



## Registry Matters Podcast

Episode 230

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Andy 0:08

Recording live from FYP studios, east and west. Transmitting across the internet. This is episode 230 of Registry Matters. Good evening, sir. How are you?

Larry 0:20

Awesome. Good evening to you, people.

Andy 0:23

You people, we missed you last week. Did you die?

Larry 0:28

Pretty close to it. I sure did.

Andy 0:31

It seems that maybe you were a little bit more prescient, then, maybe, I don't know. You weren't there. And then a whole bunch of people ended up with COVID. Right?

Larry 0:41

Well, I've heard that. That was one of my considerations. But that was not the primary one. But I did think about the elevated level of COVID, in particular in the part of the country where the conference was being held.

Andy 0:57

You don't believe in this Hokey Pokey? Like this COVID thing? You don't think that's real, do you?

Larry 1:04

I know it's real? My brother had it and almost died.

Andy 1:07

Oh, oh, okay. Well, all of my friends and family, they've all caught it. And all they did was they

took the horse stuff. And it's just it's easy, man. Don't worry about it. I'm just kidding. Don't send me hate mail. I am not that person. But we missed you. And we had a good time. I've gotten a whole lot of positive feedback from the episode last week. Did you listen to it?

Larry 1:34

I did listen to a good part of it. But I didn't have to do the transcripts so I didn't listen to the entire thing.

Andy 1:42

You pushed that off on someone else. Well, very good. Let's see. Is there anything else important that we are not going to talk about tonight? Anything at all?

Larry 1:51

Well, of course, there's always important things we're not going to talk about because the podcast only has a limited amount of airtime.

Andy 1:59

That's actually not true Larry. We could broadcast indefinitely if we wanted to. (Larry: If you say so.) All right. Well, give me a rundown of the show this evening.

Larry 2:10

We're going to focus really on two things. We're going to focus on the state of South Carolina and a new removal process for people on the registry. And we're going to focus on entrapment, the defense of entrapment and a decision just released yesterday from the Illinois Supreme Court.

Andy 2:30

Very good. Do we have a guest joining us?

Larry 2:33

We do. We have a very distinguished guest from South Carolina who has been a part of advocacy

for so many years, I can't even remember. He's been the emcee for NARSOL for the conferences for a number of years. And he leads the South Carolina charge. And his name is Don. And Don, we're glad to have you here with us.

Andy 3:01

Don, welcome.

Don 3:04

Thank you. It's good to be with you guys.

Andy 3:07

If you don't mind, before we dive into all the stuff, Don I believe - and Larry, I think you'll back me up on this - I believe that whether you are on the registry, whether you aren't on the registry, whether you're an adult or a minor - probably being adult would be a little bit more impactful - that you by yourself can go talk to your legislators and make a difference by helping them navigate through some subject, we'll call this one the PFR registry thing that we have. But you can be a person that can go advocate for good bills and oppose bad bills and help move our system forward. And you can do this by yourself. Larry, do you agree with that? (Larry: I do indeed.) And Don, could you possibly answer that with actually your personal opinion of can you do this by yourself?

Don 4:00

Yeah, absolutely. It hasn't stopped me one bit, because there really hasn't been anybody else from NARSOL who's been advocating for several years. My predecessor in this role got literally run out of the organization by internet trolls who just attacked her mercilessly. And so, I was a little reluctant to get into it, but once I did, I kind of got fired up. And once I got over the hump of learning the ropes of going down to Colombia and going to these committee meetings and understanding the process and how they worked and what you could do and what you couldn't do. It didn't take very long to do that. And but honestly, I've found that it was easier than I expected. And I've found

that legislators are really very receptive and very cordial to people who take the time to come and testify. I mean, they want to hear people come and voice their opinions about these things. And as a rule, they're quite welcoming to have people come down and participate in the committee meetings and speak up. And I know a lot of states have a lot of rules about how long you can talk. And once in a while, we'll have so many people trying to testify on a bill that they'll clip it. But honestly, I think I've only once been cut off from something I wanted to say. And very rarely do they impose actual time limits. If you've got a bunch of people there, they'll ask you to, you know, keep to the subject. And I've heard legislators ask people to stay on point when they started wandering off. But it's been quite an easy process to go present my opinions to people. And I know that some of them listen. I mean, you don't always... you know, they're not going to rewrite their legislation because of one person coming down to testify. At least not normally. But you can tell they listen. And we'll actually talk about that a little bit in the podcast tonight as we talk about what happened in South Carolina, because I have been working with a group of these legislators for several years on juvenile-related stuff. And so, after several years of listening to me present statistics, and talk about collateral consequences, and all the ramifications of what it means to people to be on the registry, they're believers. And I know these guys are believers. And as I'll talk about tonight, that became real clear from what happened with this bill this year in the legislature. And it was a really good thing, so.

Andy 7:07

I'm glad that you've been doing that. And I, just, I really wanted to hammer home that you are the lone wolf doing this stuff and you're having an impact, whether you're on the registry or whether you're not on the registry, whether you can vote or not, it doesn't matter in this regard that you have been able to do this stuff. And you're having to go talk to the opposite party for

whom you would vote for if you could. Can you vote in South Carolina? (Don: Yeah.) Okay. Well, I think you know, Florida, none of our people can vote.

Don 7:35

Yes. In South Carolina, as long as I can remember, once you complete your sentence, you can vote again.

Andy 7:44

Okay, okay. And that would include probation as well? (Don: Yes, it does. Yeah.) Okay. Gotcha. All right. Well, cool. Anything else, Larry, before we want to dive in or Don before we dive in?

Larry 7:55

Oh, let's get going, because we've got a lot to cover with these two issues.

Andy 8:01

Well, sure. But first Larry, you dropped a question in there, and I just want to make sure that we don't leave anybody out because this you put this in there for us to cover. So we'll do a question real quick, and then we'll go over to the other content. It says, my question says, "Dear Larry, my question is one that I share with a lot of fellow PFRs at a SOMP, a sex offender management program yard, within the Bureau of Prisons. Federal Medical Center in Deven. Where's Deven's Larry? (Larry: I don't remember.) [It's in Ayer, Massachusetts] Okay, that's all right. No worries. Why does the sentencing for an SO crime, possession and or distribution of CP, for an example, differ from a state conviction compared to a federal? Federally -entenced inmates typically get a mandatory minimum of 60, 120, 180 months for a conviction, whereas a state conviction will have the same inmate, same charge, only receive probation for the same crime. Is there any laws or legal groups working to make the sentencing equal with both state and federal court systems? I think I understand the question now, just from that one little part. Do you want to go after that one real quick?

Larry 9:05

Sure. The reason why I put it in there is because people don't understand that each state within our nation is an independent sovereign, and they get to make their laws in terms of what they want to criminalize and how seriously they want to treat those infractions of the law and what the penalty schemes are. The federal government, that is one sovereign of all the states and territories, and that's representative of the voters of the entire country. And the federal government has chosen to make those crimes where federal jurisdiction is available to them- not all sex crimes are, they cannot have a federal jurisdictional hook, but in terms of child porn, there is a federal jurisdictional hook because of the internet connection. And they have decided - we have decided I should say, not they - we've decided that we want to treat those crimes very harshly with mandatory minimums. If you paid any attention to the confirmation hearings recently for the recent Supreme Court process, you will likely remember that there's not going to be any abatement of those harsh penalties because any judge who now would risk deviating into a downward departure of any type is going to be basically writing off their appellate court elevation consideration to be elevated to an appellate level according to the US Supreme Court because of the vilification. And the public was outraged by these lenient sentences that Judge Jackson was handing out. They were just so off the chart, it's so ridiculously lenient, and a number of conservative senators led the charge against Judge Jackson. So don't expect it to get any better anytime soon on the federal side. And as far as anybody leading the charge on that, not really, that I'm aware of.

Andy 10:51

To make an extreme example, so I mean, even what he used, he was talking about 180 months for- that's 15 years, correct? And so you could have some level of CP charge and get 15 years

and then in another state, maybe get probation for that, that's an extreme difference.

Larry 11:13

It is indeed, but that's permitted in our system.

Andy 11:17

Okay. The only other thing then is you wouldn't be charged in both places at the same time?

Larry 11:22

You can be. They're independent sovereigns. Oftentimes, you're not because the federal sentencing is very harsh, and that's usually enough to keep the person put away for a while. So as a general rule, it doesn't happen. But it can happen unless there's a statute in your state that says if the Feds charge for the offense, unless there's a prohibition, you can be. There is no constitutional prohibition. It's a separate sovereign. They're two separate sovereigns, so you can commit a crime against both entities.

Andy 11:51

And sovereign is the same as saying like Spain versus France. We don't consider anything of the sort that France and Spain would have the same laws. and to compare Florida to Georgia to Montana, it's an equivalent-ish thing?

Larry 12:06

It is. And you can actually commit a crime, the same crime, in two nations. And oftentimes, one Nation defers to the other, but sometimes when they finish with you, they hand you off to the other nation. But yes, that is a good comparison.

Andy 12:21

Very good. Okay. Did you have anything, Don, that you would want to add in that?

Don 12:26

I have a question to ask, and it's one that people might think of. Why doesn't that invoke the double jeopardy prohibition in the constitution for being tried twice for the same crime?

Larry 12:41

Because it's two separate sovereign entities. That's why it doesn't. You couldn't be tried twice for the same... I mean you couldn't be punished twice. You can be tried twice for the same charge if the jury deadlocks, there's no jeopardy generally attached.

Don 12:53

Yes, I understand.

Larry 12:55

But yes, it's not double jeopardy, because they're separate prosecutorial entities. So you committed the crime against New Mexico, and you've committed the crime against the United States.

Andy 13:07

Do you remember the DC shooter Larry, in the late 80s, early 90s? The last name was Malvo? (Larry: Yes.) (Don: Yes.) They killed people in Maryland and Virginia. And they were going to try them in both places, two separate sovereigns, two separate sets of crimes committed.

Don 13:24

Well, they were different crimes to shoot people in two separate states.

Andy 13:29

But to see the difference between the state and the federal, one just happens to be... one is superior- not superior, but up the hierarchy chain.

Don 13:39

No, you have to shoot two different people in two different states to do that. You can't shoot a person in two states at the same time.

Andy 13:49

Oh, you probably could. I shot them in Virginia, and they walked into Maryland and died. Oh boy.

Larry 13:58

You guys are being silly, but it's absolutely possible. You could fire a shot from Arkansas into Oklahoma, and the person could die in Oklahoma. And they would have a murder charge. And the person in Arkansas, they committed some kind of reckless crime and Arkansas could also choose to prosecute them because they committed a crime in Arkansas when they recklessly fired the gun into Oklahoma. So you have two separate sovereigns at work.

Andy 14:24

Yes, we are being silly but can you imagine just the extreme circumstances of having an attorney trying to represent- like "My client..." Oh gosh, I can just see this. Okay. Anyway. Well, let's continue on from there then, unless you have another question Don.

Don 14:41

Nope.

Andy 14:44

Okay, cool. So the reason why you're here, Don, other than being a super magnanimous awesome person and a Patreon supporter, is that South Carolina now has a process for being removed from said registry. And when does it start? When does the law go into effect?

Don 14:59

It is alive and well. (Andy: Sweet.) By law, it went into effect on May 23<sup>rd</sup> when the governor signed the bill. That's when it officially became law. I kind of anticipated SLED dragging their feet on it, but they didn't. And I suspect they were probably getting hammered with phone calls on, when are you going to do this? Because it took them only about two weeks to have this process defined and published. It's out on their website, they have it very well documented. And there's a form, online form that you can you can either download it or fill it out online to start the application process. So you basically fill out the form and they ask you to provide any documentation that you can. They

want you to submit arrest records, sentencing records, whatever you can, whatever documentation you have to demonstrate or make it easy for them to clarify if you meet all the requirements. And if you meet the requirements, they are obligated to remove you from the registry within 120 days of submitting your application.

Larry 16:17

Let's clarify for those who don't live in South Carolina. SLED is South Carolina Law Enforcement Division.

Don 16:23

Yeah, thank you. I'm sorry, I get too used to talking about them.

Andy 16:30

I'm thinking it's wintertime and we're going downhill and having a goodtime.

Don 16:34

Yeah, the Law Enforcement Division. It's the equivalent of a state FBI. Tennessee and Georgia have a Bureau of GBI or TBI, same kind of thing where that's the level of organization that it is. And they're charged by law with having responsibility for maintaining the registry. We do our registration through the sheriff's department, local sheriff's departments, but SLED is the organization that keeps the registry and oversees all the operations of it. So they work in concert with the local sheriffs' departments to administer that. But to apply to get off, you have to file this application with SLED. And right now, I'll just make a note here that anybody who has been classified as tier one who has been on the registry for 15 years, or will be on the registry for 15 years by October, is eligible to file right now. So they can file for removable now. And hopefully these things are gonna go smoothly. We'll talk a little bit more about objections and the Attorney General a little later in the podcast, I think. But there are a lot of people who can apply right now and are eligible for removal. And it isn't just people who

have been classified as tier one, because one of the things that happened with this bill was the legislature finally put into law what the tiers are and what offenses go with what tiers. And there are a lot of people, like my wild guess is maybe as much as half the registry are going to move down one tier from where they used to be classified. We've been using tiers in South Carolina since about 2008 or '09, probably. Might have been '10. But they never were put in the state law. There's been nothing in the law about the tiers. This was an invention of the Attorney General's Office basically. And they came out with this crazy set of guidelines that they gave to the sheriffs' departments that got into nitty gritty details of the crime that was committed and the circumstances. And it forced the investigators in the sheriffs' departments to actually dig into case records for individual people to figure out what tiers they were going in, and nobody liked the system. Nobody knew what the rules were. And I knew what the rules were only because I filed a Freedom of Information Act about 10 years ago, filed a FOIA request with the Attorney General's office and made them give it to me, and it was insane. And it put tons of people in tier three that should never have been in tier three, probably 60% of the registry. But a couple of years ago...

Larry 19:57

Don, I'm gonna ask you to stop, we're getting way off track.

Don 20:01

Yeah. All right. I can do that. I'm sorry.

Larry 20:02

Yeah, we're trying to keep this to a concise interview. (Don: Yeah. Alright.) Okay, thanks.

Don 20:09

We'll move on.

Andy 20:11

Don, tell me what inspired the state to pass the process even to begin with? What did the

Supreme Court, what was the decision that they had?

Don 20:20

The decision was one that was submitted by a guy named Powell who was caught in a sting back in 2008. And he actually went to the court, and he completed his sentence. And in 2016, he filed a petition with the court for removal based on grounds that, number one, the state law didn't allow for the registry information to be published on the internet, but he also claimed that it was a due process violation to arbitrarily assign people or give people lifetime registration without any kind of court review or due process. And I think there's one other claim that he made in there also. At any rate, the trial court gave him summary judgment, and said, "Yep, you're right. It's unconstitutional. Take him off the registry." So the Attorney General's Office appealed. And the appeals court, interestingly enough, just kicked the can upstream and said, "We're not touching that one with a 10 foot pole. That needs to go right to the Supreme Court." And the Supreme Court heard it, and Larry, you lecture about this from time to time, but anybody who thinks court processes happen fast, understand it was five years from the time Powell first entered this case until there was ultimately a decision made on it. Five years transpired.

Andy 22:10

Hey, Don, so did someone that was really unexpected file this case to begin with?

Don 22:16

Absolutely. And I was dumbfounded. The case was actually filed by a man who was the director of the Department of Corrections for years, including all the time I was locked up. So I've had to change my opinion of him slightly since my days in the Corrections Department. But nobody saw that coming, and nobody knew about the case. It was really bizarre. It just, it came out of the blue. I knew nothing about it.

Andy 22:44

That's the second time, though. There was six months ago or 12 months ago, we talked about a case from South Carolina to the Supreme Court that no one knew about until it happened.

Don 22:54

There have been two good ones. This one and another one called Dykes where they got rid of lifetime GPS monitoring. (Andy: That's the one I'm thinking of, yeah.) Yeah. Same kind of deal. And both of those went through without any publicity at all. And nobody heard about them until the Supreme Court rendered their opinion.

Andy 23:16

Who was eligible for removal? And how long must they have been on the registry before they can petition?

Don 23:28

Well, at some point, anybody is eligible for removal. But the times and the process depend on what your tier is on the registry. The tier ones have to be on the registry for 15 years. Tier twos have to be on the registry for 25 years. And tier threes have to be on the registry for 30 years. Now for tier one and tier two, they can go through this petitioning process with SLED. And if things go the way the legislature intends it to go, it's an automatic process. SLED reviews the requirements and says yay or nay, and you're off. It's automatic. There's no court hearing No, nothing.

Andy 24:30

That's awesome, because in Georgia, you have to- you probably don't have to get an attorney, but you should get an attorney to do it.

Don 24:36

Yeah. You should not have to do that in South Carolina. They really didn't- especially with the number of people that are kind of backed up who are going to be eligible very quickly to get off the registry. We knew there are gonna be a lot of

them to get processed. And part of the impetus for getting this bill done was that people realized if they didn't pass this- I mean, we kind of shortchanged part of the discussion here on what happened with the Powell case- But the Supreme Court understood that there was going to be an issue. And so, they gave the legislature one year to remedy the situation. And so, we waited a long time for that to happen. And I thought maybe it wasn't going to happen. And honestly, we had attorneys advertising for people to start filing petitions. And people realized that there were going to be 1000s of petitions filed with courts this summer to let people off the registry. And they did not want that to happen. So late in the season, we got this activity going to get it done. But they still, if everybody had to go through the court, you're faced with 1000s of petitions being dumped on a court system that still hasn't recovered from COVID. I mean, we're, seriously, the courts are backlogged big time. (Andy: People are waiting pretty much everywhere.) People are waiting two or three years to have simple cases heard. And it's insane. And they saw, you know, what happens if we get 7,000 people file petitions with the court to be removed from the registry? Well, I mean, people are not going to get stuff done for years. And so, they really- the Senate, in particular- was very concerned about trying to make this automatic. And so, we put it in here. And there's a caveat that says, unless there's an objection from the solicitor in the convicting County. Well, when we were in our committee meeting in the Senate, the Attorney General was there, along with one of the county solicitors. And the Attorney General takes the position that they're going to object to every petition that comes in, just arbitrarily we're going to object to everything. We're gonna see how long that really lasts. I don't think it'll last very long, because it's going to create so much of a backlash. It'll be a real problem. And honestly, if they really do that, it will cost the state millions of dollars in legal fees and court costs, because they have to bear the burden of this financially if they cause all these court hearings.

Andy 27:43

Let's go down that path. Who has the burden of proof? And what is that burden? Who has to prove whether you should get off the registry or not?

Don 27:50

It depends. We're going to kind of walk back to what I was going through before on the removal process. Because when you go through the SLED process, there are really three qualifiers to get off. You have to have completed your sentence, you have to have completed any required treatment program that you were required to do, and you can have no registry violations within the past 10 years of failure to register. And those are the three basic qualifications. And if you meet those, you're okay. And SLED is basically going to verify that you're okay on those three counts. And, unless they have reason to believe that you're not, then the removal is supposed to be automatic. And if you're going through SLED, the state has the burden of proof to prove that you do not meet those three qualifications. How, however, if SLED determines that you should not be removed from the registry, you have the right to appeal to the court. So then you can file a petition, an appeal petition with the court for removal. But if you go to court, then you're going to be subjected to a psychological evaluation. And you have to prove to the court, then, by clear and convincing evidence that you are not likely to reoffend and that there's no public interest served by your continued registration. So, once you get in the court domain, the burden of proof transfers from the state to you. So, you have to you have to prove that you're not dangerous if you get in the court path. And tier threes always have to do the court path. Tier threes cannot go through SLED to get off. You automatically have to apply to the court to get off if you're tier three.

Andy 30:01

Do you expect the state to oppose all requests for removal based on their testimony in the General Assembly, though?

Don 30:08

I cannot imagine that they're really going to do it. I mean, the Attorney General claimed they were going to do it in the Senate committee hearing. But I can tell you that the senators listening to him wanted absolutely nothing to do with it, and tried to shove it aside. And he was very insistent. He was asking for money, and they said, "We got a budget process coming. Go ask the ways and means committee for more money." And so I don't think it will really happen if you want to know the truth, because any solicitor who wants to object is going to have to have good reason to do that. I mean, they have to have a reason to object in the court, or they're going to look like idiots. Now, the risk is something that I've heard Larry talk about before on a podcast at one point, and that is that the Attorney Generals are going to try to bring in the victims and start creating a circus out of victim testimony, and boohoo, you ruined my life and all this crap. I mean, I don't say it that way to diminish the injury that's done to the victims. But the problem with that, legally, is that that's not relevant to whether somebody's dangerous today or not. That's totally irrelevant testimony, and has nothing to do with the question, because the only question that's in front of the court is, is this person dangerous now? And what somebody did 25 years ago has nothing to do with whether they're dangerous now.

Andy 31:59

I should play that clip that Marci Hamilton said that they don't ever age out, which I think would be very easily rebutted with a bunch of evidence.

Don 32:09

I don't need to hear that. I've been listening to that from a stupid victim's advocate in South Carolina for five years. Honestly, I got so angry

with her one time at a committee meeting. She just dumped a pile of crap on the subcommittee that was listening. And I got up, honestly, and didn't even use my notes. I said, everything Miss Hudson just told you is wrong. And point by point, I just went down everything she said and quoted statistics and studies and everything else. She got up and walked out of the room.

Andy 32:46

Hold up. Larry, this might be a use for recidivism rates.

Don 32:49

She's been a lot nicer ever since then. (Andy: Interesting.) At any rate, back to the questions.

Andy 32:59

Pretty much like the last one that exists is do you have any idea in the terms of litigation you might want to see happen in South Carolina?

Don 33:09

Yes, actually. There are two or three possibilities that are likely things in which is going to be challenged. Some of the attorneys feel like what got passed didn't actually address the Supreme Court's complaint. And that is that, you know, 30 years is only marginally better than lifetime. And we've had a lot of comments on the NARSOL website in the article about this that kind of had that flavor. And I've got attorneys here that agree with that that there's still no due process in saying you got to do this for 30 years, there's no sound reason to do that is the bottom line. But they think that it just plain doesn't do what the Supreme Court asked. And some people would like to challenge it simply based on that. But I have a bigger problem that I think is an easier one to use to challenge, and that is that when Adam Walsh Act, by comparison, simply says you have to be offense free for a certain number of years. Well, that kind of stipulation makes some sense, because we know that the longer a person is offense free in the community, the less likely he or she is likely to reoffend. I mean that's

statistically provable. So saying you need to be offense free for a certain amount of time is a reasonable thing to put in the law. And then we can argue forever about how long that timeframe should be. But this bill has a very particular problem that I tried to address in both the House and Senate subcommittees and neither one of them would listen to me. So, it requires that you be on the registry for a certain number of years. Your clock starts the day you were put on the registry. So yours truly is a good example, committed a crime in 1985, was not prosecuted until 2001, and was put on the registry in 2007. So, I was literally put on the registry 21 years after the crime was committed. And I was on the street without reoffending for 16 years before the State ever had any idea I had committed the offense, without reoffending. So to come back now and say, "Well, Don, you need to be on the registry for 25 years," there's no logic behind that requirement at all. And because this is supposed to be a civil regulatory scheme, it has to have something to do with public safety. And there's no rational justification for imposing a long term on the registry for somebody who has already proven that he's not a danger to society. So that's really a rational basis argument. And I contend that that's a sentence, and it's punishment, because it doesn't have anything to do with public safety. And so, it could fall as an ex post facto thing. But I think the real argument against it is a rational basis argument that say, there's no relationship between the imposition of years on the registry to your being dangerous. So that's, yeah.

Andy 37:15

That's awesome. Larry, do you want to chime in there as like the legal expert and support what he's describing?

Larry 37:21

We've discussed it, and I've suggested to him that I would be interested in pursuing that angle. So yes, there is something there to work with.

Andy 37:31

I find it fascinating how much more frequently I hear civil regulatory scheme, therefore it's punishment. And what was the other thing? Using terms like rational basis and stuff like that. I, just, my inner Larry goes, Oh, I know those terms. So that's awesome you use those terms, Don, thank you.

Don 37:54

I've been talking to Larry for a long time.

Andy 37:58

No kidding. Is there anything else that we would need to know? Larry, do you have any follow up questions?

Larry 38:04

No, I think I've got it. I'm really feeling bad that the tier threes have the burden from the get-go. But at least there is a process. So we have an improved situation where, previously, there was no process in existence. But the burden should always be on the state in my opinion.

Andy 38:20

That's pretty cool. Well, very good. Appreciate it. Then we are going to move on to the next segment. Larry, are you ready for all that?

Larry 38:32

I hope so.

Andy 38:34

Because I have a bone to pick with you. (Larry: All right, let's do it.) Because I had been preparing- you told me a week or something ago, we were going to be discussing a case from the Ninth Circuit regarding something that is near and dear to our hearts, Steven Mays' case, and there was an extraordinary petition that we were going to cover and no, you decided to change it up and do this thing from Illinois. So why did you do this at the last minute? I hope you have a good reason. (Larry: Well, I do.) And that reason is? I've read all the 52 pages of it, and it's related to entrapment.

Didn't we do an entire program on this already with Kathleen Hambrick? I think it was episode 205.

Larry 39:17

We did. But this was exciting because the challenger, Mr. Lewis, gets a new trial.

Andy 39:24

Shane Lewis was charged with involuntary sexual servitude of a minor, traveling to meet a minor, and grooming. At trial, he asserted the defense of entrapment, and a jury found him guilty of the offenses, and the Circuit Court of Kane county sentenced him to six years imprisonment. But he appealed, did he not?

Larry 39:43

He did. On appeal, he argued that defense counsel was ineffective in presenting his entrapment defense because it, one, failed to object to the circuit court's responses to two jury notes regarding a legal definition of predisposed, and, two, defense counsel failed to object to the prosecutor's closing arguments mischaracterizing the entrapment defense and the party's relevant burdens of proof and, three, present defendants lack of criminal record to the jury, meaning Mr. Lewis' lack of criminal record. The appellate court agreed and reversed his conviction holding that the defense counsel's cumulative errors rendered the proceeding unreliable under the *Strickland vs. Washington* test, and that's a US Supreme Court decision from 1984. The appellate court remanded the case for a new trial, finding there was evidence sufficient to retry the defendant.

Andy 40:37

And the state of Illinois- Illinois, I know how it's supposed to be said- did not want him to have a new trial. So they asked the state's highest court to review. Is that right? (Larry: Correct.) All right. So before we get too deep into the appeal, let's talk about the case against him in his trial. According to the opinion, based on what I read, the following evidence was presented to the jury.

Jeffrey Howard, a special agent with the United States Department of Homeland Security, testified that he coordinated a sting operation with the Aurora police department, and that the goal of the undercover operation was to arrest multiple people on the demand side of human trafficking. The operation involved posting an advertisement for an escort on backpage.com. He described Backpage as a website that had advertisements for various goods and services, and had an adult services section. The phone number in the ad did not link to an actual phone, but rather went into a software system that allowed multiple officers to read and respond to text messages. The program created a record of all the messages. According to Howard, as a matter of protocol, the officers were to stop talking or texting with the suspect if the suspect wanted to do the nasty with an adult. Before posting the ad, agents reserved adjoining rooms at a hotel in Aurora and in the target room, an undercover agent posed as a mother who was offering her 14- or 15-year-old daughters for sex. Two surveillance cameras were set up in one in the hallway and the other in the target room. Now, Larry, you have to admit that that's the classic thing. Like, we've watched video after video, even the one where we had Mayor Marion Barry where I did that as a Who's that Speaker, but that's how the thing was set up. Can they do that, Larry? Can they do that?

Larry 42:27

Oh, well, I cannot admit based on what we've heard so far that that is entrapment. No, I can't.

Andy 42:33

Okay, I'll keep reading. I'll get you to sway in my way. Investigator Erik Swastek of the Aurora Police Department testified that he composed and posted the advertisement on January 8 of 2015. He explained that to post a Backpage Ad, a person had to be 18 years or older. The sting operation's ad indicated that the Escort was 18 years old. Swastek testified that the officers were instructed to respond that they were the mother

of two minor girls- this sounds just like that thing we talked about not too long ago, Larry- both available for sex in exchange for money. The advertisement was titled, "young, warm and ready." The body of the ad read- this is kind of disgusting, Larry- "It's so cold outside, come warm up with a..." Come on. Dude, I'm not reading this. I'm not doing this. I'm skipping this, Larry. How is it that you have so much trouble seeing that this is obviously entrapment?

Larry 43:31

Well, I'm not sure that I'm having any trouble seeing the obvious. This type of operation is repugnant and a waste of resources. But having said that, it does not escape the issue of whether the person was predisposed to commit a crime, which is one of the tests for the entrapment defense to be successful.

Andy 43:49

Okay, we do know... I am going to ask everyone in chat right now to tell me that you are hopelessly stubborn. So everyone agree with me that Larry is hopelessly stubborn. I will continue to read. In the video footage captured by the hallway surveillance cameras, Lewis exited the elevator. He then walked up and down the hallway for several minutes before knocking on the door of the target room at about 11:20pm. Agent Melissa Siffermann of DHS was the undercover agent waiting in the target room to meet him. She posed as the mother of the two minor girls. When Lewis arrived and knocked on the door she invited him in. The officer testified that Lewis was well dressed and very polite, but seemed nervous. She indicated that he was hesitant and expressed his concern that this was some type of setup. She told Lewis that she likes to meet the guys first to make sure that they're not crazy. In addition, she told Lewis he looked like a nice guy and seemed like a good guy. The officer also told Lewis that, as their mother, she was okay with this, and that she would tell them that it's fine and that they had a little bit of experience but, they're not like, well, they're not pros. Lewis

described that the type of sex he would have with the girls was... Come on. I'm gonna skip ahead further. The officer proceeded to the bathroom and seconds later, an arrest team entered and handcuffed the defendant. And what happened at trial?

Larry 45:21

Lewis testified at trial that he never had any desire as an adult to have sex with a minor, that he agreed to do so only because the agents put the idea in his head that was never there before. He stated that his memory was somewhat foggy about the night. He also explained that whenever he expressed reluctance or doubt, the agents diverted the conversation and complimented him. What a surprise.

Andy 45:48

That sounds like grooming right there.

Larry 45:52

When asked about the comment that he thinks that... I don't want even read that. I don't know how that got in there. Who put this text together? Anyway, Lewis stated that he was told...

Andy 46:05

It just happened by magic.

Larry 46:10

He was curious, and he met curious about what was going on in the hotel room, not curious about the youngsters that were supposed to be there with their mom. But the jury did not agree with him.

Andy 46:22

Alright. And over the state's objection, the circuit court granted Lewis' motion to instruct the jury on the defense of entrapment. The court instructed the jury as follows with Illinois pattern jury instruction, it is a defense to the charges made against the defendant that he was entrapped. That is that for the purpose of

obtaining evidence against the defendant, that he was incited or induced by a public officer to commit an offense. However, the defendant was not entrapped if he was predisposed to commit the offense and a public officer merely afforded the defendant the opportunity or facility for committing an offense. You people have asserted for years that entrapment defenses are rarely successful. Why is that?

Larry 47:08

Well, juries tend to side with law enforcement. Juries tend to be more representative of the middle class, and of people who've lived a law-abiding life, and they tend to side with law enforcement because they're the good guys trying to capture bad guys that are doing bad things. And that's especially true when it comes to crimes involving minors.

Andy 47:30

And the state argued that the appellate court erred in granting relief on Lewis, ineffective assistance of counsel claim. Specifically, the state maintained that defense counsel competently presented the entrapment defense and therefore could reasonably acquiesce to the circuit court's response to the jury questions regarding the legal definition of predisposed. The state also maintained that the defense counsel reasonably did not object to the prosecutor's closing argument because counsel could be confident that the court would correctly instruct the jury following closing arguments. In addition, the state argued that defense counsel reasonably believed it was not necessary to introduce evidence of Lewis' lack of criminal history because he did elicit testimony that defendant had never been involved with sex with minors and presented four character witnesses on his behalf. Alternatively, the state contends that based on the strength of its case, Lewis suffered no prejudice because there is no reasonable probability that defense counsel's alleged errors affected the jury's assessment of inducement and predisposition. What was Lewis' response to that part?

Larry 48:34

Well, Lewis argued that defense counsel's cumulative errors support his claim of ineffective assistance of counsel. He pointed out that the appellate court properly found that he was prejudiced by defense counsel's errors in presenting the entrapment defense. Lewis requested cross relief, arguing that the state failed to prove beyond a reasonable doubt that he was not entrapped into committing the offence, that he was not guilty of involuntary sexual servitude of a minor because that statute applies to sex traffickers, not to patrons- that means patrons of sex, not our patrons- and three, his conviction and sentence for voluntary sexual servitude of a minor should be vacated because the statute violated the proportionate penalties clause of the Illinois constitution.

Andy 49:24

So, what did the court ultimately hold from that?

Larry 49:27

Well, the Supreme Court affirmed the appellate court, which had held that, Lewis, the defendant, was prejudiced by defense counsel's three errors which constituted deficient performance. Strickland prejudice is defined as a reasonable probability, but for counsel's unprofessional errors, the results of the proceeding would have been different, and that Strickland versus Washington a case from 1984, 466 U.S. at 694. The appellate court succinctly stated that the effect of the state's burden shifting inducement argument and the jurors confusion over predisposition was further compounded by defense counsel's failure to inform the jury that defendant had no criminal history. A fact that would have bolstered the argument that he was not predisposed to commit the offense before his exposure to government agents.

Andy 50:20

You are always obsessed with the predisposition of the accused. In this case, the court stated that

the state maintains that the evidence establish that Lewis was ready and willing to commit the crime without persuasion before his initial exposure to government agents. This would be their expected argument. However, according to the court, there are six factors to be considered in determining whether a defendant was predisposed to commit a crime. The character of the defendant, defendant's lack of a criminal record, whether the defendant had a history of criminal activity for profit, whether the government initiated the alleged criminal activity, the type of inducement or persuasion applied by the government or the way in which it was applied, and, finally, whether the defendant showed hesitation in committing the crime, which was only overcome by repeated persuasion. Can you finally, Larry, finally admit that this person was not predisposed to do things with kids?

Larry 51:18

Well, I will just rely on what the court said. The court stated, We acknowledge that, under the totality of the circumstances, the defendant ultimate acquiescence in paying for sex with two minors- remember, he laid \$200 on the table- for sex with two minors must be considered. However, because defendant had no criminal history or involvement with minors, his acquiescence could have been the consequence of the government's persuasive enticement or inducement. In addition, there is no requirement that defendant demonstrate an attempt to withdraw once induced into committing the offense. In fact, the entrapment statute makes it clear that a person is not guilty of the offence if his or her conduct is incited or induced. The agents acting as the minors' mother continually indicated that this was all right, that the minors had done this before, they wanted to do it, and the defendant was not crazy or creepy for agreeing to engage in this criminal conduct. This is the Supreme Court of Illinois. As they relied on a US Supreme Court decision, determining when the government's quest for conviction leads to apprehension of an otherwise law abiding citizen,

who, if left to his own devices, likely would not run afoul of the law, the court should intervene. And that's Jacobson, 503 U.S. at 553-54, a Supreme Court decision from way, way back. I forget what year that was.

Andy 52:53

And as we're running long on time, closing the segment out, I'll just read what is most relevant. It says, We hold that Strickland prejudice resulted from defense counsel's cumulative errors, which constituted deficient performance, and established his ineffectiveness, rendering the jury deliberations and verdict unreliable. Accordingly, we reverse the defendant's conviction and remand the case to the circuit court for a new trial. So this is good news.

Larry 53:22

It is. It's really good news. And it shows what I say about the difficulty at the trial court. This is why the attorneys say you need to cop a plea, because you see what happened. He raised his defense, and the jury didn't buy it. But the jury wasn't properly instructed. The jury did have questions. I had to cut a lot of stuff from 52 pages about the jury sent out note after note having questions about this. And the court said, well, we really can't help you. It's up to you guys to figure this out. And this is an example of over-budgeted law enforcement. And as you've heard me say on this podcast so many times, if you don't want to reduce the resources that you provide law enforcement- we're not talking about totally eliminating them- but if you don't want to reduce the resources, don't be surprised when they have the budget to do this. And as Don said in the earliest segment, he's actually going to be probably surprised that they will get the resources that they need. And if they don't get additional resources, they already have such an excessive amount of resources in the AG's office, they'll find a way to oppose most of these removal petitions. That's just what happens in real life.

Andy 54:36

I gotcha. Well, okay. So, I guess a way to word this though, is if he had taken a plea, then he would not have had this option to appeal, right?

Larry 54:46

That is correct. He would not have this option. But now he gets a new trial, and he's gonna get the proper instruction, and he's gonna get a more careful trial judge. If it's the same trial judge, this trial judge doesn't want to be flipped again. So the trial judge is going to make sure he gets a fair trial.

Andy 55:02

I see. Okay. Dan, do you have any questions briefly about this?

Don 55:06

No, I thought the decision was great. And I tend to side with you on these questions, Andy. I'll quote one sentence out of the opinion that I thought was very relevant. And that is predisposition is established by proof that the defendant was ready and willing to commit the crime without persuasion and before his or her initial exposure to government agents. And I contend there was none there. And in fact, at the beginning of the transcript they had in the opinion when there was a first suggestion that she wanted him to have sex with her daughters, he said, "No way." I mean, he objected and was talked into it. And to me, I've gone back and read two or three of the Supreme Court cases that deal with predisposition, and in my opinion, it's an open and shut case that it was entrapment.

Andy 56:10

But we have talked about on here, Larry says, as soon as you find out that it is not an adult person, that you need to immediately back away and move on. And that would end the whole problem. But that's not what people do.

Don 56:22

Larry's right. I mean, that's the correct behavior. Some of us would question whether it's smart to be out on these websites looking for sex to start with. But whatever the case of what's the right course of action and the best course of action, the legal precedent says that there has to be proof that you were inclined to do this before your first interaction with government agents. And that did not happen in this case. It did not show any evidence of any kind that he was predisposed to this type of behavior before his first interaction with government agents. (Larry: I agree with you, Don. Unfortunately, when it gets to the jury, the jury doesn't. So you have a real hard time keeping the jury from getting these cases because that's where the judges let them go.) But that's why this whole case is about instructions to the jury, because those instructions should have been given to the jury, and they were not. And when the jury asked about them, the judge refused to answer the damn question. And that's why the case got overturned. (Larry: Correct.)

Andy 57:41

And the way Kathleen has described it is after you go, Hey, no, I'm not interested, they keep speed dialing you back, which is nutty. That totally brings you back into the fold. And then even in this one they talked about, like, the officer is grooming the defendant, saying no, no, no. Come on back. You're great. Like really? Well, very good. Anything else before we close out? Because we do pretty much have to shut the show down now, Larry.

Larry 58:09

All righty. Do we have a mystery speaker this week?

Andy 58:13

We do. That's where I was just about to head. We can cover the one that I did last week. And this was before the conference because it was a whole big production to do the podcast at the

conference. There's this great microphone that the sound guy lends me, Larry, that you just sit on the table. You used it last time in Houston. And it picks up so well. It's so amazing how well that thing works just sitting there on a table. But anyhow, last time, this was from 228. I don't recall anybody- I think maybe somebody wrote in, but I don't know who it was because it was very busy. But this is who I played last time.

Ronald Reagan 58:46

I would think that some of the bills that have been suggested, such as not carrying a loaded weapon on a city street or in town, this might certainly be a good one. There is absolutely no reason why, out on the street, today, civilians should be carrying a loaded weapon.

Andy 59:04

Now that obviously came on the heels- I don't even know if the other shooting had happened by then. That was buffalo. I don't know if Uvalde had happened yet. Do you know who that was, Larry?

Larry 59:13

Oh, I know who it was. That was a former President Ronald Reagan.

Andy 59:16

Yes, it was. Don, did you know it was? (Don: No, I did not.) Okay. I couldn't recognize it at all. When you hear him in modern and clear, I can pick him out instantly. This one did not come out to me at all. And this was like from the 60s or 70s when he was...

Larry 59:31

This would have been back in his gubernatorial days when everybody was afraid of the Black Panthers. And this was in response to, you know, we can't have black people carrying weapons around the street, but it's different now that it's not black people doing it.

Andy 59:44

Absolutely. That's why I found this to be super funny. Alright, so that was last go round. And then this one, if you don't get this one, just stop listening if you don't get this one. I think that's a fair assessment, don't you think Larry?

Larry 59:58

Yeah, and I couldn't help myself because this one is consistent with some recent news.

Who's that Speaker? 1:00:04

I would, I would, I am, I am pro-choice in every respect and as far as it goes, but I just hate it.

Andy 1:00:12

Alright, so like I said, I had to clip that down because there was a bunch of stuff in there that would have given it away. Seriously, if you don't know who that is, like, you need to you need to possibly listen to some new news because you're not picking up the right voices. Come on, man, you can't give the answer in chat now everyone sees it. You're fired, Don. That's why you're not allowed in chat. \*Don laughs\* Send your answer to registrymatterscast@gmail.com. (Don: I got the answer.) Yes, you win. And then, Larry, while you have a moment, you can look up to see if anybody subscribed on the snail mail side of things. But we did get two new patrons at [patreon.com/registrymatters](https://patreon.com/registrymatters), that was Andrew and Mark. And they came in some time over the last couple of weeks between now and the conference in the past. But I do want to point out that a handful of people have been incredibly generous over on the FYP side and donated over on the link on that side. And I can't thank you guys enough for the contributions and the support of the program, because it really helps move this thing along. And you that's all I really wanted to say there. Thank you so very much from the bottom of my heart.

Larry 1:01:30

Yes, we have no new print subscribers, but we did have a generous donation to help defray the cost

of the printing operation. So we appreciate that very generous person, because we're gonna have to reexamine the print subscription and distribution if it doesn't increase in volume.

Andy 1:01:46

We're gonna probably move to smoke signals, you think?

Larry 1:01:50

Well, we probably won't do that. But we need economy of scale. And we don't have that with the number. So we need to double or triple the number of subscribers we have.

Andy 1:02:01

If you are receiving this, and you're primarily on the inside, then share it and try to get some of your nearby residents to subscribe to this also, and spread the word. Tell mom and dad and have them spread it around and so forth. And that would help us out immensely. And I think that about does it. Don, thank you very much for joining and all the information that you provided. And also, I really want to thank you for all the advocacy work that you do supporting everything pretty much solo in South Carolina, and then all the work that you do at the conference. It's incredibly kind of you to donate as much time as you do.

Don 1:02:36

It's my pleasure. Thanks, Andy.

Larry 1:02:37

And also, he has been nominated to be on the board of directors of a very outstanding organization.

Andy 1:02:48

Oh, which one might that be? Geez, um, let me think, let me think. Do I know which one it is, Larry? (Larry: Maybe.) Maybe. Okay. If you don't know, again, you're probably listening to the wrong program. But all right, Larry, anything else before we head out of here.

Larry 1:03:02  
I'm glad to be here with you again.

Andy 1:03:06  
Thank you very much. Well, you know, I couldn't get you last week. I had to have a stand-in with two PhDs and then the executive director of NARSOL. That's what it took to replace you last week.

Larry 1:03:16  
And they did a spectacular job.

Andy 1:03:18  
They did do great. All right. Thanks, guys. All the shownotes, registrymatters.co You can find all the other stuff. Everything else has already been published every other week. And I hope everybody has a great week and I will talk to everybody soon. Thanks, guys.

Don 1:03:36  
Goodnight.

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**Glossary:**

PFR – Person Forced to Register	CAGE – Citizens Against Government Entrapment
NARSOL – Nasional Association for Rational Sexual Offense Laws	PV – Parole / Probation Violation
AWA – Adam Walsh Act	SMART Office - Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking
BCC – Bureau of Community Corrections	MSR – Mandatory Supervised Release
CCC – Community Corrections Center	ICAC - Internet Crimes Against Children
CCF – Community Corrections Facility	ACLU - American Civil Liberties Union
ICAOS - Interstate Compact for Adult Offender Supervision	ACSOL - Alliance for Constitutional Sexual Offense Laws
PC – Protective Custody	ALI - American Law Institute
PREA - Prison Rape Elimination Act	NCIC – National Crime information Center
DOC – Department of Corrections	
CSL - Community Supervision for Life	
DCS – Department of Community Supervision	
IML – International Megan's Law	
SOMP – Sex Offender Management Program	
BOP – Bureau of Prisons	

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