



## Registry Matters Podcast

Episode 293

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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 293 of Registry Matters. Good evening, Larry. Good evening Chance, how are you?

Chance 0:26

Good, good. Thank you.

Andy 0:26

And Chance, are you permanent now? Larry, is this a permanent addition?

Larry 0:36

Permanent as long as we can, as long as we can keep Chance.

Chance 0:39

I'm more than happy to stay. If you guys invite me, I'll be here.

Andy 0:47

Have you continued to be invited?

Chance 0:49

Yes.

Andy 0:49

Because I didn't do it!

Chance 0:50

No it was all Larry's fault.

Andy 0:53

I believe that.

Larry 0:54

So you have a little thing to play, now that we have an additional person here, that you can play from the postmaster.

Andy 1:02

Oh! I do have that one:

Postmaster Clip 1:05

How much longer are you planning to stay? A, uh, a long time. Get used to me.

Andy 1:11

And that's Chance now?

Larry 1:13

No but since we have Chance, you get to pose that question to me! How much longer am I planning to stay? So I'm planning to stay a while longer, but I don't know if I could go as far as he went in that clip, though. But I'm planning to stay a while longer, at least through this year.

Chance 1:27

Stick around, Larry.

Andy 1:27

All right, perfect. Well, make sure that you press Like and Subscribe and hit that notification bell on YouTube that helps the algorithm. You all know this: Every YouTuber says "Make sure you press the like and subscribe and notification bell", all that fun stuff. You can download the show as a podcast, and listen in your favorite podcast app. That's what my preference is. I have like ...60... podcast subscriptions? But that's because I'm just a freak of nature on that one. Now, with all of that said, Larry, what are we doing this weekend?

Larry 2:00

We're all over the map this evening. We have some listener questions, and I really have to commend one of them as very creative. We have a case from the state of Louisiana from the U.S. District Court, Middle District, Aaron Nelson, that deals with juvenile PFR issues. And we have a "California Corner" that deals with some issues related to hearings for getting off the registry, and some articles that are entertaining. And also, up front we're going to do a "scam warning".

Andy 2:35

So let's dive right into the Scam Alert! This comes from Scott Morgan, who is the NARSOL Region Three Coordinator which is the center of the United States, kind of west of like Pennsylvania and Georgia, that general region, Illinois Voices is who he is with, and says "I received a call from a guy named (ahem) "Officer Brooks", claiming to work for McHenry County Sheriff's Office. He called me at work today, and I asked him if it was a joke, and he hung up on me! I have called him back a couple of times from another number and both times he answers the phone, 'Sheriff's Office'. If anyone wants to have fun with him, call him back at" -- oh, here's the phone number. Please, everyone call him! "(815) 242-7154. I don't think he's a sheriff. Please don't mention my name, but ask him why he is calling people to harass them. Presumably, he was going to blackmail me but I didn't let him get that far. The number

appears to be a landline in Rockford, Illinois. Does anyone have a subscription to a service that can identify this guy?" Oh my God, that's awesome! (laughs)

Larry 3:40

So, on a serious note, folks, please don't buy into this. If you're in any type of arrearage with your registration obligations, they're not gonna let you "buy your way out of it". Now they may call you, and give you a courtesy call. I have heard of that, and tell you that if you don't get down to the sheriff's office in person by a certain time, either today or very soon, that they're going to come out and visit you with a warrant in hand. But they're not going to ask you for money to resolve this unofficially and, whatever they call it, "privately". All that stuff, that's nonsensical. I don't go so far as to say I would hang up on them, because there is a slim chance you might be dealing with the real authorities. But if they ask for money, it's kind of like when the person morphs into a minor, that started out as an adult? When they start talking money, you know, at that point. From that point on, anything you do is B.S. because the law is not going to ask you for money to work this out privately.

Andy 4:51

I'm with you but, god can you imagine if we all like just phone-bomb the guy, and (laughs) just war-dialing the guy? Do you remember, Larry, Les Nessman and WKRP with the chickens on the library steps or something like that?

Larry 5:13

I remember the show, but I don't remember that episode.

Andy 5:15

Oh my god, it was so funny. So there was some, like for turkey-day, like Thanksgiving or whatever, and they were dropping chickens out of a helicopter. I don't remember the details. I'm sure someone in chat is about to tell me all about it. But oh my god, I can just imagine all of us calling this guy just non-stop, day and night, harassing the shit out of this guy. That would be amazing.

Larry 5:39

Let's be careful though. When you encourage people to make unwanted telephone calls, even though what he's doing is below the pale, there is a law against making a phone ring repeatedly with no legitimate purpose. I don't want anyone to be charged with harassing or annoying phone calls, or anything like that. But it would be funny if you could do it and not be detected, but I would certainly be careful with that.

Andy 6:05

Okay, so don't (wink-wink, nod, nudge-nudge) do it. Don't do it! Telling ya: don't do it.

Chance 6:16

(whispers) Don't do it.

Andy 6:17

That's really funny. So all of my stuff had crashed Larry and I'm just putting it all back together now. So all right, we are able to move on now. I'm sorry. And now we can move over to... not that window. I don't have stuff set up, Larry, I'm so bad at this today.

Larry 6:34

We have a question from Ami. And it's to Larry and Chance. You want me to read it?

Andy 6:39

No, I can get it. I just don't have the screen pulled up to display to the You People. But I'm getting there, I'm almost there. Just give me one second and I'll have it put up there.

Larry 6:49

While you're looking, I'll describe this question. We're going to have a little bit of a struggle with it because it's extremely long, and I shortened it. And I tried to divide it into a breaking point between the main two points of the question. And it really does have two central points that she's making. And, Ami, we're gonna do the best we can. We really don't have any great answers, but these are great questions. And you put a lot of effort into thinking up, particularly the tail end of it, of the discrimination based on race. That is some pretty creative thinking.

Andy 7:24

And I will do this, just one second. So it says "Hi Andy, Larry and Chance. I have a couple of questions about the Equal Employment Opportunity Commission (EEOC) and how it might apply to our community. And here's a link to the guidelines I have been researching [<https://www.eeoc.gov/laws/guidance/enforcement-guidance-consideration-arrest-and-conviction-records-employment-decisions>]. My husband was convicted of one count of possession of CP in '97 in Texas. He moved from Texas to North Carolina, and then from North Carolina to South Carolina. He has been removed from the registry, and its requirements, in South Carolina, where we do live now. He remains on the Texas and North Carolina websites. North Carolina says they will take him off if Texas does. And Texas is denying his petition for removal. Gaining unemployment in the healthcare field has been proven to be tough." Is that "gaining unemployment" or is it "gaining employment?"

Larry 8:28

That was a typo I didn't catch in there.

Andy 8:31

Okay, very good. Just making sure. And so it's "Gaining employment in the healthcare field has proven to be tough. He gets offered positions and then they rescind their offer when the registry check comes back. The same situation happened with his current employer. I read their hiring policy, and opened a case with corporate, stating that his Fair Credit Reporting Act rights had possibly been violated due to not receiving pre-adverse action notification, and adverse action notification. Per this organization's policy, they were to provide both in writing. However, the FCRA," and that was the Fair Credit Reporting Act, "the FCRA accepts verbal. He was still denied employment. But corporate said if he was taken off the registry where we live, that he would be eligible to reapply, and work for the company. A few weeks later, he received a letter from South Carolina that he had been approved for removal from the South Carolina registry. He applied for another position and could tell immediately that the application was being kicked back. I reached out to corporate again, asking them to remove the block they had on him, and telling them that he had been removed from the South Carolina registry. We got everything straightened out, and he was hired! I started researching hiring regulations for people with felonies. I have researched the Equal Employment Opportunity Commission regulations and I'm probably grasping at straws to find something that could work for our community. I trust that Larry will not hold back, and give me his honest opinion (not advice). I'll pause here for Chance and Larry." So, take it away!

Larry 10:08

All right. So what she's communicating in that first segment is what most registrants out there don't think that I understand when I say "you're listed on the website", and somehow or another, they don't think I understand that it \*can\* cause you difficulty. But being denied a job, although as horrible as it is, is not the same thing as "being registered". But it certainly is something to not be taken lightly. So I recognize that. I can concede that it happens, and it did happen. And her persistence is likely what got him over the finish line. She sounded like she was being so diligent and thorough, and corporate probably didn't want to deal with her, and any possible consequences, because she comes across as being someone who's thorough, and possibly litigious. But on the second part of this, she's come up with a scenario that I could never have imagined, in terms of how she wants to change the EEOC hiring protection that people have against discrimination. She wants to have a protected class of people, and she's come up with a scenario that -- you've got to give her credit -- it tops the "Blizzard in Fort Sill" by a longshot!

Andy 11:33

(laughs) But we're not a protected class. So, does this just die, right on the doorstep?

Larry 11:40

I'm afraid so. But yeah, in this second half you're gonna read, you can see that she's actually come up with something that \*is\* plausible, it could happen! I always say, "You need to come up with something that's plausible." This is actually plausible.

Andy 11:53

Okay, so I will continue. "A covered employer is liable for violating Title VII when the plaintiff demonstrates that it treated him differently because of his race, national origin, or other protected basis. For example, there is Title VII disparate treatment liability when the evidence shows that a covered employer rejects an African American applicant based on his criminal record, but hired a similarly situated white applicant with a comparable criminal record. In this scenario, say a white man has a conviction for possession of CP in South Carolina. He has been on the registry for twenty-five years. He petitions to come off the registry in South Carolina and it is granted. He applies for a position and they run the background check for ten years. His conviction does not show up, and neither does the registry. On the same date, a black male committed the same offense and was convicted in South Carolina. However, he has been to Florida on vacation for a week. He petitioned South Carolina and was removed from the South Carolina registry. Of course, he is now on the website in Florida, even after death. Although he has no legal requirement to register in Florida" -- pay attention you people in California -- "Although he has no legal requirement to register in Florida, it shows up on the quote-unquote "National Registry" background check for employment. He applies for the same position as the white guy we just talked about. Let's say the black male has more years of experience and is better qualified for the position. These two people committed the same crime, on the same day, and the state they live in removes them from its registry. However, even though the black male is more qualified for the position, the white male gets the position because the black male went on vacation to Florida." (laughs) That's probably true, Larry! Go ahead, interject please! There's still a lot more to go!

Larry 13:51

Well, but do you see what I'm saying? Who could have ever thought of this?

Andy 13:57

I think a lot of us could have thought of it, because all you have to do is spend, whatever, 75 hours, whatever it is, in Florida and you're just... you're "on the website", Larry. You're not on the registry, you have no legal obligation,

you're not under any threat of prosecution, but ...ya still show up! Had I done that? I've been off the registry now for what, two-ish? ...three years now, almost? And I would still be \*on\* Florida's website, having all that baggage come behind me, like a wedding car with all the cans coming behind it all the time.

Chance 14:29

Except in Florida, it's not "until death do us part". That's the problem.

Andy 14:33

That's right so, we're like "married", and it's a bad marriage!

Chance 14:36

It's "For All Eternity" in Florida.

Andy 14:36

All right, now I gotta figure out where I left off. Um, okay, so budubdubiduhh... "I believe the EEOC should not let the registry be used at all for employment screenings. However, at the very least, it should be a requirement that, if it will be used for employment, that the employer only be able to run it for the state they live in, since the state laws are so inconsistent. I know that people would argue that there are certain positions that people who have been convicted of a PFR-type offense are ineligible for, places such as daycares, schools, nursing homes, etc. That being the case, the registry is not a good check for that, because in the scenario above, the white male no longer is on any registry, but he was convicted of the offense. Employers of that nature should run a background check back to the applicant's date of birth to ensure they capture ineligible applicants. If an employer's policy is to run a background check back, say seven, ten or even twenty years, that means they believe that, if someone has not committed a crime and that timeframe, they are eligible to work for their organization. That should be no different for our population. I would argue that the registry is discrimination. The Oxford Language Dictionary defines discrimination as 'the unjust or prejudicial treatment of different categories of people'. I would think this is different categories of people, those who are on a registry website, versus those who are not." And then of course, Larry, "Any thoughts?"

Larry 16:01

I actually agreed with Ami, and I was talking to a gentleman that contacted me in the last week or so. And Chance, you and I talked about this guy because he got "the communist state of Colorado" to release him from registration, based on a Texas conviction, then he wants to go back to "the freedom-loving state of Texas" that will not release him from their registry obligation, because he can't stand the communist state. But he wants to do an ex post facto challenge in Texas and I told him, "I do not support that." I

said "You can blow your money if that's what you want to do. But I think you ought to more narrowly focus your challenge on the \*harm\* that you suffered from being on the Texas website, because you've got tangible proof." They tried to disembark him from a cruise, in three different nations because they discovered him on the manifest after the ship was on the cruise -- they discovered his condition of being listed on Texas and Illinois, although the "communist state of Colorado" had granted him termination (and those were his words, that's why I'm saying that.) He wants to leave that communist state now that he's off the registry. And I said, "Well, if you challenge your direct harm, you've got a direct harm here, because it would have cost you thousands of dollars of lost cruising expenses, plus whatever thousands that would have cost you" -- I think Guatemala was one country they tried to kick him off in. Another was Belize, and I forgot where else they were trying to disembark him. And the other nations, surprisingly, they didn't want him for some reason. And this would be, in this scenario that Ami described, this would be where a person could possibly have direct harm that they can associate with a challenge to Texas, about continuing to keep him listed as a PFR on their website. You would file the challenge, in Texas, saying that "There's no rational basis to keep me on your list, because I have rehabilitated," whatever your arguments you make, "I'm no longer required to register, and I haven't been connected to Texas in twenty-seven years now. And you're continuing to harm me!" So, under the scenario that she described, if we could find such a person, who actually had those particular facts, I think it might be a worthwhile challenge. What do you think about that, Chance?

Chance 18:04

Now that's quite possible, quite possible. You know ...unlikely, probably, but possible.

Andy 18:25

(laughs)

Larry 18:31

Well, I don't think it would be dismissed on the 12(b)(6) motion right away, because if you can show harm, that keeps you in court. Our system revolves around harm. Everything that's "wrong" doesn't harm you. But this would be an actual harm, an economic harm!

Chance 18:52

Well, I think that's true. Way out of my wheelhouse...

Andy 18:56

Does this go to court? Or does this go through the legislature?

Larry 19:01

Oh, well, I think the court would be the impetus to get it to go to the legislature. Because Texas is not going to stop doing that, and the other states that do that aren't going to stop doing it. But you would bring a cause of action in Texas showing your genuine economic harm. And you would do a petition for declaratory judgment, saying that this, either your policy or your state law -- I don't know if it's one or the other, it could be both -- but this violates my right to have gainful employment. You are carrying something that's no longer true. I am not a registered sex offender. Now, if I were to put on the State of Texas's hat, I would say "You're so right. And what we're going to do to fix that is we're going to put, in little, tiny, eight-point font, on the registry, 'No longer required to register'. And we're gonna leave it just the way it is right now. So good luck. Go ahead with your suit." I mean, if I can think of that, so can they. But I think that you would not be laughed out of court, if you actually have actual harm. So someone who could prove that they had better qualifications, they were denied a job. And somebody had almost an identical crime, almost identical years in the past, and they \*got\* the job... That's gonna be a tough thing to show, but like I say, it was very creative. And I think that it's not laughable in terms of, it might gain traction. And then you would use that as leverage to get them to change their policy, to stop keeping people listed who are no longer connected to Texas (or Florida or wherever the case might be).

Andy 20:35

Apparently, we need to find a very bored attorney. Do you know any? I'm thinking maybe Chance is bored?

Chance 20:40

Oh, no. No, Chance isn't bored, nope. Not me!

Andy 20:46

(laughs) Interesting! So Ami is now our hired creative-thinking person?

Larry 20:55

Uh, if she can top this, I'll be waiting for it!

Andy 20:58

(laughs) Alright, well, Larry, you have a case in here, for tonight, that is from "Lousy-anna". It's Aaron Nelson. I should have said "Aaron Neville". I should have just put that in there, just as a flub up, on purpose. But it's "Aaron Nelson, Et al. vs. Jeffrey Landry, in his official capacity as Attorney General for the State of Louisiana". And, uh, "Et al"? Chance, what is Et al?

Chance 21:25

I'll take a shot at this. It means "and others" and it's often used in the legal documents for multiple individuals, and a

single party must be noted. It's also used to reference a large group of people, so more than just the people on the title in this case, are involved.

Andy 21:43

They use it in scientific papers. And I believe that I think it comes out to be the person who's alphabetically first usually ends up to be the first person?

Chance 21:51

Well, I'm not sure about that. I've always thought it to be that term, "and others" meaning there's a class depending on this.

Andy 22:00

And Larry, are you even qualified to answer that question?

Larry 22:03

I would say I'm not qualified. But I would give a similar answer. I've used it in pleadings before and I believe that "that would be consistent with what I think it means."

Andy 22:14

(laughs) All right. In the opening, it says "This matter comes before the Court on Plaintiffs' Motion for Partial" --oh, here it is, Larry! Here it is! -- "Partial Summary Judgment." Larry, I know you love it.

Larry 22:28

Well, I \*do\* love summary judgment ...when it's used appropriately, and when there are no material facts in dispute, and those facts don't need to be fully developed in a trial. In this particular case, summary judgment seems to have been the appropriate vehicle, because there don't seem to have been any material facts in dispute here. This is more an interpretation of the law. But I'm not absolutely, positively sure. That twenty-eight pages, it was such a difficult read that I gave up on it.

Andy 22:55

(laughs) So this case is about Louisiana's PFR registration and notification statutory scheme, "In their Motion, Plaintiffs who committed PFR-type offenses as juveniles, and are now subject to Lousy-anna's statutory scheme, urge the Court to declare various parts of this scheme unconstitutional and enjoin the State from enforcing the same against them. Specifically, Plaintiffs challenge (1) Louisiana's requirement that PFRs' driver's licenses be branded with the phrase "PFR!" (2) Louisiana's requirement that registered PFRs identification cards be branded with the phrase "PFR!", and (3) Louisiana's social media ban for PFRs." That sounds pretty nasty, and I'd like to see if Larry can concede that these requirements are unconstitutional.

Larry 23:53

I can say that they have a powerful case to make, because there was a case in Louisiana, from the state Supreme Court that dealt with the state ID card markings, and I think it was the Hill case, it was referenced in this opinion. So the state is already on shaky ground, because they have the highest court of the state saying "You can't do this". And then, in terms of the social media ban, I think that we already have a fair amount of guidance on that, from the North Carolina called Packingham. So, I think I can concede that the state is on weak territory with what they're doing in Louisiana. But why are you surprised? It \*is\* Louisiana. It's like that whole bible-belt is so forgiving. This is common stuff for Louisiana, Alabama, Mississippi...

Andy 24:43

Louisiana is one of the worst ones as far as, like death penalty stuff, or life imprisonment kinds of things, at least in my mind, from whatever we've covered and whatever I've heard, they are just awful. Angola, right? That's in Louisiana. All right. Well, "The Plaintiffs began by asserting that, under Louisiana..." what is R.S.? Something-statute?

Larry 25:05

I'm guessing "Revised Statute".

Chance 25:09

That's probably right.

Andy 25:10

Okay, so "Plaintiffs began by asserting that under La. R.S. 40:1321(J), those who are required to register, regardless of the date of their conviction, must obtain and carry an identification card from the" --what?? -- "Department of Corrections that contains the words," -- the ones I've been screaming so far, "PFR!" -- "Likewise, under La. R.S. 32:412(1) those who are required to register, regardless of the date of their conviction, must have the words" (aforementioned, PFR) "in \*orange\*, on their driver's license (Id. at 6.)" What does that "Id" mean?

Larry 25:58

It was -- it should have been omitted, but when you "do the Id", it just means the preceding citation carries over. So, what you've just spoken to previously, rather than having to write it out again, that's all that does.

Andy 26:11

Okay. And then, so continuing, "Plaintiffs argue that, since both statutes apply to registrants, regardless of the date of the registrant's conviction, and a juvenile adjudication is not a conviction of any crime, these statutes do not apply to Plaintiffs, who are delinquents adjudicated in juvenile court." (and the same thing you just said about citing any

number of cases that I'm not going to read) What do you think of their argument?

Larry 26:38

Well, based on the fact that there's already State Supreme Court precedent, and they have that dual requirement in Louisiana, the ID card and the driver's license. I believe that Hill case was decided on driver's licenses. But I'm surprised that it's taken this long! Because when the state Supreme Court says, "our registry has infirmaries", the state said that they would voluntarily stop enforcing that, the motor vehicle department putting the PFR marking on the licenses. And now I think they have a code. But apparently they didn't do anything about the identification card. But I'm surprised it took this long.

Andy 27:21

Chance, do you have anything to add from there?

Chance 27:23

Well, you know, it's a partial victory. And, you know, the Court granted some of the relief requested. But it seems to me that it did a pretty good job in almost granting all of it. But still, it's partial. And I can go through those things if you'd like me to.

Andy 27:43

Yeah, that would be great if you could, because you'll be able to read the statutes way better than I can! (laughs)

Chance 27:48

I don't know about that, but I'll be happy to do it. First, the court declares that "Louisiana's Statute section 32:412 sub one - La. R.S. § 32:412(1), Louisiana's requirement that registered sex offenders' driver's licenses be branded with the phrase 'SEX OFFENDER', that's unconstitutional. and it enjoins all defendants from enforcing it. That's the first thing. As to Plaintiffs' La. R.S. § 40:1321(1) claim" -- that's a lot to say. But anyways, that's -- "(challenging Louisiana's requirement that registered sex offenders identification cards be branded with the phrase 'SEX OFFENDER'), Plaintiff's claim is moot, and the Court thus denies this part of Plaintiffs' Motion, dismissing Plaintiffs' La. R.S. § 40:1321(J) claim without prejudice. What does that really mean? One, that's the denial in part, so they don't get a total victory. But "without prejudice" means they can come back and do it again! And then the third thing to note is that it declares Louisiana's Revised Statute "La. R.S. § 14.91.5, Louisiana's social media ban for registered sex offenders, inapplicable to adjudicated juvenile delinquents." So, you know, if you look at it contextually, it is quite a victory. I mean, what they denied in part, that can be fixed, and resought, but the rest of it they got, so that's pretty good!

Announcer 29:25  
Registry Matters Promo Deleted

Andy 30:14  
Something that comes to my mind is we had sort of a split decision of what they did. So, Alabama had the driver's license marking turned away. And Florida has one, but it's really, from what I have seen of it and I saw one in person, it's pretty benign. But the Oklahoma one is pretty horrid. So, this would fall in line with what Oklahoma has. But it got turned away in Alabama. The victory was ours in Alabama, that they couldn't write this on the driver's license. So where does a split-decision like that come down when it goes to court?

Chance 30:50  
Larry, where's Larry?

Larry 30:53  
I'm not sure I understand the question. When you say "a split-decision", what do you mean by that?

Andy 30:57  
Well, what I mean is that Alabama, they were going to put like frickin giant neon-sign-sized letters on the driver's license saying PFR. And then Oklahoma has something \*fairly\* obvious, I can't remember exactly what it is on theirs, that says that you're a PFR. So you have one state that has driver's license Very Clearly Marked, and you have one that lost in court, of putting them on the driver's license, as in, we want to keep them off the driver's license. So you have that "split".

Larry 31:28  
Well, when you say "split" normally, you're indicating something that I don't think applies here. Because these are state Supreme Court rulings, and one state is not bound by what another state Supreme Court does.

Andy 31:42  
Yep, you're correct. I agree.

Larry 31:45  
You could argue this is "persuasive authority". If it supports your position, you would say "What a brilliantly well-written, well-reasoned decision!" I mean, you would just embellish it, beyond all imagination. You would cite to it, but it's not binding. But the markings on driver's licenses... the state \*can\* mark its driver's licenses. I keep saying that, and I get hate mail for this. You can mark driver's licenses, but we have to mark driver's licenses like we do everything else. When we force people to "speak" (as in First Amendment speech), we have to give people the opportunity to address that "speaking", and see if that's something that \*needs\* to be spoken. But, we can force

you to speak if you have a communicable disease, to keep the public safe. We can force you to do that. We can force you to speak if you're running a restaurant, if you're running an unsafe restaurant, and you're downgrading, we can force you to speak that. And we can force you to speak on your driver's license if you have visual needs that make you an unsafe driver. But in all those instances, you've had an "individualized determination" that you need to "speak that" for the public safety. In the case of putting markings on people's driver's licenses, they've merely been given a categorical designation that they've been convicted of a PFR offense, which is a voluminous list in most states. So that is no "individualized determination", if the public safety needs that speaking to be done. But, absolutely, if you gave people due process, and you narrowed down whose licenses got marked, and how they were marked, you could force people to speak! We force you to speak with an "interlock license" here in New Mexico, when you get a DWI. We force you to speak that, while you are serving your sentence you have to have a special license, we can force you to speak because you've had an individualized determination. In this instance, these states just go so crazy putting this stuff -- everybody has to do this. But if they would just narrowly tailor it, and give people a process... If you go to the motor vehicles, and you've had LASIK surgery and you no longer need visual corrective lenses, you can go in and say, "Look, I want to take an eye test today, because I don't need to have this "speaking" on my license anymore, because I can drive just fine with regular eyesight." They put you up to the scope, you read the letters without corrective lenses, and they will issue you a new license without you having that requirement that you have to have the corrective lenses.

Andy 34:08  
I'm trying to think, in my brain, that we have the PFR "civil regulatory scheme", and we have driver's licenses. That's a civil regulatory scheme. If it's a \*factual\* statement about what is in the past, isn't that like: "You're seventeen. That's a factual statement, so now you have to turn your driver's license sideways, or you have, like a different color background than everyone else's, so it's clear that you're a minor." Isn't this ...similar?

Larry 34:36  
It's similar, but only remotely similar. Because the speaking that they're forcing you to do, is implying you are a danger.

Andy 34:44  
Okay.

Larry 34:44  
Your driver's license, when you hand it to somebody and it says "sexual offender", the state is articulating that this is enhancing public safety, that "people who encounter you,

public or law enforcement, they need to know these sorts of things." And to me, that's a weak claim because, if you're registered as a PFR, the law enforcement knows you, that you're registered. Or as soon as they run the NCIC they're going to know, because you're in the NCIC as an actively registered person. But in terms of, it's not historical accounting. To me, it's a different connection, but I can see your logic.

Andy 35:19

Yeah, I appreciate the way that you word that. Plus, I don't imagine that very many PFRs are going to like spontaneously offend against a cop, upon some sort of traffic citation.

Larry 35:33

Well, it's not just that you might spontaneously offend against the cop. It might be that... where you are, the situation you're in, would be more thoroughly investigated if they knew that information, that you were actively registered. But I'm saying they can get that information anyway. If you're by a high school ball field, and you've got a pair of high powered binoculars, and you're sitting there with a blanket over you, and the officer comes up to your window says, "What are you doing?" and he runs your license, and you're on the active registered list, and you're watching the teen athletes with binoculars... that would probably be justified, to ask a few more questions. (laughs)

Andy 36:13

Fair! Fair, fair. But he would've found that out by running you in the computer anyway.

Larry 36:17

That's correct. That's why I'm saying this is totally unnecessary. But! Just because something is totally unnecessary, doesn't mean they can't do it! As long as you narrowly tailor it, and you can narrow this down to such a small group of people, and have due process -- Law enforcement: Listen to me carefully! -- You can do a lot of stuff, as long as you narrowly tailor it, and give people due process so that they can undo it. If you follow my advice, you can get away with a lot of things!

Chance 36:44

And that's absolutely true! Absolutely true.

Andy 36:50

Well, let's continue though. Go ahead, Larry.

Larry 36:53

Well, it's bizarre that they don't think that way! Because narrowly tailoring, you put somebody on probation, supervision, you could, almost deprive them of every single right that they have, because they're being punished. But it

has to be narrowly tailored, and related to that offender and those particular factors of that offense. You might can tell a person things that you could \*never\* tell the whole population of supervised offenders. You can tell them "Sorry, we're gonna monitor every phone call you make. Your phone must have an individual printout of all your calling." But you can only do that to a person who has telephone problems. You couldn't do that to the population at large, but you can get away with almost anything if you're narrowly tailor it.

Andy 37:39

I noticed at the end, the following: "Plaintiffs also argue that Plaintiffs' Statement of Uncontested Material Facts should be deemed admitted as to Defendants DOC, LSP, OMV and BCII, since none of those Defendants responded to Plaintiffs' motion. Since these Defendants did not oppose Plaintiffs motion, Plaintiffs' Statements of Uncontested Material Facts are deemed admitted as to these Defendants. Further, since these Defendants did not oppose Plaintiffs' Motion, this Court's ruling is deemed binding as to these Defendants as well." Holy moly, Larry! That is a lot of talking in circles the way that it sounded to me. I don't know what those acronyms are. And there's a lot of "Plaintiffs' Motion" and "Plaintiffs' Statements" and all that. So anyway, what does this mean? Please tell me Chance, please?

Chance 38:30

You know, I want to initially say it's like, they're all married to the Plaintiff Statement of Uncontested Material Facts. I mean, there's nothing more to consider on the issue because they didn't submit anything. But you know, more interesting than my take would be Larry's, because this is Larry's thing right here. Larry, tell us about this!

Larry 38:51

So, well, I get very irritated about facts. And there's several ways you can get facts into the record. And one of the ways is you can file a... I'm having a Senior Moment, but you can file \*something\*, and if the other party doesn't dispute, it's "deemed as admitted". You can file a "request for admission" -- I think it's what it's called. Help me out here, Chance. You can file a request for admission?

Chance 39:15

Right.

Larry 39:17

And if the opposing party doesn't respond to that, in a certain amount of time, under the court rules in our state, those requests for admissions are deemed "admitted". And that's kind of what we have here. We have facts that were established by those various agencies. I'm assuming that "DOC" is Department of Corrections. I don't know what



"LSP" is, probably Louisiana State Police. I believe "OMV" is Office of Motor Vehicles, and I don't know what the other one, "BCII", is. But all those Defendant parties in that "Et al" category, they didn't respond to these requests for these Material Facts so therefore, they were established as facts! This is now the law of this case. This is the law of the case. This cannot be easily disturbed. If this goes up to the Fifth Circuit, these facts are there.

Chance 40:07  
Exactly.

Andy 40:08  
So, word it a different way though. Is this like, they asked for their response, and they didn't get it, so they just timed out? Therefore, by default, what was there already ...takes precedence? And that's not the right word.

Chance 40:23  
Yeah I think the right way to think about it, Andy is "If you snooze, you lose."

Andy 40:28  
That's fair! That's fine. Yeah yeah yeah yeah, that works. That works.

Larry 40:31  
Like I say, you file a Request for Admission, and they don't respond, so you ask the judge. Now it's usually accompanied by a motion to deem those facts admitted. But, in this particular case, it doesn't look like that motion happened. It looks like that, just by snoozing, that they lost, and the judge ruled that they were "deemed admitted". So those facts are now the law of the case.

Andy 40:33  
Interesting. And so you always rail on summary judgment. So here we get to throw pies in your face, because it worked for us! (laughs)

Larry 41:04  
Because of the uniqueness of this case! But that doesn't make me a fan of summary judgment all the sudden. I'm a fan of it when it's appropriate.

Andy 41:12  
(laughs) Anything else before we then go over to the California Corner? Dun dun dun dun!

Chance 41:18  
Come on down, Come on down...

Larry 41:20  
Let's do this cause this'll get me off the hook for a while, because I don't know squat about California.

Andy 41:25  
Okay, well, please take it away, Mr. Chance!

Chance 41:28  
All right. It's just an extension of what we've been talking about. I mean, we talked about, you know, the process of petitioning. And we talked about some snags in the petitioning process. But what happens when there's opposition? What happens when the prosecutor objects to your petition? What happens next? So this is the logical progression of the petitioning process, actually, "Part Two: Demystifying the Hearing Process". The standard governing registry termination petitions here in California is Penal Code, section 290.5(a)(3) section 290.5 requires the Court to determine, based upon "evidence" presented by "the district attorney", whether "community safety would be significantly enhanced by requiring continued registration". The purpose and language of the Tiered Registry Law indicate a legislative determination that a person who has served his or her minimum registration period, or longer, \*should\* be relieved of the duty to register, unless evidence demonstrates that the individual possesses a 'significant' risk of re-offense." And that is something that's so important in California, because that's really where risk comes into play. Now, specifically, the Penal Code section that we're talking about here is 290.5(a)(3), which provides that "If the district attorney objects to the petition for termination from the sex offender registry and requests a hearing," -- well, if they object, you're gonna get a hearing, usually, unless it's based on eligibility, and it's an objective factor. So if they object and request a hearing, "the district attorney shall be entitled to present evidence regarding whether community safety would be significantly enhanced by requiring continued registration. Any judicial determination made pursuant to the section may be heard and determined upon declarations, affidavits, police reports, and any other evidence submitted by the parties, which is reliable, material, and relevant." So, one might ask, who has the burden of proving that evidence demonstrates that the individual possesses a significant risk of re-offense? Well, we got that answer last April, in a case called Thai. The Court of Appeal, in *People v. Thai*, which is a 2023 case, and it can be found, for all you folks who want to read it, at 90 Cal. App. 5th 427, or 307 Cal. Repr. 3d 178, and it interpreted the standard to mean that the \*prosecution\* has the burden to produce the evidence that the petitioner is \*currently\* likely to re-offend (*Thai*, supra, 307 Cal. Rptr. 3d 178, at p. 182.) Okay, so it establishes that the People, the prosecution, has the burden to prove this. The prosecution's burden for continued registration includes seven \*mandatory\* considerations to guide the court's evidentiary determination as to whether "community safety would be significantly enhanced by continued registration" and these are the factors. And I'm gonna go through these, but there's really just one important one. But the first one is

"[1] the nature and facts of the registerable offense;" The second one is "[2] the age and number of victims; [3] whether any victim was a stranger at the time of the offense (known to the offender for less than 24 hours); [4] criminal and relevant noncriminal behavior before and after the conviction for the registerable offense;" And I think that's common sense, you know, any crimes, any sex crimes committed before or after. Let's see, and number "[5] the time period during which the person has not reoffended;" That's a big one. "[6] successful completion, if any, of a Sex Offender Management Board-certified sex offender treatment program;" and "[7] the person's current risk of sexual or violent re-offense, including the person's risk levels on the SERATSO static, dynamic and violence risk assessment instruments." For our purposes, and for thinking about this particular issue, of all of these factors, the most important is the nature and facts of the registerable offense. And the reason why, is because the prosecution almost always objects to granting the petition, and requests a hearing solely based upon the nature and facts of the offense. Because of the plain text of California's Tiered Registry Law, as well as the Second Appellate District's ruling in *People v. Thai*, they confirm that continued registration cannot be based on that justification alone. He can't just base it on the facts and circumstances of the original criminal case. Continued registration is warranted *only* when the facts of the offense, combined with other statutory considerations in Penal Code section 290.5(a)(3), which I just went through, present an "empirically" (which, is a proven, grounded reason) to conclude that the individual is currently likely to re-offend *and* that continued registration would "significantly" reduce the risk of re-offense. And that comes from Thai. So, let's put this in perspective. In this hearing, the prosecution's burden is incredibly difficult to carry, if a registrant has not re-offended! It's about as simple as that. So let me give you a case in point, and that is the Thai case. And it's so helpful to understand. In Thai, the petitioner filed a petition for termination of sex offender registration 24 *years* after his conviction for violating Penal Code section 288(a). The petitioner had not re-offended since his conviction, which is a Big Fact... and the prosecution's evidence consisted solely of "various exhibits dating from the time of the offense", which means they were relying on the facts and circumstances of the case, 24 years ago. The prosecution argued that Thai's conduct "itself" was sufficient to conclude that "community safety would be significantly enhanced by his continued registration" *because* the facts of the offense were "particularly egregious" in this case. That's what they argued. They said "Adult Thai took complete advantage of 12-year-old Doe; Thai preyed upon the familiar Doe." Also, Thai had two misdemeanor convictions for selling alcohol to minors that predated the underlying offense. But he had not suffered any conviction since then. So, for twenty-four years, he had

had pristine conduct. They also said that Thai's statements after the underlying offense, which was 24 years ago, demonstrated that he lacked remorse, that he felt treatment was unnecessary, and that it did not appear that Thai had completed any sex offender treatment program. (I don't think there was any in effect at the time.) So, based upon evidence presented by all parties in Thai, the Court of Appeal held that the "prosecution failed its burden to produce evidence establishing that terminating the registration requirement considerably raised the threat to society, because 64-year-old Thai was *currently* likely to reoffend." They didn't establish that! Specifically, "other than the evidence of the 24-year-old underlying offense, the prosecution offered no evidence that Thai presents a danger *today*". Indeed, evidence demonstrates the opposite." And this is what the court said, "For almost 24 years, Thai had not suffered any conviction." (Thai, *supra*, 307 Cal. Rptr. 3d at p. 183.) Most notably, the Court of Appeal in Thai noted that the trial court's "singular focus" on the facts of the underlying offense "did not demonstrate Thai was a risk to the community over 24 years later." So, here's the point, and the conclusion: The hearing, if you're going to have a hearing, is all about a registrant's *current* risk of re-offense. If the prosecution cannot *prove* that you pose a current risk of re-offense, the Court must grant your petition to terminate registration. And that is what makes California distinctive from just about any other state in the Union.

Larry 50:10

Congratulations on that, because I never fully understood that. I had a bias against the removal process, because I don't like a process where victims were able to participate. And so notably, in cases we've covered, that is in fact what happens. They either participate by showing up, or they participate by sending a letter that the prosecutor reads. But in Penal Code section 290.5(a)(3) that you read, it says "any judicial termination made pursuant to this section may be heard and determined upon declarations, affidavits, police reports, and other evidence submitted by the parties, which is reliable, material and relevant." I interpret that fairly broadly. So, what stops them from using police reports from 24 years ago? What stops them from using the *parties*, the victims, from 24 years ago? Because if the party comes in, and it says, loosely interpreted, "parties and reliable, material, evidence that might be relevant". What precludes them from bringing these people in, under that language?

Chance 51:11

Well actually, Larry, nothing. It can come in. And it often does come in, in terms of exhibits attached to the objection. But courts have interpreted this law as a "window", and that window starts at the date that you're *convicted*. And it extends to the date that you petition and end up in court.

It's that window that's really the focus. And so, it's what has happened within that window. If, for instance, you revisited people who are alleged to be victims in the case, if you've picked up other sex crimes, if you have failed to register, whatever happens within that window is game! And then you can start to work down those factors. But, let's just start from the obvious. If a person has had pristine conduct, and there's nothing "within that window" for the prosecutor to bring forth, in terms of establishing that a person is a current risk, there's just next to nothing that can be offered over.

Larry 52:18

So, it \*can\* come in, but the Thai case so limits it, I think is what I'm hearing you say, because of the interpretation of Thai, that the focus is from registration going \*forward\*, not from registration going backwards.

Chance 52:33

That is correct. And you know, when the tiered system first appeared on the scene, and even before it was implemented, I was always worried, because the initial drafts didn't have "acts and circumstances of the underlying case" nor, you know, it had a few factors to be considered. It grew, in essence, and the one I was most worried about, was the facts and circumstances, because every single case has egregious facts and circumstances. And that would mean that any petition, based on the facts and circumstances of the case, could be denied. I've always read the law to be consistent with what Thai says. And Thai just does a beautiful job of interpreting it, and saying exactly where the burden is. Because often, when we first started these hearings, the first thing the government tried to do is shift the burden over to the petitioner. This does not allow for that, which makes it a much better hearing. The focus then becomes current risk. And that's what these hearings should do. They should address whether a person is a current risk, and Thai goes a long way in helping that.

Larry 53:48

I agree. And I was just reading that case we talked about in Louisiana. I didn't get into that part because it wasn't really relevant for the point, but the juveniles can petition to be relieved of obligation after twenty-five years. But it makes it clear that the burden is by "clear and convincing evidence" on the \*registrant\*, on those juvenile registrants. And that is quite the opposite of what you're describing there in California. So you guys have got a much better system than what I thought, because my bias is against any petition process. I want people to simply time-out. That's the most simple, straightforward process that can be invented.

Chance 54:24

Well, yeah. And I, you know, I really agree with you on that. I mean, if there's nothing in between, they really should.

But you know, short of that, I think the best thing that's going in the United States today is this process, as it's starting to shape up. It's not just the statutory law, but it's the case law that's coming down, that's just incredible.

Larry 54:48

So, well, we've got an article to cover too, and I'm gonna carry one over, but do you want to get into this Ninth Circuit thing, about defense attorneys' access to victims? Are you up for that? Or do we want to carry it over as well?

Chance 55:03

Yeah, probably should.

Andy 55:04

If you're asking me, I'm good. But we can certainly carry it over.

Chance 55:07

Yeah. I don't mind carrying it over. I mean, I'm not sure we have a whole lot of time to discuss it.

Larry 55:14

So well, let's just carry this stuff over. We're getting near an hour now. And we have an announcement to make: There won't be a podcast recorded this coming week. We have travel and conflicting schedules, and all of us won't be able to get together next Saturday. So we'll be off the air for a week, and be returning in two weeks. And we'll have, hopefully, a piece of legislation to dissect and talk about, from West Virginia, and one or two of these articles that we didn't get to tonight. What else, Andy, do you have on your radar?

Andy 55:46

Well, I would definitely like to have something to talk about from Florida about something with having transposed letters! God, if we could get that, that would be phenomenal! If you get violated on your registry for using like a one instead of an i, or vice versa, and that causes you to go back to prison because, like maybe you mistyped it on the keyboard. I don't even know how that would work. That just came across my radar. And that just sounds absolutely diabolical!

Larry 56:13

Well you've got to remember that Florida is a Fiscally Responsible State (Andy scoffs) and they do not spend money unnecessarily, at all. So, they would never incarcerate a person for just simply making a typo. Why are you being... Why are you scaring people about stuff like that?

Andy 56:28

(laughs) It's because their governor is self-conscious about being short, and has to put little risers in his boots!

Larry 56:34

I see.

Chance 56:36

I heard about that...

Andy 56:37

(laughs) We did get two new patrons, Larry. I sent you over screenshots on their stimulus money. And it was Robert and Daniel, and thank you both so very much! I just was looking through, Larry, that we have -- one of them is joining us here tonight -- he's been a patron since June of 2018!

Larry 56:57

Well, you need to disconnect that person. He's been around way too long.

Andy 57:01

And he just said, "No podcast next week?" He's quitting.

Chance 57:04

Wow.

Larry 57:05

Uh-oh.

Andy 57:06

I know. That's harsh! That's how it is around here, man. It's brutal! So. Anywho. Any closing words before I take us out of here?

Larry 57:15

So well, I'm looking forward to the next episode, when we dissect a piece of legislation that's gonna be working its way through West Virginia, and it's an AWA compliance measure, so that should be fun.

Andy 57:30

Yes, I'm sure. Chance, do you have any Really Exciting cases in the next two weeks?

Chance 57:35

I do. I have one, I think, that needs to be litigated. And I'm ready to go to trial on it. I think we'll be doing it next week. It's a Failure to Register case, involving someone who was out of state, and could de-register in California, it's going to be fascinating. I will be happy to talk about it once we're done. It's exciting.

Andy 57:59

That'd be awesome if you can bring those, I think Larry would also appreciate them. If you can bring us certain, like interesting nuggets of cases that come across your desk, that would be so much fun to talk about.

Chance 58:12

I'm more than happy to do it, more than happy to do it.

Andy 58:15

Fantastic. Well, very well. So make sure you head over to registrymatters.co for getting the podcast. You can subscribe there, or you can listen to it right there on the website. Leave voicemail at 747-227-4477 or send us an email (no one ever does any more!) to RegistryMattersCast@gmail.com. I guess that's not true, because some people sent them, and I always forward them over to Larry (and Chance, these days). And \*please\* support the podcast over at patreon.com/registrymatters. It's very helpful, even for a buck a month, it helps us make the podcast and we appreciate it. And we can announce your name just like I did for Robert and Daniel above. And without anything else, I hope everybody has a great rest of your weekend, have a nice week off, and not Steve. I guess we'll, uh, we'll talk to you some other time, because you're leaving us! But thank you, Larry and Chance. I hope you have a great weekend.

Chance 59:08

Thank you.

Larry 59:10

Good night.

Announcer 59:15

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