



Registry Matters Podcast

Episode 204

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Andy 00:08

Recording live from FYP Studios West and an igloo in the northeast. Transmitted across the internet. This is episode 204 of Registry Matters. Happy Saturday night, Larry. It's freezing cold where I am. I hope it's cold where you are just so you can empathize.

Larry 00:24

It is not cold here. It was 60 degrees today.

Andy 00:28

Okay, it's 60 below here. That's all I'm saying is it 60 below.

Larry 00:32

Well, that's good for the Michigan consolidated gas company or whichever gas company provides your service in that igloo you're in.

Andy 00:41

That is true. Tell me sir, do you have anything snarky to talk about before we go into it or are we gonna dive right into it?

Larry 00:48

We're gonna dive right into it. We have a lot of stuff on this agenda. We've got to do it in 26 minutes.

Andy 00:53

26 starting now. Go!

Larry 00:56

Okay, let's wrap it up.

Andy 00:58

Yep, we're done. So what do we got going on tonight, sir?

Larry 01:05

We have two amazing cases we're going to be talking about, one from Iowa and one from Connecticut. We've been putting off for two or three episodes. We have some questions that have been submitted to us. And we'll do the best we can with those questions. But I'm not completely clear on the last one.

Andy 01:23

Very well. Yeah. I mean, when someone just posted on the website. They don't give us a lot of detail. They did give us the recent case anyway, we'll get to it. But if you don't give us more information about it, we got to do what we got to do. But starting off with things, this first question came over Discord probably two weeks or three weeks ago. There's a guy in there that has moved to Georgia. And it got framed that the website mixes what's required by statute with that what's not required by statute. How does one comply with what's in the statute while refusing to comply with what's not in statute? So if the sheriff asks for something, Larry, how do they how do you politely say no? Can they mix the two in a notice, like the above? So the person just called the sheriff's department for Paulding County, Georgia,

which I think that's over by Six Flags Larry? It's over kind of on I-22, the west side?

Larry 02:18

I don't believe so. I believe it's actually on the north side of Atlanta. But go ahead.

Andy 02:21

Oh, well shows you what I know. Alright, here's the breakdown on what I need: something showing my original charges, and then a \$25 cash fee, and internet identifiers. I'm confused. Like, what is he supposed to bring? Almost like a utility bill that says where he lives. So he has to bring something showing his original charges? Like, can't they just look that up?

Larry 02:44

Well, he's moved to Georgia. So he has a non-Georgia conviction. So they don't have that readily available.

Andy 02:52

I mean, I guess he just brings the court docket from where he comes from. He's coming from Florida.

Larry 03:00

Well, I've not heard of them asking for that until very recently from my state now that we have an out of state translation process thanks to our work here. But in Georgia, you're going to have to register. They have the catch all language that we don't have. So I don't know what that would do in terms of unless there is a provision to not have to register in Georgia. And I would seriously doubt the Paulding County sheriff is trying to find a way that the person doesn't have to register. That would be very surprising to me, wouldn't it you?

Andy 03:32

Totally. So he's bringing some sort of court document from his original so they can figure out how to translate it?

Larry 03:39

Well, but I didn't know the sheriffs in Georgia do that. I didn't think that was one of the responsibilities. If you come to Georgia, I'm just thinking pretty much there's a catch all that you have to register in Georgia if you have to register anywhere.

Andy 03:52

So that that'd be for something of because there's the three or four different windows that he can apply to, like before '03, I think.

Larry 04:00

That's a good point. See you don't even need me here. I keep telling you that. He would have more progressive restrictions depending on how recent his event occurred. So that would be one of the reasons they would want those documents, to look at what he did and when he did it.

Andy 04:17

And then what about the \$25 cash fee? I mean, he was supposed to bring in there a \$20 and a \$5?

Larry 04:24

I'm not sure about that \$25 cash fee. But I think internet identifiers... I'm not registered in Georgia. But don't ask for those in Georgia? Don't they ask your user? (Andy: No.) They don't?

Andy 04:38

Listen, when you and I first met in a hotel... not a hotel... in a hotel meeting room, there was an individual there named Terry and I'm drawing a blank on his last name. It is my understanding that that individual fought Georgia and won and that's what got rid of the internet identifiers. I can't verify this. But that is what I believe to be true. And so they have taken that away, they have never asked me for a single online account of any sort.

Larry 05:08

Well, his question is, how do you politely tell them and that is very tricky and very cautious because you don't want to set yourself up for them targeting you to try to catch you in non-compliance with something petty. But on the other hand, you don't want to give them information that could come back to haunt you that's not required by law. It's almost a catch 22, isn't it?

Andy 05:35

It totally is. I mean, you're very much damned if you don't, damned if you do. If you go in there and be hostile to them, then I believe like your terms would be, they're going to enhance your supervision. He's not on supervision, mind you, but they're going to enhance their monitoring, so to speak. But if you just comply, maybe you're setting yourself up to be giving them more than what is required.

Larry 05:55

Which may come back to haunt you later, depending on what you give them. That's our issue with Cobb County, they're asking for work schedules. And your schedule is not required by Georgia statute. Cobb County is a suburban Atlanta County for our global audience that doesn't relate to that immediately. And if you give them that work schedule, then it begs them to go out and check and see if you're there. And then if you're not there, they say you lied to them. And then they intimidate you and say, well, we're gonna have to file a registry violation for not giving us truthful information. So I'm thinking people probably should not give those work schedules unless they're static and don't change. But people are giving them because the sheriff with a gun is telling them, I want it.

Andy 06:45

This is not very different from the homeless individual that we spoke about three or four episodes ago, who has to text in where he's staying that night, because he's homeless when he gets home from work or whatever. Like, that's not required either.

Larry 07:00

That is absolutely not required. And we're actually, we being NARSOL, we're actually looking into that. All these trains take some time to run. And people want instantaneous problem solving. And our first strategy is to try to figure out if there's more than one person in Barrow County that's having to do that because we would like not to out a particular individual, because that's who they're going to turn their retaliatory attention to. But

it may be that there's only one. So I've encouraged that person not to pretend they're homeless, if they're not homeless, because they will definitely prosecute you for that. Declaring yourself to be homeless and not being homeless. That's not an accurate representation of your status, is it?

Andy 07:49

No, could you give me something more of a legal definition of homeless. If you're couch surfing, is that homeless are not homeless?

Larry 07:58

Well, I don't think homeless to me, if you have a home, if you have a structure, I don't think you're homeless. But that structure, if you're couch surfing, that structure may change continuously. You may be allowed five nights. Well, then you've got to constantly keep the department, the sheriff, or the law enforcement in Georgia informed. They take the position that if you don't have a fixed residence that you're going to be at permanently that you have to report in every week. My personal position is that if you have a temporary place that lasts more than a week, you shouldn't have to report every week because you're in a fixed location. We don't know the answer that question because it hasn't been litigated in a case. If a person says Well, I don't own that place. I don't rent it. I don't have a rental agreement. But my friend, Jeff is letting me stay there. And I don't know how long he's gonna let me stay. He may let me stay for three months. Well, to me if you're fixed at that time, you shouldn't have to go in more frequently than anyone else because that's at a fixed location. Because all your locations can be unstable, depending on if your wife kicks you out, puts the suitcase outside. Your girlfriend does all these things, if the landlord finds out, tells you to vacate, which they're prone to do. There's all these kinds of things that can change your status. But if you are at a fixed location, that's my personal opinion. But there's so many things we don't know the answer to, because no one has been faced with that and been prosecuted. And we don't have any appellate guidance from the Georgia Supreme Court or Georgia court of appeals in terms of what is homeless. They try to define it in the statute, but sometimes they don't do a very good job.

Andy 09:39

I would like to get you on the record. Can you walk in there? Good. I'm on camera right now and you hold up your two middle fingers and go FYP I'm not giving you the original charges, the cash money, or the internet identifiers and walk out and mic drop on the way out.

Larry 09:54

I certainly would not encourage that approach.

Andy 09:59

laughing All right. How do you stand your ground without being a jerk and cover your bases at the same time? Like, is there like secret legal language that you can say to the sheriff of "No?"

Larry 10:15

Well, I would do my best to be polite as all possible. But say, I'm not familiar with that section of the statute. Can you show me what it is I'm required to do so that I'm absolutely clear. And I'm intending to fully comply. And of course, if it's not there, they

won't be able to show it to you. But you said it politely rather than giving them the middle finger. And, you know, it would even be great if you held a copy of the statute nearby. And say I've studied this thing, and I'm not sure where that's at, and I certainly want to comply, but can you point that out to me?

Andy 10:48

I can imagine saying something like that. Oh, I'm sorry, you can't find a copy? I brought one with me.

Larry 10:53

That's precisely what I would do.

Andy 10:57

I picture that doesn't go over well, either.

Larry 11:00

Well, it would not go over well. And you've made the point that he's not on supervision. But they treat it kind of like supervision, even though it's not. They do those checks on you. And they're looking for an I gotcha moment. So I remember I just had this conversation about two weeks ago with Paul Dubbeling, the attorney from Chapel Hill. And I told him, I said, Well, you know, you can... because he was saying, tell them to take it and stuff it. And I said, you can't do that. I said, here's what happens if you did do that and I started naming the things. He said those things are illegal. I said, Paul, you're defense attorney, of all people you should understand that law enforcement does a lot of illegal things. Just because something is illegal doesn't stop them from doing it. I said, what they would do, if you declare yourself homeless, and they don't believe you're homeless, let me tell you what they will do. They will go out, find out who owns the property, if it's public or private, they will contact the entity or the individual. And they will ask them to give them an order to remove you. They'll say that you're trespassing. And then will talk the property owner into agreeing with them. And then they'll come back and say, you've now been given a no trespassing order. That's one thing they will do. If you have a vehicle, they will surreptitiously put a tracking device on your vehicle. Now, I'm not saying that that county will do it. I don't know the reputation of Barrow County and what they will do. But I can tell you that law enforcement does that all the time. And Paul says that's illegal. Of course, it's illegal.

Andy 12:32

The Supreme Court ruled that in 2010 or something that they couldn't do it.

Larry 12:36

But they don't use it in the complaint, what they will do is they will track you to your girlfriend's house that you're going to every night claiming to be homeless, and they will set up surveillance at the neighbor's house. They'll ask the neighbor, you know, we'd like to set a camera up on your property, and the neighbor could give permission for that. And then they will track you with that vehicle coming to that location every night for a requisite number of nights that you should have declared that residents. And then they will go down, and they'll get a warrant. And they will say on information and belief that they found that you weren't staying at the place that you identified that you were spending the night at when you're homeless. That's what they will do. They will never

disclose exactly where they found you out. They will just say on information they have that you're not there at that location. And they'll say that they've done visual surveillance, and you're not there. They won't say that in the affidavit for the arrest warrant, they won't say and we surreptitiously put a tracking device on their car. Why would they do that?

Andy 13:39

I gotcha. I gotcha. I think we should probably move on from this one. Is there anything else?

Larry 13:46

I empathize with him? I don't know that counties reputation all that well. Generally, those suburban counties tend to be more conservative. They tend to be more affluent, and they tend to have more resources. So therefore, if you irritate them, they just may well turn those resources on you.

Andy 14:10

Well. This one comes in from the YouTubes and says, from FreedomisRight asks, Why in the US, does the sentence matter from a plea to a trial judgment? Just basically poking at you Larry? It should not matter. As citizens, we are guaranteed a trial. So why does the punishment increase if we express that right? because it saves time or cost taxpayers more money? Bullshit. In other words, the US sucks. Is that what you said Larry?

Larry 14:41

I don't recall ever saying the US sucks. Matter of fact, I think I have said over and over what a great country we have and how proud I am to try to be a part of making it even better. But in terms of the trial, one reason why you get a tougher sentence is because with a plea you can contain the damage by limiting the judge's discretion. We have a case in Brunswick, Georgia in Glenn County right now where the judge's discretion is very limited because by statute, they must impose at least on two of those guys, a life sentence. The only discretion the judge has as life without parole or life with parole. When you do a plea agreement, there can be charges that are dropped as a part of the negotiations, which would enlarge the exposure of the judge. Because if you take out three counts, you've just extinguished some discretion of the judge. Would you agree with me on that? (Andy: Yeah, I think so.) Okay, so you've limited the exposure. Depending on how far a plea agreement goes, you may have a sentencing agreement that even would contain the judge's discretion further. sS the judge may have 15 years of discretion, if he were to max you out of the charges that you pled. But the sentencing agreement may say that as a part of the plea agreement, that can be no more than five years of incarceration imposed. So that's one of the reasons why you get more time. You have not restricted the judicial discretion when you go to trial. It's open season for sentencing. So does that make sense to you? A plea agreement usually limits the discretion of the court. Without a plea agreement, the court has unlimited discretion up to the maximum of each count.

Andy 16:25

Does seem though, Larry, that there is almost like a tax or a penalty for taking a trial to court.

Larry 16:32

We're going to get to that point. This is the first part of the answer is that's the reason why you get more time because you have no limitations on the court, except the maximum penalties prescribed by law. These are human factors, and folks try to remember I don't make the rules for life. I'm just simply the passer that passes these rules on to you. Judges are human. And so are prosecutors. So are witnesses and victims. And there's a common belief that if you force the court to go to trial when there's overwhelming evidence against you, and you tie up the court's time, that somebody is going to have to pay a little something for that. Now, most judges will deny that. They'll say they don't do that. They won't go on record saying I was extra harsh because the person went to trial. But that's a reality of the situation. Now, if you want to pretend that's not a reality, that's okay. Because I'm just the messenger here. But of the all the trials I've seen very seldom, occasionally, but more likely than not, the sentence would have been better to have been resolved and imposed by a plea agreement. There are exceptions, our former Secretary of the Department of Taxation and revenue for the whole state just went to trial on embezzlement. Not from the state, but from a private client. She was convicted at that trial. And she was sentenced to probation, which was a very tough decision for the judge to make having to sit through days of horrible testimony. And all the public vengeance was about this person needs to go to prison. But those are rare situations. More likely than not, you're going to get a harsher sentence if you go to trial, because the theory is you have not recognized the error of your way. You're not feeling remorseful. And perhaps a harsher sentence will give you the opportunity to do some introspection and reflection and maybe perhaps you'll feel remorseful. That's what the attitudes are. Those are not my attitudes. Those are what's developed over 240 years of our existence.

Andy 18:41

Do you think that that's an accurate perception?

Larry 18:47

I think in some cases. If a person goes to trial, if they're innocent, of course, they're in denial. But if the evidence is overwhelming, that's why we have the offered plea. Because sometimes, the fact is, the evidence will convict you even though you didn't do it. So, I don't make those rules either.

Andy 19:12

Yeah, I can see. I hadn't really considered your part about you hadn't preemptively... I guess you're signaling to the court that you are taking some level of responsibility for your actions by taking a plea.

Larry 19:25

You absolutely are. And in the federal system, it's written into the sentencing guidelines, which passed in the Reagan administration, which was one of their cherished achievements. There is actually that in the sentencing guidelines. There are enhancements for going to trial. It's written in the statute on the federal side. It's not just a practice. It is written because you are not accepting responsibility.

Andy 19:52

Interesting. All right. Then I think we are ready to move over to the third question. This came in on the website. Someone posted a comment on registry matters.co Is anyone considering illegal ex post facto applications? Recent case of John Doe vs. Kent remove plaintiffs from registry in Tennessee through due process and ex post facto because Feds ruled registry punitive without review. Now, I just put this in there this afternoon, haven't had a whole lot of time to try and go track down any further details. Do you have an off the cuff kind of response to what this is?

Larry 20:30

I'm not sure of the John Doe versus Kent case but Tennessee is within the Sixth Circuit. And all the stuff that's happening, Tennessee is flowing from the Does versus Snyder decisions out of the Sixth Circuit out of Michigan. So I'm suspecting that's what he's talking about. But that's exactly what they're alleging is that... The registry is not unconstitutional, and please save your hate mail. It depends on what you require of the registrant. The mere act of registering is not unconstitutional. We register voters, we register schoolchildren, we register young men for the draft. And they don't have an option because I know people are gonna say, Well, Larry, you just don't seem to understand. People voluntarily register to vote. Well no, not for the draft. You don't. You're required to do it as a federal statute. Carries a prison, maximum prison sentence of five years if you don't do it, and you lose your financial aid for college and a number of other benefits, which I don't think I can recite all of them. But it's a serious matter not to register for the draft. But no one has ever argued that the draft registration process is punitive. Because it isn't. And you could have the same PFR registry that would not be punitive. So merely registering people is not's what's punitive. In the case of Michigan, they just couldn't stop adding on. The case of Tennessee, I think we've gone through it on an episode. They just couldn't stop adding on and adding on and that's the case around the country. But you could have a very benign registry that would be very constitutional. But the ex post facto is where most of these are being won because they're imposing probationary type conditions, and disabilities and restraints that're way beyond what can be considered a registry.

Andy 22:23

If we all were to have the registry that existed in Alaska in, whatever it was, 2003, 2001? I forget the date, Larry.

Larry 22:30

Yes. 2003.

Andy 22:32

I struggle to think that, other than people b***ng about they're going to visit the popo, whatever it is over here. I don't know that anybody would really complain that much. Yes, some people would complain, yes, you shouldn't have to do it, blah, blah, blah. But you wouldn't have living restrictions, you wouldn't have work restrictions. At the time, there wasn't much internet. So at least that wasn't much of a thing. But now it is. So that wouldn't be much of an issue. You wouldn't have people living under bridges. If that were the registry, you wouldn't have people living under bridges and tent cities that you do in Florida.

Larry 23:00

Well, in fact, in Alaska 2000 at that era, you did not have to go to the popo, you mailed in a form. (Andy: Okay, so that was even more gooder.) Well, that's how they found it constitutional. Because there was very little required.

Andy 23:15

And you don't have to go get booked and fingerprinted and frisked and put in lockup and in a holding cell for a period of time. You just mail in a form like, wow, that doesn't sound so bad.

Larry 23:27

Well, there are only a few registries left like that anymore. And the authorities, the lawmakers will continue to pile on. And there will continue to be challenges. But folks, the magic silver bullet you're looking for isn't coming, because the mere act of registering is not unconstitutional. So therefore, you can peel the registry back once there's been an adverse court ruling. And it is constitutional. Only the narrowest of circumstances like in Maryland where they have that constitutional provision in the state constitution that says that there cannot be any disadvantages imposed. Maryland would have a real hard time because any type of registry would be a disadvantage, ex post facto.

Andy 24:13

Any idea how that ended up in their constitution versus the other 73 states? However many that is.

Larry 24:21

I think it's 61. But who's counting? (Andy: Okay, right.) But anyway, I don't know how that ended up in their constitution, but it is a great provision that has saved them because they would have gone back and tried after those cases that went adverse to them. They would have gone back and tried to make a more benign registry, which is what the other states typically do. They don't generally throw up their hands and say, well, we give up. I mean, we covered an article about two weeks ago or last week from Tennessee. I think it's two episodes back where we read verbatim from the quotes from the legislators saying that they weren't gonna get rid of the registry.

Andy 25:02

They were going to figure out how to pigeonhole it in with the Sixth circuit. They were going to try to figure out how to make it fit within those guidelines. And they were going to roll it back to the point that they were not forced to roll it back further.

Larry 25:17

That is correct. And that's what they're typically going to do. Folks, we will stop having registries when the public stops supporting them. That's really the end of it. The silver bullet that you're looking for in legal cases, is not coming. Now we might get a silver bullet in terms of the internet dissemination, because that is something that really damages the individual. Particularly when they physical address, the vigilantism and the disenfranchisement from employment and from residence. I mean that that's a horrible thing that you couldn't really have thoroughly evaluated in '03 when they did the Connecticut Department of Public Safety versus Doe. And the Connecticut court had said it was unconstitutional. But of course, the AG of Connecticut took it to the US Supreme Court, US supreme court said no, it's merely just a

dissemination of already existing information. All that has changed since that case, because it's no longer just a dissemination of existing information about the conviction. Now, it's all the stuff that was not a part of the conviction that's being disseminated. So it's ripe for brand new litigation, because that case law can be distinguished from what exists today.

Andy 26:36

I gotcha.

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Andy 27:24

Okay, let's move over here. Larry, I put this in there. And I asked you the question straight up, like, what's the grand jury indictment Georgia case? You didn't give me any information as to what this is about. So what is this about?

Larry 27:36

I just said in preshow we could drop it because I thought the Georgia case might come out of... (Andy: Oh, you did?) It might have been worthy of discussing the conviction in Glenn County and Brunswick with the Father, the Son and the neighbor. But that was a very complicated indictment, and I didn't really completely understand it myself. They had like nine counts on each one of them and they got convicted of almost all counts.

Andy 28:01

Okay. So might be something that we revisit at a later date? (Larry: Could very well be.) Cool. All right. Well, then we are going to come over here to the Iowa case that you are very excited about for some strange reason. And I did notice some chatter about it on the NARSOL affiliate list. It was just decided by the Iowa Supreme Court this week. 20-0375 and the name is Travis Bomgaars, Kyle Cross, Anthony Gomez, James Hall, Raymond Labelle, Shane Millett, and Kelly Sand vs. the State of Iowa. Did all these people, Larry, did they all have some big powwow? They met at the local Starbucks, and they filed a lawsuit against the state of Iowa.

Larry 28:45

No, that's not exactly how it happened. There were several inmates who had filed petitions for post-conviction relief. And their cases were ultimately consolidated for purposes of appeal. And this is not all that uncommon, and it's done for judicial economy.

Andy 29:04

Okay. Well, here even though I'm in an igloo, I did read all 45 pages Larry, which I'm sure surprises you. I noted that the essence of the case is that several male inmates serving time for sex related offenses are challenging what they believe to be a catch 22 in Iowa's prison system. But before we get to that, I noticed the

state challenged almost everything. They challenged the venue, they asserted that the case was not ripe for decision. And the most appalling thing is that they challenged the appointment of counsel to represent the men. They prevailed on that particular challenge. So the men were left without representation. I swear I thought that you were entitled to have some sort of court appointed attorney represent you. But why did they fight so hard?

Larry 29:49

You are entitled to representation when you're facing loss of your liberty, but they're already convicted. They're trying to shorten their loss of liberty. But why does the state fight so hard? It's really easy. Easy and simple to understand. If you can prevent a trial, you cannot lose. So therefore, the state will use every tactic. Sometimes they'll border in the gray area, but they'll use every tactic that they can conceive of to prevent the issue from being determined on the merits, as alleged in the complaint. So they put forth those challenges about venue. I mean, "we're in the wrong jurisdiction here. I mean, this should have been filed where they were convicted," because that's normally the way I think, post-conviction may flow in Iowa. And then they asserted it was not ripe, because they said, Gee, these men have not proven that they're being held merely because they haven't completed treatment. They have not shown that they're otherwise eligible. So therefore, it's not ripe. They have to become eligible for release in all other aspects before they can say that this is the only thing holding them up. And of course, they wouldn't want him to have counsel, because a counsel is going to be better trained in presenting the arguments than a pro se litigant's going to be. So all of it makes sense. You're trying to delay. It works the same way if you're charged with a crime. I have all these people, they just say, Larry, I can't take this anymore. This has been pending for a year and a half. And I said, Well, you're still free, right? Well, yeah. But it's just stressing me out. I said, but you're still free, right? And if they never can get this case to court, you will never be convicted. But I just can't take it anymore. I said, well, we can always...

Andy 31:34

Yeah, it seems like the longer the time goes on, the better off it is. That would indicate to me, that would send you a signal that they have less than stellar evidence against you, or they're waiting for something to develop?

Larry 31:46

Well, it could be that you've delayed it. It could be a combination of delays, but the delay often works to your benefit. Because if you have a case that's going to go to trial, or you're contemplating going to trial, things can happen that makes those witnesses unavailable. I mean...

Andy 32:06

This sounds like a mafia movie right now, man.

Larry 32:09

People do move. I mean, this is a vast country, and people do relocate from state to state, I mean, it surprises you, but they do. People are in points of their life, they might be in the armed forces, and they may be deployed. There's just all these kinds of things. A critical witness is sent to a combat zone. And they have to stall the case for the term of deployment. That witness may come back and the other one may be in college in Honolulu by

them. And they can't put on their case. So that enhances your negotiating power because the time is running and the evidence is getting older and older. The people may be getting less and less anxious about having you go to prison. It can only get better for you the longer a case runs. But people just can't stand it and they just say I just can't. I say if you want to go ahead and call the AGs office and change your plea, we can do that.

Andy 33:06

Let's get to the underlying claims made by the men. To be considered meaningfully for parole, these inmates needed to have completed their PFR treatment program or SOTP. But because of limits on resources, this treatment has tended to be available only as the inmate nears his tentative discharge date. The inmates asserted among other things, that this circumstance violates their constitutional right to due process. I don't understand. To me this case seems eerily similar to the case from Illinois, which was won by Adele Nicholas. It should have been a slam dunk, Larry. Yes?

Larry 33:41

No. It shouldn't have been. There's a significant difference in Iowa and Illinois in the process. The challenge in Illinois was successful because the state has a period of mandatory supervised release, which commences only after you conclude a person's incarceration. And the Illinois prisoner review board sets conditions for that period of MSR, mandatory supervised release, which includes having approved housing. Iowa has a system of meritorious parole, which permits an early release from one's period of incarceration upon successful completion of the required programming. And therein lies the problem. The required programming of treatment cannot be completed due to lack of slots, which is a funding issue. The challengers were not successful in carrying their burden of proof that there was deliberate effort to keep them in prison. They didn't have evidence to show that.

Andy 34:40

it's just that simple. They did not carry their burden of proof. So it's okay to deny them parole? You know that the state is deliberately, Larry, you must know that they're deliberately keeping them in prison by not having enough treatment resources available. Why can you not see this?

Larry 34:58

Well, in courts, we require proof. I mean, that's the way our system works. It is a real tragedy for those who are unable to make parole due to lack of housing, or due to lack of treatment. But having said that, being released on parole in a system such as Iowa is not a constitutional right, because you're getting to go home early. But you're prison sentence is still in place. Meritorious parole is a privilege that is granted when all program requirements have been met. For better or worse, these offenders are not eligible for early release from prison until they complete treatment. That's in stark contrast in Illinois where they've actually exhausted their prison stay and are still serving a period of prison time because their mandatory supervised release is being served in custody. The prisoner review board in Illinois won't release them because they don't like where they would propose to go. That's different than in Iowa and every wrong that occurs in society is not necessarily a constitutional violation. This is morally wrong. And I think it should be fixed by additional funding by

treatment, which is in and of itself a tough political sell in an era of no new taxes. Read my lips.

Andy 36:17

Oh, I don't have that one queued up. But I do have this one queued up.

Justice Scalia (Audio Clip) 36:19

The notion that everything that is stupid is unconstitutional is probably the besetting sin of judges, anyway.

Andy 36:30

And that's Scalia saying that just because you don't like it, doesn't make it unconstitutional. I think I queued that correctly. (Larry: That is great.) Um, just real quick, as a side note, can we summarize the difference between Iowa and Illinois is that the Iowa folks would be getting parole versus the folks in Illinois have maxed out and they would be getting released on probation. Or even without probation, like they've maxed out their sentence? That's the difference.

Larry 36:59

They have maxed out their term of prison, they have a subsequent sentence called MSR, the mandatory supervised release component. But that is intended... just listen to the title, Mandatory *supervised* release.

Andy 37:13

Sounds like supervision of some sort. So it's probation, it sounds like.

Larry 37:17

Yes, it's intended to be a supervised community component. But their equivalent of the parole board is saying we won't release them until they have housing that we like. But they've already paid their debt in full on the incarceration side. That MSR is intended to be served in the community. Your prison sentence in Iowa is a prison sentence. And if you are released early from that prison sentence, that is a meritorious grant this condition upon you doing things that they impose upon you to do.

Andy 37:52

I gotcha. All right, well, I'm confused, because it's clear that those in prison have a Liberty interest in parole. Iowa Code section 906.4(1) (2019) provides a parole or work release shall be ordered only for the best interest of society and the offender, not as an award of clemency. The board shall release on parole or work release any person whom it has the power to so release, when in its opinion there is reasonable probability that the person can be released without detriment to the community or to the person. A person's release is not a detriment to the community or the person if the person is able and willing to fulfill the obligations of a law-abiding citizen, in the board's determination. Larry, they do have a Liberty interest in getting out of prison early. How can you deny this?

Larry 38:44

Well, I'm not denying that at all. There's no disagreement. The question is, do they have a constitutional right that requires taxpayers to fund the programming that will permit the parole board - because you read the language - that would permit the

parole board to release them consistent with all the requirements articulated in section 906.4(1)? Where in the Constitution? It's just not in the constitution.

Andy 39:13

So I think I see what you're saying though, on page three of the opinion, the court stated, in considering this case, we emphasize that our job is not to approve or disapprove of how the State allocates resources in the prison system. We simply conclude that no constitutional violation has been established. The record shows that the Iowa Department of Corrections (DOC) has not postponed treatment in order to delay parole. The problem is simply one of numbers: there are more male PFRs in the Iowa prison system than treatment program spots available. The DOC has been actively addressing the need for PFR treatment by increasing the number of classes and counselors. The existing waiting list, which prioritizes admission to treatment based on tentative discharge date, is a reasonable way to decide when an offender gets admitted to treatment. Are you telling me that the court does not have the power to order the state to provide more resources or treatment?

Larry 40:05

No, I'm not telling you that. I'm telling you that it's not the role of courts to allocate funding unless it finds there is a constitutional violation. A person serving a sentence of incarceration does not have a constitutional right to early release, nor does that person have the right to be provided anything other than basic medical care. Do you remember all the controversy a few years ago when the court ordered that a sex change be paid for by the taxpayers? Do you remember that?

Andy 40:32

I do recall this and I remember it was a little bit heated, I guess we can say. That was a case ordering the state of Idaho to pay. It was due to a ruling from the Ninth Circuit Court of Appeals. Everyone knows that court is dominated by a bunch of liberal pointy heads, Larry. You still have not convinced me why is this not a constitutional violation. But at the time of the hearing, all seven offenders were on the waiting list to receive track one treatment program, the Sex Offender Treatment Program. That waiting list had 419 individuals on it. The petitioners occupied positions 209, 306, 341, 368, 377, 382 and 392 out of 419. I mean, they're on the bottom half of that list. While this case was on appeal, Cross was moved off the waiting list and began the treatment program. It's a conspiracy theory, Larry, and you just will not admit it.

Larry 41:27

Well, I can't admit it because the petitioners did not prove such a conspiracy. According to the court, except for a small program for inmates with special medical needs, which is at the Iowa Medical and Classification Center in Oakdale, all SOTP programming for men takes place at the Newton correctional facility. And treatment takes approximately three to four months with track two inmates lasting somewhat longer than track one. At the time of the hearing in this case, there were potential slots for 175 individuals to undergo treatment at Newton correctional at any given time. However, the correctional system as a whole has 1600 male inmates needing to complete treatment. Thus, an inmate in a group of 1600, as they get closer to the discharge date, they would typically be transferred to Newton correctional and put on the

waiting list. The court found that process of assignment on the waiting list is not unconstitutional. It seems to me that the evidence shows that the people are getting treatment. The issue is more funding. And that's an issue to be determined by the legislature. I mean, you don't like legislating from the bench. Do you, Andy?

Andy 42:32

Oh, I don't think we should legislate from the bench. And I guess state constitutions are generally set up like the federal one and the Congress controls the purse. I assume that's who controls the budget generally for the states

Larry 42:44

That is correct. The state legislature.

Andy 42:47

While I was reading, I noticed that on pages 16 and 17, that the opinion cites case law from other jurisdictions and stated, as a general proposition, prisoners do not have a constitutional right to rehabilitative services. It goes on to list a few cases which I won't read. The bottom line is that this is not the same issue as Illinois, and that these people will have to wait. Did I get that right, Larry?

Larry 43:11

That's what the Iowa Supreme Court said. You do, indeed have that right. Unless the people of Iowa, through their elected officials decide to prioritize additional treatment, they will indeed have to wait. As I stated numerous times, just because something is not good public policy, it does not magically violate the constitution.

Andy 43:30

I can play that clip again. Let me try this one.

Scalia (Audio Clip) 43:32

Stupid, but constitutional. Whack. Stupid, but constitutional. Whack. Stupid, but constitutional. Whack.

Andy 43:41

I couldn't resist doing the Whack part. So any closing remarks on this case?

Larry 43:48

I feel really bad for the people that are trying to do their best. The sad thing from a public policy perspective is that we would actually want to incentivize people to do everything they can in the way of programming and to behave themselves for a second chance at freedom – an earlier chance. When they serve their entire sentence, they're gonna be released anyway, because they don't, as far as I know, Iowa doesn't do what Illinois does: continue to hold them in there. But we would want that. It should appeal to the conservatives, because theoretically it would save some money if people were out in the community. I don't know that that's really as much of a savings, but we just want these people out being productive, working, paying taxes, and moving on to the next chapter of their life. So it is unfortunate, but the remedy is not going to come through the courts. I don't think you're going to solve this through court challenges. I just don't.

Andy 44:44

I'm going to give you a part of an expression and I'm going to hope that you can finish it but if not, I will finish it. But I think it goes something like an ounce of prevention is worth... (Larry: ... a pound of cure.) So could we not apply that to this? And if we were to invest a small amount of money on the front side to get more people to go through the treatment stuff, then they would not stay in prison as long, which costs an exorbitant amount of money for it to keep them actually locked up. But we're not willing to fund it up front. This sounds like getting vaccination versus actually getting treated with a further cure. That's what's it sounds like to me, Larry.

Larry 45:22

It does, indeed, but you know, when you when you take a few handful of people out of prison, you really don't save a lot of money there. I was having a discussion recently with a colleague of mine, you really save money with prison management if you can close an institution. But I mean, when you take 30 people out of an institution with 1400, you save the cost of breakfast, lunch and dinner. But I mean, the security staff is all in place, the program staff is all in place, utilities are running, everything is running as normal. I mean, the savings are really insignificant. So you have to really do a significant decrease in population and ideally, to close an institution. So I mean, you run and say, Well, if I could get these four guys out, but you've got 1600, what did that accomplish?

Andy 46:10

I do see that. I'm just looking at some sort of tidal wave coming down the pike where some number of those will exceed the capacity of that Newton correctional facility or whatever. And they have to figure out a way to get more of them to go through or else they're gonna butt up against their max date. And they either let them go without having the treatment or they hold them over. I mean, that's just an actuarial table, if I'm not mistaken.

Larry 46:35

That's correct. But yes, it's a tough sell on saving money, because treatment costs money, and the savings is marginal unless you can significantly decrease prison population. And that's the tough sell politically. Because crime in many instances, the statistics are showing since the pandemic crime has been going up across the country. So, there's a lot of fear against further relaxation of how we treat those who are in prison and those who are facing prison. There's kind of a backlash against all this liberal do-goodism.

Andy 47:08

Well, thank you for helping out to clarify all those points. Let's cover this one that we've picked at least once out of Connecticut, and the name is Anthony versus commissioner of correction. What's this case about?

Larry 47:20

This is a lingering case that's gone on for several years. It's Anthony A. versus commissioner of correction, which was decided in 2017. The Connecticut Supreme Court affirmed the judgment of the appellate court which had concluded that Anthony A. had a protected Liberty interest in not being incorrectly classified by the Department of Correction as a PFR for purposes of determining his housing, security and treatment needs. The bottom line is that

Connecticut decided to classify him as a PFR anyway, even though he had not been convicted of a sexual offense.

Andy 48:00

Right. What did they base that classification on?

Larry 48:06

Well, can you just read the partial, extremely redacted excerpts from the court's opinion? It explains it probably better than I can.

Andy 48:19

Okay, all right. So um, there's gonna be some level of colorful language here. So, trigger warning. If you are sensitive to violence kind of things, that this might be coming down the pike. Based on the decision of the court, the petitioner was arrested and charged with several offenses, including sexual assault in a spousal relationship in connection with an incident that occurred on the evening of July 18 and the morning hours of July 19, (Larry: 2017.) His former wife, M., informed the police that on the night in question, she and the petitioner had been drinking and smoking some crack cocaine, which caused the petitioner to become paranoid. Shocker there. And to act in a delusional manner. Believing that another person was in the house, he began searching for that person under the bed, in closets, and in the hallway outside the bedroom and looking for used prophylactics. After repeatedly accusing M. of having an affair, petitioner made her take off her clothing and lie on her back. Larry, I've reread that sentence a whole bunch of times, and I still don't see how those two things are connected. Whereupon he digitally penetrated her. Later the petitioner became suspicious that another man had been using his video game system and repeated what he had done. When the petitioner continued to accuse her of having an affair M., out of annoyance, lied to the petitioner that, in fact, she was having an affair with one of his friends, which caused the petitioner become violent and to pour soda on M.. That also doesn't make any sense to me, Larry. This is too much to read. So I'm stopping. Did he provide a statement to the police Larry?

Larry 50:00

He did. And let me correct. That year I said, 2017, it's not correct. The event happened at an earlier year. That was the year the appeal was decided. But this is a redacted version of what was in the court's opinion. In his statement to police, he admitted he was getting high on cocaine, and questioned M. about whether she was having an affair. He also stated throughout the night, as he lay in bed next to M., she said, no, and that she was not in the mood, pushing him away. He stated that when M. said no, he would stop for a while before trying again, which happened several times throughout the night. And then at one point, M. got so tired, she threw a phone at him. And the petitioner stated that he took the phone and snapped it in half.

Andy 50:47

Sounds like bendgate. It must have been an Apple phone. I'm guessing that the state would have had a strong case on his admission. I recall the accuser subsequently recanted.

Larry 50:56

She did. Indeed she did. M. recanted her statement to the police. In a notarized letter dated August 17th, 2011, which is the correct year, she stated that she did not wish to pursue any charges

against the petitioner, that the police report concerning the night in question was inaccurate, and that Petitioner never sexually assaulted her. M. explain that she and the petitioner are very sexually active. And that the marks on her body that evening came from their sexual activity. M. further stated that her face was injured when she came out of the shower and slipped on the wet floor. And that Petitioner was not present when she fell, and at no time had tried to harm her.

Andy 51:39

You know, people in prison often end up with different kinds of bruises and stuff and they go oh, yeah, I repeatedly smacked myself in the face in the shower. Probably not true. But so her recantation should have ended the case, Larry. I can guarantee you that that's how that went.

Larry 51:55

Unfortunately, it doesn't work that way. On February 21, 2012, the prosecutor informed the court, which was what she was supposed to do, that she had met with M., who informed her, the prosecutor, that she was abusing substances on the night in question, and that she no longer recalled her conversation with the police, and that she now believes that something different happened from sexual assault, which was alleged to have happened. The prosecutor informed the court that M. also stated that when she sobered up and saw what really happened, it was not the petitioner who had sexually assaulted her. And that when she slipped and hit her head on the bathroom, she had a seizure. And sometimes seizure makes her believe things that are not actually true, and that she has no memory of whatever she told the police, but now believes that it was incorrect.

Andy 52:48

What did the state do after receiving that notarized statement?

Larry 52:51

Well, the state entered nolle prosequi on the charge of sexual assault in a spousal relationship. The petitioner thereafter plead guilty to unlawful restraint in the first degree, failure to appear and violation of probation for which he was sentenced to an effective term of three years and six months of incarceration.

Andy 53:10

You just use the word of nolle prosequi. What did you say?

Larry 53:14

nolle prosequi. That's a Latin term, which means that the state wishes to not proceed any further. Just, for this case, we wish to move no further on the case. So it's an essence a dismissal, but it doesn't have the same title.

Andy 53:28

Okay. The way I read the case is that the Department of Corrections decided that the petitioner had committed the offense that was dropped after the accuser recanted. And his argument was about the due process clause. Is that because the due process clause prohibits the government from depriving a person of any such interest except pursuant to constitutionally adequate procedures? The case was remanded to the habeas court for a determination of whether the Department of Corrections had afforded the petitioner the process he was due

prior to assigning him the challenge classification. Do I have that right? What was the Supreme Court deciding? Connecticut Supreme Court decided.

Larry 54:10

Well, you do. You have it right. Pretty soon, I'm not gonna have a job at FYP. (Andy: Hopefully.) It was the petitioners appeal from the judgment of the habeas court denying his amended petition for a writ of habeas corpus. The petitioner asserted that the habeas court incorrectly determined that the commissioner of correction did not violate his right to procedural due process in classifying him as a PFR. So the Connecticut Supreme Court had decided in 2017 that he did have the right to be properly classified and that he had the right to due process. So that's what he was alleging the habeas court didn't do a good job of. He also claimed the habeas court incorrectly determined that his challenge classification did not violate his right to substantive due process or his right not to be punished except in cases that are clearly warranted by law under the Connecticut constitution. The court concluded that the petitioner was not afforded - this is the most recent appeal that we're talking about - was not afforded procedural due process protections he was due prior to be classified as a PFR. And therefore, his classification violated his right to procedural due process under both the federal constitution and our state constitution. And they rejected the substantive due process claim.

Andy 55:27

Can you explain what the differences between the two?

Larry 55:30

I'll try. Both substantive and procedural due process are two different aspects of the same due process of law that originates in the fifth and 14th amendments. However, a distinction between the two is noticed when procedural due process aims to protect the fundamental right of the individual by ensuring that the government follows the rules and a free and fair trial is given. Substantive due process prevents the government from exceeding the limits by inventing laws. The substantive due process generally serves to put a brake on what the government can do when it announces a broad policy statement. And the procedural due process is you're entitled to a certain level of procedure before they take away a right. He had the right to be classified correctly, because that affected his housing and program opportunities. So, if they were going to classify him as a PFR, they needed to give him the adequate process where he would know what he was being... what evidence they were using, let him call witnesses, let him try to rebut their presumptions, and they surely would have given him a kabuki kangaroo court. And it came back to haunt them. The Connecticut Supreme Court did not say you cannot classify someone as a PFR. They had ample evidence to classify him as a PFR. But they just wanted to take a shortcut. Folks in Connecticut, I know you're listening, the correction Secretary probably listens. You're gonna win. All you need to do is just take a little bit more time. Let the person have counsel, if they request it. Let them know what the allegations are. Let them cross examine your witnesses. In all likelihood, he did commit this offense that got dismissed. But they wanted to take a shortcut to classify him. And they did without going through all the details. They basically just railroaded him through something that didn't even closely resemble due process. And they said, we're classifying you as a

PFR. Well, guess what? Can't do that. You got to give the person process.

Andy 57:41

And if we overlay this over the new AWA guidelines coming down, is this a violation of the due process clause?

Larry 57:51

Oh, well, it could be a violation of both forms of due process. We'll just have to wait and see. I don't think we know yet. These regulations, I haven't followed that. You're talking about the new regulations that were proposed by the Trump administration that are actually going to be implemented under the Biden administration, right?

Andy 58:08

That is correct. Yes.

Larry 58:10

Yes. I think there might be some both forms of process that we'll challenge if those do - not if - but when those become the final rules for AWA. I suspect there will be a number of process challenges, both substantive and procedural due process challenges.

Andy 58:26

We're starting to get short on time. So can you tell me what the court ultimately decided in this case in Connecticut?

Larry 58:33

It concluded that although the petitioner was afforded some procedural protections required, it is clear that he was not provided all of them. And particularly, he was not provided (1) an opportunity to call witnesses in his defense, (2) adequate notice of information to be relied upon in determining his classification of the PFR, and (3) the impartial decision maker to rule on his appeal. He wasn't provided any of those things. Folks, you can do an awful lot if you'll just follow the rules. That's all.

Andy 59:05

Very well. Any final notes before we move on to Who's that Speaker?

Larry 59:10

Are we running out of time already?

Andy 59:12

Yeah, we're at 50... oh, sorry, almost 60 minutes.

Larry 59:15

Wow. Time flies when you're having fun?

Andy 59:19

It does. It does. It does. All right. Well, then I think we can move over to Who is that Speaker? And last week I played

Johnnie Cochran during O.J. Simpson Trial (Audio Clip) 59:28
It doesn't fit. If it doesn't fit, you must acquit.

Andy 59:33

And I received numerous people signing up for answers and the first one to come in came in I think even before we were even done recording. But if not, it came out as soon as the Patreon version came out. And that was Brian M. And he wins all the glory and fame that we have to offer here at FYP studios. Do you want to set up Who's that Speaker? for the next one or should I just play it?

Larry 59:55

Well, it just goes way back. Folks, you're gonna have to remember back to the decade of Watergate. That's not enough of a clue.

Andy 1:00:05

Oh, man, you just, you give stuff away.

Larry 1:00:07

You gotta think back. But this is not an everyday household name that made this one here. And then, before we play this, we're anxious to have some submissions from listeners of things they think we should use. Because we've been told that ours are too easy. So send them to Andy. And he will screen them and we will decide which ones to use as recommendations for our mystery speakers.

Andy 1:00:33

You could do that. Send me messages, subject of mystery speaker at registrymatterscast@gmail.com. And we can fill these in. But yeah, Larry, like everyone is guessing. They're saying, I'm not guessing because it's too obvious. So this is going to be a little bit more obscure. Here is this week's Who's that Speaker?

Who's that Speaker? 1:00:55

What did the President know? And when did he know it?

I will play that again.

Who's that Speaker? 1:00:55

What did the President know? And when did he know it?

Andy 1:01:07

And that is Who's that Speaker? for episode 204. Send me a message at registrymatterscast@gmail.com with the subject Who's that Speaker? or something like that and tell me who that person is there. We didn't get any new patrons this week. Did we get any new snail mail subscribers?

Larry 1:01:27

I don't believe we did. But we're sending out an awful lot of sample transcripts. So I know that they're going to come. They're going to come rolling in here by the dozens in 2022.

Andy 1:01:38

Did you see who I gave you for a picture this week?

Larry 1:01:41

No, who did you give me?

Andy 1:01:43

I gave you Johnnie Cochran.

Larry 1:01:47

There is actually a strong resemblance in us there.

Andy 1:01:50

Yes. And this is a picture of him with the gloves. And what were the gloves?

Larry 1:01:54

Those were the gloves that were alleged to have been used in the murder of Nicole what was his name? Ron, Ron. Ron. Ron Goldman.

Andy 1:02:07

Okay. And so, if the gloves do not fit, you must acquit. That's what the statement is? Very good sir. Anything else before I close it all out?

Larry 1:02:14

There could have been a number of reasons why they didn't fit. He could have had swollen hands that day. We don't know why they didn't fit. The gloves could have shrunk. We don't know why they didn't fit.

Andy 1:02:30

It could be all kinds of things like that. Anything else before we close out Larry?

Larry 1:02:34

Well, I'm gonna just ask now, are we going to be recording on Saturday, December 25th, at our normal time?

Andy 1:02:41

I mean, seriously? No, I can't imagine we will actually record on Christmas Eve.

Larry 1:02:46

I thought Christmas Day is Saturday.

Andy 1:02:48

Whatever. Christmas Day, whatever. You're gonna ask me that a month from now? I don't know, it's a month from now. You might not be here. You might go visit that bridge in West Virginia.

Larry 1:03:00

I've given it a lot of thought.

Andy 1:03:03

Okay, um, you can find all of the show notes over at registrymatters.co. You can leave voicemail at 747-227-4477. Email at registrymatterscast@gmail.com. And thank you so very much to patrons that support the program and you can join them over at patreon.com/registrymatters. Twitter. There's a Facebook page if you want. You can also go find the show... Do us a favor, go over to YouTube and do like a thumbs up, listen to the program, help get some of those numbers up and feed that suggestion engine for more people to perhaps find it. So that's youtube.com/registrymatters. And I think that's all I got for the evening. Larry, anything you want to say before we close out?

Larry 1:03:47
I hope everyone had a wonderful Thanksgiving holiday weekend.
By the time this gets out, they'll be back to work.

Larry 1:04:03
Goodnight.

Andy 1:03:54
Absolutely. Again, Larry, I hope you have a splendid evening. I will
talk to you in a few days. Have a great night.

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Glossary:

PFR – Person Forced to Register
NARSOL – Nasional Association for Rational Sexual Offense Laws
AWA – Adam Walsh Act
BCC – Bureau of Community Corrections
CCC – Community Corrections Center
CCF – Community Corrections Facility
ICAOS – Interstate Compact for Adult Offender Supervision
PC – Protective Custody
PREA - Prison Rape Elimination Act
DOC – Department of Corrections
CSL - Community Supervision for Life
DCS – Department of Community Supervision
IML – International Megan's Law
SOMP – Sex Offender Management Program
BOP – Bureau of Prisons
CAGE – Citizens Against Government Entrapment
PV – Parole / Probation Violation
SMART Office - Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking
ICAC - Internet Crimes Against Children
MSR – Mandatory Supervised Release



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