



**Episode 238**  
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Announcer 00:00  
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Andy 00:18  
Recording live from F.Y.P. studios, east and west, transmitting across the internet. This is episode 238 of registry matters. It is 238, is it?

Larry 00:28  
That is correct.

Andy 00:30  
Oh good. I got it right this time. Happy Saturday night. How are you, sir?

Larry 00:35  
Well, I was doing awful. I mean, doing well, until I tried to clean my tub. And now I'm doing awful.

Andy 00:41  
You know, so my solution to that much like my kid hurting his stomach and it hurts to breathe. Don't do that.

Larry 00:46  
So don't clean the tub.

Andy 00:50  
Don't clean the tub. Although, what are you--170? You can find someone to clean it. Like you're just you in your house, right? It's just you. More or less?

Larry 01:01  
More or less.

Andy 01:03  
More or less. Like, how often do you clean it—weekly or monthly?

Larry 01:07  
Every two or three months when I can't stand it any longer.

Andy 01:10  
Okay, good. Just hire someone to come in there every month. I'm sure you can afford it, Larry.

Larry 01:17  
Well, if F.Y.P. would compensate better, maybe.

Andy 01:22  
Alright (laughs). So step up your patronage so Larry can get a cleaning person to clean his shack. Is that what you're saying?

Larry 01:28  
I like that idea.

Andy 01:30  
All right. We'll get on that one. Would you be so kind, sir, to tell me all that we have going on?

Larry 01:39  
Well, we have a spectacular outline for tonight. We're going to be talking about an individual who wrote a long explanation about no means no, but yes does not always mean yes. And he explained in great detail about what the process is when you're accused. And under the Uniform Code of Military Justice. We obviously can't read all that. But I picked out a part I liked to read. I thought it was quite interesting. And we have a case that was just decided in the 11th circuit court of appeals regarding moving out of state from Florida, and I put that in at the last minute. So have you read that case from cover to cover two or three times?

Andy 02:34  
Two or three times.

Larry 02:36  
Okay. Then we have a case out of New York that has to do with an issue that is of great interest about the Full Faith and Credit Clause. So the theme is going to be the Full Faith and Credit Clause tonight, in terms of both cases. And we touched on that on the last episode. So we're going to be zeroing in on what the Full Faith and Credit Clause can do and cannot do.

Andy 03:06  
All right. I guess we--oh, wait, did you finish?

Larry 03:10  
I think you have something that you're going to put in that had some chatter about a potential seventy-year sentence.

Andy 03:17  
Yeah, there's an article from one of our recent guests from a prominent magazine that I wanted to make sure that we featured. I wanted to make sure that we brought that to everyone's attention. So that'll run the show. Right?

Larry 03:35

Are we going to do that article at the end? Or at the beginning?

Andy 03:38

Yeah, we'll do that at the end. So the first thing up is to be read from JRFC, which--I can't remember what JRFC means.

Larry 03:49

The Joint Regional Correctional Facility over in Fort Leavenworth. That's where a lot of our former--I guess they're still military. I guess they don't kick everyone out. But they're serving sentences of varying length. And I think they're shorter sentences. I think they have another facility over there where they serve longer citizens. But this was a something written, and I just took out a part of it. It was good stuff. We may publish some of it in the NARSOL newsletter.

Andy 04:17

All right. So the title is "No Means No. But Yes Doesn't Always Mean Yes." Why any of this should be an issue at all is the bigger problem. "Because consent can be withdrawn at any point to include long after the fact. Now, the idea of withdrawing consent is completely unquestionably legitimate. Just because someone willingly participates in sex does not mean she cannot stop at any point. If you agree to go up in an airplane, you can still change your mind about skydiving. The problem is the concept of withdrawing consent after the fact sometimes long after the fact, as there is no statute of limitations in these cases. Now, women are not literally saying 'I said yes, but I changed my mind now.' That is one step too far toward being ludicrous. What they do instead is stop one step short of that and say, 'I said, Yes, but I was too drunk to have consented,' and offer as proof only their recollection of being intoxicated, and at best, the recollection of some friends. This is why the war stories, and all the disgusting glory are so necessary. Guilt or innocence hinges on the memories, sometimes distant ones, of highly intoxicated people. There's literally no other instance where such logic would be acceptable. After all, you can change your mind about jumping only up to the point you step out of the airplane door. Imagine a person on trial for vehicular homicide testified that she could not be held responsible for agreeing to drive because she had been too intoxicated to have agreed to do so. As evidenced by the fact that she threw herself up right before getting in the car." So yeah, that's a problem there.

Larry 06:02

Well, there's much more to that submission. We need to find out how to validate it. The person who authored it was not the person that sent it to us unless they're using a pen name. So we need to communicate with the person, but that there may be some of that published. But it's kind of

scary because you can withdraw your consent and say, "Well, I was intoxicated," and you bear no responsibility for being intoxicated.' I've never been intoxicated in my life. And I do not know how a person becomes intoxicated without some participation. So you guys, please enlighten me on that.

Andy 06:41

I can see like some frat stories where you're held down, people push the keg tube into your face, and you're like, you know, college pranks. But beyond that, that one is tough to figure out like, maybe people slip stuff into your drink.

Larry 07:00

Well, now there's drugs that they do that where they render people incapable—

Andy 07:10

Roofies! You know, Larry, I do want to bring up one thing. I got a whole mess of crap last week for not knowing what a White Claw is, and I just want to reiterate, I have like, I don't think I've ever been drunk in my life. On a count of five fingers is how many times I've had alcohol in my life. I'm just not a drinker. So leave me alone, man. It's not fair.

Larry 07:30

What is a White Claw? Because I didn't know either.

Andy 07:34

It's a hard seltzer when I looked it up. So I guess it would be like a ginger ale. But now it's got booze in it, and flavors. Somebody says it's a girl's drink. So there you go. There's that.

Larry 07:51

All righty. Well, the other thing I had to mention is back in June, we received--actually, the first packet came in March for a person at the same facility. Then a much larger package came in June. And because I am particularly said that I really don't understand the Uniform Code of Military Justice, and how parole works. And the person sent enough material that I can understand it now. I'm not claiming to have read every page. And the person didn't expect me to read every page. But I've read enough of it that I think I understand it much better now. And it resembles the old federal parole system prior to 1984 when the Sentencing Reform Act was passed. And I intend hopefully to reach out to the person's contact on the outside in the coming couple of weeks. And find out if that person would like to explain in more detail what I still don't understand. Because it is of interest to the audience about making parole, and this person, at first glance, it looks like they're being denied parole from the documents without a lot of justification. So,

I'm not in a position to pronounce that with any authority, but it looks like they're jerking him around.

Andy 09:12

And then I guess you want to do the Florida case.

Larry 09:18

Yes, that's the 11th Circuit Court of Appeals. I'll have you set it up.

Andy 09:23

So let's do this. And you put this other case, of course, it's something you did last minute. So we have a bone to pick. I get everything all set up later. And you're like, oh, by the way, here's this thing last minute. So here we are. Last minute. It's a Douglas Lindsey versus Florida Department of Law Enforcement. It's in front of the United States Court of Appeals for the 11th circuit. Can you remind the audience where the 11th circuit is? Also tell us what it encompasses or who is in the 11th circuit.

Larry 09:52

It is in the southeast United States. Geographically it's relatively small. It includes the states of Georgia, Florida and Alabama.

Andy 09:59

Let me expand on that how so? Let's see 10 million people in Georgia, probably 25 or maybe 30 in Florida. Alabama has got like 55 people that live in it. So you end up with what the ninth circuit that's got, like a third of the country in it.

Larry 10:13

That is correct.

Andy 10:16

They're obviously not broken up in any sort of representative way. So the 9<sup>th</sup> Circuit--is it actually bigger than the 11th Circuit?

Larry 10:27

Yes, it has more judges, and it covers the largest geographic territory. What happened in the creation of the 11th Circuit is going to be difficult to replicate. Jimmy Carter was president, and at that time, there was no 11th Circuit. And the courts were claiming that they were grossly, grossly overworked and needed more judges. So they created a lot of additional judgeships, which Carter got to fill. And they created the 11th circuit. And they carved it out of other circuits, primarily the Fifth Circuit. So prior to that creation, if you were in Georgia or Alabama, you would be in the Fifth Circuit, which was in New Orleans. And I don't remember if Florida was in that circuit. Now that they created this circuit, the bipartisanship that existed then to create an

expanded judiciary doesn't exist. First, it was a Democratic plot to pack the court if you want to expand the judiciary. They did a similar thing with George HW Bush. I forget how many. They didn't create a new circuit, but they created a significant number of new judgeships. But it's going to be hard to replicate that again. So that's how we end up with 11th circuit. They split up the circuits and created the 11th. There was talk of doing that in the Ninth Circuit, but it's not likely to happen anytime soon.

Andy 11:47

Really. Okay. And you said Carter, so late 70s,

Larry 11:51

Late 70s. Yes.

Andy 11:55

So it hasn't really been that long. It's not like it's been that way for 100 years. So this is something somewhat mutable.

Larry 12:00

It could be done again.

Andy 12:03

And I recall through the years that we've done this podcast, you haven't been excited about the type of challenge Lindsey was making. His issue is that he remains listed on Florida's public website, even though he doesn't even live there. He's no longer required to register in his home state of Oklahoma. And I got to wonder, Larry, do you people have zero heart. Do you have no heartbeat?

Larry 12:25

Well, I think I have a pretty big heart, actually. But unfortunately, the courts are not supposed to decide issues based on emotion. And I've been trying to analyze this through the years based on the facts. And the fact is that Mr. Lindsey was once registered in Florida, and it's historically accurate, which means his claim is weak to put it mildly. And until the United States or a state within the United States adopts a law that a person can cite to that there, at the moment, there is no constitutional right to be forgotten. And remember, folks, I don't make the rules. I'm just a messenger. I wish such a challenge were viable. But unfortunately, in my humble opinion, it is not, as it existed in that case. Now there would be an instance where such a case would have much more viability, and that would be in a case like with Wisconsin, because Wisconsin continues to allege that it has control over you. Florida doesn't. Florida just says you sailed off into the sunset, you were here, and we're reporting that. They scrubbed the address, I think from where you were living, and they say living out of state, and Florida has dealt with you. Wisconsin takes the position that you owe us \$100 A year monitoring, and you must continue to keep us informed as to where you are. That

would be the same as Wisconsin state, you have to continue to pay your vehicle registration fee, even though you've taken your vehicle to Florida. So the way the challenge was set up in this case, he had a very weak claim. But that's not to say that a correct they set up challenge would have viability, but this one didn't. I said that to him. And I'm saying it again. Now. The fact if you're listed on a registry, that in and of itself, is not enough under our current law to get you any type of relief.

Andy 14:21

And according to the court, Douglas Lindsey appealed from the district court's dismissal of a suit against Richard Sweringen in his official capacity as Commissioner of the Florida Department of Law Enforcement, Mr. Lindsey argues that based on an Oklahoma State court order finding that he was no longer required to register as a PFR. In that state, Florida's PFR registration resume is unconstitutional as applied to him under the Full Faith and Credit Clause. That sounds familiar. What's wrong with his argument?

Larry 14:51

Well, before we go there, let's set up the case a little bit more. Lindsey had been deemed a level three offender under their own risk-based system in Oklahoma. They used to do an evaluation of risks that they scrapped at some point. I don't remember the year, but in June 29, Lindsey filed a motion for review of his lifetime risk assessment duration. And in September of 29, Oklahoma District Court issued an order finding that Lindsey was level one PFR. And pursuant to its authority under blah, blah, blah, it determined that based on the new designation and the absence of any legal trouble for a period of 10 years, he was no longer required to register under the old OSORA. Soon thereafter, he was removed from Oklahoma PFR Offender Registry, rather than staying put he moved to the great state of Florida, that keep track of the time because we have the dates here, so go.

Andy 15:43

Okay. In 2011, Lindsey moved to Martin County, Florida. He did not register as a PFR. In November of 2017, the Florida Department of Law Enforcement, which maintains the registry informed him that he was required to register. Lindsey complied. This is probably the failure right there. He should have gotten out of Dodge. Later then, in June 2019, Lindsey formally requested that the Florida Department of Law Enforcement remove him from the Florida registry based on the Oklahoma order. The FDLE denied his request, stating that because he was released from the sanction imposed for his qualifying crime after October 1 of 1997, he had a requirement to register in Florida. So tell us what happens next.

Larry 16:29

Well, before I do that, I would just like to point out that from 2011 to 2017, that hovercraft took a while to find him.

Andy 16:38

It seems like it did take some time.

Larry 16:41

Yeah. Now what we don't know is if he got ratted out by someone who knew that he had the old conviction of Oklahoma, or if he encountered some law enforcement. They don't have to tell us that. And I've had dug deep enough in the into the lower court, I might would have found what triggered this information. But it's not like the hovercraft picked up right away. But anyway. In August 2020, Lindsey moved back to Oklahoma. As a result of that move, Florida Law no longer requires him to provide his registration update information or anything for Florida. But the Florida registration remains publicly available, including on the internet. And therein lies the problem he and many face.

Andy 17:19

So then, according to the court, as a general matter, for a person with out of state convictions like Lindsey, residency in Florida triggers the registration requirement. Lindsey specifically was required to register because his offenses of conviction--the sanctions from which he was released after October 1, 1997--were similar to certain enumerated offenses under Florida law. He's not in Florida any longer. So then, Larry, why can't he be removed--along with the other 50,000 people in similar situations?

Larry 17:50

Well, they could be, but they have no right to be under law. But according to the court under Florida law, specifically 943-0435, subsection 1h, 1a, some PFRs may petition for removal of the registration requirement after 25 years, but not those convicted of offenses such as sexual battery or lewd lascivious offenses or similar offenses in another jurisdiction. And then they go on to say the Florida PFR simply does not provide a mechanism for removal from the Florida registry upon domicile outside the state. So it's just not in the statute.

Andy 18:24

I do honestly think, though, Larry, it seems like a no brainer to me. So he's no longer in Florida. And the court itself said the Full Faith and Credit Clause requires the states to recognize and give effect to the public acts, records and judicial proceedings of every other state. US Constitution, Article four, they went on to say the purpose of the Full Faith and Credit Clause "was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the

judicial proceedings of others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded, as of right, irrespective of the state of its origin." He has an order from Oklahoma. Let's see you spin your way out of this. You people need to figure out how to spin your way out of this.

Larry 19:17

Well, I've just got to rely on what the court says because the court disagrees. They said, "according to Lindsey, the Oklahoma order is a final judgment entitled to exacting full faith and credit in Florida. Like the district court, we disagree. Mr. Lindsey's 1999 Oklahoma convictions remain in place and their validity is not in question. This is not a case, therefore, where the underlying conviction has been set aside. And the Oklahoma order based solely on Oklahoma law, that is the authority granted to the Oklahoma district court under Oklahoma law does not purport to bind any other jurisdiction. Nor does Oklahoma, as a general matter extraterritorial jurisdiction to exercise police power in Florida."

Andy 20:07

Thank you. I would like to say that that would be extra-terrestrial for you.

Larry 20:11

So, the fact is, as I've said many times on the podcast, one state cannot relieve you of another state's obligations.

Andy 20:22

And another state is, therefore not obligated to follow what another state does. It goes in either direction, either in your favor or not in your favor, right?

Larry 20:31

Well, that's what the case law appears to say in this particular case. This was a non-published opinion. And I didn't put that in our plans. But a non-published opinion is not binding precedent. It's kind of like a decision from another jurisdiction that you can cite. And you can say what brilliant analysis it is. But you can't compel any other court in the 11th circuit to follow it. But the courts are not finding a lot of sympathy for this argument so far.

Andy 21:05

And you said this came out in the last day or so. So you haven't done a full Larry-Analysis of it. You've done just sort of a cursory overview of it.

Larry 21:15

I've done an analysis of the 11th circuit, but not the underlying District Court. The district court decision may have been more comprehensive, but I didn't read that part

of this, because it just I just actually got it last night when I sent you that message.

Andy 21:30

Well, we need to probably get out on this one. The court concluded that "the Full Faith and Credit Clause does not direct us to resolve this conflict in Mr. Lindsey's favor. In fact, it prescribes just the opposite as the Clause does not require Florida to substitute the OSORA" for the Florida PFR act, citing Hyatt 578, U.S. at 176. They said, "Florida has a legitimate interest in prescribing the manner in which it protects the health and welfare of its citizens" from persons convicted of PFR type offenses. So what else do you have before we move on from here?

Larry 22:11

Well, the court also stated Florida need not dispense with its preferred method of doing so because another jurisdiction has less restrictive requirements on PFR registration, as the District Court essentially recognized, even if Oklahoma did not have any registration requirements for offenders like Mr. Lindsey, the legislative choice would not prevent Florida from enacting a PFR registration scheme. So you can come to Florida and say, I don't have to register. And they can say, too bad. So sad. You shouldn't have come here.

Andy 22:45

Um, I do have to wonder. So somewhere in there, what we just said is that Florida has legitimate interest in prescribing the way it protects the health and welfare of its citizens. Isn't that a condition where we could go back with evidence saying that this doesn't do what you're saying it does?

Larry 23:07

You could, I don't think it's going to gain traction. Because it's not a rational basis. The test that gets applied to this, whether something works or not, is not a part of the evaluation to what you were looking at. Is it rational to want to protect the safety of the community? Yes, it is rational. So that is the inquiry.

Andy 23:34

So we don't need evidence to support a rational basis. Just because it's a logical statement to make. It doesn't require evidence to back it up.

Larry 23:41

It does not a kind of free society would be in a free society. We get to impose irrational laws on ourselves.

Andy 23:52

And is there a type of inquiry that the evidence would be required?

Larry 24:02

Well, as you're going up in the review standards, you're to intermediate scrutiny. And then strict scrutiny? Yes. Where evidence is required with strict scrutiny, when you're talking about the First Amendment, it must be a compelling governmental interest. It must be shown by evidence, and it has to be the least restrictive means to achieve that government interest. But in terms of just having a law, we can restore the 55 mile an hour speed limit tomorrow. There doesn't need to be a shred of evidence to support that.

Andy 24:29

Okey, dokey. All right. Well, then, so we'll move on to the New York case.

Larry 24:35

I suppose so I feel bad about this. Because there are a lot of people who really do believe that I'm crazy when I tell them this. And I got even some grief when I said something to the effect of it's only a website. And I don't mean to diminish a website. It's not a fun thing to be on. If you're presented an unfavorable light, but you have no reporting obligations. You have no disabilities or restraints. Your life is not altered. Now if Mr. Lindsey wants to come forward with real evidence how this is altering his life, he is free to initiate a new cause of action. He can put forth some kind of ridiculous theory that he might not be able to travel internationally, because he's listed on Florida's registry. It's hypothetical until he's denied travel. Now, of course, my position is that I don't deny anybody the right to travel, you just have to provide the notice. But he is no longer required to register in any jurisdiction. He would only be required to register in Florida if he were to return there. So he's merely listed on a website, folks with no disabilities or restraints other than the fact that it's an emotional thing. Most people would prefer that their dirt not be aired publicly. I would agree with that, wouldn't you?

Andy 25:53

Oh, without a doubt.

Larry 25:54

It's like, if you had an ugly divorce, most people would probably prefer that the divorce allegations, and some of that file be sealed from public exposure, and they do their very best. But he's got to show how he's being harmed by this. The fact that he doesn't like it, is not enough. I don't like what's on the internet. I'm sure that all of us find things of this less than flattering now in this in this digital era that we were living in. But not liking it doesn't make it unconstitutional.

Andy 26:24

It's government-sponsored doxing or sanctioned doxing.

Larry 26:29

It's my understanding that they're not really putting out any information on him that's private. I think they're just listing the fact he was there. There's no address attached to it. He was registered at one time in Florida. That's historically correct.

Andy 26:44

Gotcha. All right.

Announcer 26:46

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Andy 27:34

All right, so this is New York. You people put this case in here and named it People of the State of New York versus Matthew Corr, and that's C-o-r-r. And that's from the Appellate Division of the Supreme Court of New York, Second Department. It has to do with the clock restarting when a person moves to New York. And I think this case fits nicely with our last episode dealing with the Full Faith and Credit Clause. Larry, you've developed a theme here for the last two episodes. The last one had to do with the Full Faith and Credit Clause as well. Tell the audience in less than--I'm going to make it one minute--what this case is about.

Larry 28:11

Sure. According to the court, "this appeal presents an issue of first impression as to the duration of registration and verification of a level one PFR, who was convicted of a qualifying offense in another jurisdiction, registered another state and subsequently established residence in New York." Is that fast enough?

Andy 28:31

I believe you did it perfectly. And I read the case twice now. And it's so blatantly obvious that the court got it wrong. Can you at least admit that the court got it wrong?

Larry 28:43

I'm leaning in that direction, but I can't admit it.

Andy 28:47

Dammit, man. Okay, so the court stated, we disagree and hold that the initial date of registration referred to in that statutory provision means the initial date of the offender's registration with the Division of Criminal Justice Services pursuant to New York's PFR Registration Act. If Mr. Corr was registered in another state and subsequently relocated to New York, how can there be any a question about his initial date of registration? Doesn't the word initial mean the first date of registration?

Larry 29:18

Not necessarily. Depends on the language of the statute.

Andy 29:23

You're hopeless. So upon moving to New York, the court did not contest the risk level designation, but instead argued that the date of his registration under Sora should be made *nunc pro tunc*. Larry, I don't know what these words mean. What do these words mean?

Larry 29:42

Well, it's an order issue today as is if it had been issued on the previous date. It's Latin, and it simply means now for then.

Andy 29:52

Alright, so *nunc pro tunc* to January 29 of 2016. The date that he first registered in Massachusetts, he asked the Supreme Court to credit his registration and verification requirements with that time. Please tell me what *nunc pro tunc* is again?

Larry 30:10

It means you've set up the order as if it had been issued then. So it means now for then. So what he was wanting was an order from the court crediting him with the time that he had been registered in Massachusetts.

Andy 30:27

Is this like backdating a check?

Larry 30:31

Sort of. A court sometimes makes some mistake. They get the judgment wrong. So you go back and correct the order, and you want the order to have been effective from the date that it should have had effect.

Andy 30:47

So like retroactive.

Larry 30: 50

Then the order is titled *nunc pro tunc*. So it precedes the previous order, and it would make it effective.

Andy 30:53

Okay, I gotcha. And so I note that the court stated, "It is fundamental that a court in interpreting a statute should attempt to effectuate the intent of the Legislature." "As the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof." What does this mean?

Larry 31:17

It means words matter. They are interpreting what the word "initial" means in the context of Mr. Corr's registration. When did he initially register? "Where a statute describes the particular situations in which it is to apply and there's no qualifying exception added, an irrefutable inference must be drawn, that what is omitted or not included, was intended to be omitted or excluded." So the legislature did not include anything that said credit. So that's what they're saying, "hey, we just wear these robes, we don't we don't make the law."

Andy 31:58

So sometimes you have judges that overwrite law, and then other times you have them saying, "Ah, we're staying away from that one." I did zero in on that they stated "here, the legislature addressed a PFR like relocation to New York from another state in Correction Law Statute 168-k and did not provide that the duration of registration in New York was impacted in any way by the registration in another state." Had the legislature intended to diminish the registration obligation of such a PFR, it easily could have so stated that they went on to say at the provision concerning PFRs, whose crimes were committed outside of New York and who establish residence in this state has been amended numerous times, yet the legislature had not provided the duration of registration in New York should be pro forma reduced by the amount of time the offender was registered in another state. Now, I know where you're headed.

Larry 32:55

Correct. The court concluded that "the legislature's failure to provide such qualification compels the conclusion that in intended for a PFR established in residence in New York, to register for the statutory period time, from the initial date of registration in New York, following the board's determination that the offender is required to register with the division pursuant to SORA." So I'm sorry, folks, but words matter. If you want to be credited there--just as we have tried and failed in this state to get credit established in the statute--we don't have it. So when you look at the old statute, it says what it says. And I know you wouldn't want judges legislating from the bench, would you?

Andy 33:41

We're back to the Full Faith and Credit Clause. Did Corr argue that?

Larry 33:46

He did argue that on appeal. But unfortunately, the Court held that court's contention that the Supreme Court's denial of his request for the Full Faith and Credit Clause of the Constitution is unpreserved for appellate review. It appears that he did not develop that argument below which precluded it from being reviewed on appeal.

Andy 34:06

Do you think someone else later could argue that?

Larry 34:09

I think they absolutely could do based on the case that we just did, I'm not as optimistic as I was a week ago. But absolutely, this is an argument that is worth making.

Andy 34:24

Interesting. These are kind of wonky. These are a little bit in the weeds for my little pea brain.

Larry 34:35

I don't they're not complicated. You're just making it complicated, aren't you?

Andy 34:41

That's probably very true in the grand scheme of things. Probably very true, Larry.

Larry 34:48

What I would say is that the lawyering on this case could have probably been better. You know that any argument you're going to make on appeal you need to make in lower court. You've got to give the trial judge an opportunity to rule against you. And if you're going to argue Full Faith and Credit, you need to develop it in lower court, and you need to get denied. Now, it could be that he had a different appellate lawyer who was trying to reach for something and raised it first time on appeal. But as a rule, courts are not going to entertain an argument first time on appeal if it wasn't argued below, because the trial judge didn't get a shot at it.

Andy 35:25

Again, wonky. You're talking about some lawyer strategy stuff that I think goes above at least my pea brain.

Larry 35:34

Well, when you think about the court system, the appellate courts are fewer in number. You may have hundreds of trial judges out there in a state, and you only have one court of appeals. Therefore, they cannot be reviewing everything that you could have done and giving you an opportunity in an appellate forum to do what you should have done. That's all they'd be doing is trying cases all the time. Because everybody would think of something that they

didn't do, and that they could have done. Therefore, they just can't review on appeal what you didn't develop before. You've got to give the trial court an opportunity to rule on your issue, even if you know that they're going to rule against you. And that's difficult, particularly in criminal settings for people when the judge is not buying it. And the judge is conveying with their body language yet to say, look, Your Honor, I need for you to let me lay the record for appeal. And if you practice in front of that Judge regularly, it's hard to say, "Judge, I need you to stop. Because I'm playing the record. I know, it's going to make no difference here. But I'm making a record."

Andy 36:39

And if I'm not mistaken, the upper-level courts don't introduce new evidence. They're just basing everything from the lower courts on the evidence presented at that time.

Larry 36:51

That is correct. And that's the angst a lot of people have when they go into this Smith versus Doe, because the facts that the Supreme Court used were decided by the parties below it. And I say that despite the fact there are legal gurus out there that have written all these articles and published them about how they got it wrong. And my opinion, they got it exactly right as the law existed in 2003 in Alaska. There was no punitive effect of the Alaska registration at that particular time. So they got it exactly right. You need to get over that. And you need to develop the evidence now to show that generation of registries no longer exist. You need to build an evidentiary record. You need to argue with the court. When the court doesn't let you build your evidentiary record, you need to set it up so you can get a remand so you can build your evidentiary record below. But you need to get over Smith versus Doe. It's ancient history, and let's move forward from here. The parties stipulated to that evidence to the facts as they existed by the way they manage that case from beginning to end.

Andy 37:58

And if you will indulge me for a minute--I was having a conversation with someone recently. And I presented a lot of what you just said. Just for my edification that I responded the right way--we need something of an exceptional plaintiff, under the right conditions, with a lot of disabilities and restraints--to start running something up the flagpole, and it needs to go through the lower courts, the middle courts, the intermediate courts, the High Court all the way to get to the Supreme Court. Then the Supreme Court has to be willing to hear it because they see something wrong with what was done to the person. So that they could then essentially do something that overturns Smith.

Larry 38:40  
That's largely correct of what would need to happen.

Andy 38:44  
They don't just wake up one morning and say, "Oh, shit, we got this wrong. Let's go back and revisit this '03 decision, a 20-year-old decision. And this is where they got it wrong." They don't do that.

Larry 38:54  
But they don't have the authority to do that. A case has to come before them. Now they've had opportunities to take cases dealing with this issue that they've declined. Remember, they declined the Pennsylvania case. They declined the Michigan case because they were not convinced that there was anything that they needed to review. So they declined to grant certiorari to both of those cases. But at some point, there could be an egregious enough case where they could revisit registration, and they could come up with a different holding. I'm not optimistic about this particular court. And I haven't been for some period of time, but I can't control what people file certiorari petitions on. You know, there was a guy in Kansas--you remember the case--what are we litigating? He went to the Kansas Supreme Court, and the justices are asking "what are we litigating?" It's one thing to disagree with the points but it's another thing we don't know what we're litigating. Whenever you have a case that say, you know--

Andy 39:50  
I think I need to capture that audio and just hold on to it. What exactly are we arguing here?

Larry 39:56  
Why are we even here? I can't and control where people will file cert petitions on. But I can tell them that this Court as it is constructed right now, doesn't have a lot of empathy. This is not the Earl Warren Court that came out with all the things that prisoners cite to the right to remain silent. The Gideon decision. Brady versus Maryland. That court doesn't exist. That court hasn't existed for a long time. And they're not inclined to do anything. But people continue to say, well, we need to get a Supreme Court decision. That's fine. Let's go for it. But let's build a case correctly, with a registration scheme that is very oppressive, and that has lots of disabilities and restraint. And we box them in, and we say you can't continue to ignore this. Your court said in 2003 that you allowed this to stand in Alaska because it didn't impose any disabilities of restraints. You said in 2003, that they're the seven factors used to determine if something that's called a civil regulatory scheme is truly civil, regulatory, and non-punitive. Using those seven factors, we have demonstrated by evidence below that we've met five or six or seven of those factors.

You cannot continue to say that this is not punitive. And hopefully, that would work. But what happens if it doesn't? What happens if that case gets there and they say, we choose to stick with Smith versus Doe? Then we were set back for another 25 years.

Andy 41:28  
And 100 grand.

Larry 41:32  
Well, I'm not even worried about the 100 grand, but you're set back for 25 years. It goes to the states that have even considered any reduction in requirements--the floodgates would be open for the law enforcement apparatus to come in and say, "Oh, well, we can stack on more. We don't have as many restrictions here as that state did, and the Supreme Court said that was okay." And then suddenly, you've got the license and open door to make the registry even tougher. This is a risky business, folks. This is a very risky business that we're in in terms of what we're trying to do. We must be very judicious and very cautious about how we take cases to the court.

Andy 42:12  
Then one final question before we move on to article two. Did the Michigan and then the Pennsylvania ones not being heard by the Supreme Court improve or not improve the situation overall?

Larry 42:30  
I don't think it really altered anything. First of all, that court that started those cases don't largely exist because there's only a few of the justices that heard them left. But they didn't need to hear those cases because they were pretty cut and dry. They were decided largely under state constitution, particularly the Pennsylvania one. And so there was no jurisdiction there. The Michigan case, I think was decided on both. It's been a while back now. I don't think it really changes anything. In terms of this court--this court is not your friend, folks. It's not. Get over it. It's not. You want to believe that it's for small government and it's going to end everything. It isn't.

Andy 43:11  
All right. Okay, um, let's see here, then there's that article. Emily Horowitz, who is a good friend of mine and a friend of the podcast. If you go back to the episode that we did at the conference, she was a guest host and a guest on the program with a panel. She had an article published in *Reason* magazine. The title is "18-year-old faces possible 70 years in federal prison for Snap Chat texting crime." And I wanted to pretty much just ask you a question or two. And basically, I'm confused that it says, so he was 17 when he was doing this. So in my brain, he would be charged as an underage person. And the individuals that he was

communicating with were, as far as I understand it, 16 years old, so only a year difference. But he's not an adult. And as I understand it, is that they waited till he turned 18 before they filed charges. And that makes my head spin around in circles. Like, if the crime was when he was 17, then shouldn't they apply the laws to him as a 17-year-old? What's the deal with them waiting till he's 18 to then really put the hammer down?

Larry 44:27

Well, I don't know the answer to that in its totality. Generally speaking, you're correct. When a person commits a crime, it's the penalty scheme that was available to them to the prosecution to the court at the time they committed the crime. That's the basic Ex Post Facto Clause. We cannot subject a person to a different statutory penalty that would have been available. It gets a little bit murkier than that though, because sometimes the person could have been prosecuted as a juvenile and then could have been prosecuted as an adult, even though they were 17 or 16. There's the potential they could have been prosecuted either way based on the prosecutor's discretion.

Andy 45:05

Well, if I'm a prosecutor the crime must be super heinous. Like I think of John Malvo, one of the DC snipers. The snipers are underage, and they decide to go charge them as an adult for the crime.

Larry 45:14

That is correct. In some state it is the prosecutor's discretion. They don't have to follow anything in our state. It's a very, very rigid prosecution process where they have to show that there was a non-amenable to treatment before they move a juvenile to adult court. And as I've said many times about Sam Donaldson, the younger they are-- he was 14 at the time when he killed the father, mother and sister. And he was tried as a juvenile here, and he is already out of prison because they can't keep them past their 21st birthday. But in this instance, since I don't know the federal practice, I'm not sure what the Fed's options are with dealing with underage offenders. It may be that he can be prosecuted as a juvenile or an adult. It may be discretionary. But, folks, he's not going to get the 70 years. That's just a maximum penalty--if everything that they potentially have charged, and he is convicted. If he were to be found guilty, not negotiate a plea, that's a maximum stacking the charges, but nobody gets the maximum. Seldom does that ever happen.

Andy 46:24

What about the 292 from last week, man?

Larry 46:27

Well, that wasn't a maximum number.

Andy 46:28

He was sure he was going to get 400 or something.

Larry 46:31

He was facing well over 500 years. He only got about half of it. I mean, what is your complaint?

Andy 46:40

Okay, sorry. So if he gets somewhere roughly half of the 70, he's looking at 30 and change. He's only 18 years old, and he's going to serve more time in prison than he's been alive. Good grief.

Larry 46:54

Well, not so simple. First of all, we don't know. Just like the internet user who did this once. This looks like there was a substantial amount of this stuff happening, at least based on the story, right? This was not a guy who just stumbled upon it one day and did it once. Is that the way you read it?

Andy 47:14

Something along those lines, yes. I'm still at the 17- and 16-year-olds having access to the technology to take pictures of the junk and just press go. The friction level is so low. Back in your day, you had to take it to the Photo Mat place and get it developed, and you're going to get in trouble at that point, it would be hard to develop photos at home on your own. Now you just you have a full 4k production studio just sitting on your iPhone or Android phone.

Larry 47:42

So well, if he does choose to negotiate a plea, he will be able to probably get rid of many of those counts. And that'll be a part of the prosecution negotiation--you got 20 counts; you reduce it to five or whatever. And then he accepts responsibility by negotiating a plea. They have this sentencing scheme where they look at the severity level. So you want to you want to start with getting the prosecution to agree with that you plead to the least serious crime. So that drops to level and then there's the career history points, it's hard to imagine that he's had has any career history of crime, that's going to be significant in the calculation as, as young as he just has moved beyond his juvenile status. But so they start with those factors, and they're going to come up with a range of sentencing. He's going to be subjected between X number of months and X number of months, and the judge is going to be able to pick between those, and the attorney is going to put on mitigation that he's amenable to treatment, he's young, and on and on and on, and all this kind of stuff. And hopefully he doesn't come out with seven years, but she's trying to illustrate the point. And the point is well taken, that these sentences, the potential exposure is enormous, and therefore you have to come in and cut a deal. I mean, I can guarantee you confessed, he told him how he did

everything. He admitted that it was his, there's nothing to work with, other than trying to set aside the confession that he made, and that's difficult to do. So he's going to end up with a negotiated outcome.

Andy 49:24

If I can turn over to the technology side for a minute, even if they were across the street neighbors, because the Snapchat servers are located in California, it's the equivalent of him getting in that airplane flying over to California using the Photo Mat to develop the photos and then transporting them back. So now he has distributed CP across state lines. And that's how the Feds get involved because of all those little bits--ones and zeros. They are not following what path you would think of that short little hop across the street. They're going all around the globe. So you end up with interstate commerce and possibly like international commerce.

Larry 50:06

Absolutely. Well, it was noted in the article that under Kansas law, he probably would have been facing something like four to 20 years. But he's not under Kansas law.

Andy 50:18

Yeah. Just simply because he used Snapchat. If he found a platform that was local to his neighborhood or something like that, and then it may not have traveled across state lines. But you know, Larry, I like he used Snapchat. So then the prosecutors just put together like the cookie cutter answer. They didn't go trace that the images are sitting over there. They just know that's where they went. So therefore, then they have a federal jurisdiction. They don't have the photos sitting there from Snapchat servers. I can almost guarantee you that.

Larry 50:50

You're way over my head. I don't know what they have.

Andy 50:53

That's garbage. Someone just posted in chat--Don't talk to the police. I think we did that recently.

Larry 50:59

We did that. But his public defender had recommended he take a plea that would keep his incarceration at 20 years, and perhaps, maybe as little as 12 to 15.

Andy 51:10

But still a lot of time for 17 years old.

Larry 51:13

But he said he recently receives some good news. He sent a note to the judge pointing out that he was just a month away from September 27 trial date and still did not know how the public defender plan to argue the case. This moved

the judge to dismiss the public defender and allow a pro bono lawyer to take over. So now his trial has been pushed back indefinitely. So maybe the case will take on a different course now with a new attorney coming in.

Andy 51:41

Pro bono means--I'm not trying to bag on public defenders--someone that can focus time and attention on it at a normal level of workload attorney, obviously doing this for no money. Is that what that means? Right?

Larry 51:56

The pro bono does mean without pay. I don't know that that pro bono attorney is going to necessarily have a lot more time. The Pro bono attorney could be driven by the notoriety of the case and want to get his or her name out there into the public domain.

Andy 52:11

I see. Someone trying to make a name for themselves.

Larry 52:14

It's a possibility. I don't know.

Andy 52:17

Okay. Is there anything else that you would like to cover? And let's say five minutes before we shut this thing down?

Larry 52:26

Shut it down. We've only been going for like 15 minutes.

Andy 52:30

Yeah, yeah, exactly. 15. How about 51? And change?

Larry 52:33

What is wrong with you people?

Andy 52:35

I know. And I'm okay going like longer, Larry. But apparently some people hurt themselves and they want to go home. Maybe they're loopy pills are actually kicking in. Okay, so maybe instead of an article, can you commit to when we will do a Chat with Larry episode? When you would be willing to come online and talk to our peoples?

Larry 52:57

Let's do it. Tonight from now till midnight.

Andy 53:01

I can't announce that to people in advance of. Well, are you willing to stick around though? I'll go tell everyone.

Larry 53:09

No, let's tell them before the month of September is out. So it's either next week or the week after? Because we got two more episodes--no we got one. The last one will be on the first.

Andy 53:21

Yes, that would be on the first. So can you tentatively give me a day this week?

Larry 53:27

So I will do that? Yes.

Andy 53:29

Okay. All right. So is there an article you would like to cover? Or should we just let it go.

Larry 53:36

So I think that we have done a huge amount of work in a short amount of time. So maybe short is better.

Andy 53:43

I'm okay with that. I think that'd be just grand. And so without anything else, I will bid everyone adieu. You can find all the show notes over at [registrymatters.co](http://registrymatters.co). You can leave voicemail at 747-227-4477. And email [registrymatterscast@gmail.com](mailto:registrymatterscast@gmail.com). And of course, support us on Patreon at [patreon.com/registrymatters](http://patreon.com/registrymatters). Or if you want to go over to go to [fypeducation.org](http://fypeducation.org). There's a donate button for a onetime donation to the 501c we have. And without anything else, Larry, I hope you have a splendid evening, and I hope you feel better.

Larry 54:22

Thank you. Well, you forgot one thing--to hit subscribe.

Andy 54:26

Oh, I did. Alright, I'll do it right now. Go find all the subscribes and the likes buttons. There you go.

Larry 54:34

Give us five-star reviews and talk on the YouTube channel. There are not enough people responding. A guy did make a request on YouTube this week. Did you see that?

Andy 54:45

Is it the one about what is F.Y.P. stands for?

Larry 54:48

He told us that we should provide some entertainment for the holidays.

Andy 54:54

Oh, I know what that means.

Larry 54:57

He suggested that we do a duet of A Little Drummer Boy.

Andy 55:01

No, that's not happening. I have a mission this year. I am perfectly poised that I will not listen to a single Christmas song through the whole holiday season. That is my goal. Every year it is my goal, and I usually fail, but that's my goal.

Larry 55:15

You people, what is wrong with you?

Andy 55:18

Yeah, I'm just Mister Bah-Humbug. Well, Larry, I hope you have a great night, and I will talk to you very soon.

Larry 55:25

All right, good night.

Announcer 55:34

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