



Registry Matters Podcast

Episode 277

Recorded 9-23-23

Announcer 0:00

Registry Matters as an independent production. The opinions and ideas here are those of the host, and do not reflect the opinions of any other organization. If you have problems with these thoughts, FYP.

Andy 0:18

Recording live from FYP studios, east and west, transmitting across the internet, this is episode 277 of Registry Matters. Good evening, sir. How are you?

Larry 0:28

I'm doing awesome.

Andy 0:32

Be sure to go over and like and subscribe on YouTube and give us five-star reviews. You know the drill. Everyone says make the notification bell all those things that we can feed the algorithm and then other people can find the program. And if you're new to the show, though, you can not only find us on YouTube, but you can also download the podcast and listen to it in your favorite podcast app, which is my favorite thing. I have actually like an old phone by my bed, Larry. And I have podcasts and I have it hooked up to a speaker there. And that's how I listen to podcasts when I go to sleep. It's a really great way to lull yourself into sleep.

Larry 1:06

I do a similar thing except I'm always listening to YouTube. [Andy: Oh, do you really?] I put the phone right next to my head and listen to stuff I want to hear until I fall asleep.

Andy 1:16

But hold on, though your screen stays on because you're not paying for YouTube, you have this light blaring into your room?

Larry 1:26

Well, I usually wake up and turn it off.

Andy 1:28

Oh, I see. Alright then. What are we doing today?

Larry 1:34

Well, we have a certiorari petition to the US Supreme Court from Florida, a situation in Wyoming that has gained some national attention, a story from Ohio of a pre-teen that is being threatened with prosecution for sexting, and a case that was just discussed and decided by the Michigan Court of Appeals for the next episode. I've not had enough time to read it because it just materialized today, but it was a challenge under the cruel and unusual punishment clause.

Andy 2:10

Tell me something really quick, though at first blush, about the case. Do you think that he can reverse it with the State Supreme Court?

Hysterical Laughter

Larry 2:29

That's why I like it. It's a great laugh. So, at first blush, I think it's very unlikely that he's going to be able to reverse it. And I'll tell you why. Do you remember the case from Colorado, *Millard V. Rankin*? We had an old federal judge named Richard Matsch. [Andy: I do remember that, yes,] Judge Matsch wanted to grant relief under that clause. And he did, in fact, grant relief under that clause. The challenge was initiated by an attorney. Her name was Alison Ruttenberg. [Andy: I remember] and she succeeded with no money for expert witnesses and secured a favorable outcome at the district court level. And I pontificated that it would be overturned by the Tenth Circuit on an appeal, and it was. And with all the resources that Judge Matsch had available to him, and wanting to grant relief, if he could not find enough legal grounds to sustain the relief, then it's hard to conceive of Michigan being able to in a state court to find those grounds because the cruel and unusual punishment clause is very difficult to meet that standard. According to the originalists and the textualists, we have to look at how when the Constitution was drafted, what punishments would have been considered cruel and unusual in that era, not by today's evolved standards, but at that time. Well, it's hard to think of a registry at that time, but putting people to death was widely accepted and not considered cruel and unusual. Taking that as the basis that you can't find juicing people with gas, electricity, and a hangman's noose, a registry certainly does not come close if you can't find any of that to be cruel and unusual. I think Alabama has invented some kind of new potion that they're using for executions now. If that's not cruel and unusual, it's hard to imagine that being on the list is going to be cruel and unusual. So, I think it's going to be tough, but we got to get into it on the next episode and dig deeper into the case.

Andy 4:44

Very well. Let's begin with a story from Wyoming. A young woman from West Virginia told members of the Wyoming legislative committee on Tuesday that a youth pastor, who groomed her when she was a teenager, is living in the state without accountability. Maddie Morgan told the joint judiciary committee that when she was 12, her youth pastor groomed her by posing as a boy her age online. "When I was 12 years old, I was approached through social media by someone posing as a 16-year-old boy living in my state, who turned out to be my 31-year-old pastor." She said the youth

pastor groomed, her sending her explicit photos and messages to her for two years before he got caught. She is unhappy that he is not registered in Wyoming.

Larry 5:35

You're correct, she's very unhappy that he's not registered, and he's not required to do so under Wyoming law.

Andy 5:42

And to give a little bit more context, the man left West Virginia after serving his sentence Morgan said and was no longer required to be registered in the state. She said he was ordered to comply with the registry requirements of the state he moved to. Upon finding out that her former youth pastor had moved to Wyoming, Morgan said she contacted the Wyoming Division of Criminal Investigation. The agency told her that there wasn't a state law equivalent to the crimes he was convicted of in West Virginia.

Larry 6:10

The girl stated, quote, "He cannot be held to the lifetime registry requirement that I was promised as a child. Even though I was promised justice, I do not feel that it has been given to me since he found a loophole in the registry."

Andy 6:27

The bill draft that the lawmakers were discussing when Morgan addressed the committee would make six criminal penalties a part of the state's PFR list. The charges contained in the bill draft are: sexual servitude of an adult, felonious restraint; that's when the victim is a minor and is committed by someone other than the parent or guardian, and false imprisonment. The same rules apply as the previous thing with the parents if it's not a parent or guardian; sexual servitude of a minor; first degree human trafficking; and second-degree human trafficking. Do you think that this bill can be defeated?

Larry 7:00

Possibly, but it's going to be difficult. Morgan warned the committee that the man who groomed her is now heavily involved in a Wyoming church, noting that he is a featured guest on an episode of the Church's podcast, and there's no law in your state. This is a quote, "There's no law in your state to prevent him from doing this again," Morgan said. "This is enough for me to come out and say that everyone needs to hold him accountable for what he did."

Andy 7:26

And I imagine that you being the legal strategist, pontificator of the universe, that you have a strategy? And would you be so willing to enlighten the audience?

Larry 7:38

Well, I would be able to come up with a strategy, but I can't guarantee your success. I can almost guarantee you that the strategy that most opponents of it will try is doomed to failure. This is because they will try to come in with reams of documents, and they will tell people that registries are not effective, and that it doesn't reduce recidivism. And that's not the issue in play here. We have to look at the issue in play here and focus on that issue. This would be a good lesson, like when Texas was trying to prevent the smaller towns for being able to have their own registry. And the issue before the legislature is why can big cities with Home Rule have prohibitions, and why are smaller towns not allowed to have that? The issue here is why is this man able to live in Wyoming not being registered, and that's where you focus. So, I doubt anybody will be able to carry out the strategy. And I admit it'd be a long shot, but it centers on three points. Registration as a civil regulatory scheme. Can you utter those words because no one can that's in advocacy?

Andy 8:51

I can. It's a civil regulatory scheme. I was totally going to ask you about this. She's talking about he's not being punished. But it's a civil regulatory scheme, which shouldn't be punishment.

Larry 9:00

That is correct. And that's what you have to address. There's not a soul in the Wyoming Legislature that knows that it's a civil regulatory scheme. The last time they did a major overhaul was when they became substantially compliant with the Adam Walsh Act. And that's been many years ago, close to a decade ago, maybe even more than a decade ago. And there's hardly anyone who's thought about the registry much since then. And therefore, they don't know that. So, this is your teachable moment. The young lady is mistaken about him not being punished. He did pay his debt to society; he was punished by the state of West Virginia. We don't get to punish him again because West Virginia punished him for his actions. What he's dealing with now is a registration civil consequence of his behavior. And had he stayed in West Virginia, he might be required to register, but Wyoming has its own rules. So, you've got to make sure civil regulatory scheme is top on the agenda and educate them that this is not a part of the man's punishment. And when you do that, you might gain some traction. But the first step I would do is reach out to the committee because they plan to revisit this in November, according to the article. And you really want to lean heavily on Wyoming being in a unique club of states. There are one of 18 that have been deemed as having met the tough threshold of AWA compliance. They've been deemed by the feds; "we have one of the 18 toughest registries in the nation." That works to your benefit in this

argument. You say, well, "maybe West Virginia has too many things on their list because we've got everything that's required by the feds to be registered. We're already doing that and that's why they deemed us substantially compliant." And you probably would want to eliminate the word "substantial" and say, "that's why we were deemed compliant with the federal guidelines." And we're getting our money because we've met those tough criteria that the feds put forward. So, in West Virginia, we can't speak about what they're doing, but we've met or exceeded what the Feds require. You got to make sure that they understand that, that Wyoming is in a unique club, and you're proud of that as an advocate. "We're very proud to be in this club of only 18 states that have been able to achieve that designation. And we have a very tough registry for our citizens here." So, do you think you can have an advocate that would say those words?

Andy 11:41
That doesn't even sound that complicated."

Larry 11:44
Yes, but no one is going to say how proud they are to have an AWA compliant state. You're not going to find a soul that's gonna be willing to go in and do that.

Andy 11:53
It seems like both of those points haven't even gotten to point 3 yet. The first two points seem like that would shut the whole thing down.

Larry 12:03
But I'm saying, in terms of someone who would be a PFR advocate, can you visualize them going in and saying how great it is that we're in a compliant state, and we've already got a very tough registry, which is very good for our citizens.

Andy 12:16
I don't know what the right way to say this is, but you're like tapping the ball into the net, saying, "There's nothing more that we must do because we're not required to do it. So why should we have to do more than what we already have?"

Larry 12:28
Well, but you need to be proud of your state in this situation.

Andy 12:34
But you're doing it very fake-ly, which I know isn't a word, but you're doing it under dishonest intentions, I suppose.

Larry 12:41
I have an audio clip for that. Would you play it please?

Andy 12:44
Oh, my God, which one am I supposed to play? I totally don't know what am I playing? [Larry: Bear Bryant?] Oh, trying to win the game. Gotcha. Game. [Bear Bryant: Trying to win the game].

Larry 12:54
That's what we're trying to do here. We're trying to win the game. So those are your big points, but you've got another point, and this is one that would probably be more likely that you could do. You've got a possible Equal Protection Clause violation. The United States Constitution has an equal protection clause, and the Wyoming constitution likely does as well, but I haven't read the Wyoming constitution. And you would want to really center your arguments on that. And say, "You know, there's a bunch of liberal lefties called NARSOL. [Andy: I've heard of them] and they love to go around the country litigating and trying to cause problems." And what we need to do is to make sure that we don't violate any constitutional provisions like the Equal Protection Clause. This man moved here and he's now a resident of our state. He's entitled to equal protection of our laws and we can't single out an individual to try to punish because clearly, that's what this woman wants, is to try to punish him more because she's not satisfied. We can't do that because it violates the Equal Protection Clause. We don't want those liberal lefties coming in here with a legal challenge because this is a vital public safety tool for our citizens. And we don't need to be spending a whole bunch of money embroiled in court challenges like they had in Pennsylvania that went on for a decade, and they had in Michigan that went on for nearly a decade. And these challenges are going on all over the country, and that's what these people do. We don't need that here. We've got a great registry. We need to just tell her we're really sorry, but our registry does not require him to be on it. And he's turned over a new life here, and we're sorry. And of course, there's one thing that conservatives claim that they like; he's a taxpaying citizen, productive in the state of Wyoming and that's what they say they are for. "We've got a man here paying taxes and he hasn't broken any laws that we're aware of. And that's all speculation that what he might do."

Andy 14:53
What is the counter argument to your first part about that it is a civil regulatory or scheme, the whole claim that he is not be punished? And what would be their response to that if you're saying that he is not being punished, but it's a civil regulatory scheme, and it can't be punishment? Doesn't that start you down this like death spiral of talking about Kennedy Mendoza?

Larry 15:14

It does, but you wouldn't need to go there. Because you're gracious to the young lady, you say she's very mistaken about this; the prosecutor should not have told her he would be required to register for life because even had he stayed in West Virginia, that's a promise that the prosecutor couldn't make because the laws are not carved in stone, they could change. Perhaps he might have been required to register for life, but that was still even in West Virginia, a civil regulatory scheme. It was not a part of his punishment. His punishment was prison, and any probation or parole that followed his sentence, which has expired. And it's a tragic thing that a prosecutor would tell her such a thing. Maybe she even misunderstood it as a young 12 year old. But the fact is, this is not a part of his punishment.

Andy 16:02

But the point that I'm trying to get at Larry is that the title of the article is, "Victim warns judiciary committee that some PFRs go unpunished in Wyoming." These wouldn't even be PFRs anymore if they're not required to register. So, these are previous PFRs. She thinks that this guy is getting off through a loophole. And I'm wondering, then, what was the argument from the judiciary committee that they are going to go forward and try to apply laws to this guy after the fact, if it's not punishment, and she wants him to be punished.

Larry 16:39

That is the argument I'm making. We can't do that in a civil regulatory scheme. She's misguided. And we can't do that because we run severe risk of having our great registration scheme toppled by a legal challenge. We've got a compliant registry, it's a very tough one, we're one of 18, so we need to leave it alone.

Andy 17:02

I like it. I like your strategy.

Larry 17:05

But nobody's gonna do it.

Andy 17:08

I see. And let's just say we had a mythical clone of "Larry Wyoming." So, your name is now Larry Wyoming and you're approximately 150 years younger and you went in there, lobbying. Even if you didn't really have many relationships, if you're just talking to your local representative that you've just recently met? How well is this sort of argument going to go.

Larry 17:32

I would expect it would be very cordially received. I'd suspect that they have not heard these arguments before. And I suspect that they would give it a lot of consideration. I

don't know if they would go my way, but they would be provided thought that they've never had before. And the people who were inclined to carry reams and reams of stuff, please don't do that. It does no good, I will carry this around on one sheet of paper, I would have four points that I would make. And I would be able to do it in my three to five minutes. And I would be lucky if I got that much time since I don't know these people. And I would probably be given a few minutes to speak in the public hearing. And I think it would have a chance of working. But that's not the way most people pursue it. They're gonna go in with volumes of stuff. And they're going to talk about recidivism. And they're going to talk about everything that is irrelevant. What's relevant here is that this is a civil regulatory scheme. He's paid his debt to society; Wyoming doesn't register this offense, and, therefore, we can't single this man out for unequal treatment. If he commits a new sex offense here, he'll be registered, prosecuted, and probably put in prison as a repeat offender for the rest of his life.

Andy 18:51

Yeah, I would imagine, especially the repeat offender part. He's definitely going to have some heavier book thrown at him than the first time and we didn't even cover how long he served on the first stint.

Larry 19:03

I'm not sure if that was even clearly delineated in the article.

Andy 19:08

Well, all right, so there you go. There's your advocacy lobbying lesson for the day. Shall we move on to this next article?

Larry 19:16

Sure, this one's gonna be a good one as well.

Andy 19:20

This one, like I said, is from Florida, and is before the US Supreme Court. You call it [Southern accent: court], I believe. I had some plans, but you put this in there, so I had to read it. Why did you wait to the last minute to put this one?

Larry 19:40

Well, because I just found out about it. So, you cancelled your plans this afternoon just to read this stuff.

Andy 19:46

Yes. I've been sitting here like slipping through all the pages. [Larry: I see.] You need to figure out your pipeline and get this stuff earlier than the day before. And this isn't coming from the Florida Action Committee. Is this the first time you've ever heard of this case?

Larry 20:05

It is indeed and I'm not sure if the Florida Action Committee has anything to do with it.

Andy 20:10

I'm still baffled at how this stuff just shows up like it's on the doorstep. These things take years and years to develop, and no one's ever heard of them. The case that we're talking about is *Clements vs. the State of Florida*. I've read it three times and am convinced that it's a good case. Do you mind if I set it up? [Larry: Go ahead]. Alright. In 2017 Clements filed a pro se. Boy, oh, boy, that's your favorite thing to start with. He filed a pro se petition for a writ of habeas corpus in the United States District Court of the Middle District of Florida, pursuant to Section 2254. The state moved to dismiss, arguing that the District Court lacked jurisdiction because Clements was no longer in custody. Clements replied to the burdens of PFR registration, along with all the other restrictions that come with being a registered sex offender should be sufficient to establish custody. You absolutely love pro se litigants.

Larry 21:12

I do indeed, I'd love for them to stop making bad case law.

Andy 21:17

What did the district court decide?

Larry 21:20

The district court dismissed this case for lack of jurisdiction because Clements was not in custody.

Andy 21:29

Clements then appealed to the Eleventh Circuit. How did they resolve the case?

Larry 21:35

Well, as the Court of Appeals framed it, the proper inquiry for resolving the question presented as whether Florida's registration reporting requirements substantially limit Mr. Clements' actions or movement. The court concluded that they do not. It reasoned that petitioner is not at the beck and call of state officials because his reporting requirement is periodic and predictable. Furthermore, he is not required to live in a certain community or home and does not need permission to hold a job or drive a car. And lastly, while he must provide in person advance notice of trips outside the state and outside the country, the trips themselves do not require the permission of any state official.

Andy 22:22

But he does have to get permission to work at a particular place. Wouldn't you have to do that with residency, like the 1,000-foot or the 2,500-foot rules that exist in Florida?

Larry 22:32

No, he doesn't have to get any permission. You can move anywhere you want to. Now, you may get prosecuted for being in an exclusion zone, but you don't have to ask anybody for permission.

Andy 22:40

That sounds almost like entrapment. Well, let's move over to the present though. Clements has filed a petition for certiorari or cert from the Eleventh Circuit court of appeals. This means that Clements has now asked the Supremes to take a look at it. The Supremes?

Larry 23:02

Not literally; the Supreme Court of the United States.

Andy 23:06

He has asked the Supreme Court of the United States to take a look at it. He's using habeas corpus as a vehicle. Tell me what you think about that strategy.

Larry 23:16

I'm not terribly optimistic.

Andy 23:19

Tell me what habeas corpus is, like really dumb it down because I hear this term a lot. And again, it's Latin and I have no idea what it means. I've heard it and don't know.

Larry 23:31

It's a person who's in some form of custody, that believes their custodial status is not lawful. And they're seeking an order to be brought before a court for the custodian that's holding them, to have to justify their detention. The key word that Clements says dealing with is 'custody.' Mr. Clements is not in custody as the term custody as defined.

Andy 23:57

And he's completed all of his obligations of assent sentence and is only on the registry in Florida. [Larry: That is correct.] You can't understand that registration with all the requirements is not the same as being on probation and parole. You can't put those two together.

Larry 24:15

No, I cannot because it's not to say by any stretch of the imagination.

Andy 24:20

Well, as usual, Larry, you're pretty cantankerous, and the person on the registry does have many duties and obligations that are similar to supervision. And it's sad that you can't see that.

Larry 24:33

I can see some similarities for sure, but there are many differences that distinguish one from the other. A person on probation is subject to a plethora of rules such as no recreational drugs, no alcohol use, no significant financial transactions without approval, restrictions of who they can associate with, and prior approval for travel. Other than Alabama, I know of no state that requires a PFR to have a permit to travel when they are only on the registry. Registrants are not subject to curfews, drug testing, polygraph testing, and on and on. So, it is not the same.

Andy 25:28

Being on the registry and failing to comply with something would put you in custody really quickly.

Larry 25:33

Yes, but that's a violation of the registry. Your probation can be revoked for a technical violation, like missing curfew. Your registry doesn't get revoked because you're up past a certain time of night.

Andy 25:42

I'm going to come up with a way to beat you on this argument later on. But before we get to that, let's get into the essence of this case. The question presented is whether a person is "in custody" within the meaning of Section 2254; if that person remains subject for the rest of his life to a state law PFR registration scheme that, among other things, compels his frequent physical appearances for in-person reporting at particular times and places and limits the circumstances under which he may travel, all under the threat of criminal sanction. Can you admit that Clements is in custody now?

Larry 26:19

I cannot admit that. Since 1874, a person seeking federal habeas corpus relief from a state court judgment must, among other things—be "in custody." The "in custody" requirement has remained unchanged through subsequent legislative revisions of the various habeas corpus statutes. The Anti-terrorism and Effective Death Penalty Act, passed by Congress in 1996, which restricted habeas relief, left intact the "in custody" language in § 2254(a). And according to the Eleventh Circuit, Congress, when enacting the dramatic changes to federal post-conviction review as part of the 1996 Anti-terrorism and Effective Death Penalty Act, did not affect the Supreme Court's custody jurisprudence.

Andy 27:31

According to Clements, the court should grant review to resolve the split and bring the Eleventh Circuit's precedent back in line with the Supreme Court's holdings. Proper resolution of the question presented has profound practical consequences for hundreds of thousands of individuals

nationwide who are denied federal habeas review of their state court convictions, despite facing lifetimes of significant restrictions on their liberty. The court's guidance on Section 2254's custody requirements is sorely needed, as confusion surrounding its application has produced arbitrary and inconsistent results among the circuits. Now, what do you say to that?

Larry 28:11

The results are not all that inconsistent. There was only one circuit that has split. The rest have determined that PFR for registration does not meet the in-custody requirements of federal habeas. So, I don't know what he's talking about because he's only cited one circuit. And, in fact, I think we talked about that case, and we'll get to it later. But I don't know about all these splits. There really is no split, there's a renegade circuit, and the rest of them have consistently interpreted the way I think the law was intended to be interpreted.

Andy 28:39

28 US Code Section 2254 specifies that the Supreme Court, a justice thereof, a circuit judge or a district court shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States. The issue here is whether Clements is in custody per Section 2254.

Larry 29:11

And you finally got that correct and he's not in custody. Why can't you see that?

Andy 29:16

Let's cover what the requirements are to see if the registration requirements or like probation. Report to the local sheriff's office in person every three or six months depending on the offense. If homeless, the requirement is monthly report in person within 48 hours of any change in address or vehicle registration. Report out-of-state travel plans including 48 hours before out-of-state domestic travel lasting more than three days and 21-day advance notice of international travel, report online within 48 hours any changes to employment, telephone number, email address, or internet identifiers. Please agree with me that these are probationary in nature.

Larry 30:03

Well, I guess I could agree with you that some of those are permanent probationary nature. But I cannot totally agree with you because the person under supervision must seek prior approval for doing most, if not all those things. A PFR does not need prior permission to do any of those things, he or she must simply report those activities.

Andy 30:22

And what would happen if you don't report the activity?

Larry 30:25

Same thing that would happen if you don't have your restaurant inspected and have your temperatures at the right level, you either get shut down or locked up. But if you do those things, you're fine. If you do the things, you're not in custody.

Andy 30:36

I think that you're pretty much hopeless because let's suppose you were a day laborer, Larry, and you changed employers every day, you would then have to go to the popo [police] office and update your stuff pretty much every day. And you wouldn't be able to maintain a lifestyle like that. That would be equivalent to being in custody at the local sheriff's office.

Larry 31:03

Well, that's like saying, "If I want a cat and the city ordinance requires me to restrain my cat to my own property, that I can't do that, that's your problem." To figure out how to do that if you're on the PFR registry, you got to figure out how to comply with the terms of your registration. And I don't know if you can report the change of employment any other way than in person. But if you had to report a day laborer job, if you couldn't just simply report this, you're working for a day laborer outfit, and if that outfit changes, if you had to report each location, that would definitely be cumbersome. But as long as you report it, you're fine.

Andy 31:37

You're hopeless. Other provisions of Florida law restrict where registrants are permitted to live. Registrants are forbidden, in particular, from residing within 1,000 feet of any school, childcare facility, park or playground, or pretty much where any other humans are living. The Eleventh Circuit has recognized that such provisions create vast, vast exclusion zones in which registrants are barred from residing, a condition that especially burdens those with families, citing *McGuire versus Marshall*. Oh, my God, I can't read that thing. What is that? [Citing *McGuire v. Marshall*, 50 F.4th 986, 1009 (11th Cir. 2022).] So, what's your spin on that take?

Larry 32:13

That was the *McGuire versus Marshall* case from Alabama that we talked about. And that was the one who kept calling. No, he didn't keep calling, but he did go in at his brother's behest to check because he had never been registered or required to register in Colorado,

Andy 32:28

That's the cat from Colorado. I gotcha.

Larry 32:30

Yeah, that's the one who went in because his brother told him, "Now you go down there and be a good boy, you check." And his brother was a lawyer who didn't know jack about registration. And they kept them there all day. And they said, "By the way, we've got all your paperwork from Colorado, and you are covered here. And if you don't register today, we're going to lock you up." But still, in terms of your question about my spin, he's still not in custody. These are provisions of the regulatory scheme; the person does not need permission to reside at a particular address. They simply need to respect the limitations of the exclusion zones. Clements is relying too heavily on a case from the Third Circuit and I'm going to try to pronounce this. It's *Piasecki v. Court of Common Pleas, Bucks County, PA*, and for those legal beagles, it's 917 F.3d 161 (3d Cir. 2019). And that was the Third Circuit decision from 2019. We discussed that case at the time. It was a fantastic holding that he was in custody for habeas purposes. But it's an outlier and not in the mainstream of jurisprudence.

Andy 33:39

When we were prepping for this, you pointed out that there was a significant mistake in the certiorari petition. Would you enlighten the audience upon that?

Larry 33:47

On page 9, the paragraph reads, "The Fourth Circuit came to the same conclusion as the Sixth, with respect to analytically identical Texas registration requirements. In *Wilson v. Flaherty*, 689 F.3d 332 (4th Cir. 2012), the petitioner faced similar in-person reporting requirements and limitations on travel. Despite all this, the court held that the Texas requirements lacked the discernible impediment to movement that typically satisfies the 'in custody' requirement." That stood out like a sore thumb because Texas is not in the Fourth Circuit. I located the case and it's actually from Virginia, which is in the Fourth Circuit. Shame on you for being careless before the U.S. Supreme Court.

Andy 34:49

I could see kinda getting the districts wrong, but Texas isn't anything like Virginia, just pointing this out and being pedantic. But tell me what's next.

Larry 35:00

Well Clements is actually still alive at the moment, the state of Florida declined to respond to the petition, which is customary, and you've asked about this before. The Supreme Court receives 8,000 to 9,000 certiorari petitions, and only about 1% are going to be granted. Therefore, if you responded to everybody that filed the certiorari

petition, you would be answering 8,000 petitions that don't need to be answered. So, they waive response. And they wait to see if the court is interested. The court has ordered a response. I think it's due either Monday or very soon in the coming days and then it will go to conference. They will decide if they have the four requisite votes to grant certiorari, so he's alive.

Andy 35:48

And as usual, your Mr. Doom and Gloom, but since they're interested, it means there's hope, right?

Larry 35:57

Ah, well, that's one way of looking at it, but there's a basis for me to come to the conclusion. The court has had at least two opportunities to help PFRs in recent years. Do you remember a case from the state of Michigan? State of Michigan, *Does vs. Snider*? Does that ring a bell?

Andy 36:14

That does ring a bell.

Larry 36:16

Do you remember Michigan asked the Supreme Court to take a look; they requested certiorari? And what did the Supreme Court say in response to that certiorari petition? They could have helped PFRs. They could have done what they could have and granted it. [Andy: They denied it.] Okay, then in Pennsylvania, the name of the case has escaped me because they've had so many, but they filed a certiorari petition. A county prosecuting attorney did not like the Pennsylvania Supreme Court's decision and sought US Supreme Court intervention. And what did the Supreme Court do? They could have said, "Yes, we want to look at this." Had they affirmed, they would have had the effect of overturning *Smith vs. Doe*. What did they do in that case?

Andy 36:56

I'm gonna go with a denied certiorari on that one, too.

Larry 36:59

They denied certiorari. So, if they had really wanted to revisit *Smith vs. Doe*, they could have granted review on either of those. In my humble opinion, if they grant review of this case, the danger is that they will affirm the Eleventh Circuit. If that turns out to be the case, they will extinguish the Third Circuit's favorable holding Piasecki. That would mean that everybody in that circuit who can use habeas as a vehicle will no longer have that vehicle. I can't imagine that the states that compose that circuit where Piasecki is binding, if the US Supreme Court says "Nope, this is not the way we see it." I can't imagine they would continue to entertain habeas petitions from people who are not in custody. So that's what my fear is.

Andy 37:49

Why do you think they would not expand habeas relief to include those on the registry?

Larry 37:56

Well, it would open proverbial floodgates to 1,000s. If there's 800,000 people on the registry, I would imagine, do you think at least 10% would want to get off?

Andy 38:07

I would imagine more than ten thousand members that would want to get off the registry if they had a vehicle.

Larry 38:11

Well, if you open habeas to 80,000, let's just say, conservatively to 10% will have the wherewithal to know how to get off the registry. You've got 80,000 petitions dumped into the court system saying, "I want habeas review. I want to reopen my case for ten, twenty or thirty years ago, and beyond that." Congress has mandated that there be an in-custody position of an individual seeking habeas. Now, I know our audience is very strict in interpretation and they don't want you to be legislating from the bench. This would be legislating a brand new vehicle from the bench.

Andy 38:53

I have a question and I want you to think for a moment, would there be a way to reword some of the laws, add amendments to it, or something like that, that would make registration more like being in custody even not necessarily inaction, but in words?

Larry 39:12

I never have thought about that. But why would you want to do that?

Andy 39:15

That would make you a vehicle for you to run this habeas thing because you're in custody. That's why.

Larry 39:22

You've got other vehicles; you can use petitions for declaratory judgment. You don't have to use a habeas vehicle. But declaratory judgment is complicated. I can't even get lawyers to understand this as fact. I'm working on a case with a PFR in New Mexico that has a Colorado conviction. And he hasn't been able to find an attorney. So, I told him, "Well, we've got a couple in the building, I'll recruit one for you." And I talked to one. I told him this is what I like to do, but I need you to at least be on board and he said, "Well, why do you want to file a petition with declaratory judgment?" I said, "Because that's how we pose the question." The lawyer said "He's the one that you just file to have him removed from the registry?" I said, "We

don't have a process, but if we even had a process, that's still not the right vehicle because we're questioning whether or not his out-of-state conviction is equivalent, and the proper vehicle is for a petition for declaratory judgment. And it took me 30 minutes to convince him. He said, "Oh, okay, I believe that's the way we'll do it."

Andy 40:25

May we move on now, Mr. Doom and Gloom?

Larry 40:27

I think I've run off every listener we have by now, but let's go.

Announcer 40:33

Registry Matters Promotion Deleted

Andy 41:21

Well, this article is from the Associated Press, from Columbus, Ohio. When an Ohio father learned that his 11-year-old daughter had been manipulated into sending explicit photos to an adult, he turned to the police for help. Now listen carefully. He turned to the police for help, but instead of treating the girl as a victim of the crime, an officer seemingly threatened to charge her under a law most people view is designed to protect child victims.

Larry 41:50

Well, I'd like for you to please admit that this is funny. Can you do that?

Andy 41:57

Not funny. No.

Larry 41:59

If you call the police, and they are your friends, and you've been a victim for crime, and they don't help you That's not funny.

Andy 42:08

It's not funny. I'm a father. It's not funny.

Larry 42:10

The shocking interaction was recorded last week on body camera audio. Actually, it says by the father's doorbell camera in Columbus. The footage drew criticism from the public and from experts who saw law enforcement officials having long misused laws meant to protect children by threatening to charge them as being part of the same crime. Experts said the incident also showed that training for officers on how to respond to Child Exploitation cases is spotty and not standardized between police departments.

Andy 42:46

I have an opinion about those ring doorbells, too, they're really bad. We can talk about that later, if you want to. In the redacted body camera, obtained by the Associated Press, the father asks if there's anything that the police can do. A female officer is heard replying that his 11-year-old could be charged with creating child pornography. The parents protest that she is a child victim who was manipulated by an adult. "It doesn't matter," the officer said, she's still creating it. The angry father ends the conversation and slams the door behind him. The video he posted to Tik Tok has been watched over 750,000 times as of Thursday.

Larry 43:27

So, why can't you bet this is funny. I want you to and I need to agree on something funny, or at least one episode.

Andy 43:33

This is not funny because as a father, I could see this happening to my kid. This is still not funny.

Larry 43:41

All right, but she is a person. Right?

Andy 43:46

She's a minor. she's therefore not a person.

Larry 43:50

She's a person, she created this image, and she sent it. Ohio law makes no exception.

Andy 43:58

Seriously? A three-year-old grabbed your camera and happened to open the camera app and it's in between diaper changes and the kid takes a picture of their junk. You're going to charge a three-year-old?

Larry 44:08

Well, I wouldn't but I mean, I did put my hand on the Bible.

Andy 44:12

It does say no exceptions. Good grief. So, Columbus Police Chief Elaine Bryant responded quickly in a statement that the officer's conduct was being investigated and did not meet the division standards for how victims should be treated.

Larry 44:27

So yes, Columbus police spokesman Andres Antequera that spelled ANTEQUERA said the agency has a nuanced policy that considers each case individually, but that the focus is to protect the minor through education, counseling and social services, not criminal charges. He said the department

sometimes provides information on those resources to parents as well as referrals for services.

Andy 45:00

But Antequera said Ohio statutes are clear that miners who create, possess, or distribute images of [private parts], even of themselves are violating the law. He said prosecutors ultimately decide whether to file charges, but he did not answer when asked whether Columbus police had arrested minors under similar circumstances in the past.

Larry 45:22

Rebecca Epstein, the Executive Director of the Center on Gender Justice & Opportunity at Georgetown Law, said charges against victims are common. Epstein co-authored a report in April looking at how survivors of sexual assault and abuse are often criminalized. "Girls who experienced sexual abuse are often the ones who are punished for the sexual abuse they experience rather than being treated as survivors who need support. They're funneled into the criminal justice system. Our cultural science complicity to girls who are too young to legally even consent to sex," she said. This is what happened in Maryland. Do you recall a case that we reviewed a couple three years ago from Maryland's highest court where a teenage girl was prosecuted and convicted of distributing images of herself?

Andy 46:12

I don't recall that one. I recall other ones that we've covered, but not that one, specifically. The Maryland High Court urged the legislature to change the law, though. Did they?

Larry 46:23

Not to my recollection. I don't think they've changed the law, but a liberal lefty western state has.

Andy 46:29

Which state was that?

Larry 46:33

Oh, there's a bunch of liberal do-gooders in a western state that has changed the law. [Andy: Which state is that?] New Mexico. [Andy: How was that done?] Well, it's really not that difficult. We just simply carved out an exception in our law for those who are under the age of 18 taking into account the reality of sexting as it's become known.

Andy 46:56

Did you guys find that difficult to pull off?

Larry 46:59

Oh, it was definitely difficult. Coming up with the language is not that hard. In fact, I'm sharing it with the world right now in this episode. But actually, getting that passed in the

law enforcement apparatus was difficult. They fought us vehemently. And the Mexico Attorney General's Office led that fight. We gained the support of a courageous Republican state senator who really got us to the finish line. See, I'm bipartisan, I'll work with whoever I need to. In the end, it actually cost her dearly because the Republican Party withheld financial support and campaign assistance, which led her being defeated in the 2016 General Election by a liberal lefty Democrat.

Andy 47:37

What is the wording in New Mexico's law?

Larry 47:41

Well, I'm gonna let you read it and I'll fill in what the exceptions are. So go ahead and read the section on the Mexican law that deals with this type of activity.

Andy 47:49

NM Stat § 30-6A-3 Subsection A states, "It is unlawful for a person to intentionally possess any obscene visual or printed medium depicting any prohibited sexual act or simulation of such an act if that person knows or has reason to know that the obscene medium depicts any prohibited sexual act or simulation of such act and if that person knows or has reason to know that one or more of the participants in that act is a child under eighteen years of age." A person who violates the provisions of this subsection is guilty of a fourth-degree felony. Why do they make the language so convoluted?

Larry 48:31

That's just the way the cookie crumbles in this business. Subsection B is what saves the minors. Subsection B states: "The provisions of Subsection A of this section shall not apply to a depiction possessed by a child under the age of eighteen in which the depicted child is between the ages of fourteen and eighteen and the depicted child knowingly and voluntarily consented to the possession, and:

(1) the depicted child knowingly and voluntarily consented to the creation of the depiction; or

(2) the depicted child knowingly and voluntarily produced the depiction without coercion.

This subsection shall not prohibit prosecution nor create immunity from prosecution for the possession of depictions that are the result of coercion.

Andy 49:40

Do you think other states could use this as a model?

Larry 49:43

I think they could. Now, again, having the language is not battle. The battle is trying to overcome law enforcement. Remember, they make a lot of arrests on this type of thing. It's like the biggest population of the federal prison system. And it's significant within the state. If you think back on your stint, you probably knew of some people. They are not going to want to lessen the number of prosecutions that they have, and they see this as a threat. So, it's going to be hard to overcome the opposition. I don't know how many courageous Republicans that you're going to be able to find like what we had here. She happened to have several minor children, and she recognized the danger. And she had a vested interest in keeping her children beyond the zone of prosecution because she had actually been a prosecutor at one time. She understood that if you give prosecution tools, they will use them. You have to strip them of those tools. And that's what the public doesn't understand. It's just like everything else with law enforcement policies and procedures. When they say a standard operating procedure, it's only standard operating procedure because you haven't asserted the control that you have over your police. And you haven't told them you will police the way that we instruct you to do. But that is our right as citizens. We can define the boundaries of what our cops are allowed to do. They work for us.

Andy 51:13

His daughter was 11. I'm trying to say like, literally, there would be a district attorney that says, "Yep, this is a blatant violation of the law. And we're going to charge your 11-year-old daughter with these crimes, and we're going to seek five years in prison."

Larry 51:35

Well, as a juvenile, you're not likely to get five years in prison. But again, it's possible, depending on the state and the rigidity of how they punish juveniles. Here, no juvenile, even if it were prosecuted, no juvenile would ever be sent to incarceration for something like that. But again, we're very rehabilitative in terms of how we treat juvenile offenders. You've got states in the Deep South, in the forgiving Bible Belt, where they believe that juveniles should be treated very harshly. We've had articles that I've put off for three weeks now about the Angola state prison, where the court ruled that they could put juvenile offenders in housing at Angola. And we haven't even gotten around to it yet. But that's down in the Deep South. And they believe that one way you teach juveniles and get their attention is to treat them very harshly. Put them in Angola. That makes perfect sense to me, doesn't it to you?

Andy 52:30

Without a doubt, I'm still like, "What do you do with the 11-year-old? Do you put them in like the juvie hall or something?"

Larry 52:36

Yes, they would go into juvenile facility. But again, if you take the tool away from the prosecution as we did, you don't have to worry about this. You don't have to worry about the renegade prosecutor. I would say that 80%, 75%, 80% of the prosecutors would never prosecute an 11-year-old. What about one that does?

Andy 52:54

I'm trying to play out the scenario there. I'm not trying to take away the tool. I'm trying to play with the scenario of that district attorney that does want to prosecute this because I can't even come up with a rational reason why. I guess like, "Well, it's a law that's on the books and I must follow the law as the legislative body did representing their population. They obviously wanted this." They would have made that a carve out if they didn't want it. So, they obviously want the 11-year-old to get charged with creation, but then also distribution of it because they sent it over the interwebs.

Larry 53:31

Well, again, some prosecutors would do it because it is the law, and they don't have to have too many staffers in their office and they're looking for something to do. Some may be in the middle of a heated, contested re-election. There could be a number of reasons. But if you don't want it to happen, take the power away from them.

Andy 53:47

I gotcha. But the police are obviously overworked and underpaid, so right.

Larry 53:56

Well, that's obviously what I think this gentleman thought when he called the police. He would have never had any idea that police file charges and threaten people with charges. He would have listened all of his life that the police are good. They're here to help. They're overworked, short staffed, the bad guys have all the rights. And he would have believed that. You all believe that until it comes home to you.

Andy 54:18

Yes, that is true. I'm with you on that one. I'm trying to play out the scenario of putting an 11-year-old on this stand in cuffs and all that as an 11-year-old person's four feet tall. They have to use extra small jumpsuits for them. Can you see an 11-year-old being paraded around the courtroom?

[Larry: It happens all the time.] Good grief for something like this. I can just see our little pigtales. This is ridiculous.

Larry 54:46

Well not for something like this, but 11-year-olds get prosecuted all over this country. There's nine-year-olds, I think the youngest registered in America is like nine years old. I found this out when I saw the UN report on America. So yes, we do prosecute people for crazy stuff here.

Andy 55:01

We're American exceptionalism at his best.

Larry 55:06

If you don't want that you have to remove the power.

Andy 55:08

I totally understand. Is there anything else that you want to talk about before we get out of here? This is ridiculous.

Larry 55:15

No, because I should have accomplished my mission tonight.

Andy 55:18

And that is a running everyone else off?

Larry 55:21

As Mr. Doom and Gloom, I've probably run off a dozen listeners tonight.

Andy 55:26

Did we get any new subscribers before we head out?

Larry 55:31

We did tell me who it was because I forgot.

Andy 55:36

David in Ogdensburg New York. Is that a facility or is that a free world person?

Larry 55:43

That is a facility that houses people that have been civilly committed, I do believe.

Andy 55:48

David is about as generic an English American name that you could come up with. I try not to out anybody. So go to RegistryMatters.co for the show notes and leave a voicemail message. We haven't had one in a while. 747 227-4477 RegistryMatters.cast@gmail.com if you would like to leave a message. We record the show usually around seven o'clock unless Larry's late at 7:30 on Saturday nights. And if you become a patron, you can listen to the program as we record it live and you will become a patron over at patreon.com/RegistryMatters. I don't have anything else and if you don't have anything else, then we'll head out of here.

Larry 57:14

Thank you. We'll see you soon.

Andy 57:16

Have a good night there.

Announcer 57:22

You've been listening to FYP.

Registry Matters Podcast is a production of FYP Education.

More show transcripts are available at <https://RegistryMatters.co> (that's right... just C O with no M)

In prison and can't get the podcast? Have a loved one "subscribe" at <https://patreon.com/registrymatters> at the **\$15 level**, and include your prison address information. Or send a check to cover at least 3 months.

REGISTRY MATTERS
MAIL-IN SUBSCRIPTION FORM

Sign me up for _____ months X \$6 = \$ _____
(Minimum 3 months) * **We do accept books or sheets of stamps. No singles please.**

First Name

Last Name

Name of Institution

ID Number

Address

City

State

Zip Code

**Make check payable to FYP Education and send to RM Podcast,
Post Office Box 36123, Albuquerque, NM 87176**