Short Circuit 180

Anthony Sanders 00:06
Hello, and welcome to Short Circuit your podcast on the Federal Courts of Appeals. I'm your host, Anthony Sanders, Director of the Center for Judicial Engagement at the Institute for Justice. We're recording this on Thursday, July 1, 2021. If you enjoy this podcast, you should check out our newsletter, and often irreverent take on recent Court of Appeals opinions, which we publish every Friday, you can subscribe at shortcircuit.org or find it on the Volokh Conspiracy blog. And please also check out our sister podcast, the documentary series Bound by Oath and our latest two-part episode, the shooting of Bobby Moore. We haven't talked about qualified immunity on Short Circuit in a very long time, we've left that to our experts over on Bound by Oath. But this week, it's back. And where else would we look at qualified immunity then the crucible of QI, the Fifth Circuit. The Federal Court of Appeals for Texas, Louisiana and Mississippi somehow supplies more than its fair share of outrageous decisions and terrible facts. We're going to focus on two QI opinions from the Fifth Circuit this week, and also discuss a spirited denial of en banc, and also what's been going on at the Supreme Court to cause some of these ripple effects in the lower courts of appeals. And to help us walk through some of these facts from the last few days. We have a special guest, who was an attorney in one of these cases, his name is Nicolas Riley. He is currently, but not much longer, Senior Counsel at the Institute for Constitutional Advocacy and Protection at Georgetown Law. And soon he's going to be moving over to the Justice Department. Although he's moving on to bigger and better things very, very soon. He's been very gracious to allow some time for us on Short Circuit. So, Nick, welcome to the podcast.

Nicolas Riley 01:58
Thanks so much for having me.

Anthony Sanders 02:01
Also, joining us is IJ attorney Anya Bidwell, co producer of Bound by oath and Slayer of governmental immunities. Anya, thanks for coming back.

Anya Bidwell 02:11

Thank you for having me, Anthony.

Anthony Sanders 02:13
Nick, so you are counsel on this case, J.W. v. Paley, which the Fifth Circuit ruled on last week, if you could tell our listeners a bit about what happens to your client, and then what the court said at the appellate level?

Nicolas Riley 02:28
Sure. So, the J.W. case is an excessive force case, arising out of an incident that happened at a Texas high school back in the fall of 2016. Javan, and I'll call him Javan, was the student and the plaintiff in this case, because he's now in his early 20s. At the time was a 17-year-old high schooler at a school just outside of Houston, a special needs student having a tough day. He was being made fun of which was unfortunately not uncommon in his routine at school and got into an argument with the student who was mocking him, had an outburst and then stormed off out of the classroom. And he was going to what he referred to as his chillout classroom, which was a room that he would sometimes go to cool off when he had moments like this and he knew that this was a good, a good way for him to sort of calm his nerves. But unfortunately, that day, there were there was another student in the chillout room and so he didn't feel like he could stay there, and you know, kind of keep storming off down the hallway towards the exit of the building. And that's where things really kind of went off the rails. He's trying to leave the building wants to get some air to cool off. And there are school administrators that meet him there. There's a teacher and there are a couple of school resource officers, school police officers who essentially surround him and try and stop him from leaving the building. You know, he engages very briefly in conversation with some of the administrators and officers, again, keeps trying to kind of insist that he needs to go outside and get some air. When he attempts to do that, they physically begin restraining him. One of the officers puts him briefly in a chokehold. He keeps, you know, he's having a hard time struggling at that point getting out of the chokehold, and the officer then tasers him, tasered him for quite a long period of time, about 20 seconds. He continues tasing him even after Javan kind of falls to his knees, and is you know, lying prone on the ground, the officer continues tasing him at that point for another 10 seconds, so about 20 seconds in total 10 of which he's on the ground. You know, it's obviously tremendously painful for him. He loses control over you know, his bowels and you know, urinates on himself. It's really, you know, has this kind of really traumatic impact on him causes him to miss a fair bit of school after the incident and you know, ultimately leads him and his mother to file suit against the officer and the school district. And they bring a handful of claims, some, you know, federal statutory claims under Disability Rights Law, some claims into the Texas constitution. And then you

know, most importantly, for the purposes of we're talking about, he brings a couple of federal constitutional claims, and in particular, he brings a Fourth Amendment excessive force claim against the officer. And he also brings a 14th Amendment substantive due process claim, essentially arguing that this is, you know, this was a form of corporal punishment, right, and it shocks the conscience. The District Court grants summary judgment, ultimately to the school district and the officer on all claims, except for the Fourth Amendment excessive force claim, the officer had moved for summary judgment on the basis of qualified immunity on that claim. And the district court said, in our view correctly, that you know, there are all these factual disputes surrounding this incident, there is body cam footage, but it's shaky and choppy and cuts out at times. You know, there's disputes about how much if at all, Javan was resisting the officer, these are the kinds of factual disputes we need to go to trial on, we're not going to resolve that here at summary judgment, and I can't determine whether this officer is entitled to qualified immunity without a resolution of those factual disputes. So again, qualified immunity denied at that stage officer appeals interlocutory to the Fifth Circuit. And that's where my office got involved in helping to represent Javan in the Fifth Circuit, in defending the district court's judgment. The Fifth Circuit ultimately reverse last week, as Anthony alluded to, at the top, and their reasoning was that the state of the law in the Fifth Circuit on whether or not the Fourth Amendment even applies to seizures conducted by school officials, is uncertain. And therefore, because the state of the law on the Fifth Circuit is uncertain, there's no clearly established law that would have fairly put this officer on notice that his conduct was violating the Constitution, and therefore he gets qualified immunity. And that's where we are now.

Anya Bidwell 07:07
So, what do you think about the clearly established analysis here? It seems like they're using this one case, it is an unpublished one, that goes against the consensus of cases on the Fourth Amendment violation here. Do you think the clearly established reasoning was too narrow? Or is it just consistent with kind of the general case law on corporal punishment? In the Fifth Circuit?

Nicolas Riley 07:37
Right, it's a great question. So, you know, the case you're alluding to is this 2004 unpublished decision, Flores, where the court had in Flores basically said, we're not sure that the Fourth Amendment should apply to seizures by school officials. You know, what gives me pause about Flores and what I think is so disappointing about the decision last week is that there's a more recent published decision called Curran v. Aleshire, in which the Fifth Circuit held that a school resource officer did violate clearly established Fourth Amendment law by, in that case slamming a student into a wall. And I think what's

important about that current case is that it's not simply holding that, you know, a school resource officer could violate the Fourth Amendment under certain circumstances. It's holding the law on that is clearly established. Right. So, it's really, I think, removing any doubt about the application of the Fourth Amendment, that objective reasonableness standard, what lawyers call the Graham standard, the application of that standard to school officials really is settled law after Curran, which was decided in 2015, a year before the incident that gave rise to our case.

Anya Bidwell 08:52
It seems like there is a little bit off kind of this strange thing going on with like the 14th Amendment and corporal punishment in the Fifth Circuit versus Fourth Amendment, excessive force claims, and like the court is kind of continuously kind of harkening back to essentially there's no such thing as a due process violation. So maybe we should be skeptical about Fourth Amendment claims too. Do you think it's part of like what they are so hesitant about?

Nicolas Riley 09:23
I do and I think the way you describe that is exactly right. And just you know, for context for listeners, what Anya is alluding to is the Fifth Circuit's rule and it is an outlier rule, the Fifth Circuit's the only circuit that approaches substantive due process claims based on corporal punishment in this way, the rule is essentially that you can't bring them in the Fifth Circuit because under the Fifth Circuit's lens of analysis, as long as there is some other mechanism of challenging corporal punishment in schools, including it as long as there's a criminal law on the books prohibiting it, you can't bring a civil suit under the substantive due process, line of, you know, theory of constitutional liability because of that existing alternative remedies. Again, that's very different from what other circuits do. Most circuits apply something like the shocks the conscience standard when they see corporal punishment committed by school officials, the Fifth Circuit's taken a different approach. And I think what it is exactly right about is that has sort of driven in some ways their approach to these Fourth Amendment claims. The Fourth Amendment obviously, is a different provision of the Constitution, it protects different interests, it shouldn't really matter. You know, right, whether the Fifth Circuit's rule on corporal punishment is right or wrong, it shouldn't really matter. You know, the unavailability of the remedy under this substantive due process theory shouldn't preclude liability under a Fourth Amendment theory. And I do think that there is a little bit of kind of conflating those two things as Anya suggested,

Anthony Sanders 10:56

Nick, one thing that really confused me about the opinion, this only seven-page opinion, is that usually when we read these qualified immunity cases, even the ones that that really seem to be pretty aggressive, is that it's because of the specific facts of this case don't line up with an earlier case that qualified immunity applies. Here it seems that qualified immunity applies, because you just can't have a Fourth Amendment claim in the context of a, or there's no clearly established right that you can have a Fourth Amendment claim in the context of a school officer, as opposed to, you know, other kinds of officers, which seems to be bringing it to a whole other level. Because, as you said, there is this case that says that it does apply at that in in the school, and the whole claim is an unreasonable seizure. And no one's no one's, you know, disputing that this was a seizure. And the question of whether it's reasonable or not, has been adjudicated in schools before. So, I'm confused, I can't say, to tell you the truth, whether that's a worse, or a better analysis than the ones we usually, you know, disagree with where there's just a very slight change of facts from one scenario and another, and therefore, qualified immunity doesn't apply. But it seems to be just a different way of applying qualified immunity that doesn't have a lot of precedent for it.

Nicolas Riley 12:33
I think that's exactly right. I mean, the way I think about it, this is, you know, along the lines of what you're describing, Anthony, is that, you know, we think of qualified immunity in the typical case as being a comparison of facts in one case to facts in another case, right? What's happening here is really applying that qualified immunity lens, that sort of deference to the officer at really a threshold stage, which is even before you get to the fact to fact comparison, there's just this question about, well, what is the legal standard that even applies here? And if there's any uncertainty on that threshold legal question, then we're going to apply qualified immunity before you even get into that, you know, the usual analysis of are these factually, or is this situation factually analogous to up to a prior case? It's not even a facts to facts comparison, it's really kind of this doctrinal analysis that happens on the front end whether which is getting the qualified immunity treatment. So, I think you're right, this does seem a little different from what you often see in qualified immunity cases.

Anya Bidwell 13:30
And I want to bring the listeners attention to this corporal punishment law and the 14th Amendment jurisprudence, right. That is taking place in the Fifth Circuit. As Nick mentioned, it's very much of an outlier. And it's kind of crazy. Just a couple of weeks ago, there was a similar case, T.O. v. Fort Bend Independent School District, right. And, in fact, this opinion cites to that case, and it's a 14th Amendment due process violation. And they basically say, you know, you can't sue a school employee

or an officer in a corporal punishment context under the 14th Amendment. And the T.O. case is also outrageous, right. In terms of fact, the kid was like a first grader, and this teacher basically slammed him to the ground and chokeholded at him. Right. And you can't, you know, she wasn't disciplined. She's still working there. And you can't bring a lawsuit against her. Judge Wiener wrote both majority opinions saying that, yeah, we can't do it in the Fifth Circuit. Unfortunately, you don't have a claim, and also wrote a concurrence, specifically asking the Fifth Circuit to reexamine this jurisprudence and Nick, what do you think about this kind of what is the Fifth Circuit driven by why are they doing it this way?

Nicolas Riley 14:51
Yeah, no, it's a great question. We saw the T.O., actually learned about it from the IJ Short Circuit newsletter, which I'm a big fan and a longtime reader? Obviously, it's very disappointing. It's obviously a very disappointing result for all the reasons, you know, you mentioned. You know, I think what one of the things that you see with, and I think Judge Wiener's dissent, as concurrence, as you noted, does a good job of kind of walking through this is really an old rule on the Fifth Circuit. And, you know, it hasn't held up well over time. I think you've seen other circuits, you know, consider what the Fifth Circuit's doing and choose to go a different route. This has been an issue for Judge Wiener, he wrote a similar concurrence in a case about 20 years ago. And it is most recent concurrency sort of says, you know, the law in other circuits has not, has not been following us. It's been we've been kind of becoming even more of an outlier on this particular issue. So, it's really disconcerting, particularly when you see it applied in situations like the T.O. case that you described.

Anthony Sanders 15:51
Well, turning to another Fifth Circuit case, Anya, I understand that the court actually ruled against the government in a qualified immunity case last week. Tell us a bit about Kelson v. Clark.

Anya Bidwell 16:06
Absolutely. This is a heartbreaking case. The Fifth Circuit, as you mentioned, did the right thing it came through it affirmed the denial of qualified immunity to these paramedics who refused to treat a homeless man who had visible injuries and who asked them for help. This man, Hirschell Fletcher, right after Christmas in 2016, he was assaulted outside of the soup kitchen. And then again in a separate incident when he was punched in the head, fell, and hit his head on the wall. Bystanders saw that, they called for help police and these paramedics arrived. Fletcher then told the paramedics that he needed medical attention, but instead of giving it to him, they stood on the sidewalk, and they laughed. You can actually see that in the video with Mr. Fletcher sitting on a sidewalk helpless, and two paramedics and

three officers harassing him and openly laughing. The officers then brought Mr. Fletcher to jail. From what I understand that's actually because he didn't have a home. So that was a place for them to actually have him spend the night and he died there the following morning from his head injuries. The two paramedics then falsely stated in their reports that they never had contact with Mr. Fletcher. And because of this, they will later indicted for falsifying government reports. And they also pled guilty to that. The state of Mr. Fletcher sued the paramedics and the officers and then paramedics filed a motion to dismiss, which the officers didn't do by the way. The paramedics filed motion to dismiss and invoked qualified immunity. The district court denied qualified immunity and the paramedics went up on interlocutory review. Listeners to this podcast. Hi Will Langley, by the way, I know you're a listener. Listeners to this podcast would know that this interlocutory Review procedure is actually one of the worst things about qualified immunity doctrine as it works today, because this procedure can potentially delay litigation for years. Right. So that's what happened here when the paramedics basically stopped all the litigation in its tracks below and went to the Fifth Circuit and said, "Hey, we know we lost on this intermediary doctrine thing. But you don't have to wait for final judgment. You can review that decision right now. And hopefully you can tell the district court that they were wrong." Well, the Fifth Circuit didn't tell the district court that they were wrong. Judge Higginson, writing for the unanimous court, denied qualified immunity to the paramedics holding that at least at the motion to dismiss stage, plaintiffs showed a violation of a 14th Amendment right when these paramedics failed to treat him and his visible headwounds, and these headwounds ultimately led to his death. So that was pretty fascinating, right. They also said Judge Higginson and Judge Elrod, and who was the third judge here,

Anthony Sanders 19:27
Wiener

Anya Bidwell 19:30
Judge Wiener, there you go. The three of them basically said that not only was there a constitutional right, but that that right was clearly established, right. And they kind of looked at it rather broadly. They said that there is this right to pretrial detainees, that they have a 14th Amendment right to a medical care and then this right was violated, and it was clearly established. Right. This is very interesting case, especially in light of Taylor v. Riojas and McCoy v. Alamu, right? You folks who listen to us regularly would know that those two cases were, you know, prison conditions cases where the Fifth Circuit affirmed qualified immunity. And then the Supreme Court, when it looked at Taylor and McCoy, the Supreme Court said, actually, you're applying the clearly established test way too narrowly. So, you're actually wrong, we're going to reverse and we're going to vacate your decision. So, the Fifth Circuit got

slapped on this twice this term. And it seems to be at least somewhat paying attention to these decisions. And when I was reading Kelson v. Clark, I kind of thought back to Taylor and Alamu, and thought maybe something was going on there. And, you know, judges are definitely paying attention to what the Fifth Circuit is having to say, and they are trying to dial back on you know, looking at the clearly established test, as something that requires very fact by fact specific analysis, because like in Taylor, for example, right, the detainee was there, in these horrible feces filled cells for six days. And the Fifth Circuit basically said, “Well, we don't have a case law that talks about six days, right.” And the US Supreme Court basically said, that's this is not how you should be looking at this. Right, this kind of behavior by government officials, quote, “offends the Constitution.” Right. And they should have been unnoticed that it offends the Constitution. And there is no need to look at exactly how many days this poor fella was in these freezing feces filled cells. So maybe Kelson v. Clark, you know, is kind of an indication that the Fifth Circuit is listening.

Anthony Sanders 21:58
Nick, what are your thoughts about these tea leaves that the Supreme Court has been sending recently? The McCoy case being one, that although the get the QI law hasn't really changed because of that, these that they're taking a second look, especially it seems in the in maybe it's some cases in the Fifth Circuit?

Nicolas Riley 22:21
Yeah, I mean, I think it's a promising development. You know, it used to be that the only times you'd get a GVR from the Supreme Court in a qualified immunity case, it was in favor of the government, it was in favor of the officer. And so I think, you know, seeing the Taylor case, the Alamu case, I think is a, you know, at least a step in the right direction towards some balance. You know, it's obviously, as you both alluded to, it's very difficult to kind of read the tea leaves as to exactly what this portends for the future. But I was at least gratified to see both those cases. And I would just, you know, flag, I think both of those cases, were really brought by Rights Behind Bars, a new organization that was involved in both the petitions in both of those cases. So it is, I think, you know, part of what we're seeing is we're seeing, I think more advocates in the public interest world paying attention to qualified immunity. And, you know, you hope that that translates into something at the at the actual decisional level two.

Anya Bidwell 23:20
And that makes me think about just public interest and qualified immunity, and lawyers in general, right, because it's actually extremely hard to find lawyers to represent civil rights plaintiffs because

qualified immunity is such a difficult doctrine to overcome. And you might be, you know, in litigation for years before you can even see trial, right. Even when your claims are really good, well pleated claims. So yes, public interest organizations like Rights Behind Bars, like MacArthur Justice Center, who was the other, you know, law firm who brought the McCoy case, they were co lawyering it, right. It's really important to see those guys step up and represent plaintiffs and qualified immunity claims. But it's also important to make sure that qualified immunity is not such a huge barrier that no lawyer is willing to represent a civil rights plaintiff, even with legitimate claims.

Anthony Sanders 24:20
Anya, I mentioned tealeaves a moment ago. Tell us about this other case that mentioned a telegraph signal.

Anya Bidwell 24:31
Yes, Judge Willett was all about the telegraph signal. And so was Judge Jolly, apparently. But the case is Ramirez v. Guadarrama, right. And it was and there was a first Fifth Circuit panel decision where they said that the officers, who set this man on fire, were entitled to qualified immunity. And then there was a petition for en banc review, and what we're talking about is essentially concurrences in support of the denial of en banc review, and then dissents from the denial of en banc review. And it's really fascinating because you have three separate concurrences. And you have two separate dissents. One dissent, specifically on qualified immunity by Judge Willett. And another one is by Judge Smith on a separate issue. And then you have three concurrences disagreeing with Judge Willett on qualified immunity. And the facts of the case are fascinating, right? You again have this kind of mentally unstable man, he, you know, covered himself with gasoline, and he was threatening to light himself on fire. But the room where he was standing was also covered in gasoline. And there was his wife, and then there was his child in there, and the officers came on the scene, right. But they knew that if you use tasers right, then that would ignite a person who is covered in gasoline, they knew that, and they still chose to go ahead and use the taser on this man. So, then he was put on fire. And so, Judge Willett's dissent from the denial of en banc review is essentially that he basically says they knew that if they were to do this, that would have set him on fire. And they continued with that, right, there could have been other options, and the concurrences, from the denial of review are all about, no, you know, you don't know there were other options. And the officers acted absolutely reasonable. This is a scary situation. This is a split-second type of situation. Right. And what's also interesting is that they all talk about Taylor, and they all talk about McCoy. And they agree that those two decisions are very important, and that the Supreme Court is indeed, you know, maybe strengthening Hope v. Pelzer. The one important post Harlow

qualified immunity case where the Supreme Court basically says that fair warning means that sometimes when the violation is obvious, you don't need a specification point, you should have known it, nonetheless. So, judges in the Fifth Circuit agree that those two are important that the Supreme Court is sending them a signal, right, but they disagree that in this particular case, whether qualified immunity should shield those officers or not. And it's kind of, you know, unusual to see so many concurrences and dissents about this one case, right? It's kind of a little bit of, you know, showing the inside workings of the Fifth Circuit, and also kind of, you know, they're testy, some of those concurrences are testy, right, like Judge Jolly, he's obviously irritated with Judge Willett. And he, you know, makes fun of the more Stella Graham, that judge will it opens with, right? So, it's kind of it's an it's an unusual case. And in that sense to where you see, kind of, maybe, you know, you see more than what you want to see, in terms of disagreements between just judges, where it actually gets personal.

Anthony Sanders 28:28
And the line I think that most stands out is Judge Ho's concurrence, as judges, we apply our written constitution, not a woke constitution. It may be many things, I don't see it really as woke.

Anya Bidwell 28:44
I don't see this woke at all. And I also don't understand why Jolly, Oldham, and Ho all needed to ride separate concurrences essentially telling Willet that they disagree with him, right. I think one would have been enough. You know, I can totally see that. But why do you need three separate and all trying to take shots at him? And that is just beyond me. I think that went way too personal.

Anthony Sanders 29:12
What one point I was, Anya, I'd like to ask you a question before we wrap up on the opinion is what one point I didn't really get that judge will it was discussing was, you know, all of the concurrences that are saying what else should this cop have done? Instead of firing the taser? What else could he have done? And Judge Willett says there's other options, and we need discovery to figure out what they are. And I think it seemed like the concurrences weren't happy with that because they're saying look, what is the other option? And then you know, the answer is, well, whatever they are, we'll find out in discovery. It seems to me he would have been better served not to rely on discovery, as like the antidote to that. But on the fact finding. Right. So, we that how the system is supposed to work? Did you go to a Fact Finder, whether it's a jury or a bench trial with a judge, and you figure out what really happened, and what else could have happened, and maybe you get testimony from other officers like, what would you have done in that situation? Instead of saying, well, we'll find it in discovery. Whereas, because this is a

very well pleaded complaint, it's, it seems from the opinions, you know, discovery was would just have tried to back that up. So, I don't I think that might have been a little bit my opinion was, I think that might have been a little off to rely on discovery and not say, what else would have happened, like, when I read this, what else should have happened was anything else? Because if you, look, if you're trying to stop someone from burning the house down, and you tase them, which creates the burning, in fact, I'm sure it's more than this guy waving around a lighter and who knows if that would actually caught fire or not? You, I don't know. You try to talk the guy down as much as you can. Because once he drops the lighter, it's the same thing as tasing him, you try to tackle him, you try whatever it is, it's going to be better than the tasing. That's the ultimate issue. And yet, it seems like well, discovery, you know, might figure out what else we should have done, it seems to me, it's just it should go to a Fact Finder is the bottom line. But what's your read on that?

Anya Bidwell 31:21
I agree, I think one of the worst excesses of qualified immunity, right, is that it prevents factfinding from ever taking place. And that's, you know, horrible. And I think part Willett kind of gets added, maybe he is not saying it directly. But at the end of the day, that's what really bothers him, right? He basically says, “How in the world can you guys do this at the motion to dismiss stage, just throw it out and not even worry about it?” And that's kind of what qualified immunity does, right? If there is an excuse whatsoever to say that somehow the law is not clearly established. And you have a lot of, you know, latitude in how you want to apply the clearly established tests, including by applying it, in fact, by factor analysis, then you throw out a well pleaded complaint, right? And a constitution is nothing, but you know, an empty promise. So, at the end of the day, I think Judge Willett is concerned very much with that we are at the motion to dismiss stage, how in the world is this possible? It can't be he's pleading with the Supreme Court essentially, to take this on and do something about it. And I absolutely agree with him, at the motion to dismiss stage, this should not happen.

Anthony Sanders 32:43
Well, we're still waiting on the Supreme Court to do something about qualified immunity beyond these tea leaves and telegraph signals that they've been sending. But we hope that may change in the near future. And there are signs perhaps that may change in Congress in the near future. So, we're watching both developments. While those happen, we're very happy that our friend Nick will be going to bigger and better things, but we want to thank him so much for coming on the show today. Nick, it's been a pleasure to have you

Nicolas Riley 33:13

The same here. This was a lot of fun. I appreciate it.

Anya Bidwell 33:17

It’s great to have guys like Nick at the DOJ!

Anthony Sanders 33:20

I will affirm that and thanks so much to Anya for coming on as always. And to the rest of you. I'm going to say please have a very Happy Fourth of July and in the meantime, to get engaged.