



## Registry Matters Podcast

Episode 235

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Disclaimer 00:00

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Andy 00:16

recording live from FYP studios, east and west transmitting across the internet. This is episode 235 of Registry Matters. Good evening, sir. How are you?

Larry 00:27

Well, I'm doing okay, considering everything. It's good to be with you.

Andy 00:32

We will do this really quick. Can you do the introduction on Ashley real quick?

Larry 00:38

Sure but I'm gonna have to monologue for a little bit because my computer's not opening the document I was gonna read from.

Andy 00:45

I can take care of it for you if you'd like.

Larry 00:48

Well, you go right ahead.

Andy 00:51

Where did it go? Where to go to see let me find it find to find it. Ashley, Ashley, Ashley. Good grief. Where did you put it in here, man?

Larry 00:59

I got it here. Tonight, we have a special guest who's been with us from time to time. Ashley Raymore Cloud is a former district attorney, assistant district attorney with the 13th Judicial District Attorney's office. And also, she was with the Second Judicial District Attorney's office. I left that out. She departed the DA's Office in 2019 to join the defense bar and handles a variety of cases including PFR type cases. She spent the better part of her 25-year legal career as a prosecutor in New Mexico. As a prosecutor she also held positions as a felony DWI supervisor, arson division supervisor and supervisor of the DA's Clinical Law Program. During her time as a prosecutor, Ashley has prosecuted and tried numerous cases including child sex crimes, murder, property crimes, drug crimes, domestic violence, escape from jail, arson, DWI as it goes on and on. Now, she has also practiced in domestic relations, or white-collar bankruptcy, and now she's on the criminal defense side, the right side of this and she was recently recognized by the Law Offices of the Public Defender as the Contract Attorney of the Year. So welcome back.

**Production Note: Podcast was paused briefly due to technical difficulties.**

Ashley Reymore-Cloud 02:12

Thank you, Larry, it's great to be back. It's always good to be with you people.

Andy 02:17

He has you trained with the new people part. The reason why I wanted to do the introduction just out of out of the script was because we have a little bit of a memorial that we want to express and Ashley's going to do that part. And I didn't want to have some random voice show up out of nowhere to describe what has occurred in the last handful of days. So, Ashley, will you go ahead?

Ashley 02:36

So sadly, we lost one of our own. He was on the show a couple of weeks ago, I believe. Andy: Yeah, that was Grant. Yep. Ashley: And he left us on Tuesday. We are very, very distraught over this. Larry. and I both worked with him for numerous years, Larry has worked with him for quite a bit of time. And it's, it's been very hard. So, I just wanted to take recognition and say that we will miss him.

Andy 03:06

That's really sad. I'm really tragic and unexpected, obviously, when he was a young, early 20s.

Ashley 03:11

Yes, he was in his early 20s. It was very unexpected and very sudden. And it's just there's no words for this kind of loss. Our hearts go out to his family and everyone else as well.

Andy 03:23

Absolutely. I'm sorry to hear that. Larry, I'm sorry for the loss as well.

Larry 03:26

Thank you.

Andy 03:29

Well, um, so I hope you are ready to go forward instead of are you? Are you gonna be okay for the episode?

Larry 03:37

I'll do my best. Okay,

Andy 03:39

So, what do we have going on this episode?

Larry 03:42

Oh, we have a lot of stuff. We have a case from the Kansas Supreme Court, which is fascinating to say the least. A person was convicted of failure to comply while he was locked in a psychiatric hospital. And we have a question from a supporter named Joel in Colorado. And we plan to touch on the sentencing of the individual involved in January 6th incident who got the seven-year sentence if we have time. And I think you even had some observations and questions on that particular case.

Andy 04:09

I think I do. We all well on let's see here. Do you have any current things that you want to mention wasn't the wasn't a jobs Friday yesterday?

Larry 04:20

Yes, it was. It was awesome jobs report released yesterday. 528,000 new jobs added and an all-time record number of people working in America. I won't say they're all Americans, but that's what people generally say. But we have an all-time high number of people working. We have wage gains across the economic spectrum. We have approaching 11 million jobs still open remaining to be filled. I think that number dropped us something between 10 and a half million. So, despite all the gloom and doom from the naysayers, the economy remains very strong. So that's the positive news for the week.

Andy 04:59

So, I recall back in the whatever, oh, 809 timeframe when like the economy was going into freefall like it was 800,000 jobs being lost per month. So, 500,000 gained, I imagine is an incredibly strong number.

Larry 05:13

You are recalling correctly during the 08 debacle when the economy was collapsing, we were losing five and 600,000 plus jobs per month. And we ended up being in a very deep recession.

Andy 05:28

Alright, so we had an awesome, awesome jobs. And we will move on just to I guess you're just doing that to try and balance from all the negative news that goes out about a crappy economy, but the Fed raised interest rate a couple of weeks ago to another  $\frac{3}{4}$  percent. Alright, then I think we can continue, I'll try to continue. Let's, let's go over to this question that we had from Joel in Colorado. And we already did the introduction with Ashley. And so welcome back, Ashley, really, I didn't get a chance to say that. But thank you very much for coming on. It's always fun to have you on your great banterer.

Ashley Reymore-Cloud 06:09

It's great to be on and I enjoy the banter on this as well.

Andy 06:13

Tell me about your recent award as a contract attorney is this like, like a hired hitman kind of person.

Ashley 06:21

Sometimes it feels like that, actually. So, in the past, every year, they have a public defender conference. And in the past, they would give a public defender the attorney of the year and this is the first year they actually decided to give a similar award to contract attorneys. And out of 250 attorneys, I was chosen as the contract attorney of the year across the state.

Andy 06:44

Out of how people? Ashley: 250. Andy: Ashley: So just one or two. Andy: I mean, if there were like five attorneys that it'd be like, okay, so they just sort of gave you a token of appreciation, but out of a couple of hundred, that means something to me.

Ashley 07:00

It was there was somebody in all fairness, there was somebody else who was also named down south. I don't know who that person is, but it was still quite an honor.

Andy 07:10

Would you mind taking a few minutes and talk about what is your daily kind of run sheet is your calendar looks like from? Like, is there such a thing as a typical day?

Ashley 07:23

No, nothing in my day is typical. But as Larry can speak to sometimes he looks at my calendar, and then he will text me and say your calendar is sick.

Andy 07:32

Oh, and that's not the bad sick isn't.

Ashley 07:38

It could be either way, it's pretty laughable. There are times when you look at my calendar, and I'm supposed to be in seven different courts all at the same time. So, it can be quite the Juggle. But I spend a lot of time in court. So, with it being virtual, because of the pandemic, some of it is manageable. But a lot of the courts have gone to a hybrid system where you have to be in person and also virtual, and it's causing some interesting logistics. Luckily, I'm pretty good friends with a couple of other attorneys that are also contract attorneys. And so we've started to tag team men to each other's hearings or cover stuff if one person is in a courtroom. But then there's days when I'm sitting here and I've got my phone up in one courtroom, I've got two laptops running and the other courtrooms and I'm juggling judges, hoping nobody calls on me.

Andy 08:27

All right, then. Can you think of anything in the recent past that you're particularly proud of?

Ashley 08:35

Um, I've had a couple of good outcomes at trial lately. During the pandemic, I've done three trials, I did a rape a homicide. And then most recently, in May, I did a shooting at a occupied dwelling, which here in New Mexico is, is considered a second degree felony meaning it's punishable by up to nine years plus there were a bunch of other charges. So my client was facing about 25 to 30 years. I had a plea offer for him that he would have gotten out in another three months. And he did not want to take the plea. And I didn't think we had a defense on that case. And the previous attorney said there is no way don't take that case to trial, you're going to lose. But my client wanted to go to trial I never make them plead and we went to trial. And it just kept getting better and better and better. And the jury was out about an hour and came back with not guilty on everything, including an aggravated fleeing charge, which happened in front of officers meaning he ran from officers, meaning they didn't believe anybody. And there were some really interesting things that happened during that trial, including the prosecutors tried to get the fingerprint person they were trying to tie my client to the scene and they were trying to get a fingerprint person to say that was the box of ammunition that that had the bullets that were fired, had my clients fingerprint on it, but they didn't lay the foundation right and so the fingerprint person went I've never seen that box before in my life.

Now, the judge knew why, I knew why, prosecutors knew why. But in the jury's mind, they believed there was some big screw up and it never got corrected. So, I just hammered that in closing along with several other things. And it was it was a lot of fun.

Andy 10:13

All right. Do we have a case in here that you want to talk about from Kansas Supreme Court?

Larry 10:24

Yes, we have. We have Kansas Supreme Court, and we have a question from Joel.

Andy 10:29

Okay. Oh, I haven't done the question from Joe yet. Oh, let's do the big question from Joel. It says, To Whom It May Concern. I'm a subscriber to the NORSOL digest, and I saw your advertisement regarding your podcast. That's not accurate. Registry Matters. I would like to obtain a sample transcript of a recent podcast or podcast that relates to my situation of being released from prison in the next 60 days, rather, have to register as soon as I am released under federal SORNA requirements. However, prior to my incarceration, I registered in the city of Aurora, Colorado. I had to self-report to Englewood two months later, a few days after my self-reporting to incarceration serve 14 months sentence, the city of Aurora police department they visit to my wife at my residence informing her that my charge of access with internet to view was not registerable crime in the state and that the state does not recognize my only charge, access with intent to so I'm in limbo as to when I'm released, and when I register and the state still does not recognize my crime as a registerable offense. Yet, by federal law, I must register who takes precedent? Anyway, I'm looking forward to listening to your podcasts upon release. I may be able to participate in your discussions regarding the topics as an advocate for major reform program on PFR law and the registry. Thank you for your time and looking forward to your transcript. Please mail the transcript to blah, blah, blah.

Larry 11:56

So, this person, he wrote this, and I got the opportunity to work on it because I know an attorney who's in the Denver Metro area who does work related to this issue. So, I called the attorney. And we had a discussion about the case I shared the letter. And she knows the detective already at Aurora PD that handles PFR registrations. So, they don't have any records in their files that reflect what he says in this letter in terms of this not being a registerable offense. And in fact, they registered him. He was registered for the time he was waiting for his voluntary surrender, which actually stumped the attorney because she is saying, well, wait a minute, he must have another charge. I said, no, no, he did his plea, and he was given voluntary surrender. And I said, when the judge entered the conviction and sentence and allowed him to self-surrender. I said there was a period of time where he would have needed to register. And so they accepted his registration. And I'm not saying that they didn't go by and visit with a family because they may have been doing a standard residency check. But they did not, according to the detective's recollection, tell them that the family that and they also took his registration. And he was complying for that period of time, he was waiting for a surrender date. The attorney said that this would translate to a Colorado offense and her professional opinion, but she'd be more than delighted to

have a conversation if he so chooses, but this looks like something that would trigger a duty under Colorado law to register. Now in terms of the federal what controls that's still up for debate. I maintain that a state gets to choose to register whomever it wants to register, and it gets to decline registering people it doesn't want to register. And as part of our system in the United States that we recognize federalism, and they don't have to register Colorado doesn't have to register anybody to begin with. And they certainly don't have to arrest register people that they don't think have an offense that's covered by the scope of their registration law. But there's circuit law that says to the contrary, that as an independent federal duty, particularly the Willman case out of Michigan, I believe it was, but that is not a national precedent, that's within that one circuit. And the 10th circuit doesn't have any search such press precedent, which is where Colorado is in the 10th circuit. So, Ashley, do you have anything to add to it, but I think the guy's gonna have to register. And particularly, I think, for the period of his supervision, he doesn't want to fight this battle while he's under supervision.

Ashley 14:46

So, I agree he doesn't want to fight this battle while he's under supervision. The only other thing I would possibly add is if in fact, it is not a translatable offense, and he doesn't have to register, he needs to really get good documentation on that in case his federal supervised probation people come looking for him and asking him about his compliance with it. So, Laif it does go down that path, I would just advise having really good documentation, not just saying, Oh, someone told me I didn't have to register. And that's my only additional two cents.

Andy 15:25

Is there anything else that you want to talk about there Larry?

Larry 15:27

No, I think that covered it, I hope that it's helpful to him. And for the relevancy, it's, it's for anybody who may be in a similar situation. If you have something you don't think translates to registerable offense, I would strongly encourage you, if it was dictated to you that you will register by the court, at least for the period that the court has jurisdiction over you in terms of possibly taking your freedom away, you probably would want to register if the state will accept your registration. If you go into the registration office, and they say, sorry, we don't register obscene phone calls here. Too bad. So sad, then you really can't register. So, if you transferred from Georgia to Colorado, and they don't have a provision that registers that offense, that's not an equivalent offense in Colorado, then you did the best you could. Would Georgia revoke you if you didn't register in Colorado? Ashley: what do you think? What would the prosecutor in Cherokee County, Georgia be upset that the person was able to dodge registration by getting here and being told that they didn't have to register?

Ashley 16:27

If it was a condition of their probation? I think Georgia would take somebody back in a heartbeat. But what do I know about that, Larry?

Andy 16:37

So, is that similar to the person we talked about? I think it was North Carolina that wanted it like he went in three times that say, hey, look, should I register? And then they were like, Hey, you're supposed to be registered and he got jammed in the in the tush?

Larry 16:50

That is that is similar. Some people just can't take no for an answer.

Andy 16:56

And your legal opinion, but not lawyer level opinion is if you are not, how do I want to wear this, if you move to a place that you've been off the registry, and like, don't go to tell them that you're there, because you don't have a duty to tell them that you're there, something like that?

Larry 17:14

Well, I don't know if it goes that far on a program with tens of thousands of people listening and probably some law enforcement. But I would say a little more cautiously that if you have been dutifully discharged from registration with documentation, not that you're choosing just not to present yourself, but if you've been dutifully discharged, it would be very unlikely, in my opinion, that they would secure a conviction. Because it's plausible that a reasonable person is receiving a letter saying, or an order, whichever it is, in some cases, it's a court order, but receiving an order or a letter saying you have no duty to register, the reasonable person could go to a state and not believe they have to register. Now Ashley was in prosecution for 25 years. If a case like this came in the 13th judicial district that a person had been released from registration in Georgia. And they moved here, and Regina said that they should register. Would you take that as a prosecution when you were screening cases?

Ashley 18:14

Absolutely not. I would take it that they attempted to comply that they were in substantial compliance, and I wouldn't prosecute it. There's no intent there. But I think that ties us into that Kansas case about intent.

Larry 18:29

So well, well, yeah, but if a person if a person has been released from registrations through an official mechanism be where they timeout, and they just simply are told that your period has ended, which is the way we do it here. Of those who have the privilege of timing out if they're in the 10 or 20-year group. But or if you've been petitioned and been successful, and you've got an order, I can't see a prosecutor in most jurisdictions wanting to take that case, because it's reasonable, there's a reasonable doubt that you thought you had to register. I just don't see that. Anything's possible. But I see that they're gonna give you a notice to register and say, we believe you're covered. And then you can find it out in court if you if you don't believe you're covered in that state.

Andy 19:18

Well, let's move over to the case from Kansas that you people put in here versus Daniel or Earl Jensen, and I've read it and I think that the guy got screwed, and I'm hoping that you can finally admit, someone got screwed. Larry, can you finally can we all say

like, good evening, Larry. Hi, Larry. Can you admit that this guy got screwed?

Larry 19:41

Yes. Okay.

Andy 19:43

Well, cool, then. We're probably done with the podcast right now. All right. Well, I guess we'll cover some basics after his conviction for attempted voluntary manslaughter, Jensen needed to register as a violent offender under Kansas Offender Registration Act. Is it the same Offender Registration Act? PFRs

Larry 20:00

Yes, it's called KORA.

Andy 20:04

Yeah, but I'm saying like he did something related to murder, not a sexual offense and they have yes classified in the same place.

Larry: Yes, same, same, same registry. Andy: Okay. And then so on August 29, 2017, he did so at the Riley County Police Department. The forms Jensen completed, informed him that he had to register every May, August, November, and February, and upon certain occasions such as when his address changed. On September 18, Jensen came into report a change of phone number. He came in again on October 9 to report an address change, but Jensen failed to show up for his registration appointment in November. He registered on December 15, which was 15 days late. So what happened next there, Larry?

Larry 20:48

The state charged him what's violation of KORA, and this is a severity level six felony based on his failure to report in person during the month of November 2017. And before trial, the parties stipulated that Jensen had been convicted of a non-sexual rime, still requiring registration under KORA. And Jensen filed notice of intent to assert a defense of mental disease or defect.

Andy 21:16

All right, well, Ashley, if you can explain the notice he filed I noticed that the state objected because Kansas eliminated a mens rea element for KORA violation making it strict liability offense. What is a mens rea, and why is that important to the case?

Ashley 21:39

Sorry, had to get back to my mute button. Okay. So mens rea is extremely important. In all cases, it is the essence of the case. And what mens rea actually means is your mental intent or your mental capability depending on whether it's a strict liability, a specific intent, or a general intent crime. The thing with mens rea is you have to in order to convict somebody of a crime, you have to have both men's rea and the actual action of the crime, and it's always in the elements. Now, there's nuances again, as to whether you had to intend, for example, you had to intend to shoot somebody, or you had to intend to cross the street across the light. But all those are mens rea, you still have to mentally commit a crime. And when I say mentally commit a crime, I don't mean you're just thinking about it, you have to actually have some mental culpability for it. Now, that's diminished if you have an insanity or diminished capacity claim. In some jurisdictions, you

don't have full insanity defenses. At best, you can argue diminished capacity. But what that means is that you couldn't form that mental intent, you lacked the mental intent to commit a crime, and that's where this went completely south in this case.

Andy 22:59

So, it seems that Jensen argued, among other things, the state's construction would allow for the conviction of an individual who falls into a coma during his month of registration and is physically and mentally incapable of complying. Jensen did not clearly articulate an argument that his mental illness rendered him physically incapable of complying with his registration obligations, nor did Jensen's reply raise a constitutional claim, although he would later develop the same argument in challenging the statutes constitutionality. The district court rejected Jensen's request for his mental disease or defect defense agreeing with the state that mens rea is not an element of the crime charged. Accordingly, it held Jensen's mental health in November of 2017 was irrelevant. This can't be right. He was in a psychiatric hospital. How do you register if you're in a hospital, Larry, what happened next?

Larry 23:52

Well, the case proceeded to trial and Jensen's attorney noted that he had been involuntarily committed to Osawatomie State Hospital for roughly the first half of December 2017 and challenged the constitutionality of strict liability registration and violation offenses. And Jensen's attorney also asserted that he had a constitutional right to present his mental health defense, that he did not believe that the strict liability statute of KORA is constitutional period, and that there was a constitutional argument as to statute as to why the mental health issue should be able to be discussed before the jury. That's what he said. What he argued,

Andy 24:32

Ashley, what do you have to say to what Larry just articulated?

Ashley 24:36

Well, the issue was that I mean, that's a great start to the defense but the problem was he didn't actually state how his client's mental capacity or incapacity in this instance prevented him from registering. So, he never actually applied his client's facts to what he was arguing and that's a big issue whenever you're going to do something on appeal or you're going to argue any case, you have to say, okay, here's my argument, and this is how this matters in this case, and he didn't quite get there. Right, Larry?

Larry 25:08

It didn't appear so from what I read now.

Andy 25:11

So, he could have. I mean, are you are you being critical of another attorney there Ashley?

Ashley 25:17

No, I would never do that. I what I might have done a little bit differently. But I also think that as attorneys, we sometimes get caught up in believing that because we know what our argument

is that the court automatically knows what's going on in our head, and there might have been a little bit of that going on.

Andy 25:34

Okay. The district court did not rule on the statute's constitutionality but repeated the substance of its previous written ruling that generally questions inquiries, evidence, or for that matter argument related to defense of mental defect are not going to be allowed. As the District Court put it a ruling on the statute's constitutionality will be the appellate court's function. In its eventual journal entry, of jury trial, the district court characterized this as a ruling of the state's motion in limine. COME ON motion in limine. What does that mean?

Ashley Reymore-Cloud 26:10

What does that word limit any motions in limine? Limiting?

Andy 26:14

What in the fricative frack I've never heard this word before, I've really had to hand props to Larry for saying the Osawatomie, and now we're at this.

Ashley 26:24

Motions in limine are what make trials go smoother, both sides tend to file motions in limine stating I this is not allowed or this is allowed. And then they make the argument before the judge before the trial, proceeds so that you don't have to keep going up there and interrupting the flow of the testimony with the jury and both sides know what kind of evidence they can get into. So, for example, I'll file motions in limine all the time on hearsay and suppression things that I don't want them to be able to bring up my client's past, things like that. Those are all considered motions and limine. So, in this instance, what that lawyer was arguing was in his motion in limine that he was going to present this defense but the judge shot him down.

Andy 27:07

At the end of the state's case, Jensen's counsel made these proffers of what testimony would have been if this Court had allowed us to go into mental health issues, the highlights of what he proffered the court in the state of Kansas had involuntarily committed Mr. Jensen to Osawatomie after Jensen actually took himself to the to a hospital. Jensen would have testified that he had not been on his medication in the month of November, that he became cognizant enough to reach out to his mother and ask for transportation to go to the hospital because he knew he needed help. He was unable to reach his mother, and Mr. Jensen was able to get himself to the hospital. He would have testified he believed that he would be up by the end of November, beginning or beginning of December. He spent his time at Osawatomie up through December 14, and when he was out of Osawatomie. Could you people not write these things so many times? Everything was out of that place and medicated and his proper treatment plan, he registered the following day. Come on, man. Why can't they have some level of compassion that the guy was in the hospital not taking his medicine?

Larry 28:11

Well, despite all this, the court found him guilty. Ashley, what happened next?

Ashley 28:20

So, before sentencing, Jensen moved to dismiss the case, asserting that KORA was unconstitutional under the due process clauses it applied to a strict liability standard to a crime of inaction. Jensen also filed a renewal of Motion for Judgment of acquittal, a Motion for Judgment, notwithstanding the verdict, also known as a JNOV. And a motion for a new trial in which he argued a number of things.

Larry 28:48

So, Andy, I think it's your turn?

Andy 28:53

I got it. So, he was barred from presenting any theory of defense in this case, specifically ruling that evidence concerning his mental state during the month of November 2017, was ruled inadmissible and irrelevant. He proffered evidence that would have established that his mental condition during the month of November 2017, was unstable at best and he turned himself into authorities on December 2nd 2017. Law enforcement officers were so concerned with his mental condition that he was nearly immediately transported to that mental health hospital that I don't want to keep saying because it's complicated, while the Riley county attorney's office filed a care and treatment case. The court's ruling effectively deprived him of an unquestioned constitutional right to testify in his own defense in any meaningful way. Ashley, let's dig into these key points, especially about his not being able to testify explain how that would impact him.

Ashley 29:47

So, this is huge. This is absolutely huge. His Jensen lawyer put it very succinctly without being able to testify about what was taking place in his life during November 2017 or the reason you that he turned himself into authorities on December 2 2017, or his subsequent admission to that hospital. I won't even say the name of it either. I'm not even gonna attempt it, or even his initial registration address in December 2017, Mr. Jensen's potential trial testimony was essentially limited to stating his name on the record and immediately stepping down to return to the defensive table to be convicted. I mean, that's basically what happened, they deprived him of pretty much his ability to defend himself

Andy 30:34

Wouldn't in this whole situation of him being in a mental hospital, wouldn't that like, I mean, hi, I was in a mental hospital, don't convict me, and the jury would then go, oh, we shouldn't convict you because you were actually incapable of going to register? I don't I don't see how that even like works at all.

Ashley 30:56

I don't either. And I will say even though it may have come across that I was a little bit critical of his lawyer on the other aspects. This was exactly the plan of attack, his lawyer needed to go down. But the court wasn't buying yet. And essentially, they deprived him of his right to defend himself.

Andy 31:12

Do you think they didn't believe the whole situation that he was in? I mean, like, did he get a doctor's note? Can he prove that he was in the hospital? Is there any question about that side? Or

they're just flipping them? The bird saying, Sorry, too bad. So sad, you didn't meet your registration date?

Larry 31:26

Well, they issued the order to commit him. They know he was there. Ashley used to issue those orders when she worked for the DA's Office.

Andy 31:36

I don't understand. Um, the Kansas Supreme Court noted before the district court, Jensen did not clearly delineate his substantive due process arguments as arising either under the federal or Kansas constitution. Instead, Jensen mainly framed his arguments around his constitutional right to present a defense without specifically referencing either the Kansas or Federal Constitution. Why is that significant? That's to you Ashley.

Ashley 32:05

So, when you go into trial, at any given point it you always look as to what your appealable issues are going to be. And any good trial attorney will start from day one, writing down, I actually sit there in a notebook. And as we go through trial, any objection that I make any argument that I make I write it down whether it was overruled or sustained everything to set that appellate record. Because if you don't basically protect those appellate rights at the trial level, the court has the discretion not to hear them at all. And that's pretty much what they did in this. They said it wasn't preserved at the trial level, and so they don't have to consider it.

Andy 32:43

So, the trial attorney blew it, Ashley?

Ashley 32:49

I can't go that far on another attorney. But here's what I would say. As an attorney, you need to be very cognizant. Now, sometimes this stuff is going down and you're focused on this issue or that issue. It's understandable that he wouldn't have preserved some of that. But if there was going to be a due process argument and a constitutional argument, he needed to lay the foundation and give the court a chance to give a ruling on it so that you could appeal it later.

Andy 33:21

And they apparently, they chose to invoke the Prudential exception. What is that?

Larry 33:28

Well, it was in the decision the first time I've ever seen that. But apparently, it's a doctrine in Kansas that they will not consider any issues that are raised on appeal for the first time, which is very common throughout the country. But apparently, they have a special rule that I've not heard of that. That was referenced here. The Prudential exception.

Andy 33:48

All right. And then the court noted that Jensen's proffer does not establish the severity, nature or genesis of his mental illness. Although we can look, we can loosely infer that Jensen believes the evidence would show he was not cognizant during some of November 2017. Nevertheless, Jensen's failure to register at any time during the month of November only became criminal at

midnight on December 1 2017. They are implying that he should have registered prior to being hospitalized. And Ashley, what would your reaction to that be?

Ashley 34:17

He may not have had the mental capability to register at that point. I mean, this there was a lot going on and he didn't get to testify about any of it.

Andy 34:28

It's like if you are about to, like if you're in the car getting in getting into an accident, and you're like going to have almost like a limb chopped off. Oh, crap, I forgot I have to go register. Hold on. Let me stop the car crash. Let me go register and then go continue the car crash like that's, it doesn't even seem at all remotely logical or rational to me.

Ashley 34:53

No, I completely agree. I don't know how they even got to that point, given he couldn't explain it. He wasn't allowed to explain it. And then also, just like you just said, Andy, it's like somebody who ties their helmet to the side of their motorcycle and then says, oh, I'm about to get into an accident. Wait, let me stop and put this on. That's literally what they're asking somebody to do is to predict the future, and then act accordingly.

Andy 35:19

Jensen's claim that KORA's imposition of strict criminal liability violates his substantive due process rights rests on the interpretation of various comments set forth in numerous cases decided by the United States Supreme Court and this court across the decades, but the Supreme Court has never declared that the legislative criminalization of conduct on strict liability basis violates substantive due process, have they?

Larry 35:44

Is that for me?

Andy 35:46

Well, I would pose that to either, but I think Ashley would be you know, she's the guest. So, we'll give her the limelight.

Ashley 35:52

So according to the Kansas Supreme Court, they did not. And I think Larry would actually take issue with that. Right, Larry?

Larry 36:01

I do take issue, but go ahead.

Ashley 36:06

Well, I again, I don't see how they even got there. They didn't examine several things. They declined to look at other things. And then here we are with this verdict that basically says, oh, we've never said that strict liability violates due process. And I'm not so sure that's right across the US. But I defer to Larry, who's really, really up on things like that.

Larry 36:27

Well, this has been an issue, important to me for a long time. And I can't read into these decisions, what they read into them. And they cited the correct decisions. The Morrisette case from back in

whatever year was in the 50s. And they cited X-Citement Video, and Staples, and all these cases say just the opposite. They say that there is a presumption in our statutory scheme in favor of scienter, which is knowledge the mens rea, and that these things should be in the statutes are presumed to exist, even though they're not in statute unless it's a minor regulatory infraction, that doesn't carry significant consequences. I would say a level six felony, which is probably the lowest level in Kansas, is significant enough that you could lose your freedom. And I think that that would be the presumption that you should there should be some culpable mental state. So, I just don't agree with this decision at all. In fact, I'm going to reach the reach out to the attorney and see if they are planning a cert petition or maybe reconsideration which will do no good with that bunch at that at that Kansas Supreme Court. But it might be worthwhile to take this to the US Supreme Court on cert.

Andy 37:40

Let me let me ask you this question. And I never ever want to like, like, poke at you that you're not an attorney. So how do you present yourself as being like the expert in this field without having the initials and the Esquire and the cot? Like, how do you say, Hi, Mr. Attorney, I see that you have all the credentials in the big high billing rate. But I know my shit, how do you present that to them so that they would take your advice and counsel?

Larry 38:08

Well, Ashley could probably answer that better than I can. Why do people listen to me in New Mexico?

Ashley 38:15

Because Larry knows best, there is nothing else to say about it. He's Larry knows more about registration matters, these laws, he actually takes the time to read the opinions and not just do scans of them and actually understands the rationale behind it. And he spent a lot of years getting to that point. So, he's, I would take his advice on pretty much anything, in fact, I do sometimes. Right, Larry?

Larry 38:43

That's correct. And I think my track record from the Defense Lawyers Association, I've done presentations, not recently since Kathy retired, but I'm, I think, still presumed to be the go to person, I still get inquiries on a regular basis from practicing attorneys. So I think there's still a fair amount of confidence in what I know how I got. That was, what he said was a lot of work. A lot of offering my services for free, popping on the defense lawyer's listserv and answering their questions and offering to talk to them and sending them citations to what I'm saying so that they could read it for themselves. And it was just years and years of hard work.

Andy 39:22

Got it. All right. Anything else here we have a handful more things to cover. And by my clock, we're somewhere a little over 40 minutes, and we have a good little chunk left to do.

Larry 39:32

Let's get out this. This was a sad case. And I'm hoping that that something can be done. I'll have to wait to hear back from his legal team.

Ashley 39:40

Is there a possibility of writing an amicus brief Larry on this?

Larry 39:44

If they're going to do a cert petition? That's what we would intend on doing as we would jump in early rather than waiting. Most organizations won't do a cert petition because the grant rate of petitions is so low and you're expending resources Probably for no good. But something as important as this. I think it might be somewhat persuasive to get to that magic four at the Supreme Court say, Hey, this is a great public importance you need to define once and for all what the boundaries are in terms of when legislators can eliminate mens rea.

Ashley 40:18

I 100% agree, because I think that this could affect a lot of people on a lot of levels. And I do think that this is worthy of impact litigation, or at least an appeal.

Larry 40:29

And we've even got potential conservative support of this. The Rio Grande foundation here in New Mexico, they have spoken consistently about the danger of lack of a culpable mental state. Now it was not because of this, it was because of Unser (NARCAR Driver) getting off a trail. There was a blizzard on forest service land and he got off trail and he got a small citation. And out of principle, he appealed that and challenged the constitutionality. And the Rio Grande Foundation says you should have this in the statutory schemes so we might even have some support from them, or another organization similar to the Rio Grande foundation.

Andy 41:56

All right, well, I'm gonna trip you both up with a question that it just got off a YouTube like an hour an hour before we recorded. And so, this one is could you clarify setting precedents a little bit more? Because I think last week, we covered a case, Larry that they wouldn't do anything unless there was precedent. But how do you have precedent? If no one if no case prior to has? Like there's no precedent to set the standard? So how can you so it sounds like you have to win a case to set precedents. But how do you do that if you can't have your case heard, because of no precedents? That sounds like a whole like the picture with a snake eating its tail, and it's just stuck in a circle eating itself?

Larry 42:35

So? Well, that's a great question, Andy, in terms of precedent, since you have a right to an appeal. And they're when you take it up to the appellate court, of course, they're looking for some citations and authority. But you would convey to them and your brief that there is nothing in existence. And this is a matter of first impression. And Ashley could probably better expand on that. But you would tell them that this is a matter of first impression. But we need this guidance because this is capable of continuous repetition. So that would be one of the arguments you would make asking an appellate level court to be sympathetic to this. And they may still deny you that becomes a precedent from a Court of Appeals. If they say no dice, we're not interested. But that's one of the ways I would argue Go ahead, Ashley.

Ashley 43:18

So, it's really interesting that you say that because from a lawyer's perspective, nothing is worse than trying to find case law that doesn't exist on an issue that you need to bring before a judge. And so, there's absolutely right, you do it under a first impression, or sometimes they'll call it a de novo issue, which is they just haven't heard it before matter of it's the first time they've heard it. But what you see a lot of times in cases that the court will decline to address that issue, because they don't want to be the ones to set precedent. So, it is a very tricky thing to do. But there are in this case, I think there's enough precedent, actually, in the Kansas case, as an example, there's enough precedent to where other precedents can be set. Now, one last thing I want to say about precedent is it's not always good. It can be bad, too. We have in New Mexico, we have a lot of magistrate judges that are not attorneys around the state, and there are very bad decisions that come out of those. And that's what gets appealed. And they set very bad precedent, sometimes. So, it's not always a good thing to have precedent.

Andy 44:25

Okay. Well, thank you for answering that. Both of you. I told the person that it was perfectly timed that we were having a actual real life attorney joining us so that we could get that extra insight on an answer. Um, and then there was a thing you put in there about an announcement from Georgia. Is that where we can go now, Larry?

Larry 44:44

Yeah, you could just read that quick announcement.

Andy 44:45

Sure I can. Today, I can officially state that we have prevailed in the case. At a hearing this morning, the sheriff after filing a motion to dismiss the case represented to the court that he would no longer attempt to place signs in front of registrant's homes without their permission. He has submitted a written policy stating the same. Following that representation, the judge confirmed that Reggie Holden's case would be granted summary judgment in his favor per the mandate of the 11th Circuit. The other side have tried to claim the changed policy mooted the 11th circuit mandate. I assume that came from a particular attorney in Georgia.

Larry 45:22

It did indeed. And that was on NARSOL case against the Butts County Sheriff there was a simultaneous filing against the Spalding County Sheriff, which is the county adjoining Butts, and Spalding settled, and Butts wanted to have their day in court. They had their day in court, and they lost to the 11th circuit. And I'm told that that was probably the most conservative three judge panel that you could have put together. So, they ended up losing the case that he said, I'll take all why the Supreme Court? Well, he didn't take it all the way Supreme Court, and now they're gonna pay out a bunch of fat legal fees

Andy 45:58

I dearl, deeply searched everywhere I could find to try and see if that was actually recorded. Anyway, I could never find a recording of him saying that God, I wanted to find that recording. That would be great to just always have I'll take that all the way to

Supreme Court. Okay, man, knock yourself out there. Okay, and then that's, can I say the attorney's name? Larry: You may. Mark Yurachek is the attorney that did that. And I think that has worked out pretty well for us I think.

Larry 46:27

It has been a splendid success. We got criticism, and there's a particular individual in Clayton County, which is a suburban Atlanta County that said, we were crazy, because we're going to create problems, because his county of Clayton had never done such a thing. And he says, well, all they're gonna do is pass a law where they'll have the authority to do it, because that was one of our arguments. Well see now they can't pass the law, because the 11th circuit has issued precedent that is good for three states in the circuit, Georgia, Florida, Alabama, that they can't put the signs up. So, despite his uninformed opinion, and his criticism, now, we have accomplished something in those three states, and we have something that can be argued as persuasive authority all across the country, from a very conservative court. They still got it right.

Andy 47:17

Hey, and somebody in chat. I this was a perfect segue. Is this like Alex Jones money payout? Like there was a \$46 million dollar judgment against him? Isn't that kind of money?

Larry 47:26

No, it's over six figures, probably. But it won't be that kind of money. It won't be millions.

Andy 47:32

That is just ridiculous. I think he's a terrible human being for saying the things that he said. But that is a gargantuan amount of money.

Larry 47:41

Maybe he'll learn his lesson.

Andy 47:42

Maybe we'll get him to not be a representing on the air, like I say on the air, but he never was on the air. But he's just over on all of the different platforms and but he's Anyway, anyway. And then we received a really quick kind of tongue in cheek kind of comment from Will of Patron.com/registry matters says I was once a friend with a DJ who taught at a broadcasting school. She told me that her pet peeve was training southerners to say Washington as opposed to Wurshington, it's a southern thing Will Said. We should have gotten him to like read that because he has a really thick southern accent. Larry: All righty.

Larry 48:24

Um, can we go into who's that speaker then? Larry: Yes, we can do that. If that's your pleasure. Andy: It is.

Andy 48:29

Well, I want to make sure that we keep this under time because we are short staffed at FYP and you. Are you actively looking for a replacement to do the transcripts?

Larry 48:40

We will be in need of that person because I can't handle that additional indefinitely.

Andy 48:45

I don't know what else you do all day.

Andy 48:54

Actually, maybe you can do that.

Ashley Reymore-Cloud 48:57

No, I'm busy eating bonbons too..

Andy 48:59

Oh, okay. bonbons? Not pot gummy gummy bears.

Ashley Reymore-Cloud 49:04

Like I said they can put it in anything.

Andy 49:08

Alright, well, last week, I played this one.

Mystery Speaker 49:11

I had so much bravado. I thought I was untouchable. Made a lot of money. You know had the big house to fancy cars, the beautiful children beautiful family. When Amy came into the picture. I was full of piss and vinegar.

Andy 49:26

Any idea? Larry?

Larry 49:28

I'm stumped.

Andy 49:29

Ashley, do you want to take a stab? I'm stumped too. All right. So, there was a sex scandal I guess it was probably in the 90s maybe in the late 80s. And like, if you the picture on YouTube this week is the person it's Joey Buttafuoco. And there was this whole thing with an underage but anyway, anyway, that's who that was. That was Joey Buttafuoco. But Benjamin wrote in and thought it was Hunter Biden. And no, that was definitely not Hunter Biden. But I appreciated that somebody sent in a guess but nobody guessed it, which is really tragic.

Larry 50:00

You've got a string of fooling people lately, so keep doing what you're doing.

Andy 50:04

Go me Go me. Alright, so then this week. Yeah, I don't know. I don't even know how to set this up, but and it's short. So, listen to it. I'll play it twice.

Mystery Speaker 50:15

This is crack every time you use I, you risk dying.

Andy 50:20

So, they played that a second time Larry, Ashley?

Ashley Reymore-Cloud 50:27

I don't know who it is either.

Larry 50:29

I don't think playing it a second time will help.

Andy 50:33

He said Nancy Reagan. No.

Mystery Speaker 50:36

This is crack every time you use it, you risk dying?

Andy 50:41

Well, very good. Um, let's see no new patrons, any new subscribers?

Larry 50:45

No new subscribers.

Andy 50:48

And anything else you want to cover before? We Oh, do you want to talk? We have a couple minutes. Did you want to talk about the guy that got the seven years for the person that stormed into the Capitol? I don't think he made it into the Capitol. I don't think he's one of those people.

Larry 51:05

I'm not sure how much time we can spend on it. But I did intend to mention this is an example of what happens when you go to trial. He had an option I'm sure the government always offers pleas, almost always. And he decided he was going to have his day in court to kind of like Sheriff Long. And he had his day in court. And he was sentenced the most harshly of any of the people who have been have had their cases resolved thus far. And Ashley now practices in federal court on some limited level. And she can speak to what happens in terms of the Federal sentencing structure. If you decide to go to trial, that there's just not going to be a good situation. Ashley, what happens when you go to trial in federal court.

Ashley 51:49

Sentencing in in federal court is based on federal guidelines, sentencing guidelines, there's a there's a grid. And if you negotiate, they can usually mitigate it down. So you'll serve less

time but if you actually go to trial, you'll get whatever is maximum in that grid square, which apparently was seven years in this case.

Andy 52:09

The person that we're speaking about is guy Wesley Reffitt. I heard a podcast about this guy, his kid, oh, my sound just went crap again, didn't it?

Larry 52:19

Yes, but his son did report him after overhearing conversations from his dad, as that was about to unfold, and he became concerned about his father's stability. And he interpreted what his father was saying that something big was about to happen. So, he, he turned him in through some app that allows you to report stuff to the FBI.

Andy 52:42

Yeah, he phoned in to the FBI. That's the punishment for going taking something to court.

Larry 52:54

So, All righty, well, I'll stand in here for you since you're all messed up with your sound. So, we appreciate all your support. And if you want to contact us it's registrymatterscast@gmail.com or you can leave an old-fashioned voicemail that's 747-227-4477. And best of all, you can become a patron and I forgot what that address is. It's patreoncom/registrymatters. And you can pick your level I think you can select any level starting at \$1. And you can go up to we're looking for the \$1400 month level. So, if anybody can do that would be greatly appreciated.

Unknown Speaker 53:44

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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
- COMET - Collaborative Offender Management Enforced Treatment Program
- PV – Parole/Probation Violation
- SMART Office - Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking
- ICAC- Internet Crimes Against Children
- SHU – Special Housing Unit
- ICE - Immigration Customs Enforcement
- ACSOL - Alliance for Constitutional Sexual Offense Laws
- ALI - American Law Institute

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