



## Registry Matters Podcast

Episode 266

Recorded 5-13-23

0:00:00

Announcer

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0:00:18

Andy

Recording live from FYP Studios East and West and all I hear in the chat room Larry is crickets transmitting across the Internet. This is episode 266 of Registry Matters Good And you Sir how are you?

0:00:31

Larry

Doing awesome. How are you?

0:00:33

Andy

I'm doing fantastic so make sure that you find us on YouTube, click 'like,' and subscribe. Download the show on your podcast app and give all the reviews and do all those great things. You know what I'm saying? You know this rule Larry?

0:00:53

Larry

I have heard tell of this, yes.

0:00:56

Andy

I got a question for you. There was a conviction in court. In civil court, are you still found guilty? I guess you're still found guilty in civil court.

0:01:08

Larry

You're found liable, but yes, go ahead.

0:01:11

Andy

Ah, OK, Here's my question. Trump went to court. Or I guess, the jury announced that they found him guilty of inappropriate things with this woman. And I'm not trying to go into that part of it because of who he is. And I was wondering this question if it is a civil regulatory scheme, Larry, this is a civil regulatory scheme, this registry thing, right?

0:01:37

Larry

That's what they say.

0:01:38

Andy

And so if it's a civil regulatory scheme and you are found guilty in civil court of doing inappropriate things, and he wasn't found guilty on this part, but just go with me, then wouldn't he end up on the civil regulatory scheme?

0:01:52

Larry

I have heard of a state or two that has been requested in legislation to make a person who had been found civilly liable to register. I don't believe any state has added that to the enumerated conditions that will trigger registration, but it has been thought of before. And remember, the burden of proof is so much lower in a civil case, it's only by a preponderance of the evidence versus beyond a reasonable doubt in a criminal case.

0:02:28

Andy

And preponderance is that's the 50 + 1?

0:02:31

Larry

Slightly more than 50 percent. Whatever it takes to move the conscience of the Fact Finder to conclude that it was more likely than not.

0:02:42

Andy

I see. Interesting. Do you see the quandary there though that if you're found guilty in civil court, you would end up on the civil regulatory scheme or I guess worded otherwise, if it is a civil regulatory scheme, why does it take Criminal Court to put you on the civil regulatory scheme?

0:02:58

Larry

A great question, but let's don't talk about that too loud, because since it's already been proposed out there, I could see that there'd be an advocacy that would spring up and say, "Well, let's take him into civil court, and get them found liable." Kind of like after OJ Simpson when he was found not guilty in Criminal Court, then he was tried in civil court and he was found liable for the death of Nicole Brown Simpson and Ron Goldman, to a much lower standard so that you could put him on a registry for that, with that low, much lower showing of probability. That would start us out on a path where there would be really no need for a Criminal Court. You would just bring everyone to a civil inquiry and find them guilty with a lesser standard of evidence and say that you have to register and we get to punish you for the rest of your life or something we couldn't convict you of doing.

0:03:52

Andy

That sounds horrible. It's still bad enough that you're found guilty with the higher standard and you're punished for the rest of your life. Except for it's not punishment. It's a civil, regular choice scheme, right?

0:04:05

Larry

Right, but we have to show that it's punishment. We have to stop with our summary judgment. And you sent me a plethora of pleadings from a state that I will not name tonight for fear of provoking a backlash. But I read through the most significant amount of that and that's exactly what they are doing.

0:04:27

Andy

I see. All right. Well, please, sir, give me a rundown for the show this evening, if you wouldn't mind.

0:04:33

Larry

We've got a couple of questions that have been submitted. They shouldn't take too long. And then we're going to get into this crazy case that you seem to be obsessed over that came out of Albuquerque about a police officer here, and then we're going to get into a deeper dive. The plea process and the two tie together the case and the plea bargaining process, which I don't think you're much of a fan of.

0:05:08

Andy

It seems like there's a penalty for taking a plea deal as opposed to, I'm sorry, for taking something to court instead of to trial instead of taking a plea deal. It seems that way.

0:05:21

Larry

Well, there is.

0:05:23

Andy

Should there be?

0:05:25

Larry

I don't know. That's why it's called a plea bargain. Because in theory, both sides win.

0:05:34

Andy

Just nobody gets everything they want, but nobody walks away totally happy either.

0:05:40

Larry

That's the reason why it's referred to as a bargain. But as we will illuminate this evening, the process has been distorted over the decades and it's really not what it should be, but yes, we're going to get into it with this discussion and I'm surprised that you even know about this case up in Pennsylvania.

0:06:01

Andy

Well, you'd be surprised what I know about. All right, well, let's move on. We'll have the first question here. It says, "Love the podcasts and always look forward to new episodes. I live in Iowa. I prefer to remain anonymous on the podcast if you use my question. OK, "John", I don't know your name though. I'm just picking on you. I own my own home with three bedrooms and it's in a location in the county that is perfect for those with the 2000-foot law restriction. I don't have that myself. I have one roommate who is a PFR and has the restriction. I still have a bedroom remaining. I'd like to put another PFR in there as well with the same restriction, but the parole officer won't put more than two of us PFRs together. What is the proper way to fight this kind of

battle? To let more than two live together so I can help people from going homeless? Thanks for your time and effort and all you do."

Andy

Great question.

0:06:57

Larry

It is, and I'm going to make some assumptions here like I typically do with questions when he says the parole officer will not allow. The inference is that both of the people are on supervision of some sort. Probably parole since they said the parole officer, well, if you have an addition of supervision, it would probably be not wise or very unwise to try to challenge that. If it's been Iowa's PFR registration scheme, that's a whole different matter. There are some states that have laws that the people that are on the registry can't live together. They refer to that as clustering, you see? But we're going to assume that this is the condition of supervision and when you're on the supervision, particularly 'parole' and that word is key because parole is theoretically a test drive of early release from prison, So far so good, right?

0:08:00

Andy

I'm with you.

0:08:01

Larry

You've gotten out of prison early, and when you're leaving the walls of prison early, they have extraordinary powers over you in terms of what they can limit you and your activities to and your associations. Having said that, I would probably not try to rock the boat. What you're going to end up having happen is the person who is attempting to join the other person in living there and you start rocking the boat, you may end up with the first person not being allowed to live there. Because I can see the supervising authorities say this was a troublemaker, and therefore, our client is not best served by living with a troublemaker who's trying to rock the boat. Now, if it's something Iowa law specific, then I'd have to take a look at that part of the statute and figure out what the best strategy would be. But I think I would leave this one alone.

0:09:00

Andy

Yeah, I can see why. A friend of mine does this in the Augusta area and I don't know who he has renting now, but in the past, he has had two PFR roommates along with him being a PFR.

0:09:16

Larry

Well, I commend what he's doing. I agree with it because he's trying to provide an opportunity where a person has limited options that are subject to that 2000-foot requirement and stipulation. If you look around the urban settings, it really puts a lot of restriction barriers. 2000, it's almost half a mile, right? It's 5280 feet as a mile, so you're approaching half a mile of distance, and that puts a lot of things off limits.

0:09:46

Andy

Absolutely. All right. Well, then let's move over to the next question, and this is, "I'm writing about an inmate that was sentenced per Cali." I'm assuming that's California?

0:10:01

Larry

Correct.

0:10:02

Andy

Cali, Penal Code 288ALL. the allegations of this inmate claim he is part of the LBGQT Plus community and at one point took photos of an underage boy. There was never any human contact, just photos. Regardless of the allegations, the inmate was sentenced to two years for every photo, of which he had had nine in total. He is on his 10th year of the 18 he was sentenced for. Per Cali Penal Code 667.5, this crime is considered violent. I feel that this is not right and should be separated in a more ethical manner. Due to the changes that have been happening, he is willing to use this case in an attempt to change the law in a more meaningful manner. I'm hoping to get some feedback on your thoughts. Do you feel this constitutes violence or am I on the right track? I feel there should be a better way of handling the law."

0:11:00

Larry

I'll take the first question. Do you feel this constitutes violence based on what he said? I see very little violence since taking photos, but the citizens of California have found it to be very objectionable and they have made a law that says that doing this is so objectionable that we will treat each photo as an individual and separate count. And therefore, he's in a conundrum here because it is the law. And what can he do about it? Well, what he could do as he could allege that it's cruel and unusual punishment. We just had an episode about that, didn't we?

0:11:46

Andy

I believe so, yeah.

0:11:48

Larry

Yeah, well, cruel and unusual punishment is an almost impossible standard to me because putting people in a chamber filled with gas or in strapping them to a chair and putting electrodes on their body and using them up in the most painful way that can be imagined if not considered cruel, unusual punishment by the US Supreme Court. Therefore, it's hard to imagine that an 18-year prison sentence where you stay alive would be deemed cruel and unusual punishment.

So if I were going to look at a legal challenge, I would try to look at a challenge for a person that has more time imposed than 18 years, right? 18 years is a long time, but it's not shocking in terms of how much time is imposed for people for these types of offenses. They can be 60, 70, 80, 100 years, effectively a life term and therefore, this is not the best candidate to raise that challenge.

But the other option is to get the law changed where you would have the amount of help that could be stacked. So each one would be an individual up until a certain amount. And I think we did that here in my state. I think there's no precise language, but there's guidance in terms of how many years they can get for certain levels of porn possession and I think it maxes out around 10 or 11 years, which is better than 18. Oh, he's got the a legislative approach, and a legal challenge, but this guy's not the best candidate for a legal challenge.

0:13:28

Andy

These laws were written when the best you could really come up with was like a Polaroid. I'm assuming that that's how this kind of law comes about, where the cost of having a photo was significantly higher than it is now, where you can snap 100 pictures in 10 seconds on your phone.

0:13:48

Larry

Probably the statute could be old, but it's the objection of the community's sensitivity. The citizens of California are not too happy about having their teen boys' photos taken, revealing their private parts to older adults. And they're expressing that outrage through a statutory scheme that says punish these people. So really, that's their prerogative to do that.

0:14:17

Andy

Let me throw this at you to get a little bit nerdy for a second. When you take a photo with your camera, at least on modern phones, it'll take 2, 3, 5, or even 10 pictures to analyze which one's the best and possibly merge them so that it takes them underexposed and overexposed and then blends to give you like the super-dark darks and the vibrant colors at different exposures. Now your phone could be holding on to 10 pictures for every picture you have, and if somebody, if some forensics person wanted to get really really picky, they could see you've taken one photo, but you have dozens.

0:14:56

Larry

Based on a significant amount of time in many States and therefore, like I say this guy with 18 years, although I feel that successive is not a good candidate for a challenge. Under any provision of the Constitution that I can think of.

0:15:12

Andy

Yeah, I agree. I understand.

0:15:13

Larry

I can't see the Supreme Court of California of the United States, either once saying that this is cruel and excessive and unusual punishment.

0:15:23

Andy

Would you do me a favor and would you go the other direction could you construct in Larry's perfect land what case you would want to challenge this way? Have you ever thought about that?

0:15:37

Larry

Someone who has a very long sentence that effectively is a lifetime sentence and that person hopefully is the first-time offender and they got a life sentence for something and hopefully, the pictures they snapped were of a person who was not too much below the age. The public is less incensed and enraged if the person was 17 years old versus if they were 12 years old.

0:15:59

Andy

We were talking years ago about the kid who took pictures of his junk and sent it to his girlfriend who was underage and he got tried for having it, distribution, and possession of and it was pictures of himself because he was a minor. It was just so bizarre. But maybe that would be a kind of case?

0:16:18

Larry

Something like that, that from Maryland, I believe the pure.

0:16:21

Andy

I thought it was North Carolina. There was another one we talked about from North Carolina. I thought, but whatever, it doesn't matter. That's just ridiculous that you have pictures of yourself and you're a minor. And that's like, I don't understand. That one really made my head twist around in circles.

0:16:36

Larry

Well, the problem is, during the drafting process, we were not there and we did not tell them that. The way this was constructed, a prosecutor can charge the minor. If we're not intending to have minors being charged for sending pictures of their junk, we've got to say that because the court cannot remember all the episodes we've done, they can't write into the statute what the legislature has deliberately left out. If you want that exemption, you better say it, because otherwise it's legislating from the bench and we cannot have that.

0:17:10

Andy

That sounds bad. I've heard that people get pissed off about this.

0:17:15

Larry

Well, they do. Until they're benefitted and amazingly they're okay with legislating from the bench if they can't win it any other way. We're all like that. You and I both are the same way, of course, but I would look at this from a legislative point of view. He's got to find a sympathetic lawmaker that has no threat of losing their election and doesn't matter what side of the aisle. Preferably it's on the Republican side, but they're kind of scarce in California. But you've got to find someone who is safely in their seat.

And you got to show them the absurdity of this and that the California prison system is filled with people that are serving exceptionally long sentences for first-time offenses because purely of the number of images. And that's not good for us because our prisons are costing us too much money already. You want to win the liberals over because they see more funds that they can do things with and they'd rather spend those dollars on other things than prisons.

And you can win the conservatives over because theoretically they're trying to be so frugal with the resources and you can save money. And if the conservatives maintain any intellectual honesty, they would be okay with that if you find the right conservative to lead the charge.

0:18:32

Andy

Very well. Shall we move along, sir?

0:18:36

Announcer

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0:19:24

Andy

I got a bone to pick with you.

0:19:26

Larry

Let's do it.

0:19:27

Andy

All right. Well, you think I don't pay attention to the news, but I saw that there was a police officer that was arrested in Albuquerque, which I believe is kind of in your neck of the woods. He allegedly tried to coerce a 13-year-old into a relationship. Do you feel up to talking about the situation unfolding in the Duke City?

0:19:50

Larry

I do. I'm familiar with it, but I don't know how it can be up there in New Jersey and Pennsylvania and all across the Northeast and Georgia and everywhere else where I've been hearing people. This has been brought to my attention by multiple people.

0:20:06

Andy

Is that right? It's a pretty high-profile case and I'm guessing it will probably go to trial and then there would be a trial penalty if he

chooses to do so. Is that the reason why we are going to talk about it tonight?

0:20:20

Larry

Yes, this is definitely why we're going to talk about it because it fits in with the trial penalty plea bargaining process. So it is definitely why it's in here. That's why I said go ahead and put it in, even though I didn't think anybody cared about it. But my phone's ringing off the hook.

0:20:36

Andy

All right, well, to set it up, a former police officer, former now because he's no longer a police officer after this, Joshua D, who is 27 years old, has been accused of trying to strike up a romantic relationship with a 13-year-old girl in March. It is alleged that he invited her to sleep over. Also, it is alleged that he tried to kiss her. How did they meet?

0:20:58

Larry

They met after the officer initially responded to her house when she contemplated suicide on two separate occasions.

0:21:08

Andy

That's pretty crazy, Larry. What has he been charged with?

0:21:12

Larry

Well, so far he's been charged with child solicitation by electronic communications device and contributing to the delinquency of a minor. And he's also charged with receiving public money for services not rendered after meeting the girl at her apartment on multiple occasions while in uniform and on duty.

0:21:33

Andy

Can you say that part again please?

0:21:38

Larry

You've never heard of this charge before? Neither have I. I had to look it up to see if it existed. He's charged with receiving public money for services not rendered. He was on duty allegedly, and he met the girl on duty and in uniform, so therefore, he was stealing from the citizens of Albuquerque.

0:22:00

Andy

I have seen videos like, you know, like whatever cop drama or whatever, where a cop spends a little 'on-duty' time in maybe his girlfriend's house, whatever, something like that and they get in trouble for, I guess, essentially stealing, right?

0:22:17

Larry

Well, I mean, it is, but you have to admit that that charge is funny, right?

0:22:20

Andy

It's not funny. It's never funny, Larry. Nothing you offer is ever funny. Let me give you a little bit more background. On March 9th, police learned the teen reported Officer D as being inappropriate with her. The girl told police she was scared as Officer D had become aggressive when she wouldn't kiss him. Police said Officer D first met the girl on February 8th. When he responded to her residence after she threatened suicide due to bullying at school. Then on February 14th, he responded to the girl's home again when she threatened suicide with a knife. I'm guessing that the department policy required the officer to cooperate with their investigation.

0:22:59

Larry

That is correct, and the former officer reportedly told investigators he thought the girl was 14, but he had developed a crush on the teen.

0:23:09

Andy

Can you tell me the significance of being 14 versus 13 under New Mexico law?

0:23:16

Larry

There's no discernible difference whatsoever, and I was chuckling about that. And, of course, that's not funny either to you. But if you were to spend the whole day in any public forum around any state in the country, and you ask them if a 27-year-old is trying to hook up with a 13-year-old. And he thought that she was 14. What difference would that make? I don't think you'd find a single adult that would say it makes any difference, but he apparently felt it was important that being 14 rather than 13.

0:23:46

Andy

I'll bet you if you were in Mississippi or Alabama, everyone would be like, "Yeah, that makes all the difference in the world."

0:23:51

Larry

So that's another funny as far as I'm concerned.

0:23:54

Andy

Again, not funny. What did the police find when they searched the former officer's vehicle?

0:24:00

Larry

Well, at that time he was still an officer. They found an unopened package of condoms. And this is according to court records. When they searched his Snapchat account, they found an inappropriate chat with a separate self-proclaimed 13-year-old girl.

0:24:18

Andy

This is going South really fast, Larry. The article stated that prosecutors have filed a motion to detain him until trial, calling

him a danger to young female children in our community who has shown that he has a sexual interest in vulnerable girls. And the motion prosecutor said the Snapchat messages were between Officer D and a separate teen are still being reviewed. The prosecution stated, however, this indicates ADL, the minor in this case, may not be his only victim. According to the story, the girl was taken to a hospital and treated for the next several days after the incident. Then Officer D began texting her on February 25th asking if she was doing OK.

Police said the pair began talking over the next few weeks, with the former officer at first offering to cruise by to check on her, offering to bring snacks and candy. He then offered to take her on a ride-along and, "Would buy you anything you want." Albuquerque police policy certainly would not have permitted this kind of contact. That's got to be true, right?

0:25:21

Larry

You're correct, but it got worse. On March 3rd Officer D visited the teen at her apartment for the first time, texting her that she was very cute and adorable afterward, according to the complaint that was done. Then on March 5th, he texted that they'd go to a movie together, and, "This might be bad, but I think I like you." He was definitely escalating.

0:25:46

Andy

Police then said the teen texted that she was inexperienced, being in a relationship and he replied, "I can teach you and we can keep it a secret. I don't think people would be okay with us dating," he texted the teen, according to the complaint, "because you're much younger and I'm much older LOL." Police said the teen asked, "Is that bad?" and Officer D replied, "Technically yes, LOL." He then reportedly told the girl she should come stay the night sometime. This certainly sounds like a solicitation to me.

0:26:20

Larry

Well, not so fast asking someone to spend the night does not necessarily imply sex is on the agenda. I mean is it possible to have someone sleep and not have sex with him?

0:26:35

Andy

That's a stretch. There you go again, Larry, making excuses for criminal conduct. When the teen asked what they would do, Officer D replied, "Well, we can see how the night goes and just take it from there." Can you make an excuse for that though?

0:26:50

Larry

Well, I can only work with the evidence that we have right now. And he said, "We could watch movies, play games, yes, whatever else the night brings." None of those would be considered sex.

0:27:03

Andy

Oh, oh, you want you want me to play the clip from Bill Clinton about what sex is, don't you?

0:27:10

Larry

Not really, but I'm just saying that in a legal sense, you guys are making assumptions that kissing is sex and under the way I read the statute. I don't believe that it would constitute sex. So therefore, if he said, "I would like to kiss you," that is not the same thing as saying, "I would like to have sex with you." Those are two different activities.

0:27:31

Andy

The allegations are that Officer D deleted the messages between the two on his phone, but records show they texted each other 250 times in two weeks. Also, police said surveillance video in the teen's apartment caught Officer D meeting with the girl after midnight on March 9th while on duty and in uniform. The video reportedly shows him hugging the teen before they move out of view and he allegedly tried to kiss her. Explain that one.

0:27:55

Larry

Well, again, kissing is not sex, I'll add a little bit of adlib here. You would think that after 33,000 missing emails and all the hoopla about that, and you would think after \$787,000,000 having been paid out or in the process of being paid out for text messages and emails, you would think that people would be very careful about what they put in text messages and e-mails, but anyway, the teen told police she covered her face with a folder to stop him from kissing her and he got frustrated. But he got frustrated is 'her' opinion.

0:28:37

Andy

He texted her, "That was mean," and she replied, "How was it rude?" He texted, "Because I was hoping for a yes." Larry, you're short on spin, so try to spin your way out of it.

0:28:51

Larry

Well, I can easily argue that he was hoping for a yes to the kissing since they were in a public place. But again, kissing is not sex. It would lead to sex, but it isn't.

0:29:07

Andy

The police said the teen told him that Officer D should have been there to protect her. That is a very enlightened response from a 13-year-old.

0:29:16

Larry

Well, it may be an enlightened response. Or maybe it's someone who's been coached.

0:29:24

Andy

When the police interviewed Officer D, he initially told them he was doing a welfare check on the girl and denied trying to kiss her. He said he invited the girl to stay over to give her options where she would have a sense of peace. Is that a viable defense?

0:29:38

Larry

It's going to be tough because the police said he acknowledged it was not appropriate and then he told police he had developed a crush on the teen and felt they were more than friends. His own words are going to be bad. Remember, don't talk to the police. Well, he was the police, but he talked to the police. He asked her for photos and sent her photos, including of one of him in his bed. But in the public domain, that picture of him and his bed was not in of itself a crime. It did not say he was exposing his junk. But this is going to be a tough case to defend, absolutely, and that's why we're going to dig into this about what the strategy will be a little bit later. He has definitely dug himself into a hole.

0:30:24

Andy

Can we dig into that strategy a bit, if you don't mind?

0:30:28

Larry

Oh, sure, that's going to be exciting because I'm hoping to be a part of his defense team. I'm actually volunteering my services for Pro Bono.

0:30:39

Andy

So how did the pretrial detention motion go?

0:30:42

Larry

It's still being decided. He's being held in detention right now. He'll be back in court on May 18th, and the court at that time will determine if the state has met its high burden of proof. And the burden is that no set of conditions can be fashioned that will ensure his appearance and protect the community. This is a part of our fabulous constitutional amendment that the voters adopted some five or six years ago that eliminated cash bail and the trade off to win this Constitutional amendment was that we were going to empower our judges to hold people without bond. Theoretically, it's going to be a very extraordinarily rare case. It's become far too common and this is an example of it over use. There's no reason for this man to be held pretrial. There just isn't.

0:31:29

Andy

Do you think that they will prevail?

0:31:34

Larry

Being that it's high profile and being sensationalized and has made its way around the country apparently, I think it's going to be tough for a trial judge to grant him release. But man has no criminal history or he wouldn't be on the police force. At the most he could have used a little pot in his lifetime. He possibly had a DWI that I think that they can get past if a number of years has elapsed since the DWI, but I don't know that for certain. But he has no criminal history. I'm assuming that a person with no criminal history with 4th degree felony charges, we looked at 4th degree felony charges, which is the most minimal charges we have on the felony sides, most of them are released to the community. There's no reason to hold this man. They can fashion conditions of

relief, including electronic monitoring, including exclusion zones. They can do all those things.

And he needs to be out of jail. He's a target for all sorts of abuse. He's locked down 24 hours a day. This is atrocious.

0:32:36

Andy

I will say that you're sounding a whole lot like a bleeding-heart liberal. Why should he get preferential treatment?

0:32:43

Larry

Well, there's no bleeding-heart here. I simply believe in our constitution and the document guarantees a right to bail and the presumption of innocence. I'd say the same thing regardless of who the accused happens to be. Former President Trump deserves no less. An accused police officer deserves no less as well. I only wish that someday it will come to be that the police can bring themselves to say the same thing when they accuse someone of committing a crime because I say it without any hesitation.

0:33:16

Andy

And I'm going to assume that he can't get a fair trial in Albuquerque. Do you agree?

0:33:23

Larry

Well, prior to my stint on a grand jury I would have said yes he can get a fair trial. At this point I'm not as confident that he can get a fair trial, but I'm hoping he can get a fair trial because I'm assuming they're not going to offer me any type of reasonable plea. I would have said a fair trial was possible because I used to think our community was more enlightened, but I saw it from a different perspective when it came to sex cases. There was no interest whatsoever in fairness.

0:33:57

Andy

All right, well then if we go for worst case scenario, if he's convicted on all charges and they throw every book at him, how much time does he face?

0:34:06

Larry

Six years.

0:34:07

Andy

Only 6.

0:34:09

Larry

Correct.

0:34:11

Andy

Do you think the prosecution will offer some kind of plea deal?

0:34:16

Larry

It's going to be very difficult because like I said, there's so much been said about it and the community is rightfully outraged. We pay these people decent money to be on the force and they're supposed to serve and protect. And clearly, if the allegations are true, he made some bad choices. But again, I don't think we need to throw him in jail.

0:34:44

Andy

Let's assume that you've been retained by the defense to help. What is your strategy there?

0:34:50

Larry

Well, my strategy is to keep this man from being sentenced to any jail or prison time. It would be very tough on him being a former law officer. You combine that with the age of the person who's making the accusations and it's not going to go well for him in prison. So therefore, he's in protective custody for the entire time. And I don't even know if they can keep him safe, even in protective custody. I've not been in the big house before and I don't know what they would do with something like this when you were in the big house. Did they have any former police officer serving time?

0:35:26

Andy

I don't recall running into anybody of that sort. But I wasn't Mr. Socialite and going around and trying to politic and shake hands and kiss babies and whatnot. So if you force the state to go to trial and roll the dice, haven't you heard that if everyone did that, then the whole system would crash.

0:35:47

Larry

I've heard that strategy and it's doomed from the beginning. On the defense side, our job is to defend and get the best outcome for our clients. If I were working for officer D's attorney, we would both be on the same page on that. Our job is not to crush the system. Rather, we are to work for the best interest of Officer D at each individual client, and the interest I clearly articulated is to keep Officer D from going to jail. Our interest and job is not to crash the system.

0:36:22

Andy

So in your first move, if you were to attain this position, would you move to suppress the statements that he's made?

0:36:31

Larry

Probably would not. I don't think an attorney would want to do that. I wouldn't want to do that. I would certainly need to review the discovery very carefully before I could say for certain. But he's a police officer. He's been trained as an investigator at some level and trying to say that he did not know his rights is going to be a long shot. And remember you do not want to make the prosecution work because (A) that does no good and (B) each time they win, you have less leverage. The uncertainty that you might

win is part of your leverage. So my strategy would be look at the case, and look for weaknesses that might encourage them to offer a plea that they'll not include prison time. If that's not agreeable, we would ask the state "At least can you agree to not to seek prison time and leave it up to the court?" And they're probably not even going to agree to that. But if they won't agree the stipulation of no prison time or an initial sentencing, then we would ask them to agree to not make a sentencing recommendation at all. And that would be an achievement and of itself.

0:37:35

Andy

Why wouldn't you try to get his statements tossed? It seems like those would be some of the more incriminating kinds of things, so why wouldn't you try to get those removed?

0:37:43

Larry

Well, we're going to lose, but you've got to draft a motion, and you've got to file it. The prosecution's going to have to draft a response, and then you've lost that motion and the possible leverage you have. You always tell the prosecution, "I've got motions that I can file." Each time you file and lose one, you've just taken away some of your leverage. I think the prosecution's going to know a motion like that is not going to prevail because the man is a police officer. He knows not to talk to the police. So I think you're getting nowhere with that. He's a highly educated man. I think he has to have at least a couple years of college to be on the Police Department. He can't claim he didn't understand English. He can't claim all these things that other suspects can claim because he knew better.

0:38:28

Andy

Let's assume that the prosecution says no to any negotiations and then what happens? What's the strategy that you guys would go after then?

0:38:36

Larry

Well, we'd prepare the case for trial. We'd try to shoot them down on their theory that the former officer was seeking sex. That, of course, will be very difficult because the average juror is not going to be amenable to any argument that a 27-year-old man was not seeking sex. I'd also try to sink them on the theft of service charge. And if we get a not guilty on that charge, we've reduced their maximum by 18 months. Each one of these 3 felonies carries 18 months. So you combine 18/18/18 on three charges and then you've got one additional thing on the child solicitation. If you show up for a meeting that elevates that one level and they have not alleged that he showed up for a meeting yet, but that would logically be their next move because that would give them additional exposure. So that's why I said the maximum he's facing, you take 18 for the three felonies, for the two felonies and then you do the enhancement 3 years. So you're looking at a total of 6 years potential exposure. But if we can get the theft of service charge gone, then we've taken 18 months of exposure off the table. I think that's a tough sell. He was on duty, yes.

But what I'm going to do on the defense team is I'm going to come in and say, "Well, okay guys, you're saying he stole service. How



many officers in the interest of community relations have done the same. What are your standard operating procedures that regarding police following up with people who have been victimized by crime, who are suffering any type of adverse and that I would say suicide, almost committing suicide is certainly an adverse situation in your life? So we're going to tell our officers that they can't do any community relations as a result of that? Let's be consistent here. You've never brought this charge against anybody before? I would be willing to file that motion that this is vindictive and selective prosecution and I bet they would have a difficulty showing that they brought this charge against anybody before. We knocked that one out. We just taken 18 months off of them, off of this exposure.

0:40:44

Andy

Wouldn't these then run concurrent instead of consecutive?

0:40:48

Larry

It could be, but if he goes to trial, they're not going to

0:40:51

Andy

Course there's the trial penalty piece. Of the three charges, which do you think is the strongest in your opinion?

0:40:58

Larry

The contributing to the delinquency of a minor is probably the strongest charge. Depending on the evidence they might have, it might not be such a strong case on the child solicitation, but the contributing to the delinquency of a minor? I don't think you can spin that anyway. You show up after midnight at a teenager's house? Most parents are not going to approve of their teen having a late night rendezvous with an older adult that's twice their teen's age I suspect that that one's going to be tough to get a 'not guilty' verdict on. You're not going to get a directed verdict at the end of the trial by the judge saying the evidence isn't there. You're not going to get a not guilty on that one, but you've got that one. But remember, that's about a vegetable PFR offense. That is not a vegetable offense.

We're not one of those states where you can say, well, sex with the underlying motivator for that permission of that crime. So you have to register for contributing to a minor. If that's all that they convict him on, then he's not a registered PFR.

0:42:00

Andy

And then everybody is looking at the text messages will believe that he wanted sex. How do you win on that one?

0:42:09

Larry

It's not what everyone knows that matters. It's what they can prove that matters. I've seen no evidence so far that he explicitly asked for sex. It was implied but not specifically requested, and at least with the evidence that's out in the public domain, now magically, I'm going to become a textualist here. I'm going to look at that statute. I'm going to say, "Where's the solicitation for sex?"

Where did the officer ask for sex?" He said, "Whatever happens." He didn't say, "I want to have sex with you." And I'm going to say he didn't specifically ask for sex. And then they're going to say, "Well what about the condoms?" I'm going to say, "Can you pinpoint the purchase date of those condoms that he had with him?" I would say the average 27-year-old man is running around with many condoms and put it into context; the Police Department assigns a patrol unit to the officer. They get to take it home with them. It becomes their personal vehicle. It's supposedly a deterrent for crime in the community. That officer uses it as his personal vehicle. I would dare say that he might go out on a date driving that patrol vehicle. Possibly, and who knows, but unless you can show me that he bought condoms and he told this 13-year-old that he was bringing condoms for sex, you have not proven that he was intending to use those condoms for sex with her.

0:43:36

Andy

I can tell you that if we rolled the clock back to, I don't know, 2004ish, that I sat on a jury trial for a police officer that had been alleged to have taken photos and then used those photos to extort an informant to give up information. And everyone on the jury. I think I was the jury foreman, thought that he was guilty, but like, show me the Polaroid. And there was no Polaroid. So while we believed he did it, we didn't have the evidence to support that he did it. We found him not guilty.

0:44:14

Larry

Well, being that I'm not expecting a plea offer in this case, if I'm invited to participate, I would definitely roll the dice because that's the hand we're being dealt. But I would hammer the fact that there was no direct request for sex. You're going to make the man a sex offender and he was acting inappropriately and goofy and irresponsibly. But that does not constitute a direct solicitation for sex and your duty, as the great attorney said in the OJ Simpson case, the evidence doesn't fit here. This man was totally inappropriate, but he didn't specifically ask for sex unless other evidence comes out that I'm not aware of.

0:45:00

Andy

Let's say he does get convicted. Then what happens?

0:45:03

Larry

Oh, well, then we have to prepare for sentencing and we humanize this man in every way possible. We have a psycho-sexual evaluation done. We have to at that point, if he gets convicted of the child solicitation, he's a convicted sexual offender. So we have to have a psycho-sexual evaluation done. And, in fact, we would have a full psychological evaluation and we would want to know all about anything that would provide the court with a way to mitigate the sentencing. We would look for delayed development. Maybe he was in special education. We would look at everything, trying to figure out how to minimize the outrage because the judges theoretically are neutral and detached individuals. And at that point, we're arguing directly to the sentencing judge that this man has been convicted and we would we would bring in everything that we possibly can that shows he's

a good person and maybe his emotional immaturity. We would look at his 27 years of age. He may have an immaturity that goes along that doesn't make him act his age and we'd want to show his full life and ask for letters of support from his friends and family. Perhaps we might even find some of his colleagues from the Police Department. They might be willing to write letters and support, but we would try to show a judge that this was an aberrational behavior and he deserves a chance to redeem himself and go on to be a productive citizen. That's what we would try to do. And it would be an expensive proposition because I need psycho-sexual tests and a psychological battery on him, and I need to spend some time going to the people that are going to write the letters to make sure we know what they're going to say. And they don't make their way to the court until we see what they've said. You know, this is not a \$2500 case here.

0:46:50

Andy

Right. And with what you're saying, I get that you're offering your services pro bono, but these other things, when you start calling in third-party services, they're not free. The psycho-sexuals, hundreds, if not in the low thousands of dollars. Where does that money come from?

0:47:05

Larry

Well, theoretically it would come from the Pd's office. He has no income. The case is currently assigned to the Pd's office and they are allowed some funding within reason if they can justify why this is necessary. And with this case, I think it would be considered extraordinary litigation because of the high-profile nature and we might get funding from the state. But again, it's a little unusual that these 3 felonies would merit the type of attention that he's gotten. But on the defense side, we didn't have the control of that. This was a choice made by the District Attorney here and these are the cards we were dealt and if I'm a part of the team, I'm going to do everything I can to get this man the best outcome possible.

0:47:52

Andy

And circling back around, sometimes higher numbers mean worse and sometimes lower numbers mean worse. 4th is low as far as severity in this case.

0:48:02

Larry

That would be correct if you move from the misdemeanor level to a felony, the lowest felony we have is a 4<sup>th</sup>-degree felony, and the basic sentence for a 4<sup>th</sup>-degree felony is 18 months. In the case of child solicitation, if you show up at a meeting it elevates it one level, which would be a third degree, which would give him an exposure of three years versus 18 months. And then the other two charges are 4<sup>th</sup>-degree felonies. But right now they have not enhanced the child's solicitation because I think they're in a conundrum trying to figure out if he actually showed up for a meeting pursuant to the solicitation. They've got to be able to show that he did show up in a meeting. He did show up at her apartment, but there's no indication that he texted and arranged that meeting and that there was a solicitation for sex. They're going to have trouble if they try to do that because I'm going to

say, "Hey, sorry he didn't show up for a meeting, He was already there."

0:48:55

Andy

I see. Gotcha. Anything else before we move on to the final section?

0:49:01

Larry

Oh, I guess we've covered it. We got a lot to go through here and running out of time.

0:49:06

Andy

Very good. We've combined three articles for the segment. A news release from the National Association of Criminal Defense Lawyers, otherwise known as NACDL, says that 24 criminal justice organizations impacted people's think-tanks. Academics, activists and reform leaders from across the ideological spectrum have united and formed a coalition to end the trial penalty.

The trial penalty refers to the substantial and coercive difference between the sentence and a plea offer prior to trial versus the much greater sentence a defendant often receives after that. Would you please expand on that?

0:49:44

Larry

Well, according to the news release, those who choose to go to trial and are convicted often face sentences that are on average three times the plea offer and sometimes measured in decades.

0:49:57

Andy

The news release states that the coercive and punitive effects of the trial penalty are so pervasive that they have virtually eliminated our constitutional right to a trial. In fact, over 97% of cases ending in a conviction never go to trial. Why is that such a bad thing?

0:50:15

Larry

Well, the NACDL statement says there are a number of issues reverberating through our legal system, including the waiver of numerous constitutional freedoms and rights, over criminalization, loss of public oversight, and racial injustice. The Coalition aims to restore the right to trial, helping right those wrongs to ensure a fair, rational and humane criminal legal system.

0:50:42

Andy

If you'll allow me to read a quote, "Over the last half century we have surrendered the framers vision of a system of public jury trials to an assembly line of pleas coerced by threats of severe sentences. An assembly line that has generated mass incarceration, wrongful convictions, racial injustice, and law enforcement misconduct beyond the scrutiny of judges and juries. This was attributed to Martin Sabeli, who is the National Association of Criminal Defense Lawyers, immediate past

president and cofounder of the coalition. "Tell us about the coalition.

0:51:14

Larry

According to the news released, the coalition spans the ideological, political and professional spectrum. And it will breathe life into the criminal legal community by identifying and dismantling the laws, policies and practices that have undermined the vision of the flavors. 40 years of coercive plea bargain is enough. It is time to restore the balance that protects liberty and freedom in the quote.

0:51:38

Andy

We just completed a segment on plea bargaining where you defended the process. Let me read another quote, Rodney Roberts, an exoneree and reentry coach at Innocent Project stated. "When I was arrested and charged for a crime I didn't commit, I was told that if I went to trial. I would probably lose and be sentenced to life in prison. Feeling powerless, I accepted a plea that I would have the chance to see my loved ones again. Little did I know that I would end up spending 18 years in custody, both in prison and civil confinement, before DNA would prove my innocence. Can you please admit that this process is all kinds of effed up?"

0:52:15

Larry

Can admit? I can admit that the process is misused, but according to the N A/C DL, the pressure put on people to accept pleas is so overwhelming. Many people claim they would never ever be guilty of their crime they didn't commit. This man said he thought the same thing until quote, "My life was hanging in the balance." But just because there are problems with the current system, that does not mean it should be scrapped in its entirety.

0:52:42

Andy

I'll share another story with you. One of my first roommates while I was gone had been sentenced to life. He claimed innocence. The prosecution offered a three-year plea deal. Three years for something attributed to murder Larry and he didn't take it cuz he says he's innocent and takes it to trial and the jury finds him guilty and he gets sentenced to life and he died in prison. Which is I like if they only offered a three-year deal that it seems like they had pretty scant evidence. It seems.

0:53:13

Larry

That would likely be the case, yes.

0:53:16

Andy

There's another story. There's another example from the NPR story. Robert Rose made one of the most important decisions of his life. In 1995, Rose was on trial in New York for grabbing a gun away from his mother's boyfriend, then shooting and killing the man. Deep into the case, prosecutors offered him a plea deal. He followed advice from his lawyer and continued with the trial, with the homicide trial, Rose said. In the end, I was sentenced to 25 to

life instead of the 3 to 9 that I was offered, Rose remembered recently in an interview from his home in New York. And I guess my not wanting to take a plea frustrated the judge as well as the prosecutor. And as a result, I was punished for, you know, exercising my right to go to trial. How do you justify that one there, Mr. Larry?

0:54:00

Larry

Well, I can't justify the abuse of the process. I can say that the plea offer that he had dangled before him would have been preferable to the actual outcome after the trial in Mr. Rosen's case. I tend to agree with Cully Simson, who is the senior legal fellow at the Heritage Foundation, which is a conservative leaning organization, Simpson said. The system works pretty well as it is. He went on to say that quote, the fact that many cases result in guilty plea, it's not a problem because in many cases, and I've been a criminal defense attorney, the person is guilty and they're taking advantage of a plea deal that subjects them to less time. So I don't think there's a real trial penalty, he says. I think it's a privilege and that's the end of the quote.

0:54:52

Andy

This is hopeless, really. Rose was punished for going to trial. He spent about three times longer in prison for going to trial rather than taking the plea. What do you say about this and the fact that prosecutors stacked charges to induce a plea?

0:55:09

Larry

Well, I say we need to fix the system. I keep saying that it's got problems, but we are in an adversarial system and theoretically, it's a plea bargaining system because the prosecution gains. The certainty of a conviction and you gain the certainty of an outcome that's not at the whims of the court. It is a managed outcome, and it benefits both if it's done correctly.

0:55:35

Andy

The leverage is all wrong, Larry. They're dangling all of your freedom in your face for you to walk away scarred, bloodied and bruised. I get the plea bargain like the bargain side of it, but if you walk off the car lot after you've negotiated with the car dealer, you don't end up feeling like you just got, well, all right. Anyhow, I don't think the system can be fixed. As Clark Neily, senior vice president for legal studies at the Cato Institute, explained, it's no accident that more than half of the Bill of Rights is devoted to the subject of criminal jury trials.

The Founders' decision to put citizen participation at the heart of the administration of criminal justice is unmistakable. And our decision to replace that process with one of plea driven mass adjudication has led to countless false condition convictions, swept untold amounts of police and prosecutorial misconduct under the rug and thoroughly undermine the morale and political legitimacy of the American of America's criminal justice system.

0:56:40

Larry

Everything that Clark said is correct, but this is an issue that we should be able to unite on in terms of fixing it. This coalition is a good thing. The coalition plans to further partner with impacted people and their families, community leaders and criminal justice legal system stakeholders, and local organizers to ensure everyone has a seat at the table in the effort to restore justice to our legal system. Remember, we're the ones who made the laws that said the judges can give you more time for not accepting responsibility. We can unmake that law. We're the ones who are in the driver's seat. It's like we refuse to oversee police conduct. They work for us. We can fix them if we have the will to do that.

0:57:27

Andy

Larry, I see this as being something that maybe you could get this group or this group or this group, all these different kinds of think-tank kind of groups, but when it would actually come down to changing laws. I don't think that the public would get on board some criminal, whatever jury trial, hungry kind of prosecutors going to get up and say that this is going to unleash an untold tidal wave of crime of blah, blah, blah. And these people obviously have been accused of something and they're guilty, otherwise we wouldn't accuse them. And then the public feels all fear mongered and they're going to say no, no, no, we need to keep it exactly the way it is.

0:58:03

Larry

You could be right. And again, that's a shortcoming of We the People. Remember we were blessed. Or we were endowed or whatever. With the system where we get to determine our destiny. We can determine that. We don't want to have a system where everybody is coerced into admitting guilt. We can stop this and we can make the process be what it was intended to be. The prosecution can operate fairly. If they're forced to, they can be prohibited from stacking charges. I remember a guy that ran for President in 2016 said that he would seek the maximum number of charges, and the highest offense. And he instructed his prosecutors to do that through his attorney general. The people voted for that candidate, remember.

0:58:50

Andy

I do recall.

0:58:52

Larry

Well, we've got a chance coming up next year that we can vote again and that candidate may be running as the nominee for one of the major political parties. And if you vote for that again, do not be surprised if the status quo doesn't change.

0:59:08

Andy

We can't even agree that you're innocent until proven guilty.

0:59:12

Larry

Well, I agree with that, and I even said that everybody, including the police the police officer are innocent until proven guilty.

0:59:18

Andy

Well, I know you, but you're well. I mean to say it lightly, you're an anomaly and I agree with you that you are innocent until proven guilty. But I think that by far and large, the mass number of the population, the public in general at large does not understand that concept nor would agree with it.

0:59:37

Larry

That's a real tragedy because I didn't realize schooling had changed. And that was one of the big things that I learned back in the 1800s was that you're innocent to proven guilty.

0:59:48

Andy

Absolutely. Well, I hope this works. I think that everybody should get on board with this. And the trial penalty is an ideologically diverse coalition of criminal justice organizations and leaders committed to ending the trial penalty to ensure a fair, rational, humane criminal legal system. And the coalition aims to eliminate the coercive elements of plea bargaining to restore our fundamental constitutional rights, including the right to a jury trial.

1:00:16

Larry

I agree with you, you should not get sentenced more harshly because you go to trial, but that's the way it's been for quite some time.

1:00:26

Andy

Well, Larry, as usual, I'm very happy that you are here and I can't thank you enough for all that you do for the podcast.

1:00:33

Unknown Speaker

I agree with you entirely. That is why I am here.

1:00:38

Andy

I'll let you do it since you handle the snail mail subscribers. Did we get a new one there?

1:00:44

Larry

We did. We have Benjamin from Texas who joined us this week.

1:00:48

Andy

Fantastic. So he's gonna be getting a snail mail transcript from FYP Education, is that correct?

1:00:54

Larry

That is correct and he subscribed for many months and he renewed his subscription to the bi-monthly publication that an organization I'm affiliated with produces, and he's very fond of the work that both entities do.

1:01:11

Andy

Fantastic. Well, very good. Find all the show notes over at registrymatters.co or find the transcripts at fypeducation.org. Both are part of the same 501C3 organization and you find all the show notes over there that you want to find at registrymatters.co. And without anything else, Larry, I think that that will conclude this evening's extravaganza.

1:01:35

Larry

Thank you. I look forward to being back again soon.

1:01:38

Andy

I'll talk to you soon there. Have a great night.

1:01:42

Announcer

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