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Episode 24: A Deep Dive into the Trial of Governor Greitens

with SLU LAW Associate Dean Anders Walker, Ph.D., J.D.

The trial of Missouri Governor Eric Greitens has captivated the local and nationwide media and general public. The case is complex and the trial of a public official in office is rare. The charges are unique and provide an interesting legal lesson. In this episode, we are joined by Anders Walker, the Lillie Myers professor of law and associate dean for research and engagement. Dean Walker is a criminal law expert who has been following the case since the indictment and is here to help us unpack the issues on trial.

SLS: Thank you for joining us, Anders.

AW: It's great to be here.

SLS: So we're just going to jump right in. There are a few different players and investigations going on concerning the governor. Can you break that down and explain who are the major players?

AW: So this case really hinges on a photograph and the charges that the governor allegedly took a photograph without the "victim's" consent and then transmitted it. So there's the governor, there's the victim, whose identity has not been revealed but apparently she was his hairdresser at the Chase, and then there's her ex-husband whose identity also has not been revealed who apparently found out about his wife's affair with the governor and then secretly recorded her confessing to him about what the governor had done, and during that confession, according to her, the governor had trundled her down into his basement, blindfolded her, bound her hands and then taken a picture of her and said if she ever went public with their relationship, he would publish the photograph.

SLS: So what are the actual charges that are being brought regarding the photograph, with the jury selection happening today (May 10, 2018)?

AW: So the charges are very specific. It's that the governor took a photograph of the victim without her consent and then transmitted that photograph. So there are two big issues in the case and I think both run in the governor's favor. One is – was there even a photograph? The circuit attorney ideally would need to produce at trial the photograph that was taken and then I think, ideally, would need to have that photograph on someone else's phone or computer, someone the government had sent it to, maybe an old friend in the Navy, someone else in the government, who could then say, 'Here's what I got in the mail today, it's a photograph of a woman, and it was sent by the governor.' That is a conviction. If there's no photograph however, let's say the governor said 'I'm taking your photograph,' but he never did, then there's no crime, and so there's no way that the governor could be convicted. Similarly, if the governor did take a photograph but didn't send it to someone, i.e. just saved it on his phone or



uploaded it to his cloud, I think that, too, could be an issue, and the defense could argue, 'well transmission really means sending it to another person, not just saving it on your phone.'

SLS: So it all seems to hinge on the transmission, as you said, which would kind of be construed as blackmail?

AW: That's what I think. So, first, if there's no pic, no convict. If there's no photograph, if the circuit attorney cannot produce a photograph, and if the "victim" comes up on the stand and says 'well I didn't see the photograph, the governor just said he took one,' I think the defense is going to have a field day with the witness grilling her on 'well if you didn't see it, how do you know that there even was one? Would someone actually take such a photograph if their own career is going to be jeopardized?' I mean the only person who's going to go down if this photograph was ever revealed was the governor himself, so wouldn't it make sense for him to say 'I'm taking your picture,' but never take it? Or did he even say that? How do we know? There's really no other direct evidence, there's no recording of their conversations, there's just a recording of her talking to her ex-husband, and wouldn't she have a motive to tell her ex-husband something like 'The governor trundled me down into his basement against my will.'? So there's that, and then there's the whole issue of, let's assume, just for the sake of conversation, there was a photograph, was it ever transmitted to anybody? Unless the circuit attorney can prove or show a witness who got the photograph, the state's going to have to argue that it's simply saving the photograph on one's cell phone that constitutes transmission because at that point, it is discoverable by a computer. Technically that's true, but that could also be a hard argument to make because the theory is that the felony, the reason this is a felony and not a misdemeanor privacy charge, is – people may take photographs of each other all the time. People who are in relationships may take photographs of each other, but the harm comes in when someone takes a photograph of an individual in a compromised position and then sends it to a stranger. That's when there's harm to reputation, there's harm to the individual emotionally knowing that their photograph's out there with other people looking at them, that's the reason it's a felony. I don't think that the legislature had in mind 'well it's just saved on the governor's phone for future reference.'

SLS: So speaking of the witness in this case, these witnesses are kind of unusual because they seem reluctant to come forward, put their names on the record – how necessary are they actually to the case?

AW: Well it is absolutely imperative that the victim testify on the stand. She is the only person who to my mind can say that a photograph was taken. And if the circuit attorney doesn't have a photograph – the only reason I'm focused on this is because apparently the circuit attorney admitted they did not have the photograph and earlier this week we're looking through the governor's phone. I think it's a little late to look through the governor's phone. The whole case is going to hinge on what this witness/victim says. And I think it's another problem that she herself has not been that forthcoming and may not ever have wanted this to go public in the first place. So is it a reliable witness? I don't know. I think the defense could also attack on that angle and say 'Were you pressured into testifying and what exactly is going on here? Why did this story come out? Is it really your doing or is someone putting you up to this?'

SLS: Are there any particular nuances in this trial that you're seeing?

AW: Well, so, the other big problem here is there's so much in the news about the governor. And it's going to be very hard to get a jury who haven't been awake and in Missouri for the past month or so. There's the House investigation of the governor's liaison with this woman, the House released a report with salacious details that didn't really focus on invasion of privacy but suggested that maybe something even worse was going on, maybe the governor was putting the victim in a state of fear, maybe the governor was using force, all things that the defense are going to have to try to keep out of the trial and keep out of the jury's minds. It's not relevant to the privacy charge. But the problem is that it's been circulating, this has been in the news, people have been focusing on it, and so that's going to be an aspect of this case that's going to be very difficult to separate out as well as the political dimension, we're talking about the governor of the state so this is clearly a public figure who has allies and enemies based on political lines, and so that too could come into play; we'll just have to see.

SLS: Privacy charges aside, Greitens' name has been in the news for other reasons lately. So what are these other investigations going on, is he even charged with anything, can you touch on that?

AW: So the other looming charge is felony computer tampering. Now this, too, is based on the idea that a computer was misused, this case though not in the context of privacy but rather in the context of donor information to the governor's nonprofit The Mission Continues. And the charge here seems to be that the governor ordered someone who worked for the nonprofit to release names of donors for purposes of raising money for the governor's campaign. And that's a problem because the nonprofit has written into its charter that all money going into the nonprofit goes to the nonprofit; it's not a front for Eric Greitens to run his political ads. And so that is a separate matter. There may be more to this case, I don't know. We do know that [Attorney General] Josh Hawley was looking into this independently.

SLS: So assuming that these charges continue forward, how will that proceed? What do those charges have to do with the other charges?

AW: So, first on the invasion of privacy, this could be interesting because in criminal law these days there's a lot about technology. And with the iPhone, we are now in a brave new world; everyone's got a camera, everyone's recording everything, and these images and recordings are being sent all over the place. So one thing that might happen is that if the governor's convicted, which I don't think is going to happen because I don't think there's a photograph, but let's say for the sake of conversation, the circuit attorney gets a conviction, that will probably be appealed, because the defense will argue 'Well there was never a transmission, because transmission means sending to another party, not simply uploading.' So there's the whole issue of – does uploading an image on one's phone into the cloud or onto one's computer or even onto one's photo itself, does that qualify as transmission? So that's something that an appellate court would weigh in on down the line, this could be one year, two years out.

The question of the computer tampering charge for the campaign finance issue – again it's a technology question. So it's really a campaign finance case, and it's about ethical violations, taking information from a nonprofit, using it for a political campaign, but again we're focused on a computer. So here, too, we may see something new about how these kinds of cases might be prosecuted and what people need to be aware of. So there are hints here of past problems people have had. So Jeff Smith who was a candidate for the U.S. Senate in Missouri ran into problems with campaign finance. I think anyone who's running for office in the U.S. really needs an expert to sit down and advise on what can and cannot be



used in regards to money that's given to campaigns or to related entities. And there really theoretically should be a class on that, because this is not straightforward stuff.

SLS: For listeners outside of Missouri, what do you think this looks like to the rest of the country? Is it fitting into other instances such as the "Me Too" conversation that the nation is having right now? What do you think this looks like from a broader perspective?

AW: So I think this is right in the middle of two of the big issues in the United States right now. One is the "Me Too" Movement, which is a reassessment of the behavior of men in positions of power. The other thing that this is in the middle of is the Trump administration, so is it possible that the president has changed the game and that now we're going to see elected officials much less willing to resign over allegations of moral impropriety, and more willing to hang in there and ride it out hoping that it'll all blow away?

SLS: Given the governor's current unpopularity in the state, what do you think is next for him? Say that he survives all of these charges, he continues to serve out as governor, what's next from there?

AW: So if he is acquitted on all charges, I think he's going to have some work to do to rebuild his brand and maybe also to rebuild confidence in the Republican Party and him, and we'll just have to see how he does that.

SLS: Well, this has been a fascinating conversation with Professor Anders Walker. Thank you again, Professor Walker, for being here, and we'll see you next time on SLU LAW Summations.

AW: Thank you.