



Registry Matters Podcast

Episode 278

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Announcer 0:00

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Andy 0:13

Recording live from FYP Studios, east and west, transmitting across the internet, this is episode 278 of Registry Matters. Good evening. How are you fine, sir? I thought we were having the day off. I don't care how you're doing. How about that?

Larry 0:28

Well, we *were* having a day off, but I texted you and you said you felt like recording.

Andy 0:34

I said, I didn't mind if we recorded. That's how that actually went down. You said, "Hey, do you mind, and I said ok. That's how that actually went down.

Larry 0:41

Ah, all right.

Andy 0:45

Go over to YouTube and press like and subscribe and notification bells. And if you aren't so inclined to become a patron, please go to like Apple podcasts, whatever they call it. It announces iTunes. I don't even know what they call it now, and leave us, don't leave a four, a three, or two or a one-star review, make sure it's a five-star review and tell everyone how wonderful we are. And then go to Reddit and tell all those people that don't like that we use the term PFR and tell them that PFR is used on purpose for a reason. And then subscribe with your favorite podcast app. Now, Larry, what are we doing tonight?

Larry 1:20

Well, we have a case from the Michigan Court of Appeals. We just didn't have enough time last week to get to it. I want to let people know it's graphic, which means that listener discretion is advised. I'm going to read the stuff that's in there, you probably will not, but it's in a court opinion, and it's graphic. So, if you have tender ears, tune this episode out. We have a letter to be read from one of our print subscribers. We have some news from the state of Washington that may be of interest to PFRs. We might even cover an article or two.

Andy 1:57

Well, fantastic. Now look, I don't have sensitive ears. I am just not comfortable broadcasting out to the universe that

we cover these things because this is gross. This is not cool Larry by any means. This is not appropriate activity for someone to be doing.

Larry 2:13

Well, it's not, but we had an attorney who has been a guest here who opined that this opinion was based on thin soup. Now to me, as we go through it, the soup is not all that thin. It's actually quite thick.

Andy 2:30

All right, let's cover this kind of happy letter. I mean, I'll leave it at happy and it's coming from a guy named Mark who is locked up. I'm very sad that you're locked up, Mark. I feel you man, I've been there. So, this is regarding the transcripts.

"Hello, first, please renew my subscription to the podcast service for four more months. I've enclosed 40 stamps. Can we get some soups with that, Larry, I need a honey bun and some soups. And this should cover our standard fee for those 40 stamps. Second, and perhaps more important, in your recent podcast, you said that you were considering discontinuing the transcript service because of its cost and pain in the tuchus. Notice, he said buttiness but I decided to call it tuchus. As a registered and currently incarcerated federal prisoner I respectfully ask, and even humbly grovel that you do not do that. These transcripts are really the best and only resource that we have here on the inside. And not only is your information practical and useful, it is not available to us in any other form. As PFRs in federal prison, we have no access to the internet or even email. It would be cruelly ironic if our one source of legal news is discontinued. I will also add that your podcast is inspirational. It has inspired me to continue to advocate on behalf of PFRs. And it has notably improved my advocacy efforts. So, what do we do? Were I on the outside, I would offer to take over the transcript service. And maybe someday when I'm out, you will hold me to that. In the meantime, I wonder if you might put out a call for volunteers who are currently available to help. As for me, all I can offer is encouragement and cold hard cash, not just mine, but those of others who I've talked to who share my opinion of the service and have expressed a willingness to send money to keep this going. How much does it cost per month to provide the transcript service? I'm confident that I can secure pledges from family, friends, and fellow inmates to keep this thing going. Please, just let us know. Thanks for your time and continued efforts, sincerely.

Larry 4:36

Well, that was so touching when I read that because despite our low circulation, I can see that it's really well received

and appreciated. And that's very touching. And so to answer his questions, what I'm going to do for Mark is I'm going to send him a raw version of just the automation of one he's recently read. I'd like to get feedback about whether the raw version would be satisfactory. In my mind, it is not. I cannot, in good conscience, charge people money for something that's referred to as a transcript, unless it fairly accurately represents what we've said, with corrections that I put in from time to time where we've stuttered and we misspeak and I put back what we were trying to say. But it's largely what we have said. And the cost of it is \$6 a month, if you want to do the math for it, the postage itself, because of the weight is 90 cents, the envelopes are about 30 cents each that they go in. And the print and the paper, if you assign that some cost, you've basically consumed the entire revenue from the subscription, but just the hard cost. That doesn't count the labor cost of getting the transcript ready so that we can put it into the envelopes and mail it to you. That requires about three hours' worth of my time and another hour's worth of Andy's time to try to get the automated version into a format that I can work with. And if I could find a volunteer who would actually listen to the podcast on playback, and make those corrections, that would be amazing. So far, I have not been able to find a paid staffer that will actually listen to it when they're receiving compensation. And with the clamor for the minimum wage to be at least \$15 an hour, I don't see how we can offer anybody less than \$15 an hour to do it. So, you're talking about 45 to \$50 a week minimum. The cost for the transcriptionist is going to be \$50 or \$60 a week. You're talking \$200-\$250 a month, which is what we would need to continue it because I really don't have the energy to give up every day of my week to work. This has been a seven-day work week for me for some time now since we haven't had a transcriptionist. And I hope those who have been receiving transcripts for a long time, recognize that they have markedly improved and their accuracy versus what they were when I took it over myself, because I looked at them and I realized what you were getting was not what we were saying.

Andy 7:22

You and your ridiculous demands of it being accurate. Ah.

Larry 7:27

So, if he can raise that kind of money, and it doesn't have to be him personally, but if that type of financial pledge were to be made, and we find someone who will do it accurately, you can't just spellcheck. The words may be spelled correctly, but they might not be the words we spoke.

Andy 7:45

Misspellings in it to begin with, unless there's going to be somebody's name in here, that's funky. It's not "John

Smith." It's a funky name and there's no way that Otter [Otter is Al] is going to pull that one off. Not gonna happen.

Larry 7:59

Yes, but it converts a lot of words we say to words we didn't say [Andy: true, true, but they're not misspelled. That's the thing.] Yeah, but a spellcheck is not going to reveal those misspoken words, where Otter has not gotten the correct words. You can spellcheck all you want until they look beautiful, but it's just not what we said.

Andy 8:16

Yep. And then when we say case number out of the Federal Circuit, Third Edition, whatever man, it trashes that if I say 913; it's going to put a nine. And they might even spell out nine and then put 13. And so that's anytime there's a case number, anything like that, that has to all be transferred, transposed, however, you want to look at that. So yeah, there's approximately two-ish hours editing to bring the production up, including the video. Maybe that's even pushing into three hours. And then when there's another three-ish or so hours to do the transcript that's every week, that doesn't even include any prep.

Larry 8:51

That is correct. Average prep for that, which does not relate to the transcript per se, but an average prep, is about four or five-hours Saturday afternoon, getting these things set up so we can cover the salient points. It does no good to talk about a case if we don't know anything about it, and haven't pulled out the relevancy of the case, because they can be 20, 30, 40, 50 pages. And if we just sat and read 50 pages, you'd get very bored very quickly. So, we go back and forth with what I think are the most interesting points and the case as far as the law is concerned.

Andy 9:28

Why can't we just go into court Larry and wing it? [Larry: You can]. Did you? Did you see the movie My Cousin Vinnie?

Larry 9:37

I did not.

Andy 9:39

There's a story about these two kids who are falsely accused of a murder and the public defender goes in and hadn't read anything about the case. When the judge calls him to start doing his opening remarks and whatnot, he immediately develops this terrible stutter. I'm not picking on people with stutters, the guy in the movie is. And they're just completely flabbergasted that their attorney isn't prepared. Can't articulate their case. But he was just gonna wing it.

Larry 10:14

Well, now, can you admit that that's funny?

Andy 10:17

That's a really funny movie. This could actually be a Patreon Extra, where we watch My Cousin Vinnie and you do the legal analysis of the work of the My Cousin Vinny, who ends up being their attorney who's really just an ambulance chaser.

Larry 10:31

No way.

Andy 10:32

It's frickin hysterical. He has a law degree and everything. But all he does is know how to file briefs to help you with your damages. Hey, you were in a car wreck recently; one of those people.

Larry 10:44

Don't remind me of that disappointing experience.

Andy 10:49

Okay, so we need about 1,000 people to subscribe. I'm kidding. What kind of number? Do you want to tell how many we have approximately of subscribers?

Larry 11:00

It has drifted from the 50 to 60 arranged by about half that number. So, we're sending out about 30 a week.

Andy 11:07

And if we had x, would you be okay if we had X number of people? Would 60 be enough to keep us doing it?

Larry 11:17

It would be a significant improvement because we would still have the 90 cents plus the 30 cents plus the printing cost. But hopefully, we would be able to look at the total revenue picture differently. Right now, I'm looking at something that brings in very little money compared to all the effort that goes into it. And it's not all about the money, but the money is a part of the capitalist system. You do have to have money to make things work.

Andy 11:43

Gosh, I thought you were not a capitalist Larry.

Larry 11:47

That's why the idea about donations was so exciting. If we can find a sponsor, this would be someone somebody wants to sponsor, then that would be wonderful. If someone wants to volunteer, get a hold of us, we will set you up and see if you can do it.

Andy 12:01

If you want a part time job, we'll set you up with it.

Larry 12:06

That's been disappointing so far.

Andy 12:08

I understand. All right, well, then we shall move along. You put this article in here: *A Washington panel might push to outlaw PFR community notification*. And this says that the policy board, the Washington State PFR Policy Board, was created by the legislature at the request of Governor Inslee in 2008. And coming in 2024, it is possible they might make some of their most controversial recommendations yet. If the idea and a draft proposal are sent to the legislature in 2024, and passed, notifications like this one pictured from Grant County would go away.

Larry 12:51

This is really good news. The Policy Board is considering doing away with public PFR notifications. The Board held its latest meeting and is considering some eye-opening policies. Justice and Safety and Justice and Reentry Committee Chair Roger Goodman is behind these ideas. According to the information shared by the Center Square and Seattle-based talk show host, Arl Hoffman, there are some officials who wish to do away with community notifications about PFRs when they move into neighborhoods.

Andy 13:24

According to a tentative draft proposal, which not all the members of the policy board had been made aware of, public notifications undermine public safety. The result, convincingly documented, is that these laws actually undermine public safety. The exact opposite of what lawmakers and the public so confidently assume they accomplish. Isn't this a positive step though?

Larry 13:46

Yes, it is. The argument is that public safety is undermined when law enforcement issues bulletins about PFRs who, upon having completed their sentences and jail time, move into neighborhoods. Some of these offenders are considered low level and some are like level three, which are considered more likely to offend. But the report suggests that offender registries should also not be made public, but only available to law enforcement. The draft report also makes other controversial suggestions concerning PFRs in Washington State.

Andy 14:22

To reiterate what you just said, they were also going to not let the registry stuff be public, like the website stuff that all would only be available for law enforcement.

Larry 14:32

That's what it says in the draft. I didn't read the draft, but we do have a link. I think you're going to have a link to it in the show notes.

Andy 14:42

And I mean, I should cue the laugh track. Do you think this will become law?

Larry 14:47

I really don't. The law enforcement and victim advocacy organizations will put forth an intense campaign of opposition and they will do this with the intent on scaring the public.

Andy 14:58

And so even when you've put out information from the PhDs, the social scientists, et cetera, et cetera, they will still clamor for it because it makes them feel good.

Larry 15:14

I wish I could speak for why they do what they do. I think it's deeper than that. I think the victims' advocacies need to justify their existence. And scaring people is one thing that justifies existence. I think law enforcement has a similar motivation of scaring people and this is a universal success. We're talking about registrants and the horrible danger of not keeping a tight noose around them. I just think that they can't help themselves. It's built into our system.

Andy 15:45

To read the report yourself, click on the link we have and that'll be in the show notes. The website is KFLD News Talk 870AM. If you want to try and track that down before you get a link to it. Ah, so it sounded like it was going to be good news, Larry, but then you sank the battleship there at the end.

Larry 16:05

I just can't help myself, can I?

Andy 16:09

Apparently not. All right, man. So, this is going to be the section where I have to press the beep, beep beep button all the time, because there's gonna be a lot of very disturbing language that comes down the pike here in the next few minutes. This comes from a Macomb Daily. You did this last week, so I had a whole week to read this. It's the people of the *State of Michigan vs. Kenneth Malone*. We didn't have enough time to prepare for it, but we're going to try and cover it on this episode. Are you ready?

Larry 16:44

I think I'm mostly ready.

Andy 16:48

Here we go. Alright, so beep beep. Just kidding. Alright, I'm gonna set it up. Defendant Malone appealed the trial court's order denying his motion for removal from the PFR Registration Act called SORA. The trial court rejected Malone's argument that lifetime registration under SORA constituted cruel and unusual punishment under the state constitution. What was their decision?

Larry 17:11

The Court of Appeals affirmed the trial court.

Andy 17:15

All right. So, if they did that, we're done, and we can just call it quits and move on to the next segment.

Larry 17:21

We probably want to go a little bit more. You do have some questions after reading this for a whole week, right?

Andy 17:26

Yes, I do. I actually ran this through chat GPT and you know what it told me, Larry? The content goes against their policy, and it can't talk to me about it. That's what it said. [Larry: Now, that's funny.] All right. And yes, I have read it repeatedly over the week, and I did not see how you can find any rational reason for what they did.

Larry 17:49

Really no rational reason at all? I'd say that this is one of the most ridiculous cases I've ever seen in my 180-year lifespan, and that their decision is actually very rational.

Andy 18:02

They filed a petition for removal under Michigan's law. What do you think of the vehicle that they use to seek relief?

Larry 18:09

I don't think that they used the right vehicle. I always disapprove of filing a removal petition when you're categorically not eligible to be removed under that process. If you have a criteria, like for example, in Georgia, if there's a group of offenders that are not eligible under the criteria, you would not file a petition for that because, on the face of the law, you're not eligible for relief. And on the face of Michigan law, he's designated as a tier three. That category is not eligible for removal from the registry. So, I'm surprised he made it this far because jurisdictionally, the court had no authority to release him from the registry.

Andy 18:51

And just to flip that over, if he were hypothetically, or someone else is a level one, there is a vehicle, and they may

not be removed, but they could do this process to get relief and be removed from the registry.

Larry 19:04

That would be my understanding. But in this case, he filed the wrong vehicle. He should have used a Petition for Declaratory Judgment.

Andy 19:14

All right. So you say he should do that. And what could you remind this fine audience what Declaratory Judgment is. I do recall a couple years ago, Larry, where there was pretty much like a weekly thing we would talk about declaratory judgment. Can you remind us of what it is?

Larry 19:27

Sure, we can do that. It's really just a vehicle. When you go to court, you file a Cause of Action. And through decades and millennia of judicial operations, these various vehicles have cropped up for seeking the type of relief you're looking for. And there's this nuanced petition that goes outside a petition for dissolution of marriage or the standard ones you hear so frequently. It's called Petition for Declaratory Judgment and you're asking a judicial officer to take a look at the law and declare what your rights and obligations are under the law. You're asking them for relief most of the time. You ask for declaratory judgment. You're wanting the court to side with you and declare, in the form of a judgment, that that law should not be applied to you. So, he should have filed, in my opinion, a Petition for Declaratory Judgment and stated his reasons why he felt like the Michigan PFR registry was unconstitutional as applied to him, rather than filing a removal petition, which he was clearly not eligible to participate in that removal process.

Andy 20:41

Malone had cognitive issues and I think that he probably deserves a break, Larry, can't you cut this guy some slack?

Larry 20:48

I can and he received many breaks over the course of his life as a result of his cognitive issues.

Andy 20:56

I see. So, you're just going to be cold-hearted Larry. Anyway, Malone was born on April 4 of 1998. He is characterized as cognitively and emotionally impaired and received special education services throughout his school years. Malone's mother proffered that he was diagnosed with schizophrenia. Additionally, Malone reported that he has a history of auditory hallucinations. Specifically, he claimed that auditory hallucinations commanded him to either commit suicide or commit acts of criminal sexual conduct. Where is your heart, Larry?

Larry 21:30

My heart is really not important here because we're a nation of laws, not a nation of hearts. And here's where he went off the rails. Malone took the victim into a bedroom for a nap. When Malone did not return, his mother went to the bedroom to check on them. Malone was lying on the bed with a victim with a blanket covering them. When his mother asked what he was doing, he admitted that he was indulging in self-gratification, except that's not how he described it. She removed the blanket and found that he had his pants and underwear pulled down. In addition, the victim's pajamas and diaper were pulled down and his organ was touching the victim's buttocks. She then called the police.

Andy 22:17

I'm glad you're covering the graphic stuff for real. I don't even like that you're reading it. I'm gonna have to see it again and listen to it 45 times over on the transcript.

Larry 22:27

Yep. Well, that's just the tip of the iceberg. Initially, Malone explained to the police that he exposed his organ [Andy: junk] and placed it inside the victim's body, however, Malone later denied penetrating the victim's body and claimed to have only placed it between the victim's buttocks. Also, during the police interview, Malone acknowledged that he had penetrated his cousin, but the incident was not reported. This is all messed up. Can you at least admit that?

Andy 23:00

It's severely messed up. Although Malone proffered those auditory hallucinations and his prescribed medications caused his behavior, a mental health evaluation performed in March of 2015, diagnosed the defendant with generalized anxiety disorder and recurrent major depression, but not psychotic symptoms. Malone attributed his conduct to auditory hallucinations, but then admitted that his conduct was the result of his sexual impulses. That same report characterized Malone as oppositional and defiant and noted he was physically or verbally aggressive towards adults or peers regardless of whether provoked or not.

Larry 23:38

At sentencing, Malone's counsel stated that a psychologist, "Dr. Ryan," determined that the defendant was bipolar and schizophrenic and suffered from attention deficit hyperactivity disorder (ADHD) and depression. Dr. Ryan also estimated that the defendant was mentally in the age range of a 7 to 9-year-old. It is noteworthy that the court noted that "Dr. Ryan's report was not preserved in the lower court record for our review." A psychological evaluation and

reoffending assessment determined that the defendant had a high risk of reoffending if he did not receive treatment. The trial court sentenced defendant as a Public Act 150 ward and remanded him to the juvenile justice center until placement in a treatment facility. The trial court further ordered the defendant to register under SORA for a Tier III offense.

Andy 24:38

The court noted that under Public Act 150, the defendant was placed at a specialized treatment facility and that this placement did not yield positive results. Defendant engaged in grooming behavior with peers and specifically sought out younger individuals or individuals with emotional issues in an attempt to take advantage of them. Defendant did not attempt this behavior with strong peers in his group.

Larry 25:01

Yes, and that tells me he knew just a tad bit more than what his counsel represented. They also noted that although defendant was on task three of his workbook, he was forced to repeat the task because he lied numerous times. At another review hearing, it was learned that the defendant was acting out sexually, denied privileges, removed from his peers, and placed in detention. After being given a new supervisor and peer group, defendant improved in his behavior. And the small steps were deemed encouraging. It was determined that defendant would remain in a juvenile program at that point.

Andy 25:40

All right, well, that's kind of encouraging. So, what happened next?

Larry 25:44

Well, it didn't seem to hold. In February 2017, the trial court was advised that defendant should be re-sentenced as an adult. Malone had engaged in inappropriate behaviors, including grooming his peers, and inappropriate sexual behaviors, made inappropriate comments to staff and peers, and failed to follow the rules. It was concluded that Malone was ineligible for release because he had not incorporated the teachings of the program into his daily life. Despite Malone's lower cognitive ability, it was recommended he remain in a secure environment because he had a higher probability to reoffend. And after an alternative program for defendant cannot be located either in or out of the state of Michigan, he was sentenced as an adult to 36 to 180 months of imprisonment.

Andy 26:30

Can we go into the courts analysis now?

Larry 26:35

Let's do it. What do you want to ask me?

Andy 26:37

All right. Well, they said questions relating to statutory interpretation are reviewed de novo. We'll get to that in a minute. When interpreting a statute, the court's overriding goal is to give effect to the legislature's intent by examining the plainly expressed language. Larry, I gotta tell you, there's no plainly expressed language in legal stuff. They said constitutional questions are generally viewed de novo. What does de novo mean?

Larry 27:04

What it means is some levels of review are deferential to the trial court. A de novo review is when the trial court doesn't get any level of deference. So, these questions about constitutionality, they really don't care what the trial court thought about the constitutionality. There's going to be no deference to the trial court. So, it means a brand-new review. When you're looking at the fact-finding the trial court did, since the appellate court is not finding facts, those findings that were developed in the trial court in evidence below, those are going to carry over. But de novo review means that these issues, specifically, are going to be reviewed with no deferential treatment to the trial.

Announcer 27:09

Promo Deleted

Andy 28:40

Malone contended that lifetime SORA registration for juvenile offenders even when convicted and sentenced as adults, constitutes, on its face, cruel and unusual punishment under Michigan Constitution. Can that standard be met in your opinion?

Larry 28:55

No, it cannot, in my opinion. Now, I'm going to set this up by saying Michigan doesn't have a death penalty. And Michigan has its own constitution. But as a general rule, if putting people to death by cruel and barbaric methods, and Alabama has come up with some recent new tactics to put people to death, it's hard to imagine that registration in and of itself can compare to being dead. Maybe it could compare, but I just can't see how we can torture you for 30 or 40 minutes with a botched execution. If that's not cruel and unusual, I don't see how we get there with a regulatory scheme.

Andy 29:37

Ah, all right. Michigan's not one of those states trying to come up with whatever concoction they can come up with to nuke people, are they? It's just like the southern states of Mississippi and Alabama, probably Texas or something like that.

Larry 29:49

Yeah, that's why I qualified it with my comments. Michigan hasn't had a death penalty since probably back in the 1870s. So, they've long since abolished it.

Andy 29:55

Seriously, like that long since you were a yute?

Larry 29:58

Yeah, I think they abolished it. I remember President Lincoln's push for that. And I think that Michigan was one of the first states that said, "Yeah, we want to abolish the death penalty," but it's been a long, long time.

Andy 30:12

Okay. The Michigan Legislature enacted SORA in 1994 to better assist law enforcement officers and the people of this state in preventing and protecting against the commission of future criminal sexual acts by convicted PFRs, MCL 28.721a. Although the enactment initially was a confidential database accessible to law enforcement only, it evolved into a computerized database available to the public online. The requirements placed on registrants also expanded to require disclosure of affiliation with an institution of higher learning and updated photograph, employment status, vehicle information, and shortened [lengthened] registry requirements. I felt that the Michigan Supreme Court had held that registration was not punishment.

Larry 30:58

They did indeed and I think I wrote that wrong. I think I meant to say lengthened registry requirements. But that case was the *People vs. Betts* from 2021. The Betts Court determined that the 2011 amendments to SORA contained aggregate punitive effects that negated the state's intent to deem it merely a civil regulation. Accordingly, it was concluded that the retroactive application of the 2011 SORA violates Michigan's constitutional ex post facto provisions and because severability and revival did not provide an adequate remedy, the court held that the 2011 SORA may not be retroactively applied to registrants whose criminal acts subjected them to registration occurred before the enactment of the 2011 amendments.

Andy 31:47

In light of the determination that the 2011 SORA amendments constitute punishment, Malone argued that the lifetime registration requirements violate Michigan's constitution prohibition on the cruel or unusual punishment under the Michigan Constitution of 1963, Article 1, Section 16. What is the legal standard for such a challenge?

Larry 32:08

Well, I'm gonna quote directly from the court. "When a party asserts a facial challenge to the constitutionality of a statute, the party must demonstrate that no circumstances exist, which the statute would be valid." You and the audience have heard me say this dozens if not hundreds of times. This is the precise reason why courts will never declare the act of registration to be facially unconstitutional. Because there are circumstances by which you can register people constitutionally.

Andy 32:40

Using your big Larry brain, could you tell me what Malone would have needed to meet in Michigan to have it be ruled unconstitutional?

Larry 32:49

I couldn't tell you, but I went and looked that up in the decision and it says, "To determine whether a punishment is cruel or unusual, courts assess whether it is 'unjustifiably disproportionate' to the offense committed by considering four factors: (1) the harshness of the penalty compared to the gravity of the offense, (2) the penalty imposed for the offense compared to penalties imposed for other offenses in Michigan, (3) the penalty imposed for the offense in Michigan compared to the penalty imposed for the same offense in other states, and (4) whether the penalty imposed advances the goal of rehabilitation.

Andy 33:28

Malone argued that the severity of the offense, rubbing his junk against the 14-month-old's butt, was not the most heinous act because the victim will have no memory of the incident. Now, Larry, that's a funny argument to make that the 14-month-old won't have a memory of it, therefore, it's okay to do. Malone further contended that he will be given a social stigma and branded as a PFR subjected to a plethora of registration requirements and unable to petition for removal without consideration of the science pertaining to the juvenile brain. Now, what was the courts take on that?

Larry 34:07

They did not respond very well. They said, "Contrary to defendant's assertion, defendant initially reported to the police that he anally penetrated the victim but later claimed that he merely rubbed his deleted word [junk] externally against the victim's buttocks. Regardless of his contention, the defendant, nonetheless, penetrated the victim. And, contrary to defendant's claim, the gravity of the offense was the most heinous. The defendant removed the victim from the care of an adult and took him into another room. There, the defendant decided to engage in masturbation and employed the victim in his sexual act by removing the victim's pajamas and diaper to penetrate the victim. The

victim, only 14-months old, was limited in the ability to ascertain what was transpiring as well as to articulate the need for help. It certainly seems predatory to me.

Andy 35:00

I'm pretty sure that this guy needs some treatment. Can you see that?

Larry 35:05

Oh, yes, I saw it and so did the court. He had been in treatment and care of the mental health professionals for a number of years. Yet it did not appear that he benefited from medication and treatment. He committed the offense at age of 16 and was sentenced to a juvenile facility at 17 and then was re-sentenced at 19 because treatment wasn't taking hold. At the time of his sentencing as an adult, the defendant was deemed a high risk of reoffending. The court noted that the contention that the severity of the offense does not equate with the harshness of the penalty is not supported by the record. In light of the gravity of the defendant's offense, mandatory lifetime registration is a proportionate punishment. So says the court.

Andy 35:43

Now, to be fair, Larry, this is for the rest of his life. Is it not possible that he could change?

Larry 35:52

It is certainly possible that he could change. But unfortunately, the people of Michigan have made the law. Malone also contended that the penalty imposed mandatory lifetime registration is exceedingly rare and more severe because the punishment will last longer on a youthful offender as opposed to an adult offender. Now you have to give him credit. That's a creative argument a youthful offender will likely be registered longer.

Andy 36:11

That's a good one. I mean, if you got sentenced, you're already 180 years old versus him. He was 16 or whatever, so that's a long time versus you don't have much time left.

Larry 36:23

So, lifetime registration is not the only mandatory penalty imposed under Michigan law. Mandatory lifetime in prison is the penalty imposed for first degree murder. And can you admit that lifetime on the registry is less harsh than lifetime in prison?

Andy 36:40

I'm not sure to be honest with you. Because sometimes in prison is easier than the registry for certain people. For some people, it's going to be easier. Malone notes that an examination of other jurisdictions reveals that only 18 states have substantially implemented the Federal Sex

Offender Registration and Notification Act, otherwise known as SORNA. And there is no uniform view that these registries operate to improve public safety. And research indicates that the dangerousness of PFRs has been overblown. He further submitted that individual considerations of the juveniles are more desirable and appropriate. Can you not admit that both of these statements are true?

Larry 37:26

I can admit that, but that's for the people of Michigan to determine, not for the courts. Remember, no legislating from the bench? Do you not remember that? We want people who wear those robes to interpret the laws that have been made, not to create their own law. And you keep forgetting that Malone did not comply with the rules of facility, did not obey the staff, and engaged in inappropriate sexual behaviors, and was warned of the consequences of his noncompliance in an attempt to obtain compliance and ensure that Malone incorporated these lessons into his daily life. He was even given a new supervisor and peer group. What more did you want from them?

Andy 38:07

So, then you just suggested the guy give up and just say, "Well, this is my fate."

Larry 38:11

Well, I don't know that I'd say you give up, but you move on to Plan B. And that's what they did. They moved on to Plan B. They said, "Treatment is not working, and we have the option to put you into a different system." And that's what they did. But as the court noted, Malone simply could not be released from the program due to his failure to benefit. I mean, that would be the state giving up. "Well, we tried treatment, so we'll just let a high-risk offender go, just turn him loose." According to the court, regardless of the number of states that have adopted sex offender registries, whether the registries benefit public safety, and the recidivism of sex offenders generally, defendant committed CSC-II with a 14-month-old victim. His penalty involved treatment in a juvenile facility. Despite being in the care and supervision of staff, defendant deliberately attempted to groom vulnerable peers and engaged in inappropriate sexual behaviors. Defendant was deemed a high risk for reoffending in light of his continued inappropriate conduct, and he continued to engage in inappropriate acts in front of supervising adults. He left them little choice. Can you not admit that?

Andy 39:22

I think I can. Lastly, Malone argued that a remand is warranted for an evidentiary hearing to determine whether mandatory lifetime SORA registration is cruel or unusual

punishment as applied to him. What did they say in response to all of that?

Larry 39:40

Well, they said a statute is not deemed unconstitutional simply because of a hypothetical may cast doubt upon it. Rather, the analysis must focus on whether the statute, as applied to the actions of the individual defendant, is constitutional. That's what they said.

Andy 39:55

Malone questions whether he has the ability to comply with the many procedural requirements of SORA in light of his mental capacity, and in the absence of assistance. Now, do you think that that's a valid point?

Larry 40:07

Well, I can see it has some validity. But he didn't preserve that issues, he did raise mental health issues as a defense to the underlying crime. And this means that he is presumed to be mentally stable and healthy. And he didn't preserve that issue in any way for review. And the court noted at this point, this is a hypothetical. And it's insufficient to raise it as applied challenge or to warrant a remand to the trial court. I mean, his attorney possibly botched it up.

Andy 40:38

Isn't Michigan one of those states that has the never-ending civil commitment for PFRs? [Larry: I don't think they do, actually.] Am I thinking of what's the state nearby? Is it Illinois?

Larry 40:48

And Illinois does have it, I think.

Andy 40:51

That's probably worse than lifetime in prison. So, because, at least in lifetime in prison, you know, there's no end. If you're in civil commitment, you sort of think that you may get out at some point in time, you just don't know when. If you have lifetime in prison, you know, it's never that. [Larry: That is true.] So, what's next for Malone?

Larry 41:13

The Michigan Supreme Court is certainly an option.

Andy 41:18

And what would you suggest he do that?

Larry 41:22

I would not. This is a horrible candidate for such an endeavor. I think there's virtually no chance of a different outcome with the State Supreme Court.

Andy 41:30

I need you to give me two hypotheticals. Use your big Larry Brain. What attorney would take this on? Is guy rolling around in cash to hire an attorney? Is there some brand new law school graduate that decided to take on the impossible case to make a name for themselves? What attorney would take this on?

Larry 41:52

It could have been either of the above. It could be that their family has lots of money. It could be that he genuinely believes in what he's doing. He or she, that attorney may believe wholeheartedly that they're doing the right thing. Because we hate to write off a juvenile offender. I hate to write off the juvenile offender. But in this particular case, I can see how they got to their answer, although it's sad.

Andy 42:18

And I don't think we really hit home the whole concept. I mean, the reason why you brought this up in talking about it in pre-show was that if this doesn't meet the standard of cruel and unusual, excuse me, if the whole execution thing, if that's not cruel and unusual punishment, then just dealing with some lifetime registration stuff, like we need to hammer home that whole thing about people thinking that this is unconstitutional under the cruel and unusual punishment clause.

Larry 42:45

That's certainly going to be difficult to make the case ever that registration is cruel and unusual punishment. We've successfully reached the conclusion that it can be punitive. But being punishment does not magically translate to being cruel nor does it translate to being unusual, and that's what people miss out on. I've had intense arguments. People say, "Larry, don't you understand the court has already held that it is punishment?" I understand that, but there's a different standard for punishment and cruel and unusual punishment.

Andy 43:18

I see what you're saying there. But there have been a mountain of cases that have been won on our side of things, saying that this is not what the registry was and that adding these things as ex post facto, and so forth, that this then starts to look like a punishment scheme, instead of it being just a registration scheme.

Larry 43:39

That is correct. And you can do a punishment scheme prospectively. And that's what happened to this guy. These things were enacted after he committed his heinous series of events, and therefore, it's not punishment as applied to him necessarily. And they decided, even though he argued its punishment, it is certainly not cruel and unusual

punishment, they found it to be very appropriate punishment.

Andy 43:59

I don't like these cases. I don't like talking about them because the whole reason that this whole PFR industrial complex exists is because of a guy like this. And so any of us that have been the most, I don't know, I don't want to diminish it to this point, but this guy is so far on the extreme end of things, that anything else, you just get lumped in with this guy.

Larry 44:29

And it's sad, but there are people like that, that really, this is the person we always dread when we're approaching a legislative session. What happens is someone like this man commits an offense two weeks before the legislature kicks off for a session.

Andy 44:47

Oh, wow. I don't even really think about that being part of something that you have to account for when you're trying to go talk to your legislative bodies.

Larry 44:55

Well, it would be when you have a high-profile case happen and they say, "Well, Larry, what about this? You know, this is why we have the registry." What do you say in response?

Andy 45:04

I probably just like tuck my tail and go home and say, "I'll try again another time."

Larry 45:08

Correct.

Andy 45:12

So, I had that one right. Okay, then we shall move along. Hey, we're gonna kick you out of the show with some happy news. We'll call this the kicker. And this is from the Los Angeles Times. "Gerardo Cabanillas swore on his child's life that he was innocent when he was arrested on suspicion of sexual assault at the age of 18, his attorney said. Yet, he confessed anyway when a South Gate police detective allegedly promised he'd be given probation as long as he admitted to the crime. That false promise left Cabanillas in prison for nearly three decades until DNA evidence showed someone else had committed the crime, officials said. Flanked by his family, attorneys, and Los Angeles County Dist. Atty. George Gascón, Cabanillas stood in the downtown Hall of Justice as an innocent man Tuesday, as officials discussed his bittersweet recently vacated conviction. How did this happen?

Larry 46:34

This conviction came about, I would say, because of poor police work, and totally inadequate legal representation. And if I've got a client telling me, "I did not do this," I'm going to say to the client, "Well, we're going to have to look and see what they can convict you of. What evidence they have. Well, I'm gonna look at your confession. You confessed, so they've got some pretty convincing and compelling evidence." "Well, but they tortured me, they tricked me," and then when they say, "But I didn't do it," I'm gonna say, "Okay, well, here's the next thing I'm gonna do, I'm gonna hook you up to the Kabuki machine and see what it says." I know it's not the cure all, end all, but it usually has resulted in people admitting after they failed the Kabuki machine that they did do it. So, the next thing I would do is hook him up to the Kabuki machine with a reputable examiner and see what the results of the test would be. This is all we've got, though. I mean, look, would you rather plead guilty and get 28 years in prison?

Andy 47:40

No, you just used the Kabuki machine and the word reputable together. I can't see how those two words go together?

Larry 47:48

Well, there are people who try to follow the science as they understand it, as they've been taught. And they frame the pre-exam interview with questions that are appropriate. They try their best to get the result from the machine as best as it can render. But I'm trying to get you to admit that either you did or didn't do it. Because I can't plead you to something that you insist you didn't do. So that's what I would have done to see if he passed the Kabuki machine. Now if he *did* fail the Kabuki machine, then we would have a talk. But if he passed it, then I'm going to be on the phone with the prosecutor saying, "Hey, we've got a problem here. [Andy: Yeah. All right. All right.] Your detective extracted a confession from a young person, and that confession is highly suspect to me because of X polygrapher." Usually, you use someone who has been in law enforcement as well respected by the prosecution. "And this polygrapher says that my client is being honest." And we have that discussion, but that's what I would have done. And then after that, you have to open up a budget, start doing an investigation trying to figure out if you can find witnesses that know something or heard something. All those things cost money, but you have to put some boots on the ground and try to figure out what happened. That would be the course of action I would follow.

Andy 49:08

Cabanillas was accused of a brutal robbery at gunpoint and sexual assault of a young woman in South Gate in 1995, officials said. During a seven-hour interrogation during

which Cabanillas didn't have access to an attorney, South Gate Det. Jack Lee Alirez promised the young man he would be released on probation if he admitted to what he was being accused of. Instead, Cabanillas was charged with 14 felonies, convicted, and sentenced to a de facto life sentence, court records show. Good grief.

Larry 49:55

Cabanillas denied all wrongdoing for decades, and his case was finally taken up by the California Innocence Project in 2017. This year, DNA evidence not only cleared Cabanillas, but also identified another suspect, who was already in prison awaiting trial for murder. Now, isn't that funny?

Andy 50:13

That would be the same person who then they think did this one? Is that what you're saying?

Larry 50:19

Yes, they identified, with a DNA hit, a person in prison in custody, awaiting trial for murder. So, it sounds like not a very nice person. But he got away with it for 30 years practically.

Andy 50:32

But he's already in prison.

Larry 50:35

Yes, but he got away with this crime.

Andy 50:38

Yeah, that's true. So yeah, we don't know how long that that guy has been locked up. Oh, my god. What is your opinion of the bazillions of DNA kits sitting in police lockers?

Larry 50:51

Well, I don't really have an opinion other than that they should be analyzed. And I think they're making great strides and clearing the backlog, but it costs money.

Andy 51:00

But then the way that I hear it is that DAs stonewall to some degree about having them analyzed and worked with?

Larry 51:13

I don't know that that's the case. I have not really experienced that particular aspect.

Andy 51:17

Okay. I will have to get more information on that and then take you to the mat. And we'll have a showdown on that subject. Larry, I want to get out of here. I'm tired. I had a long day. [Larry: All right, let's do it.] So, if you want to go over to Registry Matters.co, you can find the show notes. And you can download the podcasts, or you can subscribe to it there, you can find links to Patreon, which is patreon.com/Registry Matters. Please come in and join the program to support the show. If you come in at like, I think it's a \$15 level, you could use that as a mechanism to send the transcript off to someone that is locked up. If you want to do that. That's a very nice way to donate and get the transcript sent to somebody. And I think that's all I got Larry. We record this usually at seven o'clock on Saturday nights. And then Larry sometimes pulls a fast one and he says we're not going to record, but then here we are.

Larry 52:16

That's all I got. Well, we'll see you next episode.

Andy 52:20

Take care. I'll talk to you soon. Have a great night and see everybody later. Thanks for joining us tonight.

Announcer 52:28

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