



Registry Matters Podcast

Episode 265

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Announcer

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0:00:18

Andy

Recording live from FYP Studios East and West, transmitting across the Internet, this is episode 265 of Register Matters. Good evening. Fine Sir, how are you?

0:00:29

Larry

I'm doing awesome. How are you?

0:00:32

Andy

I am doing fan frickin tastic. So, you know, we have been doing this thing for like over five years now.

0:00:40

Audio Clip

How much longer are you planning to stay? A long time get used to me.

0:00:47

Andy

Do you think we can ever get used to you?

0:00:49

Larry

I don't know, but I'm hoping So, after 5 1/2 years.

0:00:54

Andy

Has it been that long?

0:00:55

Larry

Yes.

0:00:57

Andy

Is this why I contemplate slitting my wrists every Saturday night?

0:01:00

Larry

I'm sure it's a factor.

0:01:03

Andy

Well, please everyone, if you would be So, very kind, make sure that you like subscribe, leave five-star reviews and all that. You can do that on your podcast app. You can do that over on YouTube. You can do that wherever it seems most appropriate for how you choose to listen. Like I said, I am a podcast person. I was listening to one while I was cutting the grass today. It's a great way to listen to things. Forget that whole YouTube scam thing. We own this

platform. We can never be taken down. YouTube could be like, we don't want you here anymore, So, you should do it with podcast. It's just my opinion. Do you have anything to say on top of that?

0:01:37

Larry

Now you're saying that YouTube, with the vast audience that we have that's approaching many hundreds of thousands now that they would dare take us down. Are you saying that they would do that?

0:01:50

Andy

I could see that our content could cross some line somewhere and we could be taken down. We are as controversial as a person like Alex Jones. Or what's that other knucklehead? Well, we'll just leave it at Alex Jones.

0:02:07

Larry

I can't fathom that they would take down a popular program that has the type of ratings that we have.

0:02:15

Andy

Please Sir, could you give me a rundown for the evening and so, that I can feed it into an AI system So, that it can write the description for me?

0:02:23

Larry

Sure. Tonight, we're going to be talking about lets see, we've got some stories. We haven't done much news lately, So, we've got some stories from Florida, Georgia, different places around the country. I don't remember what I threw in here, but. The big events are we're going to be talking about your favorite of all subjects, the Interstate Compact. You love that, right?

0:02:45

Andy

The most confusing subject on the planet, for real.

0:02:49

Larry

So, we're going to do a segment of Interstate Compact and then we've got a case out of the state of Michigan that is going back is back before the Sixth Circuit and we're going to get into a kind of a deep dive about that case. And the likelihood of its success on the issues that have been raised by the attorneys in the case below. And you're going to have fun with that because I know you've read it, what, twice now?

0:03:19

Andy

12 times. What's the difference? At this point I know it almost by heart from memory.

0:03:27

Larry

All righty. Well, let's look forward and see how we do. I think that covers what we've got planned for tonight. We're going to try to keep it to an hour because my fingers are tired at the end of the week in terms of doing this transcript, So, we're going to try to keep it compact. So, let's roll.

0:03:44

Andy

Fantastic. Well, first thing that you put in here, crazy as it is, is path to voting continues to be murky for Florida ex-felons. This comes from NPR public funded media. You know, Larry, I did find a quote that I want to figure how we can stream it in there. The guy's name is Fred Rogers. Is that who Mr. Rogers is?

0:04:04

Larry

I don't know, but I do remember Mr. Rogers from NPR.

0:04:08

Andy

So, well for from public broadcasting or whatever. And he testified before Congress about why we need funding for public media because of its non biases. Anyhow, need to figure out how we can fit that in here Anyway, So, this is from NPR. Nearly 1,000,000 Floridians who have finished prison time for a felony remain disenfranchised despite a 2018 ballot measure. That was a constitutional amendment that promised to restore their voting rights. And as this year's legislative session wraps up, advocates say Florida lawmakers still haven't done anything to provide clarity for the formerly incarcerated who want to regain their rights. The reason so, many people remain disenfranchised stems from rules Republicans added after voters approved a ballot measure. And again, this was to update. It was Amendment #4 of their constitution that prevented anybody with a felony from voting. So, in 2019, legislators passed a law requiring returning citizens to pay all fees and fines associated with their sentence before they can vote again.

0:05:06

Larry

Yes, I do recall that we've talked about it before, and according to the story, lawmakers never created a system to find out who owes what, says, Fentrice Driskel the Democratic leader of the Florida House Quote. We have been asking for a database, she said. Just let people know whether or not they have fines and fees, Let them know how to pay them, Let them know whether they're eligible to register to vote. End of quote. The funny thing is, that was not in the constitutional amendment. That was something that was passed by law. But the constitutional amendment was a little bit vague. It said to all obligations. So, the Republicans who run Florida decided that all obligations could include fines, fees, and restitution. Anything they could tack on. And apparently there's no system to track that.

0:05:59

Andy

That seems weird. What? What do you think that I will get fixed?

0:06:03

Larry

I don't think it's likely to be fixed. I think that the partisan nature of it, the Republicans have this fear, It's an unfounded fear that all these voters going line themselves with a Democrat party. I don't see that as being a realistic fear, but that's the fear they have. So, I don't see them wanting to put a million new Democratic voters on the rolls in Florida.

0:06:25

Andy

Driskel goes on and says issues around voting eligibility for the formerly incarcerated came to a head last year when the state's newly elected created Election Crimes unit announced A slew of voter fraud and arrest. We all watched in horror as Governor Ron DeSantis had 20 people arrested, she said. He had returning citizens who believed that they had registered to vote in a valid way. He had them arrested. Those 20 individuals weren't eligible vote because they had been convicted under murder or PFR type offenses, which exempted them from getting their rights back even if they had paid their fines and fees. Despite that, most of them were given voter registration cards. Local election officials said they were relying on the state to make sure voters were eligible.

0:07:11

Larry

That's really sad because that's kind of what we do when we go in to register to vote, they take the information. And they run it through various machinations that we're not familiar with, but they have access to a number of databases. And I have some connection to the election system because I work for someone who was formerly the election director for the whole state. And the assumption is that they wouldn't give you a voter card unless you were eligible. At least that would be my assumption. What would yours be?

0:07:41

Andy

Well, I was just going to ask you, can you please dig into? Voting is handled at the county level as far as I understand it. But then who's responsible for making sure that you are an eligible voters that like the DMV?

0:07:56

Larry

Well, the way I understand it, and I'm not the former election director, but the way I understand it, the county feeds this stuff to a to a state database that's available to county clerks. Here the registrar for voters is the county clerk of the county and they feed that information and then it tells them if they are prohibited for whatever reason. And if they issue you a voter identification card, if it arrives in the mail, you would assume that you're eligible to vote. The average person would make that assumption, but it is state rules, but they're administered locally.

0:08:27

Andy

Doesn't this? Wouldn't this fall under the category of I'm going to forget this term, Catherine Carpenter used it. It's when laws are. The punishment is very benign, but you don't know the

consequences. Like speeding. Oh, I didn't know you're guilty anyway. What's God, I forgot the term. I asked you like a month ago and you're like, I don't remember.

0:08:46

Larry

Oh, you're talking about strict liability?

0:08:48

Andy

Strict liability. Wouldn't this fall under something like that?

0:08:54

Larry

Well, the way the governor of Florida interpreted it, yes. But that's just the governor of Florida's interpretation. You can always arrest someone. That doesn't mean you can secure a conviction. If I were, if I were defending that person, I would argue that there was no, that the statute is defective because you would assume that you're eligible to vote if a card's issued and you would not have known this stuff. It was not a knowing commission of a felony. And if for a felony offense to be, I think it was a felony. If you're going to convict someone a felony, they have to know that they're breaking the law. That would be my argument that you can't have strict liability. But unfortunately, we do have strict liability when it comes to certain PFR type offenses.

0:09:36

Andy

Right, but in this case, is this something that you would go to prison for? And I don't want to diminish being there for 30 days and missing car payments and rent payments and losing your job. I don't want to diminish that. But is this like, what is the punishment for this?

0:09:53

Larry

It can be a much longer prison sentence. If it's a felony, it's going to carry more than 30 days, So, people could go away for a long period.

0:10:02

Andy

The other Is this a is this a problem? Is this a nonexistent problem? Because there's all these reports, all these people, you know, the whole Fox News settlement thing of voter fraud, that there's no documentation of any voter fraud. Is this something in search of that problem?

0:10:18

Larry

It is indeed. Now, of course, voter fraud happens. Some of it is intentional and some of it is unintentional. For example, people are busy in their lives, and they move. And they go back to their former precinct to vote, even though they don't live there. That's their registered address, but they would go sign in. Now, we don't do it that way because you can vote it any vote center here. We're not tethered to a precinct anymore, but many states are still tethered to the precinct. But even if you're not tethered to a precinct, you have to give the address where you're registered, and therefore that person is actually not eligible at that location,

but they are an eligible voter but very little of it is fraud where the person's trying to vote multiple times. They never show any evidence that that there's this mass conspiracy to create votes. That evidence just hasn't surfaced. I mean we had an investigation here some years ago when we had our only Republican Secretary of State since the state has existed. They investigated thousands, they pulled down thousands of votes and they found out that everyone of those suspect votes were legitimate. They were, there was no fraud. But yeah, it is a solution in search of a problem, but doesn't mean we shouldn't be on guard against it because it would diminish the voter's reliance on a system if they're people voting who are not eligible to vote or they're people voting who don't exist and the funny thing that people do is they run down and register.

Fictitious names. And sometimes those get through all the screening, and they say, see, this shows that it's a corrupt system. I registered Donald Duck.

0:12:00

Andy

Or my dog got registered. OK, let us move along to Michigan. I got it. Very good. There was the wrong title. Thing was in the place. Gotcha. Let us. Cover Michigan PFRs seek individual liability for enforcement of vacated rules. You want to talk about this case pending before the Sixth Circuit Court of Appeals from Michigan? Please tell us what is up with this on the latest and greatest.

0:12:33

Larry

Sure, John Doe plaintiffs, that's the name of the plaintiffs of the case represent a class seeking monetary damages for alleged violations of the 14th Amendment and the ex post facto clause of the United States Constitution. Plaintiffs say there are 42 United States Code 1983 claims arose out of the Michigan State Police's enforcement of allegedly unconstitutional provisions of the Michigan PFR Registration Act, otherwise known as SORA.

0:13:04

Andy

What are they looking for here? What are they seeking?

0:13:07

Larry

They want money. The plaintiffs claim that they were subjected to due process violations, retroactive punishment, and 1st Amendment infringement, and they suffered significant economic loss and emotional harm.

0:13:20

Andy

Would you be so kind if I give you some background, would that be okay with you?

0:13:25

Larry

Yes, you've read this case 20 times, right?

0:13:28

Andy

Yes, I like I said, I'm going to kind of do it from memory. Here is some background. Michigan enacted SORA in 1994. It established

a confidential database containing information about PFRs that was available only to law enforcement. The Michigan State legislature has amended SORA numerous times, and the problems really cascaded with SORA in 2006 amendments.

Those changes increased reporting requirements for registrants, introduced a registration fee, prohibited registrants from working, residing or loitering, basically existing within 1000 feet of a school and all those other places. And it created a program where members of the public could be notified electronically when a PFR moved into a particular ZIP code. And I vaguely recall that there were some more changes that came up around 2011.

0:14:14

Larry

Yes, they made SORA changes in 2011 and they significantly altered the structure of the law and that was to achieve AWA compliance. The statute assigned certain offenses to certain tiers based on the legislature's perception of the offenses' dangerousness. It did not factor in an individualized determination of the offender risk. Tier levels dictated registration and compliance obligations in terms of years, tier 1 for 15 years, tier 2 for 25 years and tier three for life. The 2011 amendments also, subjected registrants to the frequent inconvenience of reporting to law enforcement in person whenever they changed residences or employment, enrolled or even unenrolled as a student, changed names, registered a new e-mail address or other Internet identifier, or wish to travel for more than seven days, are brought or bought, or began to use a vehicle. Or even cease ownership of the vehicle. Basically, anything that you did that fell within the zone of registration, you had to do it. You had to report in person to make those changes.

0:15:20

Andy

Plaintiffs in this case alleged that that SORA's continued enforcement after previous ruling significantly impacted each of them. They say this impact reaches far beyond the stigma of simply being identified as PFRs on a public registry. Plaintiffs brief detailed numerous instances where they were required to comply with invalidated provisions of SORA. Did the Court find their allegations compelling?

0:15:44

Larry

Folks, we're talking about the trial court at this point and know the trial court did not.

0:15:51

Andy

The plaintiffs argued that all defendants are individually liable for constitutional violations resulting from MSP's enforcement of SORA. That would be Michigan State Police, I guess.

0:16:01

Larry

Correct.

0:16:03

Andy

They asserted that despite having knowledge of the violations, Defendants failed to issue any directive, policy, memoranda, or

other form of communication instructing subordinates of the enforcement of 2006 and 11 amendments was unconstitutional. That does seem compelling to me.

0:16:21

Larry

Well, it is compelling, but as we get to later not compelling enough. They also stated they believe defendants encouraged and implicitly authorized to continued violations of plaintiffs' rights by the Michigan State Police and other law enforcement agencies. The problem is they said they believed it and they did not prove the assertion. It's difficult to prove things without going to trial unless the opposing party enters into a joint stipulation. Can you imagine that the state of Michigan went into a joint stipulation on any of these important facts that were not proven out.

0:17:01

Andy

No, I guess not.

0:17:02

Larry

Well, that's one of the downfalls of summary judgment. Keep going.

0:17:06

Andy

Oh, this is summary judgment, is it? Yes. So, the state asked that the case be dismissed. And what is the legal standard when a motion for dismissal is filed?

0:17:16

Larry

Well, since I'm not a lawyer, I'm going to always pivot to the trial judge. The trial judge said to survive a motion to dismiss, a complaint must contain sufficient factual matter accepted as true, meaning the court has to accept the complaint is true to state a claim for relief that is plausible on its face. You can find that in the Order of dismissal on page 14. Dismissal under Rule 12B6 is warranted only if it appears beyond doubt that the plaintiff can prove no set of facts in support of the claims that would entitle him or her to relief.

0:17:54

Andy

And you said that the case is pending before the Sixth Circuit. This means that things did not go well at this lower court level.

0:18:01

Larry

That would be an understatement, to say the least. They certainly did not go well.

0:18:06

Andy

The trial court identified several issues with the complaint. They will have to overcome the issues with the statute of limitations, sovereign immunity and qualified immunity if they are to turn the ship around in the Sixth Circuit. I almost said circus, do you think they can recover?

0:18:23

Larry
Extremely unlikely.

0:18:25

Andy
You are So, doom and gloom. SORA was declared unconstitutional under the First Amendment and the 14th Amendment and the ex post facto clause by several federal court rulings. The list on page four of the District Court opinion and that that's the list that's on page 4. Why was the law enforced after that?

0:18:45

Larry
Well, because the court did not order the state to cease enforcement of SORA. Instead, they permitted the legislature time to rewrite the law without the unconstitutional provisions. Remember that when they said we will give you time to legislate. That's what happened.

0:19:02

Andy
I do remember that you also, predicted correctly that they would not legislate until a date certain for the registry going down was established by the court.

0:19:13

Larry
I did predict that that is in fact what happened. The Michigan legislature eventually passed, and the Governor signed Public Act 295 of the 2020 session. It was known also, as House Bill 5679 which repealed certain provisions and amended other provisions of Michigan SORA. These changes took effect on March 24th, 2021. That was five years after the Sixth Circuit found that the law was unconstitutional.

0:19:40

Andy
So, in 2016, *Does I* before the Sixth Circuit addressed only the retroactivity of the amendments. The Court held that retroactive application of the 2006 and 2011 SORA amendments violated the ex post facto clause. This ruling made it unlawful for the state to apply any 2006 or 2011 amendments to *Does I* plaintiffs who were convicted before the effective dates of the amendments. How did they continue to enforce this from the unconstitutional law point of view?

0:20:11

Larry
Again, because there was no order from the court to stop enforcing it, the court didn't want to just have the registry go dark. So, they gave since they're not in the legislative business, they left it up to the legislature to fashion a constitutional law. But the courts are not political creatures by and large. There was no rush to do that. You're sitting in the legislature. Imagine this. You do have some protection from the court by that order. But who wants to be the first one? Say, I tell you what I want to do, I'm going to see how we can peel back some of these requirements on PFRs. You're just not going to do that. So, there was no rush to do that.

0:20:52

Andy
So, I'm going to make my own analogy that I keep hearing about this, the redistricting stuff, and then the court says that this is gerrymandering, and you can't do this, but the court doesn't gerrymander. They just say you guys have to go write different maps because the legislature is the group that rewrites the maps. So, then they come back with new maps, and they try this all again. Is that a fair analogy?

0:21:13

Larry
It's very fair. That's in fact, that's what often happens. On rare occasions when they're at loggerheads and cannot come up with district maps, courts have been known to draw maps, but it's extremely rare. They're not in the legislative business.

0:21:28

Andy
And So, that's essentially what is happening here. They said you can't do this. We're not telling you what you can do, but you can't do this.

0:21:35

Larry
Correct.

0:21:36

Andy
All right. And then there was another case, otherwise known as *Does I*. Days after the Sixth Circuit decision in *Does 1*, six different John Doe plaintiffs filed a class action complaint challenging the constitutionality of SORA on the same grounds as *Does 1* on February 14th. Hey, Happy Valentine's Day of 2020, *Does II* held that SORA 2011 amendments declared unconstitutional under the ex post facto clause in *Does 1*, and they could not be severed from the state's statute. It concluded that no SORA provisions could apply retroactively to members of the ex post facto subclass, and that would be individuals whose offenses occurred prior to July 1 of 2011, the enactment of the SORA and amendments. And did that finally end enforcement?

0:22:26

Larry
I think it's finally did shortly after that, yes.

0:22:32

Andy
So, do you mind if we go through their individual arguments?

0:22:35

Larry
Yes, I do look forward to that because they all got pretty well demolished, but let's, let's do it.

0:22:41

Andy
All right. The state asserted that the plaintiffs are time barred by the statute of limitations. And so, from the time that it's enacted, they had five years of some number before if and if they didn't do it at that time, like you're just doomed from the start.

0:22:56

Larry

That's correct, the judge stated plaintiffs did not respond to defendants. And therefore, concede that fact, given the date they filed suit and the statute of limitations defense, any claims for damages that occurred prior to August 17th, 2018 are time barred.

0:23:15

Andy

Can that be overturned on appeal?

0:23:18

Larry

Not likely. I don't see how you could sitting as a tribunal. I don't see any way that you can overcome the law. The statute limitations is there. That would be the ultimate of legislating from the bench to say, well, I'll look at that thing there and it says that, but the hell with that. I'm going to rule the other way. I just don't see how that can be overturned.

0:23:39

Andy

There is the issue of supervisory control. Plaintiffs allege failure to supervise the MSP by the governor. That doesn't sound like a bad argument. Is that will that be overturned on appeal?

0:23:52

Larry

Well, a supervisory official's failure, supervised control or train a subordinate officer is not an action is not actionable unless the supervisor either encouraged the specific incident of misconduct or in some other way directly participated it and that's what the trial judge decided at the trial judge cited. *Petros versus City of Memphis*, and that's the Sixth Circuit binding case from 2016. I don't see how they're going to overcome that. It's the law of the circuit.

0:24:27

Andy

So, I do also, see that and then the judge also, stated that it is not enough for the plaintiff to allege that the defendants, the defendants supervisors, were sloppy, reckless or negligent in the performance of their duties. A plaintiff must allege that considering the information the defendants possessed the offending officers' failure to take adequate precautions amounted to deliberate indifference to plaintiffs' constitutional rights. You don't think they can overcome that one either?

0:24:53

Larry

I do not. On page 18, I'll refer to that, the court stated. "In short, to survive dismissal, plaintiffs must plausibly allege facts indicating the defendants one had a duty or authority to act. And two, were each personally involved, implicitly authorized, knowingly acquiesced, or approved the continued enforcement of SORA after it was declared unconstitutional. And three, they must plausibly allege that defendants' conduct cause injury. Again, it's hard to do that without a trial. You don't have any evidence that I'm aware of, and I doubt the state stipulated to any of those things. I can't imagine why they would.

0:25:34

Andy

Let's move over to sovereign immunity, sovereign immunity, the court stated. The defendants raise a strong 11th Amendment sovereign immunity case. Defendants say that notwithstanding the wording in the complaint, this lawsuit is barred under the 11th Amendment because the state of Michigan is the real party and interest, and plaintiffs seek the payment of damages at the state's expense. What did the trial court decide here? Do I need to play the laugh track?

0:26:01

Larry

It might not be a bad place to play it. The trial court held that defendants are correct. If an action is really against the state, even if it's not named as a defendant, the state is the real party and interest, and it is entitled to invoke sovereign immunity. And they cited *Lewis vs. Clark* from. I'm not sure where that case is from. Oh, that's the Supreme Court case from 2017. Not only that, but 1983 actions cannot be prosecuted against the state or state official in their official capacities. I didn't read those cases. I don't know what they said, but that's what the trial judge relied on, and I'm certain that she or her law clerk did read them.

0:26:44

Andy

Plaintiffs also allege that defendants are liable because they failed to terminate the unconstitutional application of SORA by the subordinates, or issued an executive order, policy directive or other communication instructing the Michigan State Police and other law enforcement agencies that the continued enforcement of the 2006 and 2011 SORA amendments was unconstitutional. Can you not admit to me? Please admit that this judge is wrong.

0:27:12

Larry

I can't do that. The judge is relying on controlling case law. And the Constitution, both of those cases I cited, one was from the US Supreme Court, one was from the Sixth Circuit. They're both federal because this is the Sixth Circuit. The 11th Amendment bars federal suits by private parties when the ultimate judgment will be paid from the state treasury. And the trial judge cited *Tucker vs. Ohio Department of Rehab and Corrections*. And that's again a Sixth Circuit case, a damage award for the state's unconstitutional enforcement of the law would likely be paid from the state treasury and impact state policy to be implemented by current and future governors and Michigan State Police directors. The judge is following the law. Now which is it that you guys want, Andy? You want judges that follow the law or do you want judges who invent the law on the bench? I'm getting confused tonight.

0:28:04

Andy

I want it to be whichever way I want it at the time that it benefits me most at that time.

0:28:09

Larry

Okey dokey.

0:28:11

Andy

So, I'm sure you're optimistic that this will be overturned on appeal.

0:28:16

Larry

I don't see that issue being overturned on appeal either, no.

0:28:20

Andy

All right, you are Mr. Doom and Gloom tonight. Now let's look at qualified immunity. And I've heard you pontificate in the past about qualified immunity. Qualified immunity shields government officials from liability for civil damage unless it is proven that the conduct violated clearly established statutory or constitutional rights. How is it? How is that determination made whether a right is clearly established?

0:28:44

Larry

Well, the court stated in inquiring whether a constitutional right is clearly established, we must look first to a decisions of the Supreme Court, and they're speaking of the US Supreme Court, then the decisions of the Court of Appeals, then to other courts within our circuit, and finally to the decisions of other circuits. And then the court eloquently pointed out, a single District Court opinion is not enough to pronounce a right is clearly established for purposes of qualified immunity.

0:29:12

Andy

Can the plaintiffs prevail unqualified immunity on appeal?

0:29:16

Larry

Again, not likely. The trial court held it was not until August 26th of 2021 and that's the date that the *Does II* judgment that the unconstitutional of SORA amendments under the first and 14 amendments grounds. That's when it became a clearly established constitutional violation. So, everything that happened prior to them, no, you cannot recover from this in my opinion.

0:29:44

Andy

What about on ex post facto grounds? The Does 1 decision should have served it as a notice and the rights to be free of ex post facto punishment. Wouldn't that have been clear then? How can you spin this one that way?

0:29:56

Larry

Well, you're correct, it should have put people on notice. But on page 31, the trial judge acknowledges that. The trial judge said Plaintiffs Expos facto rights were clearly established by the time of Does 1 in 2016. The judge then stated a reasonable officer would have known that the retroactive application of SORA by the State of Michigan violated the ex post facto clause of the US Constitution. In summary though, defendants would not be entitled to qualified immunity on count on that count for claims that arose after August 25th, 2016, but because of the impact of

the statute of limitations, Plaintiffs cannot claim damages for any injuries that they suffered. So. So, remember, look at the dates, there was a gap there when they were on notice, but then they let the statute of limitations run. So, but even if those claims cannot move forward because of other defenses of which she said, but even those claims cannot move forward because of other defenses which defendants have prevailed. So, yes, they are. They're screwed.

0:31:02

Andy

Going along, Senior US Circuit Court Judge Danny Boggs, a Ronald Reagan appointee, pointed out much of the complaint filed by Matuka's clients was written in the passive voice. And they were. And they asked the attorney why the individuals who directly enforce the registration requirements were not named as defendants. That turns into a whack, A mole problem, Matuka said. No one from the top of the authority with the authority to do So, said. This needs to stop or this is unconstitutional. Was this a failure or a bad strategy?

0:31:35

Larry

Not sure I can say with my limited information, but I can say that for whether it was bad strategy, it's going to probably result in an outcome that we're not going to be happy with. It's going to surprise me if they turn this around.

0:31:53

Andy

And of course, I'm going to ask you what happens next.

0:31:56

Larry

Well, this case had oral arguments before the Sixth Circuit last week. It's been submitted. As they refer to it, the case is now submitted and so we're waiting on the decision. I remember we waited for how many years from the 11th Circuit? We waited for that decision from the 11th Circuit with McGuire. We could be waiting for some period of time, or it could come out within three months. Who knows?

0:32:21

Andy

And so, that is at the Sixth Circuit Court of Appeals. Is that correct?

0:32:24

Larry

You're correct.

0:32:26

Andy

Okay. And I mean, what do they use similar terms to the Supreme Court where they say they grant cert? Is that the same sort of terminology?

0:32:34

Larry

No, when you go to the Court of Appeals, that's a right that you have. So, you don't they don't get to say no, we won't hear your

case. They can flush it. Oh, but that's a right you have to your first level of appellate review.

0:32:47

Andy

I see. OK. Hey, let me take a quick detour. I got a question for you regarding when you say I'm going to take it straight from the judge or from the opinion because you're not a lawyer. I hear reporters on news programs, they're not attorneys and they speak of what was said, but they also fill in their opinion as being legal experts of sorts. Why can't you?

0:33:08

Larry

I could, but I'm trying to give people less things to shoot and saying that I'm practicing law without a license. If I'm reading, I have been told by our chief disciplinary counsel several times that I can always read the law, I can always read a judicial opinion. But when I start interpreting it, then I'm getting into a gray area. So, therefore if I let the judge speak, then I say look, the judge said it, I didn't say it.

0:33:36

Andy

But you're not practicing, you're not advising a person to do a thing. You're whatever, all right? That's a whole different enchilada that we would have to slice and dice at a later date. And yesterday was Cinco de Mayo, So, there you go.

0:33:50

Announcer

Promo for Registry Matters deleted.

0:34:39

Andy

Shall we move over to this main event of things that I had confused a moment ago?

0:34:44

Larry

Yeah, this main event comes because of you and all the commotion you make about Interstate Compact. And then I got this ugly message from a person who fouled up and I said you know what a great segment this will make cause Andy loves Interstate compact stuff and this fits right in because of the violation as we go through it people are going to of course I'll use the term funny, but I doubt you'll say it's funny.

0:35:06

Andy

Every time we go through it, Larry, I think I understand it this way and then you explain it as it is that way and I try to adjust to go that way. And then the next time I think that you have switched me back to thinking about it a different way. Every time we do this, I end up confused again. So, we are going to go back to of course one of the most confusing issues, which is the Interstate Compact. We've not, we have not discussed Interstate compacts in a while. Or issues related to those who are transferring via the Interstate Compact in quite a while. Do you mind if we do that again please?

0:35:40

Larry

I don't mind because this is one. I really don't have to do a lot of prep on. But I did prep to plug in the facts of this person's case because I actually used it for something I wrote for the Legal Corner column.

0:35:53

Andy

And why should we listen to you on this specific subject? Since you're not a lawyer, you're just Larry. Why should we listen to you on this subject?

0:36:01

Larry

Because I've been recognized as an expert in this, and I have been engaged by entities in the state to train attorneys related to this issue. So, therefore you should listen to me on this.

0:36:12

Andy

I see the issue was communicated to you in the form of a question to the Legal Corner, which if I'm not mistaken is a NARSOL segment of the newsletter. Is that correct?

0:36:21

Larry

That's correct.

0:36:23

Andy

All right, the writer asked, How does a New Mexico ignore its own laws when New Mexico law mandates a review after five years to determine if supervision should continue? He was transferred to New Mexico from Arizona, and they did not provide him a review hearing. I've heard you say that PFRs in New Mexico are entitled to review after five years of supervision.

0:36:46

Larry

They are. When they were convicted in New Mexico, he was not.

0:36:50

Andy

Oh God, it's one of these things where you start mucking up everything. Alright, he stated, they never reviewed me while I was there. If they had, I would have gotten off before they caught before they caught me with an unauthorized electronic device. Does he have a point?

0:37:07

Larry

He does have a point, but he has a point on the electronic device. He shouldn't have had that his possession. But he does not have a point regarding the review hearing because he's not entitled to one. He has lifetime supervision imposed by Maricopa County, Arizona. New Mexico cannot give him a review hearing on that.

0:37:30

Andy

We really need to take a deep, deep, deep dive regarding the power each state has over an offender who is supervised pursuant to the Interstate Compact for Adult Offender Supervision, which is also known as ICOTS, is what I call it. This continues to confuse me, So, please debunk me, de confuse me.

0:37:52

Larry

That is why I am here. What do you want to know specifically? Registration versus supervision requirements can be confusing. These are two completely separate and distinctly different in terms of which state controls.

0:38:08

Andy

So, So, please make it simpler. Dumb it down for me.

0:38:13

Larry

Okay, a person who has been sentenced to a penalty for criminal conduct, is paying his or her debt to the people of the state where the conviction occurred. Just to clarify, it's the people who make the laws, and in this case, it's the people of Arizona whose laws he broke. This means that only the state of Arizona can reduce or eliminate the remainder of his lifetime supervision.

0:38:38

Andy

But New Mexico does have a law that PFRs are entitled to review after five years. Does New Mexico get to ignore their own law?

0:38:46

Larry

Well, actually they have ignored that law, even for people who were convicted in New Mexico. But that's an issue that's unrelated to this guy because he's not entitled to that provision because his penalty did not come from New Mexico. He has to take all of his issues with his penalty back to Arizona. The person that, let me put it different, that is a person that's not entitled to that hearing if New Mexico did not impose the sentence. Wouldn't it be great if a person could extinguish their penalty for committing a crime in one state by moving to another state?

0:39:21

Andy

I think that sounds like a great plan. We would, we would all buy stock in UHAUL so that we could capture all of the people moving around from state to state. But this becomes confusing because the receiving state, which is New Mexico in this case, likely imposed some special conditions that were not originally imposed by the state of Arizona. And I thought you said that the state of conviction controls the sentence.

0:39:45

Larry

I have said that numerous times, but nevertheless, they're always exceptions. An offender who requests to be transferred through the Interstate Compact is obligated to abide by any special conditions imposed by the receiving state. That power is

specifically in the ICAOS and is intended to eliminate inconsistent supervision of offenders with similar convictions. Can you imagine how difficult that would be? Say you've got a caseload of 60 and say that 9 of them are from other states. And if you had to have a flow chart of what you could do when I will this one has a curfew at 9 and this one has a curfew at six and this one has... You couldn't do that. So, therefore, if it's a standard condition that would be imposed on a PFR in New Mexico, New Mexico can impose that special condition even though Arizona did not. But that does not enlarge the punishment. It makes the punishment a little bit more rigorous, but it doesn't enlarge the punishment. If he had 10 years' probation, he still has 10 years' probation. Doesn't change that if he had a \$10,000 fine, he still has a \$10,000 fine. If he has \$100,000 in restitution, he still has \$100,000 in restitution. Those factors, the actual punishment, cannot be changed.

0:41:03

Andy

OK, my head starting to spin. You're doing doublespeak again. Which state controls the sentence?

0:41:10

Larry

The state of conviction is in control of the sentence. Only that state can reduce any aspect of the punishment. The receiving state can add special conditions to the supervision, but the caveat is that the special condition must be conditions that would have been imposed had the person been convicted of a similar offense in their state. Special conditions do not alter the sentence itself, but it is reasonable for you to believe that if New Mexico can change your conditions of supervision, they can also modify and or terminate your supervision, but they cannot. No state can increase or decrease the term of your punishment or levy additional fines or restitution. This would be usurpation of the sending state's powers and the receiving state just does not have that authority. Modification of the length of an offender sentence is exclusive within domain of the state of conviction.

0:42:06

Andy

Clarify what is considered punishment.

0:42:12

Larry

Well, that would be easy. The term of imprisonment if there was a term of imprisonment imposed, any post-prisons supervision or probation would be considered punishment. Any fines or restitution would also be considered punishment. The receiving state cannot alter those aspects of the sentence. In other words, those are fixed by Arizona in his case. Arizona fixed lifetime supervision. There's not a thing New Mexico can do about that. The only thing New Mexico could do would be recommend that he's been stellar under supervision and that he be terminated. They're not going to do that, but they could do that. But that's all they could do in terms of lessening his penalty. Same thing with any fines or restitution. That's all within Arizona's hands.

0:42:57

Andy

What about supervision fees?

0:42:58

Larry

Now that again will make your head spin because the receiving state does control supervision fees because they're providing the supervision service. However, supervision fees one would have paid in the state of conviction no longer apply when the person is on Interstate Compact. Meaning the state of Arizona doesn't get to charge him fees as well. When they turn loose of him and send him to out of state, then their supervision has terminated other than he's on someone's desktop to communicate with the state where he's serving his probation and they don't have any direct contact with him. So, they don't get the money. New Mexico gets the supervision fee.

0:43:35

Andy

And then I guess, what about registration stuff PFR registration? Who do you register with? To whom do you register?

0:43:43

Larry

Now there is where we start getting complicated again. Registration obligations are determined and controlled by the state one is residing in, rather than the state of conviction. This means that New Mexico would have had the final say regarding the duration and frequency of registration while he was supervised in New Mexico.

0:44:02

Andy

What about now then?

0:44:03

Larry

Well, as I understand it, based on the communication, he's back in prison, but say that they let him out because of an unauthorized device may or not have yielded a long prison time in Arizona. But now that he's no longer in New Mexico, he must comply with Arizona's registration laws upon his release, unless he is transferred again.

0:44:23

Andy

Does he have plans to return New Mexico? Will New Mexico accept him again?

0:44:28

Larry

He did mention that he would like to come back and. They will do all they can to deny him and beyond that, it would be foolish to return because they will target him for revocation again if he does get to come back. It would seem like that he would have learned his lesson from being here the first time that these people are not going to go easy on him. He's not going to get cakewalk and I don't know why he'd want to come back.

0:44:52

Andy

Just a quick comment in in chat. The moral of story, don't leave the state till you're off of supervision. But in this guy's case, he was going to be on it for life. So, like I you just supposed to shut down

your whole living apparatus if you're on lifetime supervision. All right, well, you have pontificated that at the time of conviction, the court must apprise the person of their duty to register. And as far as in my mind, this is where it gets super muddy. Since he was informed of his duty to register, can the failure to comply with registration result in a violation of your supervision and a new criminal charge?

0:45:28

Larry

It definitely can do both. This means a person who's been transferred out on Interstate Compact can be sent back and face revocation of their supervision for failing to comply. So, failing to comply since the Arizona court told him when they apprised him of that duty that's something that can also constitute a violation of his terms of supervision. So, New Mexico could say, Gee, we're having trouble with him, he hasn't been registering, and Arizona can initiate a revocation proceeding. And at the same time, New Mexico can file a criminal charge as well for failing to comply. But that's a brand-new criminal charge, and he is subject to the nuances of the registration scheme in New Mexico and all the paperwork they handed in Arizona that told him what he had to do to register that was null and void when he got to New Mexico. And if he's tripped up in New Mexico, he could be facing both a revocation and a criminal charge in New Mexico.

0:46:25

Andy

Do you know the acronym, The shortened version ELI5?

0:46:30

Larry

Doesn't come to mind.

0:46:32

Andy

OK, well I'm going to use it here. We need to wrap up this segment, So, can you please provide a simple explanation of the difference which is equivalent to ELI5? Explain it like I'm five please.

0:46:43

Larry

Registration of PFRs is a civil regulatory scheme and not considered part of the person's actual punishment, even though the penalties for failure to comply are extremely harsh. FYP recognizes despite the civil non punitive label, the process of registration and maintaining compliance with many of the restrictions is akin to punishment. In fact, some states have registration requirements that impose more restrictions than the person would have had when they were serving their court-imposed sentence. You could have more obligations as a registrant that you had while you're being supervised as a sexual offender. We get that, but it's still not a part of your actual punishment. It's a duty that flows from the conviction, and therefore it's sole and separate from the punishment. You have to get over it. Until we prove it's punishment, it's not.

0:47:41

Andy

Which would be equivalent to buying a car in some place that doesn't have any or limited smog controls, and then you move to 1 California that makes you have super tight emissions. It's a civil regulatory scheme. It's not punishment. If you don't want to comply with the punishment side of it, then don't move there. You don't want to have your car having the tailpipe thing not put out the stinky smoke, then don't move to California.

0:48:03

Larry

That is correct. That's probably one of the stricter states. So, I'm thinking some of the compact states up in the Northeast, New Jersey, would probably be similar. They wouldn't allow a lot of clunkers to come there because they have too many people cramped into too small of a space.

0:48:18

Andy

Yep. And then that means that the sending state is not in control of PFR registration unless the person does not comply with the receiving state's law.

0:48:28

Larry

That is correct. While the person is under supervision and they're not in the state that convicted them, they are not in control of registration. But that doesn't mean that you cannot have a violation that can be punished in both states. So, in conclusion, the person's actual punishment, which is probation, parole, remains forever in the hands of the sending state. Registration is in the hands of the states where the person's living at any point. The crossover is that failure to comply with requirements of registration can trigger a revocation in the in the sending state as well as a new criminal charge in the receiving state. If you don't want to stack, have this thing stacked, you better comply with the registration in the state that you're sent to. That's your chief thing to do. Forget about what they told you in Vermont, that you have to mail this form in once a year. When you go to Florida, that goes, that goes into the garbage dumpster as soon as you get into Florida. You will do what De Santis tells you to do, or you'll face a long prison sentence in Florida. And then when he gets done with you, he will hand you back to Vermont and they can decide to do nothing. They can decide to give you credit, time served, but you can end up in a conundrum in both states.

0:49:45

Andy

All right. I'm going to stick with what I already think I know in my head, and the people in chat are also equally confused. So, we'll leave that where it is and we have a couple more news items to cover unless there's anything else you would like to say about this particular subject in general.

0:50:03

Larry

Not about this subject, but I'd like to double back to a question that I didn't answer last week from at the very beginning of the show. We took a detour, and I didn't answer. The guy had asked why is it, if it's a regulatory scheme, why are the penalties so

severe? And there's no correlation, you can't make that quantum leap. Failure to register for the draft carries up to five years in prison. Nobody ever gets the five years for failing to register for the draft. But it is a maximum penalty. I did the research recently. You cannot say because the penalty is harsh, that that makes it a punitive scheme just in and of itself, because penalties can be imposed, or they can be probated. He's looking at it incorrectly. Well, it's a serious crime that makes it punitive. No doesn't. You can do serious damage with violating civil regulatory schemes. You can go to jail for a number of civil regulatory schemes that you don't comply with, including serving bad food, not handling it properly. You can be shut down and you can be incarcerated. Seldom happens, but it can.

0:51:06

Andy

I knew a woman who got and I'm going to get the details all screwy, but the material handling data sheet and whatever it is. This individual had an employee not follow it correctly and because she was the supervisor business owner, she went to federal prison for like two or three years. And of course, she was pissed off because she lost her gun rights, but because of a civil regulatory scheme of not handling chemicals correctly, she had to go serve time for it. Something along those lines. I might have some details incorrect, but.

0:51:36

Larry

Absolutely. All right, well, let's do these last two and get out of here.

0:51:40

Andy

Well, I do. I have a quick question for you. That is a sort of legal and current events, news oriented that. You may have heard that some of the individuals that were at the peaceful protest at the Capitol were convicted in the last handful of days. Did you hear about that?

0:51:55

Larry

I've heard some rumors of that.

0:51:57

Andy

OK, well here's my question. Their crimes to me seem exorbitant. I don't want to debate with anybody whether they, you know, false flag this. I don't give a shit, but they are convicted of this and the maximum sentence that they can serve for attempting to take over the country or overthrow the government, which I whichever you want to word it, the maximum penalty they could get us 20 years. And some of our people get sentences of hundreds of years and I in my brain it seems like overthrowing the government is worse and they can only get a maximum of 20 years. You want to straighten me out on this concept? I.

0:52:39

Larry

Think I'm going to duck and dodge that one.

0:52:45

Andy

We've talked about like the, the parity of different kinds of sentences. And you said you just really can't compare them because, I mean, we are a system of laws by the people, and what we choose to make a sentence for someone for doing a thing is just whatever it is. And that's what this sentence is, but.

0:53:03

Larry

Yeah, I think I'm going to leave that count of worms alone.

0:53:07

Andy

You are just whatever. All right, So, here's a story from CNN. Oklahoma PFR fatally shot his wife, her three kids and two teen girls before killing himself. Police say a convicted PFR this week allegedly fatally shot his wife and her three children in their Oklahoma home, as well as two teenage girls who were there for a sleepover before killing himself. Authorities found the bodies Monday at a property in Henrietta, a city about 90 miles from Oklahoma City, where 39-year-old registered PFR Jesse McFadden lived with his wife, who was 35 years old, Holly McFadden and her children, who were McFadden's stepchildren, and their names are given. I would definitely call this a terrible chat. Terrible tragedy,

0:53:53

Larry

We're very sad here about this here at FYP education. There are no words that are adequate to express the emotions I feel, and I'm sure you feel that something like this happened.

0:54:04

Andy

And how did they discover this and why are we covering it?

0:54:08

Larry

Basically, I just wanted to say, I'm sorry. I'm afraid that this is going to result in a cataclysmic shift in terms of pretrial detention of PFRs in Oklahoma because this is such a sensationalized story, and it will remain so. They discovered it because he was set to go on trial at 9:00 AM on Monday. He didn't show up and the charges were solicitation of a minor and a bench warrant was issued for when he failed to show up. And authorities then discovered the bodies when they were executing a search warrant to try to find him. And they will definitely be proposals.

There will definitely be proposals. I'll be shocked if they're not that if a person's already on the PFR registry and they get accused of another crime, that they have to be held at pretrial detention. And that's the reason why we're covering it. Because folks in Oklahoma you need to sharpen your game because this is coming at you.

0:55:01

Andy

And I wanted to clarify the details, which you just did. So, he was already on the registry and had been accused of something else and he obviously didn't want to face the sentencing, the court and all that stuff. So, he took care, took matters into his own hands. But did he drag everyone with him?

0:55:21

Larry

It's a tragedy.

0:55:25

Andy

Anything else there because we have one other thing to cover, and I think then round out the hour.

0:55:32

Larry

All right let's move on to the Peach State of Georgia.

0:55:36

Andy

Fantastic. Governor Brian Kemp signed a law Thursday that will increase penalties for repeat violent PFR type people, among other provisions. Miriam's Law is named for an Atlanta woman, Mariam Abdulrab. I'm sorry, I'm butchering that name who was kidnapped and killed in 2021. According to a Georgia House release on the signing of the bill, House Bill 188, it also changes a State Offender Review Boards risk assessment evaluation process and timelines for violent offenders and improves how the state handles PFRs who move to Georgia. The bill provides for a life prison sentence or split sentence of prison followed by probation for life for any person with a previous felony for PFR type thing who is convicted on a long list of crimes on a second occasion. The list will be shown in the notes. The law provides that any probation term shall also require monitoring.

0:56:36

Larry

The reason why I put this in here is because this is a deliberate attempt to get around the ruling of the *Park* case in Georgia where they said they couldn't put the electronic monitoring on people after they had extinguished their sentence. So, now they're going to put remember, this is the state that keeps a good close watch on every fiscal affair and expenditure. But they're going to lengthen the sentences so that they will have the ability to say, well, you have not extinguished your sentence, therefore you can have this. The law as you pointed out provides the probation term to also include electronic monitoring and the list of the crimes is fairly long. So, this is remember fiscal responsible people, they keep a good eye on every expenditure.

0:57:25

Andy

I will say it is for people that have multiple offenses. Well, I mean this kind of made, this made the rounds with the Georgia folks and trying to fight stuff and maybe there was some confusion about it, but. It is for a somewhat isolated group of charges, and it has to be someone that has multiple offenses and this is not multiple charges at the time of the offense. This is something that you do with a later date at like as a second incident.

0:57:52

Larry

Correct. And you, if you've been convicted of one of these crimes on the list previously, the way I understood it, and you do it again, it doesn't have to be the same crime, but if you get a conviction now? For one of these crimes, and you've had a previous

conviction for another crime on the list, The way I interpret it, then you would be subject to this, yes? So, you get your second sexual offense in a second and separate case from second from subsequent conduct, you will end up in this predicament.

0:58:21

Andy

Very good, Sir. Before we kick out of here, I would like to announce that we did get a new patron and I will thank you very much, JP we have a little bit of some history. And I thank you so much. He came in for an annual subscription using that \$1400 a month level from the stimulus money Thank you very much, JP And do you want to say that we got a new mail subscriber.

0:58:44

Larry

We did. We've been a drought, but we got a new one named Nathan and welcome Nathan. He's subscribed for 20 years.

0:58:55

Andy

Say again?

0:58:56

Larry

No, I'm just kidding. He subscribed for, I think, two or three months.

0:59:00

Andy

OK, you said sit. You cut out very good, very good. How do you think? Let's see, how could we promote the transcription service, the snail mail thing. Everyone knows somebody that is locked up. So, please tell all your people that are locked up about the subscriptions. Can they ask for like a freebie?

0:59:20

Larry

Sure, we send out freebies all the time, Absolutely.

0:59:24

Andy

How would they find us to get a freebie?

0:59:27

Larry

By knowing someone or it's in the NARSOL newsletter advertisement. It's in there every month telling them to write to us for a free one. And we do that and sometimes through my generosity, even though I'm only intending to send them one, I get lazy and I leave their name on the list. And they probably think we're crazy and that may be why they don't pay for it, because I don't take them off after they get their freebie.

0:59:52

Andy

Very good. Otherwise, please head over to registrymatters.co That's where you can download the podcast, and then over at FYP Education. That is where the transcripts are provided. If you want to do it on a DIY kind of level, you can print them out and mail them into your people in prison. If you want to do it that way as well, the PDF's of the transcript are posted up there eventually. And then of course, thank you so much for becoming patrons and all of you that are here in chat listening are patrons. And I can't thank you all enough. And you can find that over at [patreon.com/registry matters](http://patreon.com/registrymatters) for as little as a buck a month. And it all helps to support this program and the content that we're creating. Anything else before we go, Sir?

1:00:33

Larry

I think we're about to roll into a holiday for Sunday, which we should say happy holiday to that special person.

1:00:42

Andy

Oh, I was like, there's not a holiday this coming weekend. Oh, but yes, it is. Every one of us has a mother somewhere, or at least you did at some point in time. And you should thank that person very much for bringing you here if that is a relationship that you have.

1:00:58

Larry

All right.

1:01:00

Andy

Thanks everybody. Thank you Larry. I hope you have a splendid evening and rest of your weekend and I will talk to you, what at 5:00 o'clock tomorrow morning, Is that five my time or five your time?

1:01:10

Larry

5:00 my time.

1:01:12

Andy

OK, very good. Take care, buddy. Good night.

1:01:18

Announcer

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