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SPEAKERS

Anthony Sanders, Will Aronin, Jeff Rowes

00:00

A **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. Today is Thursday that we're recording this January 27, 2022. And joining me today are two of my esteemed colleagues. We have Senior Attorney Jeff Rowes and IJ Attorney Will Aronin. Welcome both of you back to Short Circuit.

J **Jeff Rowes** 00:38

Thanks, Anthony, as always great to be here.

W **Will Aronin** 00:40

Thanks so much love being here.

A **Anthony Sanders** 00:42

Well, guys, as you as you know, because I just told you before we started recording, as you may know otherwise, we at Short Circuit are looking for the best courtroom in terms of aesthetics. The best courtroom in the federal circuit courts in the country, we've had many nominations. This is going till January 31. So if you're listening to this, you know that the start of the weekend, this is the last couple days, you can tell us what your nominations should be. A lot of nominations from the Ninth Circuit, but a few from other circuits, including the Fifth. And Jeff, I think you want to add to that pile.

J Jeff Rowes 01:18

I would I'd say the en banc courtroom in the Fifth Circuit, Louisiana, New Orleans, Louisiana is the most beautiful courtroom in the United States.

A Anthony Sanders 01:26

What is it about it when you walk in, it's just you know, makes you feel like it's a work of art?

J Jeff Rowes 01:32

You know, it's one of these cavernous rooms. And it's cathedral-like. The architecture matches the exterior architecture, which is Greco Roman, and gives you a sense of majesty and permanence. It you know, this was built before the era of kind of functional, financially rational courtroom architecture that you see now where it's just like, you know, standard wood paneling and stuff like that. So it's a beautiful place. Everyone should should check it out if they're in town, and the library is also beautiful in that courthouse.

A Anthony Sanders 02:07

Well, and Will any any thoughts from you.

W Will Aronin 02:09

As a general rule, I don't like to agree with people, just not as much fun. But it really is the most beautiful courtroom I've ever seen. And since I can't speak about the architecture as nicely, I'll say, since it's in New Orleans, you also walk in with a belly full of the best food in America.

A Anthony Sanders 02:23

Well okay, so those those are good points and maybe a hurricane while you're walking down the street there too, Will. So we have a handpicked, extremely non-objective panel that is going to come up with the answer next week. So we'll look forward to their results. And that will be announced on a future Short Circuit. For now, I just have a very brief update. Last week, there was there was disagreement between myself and my colleagues, Sam and Bob, about how to pronounce en banc, which of course means the full court. It's used often in American courts, both state and federal. And they both pronounce it <>, which I thought was just dreadful, and hadn't really heard much before. But I've done a little research on this this last week. And both of those guys by the way took French so it's not like they weren't familiar with French words. I stated last week it's a Latin word, but I should have been thinking it's actually a law French word from Norman French that our Anglo Saxon ancestors inherited from the Normans, well, was foisted upon them, I should say the law French language.

J Jeff Rowes 03:42

Yeah, we still haven't gotten over 1066.

A Anthony Sanders 03:45

Oh no, the Norman yoke is still strong, especially in in American courthouses. But there was a movement funnily enough for a while of using in banc, i-n and then b-a-n-c, kind of an anglicised version of en banc. And it began to get popular, according to some research I did, in the late 19th century and was actually used more in both federal and state courts in the early 20th century. But then for whatever reason, maybe it was some, you know, some old Norman purity or whatever, it came back in the late 20th century. And now <> is almost is almost extinct except it still is actually in the federal statute that governs en banc panels. It actually has i-n in there. The federal rules had it for a while but it was changed in 1998 mysteriously. So there's an update about en banc. There will be more to be said about this in the future. Because of course we at Short Circuit have en banc watch or en banc news is what John Ross, our newsletter writer likes to say. And so there'll be more -- there's actually an interesting footnote in an article from Judge Jon Newman of the Second Circuitfrom 1994 where he outlines some of this that we'll maybe put a link up to, as they say.

J Jeff Rowes 05:07

Well, you know the next time you're wrestling with French pronunciations, you should clearly come to me, a Canadian who learned French and mastered it by reading the backs of cereal boxes as a kid which have English and French side by side. And I could have resolved this for you without all of that scholarly research.

A Anthony Sanders 05:24

Wow, that's like a language mandate that's, you know, had some positive effects from you reading cereal boxes. So I'm glad to hear that.

W Will Aronin 05:32

I can just imitate the candlestick from Beauty and the Beast but the offer is on the table.

A Anthony Sanders 05:36

Well my couple of years of high school French allows me to imitate the lumberjack from the Bugs Bunny cartoons so we got that too. But Jeff, different subject, contracts and the Constitution, what's going on? It's looks like it's a suburb of Austin, have you ever been to this place?

J Jeff Rowes 05:56

J Jeff Rowes 05:56

So I haven't been to Hutto. But it is in the great state of Texas and metropolitan Austin, and Hutto decided that it wanted to have a mixed use development 200 plus acres. This is pretty standard issue for cities all over the United States. And they have a government nonprofit corporation, which has special powers to borrow money and kind of finance these things. And this entity borrowed money from another entity that finances government mixed use development projects. And you know, long story short, they got into disagreements about stuff. And the entity, the borrower, or the lender wanted to get paid back. The borrower said no, we don't have to. Goes to court. Then interestingly, the entity brings a takings claim and says your failure to pay me back under the terms of this contract is a taking that violates the Fifth Amendment proscription against takings but for a public use. And the Fifth Circuit said, uh uh uh, not taking this is a garden-variety contract dispute. That's how you resolve it. The Takings Clause is not a super contracting. And the Court drew an interesting distinction between the government acting in its sovereign capacity and acting in its commercial actor capacity. So when the government is just hiring, when it's entering into contracts, doing that kind of thing, it's acting like a market participant. It's not acting like a sovereign, which is what happens when it exercises the power of eminent domain.

A Anthony Sanders 07:24

Will, one thing that confused me when I read this case, and why I asked Jeff to come on, but let's have you weigh in on this first was I, when I first looked at it, I didn't read it carefully at all, I just glanced through it. I thought it must be a contracts clause claim. But actually, they brought a takings clause claim, which just seems to be a peg, or, you know, round peg in a square hole or whatever it goes. What did you get what was going on? It just seems like there's something else going on under the surface, why they would have had this legal tactic.

W Will Aronin 07:58

Yeah, I had the same thought about there -- it seems that there is something missing, or just a fact that the decision didn't either need to go into or just chose not to go into. It's just not clear. What what the decision held was that if you enter into a pure contract with the government, that you can sue them under the contract, but it doesn't make it a constitutional violation. It really struck me that there was no reason to bring this as a takings claim to begin with.

J Jeff Rowes 08:22

Usually, you know, I've actually thought about bringing a few Contracts Clause cases in the past and have done some research on this. And and in some ways, the doctrine tracks what they did here. But I think the explanation is that in a Contracts Clause case, what happens is the sovereign passes a law, right? It's not that it just enters into a contract, it passes a law. The law vitiates a contract. And then it just gets basically rational basis review. If the government has a reason to vitiate the contract, a kind of public policy justification, courts will uphold it. Now, it's true that what the government can't do is pass a law that says I don't have to pay back my ordinary contracts. But the but the government, and the government is actually held to a higher standard under the Contracts Clause, when it tries to nullify its own contracts that it's made in its market participant role.

A Anthony Sanders 09:14

Right, which is kind of what happened here, except it didn't really pass a law.

J Jeff Rowes 09:19

Yeah, that was the thing is, I think, you know, the person who really was in default, or arguably in default, was this non government, or was this government, nonprofit financing vehicle. And that is not exercising sovereign legislative power. So when it when it just refused to pay back for whatever reason. It didn't think it had to, by the way. And the court said, we're not weighing in on who's right or wrong on the contract thing. We're just saying this isn't a takings claim. But it is sort of interesting that it wasn't a Contract Clause claim. I assume that the lawyer researched it and I would have thought that perhaps you would research that and then say to yourself, boy, this isn't a good Contracts Clause claim and then also say to yourself that it probably isn't very good takings claim either.

A Anthony Sanders 10:00

And I'm dumbfounded. There's nothing --I mean, this, it was a full, it sounds like it was a full normal financing contract that you could go to court to enforce if the terms are violated. It doesn't even sound like there was -- they didn't make up, they missed a payment or something like on a bond. Because it was pretty darn soon after it was entered into. It's like, right, they didn't like the way the winds were blowing. It also was an April 2020, which makes me think this was related to the pandemic and maybe the economy dropped or so I don't -- it's almost like they were trying to get around their own contract. I wonder.

J Jeff Rowes 10:44

Yeah, I mean, in a, in a declaratory judgment action under a contract, you just look at the four corners and apply the law. Or if there are some factual questions about performance or non performance that gets preponderance of the evidence. These are all way better than rational basis review, which is basically what you get under the Takings Clause. And so it's hard to figure out why that would be your best and only option if you're doing this. And I think the other thing, just for the broader judicial engagement concept that the court was expressing is like, hey, the federal courts don't exist to solve, you know, sort of every problem. You can't constitutionalize all kinds of torts or reformat them as constitutional claims. When maybe for some procedural or substantive reason you can't actually bring it as the ordinary garden variety state law tort that it is.

A Anthony Sanders 11:39

Yeah, I think that's largely what the the court was driving at. One last thing is, it looks like they entered into this agreement, because there was a prior developer -- that a similar plan fell through. And of course, it reminds me of all too many development plans that we at IJ have

looked at in our eminent domain cases. Luckily, eminent domain was not it seems not involved in this case or not that I can see that -- such as Kelo and many other sad stories.

J Jeff Rowes 12:08

Yeah, this also may be like a crazy situation of what economists sometimes call an efficient contract breach, like in other words, it's not that the pandemic caused the market to collapse. It's that all the like real estate prices exploded during the pandemic in the Austin area, and maybe somebody wanted out of the contract, because you can make a whole lot more money using the land for some other purpose.

A Anthony Sanders 12:28

That's a very good point. Well, another purpose of the law is to try and figure out what objects created what kind of blood splatters. And Will is going to fill us in on that.

W Will Aronin 12:45

Thanks. That's a great transition from contracts to blood splatters, fighting over contracts.

A Anthony Sanders 12:50

There weren't a lot of others available.

W Will Aronin 12:52

Fair enough. So I actually want to talk about a case. It's O'Donnell v. Yezzo. And it's a case that came out of the Sixth Circuit about a week or two ago. And before IJ, my background is actually in criminal defense. So this one really spoke to me. And it's about a man who wrongly spent 23 years of his life in jail for supposedly murdering his wife based upon honestly just based upon garbage testimony by the prosecution's expert. Not just junk science, which we'll talk about, the expert herself, and this was defendant Yezzo, had been suspended for, and I want to quote this, suspended for going postal, threatening to kill her colleagues, and was actually brought back early from that suspension specifically to testify against O'Donnell. You can't make this up. Literally her first day back from suspension was to testify. None of this was actually disclosed to O'Donnell the defendant, the defendant on trial would have had a chance to cross examine and impeach Yeszzo. And that's obviously bad, right.

J Jeff Rowes 13:55

Well, I was gonna I was just going to throw in there to like what one of the disciplinary problems that the supervisors identified is that she stretched the truth in order to please her supervisors. Like you want to know that if you're the criminal defendant that person testifying against you is

regularly exaggerating in order to get gold stars from the from the prosecutors and from the people in the forensics office.

W Will Aronin 14:15

It's crazy. The exact word they use is stretch the truth, and she would work to give the detectives what they wanted if she liked them. This was all in her personnel file. So the fact that she went postal was not disclosed. And the fact that she stretches the truth, and the basically the government knew her to be a liar was was not disclosed and O'Donnell spent 23 years in jail. 23 years later, the Ohio Innocence Project gets involved in much respect to them. They unearth all of this, and O'Donnell was released from prison. But the damage was already done. He spent a huge portion of his life behind bars, and he passed away before he could either be retried or sue or anything like that. His family, his daughters brought suit. And they sued everyone they possibly could: the expert herself, the city, the detectives, the expert's supervisors, everyone. And this case actually has a lot in it, including some interesting qualified immunity issues, especially about those supervisors and the detectives. But I want to actually use this case to focus on two things. First, the Brady violations and junk science in prosecutions generally. So I think our listeners probably know that Brady v. Maryland, or really just Brady at this point, means that prosecutors and the police and the government must turn over helpful evidence to an accused. Basically, they can't just hide evidence that hurts their case. And that's because they are there to do the right thing. They're supposed to do justice, not just get convictions.

A Anthony Sanders 15:43

And Will, I don't know a lot about Brady at all, but isn't it that they have to do it without being asked?

W Will Aronin 15:50

Yeah.

A Anthony Sanders 15:51

They can't wait for a clever discovery request to actually, you know, ask for the thing that might that would go against their theories of the case.

W Will Aronin 16:00

Yeah, that's exactly right. So they have an affirmative duty to go through their evidence, and actually find out if there is something that either like legitimately impeaches their main or one of their witnesses, or like exonerates the defendant and shows that perhaps there's reason to believe somebody else did it. And it doesn't have to be the smoking gun. It doesn't have to be like a photograph of somebody else doing it. It just has to be something that makes -- that is strongly supportive of the the accused.

J Jeff Rowes 16:29

Yeah, it seems like the sort of nutshell in Brady is like, if you were a civil litigator, and you saw this piece of evidence, and you said to yourself, whoa, I hope that doesn't get out, or I hope there's no discovery request for that. As a civil litigator, you get to just like tuck it away in the back file unless somebody asks for it. But if you get that impression, as a prosecutor, you're supposed to be like, Okay, I'm going to turn this over.

W Will Aronin 16:51

I love that. The less you want to turn it over, the more you have to. That's a perfect description of Brady. So again, there was really unquestionable Brady material that was not disclosed that the prosecutors held on to. And plaintiffs sue everyone they could for this violation. And that's really important. But a lot of the focus is on the detective and the fact that the detective never disclosed this to the defendant. And ultimately, the court ruled that the detective himself didn't do anything wrong. And that's because cops are supposed to tell the prosecutors about the bad stuff. And once they've done that they've done their duty. There's actually this line from the decision that just cuts to the heart of the problem. And it's the detective cannot be sued because, and I'm quoting, he learned of Yezzo's suspension from the prosecutor so there was no further Brady evidence for him to disclose to the prosecutor. I mean, great, that actually makes sense. The next line to the next paragraph will presumably talk about how the prosecutor failed to tell the guy that he was trying to send to jail about this and they can be sued. No, that's exactly the opposite of what it was. And that's because prosecutors actually have absolute immunity for Brady violations, intentional violations, flagrant ones, it literally doesn't matter. You can send someone to jail for life, destroy the documents that like prove that the person was innocent. And if they're miraculously recovered decades later, the DA and what that really means is the prosecutor's office or the city, the government can't be sued for the Brady violation. It basically is absolute immunity. And this all comes from a 1976 Supreme Court case called Imbler, which created this. And there's this line from the decision that just shows how obvious of a problem they created. It's one of those like a to-be-sure line, where you acknowledge the exact problem, but then kind of move on from it really quickly. And it's from the Supreme Court that creates absolute immunity: to be sure this immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest actions deprive him of liberty. And that's exactly what they've done. That's exactly what happened to O'Donnell. They didn't know that the -- the prosecutor never disclosed that their main witness was a crazy liar. And the person spent basically the rest of his life in jail. Now speaking of messed up prosecutions, I also want to talk just a little bit about the junk science results and convictions. And a lot of this stems from what we call the CSI effect, you know, the show where the forensic examiners uncover smoking gun or know exactly without a question who the who the bad guy was by the end of the episode. It just doesn't work like that. That's not the reality of what the science is. So in this case, Yezzo's testimony involved some really questionable blood splatter evidence that purported to just show some absolutely impossible things. I don't want to get into the complete weeds about what happened but basically the murder weapon was a Craftsman tool. And Yezzo claimed that the that the weapon left behind imprints of the Craftsman letters in a way that the Innocence Project later showed was absolutely impossible. But it's not just dishonest experts that bring up the science that convict people wrongly. There's a lot of it. In IJ's own cases we keep see coming up to things like drugs sniff or dog sniffs. That we know that there's just this evidence is not as

reliable. That so much of the money in this country has drugs, that the idea that a dog sniff alerts to drugs on currency is really effectively meaningless. That's one another example. There's actually 51 convictions in Colorado right now that are being reviewed based on just hair analysis that over time has not stood up to any real scrutiny. This comes up in bite marks. Even ballistics, which people think is relatively accurate, is just not. In fact, even eyewitness identification has been shown to just not be reliable, especially cross racially, if the witness and the person they're identifying are a different race. It just comes down to this idea that science is there to give you the best possible guess, but the requirement of like proof beyond a reasonable doubt -- how inapposite those two things may end up being.

J Jeff Rowes 21:09

Yeah, it's interesting you mentioned the CSI effect, because I've spoken to a couple of prosecutors over the years. And they talk about how it cuts both ways. That a prosecutor can have, you know, really, really compelling traditional evidence and the jury's like, where's the DNA? Right? Like, Oh, you don't get to convict anybody of murder unless you have one of these forensic specialists who's like Sherlock Holmes on steroids and has all of this special technology and that person will find the DNA. Because that's what you need -- DNA to know that the murder happened. And then on the flip side, is this idea that if you have some kind of CSI type of evidence that you're just like, Okay, this is CSI type evidence. It was obviously done by a by a Sherlock Holmes on steroids. It must be this. This is the evidence. We have to convict. And that's what it was running into in this case, I think.

W Will Aronin 21:58

I think every every -- certainly every homicide trial, I did, but I think every major criminal trial, you end up on jury selection talking about this and trying to get the jury to accept in the very beginning, that just these experts are there to give you their opinion. But the science is not just this is the answer to the question. I think I remember crossing on one case, someone on blood spatter and entry point wounds. And it's just their experts said what they said. And our experts said the opposite. And it didn't matter how many textbooks you could show the other expert, once they make their opinion and use that magical phrase, well, I can opine to this to a reasonable degree of medical certainty, or scientific certainty. The jury believes them and it really is a problem.

A Anthony Sanders 21:58

Yeah, I have to say reading, I mean, I'm just reading what the opinion said. But this evidence that that the tool left, you know, a couple letters that are imprints from the word Craftsman on this sheet. And if you haven't read the case, listeners, they only know this through, like a couple photos of the sheets that by the time they're looked at are like over a decade old. It I mean, it sounds like phonology, about, you know, reading or feeling someone's head. And because of that the bumps on their head knowing you know what their personality type is. I don't even get how it made it to the jury at all, let alone convinced the jury. But I think you're right, it's the whole holding someone up as an expert and that they say the right mumbo jumbo and that sounds impressive. And like I would have no clue about some of the science behind a lot of this stuff. And they go with it.

J Jeff Rowes 23:42

I was gonna say to that the the sort of final tragedy in this case, the human tragedy, is that his daughters brought this. He was in prison for 23 years, his daughters brought this lawsuit. And they clearly believe their father all those years that he was in prison saying I didn't do it. And then he died before either the prosecutors could affirmatively say like, we're not bringing this because we think this evidence exonerates him, or he didn't have a trial in which it was determined not just that the government had proved its case, but basically exonerated them. And so the court said that the malicious prosecution claims because he died with a sufficient cloud over him, we can't actually allow the malicious prosecution claims to go ahead because we don't know that this evidence made a difference. And I thought that was just kind of like the last human thing that the you know, the daughters were trying to get this vindication for her father and just kind of couldn't.

W Will Aronin 24:41

And that's why it's so just messed up that you can't sue for the prosecution's failure to turn over Brady. Because that's the piece of evidence that any defense attorney really needs. If there's Brady material, it means either that the expert or the witnesses is not a credible witness, or there's some proof that base suggests that you that they got the wrong guy, it's really important thing. And the party that makes the choice to turn over Brady or not is the prosecutor. So the fact that there's absolute immunity means that the entire system, the state, the city, whatever it may be, can hide behind that absolute immunity and prevent you from suing based on what really happened. The fact is, you were wrongfully convicted because the Brady material was not given to you and the person who didn't give it to you was the prosecutor. And he spent time in jail. This just has to be fixed.

A Anthony Sanders 25:30

Well, I really appreciate you walking us through that that case, Will. There is so much that can be said about junk science and prosecutorial immunity. I encourage people to to look up, if you haven't, our our sister podcast Bound by Oath and the episode on prosecutorial immunity that John Ross has put together, goes into a lot of these details and in the historical background of how the heck did we get to this place where you can't sue a prosecutor who did something as outrageous as Will just just told us about. Thank you both for coming on this week. We look forward, listeners, to presenting you with some more Short Circuits in the in the coming future. We have a special coming up in a couple of weeks on a recent IJ report that will be excited to talk about. But in the meantime, I look forward to all of you getting engaged.