



RM 241—Recorded 10-8-22

Eleventh Circuit Court of Finds Alabama’s Registration Scheme Just a Civil Regulatory Scheme

Announcer 00:00

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Andy 00:17

Recording live from FYP studios, east and west, transmitting across the internet. This is episode 241 of Registry Matters, recorded on Saturday night, October 8th. Right?

Larry 00:29

Well, not exactly Saturday night. We're a little bit before Saturday night.

Andy 00:34

like 24 hours on the nose.

Larry 00:38

24 hours on the nose. Yes.

Andy 00:40

And why are we here early. You people are doing something tomorrow?

Larry 00:43

I'm hoping to do something. The Great Albuquerque International Balloon Fiesta is operating through Sunday. And this is the 50th anniversary at the Fiesta, and the 100th anniversary of the radio station that started the Fiesta in 1972.

Andy 01:02

You mentioned that it might not happen tomorrow night because of some inclement weather. And I told somebody this and they said Larry said they never have weather.

Larry 01:11

Well, you know, this Fiesta has been unusually wet. They tried to cancel some of the sessions. But it looks like it's clearing off out there. And I'm more optimistic that we're going to be able to go right now. The only question is if my partner is going to be available to go because the partner is the key to how we got the special VIP tickets. And I'm not really sure that I want to go with the VIP ticket without the person whose name is on it with me.

Andy 01:40

How many balloons show up? This being the 50th, I'm sure it's even more than normal. But is it hundreds? How many balloons show up?

Larry 01:51

It's about 600 roughly. They have had more. When they went to the present launch site back in the 90s when they got their own park, they ran it up to 1000. And they realized that was not manageable. So it's typically in the 600 range. But they come from many countries. And it's a fiesta like no other. When you compare it to what started in '72 with 13 balloons as a part of KOB's birthday celebration. And they were putting the station's insignia on the side of the balloons to fly over the city so they could celebrate the 50th anniversary. To imagine that it morphed into what it has over the last five decades. It's just unbelievable. We bring out a million people to visit the Fiesta. And it's just a phenomenal event. It's fun to be there because it's a well-behaved crowd. You don't have all the dredges of society that you might have at a fair. It's exciting to be at the Fiesta. I haven't been out there several years. But hopefully we make it tomorrow.

Andy 02:59

One last thing--balloons don't really drive much. So how do they manage keeping anybody from crashing into somebody else?

Larry 03:12

Well, I don't know if I can fully understand it explained that. But they do refer to the Albuquerque Box and the prevailing winds here because of the location of the mountains being to the east. And the way the air settles into the valley at different altitudes you can rise. And the winds are different as you go up to a slightly different altitude. So you can leave the Fiesta launch site, and if the box is working, as it often does, you can circle back to where you launched from by using the prevailing winds.

Andy 03:49

Sure, totally understand that. Totally understand that. If we had our pilot guy here. He said he was going to be here, but he's not here. He could explain all the wind layer thingamajigger as you go up in the different altitudes and go this direction or that direction. Anyway, I'm going to turn off the rotator thing and I'm going to say to people make sure you press that like and subscribe button and the bell, so you get notified and subscribe in your podcast app, and five-star review, and all that above--blub, blub, blub up.

Larry 04:21

Now you just messed up the transcriptionist. How is he gonna spell that?

Andy 04:26

He's never gonna spell it, but he'll figure something out. Tell me, sir. What do we have going on this evening?

Larry 04:33

We have two significant cases to talk about. First, the 11th circuit court of appeals. That's going to take up the bulk of it. We're gonna talk about a long-awaited decision regarding the Alabama sex offender registration statute, and its constitutionality. And then we have a New Mexico Supreme Court case talking about what a person released on parole are entitled to and what the Supreme Court decided in terms of those hearings that the parole board has been refusing. We've got a couple of listener questions, and we've got this short video segment of a high-profile trial that's going on right now of a guy that's really strange.

Andy 05:17

All right. You know, I think that we should start with the video trial. We'll do this segment really quick. Can you set this up.

Larry 05:30

This is the high-profile trial of Darryl Brooks who was accused of mowing down, I forget how many people, on a Christmas parade.

Andy 05:39

He's got like, 70 counts of murder, attempted murder, or something like that.

Larry 05:43

It's awful. And the guy is totally certifiable in my opinion, although I'm not qualified to certify anybody. But if I had the qualification, I would certify this guy. He wants to represent himself, the court agreed, and released his attorneys to represent himself. And he's just making a spectacle out of everything. So we can't begin to cover this trial. But the sad thing about it is, I believe this guy is really nuts. I don't believe that this is an act. First of all, you look at his behavior of what he is accused of doing. He's still presumed innocent, but you look at his behavior, if he did those things. And then you look at how he's comporting himself. And the fact that he's got life, many times over, looking at him and he fired his attorney is just, it's sad. But this judge is being very patient, far more than I can be. So we got a couple excerpts of the judge interacting with him since he's representing himself.

Andy 06:47

All right. Well, let me see if I press this button, and then that button--doesn't work. Why doesn't it work?

Larry 06:53

Because it's broke?

Andy 07:02

You know what? The operator broke it. I did all the things except for the thing that I needed to do to make the thing do the thing.

Larry 07:10

Well, I can babble while you're fixing it. So the thing that troubles me about this case is that it's likely, in my opinion, to come back on appeal that he wasn't capable of representing himself. And this is just a circus show. And they're going to have to give him a new trial with representation. And he is entitled to represent himself. But he's turned it into a spectacle, so he can't get a fair trial. He's pulling off his shirt. He's been separated from the regular courtroom because he won't stop interrupting. They can't overpower him. I mean, you can mute his microphone, but they can't stop him from overpowering and interrupting continuously. So they've got him in an adjoining courtroom. muted, but watching on video and listening on audio. And he's just not getting a fair trial, because he's not capable of getting a fair trial. He's not an attorney. And he doesn't know the process, but this is going to be a disaster. But go ahead if you're ready.

Andy 08:13

I'm ready. Okay, let me try again.

Judge Jennifer Dorow 08:18

Mr. Brooks, you just interrupted me within a minute of us starting this case here today. I'm asking you to respectfully not interrupt me--that's the second time--so I can go through the list of things that I need to get through this morning.

Angenette Levy 08:32

The trial for Darryl Brooks--the man accused of driving through the Waukesha Christmas parade last year, killing six people begins, and Brooks is representing himself as a sovereign citizen. Welcome to the Law and Crime Sidebar Podcast. Darrell Brooks faces 676 counts in Waukesha County. Six of those counts are intentional homicide. And we're looking at the top moments of the Brooks trial so far with opening statements beginning Thursday. The day started with Walker Shaw County judge Jennifer Dorow asking Brooks to put on a suit.

Judge Jennifer Dorow 09:01

It is your choice, though. Are you willing to go back to your cell and put on your suit?

Darryl Brooks 09:15

It is my right to do so or to not do so. And at this point, Your Honor, who doesn't know that I'm in custody?

Judge Jennifer Dorow 09:24

Mr. Brooks, I've had many trials with individuals who were in custody. And when I've talked to the jurors after the conclusion of the case, they had no idea. The whole point of allowing for street clothing is not only to shield jurors from the fact that you are in custody, but also you being in a suit and a tie or other street clothing, I think also lends to the dignity of the proceedings. This is a trial. Again, it is your choice. Are you willing to go back to your cell and be dressed in the street clothes that you previously appeared in?

Darryl Brooks 10:09

In due respect, I do not agree with that assessment whatsoever. There is no possible way that anybody will not know that I am in custody. I think that's a well-known fact because it's reported on every day in the media. It's shown every day on the news, where I am which jail, I am housed in and that I'm in custody, it's virtually impossible for anybody to not know that I'm in custody.

Andy 10:40

So there you go. There's two minutes of it before they go into a whole bunch of other talkie talkies about it.

Larry 10:47

Yes, I've never seen anything like this. But it reminds me of a case I worked on about a guy that was convicted in Georgia--ultimately, he moved to Texas. I worked on a team trying to set aside his conviction. He was not competent to stand trial. He was acting erratically. And the judge ignored that. This judge is ignoring his behavior. Now, there are things we don't know. There could have been a competency exam before--a psychological and psychiatric workup on him. And they may have already concluded that he is competent. And he knows what he's doing. He's doing this deliberately. But if those things are lacking, this high-profile case runs the risk of being overturned on appeal because this man can't get a fair trial because he's already irritating the jury in the way he's conducted himself.

Andy 11:43

There was a segment in that whole video clip that he is shackled at the ankles or whatever. And he won't just chill out for a minute so the deputies can take off his shackles.

Larry 11:55

Well, they're deliberately keeping those on, but they have the skirting around the table. They do that to make them invisible. So they're sitting there with their hands free, but their legs are shackled. Because, if they get a jump on you, they can make up some really fast time. Those deputies are sometimes on the large side and can't make up that time. If they get several beat on you. If they happen to hit the doors just right, they can get out the courthouse, you know, and they could be on the on the run. So yes, they do have him shackled below, but they have skirting around the tables. And the tables look like the defense table and the prosecution table have the same skirt. So you can't conclude anything from that. The guy's just off his rocker.

Andy 12:40

All right, well. We can move on from that then. Okay. And this is a listener question from Deborah. And I will thank you later, Deborah. Deborah increased her Patreon donation fivefold, Larry, fivefold. 1-2-3-4-5.

Larry 13:01

Did she go from 100 to 500 monthly?

Andy 13:04

Sure, whatever. The \$1,400 stimulus money or 2400? Divide that by five. So it was like just shy of 500 to 2400.

Larry 13:12

All right, we're joking, folks. But go ahead.

Andy 13:15

Yes, of course. So she asked what Larry's recommendation is if the PFR is on parole, and they are told they have to take a computer voice analysis test, which is she put in parentheses "a hyped-up polygraph test." So right off the bat--polygraphs are Kabuki machine, so it's BS. It's pseudoscience and means nothing. But what is your professional opinion for a PFR on parole that has to take a Kabuki-machine test?

Larry 13:46

Well, I would advise that they cooperate with that testing regimen. Because I'm assuming that he signed that agreement in order to be granted parole. This is a person who has a conviction, as I understand it, from the military, and they actually do parole them prior to the end of their sentence. So he's getting actually a favor. He's getting out early, unlike in New Mexico where you serve all your time. He's actually out early. I would advise him to remember that he signed an agreement to go through their treatment regimen, which includes polygraph or some truth detection process. But keep in mind that you have a fifth amendment right in the United States of America to not incriminate

yourself. And that is where he's got to be careful. Because if he says no, I won't pick the polygraph or the voice test, that's not going to go over well. But if he says yes, I'll take it, and then in the pretest interview workup, they're going to disclose the questions to him. My recollection is that I had one of these one time when I worked for convenience store back in the 70s. And my recollection is that they do the same thing that they, when they wire you up for the voice stress analyze, analysis, as I do with a polygraph, they go through the questions. Like, for example, in a convenience store business, it was generally because of lost merchandise or cash shortages. So they would try to build questions around whether you had anything to do with the inventory shortage, or the cash shortage that turned up. And if the questions would be geared around had you ever stolen anything in your life, that's not relevant. If the relevant subject matter is, while working here at the magic market in the last 30 days, we're short a \$900 shortage on inventory. Did you give away merchandise? Or take merchandise that wasn't paid for? You know that question is going to be hitting you? Because they're going to tell you that question before they wire you up? And if they were to ask you, if they were framed with the question of say, have you ever stolen anything in your life, then that's a bogus question. And that does risk incrimination? Because you could say, well, I'm not going to have to decline that question, because it's too broad. And if I were to say, an answer to that, I would subject myself to prosecution. Well, the same thing is true--if the answer to this specific issue is that you have been stealing from the company, you can also subject yourself to prosecution. So it's very difficult to figure out when you could decline the questions. But you do have the right to decline the questions if there's a credible threat of prosecution that you're going to expose yourself to that. At least in the 10th Circuit--remember, we talked about Von Behren.

Andy 17:03 We had him as a guest once.

Larry 17:06 Yes, we did. He attended a conference. Mr. Von Behren said I can't take those questions. And they were able to get an emergency injunction against the exam. But this guy needs to cooperate as best he can and see what they're going to ask him, and then raises objections if there's threats to incrimination and prosecution.

Andy 17:33
There was a person if I recall, even in Georgia, this was probably pretty close to the beginning of our relationship, Larry, that said, Eff you, I'm not taking a polygraph. And they put him in jail. I believe.

Larry 17:46
I do recall that. And that's exactly what they'll do with this case. If he says, no, I'm not going to do it.

Andy 17:53

Can you go back over something? I think you just said it when we were talking earlier today that if they ask a question that may be like too broad that opens yourself up, but you can negotiate or something, about the question and honing it down and narrowing it into a specific thing of what exactly are you asking?

Larry 18:09

You can indeed now. I don't pretend that every polygrapher has integrity and honor. All I know is that the ones that I've dealt with generally have, and if you express concern about a question being too broad, and it's going to cause a reaction, the examiner, theoretically, doesn't want to hose you. The examiner's trying to get at, quote, the truth. So the examiner is gonna say, Well, what's your concern about that question? And, well, you've asked a question that would include not only this inventory shortage in the last 30 days, but you're asking a question that includes time I didn't even work for the Majic Market company. So that's what I'm concerned about. So let's try to narrow down where we're focusing on this. A good polygrapher is gonna say, oh, I see your point. But I'm not saying they're all good.

Andy 19:06

I just struggle with the idea of good and truth when you're talking about a pseudoscience thing that doesn't do any of these things other than record that you're sweating a little bit more or your heart rate and breathing rate has changed. It just irritates me at the core.

Larry 19:21

I know it does. But as we talked about in pre-show, I was sold on it because every person, every client we had, when we presented them with the scoring, and how much deception they had shown, because it scored you know, your minus five, minus seven, plus five, or whatever. When we said this is what the examination has revealed, they all confessed that yes, I actually did do it. So you have an answer for that so you can share it with the audience. But in my mind, it worked because the people said yep, I did it.

Andy 19:55

Yeah, it just scared them. It's a reverse placebo if you think that the doctor wearing the nice coat gives you the sugar pill that it is going to make your pains go away. This is just working in reverse in that it scares you into admitting. And when they ask the question, did you steal the candy bar from the grocery store? You're like? No. Why would you think that? So that just scares you. That's all it is. It's a Boo Game. Boo Game.

Larry 20:17

So I take it that you're not going to be investing in a polygrapher anytime soon.

Andy 20:24

And then I was talking to our friend in Georgia who got locked up that you helped get an attorney for. He had a polygraph machine at home. And I was like, you had some game on your phone? He goes, no, I had like, the whole thing where it wrapped around his chest and head. I was like, Oh, my God, dude, you're so doomed. You're not--how do you explain? Well, I just had it for understanding how the system works. Like, how are you going to explain that away from the judge when they don't lock you up for trying to cheat against the polygraph?

Larry 20:51

Well, I do not advise you to possess a polygraph machine while you're on the supervision.

Andy 20:59

Oh, my God, [laughter] That was so really ridiculous. Anything else that before we stroll along?

Larry 21:04

I think that's the best I can do, not knowing if there's any case specific case law. I didn't do a circuit search for cases on this topic. But based on what we're about to talk about, I'm not optimistic that the 11th circuit is going to have anything that resembles as much coverage as the 10th circuit did in the Von Behren case. They may have far less protection. But I don't know the answer. He needs to talk to an attorney that can do the research for the circuit and for the state of Alabama State courts as well--even though it's a federal conviction--because that can be used in terms of if Alabama has a new law that limit the polygraph. So yeah, they need a legal professional. Well, oddly enough, I told you about working in the convenience store business. The law that restricted the employers was signed during the Reagan administration by Ronald Reagan. And pre-employment testing was heavily restricted as a result of that change in the 80s that Reagan signed. And like the company, the store was named Majic Market, but the company was Munford Incorporated. And Munford was a big believer in the polygraph for pre-employment and for investigative purposes, and Munford had to curtail the polygraph because they can only use them after that reform for specific investigations. Now they exempted the certain aspects of the federal government for national security. They could continue to do them like the FBI, and certain national security applications. But you could not just do a random polygraph when everybody has a condition of employment. And Ronald Reagan signed that. So just because it's the state of Alabama doesn't mean that they don't have anything good on the books down there. But it's probably doubtful, but not necessarily the case.

Andy 23:03

All right. Well, you people put two cases in here. One is from the 11th Circuit of Appeals, and the other is from New Mexico Supreme Court. I believe that you're familiar with those people in New Mexico. And let's cover the 11th Circuit One first. Nobody cares about New Mexico anyway, right?

Larry 23:19

That's what I hear because we don't have many people here. So who cares?

Andy 23:23

Like what's your population? Half a million?

Larry 23:27

2.1 million. Thank you.

Andy 23:30

Oh, sorry. Okay, I can count those on my fingers and toes. So this is about the guy that I do. Remember, the guy moved to Alabama from Colorado, where he wasn't required to register. But he then also decided to call up the office a bunch of times, I think, back in the 80s, despite the fact that he wasn't registered and never had been. He checked in with law enforcement in Alabama, and they said, Yep, you have to register here. That's funny.

Larry 23:55

That's funny?

Andy 23:57

Yes, it's funny.

Larry 23:58

Really, I don't think I ever hear to say those words.

Andy 24:05

So what happens next?

Larry 24:06

So, you do have a good memory. He is the one, and his brother is also an attorney. And his brother's the one who told him he didn't have to register in Alabama but encouraged him to stop by the law enforcement just to make certain.

Andy 24:22

Just to make sure. Yep, that will never go wrong. So Larry, I went through, and I read all 81 pages and I read it multiple times. In 1986, Michael McGuire was convicted in Colorado of first-degree sexual assault of his girlfriend, second degree assault by "causing and attempting to cause bodily injury," and three, menacing by placing another "in fear of

imminent serious bodily injury" After he was released, he was a productive taxpayer as I recall.

Larry 24:52

He was indeed. Mr. McGuire spent much of the next 20 years, after getting out of prison in Colorado, working as a hairstylist and as a jazz musician in Washington, DC. You should be able to relate to that. And I find it somewhat ironic that the state of Alabama has rendered this productive member of society into a non-taxpayer by the harshness of the registration requirements, particular since the southern states claimed that they want people to work and pay taxes. Now, that's funny.

Andy 25:24

I don't think they want people to work to pay taxes. I think they just they want to some people to work and pay taxes, and they want some people to work and maybe be free labor. But that's probably too far out there. You are being a little too logical about that, though. I think in 2010, "Mr. McGuire and his wife decided to move to Montgomery, Alabama, to live with and assist his elderly mother. But upon arriving in Montgomery, Mr. McGuire registered and then learned that he could not live with his mother because her home was too close to a childcare center."

Larry 25:58

Now you have to admit that's funny.

Andy 26:01

I'm not going to admit that's funny, because that's not funny. You have people who can look up what the word funny means and see if this actually applies to that. We have an English professor in chat, and he could tell us what the definition of funny is, and this does not qualify as funny.

Larry 26:13

Well, we don't use dictionaries in New Mexico.

Andy 26:17

That doesn't surprise me. That is so sad, Larry. The Court acknowledged that "Mr. McGuire looked for a compliant house. He was local law enforcement asked about the suitability of dozens of homes for rent but was told that ASORCNA--the Alabama sex offender registration and community Notification Act. So ACSORCNA prevented him from living at any of those addresses. From this point on we will refer to the Alabama law as "The Act." "They stayed at a hotel until their money ran out." Hotels are expensive--I can personally attest to that. "And then the couple briefly stayed with Mr. McGuire's brother. But when his brother's minor children returned from vacation, he had to move out because The Act prevented them from staying overnight with minors present. Unable to find housing, Mr. McGuire

began living beneath an interstate overpass." How can this be a thing in the United States of America, Larry?

Larry 27:13

It's really sad for sure. And after having been a taxpayer, "Mr. McGuire began receiving social security disability benefit payments. And he's continued to receive them." He also receives a non-service-related benefit payment from the Veteran's Administration. I didn't put all of it in there. But it has to do with agoraphobia, and some psychiatric diagnosis which could easily flow from all the crap he's gone through. And it's really sad.

Andy 27:42

Remind me though. So he was a worker had been working for a decade or a couple of decades. Then because of a quote unquote, civil regulatory scheme, he can't live with his mother, who he's taking care of, and then ends up receiving money because he's on disability, probably because he is unable to work anywhere. That's the picture that I'm painting in my head.

Larry 28:06

That's the correct picture. And like I say, the diagnosis was spelled out in the opinion, it was agoraphobia, and schizoid. Now, the schizophrenia part I don't know enough about, but when you're on the PFR registry, particularly in a place as bad as Alabama, and you'd have that kind of stress of being under a bridge, all sorts of psychiatric things could materialize because of the stress you're under. When you're living under a bridge, it's not a lot of safety that you have living under most bridges.

Andy 28:42

Yup. Mr. McGuire was living under an overpass. Does Alabama require more frequent reporting for homeless PFRs?

Larry 28:50

Yes, during the time he was homeless, Mr. McGuire was required to report and register in person each week. The funny thing is that he was required to report in person a week to both the Montgomery County Sheriff's Office and the Montgomery County Police Department. So they have dual reporting in Alabama.

Andy 29:09

Why does he have dual reporting?

Larry 29:13

That's the Alabama law. Its first I've ever heard of it. But yeah, that's the law.

Andy 29:17

Seriously. So then from my record--it's your turn to go.

Larry 29:22

Well, I know you're next. So you gotta be honest. So by your recollection is what?

Andy 29:28

That the case went to trial with no motion for summary judgment.

Larry 29:31

You know how much I love summary judgment, and it did go to trial. It went to trial and the district court, and this is a US District Court entered findings of fact and conclusions of law. "The court described the difficulties that Mr. McGuire faced in trying to find housing and work outside of the exclusion zones. It also addressed the effect of residence and employment restrictions and other restraints in Montgomery. The court found that these two restrictions made approximately 80 to 85% of Montgomery's housing stock and jobs off limits." And one would think that would be proof of the fact that the civil regulatory scheme is imposing significant disabilities or restraints.

Andy 30:17

But the court skirted that by finding that many "registrants were able to find housing and jobs in Montgomery nonetheless, and of the 430 registrants who lived or worked in the city, the court found only three were homeless." I find that to be probably bullshit. "And approximately 50% of these registrants had jobs. Although this meant that roughly half of the Montgomery registrants lacked jobs." The court ignored that but noted "that this number included some registrants who were not actively seeking employment." So much for your disabilities in restraints argument. Can you admit that, Larry?

Larry 30:52

Yes, I can admit that it failed. This is an amazingly shocking case, from the trial court, the outcome of the trial court, and the court of appeals. This is amazingly shocking, when you have that many disabilities and restraints.

Andy 31:07

I just really struggle with that one being there how any of this passes any sort of muster as not being disabilities and restraints. But I also noticed that the trial court's conclusions of law addressed the merits of Mr. McGuire's ex post facto claims. For most of the challenged restrictions, the district court concluded that Mr. McGuire failed to carry his burden of demonstrating that the restrictions were so punitive in purpose or effect that the legislature's non-punitive intent was overridden. I thought you said he won on a few of the issues in the District Court, though?

Larry 31:40

Well, he did. For example, the external reporting provisions which requires reporting to the both the city and to the county, the trial judge found that that was unconstitutional, and also its travel permit requirements, which mandate that registrants living in cities obtain permission and permission not just notified them but permission from both municipal and county law enforcement before traveling outside the area. The District Court declared the retroactive application of those two provisions unenforceable under the Ex Post Facto Clause, so he did win. But wait till you hear what happens as we go through this.

Andy 32:25

"Both Mr. McGuire and the Attorney General appealed parts of the district court's judgment. While this appeal was pending, the Alabama legislature amended The Act." Hey, that's a shocker. "It removed the travel permit requirement and clarify that registrants simply need to notify Leo law enforcement before traveling. It also modified the dual reporting requirements. Registrants who lived in cities no longer needed to report to both city and county law enforcement officers if they were homeless or plan to travel." I read this to be that the Alabama legislature at least concluded it had some problems with the registration because they made those changes.

Larry 32:59

Well, they did. They made those token changes, but not nearly enough, in my opinion.

Andy 33:04

So didn't Alabama have in big red letters criminal sex offender on their driver's licenses and ID cards?

Larry 33:11

They did. Gee, you have a great memory?

Andy 33:15

Well, there's only a handful of states that have it. Like three or four that have the markings of some sort.

Larry 33:19

So yes, at the time that the district court ruled, the Alabama law enforcement agency (ALEA) implemented this requirement. "But in a different lawsuit, a group of PFRs challenged a legal requirement under the First Amendment. The district court in that case declared that the identification requirement as implemented by ALEA was unconstitutional. And that was Doe vs. Marshall. We've talked about that 367 Federal Supplement back in 2019. After that ruling, ALEA changed the designation it used on licenses and identification cards by replacing the words with a code.

Andy 33:58

So even with those changes, though, Alabama law includes "in-person quarterly registration, direct notification to the public when a registrant lives nearby, prohibits registrants from living, working, or volunteering within 2000 feet of schools or childcare centers, requires homeless registrants to report to law enforcement once a week, and mandates that registrants notify law enforcement before traveling." Sure, sounds to me like there are plenty of disabilities and restraints here, Larry.

Larry 34:28

Oh, it sounds that way to me too, particularly the cumulative impact of all these restrictions, disabilities and restraints. This is just mind boggling to me.

Andy 34:39

The travel restrictions are considerable. The Act requires registrants to notify law enforcement when traveling before leaving his or her county of residence for three or more consecutive days. So you could just hop across the street essentially and that could be a county delineation. And if you're gonna go hang out with your mom or something for a couple of days over a long weekend, you got to let them know because you want to cross the street. Correct, Larry?

Larry 35:01

Correct.

Andy 35:04

Correct. The person must disclose his travel dates, intended destination, and temporary lodging information. Good grief. For domestic travel a registrant must complete the document within three business days of beginning a trip. For international travel, they must generally complete the Travel Form 21 days prior to travel. Do you people want to explain the penalty for non-compliance?

Larry 35:26

Sure. A registrant who knowingly violates the travel notification requirement faces up to 10 years imprisonment. And that's in the Alabama statute 13a.5.6, subsection A3. So if you are in Alabama, I encourage you to do these things unless you enjoy analyzing the inside of a prison cell.

Andy 35:49

Since the legislature amended some sections of the act, did they moot any of McGuire's claims?

Larry 35:56

Yes, they mooted some. And the case of Doe versus Marshall booted the driver's license issue.

Andy 36:04

What issues remain in the 11th circuit, then?

Larry 36:06

The residency and employment restrictions--those remain. The homeless registration requirements, travel notification requirement, community notification requirements remain in effect. So those were before the circuit.

Andy 36:24

Now, Larry, if somebody has to report weekly and they're homeless, I mean, what else are they going to do? This is almost like good for them that they then have something to do at least weekly. Right?

Larry 36:35

Well, if you look at it that way, but what about public transportation? If you're homeless, you generally lack transportation in most instances.

Andy 36:43

And if you do, then also there's the funds to take it.

Larry 36:45

And I would guess, not being a resident of Alabama, I'd be surprised if there's any meaningful public transportation. My guess would be you might have some in Montgomery, maybe in Birmingham, maybe in Mobile. But after that, I suspect it's going to be spotty at best. So if you live in the countryside--Alabama is a pretty good-sized state--I don't know how you would get there.

Andy 37:09

Well, if you have weeks in between, you can spend three days walking in each direction.

Larry 37:14

That's a great idea.

Andy 37:17

How does the court determine if the Ex Post Facto Clause is being violated by the act?

Larry 37:23

Why did you ask that? To show because to show entitlement for relief under the Ex Post Facto Clause, Mr. McGuire must establish that the challenged provisions in the Act are criminal in nature. To determine whether the laws are criminal in nature, the court applied a two-part intent effects test from Smith versus Doe. That's the famous case from US Supreme Court in 2003. And in the first step of the inquiry, the court asked whether the legislature intended to impose punishment. If they can make that conclusion that the legislature intended to impose punishment, the inquiry ends, and the statutory scheme is

declared punitive. But that's not generally what they find. They find they take the preamble that this is intended to be non-punitive. And they run with that. If the intent of the legislature was to create a civil non-punitive regulatory scheme, the court proceeds to the second step and asks whether the statutory scheme is so punitive either on purpose or effect as to negate the legislature's intent to deem it civil. In other words, that preamble that can be overridden theoretically, by evidence. It didn't seem to work in this case, but theoretically it can.

Andy 38:34

The court also noted that the Supreme Court has cautioned because we ordinarily defer to the legislature's stated intent, only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty. This means that the burden of proof is on the challenging party. In this case, Mr. McGuire, is that right?

Larry 38:57

That is correct. I've told you enough that you don't really need to hear. You've mastered that this is correct. You don't need me here. You are correct--he's got to carry the burden of proof.

Andy 39:10

First, they needed to determine whether the legislature intended to impose a civil or criminal scheme. That should be easy because the Alabama act is in the criminal section of the statutes that should have ended the inquiry. Can you confirm that?

Larry 39:25

No, I can't. The Supreme Court has already rejected that argument in Smith versus Doe nearly 20 years ago. In that case, the registrants argued that the codification of the Alaska registration provisions in the state's Criminal Procedure Code showed a legislative intent to punish. The Court acknowledged that the placement of the provisions in the Criminal Procedure Code could be probative of the legislature's intent in Smith versus Doe. But it found the placement not dispositive because the location and labels have a statutory vision and do not by themselves transform a civil remedy into a criminal one. That's what the US Supreme Court said.

Andy 40:07

And now we can move to the Kennedy versus Mendoza-Martinez factors or the intended effects test.

Larry 40:15

Correct. I'm ready, I think.

Andy 40:19

Okay, here we go. The court stated on page 30. "To determine whether a regulatory scheme is so punitive and purpose or effect when applied retroactively. We consider several factors that the Supreme Court originally adopted in Kennedy Mendoza, Martinez, 372 U.S. 144, 168 to 69 from 1963." I got that part right. The court "later applied in the ex post facto context of Smith versus Doe. Mendoza Martinez directed us to consider whether in its necessary operation, the regulatory scheme has been regarded in our history and traditions as a punishment. Number two imposes an affirmative disability or restraint. Number three promotes the traditional aims of punishment. Number four has a rational connection to a non-punitive purpose, or number five is excessive with respect to the purpose." McGuire should have won on all five. Everyone in Alabama should win on all five, it seems.

Larry 41:19

Unfortunately, he did not. But I do agree with you.

Andy 41:23

And then I've heard you speak about a facial challenge versus an as applied challenge. Can you explain the difference, sir?

Larry 41:33

Sure. I can just read excerpts from the opinion of the court in this case says "in an as-applied challenge, a plaintiff seeks to vindicate only her own constitutional rights. In evaluating an as-applied challenge, a court addresses whether a statute is unconstitutional the facts of a particular case, or its application to a particular party. By contrast, in a facial challenge, a plaintiff seeks to invalidate the entire statute and vindicate not only him or herself, right, but those of others who may be adversely impacted by the statute."

Andy 42:13

Every PFR would feel that if it's unconstitutional as applied to one, it's unconstitutional to all. Doesn't that make sense? Do you agree with that?

Larry 42:24

No, I don't. The logic is actually fine. But the law doesn't see it that way. According to the 11th circuit, a plaintiff who brings a facial challenge bears the burden of proving that the law could never be applied in a constitutional manner. To prevail, a plaintiff must establish that no set of circumstances exist under which the statute couldn't be valid. And that's what I need people to listen to very carefully. When people say, why don't you just bring down the whole G-D thing? You can't. Because there is a situation where registries could be constitutional. A facial challenge says you can't do this under any set of circumstances. But you absolutely can register people under many

circumstances. And we do it all the time. But registering people under the PFR statute, particular in Alabama and most of the South is very problematic, because they're not just registering people, they're basically putting out a lifetime supervision. So a facial challenge, you could not have a court declared that you could never register people. That's what a facial challenge would mean if you were to win a professional challenge. It would be like the closing the libraries to PFRs. We had that case here in Albuquerque, and our case went up to the 10th circuit. They tried to basically close Albuquerque public libraries to PFRs. And you just can't do that. You could regulate them. Can you restrict them to sections on ours? Yes. But just have a total ban? No. Because there's the constitutional problem there that you have rights to receive information. So that's a facial challenge there. And on its face, you just can't have that prohibition that broad, but you could have a more modest prohibition.

Andy 44:13

Is it oversimplifying it to say that even just like reading the title of the challenge is enough to go--Oh, no, you can't do that. Is that an oversimplification of a facial challenge? That it's unconstitutional on its face?

Larry 44:28

I mean, it has to be something that there'd be no circumstances under which you could do that. There'd be no circumstances where you could just bar people from the library altogether. And so therefore, a facial challenge. I don't know if I'm making it clear enough. When you're asserting a facial challenge, you're saying, look, court, there's no circumstances where you could ever do any of this. And that is just not the case. There are circumstances where you could register people quite easily and constitutionally.

Andy 45:03

And using your library example, I'm thinking, if there were like "reading with children time," it's not unreasonable to think that people that have been convicted of crimes against children can't go to the library when they're having 50 kids gathering in there to have some sort of reading session. That doesn't seem an unreasonable thing. But if it's just like, general time, that you can't not let them go to the library.

Larry 45:25

That is correct. A total ban. And it's like the people who say I'm not allowed on internet, that's facially unconstitutional. But a heavily restricted monitoring of your internet activity is quite constitutional. The more facts-specific they can be related to your facts of your case and your individual characteristics, the more disabilities they can impose on your net, but not a total ban. That would be an extreme

remedy. And you should be able to buy set maybe in the 11th circuit, but you should be able to go in and undo that by saying, hey, this is facially unconstitutional. They cannot allow they cannot disallow me from ever being online.

Andy 46:06

We should probably start closing out the segment because we're at about 40 something minutes and the court said at last "we apply the intent effects test to determine whether the act is civil or punitive, because we conclude that Alabama legislature intended to enact a civil legislative scheme, we must assess whether Mr. McGuire has shown by the clearest proof that the acts challenged provisions are so punitive and purpose or effect as to override the Alabama's legislatures and stated intent to enact a civil regulatory scheme. We hold that he has failed to meet that heavy burden." How can this be he showed so many disabilities and restraints? I can't wait to hear you figure out how to rationalize this and make excuses for them in this outcome?

Larry 46:51

Oh, well, I'm not going to do that in this time. I'm devastated at a loss for words to explain that if the Alabama act does not impose punishment with all these disabilities, then no registration scheme across the country does.

Andy 47:06

All right. What are his options now, Mr. McGuire?

Larry 47:09

Mr. McGuire's options. He can ask the three-judge panel to reconsider. But since they were unanimous that's not going to work. He could seek on-block review, which means that every judge on the 11th circuit would hear the case. That's also a longshot, because they don't want to do that. Because then everybody would like a second bite at the apple. So the final option is to file a petition for cert with the US Supreme Court. And I think the Supreme Court just might grant cert, since there is now a circuit split. You remember the Sixth Circuit found Michigan's registration scheme to be too punitive. And 11th has now held that a registration scheme more punitive than Michigan's is not. So we've got a circuit split.

Andy 47:53

Interesting. And it's probably not a guarantee that the Supreme Court would hear it, but certainly you have conflict there. So they're more than likely to hear it.

Larry 48:02

That is correct. And I would say that I'm scared, but he might for well file a cert petition. I think the odds are very good that he will.

Andy 48:13

And does NARSOL then pile on top of that one?

Larry 48:16

If the team decides they're going to file for cert, we absolutely, as long as I'm involved in a legal decision-making process, we will jump on this one at the very beginning. And try to encourage them to take the case, although I'm fearful, the downside of this is if they take this case, they grant cert, and they review it with a whole different court. Now we've got a different court than we had when they looked at the Michigan case. Folks, you got to remember, three new justices were put on during the Trump presidency. If they were to find that this is still a civil regulatory scheme, we would set back the cause of reform for many, many years, if not decades. It would encourage other states to toughen their registry schemes because if they were to affirm what Alabama is doing, why would a state feel restrained at that point?

Andy 49:12

Right. I understand. All right. Anything before we then go on to the your-people place?

Larry 49:20

Think not because we are going to run short on time.

Andy 49:24

Yep. You people wanted to rant about a case from a New Mexico. The name is the state of New Mexico vs. Ryan Thompson. And I've read it again. I read this thing twice. It does have to do with PFRs. And so we can go over it and make you people happy as I read the decision. It's a textualist dream. Let's set it up a bit. In every felony case in which a sentence of imprisonment is imposed, the defendant is required to serve a period of parole after that sentence. The mandatory period of parole for most is either one or two years. Unfortunately, they have a different period of time for PFRs. So can you explain that is equal but different? How's that thing go with Brown versus Board of Education?

Larry 50:06

That's correct. Those convicted of sexual offenses face an indeterminate period of supervised parole. The requirements are from five to 20 years for certain offenses and from five to life for the more serious TFR offenses. And that's in the New Mexico statutes annotated 31-21-10.1

Andy 50:28

Thanks. Okay, what determines the length of parole since it's indeterminate? Now, I remember we've talked about this a number of times of like, it might be this long, it might be that long. Who knows?

Larry 50:40

Well, the minimum period of supervision is five years. At the five-year mark, the PFR is entitled to have a review to determine whether the parole will terminate after five years or continue. This statute requires the parole board to hold a duration review hearing.

Andy 50:59

Who has the burden of proving that supervision should continue?

Larry 51:02

Under the law, the state has the burden of proving that the person should remain on parole.

Andy 51:09

I gotta think that, like if you come in here with like, the flimsiest of evidence and just say, yeah, he wore plaid on Tuesday. Oh, we should continue supervision. I gotta think that that would be the standard of evidence required to keep somebody on supervision.

Larry 51:24

You know, the funny thing is, you're not far off. Let me tell you how funny you are. You're cute. But I've seen through my work with attorneys who are fighting this that this has been a long-term issue since they passed this into 2007. But there have been people who have done splendidly well, no violations. And the parole board comes in and argues well, yes, he has done well, and has no violations. But we believe he can benefit from further supervision. Right, you have to admit that that's funny.

Andy 52:06

It's not funny, but there was a friend of mine in Augusta who went to have a good cause hearing in Georgia. And they said you are doing so well on parole and probation, whichever one it was, that we think you should stay on, because you're doing so well. The issue in Thompson's case is that the parole board refused to give him a hearing after he'd served more than five years. The statute is clear that PFRs are entitled to this hearing after serving the initial five years of supervised parole, and at two- and one-half year intervals thereafter. How in the world, Larry, did they justify not having the hearing?

Larry 52:44

Well, the parole board admitted a new requirement that's not in the statute. Mr. Thompson had violated his parole, had been returned to prison, and then released again. They claimed that he must have five years in the community reporting to a parole officer. The only problem is that's not what the statute says.

Andy 53:02

So Mr. Thompson brought this to the court by filing a petition for a writ of habeas corpus that is filed in the sentencing court. What did the lower court decide in his petition?

Larry 53:14

Oh, well, surprisingly, the district court agreed with Mr. Thompson. They ordered a duration hearing. But they denied his other requests that he just wanted outright release. And I recommended that you put that in there that since the state has not fulfilled its obligation to hold the review, to go ahead and make the assertion that you should be discharged because they've lost jurisdiction. Judge didn't bite on that. But the state appealed the decision because they saw the potential of having to conduct hundreds of these duration review hearings.

Andy 53:45

That would be their burden, but whatever. Anyway, I'm still confused. What was Mr. Thompson litigating?

Larry 53:52

Well, he had served his prison sentence. Remember, you don't get out early. You serve your prison sentence minus any meritorious good time. It can be 15% for some offenses, and it can be 50% for others. So you exhaust your sentence. And then you roll into that mandatory period. For most felonies, that's going to be two years. For the most minor one, one year. For most PFR offenses, it's indeterminate. So you roll into that period of parole. And his, unfortunately, his parole had been revoked, which meant that he was serving part of that indeterminate period in house because he was still in a parole period of indeterminate time of the five to 20. And the state contended the in-house time did not count toward the five years and the five years had to be consecutive with no violations, so they were asserting that they a right to restart the clock. So that's what they were litigating.

Andy 54:50

Okay, how could they make such an assertion if the statute says they are entitled to the duration review hearing?

Larry 54:57

Well, the state was creative. They relied on the definition as set forth in the parole statute, which was passed decades ago, when we actually had meritorious parole that you would, that you would get released early. And parole as it was defined then means they're released into the community of an inmate of an institution by decision of the board or by operation of law, subject to conditions imposed by the board as to its supervision. We didn't fully word the statute the way it ought to have been worded when we got rid of meritorious parole. And we created this mandatory

period of post-prison supervision that we still label parole, and therein lies the problem.

Andy 55:39

You keep using the word we. Did you help craft articulate this legislation?

Larry 55:45

I did not. When I say we the people are responsible for everything that happens in our states. Collectively we did this.

Andy 55:56

Okay, I'm thinking is this like we you people?

Larry 55:58

No.

Andy 56:02

What was the ultimate outcome for Mr. Thompson then?

Larry 56:04

What, did you skip two paragraphs?

Andy 56:11

I did. That's very possible. So yes, New Mexico has the nuance of calling the period that follows one sentence, it says parole in reality, it's really a mandatory period of supervised release, is it not?

Larry 56:23

That is exactly right. You are correct. And as the Court pointed out, under the literal statutory definition of parole, it's unclear what exactly a parolee who is completed his or her basic sentence is doing in prison if not serving parole. So the court got that. If you've served your time, and you're still in prison, you're on parole, even though you're in prison. They went on to explain that a parolee can be incarcerated during a parole period that follows the completion of the basic sentence for several reasons. One, because the lack of approved parole plan, which you have to submit, even though you're technically entitled to release, you have to tell them where you're gonna go. Or because the inmate refused to approve the conditions because they can put conditions on your supervision like the polygraph Kabuki machine. If you were to tell them to take that condition and shove it, they wouldn't release you. Or as a consequence of a parole violation, you can be serving your parole in house, because if you're not cooperating with this condition of parole, all those things could put you back into prison, but yet you're still in your parole period.

Andy 57:31

So now what was the outcome for Mr. Thompson?

Larry 57:35

Well, the court held it is unmistakable that the legislature intended that the duration review hearing be conducted after a PFR has served his initial minimum five years of mandatory parole, and that's on page 14. So there was no ambiguity in there.

Andy 57:52

Okay. But then the court said on page 15, "where text structure and history failed to establish that the government's position is unambiguously correct. The rule of Lenity applies." What is the rule of lenity?

Larry 58:08

It means that the tie goes to the accused. As the Court stated, "limit is reserved for these situations of which a reasonable doubt persists about a statute's intended scope even after resort to the language and structure, legislative history and motivating policies of the statute." So the court looked at all those things and they said, well, maybe the state has something here. But the rule of lenity applies. He's entitled to a hearing. You can make all the arguments you want, but he's entitled to hearing because the benefit of doubt and ambiguity goes in favor of the accused.

Andy 58:45

Okay, and in this case, the accused is Mr. Thompson. And so that decision goes to as Mr. Thompson because in this case it's a tie? Okay. Then the court concluded by stating "we hold that the term initial five years of supervised parole in Section 31-21-10.1B includes all time served during the parole sentence, whether in prison as contemplated by section 31-21-10 D, a rehabilitative institution pursuant to section 31-21-11 or the community as set forth in section"-- I'm done with this. This is a win, is it not?

Larry 59:27

It is a win for sure. But the statute still needs to be rewritten parole as existed. Parole, as it existed when the laws was enacted no longer exists. Therefore, we need to require that a person be released when he or she has completed serving their prison sentence regardless of whether they have adequate housing plan. Lack of an approved address does not mean that these people can continue to be held in prison. Our situation is nearly identical to what was occurring in Illinois before Adele Nicholas and Mark Weinberg took that case to federal court and won it. The federal court there ruled that that is blatantly unconstitutional. It's just as unconstitutional here. We just haven't been able to put all the pieces together and get a litigation team ready to do that. But I think we can win that here as well. We need to change the statute.

Andy 1:00:18

And let me try and play this out. So you, you're being released on parole, and you have been afforded the parole date, but you don't have adequate housing. And so instead of serving your parole, you're still locked up. But then when they finally do let you go, they start counting the clock on that day, but they should have been counting it when you were afforded the date, because you have you have a technical problem of being released. That probably didn't explain that very well,

Larry 1:00:50

There's one little thing that's not quite right. When they're not assigning you a parole date, you are maxing out your sentence. Okay, yeah, contrary to like in many states, where you, you serve a certain portion of your eligible here, you do not get to serve a portion, you serve all of it, unless your good time. So you've maxed out your sentence. So it should be a kick out should be occurring.

Andy 1:01:15

But then whether you have a place to go or not, they should open the door and you walk your tooshie out.

Larry 1:01:19

That would be my position, because your freedom has been restored. That period of community supervision is intended to be in the community. But they put all these cables in there that they give the parole board the authority to handle your period of what should be supervised release, like the federal system. In the federal system, you're going to kick out on that date. Because our system is almost identical. You're going to leave when you've served all your time. But here and in Illinois, who knows where else they continue to hold you because they say what you haven't given us a suitable address. Well, that's not my problem. You could lock me up if I violate the law, but right now, I've kicked out I've discharged I've done all my time.

Andy 1:02:03

You signed a contract with the state to say that you were serving X number of years or days, however it worked out. And now they are in breach of that contract.

Larry 1:02:14

That would be that would be one of my arguments. Yes.

Andy 1:02:18

I gotcha. I gotcha. We're done here on this one.

Larry 1:02:23

Yes, we are done with this one. And almost done with our time.

Andy 1:02:28

Yes, we are. I was just going to see if you said that you wanted to cover this ACLU article that we can just do very briefly. We're at like 1:02 and change on time. And this is from the Crime Report, ACLU calls electronic monitoring a failed reform. Why did you want to cover this so quick?

Larry 1:02:44

Well, I've had felt ever since I started seeing how they're using electronic monitoring, it's merely an expansion of the reach of the judicial system, and the ACLU has come to the same conclusion. Rather than being an alternative to having so many people incarcerated, we are still although we are down slightly after the pandemic, in terms of our numbers, the number of totally people incarcerated has come down. But we are still incarcerating more people. But we've expanded the judicial system. So if you get arrested for a crime, now you're going to be put on pretrial supervision with electronic monitoring, even though you're presumed innocent. And for the slightest violation of supervision, you're going to be put on electronic monitoring. I thought we were going to use this tool, according to the proponents, to help remove people from prison who, without that technology, would have not been safe enough to let out of prison. And now all we've done is just expanded the universe of people who are under correctional supervision, more people monitoring GPS for people it takes to monitor those people. And reply to the alarms and all the notifications. It's a whole industry that sprung up. It didn't do anything to reduce the people in prison that I can see. It's not discernible.

Andy 1:04:03

I gotcha. Yeah, it doesn't seem. It should be, hey, we took this one person out, we put him on an ankle monitor. Now we have one fewer person in the county jail. Oh, wait, no, we have a bed to fill. So let's bring somebody else.

Larry 1:04:20

That seems to be the way it works. And I'm disappointed, and I've learned my lesson. We're not really committed to reduce the prison population. The reduction of the ratio of incarcerated people effort gets met with all this--they're turning loose a tidal wave of crime, lawlessness on America. We get this attack from the conservative side about how dangerous it is. But you know what? The rest of the nations around the world have figured out a way to keep their citizens safer. They have lower crime rates and lower rates of incarceration. So I don't know how they do it, but we can't seem to do that here.

Andy 1:04:57

I saw this in the news. Here's just the title from the Washington Times "Biden to Pardon All Federal Convictions for Marijuana Possessions." Did you hear about this idea?

Larry 1:05:06

I was going to put it on tonight. But there'll be criticism that next thing, you know, he's gonna be turning loose all the drug pushers, and you can just rest assured of that because we're in an election cycle. And he's going to be vilified for that.

Andy 1:05:22

Okay, I just wanted to make sure that it was put out there that, if I'm not mistaken, Jeff Sessions was like, we're gonna prosecute to the maximum extent of the law. And then two presidents on the outsides of that were pardoning or hitting with kid gloves on those kinds of drug charges. Just saying.

Larry 1:05:42

Yep.

Andy 1:05:44

All right, well, then, we'll close things out. We had no new patrons, but one of them did a massive leap in his Patreon niche. Thank you, Brian. So very much. It was incredibly generous that you did that. And then Deborah, we covered her question earlier, she did a five-fold increase. And again, thank you so very much to both of you, helping support the cause here at Registry Matters. And anything you want to say before I do the close out of location and stuff.

Larry 1:06:14

No, I will look forward to seeing you people next week.

Andy 1:06:19

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Larry 1:06:54

Thanks. Good night.

Announcer 1:06:56

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