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Announcer 0:00

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Andy 0:16

Recording live from FYP studios, east and west, transmitted across the internet. This is episode 236 of Registry Matters. Larry, I got a bone to pick. We are not supposed to be recording tonight, but you insisted.

Larry 0:28

I don't recall it exactly that way. But if you say so.

Andy 0:32

Well, feel free to offer up an alternate story. Was there anything significant? I guess maybe that would be enough to cover the grounds here.

Larry 0:43

Well, I sent a message to you saying that since we were going to take off for three weeks and this earth-shattering case came out, that we might want to reconsider, and you agreed.

Andy 0:56

I suppose that's a fair way to put it. So I guess we have this Torsilieri case, and we are honored to be joined by Teresa Robertson. With your bio honestly, Teresa, if I read it, that would be the whole podcast just to read your bio. But you are, among other things, including the executive director of Pennsylvania RSL or otherwise known PARSOL. And we wanted to have you on to provide some feedback as boots on the ground in Pennsylvania to discuss the decision that just came out in Pennsylvania. And I'll just add that she's a personal friend of mine and a really great person who I admire greatly. So thank you for coming on on such short notice.

Theresa 1:37

Thank you guys for your interest and for kind of cutting your little holiday a bit short because it is important stuff.

Andy 1:46

Without a doubt, and this has the wires going completely bonkers. The affiliates list, Larry, I'm sure you follow that, has everyone's panties in a wad. And I think Theresa that you're getting at least one or two emails about it.

Theresa 1:58

Yeah. At least.

Andy 2:02

Do you want to just seriously just jump right in Larry and go after it.

Larry 2:07

Let's do it. Because since we're supposed to be on vacation, I'd like for this podcast to end relatively quickly, and we've got a lot of questions and answers prepared, not to mention whatever you may extemporaneously come up with.

Andy 2:21

I do enjoy that part, and we're trying out a new transcriptionist. So we should find all the crazy words to put in tonight so that he has a dickens of a time working it out tomorrow when he does the transcript. Hey, Stefan, how are you, buddy? Well, you people put in this case from the Court of Common Pleas in Chester County, Pennsylvania. It's caused quite a stir in the last few days. We are looking at a case from a trial of a court. And I thought you only review appellate level cases, Larry. This is a criminal case involving a person named George Torsilieri. And that name sounds familiar. Have we done this before?

Larry 2:57

Yes, we have. It was just over two years ago. The case has already gone to the Pennsylvania Supreme Court, and it was remanded to provide the state an opportunity to present evidence to support its assertions that all PFRs pose a danger. On June 16, 2020, the Pennsylvania Supreme Court directed the trial court to analyze further whether the PA SORNA's irrebuttable presumption that all PFRs pose a high risk of reoffending sexually is constitutional, and to analyze whether Act 29 of SORNA constitutes criminal punishment. And they were directed to use five of the seven Kennedy Mendoza Martinez factors.

Andy 3:37

Tell me--you use this word irrebuttable that's not irrefutable. What is irrebuttable?

Larry 3:45

Well, it's the opposite of rebuttable.

Andy 3:49

Okay, that's easy enough.

Larry 3:53

It means that despite what you would come up with, it's the reason there's no reason. It would be akin to like a regulatory violation. If you're speeding, we don't have a requisite mental state, that you know what you're doing, that you were informed, you can claim you missed the traffic sign, it doesn't matter. There's the presumption that if you're going 50 miles

an hour, and the speed limit's 25 that you're guilty. And this registration scheme, despite all the rehabilitation that you've done, all the unique individual characteristics, you're subjected to this registration scheme. And the presumption is you're dangerous, and there's no opportunity to rebut that.

Andy 4:38

And so as I'm thinking about it, I use the vast research network for FYP education and found that it was episode 133 that we recorded, I think it was in March, so almost, it was almost exactly 100 episodes ago for we're at 236. And many were upset that the state was given a second chance to provide evidence. And why, Theresa, maybe you could ask answer this one, why were they given a chance to go back and provide evidence where they weren't the first time?

Theresa 5:10

So at the time, I was one of those people who was upset about it and have since learned that by declaring a statute to be unconstitutional, it's an extreme remedy. So remembering what happened in Colorado, when Judge Matsch declared Colorado SORNA unconstitutional, with little evidence. Do you remember that?

Andy 5:36

I do. And as that went down, they didn't want to spend the money on it, as I recall. So they didn't bring in any expert witnesses. And so it was reversed on appeal. But on the decision for this, it says on page two, our first task is to evaluate the constitutionality of SORNA's irrebuttable presumption that all PFRs, regardless of the personal characteristics and circumstances, have a high risk of reoffending sexually. And so I guess you just cover what the rebuttable presumption is, though, Larry. So can we move along from there?

Larry 6:09

Sure. We can if everybody is clear on it. It just means that the legislature has decreed that if you fall into the zone of covered offenses, that you're dangerous.

Andy 6:21

Oh, okay. So yeah, I'm with you. So alright, let's continue from there then. So we sort of have an idea of what irrebuttable means. How does the court determine if someone is irrebuttable and is it constitutional?

Larry 6:40

Well, according to the court. Now, this is a new argument that I can take no credit for, although I love to take credit for things. But I can't take any credit for this. So whether according to the court whether an irrebuttable presumption is constitutional involves a three-part test. "An irrebuttable presumption is unconstitutional, where (a)--it encroaches on an interest protected by the due process clause; (2) the presumption is not universally true; and (3) reasonable alternative means exists for ascertaining the presumed fact." The court stated

that "our analysis of these three factors leads us to conclude that sort of a rebuttable presumption does not pass constitutional muster." But we're going to dig into that quite a bit as we go through here.

Andy 7:28

All right. And then the court noted that in Taylor versus Pennsylvania State Police of Commonwealth with the attributes that go along with what and where to go find it, a person's reputation is among the fundamental rights that cannot be abridged without compliance with the state constitutional standards of due process. I have a question for you in a minute, Teresa. The existence of government records containing information that might subject a party to negative stigmatization is a threat to the party's reputation. And I've never heard of such a right in the US Constitution. Did I miss it? And that's why I'm going to ask you this. Teresa, Pennsylvania has something funky where your reputation is something that you have a constitutional right to?

Theresa 8:07

Yeah, not funky, so much as wonderful.

Andy 8:09

Right, right, right. Of course.

Theresa 8:11

We're not the only state with reputation, but we are one of only a few. And we owe that to our founder, William Penn, actually. He made sure that got into the Constitution. The Federal Constitution does not recognize reputation standing alone as a fundamental constitutional right.

Andy 8:32

Larry, do you have any further insight on how that would be applied at a handful of states? And I'd never heard of it until we started talking about Pennsylvania. And I assumed that it was the only one. But then how does that not end up to be a federally recognized constitutional right?

Larry 8:48

Well, I mean, the simple answer is because we have not amended our constitution to expand to include that as a basic right and or amending the US Constitution. It's far easier to amend most state constitutions than it is the federal constitution. Therefore, that's why we've had such a small number of changes to the federal constitution and our 240 years or whatever it is, we've been around. What is it? 27?

Andy 9:11

As far as I know, it's 27 amendments. I just find it like completely fascinating that we have that there are some states that have your reputation as a constitutionally protected right, just on its own because I've never considered such a thing.

Theresa 9:24

Yeah, it's my I believe I'm correct in this, but the right to reputation in Pennsylvania was written in originally, it was not an amendment.

Andy 9:36

Right. That's cool. That is really, really cool.

Theresa 9:39

It's very cool.

Andy 9:42

And then moving along. So in the decision it says "not only does this label ruin the chances for a PFR to successfully rehabilitate under Pennsylvania law, rehabilitation being another indisputable aim for penal legislation and an equally compelling interest of policy of the Commonwealth... It catches within its overbroad, suffocating net persons whose crimes may have had no sexual component to them whatsoever." It continues, "Characterizing these offenders and subjecting them to global public shaming is incorrigible, sexual recidivists regardless of the circumstances of their crime, and the fact that these crimes do not require sexual offending, for culpability. For all the reasons above, we find that SORNA's rebuttable presumption that all PFRs pose a high risk of reoffending sexually encroaches on an interest protected by the due process clause, namely, the constitutional right to reputation in Pennsylvania." And I say to that, Larry, I say, oh, my God, this is what the judge had to say in the decision. My question is, then, if the judge can see this and articulate the ideas here, specifically, rehabilitation being the aim for penal legislation, then lawmakers are usually lawyers, or at least legal backgrounds, how do we end up with these laws that keep going and going and going like the Energizer Bunny?

Larry 10:53

Well, first of all, I'm not sure that it's that clear in other states that rehabilitation is the goal, one of the goals of, of the criminal justice system. But because these laws are supported by the people, which means that the legislatures will continue to enact them until that support changes. To go a bit deeper. This is the first state I'll recall where there is a right to reputation in the state constitution. Teresa's just told us or some others, but I was not aware that. In addition, this is one of the best developed cases I've seen in my 20 plus years of working in the legal arena. I mean, they've done an amazing job. Now, let's be clear, this has been a 10 year fight. And they've had plenty of time to perfect their argument. And largely this is being funded by public dollars, because the Defender Association of Philadelphia is leading the charge as far as far as I know this, but this is great work.

Andy 11:49

I have this conversation with people somewhat regularly. And it's really no fault of their own. But they think that, oh my God, there's this egregious thing done, there's a something done to someone that we need to fix this, and oh, my God, I should go knock on my legislator's door, and we should be able to get

this thing solved. But when was the original case of the Torsilieri thing? When did this all begin? And you said a decade ago?

Larry 12:11

That's correct. It was actually passed in 2010. And then it became operational operative in 2012. And then litigation shortly and sued shortly thereafter. And there have been a number of decisions in the intervening 10 years, and there will be more. This is not the last decision there will be. There will be more litigation. It may stretch on for another five or ten years.

Andy 12:35

I just want to just point out that the Packingham case went on for quite some time before there was that decision, and I'm just just trying to lay the grounds that these things take a while for them to go through all of the machinations that they need to go through. So it appears that the judge understands, and she said SORNAs irrebuttable presumption concerning PFRs heightened future dangerousness as a cohort indisputably encroaches upon a person's fundamental right to reputation under Article One, Section One of the Pennsylvania constitution. That sounds like that would be at the very top of it, Larry. Like, as Theresa said, that's not an amendment, that's baked into the cake. And SORNAs irrebuttable presumption, unduly stigmatizes persons convicted of committing sexual offenses, a class of crimes that covers a wide spectrum of conduct and does so without any consideration of individual characteristics and circumstances. Wow.

Theresa, do you have anything to follow up with that?

Theresa 13:33

Nothing. Nothing more than happy dance. You know, we've been doing that most of the week. The language and the the strength of the the judge's comments, and it has has just been Oh, my God, a huge relief. Finally, we're hearing what we've been talking about forever. Right?

Andy 13:56

Sure. Well, Larry, continue, please.

Larry 13:59

The court also referenced an affidavit from Professor Elizabeth Letourneau, who stated that a person convicted of a sex offense subject to SORNA will likely experience difficulty in finding housing, employment, education, establishing pro social relationships with others--three factors described by experts as the most important factors contributing to an offender successful reentry into society and maintenance of a law-abiding lifestyle. That is powerful. But just I mean, I don't want to rain on anybody's parade. But the judge actually didn't write this decision. I mean--

Andy 14:31

Come on, stop with that. You said that Governor Whatyoumaycall it, the AG in Michigan, she did right to thingamajigger that came out. Why do you do that?

Larry 14:39

Well, I'm just letting people know how it actually works. So at the conclusion of the case, the judge would have asked both sides to prepare a proposed order. They would have been submitted to the judge in word form, and the judge would have massaged and picked who the winner was and what to use. This is not to say the judge should be diminished because the judge could have picked the state. Most of this was written by their attorneys who represented the defendant. The large majority of this was not written by the judge, but it's great stuff nonetheless.

Andy 15:15

All right, and the state put forth their usual specious arguments. They asserted that offenders would experience these stigmas anyway, by virtue of their public record convictions for PFR offenses alone. The Commonwealth also suggest that every offender, whether they're guilty of committing an offense, or some other type of offense, experiences the same stigmas as a result of their conviction. To that, Larry, I have to just completely laugh and say, what a bunch of BS.

Larry 15:41

True. The court gets that and noted that non-sexual offenders were not placed on Public Registry, are not subject to public notification about almost every aspect of their personal lives, which is one of the things I have said for years. That if it were just your conviction, but it's not. Every aspect of your personal life, even if their offense was a serious violent crime, we do not place murderers on a registry nor do we placed offenders, such as those convicted of aggravated assault, or other violent crimes on a registry, regardless of how many times or how egregiously they offend.

Andy 16:15

And the court continued and says no matter what their propensity for violence may be, we do not label them or published to the world that they are, quote, unquote, high risk of committing additional violent offenses. The special stigma associated with the registry requirements is the express accusation in the legislative findings that everyone convicted of a PFR offense presents a high risk of sexually reoffending. You work in the legislative area, Larry. Can they make that finding?

Larry 16:43

Yes, they can. And they can do it to they're stopped, and I'll expand a little bit more. I thought you'd probably not appreciate just that. But the legislature can find anything they want to. And this will not change that. They can continue to find whatever they want to. They can find that when you get to the edge of town, that the world is square, and that you'll fall off at the edge. If they want to. And they can put that in

legislative finding. There's no court in the world that can stop them from doing that. So they will continue to have findings. But in this particular case, their legislative findings encroach on constitutional rights that are recognized in the Commonwealth of Pennsylvania. But they will continue to come up with these boilerplate legislative findings. They're submitted to the states by the National Conference of State Legislatures. And they don't drink this stuff up. They tell them here's your model proposal for this type of legislation. And here's your preamble, and you're literally findings. And that's what they used, and they will continue to do that.

Andy 17:42

I had a question. And then like, left my brain, right, I had something very, very clever to say to you, and it's probably gone now. Oh, wait, I know. So if this is something that is baked into the cake of the Pennsylvania Supreme Court, and it is not a thing recognized by the Supreme Court, the Federal United States Supreme Court, then wouldn't this just like be a non-starter right at the start? So it would only apply to Pennsylvania, and then possibly the other states that have similar language in their constitution. Like this is just dead--it doesn't apply to Georgia or other states like that.

Larry 18:12

I wouldn't say that in its entirety. I would say that in terms of partially, you've got the rebuttable presumption that is universal across the country, as far as the registry's scope. The reputation component, or the handful of states, if Teresa knows what those states are, I don't, she can chime in here. But what's going to be more problematic. Because if I start arguing under Georgia court that you have this right, they're going to say, what kind of wacky weed are you smoking? But if I go in and I start arguing, hey, the Pennsylvania Supreme Court, which we hope they affirm this, the Pennsylvania Supreme Court has written this beautiful opinion about irrebuttable presumptions, and you should consider that persuasive. That will probably be worthwhile around the country. But the the right to reputation, it's going to be a lot more difficult, except in those states that have such rights.

Andy 19:09

I believe that we're going to cover that more detail as we move forward. Because when you went to court, you were presumed innocent. So after your conviction, shouldn't you be presumed innocent of other crimes going forward? You shouldn't just be assumed that you're like this walking around volcano that's ready to blow. But that's I think that's what you're describing.

Larry 19:29

That's what we're describing? Yes.

Andy 19:31

All right. Let's get to the second prong of the three-prong test of determining if an irrevocable presumption is true. The judge said the evidence presented to this court demonstrates that it is not. The court noted of the two experts retained by the defense to opine on the issue. The third James J. Prescott, PhD

was retained to discuss the efficacy of SORNAs registration and notification provision on sexual recidivism. And then Dr. Karl Hanson asserted that research has shown that 80 to 85% of PFRs, do not reoffend. And Dr. Letourneau asserted that methodologically rigorous research studies indicate that 80 to 95% of PFRs will not reoffend sexually. That's powerful data. Theresa, can you go along with that one and help us a little bit more?

Theresa 20:25

Absolutely. And none of this is new news. These findings have been available for decades. And these particular expert witnesses are just real leaders in the field internationally. So basically, the state's main opposition to the defense experts opinions regarding sexual offenders, low rate of sexual recipient recidivism was this phrase called "The Dark Figure" of sexual crimes. And this is an article that came out a while back about the dark figure of sexual offending. Basically, the author's tried to argue that there's a difference between the number of sexual offenses that occur, but are never reported, and those that are known to the authorities. And they asserted that the number is much higher because of the underreporting. Bottom line being that the defense experts, nonetheless, demonstrated that 80 to 95% of all sex offenders or people who've been convicted of a sexual offense will not reoffend. Consequently, the court found that SORNA--and I never say this, right, I always want to say irrefutable--but I know it's a irrefutable presumption that all sex offenders are. And that all people who have offended sexually pose a high risk of sexual recidivism is not universally true. Therefore, SORNA violates the second prong.

Andy 22:13

So and that matters coming from your mouth, because you are a PhD, at least in a related field, correct?

Theresa 22:21

Yeah. Well, yes, I have I have a PhD and my dissertation research was focused on providing mental health services to persons on the registry, to help them to overcome the negative psychological consequences of being on the registry, right. It wasn't about SO specific treatment. So as a result, I did an awful lot of research. I'm very familiar with the research that was used in this case to clearly state that no, the myths that everything has kind of been flying on for so long is just not true. To use your eloquent term,

Andy. It's BS, right?

Andy 23:18

Right. Right. Right, right. I don't care if you cuss. I mean, this isn't a kid's program, as much as Larry wants it to be a kid's program. And also doing this work that you read, you learn that any time you see the actual S.O. word written out, you just immediately go PFR. Every time I see it, I say PFR.

Theresa 23:35

Yeah. If I could interject quickly, I just want to say that with this whole "dark figure" thing, Karl Hanson did a phenomenal job of

pretty much blowing up the argument that this dark figure of sexual recidivism was something that we needed to take care of. He pretty much blew holes in the assumptions that were made in this paper.

Andy 24:13

Yeah, I'm with you. If you inverted the whole argument, if you brought forth the numbers that they say actually occur of the people that are abducted off the street, we would have population decline from all the children that are missing. And I don't know where they would go. You would eventually start finding them somewhere, but they're not being abducted by aliens. Right? So but it is really easy for the 5 pm News or 6 pm news to go, well, there was another one. But 99.9% of those are found, and it was Uncle Johnny that picked them up from daycare. And that wasn't communicated properly. And oh, whoops, that was a mistake. But they don't report the other side of it on the news. And so Larry, I'm gonna end up directing this at you and kind of poking fun at you, but I suspect that this is outside of your expertise. But I want to highlight it anyway because you know--science. It says that the state produced an expert report and testimony of Dr. McCleary. He attacked the research that was discussed by doctors Hanson and Letourneau, and Prescott. But the research is peer-reviewed and conducted by well-respected experts. Peer Reviewed is the process by which other people in the field go punch holes in it and twist it around like a Rubik's Cube, they test it repeatedly. Why would the state bring forth expert testimony that seems to detract from that individual's credibility? What would be their method of seeking out expert testimony? Like how would they determine who they're going to do? Is it like a skill? Is there a Crackpots Anonymous perhaps?

Larry 25:40

Well, I wish I had been privy to this. But what happens when you go looking for experts is you have the universe of experts that are out there. And it's very hard to find experts to carry the state's argument. So I suspect my guess is that they did the best they could, and they found these experts that were not difficult, I should say, to challenge their assertions. I mean, they discredited themselves. But the other alternative was to have no expert at all. It is to contest or not contest but concede the point. They're not going to do that.

Andy 26:16

But I mean, even

Theresa probably spoke. This goes to you if have you been ever asked to be expert testimony in your field?

Theresa 26:24

Actually, no.

Larry 26:25

I thought you were asking me. I have been.

Andy 26:28

So you have been. So the prosecution and defense they're looking for you, obviously to support their side. Have you ever

been called by the other side? And you're sort of asked to support their side, even though that's not what you believe?

Larry 26:44

I'm not understanding the question.

Andy 26:47

So if you are, you are a defense kind of oriented person. But if a prosecutor asked you to come testify, an expert in whatever, and I don't really have a great example to articulate for you. So I do computer security work. And if they asked me to articulate evidence, and an almost like, botched truths, just to support their claim, and they're gonna pay me some, I don't know, five or 10 grand. I mean, like, do you go ahead and do it against your own name and your credibility?

Larry 27:17

Yes, I understand the question. People would do that. Everything has a price. You can say we do the same thing. Let's say we're trying to put forth a diminished capacity defense, or trying to put forth mitigation, even if we have inserted a diminished capacity offense. We might go out and talk to a couple or three mental health professionals. The first two may tell us Nope, I can't get you where you're trying to go. No, I can't help you with that. And we finally get to the third one. So here's what we're trying to go. We're trying to make the connection that the child abuse that happened when our client was between the formative years of 13 and 17, has a direct correlation to the difficulty that they're experiencing today and that it's eminently treatable, that it's not something that they are stuck with for life. And what we find the person that says, yes, we can get there, of course, that's the one we hire. So the state, the state would have done the same thing. They would have been looking for someone that could get them to the point they were trying to be with their testimony.

Andy 28:17

I gotcha. I guess we can probably move along to the third prong of the test. There is a third prong. Right, Larry?

Larry 28:26

There is, and that is whether a reasonable alternative exists for the state's objectives. The court stated that it did not have to determine that prong. I'm quoting now, "we need not only rely only upon defendant's experts." However, in the case of Inre:JB and the citation is 107, A.3d. 1 in 2014. "The Pennsylvania Supreme Court found that the reasonable alternative of an individualized risk assessment was available, and indeed, is used in SORNA with respect to sexually violent predator assessments and assessments for adjudicated juveniles. The court concluded that "SORNAs irrebuttable presumption that all PFRs or high risk dangerous recidivists does not survive scrutiny under the three prong test for constitutionality." And then they cited a case of Peake versus Commonwealth.

Andy 29:24

I also noticed state also suggested that because convicted offenders have had a trial, they have been given ample notice that they face being labeled as a dangerous recidivist. But Teresa, what do you think about them saying that anyone who went to court now you have been on notice that you may end up with this as part of your conviction?

Theresa 29:45

Well, the court responded that this argument ignores the fact that individuals are presumed innocent until they are found guilty by proof beyond a reasonable doubt. In certain sexual offense trials, facts can be murky and most often there are no independent eyewitnesses. So the trial itself gives a criminal defendant no effective opportunity to contest future dangerousness. That is not an issue in the guilt determination phase.

Andy 30:17

I don't think no one goes to court thinking, Well, gosh, okay, so I'm gonna do my five years, pick your time, don't care. And then I have to worry about in the future. People just think that they're going to do their time they're going to do their probation, they're going to get off, and they'll move forward. Nobody thinks about how am I going to be labeled going forward? Larry, no one thinks about that part of it.

Larry 30:38

Absolutely. And what would have happened if a defense attorney--of course these are 95% resolved by plea agreements--but if the defense attorney had there been a trial, in a particular case where there was a trial, and the defense attorney had said, I want to put on evidence regarding the issue of the registry, and whether my client poses any threat to the community. The prosecution would have jumped up, and they would have turned that their table practically upside down. And they would have screamed at the top of their lungs, "Objection, Relevancy." The first thing they would have said is "objection to relevancy." And the court would have sustained that objection, because it wasn't relevant for the guilt or innocence. So this is a great argument that was put forward, and the judge accepted it because it would not have been allowed, you would not have been able to go there.

Andy 31:30

And "finally, we do not invade," this is a quote, "finally, we do not invade the liberties of citizens based on crimes for which there is no proof. Similarly, we do not restrain people's liberties based on future conduct that has not yet occurred. SORNA, as written does both of these things." You, Larry, as a quick little aside, we totally need to watch the movie Minority Report, because this is totally Minority Report. In that movie, just really quick, you are convicted of crimes that may have that are predicted to happen in the future by these like overseer people. But anyway, so you have to run around and you're like, you get arrested because you're going to commit a crime and an hour from now. Like I didn't commit the crime

yet. Anywho. That's what this sounds like to me. And this statement is the whole PFR industrial complex in a nutshell. It's shitty when people have things done to them or taken from them. Those would be the victims. But and when caught, people are punished. Do you have any level of explanation as to why we continue to think that these laws are effective and ultimately will pass the muster with the courts?

Larry 32:31

Well, they have consistently passed the muster of our courts for a number of reasons. Some of the reasons are due to bad strategy by the attorneys. In terms of whether they work or not, that's a matter for the public to decide, as I stated countless times, public policy can be ineffective. It's not whether their public policies effective or ineffective, that doesn't render it constitutional or unconstitutional. We have absolutely the right to have ineffective public policies.

Andy 33:01

We have that right?

Larry 33:03

We absolutely have that right to pass ineffective public policy.

Andy 33:07

Uhm,

Theresa, do you think that we have a right to have an ineffective public policy?

Theresa 33:12

Well, apparently we do, because we certainly have embraced ineffective public policy, in not only in this arena, but in many. That's just my opinion.

Andy 33:25

But when that goes, we are a government at the federal and state level of government for the people by the people. So we the people elected the people that make the laws that interact with us. And so it is ultimately our fault for making these laws.

Theresa 33:40

Theoretically, yes.

Andy 33:42

Theoretically. Okay. Larry, let's move on to your favorite part of the Kennedy Mendoza Martinez factors. Can you quickly? Yeah, can you quickly tell me what the Kennedy Mendoza thingamajigger is?

Larry 33:54

Well, sure, there are five.

Andy 34:18

Actually, there are seven.

Larry 3:20

Yeah, there are seven tests right. In this case, the court is only looking at five of them. But there was a case in 1963, US

Supreme Court--Kennedy vs. Mendoza Martinez. And it was articulated by the US Supreme Court of seven factors to determine whether something has been labeled as civil and regulatory, whether or not despite that label, it is in fact punishment. So those five relevant factors as they apply in this case are--one, whether the requirements involved an affirmative disability or restraint, which is my favorite; two, whether they have been historically regarded as punishment; three, whether the operation will promote the traditional aims of punishment, retribution and deterrence; and four, whether the alternative purpose to which they may be rationally connected as assignable for them; and five, where the requirements occur excessive in relation to the alternative purpose assigned.

Announcer 34:54

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Andy 35:42

So in the decision on page 19 or so, depending on how you load the document up, but somewhere around there, I'm reading the first block and they're comparing tier three SVP types to tier one and two and sorry, Larry, but it's a lot of comparing to this and that and back and forth. Would you please help break it down? I realized the conclusion is that it would appear that Pennsylvania SORNA imposes a disability and restraint. I don't think there's any argument or question on their part. But what else did they conclude?

Larry 36:08

Well, they concluded a lot of things.

Andy 36:28

Yeah, right. I know.

Larry 36:29

So but in this instance, on the tiering, the court clearly understands the game being played by the state. Tier one offenders who are required to register for 15 years, they will never be able to challenge their status. Because they're not, they have, you can't do anything until 25 years where you're all on for 15 years. So you can't file anything. And then the tier two offenders, they're only for 25 years. So it's that provision is useless for them. And then the court recognizes for the tier three offenders, they will have to bear the added stigma of being labeled high-risk dangerous during the most productive years of their lives with no opportunity to avoid the prejudice that comes with this distinction, and no opportunity to address

it before the deprivation of their constitutional right to reputation for a period of time that could easily extend beyond the maximum sentence for a given offense. I mean, this, this is powerful. This is really, really powerful. Because I think this part can transfer to other states. You've got to save deprivation, and these removal processes are meaningless if you can't, if you can't use them. Basically your life is over with if you're 30 years old.

Andy 37:23

Yeah, exactly. I was just gonna say if you're 30 or 40 or 50, and you have 25 years, you are pretty much done by the time you get off.

Larry 37:44

Sure.

Andy 37:45

Um, the second factor whether the registration and notification policies of SORNA have historically been regarded as punishment. What did the court conclude there, Larry?

Larry 37:42

The judge stated the Pennsylvania Supreme Court held that registration and notification and provisions of SORNA have historically been regarded as punishment, a finding of that the Court recognized weighs in favor of a determination that SORNAs registration notification provisions are punitive, notwithstanding the legislature's intent to effectuate a civil regulatory scheme and concluded that we are bound by this determination. So this is the trial judge saying, I'm merely relaying what my bosses have told me, they've already determined this. So here you are. So it didn't require a lot of analysis on the second prong.

Andy 38:20

And then for this second test to continue, though, they said that the notification policies of SORNA have historically been regarded as punishment. Forgive me here, but the whole reason we have them is that they, quote unquote, aren't punitive. What's the harm in telling law enforcement that we live here or there? They aren't punitive? They are to enhance public safety. But whatever. Can you explain that to me, please? Not really. All right.

Larry 38:49

Maybe, maybe

Theresa can, but no, I can't explain it. I have never figured out how that you can be forced to do things that you would prefer not to do and give up information that you prefer not to give up. And you can have all these restrictions placed on your life in terms of disabilities and restraints. And you can come to a conclusion that that doesn't violate the constitution. I've never understood that.

Andy 39:17

Very well. On the third factor, the court said "we are required to examine specifically whether the operation of SORNAs

registration and notification provisions will promote the traditional aims of punishment, retribution and deterrence, we find that this factor weighs in favor of the conclusion that SORNA is punitive." We are already there at three of the five factors that weigh in favor of punishment. So I'm thinking and literally Larry only honestly made it to four and they were all listed as punitive. So what do you think, where are we going from there?

Larry 39:49

Well, the court stated that based on our analysis of the third factor, we find that service registration and notification procedures do promote the twin aims of criminal punishment. That is retroactive on deterrence and therefore weight an equal importance with the other factors we're required to consider in favor of conclusion that SORNA is punitive. Now, again, if you have a civil regulatory scheme that's not intended to do those things, let's use the restaurant. The long term listeners have heard me talk about restaurants in the past, because that's truly a civil regulatory scheme. When they, when the authorities tell you that you will keep your food temperatures at this level, you will have your parts per million for your sanitation at these levels. There is no intent for that to be punitive. That's intended to promote public safety so that there's not spread of foodborne diseases. Now, you can be punished if you don't do those things, including downgrade of your restaurant operation, notice to the public that you're not fully operating within safe parameters, and including suspension of your permit. But none of that is intended to be punitive. The court is recognizing that these things that they're imposing on people have traditionally been used as a part of deterrence. And that is not permissible in a regulatory scheme. You cannot, you have to tell the victims advocates, sorry, victims advocates, we cannot inflict punishment. We know how much you hate these people. But if we're going to have a civil regulatory scheme, we cannot let it go beyond what the courts will recognize as being being non-punitive. And us, what we're doing now is clearly inflicting punishment.

Andy 41:34

The fourth factor begins around page 22. And this one is particularly interesting to me. And I'm sure very uninteresting to you, Larry, in in talking with you all of these years. I get it when you say that public policy doesn't need to have evidence to back it up. It's just simply that the public wants it and get it. In this block for several pages. There is the conclusions by doctors Prescott and the attorney and they're pretty profound. But it's all sciency, Larry. It's all about evidence and using statistics and whatnot. But it's very interesting to me. The fourth factor is whether an alternative purpose to which they may be rationally connected is assignable to them. What did the court conclude in that one?

Larry 42:15

Well, the court concluded while there is unquestionably a valid purpose to SORNA that is unrelated to punitive effects, the defense provided evidence indicating that the relationship between SORNAs registration notification requirements, and

the public protection aspect of SORNA are not rational-related, and that's on page 22 of the opinion. So I hope people go read that. But you're right, there's quite a lot of explanation about this.

Andy 42:41

Theresa, what do you think about the rationally-related part?

Theresa 42:44

So when I read that word? I mean, that's what we're all about. Right? We got, you know, Pennsylvania, as far as well, rational, right? Rational sex offense laws. Same with NARSOL, you know. It's like, music to my ears. Right?

Andy 43:00

And what about them? I didn't take a whole lot of notes specifically, where they were talking about their blocks and the statistics and tell me about like, there was a whole piece in there about a meta analysis that if there was just one or two studies, maybe we could have some expectation that there's flaws in it, but not with all of them.

Theresa 43:21

Right? Yeah. And that's, I mean, this is robust research. We don't, we don't prove anything in our research, right, we have findings that are interesting. We might find associations, we might, you know, have a clinical or trial that, you know, is set up in such a way to minimize confounded factors. But really, what we need to do in order to feel really solid about our results in social science is to replicate the findings repeatedly over and over again. And that's what gives it power and strength. And this has been happening. We have over 25 years of research in this area that has been replicated repeatedly in very robust ways.

Andy 44:30

So the value of the expert shines here. Dr. Letourneau discussed multiple studies demonstrating that the registration and notification procedures of SORNA do not appreciably reduce the rate of recidivism. They hinder rehabilitation by impairing housing, employment and prosocial relationship prospects; and divert community resources from the offenders who would most benefit, ie those who have a high likelihood of reoffending; are very costly to maintain; and result in a bargaining down of registerable offenses to no register role ones, all of which jeopardize public safety and welfare purpose espoused by the legislature. Larry?

Larry 45:08

Gee, it's hard to say much about that other than, indeed it's true. Well, we're negotiating, please. We're looking at is every possibility to lead someone down to something that's not? Yes, trigger registration. And they may have committed a sexual offense and the evidence is not particularly strong. And with all the prosecution, hey, if you want a conviction, you're not going to, you're not going to get it unless it's an unregistered offense.

Andy 45:28

And does the DEA, the DEA probably doesn't care he gets to check or she gets to check off a box saying I got a conviction, whether it has all this other baggage that goes on the backside.

Larry 45:43

Sometimes that's not true because of the public pressure of a high-profile nature case. Or, if the person is connected in a way that they really don't have that luxury. But you're correct, generally speaking, if the case is weak. Now, if your client signed a confession, and say, made the case airtight for the state, there are a lot less negotiable. But if they have a case with holes in it, that gives us more latitude to negotiate with the state for something that will go to person, but not registerable offense. So that's what we go for.

Andy 46:15

Right. I gotcha. The court concluded based on the evidence of scientific and academic consensus presented, we find that SORN laws do not have the effect on recidivism and public safety anticipated by the legislature and that they are not rationally related to the purposes for which they are enacted. Thus, the fourth factor, we have been directed to analyze ways in favor of determination that SORNA is punitive. Only one factor to go, Larry, what is that factor that's left, Larry?

Larry 46:48

Well, it's the fifth and final factor that the court is required to consider whether the requirements appear excessive in relation to the alternative purpose assigned. Unfortunately for the state, the court was not persuaded by the arguments on that one either.

Andy 47:02

While I'm not surprised by this, so the court stated in the fifth factor, "our analysis of this factor yields the same conclusion reached with respect to the preceding four factors. SORNA registration and notification requirements are excessive in relation to its nonpunitive purpose of protecting public safety. SORNAs registration and notification policies are based on the title of the offense, not the personal characteristics and circumstances of the offender. They do not take into consideration the actual risk of any particular defendant to offend in the future. The title of the offense bears little relationship to the question of whether a person subject to registration will recidivate." Slam dunk, it would appear. Theresa, tell me, like are there? Are there predictors for people to commit offenses? Reliably.

Theresa 47:45

Well, yeah, I mean, there certainly are predictors that, you know, have strong psychometrics. There are instruments, there are actuarial instruments that have strong psychometric properties, and can be relied on in terms of assigning risk. Certainly not going to predict if someone is going to but certainly can predict if their risk is elevated.

Andy 48:20

Okay. I don't know if this is a fair question, and I hope I articulated it well. When you say it assigns a risk level, are we talking about this person is a 5% 50%? Is it articulated that way? Or is it just low, medium, high?

Theresa 48:30

Yeah. So um, so different actuarial instruments will have different assignments. Dr. Hanson who was one of the one Torsilieri used, the expert witnesses actually has one of the most well used actuary actuarial tools, probably most folks who listen to this program have heard of it, the Static 99. And in that instance, there are five levels of risk. And we also know from Hanson's research that it's really important to reevaluate because that risk risk changes over time. Almost everyone--

Andy 49:23

That's totally where I wanted to go with that. So if you commit your crime, when you're 20, pick an age. When you're 30, you would have a different evaluation. And when you're 70, you have something completely different. You'd be a different person almost by that.

Theresa 49:32

That's right? And Hanson's research indicates clearly also that, that when your risk is at a certain level when you leave prison, that there are many folks who are low risk, right when they leave? At the time they leave prison, they are not much more likely to commit a sexual offense than anyone else on the street. None of us had zero risk every one has some. But, you know, the bottom line is, you know, if you get out of there with a level one, you're not likely at that moment you step out the door, you're you're not likely to commit another sexual offense any more than anyone else. If you get out of there with a risk of a level two, it's really pretty incredible. Even folks with high risk within 20 to 25 years are down to a minimal risk.

Andy 50:37

I thought I'd heard somewhere along the way, and maybe this is just for the lower or maybe even tier-two kind of folks, that after somewhere around five-ish years, like you're background noise.

Theresa 50:47

Yeah, pretty much. Yeah, there's this depending on whether you're, you're coming out with a level one, level two, level three, 4A, or 4B, it's going to be five years, 10 years, 15 years, 20 years, right. So as you age, this is time in the community offense free. So the you know, five years, offense free. So you you have a certain percentage who come out and their risk level is a one. So they're they're down at that they're down there with you and me at you right away, anyway. And then there's folks with a risk level of two, they're going to need to and I forget what the exact is, it may be 5-6-7 years in the community risk-free. Level three, you know, they're going to be needing to be in the community, offense free for a longer

period of time, before they get to that place where their level of risk is the same as anybody else walking down the street.

Andy 51:47

So if you would do me a favor, Theresa, and maybe you won't. But you have been receiving questions from people to the PARSOL mailbox. If if you want to collect maybe one or two of them. I'm going to ask Larry a final question. If you have anything that you want to poke at Larry with then I think that would be great to close things out.

Theresa 51:52

I'm sorry, I've been receiving mail like now, during this?

Andy 52:05

Well, not necessarily at this very moment. I just, I knew that I received mail to the mailbox. And so if there were any, any points that you wanted to throw from the community at large. But so Larry, when, what, one thing that seems strange to me is, if I understand this, this went to the Pennsylvania Supreme Court, and they kicked it back for this extra evidence to be brought into the fold, and then it's going to go back there? I don't quite understand that policy procedure that it would go up and then come back down. And to go back up again.

Larry 52:39

Well, I don't have an absolute guarantee it would go back up again. But I can almost guarantee it will. Because it's basically going to result in a statute being declared unconstitutional. Unlike the social security guy that tells people what they want to hear, I can't bring myself to do that. They are not going, they're not going to allow this to stand without a challenge. So they're going to file the Intermediate Court that's going to go on to say, Hey, this is not for us. And it's gonna go back to the highest court of the state. And now they have a full evidentiary record. They have what they need to make an informed decision. And we're not likely to end up in the same decision, we ended up with Judge Matsch in Colorado, where he did what he did because he was 85 years old and at death's door. And he felt like that I don't have time to wait for evidence to come in. And I'm gonna declare this thing unconstitutional. But it's going back up again, for review. But this decision is solid. The evidentiary record is solid. The previous decisions are solid.

Theresa informed me, that it's the same justices that were sitting in 2020.

Theresa 53:52

With the with the exception of one. I was mistaken, when I talked yesterday, but there's one new judge or justice.

Larry 53:58

But it's not likely that that one is going to change the entire court unless they are extremely persuasive. So I'm looking for a favorable outcome at the state Supreme Court. But I cannot imagine that they will just roll up their sleeves and say, We're done with this, and throw up their hands and quit. They're not going to do that. So they're going to take this back up with the

Supreme Court again, it would be my guess.

Andy 54:20

Larry, I think you say those things specifically so that we never have to shut down registry matters.

Larry 54:27

I don't think there's any danger of us needing to shut it down.

Andy 54:31

You think that we're gonna have stupid laws in perpetuity?

Larry 54:34

I think that's quite likely, since the origin is from the people themselves. And since the people themselves are largely uninformed, I don't expect that to change anytime soon.

Andy 54:42

Fair enough.

Theresa, did you happen to find any or do you have any questions that we didn't cover in here?

Theresa 54:49

I mean, the bulk of the questions that we've been getting are really related to what does this mean for me?

Andy 54:56

Right, of course, of course.

Theresa 54:58

And they and they, those questions, everybody's situation, many situations are very different. So at this point, it's important for people to understand that at this point we need to wait for this year or so, until we hear back from, from the Supreme Court of Pennsylvania before we can answer many of these questions. Right now, this ruling applies specifically to Chester County. If there are folks in Chester County on the registry, they may want to contact an attorney and discuss filing a PcrA. And, and I think that's about it in terms of what folks might be able to do right now to get relief. The rest of it, everything else is just going to have to wait. And we'll continue to follow what the Supreme Court does. There's also been some misunderstanding. Folks want to know, is this going to be appealed? Well, it's not going to be appealed, because it was already at the Supreme Court. And I think Larry talked about this early on, you know, if the Supreme Court remanded it back to the lower court, so now it goes directly to the Supreme Court for their input.

Andy 56:24

And that Scope, right? The Supreme Court of Pennsylvania. I keep calling it Scope because it just sounds funny. So that is, that will be the final question. I suppose, Larry. That this only applies to that county. Does it apply just to Torsilieri? Does it apply to Pennsylvania? What does it apply to?

Larry 56:37

I'm not even prepared to say it applies to beyond Torsilieri? It does. You certainly could go into a court in that county and make that argument and cite that particular judge. But it would be my opinion, right now, this is just a law the case applying to this case, but I'm not a practitioner in Pennsylvania. So I'm not certain of that. But I would be very reluctant to tell people that they can seek any relief, but it's certainly a good question to pose to a legal professional in that particular county, Chester County.

Theresa 57:16

Exactly.

Andy 57:20

Do me a favor

Theresa. So how can people find you find PARSOL and all of the things like that?

Theresa 57:15

So we, and particularly to follow this case, we have Q and A, all kinds of information about this. Go to our website, which is parsol.org. p-a-r-s-o-l.org. You can also find us on Twitter. We have a YouTube channel. And I think there's something else these days. We have so many wonderful technologically savvy volunteers at the moment that there's plenty of information out there.

Andy 57:55

Very cool. Larry, do you want to do our Who's That Speaker? Do you want to just wrap it up? Do you want to--

Larry 58:00

Let's wrap it up? We've got a lot of stuff that we've covered tonight. And we're at an hour and so we will return to "Who is that Speaker." And the transcripts, the people who get printed transcripts, we apologize you didn't get any for a couple of weeks because we didn't record. I will probably extend your subscriptions by one month because we missed another episode. And we're probably going to miss Labor Day weekend. So I'll give everybody that's a paying subscriber to transcripts probably an additional month to compensate for missed episodes.

Andy 58:31

And I'll pile on top of that, that we had to take some time off. There was a whole lot of complication. Obviously, you were grieving from your loss, and work's crazy. My work is crazy, and so forth. So we had to take some time off. I'm not really the best at notifying everybody, but patrons got notified. I will tell you that. So there's a hint, hint, wink, wink, nudge, nudge, nudge nudge to become a patron, which you could do over at patreon.com/registry_matters. Larry, we did get a new patron. And I'll just tell you that. So Kyle a couple of weeks ago, right, right before we took off, became a new patron. And I very, very much from the bottom of my heart, thank Kyle for becoming a patron. And that'll be about it for the program. Theresa, as always, you are more than welcome to come along.

I love hanging out with you. And you're a special person. And I bid you a super fantastic evening.

Theresa 59:18

Yeah, same to you, and so nice to be able to talk with you and Larry again.

Andy 59:23

Beautiful. Larry, I hope you have a wonderful night. And I hope you stay out of trouble. And I don't know--is it still hot out there?

Larry 59:30

No, it's actually very mild in the mid 80s. Nowadays.

Andy 59:35

Fantastic. Perfect, perfect and 10% Humidity 5%?

Larry 59:38

Something like that.

Andy 59:40

Well, very good. Thank you everyone for joining us. And we will talk to you at least in two weeks. Maybe I don't know if there'll be anything on Labor Day weekend. So see you in a couple of weeks, guys, and have a great night. I'll talk to you soon. Good night.

Larry 59:58

Good night.

Theresa 59:59

Bye.

Narrator 1:00:01

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