



RM Episode 249 Recorded 12/21-22

Announcer 00:00

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Andy 00:18

Here we go. Welcome, everybody in chat, recording live from FYP studios, east and west, transmitted across the internet. This is episode 249 of Registry Matters. As you can tell, Larry, I am still getting over a cold, which is why we didn't record Saturday night. I still have crud in my head, which brings up a really interesting conversation. Why does this happen? But first, how are you?

Larry 00:41

I'm doing awesome. This is a very lovely time to record. Two o'clock in the afternoon.

Andy 00:48

Yeah, it's what four o'clock here? It's a little after four here. So yeah, like you end up with all this crud and junk in your head, and it changes the whole acoustic structure of your face. And then your voice sounds different. And when I wake up, I actually sound like Rick.

Larry 01:03

Wow. That's quite a difference.

Andy 01:08

I recorded something early and it was like, you've been listening to F--and it sounded just like that 2am DJ with the super sweet, sultry voice.

Larry 01:17

So, all righty. Well, I'm glad to be with you. I'm glad we're able to get an episode in, prior to Christmas.

Andy 01:23

Absolutely. Tell me you have something to do with a kabuki machine with us tonight, don't you?

Larry 01:31

Yes, we're going to talk about a case out of the state of Oklahoma, decided by the Supreme Court of Oklahoma. And it actually went up to the US Supreme Court about polygraphs and treatment. And I think you're just going to enjoy this case because you're such a fan of the art of calligraphy. Is it an art or science anyway? You're such a fan.

Andy 01:53

It can't be a science. It can't, and art is in the eye of the beholder, I guess. So maybe it's art to somebody, oh, I hate that thing so bad. But make sure that you go over to YouTube and press like and subscribe and all that. And if you have a podcast app that lets you do a review, please write a review on your podcast app. I subscribed to a podcast that is pretty new, and there are literally no reviews on it. But please do that. And that would send us some love if you can't be a supporter financially. Larry, what else are we going to do tonight? Give us the rest of the rundown?

Larry 02:30

Well, we've got a group of questions. One was sort of a variation of a discussion that I turned into a question because it was asked. We've got some submissions of questions that are quite good. And we've got the case from the Oklahoma Supreme Court. And we've got some articles if we get to them. Not likely we will, but they're there just in case.

Andy 02:55

All right. Well, then let us dive into question numero uno. And it says, "Hi, Andy, my brother gave me your email. My son has been ready to leave jail since July, and we can't find a place for him. Our houses are too close to places, or we have kids in them. I finally found a small condo in Atlantic City, New Jersey for interstate compact to approve. Georgia sent an address to New Jersey. But they denied it basically because Mr. Moore from Georgia said to deny it because it is a beach." Like really the beach is off limits. So the whole coast of the United States would be off limits. "So we want to challenge this. Do you have any information for us to begin. A man from the interstate compact? Georgia called me after my emails to New Jersey and he even couldn't say why the beach was denied." You know, kids are known to congregate at beaches, by the way. "And he sidestepped it with other excuses like it's near a bike shop. If you have any information to help, please let me know. We've tried halfway houses. Some were denied. Others have no room. Thank you, Jerry." Yeah, I'm pretty sure that beaches would just be classified as places where children are known to congregate. So they're going to be like, Nope, can't live near a beach.

Larry 04:13

Well, are you asking me what Jerry should do?

Andy 04:17

I am. Absolutely. That's why you are here, because I'm just here to tell them that the authorities are dumb. But you're

gonna give us some sort of rational reason to explain what's going on here.

Larry 04:30

Well, I'm dubious, but I've always learned not always. But I've learned through the years that just because I'm dubious, doesn't mean that I'm correct. But I'm dubious if it went down the way that it was described here. Because I believe that New Jersey gets to make its own decision. If Georgia had not wanted that address approved, they could have easily just not submitted it. They could have said we did Google Earth or whatever you call it. And we're not even going to submit that address. So, so I'm dubious that it went down that way. I think we've had these episodes before about interstate compact and how states would prefer that you keep your offenders, particular certain categories of offenders, because of the community heightened sensitivity of those offenders, and what would happen if there were violation or re-offense or something. So I have a feeling that when it got to New Jersey--folks, this is speculation, because I'm not on the backside of this. But I have a feeling that New Jersey was looking for a reason to deny. And they communicated that they proposed address was near the beach or on the beach or whatever. And I have a feeling that New Jersey was the instigator of the denial.

Andy 05:49

Are you suggesting Larry, like the receiving state doesn't want you there, they're not open arm welcoming you in?

Larry 05:56

Absolutely. I'm suggesting, as I've discussed before, if you're supervising an offender that didn't come there, that really doesn't have any attachment to your state, per se. They didn't commit their offense there. Most of the time. They're compacting in him because they have a resource there for residents, but they are not established in that state. They would rather supervise their own people that they're stuck with. And if they're smart, they want to get rid of as many of their own as they could as well. But you would want to keep those from coming. Because if there is a transgression, the camera comes rolling in, and you would rather not be put in that uncomfortable position of saying how lax you were supervising. Remember the case in California where the person held a captive for how long was it in an enclosure in the backyard?

Andy 06:48

Oh, like 20 years?

Larry 06:51

So no one wants that type of publicity about how did this happen on your watch? Well, if you don't ever let the person come there, it cannot happen on your watch.

Andy 07:02

Right? There was a guy in Chicago named Castro, he had three women in his house. They were like chained to the floor. I'm not saying he was a PFR. But you don't want this in your backyard for sure. I'm with you.

Larry 07:15

So I'm thinking that Mr. Moore received an electronic communication from New Jersey, denying the address. And I'm doubting that Mr. Moore encouraged it. I really am. What can they do about it? I am very dubious if there is anything they can do about it. You begin with the premise that you do not have a right to be supervised in any place other than where you were convicted. Assuming that you have supervision as a part of your sentence, the state that imposed the sentence can't let you out of prison and say we're banishing you. You've got five years of supervision but get out of our state. They have to supervise you. But it's a privilege to go to any other state to be supervised, right, because you didn't commit your infraction there. And they're doing the supervision as a courtesy to the state for the state where you were convicted. So the question would be, what would you file? Where would you file it? Who would you name as a defendant in your filing? And what level of court would you file it? Would it be a federal case? Or would it be a state of New Jersey case? And she could call attorneys until she's blue in the face? And she wouldn't find an attorney that would want to touch this? Because there's not a lot of case law on this issue in terms of if they decline you what can you do? The easiest thing that you can do is to try to keep coming up with new addresses. Now, there are people sitting there saying, well, that's not so easy because people don't have all these options. And I realized that but trying to come up with another address is easier than following what's going to be a years' long legal challenge. And waiting for the courts to try to sidestep it and dismiss it by saying that we don't have subject matter jurisdiction over this. And it would get very ugly and very expensive. And you're probably spinning your wheels for a very long time. So the simplest thing to do, although it's not necessarily simple, would be to try to find a suitable address and resubmit the application to New Jersey.

Andy 09:29

You're also going to piss off a bunch of people. And then if it's a foot short, where they may have cut you some sort of slack at some point in time, now when you get there, they're going to be pissed off at you. And they're going to put the screws to you when you get there.

Larry 09:44

Well you could do that. But if you came to me--and I think of myself as least a crackpot legal professional--I wouldn't even begin to know how to unravel this. Okay, I would be tempted to want to file in federal court, but this is an

agreement between the states. Interstate compact by its very nature is essentially a treaty among states. So you've got agreement that the states have made. So the federal courts are not going to want to get involved in it, I don't believe. So you file in federal court, and you get dismissed on a 12B.6 motion. Then you file it in New Jersey State Court. And New Jersey State Court says, well, you know, we were not the ones. We didn't have to do with this, this is on Georgia. I mean, she says that Georgia has told us to deny it. So you've got to file your claim in Georgia. And you file it in Georgia, and their defense is going to be well, we didn't turn him down. New Jersey turned him down. You see how it's going to turn into a circular thing.

Andy 10:43

Total. It's gonna be a round robin of blaming other people. You're going to spend days and days and days and days and days trying to track down who to call next to say they denied it. Well, who's they?

Larry 10:56

That will be it. I wish I could be of more help, particularly for the holidays. But keep trying to come up with a suitable address, that's the best I can do. Or cash out all your 401k's your IRAs and contact me directly. I do have a fairly significant attorney in New Jersey, and we'll put our heads together trying to come up with a strategy. But be prepared to spend a whole lot of money and be prepared to be willing to lose that whole lot of money.

Andy 11:28

You mentioned this earlier. Can you guarantee any level of success? You cannot. Nor can any attorney, not just you.

Larry 11:37

You cannot. It's unethical to promise an outcome. You can convey to people that they have a strong case, and you can even suggest that they have an exceedingly strong case that they should win. But if you tell someone I guarantee you're going to win, you're breaching the Code of Professional Conduct.

Andy 11:56

All right. Well, then let's continue on. People are yelling at me--hey, there's another interstate compact question. Hey, it comes up a lot. Leave me alone. So here's question number two, Larry. I like how this starts--"You two drive me nuts. You tell us not to talk to the police and to consult with an attorney. Both of you must live in some kind of Dreamland, where everybody has an attorney on speed dial. And it's apparent that you have no idea what it's like to have guns all around your head, and the distress that causes when the police into your house. Beyond that, how in the hell can the regular mortals hire an attorney? When

I've heard Larry say how difficult it is? You are a very big hypocrite there, Mr. Larry, what are we supposed to do?"

Larry 12:42

That was that was generated through a conversation with one of our supporters I was having. And he said, I've listened to you babble about this, and tell people don't do this and don't do that. And then you're saying that you can't find an attorney that will you the satisfaction you're looking for in your case. So what do you expect us to do? And I said, you just gave me a great question for the podcast.

Andy 13:04

That's totally true. I mean, you and I have been beat this around before. And I'm just like--the people in chat are all very smart individuals. But none of us have the expertise to go, so Mr. Attorney, what do you think about this? Even when I went and saw my attorney about getting off of probation and the registry, he did not like me asking him questions. Like I was now walking around in his turf in his playground, and he was not happy with me.

Larry 13:35

Unfortunately, that's the reality. And even though I work in this business and profession--hopefully, it's more of a profession than a business. But I've had that same disappointment with my injury case, I really have. I've struggled with communication. Getting simple questions answered in terms of strategy. And how we structure the demand letter. I ended up having to rewrite a segment of the demand letter. I ended up having to put stuff in the demand letter that was readily available had they done the research through my injuries through the medical records. I just am very frustrated that even as a semi-colleague in the business, that I didn't get the type of attention that I felt that I deserved. Or the level of respect that I think I deserved. And I don't know what to tell people because if I can't navigate through this, with the knowledge I have, I don't know what you do. Your attorney--I remember he was giving you pushback. But that's no different than when you're at a doctor's office and the doctor looks at your MRI or your X-ray. The doctor says you need to have a hip replacement. Does a doctor get all flustered if you say well, are there any alternatives? And there'd be no reason for them to get offended. And in fact, it's very common you go get a second opinion, when a doctor recommends something significant. It's very common, you go get a second opinion. And I've not known any doctor to lecture me because I got a second opinion and say, hey, if you don't trust me.... But that's what the lawyers do. They say, well, I see you don't have confidence, and maybe why, maybe you need to find somebody else. And, of course, my answer to that is, perhaps I do. But it's very frustrating. And I don't know what the answer is, because I certainly can't help everybody to sit on their on their attorney interviews, when

they're selecting an attorney. But if they push back, it's a real warning sign if they push back on your questions. You're supposed to be a partner. I think you were at one of the conferences where William Quinn from Georgia attended, and he did a workshop. It was at a NARSOL conference. And he said that representation is a partnership between the client and the attorney. And if they're not going to be respectful and treat you as a partner, in the end, whatever the pursuit is, whether it's injury, whether it's criminal, whether it's tax, overpay, underpayment, whatever it is, if they're not going to work in partnership with you, and be respectful and hear what you have to say, and your ideas, then perhaps you've got the wrong attorney. But then the question becomes how do you disengage?

Andy 16:19

Yeah, I didn't mean to even find the the first attorney that will talk to you. Forget about whether you can work together. So it took you a lot of effort to find one that would be willing to talk to you about your case. Now you also have to couple that with we have to have a partnership where we can have dialogue back and forth and just throw ideas around. But no, you want us to find the unicorn attorney, Larry, and we can't find them.

Larry 16:52

Well, you know, I've learned my next time if I need an attorney, and I probably will, if I live long enough, I'm going to ask straight out. Do you find it offensive if you have a participatory client who wants to have answers? And who has lots of questions because I may not be the client for you. Because I'm not likely to change. So that's going to be my next attempt when I need another attorney.

Andy 17:18

And on the flip side Larry. When I do tech work for people, and you may have seen the email that I sent out where I gave an executive summary, and then there's 50 pages of details behind it. A lot of people don't even want to engage. It's just can you just fix it, please?

Larry 17:36

There are those clients who when they have an injury, for example, will want to know when they're going to get their check and when can they start spending their money. But I have a greater interest in my case because my injuries are permanent. I don't want to know how to maximize what I'm going to get because it's reduced my capacity to earn money. So I'm not happy just to get a quick payoff. I made it for the long game. But a lot of people, you're correct. They just want to how quick I can cash out. I need some money. I need it. I want my money now?

Andy 18:10

Yes. I don't want to give them any free advertisement. Those are very, very annoying commercials. All right. Well, then we will move along to question number three. And this one is from Sylvia. "Hi, Larry. And Andy. I hope you're having a good holiday season." Have you not heard about the weather coming, Larry, in the next handful of days? The guy in chat who's in Colorado, he says that his temperature is dropping 40 degrees in the next hour, or something like that. Maybe it was 50 degrees in four hours. 50 degrees in four hours. That's nice.

Larry 18:47

I heard about it. They're referring it, as I heard other meteorologists using--Arctic Cold Outbreak--a term I haven't been familiar with. But yeah, it's supposedly going to make it down the eastern side of our state, but it's not going to hit the metro very hard here. It's going to be very cold. I think they're expecting 20s way down into Florida.

Andy 19:07

Okay, yeah, it's gonna be cold in Georgia, too. All right. So it's a cold holiday season, and it's going to be very cold on Christmas. But back to the letter, "Lately, I have been reading a lot about the California constitutional right to privacy, which is closely related to the right to reputation that was brought up in the Pennsylvania case. Once a person registering in California receives a 1203.4, which is an expungement, or sealing of his record, should that person's information not be removed from the public Megan's Law website. I know this has been fought in courts, but it never addressed the actual right to privacy. It only addressed that the expungement would relieve the person of virtually all penalties and disabilities. And since the registry is not deemed punishment, this argument never succeeds. Yet the right to privacy would be, in my opinion, have a lot more merit as one's conviction technically no longer exists, but yet it is disseminated on the worldwide web inaccurately as an existing conviction. We'd love to hear your thoughts on this one. And, oh, by the way, FYP?"

Larry 20:16

Well, it's good question. Sylvia's educating me, because my understanding was that they actually do that when you get that expungement. But apparently, that is incorrect. Maybe I've got it confused with some certificate of rehabilitation for, you know, the attorney Chance that works with another organization that we're familiar with. He got the certificate of rehabilitation. But it's a really great question. And the answer is, I am not aware of any litigation that has paralleled what was decided by the Pennsylvania Supreme Court about the reputation. And I would say to Sylvia, that this is an area that where there needs to be some development. And since I'm on the legal team of an organization where we're looking for good solid cases, we

will at least take a look at this. So we can direct Sylvia to file a request for consideration for a case on the normal website. It will be submitted, and it will make its way to me, and I'll share it with our team, and we'll see what we think. But yes, it should be that way--you have an expungement on your record and that should restore you to privacy. It should.

Andy 21:44

Do you see it as being something that might carry some weight?

Larry 21:49

I do. Because this is an evolving body of case law, as we've talked about so many times. People didn't realize the harm that the mere act of being on the registry, even if you're not having to report on a registry. Apparently, that person is still having to register. But even if you're just simply listed and you're not reporting in, there's a lot of disabilities that go with it. And if you have been effectively just shy of being pardoned--I mean this is not the same as a pardon. But if they're sealing your record and expunged it, there's a public state supported listing of your behavior, that kind of neuters the effect of an expungement. It really does. How would you say that's an expungement? If the state of California is still disseminating registration information?

Andy 22:41

Have we covered cases where people have had something to the effect of their conviction being overturned, but they still end up on the registry? So I guess one question would be--Have you ever been on a registry before? When you go to another state and be like, well, yeah, but it was expunged? Yes. But were you on a registry? Yes. Then you'll be on the registry here.

Larry 23:03

Yes, we have. This is a slightly different, but yes, we've covered that. In the past, and you can have an example, if you're found not guilty by reason of insanity, you don't have a conviction. But in some states, that is still considered one. The evidence is there for you to get or not what's called an NGI verdict, not guilty by insanity. The underlying facts have been agreed to that they actually happened. But you are not responsible because the lack of culpable mental status, or inability to conform your conduct to law because of a mental disease or defect. But you technically don't have a conviction. So not having a conviction by itself is not enough to keep a person from having to register their circumstances by which you can register.

Andy 23:49

It seems like if you're not convicted, then you shouldn't be on it.

Larry 23:54

So yeah, you've you look for too many technicalities. What's wrong with you?

Andy 23:59

Yes, yes, me. All right. Okay, so Larry is not Mr. Doom and Gloom always. You are not doctor Dr. Doom. Doom and gloom is what I called you, Dr. Doom and Gloom?

Larry 24:12

You did, and see I've tried to learn from that and for Christmas Eve--we're three days out from Christmas. I'm trying to be positive.

Andy 24:24

All right, well, then let's go on to number four. We're at 25 minutes. We're doing well. Maybe we'll have time for that one other question in there. And this is question four from Joanne. "If a PFR with a federal offense (access with intent to view CP) is registered in a state that allows him to petition to be removed from Tier One in 10 years, would he file a petition to be removed from lifetime federal supervision at the same time? To the same court? How likely is it that he will be removed if he has a perfectly clean record for those 10 years? Does it even make sense to be off the registry but still under federal supervision for his entire life? Thanks. I listen to your show all your shows, and I'm a Patreon supporter person." Thank you, Joanne very much for your support on Patreon.

Larry 25:14

I like this question because it gives me a chance to talk about there is no federal registry. So there is no jurisdiction for the federal court to remove you from registration. So we don't have state specific stuff here. But let's just pull a state out of thin air. So he's registered in Colorado, and he's under federal conviction for CP? Well, there are two different things. He's reporting to the registration authorities in Colorado, and they have had the opportunity to prosecute him for failing to comply with any of the massive number of things. We probably should have picked Mississippi that has even a larger list of things you have to do, including paying for a community notification. Let's change it to Mississippi. You're registering in Mississippi, rather than Colorado, one of these deep South states. And you have all these disabilities of restraints of where you can live and where you can work. And you have every three years to pay for a new ID card in Mississippi, as I understand it. And you have all these things that could land you in a state prosecution and put you in a Mississippi prison for a long time. You absolutely would want to get away from that threat. So if you're in a state that would allow you to petition for removal from the registry, you could not file that petition with the federal court because it doesn't have the jurisdiction. You're registering with that state. So you'd

have to sign that petition. And there would be no reason in the world I would ever think about if someone came to this office and said, gee, I'd like to petition to get off the registry, but I've got lifetime supervision. I'd say they're two unrelated things. So we're going to tell you that that the registration is worth your while because it cares felony penalties and long-term incarceration. And if we can get you off of that, we take some of the stress out of your life. Now, lifetime supervised release is something that you would file in federal court with the jurisdiction where the cases domiciled either weren't happened or it may have been transferred, and jurisdiction taken over by another federal district, which would file in the district court asking that the period of supervised release be reduced to the time served, if you've got lifetime. My experience here in the District of New Mexico from the attorneys who practice in federal court, if you don't have 10 years, then they're not even going to consider removal from lifetime supervision. But so I would say you would do both. But you wouldn't do it with the same court. If you can petition to get off the registry in 10 years, you would file that in your proper state court. And you would certainly want to seek legal advice on both of these things. But the filing for removal from termination of supervised release, you would want to have a different attorney that practices in federal court who knows the lay of the land there. And they would want to find out what the temperature is for cutting people loose particular which judge. Some judges just don't cut anybody loose for PFR supervision period. They just don't. Well, so you want to find that information out. Why would you want to file a petition if the attorney can come back and say, you know, you're Andy, I can file this removal with Judge Fosca. So I picked out as a federal judge here. And Judge Fosca, as best I can find out, has never terminated a lifetime supervised PFR. I hate to take your money, but I'm willing to take your money, and we can give it a great shot. I'll have Dr. Kabuki. Do a great psychosexual eval. If we get a good report, I'll put together the best arguments I can about your success. But it's a long shot. Be \$10,000. Please, that's up for you, but the same work has to be done.

Andy 29:06

The success or failure, the work has to be done.

Larry 29:10

Anyway, if you think you're going into it to fail, you actually have to do more work, because you're trying to cover all the bases. If you're a decent attorney, you're trying to cover all the bases to up the odds. But if I'm the client and an attorney tells me I can't find a single case in the legal community in this district where Judge Fosca has terminated lifetime supervision. I don't know if that's the case with Judge Fosca, because I've just pulled that out there. But if an attorney tells you that and you want to spend your \$10,000, isn't that on you?

Andy 29:40

Absolutely. You know, Larry, after all these episodes, you don't really paint the up to optimistic picture that the legal system is really in our court. Do you know that?

Larry 29:53

I don't know what you mean by that.

Andy 29:57

It's there are a whole lot Have roadblocks and things to trip us up along this path. Not, not excluding the fact that we can't find attorneys that would help represent us that have skills in these areas. And then we're going to go up against the legal system that really does not want to do anything, just like you're the judge you're talking about just now has never released anybody. We're just doomed.

Larry 30:23

Well, that was hypothetical. I don't know that. But I'm saying if an attorney tells you that, you can't fault the attorney for the fact that you don't get released if your attorney told you up front, I don't think this is going to work. But we're going to give it one heck of a go if you want to move forward.

Andy 30:45

Yeah, I totally get that part too. I'm with you. Yeah, it's just you were saying earlier that you can't get an attorney that gives you a guarantee of some sort like that. You're doomed, or they're committing a professional conduct violation kind of thing. So you just have to know going in that you could be just throwing five or 10 grand down the toilet.

Larry 31:10

Oftentimes, that's the way these early terminations go down, as the Court denies them and says, come back in three years or come back in five years. And to your attorney, his credit, he was very reluctant to do yours, because he wasn't sure the odds were good.

Andy 31:29

And he said no. He said, no, no odds.

Larry 31:32

And then--without going into great detail--there was discussion that caused him to change his assessment of what the odds were. But those type of things don't happen very often. You had an unusual situation where people wanted you off supervision.

Andy 31:50

I still have no understanding as to why, other than like, would you want a huge caseload of people that are not a

problem. Why would you want to then have a collection of misfits that are a problem for you to deal with all the time?

Larry 32:07

I agree with you. If I had a caseload, I would not want to get rid of people who do well, because I'm going to get stuck with someone who was not.

Andy 32:13

Correct. So then it doesn't make sense. So in this case, the squeaky wheel, the squeaky cog gets the oil or whatever, and I wasn't a squeaky cog. So why would you get rid of it? This one's working.

Larry 32:24

I don't understand it. All right.

Announcer 32:28

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Andy 33:16

Alright, so then let's move over to the Kabuki machine. You ready for that?

Larry 33:22

Hope this case now, when we go through this case, I know even though you're not going to laugh, that audience is gonna be laughing.

Andy 33:31

Yes, I'm sure they're gonna be all up in arms, just giggling their butts off. Well, yeah, there may be some giggling, I'm sure. So you put this thing in here, and it's out of Oklahoma, from the Supreme Court of Oklahoma even and it's Benjamin Petty versus the State of Oklahoma, and involves my favorite thing, Larry. It involves the Kabuki machine. And if you're ready, I can't wait to hear your spin on this. It's clear they violated his supervision because of the Kabuki machine. Can you admit that at least to start?

Larry 34:02

No, I can't. So that should be it. Laughter number one.

Andy 34:08

Okay, so I should start already. [laughter] That one?

Larry 34:15

No though, the audience should be laughing because I cannot admit that. I will be able to set it up a little bit more. And hopefully we can get into it. But Mr. Petty certainly wasn't happy with the ruling of the Supreme Court. So he filed a cert petition with the United States Supreme Court.

Andy 34:36

All right, and what did they do?

Larry 34:38

They denied cert.

Andy 34:40

And that means they said no.

Larry 34:43

They said we don't want to review your case.

Andy 34:46

And they need four people at the Supreme Court the United States Supreme Court to accept it right?

Larry 34:52

Yes, they need four people that think there's something earth-shattering there. And it's very difficult to get to that magic four.

Andy 35:00

Do you have any indication on did three, did one, did none? Do you have any idea?

Larry 35:05

They don't tell you that. When it's not the requisite number, they just say petition for cert denied.

Andy 35:10

Interesting. All right. And so this means that we will confine our discussion to the Oklahoma Supreme Court. And let me set up some of the facts. On January 19, 2018, Petty pled guilty to--I don't want to read all that stuff--and blah, blah, on each count he was sentenced to fifteen years per each count, with all suspended. ended. The sentences were ordered to run concurrently. On August 13, 2020, the State filed a motion to revoke Petty's suspended sentence, alleging he violated special condition G which required PFR counseling or equivalent as directed by probation or his treatment provider. What happened next?

Larry 35:54

Well, before I do that, because I know it's consternated you through the five years, we've done this program that people get probation, but if you notice, even in a relatively hard-nosed state like Oklahoma, he got probation for those

charges. Yes, for those. That's why what happened is the stuff you didn't want to read, which could have caused problems with our prison sensors. But with all that, he still got a suspended probated sentence. But what happened next at the conclusion of the hearing, the district judge that sentenced him found that the state had proven the allegations, and its motion to revoke by the requisite evidence standard, which was preponderance of the evidence, and he revoked his suspended sentence in full and five days later, the district court resumed a revocation hearing, citing time constraints from the previous setting, and further sentenced Petty to three more years of mandatory post imprisonment. Plus the posted prisoner supervision for the state of Oklahoma special supervision conditions for PFRs.

Andy 37:07

It is from this order that Petty raised the following issues. It is from this order that Petty raised the following issues:

- I. Petty was denied due process of law and a fair hearing by the State's use of polygraph results to support revocation of his suspended sentence;
- II. Petty's denial and inability to detail the original offenses did not violate his treatment participation rules and conditions of probation;
- III. Petty's revocation hearing was rendered fundamentally unfair by the District Court's denial of the requested continuance necessary to guarantee Appellant's due process rights to present expert testimony in his defense;
- IV. Alternatively, denial of the requested continuance robbed Appellant of adequate time to prepare his defense, resulting in state-induced ineffective assistance of counsel at the revocation hearing; and
- V. As Petty's concurrent suspended sentences were revoked in full, the District Court lacked authority to impose additional rules and conditions of probation or for mandatory post-imprisonment supervision.

I understand that he wrote to NARSOL requesting an amicus brief and support for his Cert Petition. What did the NARSOL legal team think about his case? [Clinton laugh track]

Larry 38:38

Okay. Well, not much. We didn't think much about it. And there really wasn't even time if we had thought much about it because of the close proximity of his request when it went to a Supreme Court conference. But yeah, we weren't optimistic.

Andy 39:00

So let's look at another issue regarding the Kabuki machine. Can you detail some things about it?

Larry 39:07

Sure. The record shows that polygraph test results were not used to revoke his suspended sentence. Evidence was presented that Petty had taken a polygraph test and that he denied his crime of conviction in addition to polygraph results indicating potential deception. Petty was identified as a treatment failure but given the opportunity to attempt treatment with another provider. However, Petty continued to deny his crime of conviction and deny any criminal sexual behavior and was ultimately deemed a treatment failure by the second provider. Petty's repeated denial of his crime of conviction resulted in his second treatment failure and the basis for the present revocation, not the fact that he failed two polygraph examinations with his first treatment provider.

Andy 39:58

So we're going to dig into this one a little bit. Why can he not deny his original claim?

Larry 40:04

Well he could. Only, he pled guilty. He could have conceivably gone to trial. I know people have gone to trial and be convicted. And they get into same dilemma, because as a matter of law, they've been found guilty. But he could have conceivably asked his attorney about doing an Alford plea. And under the Supreme Court ruling in North Carolina versus Alford, it's been recognized by the highest court in the land that people plead guilty sometimes--although they're not guilty--because it's in their interest to do so. And possibly, if he had done an Alford plea, he could say, I've never admitted the crime. But you can't go in and tell the judge you're guilty and then turn around and say, I'm not guilty. I didn't do this stuff. Because one of the conditions was that he have treatment, that he participates and complete treatment. And that's inconsistent, when you say you didn't do anything you need treatment for.

Andy 40:58

I so struggle with this. Because if you're not guilty of what they're accusing you of, and they're threatening 7000 years in prison, so you're like, Fine, I'll admit to some of these things. And then the polygraph person tells you have to admit all these things like you are really stuck between a rock and hard place.

Larry 41:20

Well, according to the recitation of facts here, he was denying any sexual wrongdoing, not just some, and he pled guilty to sexual wrongdoing. And therefore he cannot maintain steadfastly that he's innocent of any and all sexual misconduct because he pled guilty to it. He might have been able to if he had done an Alford plea. That's a question for his attorney at the time of when he was in plea negotiations, where you let me will they let me do an Alford

plea. Sometimes the prosecution won't accept an Alford plea. The victims need to hear that admission that you did this ugly thing to them. And that's part of the victim's advocate role who has worked with the victim prior to the court, and the victim has made it clear that I want to hear him. I want to hear this person admit that they did this ugly thing. So sometimes the prosecution won't allow that type of plea.

Andy 42:11

And if we move on over to the next issue, issue number two, you're probably gonna say something along the same lines.

Larry 42:17

I will indeed. You know, he can't have it both ways. He can't plead guilty and then deny that the offense occurred. And it's clear from the record, Petty knew from the beginning that he had to participate in it and not fail out of PFR treatment. Specifically, Petty's special condition G requires that he participate, as directed by the probation officer or service provider. Petty failed to do so. He does not establish that he was revoked for anything other than a violation of special condition G. Now you're going to tell me that I'm impossible, aren't you?

Andy 42:51

Oh, you are totally impossible that you can't admit that he was revoked because of the lack of the Kabuki machine.

Larry 43:03

Well, I keep saying that, because the evidence doesn't support it. Yes, indirectly, had there been no Kabuki machine, he would never have been brought to court. I shouldn't say that. He would have been less likely to be brought to court. That Kabuki machine is what made them take him to court because they're looking at what they're showing as a deception on their device. And a person who's in denial. And their explanation would be he's not a candidate for treatment. Therefore, he presents a great threat to the community. But had they just not had a kabuki machine and he was still not admitting his offense, it could have ended up in the same result. They could have said, you're still in denial and not an acceptable candidate for treatment. But the Kabuki machine may have had some indirect role in it. But bottom line is you can't go to treatment after pleading guilty and say I didn't do nothing.

Andy 43:59

And the conditions of your probation are going to tell you that you have to go through the Kabuki machine. And so this would be where we would say, you have to just go through the Kabuki machine rigmarole and do your best. And if they tell you you're lying, you're being deceitful or whatever, then you say, no, I'm not. Stick it in your shorts.

Larry 44:18

Well, he couldn't do that, though, because the treatment rules for those providers were that a person who won't admit that they did anything is not someone that they can treat. So they terminated him. And therefore he would have to come up with another treatment provider that was suitable to the supervision authorities. Remember, that's one of the conditions you see. It has to be an approved treatment provider, not just somebody you go dig up out of your own volition. He was running out of options at that point.

Andy 44:54

Did I ever tell you that when they told me that I had to do my treatment, they pulled this list off and that guy's got on his desk, and so then it's on his desk, and he's got this piece of paper with five or six or seven something providers. And he very meticulously said, I'm not telling you which one you should use, but I'm just saying that maybe there might be some that will be better for you than others. And I was like, oh, wink wink, nod nod. And so I made sure that I called those two providers.

Larry 45:38

Were a couple suggested to you that particularly might be better.

Andy 45:43

Yes. And one of them I call it up and oh, my God, it was going to be--I was going to be a very, very uncomfortable person in there because it was going to be all faith-based, and I was going to be a very uncomfortable individual. The next one, my first question was--do you guys like push polygraphs? And they go, oh, look, honestly, because they're so expensive, if the polygraph, if that's gonna cause you financial hardship, then that means you're not paying us. So we rather have you pay us than the polygraph machine. And then there was not any sort of statement of faith or anything of that sort. So I was happy, so I went with that one.

Larry 46:22

So well. Yeah, I guess I'm sure you can throw some other crap at me here. So what else you got?

Andy 46:30

Oh, yeah, I'm coming. Oh, well, I was going to ask you about issue number three where the court denied a continuance. What is the continuance?

Larry 46:37

Well, he needed more time to be ready for his revocation hearing. And the court held that the reliability of Petty's polygraph examination, or the veracity of his denial of the criminal conviction were irrelevant to the revocation

hearings. Petty was required to attend PFR treatment as directed by his probation officer. It was Petty's denial of any past sexual wrongdoing that stalled his treatment and resulted in his ultimate failure. So therefore, since he failed out of treatment, the court said all the continuances in the world won't change the fact that you failed. I don't know. I completely agree with that. But that was the trial judge's ruling.

Andy 47:16

I'm running out of options on how to for you to redeem yourself since you are totally Mr. Doom and Gloom, and we'll find no merit here. So can we find something with number four?

Larry 47:29

Well, as the Court pointed out, a decision to grant a continuance is discretionary will only be disturbed by clear showing that the court abused that discretion. He failed to show that the court noted as discussed above the reliability of the polygraph examinations or the veracity of his denial of the crime, aggravation was irrelevant to the revocation hearing. As a result, Petty cannot demonstrate state-induced ineffective assistance of counsel.

Andy 48:00

I think there's just one more to go. You've got one shot left, Larry. So how about number five?

Larry 48:06

That was a failure on issue number five. He didn't raise that below. And the court said failure to raise that below the petty Argus a discord, they don't have authority to post those post imprisonment, supervision conditions, because it did five days after the revocation sentencing. And that he already been maxed out. And this one gives me the most consternation because the court said however, even presuming error, Petty fails to demonstrate that it seriously affects the fairness, integrity, or public reputation of judicial proceedings. And an otherwise represents a miscarriage of justice. If you're putting someone under supervision for three years with very stringent conditions, and they do not have the jurisdiction. I think that's a fundamental error there. And I think of all the issues, there may be some appealability on this in terms of he gets out from under the extra supervision, the PFR supervision, when he gets out of prison for serving his time. I think that if there's no authority, he has some shot at relief from the extra supervision. So I give him some hope that on issue number five, he may be able to get some relief.

Andy 49:24

So when it says he failed to raise it below, could you elaborate on that? Like, below what?

Larry 49:31

And in the trial court when you take something? Oh, in the lower court? You mean? Yeah, he didn't Yeah, he did raise it below. So the trial court didn't get the opportunity. Oh, okay. The design of the court system is not to give people multiple bites at the apple to think of things that they should have thought of previously, kind of remember waiting. We had the Kansas Supreme Court, but a judge when those words, maybe there should be some kind of remand here and he said, why would we do that? Why would we give you a chance to do that? Well, there would be no end to litigation. If people could say, oops, I forgot that. So as a general rule, barring some extraordinary circumstances, if you didn't raise the issue below and give the trial judge a chance to rule against you. But if you didn't preserve it below by raising the issue, that most issues are not raised first time on appeal. There are some exceptions. I continue to say one exception would be if according to the Constitution it's a facially unconstitutional statute and you didn't raise that below. I think I'm on reasonably solid ground to say you can raise the constitutional challenge at any stage, and the Supreme Court has agreed with me on that. But in terms of most things, you have foreclosed by not raising them below.

Andy 50:49

All right. And then finally, they also said, Petty argues that the district court did not have the authority to impose post imprisonment supervision because it did so five days after the revocation and sentencing. Petty also argues that the District Court lacked authority--you will respect my authority--to impose rules and condition on his post imprisonment supervision. However, even presuming error, Petty fails to demonstrate that it seriously affects the fairness, integrity or public reputation of the judicial proceedings, or otherwise represents a miscarriage of justice.

Larry 51:25

Yeah, that's what I was trying to just go through. I try to disagree with him on that one. I think if there's no subject matter jurisdiction, if he's already maxed out what he has the authority to do, this issue may gain legs later, but he's got to serve his time. Because if he files on this now, if I'm an appellate court, I'm going to say, well, you know, you may be dead before this becomes an issue. So bring it back to us later when you get closer to being out. When, you served your 15 years. Let's talk about it. That would be my reaction. I don't want to do any work. I have to deal with briefing on this now when it becomes a problem for you later. You're lawfully in prison right now. So right now, you're not serving these three years. When you're serving these three years, let's talk about it.

Andy 52:06

And I just want to circle back to the because he failed to raise it below. That's how the whole Smith versus Doe thing came about, isn't it? Because they didn't raise certain conditions in the lower court before it went to the Supreme Court?

Larry 52:19

That is correct. On Smith versus Doe, there was an assumption that just the very nature of imposing something ex post facto, that it would automatically be ruled unconstitutional. And they didn't do their diligent research. It was an arrogance factor. Well, of course, they can't do this. That was the attitude of Doe. And it turned out if they had done their requisite research, they have found that there was a Supreme Court decision and Kennedy versus Mendoza-Martinez in 1963 that said a regulatory scheme can be imposed retroactively. They would have been prepared for that argument. But they stipulated that all the stuff that they should have stipulated to, they did their summary judgment. And everything that the state would have argued, was assumed valid. And that's what people continue to misunderstand. Even attorneys out there that promote the myth that it's totally wrong. If you go do summary judgment, every defense that was not tried and tested and aired in open court is presumed true. So if the state of Alaska says the recidivism is frightening or high, that's what we're going to argue. And you say, Judge, go ahead, let's go forward summary judgment, no need to have a trial, then the decision has to be made assuming that recidivism is frightening and high. Now, the other way work around that is the trial judge can say no, I am not going to grant summary judgment, because I'm not ready to conclude that summary judge that, that there is no justiciable material dispute of any facts. I'm looking at the state's argument they're saying that recidivism is frighteningly high. And I'm going to say that we have a trial on that, because I don't know that to be true. But if the parties are willing to stipulate that there is a frighteningly high, then you can't be mad when the court has that the parties agree with facts. It's kind of like if you agree about the property line on your property. The court is not going to say well, you know, I kind of feel like there might be something but a hormone surveyor we're going to go out there if you guys agree where the boundary is. That's the boundary even if it's wrong,

Andy 54:27

Right okay. Any final thoughts on this before we close this part down?

Larry 54:36

No, but I know that there's just people just breaking out in laughter in chat now, right?

Andy 54:43

They were a little while ago. It's very quiet in there now. You have squelched all of their conversations there. We should start talking about people being convicted of certain kinds of images and get that all brought up again. That was a very popular subject.

Larry 54:59

Yeah, we got more views than we have in recent episodes.

Andy 55:05

Do you want to do this last letter thing? Or do you want to close it out for the night?

Larry 55:11

Well, let me go ahead and tease what we're going to be doing very soon in the next episode or two. We've got what I consider a great question that I snarled about when I first got it. And we had too much already lined up for tonight. But we're going to be talking about a person who's in our favorite facility in Fort Leavenworth, who is very creative and energetic and was thinking things through very carefully, maybe even overthinking them. And he wants to know about registering when he gets released from the military custody in Fort Leavenworth and journeys to North Carolina. Is he going to be in violation if he doesn't get there within three days? And we're going to unpack that and possibly even have Ashley back. Well, was she on two or three weeks ago?

Andy 55:59

Oh, my God, it's longer than that now.

Larry 56:02

Not Ashley, the attorney, but actually the spouse.

Andy 56:05

I know. Yeah. I mean, it was at least four weeks ago.

Larry 56:08

Has it been that long? Well, we're going to possibly have her back. She does amazing in terms of transcribing questions and writing up stuff. And he's a gifted writer, for sure. And, like I said, he may be overthinking this a little bit. So we're going to cover that either on Episode 250 or 251.

Andy 56:27

Very good. All right. So we'll close things out, won't we?

Larry 56:34

Well, how many minutes do we have left?

Andy 56:35

We are at 55 minutes. So we do have time I think to do it. But we can kick it back if you want to.

Larry 56:43

Well go ahead and grab it. I'll take a look at it. I've already forgot what it says. But let's take a look at.

Andy 56:49

I'm going to be reading it cold there, but I will do it. Alright, here comes a question to close out the show. It says "Dear NARSOL, my name is Michael. And I fully understand you're unable to give me legal advice. And it's just ducky. What I'm writing in regards to is an article you posted a few issues ago regarding the case of John Doe's One through Nine in the state of Tennessee. See, back in 2013, I was forced into a plea agreement for 152 months--12 years, eight months--for our crime I didn't commit. But either way, I thought that one, that once I was released, I could interstate compact from Kansas to my home state of Tennessee, do my registration, and my other parole priorities. And that be it. I was sadly mistaken. I'm now within 12-18 months of my release, and I find out that I will have lifetime post release that I was entirely unaware of and blindsided by it. Now to the reason I'm troubling you amazing people is I need some help sent my way. For Kansas lifetime post-release means that anytime I'm picked up for anything even as small as something like my attitude or tone of voice, I'd be hit with a parole violation. And transported 1400 miles from my house in Tennessee all the way back to Kansas for no less than 90 days. I'd be forced to find my way, all the way back home." Oh, that's interesting.

Larry 58:23

So go ahead. Well, the reason I put this in here is because this is an example of a couple things. The prison grapevine of misinformation, and a person who's overly thinking something. He's just flat out wrong on all this stuff. Just not even close. I mean their lifetime supervision; I'm taking that at face value that that they struck that on him at the last minute. Maybe he didn't know about it. At the time he was originally sentence that I'm not dealing with. But in terms of the violation, if he's on an interstate compact, everything is exactly the way we've talked about on previous episodes. The fact of the matter is Kansas, will not be able to do anything unless Tennessee refers him to Kansas. They start the process by sending a notice of violation to Kansas. And there has to be a violation that's articulated well. Talking to someone wrong tongue tone of voice, I have never seen a list of probation conditions that includes that. I have not seen that in my years in this business. So he if he were to have an encounter with law enforcement in Tennessee, it would rise to this level--here's the standard, folks. They notify the sending state, in this case Kansas, of violations that are in the packet of conditions that were sent to them

and of any conditions that they added when he got to Tennessee. Theoretically, if he makes it to Tennessee. So they would notify Kansas of either or a violation that Kansas sent with him. And any conditions they impose on him. For example, if they gave him a curfew and Kansas didn't impose a curfew. They would notify him that he's refusing to comply with curfew. Kansas would reply back to the report and suggest that they do a variety of things, including initiating or retaking. But that process entitles you to a probable cause hearing. You don't just get picked up in Tennessee and dragged 1400 miles across the country. So if you did find your way back to Tennessee, first of all, you would not be dragged 1400 miles without some due process. And second of all, if you did get dragged 1400 miles, you would not be let loose to find your own way back because you would have to recompact again. That would start the process all over again. So if he were to have a violation. He either waived the probable cause fighting in Tennessee and agreed to go back to Kansas and Kansas did not put him in prison, they would have to ask Tennessee to accept him again. He wouldn't just be roaming the streets around and hitchhiking with a stone out to get back to Tennessee. They would have to formally send it back to Tennessee. So basically, you're wrong on every single thing. In terms of how the interstate compact works.

Andy 1:01:20

And why do you how do you know, Larry? How can we trust you?

Larry 1:01:25

Because I used to teach this stuff. And that's one way you know. And I'm still a consultant on issues of interstate compact. Not as frequently, but that's how I know.

Andy 1:01:37

Okay, I'm right. I mean, even someone in chat has claimed that all the things that you have described are true. And you're not just going to be abducted by some black government van. And with a little hood put over your face and thrown in the car. And then three weeks later, you reappear in Kansas like, oh, crap, how did I get here?

Larry 1:01:57

No, it doesn't work that way. Now, he may end up in Kansas if Tennessee does agree that there was a violation. He could be detained, depending on what the arrest and hold authorities are in Tennessee. Some states give their probation officers arrest and hold without a warrant. Some states don't. New Mexico does. I don't think Georgia does that. They have to actually ask the court for a warrant. So depending on the state, he may be put into custody. But until he gets some form of due process, he's going to be sitting in a jail in Tennessee. And he's going to get to decide if he wants to waive extradition if they present the wrong

process to him. Or if he wants to agree that he's violated at least one or more of the conditions of supervision and voluntarily return to Kansas, but he's not going to be abducted in the middle tonight.

Andy 1:02:46

I just see it that would be epic. Ah, all right. Well, then. So you're not quite as doom and gloom on this particular one. You're not saying it's great, but it's not going to be like what he's describing as far as the doom and gloom effect.

Larry 1:02:57

Absolutely. Not good to end up back in Kansas. But it'll be for something of a more significant nature than a bad attitude.

Andy 1:03:06

And would he then go Hey, Toto I don't think we're in Kansas anymore. What do you do? Never mind. It was a bad joke. I thought you would get it. The movie came out in your youth, man. Did you ever see the Wizard of Oz?

Larry 1:03:19

Yes. Yes, I did. Oh, that was 1937 or something like that.

Andy 1:03:23

Somewhere in that ballpark? I figured you would get the joke because Dorothy goes, I don't think we're in Kansas anymore, Toto. So never mind. All right. Well, Larry, I sincerely, sincerely, sincerely hope that you have a wonderful holiday time, Christmas, Kwanzaa, Hanukkah, however, whatever you want to celebrate. I wish you the very best of a holiday season. I hope that you stay warm, because it's going to be freaking cold over here on the East Coast. And I hope that everyone stays warm and comfy, and you have lots of yummy food and great presents, and some nice time off. Spend time with friends and family and do all those things that are really actually the important things in life.

Larry 1:04:04

Well, thank you so much. And weren't you going to ask me how long I plan to stay?

Andy 1:04:09

Oh crap, I forgot.

Recorded Clip 1:04:17

How much longer are you planning to stay? Long time? Get used to me? Maybe someday you people learn.

Larry 1:04:30

I just couldn't resist when I saw that clip of Barney [Fife] saying, so maybe someday you people will learn We have to find a way to use that. So yes, I'm going to stay until you people learn or until I can't do it anymore.

Andy 1:04:47

I'm pretty sure that you're going to tap out before they learn. I'm pretty confident. Pretty confident. Alrighty, well. All right, my friend. And again, I wish everyone at home a happy holiday season and appreciate all the people that support the program, and we look forward to seeing you in the New Year. So have a great night, Larry.

Larry 1:05:08

I think we're going to be recording New Year's Eve maybe.

Andy 1:05:11

That is very, very, very, very, very possible. So very cool, man. Take care, buddy.

Larry 1:05:16

Happy Holidays, whatever you celebrate hope it's wonderful for you and your family.

Andy 1:05:21

Thank you so much. Bye bye.

Announcer 1:05:26

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