing with here at the Supreme Court because people are so giddy looking for a Supreme Court case. If this case were to be granted cert at the Supreme Court, Judge St. Eve sits in the circuit where Judge Coney Barrett came from. So, we've got judge Amy Coney Barrett, who is not likely to want to overturn her former colleagues. We've got Chief Justice Roberts, who was the solicitor for the state of Alaska,

that argued on behalf of the State of Alaska. Or he was a solicitor for the US government. He was he was arguing against the PFRs. So he would have had to have an epiphany. So, we've got two judges off the bat that're likely not going to be in our favor. Then you've got the usual ones that are not likely. Clarence Thomas is never on the side of the criminal. Samuel Alito is seldom ever on the side of the criminal. So, the numbers are not working in our favor if we get to the US Supreme Court on this.

Andy 48:40

I was going to make that comparison that it's a six-three majority of right leaning judges at the supreme court level. That doesn't sound like it would go in our favor very well.

Larry 48:52

It's a very risky proposition. Because if cert is requested, now, there's no reason for the state AGs to come in and request cert. They're winning, they've won. But the PFRs would want to restore their victory. So that's where the cert petition would come from. But the AGs would respond, saying that this is such an important case, if you grant cert that you need to affirm, there would be dozens and dozens of amicus briefs that would come in because the states want the status quo where they can have that catch all provision. If you have to registry anywhere you have to register here. This would be so damaging, if the US Supreme Court were to affirm, if they were to grant cert and affirm. So folks, this is bad. It's really bad.

Andy 49:42

And I'm asking you to tell me what you think. Not your professional opinion, but just what do you think. You think that they went into this trying to overturn it? Like they went in with I think you already said that they went into this decision wanting to overturn it before they voted for it.

Larry 50:05

well, when you say that you're talking about the full court?

Andy 50:07

Yes.

Larry 50:09

I would hate to say that they prejudged it before they saw the case. But it would appear as though when the three-judge panel came out with their decision where you had St. Eve on the losing end of that. And you had a democratic appointed judge, and then one republican. Bush had appointed Rovner. H. W. Bush had appointed Rovner I believe it was, but you did the research, tell me if I'm right on that. But they were predisposed once the case got before them to overturn and to overturn what was wrong in their view. They think they've gotten it right. And this was very complicated. I did not read it thoroughly enough. I mean, we could come back in another episode and talk about this more. This is a very nuanced case. Bottom line is folks, we lost.

Andy 51:02

Yeah. So two things that have struck me in this is that they can treat people from different states differently than their own, which seems kind of weird to me that we are the United States. And that wouldn't be like, hey, you're from outside of here. It's not an us versus them thing. That's the first thing that kind of strikes

me. And the other one is that by saying that we're going to extend supervision, like that's not... I realize it's a civil regulatory scheme, which is like the problem of it, but it imposes disabilities and restraints by doing that. But I guess it's a civil regulatory scheme. I understand the argument that you're gonna make.

Larry 51:42

It's not my argument, it's the argument the state makes and wins that it's a civil regulatory scheme, and that there was not sufficient proof of those Kennedy Mendoza Martinez factors. They only found a sliver of a disability. I mean, we read, quoting from the court, they only found that there was a minor restraint on liberty and disabilities. They went through the through the factors and found that everything weighed in favor of the state of Indiana.

Andy 52:07

And do you think that that's analyzed correctly? Was the case well brought up? I mean, I think you said they brought up a whole bunch of facts when they presented the case, not summary judgment stuff.

Larry 52:17

I think the case, I mean, they did the best they could. This is all about the type of judges we have. The courts have been hijacked. And I hate to say that, but the courts, they have taken a radical turn. And, you know, the breakneck pace of the last four years of conservative confirmations. If you look on your own analysis, I don't know if you caught that, but one of them got confirmed in like 30 days.

Andy 52:44

I saw a three-month one. I see Rovner, George Bush, well, let's see...

Larry 52:48

There's a Trump appointed one after he lost the election. After he lost the election. That would be Kirsch. Nominated on November 16, 2020, confirmed by the Senate on December 15th. So less than 30 days and was sworn in and received his commission on December 17. Now under the McConnell, Mitch McConnell doctrine, they stopped confirming judges for Obama for almost two years. They didn't confirm any circuit judges. But then they put on the accelerator, and they confirmed Kirsch with virtually very little scrutiny. There's not much you can in that period of the holidays from mid-November to mid-December. But they put the afterburners on. Because remember, they weren't going to be able to confirm judges after the new Congress was sworn in in January. So they wanted to make sure that they got as many confirmed as they could. And that's what they did. But folks...

Andy 53:43

It was like four hundred judges in the four years, right?

Larry 53:45

Yeah, a lot of you voted for this. So don't look at me. I mean, this will be a thing for you to do some deep soul searching. Are you going to consider Judicial appointments when you make your choice for senate and President going forward?

Andy 53:57

You know that shit doesn't matter, right?

Larry 54:00

Well, apparently it doesn't.

Andy 54:03

Tongue in cheek, Larry. Um, okay. Wow. All right. So we have a sad defeat there. That's not cool. And we had a victory. So we had defeat snatched from the jaws of victory, I think is how that expression should go.

Larry 54:17

That is correct. And I don't know that it can be turned around at this point, because I'm dubious of filing a cert petition. I really am.

Andy 54:26

Yeah, it doesn't sound like that would be the right move. We got to pick a different case that we would want to file something to get up there. Do we then like offer our advice saying go for it and don't go for it?

Larry 54:39

Well, we haven't been solicited, but my advice would be that this is a risky move to file a cert petition. But it's not so much the case, it's the court. It's waiting till we have a different court. And that may take some time because if we have a Supreme Court justice, a vacancy during this term, magically there's gonna be a lot of controversy. I mean, they won't be able to confirm them in 20 days like they did for Coney Barrett.

Andy 55:05

Yes. I understand. Anything else before we pretty much close everything down? Because that's pretty much the rest of all we got.

Larry 55:13

Well, we've got contestants, and speakers and new patrons and all sorts of stuff to do, yes.

Andy 55:22

Yes. Okay. Well, I do want to tell everyone, so listen carefully to the next, I don't know, 60 or 90 seconds. We have a very longtime patron, who has been overly generous, and is willing to send someone to the NARSOL conference that comes up in October, if I'm not mistaken, and is willing to cover their airfare, the ticket to the conference, and also the room. And what I would like to ask for is, if you are, obviously, interested in going to the conference, if you have a limited means, reach out to us at registrymatterscast@gmail.com, put your hat into it, and depending on how many we get, we'll randomly select from those people. And do you agree to those terms, Larry? Did I miss anything?

Larry 56:11

Well, I don't understand how we would determine if you're of limited means. But yes, I think that's a great idea. And I'm really grateful that someone would make that offer. That's very generous,

Andy 56:19

We're going to determine it by telling them to be honest.

Larry 56:23

Well now that would certainly work. I can't imagine anybody would shade the truth.

Andy 56:29

If you're Jeff Bezos, you do not qualify for this because you have enough money. So just be honest, if you have the means to get to the conference, if you're interested in going and have the means to go, don't snatch this away from somebody that may not have those kinds of means. And like I said, so this would be your airfare. This would be your hotel room, and this would be your ticket to the conference. And I can't thank this individual enough. He wants to remain anonymous, and I will absolutely respect that. And the money will come through us and then we will dispatch it to you. That's how to keep him anonymous, out of the whole thing. There you go. Any comments there?

Larry 57:04

I'm looking forward to it. I bet we're gonna have hundreds and hundreds of people sign up to be in the contest.

Andy 57:12

I'm sure that they will. Okay. Well, then we will move over to Who is that Speaker? Last week, I played this one.

Franklin D. Roosevelt 57:21

Well, first of all, let me assert my firm belief that the only thing we have to fear is fear itself.

Andy 57:33

And the hilarious thing is like before we even shut everything down and turned off the recorders, I had an email message from someone that was listening in to chat and listening to us record this live. And they sent me the answer. And that was Richard. And Richard was listening to us live. And he guessed that it was FDR, which was kind of neat. So hey, if you want to get a jumpstart on this if you're a patron, you can listen to the show get recorded live, and you can listen to us push this out there all at once. Or you will also have the benefit of listening to it when I do the postproduction stuff on Sunday morning, normally, and you get a head start before the general schleps have the chance to listen to the show. You catch that? Schleps Larry.

Larry 58:11

I don't know what that word means.

Andy 58:15

All right, well, then for this week then, this is super quick. So listen carefully.

Who's that Speaker? 58:21

And that's the way it is. Monday, September 11, 1972.

Andy 58:23

All right, so you have a little bit of a date cue there and feel free if you want to throw a guess out there and send it to registrymatterscast@gmail.com. First one that gets it right, then you will be, you'll get your 15 seconds of fame by me saying your name on the show.

Larry 58:41

Now that voice sounds very familiar to me. I've heard it before somewhere.

Andy 58:46

I think I may have heard it before. Maybe? I'm pretty sure I have. And then, Larry, we have a new patron that came in Saturday night as we were recording last night. We have a David K. And that gets us one closer to the 100-person goal that we want to have for having patrons. And where I will play a saxophone solo for people on the live stream. We are at four away. So thank you very much, David K. for signing up. We also then had a snail mail subscriber and this is Timothy from Ohio. That's awesome. Do you want to reveal how many transcription people we have?

Larry 59:30

It's hovering around 30 right now. People drop and people add and then people are writing us suggestions about getting ourselves on the tablet, whatever that means, so that they can listen rather than having to read the transcript. So, I want us to continue to try to look at if we can do that. It's all above my paygrade, so.

Andy 59:53

I can't imagine that we could email these in. Plus it would be like one person clicking, email this person, email this person, you would have to do it in whatever interface each prison system has to communicate inside the walls. I mean, if they're on JPay, then it's similar, but it would still be a pain to create a new message, copy and paste, it would be a pain. But I guess it's something we could look into. And then as far as getting the podcast in there, I looked, I didn't, I couldn't figure out how to get the podcast to be available inside the walls. But there are some podcasts that are available. But otherwise, Larry, is there anything else that you want to ramble about before we close the whole thing down?

Larry 1:00:34

I think we just need to promote this podcast. Remember to hit that like button. I want to see more likes on YouTube.

Andy 1:00:42

There it is. Like and Subscribe and click the Bell. I forgot to do that at the beginning. But yeah, so you can Like it and give a five-star rating on Apple podcasts. And Google has one and I guess Stitcher is the other one. I think that's the only ones that you can rate and review and all that stuff. I think that's it, Larry. So, head over to registrymatters.co that's where the show notes are. Leave a voicemail message at 747-227-4477. Email registrymatterscast@gmail.com and support us over at patreon.com/registrymatters. Larry, I hope you have a wonderful night and a great evening, oh and great weekend. I forgot to add that extra in there. And we'll talk to you soon. Have a great night Larry.

Larry 1:01:25

Thanks, and good night. I appreciate being here with you.

Andy 1:01:27

We'll do it again. Bye.

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