

Short Circuit 237

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SPEAKERS

Colin Stephens, Anthony Sanders, Rylee Sommers-Flanagan, Audience, Tasha Jones

A Anthony Sanders 00:25
Hello, and welcome to Short ...

A Audience 00:29
Circuit!

A Anthony Sanders 00:29
That's right, this is Short Circuit Live! live from the University of Montana School of Law. I am so excited to be back in Montana. This is Anthony Sanders, the director of the Center for Judicial Engagement. And listeners may know that from time to time we do these episodes, Short Circuit Live. Now usually we talk about a federal circuit. We've done the Ninth Circuit, the DC Circuit, the Fifth Circuit, various circuits over the years. But today, for the first time, we're doing a state supreme court. You may say, but you're Short Circuit. Well, we also talk about state supreme court cases on Short Circuit from time to time, we've even done whole specials on state constitutional issues. But we're doing this on the Montana Supreme Court because I am at the University of Montana, for a symposium about the 50th anniversary of the Montana Constitution. A constitution I really think a lot of and know a bit about because of my clerkship at the Montana Supreme Court. And so it's so exciting to be here. So we can talk a little bit about the Montana Constitution, and just Montana practice in general. Now, we have a packed room full of Montana students here to see us talk about various Montana law issues. But we also have three powerhouse Montana litigators with me today to talk about these different issues and I'll be introducing them in a second. First, thank you to the organizers of this event, the Montana Law Review and the local Federalist Society and American Constitution Society chapters for putting this all together. So we'll move on to our panelists. First, we're going to

hear from Natasha or Tasha Jones. She is a graduate of this very law school, the University of Montana School of Law. She then went on to clerked for Judge Sam Haddon of the US District Court for the District of Montana. Where's Judge Haddon ...

T Tasha Jones 02:48

I was in Great Falls, but he's now in Helena.

A Anthony Sanders 02:55

And both great towns to spend a little time clerking in. And then she went on and she has been a shareholder since 2008 at Boone Karlberg. She does all kinds of trial and appellate work, and she'll be talking about a case where she argued as an amicus at the Montana Supreme Court on that decision that just came out a couple of weeks ago. Next we will hear from Colin Stephens, he is a part of Stephens and Brooke. He is a graduate of Carroll College and the University of Montana. Like me, he got a master's degree in philosophy and we were just discussing they've come up very useful in our in our practice. I say that mostly tongue in cheek but not entirely tongue in cheek. Then he went on to get a law degree from the University of Montana. And at Carroll College by the way, when I lived in Helena, they were like a powerhouse football team. I mean, like repetitive national champions. Do you know if it's still that way?

C Colin Stephens 04:03

It should be. This year we could be doing better

A Anthony Sanders 04:08

Okay rebuilding program perhaps.

C Colin Stephens 04:11

When I was there, they still played at a middle school.

A Anthony Sanders 04:17

Yeah, I went to one game there. It was a lot of fun. That the fall I was there. And he is going to he is primarily a criminal practice at Stevens and Brooke PC here in in Missoula. And then finally, we're going to hear from Rylee Sommers-Flanagan. She is the founder of her, her and her partner's, own public interest law firm. Now working at a public interest law firm, I know from stories I've heard from the founders of the law firm, that is not exactly an easy task. And so she should feel very proud of herself in the in the work that they've done at Upper Seven Law since it was founded a little over a year ago. She is a graduate of Stanford Law School,

which is also where my co clerk at the Montana Supreme Court went when we clerked there. And she then went on to clerk for a trifecta of judges, Judge Sidney Thomas on the Ninth Circuit and judges -- I'm going to mangle these names too -- Huvelle and Hogan -- did I get that right?

R

Rylee Sommers-Flanagan 05:28

Very close.

A

Anthony Sanders 05:28

Okay, of the US District Court for the District of Columbia. And she is going to talk about a case that -- it has gone to the Montana Supreme Court on a preliminary matter, they just had a trial in the trial court, and she is going to be anxiously checking her phone while we're talking to see if the ruling has come up out. It's a voting rights case. And so we may break some news here on the podcast, we'll wait and see. But we'll give that a little bit of time. And first, we'll go to Natasha for a case -- and I will give a massive disclaimer at the beginning -- this is a case where Tasha was for an amicus for the cities and counties on one side, and the Institute for Justice signed onto a brief written by the MacArthur Center on the other side. But we can still sit here and talk about the case and all is going to be fine. So tell us about L.B.

T

Tasha Jones 06:29

Okay, so let me just set the stage about why I am talking about this case, because this was not my case. And we were asked to come in as amicus in that case. So I've been practicing for 22 years. And a very significant part of my practice has been working for an organization called the Montana Municipal Interlocal Authority. And what that is, is a collection of cities and towns that pool their resources together to provide defense and indemnity when cities and towns or their employees are sued for any reason. So that can be a slip and fall on the sidewalk. That can be a significant land dispute over zoning, you know, something like that. Or it can be a claim or lawsuit filed against a police department or police officer alleging excessive force, or some other violation of law related to law enforcement. And a lot of the cases are about law enforcement. Law enforcement officers have hard jobs and they get sued a lot. And we cities and towns generally speaking get sued a lot because they are deemed to be deep pockets. They have resources, basically all of our resources that stand behind them. And so there's just a lot of litigation against our cities and towns. And so that's that's the background that that made my law firm appropriate to act in the role of amicus as it relates to this case, LB. We have not done a lot of work for the county. So the counties have have a similar association. It's referred to as MACo. Colin actually worked for MACo a long time ago. But the same situation where it's a collection, there's membership, they provide defense and indemnity when county organizations or entities are sued. And we often team up with MACo because a lot of cases have both a city law enforcement agency and then the sheriff's office. They have agreements where they back each other up, they appear at the same calls. And so there's a lot of overlap. But usually that's not my client. In this case, it was. In addition to that, my law firm and my partner Tracey Neighbor Johnson and I had had some some cases that were similar to LB. So we had represented the City of Helena as an example, where a rogue undercover law enforcement officer had engaged in consensual sex with four confidential informants. And when that came to light, he was he was going to be fired and resigned in lieu of termination and had his

certificate revoked. And then those individuals who had been interviewed and said the sex was consensual then hired a plaintiff's lawyer and sued the city for tort damages for what they claimed to be inappropriate conduct on our part in hiring, training, supervising that officer. That case we won on summary judgment, because the judge said that that conduct -- sex with confidential informants -- was not in the course and scope of his employment as an undercover agent. So there's there's why we got the ask. So let me tell you about LB, and this was not my case. So LB is a Northern Cheyenne tribal member living on the Northern Cheyenne reservation in Lame Deer, Montana. In 2015, she and her mother left the reservation and they went to a bar and they engaged in partying. So they were drinking together at a bar off the reservation. They returned home to the reservation and the mother took the keys and said she was going to drive. Her daughter called the cops and turned her mom in for drunk driving. A Bureau of Indian Affairs agent, a BIA agent, federal agent named officer Dana Bullcoming in responded to the call. Officer Bullcoming went to LB's home and investigated the circumstances surrounding the mother's intoxication. They figured out the mom was safe. All was good there. But while he was in the home with LB, he questioned her and she was intoxicated herself. And she disclosed that she had been drinking. I think there was evidence she was visibly intoxicated, and he threatened to call social services and arrest LB for violating tribal code that prohibits intoxication within the reservation boundaries. The Cheyenne reservation is a dry reservation. The two went outside and he performed a blood alcohol test on LB and her BAC was either .132 or .136. She couldn't remember which. Clearly she was very intoxicated, at which time the officer allegedly repeatedly stated something has to be done. Kept saying that, something has to be done. And LB, catching the hint, said do you mean sex? And he said yes. So they went into the home. They engaged in unprotected sex that resulted in pregnancy and the birth of a child named DB. Those are the facts. Now again, before you get mad at me, this is not my client. This was not my case. I was not involved in any of that. And still I'm not involved because that case is ongoing. So this case went to the Ninth Circuit because summary judgment had been granted by the federal district court judge in Billings over course and scope. And at the Ninth Circuit, when they were analyzing the issues presented there, they issued a certified question back to the Montana Supreme Court, asking the supreme court to determine -- there was some conflict in the law, also some cases that we had worked on at Boone Karlberg -- about whether or not this behavior could be considered to be within the course and scope of employment. And the question was, as reformatted by the Montana Supreme Court, under Montana law, do law enforcement officers act outside the scope and course of their employment as a matter of law when they use their authority as on duty officers to sexually assault a person they are investigating for a crime? So there's the question posed to the Montana Supreme Court. So the plaintiffs filed appellate briefs and there were multiple amici that were filed on the plaintiffs behalf. The federal government filed an appellate brief. And then we filed a amicus brief arguing from the perspective of cities and towns. And our perspective really was that our cities and towns are overburdened already. That municipal governments are underfunded, and that includes law enforcement agencies. And that if you impose strict liability for intentional criminal conduct, it will have a ripple effect. And that is why this type of decision should be left to the legislature. And we said you need to harken back to a case called Maguire, where that court said if there's going to be a change in this area of the law it needs to come from the legislature. So that was really kind of the gist of our argument. So what happened? Some of you may have seen the oral argument and you will know I didn't get enough time. So I was so happy to come here and say all the things that I should have said then that I didn't get to say, because I didn't have enough time. And of course, how that works is, you each get 30 minutes and, and I had a gentleman that went first and he took too long and I didn't have enough time left.

A

Anthony Sanders 15:19

We know that story well at IJ.

T

Tasha Jones 15:21

Right, right. I know. Yeah. Okay. And then so what happened? Well, darn it. They came to the wrong decision. Unfortunately, the Montana Supreme Court issued a 5-2 decision to the certified question. The decision came down McKinnon, McGrath, Baker, Gustafson, and Shea in case you're interested in that. And then judge Sandefur dissented and Justice Rice joined in the dissent. And so what does this mean? This means that now this decision is in conflict with existing Montana law. So let me read to you the the law in Montana right now. Under Montana Code, annotated 2-9-102 governmental entities are liable for torts except certain categories, right. And a governmental entity has a duty to defend and indemnify its employees except, and this goes to 2-9-305, if the conduct constitutes a criminal offense. So now we have a decision that says it's a fact issue as to whether or not this is within the course and scope of employment, raping somebody on the job. And the law that says, let me be more clear about this: government employees may not be defended, you cannot defend them. And you cannot indemnify them if they engage in criminal conduct. So so we got a real issue here. So that the the majority said that McGuire is still good law, but doesn't apply here. They did criticize it. But they said it simply did not apply. And in that case, just briefly about McGuire. So that case was a worker in a center for extremely developmentally disabled individuals, that worker's job was to care for a very disabled person who was nonverbal, and in the course of that care, raped and impregnated the victim. And the Montana Supreme Court said not in the course and scope, and if there's going to be a change, it needs to come from the legislature. But but our majority court here said that doesn't apply because they did not review the issue in their opinion. I think that was incorrect. But they said to McGuire didn't touch upon the relevant things. It came down to this issue. The decision in LB came down to whether there was a mixed motive. And if you were at the oral argument, you remember I quarreled with Justice Sandefur for about this issue? Right? I said, never, never is there a mixed motive for rape. Never, that is never a part of a law enforcement officer's job. Unfortunately, the majority disagreed with me and it appears Justice Sandefur who wrote the dissent. Because they said that it was an issue of fact as to whether or not when the officer used his authority to basically bully LB into sex that he may have also, in addition to gratifying himself sexually, wanted to save taxpayers money by issuing a warning rather than arresting LB. And that that was an issue of fact that a jury needs to decide. And so on that basis, they kicked it back to the Ninth Circuit answering the question that Montana law does not clearly state this type of conduct is outside of the course and scope of employment. Let me just talk a little bit about the dissent. Was my favorite part, right. What what Justice Sandefur said was that the majority had erroneously applied clear and consistent precedent on the issue of respondeat superior. And remember here, what we're talking about is direct liability on the one hand, and indirect liability, which is vicarious liability, here. If you negligently hire, train, supervise an officer, a department can be held directly liable for that under negligence. Here, that wasn't the case. They're saying that you didn't do anything wrong. But because the officer committed a crime, you're on the hook for that criminal conduct. And so Justice Sandefur said they erroneously applied consistent and clear precedent in a result-oriented manner to reach a desired ad hoc result. Because this is what he says they wanted to provide a remedy, you know, make the government financially liable to an innocent victim for outrageous, tortious criminal conduct of a rogue law enforcement officer. That is that is the the words of Justice Sandefur, not me. He also said that their analysis was patently erroneous. And in manifest absence of any record, there was no evidentiary basis upon which a finder of fact

could reasonably conclude that the officer was acting with any motive or purpose other than for his own sexual gratification. So you can see here that was really the tension here is who gets to make this call a jury, or the judge as a matter of law? And from Justice Sandefur's perspective, the record wasn't clear enough. And it was it was just going to be speculation. Now remember, I had that same argument with -- if you saw the oral argument -- I had that same discussion with Justice Shea. He wanted this to kick to this to the jury. And I said, That's a terrible idea. That's a terrible idea. Why because never, never is sex. A part of the job. Never are you forwarding the interests of your employer when you cross the line as a law enforcement officer, and you engage in sex with anybody. You're criminal at that point. So that's the tension there.

A

Anthony Sanders 22:25

Tasha, and if I can ask question, a step back, that the reason why this was a certified question is because -- Is it right that under the Federal Tort Claims Act, the government is liable if the employee acts within the scope of their employment? Is that long story short?

T

Tasha Jones 22:48

And then that analysis goes to Montana law. Right. So there, there is a reference under the Federal Tort Claims Act that you need to resort to to Montana law to make that call. And then that's where the conflict was.

A

Anthony Sanders 23:03

And one interesting part about this story that regular listeners will know about the the bit about the FTCA, the act we just talked about, and then Bivens claims, which are claims against federal officers in their individual capacity. This fellow was sued under Bivens, but he didn't even show up to court. So they did get a judgment against him. A default judgment. But of course, he's not going to -- I think he's in prison now or he was in prison. So he's probably not very able to pay that judgment.

T

Tasha Jones 23:27

Correct. And that's right. I mean, so the issue here, and, frankly, the issue for many victims of crimes, there was no money to make that victim whole for the clear damage that had occurred to her and her child. And the bad guy was in jail, and he had nothing anyway, even if it was out of jail. He didn't have any money. Right. And so should there be a remedy? And this is this is this was the poll, right. I mean, that's a very emotionally charged argument. And what we were suggesting to the Montana Supreme Court is that's a legislative issue. Right? That the legislator is best suited to determine whether or not we needed as citizens to decide that a certain segment of criminal victims should have a remedy when the tortfeasor, the bad guy, doesn't have any money.

A

Anthony Sanders 24:30

And even though this was against the United States, the Montana units of government are

And even though this was against the United States, the Montana units of government are sitting in the background because of the precedent that the case would set.

T

Tasha Jones 24:39

That's right. So we that's why we came in and were allowed to come in because this ruling affects all of us in all in all Montana communities.

A

Anthony Sanders 24:49

Rylee, do you have any thoughts on the ruling?

R

Rylee Sommers-Flanagan 24:54

I think that I will just complement Tasha for how incredibly clearly she has laid out these issues. And I think also presented the real tension in the case. Because I think that when we are thinking about issues like this, I probably land on the side of -- I haven't read the decision. So I hesitate to question the majority's reasoning. But based on your presentation to me, it seems much clearer that we should just -- when when officials are acting in their official capacity, they should be held liable for their actions, and the state should also be held liable for their actions, because states have a responsibility for the folks that they employ. But it does present genuinely difficult questions around funding, especially for smaller government bodies. And so I just, Tasha's presentation of what the issues are seem to be very clearly right. Regardless of which side we end up landing on.

T

Tasha Jones 26:06

It's really tough issues. Right? I mean, what could there be a more sympathetic victim here? And at the oral argument the first speaker was the amicus talking about violence against Native American women. And, and true story, big issue, you know, sexual assault, big issue, societal problem. But there are many, many victims of crimes who go without remedies. And so without sufficient monetary remedies, and when, let me give an example: So if you've been wrongly accused, and you've been in prison for many, many years, and then you are let out of prison, because now we have DNA. As a state, we have now passed into law, a structure, a legislative structure, where you can go and seek payment for those years when you have been wrongfully imprisoned. So our state has decided that as a matter of public policy, we want those individuals to have a remedy. And I personally agree with that, because, and been involved in these cases personally, but because those to re litigate the innocence or guilt of somebody, after they've spent 20 years in jail. And the folks that that that originally testified are dead and gone are unavailable, very, very difficult to do. And so we can't, we can't take those cases through normal process. So we created a structure. And so that's what we were suggesting is these issues are very hard to deal with. But making a law enforcement department strictly liable for intentional criminal conduct. Our argument doesn't stop the original crime. In fact, it may encourage it, right. So what should be a deterrent to a police officer is that if I engage in criminal activity, if I use my badge, to be a bad guy, instead of a good guy, I'm gonna go to jail, and then someone is going to sue me and take my house and

my car and my retirement account and ruin my life. That is a deterrent. Now, if a police officer is faced with that quandary, do I turn bad guy at this moment? That officer knows, I'm gonna get a lawyer for free. And the department has to indemnify me for damages, because there's strict liability for intentional criminal conduct. I mean, so again, as a matter of policy, that was the argument that we were making to the Montana Supreme Court. Don't do this. This is this needs to be a legislative analysis. We also presented evidence about the statistics about law enforcement officers who engage in this sort of behavior. Because clearly, sexual assault is a big problem. Clearly violence against Native American women big problem. But the data does say that sexual assault by law enforcement officers is not evidence of a systemic problem. So we presented statistical evidence based on an analysis of claims against law enforcement officers from 2013 to the present day to show that this is not a problem in Montana, and that is conflating big picture problems, sexual assault, generally speaking, violence against Native American women, generally speaking, but to connect that into sexual assault by law enforcement officers that the data isn't there, and that so we were saying you you really can't tie these things together.

A

Anthony Sanders 30:01

So we could talk about this for hours. And I would like to, but to stay on our Short Circuit schedule, we'll move along. I, I think that's a terrific presentation of the issue. And I will say that this, I'm glad even though he will not be able to pay it, this man actually did get a judgment against him, which often is not true, of course, when officers are sued for reprehensible conduct. So I hope that this can lead to some reform in Montana lead legislatively, because we can always, we can always have that as the legislature can always address the issue in a better way. The biggest thing is for Congress to address the FTCA and Bivens remedies. But that's something we've talked about on Short Circuit before and will many times again, so we'll leave that to another day. You know, something I left out at the beginning, is to talk just a little bit, we'll talk just very briefly about practicing before the Montana Supreme Court, and what the court is like. So the court is seven justices. It has a right of appeal from any final judgment from state court because there is no intermediate appellate court in Montana. It's one of the last states left without an intermediate Court. Which makes things interesting when you're clerking at the court and all the kinds of cases you get. But any of you want to say what you think the listeners would want to know about Montana's court system, Montana Supreme Court versus practicing elsewhere?

T

Tasha Jones 31:40

Well, I think there's been a lot of politics around our Montana Supreme Court in Montana lately. So I would just point out a few things that makes Montana like some states and different from others. Our Montana Supreme Court justices have to run in statewide elections. And so I say that, because that is a difficult thing to do, and a very expensive thing to do. They are nonpartisan elections. And so you know, it's not supposed to be about Democrat versus Republican. But you know, it's an expensive endeavor to run a statewide campaign. And they come to the table with their own particular experience. And it's the first thing that I looked at when I'm saying when I'm gonna go argue before them. I pulled up their background, so I could remind myself of whether there was a particular background that would be relevant to the case. So as a practice point here, for example, right, exactly. I was gonna say, so you may not know this. Justice Sandefur was a law enforcement officer. Yeah. So and then many of the other

justices had criminal backgrounds experience on one side or the other: prosecution or defense. And then not very many of them had civil had a civil background. And so that was important to me, because I wasn't commenting on the criminal law. Right. I was saying, you got to think about the ramifications in the civil tort arena and what this could mean. So their backgrounds were important to me.

A

Anthony Sanders 33:16

And Colin, we were talking before we started taping about how the court could use a little more oral argument you think at times. Friendly suggestion from the podcast here.

C

Colin Stephens 33:26

Right. So you get, I'm always the appellant. So I get 40 minutes, I think when I argue with the court, and or before the courts, I should say, maybe not. And that's a long time to make a point. My theory is that they should be doing more oral arguments. Less time, oral advocacy is a skill, which I have yet to perfect. But all of you in this room, are going to face very small opportunities where you will get to argue before a court of appeals, be at the Ninth or the Montana Supreme Court. So more oral arguments, the better.

A

Anthony Sanders 34:09

So less equals more in this case, it could equal more. Do you agree, Rylee? Could use a few more arguments.

R

Rylee Sommers-Flanagan 34:16

Oh absolutely. I mean, isn't it just more fun?

C

Colin Stephens 34:19

Yes.

R

Rylee Sommers-Flanagan 34:21

I feel like they should want to see our happy faces. And I also think 40 minutes seems like it would be a very long time to be talking to a court depending on how many questions it may have. And you know, that can really vary dramatically a case by case.

C

Colin Stephens 34:38

Yeah, they've started. So I've argued I think in front of the court seven times, maybe six. And when I first started, they were great. They would just sort of jump right in and now they have a

sort of extended this, like, we're gonna let you talk for a little bit.

A

Anthony Sanders 34:54

Following the folks in Washington.

C

Colin Stephens 34:55

Yeah. And I hate the sound of my own voice. And you didn't invite me here to listen to me talk and just read my brief verbatim. So I usually try to go in say something incredibly controversial. And it's usually Justice Sandefur, who will then lean in with his with his cop attitude and say, counsel, and then we're off to the races. So it's fun. I mean, it's my favorite part of practicing law is oral oral advocacy at the Ninth, at front of the Montana Supreme Court.

A

Anthony Sanders 35:23

Yeah. When I was clerking, it was always fun. You know, we rotated so it's that you were the clerk that day with the gavel. And that was the one day you would actually wear a suit in that job. Every other day you'd wear jeans, and tap, tap tap and you know, start the argument. But there were so few of them there. It was almost like there were more attorney discipline hearings. Because those were the public and in the well, when they had to discipline an attorney than an actual oral argument. I think we had like two a month, or you know, one case one morning. So otherwise fantastic place to clerk. Helena is a great place to live. I recommend people listening out there to apply if you're applying to clerkships in the future, but maybe a few more oral arguments. Now this -- I don't know if this case got oral argument or not. It did not! But it did get an interesting concurrence. So Colin is now going to tell us about State versus Wellknown.

C

Colin Stephens 36:21

Yeah, so I'll start. I'm a criminal defense lawyer. I'm not a powerhouse. And so I guess thank you for that. But if I did, it would have a crescent moon on it. Oh, did you get breaking news?

R

Rylee Sommers-Flanagan 36:32

No. I just wanted to say that the reason I haven't argued before the Montana Supreme Court is that the state keeps refusing to appeal when we win.

A

Anthony Sanders 36:41

That's always very frustrating.

C

Colin Stephens 36:42



And from my perspective. Thank you again. Rylee represented my organization. Okay, State versus Wellknown. I don't like talking to unknown people on the internet. So I'm going to talk to you folks. It's criminal case. And basically the end of the day, it's about a Batson challenge. Anybody here know Batson. Not personally, right. I'm not asking personally. Does anybody know what Batson is? Maybe down there. I see one hand, okay. So Batson is voir dire issue, it is unconstitutional to exclude people based on their race, foreign, national origin or gender. So that's Batson in a real short form. State versus Wellknown. Mr. Wellknown was on trial for a felony DUI in Billings, and Mr. Wellknown is native. So Billings being the hotbed of well, let's see, I'll just pull up the statistics. Yellowstone County, basically, you want to lump it into 15.4% of minority or mixed race individuals at the time of the trial, at least according to the 2020 census. There's one Native American on Mr. Wellknown's jury. A guy I think by the name of Birdinground. So I'm gonna might pronounce that wrong. Anyway. So one Native American in the venire. And the state doesn't ask him any questions. Prosecutors tend to -- no offense if there's a prosecutor out there -- but they do voir dire in this very kind of third grade way where they will say -- they'll posit something and then say, Does anyone here disagree with that? And you know, the, one of the my colleagues just had a case where it was a child sexual assault, and the prosecutor stands up and says, Who here likes child sexual assault? And, you know, that's not a question. So anyway, um, the state from what I can tell from the record, it wasn't my case, does their usual rigmarole of who thinks drink drunk driving is good. Who here has had a loved one who has been affected by drunk driving? So Mr. Birdinground in the venire doesn't say anything, state passes the jury for cause. The defense asks, you know, everyone some questions and defense lawyers do tend to do a better job because I always feel like we're behind the eight ball so we will single people out, you know, and say, I noticed when the state asks you a question about whether you like child sexual assault or not, you were somewhat reluctant to raise your hand. It didn't shoot up like you were being electrocuted. What do you think about that? That's a bit of a reductio. But I think we tend to drill down more. So anyway, prosecution comes around, but eventually the defense passes the jury for cause. Prosecution uses its peremptory strike on Mr. Birdinground. So at this point the record gets a little muddled. Trial counsel then says, Hold on. I'm gonna make a Batson challenge. I want the state to present a non race based reason for why it is striking Mr. Birdinground. And so then the state which, you know, bless them. Prosecutor comes forward and says, Well, you know, I know we didn't talk about this before in voir dire judge, but Mr. Birdinground was actually the victim of a violent sexual assault at the hands of his girlfriend. And oh, by the way, he was very uncooperative with us. And we eventually had to give his girlfriend a deal. So his hostility to the prosecution is one of the reasons we're striking him. Judge says, Great, your Batson objection is overruled. Moving on, and then all of a sudden, the state comes in and says, Oh, and judge, by the way, after thought, when Mr. Birdinground was asked questions about the presumption of proof, he said, he'd have to be 100% certain before he convicted. And that's not the standard, and the judge, just sort of yada yada, yada, I'm standing with my decision. So Mr. Wellknown is convicted, otherwise, we wouldn't be here. And I wouldn't be talking about this. And so it goes up on appeal. And I don't know, for those of you who are unfamiliar with the public defender system in Montana, you've got a trial department, and then you've got an appellate department. And so the case then gets handed off to the appellate department, who can then read this record and go, You know what? It's a good Batson case. But this would be a wonderful time for us to raise the dignity clause of the Montana Constitution, Article two, section four. It's amazing. If you haven't read it, you probably shouldn't be sitting in here. And the dignity clause is sort of this vast umbrella of protection and recognition of race and social structure and culture that extends so far beyond Batson that it makes Batson essentially the stone age. So Wellknown is somewhat of an unremarkable case, because the majority just says, well, the district court didn't exactly do it right. But it's interesting in the briefs, in Mr. Wellknown's brief,

35 years between Batson and Wellknown's case, the Montana Supreme Court has yet to sustain or reverse on a Batson challenge. For various reasons, but anyway. So the majority just kind of is like, Well, you didn't raise this dignity clause at the trial level. You didn't raise it, so we're not going to consider it. It's not plain error. Denied. And in comes, Justice Baker, who's awesome, and she has a concurring opinion. And she says, I agree with the majority's opinion. But there are issues that are raised by Article two, section four, and that are evolving in our society with unconscious bias and implicit bias that we need to start working on. And so for, I think Justice Baker, had defense counsel said, Your Honor, I object Batson and dignity clause, this case probably would have had a different result. Justice McKinnon has a comment in a past case where she concurred where she seemed to have suggested that, you know, the dignity clause and an expanded sort of equal protection, recognition of various other protected classes would be available. And it's just fascinating to me, because, you know, Batson is a really narrow group of protection. The Ninth Circuit came out with a decision, what August 22, I was just reading as I was doing my last minute homework for this. And this was a prosecution out of California where the prosecutor struck Hispanic females. And the defendant said, Objection, Batson. And it churns through the lower courts, comes up on a federal habeas. And the Ninth Circuit says, well, that's not, you know, the prosecution kept Hispanic males, and it kept males and so you're trying to do this mixed race, protected class that doesn't exist, and it's never been recognized. So your appeal is denied. And it's just an interesting case. And I think it's it's definitely fertile ground for those of you who go out and want to be trial lawyers and who want to drill down in with jurors, remember the dignity clause. Justice Baker also, and I will just say, she has a footnote. It's footnote number eight where she says she's directing, so she's sort of encouraging the various committees that the Montana Supreme Court has to start recognizing implicit and unconscious bias. I think now there are draft jury instructions that are gonna go around that are part of the preliminary instructions that judges will give that address unconscious and implicit bias. So her concurrence may be just that, but I think she's going to be the cause of real change.

A

Anthony Sanders 45:32

It's always in the footnotes, isn't it?

C

Colin Stephens 45:34

That's where the best, right? I mean, like Lochner's got brilliant footnotes.

A

Anthony Sanders 45:38

Carolene products as we all know.

C

Colin Stephens 45:41

Right, exactly. So it's fun, right? Well, the birth certificate challenge that just sort of got decided today. The Department of Health and Human Services filed this, you know, we don't want you to change your birth certificate, right? Because sex is an immutable characteristic. And, you know, back in the 70s, that was rah, rah, right. Immutable characteristics get you equal

protection challenge. And now it's sort of this weird shift between ideology where, you know, it's the more conservative groups that are saying, well, no, this is immutable. And others are saying, No, it's more fluid. So it's just a fascinating, a fascinating issue. And again, I will emphasize, I'm a criminal defense lawyer and torts. I mean, if you talk to my clients, cops are always metaphorically doing what that cop did. So that's just, that's yeah. SOP.

A

Anthony Sanders 46:43

Well, we've seen both sides of the coin here, today. But a different coin is people going to vote. So Rylee, tell us how you get the vote in Montana, and how the rules might be a little fluid, changing, we're not sure what they are exactly right now. But they might change because of a trial that just happened.

R

Rylee Sommers-Flanagan 47:09

I hope so. And Anthony, I have to say you did a really nice job of getting three people who are going to talk about like totally different things.

A

Anthony Sanders 47:20

That's what Short Circuit is all about.

R

Rylee Sommers-Flanagan 47:21

It's fantastic. It's perfect and then you can see all the the parallels and relationships between different areas of law, which is the most fun thing. So I was just litigating a very exciting voting rights case where three restrictive voting laws that were passed during the 2021 legislative session were all on trial. There were actually four laws initially in the case. We invalidated one of them on summary judgment before the trial. That law, just so folks know, was one that would have restricted 18 year olds from receiving their ballot until they actually turned 18. And so essentially what the legislature had done and many, many people in this room are aware that in Montana, more than 70% of Montanans vote absentee. So we receive our ballots in the mail. They're sent from election offices 25 days before election day, they arrive in your mailbox, you can return them in person, you can send them back by mail. These are really sort of lovely facilitative rules that we have that allow people to participate in democracy. The law that was passed, HB 506, essentially said that election officials cannot distribute ballots to people who do not yet meet their age and residency requirements. So that's people who have moved in the last 30 days, or folks who are turning 18. Essentially, our argument was, you can't discriminate discriminate against folks who turn 18 in the month before Election Day and allow them less access to the ballot. Right. If we say that you're that you're eligible to vote if you're 18 on election day, then you're eligible to receive your ballot at the same time as older Montanans. The court agreed with us and permanently enjoined that law before the trial started. We then went to trial on three laws. This was a very complicated case, and I will not explain all of the moving parts, but I will just say, there were three plaintiff groups that had been consolidated. My clients are youth organizations, they are youth civic engagement organizations, Forward Montana Foundation, Mont PIRG, which is the Montana Public Interest Research Group, and

Montana Youth Action, which is a truly fantastic organization of middle and high school students that do civic engagement education with their peers. These three organizations were essential litigating these laws from the perspective that whenever you introduce burdensome laws on the electorate, they are going to land more heavily on young people. You can sort of, this is intuitively true whenever you do something for the first time, it will be harder than, you know, come a year later or further down the line, you get better at whatever it is. Young people are in the particularly I don't know, whether it's whether it's an enviable position or not. But you know, when you're turning 18, and you're becoming an adult, you are doing a lot of things for the first time. And voting is neither the most important nor the least important of them. And so we think it's really important that when we think about voting restrictive laws that create complications or burdens or challenges for people that we understand that those are going to impact certain populations more intensely. So the other three laws that were on, on trial, and don't worry, this is quick. One of them, we can do them really fast. One of them eliminated election day registration in Montana. Montana since 2005 has had election day registration where you can show up at your local election office, and you can register and vote on the same day, and you can do it on election day, up until 8pm. Right. It rolled that deadline back to noon, the Monday before noon. I don't know why. Not confusing at all, I'm sure. So that elimination is a really important thing because it impacts a huge number of people. But specifically, it impacts young people. People who are 34 years or younger in Montana use election day registration at twice the rate of older Montanans. So they vote using election day registration at a rate of 30%. Whereas older Montanans, it's about 15%.

A

Anthony Sanders 52:00

It's a millennial thing.

R

Rylee Sommers-Flanagan 52:00

Yeah, we're just into it. I mean, I will say, though, right, that millennials were constantly being replaced. Now it's Gen X, right. And there will be another generation. And we should care, I think, about the fact that these are the people that we put all our hopes and dreams on. Every every new generation. That's what we're doing. We're saying that the young people

A

Anthony Sanders 52:21

Gen X never had any hopes and dreams. You mean Gen Z.

R

Rylee Sommers-Flanagan 52:27

Yes, oh, thank God. That's an important correction. Yes, sorry, Gen Zers. But, you know, I think in seriousness, though, that the students in this room, and the undergraduates on this campus are the people who are learning as we speak, right? You are the closest to everything that is new, and all the cutting edge information in the world, and it never stops being true. Even though we sort of carry an identity with ourselves going forward. Like, I feel like a young person still, even though I'm now 34. And so I'm not as young as I used to be, but I still count as one of those people. So if I used election day registration, you know, I would be adding to my

generation's active use of it. Bottom line, it eliminated election day registration. This has a huge impact on young people. It also has a huge impact on Montanans at large. Thousands of Montanans in every single election cycle use it. Also, when we talk to election administrators about this, while they say it can have a minute impact on their day, election officials get up at 5am on election day, and they work until 2am. And that I have heard over and over again, and they tell us that it will not change if you get rid of election day registration. Legislature tells us that the reason they're getting rid of it is because of the administrative burden on election officials. That's not true. So you got to show up and you have to have some facts. And they couldn't do that at trial, which was a very fun thing to see. I highly recommend attending trial.

A

Anthony Sanders 54:01

Not having facts. I've never heard of such a thing.

R

Rylee Sommers-Flanagan 54:02

I know shocking. Like what is this? Yeah. No, they they didn't have facts. And they told us that the legislature can make whatever laws they want to disenfranchise voters, and they don't need to justify the decisions that they make, because they are the legislature. And really? The legislative authority, the constitution endows them with that authority. You know, there is a great recent Montana Supreme Court case that counters that perspective, and suggests that in fact, the Montana Constitution is not a grant of legislative authority, but instead is a check on the exercise of that power. So two more laws. One of them barred paid ballot collection. This was hugely important, specifically for Western Native Voice and for other organizations that work especially on the reservations. Mail service is significantly less reliable. This was not one of the laws that we challenged because we felt that the the tribes and Western Native Voice were best situated to explain the impacts, although it does, of course, impact young people as well. And then the last law was a complication, essentially, of voter identification laws in Montana. So young people, in particular are likelier to possess a student ID. And this law made it so that if you're going to use your student ID to identify yourself at the polls, you're going to need a secondary form of identification. And in Montana, historically, we have never needed two forms of identification. Regardless of what kind you showed up with, as long as it fit within the statutory criteria, either had your name and your photo, or had your name and your address on a government document, good to go. This law created a hierarchy in the identification preferences, and it put student ID in the second category. So it required it to be presented with a secondary form of identification. To me, this seems facially discriminatory. There were comments made in the legislature about how they wanted to see students have more stake in the game, and that they questioned whether or not students with Montana University System issued student ID actually live in Montana. I will say that I think it would be difficult to get that form of identification if you were living elsewhere. But you know, what do I know? So those laws were on trial. They were it was very, it was a very fun case, litigate. We had incredible witnesses. It was sort of riveting the whole time, assuming that you like expert witnesses.

T

Tasha Jones 56:58

To a judge or a jury?

R

Rylee Sommers-Flanagan 57:00

To a bench trial. So Judge Moses, who actually issued the the order this morning from the bench on the trans birth certificate issue, is where we are waiting with bated breath for his opinion.

A

Anthony Sanders 57:13

So when that ruling comes down how quick can it get up to the Montana Supreme?

R

Rylee Sommers-Flanagan 57:18

That is a question that we have been trying to figure out. We expect that it will be appealed, regardless of the outcome. And our best guess for sort of how this will progress is that there will be a near immediate appeal. I believe that the state expects to lose and is preparing with the \$1.3 million that have been recently appropriated to the Secretary of State to defend against challenges to election laws. This happened earlier this week. And we were a little surprised to hear of so much money being spent on an outside firm hired to represent a state entity, essentially to justify laws that disenfranchise voters in Montana. And doing so when we know we've seen cases in the past where the government has, and I realized this is not your question about how it gets to the Supreme Court. But it is really important.

A

Anthony Sanders 58:27

Well I have a question about that in a minute.

R

Rylee Sommers-Flanagan 58:29

Well so the only the only interesting thing that I think is worth sort of having in mind when you think about that \$1.3 million figure that was tweeted yesterday after the committee met is that, you know, under the prior gubernatorial administration, Montana has to, the state has to, sometimes pay for fees, whether it's from other attorneys who are litigating cases, or it's to pay outside counsel that that does happen. There is an example of a case where fees were paid to the ACLU for prison litigation that lasted for 10 years, those fees were paid at the rate of \$900,000, for that full 10 years of litigation, approved by the governor's office, sent out the door. It's the way that these systems work. But to compare that to fewer than six months of legal work done by a law firm just to defend a set of laws on their constitutionality. Not we're not talking about prison conditions. We're not talking about people's, you know, being in situations where they're having real sort of torts enacted against them, right. We're talking about laws that the legislature passed that they didn't carefully consider, that have very little in the way of justification to back them up being defended as though the the defense attorneys are an insurance company coming in and litigating literally every day. You know filing motions after the trial to get deposition transcripts in, that they didn't manage to get in beforehand on the proper schedule. That's crazy. I don't know how fast we're gonna get to the Supreme Court. But I will say that everyone wants to move quickly because having those laws -- and I know that

that's true for folks on the other side as well. I think that fundamentally, at least, I really hope that we're on the same page that like having clear laws for voters is extremely important. And we do know that when we change things, and we complicate things, that that makes it much more difficult for people to get engaged and to understand sort of how to navigate the process. Particularly because when you have organizations that are trying to facilitate that process for people, they need to know what the law is, so that they can communicate it. So soon.

A

Anthony Sanders 1:00:51

So soon. Well, that's good. And soon, we need to end this podcast. But I do have a just a big picture question on on the work you're doing, which you often hear. And we don't do voting rights. I don't exactly know where I come down on a lot of these issues. But a big picture question is, it seems like legislatures are really good. We know this in say the property rights context, the economic liberty context, the free speech context, where we were IJ litigates, that legislators are really good at doing things that they think will help their own self interest. So if a voting law is going to make the party in power, they think, have less of the other side's voters come to the polls. Yeah, they're gonna they're gonna pass that law. A lot of those laws are passed. On on, I'd say both sides of the aisle, they're passed. But it seems like in the long run, a lot of these laws aren't nearly as good at suppressing voters as they think they are. And that I mean, the one that really comes to mind is voter ID where it seems like we've had fights over voter ID for like, 20 years now. In the long run, it doesn't seem like most people vote. It doesn't actually have a difference partisan. Now maybe some people don't vote, but that's made up for other changes. And so in the wash, like, it doesn't have anything. But what do you say to people who say like, yeah, these laws, that the motivation looks terrible, but it doesn't seem like it actually has much of an effect. That's all the more reason not to pass them. True but where does that go to its constitutionality? I guess that's the question.

R

Rylee Sommers-Flanagan 1:02:35

Well, I guess I think that the the impact of the laws, so we know a couple of things, right? We there is actually very good data that suggests that you do see more restrictive laws tend to suppress turnout, more facilitative laws tend to increase turnout. That is like a well established academic study. Don't quote me on numbers, because I would not be able to say them. But you know, there, there are different centers that sort of define what what qualifies. Online voter registration is a facilitative voting law. Election day registration and same day registration, which we also have sort of over the course of the period of the late registration period in Montana. That's too much information. But the bottom line is that we know that those laws boost turnout versus suppressing turnout. I think the question in terms of constitutionality, I think that we have a responsibility to sort of think about the Montana Constitution as its own document that while informed often by federal law, also set out to intentionally raise the bar on certain topics. I think that suffrage is one of those areas. The right to suffrage in the Montana constitution is really clear. It couldn't be stronger than it is I don't think. I also think that the ways in which the Constitution and sort of the -- it guarantees the right to a free and fair election, free from interference of legislative -- I can't remember all three of the things -- but it's an incredibly strong provision. And I think when we think about laws, and I can't speak to the US Constitution in terms of voting, because I think that a lot of what has happened under federal law has really diminished the value in some ways of either the laws being passed or the litigation. Maybe it is a wash. But in Montana, it's clear to me that we value participation at an

incredibly high level, and that that our constitution set out to protect the right to vote. In an extremely strong and clear way. I've already said that. But I'm trying to think about how best to sort of say, you know, passing laws takes resources. It also impacts people inherently right? Every time any law is passed, it's going to affect a population. It will change the status quo for some people. When we needlessly change the status quo repeatedly, we can suppress activities, whether it's voting or otherwise. So I think the purpose of doing these things is to play into narratives that are essentially conspiracy theories about what's going on with elections. And to do so in a way that becomes a self fulfilling prophecy, that that creates a longer term foundation for increasingly restrictive laws. There, there is a point at you know, you're right, we go back and forth about voter ID. And it may or may not be all that meaningful at the end of the day. But the reason it's not meaningful is because of the push and pull. It's because there's someone on the other side to push back when you have somebody saying, Okay, we're going to require everyone to have real ID in order to vote. I don't have a Real ID according to the federal government. So, you know, that would be a real barrier. And but as we increase that, if we make it more more available, then we find ourselves in a situation where, okay, then we say, well, it was just a wash. What was the point anyway, but now we've poured so many resources into that whole process. And to what end? What did it accomplish?

A

Anthony Sanders 1:06:34

Any other thoughts from you guys? Closing thoughts?

R

Rylee Sommers-Flanagan 1:06:38

Apologies for a little vehemence.

T

Tasha Jones 1:06:42

Fascinating. Yeah, I think our state is in a really interesting and perhaps scary time. I mean, we, we have a lot of people that are moving to Montana, and we have a lot of influences from out of state. And so we're changing and that can be good. Change can be very, very productive. But we're also in a highly politicized environment. And so I think that, you know, there's there's a lot of reasons for young people in particular, to be worried about their future. And so all of these issues are seem to be at play in your case. And that makes it really interesting. And a lot for one judge. I mean, that's, you know, that's a lot for one judge to weigh upon his soul. And you may, you may find that he takes a bit longer to rule than you want. But yeah, very interesting and terrifying honestly, at the same time,

C

Colin Stephens 1:07:41

His dad was one of the best criminal defense attorneys. I will just say in closing the Montana Constitution, currently, there's rumblings right about and this goes to what Tasha was just saying about, you know, is it a liberal red rag that needs to go? I absolutely disagree.

T

Tasha Jones 1:08:00



Madeline Jones 1:06:10

The answer is no.



Colin Stephens 1:08:00

Right? I absolutely disagree. It's actually a very beautiful document that has, I mean, if you delve into it, and if you haven't read the con con transcripts, or the study commission, I brought my little nerdy these are the commission study. This was written by a guy named Rick Applegate, who's basically single handedly undertook to draft comments for the new bill of rights. And it's amazing. So these are online, dig into them. Professor Johnstone just wrote a book, Fritz Snyder, wrote a book about the Montana Constitution. They are amazing. Dig into the transcripts, and if Wellknown, didn't teach you anything, and it probably didn't, or at least I didn't invoke it, use it don't just fall back on the federal constitution. In fact, the federal constitution should I mean, if you're doing habeas work, you should always invoke the federal constitution. But it shouldn't be the first thing you say. The first thing you should say is judge, dignity and Batson or the 14th Amendment, or the 13th Amendment, whatever you want to use, but don't forget about it. Because it's, I mean, Justice Baker's ready to hit that nail, and you're gonna get new pattern instructions because of a footnote for crying out loud. So it's a great document.



Anthony Sanders 1:09:26

As some of you will hear me drone on tomorrow -- and listeners can see on Zoom, if you listen to this podcast in time -- money, the Montana Constitution is one of the very, very few -- I think about three in the country -- that has an explicit right to earn a living. So if you think it's a left liberal rag, that's a pretty libertarian left liberal rag that guarantees a right like that. So I think we can all agree it was it's a great document for the state from from 72 and it's worth saying celebrating. It's worth litigating. And we're going to learn about more of those in months and years to come on Short Circuit and these wonderful practitioners will be creating that law that we'll be talking about. So a big round of applause for them. And to the listeners and everyone here, I hope that all of you get engaged.