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SPEAKERS

Anthony Sanders, Anna Goodman, Joe Gay

A Anthony Sanders 00:24

The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar government from forcing some people alone to bear public burdens, which in all fairness and justice should be borne by the public as a whole. Well, that was the Supreme Court in Armstrong v. United States from 1960, by Justice Black, talking about the Fifth Amendment's guarantee of just compensation. Now, that was not exactly a high watermark for private property protection at the Supreme Court in the middle of the Warren Court. And yet, what they said in that case, sounds perfectly sensible. Unfortunately, however, that memo didn't seem to make it to the Minnesota Legislature, which passed a law that in my book is pretty obviously unconstitutional, and was challenged. And the Eighth Circuit ruled just last week in that case, and we're going to be talking about it today, along with another Eighth Circuit case on the right to a speedy trial, on 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 Thursday, April 12, 2023. I have two of my esteemed IJ colleagues with me in the virtual studio, who I will be turning over the show to in just a moment. First of all, I am contractually obligated to tell our listeners that I have well, I've talked about this before, but we're getting close to the launch of my book, which will be published in just under a month by University of Michigan Press. It is called Baby Ninth Amendments: How Americans Embraced Unenumerated Rights and Why It Matters. You can purchase it online, you can pre order it if you like the physical copy of a book. That's great, I love you old fashioned folks. And you can get either hardback or paperback copies for a reasonable price. And we're going to put a link in the show notes if you'd like to do that. However, if you'd like an electronic copy, so I've had some people recently asked me why there isn't a Kindle selection on Amazon right now, if you want to preorder a Kindle version. And I'm pretty sure it's because the electronic version will actually be available for free from our publisher, University of Michigan Press. It's called an open access publication that a lot of academic publishers do now. So you can get that PDF when it comes out and put it on your Kindle. It's easy to do. And then everyone can be happy with the version they have. And if you don't want to pay for it, that's great too. And there also will be an audio version available. So plenty ways for you to learn about baby ninth amendments, state constitutions, unenumerated rights, all that stuff. If you'd like to learn about the book, by hearing me talk, there will be some virtual and in person events in the coming weeks. And we'll put a schedule of that up on the

book webpage. So watch for that. Listen here, if you're interested in hearing from me, either online or in person, there actually is going to be an online event in just over a week that the Federalist Society is sponsoring, where I'm going to be debating our old friend at IJ, Professor Kurt Lash of the University of Richmond. And you can see that the night of Monday, April 24, as part of their Feddie Night Fight series. By the way, I hope you enjoy the poster for it. We'll put a link up to that in the show notes for this episode. But also, I want to tell our listeners that if you are interested in having me come to your local group and talk about the book and baby ninth amendments, and learn what the heck those are, whether virtually or in person, please feel free to reach out to me. My email is available on the IJ website. I'd love to come and talk to any group whether it's your local Federalist Society chapter your local American Constitution Society chapter, your local bar association, you're in a court, or even a non legal group. The book has a lot of American history in it that some history folks might want to hear about. So please reach out. Even if you don't have a budget for speakers, we can still make it work. So don't let funds be a bar to you reaching out to us at IJ. Now, much more importantly, we have two cases from the Eighth Circuit and telling us about these are my colleagues, Joe Gay, and Anna Goodman. Welcome back to both of you to Short Circuit.

J Joe Gay 05:13

Thank you, Anthony. Thank you for having me back on.

A Anna Goodman 05:15

Thanks, Anthony. It's great to be here.

A Anthony Sanders 05:17

So Joe, let's go to you first. And this involves the state of Minnesota and takings. I really don't get what these people were thinking. But tell us what happened. And of course, given the state of Minnesota's litigation strategy that I've been on the other side of a few times, they argued standing. So in a sense, this is a case about standing. But more than standing, right?

J Joe Gay 05:42

Yeah, it's Fifth Amendment, but standing, but then kind of back to the Fifth Amendment. So let's talk about that. The case is called Pharmaceutical Research and Manufacturers of America v. Williams. And as you mentioned, Anthony, this is a Fifth Amendment takings case, about taking insulin without paying for it. But like many constitutional cases that we talked about on Short Circuit, and like a lot of the work that we do here at IJ, it's not necessarily about insulin, or even about whether a constitutional right has been violated. Instead, this appeal, in a case that has been pending for just shy of three years, and an appeal that has been pending for almost exactly two years, is all about whether you get to be in court in the first place to figure out whether your right has been violated. And so specifically, it's that old friend standing that you mentioned. So before getting into standing, I'd like to just talk a little bit about the background of what this dispute is. Not all of this was in the opinion. But I think it's still interesting to have a little bit of context about what's going on here. And so this case involves insulin, which as most

people know, is a medication that type one diabetics need to live. And despite being discovered 100 years ago, and many formulations of it being off patent, for a whole host of extremely disputed, hot button reasons, the price of insulin has increased a lot over the past several years, much different than the recent inflation that we've been experiencing, we're talking about doubling, tripling, even more. And that's caused a real problem for a lot of people, because again, people need this medication to live. And the increasing price means some people are not getting their medicine or they're not getting enough medicine. They're suffering medical problems, financial hardships, and so people have even died from not having access to enough insulin that they need to live. And so a lot of policymakers have been working on this problem from various angles, such as tweaking insurance and copay rules or even trying to make competing low cost versions of insulin. But Minnesota came up with with a novel idea to address the problem. And they had a really interesting insight, which is that free, is cheaper than expensive. And so what they did is they passed a law requiring insulin manufacturers to provide insulin at no cost to certain eligible individuals. And there are some irrelevant details to the program, it might be a 30 day supply, a 90 day supply. The two different parts of the program work differently in terms of whether you just have to send free insulin to the pharmacy to give to the patient versus whether you just have to replace or reimburse the pharmacy for what the pharmacy gives away for free. But the bottom line is that the manufacturer either has to give insulin away for free or has to just give money away for free. So the plaintiff here is Pharmaceutical Research and Manufacturers of America, abbreviated Pharma, I suppose. It's a trade association representing pharmaceutical companies. And it filed suit on its own behalf and on behalf of the three companies that make most of the insulin in the country. And they alleged that the law violates the Fifth Amendment's takings clause, and they sought declaratory and injunctive relief against enforcing law against the manufacturers. Now, the defendants which were members of the State Board of Pharmacy, who enforce the law moved to dismiss and the district court granted that motion. And so the appeal addressed three potential grounds for dismissal, standing, which is what the district court dismissed the case based upon, as well as associational standing and sovereign immunity, which are also argued by the defendants on appeal. But we'll focus here today on on the standing issue, because I think that's the most interesting issue that this case spends the most time discussing. So, standing. As many of our listeners, I'm sure know, to sue in federal court you have to have what's known as Article Three standing which requires in short, an injury that is fairly traceable to the challenged action of the defendant, and that a favorable court decision is likely to redress the injury. And so those are three prongs. And there was no dispute as to the first few problems here, an injury that was caused by defendants, and the primary issue was redressability. Will the relief the plaintiff wants help relieve or redress their injury? And as a little aside, the argument on reddressability seemed a little strange to me, because the defendants were basically saying that for the Fifth Amendment's takings claim, you're not allowed to have declaratory or injunctive relief. And so because you can't get an injunction against future application of the law, then you actually just can't get the relief that you're asking for that will redress your injury. And that's a little weird to me, because it just sounds a lot like a motion to dismiss for, as the rule states failure to state a claim upon which relief can be granted. They're literally saying that relief can't be granted. So it's just a little strange to pigeonhole this argument into saying that because you haven't stated a proper claim, then your injury can't be redressed. And so because your injury can't be redressed, then you don't have standing.

A Anthony Sanders 11:39

The Minnesota AGs office loves standing, well love standing motions.

Joe Gay 11:44

Yeah, well, I mean, it worked to a point for them. But I was wondering if I was a little bit crazy here for thinking that this was just a really odd way to phrase this. And so I was a little glad to see a brief concurrence by Judge Gruender, if I'm pronouncing that right. Which basically said that they address this issue along the lines of redressability standing, basically, because that's the way the lower court did it. That's the way the parties did it. But they're not necessarily agreeing that the availability of injunctive relief actually implicate standing. So I felt a little bit vindicated by that. I might still be wrong, but at least I'm not definitely wrong. We often see courts and litigants conflate standing and merits issues. And so for whatever reason, this is how the case progressed. So basically, then, the question in this case really came down to, can you get an injunction when you assert a Fifth Amendment takings claim? So as I mentioned at the outset, this was a case we thought it was about the Fifth Amendment takings clause, then it was about standing, then it was about redressability. But now we're kind of back to the Fifth Amendment, and really trying to figure out does the Fifth Amendment let you have a claim for injunctive relief. And the reason this is kind of a tricky question just goes back to the language of the Fifth Amendment takings clause, which it says, nor shall private property be taken for public use without just compensation. And among constitutional rights, that's a little bit unusual. Usually, we have a right, freedom of speech, no unreasonable searches and seizures, but it's sort of left for later to figure out what the remedy is: injunction, damages, suppression of evidence, etc. But here, the remedy is baked into the constitutional right, you get just compensation. And it's kind of neat that way that you have that remedy right there. And I think you've talked with our colleague, Bob McNamara, the other week, that's part of our cert petition in the Devillier case. But because that remedy is baked in it has caused a little bit of confusion then about when the Constitution is violated under this clause. Is it violated when the property is taken? Or is it violated when just compensation is not paid? And so I'll just give a very brief background on how that confusion has played out, if you'll indulge me. So what happened was there was a 1985 case called Williamson County Regional Planning Commission v. Hamilton, which held that the violation happens when compensation is not paid. And so basically, you have to go to state court first and not get paid before you have a takings claim that you can bring in federal court. So the litigants said, okay, we'll go to state court and we'll ask to get paid. But then what happened was, then they would not get paid, and then they'd go to federal court, and the Federal Court would say, oh, well, you already litigated that issue and so now you're precluded from raising it in federal court. And so the result was that you had this federal constitutional right, that basically couldn't be litigated in federal court. And so just a few years ago, in 2019, the Supreme Court overruled that case, and it held in Knick v. Township of Scott that the violation happens when the property is taken. So if the government takes your property by, for example, building a dam and flooding your property, the violation happens then and you can go to federal court, you don't have to wait for them to deny you just compensation. But when it made that holding, Knick was also making clear that you're still just going to federal court to ask for just compensation, which is what the Fifth Amendment expressly requires. And so it said that in most cases, you're not entitled to injunctive relief, you just get just compensation. So you don't sue to tear down the dam that's flooding your property, you sue to get compensated. And again, that makes sense, because that's what the Fifth Amendment specifically says that the government is allowed to do, it can take your property, but it has to pay you. And so the Supreme Court in Knick went out of its way to assure the public and state governments and local governments that equitable relief is generally unavailable in these kinds of cases. And that ordinarily, you're not barring the government from acting and from taking property, as long as compensation remains available as an adequate

remedy. And so then this case is really a kind of a follow up to that issue. It's asking, well, when is there an adequate legal remedy for just compensation? When is that remedy available? When is it inadequate so that you can actually go and get an injunction? And so specifically, it's asking, well, couldn't the manufacturers just file lawsuits seeking just compensation for the insulin that they have to give away for free every month, every 30 days, every 90 days? And so what the answer the Eighth Circuit gives is that the remedy is only adequate when it is "as complete, practical, and efficient as that which equity could afford." In other words, your legal remedy has to be as good as what the injunctive relief would be. And specifically here, what the Eighth Circuit observes is that there's a long line of cases in a tradition that says that the requirement that you litigate a multiplicity of suits, over and over again, involving common issues of law, in fact that is not an adequate legal remedy. That is not the same as just getting an injunction and just stopping it altogether. In other words, you can't make these companies file suits over and over again for their compensation. That's not adequate. And because it's not adequate, they can get an injunction stopping this in their tracks. And so again with the weird procedural posture, because they are entitled to an injunction, they can get relief that redresses their injury, and because they can get redressability, they could have standing. And so I think that in a nutshell, is the holding. I think it's an interesting case. And I think it's in many ways it's a triumph of common sense. I mean, the panel is very meticulous, it cites a lot of older cases discussing equitable relief and precedent that's supporting its reasoning. But I think it's really comes down to common sense, which is that this is not like a one off case where the government built a dam and flooded somebody's property, and so you're just trying to figure out what to do about that. I mean, this is a statutory scheme, and the whole purpose of the scheme is that Minnesota doesn't want to pay for this, right. That's why they structured it this way is because it's expensive, and they don't, they don't want to do it. And the whole point is to give it away for free. And so it just makes sense that you could just kind of address this at the front end and just figure out if the scheme that Minnesota intends to implement is, in fact constitutional. So, I really enjoyed reading the case and I'm interested to hear what you all think about it.

A Anna Goodman 11:44

Yeah, this is a really interesting one. And this is fun to get to hear about because it is such a you know, you come out of law school, and you hear about what takings claims look like. And this is not what you think of with a takings claim. So I think that it's fascinating to see kind of on a wider scale, what it can look like. And I'd be curious to hear both of your thoughts too, on what kind of this approach could look like in other settings and what ramifications it could have there as well?

A Anthony Sanders 19:31

Yeah, well, I was reminded of what because I didn't think about at the time that the language in Knick is pretty strongly against equitable relief, against having an injunction. So it's also a reminder that probably in the normal course of a takings case, definitely in the normal course, you do need to ask for damages, not equitable relief. Again though, going back to litigating against state AGs offices, the argument that these companies these huge massive companies would go to state court which Minnesota has this inverse condemnation process, which usually is for, you know, something like regulatory taking, like the government damaged my land through this new regulation or flooded or what have you, and then you go to court to try to get

compensation, and that you would do that for every single insulin distribution. So say it's, you know, I don't know, $500 worth of insulin, you have to go file that claim in state court. And then you do it again and again, for all the people who are qualified under this program. It'd be madness. I mean, I think if they went through the state court process, they probably wouldn't at the end of the day, they probably would have encountered common sense in the Minnesota courts to figure out that they shouldn't have to do this, and maybe it would be unconstitutional under the Minnesota Constitution in some way. But I agree with you, Joe, that this common sense just prevailed at the end of the day. This is just such a weird program and it had to be pretty unusual that instead of paying for the insulin or having some kind of, this would be bad economic policy, but have some kind of price control, or there would be a lower rate paid or some kind of licensing arrangement like Medicare does with lower rates, that instead they're just, you know, what are they thinking? The funny thing was it was passed a couple years ago, when there was split control of the legislature, so it's not like one party just came up with this and steamrolled the other. It must have just slipped through the cracks. It's such a weird regulatory scheme.

J Joe Gay 21:38

Yeah. And I think part of it is just because two things, which is that it's very unpopular plaintiffs here. Pharmaceutical companies are very unpopular. And I think the insulin companies, I google this just a little bit just to understand what was going on here. The insulin companies are especially unpopular, given their recent price increases. So I think you have unsympathetic recipients of the government law, and then I think you just also have very sympathetic people that you're trying to help. I mean, it's an important issue, which doesn't doesn't mean that the Minnesota is allowed to do it in the way that it's gone about doing it. But I think the politics here probably favored trying this approach, even if the Constitution and just to be clear, the Eighth Circuit didn't address the merits here. This is really all about whether the claim could proceed. But it seems like they have probably a pretty strong takings case here.

A Anthony Sanders 22:39

Yes, I would agree. And to your point, as we know very well at IJ, pharmaceutical companies are not always the best friends with the free market, as Pfizer showed itself to be in the Kelo case, which was basically behind all the shenanigans there. So this case, though, it seems like they have a pretty good claim under the Fifth Amendment. One final question I have, and this is not in the case at all. But you know, with our background of eminent domain work at IJ, I start thinking, is this even a public use, right? So usually, these regulations that get into this kind of case, the public use is pretty obvious. So it's not like a Kelo situation where they're taking a home and giving it to another private owner. Usually, it's some kind of redistribution in the general economy. Here, although you might say it's a public use to help the poor, it's really just taking insulin from one party and giving it to another. Now, I bet huge pharmaceutical companies don't want to die on this hill about whether it's a private use, so they just argue about the money. And I totally get that. But, I mean, would this be a private use?

J Joe Gay 24:01

Yeah, I had that same question, Anthony. And it struck me that it's doesn't seem like a public use to order you to give your property to somebody else who's a private citizen.

A Anthony Sanders 24:15

Right. I mean, even that person is very deserving. But it's still a transfer from A to B,

J Joe Gay 24:22

It may perhaps be a public purpose, under Kelo. So I think under existing law, maybe it does pass muster, because I think there probably is a public purpose that is being served by...

A Anthony Sanders 24:37

Well, you could say that that person is then not relying on you know, either private charity or Medicaid or whatever it is. So I guess that would probably be the the reason they would use. Well, let's look at some other reasoning from the Eighth Circuit. This one made less sense to me. It is from the state of North Dakota, a criminal federal prosecution. Anna, what do we make of the right to a speedy trial here?

A Anna Goodman 25:06

Yes. So the Eighth Circuit was having an interesting time with this. So this case comes out of the case of a man named Roger Cooley. And Roger was indicted back in August, 2019. So several years ago now. And everything went as planned, he was indicted as part of a conspiracy with a number of other individuals, it had to do with controlled substance, possession and distribution. He was indicted, they went through the usual process, there was an arrest warrant issued for him. And it was put into the National Crime Information System, which is how they usually go about pursuing that, and then nothing happened. And about 14 months later, they found out the prosecutors realized that the arrest warrant had been lost about six months prior. And so it had just hadn't been out there, no one had been looking for him, no one had been pursuing the case. So they reentered the arrest warrant, and then started a little bit more actively pursuing the case in fall of 2020. So already, we're 14 months into this man's time. So with the right to the speedy trial, it starts, either at the time that you get indicted or when you get arrested, and then it runs all the way to trial. So his clock started the day that that indictment issued, regardless of when he was arrested.

A Anthony Sanders 26:24

And is that true Anna even if he didn't know about the indictment?

A Anna Goodman 26:30

Yes. And that's what the court did say, is they were looking back to the very beginning of it. His knowledge factors into when we talk about the actual factors of whether or not the delay is too long, then his knowledge matters. But whether or not his right was implicated, that starts

immediately as soon as the indictment issues and the court was really clear on that. And so after this time, so you have 14 months, and then they start kind of looking for him, you know the arrest warrants out there, it still takes them several more months to even locate him in February, 2021. So you've gone six more months from when they reenter the warrant in the system. And then he doesn't get arrested till the next month, March, 2021. And is arraigned then and get set for trial in July, 2021. So you've already gone from August, 2019, to July, 2021. So you're already almost two years into the process at this point and two years into his clock. And then his codefendants start filing continuances. And there's three continuances that are filed, two by the codefendants that he didn't protest in any way. The third one, the court doesn't really address what the circumstances were of that third continuance. But the end result of that is his trial is ultimately not set until January 25, 2022. So you're talking at that point, 29 months after that initial indictment was issued, and that clock started to run, which is not a short amount of time. So in December, shortly before his trial, he files a motion to dismiss the charges against him, basically asserting this Sixth Amendment right to a speedy trial and saying, hey, it has been this 29 month period, I haven't gotten in front of the judge and the jury, I haven't had my day in court, you can't now continue to prosecute me. And so that was what came before the court with this appeal. So the district court saw that, considered it, said no, you're fine, it hasn't been too long. He pushed back and said, no, I should get a hearing on this. I want you to consider the evidence. And the court again said, well, in the interest of justice, we don't really have to do this. But sure, we'll take limited evidence. And so he came in with a couple of statements from his mother and his sister that just gave some basic background information about the fact that he hadn't known about the indictment, and that he'd been living in the same place for eight years. And the court said, okay, we hear that, we're unconvinced. No, your right to speedy trial hasn't been violated. And so those became the two issues that he decided to take up into appeal. After the trial happened he was convicted and he then came to the Eighth Circuit to say, hey, I have my right to speedy trial, that wasn't followed and this should all be invalidated because of that. And so there were two things that he focused on. And the first was the issue of whether or not he should have gotten a full evidentiary hearing on the issue. And that one, the court really made pretty short work of and I think rightly so. There is the standard there, that a district court isn't required to have a hearing unless you have sufficiently definite, specific, and detailed moving papers. And the court looked at it and said, and the Court of Appeals agreed with the district court below and said he didn't meet that standard here. And so that's why we didn't have to get all the way to an evidentiary hearing on the issue. He said a lot of general things about his anxiety and about how pretrial incarceration is oppressive. And then when he did have his the statements from his family members, he said he didn't know about it and things like that. But none of those really created an issue of disputed fact that an evidentiary hearing would have been needed on, and that was the end of it for the court. Which that one right there, that again, going back to Eighth Circuit's logic, that seems to make sense, that seems pretty straightforward. If he's not actually putting facts forward that are creating a conflict and a dispute, the court really doesn't need that hearing in order to be able to help them reach their conclusion. The second prong of what he argued was what the court spent more time on and honestly, what seems to be a little bit more of an an interesting analysis and kind of shows what some of the concerns and maybe flaws are and where we are today with how that right to a speedy trial is considered. So to go back to history for a second, whenever we're looking at a right to speedy trial, the Supreme Court has laid out a pretty clear test for it. And that comes from the case Barker v. Wingo, which was decided back in 1972. And that case, is going to give us four factors that anytime any court is considering this they're going to be looking at. So you're going to look at how long that delay was. They're going to look for what the reason for the delay was. They're going to look at whether the defendant asserted that right to speedy trial, which is what you kind of mentioned earlier, Anthony. And then what actual prejudice came to the defendant because of that, and

there are a few sub considerations that we get into with that as well. And here, the court acknowledges 28 months, that's a pretty long delay. It's presumptively prejudicial, and so that delay is going to weigh in favor of the defendant, Mr. Cooley here, and the court acknowledges that upfront. It also says though, it weighs in his favor, it actually doesn't weigh that heavily in his favor, because there are lots of other times that courts are very delayed, you know, there are 40 month delays, there's 37, they included a string cite of other situations where people have waited a whole lot longer trial than Mr. Cooley and kind of use that to justify some of their decisionmaking there. And then, where they focus a little more, and I think what is one of the more interesting aspects of their reasoning here is the second factor that they focus on. And that's the reason for delay, which obviously, the reason for delay and the prejudice are going to be the two more most important here. And with the reason for delay, the district court actually said that the government didn't do anything wrong, but not only did they not do anything that was intentionally or flagrantly illegal or failed to prosecute, but they actually weren't even negligent. And on that point, the Eighth Circuit really did disagree and said, this warrant disappeared from the system for eight months. That happened somehow. It's not saying the government did it on purpose, but somebody had a glitch, an error, there should have been somebody that was tracking that. Even if it was truly a computer glitch, it was still on them to be aware of what warrants are in their system and what defendants they're pursuing. So that eight month period when the warrant was just MIA, they said no, the government was negligent for that eight month period. And that would seem like it's going to weigh in favor of Mr. Cooley. However, then they went back to the whole period and said, okay, eight months, but we've got 29 months here and the rest of the 29 months it seems like they did a pretty good job, and were doing everything they were supposed to be doing. So yes, it weighs slightly in favor of Mr. Cooley, but at the end of the day, it's just eight months. Which was kind of an interesting and a little bit of a disconcerting analysis to say that okay, yes, government was negligent, but on balance, we just don't care that much about it, kind of seemed to be the takeaway there.

A Anthony Sanders 33:55

Right. Yeah. I mean, it seems eight months is eight months, no matter what else happened in your life.

A Anna Goodman 34:01

Exactly. Eight months is I mean, it's most of ayear. It's a good chunk, you know. So, it's interesting that they didn't give that a ton of weight. But they did acknowledge it wasn't good. But they just didn't give it what I would say what I would have maybe expected could be the weight afforded to it. But it does seem consistent with kind of the approach that's been taken in the Eight Circuit, and more generally as well. And that third factor, then that they looked at was whether the defendant asserted his right to a speedy trial. And this kind of goes to what you mentioned earlier, as far as the timing of when Mr. Cooley found out about this indictment against him. So for that first lengthy period, he just didn't know about it. But he did, obviously, when he was subsequently arrested when he sat in jail still for almost a year after he was arrested, he knew about it at that point, and he did bring up his speedy trial right, he filed this motion. But the courts approach to that that's established in the Eighth Circuit is that well, if you didn't know about it earlier, if you bring it up later, it doesn't weigh against you, but it doesn't really help you either. It's just kind of a thumbs up, you brought up the issue, we'll consider it, it's a neutral factor. Which is interesting to kind of square with the Supreme Court

saying this is a factor that should be considered because it kind of seems to just negate it entirely and say, it's not really a factor at all, it's just a fact at that point. So I find that very interesting that that's the Eighth Circuit approach there. But then the final factor, which is the one that ultimately carried the day here, which at this point, keep in mind, you have two factors that weigh however, slightly in favor of Mr. Cooley, one that's neutral. And then we get to number four, which is the amount of prejudice. So the extent to a prejudice that's caused to the defendant by this. And there's a couple of interesting things about what the Eighth Circuit did with this is, first of all, they acknowledge that usually when there's negligence or there's fault by the government, that can kind of negate the need for a showing of actual prejudice by the defendant, because it's the government's fault. And again, that logically makes sense, right? If the government is the ones that did something wrong here, it shouldn't be as much on the defendant to say all of the reasons and all the specific ways that he has been harmed by it. There should be some responsibility there. But the court went back to that eight month period, that eight month consideration and said, yeah, it was bad. It wasn't that bad. It's not bad enough to overcome the need for him to show us specifically how he was harmed. And there's kind of three major things that when they're doing an actual prejudice analysis, the court looks for there. And so they're looking at whether the preventing oppressive pretrial incarceration, the anxiety and concern of the accused, and the possibility that defense will be impaired. And in his arguments on this, Mr. Cooley didn't make any arguments about evidence being spoiled or anything like that. So that third one just didn't really apply to him. The other two, he made just general statements that pretty much put him in the courts view, on par with every other defendant who doesn't want to be incarcerated, or who is concerned about the fact that they're ultimately going to face a sentence if they're convicted. And so the court was unpersuaded that anything he said actually showed a real prejudice. And since they said, well, the negligence wasn't enough to overcome that need for him to show it. Even those those first two factors actually are in his favor, our outcome here is that the right to speedy trial wasn't violated, the district court did the right thing. Towards the end of the case, they had a one liner that I thought was just such a fascinating summary of their position on this, and they say, "the present case illustrates the court's wisdom in establishing a balancing test." And that line, that one got me. Cause I do I think that's a fascinating a summary, the case shows this is how the test is working right now. And I think this is a pretty in some ways, a standard analysis of how the right to speedy trial is considered in courts nationwide. But it doesn't seem like that much of a balance when you actually get into it. It's wise to give us a squishy balancing test that we can use to get whatever outcome we want.

A Anthony Sanders 38:17

Yeah, I thought exactly the same about that sentence? And I was like, is this intentional? Or is this intentionally being ironic? Because the guy won the balancing test. He won the first two prongs barely, and then the last one was obviously in his favor, even though it didn't matter that much. And yet, he still loses. That's not a balancing test. That's like, ignoring the test, or the test isn't doing anything. So I almost wonder if whoever wrote that sentence meant a little bit of irony in there. But yeah, at the end of the day, it doesn't seem like he was that sympathetic of a criminal defendant, I suppose. I mean, it seems like the takeaway here is if you don't know you're indicted, then you're not very prejudiced. But if it had been 10 years since the indictment, and there's no statute of limitations problem, and then they finally go arrest the guy. And there's not, you know, a case of like a witness dying or something like that, they still have the evidence from the crime 10 years ago. I mean, that seems pretty bad. Then I

think you'd have a claim. So eight months, they're saying basically, well, eight months doesn't matter, because it's just eight months. Whereas that really is a big chunk of your life, especially at certain stages of your life, right?

A Anna Goodman 38:17

Yeah, exactly. Right. And I think that's a hard line to draw too when you're not actually balancing the considerations and the impacts.

J Joe Gay 39:55

I also thought that they focused a little bit too much on that eight months. And maybe getting back to the point of the evidentiary hearing, maybe more facts would have been useful here. I mean what about that first six months before it disappeared from their system, what was going on during that six months? And then when it disappears for eight months, usually, if you realize you've dropped the ball, you kind of have a little bit of urgency to kind of fix your mistake. But when they realize, it still took four, five, six months to arrest him once they realize the mistake. So what's the evidence of their of their renewed urgency when they realize their mistake? They talk about the continuances. You mentioned there's one continuance by the government that is not addressed. That could be important. What was the reason for that continuance? The other continuances were due to health issues. Well, would the codefendants have had those health issues if the government had moved with a little bit more diligence here? I kept finding myself with all these unanswered questions that I thought would be really useful for this analysis, that I think spanned a little bit more than just that eight months, where the warrant disappeared from the system.

A Anna Goodman 41:16

Yeah. And I agree with that. They really did focus in so much on the eight months, because that's what they attributed to the government negligence, but the whole time matters. The whole time was his speedy trial clock, and does impact him. And when you look at it from that perspective, that's two and a half years of his life, and close to a year of that was spent incarcerated waiting for his day in court. And so I think that's a great point, Joe, honestly, maybe the hearing would have gone a long way and would have brought it along. But he certainly it seems like, well, maybe not the most sympathetic individual, there's a reason that we have the rights that we do, and that we have the balance. And the government should need to have a certain sense of accountability and responsibility to if they're going to file an indictment, they're going to do something about it. And they're going to both be on top of it enough that they're not losing warrants for six months, but also when the warrant is in the system that they're actively pursuing it.

A Anthony Sanders 42:11

Well, Anna thank you for that presentation. We haven't talked much about speedy trial issues on Short Circuit in a long time, so I really appreciate you walking us through that and a little bit of background that you yourself have on that issue. I know next to nothing about speedy trials,

except I've always thought speedy trials usually don't seem so speedy. And this reaffirms my suspicions in that regard. So thank you both for coming on this week on short circuit. We'll have a another episode next week with the latest from the federal courts of appeals. But in the meantime, everybody, I would ask that you all get engaged