

# ShortCircuit375

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Fifth Circuit, Seventh Amendment, jury trial, administrative state, AT&T, FCC fine, Fourth Amendment, general search warrant, Oklahoma State Police, minor relationship, exclusionary rule, good faith exception, qualified immunity, voting rights, Supreme Court.

## SPEAKERS

Anna Lucardi, Anthony Sanders, Anna Goodman, Jessica Bigbie

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Anthony Sanders 00:12

Fury said to a mouse that he met in the house, "Let us both go to law. I will prosecute you. Come, I'll take no denial. We must have a trial. For really, this morning, I have nothing to do." Said the mouse to the cur, "Such a trial, dear sir, with no jury or judge would be wasting our breath." "I'll be judge. I'll be jury," said cunning old Fury. "I'll try the whole cause and condemn you to death." Well, that was the mouse's tale in Lewis Carroll's *Alice in Wonderland*, which pre-stages the later famous trial about who stole the tarts. Some might say it also pre-stages the modern administrative state, where often you get a trial without a jury and without a real judge. Well, the Fifth Circuit said recently that sometimes you actually do get a jury and a judge, and we'll talk about that case this week, plus a case from the Tenth Circuit about general searches- this week, here 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 Wednesday, May 7, 2025. It is an exciting show today because we have first-time guests: an attorney at the Institute for Justice, and also an old friend of ours- who is not old, I need to add, but she is a longtime friend of ours. Longtime listeners will recognize her voice on the show. We are so excited to have her back, so I will introduce her in a moment. But first of all, we have Jessica Bigbie. Jessica just joined us at IJ earlier this year. She is a grad of Florida Law, works at our Austin office in Austin, Texas, and also spent a number of years as a public defender. Now, being a public defender is a job many of us at IJ applaud- that is really the Lord's work, helping the accused who can't afford their own attorney- but very few of us actually have the gumption to go out and do that work, especially just out of law school. But that's what Jessica did. So Jessica, tell us a little bit about public defender work. Is it what we think it is? Is it better? Is it even harder than we might imagine? What's the story?



Jessica Bigbie 02:50

Yeah, of the above. I'd say it is simultaneously one of the most rewarding jobs you can have and also probably one of the most soul crushing as well. The highs are very high and the lows are extremely low. You get to know your clients as human beings when largely society no

longer sees them as such, and to see how they're treated as a result of that is really gut wrenching sometimes. So it's extremely important work. It's why I'm so passionate about the work that IJ does, and why I'm so happy to be here.

A

Anthony Sanders 03:28

So you said the highs are very high? What is an example of a high as a public defender?

J

Jessica Bigbie 03:34

Saving a client's life? I mean, winning at trial and getting them off even just getting them a really good outcome through a plea deal- which sometimes is great as well. You know, pre trial motions, which we'll talk about today, occasionally, not super frequently, but you do win those every now and then- and that can make a big difference in the case.

A

Anthony Sanders 03:56

Great. Well, we'll get to that Tenth Circuit case later, but now I am so happy to reintroduce to our audience Anna Lucardi. That's her name now- she was a fellow of ours a couple of years ago. She came on Short Circuit, I think, two or three times during her brief time with us, and then she went on to a big-time clerkship. Now she's a big-time practicing attorney, but she's taken some time to come back on the show. So Anna, thank you for coming back. And you have a case from the Fifth Circuit- it doesn't exactly involve the rights of the accused who can't afford their own attorney. I think everyone has heard the letters AT&T before, but just because you're a massive corporation doesn't mean you don't also have jury trial rights, and that's what the Fifth Circuit dug into.

A

Anna Lucardi 05:00

Yeah, Anthony, it's so fun to be back. Thank you very much for having me, I'm happy to be here today. And so with that, let's dive into the Fifth Circuit. This is a case called AT&T Inc. v. FCC- not the most original name, but it's an interesting one. And as you said, it goes directly to the Seventh Amendment and also raises some Article III issues. So for the constitutional law lovers out there, which I think many of your listeners are, it's a good one to chat about. This case arose from an FCC fine imposed on AT&T for violating Section 222 of the Telecommunications Act. The panel was Judges Haynes, Duncan, and Wilson, with Judge Duncan writing the unanimous opinion. He began by explaining what Section 222 is: it's the section that protects what's called Customer Proprietary Network Information. When you have telecommunications common carriers, they deal with a lot of sensitive personal data- like transmitted data, customer location data, and usage statistics- and it's very important that that information is protected. So the law requires them to take reasonable measures to protect against unauthorized access. They can only use or disclose that data (called CPNI) with opt-in consent from users- unless it's for providing the service itself. The factual background isn't especially crucial to the constitutional issues here, but at a high level- the AT&T has these location services. Obviously, our phones all have these different apps and things that use our locations, and that's something that is very common. But the way that they were giving

permission for third party applications to use location services- the FCC said that was not quite up to snuff. There had been some information that came out about, maybe the police getting access when people haven't actually fully opted into this information if they have a warrant- a bunch of different concerns had come up, and so the FCC decided to investigate. Under Section 222, the FCC can either assign a matter to an administrative law judge or keep it in-house, and unsurprisingly, they usually choose the latter. That's what happened here. The FCC initiated an internal investigation, assigned it to their Investigations Bureau, and decided there had been a violation. They then issued a Notice of Apparent Liability, or NAL, telling AT&T that it had violated Section 222 and proposing a fine. The FCC has broad discretion in setting fines, considering things like the nature and gravity of the violation, culpability, prior offenses, and ability to pay (which, in AT&T's case, wasn't in question). In this case, they imposed a \$57 million fine. Once the NAL is issued, the only way the carrier can respond is in writing. Before that, the FCC can request documents, interrogatories, and even use administrative subpoenas, but the carrier has limited power. After the NAL is issued, AT&T submitted a written response disputing the fine, but the FCC- unsurprisingly- rejected it and finalized the penalty.

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Anthony Sanders 11:04

And also, all of this at this point has just been before the agency. It's not even like a separate agency judge.

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Anna Lucardi 11:13

It's not even a separate agency judge. It's just the commission sending out this notice saying, "We think you owe this," and then saying, "No, we disagree with your reasons that you say you don't owe this." So it's all very much in-house- kind of a one-stop shop in a way that definitely raises some constitutional concerns. And so at that point, there are kind of two paths, and Judge Duncan really takes some time to outline this as background as well. Either they can not pay the fine, and if they don't pay the fine, it basically goes into collections. It goes over to DOJ, and DOJ can pursue an action against the carrier- against AT&T- and at that point, you get a jury trial. Which sounds great, except you're not able to challenge the legal basis for that award. So you're kind of hamstrung, and all you can argue is- so, for example, with the location services- all AT&T could argue is, "Hey, we didn't actually wrongly share location services." They couldn't make any arguments about, "Well, as a matter of law, the behavior that we did wasn't a violation." So obviously, in court- and particularly when you get it to the Court of Appeals and things like that- very often, the legal arguments are kind of a linchpin of what you want to do. And so to take that away and make you choose- you can only argue the factual bases- is very problematic and isn't letting you have a full and fair trial. That's not actually an option, really. And also, not to mention, to get to that, you first have to go into collections. Let that sit there. People are going to know. When you're dealing with companies like AT&T, that's going to be very public. It's going to affect your business. So there's a lot of problems with kind of taking that route

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Anthony Sanders 12:55

And that could just sit there for years

A

Anna Goodman 12:57

Right and you have to wait for the DOJ- because you can't go bring that action, so you also are left in this kind of balance of, well, that judgment is hanging out there, but DOJ is not taking action on it. Where do I go from here? So the other option, which is what AT&T did in this case, is that you can go ahead and pay the fine, and then you can take it up with the circuit court. And so that's what they did in bringing this case to the Fifth Circuit. And that kind of brings us to where we are here in this opinion. So AT&T raised a variety of arguments, but there really are two that the court focused on and took up and said, "This decides all of it." And those had to do with the Seventh Amendment and Article Three. And spoiler alert, the court really did not think that the FCC process comported with either of those. So to start with the Seventh Amendment, which is where a lot of the analysis really focused. Seventh Amendment is the right to a jury trial, and provides that you have a right to the jury trial in suits at common law where the value and controversy exceeds \$20 and that's basically it, then you get the right to a jury trial. And so the court honestly did a great job of, kind of laying out what you want this analysis to look like. I thought I really enjoyed reading it, and I think they did a great step-by-step approach of what this should look like. And they broke it up into two steps of talking about: A) let's look at the nature of the cause of action, and then the nature of the remedy provided. And they flipped it and started out with the nature of the remedy, which they really emphasized. And I should step back a second and say a lot of this analysis comes from last year, the Supreme Court decided a case, *Jarkesy v. the SEC*, which also came, coincidentally out of the Fifth Circuit, and dealt with when the Seventh Amendment applies, and kind of these administrative proceedings, and really guided the court here

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Anthony Sanders 14:55

We at IJ were very much watching, because we have a couple cases like this. With smaller clients, but involving jury trials and fines and all that.

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Anna Goodman 15:06

And when I was at IJ, I got to work on a case in Indiana dealing with jury trial rights, kind of in the forfeiture context as well. And it is, this is such a fascinating area, because there are so many areas that it feels like it should be intuitive that the stakes are so high you should be getting a jury trial. And yet, there's kind of these gray areas in how the case law has developed. So here the court really just did a very practical analysis. And so they started with looking at the remedy, and they said, Look, civil penalties are a prototypical common law remedy- this is kind of as common law-y as it gets. They're not remedial. They don't restore the status quo. And another factor that can come in here is, is this something where you're basically trying to, in equity, restore somebody to what they lost- but this money is going to the government. You're not giving it back to these clients, or in some way trying to compensate them for the data that's being taken.

A

Anthony Sanders 16:10

And suits in equity, famously, just don't have a jury. Maybe you should get an independent judge, but you don't get a jury.

A

Anna Goodman 16:16

Exactly. So that, and the separate Article III question of whether- regardless of if you get a jury- should you at least be in a traditional Article III court as well. And so they were pretty quick with that analysis and basically said, you know, this case, it's the same as *Jarkesy* as far as this is concerned. Like, this is an issue where it's a common law remedy. And so then they shift to talking about the nature of the cause of action itself. And they start by kind of critiquing the government a little bit for not making more of an argument about the remedy and only focusing on the nature of the cause of action, which I thought was kind of interesting. But the court very much took the view that remedy is very important. That said, they then went ahead and addressed the arguments that were raised as regards to the nature of the cause of action, and pretty much just said, "Look, we're not impressed or even slightly influenced by any of this." The key to them was that the nature of the cause of action is that this was very similar to a negligence cause of action. And they were clear that it doesn't have to be identical, but this is something where you have a company that is not taking a precaution that they have a duty to take, and they are therefore liable as a result. And the court said, look, that is just negligence repackaged. And the commission tried to say, "Well, this is very technical," and the court said that couldn't matter less for negligence. It's still a negligence-adjacent situation. That's still the type of cause of action. And again, negligence is a fundamental common law. If you look back in history, you'd be very hard-pressed to say that this is not a common law- not a suit in equity- when you look at the history and the context. Which I think is, again, just a very practical interpretation of it.

A

Anthony Sanders 18:16

Although the court doesn't get into this, I would say negligence itself actually did not exist by the 18th century. It was like a 19th century invention, but it's still in that tradition of tort for wrongful conduct. They just didn't really have it as negligence back then.

A

Anna Goodman 18:38

No, and that is interesting that they didn't- they shied away from touching on that. And also, one thing they did talk about is- and the Commission tried to use this- they tried to distinguish this case from *Jarkesy* by talking about the fact that Section 222 doesn't use negligence language. Versus in *Jarkesy*, the statute there, there was more of a direct implication of like, "Oh, we're dealing with something in the family of negligence here." That affirmative language wasn't used in Section 222, but it still was kind of in the spirit of negligence, and they found that that was enough. So I thought that was a really interesting point too. So they found, okay, the Seventh Amendment applies, and then there is a right to a jury trial if you're going to impose these types of fines. And then they set that aside and shifted for a minute to Article III, before Judge Duncan kind of circled back around to apply it to the facts of this case specifically. Then we talked about Article III- are you entitled to a judge? And the way that the Commission tried to avoid this was by saying, "Well, this falls within the public rights exception." Again, this was an argument that came up before the Supreme Court last year, and the Supreme Court was not fazed by it. And similarly, the Fifth Circuit didn't adopt it. They basically tried to argue that this is a public right. And so again, private rights- you get an Article III judge. If you're dealing with a public right, then you no longer have that. And public rights-

for example, some of the examples that were given by the Commission are revenue collection, foreign commerce, immigration, tribal relations- things that very clearly, historically fell within the purview of the executive and the legislative branches. This isn't that. And that was really what the court said. And again, they pointed to *Jarkesy* as just the clear indicator that this is a private action. It's punitive. It's punishing a company that has failed to comply with the responsibility. It just doesn't fall within this exception. And they were actually really strong in their language on this point. Judge Duncan said that he was concerned it would be "blowing a hole" in what is meant to be a narrow exception for myriad enterprises if they were to say that this type of situation fell within that public rights exception. So they were very, very clear—no, no, this is narrow. We're keeping it narrow. We think the Supreme Court intended for it to stay narrow, and we are not going to expand it any further. They also, within that, acknowledged of course the Commission has the ability to take actions and to basically hold entities like common carriers accountable, but they have to do that in a way that comports with Article III. So with that framework as the background, Judge Duncan wrapped it all up with a short and sweet return to the facts of this case. The fallback argument for the Commission was, "Well, if these things apply, then we comport with them." And the Fifth Circuit said, that's just not true. And that brings us back to what we talked about in the beginning, right? There are two paths forward, two ways to get review, and neither one is sufficient. Either you get a jury, but you can't make your legal arguments, and you can only do it after suffering the consequences of basically going into default and relying on the DOJ to take action. Or you get to come to the court of appeals, but you never get your jury trial. And at the end of the day, the Fifth Circuit said, that is just not getting your day in court. That is not getting the protections that you're entitled to, either under Article III or under the Seventh Amendment. And so it was a win for jury rights. And I think while AT&T is certainly not as sympathetic as many an IJ client, I think, as a principle, it's something that's very important and a good result to see as well.

A

Anthony Sanders 22:33

Well Jessica, doing public defender work, I'm sure you're familiar with juries, so your thoughts on all this?

J

Jessica Bigbie 22:40

Yeah, one thing that struck me, that I think the court discusses in the remedy context, but doesn't expand on- is who's getting this 57 million. Like it's not going back to the "victims" of this violation, right? Am I wrong to assume that it's going back directly to the commission?

A

Anna Lucardi 23:00

That's my understanding. I know it's going back within the government. And I would assume, yes, it does seem like it's a pretty self incentivized program, for sure.

A

Anthony Sanders 23:11

Yeah, I wonder if it's going back into their budget- but that's a whole other issue, like civil forfeiture. And as you were describing the case, I was reminded of a famous article by Gary Lawson, a law professor from 1994 where he wrote about how the modern administrative

Lawson, a law professor, from 1994, where he wrote about how the modern administrative state is basically unconstitutional. There's a specific passage from that article that's become somewhat well-known. We'll put a link in the show notes to it. And there's a paragraph from Justice Barry Anderson- he used to be on the Minnesota Supreme Court and I know him locally here in Minnesota- and he loves reading this quote when he gives speeches. It just captures so well how the administrative state often lacks real separation of powers. I won't read it now, but it's this bit about how the Commission refers matters to the Commission, for the Commission to prosecute, for the Commission to then hear the case before the Commission, and then you can appeal... to the Commission. And on and on. And at the end of the day, sure, you can kind of get into court- but by that point, everything's been settled. And it seems like what the Fifth Circuit is saying is: yeah, that's just not going to work anymore.

A

Anna Lucardi 24:26

Yeah, I think that it seems like that goes with kind of the sea change that we're seeing and what the Supreme Court is signaling. So it'll be interesting to see Jarkesy being applied, and it'll be interesting to see where it goes from here.

A

Anthony Sanders 24:38

Yeah there definitely is going to be some percolation with Jarkesy, and not just IJ cases in this case, but other cases and see how, see how broad it becomes. One last thing on the Seventh Amendment. So I was just reminded of this because I was at a conference when a speaker raised this: do you know what the \$20 in the Seventh Amendment actually refers to? Jessica, you seem like you know this?

J

Jessica Bigbie 25:06

Well, no I wasn't gonna say that- I was going to say what \$20 is equivalent to today, which is also a fun fact. I think it's like \$750 or something like that.

A

Anthony Sanders 25:16

Oh, really its only that much?

J

Jessica Bigbie 25:18

Yeah it's not as much as I would think.

A

Anna Lucardi 25:20

I thought it was more. Wow. But no, what is it?



A

Anthony Sanders 25:24

So they hadn't really started the US dollar yet at that point, as we know it today, or as it later became. So it actually referred to Spanish silver dollars. And they were called dollars, but they were in circulation, and that was what people meant by \$1. I don't think that, like, changes the value, how we think about it- but that if you were like, well, you have \$20, if you had a bag of 20 pieces of silver, then you would have a right to a jury trial.

A

Anna Lucardi 26:00

Oh interesting. I'm going to keep that one in my back pocket for Jeopardy someday. That's going to be my winning fact.

A

Anthony Sanders 26:07

Ok listeners, you might want to double check that. But anyway, I've heard it a couple other times some place. Well, we're going to shift now from extremely large corporations to ordinary folk who did things they were not supposed to do. But nevertheless, they have rights under the Fourth Amendment- the right to be free from unreasonable searches and seizures- but also the right to be free from warrants that allow general searches. So Jessica, if you could tell us about this case?

J

Jessica Bigbie 26:42

Sure, yeah. And I think me and Anna today are in a bit of a battle for who brought the least sympathetic client. I'm not sure who wins- we'll let the listeners decide that one. This case is *United States v. Alexander William Santiago*, out of the Tenth Circuit. It was on appeal from the Western District of Oklahoma. And, as has been alluded to, Mr. Santiago is not the most sympathetic of folks. He was 24 years old and had allegedly been involved in a relationship with a minor. The minor's mother reported him to the Oklahoma State Police, who then arrested him and seized his phone. A couple of weeks later, Oklahoma police sought a warrant to search that phone. The warrant specifically asked for call and text message data- but it also included this very broad language, seeking "any other information within said phone that may be deemed evidence that a crime has been or is about to be committed." And, as we all know, the Fourth Amendment has a quite explicit particularity requirement. You can't just search anything for any reason to find some evidence of a crime. You need to specify what you're looking for and why. You have to define the scope of the search. So this warrant clearly had some issues. Nevertheless, the magistrate judge approved it, and the phone was searched. Which uncovered some, let's say, incriminating images- images that Mr. Santiago had in his possession on that phone. So now the case gets referred to the feds. And the feds then get their own warrant, search the phone again, and use that evidence in a federal prosecution.

A

Anthony Sanders 28:28

And by the way, just since you know criminal procedure- why did the feds need a separate warrant? Is that a jurisdictional thing?



J

Jessica Bigbie 28:35

Yeah, I assume it was just probably for their own purposes- to make up their own case and maybe not rely on the state so much. Yeah, I was mostly in state court. I was the one who typically would have cases that the feds would take away from me. And sometimes that was good news, sometimes that was bad news. But yeah, I think it's probably just their own internal procedure and maybe, as we'll see later in this case, to try to fix some of the mistakes of the state report folks- which, not to ruin the end of this- but unsuccessfully so here. So the case is brought federally. Mr. Santiago files a motion to suppress, which is denied. He's convicted on the federal charges and sentenced to- I believe it was- 30 years in prison. So, quite a bit of time there. On appeal, he argued that the evidence from his phone should have been suppressed because the warrants used to search his phone were constitutionally deficient, we should say. The lower court agreed that the warrant was constitutionally deficient and, you know, said that it's too broad. That's not valid. But the good faith exception applies. So I guess I should maybe back up and explain first the exclusionary rule to the listeners. Basically, that rule says that evidence that's obtained illegally can't be used against the criminally accused, right? So if you, violate the Fourth Amendment, you can't then use that information obtained against someone in their criminal trial or in pretrial motions. The good faith exception, however, is just that- an exception to the exclusionary rule. So I like to think of it kind of like how in law school we learned ignorance of the law is no excuse. Well, I think the good faith exception kind of turns that and says, well, ignorance of the law is no excuse unless you're a law enforcement officer, right, who's tasked with enforcing the laws. And it defies logic, really, to say that the folks who are tasked with enforcing the laws don't need to know the law and kind of are given a free pass. But everyone else on the street- they can't use that as an excuse. So, off my soapbox. Regardless, the good faith exception is there.

A

Anthony Sanders 31:03

No, we are a soapbox.

J

Jessica Bigbie 31:05

That's the alternate name for the podcast- so there you go. But yeah, the good faith exception basically says, if the officer didn't mean to violate the law, then it's okay- we'll let the evidence in. So here, the lower court found that the warrant was too broad, but said the officer didn't mean it, and, we should let the evidence in regardless. So the Tenth Circuit takes up two issues. One was whether the good faith exception does, in fact, apply. And two, if you remove the information from the state court warrant, does the federal court warrant survive? So first, looking to the good faith exception- the government argues two points. The first is that everyone admits the warrant was overbroad, but they said you have to look beyond just the warrant itself to the totality of the circumstances to see if there are other factors that, maybe, not stated in the warrant, limited the scope of the search. And the court just kind of plainly rejects this and says, "Listen, this warrant was so blatantly deficient that we can't possibly look to other circumstances. No reasonable officer would think this was okay." So they get rid of that argument pretty quickly. Same with the second point- the government argues that the point of the exclusionary rule is to deter police misconduct, and there's no police misconduct here because a magistrate judge signed the warrant, not a police officer. So how would

suppressing the evidence deter future police misconduct? And again, the court says, "You know, good try, but that logic doesn't fit." The officer was the one who drafted the affidavit, and the affidavit is pretty much word for word the warrant, right? Like, they're the same thing at the end of the day. And the officer's the one who drafted it. So, you know- good try, but no. That's not going to fly either. So, the Tenth Circuit says the good faith exception does not apply here. And then they turn to the federal warrant. So if you take out all of the information that came from the state court's search of Mr. Santiago's phone, what are you left with in the federal warrant? And essentially, all you're left with is evidence that Mr. Santiago was in a relationship with a minor. And the case law is pretty clear that evidence of a relationship with a minor is not, in fact, probable cause for searching for incriminating images. So the law's not in the government's favor on that one. And the court says so- and kind of bats that argument as well.

A

Anthony Sanders 33:57

I mean because that reasoning was pretty chilling- like basically any couple would have bad evidence of their relationship. I hope that's not true of most couples. And maybe if you have a relationship like this, where someone is a minor, maybe it's more likely- but it's not something that we can presume.

J

Jessica Bigbie 34:18

Right. And I think even in the court's record- I listened to the argument on this- they didn't have any photos in the record to even look at to analyze. They just had descriptions of the photos, and they're pretty- I'll say innocuous. Like, you can tell they're a couple, but there's nothing explicit about the photos themselves. So the government really had no leg to stand on in terms of saying those images showed something more. They tried to argue that the photos were indicative of something more serious, but I think the court's just not buying it. So overall, the court reversed the lower court's holding, vacated Mr. Santiago's conviction, and remanded the case back to the district court. You know, really, the reason I wanted to cover this case is because it's kind of a unicorn. The law was absolutely in Mr. Santiago's favor, but the facts really weren't. And as I know all too well from experience, sometimes you can have really great law, but the court just doesn't want to let someone like this back on the street, right? And they'll do whatever they can to make sure he stays behind bars. So this one kind of baffled me- until I listened to the oral argument. And there is where the light bulb went off for me. Because the first question the panel asked the government's attorney was, "So, what's the status of the state court charges against this guy?" And the response was, "Oh, well, they're still pending." So he's probably still going to prison- maybe for life- on the state court charges. And I think that maybe gave the judges a way to rest easy at night, knowing they could overturn this conviction and still have him potentially be held accountable on the other charges.

A

Anthony Sanders 36:11

Is that because the state court charges aren't just this possession of these images, it's the relationship itself.

**J** Jessica Bigbie 36:19

Correct. Yeah. So he has some statutory issues in the state court context.

**A** Anthony Sanders 36:28

Anna, your thoughts about this in the Fourth Amendment?

**A** Anna Lucardi 36:32

Yeah. I mean, this is a fascinating one. I clerked in the Northern District of Oklahoma as well, so I always think it's interesting when cases come out of there. And I don't know if this was a McGirt case, but there are such interesting dynamics in that district with dual prosecutions in state and federal court, and how that interplays with the Fourth Amendment and with the protection of defendants' rights. And I agree with Jessica- I think this case is unique in that it sounds like the judges were really able to separate out the facts, which are pretty egregious, from the broader principle at stake. Because at the end of the day, what matters is that a rule for one person is a rule for all. And that's why the rule matters. It's not about whether a particular defendant is sympathetic or not- it's about having uniformity of application whether a defendant is sympathetic or not- so that their rights are protected. That's incredibly important, and I think it's admirable that the court seems to have gotten it exactly right here. Their job is to protect constitutional rights, and in a situation like this, the facts aren't really the issue. And also, as you were talking about the government's argument- that, well, the judge is the one who signed the warrant- it reminded me of some of the conversations we have at IJ about absolute immunity for judges. Should there be some responsibility there, too, especially if a judge is just rubber-stamping a warrant that arguably should be obviously deficient? If it's clear on its face to a police officer, shouldn't it also be clear to the judge? So that was another thought I had while listening to this.

**J** Jessica Bigbie 38:14

I think, as to your first point, one thing that I, as I'm sure many public defenders, ran into, is people come up to you and ask: how can you defend someone who's who's a criminal, right? Like, how can you defend someone who's done terrible things? And I think the answer is it doesn't matter what you've done- everyone is entitled to the same rights, right? So it's not like you can pick and choose who gets constitutional rights based on their actions. That's not how our constitution or our country works. So, yeah, I applaud the judges for being able to parse that out and look beyond these facts. I think I am maybe a bit more cynical to say that they did so because they thought he'd stay behind bars. But that's just me.

**A** Anthony Sanders 38:58

I was really struck by the language and I think that's what struck the judges too- the wide-open language at the end of that warrant you read earlier. Because there's so much in the description before that that was probably fine for their purposes. You know, all call information, voicemails, call logs, text messages- on and on- basically everything you'd expect to have on a phone. And then it ends with: \**as well as any other information within said phone that may be*

deemed evidence that a crime has been or is about to be committed.” \*It’s like they’re writing interrogatories to the other side- “and anything else”- like something you’d ask in a deposition. But instead, it’s a warrant. I mean, if you had a warrant to search a house, and then just added, “and anything else in the house that might be evidence of a crime”- well, that’s a general warrant for the house itself. You know the system better than we do, Jessica- do you think this was just one office, where maybe whoever was typing this up kind of got carried away, and it slipped through a few times without being checked? Because it just seems so blatant.

**J** Jessica Bigbie 40:19

Yeah, it's hard to say, I can't say that I saw this language in my career, in looking at warrants and evaluating cases, but it wouldn't surprise me. I imagine officers probably, like other folks, are just kind of regurgitating what they've seen done before. So if it's worked for one person in that department, they maybe just use it again and see how long they can get away with it. Who knows? It's probably more prevalent than we'd like to think.

**A** Anthony Sanders 40:55

Yeah, are warrants pretty standardized- you have a general search warrant for a phone or for a house, for a car, or is there a lot of wordsmithing?

**A** Anna Lucardi 41:06

Yeah, I always found that they're pretty much just templates that are regurgitated.

**A** Anthony Sanders 41:08

Yeah, well, interesting. So Anna, I had forgotten that you had that stint in Oklahoma during McGirt. Do you want to just tell us a little bit about that, and maybe what you know about how things are now, because Congress has not acted since that happened. So I'm guessing they still have the same situation.

**A** Anna Lucardi 41:35

I think so. Just as a quick background for listeners- the McGirt decision came down, gosh, I think it was 2020? 2020, I want to say, because I started clerking in 2021, kind of right as it was all kicking up. But it basically resulted in a large portion of Oklahoma being found to be Indian land. And with it being Indian land, a lot of prosecutions that would normally have been handled by the state became federal prosecutions. That meant a lot of people had to be retried. A lot of new prosecutions that would've normally belonged to the district attorneys and state public defenders were now handled by federal public defenders and AUSA's. It meant that the FBI was suddenly investigating kind of run-of-the-mill crimes that, again, would usually fall under the State Police Department's purview. And initially- I think judges I knew there- their dockets tripled. The federal judges' dockets tripled in, like, a year, in a way that was just kind of

unheard of, because of the shift. It made it a very interesting time to clerk there. And it also meant that, whereas traditionally in federal court you're not seeing that many trials- there were trials all the time.

A

Anthony Sanders 42:51

Lots of late nights for clerks?

A

Anna Lucardi 42:53

Yeah, definitely some late nights for clerks that year. It was an interesting time to be there, for sure. I think it's gotten somewhat better now. There have been some follow-on cases that have cleared the way for dual jurisdiction- so now, in certain circumstances, the Supreme Court has said the state can still prosecute cases, even where the federal government also has jurisdiction. Obviously, you can't get into double jeopardy- no prosecuting someone twice for the same crime- but it is possible for the federal government to opt out and let the state handle certain cases. I think that's helped. And Oklahoma has also, I believe, gotten several new district court judges over the past few years, which has helped correspond with the increased need- there are just a lot more cases, and that's likely to continue for the foreseeable future. So I do think things have gotten better as the state has adjusted to this new normal. But it definitely shook up the landscape, and it was a fascinating time to be there in the midst of that.

A

Anthony Sanders 43:56

Well, great. Well, thank you both for your summaries this week. We are not done, though. Listeners, I know you're very excited that we are now going to have a little bit of "Where Are They Now?" with some of the cases that we've discussed in previous episodes. So just a handful to update people on. A lot of cases that we've talked about in the past- if they didn't just end on appeal or get settled- they then get to the Supreme Court. And the Supreme Court, this is the time of year where you have a lot of reschedulings, you do have some cases being resolved though, some denials. And so we have a little bit of an update about that. So one case we talked about a while ago now, our friend Kirby Thomas West gave a report on- it's *McRae v. Mattos*. This is the case about a public school teacher who was fired for stuff she did on social media before she was hired, that was only later found out about. And basically they were like conservative media-type things she had posted. And so the question is whether that's covered by the Pickering standard for First Amendment speech by public employees. That case has been rescheduled four times in the last month and a half at the Supreme Court, for whether they're going to decide on the cert petition. So that seems interesting- they're trying to figure something out there. That may be a denial or a grant coming really soon, or they may keep it until the end of the term. Then a couple others- one is a case we discussed a few months ago from the Sixth Circuit. It was actually a mootness decision. It said the case was moot, but it was about this long-running battle to try to get a qualified immunity reform initiative on the ballot in Ohio. And the attorney general there is not a fan of ending qualified immunity in Ohio, and has been doing everything he can to keep it off the ballot. Finally, in the latest lawsuit, it went to the Sixth Circuit, and there was an injunction saying they had to put it on the ballot. That went up to the Supreme Court, and there were three justices who would have stayed the injunction-

but only three. So it is now going forward, and it looks like it will actually be on the ballot this year, which makes things interesting. Although I'm sure there's going to be more procedural litigation about it. Finally, we talked about a case- our friend Bert Gall, I think, discussed this case in our Christmas sweater episode, right after Christmas last year. This is the case where there's a voting rights challenge in Virginia that tries to use a statute from Reconstruction- about when Virginia can change voting laws in its state constitution. A really interesting theory. And it's not on the actual merits yet- it was a procedural matter- but that has now gone to the Supreme Court, and a response has been requested. So someone's interested in it. We'll see if that gets any more attention. That's all for now. I'm sure we'll have more as the term kind of winds down into June, and we'll do a more full-throated catch-up on some of our previous cases. But right now, it has been great to catch up with Anna, and it has been wonderful to have Jessica on for the first time. I'm sure you'll hear from both of them in the future. But for now, please be sure to follow Short Circuit on YouTube, Apple Podcasts, Spotify, and all the other podcast platforms- and remember to get engaged.