



Registry Matters Podcast

Episode 268

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0:00:00

Announcer

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0:00:17

Andy

Recording live from FYP Studios East and West, transmitting across the Internet. This is episode 268 of Registry Matters. Happy Saturday to you Sir, how are you?

0:00:28

Larry

I'm doing awesome. Thanks for having me back.

0:00:31

Andy

Again, I went down the roster and I was looking at Paul, Ringo, George, and there's some drummer before. Let's see, who did I forget? And none of them were available either. So, we're back to you.

0:00:44

Larry

That's really sad.

0:00:46

Andy

Do you remember who the drummer? Oh, see, someone already told me. Do you know who the drummer was for The Beatles before the drummer for The Beatles was Ringo?

0:00:54

Larry

I don't know other than Ringo.

0:00:56

Andy

OK, there was a guy, and I'm trusting that AI says it right? He says it's Pete Best. I knew that there was a drummer, and it's not like Ringo was that good of a drummer. I think he just continually showed up, kind of like us. Please make sure that you press all the likes and the subscribe buttons and leave reviews and do all those things to help people find the podcast. It really does help to ring the bell and having thumbs up. You could definitely do the thumbs up even if you don't want to subscribe, Thumbs up everything, and that helps share the program with other people who may not know about it. Like this guy who we will be talking to in the future, but we're not there yet. He hadn't heard of the program before. It's really disturbing to me, Larry, that people haven't heard of us.

0:01:39

Larry

It really is disturbing since we've been at this, what, five and a half years?

0:01:43

Andy

Something like that. Well, would you be so kind, Sir, and give me a rundown for the show tonight? What are we going to talk about?

0:01:51

Larry

Well, we're going to have that person you just mentioned about just for a few minutes. We're going to be talking about moving your federal supervision from district to district around the country and some considerations. And we're going to be talking about a very recent case that was on this podcast, now episode 265 from the 6th Circuit Court of Appeals out of Michigan. You gave me so much grief about it, so I brought it back again. And then we've got a segment on Jeffrey Epstein. And then we've got a couple of articles, one from California and one from Connecticut.

0:02:37

Andy

So, Larry, I guess we'll move over to this section on the transfer of federal supervised release. Do you want to set up the voicemail message from this individual?

0:02:45

Larry

Sure. We've got a person in California that's under lifetime supervised release and would like to move his supervision to the State of New Mexico. He contacted New Mexico authorities and the New Mexico advocacy and I listened to the situation. I think it'd be helpful for our audience because we have a lot of people who have varying forms of federal supervision. Therefore, we're going to go into what this transfer process would look like and the considerations. So, we're going to start with playing the voicemail.

0:03:17

Andy

All right, here we go.

0:03:20

Guest #1

Hi, my name is [bleep]. We just spoke over the phone. I have a conviction for an 18 USC 2252 possession of CP out of the Central District of California. My family is planning on moving to New Mexico, and yesterday I briefly spoke to [bleep]. She's a federal public defender at the Public Defender's office in Albuquerque. She was the duty attorney of the day. I asked her a couple of questions about what supervision would be like there for me. She told me that usually for cases like mine, they don't give out any more than five years of supervised release. I currently have lifetime supervision here in the Central District and there's no end insight. What she advised me is that if I were to move to New Mexico, that after a year to two years, I can petition to be removed and it will very likely be done after I established some trust within one to two years. Rick advised me a little differently today. Or the information he gave me, he didn't really advise me, was that, you know, he's never heard of anyone being terminated from lifetime supervision. This is separate from the registry. I'm not referring to the registry at all. I'm referring to federal supervised release which is what I'm currently on and what I'm

currently dealing with. Please give me a call back with any questions you may have. Thank you so much.

0:05:02

Andy

There you go, Larry. Feel free.

0:05:03

Larry

All right. So, like I say, great question and I'm going to try to dig into it. With the limitations of my knowledge, which I'm not in federal practice at a large level, but I did some research, I did talk to a contract federal public defender in preparation and it is true, he can transfer his supervision and he can also transfer the jurisdiction of his case so that judge that we didn't name that sentenced him could choose to relinquish the control of the case. And it would be assigned to a New Mexico federal judge. But the keyword that was stressed to me and appears to be in US Code 18, US Code 3605, the transfer of jurisdiction, it is a "may" not a "shall" which I would interpret that as a non-attorney to mean that may is an option. So therefore, if the judge in California allows the jurisdiction of the case to move, then he's going to be assigned to a judge here. I asked the public defender and they said that it would be a random assignment. So, we have no way of knowing which of the 8 or 9, or 10 active federal judges it would be assigned to. But say all that goes through, and his jurisdiction is transferred to New Mexico. What's going to happen is the probation service, I agree with the public defender. The probation service is going to need to get comfortable with him and find out how he's responded to supervision here. But they're also going to go look at the history of his supervision in the Middle District of California. They're going to be looking at any violations. They're going to be looking at his corporation and response with treatment. They're going to be looking at his job stability. They're going to be looking at basically the whole file. The beautiful thing about federal probation is they have vastly more resources than most state systems. So, therefore, the caseloads are small and they're going to be looking at him with a fine-tooth comb. And so, if we could have a little chat with the person, we will get into what I'd want to know and I'd want to know first is, have there been any violations? Second, how many years of supervision have been ongoing in the Middle District of California, and have there been any violations? So how long have you been under supervision?

0:07:30

Guest #1

So, this next February, here in February 2024, I will have completed five years.

0:07:36

Larry

So basically, you're just a few months past the four-year mark and in terms of the number of violations, have there been any violations and how many have there been if there have been any?

0:07:49

Guest #1

Yes, I had one violation for travel at the end of 2021.

0:07:55

Larry

2021 OK, so you do have a violation. Well, my thoughts would be.

0:07:59

Guest #1

Yeah, that would be. I'm so sorry about that. It was the end of 2020. So, I completed the four months of house arrest for the travel violation in April of 2012.

0:08:14

Larry

OK. Did you do any time in custody before the house arrest?

0:08:21

Guest #1

I did 36 months of federal custody. When I was released in 2018, I was released to a halfway house. In October I did four months and was released in February of 2019 into supervised release.

0:08:37

Larry

OK. Well, I would say that based on the fact that you have had one violation. Unfortunately, that particular violation is generally looked at as a pretty significant violation in terms of travel. Was it out-of-state travel or was it out-of-county travel?

0:08:54

Guest #1

Yes, I traveled from California to Las Vegas, NV for a last-minute work trip.

0:09:02

Larry

So, well if it was work-related that should serve as some mitigation versus if you did it just for pleasure. I won't get into the details of how you may have been apprehended in that or detected, but that is going to be certainly a negative. But you would want to have a part of the petition for removal. You'd want to have that clearly identified as being work-related and hopefully, you'd have some substantiation to show that it was work-related and not just because you felt like you needed some time off and you're going to give the middle finger to the PO. The feedback I've gotten is that the federal judges are largely very reasonable in this jurisdiction. So, I'm not saying it's impossible to accomplish the termination from lifetime supervision. I've got a potential client who wants off and I shopped around for an attorney to represent him, and they did not know, excuse me, it's not lifetime, it's 20 years supervised release he has and he's like 6 years into it. And the attorney told me that based on the particular judge he has which will not be named, it's not going to happen. So, let's hope you don't get that particular judge. But yes it's good question and I would say your odds if you come here with only one violation and you've been stable for all the years you've been under supervision, you've got a decent chance but then you still got a lifetime registration obligation here in the state. If you come here and I think you understand that from pretrial from preshow chat that I did with you that the registration is it currently exists would be lifetime.

0:10:43

Guest #1

Yes, I do understand. Yes, unfortunately, there is no tier system in New Mexico.

0:10:49

Larry

So well, not an official one but there are terms of registration or less than lifetime, but it's not because of any type of tier system. It's based on how the law existed at the time of those offenses and those convictions. And there are so many nuances it would take a long time to explain. But the situation you're in with the age of your offense being relatively new. You would be on the 'category' since we take the categorical approach. You would be in the category of lifetime under present law. [Guest Yes, I understand.] So, is that any way helpful to you? But I do appreciate the question. I thought it was a good one.

0:11:28

Guest #1

Yes, it is very helpful. I appreciate your time and answering my question.

0:11:34

Larry

Is there anything else you'd like to ask us?

0:11:38

Guest #1

Not really, no. You know, you guys keep up the good work.

0:11:44

Andy

Well, I got a question. Have you heard of the podcast prior to this?

0:11:48

Guest #1

No, I hadn't. My family and my fiancée are extremely interested in New Mexico because of its culture and heritage and how these movies, especially with the indigenous ones. You know, they want to move; my parents want to retire and my fiancé, we want to open up another branch of our business in New Mexico for filming. And Albuquerque is a place of interest for us and we've seriously considered there. And to me, as stringent as the state registry is at the current moment, what I have to deal with currently here in the Central District is no end in sight. And when I say no end in sight, any attorney I've spoken to, any and all attorneys which you know I've lost count, maybe over 100, give me the answer, "I don't know." And my judge, he's going to keep me on for as long as possible. I can't even file motions for modification, regardless of how far they infringe on my civil liberties, even though they're unrealistic, especially for my low-level offense.

You know, it's been extremely difficult to survive in Southern California if I can explain that to you. People who don't have restrictions are already struggling and moving in in droves into other states. So I called to poke around a little bit with the duty public defender and it's nice to hear that there's at least one district in the country that comes from a logical approach versus just focused on punitive fear-based punishment.

0:13:41

Larry

So.

0:13:41

Andy

Larry, haven't there been changes with California somewhat recently? Like there was something where they can get off the registry if you're born on this date with the full moon and super narrowly?

0:13:52

Larry

Well, I think as I understand it, his offense is still a Tier 3 in California, which would limit that option, but he's more worried about the federal supervised release. And then there is some talk of reducing the simple possession down to possibly a Tier 2 or maybe even a Tier 1, which is where it belongs. By the AWA standards, it should be a Tier 1. So, but all right, well, it's good for you to drop in on short notice, [Guest no problem.]

0:14:21

Andy

Well, have a great night.

0:14:22

Larry

There's so much traffic going by, it's kind of distracting, but appreciate you coming on.

0:14:27

Guest #1

Thank you so much.

0:14:32

Andy

Well, very good. Let's see here. So where should we go? I guess we'll jump into this Jeffrey Epstein thing. Yeah, we'll go there.

0:14:42

Larry

You want to do Jeffrey Epstein. Well, let's do Jeffrey Epstein. What do you want to talk about, Mr. Epstein?

0:14:48

Andy

Well, I did find an article from the AP News about Mr. Epstein. And dear God, I can't believe it has been four years, Larry, that the AP has obtained more than 4,000 pages of documents from the Federal Bureau of Prisons under the Freedom of Information Act. They include a detailed psychological reconstruction of the events leading to suicide, as well as his health history, internal agency reports, emails, memos, and other records. And so, let's dig into this a little bit.

0:15:18

Larry

Well, I know that there's still a feeding frenzy going on out there because there's a lot of money supposedly in his estate, so the feeding will cease when the money is gone.

0:15:30

Andy

Tell me. I know he's listed as a quote UN quote financier. What does he do? What was his job?

0:15:37

Larry

I don't really understand what he did, but he was going around the world doing it and apparently buying real estate and making lots of money.

0:15:44

Andy

It seems that what his job was that he fabricated money out of thin air and robbed Peter to pay Paul. Not necessarily rob, but created money out of thin air and became wealthy that way. That's what it seems. But to set this up, Epstein arrived at the Metropolitan Correctional Center on July 6th, 2019. He spent 22 hours in the jail's general population before officials moved him to the Special Housing Unit due to the significant increase in media coverage and awareness of his notoriety among the inmate population. According to the psychological reconstruction of his death, do you have any issues with them putting him in special housing?

0:16:24

Larry

I do. A person who has to be put in special housing for their own safety, in my opinion, should not suffer the diminution of privileges and be treated like they've broken prison rules because that's a thing that they use for people who are non-cooperative. If the prison decides it can't keep you safe because there are vultures in there, in my opinion, you should have no diminution of privileges because it's not really your fault that you're a celebrity. So, I do have a little bit of a problem that it's not his fault that he was receiving not just national but even global publicity.

0:17:03

Andy

What would you do? Tell me what the alternative is I mean, they only have so many resources, and if you show up with your entourage, not an entourage, but all of a sudden now you have an entourage, and this entourage in prison wants to kill you, what are they supposed to do?

0:17:17

Larry

Well, no. I'm saying the Special Housing Unit is okay, but there's no diminution of privileges.

0:17:23

Andy

While you still should get store call and yard call and whatever else phone calls.

0:17:27

Larry

Yes, it's kind of like the same feeling and position I have about pretrial custody. And you're supposedly presumed innocent, right?

0:17:38

Andy

That's the thought.

0:17:40

Larry

All right, so when a jail is running people in custody, it would seem to me, if you're presumed innocent versus someone who has already pled or been convicted and is sitting there waiting to go to state or federal prison, they're in their punishment phase. You're not in your punishment phase yet because you're presumed innocent. So, therefore there should be a much more liberalized treatment for you and terms of access to things. Well, that's what I feel about Epstein with a special housing unit. If he is a celebrity and the prison feels like it can't keep him safe, there's no need to diminish him in any way in terms of his privileges, because he's a special management problem, but not by his own fault. If he's throwing feces on the guards, then he's a special management problem that deserves disciplinary segregation.

0:18:35

Andy

I see your point though. The documents reveal that Epstein later said he was upset and complained about being treated like he was the bad guy despite being well-behaved behind bars. He requested a brown uniform for his near-daily visits with his lawyers rather than the orange jumpsuit he had been issued. Let's go through some of the key points of the article. It says that two weeks before ending his life, Jeffrey Epstein sat in a corner of his Manhattan jail cell with his hands over his ears, desperate to muffle the sound of a toilet that would not stop running. So, I mean, that sounds horrible. Did the BOP deliberately ignore his needs?

0:19:15

Larry

It certainly would look that way. It appears that way. And I'm assuming this AP story is well researched and true. So, we're just simply going along with the story folks.

0:19:23

Andy

If we go look at our media bias chart, they are listed as the most centered and most accurate of all news out there. The article also states that Epstein was agitated and unable to sleep, according to records newly obtained by The Associated Press. He called himself a coward and complained he was struggling to adapt to life behind bars. The disgraced financier was under psychological observation at the time of a suicide attempt just days earlier that left his neck bruised and scraped. Yet even after a 31-hour stint on suicide watch, Epstein insisted he wasn't suicidal, telling a psychologist he had a wonderful life and would be crazy to end it. But he did on August 10th of 2019.

0:20:04

Larry

Well, the documents AP obtained Thursday provide the most complete accounting to date of Epstein's detention and death, and chaotic aftermath. The records helped to dispel many of the conspiracy theories. And man, there's been a lot surrounding his suicide, underscoring how fundamental failings at the Bureau of Prisons, including severe staffing shortages and employees cutting

corners, contributed to Epstein's death. Remember, he was also presumed innocent. He was pretrial.

0:20:36

Andy

In one e-mail, a prosecutor involved in Epstein's criminal case complained about a lack of information from the Bureau of Prisons in the critical hours after his death, writing that it was frankly unbelievable that the agency was issuing a public press release before telling us basic information so that we can relay it to his attorney who can relay it to his family. What do you make of that information?

0:20:58

Larry

Well, I would say the prosecutor had some dignity and wanted to treat the family with some level of respect, which, you know, kudos to the prosecutor for being irritated about that.

0:21:07

Andy

The article also states in another e-mail, a high-ranking Bureau of Prisons official made a spurious suggestion to the agency's director that news reporters must have been paying jail employees for information about Epstein's death because they were reporting details of the agency's failings, imputing the ethics of journalists and the agency's own workers. What do you make of that kind of claim?

0:21:31

Larry

Well, I would not rule out the possibility that news reporters may have been paying for information. After all, it's a very competitive business, and being first is important. The documents also provide a fresh window into Epstein's behavior during his total 36 days in jail, including his previously unreported attempt to connect by mail to another high-profile Federal Bureau Prison resident named Larry Nasser. You remember Larry Nasser?

0:21:58

Andy

I believe I've heard of him.

0:21:59

Larry

That was the gymnastics team doctor convicted of sexual abusing dozens, if not scores, of athletes.

0:22:07

Andy

Right. And then the night before Epstein's death, he excused himself from a meeting with his lawyers to make a telephone call to his family. According to a memo from a unit manager, Epstein told a jail employee that he was calling his mother, who oddly, had been dead for 15 years at that point. That does sound bizarre, that he wanted to call his mother if she was already dead.

0:22:28

Larry

Well, remember from what we said above, he was in a very tough environment where he was, and he was undergoing chronic noise torture, as I call it, psychological psyops.

0:22:42

Andy

And he could have.

0:22:43

Larry

He could have been out of his head due to the conditions at that Correctional Facility, or he may have lied to the staff. Who knows? But it does sound very bizarre, I'll agree.

0:22:52

Andy

The article states that Epstein's death put increased scrutiny on the Bureau of Prisons and led the agency to close the Metropolitan Correctional Center in 2021. That sounds at least like something positive that may have come out of this.

0:23:05

Larry

Yes, I didn't even realize until I saw this article that they had closed that facility. But the article also states that it's what spurred an AP investigation that uncovered deep, previously unreported problems within the agency, the Justice Department's largest with more than 30,000 employees, 158,000 inmates, and an \$8 billion annual budget. An internal memo undated but sent after Epstein's death, attributed problems at the jail to seriously reduced staffing levels, improper or lack of training, and follow-up oversight. The memo also details steps the Bureau of Prisons has taken to remedy lapses that Epstein's suicide exposed, including requiring supervisors to review surveillance video to ensure officers made the required checks. Now can't you imagine having to remind people that, OK, we have a policy when we put you on suicide watch. Now, by the way, we need to remind you that logging these checks is important and that you actually do them, don't just enter them on the log. Can you imagine having to have a re-training for that?

0:24:19

Andy

It seems that if you were a guard in the suicide watch area taking care of those kinds of checks, that kind of would be your fundamental charge.

0:24:30

Larry

You wouldn't think you would need additional training? This is a suicide watch you're on. We've got to keep a good eye on these people because we don't want to lose them to an untimely death. I don't think you'd have to train people to do that.

0:24:43

Andy

I'll tell you at least the 1st place that I was at, like, you're bored as hell in there anyway. And I'm like, where could you put something? I couldn't see any place that you could hang ...

something that you could hang from. The bunks were attached to the wall, and the bottom bunk was just like a concrete slab, but there were no sharp edges that you could tie anything to, and even if you could then get it tied to it, unless you're 4 feet tall, you're not short enough to hang from it to do any damage. So, I'm very puzzled as to how somebody could do this in there. But this is a different facility, so I don't know.

0:25:23

Larry

Well, apparently it worked.

0:25:25

Andy

Clearly it did work. Unless you want to go with the conspiracy theories that somebody else did it for him. Epstein's lawyer, Martin Weinberg said Thursday in a phone interview, "People detained at the facility endured medieval conditions of confinement that no American defendant should have been subjected to. It's tragic that it took this kind of event to finally cause the Bureau of Prisons to close this regrettable institution." Did anyone face charges related to Epstein's death, Larry?

0:25:52

Larry

Yes, they did. The workers who were tasked with guarding him the night he killed himself. The names were provided by AP. Tova Neal and Michael Thomas were charged with lying on prison records to make it seem as though they had done the required checks before Epstein was found lifeless. Prosecutors allege they were sitting at their desks just 15 feet from Epstein's cell, shopped online for furniture and motorcycles and walked around the unit's common area instead of making the required rounds every 30 minutes.

0:26:27

Andy

I see that. And it also says during a one 2-hour period, both appeared to have been asleep. According to their indictment, Noel and Thomas admitted to falsifying the log-in entries, but avoided prison time under a deal with federal prosecutors. Copies of some of those logs were included among the documents released Thursday, with the guard's signatures redacted. This is terrible. What do you think drove him to suicide?

0:26:50

Larry

Well, the article states that his outlook worsened when a judge denied him bail on July 18th. I would imagine he was hopeful that the system would treat him as presumed innocent, but he had forgotten about the Bail Reform Act of 1984. But anyway, that raised the prospect that he was going to remain locked up until he had a trial and possibly, of course, being sent away for many years. It said, if he was convicted, he was facing 45 years in prison. So, four days later Epstein was found on the floor of his cell with the strip of bed sheet around his neck. This means the BOP clearly knew he was deteriorating.

0:27:35

Andy

Those injuries didn't require going to the hospital. He was placed on suicide watch and later psychiatric observation. Jail officers

noted in logs that they observed him sitting at the edge of his bed, lost in thought. And sitting with his head against the wall during an initial screening, medical records showed he was suffering from sleep apnea, constipation, hypertension, lower back pain, and prediabetes, as well as other things. He was certainly not in great health and prison healthcare sucks to say the least. And I don't know what kind of food he was eating Larry, but good grief, prison food is not good, forget even like school level lunches. I mean, this is not gourmet food. This is some garbage like a piece of suspect baloney and two pieces of white bread. Some kind of like canned peaches, stuff like that. It's really not the best diet, so he could be constipated because of the change of diet.

0:28:26

Larry

Well, I would agree that prison food is not good. I'm told that in the federal system, because of the vastly improved resource level, the food is somewhat better, but it may vary dramatically from prison to prison. But they did say that Epstein made attempts to adapt to his jailhouse surroundings. He signed up for a kosher meal and told prison officials through his lawyer he wanted permission to exercise outside. Two days before he was found dead, Epstein bought \$73.85 worth of items from the prison commissary, including an FM radio or an AM FM radio.

0:29:04

Andy

Oh yeah, man.

0:29:05

Larry

And he had \$566 on his commissary account when he died. Would you please explain what a kosher meal is?

0:29:14

Andy

Generally, kind of speaking, kosher could be also for Muslims, but for Jews it's going to be specially prepared. It's going to be higher quality in general from the prison's point of view. What would they do? Kosher meat. So probably like no pork, obviously. And if they're preparing it right, Larry, dairy and meat can't cross paths. If you remember Ghostbusters where they crossed the streams, you can't cross the streams of dairy and meat and some other thing like it just has to be prepared in a specific kind of way to be kosher.

0:29:46

Larry

All right.

0:29:47

Andy

And somebody [in chat] says they just heat it up in the prison kitchen. So maybe they're outsourced, like, you know, like a hungry man kind of frozen dinner. It's just gonna be different than what the normal food is. Epstein expressed frustration with the noise of the jail and lack of sleep. During his first few weeks at the Metropolitan Correctional Center, he didn't have his sleep apnea breathing apparatus he used. Then the toilet in his cell started acting up and he was still left in the same cell with a broken toilet. The jail's chief psychologist wrote in an e-mail the next day,

"Please move him to a cell next door when he returns from legal; as the toilet still does not work." This certainly sounds like neglect to me.

0:30:28

Larry

Well, it certainly sounds that way to me as well, but good luck getting anything done about it. The day before Epstein ended his life, a federal judge unsealed about 2,000 pages of documents in the sexual abuse lawsuit against him. This probably was the point of no return. But in terms of the neglect, you know, we're going to get into a segment later about getting compensation for damages. I think that's going to be a long shot if anybody were to try it on Epstein's behalf. Since he's perceived as being rich, it's going to be kind of hard to convince taxpayers to say, "Oh yes, we mistreated him. Of course, we want to pay him a little money." I think that's a long shot.

0:31:09

Andy

And also, since he's kind of not really living to receive the funds, why would they support a claim like that?

0:31:16

Larry

Well, if he had heirs, possibly. But like I said, I just don't think there's going to be a lot of sympathy amount any jury pool. Doesn't matter where you pull the jurors from.

0:31:25

Andy

Can I pull a little bit of devil's advocate with you on this particular thing of them moving him?

0:31:30

Larry

Sure.

0:31:31

Andy

So, let's say he's in a unit with 20 rooms and it's one-person rooms because of the conditions he's in. You can't put somebody in a room with someone else if you're being threatened with your life. So, there's potentially 20 people in this housing unit and, if all of the rooms are full and this toilet is broken, hey, move him to another room. There is no other room unless you swap him with someone else. And boy, does that put you on somebody's shit list if they swap with someone and now, they're in your room with the running toilet and they can't get any sleep. So, couldn't this just be an institutional limitation that there's no place else to put him?

0:32:08

Larry

It certainly could have been, but that wasn't revealed in the investigation till the very end where the part you read about that was apparently an open cell next to him. But it's always a problem for jail administrators when they're trying to figure out where to put people because there are so many things that can generate special needs and you don't have enough housing available, oftentimes because of overcrowding. So, I don't know if they had any other options, but it sounds like they did.

0:32:35

Andy

All right, well, I guess we will close out the Epstein article, shall we move over to this feature segment, the 6th Circuit case from Michigan?

0:32:46

Larry

Well, the article did mention there was another investigation by the Department of Justice Inspector General, and it's still ongoing, so who knows where this will end up, but thankfully the facility is closed and no one else will go through that at that facility anyway.

0:33:00

Andy

And they'll just move the bad facility to someplace else there. If that's the worst of the worst, there's still a second-place worst.

0:33:08

Larry

Absolutely.

0:33:12

Announcer

Promo Deleted

0:34:00

Andy

All right. Well, on episode 265, we spent half the program talking about a case before the 6th Circuit Court of Appeals. And the court had just heard oral arguments and now you want to circle back less than a month later. What is the fascination that you have with this case, Larry?

0:34:17

Larry

Because the case has already been decided, that's why.

0:34:20

Andy

Well, that's pretty simple. So, should we just press stop and go home now?

0:34:24

Larry

Well, probably not.

0:34:26

Andy

So, you said there's already a decision now.

0:34:29

Larry

I did indeed say that there has already been a decision. You remember all the grief you gave me on that episode about Mr. Doom and Gloom and all that stuff. So yes, there's already been a decision.

0:34:39

Andy

Hang on, I'm going to put the picture up there for you. Yes, you are Mr. Doom and Gloom on this if it's not even been a month. Like the Supreme Court takes nine months from hearing oral arguments to them making decisions in the summertime, this seems like it would also be pretty fast on the turnaround.

0:34:55

Larry

Well, I did say it's one of the fastest, if not the fastest turnaround I have ever seen.

0:35:02

Andy

Let's remind the audience what this case was about. The plaintiffs sought damages from high-ranking Michigan officials, alleging that they oversaw and failed to stop the police's unconstitutional actions. The District Court dismissed the complaint on various grounds, including sovereign immunity, and the plaintiffs appealed to the 6th Circuit. And what did the 6th Circuit decide? These are like tongue-twister words, Larry. Can't they make these words better?

0:35:30

Larry

Well, I could have tried, but they decided that the District Court properly granted the motion to dismiss because the plaintiffs had failed to state a claim of supervisory liability.

0:35:42

Andy

You were definitely Mr. Doom and Gloom, as you discussed in this case on RM 265. In fact, we got grief about that. Let me queue up. I have a little bit of a clip from the episode that we played somewhere around minute 31 of the show. What you're about to hear is me in the past. It'll probably sound almost identical, so you won't know that it's me in the past, but it's me from a month ago going along. Senior US Circuit Court Judge Danny Boggs, a Ronald Reagan appointee, pointed out much of the complaint filed by Matuka's clients was written in the passive voice and they were, and they asked the attorney why the individuals who directly enforce the registration requirements were not named as defendants. That turns into a whack-a-mole problem, Matuka said. No one from the top of the authority with the authority to do so said this needs to stop or this is unconstitutional. Was this a failure or bad strategy?

0:36:36

Larry

Not sure I can say with my limited information, but I can say that whether it was bad strategy, it's going to probably result in an outcome that we're not going to be happy with. It's going to surprise me if they turn this around.

0:36:53

Andy

You know, that sounded just like you, Larry.

0:36:55

Larry

It did, and it reminds me of how bad I sounded before I switched microphones. But yes, that is what I said. I said all throughout that episode, each one of the claims they had, that they couldn't turn them around because of a number of factors. And so here we are a month later talking about this case again, that's been decided.

0:37:14

Andy

All right. Well, let me provide a bit more background on the case before we dig into the appeal. On August 17th of 2021, John Does 1 through 5, 5 Michigan PFRs filed their complaint in this class section lawsuit. They sued Michigan Governor Gretchen Whitmer, former Michigan Governor Richard Snyder, Joseph Gaspar, the current MSP director, and Christie Atue the former MSP director seeking damages under 42 US Code, subsection 1983. The plaintiffs allege that the MSP enforced unconstitutional provisions of SORA against them from 2006 onwards, including.

After [the decisions in] Does I, Does I on appeal, and those two were decided, and they allege that the defendants whom they purport to sue in their individual capacities knew that the invalidated provisions were unconstitutional, but failed to stop their subordinates from enforcing them against the plaintiffs. Does that pretty much cover it?

0:38:16

Larry

It does. Other than they wanted money. The plaintiffs claim that they were subjected to due process violations. Retroactive punishments and 1st Amendment infringement, and they suffered significant economic loss and emotional harm.

0:38:30

Andy

The plaintiffs argued that all Defendants are individually liable for constitutional violations resulting from the MSP's enforcement of SORA. They asserted that despite having knowledge of the violations, the defendants failed to issue any directive, policy, memoranda, or other form of communication instructing its subordinates that the enforcement of the 2006 and 2011 amendments was unconstitutional. I remember that you weren't super impressed with the attorney's work in this case. What irked you the most?

0:38:59

Larry

The same thing that continues to irk me, sloppy litigation. They stated in their complaint, and I quote, "They believe Defendants encouraged and implicitly authorized the continued violations of the plaintiff's rights by the MSP and other law enforcement agencies." As I stated on that previous episode 265, that's a problem. It's not enough to believe something. They need to prove what they believe, and they did not prove their assertion. And it's difficult to prove things when you don't have a trial.

0:39:33

Andy

This doesn't come down to a summary judgment thing, does it?

0:39:35

Larry

It does not. It came down to a 12(B)(6) motion under federal rules to dismiss for failure state of claim upon which relief can be granted. When you draft a complaint on that motion to dismiss, everything is assumed true in the complaint, and then based on what the allegations are, there has to be a credible likelihood that, let me see how to word this correctly because it's not in the script, but there has to be plausible facts pled in the complaint that you would win at trial because they get the benefit of the doubt that what they pled was true. But when you put in your complaint that you believe something, that's not good enough, the complaint should have said upon information and belief, it's okay when you've got information and belief. Sergeant John Doe of the Macomb County Sheriff's Department, despite being warned, was adamant that he was going to continue to enforce the registry then. The judge looking at the motion to dismiss is going to say, "Well wait a minute, wait a minute. If they can prove that Sergeant John Doe at the Macomb County Sheriff's Department did that, this is the basis for this claim to go forward. But when you put a statement in there that you 'believe' something, that's not good enough.

0:40:59

Andy

I mean, I don't want to nitpick, Larry, for real. Are you saying one word swayed this litigation?

0:41:06

Larry

No, there was plenty of problems with this litigation. But that one stood out the most to me that irked me that they put 'believe' in there. But there are plenty of things wrong with this litigation.

0:41:14

Andy

And why would you put believe, I mean, like on such and such dates, Sergeant John Doe did these things, and the statute says he should do these things instead. I mean, that's not a belief. That's here's A and here's B where you're comparing and A is the right way and B is the wrong way, the way it was being done. And here's what the law says. It doesn't sound like that would be that hard to prove.

0:41:37

Larry

Well, except that he didn't. They didn't allege that in the complaint. They didn't allege that they needed to identify with precision who was giving the orders, and that's going to require you to do a little bit of work. These people are rushing because they're wanting to do a little bit of ambulance chasing to get on to the 6th Circuit or gravy train that the ACLU had won. And they had clients telling them, "Hey, I've lost millions and millions and millions and millions of dollars because of this." And rather than doing what I would have done, I'd have said, "Well, okay, show me what money you lost. Well, I didn't get a job. Show me that you didn't get that job because of the registry. What proof do you have that you didn't get that job because of the registry? Well, I don't have any, but everybody knows I didn't get the job because of the registry. No, everybody doesn't know that."

0:42:23

Larry

You could not have gotten the job because you're a lousy employee. You could have not gotten the job because you had bad breath. You could have not gotten the job because they didn't like your attitude at the interview. You've got to have proof of why you didn't get the job. And of course, they would have gone down the street and hired somebody else if they'd interviewed me and they'd have said that guy's the biggest A hole I've ever run into, and I wouldn't have got the job. But that's the kind of thing that goes wrong in this type of litigation. You know, they told the people what they wanted to and I would have done just opposite. You're trying to get damages from the governor. What proof do you have that the governor did anything? The governor didn't even think about the registry.

0:42:58

Andy

I'm thinking there's a YouTube video out there of a guy, a PFR calling different apartment complexes and flat out saying, "Hey, I'm on the registry, would you rent to me?" And they're like, "You know, probably not." So, you could then bring your information into court going, "I didn't get housing because of this." There would be your hard evidence of a recorded phone call conversation with the person at the apartment complex.

0:43:22

Larry

Well, it would get you started. But with me, if I'm on the defense side of that, it's not going to get you very far because I'm going to say this could be a hoax. What's the name of that apartment that you called? Who's the person you talk to? What is their policy? You know, you could have called your next-door neighbor and had that conversation recorded.

0:43:40

Andy

I'm with you, but as far as like the job thing, if you put in an application and no one calls you back, there are 500 different reasons why they didn't call you back, one of which could be the registry.

0:43:49

Larry

It very well could be, but it's your responsibility to have proof of that. This case was void of any proof. They threw everything up to see if something would stick. And like I say, the governor of Michigan never has thought about the registry. They would have no idea how it works.

0:44:05

Andy

Oh my God, didn't we talk about a case a couple years ago where there were like 67 points that we went through? Do you remember that?

0:44:12

Larry

I'm sure we've talked about cases with many 67 points or even more, but I don't remember.

0:44:18

Andy

All right, the trial court identified several issues with the complaint when it was dismissed. There was the issue with the statute of limitations, sovereign immunity, and qualified immunity, and I asked you if they could recover. You stated extremely unlikely. It appears that Mister Doom and Gloom was correct. I recall that sovereign immunity was an issue. Tell us about that.

0:44:39

Larry

Well, it was an issue, and it's very confusing. The state defendants urged the 6th Circuit to affirm the District Court dismissal on sovereign immunity grounds and sovereign immunity as a doctrine that bars official capacity suits for damages, but not individual capacity suits for damages. And that's way too complicated for me to explain, and the court even agreed. It said we need not wade into the swamp. However, because of the close reading of the plaintiff's complaint, it makes clear that the plaintiffs have failed to state a claim against the defendants in their capacities. Again, more sloppy litigation. You've got to succinctly identify how you're suing the person in their official or their individual capacity. And that is a gray area, and I am not sufficiently good at explaining individual versus official capacity. And the courts chose to sidestep it because they didn't plead it out correctly to begin with. Sloppy work, guys, sloppy work.

0:45:36

Andy

The issue that was most important was supervisory control. The plaintiffs sought to hold the defendants liable on a theory of supervisory liability. They allege that the defendants knew that SORA was unconstitutional but failed to stop their subordinates from enforcing the statute against the plaintiffs. You didn't like that claim either. Why not?

0:45:56

Larry

Well, of course, but the 6th Circuit agreed. They said, "To state a claim of supervisory liability under Subsection 1983, plaintiffs must plausibly allege that a defendant authorized, approved, or normally acquiesced in the unconstitutional conduct of his subordinates through the execution of the job functions. To survive a motion to dismiss, a plaintiff must plausibly allege active, unconstitutional behavior which goes beyond a mere failure to act. Sloppiness, recklessness, or negligence is insufficient to establish liability. You guys can sit around and drink your coffee all night long, and you can think that the governor was thinking about this. She never thought about the registry. Running a state, as the chief executive, has a lot of moving parts and the registry is the last thing on anybody's mind when it comes to running the state. She never thought about it. You didn't have any smoking gun that pointed toward the governor. You should have, rather than trying to be impressive and get a lot of publicity that we sued the governor and the chief of the Michigan State Police, you should have tried to identify someone who knew it was unconstitutional. And then you should have mentioned that person by name and said this person gave the order to do this despite knowing about the legal decisions that had already come forward that called this whole thing into question. But you didn't do that. You went for the gusto.

0:47:23

Andy

The court then stated the plaintiffs do not plausibly allege that the defendants authorized, approved, or knowingly acquiesced in any unconstitutional conduct. The plaintiffs allege that Etue and Gaspar knew that their subordinates were violating the plaintiffs' constitutional rights but failed to intervene and that this failure encouraged the implicitly authorized and implicitly authorized the alleged constitutional violations. How did the court respond to that one?

0:47:48

Larry

They responded. Failing to intervene is not the same as affirmatively granting authorization. That leaves theories of liability that include knowing, acquiescence, implicit authorization, and deliberate indifference. To show that Etue and Gaspar had knowledge of the alleged constitutional violation, the plaintiffs pointed to the decision of Does I and Does I on appeal and Does II. But Does I and Does I on appeal established only that Michigan had violated 4 individual plaintiffs' rights and not that the Michigan State Police continued to violate the rights of other PFRs. And the final judgment of Does II didn't come about until August 4th, 2021, and that was after the Michigan legislature had amended SORA to remove the challenged provisions. They also stated while Etue and Gaspar oversaw the Michigan State Police, many of the complaint's allegations appear to be targeted at the behavior of local law enforcement, which MSP directors do not supervise. If you had bothered to have done any work, you would have been able to have ascertained that the sheriff and local police don't answer to the state police. The plaintiff's allegations of knowledge thus cross the line from being conceivable to plausible only barely, if at all, according to the court.

0:49:04

Andy

The plaintiffs allege that the governors were aware of their subordinates and continue to enforce the invalidated portions of SORA, not least because the governors were subject to a never-ending barrage of lawsuits. Why was that not compelling, do you think?

0:49:20

Larry

Well, those decisions merely prevented the retroactive application of SORA to the four individual plaintiffs, and neither opined on whether Michigan was unconstitutionally applying the amendments to other PFRs nor indicated that the Michigan State Police could continue to do so in the future. That case did not definitively determine that any portion of SORA was unconstitutional. This is according to the court and that decision in Does II which granted class-wide relief became final only after the Michigan legislature had already moved to remove the offending parts of SORA. Thus, despite the plaintiff's assertions to the contrary, this case is different from the cases that they cited, which were Peatros and I forget the other one. And where they allege that the supervisor had been warned repeatedly of a pattern of constitutional violations. And they were, of course, as we do not say the plaintiffs can never plausibly allege knowing acquiescence or deliberate indifference by pointing to a pattern of

past or ongoing litigation but the three decisions the plaintiffs cite and their complaint, are insufficient.

0:50:26

Andy

I see. So, if you could have rerolled this whole thing, what would you have done to make it more gooder?

0:50:35

Andy

Know your said evidence.

0:50:36

Larry

Well, first of all, I've been much more confrontational about what the people want to do, the litigation which drives them up the wall. But I have to tell them, look, I'm going to put myself on the defense side of this, and this is what I'm going to argue if I'm defending the State of Michigan. And if I can think of this, I'm sure they're at least as smart as I am. And here's what I'm going to argue. Some basic research by the trial judge's law clerk uncovered these decisions. Petros and whatever the other one was. And all this stuff was very basic research. And if you are not capable of doing basic research before you launch a constitutional claim, then you probably ought not to be practicing this area of law. But what I would have done would have been to do extensive research on what the case law has already been decided. It's binding, and I would have told the people unequivocally, you've got to have evidence. Who did these things to you? How much money did you lose, and what caused you to lose it? What have you got in the way of evidence? Your theory is not enough. The fact that you don't have lots of money does not necessarily mean that the registry precludes you from having lots of money. You may be a loser all across the board.

0:51:48

Andy

I'm with you, all right. Anything else that you want to say? Closing this one out.

0:51:53

Larry

No, but I have detected some dropouts, so I hope we have good audio tonight.

0:51:57

Andy

I only detected one just a second ago, so we'll see. And no local copy. Yay. Do you want to cover this Oklahoma budget legislature shenanigans?

0:52:10

Larry

Sure, that was just a brief one. The state of Oklahoma legislature just approved a general fund spending plan that increases the next fiscal year starting July 1st by 20% over the previous fiscal year. Now would you say that Oklahoma is the state governed by a collection of liberals or would you say it's more conservative?

0:52:33

Andy

I would definitely lean that in the right direction.

0:52:36

Larry

But now, how is it that a fiscally responsible state like Oklahoma can increase spending by 20% in one year, and then their neighboring state of New Mexico increases it by 12.6%. And we're doing runaway spending because we're under Democratic administration and we increase our budget about 12% and they increase theirs by 20%. Can you explain that difference there?

0:52:59

Andy

20 is definitely smaller than 12.

0:53:01

Larry

Oh, OK. Now that explains it. I would be curious within the 20% who got the bulk, what which agencies got the bulk? My guess would be prisons, law enforcement, courts, and anything related to being tough on crime. I seriously doubt that very much of that money went to Human Services unless it was responding to deficiencies that had been shown by litigation. Like when the Kansas Supreme Court said that they were underfunding education after they did their big tax cuts several years ago and they were going to show us how to make an economy boom. And then they were underfunding the constitutional requirement to provide children in Kansas an education. They had to come back and increase their taxes to pay for their spending. But I'm just doubting that very much of that went to human needs.

0:53:46

Andy

Probably not. Yeah. I guess that one was kind of quick. Do you want to cover one more? I want to cover this. Taxpayers end up paying for Joe Arpaio's legal fees.

0:54:01

Larry

Well, now that's funny.

0:54:04

Andy

First of all, who's Joe Arpaio? God, what a Dick.

0:54:09

Larry

You can't say that on a family program.

0:54:12

Andy

Joe Arpaio is like the 50-year presiding sheriff over like Phoenix area right? Maricopa County.

0:54:21

Larry

That is correct. He was. He was a sheriff out there in Maricopa County for a long time. He ran for United States Senate. Fortunately, he didn't do so well. And then he did a lot of stuff that

was questionably illegal, including running his own immigration enforcement, and he got convicted for contempt of court. The judge held him in contempt and then the former president pardoned him for that. So, therefore, he didn't have to pay any penalty for his contempt because he was pardoned by the president at that time. But the article is about Taxpayers at Metro Phoenix are approaching a milestone in their financial pain 2013. The bill is expected to reach \$273 million by the summer of 2024 officials were told Monday before they approved a tentative budget of 38 million illegally compliance spending for the racial profiling lawsuit. Now you have to admit that that's funny.

0:55:21

Andy

That's amazing. And what? Tell me what he is famous for.

0:55:25

Larry

What He took great pride in. He liked being in the media, so he would do things that would draw attention to him, like keeping the cost of running his jail very low. He would pride himself in keeping the cost of meals to \$1.12 a day by feeding them green Bologna and junk food that was very inexpensive. And he had to wear pink underwear because the jail would be losing underwear that they would take with him. So, they made the underwear of pink and of course not too many, very few men are very fond of taking pink underwear with them anywhere. So, he did things like designed to humiliate, and he put people in tents and the desert heat over there. He put people in tents.

0:56:10

Andy

Didn't he also run hot water in the hot tents?

0:56:13

Larry

I don't think I remember that, but I wouldn't put anything past Joe.

0:56:19

Andy

I'm pretty sure that's what he did. He had showers, had hot water even in the desert in the summertime.

0:56:26

Larry

But what people don't understand when they're talking about stuff like this, it sounds good when he says I'm keeping my cost of feeding prisoners down to \$1.12 a day. And all areas of the state of Arizona are spending \$22 a day or whatever it is. You know that sounds really good to an average citizen but the problem that you don't see is the invisible cost. And I was having that discussion today with a person in Texas. There was a legislative proposal to air condition the state prisons in Texas and of course it went nowhere, and the person said, Larry, I can't understand why that didn't pass. I responded that I can't understand why you can't understand why it didn't pass. It's easy to understand why didn't pass. Well, Okay, well explain it to me. I said, well, the cost for air conditioning these prisons, those would be upfront costs that's going to have to be paid now. So, if we go on a building binge and we could take whatever number of units that are in Texas prisons that are not air-conditioned and ventilated properly, we're going

to have costs that have to be appropriated now. If we look at all the invisible costs related to staff outages, inmates being taken to hospital care because of heat-related illnesses, those costs materialize later, and they can be kind of shoved aside. So therefore, it's very easy to understand if you look at it open-mindedly. Okay. If I'm going to have to come up with \$190,000,000 to retrofit the prisons, it may be a long time before I spend \$190,000,000 in little chunks to pay for all the downsides of not having proper ventilation. It's hard to calculate what the morale reduction is for the people who can't perform their jobs adequately. It's hard to calculate all that stuff. It's probably going to be greater than \$190,000,000, but I've got to come up with \$190,000,000 *now*. But I've also got all the agencies all over Texas asking me for appropriations. And when I go out on the campaign trail, when I say I was able to do this for the citizens of Texas, you just don't get a lot of votes when you say I was able to get \$190,000,000 to ventilate and air condition our state prisons. That just doesn't gain you a lot of support politically.

0:58:53

Andy

I understand.

0:58:54

Larry

Is that really complicated to understand?

0:58:57

Andy

I think once you start pushing and explaining this piece, that piece, it becomes very clear to understand. But just at the surface, if you just scratch and sniff it, I can see why people don't get it. It's so complicated. All this stuff is so complicated, Larry. Nothing is simple anymore.

0:59:12

Larry

So, well, this thing with Joe Arpaio, the taxpayers are going to be paying for what he did for a long, long time. We don't know how many lawsuits might be working their way through the courts related to inmates that suffered health effects or maybe even died in his operations the way he operated the jails. We don't know any of that stuff. It may be that they spend a whole lot of money as it is above what we're seeing now. But I put this in here just to let folks know something that sounds good makes you run out and vote for someone because you have anger, and this has the need to fill that void in your heart to get even with somebody. Joe Arpaio will cost you folks in Maricopa County a lot of money.

0:59:56

Andy

Very good. Do you want to cover anything else before I talk about our new patrons?

1:00:01

Larry

No, I think we've had a great episode.

1:00:04

Andy

I agree. I want to definitely thank Mr. M for joining us. He came in at the whopping well I'm not going to say he came in at a very generous level. And then we also got a new one from John and then also David and then also a Brandon increased his support of the program. I thank you all very much that's for either new or increasing patrons this month which is fantastic. Thank you very much.

1:00:30

Larry

And I've also been watching the YouTube subscription rate go up.

1:00:34

Andy

Of course, everyone listening should go subscribe to the podcast.

1:00:39

Larry

Even if you're not going to receive it by YouTube, it helps us get closer to that magic number.

1:00:45

Andy

Yes. Also, you should download it on the podcast app.

1:00:49

Larry

What does that do? Because YouTube, as I understand the algorithm, YouTube, the more people that click 'like,' the more people who comment, the more people who subscribe, the more they are recommended out to the general audience around the country. How does the podcast downloads work in terms of the similarity?

1:01:09

Andy

To me, it's independent media that I own the server, essentially that is running the program, and that if you're downloading it directly then you're getting it directly from the source. And YouTube could turn us off one day because they don't like that we're talking about PFR issues and then our whole platform is gone, so it's just mostly spreading it out. Plus, you can listen to it in your car. It's hard to listen to YouTube in your car unless you pay for it because once you turn off your screen the audio stops.

1:01:35

Larry

All right.

1:01:37

Andy

There you go. Any snail mails? Excuse me, any snail mail subscribers?

1:01:42

Larry

I don't think we have any new ones, but we're going to transition to a new distribution model. I've got a person who's going to actually produce the transcript after I do the proofing and editing and making the corrections. The person's going to handle the preparation of mailing and printing. So hopefully it'll take a little bit of load off of me and then we're eventually going to find a new transcriptionist at some point.

1:02:07

Andy

Very good. Hey, if you want to do some transcription stuff and possibly get paid for doing it, reach out to us.registry matters.cast@gmail.com and of course find all the show notes over at registry matters.co and if you want to leave voicemail, 747-227-4477. Registry matters cast@gmail.com like I just said, and for those who don't know, Patreon support is patreon.com/registry matters. For as little as a dollar a month you can support the program and all the work that we're doing here, and it is so very much appreciated. And without anything else, Larry, I thank you very much for all the work that you do, and I will talk to you soon.

1:02:42

Larry

Thanks for having me.

1:02:43

Andy

Later.

1:02:47

Announcer

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