Announcer 0:00
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Andy 0:17
Recording live from FYP studios east and west transmitting across the internet. This is episode 292 of Registry Matters. Good evening, gentlemen. How are you?

Chance 0:27
Good evening, Andy.

Larry 0:29
Good evening, and how are you? I'm doing awesome. Our legislature is kicking ass!

Andy 0:35
And yours is like three days long or something?

Larry 0:39
Thirty days.

Andy 0:40
Thirty days. It started when?

Larry 0:43
January 16th.

Andy 0:45
So you, you're like, in kind of like the closing days, then almost.

Larry 0:50
Yeah we got thirteen days to go.

Andy 0:52
Do you do crossover?

Larry 0:54
No, we don't have a crossover. It can crossover at any point.

Andy 1:00
Georgia has a crossover day and that's like a big deal. If you can keep it from crossing over, then you've kind of won.

Larry 1:06
Theoretically, but not necessarily. Because you can take something that didn't cross over, and you can do an amendment to a bill that has crossed over, and use the language in the bill that didn't make it through crossover, if you find somebody who's willing to have that attached as an amendment. So, it's not necessarily the end of legislation that didn't cross over.

Andy 1:28
At dinner, I was trying to explain to my kid about the topic for the evening of what we're going to talk about, "frightening at high", and god just trying to describe saying, "So there's this thing at the lower court that, and then it gets ... higher. And uh …" I was like, oh my god, this is so, it's so wonky and complicated, Larry, to just try and explain to someone who's like, "Well, hey, what are you going to talk about tonight?" It's ridiculous. And that, along with trying to explain how committees work, to then go to this goofy procedural thing that is a crossover. And some states have them, and some states don't. You don't. Then there's what, Nebraska, with the "unicameral" body?

Larry 1:28
That is correct. It's the only one in the nation. They have forty-nine senators, they only have one chamber.

Andy 2:15
Chance, are you experienced with going down and testifying and whatnot with the legislature?

Chance 2:20
Yes, I am.

Andy 2:22
Oh, well, very good!

Chance 2:23
I've done it.

Andy 2:25
Oh, have you? That's, that's ... then you're like a hero. You're one of the rock stars!

Chance 2:32
Yes, yes, I have been involved in doing that type of thing.

Andy 2:37
Well, make sure that you go over and press Like and Subscribe over on YouTube, and leave five-star reviews on whatever podcast app most people use, Apple podcast, I guess it's called? So please go leave a review over there. That would be, if you do nothing else, that would be the free way to support the show. And make sure that you do the thumbs-up stuff on YouTube, everything, all that stuff, subscribe to the podcast. All that stuff would help out if you would contribute that way. So, Larry, what are we doing this episode?

Larry 3:05
We have a multitude of things for this episode. We're going to be taking some questions or comments from the audience. And we have a few articles we're not going to get to, I can see that now. We plan to discuss "frightening and high" recidivism, and the question about how that fact was determined, and the relevance of that fact, in terms of the *Smith vs. Doe* precedential decision.

Andy 3:29
You can kind of say it's not really a fact!

Larry 3:32
Well, it is a fact.

Andy 3:34
It's just not really a *true* fact.

Chance 3:36
That's correct.

Andy 3:36
(laughs)

Larry 3:36
But it's the law of the case.

Andy 3:42
Yes, I get that. But you know, Larry, we have learned recently that the more times you say the untrue things, the closer they are to the truth. If you keep repeating it, it becomes true.

Larry 3:56
Well, before we get started, just remind the audience, we have now the hundred-eighty-two-year-old Larry, but we also have a person less than half that age named Chance Oberstein who practices in the State of California.

Andy 4:15
Chance, you're ninety-something?

Chance 4:17
Pretty close, pretty close.

Andy 4:18
Wow!

Larry 4:21
So we have the opinion now of a lawyer on the Registry Matters podcast.

Andy 4:26
Fantastic! Well, let's dive in with this first comment from a person. This one's fun, Larry. I was like, oh, that's kind of an interesting person that we have in our ranks as a listener, who says, "I will keep this brief, but I will say you failed at it. I am a former deputy US Marshal who is now on the registry. Naturally, I listen to your podcast and stay up to date on the latest trends and emerging attitudes in the field. I was listening to RM episode 289, and I felt inclined to contact you. While I am now at PFR and must deal with the collateral consequences of my choices, I have to step in and provide some feedback on a comment that was made on the show about license plate readers." I guess we were talking about the young woman that was getting arrested, and how would they, like, "spot her car"? That's probably what we were talking about.

Larry 5:15
Yes, you had opined that it was likely from a license plate reader. I didn't have any information on that. But it could have been any number of things, pretextual stops, but go ahead.

Andy 5:24
Yep, yep. Yep. "The episode provided a lot of sound advice, in terms of invoking your fifth amendment right, as well as being brief, and I agree with all of this. What I disagree with is the statement saying, "They're not just running every license plate that goes down the road, they pulled her over because of one of their license plate readers triggered them to pull her over." Let me make this clear: you need probable cause, or in some situations, a "Terry stop" to pull a vehicle over. We do not know what those uniformed officers were doing when they pulled over this female. They could have seen her break a center line, miss a turn signal, roll through a stop, all reasons for a lawful traffic stop in all fifty states. What I'm saying is, we can't assume we know the basis for the stop. If there was no probable cause for this stop and detention, this driver could have had a thousand pounds of drugs in the car, and it would all be dismissed. What I am saying is, we don't know for certain why these officers pulled this woman over and for us to, in the affirmative, say it was a license plate for an abandoned vehicle, is not fair. There are dozens of other reasons that the officers could have legitimately pulled this one woman over. Anyway, thanks for your time, and I love your show."

Larry 6:30
Well, I appreciate the comment. And I think in the story itself, it was related to the license plate because the vehicle had been towed or something like that. But the former deputy US Marshal's correct. They will pull you over and they'll invent the reason later. And if they can't invent a reason, legitimately, they will make up stuff like, "Well, you drifted over the centerline." Everybody does, if you follow someone long enough, persistently enough, they will drift.

Andy 6:58
They will do something that gives you reason to pull them over.

Larry 7:03
But what Chance and I were trying to suggest was that she should have kept him on point and just say, "No, thank you." I would continue to give the same advice if you encounter a cop. I want you to deal with the reason for the stop. I'm not your friend, I'm not going to have small talk with you. I don't intend to tell you my life business. I'm not even going to tell you what I'm doing, except for maybe some vagueness about what I'm doing. "I'm on my way home." "Where did you come from?" "I'm on my way home, officer." You know, it's like, I'm not going to go down that path because it only goes downhill when you go down that path.

Andy 7:43
Chance, any other comments to go along?

Chance 7:45
No, I also appreciate what Larry's saying. He knows what he's talking about. And again, it's how you handle yourself after the stop that really counts the most.

Andy 8:03
Very good.

Larry 8:05
All righty. Well, so now we've got two questions combined into one coming up, right?

Andy 8:14
Yes, that is correct. So, Dave wrote in a question, and then Evy also asked a similar question and we're just going to kind of take them all just from what Dave wrote. He says, "Hi, Andy and Larry. Didn't the Wisconsin, so I gotta say it right, "Wiscaahnsin" Supreme Court rule on this, in our RM 272? Now, some lawmakers want it to mean multiple convictions stemming from the same incident. Having two or more convictions causes one to be labeled an SVP and requires lifetime GPS, at a cost of $240 a month (maybe more now). For what it's worth, until 2017 when the AG re-interpreted this section of the SVP law, 'separate occasions' meant, well separate occasions. When I was state contact for Wisconsin, this reinterpretation generated over 240 letters and emails for me. Does this bill stand a chance?" (I probably should have had the Clinton Laugh Track queued up for this one.)

Larry 9:05
I think he's talking about Senate Bill 874 in Wisconsin, and it absolutely has a very good chance of passing because there won't be any strong opposition that will surface. You've got the probation and parole department there that wants it interpreted the way that it's interpreted. They are the ones who solicited the Attorney General's opinion letter. Now I'm going to talk about attorney general opinion letters. And basically they're worth about a bucket of warm spit. That's why they're called an opinion letter. But they're given a higher amount of regard from the solicitor of the opinion letter. And here in our state, it has to be a lawmaker, or I believe an agency that requests review, because they have the duty to execute and perfect the law that's been passed. So they ask -- who would you ask? I mean, you wouldn't ask a sanitation engineer. So who do you ask? You ask the attorney general, "Hey, what does this mean? We're a little unclear." Well, the previous Attorney General rendered that opinion that "separate occasions" meant separate occasions within the same case. But the Wisconsin Supreme Court recently held separate occasions meant that you offend separately, in separate cause of actions and that's not the way they were applying it. So people who were subjected to that monitoring, unless they had two separate case numbers, theoretically, had been removed from that obligation. Theoretically. I'm not in Wisconsin so I don't know for sure but, theoretically, the Wisconsin Department of Corrections should have taken the action to remove those people. This is the lawmakers wanting to clarify what they meant, which would ultimately neuter the Supreme Court ruling because the Supreme Court doesn't get to decide what the law "should be". They get to interpret what the law "is be". And they interpreted that language to mean on separate occasions and separate case numbers. And the lawmakers in this proposal, I did a quick glance at it, and they're making it clear that they intend it to be the multiple convictions even *within* the same case. So it is very likely to pass. In my opinion, Governor Evers will sign it if it makes it to his desk because the political fallout would be horrendous if he didn't. So if you guys can't figure out a way to kill it in the legislature, you're gonna have a whole new problem, probably by later this year, on the effective date of this law.

Andy 11:37
Do you think there's any chance that anybody in Wisconsin will go forth and kill it?

Larry 11:42
I don't know enough about how the process works there, other than I know general politics quite well. I don't know who the opponents would be that would step forward. The victims' advocates are not going to be against it and they're usually a big part of the process. The law enforcement apparatus is not going to be opposed to it. I can't see the Department of Corrections saying, “Well, you know, we just don't have time to ..."

Andy 12:09
(laughs)

Larry 12:11
I can't think of who the natural opponents would be, possibly a defense lawyers' union or association of sorts, the Wisconsin defense lawyers, possibly. But there's not going to be any really strong opposition that's going to surface. And when the committee chairs call these bills up and ask for public comment and all the public comment is favorable, I just don't see how this is going to be voted down.

Andy 12:38
I see. So, can you explain in a little bit different detail? Having two or more convictions causes one to be labeled an SVP so it means "separate occasions"? What are they doing? Like, what are they functionally doing?

Larry 12:54
Well, suppose you had three counts within the same case. What the Wisconsin Supreme Court decided was that that did not mean separate occasions. Now, literally, it could have been separate occasions. You could have three counts in the same case, and one could have happened in 2017 and another one could've happened in 2019, and another could've happened in 2022.

Andy 13:16
Gotcha.

Larry 13:17
Those could have all been charged in the same case, and it could have been separate occasions. But the way that the Supreme Court interpreted it was that you had to have been subjected to separate prosecutions, and been convicted independently. Now that, to me, will encourage prosecutors to be more "creative" in terms of how they file charges. And Chance can weigh in on that because if they know they can put you on lifetime GPS monitoring by prosecuting you on two separate occasions. If that's the magic formula, that's what they would likely do, if that's their goal.

Andy 13:55
Chance?

Chance 13:55
Yeah, yeah, that's probably true. I mean, you know, the comment that Larry made about the opposition is really a good comment because when you're talking about trying to stop something like this, sometimes the cost of trying to enact something like this is far greater than actually implementing what people are saying, in terms of pushing this and implementing it. And you can only do that when you have opposition, and you've thought it through, and you're thinking about how, legitimately, to oppose it. It always comes down to an opposition's smart thinking about what the costs are of doing whatever you're proposing to do. And that has to be done in these meetings, and it has to be done in a way that makes sense to everyone. So that, you know, it needs to be shot down before it gets too far. Usually, in California, we have public safety meetings and those types of things are discussed, what it's actually going to achieve, and at what cost, and whether or not it's worth it. So there has to be some type of pushback. Otherwise, you're really backloading it, you're hoping to then shoot it down via constitutional challenge. And I don't know enough about the bill to say that it violates due process, equal protection or whatever. I'd have to really look at it closely, but that's an uphill battle. That's a tough battle. And when you think about it, "separate occasions", and what an SVP is, you know, this is very, very tough terrain, that's what I think.

Andy 15:50
Certainly that. Anything else before we go on Larry?

Larry 15:54
Well, I feel bad for these people because, in my opinion, unless something dramatic has taken place in Wisconsin behind the scenes that I don't know about this bill ... I can't see what the barriers would be towards it being approved. And it's the people's prerogative to designate SVPs how they see fit. And, of course, the presumption is that it's constitutional. There may be some constitutional arguments that can be made downstream, after it becomes law. But there's no order that any court can issue to tell the legislature not to legislate. They can legislate any damn thing they want to legislate, whenever they want to do it. Or they can refuse to legislate! We've learned that from following cases here when people say that the court gave the legislature six months to legislate. You can give them thirty years to legislate! They don't have to do a damn thing. That's the thing about the separation of powers, they can't tell them to legislate. They can only tell them what happens if they don't. Remember the Michigan registry, when they told them that they had to legislate within a certain amount of time? They can't do that! And they didn't legislate. But then when they finally told them, "Well, the registry's going to go dark on a date certain, if you don't, then magically they legislated!

Andy 16:02
How about that!

Chance 16:06
But you know, it's important though, if there are issues of constitutionality, and issues of cost, that someone will push back and bring it up. So at least it can be thought through

before any final decision is made because sometimes those are the things that cause a bill to go away. But once a bill is in place, that's a whole different story. That is a tough terrain, to challenge these laws and such, but I don't know enough about it to really analyze it constitutionally, to say if there's anything there to do that.

Andy 17:46
So we'll move along then. We're going to go over to Arkansas. This was a question asked by Jacob, that says, "I was convicted in 2010 in the US District Court of the Western District of Arkansas on PFR-related charges. I am a level-three offender and, though I have a while to go before I can get off the registry, I do have questions (sorry for the long statute) Under Arkansas ACA" -- Arkansas Criminal -- what would that be? Larry, "ACA"?

Larry 18:19
Arkansas Code Annotated.

Andy 18:21
Oh my god. Okay I never would have gotten that one. All right. And look, I gotta "Under Arkansas A.C.A. 12-12-919(b)(1)(B)(ii)(a)" 12 dash 12 dash 919 then a "b", then a one, then a big "B", then a Roman numeral two, then an "a". I don't know how to read that. Larry, that's too many things together.

Larry 18:36
I don't even know how to read that and I've been trained to do this. You got too many numerals and you have the capital B. And then you've got the lowercase b, I don't remember what that means.

Andy 18:49
Paragraph this, sub-paragraph that, sub-sub-paragraph -- screw that. Alright, anyway I gave it to you and it'll be in the show notes later. And it states, "No less than thirty (30) days before the date of the hearing on the application under subdivision (b)(1)(A) of this section, a copy of the application under subdivision (b)(1)(A) of this section shall be served on: The prosecutor of the county in which the adjudication of guilt triggering registration was obtained if the PFR was convicted in this state." Could they word things more complicatedly, Larry?

Larry 19:32
Seems perfectly clear to me.

Andy 19:33
Okey-dokey. All right then, to continue, "The issue is, I was convicted in the same federal district as where I was sentenced, but a different county. I am from Franklin County, but was sentenced federally in Sebastian County. So, based on the reading of the statute, do I have to notify the Sebastian County prosecutor, the Federal Prosecutor, the Franklin County prosecutor or technically neither county prosecutor since it's a federal case? Thanks for your time and, of course, FYP."

Larry 20:02
I called the guy and I enjoyed this question so much because some people can invent things to be worried about, and crazy stuff. But this is actually not totally crazy because he's reading from the statute, and I have researched that statute (not today, but I've researched it in the past) and it does say what he says it says, but I don't think it means what he thinks it means.

Andy 20:33
(laughs)

Larry 20:34
But it does say that. So, Arkansas, like several states that have removal processes, if you were convicted in a circuit court in Arkansas, you have to go back and file your petition for removal in that circuit court, and you serve it on the county prosecutor of that jurisdiction, similar to what you would have experienced in Georgia. No matter which of the 159 counties you chose to live in, your Georgia conviction would have gone back, for the removal petition, to your county of conviction. But had you been convicted in a non-Georgia setting, either federally or in another state, you would file it in, and serve it on, the county you're living in. And I think that's what this means in Arkansas. But since I'm thinking it doesn't mean it's so. So he would be well advised to consult with an Arkansas practitioner. But he's got to serve it on someone. There has to be an adverse party to this because it's an adversarial process. You don't just file a petition and the judge says, "Oh, well nobody got served, I'll just grant it!" Someone has to be served. But if it were me, and if I held a license in Arkansas, I would tell the gentleman, barring any case law on point to the contrary, I would tell the gentleman, "Well, you have a non-Arkansas conviction so therefore, we're going to file it in your county of residence, and we're going to serve it on the prosecutor in the county of residence." And that will be the responding party. And that prosecutor, having never been connected to this case, may not have any anxiety whatsoever because that's going to be a State of Arkansas prosecutor, and he was prosecuted by the US Attorney's Office. Very few people go backwards. If they're an assistant United States attorney, they don't generally give up that coveted assignment and go work for a state prosecutor's office. It just flows the other way around. You work for a state prosecutor office and you get a job with the US Attorney. So that prosecutor is not going to know anything about it. All they're going to know is whatever information the sheriff where he registers has provided or *will* provide them after the petition is filed. So that's what I think I would do. But

this is a unique question because it literally does say, "You file in the county you're convicted." He happens to be one of the rare ones who was convicted in a federal district, in the state where he's registering and where he's living. Oftentimes, they were convicted in one federal court, and the Bureau of Prisons (BOP) put him in an institution across the country, and they don't return him back to where they were convicted. But this is one of those unique circumstances. So, he needs to figure out if there's any case law on point. And, for a small fee of $10,000, I'll research that for him and give him an answer.

Chance 23:33
(laughs) Wow.

Larry 23:34
And Chance, you're not going to undercut me on your fee to do that research are you?

Chance 23:38
Well, no. No, I wouldn't undercut you a bit. But I do think that would be a very good idea to not only look at it and consider it, but to get some advice from someone who does these types of things in that state, and guidance on how to go so that you save a little bit of time and effort.

Larry 24:02
I think, when we were on a phone call with him, I did research Franklin County and it's a very small county, a population of 17,000. Most 17,000 population counties that have been stagnant at that level for forty, fifty years, they're usually not a bastion of liberal and progressive thinking. But that doesn't necessarily mean that they're going to deny the petition. But that's research you would want to add to the list. You want to find out how many people have been removed in Franklin County, if you can get some data on that. And a practitioner might be able to get that information, easily, and say, "Well, actually, my colleagues and I have been bemoaning this. In the last five years, we've filed two dozen petitions and not one of them has been granted." If that be the case, then I would suggest you do some research about places you might want to live in Arkansas because my opinion is that you can file in whatever county you're residing in, since it's a non-Arkansas conviction. Barring a legal barrier, I would get out of Franklin County when the day comes, several years in the future and I would file it there. The problem he has is that the system that Arkansas has is very expensive to administer. And there have been bills, through the years, in the legislature to dismantle the risk-based system because they've spent a whole bunch of money providing due process, and doing these psychosexual evals over in Pine Bluff, and they want to just get rid of it and go to the categorical approach. What would be hilarious is if he's in the 14th year of the 15-year registration period and they abolish it and he can no longer file.

Andy 25:44
Chance, anything that you want to add to all that?

Chance 25:47
No, not really because I think that Larry covered it pretty comprehensively. Other than that, you know, just to emphasize that legal culture is really a consideration here. If you're in a place where these things just aren't happening, and you can shift to a place where they are. Common sense tells you: go where you need to go.

Andy 26:12
All right. So on to the main event! And I guess you guys really have this thing all teed up, that we're going to be talking about, "Frightening and High". Who wants to start?

Chance 26:25
I'll start. Tell me, Andy, what was that conversation you had with your kid?

Andy 26:31
Oh, well he said, "Well what are you going to talk about tonight?" And I said, "Oh, gosh. Well, so I want I know about the "frightening and high" (and I hope that I have this right) is that, from a Psychology Today article on a very small subset of the worst-of-the-worst-of-the-worst kind of offenders, that this evidence was presented in court at the lowest of levels, and then due to summary judgment, it just kind of gets passed on, and on, and up. And then Our People say that 'the Supreme Court says,' but they never *found* it. They just carried it -- it was inherited all the way down. And then it gets cited in all the subsequent papers and references that 'PFRs have a frightening and high chance of recidivating'. And that's not really how that needs to be presented because it was on this very small set of people from kind of a junk article about a very small set of PFRs.' That's what I understand it to be and kind of explained that to him. But boy, is it complicated!

Chance 27:28
It is hard. It's hard because, when you're explaining this "frightening and high", it's like the snowball that never was, but it rolled down the hill and got very, very big! But let's take a look at some of the background on it before we get started. So, you know, Larry then can pick this thing apart from his point of view and the first thing to know about this is that, driven by a pervasive fear of sexual predators, and facing almost no discernible opposition, as we have discussed before, politicians have become ever more inventive in dreaming up ways to oppress those forced to register, through state and federal legislation and when these laws have been challenged in court, they've been

justified based on the Supreme Court doctrine that allows such laws, thanks to the "as high as 80 percent recidivism rate" ascribed to untreated sex offenders by Justice Kennedy in a case called *McKune vs. Lyle*. That's the 2002 case you'll find at 536 U.S. pages 24, 34, which then morphed into "frightening and high" risk of recidivism posed by sex offenders in *Smith vs. Doe*, which happened a year after, it's a 2003 case, and you'll find that at 538 U.S. 84. The problem is that 80 percent recidivism rate is an entirely invented number, which comes from a Psychology Today article published in 1986. That article was written by a treatment provider -- not a scientist, but a treatment provider -- who claimed to be able to essentially cure sex offenders through innovative "aversive therapies" including electric shocks and pumping ammonia into offenders' noses. Justice Kennedy found that number, that particular number which is 80 percent, in a brief signed by Solicitor General Ted Olson. The brief cited a Department of Justice manual, which in turn offered only one source for the 80 percent assertion, and that was the Psychology Today article published in 1986. The article offered no real way, scientific or otherwise, to fact-check the 80 percent assertion that was made in it. Because that 80 percent figure suited the government lawyers' aim of cracking down on sex offenders, Solicitor General Olson cited it, of course, and Justice Anthony Kennedy conveniently adopted the figure, without question, in 2002 and carried it over to where it morphed in 2003. As a result of its application in *Smith*, laws based on the Supreme Court's baseless "frightening and high" doctrine has done long-lasting damage to well over a million sex registrants in our country. Now, the question is, did it really have to happen that way? What do you think, Larry?

Larry 30:28
Well, before I go into it, if I remember right, Solicitor Olsen's wife, Senator Barbara Olson, died in 9/11 an untimely death and we're all sorry for that. You don't wish anything bad on your opponents. But, as he would have been the representative arguing the case on behalf of the United States, at least his office was, I don't know whether he was personally there. But no, it didn't have to be that way. I don't think it had to be that way. But I'm not even sure where to begin because my issue has always been that the Supreme Court did not create the notion of "frightening and high" recidivism, in either *Smith vs. Doe* or *McKune vs. Lyle*. That fact was handed to them by the parties in terms of how they handled the litigation below, meaning, at the trial court and the Court of Appeals. I'm quite certain that all of us are familiar with the rules pertaining to summary judgment: A party that moves for summary judgment tells the court that there are no material facts in dispute, and that no trial is needed for further factual development. In addition to that, the court must resolve any doubts in favor of the non-moving party, meaning the party that says, "Judge, we don't need to waste your time. You can decide this case on the briefs." Everything that was in the brief of the non-moving party, if there's any ambiguity, that ambiguity is resolved in favor of the non-moving party. So I have little doubt that in *Smith vs. Doe*, although I haven't read the briefs thoroughly, and in *McKune vs. Lyle*, I haven't read those briefs thoroughly, that they raised the issue of a "frightening and high" recidivism. In both of those cases, it didn't have to be that way, if the parties had said, "Well, Judge, we'd like to go forward with summary judgment, but the state has argued "frightening and high" recidivism and we dispute that. That is not a fact. The recidivism is actually quite low, and we're ready to put on testimony over a three or four-day trial, to show that that is, in fact, untrue." But they didn't do that because they assumed, in their mind, they had it won because in *Smith vs. Doe* it was an ex post facto argument and they figured that that would carry the day. They had not apparently read *Kennedy vs. Mendoza-Martinez* in 1963, that an ex post facto challenge is not really ex post facto if it's civil regulatory, if it is not intended or if it doesn't actually, in effect, impose punishment. And, in *McKune vs. Lyle*, which I'm gonna get into reading a little bit from that later but, the same thing: There was factual development that needed to have been done, but they were certain that they could win without factual development. And they were right! They did win, in both of those cases, below. But they didn't win at the final decider, which was the Supreme Court. They did win below.

Chance 33:43
That's correct. And I'll say the Supreme Court didn't create this false notion. They perpetuated it. It was offered up in brief, which cited a Department of Justice manual, which in turn, offered only one source for the 80 percent assertion, the Psychology Today article published in '86. It should have been challenged, and should have been developed, and that lesson has been learned. I think you can look at Michigan challenges, and you can see, throughout the country, that amicus briefs are now being attached to these things and the response is that we're just not going to have another situation like that. And I think that that is the effective way of litigating in the future.

Announcer 34:31
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Larry 35:19
So well I hate reading, but I'm gonna try to do the best I can to read a little bit from the syllabus in *McKune vs. Lyle*. It says "Respondent", because he would have been the respondent, since he had won below. When you look at a case, the party that's listed first is the party who filed the cert petition. So that is essentially the party who did not like the court of appeals' decision. So, "Respondent was convicted of rape and related crimes. A few years before his scheduled release, Kansas prison officials ordered respondent to participate in a Sexual Abuse Treatment Program (SATP). As part of the program, participating inmates are required to complete and sign an "Admission of Responsibility" form in which they accept responsibility for the crimes for which they have been sentenced, and complete a sexual history form detailing all prior sexual activities, regardless of whether the activities constitute uncharged criminal offenses. The information obtained from SATP participants is not privileged, and might be used against them in future criminal proceedings. There's no evidence, however, that incriminating information has ever been disclosed under the SATP" according to the court. "Officials informed respondent that if he refused to participate, his prison privileges would be reduced, resulting in automatic curtailment of visitation rights, earnings, work opportunities, ability to send money to family and canteen expenditures, access to personal television and other privileges. He also would be transferred to a potentially more dangerous maximum-security unit." Now, that's a pretty significant threat to hold over a person. If you don't do this, we're going to do this. I mean, would you agree with that, Chance? That's a pretty significant hammer to hold over someone?

Chance 36:55
Oh, yeah, absolutely.

Larry 36:57
So, he was basically in a no-win situation. Nonetheless, he refused. That takes some courage, where they tell you they're gonna do all these things to you, and he refused, "on the ground that the required disclosures would violate his Fifth Amendment privilege." He brought this action for injunctive relief under 42 U. S. C. 1983. The District Court *granted* him summary judgment," -- remember, summary judgment -- and the Tenth Circuit affirmed the summary judgment, that "compelled self-incrimination" actually does violate the Constitution. But ultimately, Kansas won because they went to the Supreme Court and the record that they would have had when *McKune vs. Lyle* got to the Supreme Court would have been a very sparse record because it was all done on the pleadings below. Maybe he should have, rather than being so arrogant, assuming that since self-incrimination is a legitimate Constitutional right, maybe they should have done a little bit more research to figure out what the exceptions are, and whether this would've fit within some of those exceptions, similar to what the exception was in the *Smith vs. Doe* and the *Kennedy vs. Mendoza-Martinez* analysis of what constitutes punishment. But here we are, because of summary judgment, in my opinion. There weren't enough facts established below.

Chance 38:32
Agree, Agree. And that! *that* is frightening, and high!

Andy 38:42
Very clever!

Larry 38:42
I still see many cases going up on motions for summary judgment that shouldn't go because there are things that are in dispute. There are facts that have not been adequately established. The case out of Colorado was where Judge Matsch, he's now deceased, but that very important case challenging the registry, was sorely lacking in evidence. Although there was a trial, there wasn't any evidence because the lawyer didn't have any money. There was an attorney based in North Carolina that filed a motion for summary judgment on a frontal assault on the registry and the judge denied it because the judge said, "I see facts here that haven't been properly developed." So the judge saved the lawyer. I mean, ultimately, the case was still lost, but the judge said, "I deny your motion because I see that there are facts here that haven't been clearly developed." Why are people so hell bent on avoiding trial? You've been practicing for forty-two years. Why do they want to do everything by summary judgment?

Chance 39:25
I think, 1) they are limited by resources and 2) they cut corners. Or 3) they're just lazy. Or 4), they don't know any better and it makes for a lot of bad law, that's just the case.

Andy 40:06
Larry, going back a bazillion years, like the origin of our relationship was "judicial economy". Wouldn't that summary judgment fall under that kind of philosophy, that it just makes it more expedient to move the cases through court that way?

Larry 40:21
Oh, absolutely, it is efficient. But remember, you have a duty to do the best for your client, not the most efficient for you. Now, if your client can't pay the bill, that's a different matter because if you're doing it on the hopes that you're going to win, and get a payoff under 1983 later, well, the more you have to do in advance of this case, you're going to have more to lose if it goes against you. I'm guessing, since I've never practiced law at that level, I don't know how you

would analyze that. Chance, it's my opinion that every day you're going to be in trial requires a day of prep, to be ready for that day of trial. If you're looking at a one-week trial, you gotta at least do a week's worth of prep, at least!

Chance 41:08
Let's put it this way. If I'm preparing for trial, for every hour I spend litigating, I spend three hours preparing, if you think about it in those terms.

Larry 41:19
So the loss is going to be horrendous because under these 1983 claims, they're not going to get paid unless they're a prevailing party. But I want to win and I tell the client, "If we need financial resources, we can't do this case. We just can't do this case because this case is gonna require a lot of money, and our little firm just doesn't have the money to carry this case. Although we believe in you, we believe in your issues, we need a budget of $50,000 for experts. Do you have that? Because we don't have it to front you. We just don't."

Andy 41:55
Let me jump in and ask, what is a 1983 claim? You keep throwing that out there. What is that? Chance? Probably you can answer this because you have the law degree and all that stuff?

Chance 42:07
Oh, no, I'm gonna pass this on to Larry because I'm not familiar with 1983 claims.

Andy 42:13
Really?

Chance 42:14
Yeah, those are for Federal claims, right Larry?

Larry 42:18
Yes, that's a section of the United States Code, Title 42 U.S.C. Section 1983, that provides for civil rights actions. There's a provision in 1983 claims for the prevailing party to recover the attorney's fees. I don't know if California has a similar provision in their civil litigation, but yeah, it's a way to recover. People like to use 1983 claims because the federal judiciary is theoretically more insulated from the political whims. You don't have too many Judge Persky's in the federal system. You know, they're on the bench under Article Three of the Constitution, for life. And, like 'em or not like 'em, there's not anything you can do about it unless there's some gross malfeasance, and I mean, in terms of my lifetime, it's been maybe two or three federal judges I can remember that have been impeached or removed. It's exceedingly rare.

Chance 43:05
Correct.

Andy 43:05
All right, are we done with this section?

Larry 43:15
Well, I think we could probably do a little bit more development on the issue of "frightening and high" recidivism. It is in every preamble, legislative enactment, about frightening and high recidivism. The National Conference of State Legislatures pumps out this stuff, in terms of "model bills" and this is in ours, in New Mexico. It's probably in every registration scheme around the country, saying, "the legislature finds ..." (frightening and high recidivism, risk, and danger to communities, etc.) I tried to strike that this year, in a bill that we're working on and much to my surprise, the State Department of Public Safety rejected that! I was going to strike everything in that preamble. In my version of the bill it just said, "The purpose of the Sex Offender Registration Act is to comply with the federal Adam Walsh Child Protection and Safety Act". That's what I had in my preamble and, Chance, aren't you surprised? They wanted to leave that "legislative finding" in there! So, the bill, as it's currently working through the legislature, has that preamble contained. Next I'm going to try to strike it as an amendment because there's no frightening and high recidivism. But it's in every legislative enactment, that "the legislature has found frightening and high recidivism."

Andy 44:38
But they're just citing to the Supreme Court piece, right?

Chance 44:40
Yeah, that's the snowball that never was. Because, you know, when it happened in *Smith*, it was small, it began to roll down the hill, and now it's huge and you're right. But, you know, I look at that as a rebuttable presumption. I mean, you know, "Frightening and High - The Supreme Court's Crucial Mistake About Sex Crime Statistics" by Ira Ellman [https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1429&context=concomm] completely rebuts that. And not only does he rebut it, he is a pre-eminent, respected, and credible researcher. If you look at his article, and it has been used in litigation across this country in amicus briefs and such, you'll find that it really, totally rebuts that presumption and should be used in every single way, in state and federal litigation, and also legislation. I think that it should be recognized because it really takes down that foundational brick that justifies all these other things, that oppresses all these other laws, rules, regulations, and so forth.

Larry 45:55
Well, my goal is to remove it from our preamble because there's no basis for that to be there. I've learned through the years of being in the legislature, that the victims' advocates come in and use that. They use it as a hammer to hold over the lawmakers. They say, "Well, look, you've already found that these people pose a frightening and high risk, and they're a danger to the community." And I saw a Senator (I choose not to name) that said, "I don't care about that." and I'm thinking, "Well, gee, you said that publicly. It's going to be used against you." (It hasn't been, yet.) But it should not be in there because it's just not factually correct. But it's also not factually correct to blame the Supreme Court for it, in its entirety. What would have been some options that the Supreme Court could have done that would have minimized, or diminished that, based on the posture of the litigation, being that this came to them on summary judgment, being that both Kansas and Alaska did not get the chance to test their defense? What could the Supreme Court's other options have been, rather than doing what they did? Could they have kicked it back down to the lower courts for further development? What would have been a better outcome from the Supreme Court?

Chance 47:08
Well, they could have. I mean, they certainly could have. Or Justice Kennedy, starting before *Smith vs. Doe*, you know, instead of taking it for what his use was, he could have at least fact-checked it. He could have had his clerks look at it, and really developed it before he stated it. Because it really is intellectually, just horrendous. I mean, it is a fallacy and it has no foundation and it should never have appeared in any opinion. So I think that part of this is the fact that he just didn't fact-check that assertion, just used it in order to justify some things that, again, have rolled downhill and become this, like, monster. But yeah, further development, and two, at least fact-checking it before using it in an opinion.

Larry 48:13
Well, it would be my opinion that the Supreme Court's Justices very seldom do their own research. So, I would think that his law clerk is who found this for him. But, the law clerk probably found it because the law clerk was *asked* to find something. Because that meant, in my mind, Kennedy was leaning towards ruling against a sex offender, and in favor of the state of Alaska. Or, in the case of Kansas, against the offender and in favor of the state of Kansas. So, if the law clerk was told, "You find me something. This is what I need because this is the way I'm leaning." That, I think, is probably the more likely scenario of how it came down. Do you think that they actually do their own research? I suspect that most of the research is done by the clerks of Supreme Court Justices.

Chance 49:03
I suspect that you're probably right. I think maybe some unique justices do their own research. I think that they also rely on their clerks, mostly. And I think that they set out the parameters and guidelines for that research. And, you know, those who really want to know what they're talking about, want to get a full view, both sides of the equation, before they make a bold statement that may impact people for a very, very, very long time. I think it was reckless. But I do agree with you, that I think that he was looking for a way to get to where he wanted to go. And I do think that that's probably the likely scenario.

Larry 49:41
Well, you and I probably are some of the few people still alive that remember the TV series, The Paper Chase, from the '70s. But the mythical Professor Kingsville would have read that, and he would've said, "What is your source for this? Before I put this in a majority opinion, what is your source?" I mean, he would have been a tyrant on that, because that's just the way he was portrayed in the show. But that's what a good justice would do. When something like that comes before them, they would have said, "Hey, I need to see where this comes from, how credible it is, and if it's been peer-reviewed. Because if we're going to adopt frightening and high recidivism, although this was decided on summary judgment, I'm not going to use it as a basis in its entirety, unless there's something validating this." That's something I think that Justice Kennedy could have done.

Chance 50:36
He could have done it. I mean, you know, there's an old saying we had in law school, "You get Cardozo-ed." There was a Supreme Court Justice, Justice Cardozo who, instead of doing that, drew a line from A to B, where he started and where he wanted to go, and then built everything in, to get to that conclusion. And that seems to be what Kennedy did. It's a shame because you know what? A year later, he took everyone else with them, everybody. So, it's just wrong.

Andy 51:13
Well, I think we then have time, Chance, that you could do the follow up for that additional question that was asked for "The California Corner?"

Chance 51:23
Okay, The California Corner! Is that okay with you, Larry?

Larry 51:26
Let's do it. Let's do it.

Chance 51:27
We got a few more minutes here? I'll do that as the follow up to what we spoke about maybe an episode or two ago. We were talking about petitioning for removal in California.

And this comes up, I think that a lot of folks ask this question and get caught in it sometimes in the wrong way. But the question is, "Can you apply for removal in California, if you are residing in another state?" And the answer is: Yes. AND the answer is: No. Because it comes down to how you do it. It's "no", you cannot petition if you reside out of state. And let me give you an example, in California, a man named Clifford James Smyth (however you pronounce that) was categorized as a tier-two sex offender, and he sought to be removed from the California Sex Offender Registry. However, at the time of his petition, he was living, and registered as a sex offender, in Oregon, not California. The Superior Court of Glenn County, of all places, denied his petition, stating that he was not currently registered as a sex offender in California. On appeal, Smyth argued that the denial of his petition violated equal protection, and was contrary to the legislative intent of California sex offender registration laws. The Court of Appeal of the State of California Third Appellate District affirmed the lower court's decision. The court found that the California law, which was restructured to establish three tiers of registration for sex offenders, only allowed people registered in *California* to petition for termination from the California sex offender registry. The court disagreed with Smyth's argument that excluding out-of-state registrants from obtaining relief was contrary to the legislative intent, and was just absurd. The court reasoned that, as someone not registered in California, the legislative concerns did not apply to Smyth. Okay? So it's an absolute "no", if you're not living and registered in California. It's a "yes", either by residing in California, or establishing a *second* residence in California. So, if you're an out-of-state registrant, and you want to petition off the registry in California, establish a residence in California. If you want to take your California conviction, and you want to petition for it out-of-state, then establish a second residence in California. And you can always get advice from an attorney who does these things in California on exactly how to do that. And I'm going to note two things, which I think are really important. One, you must include the out-of-state residence on the California registration form if registering in both places. Very important you understand that, because on that form, it says, "places where you register". A lot of people confuse that by thinking that's only places in California. No, if you're registered in another state... Let's say you have a California conviction and you're in Oregon, and you want to get off the registry in California, want to keep both residences, and you establish a second residence in California. All you need to do is put in that box your other address where you register at. That way you can move to and fro and still keep your established second residence in California for the purpose of being removed from the California registry. And, two, during the process of removal, you've got to serve agencies, and what I mean by agencies are the "registration" agency and the "prosecution" agency, of that particular jurisdiction, and also your *outside* agencies, meaning the ones outside the state, as part of the petition process. Why? Because California law requires it, in order for the removal process to move on because they have to establish eligibility. And too, they're asking for input. So what does this really mean? What this means is that even though your "outside folks", in the other state, are probably not going to respond, are disinterested and don't understand California law, if they have any input at all, at least you've given them a chance, by serving them with the petition, to respond. If they don't within sixty days, you're good to go. And you're only relying on the agency you're registering with in California. But it all has to be done according to plan. And those are things you'd have to consider if you're going through the process. And that is the answer to that particular question.

Larry 56:07
I love it. Yes. And no.

Chance 56:09
Yes and no.

Andy 56:11
Typical attorney! "It depends."

Larry 56:13
Andy used to tell me "That's as clear as mud".

Chance 56:18
Right!

Larry 56:19
Well, on a funny note, I have a person, I don't remember his name. I met him about ten years ago up in Seattle, and he was the best pro se litigant that I've ever seen. He was the best brief writer, for a person that didn't have a legal background. He can outwrite me, in terms of how well he composes briefs. I don't know where he got the skills to write. But he comes to me and says, basically, that he wanted to state-shop to figure out all the states where he didn't have to register and he was calling the states to get them to opine on his Washington conviction, if he'd have to register there. And he said to me, "Well, I'm gonna file in Hawaii for declaratory judgment." I said, "You're wasting your time! If I'm the respondent, I'm going to answer that saying: You're not registered here, you're not required to register here, and you don't have to register. And we won't be bothered with you until there's a legitimate question. This is not a ripe question!" And he figured out how to bypass my concern. He filed a petition for declaratory judgment, he asked the court to rule whether he would have to register, and he said that his business took him to Hawaii multiple times, frequently enough, that this was not just a theoretical controversy, but a real controversy. And

he got a court in Hawaii to rule on whether or not he had to register, and he'd never set foot in Hawaii before. (laughs)

Chance 57:48
That's interesting.

Larry 57:50
So, I learned not to be so arrogant, telling people, "You're not gonna even get -- they're just gonna can you in their first response, with: Your issue is with Washington, not with us." And he was able to get a trial court, and he won, to rule on something where there was no legitimate dispute between parties. And I thought, "Well, I just need to tone down my arrogance a notch or two" because I didn't think he could pull it off and he did. He just wrote such magnificent briefs. Where do you go to plagiarize to write that well? Because I've been doing it for twenty years and I can't write as well as he did.

Chance 58:31
That is a pretty cool story!

Larry 58:35
Andy, does AI write briefs for people because I'd like to charge a bunch of money that I can just put it into AI and say, "I need a brief" and get it done by the computer.

Andy 58:43
Somebody even said that before when we were talking about "Oh, like the New York lawyer that didn't check ChatGPT citations?" It completely fabricated citations in a brief that it wrote, just made up. But it writes really well, Larry, and I've haven't played with this yet, but you could take everything you've written, even from your boss or from you, and you could feed it in there, and you could say, "Write in this style" and it would write, like it was you. It's really phenomenal what they're able to do these days. And it's only a year old. I can't imagine what it's going to look like in five years, can't even imagine!

Larry 59:17
I generally poo-poo every pro se litigant but, in my years of doing this, I've seen two or three -- I've seen a handful of people who are really quite good at what they write, and how they think and analyze, and he was one of them. One in Maryland wrote a petition for declaratory judgment on the registry, he filed a federal cause of action, and the federal judge liked it so much, he asked a former chief public defender of the state to take the case for the guy. She consolidated it into the work that she was already doing, challenging the registry. But occasionally somebody, even though they're not an attorney, they can actually do some pretty amazing stuff.

Chance 59:57
Yep, yeah, Agreed. Agreed.

Andy 59:59
Anything else before we kick you out of here Larry?

Larry 1:00:03
I think we've covered it.

Andy 1:00:06
Fantastic. Chance, any "parting words"?

Chance 1:00:09
Just thank you for joining us! Appreciate it.

Andy 1:00:12
Well, thank you for joining us. We appreciate it. So there! (laughs)

Chance 1:00:16
All right.

Andy 1:00:18
Well, make sure that you head over to registrymatters.co for episode listings, and then you can head over to FYPEducation.org for show notes, leave voicemail at (747) 227-4477 and email at RegistryMattersCast@gmail.com. And of course, support us over at patreon.com for just as little as a dollar a month. And that is incredibly appreciated and helps "keep the lights on" I suppose you could say. As a patron you could get on the Discord server and listen to us record live, which happens at about 7pm. Eastern on Saturday nights. Without anything else, I think that we can call this a good episode, and we will get out of here. I hope everybody has a great rest of their weekend. I'll talk to you gentlemen soon! Have a great night.

Chance 1:01:05
Thank you. You too.

Larry 1:01:06
Good night.

Announcer 1:01:11
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