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SPEAKERS

Eric Foley, Anthony Sanders, Emily Washington, Anya Bidwell

A Anthony Sanders 00:25

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 Friday, November 18, 2022. And today, we're going to be talking about various things, but that will include some concurrences. Now, concurrences, you don't learn until you go to law school or maybe a long time later, are some of the most interesting parts of the appellate judicial process. Before I got the law school, I did not know what a concurrence was. I knew what a majority opinion was at a court. I mean, everyone knows what that is. You know about dissents because you hear about dissents and that means well, I don't agree with you guys. And here's why you're wrong. But if you asked me what a concurrence was, before I went to law school, I'd probably say it was a species of fish. But actually, a concurrence is where a judge can just go wherever he or she wants to. Sometimes they're completely useless. But sometimes they're harbingers of the future. And you can learn all kinds of neat little things from them. So today, we're going to have a couple cases with a couple concurrences. Now, some of you, Institute for Justice fans, listening may say, Oh, they're going to talk about the Jim Ho concurrence, where he talks about the right to earn a living from last week. That's Judge Jim Ho on the Fifth Circuit. And you know what, we are going to talk about Jim Ho concurrence, but not that one today. We are talking about that next week, though. So for a special Thanksgiving treat, we'll have some talk about the right to earn a living that I know many of our listeners are very into. That'll be next week. But this week, we have some other very weighty concurrences and, of course, majority opinions to talk about. So joining me today first of all is a voice very familiar to our listeners, and that's Anya Bidwell.

A Anya Bidwell 02:28

And an accent very familiar too.

A Anthony Sanders 02:30

No, no, no one really cares about the accent.

A Anya Bidwell 02:32

Especially I'm tired. You guys, if you really hear r's rolling, that means that it's like my 10th hour of work, and I need to go to sleep.

A Anthony Sanders 02:41

So are they rolling today on this Friday?

A Anya Bidwell 02:43

We shall we shall find out.

A Anthony Sanders 02:47

Okay, maybe as the podcast progresses. But more importantly, and much more excitingly, we have with us today, Emily Washington and Eric Foley from the MacArthur Justice Center. And I'm so glad that they're here with us. We've talked with MacArthur folk on the podcast before, but I'd like them both to introduce themselves. And also tell us a little bit about what MacArthur justice does.

E Emily Washington 03:14

Hi, everyone, I am Emily Washington. I'm the Deputy Director in the Louisiana Office of the MacArthur Justice Center. We are a not for profit law office that focuses on civil rights litigation. So it's all civil litigation aimed at criminal legal system reform.

E Eric Foley 03:31

And I'm Eric Foley, an attorney in the Louisiana Office. I think I'm like the accent bizarro world version of Anya because I grew up in Boston, and I have a complete inability to pronounce r's. So if you put the two of us together, we have ... So you're in for a treat for this podcast. And yes, I don't have anything to add to what we do as a center. Emily and I focus a lot on police misconduct and in this case, prosecutorial misconduct.

A Anthony Sanders 04:07

Okay, well, as someone from Boston, of course, you're no stranger to police misconduct. So that's good to hear, Eric. But let's go to misconduct in the Fifth Circuit, especially prosecutorial misconduct, with this big victory that these two got earlier this year. They're going to tell us about it. And they're also going to tell us about when the case almost but not quite went en banc just a couple of weeks ago. So take it away.

04:34

Sure. And, you know, I understand that your listeners are pretty familiar with prosecutorial immunity. And so I'm not going to go into a deep dive on the history but I will note -- and I don't know if it's okay to plug IJ's other podcasts -- but the Bound By Oath podcast, Season two Episode 10, was an excellent deep dive on the history of prosecutorial immunity.

A Anthony Sanders 04:56

That's so sweet of you. We never tire of bragging about our colleague John Ross' Bound By Oath podcast. So thank you.

05:03

Seriously, I really enjoyed it -- learned a lot myself. I just want to hit three Supreme Court cases really quickly that are relevant to our case. And then Emily's going to get into like the nitty gritty of the facts of Michael Wearry's case. But basically, there's a kind of trilogy of Supreme Court cases that are relevant here. The first being Imbler v. Pachtman, which the Bound By Oath podcast went into detail on. But you know, it's essentially establishing that prosecutorial acts in the presentation of evidence at trial are going to be immune. And it's really a kind of the first detailed discussion of prosecutorial immunity that we have from the Supreme Court and holds the acts that are, quote, intimately associated with the judicial phase of the criminal process are going to be immune. The next case that's really important for us is Burns v. Reed in 1991. And in that instance, we have the kind of divide between investigatory and advocatory functions, in that the prosecutor had advised the police that they could conduct an interrogation of a witness they suspected to have multiple personality disorder, that they could conduct that interrogation under hypnosis. And then later, after learning the results of that interrogation, told the cops quote, you probably have probable cause. I love that line. Probably probable. And then the next day he presents the detectives testimony at a probable cause hearing and the Supreme Court comes down and says that, you know, his act in presenting that testimony at a probable cause hearing is immune. But the advice and counsel to the police about doing the interrogation under hypnosis, well, no, that's not immune. Because that's not an act intimately associated with the judicial process. And then, the last case I wanted to talk about from the Supreme Court really quickly is Buckley v. Fitzsimmons in 1993. And that sort of solidifies what we refer to as the functional test for prosecutorial immunity. And there we had a prosecutor that essentially fabricated evidence to support his theory of the case and the investigation of the case. It involved a bootprint. And he found an expert that was known to be less than truthful and got that expert to provide an opinion on whether this bootprint matched the suspect. And we have a lengthy discussion in Buckley v. Fitzsimmons about the investigatory role that prosecutors can take on and that would not be immune. And particularly, they talk about a detective's role in searching for clues and collaboration in a case, and that when a prosecutor enters that role, they're not going to be immune. And Buckley also is important to us in the sense that it denies this sort of move to have a bright line rule where what's probable cause is found that any act after the finding of probable cause is going to be considered, you know, part of the judicial process. And Buckley, affirmatively says that No, even after that point, a prosecutor can engage in, quote, police investigative work. And in that

instance, they'd only be entitled to qualified immunity. And also, Buckley warns of the, you know, kind of danger of a prosecutor being able to retroactively immunize any of their conduct by saying that it's intimately associated with the judicial process, just by deciding to go to trial, right. You know, they could have engaged in a number of nefarious acts and then said, Well, we're going to take this to trial, and then that would theoretically be immune, if they had accepted the defendant's arguments in that case. So those that's kind of like the three cases in the Supreme Court in the background. And really as Emily's going to discuss with the facts of Michael Wearry's case, it came down to sort of a battle between whether Michael Wearry's case is controlled by Buckley or controlled by a Fifth Circuit case called Cousin. And so I'm going to talk about that really briefly. The Fifth Circuit had been interpreting prosecutorial immunity, you know, functional tests for quite a while and the most notable recent case had been Singleton v. Cannizzaro. And that was a case involving the use of fake witness subpoenas by the Orleans Parish district attorney's office. And the Fifth Circuit had denied prosecutorial immunity there saying that when a prosecutor acts outside of his quasi judicial role, he's not making decisions that are like those of a judge or a grand juror. So we're gonna, you know, deny absolute immunity there. You know, the creation of a fake subpoena that doesn't go before a judge and is just issued by the prosecutor's office is sidestepping the judicial process, if anything. And that case also reaffirmed that the Fifth Circuit's view, the Supreme Court has never held that the timing of a prosecutor's actions controls whether he has absolute immunity. In other words, it didn't matter that probable cause had been found. And you know, bills of information filed against the criminal defendants in that case. You know, that's not a bright line rule, it's just a factor that one might consider. So, with that in the background, there's a case from 2003, Cousin v Small, that the Fifth Circuit decided. And that arose from a murder in 1995. A man had been leaving a restaurant called Port of Call. And if any of your listeners have been visitors to New Orleans it's a pretty famous burger bar, and you know, kind of tiki drink place, gets a lot of tourist traffic. But a man had been on a date. And this couple, they left the restaurant, they were confronted by some men who kind of tried to rob the couple. The man ended up being shot and the woman, Miss Babin, ran away. Interestingly enough, on the night of that murder, the Miss Babin told the detectives that she didn't have her glasses on. She couldn't see who it was it shot her companion and reiterated that a couple days later. But then, you know, a couple of weeks after that, they did a photo array in a lineup and she identified Mr. Cousin, Shareef cousin who was 16 years old at the time. He's arrested, charged with the murder. And he has a friend at the same time who's in jail on some armed robbery charges. And the prosecutor goes and visits that person's defense attorney. And so this friend is named James Rowell. The prosecutor visits Rowell's defense attorney and offers a deal on these pending armed robbery charges for 15 years in exchange for testimony that he had a conversation with Shareef Cousin where Cousin admitted to this murder. And then the prosecutor meets with James Rowell twice at the jail and rehearsal the testimony. When they get to trial, Rowell recounts his previous testimony, and he testifies that he'd been coerced into making those statements. And then in response, the prosecutor calls Rowell's defense attorney and the homicide detective who had heard the statement and calls him as impeachment witnesses, which the trial court let in. You know, Cousin's convicted even despite evidence in the trial of his actual innocence. They had like videotape of him being at this basketball league, like while the murder was supposedly happening. And he's convicted regardless. He spends three years on death row before the Louisiana Supreme Court reverses his conviction because of the error and allowing in that impeachment testimony from the witness' defense attorney and the detective. There had also been some pretty serious Brady violations in that the prosecutor had never disclosed the part about Miss Babin not having your glasses on. But that wasn't actually the reasoning for the Louisiana Supreme Court reversing the conviction. So Cousin then brings his 1983 suit. And, unfortunately, the Fifth Circuit well, I should backtrack and say that his 1983 suit based not only on Rowell and his testimony, but on the error of not disclosing the knowledge of Babin not

having your glasses and her statements to the police that she couldn't identify the killer. So the Fifth Circuit grants absolute immunity on both of those and unfortunately finds that the prosecutor was acting in his advocatory function in that case when he met with James Rowell. And then of course on the Brady violations finds that that is also an advocatory function. And so it's really the tension between Cousin and the Fifth Circuit's you know, view of an advocatory function in that case and the investigatory function as as set out in Buckley and in some later Fifth Circuit cases like Singleton v. Cannizzaro. And so that brings us to Michael Wearry's case which Emily's going to talk about now.

E Emily Washington 14:57

Right so to set the stage for the civil rights lawsuit that we brought on behalf of Mr. Wearry, it's useful to understand the investigation into the death of Eric Walber and the criminal prosecution of Mr. Wearry. So Eric Walber was a high school student who was working as a pizza delivery driver when he was killed in April of 1998 in Tangipahoa Parish, Louisiana. Our client, Mr. Wearry, was questioned as to his whereabouts on the date of Mr. Walber's death. But in June of 1998, the law enforcement officials reported to the media that Mr. Wearry had an alibi and was not a suspect in the murder. There was no physical evidence connecting Mr Wearry to the murder. Two years later, the crime remained unsolved, and the stalled investigation and the lack of prosecution had garnered a lot of national media attention. So in April of 2000, there was an imprisoned man named Sam Scott, who claimed to have information implicating Mr. Wearry in the murder, and Mr. Wearry was charged in June of 2000. Now, Informant Scott would change his account of the crime over the course of numerous subsequent statements. Efforts by law enforcement and the district attorney to tie Mr. Wearry to the murder were based almost exclusively on this informants accounts, which themselves contradicted several known facts of the crime. So that brings us to Jeffery Ashton. At the time of Mr. Walber's death, Mr. Ashton was a 10 year old child. Having seen Mr. Walber's car shown on television after the murder, Jeffery told a classmate that he'd seen the car before this information was relayed to a teacher who contacted the sheriff's office. Jeffery was interviewed in late April of 1998, and stated only that his classmate had claimed to have seen an altercation between quote the pizza man and some black men. So over three years go by. We're in December of 2001, and the lead detective for the sheriff's office, named Kearney Foster, pulls Jeffery Ashton, who's now 13 or so, out of school. No parental notification or permission. And takes Jeffery to the office of district attorney Scott Perrilloux. There, Foster and Perrilloux provide Jeffery Ashton with a completely fabricated story to adopt and repeat that implicates Mr. Wearry in the Walber murder. These sessions happened multiple times. Jeffery Ashton was not free to leave. And he was facing juvenile court proceedings that made him especially vulnerable to intimidation by these authorities. In March of 2002, Mr. Wearry was tried for the Walber murder. Jeffery Ashton, who was then 14, was called as a witness and testified as he'd been coerced and intimidated to do by Perrilloux and Foster. In the closing arguments, Mr. Perrilloux stated that the jury should rely on Mr. Ashton's testimony as quote, crucial corroboration of other witnesses. The other witnesses included that unreliable informant Mr. Scott, who would later be described as the state's star witness. So our client Mr. Wearry, was convicted and sentenced to death. After his conviction became final on direct appeal, Mr. Wearry and his post conviction counsel discovered that district attorney Perrilloux and the prosecution had withheld evidence that severely undermined the credibility of the informant testimony at trial. And mind you this was evidence of additional prosecutorial misconduct that's actually unrelated to these actions having to do with Jeffery Ashton. So specifically, Mr. Wearry and his post conviction team discovered that the state had failed to disclose police records of fellow prisoners, which casts doubt on the credibility of Mr. Scott, that star witness. The state

had also failed to disclose that their other main witness had repeatedly sought a deal to reduce his exposure on an existing criminal charge if he testified against Mr. Wearry, and that the police had promised this witness that they would, quote, talk to the DA if he told the truth. And lastly, the state had also failed to turn over medical records of a co defendant in Mr. Wearry's case that completely contradicted the state's theory of how the murder occurred. So Mr. Wearry brought a motion for post conviction relief on the basis of this multitude of Brady evidence. And in March of 2016, the US Supreme Court granted Mr. Wearry's petition for cert and vacated his conviction. The Court found that quote, beyond doubt, the newly revealed evidence suffices to undermine confidence in Wearry's conviction and described the state's trial evidence as quote a house of cards. This was a per curiam with a dissent by Alito joined by Thomas. So with his co conviction overturned, District Attorney Perrilloux sought to retry Michael Wearry. So in preparation for this retrial, Mr. Wearry's defense team interviewed Mr. Ashton, who told them about this complete fabrication of his witness account related to Mr. Walber's death. In June of 2017, Mr. Ashton, who was now about 29 years old, signed an affidavit asserting that he had not seen Mr. Wearry the night of Mr. Walbers murder, and in fact that he had never seen Mr. Wearry until a photograph was shown to him by Detective Foster years after the murder occurred. Mr. Ashton said that on the night of the Walber murder, he was at a strawberry festival in the town of Ponchatoula miles away and had spent the night out of town. And he also affirmed that the testimony that he'd given at Mr. Wearry's trial was invented out of whole cloth by Perrilloux and Foster. A few months later, in November of 2017, Mr. Ashton testified to the same things under oath at an evidentiary hearing. Which brings us finally to our case. So in May of 2018, we filed suit on behalf of Mike Wearry against District Attorney Perrilloux and Detective Foster, alleging violations of Mr. Wearry's constitutional rights. At its core, this is a damages case. Mr. Wearry spent 15 years on Louisiana's death row, and we are seeking punitive damages on the basis of the defendants' intentional and egregious conduct. So specifically, in count one, we've alleged a violation of the 14th amendment where District Attorney Perrilloux and Detective Foster fabricated evidence which they knew to be false in investigating the Walber murder. That being the false account of Mr. Wearry's involvement in the murder that they coerced and intimidated Mr. Ashton into adopting. This count is advanced against Perrilloux in both his individual and official capacities, and as to Detective Foster in his individual capacity. And then we have a second count where we allege a violation of the 14th amendment for the intentional use of Mr. Ashton's false testimony at Mr. Wearry's trial. So this is a claim only against District Attorney Perrilloux in his official capacity. And lastly, we also have a supplemental state law claim for a malicious prosecution.

A Anya Bidwell 22:31

I'm just kind of wondering, in terms of public interest law, right? Do you think that Mr Wearry would have been able to just find a regular practitioner who would say, you know, what, I have a good chances of getting some percentage of damages here, to be able to represent him. It seems like, you know, public interest law firms are pretty much built to take on cases like that. What was going on through your head as you were analyzing this and, you know, Cousin, and you know, all these other things that are in your way? What are you thinking, as you're considering whether to take it on?

E Eric Foley 23:08

Yeah, so I think you're on point there Anya. Yeah, like we had thought about this. And, one of the things we we kind of pride ourselves on as an organization is that we have the ability to

take cases that, you know, private practitioners wouldn't, as far as time and resources. And so we definitely were cognizant of the fact that it was unlikely that he might be able to find someone else to bring this case and devote the time and resources. But I would also note that the team that Mike had working for him in his direct appeal and postconviction are just fantastic, really dedicated folks that have spent years and years and years, making sure Mike actually saw justice. And I wouldn't want to take any credit for that. I think, one way or another, they were going to find someone to bring this case from Mike, but I think it was going to have to be an organization like ours that had the the resources and time to do it.

A Anya Bidwell 24:14

And that, to me really summarizes like the problems with immunity doctrines, you know, because it is so difficult that you don't even -- we don't even know how many cases like this don't see the light of day because lawyers just wouldn't represent people because they know they can't recover.

A Anthony Sanders 24:34

So you guys got the case. We've got these egregious facts. He has been found that his underlying case was a house of cards by the Supreme Court. So now, briefly, tell us what happens district court and then what what's the Fifth Circuit say?

E Eric Foley 24:50

Sure. In the district court both Detective Foster and District Attorney Perrilloux raised absolute immunity on Detective Foster arguing that look, you're saying we both did the same thing. And we're both in the room when this happens. So I should be absolutely immune from this as well. And the district court denied those motions in 2020. And the defendants appeal. And on appeal, their arguments really doubled down on this kind of probable cause the termination bright line, right. They said, because the fabrication of Jeffery Ashton's narrative came after probable cause for Wearry's arrest and after he was charged that these weren't necessarily advocatory acts. They weren't investigative. And they characterize their conduct, as you know, preparation for a witness's trial testimony and control of that testimony. And they basically argue that there's there's no real difference between what we did, and what you saw the prosecutor do in Cousin. And we distinguished Cousin on two grounds. One, as I mentioned, the prosecutor went to the witness's defense attorney, with this scheme. And so in our view, that was just kind of classic plea bargaining in this quid pro quo offer that was made of, you know, you, you testify against Cousin and we'll give you 15 years on these armed robbery charges that you otherwise would be looking at, like 80 to 100. And so that was our, you know, kind of first argument that, you know, Cousin can be seen as advocatory for that reason. Also, you know, Cousin is a little bit different in that the Fifth Circuit -- the record is a little bit hazy on this, right, the Fifth Circuit finds that the statements that Cousin made to homicide detectives came before the prosecutors meetings with him to rehearse the testimony. And so, you know, argument there is that that's a much different situation than we have with Perrilloux and Foster pulling Ashton out of school, meeting with him multiple times, and just creating this story out of thin air. And so the panel opinion -- we were delightfully surprised. I wasn't necessarily that confident after the oral argument. But the panel basically said, we're gonna define advocatory and investigatory in

this way that: advocatory is organizing, evaluating, presenting evidence. Investigatory, you know, the gathering or acquisition of evidence, and the conduct here was just unrelated or too attenuated to any kind of judicial function of a prosecutor. And so they they really saw this as a Buckley case, right? They said that there was no meaningful difference between the prosecutor's fabrication of evidence in Buckley and the fabrication of evidence here by Perrilloux and Foster. And really rejected this kind of bright line rule that the defendants kept coming back to in their briefing, you know, that it doesn't matter if probable cause had already been found. Like it's clear from Buckley that, you know, prosecutor can engage in investigatory acts long after that event.

A Anya Bidwell 28:15

You mentioned that you were surprised given the way the oral argument went. Could you tell us a little bit about the oral argument itself?

E Eric Foley 28:22

Sure. I mean, this was kind of height of the pandemic. So the oral argument was still on Zoom. And our panel, Dennis and King and Ho, the only kind of active questioner was was Judge Ho. And he was pretty clear that although he was sympathetic to the facts of this case, and thought that the allegations in our complaint were pretty reprehensible, he was clear in the oral argument I thought that he just wasn't going to be able to rule for us, given his view of Fifth Circuit precedent, particularly of Cousin. Right. And so that gave me a bit of pause after the oral argument -- had been hoping that there might have been some more questions from the rest of the panel. And so when the decision came down, I was delightfully surprised there. But at the same time, we did have the dubitante opinion from Judge Ho--

A Anthony Sanders 29:27

And tell us what -- I think this may not have ever come up on a Short Circuit podcast before. I know it's come up on our newsletter. What is a dubitante?

E Eric Foley 29:37

Well, I had never heard it either, and had to go to Black's Law Dictionary when the opinion came down. And I've got Black's Law Dictionary pulled up on my screen right now. So I'll just tell the audience what Black's would say: Doubting. Term is usually placed in a law report next to a judge's name indicating that the judge doubted a legal point but was unwilling to state that it was wrong. And in this instance, Judge Ho, felt that Cousin compelled him to find that there was absolute immunity for Perrilloux. But he went on, in his opinion to really discuss why the doctrine of prosecutorial immunity in his view is wrong, and isn't backed up by either the history of the common law or the Constitution. And, you know, he the kind of thing, the most striking part for us of that the dubitante opinion was when he talks about what he refers to as the unholy trinity of legal doctrines: qualified immunity, absolutely prosecutorial immunity, and Monell, frequently conspiring to, quote turn winnable claims into losing ones.

A Anya Bidwell 30:52

We should call our project, not the qualified project, but the unholy trinity project.

A Anthony Sanders 30:57

I like that. Some donors might have questions but okay.

E Eric Foley 31:04

Yeah, it's hard for me to argue with his view there. And he felt it that Mike's case, you know, illustrates, in his words illustrates that conspiracy in action. And certainly in Emily and I's work, I think she'd probably agree with this, we see that trinity in action all the time. And just like to Anya's point earlier, it makes it all the harder for smaller, you know, solos to do this kind of work if you're going to be stuck on multiple levels of appeal of litigating immunity for five years before you ever get to discovery.

A Anthony Sanders 31:44

So then the other side asked for en banc, which is one of our favorite phrases here on Short Circuit and what happens next?

E Eric Foley 31:53

So, you know, Foster and Perrilloux petition for rehearing and their arguments essentially kind of take the first half of Judge Ho's dubitante opinion and run with it, basically that their view of Cousin and Judge's Ho's view of Cousin is basically that it required absolute immunity here. Because Judge Ho reads it as a two part test, like, if the act comes after indictment or determination of probable cause and, two, with the intent of presenting testimony at trial, then it's automatically a grant of absolute immunity. And we argued that that view conflicts directly with Buckley and Buckley's express warning that just the intent of presenting so testimony a trial is going to retroactively immunize all kinds of bad conduct that we would like to have people see a remedy for. So, the petition was denied. And, you know, the polling was nine to seven. And we end up with another kind of interesting set of concurrences and dissents from the petition for rehearing. Judge Ho kind of interestingly enough does not vote for rehearing and explains that he, you know, he talks a bit about it as his conceptual framework for why he's doing so. But essentially says that unlike a panel decision on the merits, and I'm quoting here, the decision whether to rehear a case en banc is entirely discretionary. Nothing in the rules of federal appellate procedure requires us to take a case en banc, not even when a panel decision conflicts with the Supreme Court or circuit precedent. So I exercise my discretion to maximize for the original meaning. So, he again feels that the outcome was unjust, although he feels compelled to have reached that decision inthe panel opinion, is not going to make the discretionary choice for rehearing here. And so, so it's an interesting set of set of opinions.

A Anya Bidwell 34:14

Judge Ho spends some time on talking about this difference between split second decision making where he feels like immunity doctrines could be justified. And then just outwardly malicious conduct where you actually have time to sit at your desk and plan -- where he just doesn't see how immunity should play a role there. Could you guys speak to that? That was really interesting.

E Eric Foley 34:43

Yeah. Should I take this one, Emily?

E Emily Washington 34:46

I can speak to it for a second. So I think we've seen this come up more and more recently, I want to say especially in the Fifth Circuit, this distinction between the split second decisions that say a cop on the beat out on the street has to make versus other state actors, whether that be a jailer or prison official. There's other cases that find those kind of on the other side of this split second spectrum, or in the case here, where we're talking about a prosecutor and a sheriff's office detective who are, you know, have all the time in the world to repeatedly pull this kid out of school, and coerce and intimidate him and fabricate this evidence. So I think it's I think it's a really interesting development. And, obviously, one that we are, you know, supportive of in our work -- particularly when we're talking about absolute immunities here and not qualified immunity.

A Anya Bidwell 35:44

Yeah. And even in qualified immunity context, and I'm thinking about one our cases involving First Amendment retaliation. There, we had Judge Oldham, you know, talk about these two different Supreme Court opinions and distinguishing one of them Nieves, which was a much more restrictive towards us, based on split second decision making. Right, he basically said, I can absolutely see how the court said you can't sue for First Amendment retaliation, if there is a probable cause when an officer is making the judgment right there at that time, and you really can't find better evidence of proper or improper motive than whether probable cause existed. But he says, I don't see how outside of that type of a scenario, probable cause is going to be determinative. So it really does seem like there are judges and you know, Justice Thomas, in numerous concurrences, speaking of concurrences, and dissents also talked about this, right, this idea that, you know, these doctrines have this one size fits all feeling about them. But the kind of actions that government take are so different. And in certain situations, they see how immunities apply, but in others, it just makes no sense.

A Anthony Sanders 37:04

Well, the whole doctrine makes no sense, but if we're gonna have it I can see how that makes a little more sense, Anya. One final question I have for you, Eric, and both you and Eric and Emily, is do we know -- other than your lawsuit -- do we know what ramifications or what punishment

ever happened to this prosecutor? And this detective? Because often, there isn't a lot of that, right?

E Eric Foley 37:32

Well, he's still the district attorney. He's been voted back into office. So not a ton of ramification for him yet. And while the deputy unfortunately passed away while this case has been pending, and you know, that kind of goes to the earlier point about the length of time that these immunities kind of impose in cases and how making it more difficult for discovery on the back-end.

A Anthony Sanders 38:04

So no state bar sanction, no criminal prosecution of any kind,

E Eric Foley 38:11

None.

A Anthony Sanders 38:11

Just you guys filing a lawsuit.

E Emily Washington 38:14

It's my understanding that Mike's postconviction team did, in fact, file, I believe, a bar complaint against District Attorney Perrilloux. But as you reference and as is, you know, the case in a lot of other cases here in Louisiana, and I'm sure nationwide, even when there's really egregious prosecutorial misconduct and these bar complaints filed, the actual resulting discipline or sanction is pretty much non existent.

A Anthony Sanders 38:45

Yeah. And that's something we to bring Bound By Oath up again, that we discussed in Season Two of Bound By Oath and have interviewed some people have done some really good work in this area. There is almost never those kinds of consequences from even from your state licensing authority, let alone of course criminal prosecutors or something like that. Well, Emily and Eric, thank you so much for sharing this story. There is more to come in your case, you're over the first immunity at an en banc level. So our greatest congratulations to you for that, but I know that there is more work ahead in this case. Anya, you're going to tell us about a another case with a different concurrence. Is that right?

A Anya Bidwell 39:33

A Anya Bidwell 39:32

Yes. How did you know? This is from the Eighth Circuit. The case is called Furlow versus Gunn. And at the heart of the opinion, and the concurrence is this question, are warrants required to effectuate an arrest? Or is it the probable cause that's making the arrest constitutional? So the majority thinks that warrants are required. And Judge Stras in his concurrence says that no, actually, it's probable cause which is at the heart of determining whether an arrest is constitutional. The interesting thing is that at the end of the day Stras and the majority agree on the result, where two officers are off the hook, and the third officer is not off the hook. But they kind of get there in very, very different ways. And then there is also a partial dissent. And in that partial dissent, Judge Shepherd, he talks about Monell and we talked about the unholy trinity. And whereas the majority is dismissing the Monell claims, he actually says I would have let the case go back down and district court decide.

A Anthony Sanders 40:54

Yeah, and just for some of our listeners benefit, a Monell claim that's when you sue city and whether a city is liable.

A Anya Bidwell 41:01

Right, exactly, that's the one where you sue a city and to sue a city, the city is treated as a person under 1983. So you have to show that it's that person, the city, that's kind of liable here -- not respondeat superior vicarous liability theory -- you actually have to show that there was a policy or custom that led to this unjust result. And at the heart of this case, is really this thing involving Wanteds. What are Wanteds? Wanteds are electronic notices, and officer can issue this electronic notice authorizing any other officer to seize a person and take him into custody. And there is no need for a review by neutral magistrate. So that's where it really comes in, in order to get an electronic notice issued, and the officer who is asking for this to be issued needs to believe that there is probable cause, but there is no need for a judge to write a warrant and authorize a warrant on this. And and that's kind of what the court is trying to decide over the period of the last five years or so between 2011 and 2016. There were 15,000 Wanteds issued in Missouri. So it's a very common problem or common practice, I should say, and the court is trying to really decide are these Wanteds constitutional or not? Can you circumvent a warrant? And just on probable cause alone, be able to arrest an individual? And the majority says, yes, you can. But under only particular circumstances, right. So let me briefly tell you about the plaintiffs. In this case, the plaintiffs, you know, one guy is much more sympathetic than the other. So the first guy, you know, there were two Wanteds issued for his arrest. The first one was for assaulting a neighbor. The second one was for assaulting a wife. Then he was eventually stopped for a traffic violation and ultimately arrested based on this Wanted based, on the Wanted after assaulting his wife. He was held for 24 hours, there was no warrant, so he sued. And another plaintiff, he was accused by his wife of molesting his daughter, and based on this information, an officer issued a Wanted. A state court, and this is crucial for both majority and concurrence, a state court later found allegations to be fabricated. But the Wanted remained active even after that state court determination. Again, Mr. Torres, the second plaintiff, he was held for over 24 hours without a warrant, and he also sued. And so the majority opinion really proceeds first to look at are Wanteds facially unconstitutional? And it says no, they're not facially unconstitutional, because it's true that the general rule is that you need to have a warrant for an arrest. But there are exceptions to warrants, like collective

knowledge doctrine. For example, if an officer who issued a wanted notice told the other officer why he thinks there's probable cause, then there is a collective knowledge. So that could be an exception to a warrant. The other one could be when an officer is witnessing the crime. And the third one is when you really kind of don't have time to ask for a warrant. And what the court is doing here is saying, we don't think any of these exceptions apply here. So the warrant did need to issue with regards to both plaintiffs. But so it's unconstitutional as applied, but it's not facially unconstitutional because you could have these other exceptions. And when it looks at unconstitutional as applied, they then go into the qualified immunity analysis. And when they look at the qualified immunity analysis, they actually say, you know, what, the first two officers that issued the first two Wanteds with regards to the first plaintiff get qualified immunity. Because we actually have a case in the Eighth Circuit that could have led them astray, that could have led them to think that what they're doing is constitutional. But then when they look at the third officer who issued the third Wanted against a gentleman who was then -- charges against him were found to be fabricated. They say, No, this officer doesn't get off the hook, she should have been more careful. She should have understood that, you know, time passed, and she needed to look. Basic research would have showed to her that this guy was, you know, found innocent, and that Wanted should have not stayed on the books. So they say this officer does not get qualified immunity, and therefore, a case against her can proceed. And then as we discussed Monell claims against the police department itself gets dismissed, because the court does not think that there is enough to show that there was policy or custom. And interestingly, too, the court remands it for the determination of class certification, because this case is actually a putative class action. And the court leaves it as such, and said, you know, we will let the district court to take a crack at it. And that's where Stras' concurrence comes in, where he says, I totally agree with you that the third officer should have not gotten off the hook, that the other two officers should not be facing litigation. But I'm getting here completely different way. I am saying that it is probable cause that's at the heart of arrest, not warrant that at the heart of arrest. And he says I think that there was plenty of probable cause to justify the first two Wanteds, and I have no problem with them. And the third Wanted, there was no probable cause. The probable cause dissipated after the state court ruling about the fabrication. And Judge Stras really goes through history and common law and looks at you know, what was done in this country with regard to warrants and probable cause since the Founding. And one interesting point of tension is at this idea of collective knowledge doctrine, where the majority says you very much need to pass on your knowledge about probable cause to the officer who ends up doing the arrest. And Judge Stras says, No, you don't. Remember that good old system of wanted the dead or alive? You know, when they would issue those posters, then finally the person who ends up arresting the guy really doesn't need to have that collective knowledge attributed to him.

A Anthony Sanders 48:12

He just knows that cartoon image on the poster and says Wanted, and then that's exactly arrest, whoever he thinks is the cartoon image.

A Anya Bidwell 48:21

That's exactly right. So this is a very interesting situation where, unlike the dissenting judge for thinks, at least partially dissenting, who thinks that the claims against municipalities should be remanded, Judge Stras does not disagree with any thing, right. It's a concurrence. But it's a

concurrence that basically completely disagrees with the underlying basis for the holding with which he ends up agreeing. Completely disagrees that it is warrant that's at the heart of the arrest, compared to the majority that says, No, it's not probable cause it is warrant that's the heart of the arrest. And there are only exceptions to this rule. But the rule remains that you need to obtain a warrant. You need to go to the judge, and the majority says all this thing about how you need more time and there's extra burdens. They say Fourth Amendment does not care about this little burdens that you guys are complaining about. Fourth Amendment requires you to go to a judge and get a warrant. So that's, you know, a very, very interesting set of opinions with ultimately one officer having to go back to the district court and potentially a class action certification.

A Anthony Sanders 49:39

All right, yeah, I'd encourage anyone who's into Fourth Amendment and the history of warrants and probable cause to give Judge Stras' concurrence a read. It really gets into some interesting territory. I have some questions about it I have to say, which is that he said, essentially, he says this thing that you often hear in the criminal law, which is that a police officer needs a warrant to arrest someone unless the officer or someone they're working with, sees them commit a felony, or sometimes sees them commit a crime or is known to have committed a felony that you need that warrant to arrest them. And so that's what I've always believed is black letter law. That if a officer has probable cause to think you committed, say, a misdemeanor, but didn't see you commit it. Doesn't arrest you in the act, they have to go get a warrant.

A Anya Bidwell 50:43

Right.

A Anthony Sanders 50:43

And it seems from what Judge Stras is arguing that one, that's not true as an original matter, as a common law matter. And that it really is only true, if you're arresting someone in the home that you need a warrant. But two, he says the Supreme Court has never actually squarely said this thing that I just said is black letter law. And that kind of threw me for like, really? Is that? What? So I haven't gone back to look at all this sources. But I, something tells me that just can't be true. Because that's what I've heard. And also, I think that, you know, the the whole idea of an arrest warrant, they've been used for arresting people other than just in the home for a long time. So there has to be more to it than that as a historical map.

A Anya Bidwell 51:41

It's so interesting, right? And that's why concurrences are such a useful thing to have, where a judge basically says, you know, what, I understand all this other stuff that we're talking about and I understand there's also Supreme Court precedent on something that could be against me. It's very similar with Judge Ho and what he did in Wearry, right. But I am getting out there and I'm putting this other thing forward. And maybe it's not a complete law review article with

a bow on top of it, right, but it's getting it out there so people can start looking into it. And people could start thinking about it. But what was really interesting, too, is how he kind of contrasted warrants for arrest with warrants for search, right. And when he talked about general warrants, and he said, really, what we hate as Americans, what was one of the reasons why we started this country, is this idea of a general warrant. But it doesn't mean that we don't like a warrant, you know, that we don't like something like probable cause without a warrant. Because probable cause itself has all this particularized information that you need. And that's a good thing. We have nothing against that. We just don't like this idea of general warrants and people coming into your houses with no pretext at all whatsoever and doing all this unconstitutional stuff. So he definitely threw a lot of things out there for all of us to start looking at and using them, you know, as potential litigation theories or law review articles or whatnot.

A Anthony Sanders 53:20

Emily, and Eric, you guys must know more about arrest warrants than I do. Do you want to weigh in?

E Eric Foley 53:27

Yeah, not really. At least not not on my end. I was just struck at how broadly the collective knowledge was being applied there. I didn't know such a thing as Wanteds existed. And that was pretty scary to me when I read it, and makes me wonder if ...

A Anya Bidwell 53:48

And you know, Ferguson, apparently Ferguson used Wanteds too, right. And the DOJ, and we're talking 2015, DOJ basically said, we don't think you should continue using these things. Something just doesn't sound right about them.

E Emily Washington 54:06

Yeah, we've had a couple of cases,dealing with the collective knowledge doctrine over the last few years, which I probably know more about than about arrests and warrants in and of themselves. But it is a little bit crazy how expansive it is. We had a case that took place in the French Quarter here in New Orleans that dealt with sort of this transfer of information from one officer to another to another, ultimately leading to a false arrest. And we have another case that's going on right now that deals with multiple law enforcement agencies who are kind of handing our clients off from one to the other, without anybody really knowing what had happened beforehand to actually lead to the arrest and whether or not they had probable cause to continue holding our clients. So I do think that the collective knowledge doctrine is coming up a lot in the cases that we're litigating here in the Fifth Circuit.

A Anya Bidwell 54:56

Now I just wanted to name check Professor Laurent Sacharoff. And he wrote this amazing article on the Fourth Amendment warrant requirements, and about the use of informants today

article on the Fourth Amendment warrant requirements, and about the use of informants today in order to obtain warrants. And his point is that the use of informants as an original matter is not allowed, that the officer himself needs to have the actual knowledge of what happened when he is writing up an affidavit for the warrant. So that is something that I think with judges who are interested in originalist arguments, something that will potentially come on their radar in the future. Because we are seeing a lot of warrants, like no-knock warrants, especially. There was a wonderful podcast by Washington Post, a series called Broken Doors.

E Emily Washington 55:57

It's really good.

A Anya Bidwell 55:59

Yeah, and they have so many stories about all these uses of warrants. And I guess that is all to say that just because you have a warrant doesn't mean that what's happening is actually okay. And that was one other thing, too, that Stras mentioned. He actually said, I like just basing it all -- he says that the officers would still be incentivized to get a warrant. Because if you get a warrant, then you pretty much will always be granted qualified immunity. And if you get a warrant, your evidence will be allowed into court. The exclusion doctrine wouldn't apply. So that's interesting. He's basically saying, officers are still incentivized to get warrants. And what Professor Sacharoff is saying, just because you have a warrant doesn't mean that what you're doing is kosher. So there is really a lot of tension points in this whole thing.

A Anthony Sanders 56:54

Well, I think all this discussion and Emily, you talking about this other cases you have, warrants some more collective knowledge of us to discuss with the MacArthur --

A Anya Bidwell 57:06

So proud of you.

A Anthony Sanders 57:06

-- Justice Center in the future. And so we'd love to have you and your colleagues back again sometime. Of course we will, whether I like it or not, have Anya again sometime. And thank all of you for coming on Short Circuit. It's great to have you.

E Eric Foley 57:22

Thank you so much.

E Emily Washington 57:22

Yeah, thanks so much.

E Eric Foley 57:23

Love to come back.

A Anthony Sanders 57:23

And for everyone else, look forward to the Ho concurrence we'll talk about next week and then we had two this week. So you put them together. It's hohoho. So while you all get into the holiday spirit of hohoho, we want everyone to get engaged.