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SPEAKERS

Anthony Sanders, Alexa Gervasi, Bob Belden

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. We're recording this on Wednesday, April 13 2022. I want to first briefly thank everyone who came to Short Circuit Live last week. Last week we recorded our own live broadcast. Well, it wasn't live to listeners, but it was live to people there with the studio audience at the National Press Club in Washington, DC. My colleague Anya Bidwell hosted that. I wasn't there myself. I was sorry to not be able to attend. But many IJers were there. And many other folks in the legal community and beyond came to the event. So we thank you if you're in the DC area and you made it to that event. I was told there was even a couple from Las Vegas that came out for the event. I don't think it was just for that event. But maybe that was the excuse to go to DC that they said they were big Short Circuit fans. So thank you and shout out to that couple for coming and to everyone else as well. If you're interested in seeing Short Circuit in the flesh live, you will get other chances in the future. We're going to do it other places than DC. We used to, of course, do it a lot at law schools before the pandemic and that is going to start again this fall now that we have, I think, a normal school year coming up. And there will be other opportunities outside of the law school contexts like we did last week for people to come to. But today we have two very live IJ attorneys to talk about a couple of very lively cases. They are Bob Belden and Alexa Gervasi. But first, we usually don't talk about breaking cases that IJ itself litigates here on Short Circuit. Occasionally we talk about our cases when we get a circuit court opinion. But Alexa just happened to have filed in court in Texas a case yesterday that's just really crazy and outrageous and everything we love doing at IJ in terms of trying to fight back at the abuse of the government. And so Alexa, maybe you could just very briefly give a tease to our listeners about this case, and then they can check it out on our website if they want.

A **Alexa Gervasi** 02:43

Yeah, thanks, Anthony. So we learned that for almost 20 years, a prosecutor in Midland County, Texas, was a prosecutor by day but he was spending his nights working as a law clerk to the same judges he was practicing before and in his own cases. So by day he was in front of the

judges saying, Judge, you should rule in my favor. And at night, he was sitting behind his computer and typing up the orders in his favor.

A Anthony Sanders 03:13

So for non-lawyer listeners, we're all former clerks here, all three of us, that's frowned upon right? To do that.

A Alexa Gervasi 03:23

Yeah, you know, there's only like about a dozen ethics books that say that is a conflict of interest, and you can't do it. So our wonderful client, Erma Wilson, was one of more than 300 victims of Ralph Petty's dual role. And in her case, she ended up being convicted of possession of crack cocaine, which she vehemently denies over 20 years later, in a trial where Petty was the law clerk, writing important motions and, you know, engaging in conversations with the judge and doing all sorts of stuff behind the scenes. And in her case, it resulted in her not being able to become a nurse because Texas says if you have drug convictions, you can't be a nurse. And so yesterday we filed suit in federal court in Texas, to vindicate Erma's rights and hold the wrongdoers accountable. So we're taking on prosecutorial immunity, qualified immunity, and municipal liability,

A Anthony Sanders 04:28

A hat trick. So that is all part and parcel of IJ's Project on Immunity and Accountability and is really excellent to see. That is maybe the biggest no-no in the legal ethics business, to have what's called ex parte communications with a judge and if you are actually an employee of the judge, I can't think of a more ex parte kind of relationship than that, what this man had. So, it is great to see that filed. And we'll see how it progresses. Now another case that has progressed for a very long time, and is probably not over yet, is one Bob is going to tell us about here in a moment from the Fourth Circuit. So what are the trials and tribulations, Bob, of this fellow Lynel Witherspoon?

B Bob Belden 05:24

Thanks, Anthony. I want to before I start echo your congratulations to Alexa. You know, I'm really honored to work at a place where people dedicate themselves to calling out the kind of egregious misconduct that took place in Midland County. So huge congrats on that. And I hope that justice is done. But yes, I'm here today to talk about Witherspoon v. Stonebreaker, out of the Fourth Circuit. And before I get started, I just want to put up front that the dissenting judge in this case, Judge Allison Jones Rushing and I overlapped at my prior firm for a little while. But I won't let that color any of the jokes I make today. And I'm sure it won't influence any of her opinions moving forward. But in case I seem too partial to the dissent, at some point, I wanted it to be out in the open. Lynel Witherspoon went to trial in 2013 in South Carolina state court on charges for cocaine distribution that resulted from a 2011 controlled drug buy. And at his trial, there was very thin evidence that he was the person who actually sold drugs to this confidential informant. And the police who testified said, you know, I didn't get a good look at his face. I was

kind of far away. The confidential informant, she wore a sort of sweater cam during the drug buy and it never got to look at the defendant's face during the drug transaction. And sort of as a cherry on top, that confidential informant had been convicted three times in the past of felony forgery. So that is sort of a survey of the evidence that was presented at trial. The jury got the case at around 3pm. And they deliberated for about three hours, I think, and came back to the judge and said we're deadlocked. And the judge ultimately gave the equivalent of an Allen charge and said, you know, You have to keep deliberating. The jury then asks to take another look at this video from the confidential informants sweater cam. And they didn't just want to look at the video, they wanted to freeze frame a specific shot of the video that appeared to show the person who was selling drugs, it appeared to show his face, the reflection of it, in the side mirror on this car that the confidential informant and I think it was her boyfriend who drove her to the drug buy. They were sitting in this car, the guy who was going to sell them the drugs gets in the back seat. And for a brief moment, apparently you can see a bit of his face in a side mirror. The jury wants to see a freeze frame of that that instant. So the judge agrees that they can do that. And then the jury sort of says, Well, can we have the defendant stand up right next to it? So basically have a side by side of this freeze frame and the criminal defendant's face. And the judge turns to the defense counsel and asks, Do you have any objections to this? And the defense counsel says, I would, Your Honor, but, and then the transcripts sort of reads dot, dot, dot, and it's not exactly clear how much time passes, but the judge cuts her off pretty quickly and says, I think it's appropriate, and he orders the defendant to stand up. So the jury gets this side-by-side and in a matter of 10 minutes they go from being deadlocked to coming back with a unanimous guilty verdict. And the defendant Lynel Witherspoon is ultimately sentenced to 17 years in prison for this. And so he files a direct appeal and gets a new lawyer, and this is kind of a consistent thing for Mr. Witherspoon: His appointed counsel in the South Carolina state courts keeps filing the equivalent of an anders brief, which is basically defense counsel's request to exit representation because they believe that there are only frivolous issues to be raised on appeal.

A Anthony Sanders 10:20

I'm sorry, Bob, but if you're an appellate judge, and you see it's an Anders brief, you're probably not giving it the most careful attention.

B Bob Belden 10:28

That's right. I think that, on the Fifth Circuit, at least, maybe 60 to 70% of the opinions that get released on any given day are kind of two-page orders granting Anders briefs. So it's not getting the most most direct scrutiny on direct appeal. Weatherspoon gets no relief, and he does some of the work pro se. After he's exhausted the direct appeal, he starts up with post conviction relief. And at this point, he argues that his trial counsel's performance was ineffective in violation of the Sixth Amendment and says, The failure to object to the stand up order and a number of other things fell below the expected level of performance for defense counsel. And the state post conviction relief court ultimately concludes that this defense counsel had an overall trial strategy that made sense. She objected at appropriate time, she drew out helpful evidence about the police officers witnessing the crime, the confidential informants, prior convictions, all of this stuff. She did a good job net net at trial but sort of takes a wide view of what happened and doesn't focus in directly on the failure to object and there's some ambiguity in the record about whether the state PCR court actually found there was a

failure to object or found that there was an attempted objection that was cut off by the judge. It's not totally clear. But ultimately, the state court concludes there was no deficient performance. And in a sort of summary fashion, having concluded there was no deficient performance, the state court says, There's not going to be any prejudice to the defendant because the lawyer's work was reasonably reasonably adequate. So that is basically the way the South Carolina courts leave it. And after having exhausted the state court relief that was available to him, Weatherspoon seeks habeas relief in the federal court. And so at this point, he has already gone through six years of direct appeal and state post conviction relief, and he's been incarcerated the entire time. So in 2019, he seeks habeas relief. And that's denied by the magistrate judge and the district court judge in the District of South Carolina. The lower federal courts essentially adopt the view that the trial counsel did object to the side-by-side order, and that the objection sort of was reasonably adequate performance and that there was no prejudice to Witherspoon. And he appealed pro se. And on appeal, the Fourth Circuit actually appointed the Supreme Court clinic at Wake Forest and I listened to the oral argument, which was handled by law students at Wake Forest and I thought that they did a very good job. And so I want to say that Emily Washburn and Rohun Shah did an admirable job arguing at the Fourth Circuit, which is something that I have never done and a lot of lawyers my level of seniority have not done, so good on them.

A Anthony Sanders 14:33

Yeah. What an opportunity and to do such a good job at it, too.

B Bob Belden 14:38

Yeah, absolutely. So they argue and brief the appeal and the issue that ultimately the Fourth Circuit needs to address is whether the state post conviction relief court unreasonably applied the standard laid out by the Supreme Court in Strickland v. Washington for analyzing ineffective assistance of counsel claims. So there are two kinds of applicable legal standards working side by side here. The first is the habeas standard under the Anti-terrorism and Effective Death Penalty Act, which says the federal court cannot intervene on a habeas petition unless one of three different sorts of factors are met. And the first is that the state court applied clearly established law in a way that was contrary to the clearly established law or unreasonably applied clearly established law or made a decision that was based on an unreasonable determination of facts. So the one of those three prongs that the Fourth Circuit focuses on is the unreasonable application of Strickland, and Strickland lays out a pretty simple two-prong test for ineffective assistance of counsel claims under the Sixth Amendment. The first is that the petitioner has to show an objectively deficient performance by trial counsel, something that a reasonable lawyer would look at and say that's not up to snuff. The second is prejudice, which has the court look at whether or not there's a reasonable probability that, but for the deficient performance by the trial counsel, the result of the proceeding would have been different. So you have those two-prong tests and those are reviewed deferentially to the state court, and the habeas standard also calls on deferential review of the state court decision about whether it got clearly established federal law correct. So you have two legal standards that tell the federal court you need to be deferential. So everybody, both the majority and the dissent, everybody's on the same page. This has to be doubly deferential. But the majority concludes that the state court erroneously and unreasonably applied Strickland, and the dissent disagrees. And so on the first Strickland prong, deficient performance, the majority makes a lot

of the distinction between an attempted objection and a failure to object. And so the majority can't get past the idea that the state PCR court kind of recounted what happened at trial and said, trial counsel attempted to object or her attempted objections were cut off. And the majority says, you know, the PCR court never concluded there was an actual objection. And so the district court here, the federal district court, erred in concluding that an objection had actually been made. So there is sort of a disconnect at the very beginning. The majority thinks that the state court's factual findings have been sort of disturbed or interpreted incorrectly by the district court. But the majority goes on to say that, even if we accepted the idea that this was an attempted objection or a failure to object, no reasonable lawyer would look at this situation and say, I shouldn't object to what's happening right now. And the majority looks at state law on introducing "new evidence" during the jury deliberation stage. And the majority says, Any reasonable lawyer sitting in trial counsel's seat would have seen that the freeze frame and the side-by-side with Weatherspoon are effectively new evidence being presented to the jury during this jury deliberation and that there are South Carolina cases that say the only remedy in this situation is to give the criminal defendant a new trial. And so any reasonable lawyer in that position would have stood up and objected and objected strenuously and so you have to keep in mind here that the trial counsel stood up and said, I would, Your Honor, but and then didn't say anything else. So the majority kind of concludes that was not actually an objection. And there's no reasonable explanation for a failure to object in that situation. And so, before kind of turning to the second prong of prejudice, I do think it's worth pointing out that the dissent, Judge Rushing says, This kind of intrudes on what the state PCR court actually found, because, as I've been thinking about this, the record at the state level is a bit ambiguous. And it looks like throughout the trial, the defense counsel had been raising objections, you know, when appropriate. And after the close of the evidence, when she raised objections, the judge sort of cut her off pretty prematurely, and things got kind of heated between the judge and defense counsel in chambers about various other objections that she had made. And so I'm not totally sure that it's fair of the majority to conclude that there was no objection or that the objection wasn't effective. And that is especially the case in light of the sort of second observation that the dissent makes that I didn't really see considered seriously by the majority, which is that one of the kinds of first things you learn from a professor in evidence or crim pro in law school is that when you're on a trial with a jury, it's not a sterile environment, like reading an appellate opinion, like you do in law school. There's a lot more that goes into consideration of whether to object to a question that opposing counsel's asked or something that the judge has said, or anything that has happened. As defense counsel, you are telling these jurors a story. And you want them to believe that you're credible, and that you are telling the truth, and that they can rely on you as a reasonable storyteller. And so, throughout the trial, the defense counsel had repeatedly said, you know, you cannot see the defendant's face in this video, this video doesn't show anything. And she had made a lot of the fact that the video was sort of deficient evidence. And so the dissent points out, a reasonable attorney in the trial counsel's position might have said, If I stand up and make a big show about the freeze frame of the video, or the side by side, the jury is going to look at me and think that I want to hide something from them.

A Anthony Sanders 23:13

Especially true, where, you know, she can now tell she might actually win this thing. You know, the prosecutor might be on the ropes, the jury has been deliberating, they've actually asked for new evidence. It's not, you know, just going to be a case where he's convicted as a matter of course. And so you don't want to make the jury think you're hiding something at that point.

B Bob Belden 23:39

Right. Yeah. And you don't want to upset them by, you know, even if you don't have to make a big show, raising this objection, asking the judge, can we sequester the jury or turn on the white noise in some courtrooms and let me approach the bench and we can argue about this thing. The jury is going to still hold it against you a little bit that something, even if it's just the argument about whether the evidence gets in, they're still going to think that you're trying to hide something from them. And so that was something. I kind of felt like the majority did not really give any credence to the realities of what it's like to be a defense attorney in a trial in front of a jury, and especially not a defense attorney in this situation where it does look, you know, she can see the light at the end of the tunnel, and kind of feels optimistic about the way this thing is going. So that is sort of how the deficient performance element is handled. And one point that you reminded me of, Anthony, was that earlier in the jury deliberation, the jury had asked, Hey, can we hear a little bit more about the police testimony about how they didn't see his face and a couple other issues? And the judge gave kind of a stern instruction to the jury that it's highly inappropriate for me to supplement the testimony you need to deliberate based on the record. And so the majority takes that exchange and says, anybody in the defense counsel's position would have known that new evidence at the jury deliberation stage is prejudicial to the defendant, and you would have stood up and you would have objected strenuously and you would have pressed the objection. But then the dissent marshals some like fairly persuasive case law that fair-minded jurists could disagree both about whether this was new evidence at all and about whether the new evidence was necessarily prejudicial to the defendant. So that is relevant to the two layers of deferential review that I talked about at the beginning of this, where there are honest, reasonable judges reaching different conclusions about this legal issue. It seems odd to suggest that no fair-minded jurist would agree with the state court that the defense counsel's performance was objectively reasonable.

A Anthony Sanders 26:23

Alexa, if you were on that jury, would you think there's something fishy going on here? If the guy couldn't have stood up? See the video?

A Alexa Gervasi 26:33

Oh, that's so tough, because I'd have to like remove, you know, basic, like law school training and stuff from my brain. But, you know, I don't think so. I think especially after the judge had already said, I can't give you new evidence, I think I'd probably take it as the judge already said, I can't get new evidence. The prosecution didn't have these two stand next to each other. I don't think I would have been, like, must be his face.

A Anthony Sanders 27:05

Well, Bob, it seems that that evidence, the car mirror, wasn't something the prosecution really even brought up. It's hard to tell from the opinion, but it's something that seems the jury found on its own.

B Bob Belden 27:21

Yeah. The prosecution only played the video, apparently, in the trial court. So there wasn't a kind of a Joe Buck, Troy Aikman play-by-play of the drug buy. I guess they just kind of, you know, played the video and said, Well, you know, there was a controlled drug buy here. And the confidential informant testified that Spoon was the one who got in the car to buy the drugs. And so maybe the prosecution just kind of assumed that the jury would see the kind of build of the guy by the car or something. Not sure. But you are right, that it's not clear from this opinion that the prosecution tried to focus in on that side mirror. And I don't think I could really fault them for that. I'm not sure what this image looked like. But when it was blown up for the freeze frame, the record shows that it was a pixelated, blurry image of the guy's face.

A Anthony Sanders 28:32

It's not like Mission Impossible, where they blow up the image and then it fills in all the detail. And it looks like a normal photograph. It's, of course, a blown up image that you can't tell. Alexa, did you have a similar take between the dissent in the opinion? Or do you see things differently?

A Alexa Gervasi 28:52

Yeah, you know, I think I see things a little bit differently. And I'll show my hand that AEDPA is stupid, that's this anti-terrorism defense, blah, blah, blah, too many letters.

A Anthony Sanders 29:03

We can all agree on that.

A Alexa Gervasi 29:04

We can all agree, right? So we just have to give props to Spoon for fighting tooth and nail and not giving up and his lawyers kept fighting him and he was like, Fine, I'll do it myself. And that is awesome. And good for him. But you know, I think that the dissent is creative, right? Like saying, Well, maybe she chose not to object because then it would undermine her but those are two competing theories right? On the one hand, the dissent is saying no, she did object. Her saying "I would but" and you know, we can have debates about English language and what "I would but" means. Some might say it means I'm not objecting, but on the other hand, to say she did object with her "I would but" and then to say well, she chose not to object because she was trying to, you know, tell a story, that those seem to be two competing rationales. And it's not the rationale that we got from the attorney. We actually have her position on this. She defended what she did. She said, I did object, I tried, the judge didn't like me, I couldn't do it. And so we know what the story is. So I have a little bit of trouble with the descent coming up with a theory when we already have what the council said she was doing. And listen, defense attorneys have the hardest job in the world. And they really are just doing work that they don't get enough credit for. But as attorneys, we have a duty of zealous advocacy. And zealous advocacy sometimes means saying, Judge, I didn't get my objection out or Judge, just so that I

have a record here, are you overruling my objection? And that's just what zealous advocacy means. And this doesn't mean that counsel here should be penalized for her failures in this case, but what it means is that Spoon has the right to a trial where this kind of stuff doesn't happen, and things that objectively shouldn't happen, new evidence, the jury coming up with theories for the prosecution that the prosecution didn't itself or making arguments that the prosecution didn't itself make, that doesn't happen during deliberations. And so, you know, keeping in mind my intense hatred for AEDPA and that it shouldn't be this difficult to get a fair trial, keeping all of those biases in mind, I think I'm with the win, with the majority here.

A Anthony Sanders 31:51

Well, one angle that I think is maybe between, you know, these two takes that I didn't see anything in either opinion is if you can arguably say an objection was raised, but she just didn't have a chance to, you know, give her reasoning, because if for non lawyers, if you say object in a trial, and you give no reason why you object, that's not really an objection, because you don't really have grounds. But it seems like if you say I object, and you don't get a chance to give you a reason because the judge just keeps talking and grants itanyway, you can you can then later use that as a real objection on appeal. But because there was this Anders brief, and he basically had a pro se appeal, it doesn't sound like that objection...in fact, I think they say it wasn't part of the appeal. That objection was not part of the appeal. So is the ineffective assistance of counsel really the failure to appeal that point? Because I mean, it's in the middle of jury deliberations and 10 minutes later, they convict the guy, why wouldn't you appeal that? And yet, it seems for whatever reason, they go through the motions, but they don't do it.

B Bob Belden 33:04

Yeah. So that's another disagreement about interpreting the record between the majority and the dissent. The majority looks at that Anders brief and the failure to include the non-objection, attempted objection in the appeal and says, you know, it seems like everybody concluded this had not been preserved. And they actually say that's further evidence of the trial council's ineffective assistance of counsel. And the dissent says well, you know, the equally plausible inference and the one that we should arguably make under the, in my view, admittedly terrible AEDPA standard is that nobody thought there was anything wrong with her objection. And, you know, I leave it to whoever to decide which of those inferences more is more reasonable.

A Anthony Sanders 33:57

And maybe no one thought it was wrong, but they should have. You know, the jury finding the evidence on its own, it's not unheard of for juries to go do their own thing. They're famously strange creatures, and yet so necessary creatures. It reminds me of an old story in a civil jury context, where someone I knew, she had a trial, it was like a slip and fall type trial, but it was kind of a big deal. An elderly person fell outside of a hospital. And so was the hospital responsible for the injuries that resulted from the fall? And the jury found that the hospital was not liable. And so they asked the jury afterward you know what happened and it turned out there was no video but there was a photograph of the outside of the hospital right after the accident happened. And in the photograph there's a flagpole and the flag is straight out, which indicated that it was really windy that day. And so then the jury thought, well, it must have

been, you know, he must have fell because it was super windy, nothing to do with the hospital. And so one guy said on the jury, So you couldn't find by a shadow of a doubt that that wasn't why he fell, which is the completely wrong standard in an injury case. And it also wasn't even evidence that was introduced, no one testified that it was windy that day. And yet that's what the jury founded on. So juries can go their own way. And it's important that we have standards of evidence and rules of the Constitution to try and guide all that. But it doesn't always work that way. But AEDPA not only has one of the worst names of any federal statute, but it has one of the standards we're least fond of, perhaps even rivals rational basis test in some people's minds. So Bob, thanks for trying to walk us through that incredibly, incredibly complicated thicket and the story. Alexis is going to bring us into another thicket, and another round of Fifth Circuit drama. Fifth Circuit drama is something we've talked about in other contexts in recent months. And it's always fun to go back to. It's sometimes maybe a little tedious. People get tired of all the drama in the Fifth Circuit, but you know what? Sometimes it's pretty real. And so sometimes we need to talk about it. And this one is actually pretty interesting in other ways, as well. So Alexa, give us your thoughts about that. And our fellow also former Fifth Circuit clerk Bob will give us his thoughts as well, I should add, Alexa is especially suited to this because she clerked on both the Fifth and the Third Circuit, both of whom were in some way involved in this drama.

A Alexa Gervasi 36:58

Yeah, so this case is Defense Distributed v. Andrew Bruck, who's the acting Attorney General of New Jersey. So Defense Distributed creates CAD files to help give people more access to firearms. Basically, these are files that enable someone to print a 3d gun. I'm not an expert in this, but if you'd like more information, please see The Good Wife season six episode 15. They have a whole thing about it. So here, the Department of State stepsin and they're like, no, no, no, you cannot do this. So then some litigation ensues. And there's a settlement agreement and Defense Distributed is told that they can publish their CAD files. But then nine angry Attorney Generals step in including the Attorney General of New Jersey, and they file a lawsuit seeking to enjoin the State Department's agreement to allow Defense Distributed to release these files. The agencies were like, Stay in your lane, State Department. This is a state issue, not a federal issue. And about the same time, Defense Distributed sues a bunch of people, but one of those being sued is the Attorney General of New Jersey, and they filed this suit in the Western District of Texas, based on New Jersey doing things like sending cease and desist letters to both Defense Distributed and California-based internet providers, initiating civil lawsuits in New Jersey and threatening Defense Distributed with criminal sanctions if they keep doing what they're doing. So Defense Distributed claims that these actions violated the First Amendment and they tortiously interfered with that settlement agreement that I just mentioned. Well, so New Jersey's like, pound sand, Defense Distributed. Texas doesn't own me, and they can't make me come to their court. And the district court of Texas agreed, but the Fifth Circuit did not. And they said Get your butt back into court. You belong to us in this case. But we're not done. The New Jersey Attorney General was not done trying to get out of the Western District of Texas. So he's like fine, sever our portion of the case and send that portion back to New Jersey. And the district court obliged. And so Defense Distributed filed a petition for mandamus relief asking the Fifth Circuit to step in and do something about the New Jersey Attorney General being sent back to New Jersey. So the Fifth Circuit at this point is like super sympathetic to Defense Distributed's plight. And like, I have to imagine that they are not pleased with what the New Jersey Attorney General is trying to do here, trying to get out of the Western District of Texas. So you have to keep in mind that it's the same panel reviewing this mandamus petition that said, no New Jersey AG, you have to be in the Western District. So

they're reviewing this case, they're reviewing this mandamus petition, but there's a little bit of a problem. Like it's not enough that the Fifth Circuit's upset about their order kind of being flouted in this creative way. Since the case has already been transferred to a district court in New Jersey, the Fifth Circuit technically doesn't have any jurisdiction anymore, there's no longer a Fifth Circuit district court that has jurisdiction over the case. So it can't just tell the New Jersey district court what to do, they can't say New Jersey send this back to Texas. But what it can do, maybe it's debatable if you read the dissent and the majority, is in a very "extreme case" the Fifth Circuit can tell the Western District of Texas to please request that New Jersey send the case back to Texas. And so that's what the Fifth Circuit says it can do here. Obviously, the Attorney General is like, you cannot do that. It argues that the cases that the Fifth Circuit's relying on don't say what the Fifth Circuit says it says, and that if Defense Distributed really wants to do something, they can appeal to the Third Circuit, which is the circuit that oversees New Jersey courts. The fifth circuit and its mandamus order started by noting that it does not buy any of the New Jersey AG's arguments about why the Fifth Circuit can't do what it wants to do here. It'll do what it wants. And and that is maybe to instruct the Western District of Texas to please kindly request the New Jersey district court to please send the case back to Texas. So we finally get in to the mandamus standard. And as many of our listeners know, mandamus is an extraordinary remedy that is reserved for extraordinary cases. The party seeking mandamus relief must show, one, that mandamus is the only option, two, that mandamus relief is appropriate under the circumstances, and three, that the party seeking mandamus relief has a clear and indisputable right to this relief. The Fifth Circuit was like yeah, one and two "easily satisfied" here. So the only debatable point is whether the district court clearly erred when it severed the case and sent the New Jersey Attorney General back to New Jersey. The court explained that whether a severance motion should be granted is all about judicial efficiency. And while the district court quoted the right words, it misunderstood the question. And in the Fifth Circuit's opinion, the district court failed to account for the fact that this wasn't a run of the mill severance, where the case was staying in the same court. This severance resulted in sending part of the case to a completely different court across the country. And in the Fifth Circuit's view, the district court did not appreciate the duplication of judicial resources, the potential for conflicting rulings and all of the litigation costs that could result from sending part of this case to New Jersey. So the Fifth Circuit says the district court made a legal error. So yeah, mandamus relief is granted, the district court must vacate its severance and transfer order, and it must ask New Jersey to send the case back. So I've got to say that when I was reading this, I was a little surprised that this is how it came out, that I wasn't seeing a dissent. And then I scroll down and I saw the dissent. And so Judge Higginson, he dissented from the order. And he said first, I'm not buying that Defense Distributed properly requested mandamus relief, or that it even requested the relief that we're that we're giving them, but even if it did it and even if we can do what you're saying we can do, the majority was still wrong in finding clear error. Severance and transfer arediscretionary decisions and the district court in judge Higginson's words, "painstakingly" applied the proper factors. And in fact, the district court's decision was so thorough and comprehensive and well reasoned that if the court had ruled the other way, then the other side would have had a reasonable basis to seek mandamus relief and compel the transfer to New Jersey. So in addition to the court's decision overruling a discretionary decision, it also undermined state sovereignty and comity. And basically, Judge Higginson is just very unhappy about this mandamus relief being granted to Defense Distributed.

A Anthony Sanders 45:43

Bob, do you have a sense of what's really going on here?

B Bob Belden 45:48

Probably frustration, I think, on the part of the Fifth Circuit a little bit about how long this thing is dragged out. And, as Alexa mentioned, the New Jersey Attorney General trying to kind of, I don't want to say have have its cake and eat it too, but part of the majority opinion talks about how the New Jersey Attorney General clearly doesn't have any problem with litigating in other districts because they brought this suit or brought the original enforcement suit, in the, I think, Western District of Washington or something like that. So I think that there's a sense of unfairness and frustration coming from the Fifth Circuit. And I think that probably explains the sort of decision to take the the non-conforming notice of appeal and treat it as though it were a petition for mandamus. I think that that is certainly unusual. And frustration, I think, is what's happening here.

A Anthony Sanders 46:58

Alexa, what is the litigation in New Jersey? There's some state court lawsuit or it was removed? Is that the enforcement action?

A Alexa Gervasi 47:12

Yeah, so it seems that New Jersey has sued Defense Distributed as well in New Jersey Courts. I gotta be honest, I wasn't quite following it, either. And it only comes out in the in the dissent, where you're like, wait, according to the dissent, we learn about all these other lawsuits that are already happening in New Jersey, and that have actually been joined in New Jersey, so it's just a hot mess.

A Anthony Sanders 47:41

I mean, the most important part, right, is that the United States district court in New Jersey, is not obligated to send the case back when it's politely requested by the Western District of Texas.

A Alexa Gervasi 47:54

That's right. Yeah. So this could all be for naught. New Jersey could be like, I mean, I've already done stuff here. So no, it's just gonna be mine now.

A Anthony Sanders 48:06

I mean, maybe that our listeners would be interested in the bigger picture, the end of the day of what's going on, and that the majority kind of leans on this a bit, is that, whether it's a it's a challenge or a defense, depending on what side of the V Defense Distributed as on, there is a

First Amendment argument that these plans for guns that they have that they put online, are protected by the First Amendment, not Second Amendment, the First Amendment, and that New Jersey's just going to lose wherever it is, anyway.

A Alexa Gervasi 48:42

Yes, that seems to be the Fifth Circuit's position. And there's actually, I think it's the very first footnote, that's like, putting aside all the prior restraint issues here, which this is clearly unconstitutional. But we're not remarking on that right now. Yeah, I mean, I think kind of getting to your original question, like, what is this really come down to? And I think the dissent is putting a finger on it as well and calling it out, is that the Fifth Circuit wants to be the one to make this ruling on the constitutional issue. And, you know, it's kind of a sexy case, you don't want to send that over to the Third Circuit, you're not sending something cool to New Jersey. No offense to our New Jersey listeners.

A Anthony Sanders 49:27

Say this does not all just go back to the Fifth Circuit. Because I'm guessing maybe that it's not going to. When the Third Circuit gets gets this, procedurally is it going to be a mess? Or is it going to be teed up for them at that point?

A Alexa Gervasi 49:45

You know, I think at that point, we'll be able to just get into the merits, I think the moment to appeal these kinds of procedural things as has passed. These transfers, you know, like this was the last, last ditch effort. And so I think it'll just be to the Third Circuit.

A Anthony Sanders 50:07

It seems like couldn't they appeal in the district court in New Jersey? Couldn't they then appeal to the Third Circuit and say the transfer was wrong? It should be sent back.

A Alexa Gervasi 50:17

I think that the time to do that has passed. I didn't get too into the weeds on Pacer, but I think that that moment has passed.

A Anthony Sanders 50:31

You didn't care about your multi district litigation handbook and go through all the rules? I had some flashbacks to a case I did that weren't pleasant. But anyway.

A Alexa Gervasi 50:41

A Alexa Gervasi 50:41

It seems like if any group is going to try it, it's going to be these guys.

B Bob Belden 50:46

I read that the district court in New Jersey stayed proceedings while the Fifth Circuit considered this appeal. Had Defense Distributed not already asked the District of New Jersey to send it back?

A Alexa Gervasi 51:01

Yeah, so according to the dissent, they had the chance to do that and they didn't. That it seems like Defense Distributed kind of changed their strategy at the last minute for what they wanted to do here, decided maybe Texas would be friendlier to guns. I mean, that's a weird call.

B Bob Belden 51:23

Their strategy might have changed when their regular notice of appeal got turned into a mandamus petition, they might have changed their strategy after that.

A Anthony Sanders 51:34

Well, there is quite a lot of strategy going on here. So for those not into the weeds of federal jurisdiction, I hope you got even so a sense of the drama that can come out of one of these usually pretty sterile cases. But when you have guns, the internet, settlements by one administration broken up by another, rogue AGs from states, you get you get all that drama that we'd love in the Fifth Circuit. So Alexa, thanks for Thanks for telling that all to our listeners. I hope that our listeners also have a lovely weekend ahead or whatever faith you may be whatever holiday, Easter or Passover or whatever. Ramadan is going round right now too. So whatever your faith may be or may not be, I hope you have a lovely time until you listen to our next podcast. Thank you, Bob and Alexa, for joining us today. But whatever you may be doing, I hope that all of you get engaged.