

# Short Circuit 314: That's Gold, Jerry, Gold!

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## SUMMARY KEYWORDS

BMG Monroe v. Village of Monroe, U.S. v. Crater

## SPEAKERS

Anthony Sanders, Justin Pearson

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### A Anthony Sanders 00:24

"This is gold, Mr. Bond. All my life, I've been in love with its color ... its brilliance, its divine heaviness." Well, today, we're going to learn about an entrepreneur who loved gold almost as much as Mr. Goldfinger. However, did he meet a similar fate as in that movie, or because of raising history and tradition and the protections of the Constitution, was he able to survive? We'll learn about that and more today on Short Circuit, your podcast on the federal courts of appeal. I'm your host, Anthony Sanders, director of the Center for Judicial Engagement at the Institute for Justice. We're recording this on Wednesday, March 6, 2024. And we'll get to that story that not all that glitters is gold, or maybe it wasn't such a yellow brick road to travel down, in a little bit. That's a case from the 1st Circuit. Before that though, we'll keep things northeast but with a case from the 2nd Circuit. Now, we have the perfect guest on to tell us about this 2nd Circuit case. So, many of you will recognize the voice of Justin Pearson. Justin is the managing attorney for our office in Miami, our Florida office, but probably most of you will most associate him with Short Circuit when it comes to our Supreme Court previews that we have every year at the University of North Carolina. And part of the reason Justin is involved with that is he has North Carolina roots because he went to college in that state. However, before Miami, before North Carolina, Justin was just a boy from Monroe, New York. And wouldn't you have it, the 2nd Circuit just ruled in a property rights case from that very town. So, today, we welcome Justin back to Short Circuit, but we're also very excited to take him home. So Justin, welcome back, and welcome home.

### J Justin Pearson 02:36

Thank you, Anthony. And, you know, it's just a cool coincidence when I agreed to be on the podcast, you know, again, as I've been many times, and I love it. I didn't know there would be a case about my hometown, and it's not a large hometown. It's like 20,000 residents. It's just a really crazy world we live in that we're going to talk about my town.

### A Anthony Sanders 02:53

And so let's place it. So, you were telling before it's about 45 minutes from the city if you drive in or take the train, but it's not like Westchester County right by the city. It's actually over the river?

**J** Justin Pearson 03:06

Right. It's kind of on the west side of the Hudson and due north of New Jersey, a distant suburb. You know, you could call it an exurb. My dad would take the train into the city, but it was not a short train ride. And there's not a whole lot going on around there. It's like a nice little town. The thing we're most known for is a giant outlet mall called Woodbury Commons, where I actually worked in high school. But unless you've been to that outlet mall, you've probably never been to my part of New York State.

**A** Anthony Sanders 03:30

Where did you work at the mall?

**J** Justin Pearson 03:32

I worked at the Polo Ralph Lauren outlet store.

**A** Anthony Sanders 03:35

Ooo kind of fancy.

**J** Justin Pearson 03:37

Got a good discount too.

**A** Anthony Sanders 03:38

Well, another thing apparently that the town is known for is not having enough housing, like is the case in many parts of the country. And it seems like it is still not going to have enough housing because of the story from this case.

**J** Justin Pearson 03:54

Yeah, I mean, hopefully all of our listeners will agree with you and I, Anthony, that Euclidean zoning should not exist. It makes the world a worse place. When people are trying to kind of make the world better by creating housing and doing other things, zoning gets in the way. Unfortunately, this case provides yet another example of that. It also provides an example of a couple other unfortunate things. So, one of them is the way local governments operate. I think sometimes people have this pollyannish idea of local government that, you know, it's better

than the other levels of government. That's not always true. Oftentimes, local governments are most infected by corruption, for lack of a better word, but I don't mean in the monetary sense. I mean wanting to do favors for your friends. So much of local government is about helping out your friends, you know, pursuing personal vendettas against your enemies. And, you know, it's locals; everyone kind of knows each other. They're not these arm's length policy discussions that people tend to think about. Anytime I watch a YouTube video of a city council meeting, I see a dozen constitutional violations caused by personal relationships where someone will basically say, hey, like a city councilmember will say, hey, you know, I'm friends with this person, and I've known him since childhood. He's a good guy. Let's help them out and get what he wants, even though it's gonna, you know, hurt other people.

A

Anthony Sanders 05:11

We gotta nice little beach community here, Lebowski. We don't want you messing it up.

J

Justin Pearson 05:16

Exactly right. And then the other unfortunate thing that this case shows is, sadly, something that I know you you've heard of before, Anthony: judicial abdication and how judges will bend over backwards to get out of doing their job sometimes if it's a case they just don't want to deal with.

A

Anthony Sanders 05:30

That does happen.

J

Justin Pearson 05:32

All right, so I guess we should go to Monroe, New York, right? This quiet little exurb, commuter town, 45 minutes or so northwest of New York City, where everyone kind of knows what's going on with local government and understands where everyone else stands. A developer wanting to build housing ... You know, great, we need more housing. And you know, especially with everyone moving out of the cities into the suburbs and exurbs, I'm sure there's a demand for it. And there was. He wanted to market it to the large Hasidic Jewish community there. That could be one of the reasons for the issues that were to come, and it's not clear from the record, but that's at least the allegation. And it strikes me as plausible. He also, either for that reason or just because of the way the world works these days, had to deal with obtaining a variance. Now, even in these little small towns, the zoning codes are out of control, or pretty much anything you want to do requires a variance. It's not like it's a rare thing where you're doing something unusual in order to require a variance. Any type of development or commercial development, residential development, whatever, is going to have to go get a variance. And the way it works is, everyone understands that. And so you basically go on bended knee, and you say nice things to the local councilmembers. And if they're your friends, they give you the variance. And, you know, the local councilmembers eat this up. It's always amazing to me the lengths that politicians will go to obtain an insincere compliment. And, so you know, these types of local variances are a great way for local politicians to obtain insincere flattery from

their constituents in exchange for giving them this variance that they need. But that only works if you're actually friends with the city councilmember. For whatever reason, the local government in Monroe did not want this development to happen and so they granted it kind of a conditional approval, but with a ton of exactions and requirements and conditions. The developer, you know, went back and forth with them, changing the plans, complying with some of them, not others. At the end of the day, there were some that the developer said he just could not comply with. Now, I don't know whether he's telling the truth or not. But, you know, that's what kind of led to this litigation.

A

Anthony Sanders 07:39

And some of them were like the exact peaks of the roofs and styling of the siding and things like that.

J

Justin Pearson 07:50

Right. It seems like a lot of the sticking points had to do with architectural requirements and stylistic requirements that I guess the developer did not think people wanted but the local zoning group did. And so, there were five pieces of property. Two got appealed locally, and three didn't, but they're all kind of rejected for the same reason, just at different times. And so, when those first two got rejected, you know, and then he appealed locally to the local appellate zoning board. After they upheld the denial, he went to state court. While that state court proceeding was going on, the town decided to actually kind of amend its view of what was allowed. They didn't give him everything he wanted, but they gave him some of it. He did not do that for the other three properties that came later that were basically denied for the exact same reason. And, instead, he goes and files a case in federal court alleging religious discrimination because, you know, he claims some of this was because he openly said he's going to market it to the Hasidic Jewish community right near there, but also, you know, just challenging these denials in general. And then it became this issue over exhaustion, right? Was he required to go actually, you know, get officially denied for these other three properties that were clearly going to be denied for the same reason, then go through the appellate process and all that stuff again, even though it appeared to be futile? The district court said yes and basically said you failed to exhaust. Get out of here. The 2nd Circuit agreed. And when I was first reading this opinion, at first, I thought this was going to be a podcast about how out of touch some federal judges are and how they don't understand the way things work in reality, until I got to the end of the opinion and realized what was really going on. But so, when you first read most of the opinion, like the opinion talks about how, you know, you don't know if this variance was going to be applied, right? Like you could have made a great case to these individuals and changed their minds, and it just fails to understand how local government works. Or it fails to understand that like everyone knows each other. These are not strangers showing up in a courtroom. Everyone knows each other. Everyone knows where each other stands. Everyone's mind has already been made up. They're not really going to change their mind, unless you create leverage by suing them like what happened, to some degree, with the state court appeal. And then the 2nd Circuit also says, well, you know, they didn't definitively say that they were definitely going to deny his variance application. They said that they shouldn't depart from these requirements, which would make you think that they would deny it, right? And they said that they didn't want to change anything and that they wanted to stay consistent and said all these things that would make you think that you'd have no chance, but

they didn't actually expressly say that you have no chance. And when you read the quotes, like they're pretty clear that like this guy had no chance. But they weren't good enough for the 2nd Circuit, which also kind of touches on another pet peeve of mine, which is this incentive that the courts create to incentivize government officials to be as unhelpful as possible. That, oftentimes, when you talk to government officials, it's really hard to get a straight answer from them. And the reason is because they know that if they give you a clear answer, that can come back to bite them. Like they can get sued over that. That can be quoted in a case, where if they speak in bureaucratic language, it's going to be a lot harder to sue them. And so, the courts are unfortunately creating this tremendous incentive for bureaucrats to talk like bureaucrats and not give straight answers. And many of the officials know this, and they've told me this, you know, firsthand. Like this is not some theory. And so, that's what's going on here as well. And so, you know, you're reading this, and you're like, listen, they don't understand how local governments work. They don't understand how officials talk. Like it's very clear to anyone who's actually dealt with local governments and dealt with local government officials that this developer had precisely zero chance of getting this appeal granted of this denial. And so, then you get to the very end of the appeal, of the opinion, and you see what's really going on, which is the 2nd Circuit panel talks about how this decision also just happens to further sound policy in light of the oft stated concern that federal courts, and, by the way, I'm quoting, might be "transformed into the Grand Mufti of local zoning boards." And so, here's what's going on. It's not that these federal appellate judges are totally out of touch with reality and that they don't understand how local governments operate, and they don't understand how bureaucratic people talk. What's going on is they've made the personal policy decision that they don't want to deal with zoning cases. Maybe they just think these cases are beneath them, too petty for them, I don't know. But, for whatever reason, they've decided that these cases are not worth their time. And so, they're going to bend over backwards to find a way to rationalize an excuse for them to say that the developer failed to exhaust. And that's really a shame, right? It's a shame for a number of reasons. First of all, Anthony, I don't have to tell you this, like judges have a duty to judge. They don't get to make a policy decision that they just don't like judging in certain types of cases. That's not how the system is supposed to work. And here, it's causing real problems. I mean, it's true that there are lots and lots of zoning disputes, because zoning boards are so out of control. But that's all the more reason for courts to get involved, not to abdicate their responsibility. And so, even if you wanted to make some sort of policy argument here, even though it's not really appropriate, the policy implications would be in favor of the courts reining in this abuse, not, you know, turning a blind eye because they don't want to deal with it. And so, it's just a shame. No, this opinion really makes the world a worse place in a way that bothers me. It also makes me mad at the local government officials in my hometown. Like I know Monroe is a perfectly okay town. Like many towns, it has room for improvement. And there is no doubt in my mind that it would be a better place if the zoning code was not so restrictive and if the local government officials would get out of the way and let the people trying to improve the town do so.

A

Anthony Sanders 13:39

Your comments about what's really going on and the prudent policy at the end, I think, really illustrate something else in the background, which is the court never gives the background of what the current law is on this area of law, regulatory takings, which does not mean that they necessarily got the answer wrong under current law but is a little bit of an underhanded way of explaining it. So, I'll tell you what I mean by that. So, for a long time, whenever you challenge a land use decision of a municipality, it goes under this case called *Williamson County* that the Supreme Court ruled on in 1985. And so, for a long time, you couldn't bring a case like this in

federal court after your town denies your permit or whatever because of *Williamson County*, which said you have to go to state court first. Now, the Supreme Court just five years ago in this case called *Knick* overturned that part of *Williamson County*, and so, a lot of us, you know, who are into property rights are like finally, *Williamson County's* gone. You can go to federal court. And that's exactly what this developer did, or maybe he went to federal court before, but we got the benefit of it. But, this is a reminder that part of *Williamson County* is still on the books, and that's the ripeness part. So, there were two parts. One is that you need a final decision, and that's what this case is about. The second is that you have to go to state court first. So, this person would have had to go to like the appeals process in the state courts and then gone to federal court, and that hardly ever worked because of res judicata because it was already decided in state court. Well, the court never mentioned ... So, it cites *Williamson County* a few times. It doesn't say overruled in part after it. It doesn't say, well, *Williamson County* met this, and this part is still around. It just throws it out. That's the law. And then it talks about ripeness, which is fine. And then, but I think with the background of current changes in the law like the *Knick* case, you should read some of that in a different light. And that's this final determination from the variance. So it's considered not final because you could have got this variance unless it's "futile." I think that ratchets up like, you know, what can be futile, if you ask me, looking at *Knick* and this other more recent case law. So, I think that's a little bit underhanded how the court kind of explained the law there, because it's like, you know, nothing's changed in 30 years, the takings law.

J

Justin Pearson 16:39

No, no, you're exactly right. And also, you know, in this opinion, and again, I think it's just because the court was trying to get rid of the case, but there's kind of like this subtext of wait, why don't you just jump through these additional hoops of, you know, appealing your variance? And I think the court probably understands what I'm about to say, but just in case listeners don't, like that's not such an easy thing to do, you know, in terms of reality. These processes take a long time. And this litigation takes a long time, right? Like this fight has been going on for half a decade. And so, oftentimes, what happens is people just run out of money, like they lose these wars of attrition with the government. I don't know if this developer, if that's why they needed to speed things up, but it's a very common thing where like if you add up how long each little part of the process is, with each part being longer than it should be, the total length then becomes too much for someone to bear, and they're looking for ways to shorten it. And so, it would not surprise me at all if that's what was going on here. And so, it's just not the right approach to just say, hey, you know, you should have gone and spent another six months, you know, appealing this variance denial. Like that very often is the difference between, you know, running out of money or not.

A

Anthony Sanders 17:47

If you look at all the dates here, the first application, looks like it was a predecessor entity to the current one, was in 2001. And then they, somehow, in 2006, they got some kind of an agreement, and then nothing happened until 2014. And I'm guessing that's because of the housing crash. No one could build housing during that time. Finally, the economy gets back on its feet, and they start the process again. And even then, it's 10 years later, and not a single unit has been built.

**J** Justin Pearson 18:21

Yeah, before I was talking about five years of litigation, right? I'm not counting all the stuff that happened before that. And so, like I think sometimes people just don't realize how long this process takes and how expensive it is and how desperate parties are to find a way to shorten it and cheapen it any way they can. And then, you know, they do that kind of out of necessity. And then the court turns around and says, well, you know, you should have come to us two years later, instead of when you did. And, by the way, sorry it took us five years to rule on what you brought us, but now we're gonna tell you to go back. Like it's just the disconnect between the court system and reality is so striking in cases like this. Yeah.

**A** Anthony Sanders 18:53

Yeah. If you want, you know, another example of why we don't have more housing, just read what the heck happened in this case. It was going to be 181 units, and now, none of those units are going to happen.

**J** Justin Pearson 19:06

And what's funny is, you know, then the local, and I don't know if this is happening in my hometown of Monroe, but then the local governments would turn around and say like we need the government to build affordable housing because there's a shortage of affordable housing. Well, guess what, if you allow people to build more housing, housing will become more affordable, but you know, they don't want to do that for a number of reasons.

**A** Anthony Sanders 19:25

Well, we will have to leave it at that. There are less homes in Monroe, New York, because of its local government. So 2nd Circuit wasn't booming, but maybe things are shinier elsewhere. Actually, they are not. So, this is a very different type of case. There are two takeaways here. One is just the scheme that this defendant's name is Randall Crater. What Mr. Crater went into was kind of ingenious, but nothing, you know, you should teach your children how to do. So, that's kind of a fun story. But then, we will get to his litigation tactics in court, and I don't think he did a great job. It looks like his attorneys, maybe they didn't have much to work with, they didn't do the best of jobs, but it's a warning sign on how to not do constitutional law and how to not do "history and tradition," which is like what everyone's talking about these days when you interpret the Constitution, use history and tradition and, you know, original meaning or whatever.

**J** Justin Pearson 20:42

Hopefully, at least a textbook for history and tradition.

**A** Anthony Sanders 20:44

You would hope. You would hope. Not so much here.

**J** Justin Pearson 20:46

And by the way, I'd be fine if they just said text without history and tradition, but that's another story.

**A** Anthony Sanders 20:49

Text is kind of the most important part, in my mind.

**J** Justin Pearson 20:52

Yeah, that's a very nice development that's happened after I went to law school. It wasn't when I was in law school, unfortunately.

**A** Anthony Sanders 20:59

So gold. What happened is everyone knows about Bitcoin and crypto and all that kind of stuff. Now, you may have your own views about that. I'm not going to comment on whether Bitcoin is a great thing or not, but this guy, Mr. Crater, thought that this is a new development he wanted to be involved with. So, about 10 years ago when Bitcoin was starting out, getting to be a bigger thing, he comes up with his own cryptocurrency. And he calls it My Big Coin, MBC. And instead of just, you know, being a limited Blockchain digital currency, or however you describe it, he says his is different because it is 100% backed by gold.

**J** Justin Pearson 22:00

I'm sold.

**A** Anthony Sanders 22:01

So, of course! I mean, who wouldn't like that? So, the theory is ...

**J** Justin Pearson 22:05

That's the big flaw with crypto.

**A** Anthony Sanders 22:06

Right. It's not backed by anything, right? Well, of course, the U.S. dollar isn't exactly backed by anything either.



**J** Justin Pearson 22:11  
No, but crypto is no better. It's the same shenanigans.

**A** Anthony Sanders 22:15  
So, a lot of our hard currency friends and people that we know and love at IJ and including some people that we work with, say well, you know, modern currency isn't really based on anything. And so, if it's based on gold or whatever, some real value there, it's better that way. So this guy said ...

**J** Justin Pearson 22:32  
Well, the gold standard, the silver standard ... Give me something.

**A** Anthony Sanders 22:36  
So he puts the two together, the new and the old. Crypto backed by gold. Whether that makes sense is a different story. I mean, there used to be this thing called e-gold, which I think the idea was it's like an old-fashioned gold certificate, except it's electronic. Like it's not literally paper, you know. That's pretty straightforward. That's really what this sounds like, except then it has all this, you know, Blockchain stuff. So, who knows how that was supposed to work. Turned out, it was all actually a scam. So, he said, this is 100% backed by gold, and not only that, but here's how he put it. He claimed to have a partnership with MasterCard, which would allow coin holders to "buy stuff all over the world using a MasterCard linked to their MBC account." In other words ...

**J** Justin Pearson 23:30  
I do not know how I was not one of this guy's victims.

**A** Anthony Sanders 23:32  
He should have marketed it to you. This is a debit card, right? That's nothing that special. You have a bank account, debit card, except it's a bank account with gold that's crypto with a MasterCard. So, these were the two selling points, and he got investors. So, he had at least four people with a lot of money who invested millions of dollars in this scheme. However, then things started getting a little suspicious. So, they would say, I need, you know, my gold, and he said, oh, it's at a bank in Spain, and I need to get it shipped here, or excuses like that. And then, people would get their MasterCard, and instead of it actually working as a MasterCard, it would just be a piece of plastic that said "Preferred Customer" embossed on it. But then, things really went south when it turned out that there was this warehouse in Texas where the gold supposedly was in some barrels, but it turned out, the barrels were actually full of mining

waste. Not only was this mining waste from a gold mine, and maybe there's a little dust in there or something, but it very much was not gold bullion. And he got about several million dollars as part of the scheme. Eventually though, the authorities caught on, and he's prosecuted, so of course he's just prosecuted for all kinds of federal fraud, including wire fraud. And so, he goes to trial. Now, at trial, there's a couple things to keep in mind. One is there's an expert the government calls, and he makes some objections to the expert based on federal evidence law in Daubert. This is a principle that many trial lawyers listening will know about. And he says, well, she wasn't properly admitted under Daubert. That's one argument. The other is that he says at trial that he wants to call some witnesses who work for the federal government. They worked for various agencies, specifically one for the post office, one for the Commodity Futures Trading Commission, and one for the FBI. Now, how they're relevant to his defense, he's not particularly detailed about. You might imagine like, you know, he hits on these arguments about how his currency was supposed to work and actually, you know, it wasn't as fraudulent as they're making it out to be. Or, you know, he said there was some kind of Blockchain thing involved, and it turned out, there really wasn't, but, you know, maybe he'd argue there was. And so, he said, these people in the federal government, they actually will be able to help me. Now, the government objected to their presence, partly based on something that I didn't know about, which is this case called *Touhy* from 1951. And *Touhy v. Ragen* ... Now, *Touhy* is a case about what you need to do to have people in the government testify at trial, and there are regulations that have been issued in this regard. Now, the regulations actually on their face apply to civil litigation. So, say I have a contract dispute with the federal government of a contract I had with them, and I want someone to testify. And you could see this happening a lot in that type of litigation. Maybe the agency that contracted with you has an employee who has relevant facts, so what you need to do is first reach out to the head of the agency. And then, there's some factors involved. And a lot of it just has to do with relevance. But, anyway, there's this process you have to go through. So the government says in this prosecution, Mr. Crater, you're not going through the process at all, and so, your request for these witnesses should be denied. Also, they're not relevant. You're not telling them what the heck they have to do with your defense. So, the district court rules that they don't have to testify, and you fail to go by these regulations, and also, it's just not relevant. Now, at this time, he also makes an argument under the Sixth Amendment. So the Sixth Amendment is the amendment about trials. And so, you probably remember a lot, listeners, about this amendment: the right to a lawyer, right to an impartial jury, right to confront your accuser. But, there's another part of it, which we haven't talked about much on this show, which is your right to have compulsory process for obtaining witnesses in the defendant's favor. So, that is actually like, a positive right, you might say, in the Constitution, which is if the government prosecutes you, then the court gives you the power to pull in witnesses to testify in your defense. Okay, fine. And so he says, you're violating my Sixth Amendment right. And the court says, no, we're not. And he's convicted. Okay, so now he's on appeal at the 1st Circuit, which continues to use Courier font, and we continue on this show to say, please stop doing that, 1st Circuit. But, in any case ...

J

Justin Pearson 29:01

Would you prefer they use Times New Roman?

A

Anthony Sanders 29:03

Oh, man, that's a whole segue. But, we have talked on this show before that courts shouldn't use Times New Roman; they shouldn't use Courier. But, I actually would put Times New Roman above Courier. I know there's some Courier fans out there, but we'll leave that for another day. So, at the 1st Circuit, Mr. Crater makes this argument that his Sixth Amendment right to compulsory process was denied because these regulations where you have to go to the agency's head are not in keeping with the history and tradition of that clause in the Sixth

Amendment. And I guess what he's going for there is say the meaning of the right to compulsory process and how it was practiced in 1791 when the Bill of Rights was adopted is violated by these regulations. And he cites *Bruen*. *Bruen* is the case about the Second Amendment from a couple of years ago, right, that upended all kinds of laws restricting the right to keep and bear arms. So, he says, *Bruen* says history and tradition. And, you know, that was a big change, and that applies also to my right under the Sixth Amendment. And the court basically said ...

J Justin Pearson 30:36  
That's a pretty big leap.

A Anthony Sanders 30:37  
Yeah, well, there's a lot going on there. Now, this is a warning to those of you who may be interested in litigating constitutional law based on history and tradition type arguments. And the court basically says, we already have our own case law, both at the U.S. Supreme Court and in the 1st Circuit, on how to interpret the Sixth Amendment, the right to compulsory process. It's basically a four-part test. And really, I mean, to me, it seems pretty reasonable. Yeah, it has to do with relevance. So, if I want to have someone testify on my behalf, I can't just have some random person and, you know, not say anything about what they're going to testify about. That's going to be a waste of the court's time. And I have to show how it's relevant to my defense. And I know I'm going to have some criminal defense attorneys write in and say, no, the law is all screwed up, and actually, it doesn't make sense. But, who knows? That's what the 1st Circuit has said. Maybe that goes with history and tradition, maybe not. But, the Supreme Court has not said that this older case law is now passe because of history and tradition, let alone because of *Bruen*, the Second Amendment case. It certainly hasn't happened at the 1st Circuit. And here's the real telling part. At oral argument, his attorney did not have an alternative to say, but even under your governing standard, we win. It was no, it's only history and tradition. And the court said, well, you know, we're not going to overturn all that case law just for you. But then, the bottom line is they say, you know, these regulations don't really apply anyway. And we're going to assume they don't. There's some split in the case in other circuits as to whether they even apply in criminal prosecutions, not civil cases. And so, these witnesses just weren't relevant, and so, there was no problem with not being able to have them testify. And, also, they affirmed the ruling on the expert. And so, Mr. Crater is going to spend 100 months in jail.

J Justin Pearson 32:47  
Yeah, the whole case was kind of weird. Like, when I read it, I was like is this guy pro se? And then I was like, no, no, no, he's represented by counsel. Like it's just weird decisions. Like lots of kind of self-inflicted errors, like failure to do stuff that he could have done, and then really

doubling down on very weak arguments. Now, maybe you didn't have any stronger ones to choose, so you kinda have to play the cards you're dealt, but this was maybe not the most impressive lawyering I've ever seen.

A

Anthony Sanders 33:16

Yeah, I mean, you can say what you want about the attorneys, but I get the sense that he did not leave them a lot to work with.

J

Justin Pearson 33:24

Fair. That's very fair

A

Anthony Sanders 33:25

And maybe not a lot of funds to work with once the gold turned out to be mining waste.

J

Justin Pearson 33:32

Yeah. Fair enough. And that's probably a big part of it. You're right. The attorney probably had his work cut out for him or her work cut out for her, and they just did the best they could. But, the arguments were pretty weak.

A

Anthony Sanders 33:42

So, one thing with the other part of the case that I haven't talked about here much is the expert. So, he said that this expert that the government had testify who, you know, backed up some of their claims about how the fraud worked, he said they should have been excluded. But, it seems like he didn't have much of a developed theory about, you know, how that works. The court didn't talk at all about like whether that would be harmless error, which is something that can come up in these appeals. But, did you have a take on what he was trying to do there?

J

Justin Pearson 34:24

Yeah, it just kind of goes back to my point before about doubling down on weak arguments. And so, for example, with the Daubert one ... Like anyone who's litigated a bunch of cases understands that whether you like it or not, nine times out of 10, a judge is just gonna say this goes away. And so, you just kind of have to recognize that's the lay of the land. Now, I guess, they're tweaking the rule a little bit, but like you understand that's the lay of the land, and you have to do what's best for your client. And it's just the battles that, you know, the attorney picked or that the client, you know, decided to have the attorney pick ... It seems like weird hills to die on. I thought that one was one of them.

A

Anthony Sanders 34:55

Well, let it be a reminder that although history and tradition seems to be doing a lot in constitutional law these days, just because you say something doesn't correspond with history and tradition, means that's enough. So, you might need to do a little more homework in that regard. Well, Justin, thanks for going down this yellow brick road of history and tradition and your hometown.

J

Justin Pearson 35:22

Yeah, I hope I'm welcome back after booing them. I know they have a group of Short Circuit listeners there.

A

Anthony Sanders 35:27

We do broadcast to more places than just Monroe, New York, but for those listeners who are there, we're very appreciative that you are listening and to your former resident here as well. And, for the rest of you, I would ask that whatever road you walk on, you should all get engaged.