

Short Circuit 303: Larry McMurtry Fact Pattern

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SPEAKERS

Evan Lisull, Christie Hebert, Anthony Sanders

A Anthony Sanders 00:24

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. This is our last episode before Christmas, so Merry Christmas everyone. We're recording this on Wednesday, December 20, 2023. We have a couple guests coming up who are both my colleagues and both have some fantastic Fourth Amendment cases from the 10th Circuit and the Eighth Circuit that we're going to dig our hands into. First, just a couple quick announcements. As you know, the Institute for Justice does all kinds of marvelous things, marvelous cases fighting for liberty, fighting for justice. Unfortunately, they can't do that for free. So I'm going to make one more pitch before the end of the year that if you believe in what IJ believes in and would like to help us fund our litigation efforts and the many other things we do such as the Center for Judicial Engagement and Short Circuit, you could go to ij.org/donates. And then give to your heart's content before the end of the tax year. Also, please check out Bound by Oath. Season three, episode two is just about to drop. You can hear all kinds of mysteries solved by my colleague, John Ross, on our podcast documentary series. But here on our Short Circuit podcast series, we in this last episode right before Christmas, we don't have a Christmas special this year. But last year, you may remember, we had the 12 days of Short Circuit Christmas, where we sang about all the circuits other than the Federal Circuit, which we really don't cover. And one of those singers is joining us today: Christie Hebert. Christie, welcome back.

C Christie Hebert 02:20

Thanks, Anthony. You're reminding me of that. That was pretty fun last year.

A Anthony Sanders 02:24

What was your line?

C Christie Hebert 02:26

I have no idea.

A Anthony Sanders 02:28

I can't remember. But I remember your colleague down the hall, Tori, had the five golden rings equivalent, which was five Judge Hos, I think, because each number was for a circuit. But yeah, I can't remember what yours was. It was very memorable though.

C Christie Hebert 02:45

Yeah, sure, sure. Super memorable. But, you know, I think you should do that medley composition of IJ singers again at some point.

A Anthony Sanders 02:55

There will be an excuse. And then, you know, all the audience that thinks it's cringe, they can pass it by. And for the couple who don't, you're welcome to listen. Someone that you should be listening to though is Evan Lisull. So Evan has been on before. He did a First Amendment case a while before. He's back here again with this Fourth Amendment case. And, Evan, for those of you who don't know, he is, I think his title is, editor extraordinaire because basically, all he does all day is edit our writing, and he does an incredible job. He finds things that no one else has found wrong with your writing or, not even wrong, but just could be better. Evan was one of very few people, Christie was actually another one, who helped with some proofing of my book. And Evan found that I had, I think it was my first chapter, used the word "harebrained." So I always thought harebrained, I don't write the word very often, but I always thought harebrained was like someone has hair for brains, so h-a-i-r brain. And then Evan found that's wrong. It's h-a-r-e.

E Evan Lisull 04:11

As in a rabbit.

C Christie Hebert 04:15

Like a rabbit brain?

E Evan Lisull 04:16

Yeah.

A Anthony Sanders 04:17

Yeah, and no one else ... like a lot of very smart people had read that chapter (smarter than me. And Evan was the one who saved the day.

E Evan Lisull 04:27

Yeah, so that one, you wonder if that doesn't change over time. There's a lot of those that Bryan Garner, the dawn of legal writing, tracks, you know, sort of phases as things evolve with usage. And I would not be very surprised if h-a-i-r overtook h-a-r-e in, you know, 50 years time.

C Christie Hebert 04:48

Now I have this image of Brian Garner as like a godfather figure.

E Evan Lisull 04:53

Oh yeah. Pinstripe suits, the whole nine yards. Absolutely.

A Anthony Sanders 04:56

I mean, I think that's been true for a long time, right? Garner is the godfather of legal writing. He was even called that when I was in law school, which is a long time ago now. Our legal writing instructor, I think, first introduced me to his writing. So Christie, you are going to introduce us to this fun case out of Oklahoma in the 10th Circuit, and it has to do with tow trucks and M16s. I mean, it sounds kind of like, you know, an alt country kind of thing. But what's going on there?

C Christie Hebert 05:33

Well, it is kind of an alt country, interesting experience. This is *United States v. Ramos*, Ramos, depending on how you're gonna pronounce it, out of the 10th Circuit. And it has a lot of facts. It's fact-intensive, so I'm going to try to just hit the high points here. It is in the country vein, from a tiny town in Oklahoma, a town that appears to have less than 5,000 people in it. And that's important context for in a minute. But the police in this town late one night were called out to a public disturbance at a convenience store. And when the single officer on patrol that night arrived at the convenience store just before midnight, he saw two dudes fighting in the parking lot. That officer quickly intervened and separated these two men. And here's how the court of appeals, the 10th Circuit, characterized what happened next. After the two combatants were separated, Mr. Ramos (and that's the defendant in this case "lightly slapped" the officer on the officer's right cheek and said "is fine" to the officer. The officer then arrested Ramos for assault and battery on a police officer. Now, the important context is this is a tiny town. It seems that Ramos and the police officer were former classmates, probably went to high school together is my guess. It seems that they knew each other well, and they knew each other's families. And after the arrest, the question came up what should the officer do with Ramos' vehicle, which happened to be a tow truck that was parked in the convenience store's parking

lot. And just before midnight, eight minutes after the officer arrived on the scene, that officer decided I'm going to impound that tow truck because he had arrested Ramos. And that apparently was the officer's protocol: If he arrests someone, he impounds their vehicle; A equals B. After the officer called for a tow truck to tow Ramos' tow truck, so tow truck towing tow truck.

A

Anthony Sanders 07:48

Tow truck squared.

C

Christie Hebert 07:49

Tow truck squared. The officer did an inventory of the items in Ramos' tow truck, and that's kind of standard practice when you tow an impounded vehicle. You have to check what's inside to have a record of what was in the car or the vehicle so that, you know, someone can't come back later and claim oh, I had a million dollars in my truck, and you absconded with it. And when inventorying the tow truck in this case, the officer found an M16, which the court classifies as a machine gun, behind the driver's seat. And in consequence, Mr. Ramos was charged with being a felon in possession of a machine gun and the corresponding ammunition. After he was charged, Ramos moved to suppress the ammunition and the gun, arguing that the impoundment, the seizure of his truck, violated the Fourth Amendment. And that motion to suppress is what we are here discussing today. Just kind of a quick overview of what happened in the courts. The district court denied the motion to suppress, so the evidence, the gun and the ammunition, could come in. And that is kind of the whole kit and caboodle in this case when you're looking at a gun and the charge is you illegally had possession of a gun. The gun is the critical evidence. So the defendant in this case, Ramos, entered a conditional plea. That means that if the evidence could come in, he was pleading guilty. And the real question is whether it was proper for the evidence to come in at all. And the district court in this case concluded that there was no evidence, the record lacked evidence, that the officer's decision to impound the vehicle was motivated by pretext. And by that just meant a desire to search the vehicle. He impounded the vehicle, the truck, just to search it. And then after the district court concluded that, the district court walked through the 10th Circuit's five factor test, which is used to determine if the impoundment is justified by non-pretextual community caretaking rationale. And a word about that rationale, that's just basically the Supreme Court and the 10th Circuit's recognition that police need to be able to impound a vehicle, or cars, for public safety or traffic concerns. You just don't want random vehicles sitting on public roadways, for example. Police need to be able to tow those vehicles. Now, the 10th Circuit says impoundments are constitutional only if they are guided by 1) a standardized policy and 2) that legitimate caretaking rationale. And the 10th Circuit assesses whether there's a legitimate rationale by using the five factor test known as the Sanders factors. In looking at the five factor test in this case and the 10th Circuit's analysis, the 10th Circuit said the district court weighed those factors incorrectly. And I'm going to try to quickly walk through those five factors. The first factor is whether the vehicle was on public or private property. And here, the vehicle was in the parking lot of the convenience store. And the 10th Circuit said that's private property. That's the end of the analysis. If the vehicle is on private property, the factor cuts against impoundment; you don't really consider anything else. And then the second factor is whether the owner of the property consented to the vehicle remaining there or asked for it to be towed. And here, the officer didn't ask the convenience store personnel, didn't even think to ask the

convenience store personnel. Instead, the officer just assumed that because there was a sign saying something along the lines of "customer parking only, violators will be towed" that the convenience store would have wanted this vehicle, this tow truck, to be towed. And the 10th Circuit said no, officers. You can't guess. You can't guess based on context clues or other things whether the property owner would want the vehicle towed. You should ask and see if you can get consent to leave the vehicle. And the officer in this case didn't do that. The third factor is whether there are alternatives to impoundment. And in this case, Ramos asked the officer, "Can I call my mom? Can I call my mom to come get this truck? She lives three blocks away. And she'll come over and get it." And the arresting officer knew Mr. Ramos' mom, and he still said nope. Well, actually, he just ignored Mr. Ramos' request and decided he was going to impound the truck anyway. And the 10th Circuit kind of makes the point that the officer didn't even consider alternatives, that he doesn't have a duty to necessarily allow those alternatives to be executed or chosen. But he didn't even consider it.

A

Anthony Sanders 13:13

He really wanted to tow this truck it seems.

C

Christie Hebert 13:15

Because he wanted to tow this truck. And then the fourth factor is that the truck was implicated in a crime. It wasn't part of the public disturbance that was in the parking lot. The truck had nothing to do with it. And then the fifth is whether the driver consented. And here, Mr. Ramos didn't consent. So those are kind of the factors that the court walked through. And the court said, hey, all of these factors cut against impoundment, and it seems like a pretty open and shut case. But I think the real big takeaway from this case is that the 10th Circuit is trying to really signal that the Sanders factors for the community caretaking rationale and whether you impound a vehicle are binary black and white factors. They're either satisfied or no, they're not. And the court is really trying to take out some of the discretion, I think, from those factors so that courts are getting out of the business of Monday morning quarterbacking for police officer decisions, and instead, officers will have more of a checklist to walk through whether they can impound a vehicle or not: private or public property, consent from the property owner, alternatives, the vehicle being part of a crime, and owner consent. I can just kind of walk through that checklist. And the final observation I'll make here is that I think the 10th Circuit is really trying to evaluate is the community caretaking rationale something that actually has weight here, and is it enough to outweigh the individual's Fourth Amendment right to be free from unreasonable searches? A lot of times, we see, kind of in the Fourth Amendment context, a lot of discretion afforded to officers making decisions. And here, you really see the 10th Circuit at least trying to give weight to the Fourth Amendment right.

A

Anthony Sanders 15:24

So Evan, have the cops ever searched your car when it's towed after an altercation?

E

Evan Lisull 15:32

No, I have not had the privilege of having my vehicle towed and subjected to an administrative inventory search, which I'm very grateful for. I guess one thing, I just did dwell on that public and private factor for a little bit. I was kind of taken aback by the officer's insistence that, oh, we couldn't leave the car in the parking lot. You know, one of the arguments was well, you could have just left the car there overnight; you didn't need to tow it. Nevermind the mom being able to get there even before the tow truck did, even though you never told her. But there's I don't know, we're gonna get sued. If something happens to this poor vehicle, you know, in this town of 4,000 people, if one of the three tow trucks in town is broken into, they're going to come after us, or the convenience store is going to come after us. And I've been scratching my head trying to envision if something were to happen, how would that lawsuit work? I don't, I mean, I must be missing something. But to me, the cops would be like you know, there's no established law. No, you've got no basis for ... You know, there's no taking here. I just could see a million defenses the government would bring up in the scenario where the the tow truck is left overnight, and then something, heaven forbid, should happen to it, I could see the government coming up with 14 different defenses as to why they're not responsible for that. And yeah, that seems to be like a very grave concern. They sound more like an insurance carrier than a government in this scenario.

C Christie Hebert 16:58

Yeah, I think there's a lot of lack of clarity on the police officer's side of "I'm just gonna throw these things up and see what sticks in determining my rationale to conduct the search." And in order to be fair to this officer, he probably doesn't know how it works either. And the police department doesn't want to be in the business of defending any kind of lawsuit. So they'll just say, you know, I really want to search this truck because I think there might be something in it, so I'm gonna come up with a bunch of different reasons. And you know, if there is any validity to this potential liability thing, I don't want to be involved later. So we'll just say that's a good rationale too.

E Evan Lisull 17:37

This is all so silly. This is such a Larry McMurtry fact pattern. That's what I was thinking. There's this small town. There's one point they're going through the businesses: There's a radio station, a laundromat that closes at 10 p.m. This is the most small town, blown up dispute. So your reading is that you think the officer knew there was something in the back, and he wanted that? Okay.

C Christie Hebert 18:02

Yeah. This is a guy who has like a, you know, Mr. Ramos is a felon in a small town.

E Evan Lisull 18:08

Yeah, that's true.

- C** Christie Hebert 18:09
There's some insinuation that he'd been drinking, which is fine. The cheek pat is fine.
- E** Evan Lisull 18:14
I feel like that's par for the course.
- C** Christie Hebert 18:16
It seems to suggest to me that he probably had some alcohol in him. So there's like some elements there for sure.
- A** Anthony Sanders 18:26
Also, they all went to high school together. Both of the guys in the altercation and the cop.
- E** Evan Lisull 18:34
Wait, we're talking years in each federal prison, right? For this offense?
- C** Christie Hebert 18:37
That's right.
- E** Evan Lisull 18:38
And this was about like some high school grudge. It just seems so picky to lead to like, you know, a pretty big sentence as, you know, the other case we'll talk about. I mean, I think this is some serious time, right?
- C** Christie Hebert 18:50
Yeah, it is some serious time. But, you know, the other factor that I had to think about is this guy had an M16 just sitting behind his driver's seat. And so, I know there is some public safety concern that this potentially drunk guy has an M16 gun behind his driver's seat. So, you know, we do want the police to be able to kind of exercise those public safety concerns. And, you know, as we'll see, when we're going to talk about your case too, Evan, the motion to suppress does arise a lot in these gun cases.
- E** Evan Lisull 19:24
Right.

- C** Christie Hebert 19:25
Because it's the whole kit and caboodle, as I said in the beginning, and you're not seeing motions to suppress in other contexts because it doesn't matter as much or B if you're just a general Joe Schmo who has your Fourth Amendment rights, you might not go out and hire a lawyer to litigate your Fourth Amendment rights. I'll add this other piece. You are totally right that there's a lot of facts, and it seems like a small town dispute that really kind of blew up. And the record here just has so much. It was 11:51 when the police officer arrives and 11:59 when the tow truck ... And then the opinion kind of goes through the lighting in the area. The convenience store like had some lights on and surrounding businesses had some lights on, but it's still not well lit. And there's just so many facts. And so what you're really seeing is a whole trial on this motion to suppress. And I think the defense attorney in this case, I had to actually look her up, she's out of Colorado. She's a public defender out of Colorado and Wyoming, which made me wonder how she got assigned this case in Oklahoma.
- A** Anthony Sanders 20:39
Well, they're very busy in Oklahoma federal court these days with the fallout from the McGirt decision.
- E** Evan Lisull 20:45
That's right.
- C** Christie Hebert 20:48
That's probably why. And she did a really excellent job of building a record by what I would call match stick facts to create a bigger picture.
- A** Anthony Sanders 21:01
One other match stick fact that kind of maybe puts this in a little bit more perspective is they said that the tow truck was actually still running at the time, so I don't think this excuses the officer, but it shows you how in making these determinations, often it is very context-dependent. So if it's still running, obviously the cop can't just leave the tow truck running because then, what if someone walks up and drives? Well, they probably would, you know, be in trouble. Maybe they'd have excuses, but you're not just going to detain the driver and then just leave it running, right? You're going to turn it off.
- C** Christie Hebert 21:42
Well, the court here didn't give a lot of credibility to that fact it seemed.

A Anthony Sanders 21:45
Yeah.

C Christie Hebert 21:45
It seemed that, you know, the government emphasized that fact, apparently a lot, in their brief, and it was said one time by the officer, I think, in his testimony below. And so the court here kind of gave that fact, I think in a footnote, the back of the hand like we're not really sure if that was actually what was going on, or the officer just kind of said that the truck was running because he wasn't sure. So that fact seems here to not really be considered. And I think if it was in the record previously below, this truck was running, this truck was running, this truck was running, and I didn't want to just leave it running in the middle of this parking lot overnight, that would have been kind of a bigger deal versus like a one-time mention.

A Anthony Sanders 22:34
Well, and still, you know, they could have called his mother.

E Evan Lisull 22:37
Right. There's so many ways for this to de-escalate. It just like kind of jumps out at me that they obviously wanted to arrange for this to be towed, and maybe, I mean, knowing there was a gun, he's just like, you know what Ramos? I've had enough of you. I've had enough of your garbage. You hit me; I'm gonna make you pay. You're gonna have to go down to the lot, and you're gonna have to pay whatever fee. You know, we deal with that in some other cases. Who knows what fees they're slapping on for, you know, impound and getting your vehicle out? You're gonna pay for this one.

A Anthony Sanders 23:04
Right.

E Evan Lisull 23:05
I'm gonna get you.

A Anthony Sanders 23:06
It's not cheap.

E

Evan Lisull 23:07

And then he does the inventory search, and oh geez. This is a little bit more than I reckoned I was gonna get.

A

Anthony Sanders 23:13

I mean, maybe he was hoping for some drugs or, you know, whatever it is they usually find in these searches. And there's basically a machine gun, which, I mean, I haven't looked up the criminal statutes. And we were all talking about this in the green room beforehand, but that's, you know, unless you have a real special permit these days or you are active military, that is in itself a pretty big deal, even if you're not an ex felon. One thing I want to back up to though, Evan. You earlier said Larry McGirdy facts?

E

Evan Lisull 23:52

McMurtry. *Lonesome Dove*.

A

Anthony Sanders 23:55

Oh okay.

E

Evan Lisull 23:57

Oh come on. Oh, he's great. He actually recently passed, I think. There's a lot of great, you know, small towns in Texas primarily, but, you know, just kind of these small towns where the tension simmers for decades. I highly recommend it if our listeners out there haven't read Larry McMurtry. I highly recommend him.

A

Anthony Sanders 24:15

I appreciate that. I think I'm older than you, but I did not get that cultural reference, so I appreciate you bringing it to everyone's attention.

E

Evan Lisull 24:24

Especially in our Texas office. They should definitely be reading it. It should be assigned.

A

Anthony Sanders 24:29

That's not me, but I guess that's Christie's job now. So in an even a smaller town or smaller location, it seems, is this case from the Eighth Circuit and this property in the middle of nowhere, Iowa, not to besmirch those who live in Jones County, Iowa, but the way the court

describes this place, it's pretty small. A small location in rural Iowa where a couple of guys just live across the street from each other and raise suspicions.

E

Evan Lisull 25:13

That's right. We're going to keep it rural. We're going to keep it with gun crimes. And we're going to keep it with facts that I think have a lot hidden behind them that don't flame the federal case. But this involves happenings on John Lee Ralston's property. Now, he has about nine acres, I believe, from the family. And it's one big lot, and it's split by Bear Creek Road. And these are all very evocative names, which is nice. At the south side of the property, there's a single-family house, and that's where John Lee Ralston lives. On the north side of the house, so about basically eight to nine acres away, there's a mobile home. And there's a Colton Varty, who has been seen as residing in or maybe just frequenting the home. And now, it's kind of odd. And I think the police thought was kind of odd, saying, all right, you own this property. We get it, it's big, but there's this guy hanging out there. And this is a guy we have good reason to think has been stealing a lot of property in the area and reselling it. So the officers, I guess, do a little investigation and decide to get a warrant, and they get a warrant for the entire property. They get a warrant for the mobile home, but they also get a warrant for Ralston's residence. They get a warrant for the machine shed; they get two separate storage sheds with a separate address. That's all on the same property. They're searching everything top and bottom. And so they go in, and they don't find any stolen property, but they do find a firearm. And as we just discussed, this is the whole kit and caboodle, to kind of keep the country. This is it. So they got him, and he's a prohibited person in possession of a firearm. And so it's actually the same statute as in our 10th Circuit case that they get him on. And he does the same thing and said, look, if you've got me on this, you've got me. I'll plead guilty conditionally. It's 37 months, so this is, you know, not fun and games. This is multiple years in federal prison if you had a good reason to search the property. So the magistrate is looking at this case and says, okay, this warrant is way overbroad. You're looking at this one guy who's on the north side of the property. You want to search the entire lot, the house, not just, you know, around the house or outside of the curtilage. We're talking inside the house. And you don't really establish any connection with Varty. Now, I think we might think it's weird. Okay, well, why is he here? Why is he frequenting? You know, even if I had a nine acre lot, I would be inclined to know if somebody was just hanging out on the north side of my lot. But that's just a hunch. And that's not probable cause. And, you know, you need to have something a little more spelled out than that. And the police never do it. They just say, well, he's been around here. We thought we saw one vehicle on the property on both sides that was seen at the scene of one of the crimes. We're not really quite sure. And the magistrate says this just isn't enough. So it goes up to the district court, and the district court says, well, it's probably not enough. But we think the good faith exception really applies here. Well, look, your heart was in the right place. You had enough circumstantial evidence. I mean, it's right. It's fuzzy. And they say well, it's close enough. It's close enough. And the court of appeals, the Eighth Circuit, looks at this and says there's no good faith exception here. You guys are off your rocker. There's no way a reasonable officer will believe you had probable cause. You have no evidence of illegal activity in the defendant's home. You have no indication that any of the crimes that you're concerned with were involving this guy's home. And everything else you do is just talking about Ralston's prior convictions. It's basically a character assassination. Oh, he had all these felonies. Oh, he had this. Oh, he had that.

A Anthony Sanders 29:05

He was a shady guy.

E Evan Lisull 29:06

Exactly. He was shady. But that's not good enough under Fourth Amendment jurisprudence. You can't just be a shady guy.

A Anthony Sanders 29:13

Well, in this case, it's not enough.

E Evan Lisull 29:15

In this case, it's not. That's a good point. It's unfortunately not always the case.

C Christie Hebert 29:18

Speaking from experience here, Evan, you can't just be a shady guy?

E Evan Lisull 29:20

You can't write on an affidavit that he's pretty shady. That's not going to fly, at least in the Eighth Circuit. And so I think the other thing I would flag for our listeners that I at least thought was interesting was, you know, the distinction between a property and a residence. I think a lot of people just say, well, it's your property. He's on your property. That should be enough. And I think there might be a gut reaction to a casual reader like come on, it's his property. Of course he's got to know. That's just simply not enough. And I think it's important too to remember, you know, a lot of listeners, I'm gonna go out on a limb and assume, are kind of more, you know, city mice. We don't think about having these big lots. And this comes up a lot in some of our recent open fields work where, you know, the concerns we have about homes and residences, a lot of times we're living in row homes or apartment buildings or things like that. What needs to be protected at the core is still the same though. And, you know, there's this assumption that well, it's property, it's yours. Well, that might be true in a 800 square foot apartment, but that's not quite the case when it's a lot that you own. And I do think this kind of tension between property and residents and curtilage, you know, the courts haven't fully sorted out. And I think, especially in the open field concept, they're just wrong to think that, again, and I was almost wondering, thinking this, like maybe they should just call the wildlife enforcement division in Iowa, right? I mean, everything outside the curtilage is fair game. Just have these guys say we don't need anything. We don't even need a war. Just wander up and down, go right up to the edge, do a little peeking.

A Anthony Sanders 30:02

For all we know, they did that.

E Evan Lisull 31:06

That's true. So it doesn't show up in here, maybe a little surprise. But maybe they'll get wind of this and start deputizing them. Put a couple of cameras up there, you know, like they did in our Tennessee case and just let it rip and see what you can find. But, in any event, the open fields doctrine did not come into play here. This was an old fashioned war on the good faith exception. And there was no good faith, the Eighth Circuit found. They suppressed the evidence, and I have to imagine the case was dismissed after that.

A Anthony Sanders 31:36

I think it will be on remand.

E Evan Lisull 31:40

Oh, yes. This was actually directed, so directed to vacate and grant his motion to suppress. And then I'm sure the feds will say, well, we're done here for now.

C Christie Hebert 31:50

Well, that was a great summary, Evan. And full of, you know, lively language. I just also want to illustrate not only was Evan's summary exceptional, but this case is pretty exceptional. It's, I think, pretty rare for a court to come in and say, nope, you are completely unreasonable in relying on a magistrate's signed search warrant. And so, you know, the facts of this case, and the fact that it was unreasonable to rely on this particular search warrant, just kind of hides the exceptionalness of this particular case and the rarity. To just add a piece to rarity, I tried to really figure out how often motions to suppress are actually granted, and surprisingly, there wasn't a lot of system-wide data on motions to suppress. There are a couple of like small studies and sample sizes, and from those, I kind of gleamed that only one third maybe of motions to suppress are actually granted. But that's the tip of the iceberg, right? Because folks who have searches tend not to, and nothing is found. And they just kind of go along on their merry way, tend not to file a motion to suppress, obviously, because there's nothing to suppress. And so then, if your Fourth Amendment rights are violated, and they didn't find anything, you'd have to go out and hire an attorney out of your own pocket and sue the government. As we know, the government has all sorts of defenses to kick your case out of court. So that's kind of a barrier. And then there is this other barrier that I discovered in just trying to figure out how many motions to suppress are actually granted versus denied. And there's some scholarship out there that criminal defense attorneys themselves (even if strategically it might be a good idea that the Fourth Amendment right was violated, and you could get the evidence kicked out), they might not file a motion to suppress because it'll make the judge mad. And then their defendant will get a less favorable sentence, and there's some strategic questions to litigate there. And then defense attorneys also take into consideration

their own career objectives in filing motions to suppress, so those complicating factors mean that it is difficult to find Fourth Amendment cases that give the Fourth Amendment right to be free from unreasonable searches some teeth.

E Evan Lisull 34:39

I had one other thing that jumped out since you mentioned that this is kind of rare. The other weird thing here is this is one of those instances where the district court overrules, I mean, I'm not saying this happens super infrequently, but where they overruled the recommendation of the magistrate. Do you think that maybe at least gave the appellate court like oh, you know, oh, geez, this isn't a rubber stamp, that kind of situation? Or do you think they just looked at it, you know, with a fresh set of eyes?

C Christie Hebert 35:05

You know, I used to say, to think, that most district court judges were just going to give R&Rs stamps. But I think in the last, I want to say, three years, at least anecdotally, I have heard of a lot of folks experiencing district courts who overrule their magistrate opinions.

A Anthony Sanders 35:25

And Christie, by R&R, you mean?

C Christie Hebert 35:28

The report and recommendation from the magistrate.

A Anthony Sanders 35:32

The report and recommendation that the magistrate gives, but for final judgment, still needs to be signed off by the third-party district judge in federal court.

C Christie Hebert 35:38

Correct. And for those of us who don't do it all the time, a magistrate judge is not someone who has life tenure. They're hired for eight year terms, I think. And then often on certain motions, they issue a report and recommendation that says this is what I think you should rule to a district judge. And then the parties here, you know, the criminal defendant and the government, can file objections to that R&R. And then the district judge gets to decide, yes, I'm gonna adopt this R&R, or no, I'm gonna change it in the final order, or no, I'm gonna reject it wholesale. So there's kind of like a sliding scale of menu options for a district judge. And the idea is that it takes some of the work off the district judge's plate and kind of spreads it around, gives the recommendations, so they're not starting from scratch. But here, the district judge

didn't take that. And I think that we're seeing that more often. I don't know why. And, you know, I can hazard guesses. I'm sure you could hazard guesses. But I think we're seeing it more often. And I do think it signaled to the court of appeals here that this is worth a second look.

A

Anthony Sanders 36:50

Yeah, I definitely think that's a signal to the reviewing court that you might want to take a closer look here, just like if the Supreme Court takes a case, and the district court and the court of appeals took different views on the matter, that there may be a little bit more sniffing around. I want to emphasize that the point that Christie made about this being such a rare type of case, and it's not, you know, rational basis victory rare (something that we deal with a lot at IJ), but it is quite rare that you have a good faith exception to a warrant, and that exception is not granted by the court. So that's where you have the police go to a judge. So, in this case, this was a state court judge, and they say, hey, give us a warrant. The warrant is actually signed off on, and then they go and get the evidence as motion to suppress. And then they say, you know, even though a judge signed off on that warrant, it was so terrible that we are not going to let the evidence in, and we'll grant the motion to suppress. That is pretty weird because it is a judge basically telling another judge that they didn't do their their job correctly. And that exception has swallowed a lot of motions to suppress that otherwise would have been granted. And the job of the exclusionary rule in trying to stop bad behavior by police by the argument that well, it's not the prophylactic that the exclusionary rule is supposed to be because the police were in good faith. They did everything right. And yet, it was still signed off on. Well, they were the ones who put the warrant together, so I don't really see how that reasoning goes. Now, going back to what you said, Christie, on the studies. I'm actually really surprised that as high as a third of motions to suppress would be granted. I would have thought it's more like 5% or something like that. But maybe it's something to do with the sample or just the universe is different than you would expect because of the incentives that you were talking about, is that right?

C

Christie Hebert 39:18

Yeah. And I'm not sure you can extrapolate really to the whole system because, as I said, the data is really small. There's no real systemic way of keeping track of a motion to suppress. And it often doesn't get back to the police department itself, which I think is another problem. So here, you kind of have these two courts that are assuming that officers are going to pay attention to, I'll call it, the after show of their choices to search these locations. And if the police are busy with their day to day stuff, and no one is responsible for the chain of bringing the after show to the attention of these officers of the police departments, is there really any accountability? So there's kind of two points of there's not a lot of data tracking, so you have one off things because I'm surprised too. I think it is lower, Anthony. I do. I think it's lower where motion to suppresses are actually granted based on the couple of occasions I've seen. And then there's no kind of feedback loop.

A

Anthony Sanders 40:28

Right. And I think that it probably depends on the jurisdiction too. If it's federal court, if certain circuits (of course), definitely in state court (where there's going to be a heck of a lot more of this litigation than in federal court) like we have here. It's going to heavily depend on the

judges, and in some states, I can imagine, in particular not a lot of motions to suppress are probably granted.

C Christie Hebert 40:54

Yeah, I don't know the actual statistics there, Anthony. But I do know that folks have quoted the statistics to me as sometimes something around like above 95% of criminal indictments in the federal system end up in convictions.

A Anthony Sanders 41:10

Right. Well, with plea bargaining, that's definitely, absolutely true. And as you said earlier, plea bargaining has a lot to do with whether these motions are even filed.

E Evan Lisull 41:21

Yeah, you file them. And then the plea bargaining, that's kind of part of the negotiation, right? You say, all right, we won't litigate this. You knock off, you know, this charge or reduce this or whatever. I can see a lot of them, you know, merits or not, you know, you just use it as a bargaining chip if you're on the defense to say, look, we could go through this, or we could just reach a play.

A Anthony Sanders 41:44

Well, I am going to grant a motion that you can now go your merry way. I know that Evan has a lot more editing to do before he can actually leave the office, but hopefully, that will be coming soon. So happy holidays to both of you and to all of our listeners. There will be a New Year's show next week for those of you listening to podcasts during our holiday break, and for the rest of you, look forward to the new year. But, in the meantime, I hope that all of you get engaged.