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Ken White:

Hi. It's Ken White.

Josh Barro:

And it's Josh Barro and this is Serious Trouble. Ken, we can start this week with New Jersey Senator Bob Menendez, who now has a hat trick. He's been indicted three times. We have yet another superseding indictment in this corruption case against him. The receipt of the gold bars and the unregistered lobbying on behalf of foreign entities. Now he's been charged again, and these are obstruction of justice counts that have been added?

Ken White:

Yes. He and his wife, Nadine Menendez, have been hit in the superseding indictment that adds on theories of obstruction of justice. And it is no coincidence that this was done just days after the co-defendant, Jose Uribe, entered a guilty plea and began to cooperate. Because the superseding indictment deals a lot with facts Surrounding their interactions with Jose Uribe. Now he's the guy who allegedly gave Nadine Menendez a Mercedes Benz in exchange for Menendez interfering with the prosecution.

Josh Barro:

Right. And so the claim is basically that he gave her the car as a bribe and that when they realized that they were being investigated, they told their attorneys to go and say, actually, he just loaned me the money for the Mercedes. It was not a gift. And then their attorneys said that to the government.

Ken White:

There are two parts to it. The first and more typical part is that Nadine Menendez allegedly met with Uribe, and immediately they came up with a scheme to say that it had just been a loan and that they would pay it back and began creating a document trail for that. Fake documents. Checks to him to pay back the loan. Oh yeah, just this random businessman just happened to give me a loan so I could buy a Mercedes, and now we're paying it back.

The less typical part is the one you alluded to, Josh. Is that the superseding indictment says that they told their attorneys that it had only been a loan and sent the attorneys in to talk to the government relying on that false statement. That part is pretty unusual and is pretty aggressive of the government. And you can get a taste of that by how outraged their lawyers are and their comments about this, about how this is merciless and-

Josh Barro:

How outraged the Menendez's lawyers are?

Ken White:

Exactly. What an abuse of power it is. Because generally that theory that you got your lawyers to lie to us is not something the government goes to because it tends to be sticky. What if they say, oh, actually our lawyers suggested to us, they go say that, or that's not what we told them. They're lying or whatever it is. Usually the government doesn't delve into that relationship between attorney and client and make these arguments that rely on delving into it. Here they did. The superseding indictment has a very strong whiff of we're done with your bullshit to it that they're just tired of these guys. And so this is going to be very interesting on a number of levels because they will have to demonstrate here that they got those lawyers to go in and lie. And it's clear from the indictment that the Department of Justice is saying the lawyers are innocent in this, that they made representations based on what Bob and Nadine Menendez said to them.

Josh Barro:

So will they pierce the attorney-client privilege here? Is this a crime fraud exception thing that the crime you're trying to commit is obstruction of justice and in furtherance of that crime you lie to your lawyer so that the lawyer will mislead the government? Will the attorneys have to testify as to what the Menendezes has told them?

Ken White:

Well, it does seem that this theory necessarily relies on some piercing of the attorney-client privilege. It's not explicit in the indictment or any of the supporting materials. But between the indictment and the current counsel's outraged reactions, it does seem as if that's what the government did here. They probably went to a judge and got some ruling on the crime fraud exception. And the theory is that Bob and Nadine Menendez went to lawyers for the purpose of committing a crime. Specifically for the purpose of sending them in to lie and that pierces the privilege. And yes, it is conceivable that they get the attorneys to testify.

It surprises me a little bit because first of all, they've got the obstruction just with this cleaner, simpler theory that they start making this fake trail about the loans and they've got presumably Jose Uribe to testify about that. It's really taken a big bite out of this to take on proving all this stuff about what they told the lawyers and what the lawyers said and knew. And that's again why I characterize it as they're just completely done with this petty criminality or fairly major criminality of these guys that they're willing to take such a big swing.

Josh Barro:

But Jose Uribe is a corrupt businessman who's pleading guilty to bribing a US senator. Presumably the testimony of these attorneys who were duped is of more value than Uribe's testimony in terms of credibility, right? Isn't that a reason that you'd want that in?

Ken White:

It is a reason you want that in, but you would expect the attorneys to be as uncooperative as the law allows them to be. Only to testify to the extent that a judge orders them to and to be extremely circumspect and narrow in what they say because you cannot afford as a criminal defense attorney to go out laying out your client, so you're never going to get another client. It strikes me as a little odd, as a little bit of an unnecessary complication. It also strikes me as something that does not meaningfully add to their potential sentence. So this is not something that's going to yank their sentence up. And in fact, the government could get pretty much the same kick just by proving this at sentencing at a lower standard of proof, get an enhancement at sentencing for obstruction of justice and get the same impact. So that's why I get the sense of it's like when mom has just had it with the kids and all bets are off and maybe mom's not making great decisions anymore because she's so mad. There's that vibe to it.

Josh Barro:

And what's your sense of why prosecutors would feel that way? I assume your average federal criminal defendant is a pretty annoying character. Prosecutors will have a sincere belief that that person committed a serious offense and will want bad things to happen to them. What would be especially exasperating about the Menendez's compared to other people where the feds might pass on bringing this kind of charge?

Ken White:

Well, they're pretty annoying, Josh. They're politicians. They're mouthy. Menendez is a repeat player who skated on this before. And what can I tell you? Federal prosecutors are human and sometimes they just go off on somebody. And it's scary since they have this immense power. But sometimes a defendant just rubs them completely the wrong way and they decide to use all that power.

Josh Barro:

My feeling is if you're going to receive a Mercedes as a bribe and take on all of this criminal risk, you should at least get an E-Class.

Ken White:

Right. Why would you want-

Josh Barro:

C 300. God.

Ken White:

Well, but these are people who keep gold bars in the pockets of their monogrammed robes, Josh so their expectations may not be that high.

Josh Barro:

Ken, I'm just looking back at the script here. You've written don't lie to your lawyer in all caps.

Ken White:

I couldn't figure out how to make it a pretty color.

Josh Barro:

Is that because it's inconvenient for you as the lawyer when the client lies to you?

Ken White:

No. It is embarrassing because you come off like an idiot who has no client control and who can't tell when their own client's lying to them. But it's terrible for the client. I've never seen it go well. So it makes things worse. It demonstrably made things worse here. A lot of the time. It makes things worse in the negotiation of a plea or in cooperation or whatever it is. It loses you and the client credibility and working with the government, it hardens the government's heart and it just doesn't work.

Josh Barro:

So it's never the case that you get together with your co-conspirator and you come up with a story and say, Hey, actually that was a loan for Mercedes. And you tell that to the lawyers and they tell that to the government, and the government looks at it and says, okay, it was a loan for the Mercedes, and then they don't bring criminal charges. That's the objective. That never works?

Ken White:

That does not work. And often as of here, you've left a trail of evidence that refutes whatever your dumb lie is that the government may actually already know about. Because here's the thing, these people often ... The criminals, they're not that smart and they don't have good judgment.

Josh Barro:

But here we're talking about a United States senator.

Ken White:

Well that's my point.

Josh Barro:

And his wife.

Ken White:

So yeah. The lies wind up being dumb. And that's why it's so tricky negotiating with the government on behalf of a client, particularly when it's done on really short notice. Because I find that often it takes a few times meeting with a client to get them to the level of trust where they're ready to be completely honest with me. Because it's a big thing. People are embarrassed by what they've done. They don't trust me yet. They're panicked. All these human feelings and emotions that keeps them from doing the right thing, which in this circumstances, telling the person you're trusting everything so they can do the best job for you. If you rush into the government based on one meeting with the client, you're probably going to get hosed. And that's why you have to romance the truth out of the client a little bit over time to get to the point where you can do it.

Josh Barro:

Yeah. I guess it's like if you think about how you might lie in your everyday life, you're lying to someone here who's already read all your text messages.

Ken White:

Right. Exactly.

Josh Barro:

Which is not the usual layperson situation.

Ken White:

Exactly. And you're in a world of unknown unknowns. So you don't know who else is cooperating, you don't know what evidence they have, what documents they have, and you're just taking a shot in the dark about a lie, praying that they don't have evidence already refuting it.

Josh Barro:

We have some notes in here. Apparently Donald Trump has some legal problems. Should we talk about some of those? There's a few of them.

Ken White:

Yeah. I've heard one or two things that are going on with him. Yeah.

Josh Barro:

Yeah. Let's start with this. \$83 million in change judgment against him in favor of E. Jean Carroll in the second E. Jean Carroll trial that happened. Trump posted that \$91 million bond. And we talked about this last week, the possibility that he would come up with this bond. He had said in a different proceeding that he could post a bond of approximately \$100 million for the New York Attorney general case, which suggested that he had the capacity to post a bond of about that size. And so he has posted one from Chubb Insurance or from a subsidiary of Chubb Insurance in the amount of \$91 million.

Ken White:

Yeah. And that surprised some people. They didn't think he'd show up with the money. But it makes sense. And it makes sense to me that he's actually in a way the most personally offended and mad by the E. Jean Carroll verdict just because of his personality, and it's the one he gripes about the most. So the benefit to him of that is that they can't go after his assets. E. Jean Carroll can't while the matter is on appeal. The benefit to E. Jean Carroll ... And this is significant to remember. Is that that bond is there. So in the likely event she wins the appeal, she just grabs it. She doesn't have to go through all the extended expensive difficult collections proceedings. That money's gone. So right now, you might've seen Josh that quite a lot of people are extremely

exercised at Chubb feeling somehow that a company that does bonds should not have done a bond because this is for a bad person.

Josh Barro:

As opposed to all the other people with judgments against them who are appealing.

Ken White:

Yeah. Well, exactly. That's not how it works. Of course they did it. That's the business they're in. So I guess the bigger question is still what is he going to do with the much bigger bond he has to post?

Josh Barro:

Sorry, hold on. Before we move on to that, I want to belabor one of the points that you made there, which is that this really is in E. Jean Carroll's interest because she has to wait out the appeal, but ultimately she will collect this judgment. I think there's a fair amount of sentiment on the internet where people wanted to see the spectacle of her going out and putting liens on his properties, and they wanted the sheriff to show up and seize the Trump Doral golf club or whatever. But from the perspective of the plaintiff who has this large judgment coming, it seems like you would much rather have this insurance company they're waiting to pay out when these appeals are done in whatever it is, 18 months, two years, something like that, rather than having to go through this expensive and difficult process of trying to collect the money through the court system.

Ken White:

Sure. Unless your purpose is to abuse and humiliate the defendant through the collections process. Take debtor exams, kick them out of their house, all this type of stuff. You'd much rather have the money reliably because that collection stuff can go on for years. There can be setbacks and reversals. So I would think she's happier with the money there, ready for her to get.

Josh Barro:

And so Trump, as you note, is mad about this and he was complaining about it in a speech in Georgia this week. And he again said that E. Jean Carroll's story about him for which she received the judgment was a fake story, totally made-up story. He went on to say that they were false accusations made about me by a woman that I knew nothing about, didn't know, never heard of. I know nothing about her. These are the sorts of claims that he has been sued over and lost and had one large judgment and one extremely large judgment entered against him over them. He's out there saying this again and she can sue him again, right?

Ken White:

She could absolutely sue him again. You would expect the substance of the case to go the same way. That is for him to be stopped prevented from denying what's been established before in the other cases. It would be determined as a matter of law that what he said was false and it would just be an issue of damages. I think we're reaching the point where it's going to be hard for her to prove additional damages beyond damages his prior statements have caused, unless she gets a lot of new death threats after this most recent speech or something like this. But yeah, the guy can't help himself.

Josh Barro:

And that's true. Even though he made the statements in Georgia, can she sue him again in New York State Court where these other two trials have been or would she have to sue in Georgia?

Ken White:

So I think she would have a plausible argument that it's meant to be directed to her in New York. That he knows where she is and that he attends for the impact to happen in New York. Yeah. He might have an argument about jurisdiction that it should be Georgia, but she would have a plausible argument that he's deliberately directing it to New York.

Josh Barro:

So that's this 91 \$92 million bond for the E. Jean Carroll case. Trump still is supposed to come up with another much larger bond for the New York AG case, and that's in a matter of just less than a month.

Ken White:

It is. And recall that he had made an application to the court of appeals asking whether he could possibly post a hundred million instead of 400 million because that would be much more rewarding for him. And the court of appeals denied it on an emergency basis, but allowed it to be briefed. The Attorney General Letitia James just came back with her brief on the subject and she said two key things. One is that he still is not coming forward with real records. He says he doesn't have the cash, but he just says so in very conclusory fashion without evidence. So you can't trust that. He needs to come through with a real financial accounting showing what he has or doesn't have to even consider that argument. Second of all, she's saying that if he does oppose the full bond, he may be able just to evade the judgment, which would be unfair to the people of New York and so forth. So it's not an argument I'm expecting to prevail. So it's going to be interesting to see what he does when D day approaches.

Josh Barro:

I don't understand why ... If you don't have the cash, doesn't that make the bond more important for the interests of the plaintiff? Because if you have all of this wealth and you just don't put up the bond and then you lose the appeals, then it's likely that eventually the collection process will work and the plaintiff will be able to lay their hands on enough assets to satisfy the judgment sooner or later if you actually don't have enough assets reasonably available to satisfy the judgment, it seems like that's when it's most important for the plaintiff to be able to start trying to collect right away.

Ken White:

Well, exactly. So if you don't have cash to get or enough cash to get, then you want to start the process of going after other assets before the person can do things like move assets or sell them or otherwise dispose of them to frustrate the purpose. So that undermines the point almost to say, I don't have the cash, but that's very Trumpian to make the argument that way.

Josh Barro:

And so I think the other thing is that some of the people who are mad about the Carroll bond, they may get the best of both worlds here, which is to say that E. Jean Carroll, whose interest they clearly care about, has the benefit of the bond and will eventually collect her judgment from Chubb, assuming that Trump loses on appeal in that case. They still may get to watch the spectacle of the New York Attorney General dragging Trump through the collection process if he does not in fact post the much larger bond that they require.

Ken White:

I think you're right. I think people are less personally invested in the government of New York getting the money and they're more invested in the process of abusing and humiliating Donald Trump.

Josh Barro:

Well, as a New York taxpayer, I would like to see New York get the money, but I realize that we have a national audience. In a couple of weeks Donald Trump is going to go on his first criminal trial. This is the New York State criminal case about falsification of business records brought by Manhattan District Attorney Alvin Bragg. And again, this case is literally supposed to start in like two weeks. So I was surprised to see this motion from Trump's attorneys saying that he is presidentially immune from prosecution even though the events at issue in this trial largely are events that occurred before he was elected president. And so they want the trial stopped until the Supreme Court makes its ruling in the other case about presidential immunity that they're going to consider imminently. And they also want the District attorney to be prohibited from bringing evidence about acts that he undertook while he was president in this case, even though the meat of the case, again is about stuff that happened before he was president. And so the first thing when I saw this motion was like, it's too late. You can't make that argument two weeks before trial.

Ken White:

You can't, or rather, you can't expect the judge to accept it if you do it untimely. There was a deadline for motions and motions to eliminate. He missed it. The hook for this motion is nominally well. Now the Supreme Court has accepted cert is going to hear the issue of immunity. That's a reason now. A specific reason non-speculative to think that

we should wait until the court rules. So far the judge is unimpressed with that. The judge has issued an order very promptly after he filed the motion saying It's not clear why you're waiting until two weeks before trial, but go ahead and respond DA. But it doesn't bode well for the motion.

Josh, the interesting thing about the motion is that it's really about the outlier parts of the case and not about the heart of the case. Remember, this is a case about how Trump allegedly directed his organization to falsely make business records about what that \$130,000 hush money payment to Stormy Daniels was for that we've talked about for so many years.

And the theory is he violated New York law about business records by causing records to be falsified to say that this was for a payment to Michael Cohen for legal services, when in fact it was hush money to a porn star. And it's made more serious by the allegation that it was done in promotion of some other crime such as New York election law or New York tax law. But the thing is, all those things, all those business record manipulations, all of that happened before he took office. And so Trump's theory is that the government has said it wants to put in at the trial some evidence about the shots he took at Cohen when he was president.

So Donald Trump famously trash-talked Cohen a lot after Cohen was cooperating. Said a lot of things about him that were seemingly to intimidate a witness and that type of thing. And Trump's argument is that they've said they were going to bring that stuff in about how I trash-talked Cohen, but that's all presidential activity. Everything I did on Twitter as president is part of my duties as president. Communicating with the people of the United States. Even if I'm implicitly threatening Michael Cohen's father. So therefore, the whole trial is tainted by this and you should stop the whole trial and you should prevent this evidence of anything I did while president from coming in. It's a little remote, I think. It's not the greatest argument. And the government could really cut it off at the knees just by saying, well, whatever. We won't even offer that evidence because it is collateral. It goes to his state of mind, I guess, in the sense that he knew he did something wrong because he was threatening the witness. But it's certainly not necessary and it's not the heart of the case.

Josh Barro:

Indulging the idea that the judge will even consider these arguments given the time at which they were made. I don't understand why it would be the case that even if he had extremely sweeping immunity for acts that he committed as president, I don't see why that would imply that actions that he took as president couldn't be evidence that certain things that he did when he was not president were crimes. To take another example.

Suppose that an ex-president is charged with evading taxes after he'd left office and there's a specific intent requirement and the provision that he violated is one that he specifically advocated for while he was president. And you might have statements from him as President about why we need this tax law because it does X, Y, & Z. Presumably you could introduce that as evidence of his knowledge, even though that occurred while he was president because of the crime that is being accused is the crime not while president. It seems like here, even if you accept the broadest form of the presidential immunity requirements, I don't see why that would imply that you can't look at anything he did as president for evaluating whether he committed crimes at other times.

Ken White:

I think that's exactly right. And I think that's one reason that part of the motion is particularly weak. The demand to keep out evidence of the things he said that are really being used to demonstrate intent. It's parallel to the Georgia RICO case and to the motions seeking to move it to federal court. You might remember there one of the arguments is well, they're not really charging them for official acts. They're charging them for conspiracy and RICO and the acts they're talking about are just evidence. So it is the same type of vibe. It's the same type of argument. I do think that one is definitely a losing argument even if the Supreme Court decides he has some form of immunity.

Josh Barro:

Let's talk about Michael Avenatti. Throwback.

Ken White:

Let's do that, Josh.

Josh Barro:

So he's in prison, right?

Ken White:

He is in prison until ... Right now the Bureau of Prisons website says 2035.

Josh Barro:

Wow, that's a long time.

Ken White:

That is a long time.

Josh Barro:

So he appealed his conviction. There were three and a half federal criminal cases against him. There were three, and then the one in California got split in two and he ended up with four. This was about the last one. The one about stealing. Stormy Daniels's book advance. His simplest in a way like most pathetic crime. And so he tried to appeal that conviction, which first of all, that would mean getting out of prison in 2033 instead of 2035 or something. If he won.

Ken White:

Right. It would not make a big difference in his life.

Josh Barro:

But anyway, he lost the appeal.

Ken White:

Yes. For the second time, the United States court of appeals for the second circuit has rejected one of his appeals. Remember, he already lost the appeal of that case where he tried to extort Nike through Boies Schiller. And so this time he made a variety of arguments about this case. He said that the judge shouldn't have instructed the jury about a California lawyer's obligation about safeguarding the client's money. And amusingly the court of appeals doesn't even really engage in whether the instruction was wrong as a matter of law. It just said in a doctrine that normally defense lawyers hate, the evidence was so overwhelming of his guilt that it didn't make any difference. So defense lawyers hate this doctrine of a harmless error that it just didn't make a

difference, even if it was wrong. But you have to have a certain amount of admiration for it here in a case like.

So he complained about what's called an Allen charge, which is an instruction the judge gives the jury if they seem to be deadlocked. Muscling them a little bit to try harder, which is allowed but has to be done cautiously. The court said no harm, no foul here and beyond that he was complaining about restitution and whether it had to be paid before the Nike restitution and stuff like that. It really comes off as ... It was not a very plausible or forceful appeal and it was predictably denied.

Josh Barro:

I have to imagine that if you're a trial lawyer like Michael Avenatti stuck in prison for more than a decade, you're probably pretty bored. And one of the favorite activities available to you would be filing appeals, right?

Ken White:

Yes. Although I think what we're going to start seeing from him are what's called 2253s. That's under the federal statute in what you can do a collateral attack on your federal sentence once the appellate process is over. So I anticipate a number of those.

Josh Barro:

Wait, so how do those work?

Ken White:

Well, it is like a motion and you file it in your old case saying, judge, here's all these constitutional violations that happened that you should take up. And then usually it gets denied. And these were cut back substantially. The federal equivalent of habeas corpus. So you've heard of a habeas corpus motion, which is dealing with someone in state custody usually. This is the federal equivalent. Congress cut them way back in the 90s. So basically if you file one and lose one, you don't get to appeal normally unless the judge issues a Certificate of appeal ability basically saying you had a good point, which generally they don't. So they're very rare to win. Over the course of my career, I've won one of them.

Josh Barro:

Wow.

Ken White:

So they are tough.

Josh Barro:

Yeah. Well, so I guess Michael Avenatti is going to be living rent-free somewhere other than your head for a while.

Ken White:

Well, he's going to be living rent-free in the prison law library, Josh.

Josh Barro:

Yeah. Let's leave it there this week, Ken. Thank you so much for speaking with me.

Ken White:

Thank you, Josh.

Josh Barro:

Serious Trouble is created and produced by Very Serious media. That's me and Sara Fay. Jennifer Swiatek mixed this episode. Our theme music is by Joshua Moshier. Thanks for listening and we'll be back with more soon.