



Registry Matters Podcast

Episode 300

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Announcer 00:00

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Andy 00:17

Recording live from FYP Studios, east and west, transmitting across the Internet, this is Episode 300 of Registry Matters! Good evening, Larry. How are you, sir?

Larry 00:28

I'm doing awesome. I'm glad you were willing to have me back for this final episode of Registry Matters.

Andy 00:36

I will address that in just one moment. Chance, how are things over there on the Left Coast?

Chance 00:40

Very, very good, thank you. Thanks for asking.

Andy 00:44

Fantastic. So, Larry, again, you know I'm taking submissions. You can email crackpot@registrymatters.co if you're willing to be a co-host on this show, I've reported this many times and no one chimes in, so I always have to have you back.

Larry 01:01

Well, you got a little audio clip you can play about how much longer I'm going to be here?

Andy 01:06

I might have one just like that there.

Audio Clip 01:09

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

Andy 01:16

After seven, eight years, I'm still trying to get used to you.

Larry 01:20

It's been that difficult.

Andy 01:24

Every day, man. Every day I wake up and wonder, "How do I do it?" Well, please, if you would be so kind, make sure that you head over to your podcast app, whether that's whatever iTunes calls it these days, because everyone rebrands things, Google Podcasts is shut down, wherever you get your podcasts from, if you would be so kind, and leave a review and press only five stars. Because if you don't press five stars, nothing else matters. Make sure that you Subscribe and Like us on YouTube and everywhere else that you can find us. And then, if you're feeling extra generous, please head over to patreon.com/registrymatters and any support, even a dollar a month, would be amazing, and we would thank you and be eternally grateful. Now, with all that said, Larry, what are we doing this episode? For Number 300 even! I was going to do

something, Larry. I just don't have the bandwidth at the moment to try and plan to do anything. Like, I was thinking maybe we would broadcast live on YouTube maybe? But I just don't have the bandwidth to do anything.

Larry 02:19

Well, I understand, because you're trying to save a failing entity.

Andy 02:24

Perhaps, yes. My job is very much in jeopardy. Like, we are right on the edge of saying, "Sorry, don't come in tomorrow."

Larry 02:33

So tonight we have at least one listener question, maybe more, at the beginning. And we have a decision from the United States Court of Appeals for the Seventh Circuit that did not go well. Then we had another listener submission asking about a cert petition that had gone to the US Supreme Court. That petition was denied. We're going to go over that again. We went over it a couple three months back in episode 277. Chance is going to do an amazing situation in California about something I never heard of, about making a felony a misdemeanor after the fact. I love that, so I can't wait to hear that segment. Everybody, you better stay tuned for that. What state have you heard of where you can convert a felony to a misdemeanor after you've served your sentence? Isn't that amazing?

Andy 03:25

Isn't that what people talk about, "How do I get my record expunged, my conviction expunged?" I'm like, "How would you get it expunged? It's just a true thing." But that's close.

Chance 03:37

It's magic.

Andy 03:39

It sounds like it's totally magic. All right, well, question number one says, "Hello RM panel, I have a hypothetical question about the registry in the US and citizenship. If I renounce it, would I still have to register? Now here's the scenario: Let's say that I am a US citizen and I'm on the PFR registry and pursued citizenship in Europe somewhere, and it was granted. I give my 21-day notice to the registry people and move overseas. I now possess an EU passport. Life is good! And let's say then after a couple years I decide, mostly for tax reasons, that I don't want dual citizenship anymore.

Andy 04:26

"So I write Uncle Sam and renounce my US citizenship. I quit! I gift-wrap my US passport and mail it back. Now, a year later, sadly, Aunt Fergie passes away. She was my favorite aunt, so I want to attend the funeral and visit with relatives, maybe even stay a week or two. I fly to the US. I'm welcomed by customs and my EU passport gets stamped. I'm in the US again, but as a foreign citizen tourist. Would I legally be required to register? Thanks for taking my question." And this is from Sal.

Larry 05:05

Well, when you sent that to me, my reaction was: We had one that I thought was pretty creative, but this one tops that. We have to say now that this is better than the blizzard in Oklahoma!

Andy 05:20

In a part of Oklahoma that never gets snow.

Larry 05:24

So yes, this is better than that. You have to give Sal credit for coming up with something like this, but I'm going to start with citizenship. I don't know the tax ramifications. I think that if you're a US citizen and you have income from within the US, it may be taxable. But I would never encourage a person, under any circumstances, to renounce their citizenship. The question is, "Larry, why would you say that, when you've never been out of the United States?" Well, I don't need to go out of the United States because, like I tell Andy, a lot of things I judge by what I see. What I can see is millions upon millions upon millions of people on waiting lists, trying to get into this country, swimming across shark-infested waters on rickety boats, and dying. And before the fall of the Berlin wall, being shot out of the skies. I mean, I see all this stuff and something tells me that, either we've done a very good job of brainwashing people around the world, or there's something unique about this country.

Larry 06:26

So I would not suggest that. But if Sal is determined to not be a US citizen, and if he does achieve that, as I analyze this (and Chance is going to give his opinion as well), I don't see anything that would alter his obligation to register. The registration requirements are not just applied to citizens, so him being a non-citizen of the United States would not change that. What determines if there's a registration obligation is if the person has a covered offense in the jurisdiction that they are visiting. All offenses are not uniform. So he might be in one state, and he might not have an obligation to register because there is no federal registry. Despite everybody's wishes that there is, there isn't.

Larry 07:10

The determining factor would be if the state that he's in has an obligation for that offense to be registered. If he's here, he has clearly, with an American conviction, received due process. And the primary standard for foreign convictions is, "Was due process afforded?" That standard would need to be applied. He received due process in the United States. He's got a valid conviction. If he's present in the United States, if he's in a 48-hours state, or if he's in a 14-day state, or whatever the case may be, he very well has a duty to register. I can't see anything that would alter that, by him not being a US citizen.

Chance 07:53

I agree. That's probably the proper analysis of it. What you are doing by giving up your US citizenship is you're losing something, because everything else really remains the same. When you move to a foreign jurisdiction like Europe, and let's just say you're not obligated to register there, that's fine. But when you come back into the US, you are. And so, even if you give up your US citizenship, it makes no difference whatsoever what your obligations are, when you come back. So really you're giving up

something for nothing. I think it's just wasteful and probably ill-advised because that passport is gold.

Larry 08:35

Isn't an American passport in the top five, in terms of the number of nations that it'll get you into, in terms of how respected it is around the world? I know it's not number one anymore, but it's in the top tier of passports. I cannot ever fathom surrendering my American citizenship. Does that mean that I'm delusional and think the country is perfect? No. But I think it is the oldest functioning democracy. I think we have the potential to fix our problems. Our problems, in my view, are the people not being sufficiently informed, and not voting intelligently, and not holding their elected officials accountable. But our problems can be fixed. We've gone through far worse problems than we're going through right now with civil wars, major depressions. All the things we've gone through compared to what we're going through today is really benign.

Chance 09:25

Yeah, I think a lot of people think that if you renounce your citizenship, you're no longer obligated to abide by any consequences that may have occurred in the United States. It's just simply not true. And you really need to analyze what you're doing and why you're doing it before you do it.

Andy 09:44

So I have been in the circle of people that are actively pursuing removing themselves from this place and going overseas somewhere, you know, somewhere in the kind of the middle region on the western side of Europe. I'll leave the name out. And there's one individual that I'm thinking of that he has, however old the conviction is, but he has lifetime registry requirements, and pretty frequent harassment level, like parole-level supervision harassment kinds of things, even now that he's not on supervision at all, has miscellaneous restrictions that he can and can't do. And by — I don't want to say fleeing, but, not in the most up-front kind of way, like — leaving, to have better civil liberties on the other side, isn't that something of a legit argument?

Chance 10:45

In terms of living elsewhere, yeah. But, you know, if you have to give up your US citizenship to do it, it may not be the best thing to do.

Andy 11:00

I'm trying to get an ad-hoc guest to come on, somebody that's thinking about doing it, but he is somewhat reluctant. So I'm trying to vamp for a moment to see if he'll come on and ask it from a first-person point of view.

Larry 11:14

I would never, ever surrender my American citizenship. I mean, you won the ovarian lottery to be born here, in 5% of the world's population. Do we need to fix problems? Yes. But I wouldn't do that. I wouldn't care if I were on the public registry. And it's easy to say that not being on the public registry, you know, I'm talking without having that experience. But this country has so much to offer and I would not. You're never going to hear me say, "Give up your US citizenship."

Chance 11:48
Agreed.

Andy 11:49
I completely understand. One person who is from the western side of the country, he says, "I wouldn't have a problem doing it," and I'm assuming he's saying relinquishing his citizenship. He travels fairly regularly as well. I've been overseas when I was in the military, and there was something to do with taxes and earning income in another country. How much of that would be reportable to the US? Maybe from federal taxes that you've earned income as a citizen? I don't know how that would go at all.

Chance 12:30
Well, it used to be a windfall. It used to be that it was good. Things have changed over time though, and I don't really know exactly what it is today, but it's different.

Andy 12:46
What the individual that's thinking about bailing says is that "anything under \$107,000 and you don't pay taxes." Okay, I'll let that go. Anything else on this before we go?

Larry 13:00
No, I think I've done all I can do on it. When that question comes in, my answer is not likely to change.

Andy 13:07
You know, real quick, Larry, I sent you that text from the friend of mine that traveled overseas, with his update. I would like to add that in, after we do this question.

Larry 13:19
Did you want to read that? Sure.

Andy 13:21
Yeah, yeah, yeah. And I'll find ... oh, he emailed it to me. I'll have to get to that elsewhere. All right, so then this section is "In Custody or Not?" We received a listener question about a cert petition he believed was pending before the US Supreme Court. It turns out we've already talked about it back in episode 277. Can we briefly go over it again just to recap where we are?

Larry 13:42
I think so.

Andy 13:43
Very good. Well, alright, here's what I said back in 277, after immense amount of research studying the cert petition, etc., "In 2017, Clements filed a pro se" – there's your favorite word on the planet – "He filed a pro se cert petition for a writ of habeas corpus in the United States District Court of the Middle District of Florida, pursuant to Section 2254. The state moved to dismiss, arguing that the district court lacked jurisdiction because Clements was no longer in custody. Clements replied to the burdens of PFR registration, along with all of the other restrictions that come with being a registered PFR, and it should be sufficient to establish custody." Now, I think it's important that this person is in Florida, and Florida is like, awful. And what did the district court decide from there, even though this person's in Florida?

Larry 14:39
They dismissed the case for lack of jurisdiction because Clements was not, and is not, in custody.

Andy 14:48
Then he appealed to the Eleventh Circuit. How did they resolve the case?

Larry 14:54
As I stated on Registry Matters #277, the Court of Appeals decided that "the proper inquiry for resolving the question presented, as to whether Florida registration reporting requirements substantially limit Mr. Clement's actions or movement", the Court of Appeals concluded that they do not. It reasoned that "the petitioner is not at the beck and call of state officials because his reporting requirement is periodic and predictable. Furthermore, he's not required to live in a certain community or home, and does not need permission to hold a particular job or to drive a car. Lastly, while he must provide in-person advance notice of trips outside the state, and outside the country, the trips themselves do not require any permission from any state official." So he doesn't have to gain permission. All he has to do is report.

Andy 15:44
And in your understanding of, you know, specifically a Florida kind of place, are you aware of anybody that has been denied? Saying, "I need to go here for yada yada reason?" and they say, "Okay, thanks for letting us know"?

Larry 15:58
Well, if you're just on the registry, and not having to report to a supervising agency, they don't have the authority to deny. You can go any damn where you want to go!

Andy 16:05
But you do have to tell them.

Larry 16:07
But you don't need "permission", and that's the language, control.

Andy 16:11
Yeah, yep, I gotcha. But I don't remember the terminology, Larry. Please, Chance, help me out too. That there are conditions of supervision that "resemble"... Is that the right way to phrase it, that they resemble being in custody?

Chance 16:28
Hmm.

Larry 16:31
Chance is gone. But yes.

Chance 16:34
You mean custodial-type conditions?

Andy 16:37
Sure. I mean, some of the registry things are pretty invasive, disabilities and restraints, etc., etc. Don't, at some point in time, in certain circumstances, don't they start to resemble having some kind of custodial control?

Chance 16:54

Yeah, somewhat. Sometimes, yeah.

Andy 17:01

Anything else to add there, Larry?

Larry 17:02

No. Keep going.

Andy 17:04

Okay. And so I'll reiterate the question I asked in 277. And here we can get Chance to chime in, too. He does have to get permission to work at a particular place. Wouldn't you have to do that with residency restrictions like the 1000-foot or 2500-foot rules that exist in Florida?

Larry 17:22

No, he doesn't have to get permission to live anywhere. He can move anywhere he wants to. Now, if you make a bad choice and don't do your homework, you may find yourself in an exclusion zone. But that is not the same thing as having to get permission. It's like I tell people about international travel, "You can go anywhere you want to go. They may not let you in, but nothing precludes you from going." And he can buy a house, he can rent an apartment, any place he wants to in the state of Florida.

Andy 17:52

It's almost a benefit? Having to get permission first, so that you don't end up going through the whole process of buying or renting and then you're like, "Sweet! Now I'll go to the registry office to let them know I've moved here." And they go, "Ah, sorry, that's 999 feet away from a thing. You can't live there." And, like, "I've signed leases, and gotten mortgages, etc. And now they say I can't live there." because there's not really an easy way for us to figure out where we can and can't live.

Larry 18:22

Well, that's precisely what happened in the Martin Kopf case. He had gotten permission. He had cleared it, and then they told him he couldn't live there. Now, that's what's funny.

Andy 18:31

Funny? You and your words for funny. So Clements had filed a petition for "cert" and that is --- Chance, please pronounce the full word?

Chance 18:43

Certiorari. ("ser-shee-AR-ee")

Andy 18:45

Yeah, that one. He applied for cert with the Supreme Court. I can't say ...sirshee, uh... and I asked you for your opinion on his strategy, and you stated, at 23 minutes and 16 seconds, ahem (I can't do a Larry voice) "I'm not terribly optimistic." Explain why you were not optimistic then?

Larry 19:05

Well, I was not optimistic because Clemence is clearly not in custody, as the term custody is defined. We can go around and round on this as long as we want to, but he's not in custody.

Andy 19:18

I asked you then why you can't understand that registration, with all the requirements, is not the same as being on probation and parole. You can't put those two together, still?

Larry 19:30

No, I cannot, because it's not the same by any stretch of the imagination. I'm pleased that the US Supreme Court Justices and their law clerks and the Eleventh Circuit, they're listening to this podcast, because they both see it the way I see it. I see there's some similarities, but there are many differences that distinguish one from the other. A person on probation is subject to a plethora of rules, such as no recreational drugs, no alcohol use, no significant financial transactions without prior approval, restrictions on who they can associate with, without prior approval. To have travel restrictions where you need a permit. Other than Alabama, I'm not aware of any state that requires a PFR to have a permit to travel, when they're simply just on the registry. Registrants only registering are not subject to curfews (with a few exceptions, like maybe on the Halloween blackout periods). They're not subjected to drug testing, polygraph testing, and on and on. So you can wish it's the same, but it's not.

Andy 20:32

Um, and Chance, do you think that this individual would have had a better shot at having any sort of traction if he had gone after the disabilities and restraints side of things? That this doesn't really resemble a civil regulatory scheme, that it resembles something more like punishment?

Chance 20:48

Yeah, well, you know, people try to do that. Unfortunately, you never hear of anybody really succeeding. Everything almost always fits in that administrative box, unfortunately.

Andy 21:04

What do you think about that question, Larry?

Larry 21:06

Well, I didn't refresh myself on everything about his case. He may have done all that, but his problem was the vehicle he was using. He was doing it in a habeas corpus. He would have needed to have filed a "petition for declaratory judgment". If he was going to make those challenges you're talking about, he would have needed to have used a vehicle that allowed him to move forward. This vehicle is restricted to people who are in custody, and they have to be either in physical custody or within the "extended zone" definition of custody, which does not include simply being on the registry. Now, we had a bunch of liberal do-gooders running the courts back in the sixties and seventies, and they expanded custody to be beyond the prison walls. But we're not likely to have any further expansion of the definition of custody, as long as we have a very conservative-leaning court. They're not likely to want to improve the opportunity, to have an avalanche of these types of cases so he might have gained traction using the right vehicle, but the habeas petition was not the way to go.

Andy 22:22

What about the things that a person is subject to, in being on "supervision" versus being on "only the registry"?

Larry 22:33

I'm not following the question. He was trying to get back into court and he chose a vehicle that was not available to him. If he wanted to challenge the registry, he needed to use a vehicle that was open to him. Habeas corpus is not that vehicle.

Andy 22:52

Gotcha. Is there anything else here?

Larry 22:59

Well, I could have saved them a whole bunch of money (Chance laughs) if they had just asked me, "Is this case going to go anywhere?" And I would have said, "No, you're not in custody." That's what I've said for years. "You're not in custody. You're not in custody."

Andy 23:11

Even using your creative Larry-Brain, could you come up with a way to argue that you are in custody?

Larry 23:16

I would have not even tried that vehicle. I would have tried a petition for declaratory judgment. I would have filed a constitutional challenge. Now he was hoping, because the Third Circuit decided, in a case called Piasecki (Piasecki vs. Court of Common Pleas, Bucks County, PA No. 16-4175, 3d Cir. 2019), they had decided that they would recognize custody as being on the registry. That's the only circuit that has recognized that, it's an outlier. And the risk for this petition was that, had the Supreme Court granted it, and they had decided to uphold the Eleventh Circuit, then the people that currently have habeas available to them, in Pennsylvania and all the states in the Third Circuit, would have had that right extinguished, thanks to Mr. Clements. That's the risk of doing this kind of stuff.

Andy 23:56

Sure. Are there any states that require you to have, even when, "just the registry", require you to have some kind of approval to travel, not just letting them know you're traveling?

Larry 24:10

Alabama requires a permit, but they can't deny you approval. You just have to get the permit and have it with you. That's the only state I'm aware of.

Andy 24:19

But then is there a state on the other side that's going to come out and ask you for your papers?

Larry 24:24

No, this is just an Alabama thing, that they can prosecute you for, if you didn't do it. Hypothetically, if you were required to register in Alabama and you had an encounter in Vermont with law enforcement, and they see you're registered in Alabama, and they notify the registration agency in Alabama through electronic means that they encountered you in Burlington, Vermont, when you get back to Alabama, the next time you come in, they're gonna say, "Oh! Well, did you get a permit to go to Burlington, Vermont?" "Well, no." Then they've got a registry violation that'll send you to prison, and probably, in Alabama, for a very long time. Because they don't have the habitual-exemption that we have for

registration violations, since it's a civil regulatory scheme, it can't be used as a habitual offense enhancement here. But in Alabama, it likely would be. They could be going to prison for a very long time.

Andy 25:12

Gotcha. Anything to add on to that Chance?

Chance 25:15

No, just one word. And it is: Sad.

Andy 25:21

That it is. This isn't, like, in the script. I just wanted to add it in real quick because I got an email from a friend of mine. All the people that want to go travel and ask about, "Can you go here? Can you go here?" I'm going to read you a letter from my friend, and then I'm going to add in an exception, I guess you could say. It says, "Hey, Andy, I wanted to update you and let you know that my wife and I left Saturday, and just got back from Curacao, which is an island off the coast of Venezuela. My wife had some points to burn from booking vacations, so we tried out that resort. (It was absolutely amazing, by the way.)"

Andy 25:55

"But I had zero issue getting into that country. They used to be Dutch-owned, and I never even talked to a live person. They just scanned my passport and we went right through. Keep in mind, I'm a level one." – This guy is from Georgia – "and there's nothing on my passport to indicate that I'm on the list. I've only traveled while on probation once, and that was with the court's permission." That was when he went on his honeymoon. "That said, we flew into Miami. I naturally got pulled aside and waited for 30 minutes for them to do whatever it is that they do."

Andy 26:25

"And the officer asked me, 'Who are you traveling with?' I said, 'My wife.' 'Does she know?' 'Yes.'" That was it. Nothing else. Weird as hell, but I'm used to weird. So far, I've been to Jamaica three times, Bermuda twice, St. Lucia, and now Curacao. The most consistent thing that's happened was that I get pulled over coming back into the country, asked a few questions and let through for a total of 10 to 15 minutes. One time, both my wife's luggage and mine were searched, and that was the longest wait, which was sending my wife over the edge because we had a connecting flight from Miami to Atlanta. Just thought I'd share that with you, and hope you're doing really well."

Andy 27:00

The one caveat is that there's somebody else in chat with us tonight, and he got denied going into Jamaica. So what I want to impress with reading that, and the other information is: Your mileage may vary! They may let you in, they may not. They're not obligated to, but this individual has had no trouble traveling all over the Caribbean, and another person has had trouble traveling in the Caribbean.

Larry 27:28

Well, I would agree with you. Your mileage is going to vary. I would encourage you, if you want to have the right to just enter a country at will, then let's press the American government to grant that same privilege to people coming here, that they can just enter

America at will. Regardless of what they've done in the past, they can enter our country and roam around at will. And when we're welcoming of other people doing that, then we have a moral high ground to stand on. But right now we don't because we deny a lot of people admission here. Criminality, convictions, all sorts of things will get you denied entry into the United States. Being on a "suspicious" list, all sorts of international intelligence will keep you from being admitted to the United States.

Larry 28:14

And amazingly, Americans don't have much of a problem with that. It's only when they are denied that they have a problem with it. So if we have a little intellectual honesty, if we want to open our borders to anybody who wants to come here, then I will hear your argument. But right now, my sympathy is not with you, because we're a very unwelcoming country ourselves.

Andy 28:32

It was sort of part of the platform of the previous president that, "If I'm elected president, I will deny entry to all of [this particular group] of people." And that person was elected.

Larry 28:43

You can't say that on this podcast. We're non-political.

Andy 28:46

I didn't specify which president. I just said "the former one", and I didn't specify which group he denied. (Larry and Chance laugh) I kept it kind of neutered. Chance, what do you think?

Chance 29:00

Well, I'm looking at the question and I'm listening too. There's reasons why people get denied. If you have a marking on your passport, if you come into the purview of IML (International Megan's Law) and things like that, denial is a whole different program. I'm not sure what he was convicted of, and whether or not he would be required to have a mark on his passport or anything like that. I really can't tell from the question, but this seems to be on par with what the general experience is, across the board. It's not discouraging. It's actually encouraging.

Andy 29:40

I can give you the teeniest little bit. He is a level one which, in Georgia, is the lowest risk. His crime does not involve a minor. I don't know how much of that is information that is relevant to you.

Chance 29:53

Oh, very relevant, very relevant! Because if the crime has something to do with the minor, then IML kicks in. If it doesn't, then it doesn't. And if IML kicks in, there's a notice sent to the other country, and a mark on your passport.

Andy 30:06

He would never be subjected to having the marking on the passport? He's just always clear of that?

Chance 30:12

He is. Because if his crime doesn't have anything to do with a minor, he's not under the purview of IML, and therefore, he can pretty much roam at will.

Andy 30:23

Gotcha. And I assume that the entering country, particularly ones that are closer to the United States, are going to have at least somewhat easier access to look at whatever database that would show you as being a felon. I assume so.

Chance 30:41

Not necessarily. But what they are privy to is what you have marked in your passport on the endorsement page, or in the notice that's sent to them from the US Marshals Service when they check the manifest of the flight you're going on. With the IML not applying, you're in a way better position to get to where you're trying to go, and to get in. That's for sure.

Andy 31:12

I gotcha. I understand. He is in a better position than the majority of the people in our circle here.

Chance 31:19

As long as his conviction has nothing to do with a minor, yes, that's true.

Andy 31:24

I see. I'd never really thought about it that way I guess because I've known he doesn't have a stamp for a while. All right. Anything else?

Larry 31:33

Well, just keep in mind that IML is not carved in stone. It could change for the better, or it could change for the worse. Congress can always reauthorize, amend or repeal. They're not going to do any repealing, but the IML as it currently is constructed, doesn't mean that's the way it's always going to be. I get a laugh out of people where they say, "Well, I want to go to Vermont because the registry is not so bad." I say, "Well, but who's to say it won't be bad six weeks from now?"

Andy 31:58

Yep, absolutely.

Chance 32:00

True. True, true, true.

Announcer 32:06

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Andy 32:55

Then we have a Seventh Circuit Court of Appeals decision. Let's get into this case from the Seventh Circuit. This just came out yesterday! This is why we can't ever do the podcast until Saturday, Larry, because stuff happens on Friday. "Celina Montoya, Jennifer

Tyree, Ronald Molina, and Zachary Blaye." I don't know how to pronounce that name. Any suggestions?

Chance 33:18
"Bly."

Andy 33:18
You think that's just Bly?

Chance 33:22
I don't know, but I kind of like it like that, yeah.

Andy 33:24
All right, fine. Then we'll just say "Zachary Bly". They brought a class action lawsuit against the Illinois Department of Corrections challenging an IDOC policy restricting contact between a parent who is a PFR and her minor child, while the parent is on mandatory supervised release.

Andy 33:43
The plaintiffs alleged that this policy violates the Fourteenth amendment, procedural and substantive due process. The district court entered judgment largely for IDOC. Is this Mark and Adele's case?

Larry 33:55
It actually is.

Andy 33:57
Oh, how about that? Alright. The case went up on appeal. What did the Seventh Circuit decide?

Larry 34:04
They stated, "Though we agree with the court that the IDOC's policy does not violate procedural due process, we hold that its ban on phone-contact violates substantive due process. On this record, call monitoring is a ready alternative to the phone-contact ban that accommodates the plaintiff's right to enjoy the companionship of their children at a de minimis cost to the IDOC's penological interests. We, therefore, affirm in part and reverse in part." That's what they said.

Andy 34:43
Okay, can you dumb it down, specifically for me? I took a test for my college stuff today, and my brain is pretty much zapped. Would you please explain the difference between "substantive" and "procedural" due process?

Larry 34:57
Well, we've got a lawyer here, but I'll try. It says –

Chance 34:59
(chuckles) Where, where?

Andy 34:59
I know. Where is that guy?

Larry 34:59
(laughs) Substantive due process goes to the very core of whether the government can regulate the conduct. Procedural due process refers to the process itself, meaning, "What rights do you have as

the process moves along?" There's a procedural due process where you must be afforded the right to this, the right to that, timelines, calling witnesses, being apprised of the charges against you, having the right to call your own witnesses. But the substantive due process is, can they actually regulate in this arena?

Andy 35:40
Do you disagree with any of that, Chance?

Chance 35:42
No. That's actually a pretty precise definition, yes.

Andy 35:47
I could have asked ChatGPT, probably. I could have said, "Explain it like I'm five." And then, "In Illinois, a parent on mandatory supervised release who has been convicted of a PFR-type offense is subject to an IDOC policy restricting written, phone, and in-person contact with their minor child. Upon her release from prison, the person is presumptively banned from contact with their minor child. He or she may request contact, though he or she must enroll in PFR therapy if they do. How is the decision made in terms of whether contact is approved?"

Larry 36:27
Oh, this is funny. It goes to the "containment team" to be decided.

Andy 36:30
So — I'm sure you didn't see it, Larry — but Chance, maybe you saw the movie *Monsters, Inc.* when one of the monsters comes back in with a sock on their back? And this whole team, like, jumps on them. Is that the "containment team"?

Chance 36:44
That's kind of like it! Just, you know, that's what we call procedural due process, by the way, but go ahead.

Andy 36:53
(laughs) So what is the containment team?

Larry 36:59
The containment team, they use the "team containment" model (which I believe that the great state I live in invented that for PFR supervision) and it's something where they put this whole apparatus together, and they work collaboratively to "help" the offender. Which, actually the "helping" is misleading because, they help you all right — they help you get put back behind bars. But the containment team is comprised of the parent's parole agent, a PFR therapist, and the parole commander for the district. And it evaluates the risk he or she poses to the child.

Larry 37:48
The parole agent considers the parent's compliance with mandatory supervised release conditions, including compliance with all the rules. The therapist assesses the risk of harm to the child, and makes a "dangerousness determination". This assessment holds considerable weight because of the therapist's expertise in evaluating PFRs — you know, they're supposed to be the expert. Each therapist may use his or her own policies to reach a contact recommendation, including policies related to how long the parent must be enrolled in therapy before the therapist even

makes such a recommendation. The team must give the parent an initial decision within 21 days. If the containment team restricts or denies contact, it must provide the parent with written reasons for the decision, and review the restrictions and prohibitions every 28 days. I mean, doesn't this sound like a lovely model?

Andy 38:38
No!

Larry 38:38
A therapist may deny contact on the basis of insufficient therapy to make a recommendation to allow child contact.

Andy 38:41
So this is even for people that have a crime unrelated to their family member?

Larry 38:49
It wasn't clear, when I was going through that decision, if that's the case, but it seems to be. But I don't want to jump too far out on a limb.

Andy 38:56
Yikes. So, Chance, is there an administrative appeal process with the IDOC?

Chance 39:02
Yes, according to the court, "The parent may appeal the containment team's decision to IDOC's Manager of Sex Offender Services, Sarah Brown-Foiles. Brown-Foiles serves as an independent appellate decision maker" (if you can believe it). "She does not oversee the containment team members who make the initial contact determinations and does not participate in their decision-making process. Sometimes Brown-Foiles is not independent, typically, when the containment team has solicited her advice about a particular contact request or when she supervises the sex offender therapist on the containment team. But in those instances, a different appellate decision-maker will hear the appeal, either IDOC's Chief of Programs, Alyssa Williams, or the Clinical Director at the Big Muddy River Correctional Center, Heather Wright."

Andy 39:58
"The plaintiffs argued that the policy violates procedural due process because, number one, it fails to provide a sufficiently neutral and impartial decision maker. Two, it lacks a pre-deprivation hearing. Three, its post-deprivation process is not prompt and fair. To determine whether IDOC's policy violates procedural due process, we consider the three factors outlined in Mathews vs. Eldridge" and somebody else, read where that case law is.

Larry 40:31
424 U.S. at 319 and that was a case from 1976.

Andy 40:36
Very good. All right. And so, those Mathews factors are "(1) the private interest affected by the policy, (2) the risk of erroneous deprivation of the interest and the probable value of additional and substitute procedural safeguards and, (3) IDOC's interest,

including the administrative or fiscal burdens of the additional safeguards." Does anybody think that those are good arguments?

Chance 41:01
Yeah, they are. I think they are.

Andy 41:04
All right, well, how did the court weigh in on the "Mathews factors", Larry?

Larry 41:09
Well, I'm going to take the first two because they're easy to read. (laughs)

Andy 41:14
Good!

Larry 41:16
"The first Mathews factor, the private interest affected by the policy, weighs in the plaintiffs' favor." is what they said. "Their right to enjoy companionship of their children 'is perhaps the oldest of the fundamental liberty interests recognized by the Supreme Court'" and they gave a citation that I omitted. "But the second factor, the risk of erroneous deprivation and the probable value of additional safeguards, weighs in favor of the Illinois Department of Corrections. If the policy did not provide for a neutral and impartial decision maker, there would be significant risk of erroneous deprivation." Now that's humorous, because there's nothing detached and neutral about that decision maker, but go ahead.

Chance 41:57
Well, additionally, they said "The third Mathews factor — IDOC's interest, including the administrative or fiscal burdens of the additional safeguards — may cut in plaintiffs' favor. It's unclear from the record what burden IDOC would face if the Prisoner Review Board, the PRB, had to solve the problem as an initial decision maker, and IDOC does not address on appeal the potential burden of this additional safeguard. Similarly, in assessing the third Mathews factor, the district court addressed the burden to the IDOC of providing an independent appellate decision maker (such as Williams or Wright) but not the burden of providing an independent decision maker in the first instance. The burden of this additional safeguard may be minimal, but regardless, the third factor does not outweigh the second, which favors IDOC not only because the risk that the erroneous deprivation is low, but also because the probable value of the additional safeguards is negligible. IDOC's policy, therefore, provides for a sufficiently neutral and impartial decision maker and does not violate procedural due process on this basis."

Larry 43:14
And have you got a little track you can play for right here? Because that's what I think needs to be played, about what I think about what they just said on that third factor.

Andy 43:23
I need a hint.

Larry 43:26
My favorite laugh track.

Andy 43:27
Oh, that one.

Audio Clip 43:34
(laughter)

Andy 43:34
That one?

Chance 43:34
That one!

Larry 43:35
There's nothing neutral or impartial about this process that IDOC has. That's how hilarious that is. But go ahead.

Andy 43:45
Yeah, yeah, yeah. And what will be the net result of this decision, going forward? What would the decision be from there?

Chance 43:51
Well, you can say goodbye to the phone-contact ban, but I think that's about as far as it goes. What do you say, Larry?

Larry 44:03
Well, I didn't see a lot of hope unless the attorneys were to come up with something amazing on a motion for rehearing, reconsideration. I think this case is largely over with. I mean, they could certainly file a cert petition, but I'm not optimistic about a cert petition. So rehearing is their only option. Otherwise, this is a very limited – but good – decision, within its limitations. I mean, it's a win.

Andy 44:29
Sort of. I mean, kind of, yeah. So we've had – gosh, is it Ashley? – from your neck of the woods there, Larry? The attorney?

Larry 44:43
Yes.

Andy 44:44
She has said, in like, no uncertain terms, that the parent has a right to the child. Doesn't this go against what she is saying there?

Larry 44:56
It does indeed. It very much does. But you can be deprived of life, liberty, and many deprivations with due process. The Seventh Circuit seems to be saying that, while you're being punished, and MSR, or Mandatory Supervised Release, is a part of your punishment. They seem to be saying that, with this "robust protection" that they see, that the deprivation can continue while you're being punished. It ends when you're no longer being punished, and possibly sooner. But they're saying that it doesn't violate the constitution.

Andy 45:34
Interesting.

Chance 45:35
That's exactly what they're saying.

Andy 45:41
I can accept the answer that, if your child is the victim to whatever you've done, that that would be an off-limits area. But it's just, like, I'm sure somebody screwed this up, and that's why they are then piling this on to everyone else. But I thought this whole process was about rehabilitation, and reintegrating back into society, and teaching you the ways that you've been wrong, etc., etc., etc. This seems to push back against that, and demonize you, and punish you against the thing that you would cherish most, which would be your family.

Larry 46:16
Hit that button again, please?

Andy 46:18
Oh, okay. I got it.

Audio Clip 46:19
(laugh track)

Larry 46:19
Rehabilitation, that's long in the past.

Chance 46:27
Yeah, don't pooh-poo that too much now because we're gonna get into the California Corner in a minute. We're gonna really be talking about it in general.

Andy 46:35
Well, why don't you take it away, with that segue?

Chance 46:38
Okay, well, here's the California Corner. Yeah, what you said is kind of right. What's this all about, and is rehabilitation a reality? Well, no, there is no Department of Rehabilitation, but there are little tiny, sparkly things. And this is a little tiny, sparkly thing that I think is really good that I'm gonna highlight in the California Corner. We're going to call it "Positioning yourself for relief in California by reducing felony convictions to misdemeanors for the purpose of lowering your tier designation". Everybody's probably fainting right now. Okay, I'll take that.

Chance 47:14
Let's talk about the "California Wobblers". No, it's not a fish, or a minor league baseball team. In California, there are a class of crimes that may be charged as either a felony or a misdemeanor. They are called wobblers because they wobble from being misdemeanors to felonies, depending on the circumstances, of course, and whether the district attorney decides to charge you with the felony or the misdemeanor. For example, let's take Penal Code § 311.11 (a). In California, that's possession of child pornography. Now, the way you determine whether or not it's a wobbler is what the punishment section says. So let's look at this. "Every person who knowingly possesses or controls any matter, representation or information, data or image", la da da da da, "is guilty of a felony and shall be punished by imprisonment in the state prison or county jail for up to one year."

Chance 48:07

And there's a fine, but forget the fine part of it. The most important part is "imprisonment in state prison or county jail for up to one year", and that's really important. The "county jail" part of the punishment makes the offense a misdemeanor, while the "state prison" time makes it a felony. Whether or not a person convicted of this type of offense has been convicted of a "straight" felony or a "reducible" felony depends on a couple of really important factors. First of all, prison and probation. If you do your time in prison, if you did time in state prison, you're not eligible for reduction. Your felony is a straight felony and will always remain that way.

Chance 48:54

But, if you're granted probation and did not do any time in state prison, you are eligible for reduction, even if you were given a suspended sentence! Now, a lot of people in California don't really understand this. They think that a suspended sentence means they were sentenced to prison and therefore, you can't reduce their felony to a misdemeanor. Well, a new law came into effect in 2019 and it allows a person who received a suspended sentence to apply for reduction if they were placed on probation. Now let's get down to where the rubber really meets the road. In California, under Penal Code § 17(b), the court has discretion to reduce a felony conviction to a misdemeanor when the felony is classified as a "wobbler" offense. And I get that from People vs. Superior Court of Los Angeles County. The case is called Alvarez and it's a 1997 case which is found at 14 Cal. 4th 968 at page 974.

Chance 49:59

Now, the court may reduce the offense even if the prosecution objects. And this happens all the time. Sometimes it's policy to object. Whatever it is, the court can make its own independent determination. Under People vs. Thomas, which is a 2005 case, 35 Cal. 4th 635, found at page 640, and Esteybar vs. Municipal Court, a 1971 case, 5 Cal. 3rd 119.

Chance 50:29

Furthermore, the court has jurisdiction to reduce an offense to a misdemeanor even after the period of probation has expired. And this probably freaks out Larry because he can't believe this. But this goes back to a 1966 case, Meyer vs Superior Court of Sacramento County. It's a 1966 case, 247 Cal.App.2d 133 at page 140. It freaks out prosecutors. And when they check it out they say, "You're kidding me." "Yeah, it's quite correct."

Chance 51:00

So, what are the consequences of relief? Let's talk about the California registry. If you're successful in getting your felony reduced to a misdemeanor, the court will send a report to the California Department of Justice to let them know that you now only have been convicted of a misdemeanor. Once that occurs, the Department of Justice will, or should, change the records for your case. That's another talk altogether. But they're obligated to change the records.

Chance 51:31

And also, this can trigger a redesignation of your tier level in some cases. Let's take our example again. Penal Code § 311.11(a), possession of child pornography. It is, as a felony, a tier-three, lifetime offense. But when you have the reduction occur, and the

records then are transmitted to the DOJ, they've got to redesignate that. And it goes from tier-three to tier-one. So you go from life to ten years, making relief for this conviction available. Magic! What say you, folks?

Larry 52:12

I say that is the most amazing thing I've ever heard of. And particularly with the Meyer case being from 1966. Your courts weren't overrun by liberals in 1966. How did they come up with such a progressive decision that many decades ago?

Chance 52:36

Um, you know, the answer is, I don't know. But I'll tell you one thing, it's certainly very useful!

Andy 52:43

(laughs)

Larry 52:45

Well, that's amazing, reducing a felony to a misdemeanor after the sentence has expired? The only thing I've ever heard about doing is you can do an order "nunc pro tunc", and you could change it that way. And you can explain nunc pro tunc, 'cause it drives Andy off the rails when I say that.

Andy 53:05

Just the words drive me crazy!

Larry 53:08

But the way we would accomplish that here is we would do a nunc pro tunc. But other than that, there's no way to do that I'm aware of.

Chance 53:17

Well, yeah, and even there, a nunc pro tunc has to be based on some kind of error. This is not based on error. This is actually to reward people for doing well. And it goes, really, towards the concept of rehabilitation. I mean, that's the underlying reason for that, is to reward people who have made amends, and have done much better, and now, after the fact, are being recognized for it. So that's really the rationale for Meyer.

Andy 53:50

And so when you go to your next job application, and it says, "Have you ever been convicted of a felony?" You don't have to write "yes" because you've been convicted of a misdemeanor, now?

Chance 53:58

That's correct. It's, for all purposes, a misdemeanor. The answer is "no".

Andy 54:03

Interesting. And how often do you have a chance to use this in practice?

Chance 54:10

I do this all the time, routinely, all across the state of California.

Andy 54:14

Oh! Very cool. How can people find you, Chance?

Chance 54:18

And to take one more step, to go one more further, after I do it, and it gets transmitted to the DOJ, we get a redesignation and people can come off the registry, and it's amazing.

Andy 54:33

Wow, that is pretty, pretty, pretty cool. That's pretty awesome.

Chance 54:39

Yeah. California kicks, huh? Sometimes.

Andy 54:42

Sometimes, yeah.

Larry 54:44

So, well, I love it. How do people contact you to get this reduction? Because I'm sure our audience has thousands of people.

Chance 54:55

They can find me at my office number, they can google me, or they can call you two! You'll know where to tell them where to go.

Andy 55:04

(laughs) Well, your phone number is right up there on the screen right now. It's (949) 365-5842.

Chance 55:10

Excellent, thank you so much.

Andy 55:11

They're going to get an automated voice response, and they've got to go through your secretary, then they've got to go through another gatekeeper to get to you?

Chance 55:20

Nah, I mean, if they leave a message, I'll call them back within a reasonable amount of time. They'll find me.

Andy 55:26

Large law office, with ten staff attorneys?

Chance 55:29

A quadrillion! No, actually it's a boutique firm where we're really an operation that's handheld and very close to our clients. It's a very cool operation.

Andy 55:46

Very good, Larry. I'll let you have one article!

Larry 55:50

Well, we can do, very quickly, the "Georgia sheriff asks appeals court to toss conviction for violating detainees' civil rights" [<https://www.courthousenews.com/georgia-sheriff-asks-appeals-court-to-toss-conviction-for-violating-detainees-civil-rights/>]

Andy 55:56

All right, "Former Clayton County Sheriff Victor Hill argues he did not know his use of restraint chairs as punishment was criminal, and that a holdout juror was coerced during deliberations." Oh, boy. Alright then, what is this about?

Larry 56:18

Well, I don't know anything about the holdout juror, but Victor is quite an amazing character. That's a county I spent a lot of my time in, in my youth. It surprises me that he can attempt to credibly make an argument that you can put someone in a chair that's called a "restraint chair" and not know that it's kind of uncomfortable, and punitive, and can be bad. Victor actually did a lot of good things for Clayton County. He actually tried to do some good. Nobody is bad to the core. But I don't see how he can keep a straight face – Chance, you're a great appellate lawyer. How can you make an argument like that, that he, that the sheriff of Clayton County didn't know that that chair was punitive?

Chance 57:10

That would be a little bit hard to do with a straight face.

Larry 57:16

(laughs) Well, either he's got a creative attorney or else he's controlling the attorney, rather than the attorney controlling the client. Now, the juror, that's an important thing. If a juror was coerced, that undermines the process. So that I'm not laughing off at all, because that's a serious matter. Chance, how would you determine that, if a juror had been coerced, other than through an exit interview? How would you deal with that?

Chance 57:42

Well, you know, in what context? I mean, if a juror complains, it's gonna go straight to the court, and, of course, there's gonna be an investigation and everybody's going to know the facts of it. They're gonna get to ask questions and so on and so forth. I mean, it seems to me that there's a built-in process for that. The question is, once that's determined to be credible and true, what do you do about that?

Larry 58:13

Well, you would have had a hung jury, if that juror was not convinced that the evidence was sufficient and had reasonable doubt, you would have an eleven-to-one hung jury. And the judge would tell them to continue deliberating. And then a judge eventually would ask them, in my experience, "Is there any hope of you reaching a verdict?" Because the judge is not going to make them deliberate for weeks and weeks. So the judge would eventually say, "You're split, eleven to one. Is there any chance that you'll reach a verdict?" And if the foreperson says "There's no chance," then it's a mistrial.

Chance 58:50

That's right.

Andy 58:51

Can I read two or three paragraphs from here?

Larry 58:56

Sure.

Andy 58:57

All right. So later on down, the article says U.S. Circuit Judge Robin Rosenbaum, appointed by Barack Obama, also questioned how Hill's use of the restraint chairs differed from the hitching post case. She pointed out that Hill recognized his own use of force

policies and the use of restraint chairs. The policy said they should never be authorized as a form of punishment, but only in an emergency, if a detainee exhibits violent or uncontrollable behavior, or to prevent self-injury, injury to others, or property damage when other control techniques are not effective. Many of the victims who were restrained testified about urinating on themselves multiple times and having scars on their wrists from being tied down. One of them was a 17-year-old who was restrained in the chair for TEN consecutive hours, after he argued with his mother and trashed the house.

Chance 59:50
Wow.

Larry 59:51
Well...

Andy 59:53
Nope! Not punishment at all!

Larry 59:56
No, not punishment at all. But like I say, that's not a very credible argument to me. The restraint chair in my limited knowledge of corrections management, is exactly what the judge on the Court of Appeals said. There are times when you do have to keep a person from hurting themselves. They're under the influence of some kind of drug and they're beating their head against the wall, or they're doing something that's going to hurt themselves and you have a responsibility, while they're within your custody and care, to keep them from hurting themselves. So the restraint chair can be appropriately used. But it's in those rare circumstances when the person is going to hurt someone or themselves, not because you don't like the fact that you're having to deal with this person, they've been in your jail two times previously, and they haven't learned their lesson. And that's the way I think Victor was having his deputies use the chair. He was getting the message out that Clayton County is not the county to come do your mischief in. Well, "Sorry, Victor. That's not your job."

Andy 1:00:56
Well, that's a fun way to end Episode 300.

Larry 1:01:01
Well, he was a unique and very colorful sheriff. He was the first black sheriff in Clayton County because that was a majority white county. As the demographics changed, he got elected, and he wanted to take full command of the department. All the command staff was mostly white because Sheriff Tuggle, who he had succeeded, didn't have a lot of minorities in the department. He had snipers placed around the sheriff's department when he was relieving command of their job. His thought process was, "These commanders might go off on me because I'm taking away their command status." And you just don't treat people that way. I mean, you just don't.

Larry 1:01:52
But he had them turn in their badges and their guns and everything, under sniper protection. And then the funny thing is, they won their jobs back. They went to court, and the court said that he did not have the authority to do what he did.

Andy 1:02:08
Crazy, crazy, crazy. Chance, do you have anything before we head out?

Chance 1:02:13
No, no, no. After that crazy story, are you kidding?

Andy 1:02:17
(laughs) Do you have any super-exciting cases that you've recently worked on, that you're not under a gag order about?

Chance 1:02:23
You know, I've got a whole lot, and maybe we should spend one day just talking about a couple of those. That'd be fun.

Andy 1:02:30
I think that would be fabulous that you could bring some of those in. We can change names to protect the guilty and the innocent.

Larry 1:02:35
Perfect. Let's do it.

Chance 1:02:38
All right.

Andy 1:02:39
Well, you know, I thank everybody for helping us get to Episode 300. We have 299 past episodes for you to listen to. Where are we at in years, Larry? Like 17 or 27 years of podcasting?

Larry 1:02:56
Well, we're well into our 7th year. I think this fall will be 7 years.

Andy 1:03:00
That's bonkers.

Chance 1:03:01
Congrats. Congrats.

Andy 1:03:04
Thank you very much. Appreciate it. And thank you for joining the crew!

Chance 1:03:08
Pleasure.

Andy 1:03:08
And so without anything further ado, head over to registrymatters.co for show notes. And (747) 227-4477 is the phone number. RegistryMattersCast@gmail.com if you have really creative scenarios that you'd like to toss at Larry and Chance, you can send them there. And then head over to patreon.com/registrymatters to sign up to be a patron, gain access to the Discord server to listen to us record live and all that other fun stuff. And Larry, I hope you have a great night and a great weekend. Chance, the same, even though you're three hours earlier, so your weekend seems longer.

Chance 1:03:45
Thank you. Thank you. You too.

Andy 1:03:48
Have a great night, guys. Talk to you soon. Bye.

Announcer 1:03:52
You've been listening to F Y P.

Chance 1:03:50
Thanks.

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