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SPEAKERS

Anthony Sanders, An Altik, Dan Alban

A Anthony Sanders 00:17

"Monsieur will pardon me, but he is connected, is he not, with the affair at the Villa Genevieve? "Yes," I said eagerly. "Why, Monsieur has not heard the news, though?" "What news?" "That there has been another murder there last night."" Those words were from Agatha Christie's 1923 novel The Murder on the Links, one in the Poirot series. There was a double murder. On this week's show, we also have a double murder- one case from the Sixth Circuit and one from the Fifth Circuit, both involving a murder. Both involve someone who was accused of the murder. Now, whether that person was wrongfully accused is a different story, and we'll dig into it in two different postures, but essentially the same question is at the heart of the matter. Whether the court actually addresses that question, however, is a whole different story. That's 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 Tuesday, May 6, 2024, and I am very pleased to have with me, in what is going to be a rather somber episode, two delightful colleagues of mine- one who has been on Short Circuit many times, and one who is a first-timer. So we'll get to, in a moment, our old-timer, and that is Dan Alban. He is going to discuss our case from the Sixth Circuit. Then we'll get to our newcomer, An Altik, who is going to discuss the Fifth Circuit case. Now, first, I want to start with An. She has just joined us. She is a New Mexico native, so I'm sure she's had some interesting conversations with John Kramer about New Mexico since she joined us. Then she graduated from Georgetown Law, and what I want to ask her about is that she worked in intellectual property law for a little while. Now, for those of you who aren't lawyers, if you're a lawyer and you don't do intellectual property, it's like one of the corners of law where you fear to go. It has its own kind of special rules; it even has its own special license for one part of the practice. So I have, thankfully, hardly ever had to dig into an IP question. When I have, it's been with great trepidation. So there are these people out there who actually do that for a living, and I'm always kind of flabbergasted they're able to make it work. So An, my question for you is this: is it true? Should we be fearful? And maybe, what should we know about doing intellectual property that us mere mortals know nothing about?

A An Altik 03:24

An Altik 03:24

Yeah, so for me, it was a very natural path, because I have a background in science, so obviously I wasn't quite as intimidated going into it. I have undergraduate degrees in science, and I attended two years of medical school before I changed my mind.

A Anthony Sanders 03:39

You sound more prepared than most of us, you know, numbers and things like that.

A An Altik 03:44

Yeah, for me, it was actually more natural than diving into just general litigation, because I spent a lot of time with pharmaceutical companies and reading the same scientific articles I had been reading. So in some ways, this is actually harder for me to jump into civil rights litigation, but a lot more exciting.

A Anthony Sanders 04:03

Well, true, although I'm sure there are some exciting corners of trademark and patent law and all that kind of thing, but it's lovely to have you on the constitutional team here at IJ now. So appreciate you coming aboard. We'll hear from you more in a little bit, but first we go to Dan. Now Dan, I have to ask before we get into the meat of this Sixth Circuit case, Dan is someone where he will bring up authors and movies that no one else has ever heard of and know them intimately. Seems like a pretty cultured guy. Soshamefully, for me to say, I have actually read very little Agatha Christie, despite quoting a little bit right there are you much of a reader of hers? I'm guessing maybe you've done a murder mystery or two inspired by her. Or like what's your Christie background.

D Dan Alban 05:01

I am a pretty big fan of Agatha Christie, although I haven't read one of her novels recently. I tore through them in, I think probably junior high through college, occasionally go back and revisit them. But very fun novels to sort of dive into and become engrossed with for a few days. And extremely clever plots. She sometimes plays fair and sometimes she doesn't. I have not organized any murder mystery parties based on Agatha Christie.

A Anthony Sanders 05:42

You're right about playing fair and like, how would you ever see that coming- for some murder mysteries, you could make that statement. I did see the Mousetrap back in the day when I visited London once.

D Dan Alban 05:55

I also saw the mousetrap in London. It was great.

I also saw the mousetrap in London. It was great.

A Anthony Sanders 05:59

Well, be true to the mousetrap, we will keep the secret in our hearts and not spoil it for any listeners or viewers, but we should now turn to the Sixth Circuit. So here is someone who is wrongfully accused. They're no longer behind bars, but it's been hard for this man to clear his name.

D Dan Alban 06:18

That's right. So the case is Percy Brown V. the Louisville, Jefferson County Metro Government and an individual police officer from the University of Louisville named Jeffrey Jewell, and it has quite a complex history and a complicated set of facts. So I'm going to give you the short, simple version before we get into all the complications. The short version is, there was a murder in 2000- a woman was murdered in Louisville- and Percy Brown ended up being accused and indicted for that murder. Ultimately, those charges were dropped in 2015. He filed suit a little over a year later for malicious prosecution and many other civil rights claims brought under Section 1983 against a number of detectives as well as the Louisville Police Department and the University of Louisville. The short version of how the case was dismissed- and that dismissal was affirmed on appeal- is that Section 1983 claims use the statute of limitations from the state where the claim accrued. This happened in Kentucky, and Kentucky is one of, I believe, three states that only have a one-year statute of limitations for tort claims. That’s an incredibly short period of time.

A Anthony Sanders 07:51

That's like a general tort claim. So slip and fall, whatever. It's not like just one special area

D Dan Alban 07:57

That's right.

A Anthony Sanders 07:58

And that is just crazy short.

D Dan Alban 08:01

It is crazy short. And only- I think it's Kentucky, Tennessee, and Louisiana- that have this very short one-year statute of limitations. Weirdly, Kentucky, I think, actually has a longer statute of limitations, a two-year statute, if an automobile was involved, but for a regular tort claim, one year- which by itself I think is problematic in a number of ways. If someone’s severely injured in an accident, they may not be able to recover from that accident and find an attorney and do all

of those things within the one-year period. Nonetheless, that's the baseline rule in a Section 1983 case. And so the problem was, the claims against Mr. Brown were dismissed in February 2015, and he did not file his Section 1983 claim until July 2016, which is like a year and four months later, year and five months later. On that basis, the court said, "You're too late, the statute of limitations has run, the claim is time-barred." Now there's a lot more complexity to the case, so I'm going to just start adding a few layers of complexity. Yes, the claim was time-barred because he brought his third lawsuit in July 2016, but he had filed two previous lawsuits over the same charges and the same malicious prosecution claims back in, I believe, 2009. And in those claims- well, the two cases were consolidated- and then the claims were dismissed, in part because the charges were still pending, and the court said it could not resolve the claims that he raised until the criminal charges against him were resolved. So he was essentially kind of Heck-barred in his initial claim. So they said, "oh, that was too early." And then, sort of like a vicious version of Goldilocks, they said, well, and then your third lawsuit is too late. And so he had to have timed it just perfectly right there in the middle. Now, that's not even the beginning of the complexity of the case, because what this case really involves is a man who was indicted six different times over a ten-year period on 34 different charges, and which he alleges- the basis of his lawsuit is- that this was all a conspiracy by Louisville-area police and the specific detectives named to essentially pressure him to cooperate in a fraudulent check, investigation that he may or may not have been at the center of. And so his version of events- which the court is supposed to take as true because it was deciding this on a motion on the pleadings- his version of events is, there was this large conspiracy by Louisville-area police officers to pressure him to participate and testify in this fraudulent check investigation that involved him being charged with murder, rape, kidnapping, sodomy- a bajillion different felonies- and each time, and you might think, well maybe this is just a really bad guy who did a bunch of bad stuff, and it's certainly possible, but again, the court's supposed to take his claims as true. What happened is, each time- beginning in 2005 and ending in 2016- each time the charges were brought, they would then be dismissed. And this happened over and over again.

A Anthony Sanders 11:41

He never actually went to trial, right?

D Dan Alban 11:43

He never did. And he ended up spending seven years in jail as a result of this successive series of indictments that were voluntarily dismissed by the prosecutors- sometimes a year later, sometimes many years later. Yeah, no trial, no actual prosecution of this man, other than there was an indictment, charges were brought, he gets, put in jail for, you know, indefinite periods of time, eventually released. And so his version of events is, I'm being persecuted by the Louisville police, and this murder in 2004 has nothing to do with me. Within a few days of that murder, the detectives already knew who actually committed the murder, and they instead, while interviewing someone about this fraudulent check investigation, there was some allegation tying this woman who was murdered to me, and then that kind of spiraled out of control into a series of allegations that he had committed all of these crimes based on testimony from people- maybe associated with the murder victim. It's a crazy set of events. At the end of the day, though, the court says, "well, look, that may be true, it may not be true." And I guess an important thing to point out here is, this decision is only resolving Percy Brown's lawsuit against Jeffrey Jewell, the University of Louisville police officer. Everybody else is out of

the lawsuit at this point. Some have been dismissed for various reasons. There was apparently a settlement with some of the remaining defendants- I have no idea if he received much compensation as part of that settlement, I don't really know how that worked. So at the time of this decision, and the basis of the case that was before the Sixth Circuit, was just his lawsuit against University of Louisville police officer Jeffrey Jewell. And the problem for Mr. Brown in that instance is that Jewell is only alleged to have been involved in some early interrogations in 2004 that led to the murder charge and a couple of sort of weird sodomy charges that all ended up getting dismissed. But Brown can't tie Jewell to some of the subsequent charges that were brought. And so the court says, well, the best you can do is the murder charge. The murder charge and the indictment occurred in 2009, it was dismissed in 2015, you didn't file your lawsuit until July 2016- that's over a year after the lawsuit would have accrued (which is the term that courts use to describe when you're able to bring suit). And so Brown was just out of luck, because whatever may have happened- even with some of the false indictments that continued to happen into 2015 and that were not dismissed until 2016, a few months before he filed his lawsuit- those couldn't be directly tied to Jewell himself, the University of Louisville police officer who conducted some of the initial interrogations in 2004. So yeah, it is difficult to explain how someone can spend seven years in prison and not actually be charged, go to trial, have all charges dismissed out of these six indictments, 34 charges, and not have any recompense. Now maybe he got something in the settlements with the other defendants- let's hope so. But the court's rationale is this, and I'm going to quote from the opinion. It says: "In short, the charges against Brown constitute multiple separable, overlapping prosecutions resolved on different dates for statute of limitations accrual purposes. Even if each violation of Brown's rights was an act in furtherance of a single overarching conspiracy to punish him for not cooperating with the check forging investigation, Brown's malicious prosecution claims arising out of the murder charge accrued when that murder charge was dismissed." And so based on that- based on the idea that a conspiracy is just the individual acts committed in furtherance of the conspiracy, and not something that Jewell, by participating in the conspiracy early on, I guess, is somehow... can't be held responsible for things that occurred in the conspiracy much later, 11 years later- they say, well, if Jewell didn't do anything after the charges that led to, or the murder charge that Brown was indicted for in 2009 and that was dismissed in February 2015, you're just too late.

A Anthony Sanders 16:47

It's like they are saying you should have sued about the murder charge after it was dismissed while probably he was in jail for one of these various other parts of the conspiracy.

D Dan Alban 17:03

Exactly. I mean, there were charges that remained until, I believe it was April 2016, so he would have had to file suit while a bunch of other charges were still pending against him. I don't know the status of his incarceration during all of this- but he may have been incarcerated during some or all that time, because he had just been indicted again in February 2015, the day before the murder charges were dropped. So it seems like a gigantic Catch-22, and then he also kind of offers an argument that there was really this sort of continuing violation of his civil rights because the charges kept being filed and then dropped, and then, they were pending during this entire time. But the court says, no, that's just not how continuing violations work. I mean, one continuing violation might be, you're being held in jail unlawfully, right? But they say

no- the continuing violations doctrine exists when the defendant has committed several distinct acts of wrongdoing, and the cumulative effect of these acts amounted to a constitutional violation. But if the defendant's separate acts of wrongdoing are individually actionable, the continuing violation doctrine does not apply. And they said, well, each of the indictments was individually actionable. You said that, you elicited false testimony from witnesses- you invented testimony, you did a variety of things. Each one of those indictments was individually actionable. And so because of that, there's no way to invoke the continuing violation doctrine. And so you end up with a court that sort of, you know, chops this up into little pieces and says, "well, you can't sue about the whole thing. You can only sue about the individual things, and the thing you want to sue about- the time has passed to sue over it, even though you were indicted under a bunch of different charges all related to the same conspiracy during the one-year period you would have had to file suit." So I'm sure his attorneys were extremely frustrated. I'm sure he was very exasperated by all of this. And again, this is something that goes back to 2004. It's being resolved by the Sixth Circuit now in 2025. This is over a lawsuit that he filed in 2016, and his initial lawsuits were filed in 2009. So you can sort of imagine how his life has been turned upside down for 20-plus years now, and then he ends up with this result that he can't bring his claim. Now, it may have been very difficult, right, for him to actually prove up these claims, but this was decided at a motion on the pleadings stage, which is similar to a motion to dismiss. The court has to take the alleged facts as true, and so even if the court thought, well, it's implausible that all these officers were involved in this conspiracy, they were supposed to treat that as true. They do say they did that, but then they just sort of chop everything up and say, well, this officer really only did stuff at the very beginning, and at best, we can tie what he did to the murder charges, and those were dropped in 2015- so too bad, so sad.

A Anthony Sanders 20:36

An, your thoughts?

A An Altik 20:37

When I first started reading this, I honestly had to make one of those crazy charts with all the dates and the charges, because I was so confused on what he was getting charged with and when. And I also thought it was very interesting that the court noted, oddly enough, there are no other cases with similar facts, which I think just sort of goes to how egregious these facts are. And that doesn't actually indicate anything other than that. I don't have that much experience with malicious prosecution cases, so I sort of had some more general questions that I thought we could talk about. The court seemed to really focus on this issue of separability, and I guess for his purposes, without us knowing all the details, if the court found that it wasn't separable, would that actually have made that much of a difference? And then the other question I had is, towards the end, they also mentioned that there was no conviction, so he, in some ways, didn't suffer as much as I guess other people in these situations might. And is that something that courts always look to to find a successful claim of malicious prosecution? I guess to what extent is- obviously we think he has suffered, and I think, you know, the average person would agree with that- so does the court not take that into account? Do you need that conviction?

D Dan Alban 21:51

Yeah. So on the separability issue, yeah, I think if the court had considered this to all be part of a single conspiracy to persecute/prosecute Percy Brown and pressure him into testifying or cooperating- or whatever it was they wanted him to do with respect to the fraudulent check investigation- then yeah, the claim, I think, against the officer would have gone forward. Now, again, I think it'd be very difficult for him to establish that this single officer from the University of Louisville Police Department, who was maybe involved in, I think, two interrogations of witnesses in 2004, was really participating in this long conspiracy against Percy Brown, this 11- or 12-year conspiracy. But that would have been something he could offer evidence about, and I doubt they would need to show that he continued to act as part of the conspiracy throughout the entire time. If he was simply working with others who knew that they were committing wrongful acts- that they were violating Percy Brown's rights- but they did so kind of in disregard of his rights because they wanted to pressure him to comply, I think that the separability issue, if the court had gone the other way on it, he would have at least survived this judgment on the pleadings, even if he might not have been able to prove up his case during discovery. As to the conviction thing, I don't know about the formal standards for it, but I would think that anyone would feel that if they were imprisoned for seven years and never even had a chance to go to trial, that would be some kind of pretty serious wrong against them and a pretty serious injury. And I bet very much that if any judge had that happen to a relative of theirs- a son, a daughter, anyone- they would think it was a pretty serious injury and violation of their rights. But, sometimes criminal defendants don't get treated the same way by the courts. I mean, one example of how weird all of these charges and everything are: the first set of charges related to allegations of sodomy- which, it's crazy how much they're prosecuting sodomy in this case, he's indicted multiple times for it- but the weird thing is, the witness testified that Percy Brown sexually assaulted the murder victim and forced her to commit sodomy with him. But when he's indicted, he's indicted on sodomy charges involving that witness, not the murder victim. And that witness apparently never testified that he had committed sodomy with her. So it's very weird how all of these allegations turn into indictments that seem to be like weird hall-of-mirrors versions of what's actually in the witness statements. I don't know how much of that is potential differences between his complaint and other documents that might differ- but it is very, very weird and puzzling.

A Anthony Sanders 25:31

Well, yeah, taking those facts as they’re pled and believing them, you really get the sense that these charges were not meant to be proved before a jury but rather used as leverage for this check kiting scandal or whatever it was, which sounds so minor compared to the murder that was prosecuted. Of course, knowing how often plea bargaining is used and witnesses play off each other in the criminal justice system probably points to a much larger pattern- whether in this office or others- where charges are brought without any real intention to try them, then dropped once prosecutors get what they want or lose interest in a witness, and the matter just disappears without a lawsuit like this one ever arising. Maybe you can speak to this, Dan, since you probably studied the case more closely than I did. I was trying to use a chart at one point, and I don’t know what the settlements were, but usually in a case like this, it’s really hard to sue the actual prosecutors because they have immunity for their work as prosecutors. And it's like you kind of have to find this little bit of the case that they did with the officers, where they're investigating before they were really a prosecutor to even have liability, and so I'm sure that was shaping, why they're just going after this cop at this point, and not whoever else was involved?

D Dan Alban 27:13

Yeah, I think that's absolutely right. Prosecutors are protected by immunity, and it definitely seems like many of these charges were brought not with the real intention to prosecute them at trial but to pressure a plea agreement. What's remarkable is that he apparently never signed a plea agreement on any of these charges, which, if he had, would have likely created a Heck bar preventing him from challenging the malicious prosecution on at least that charge and probably related ones too. But he didn't, and as a result, he spent seven years in jail. Despite doing the right thing by not confessing to something he didn't believe he did, he probably could have signed a plea deal at some point and been out on time served without ongoing issues. However, it seems like they really wanted more information from him about the check fraud scheme, and they applied serious pressure- what he portrays as an oppressive prosecution for what seems like a fairly minor crime. I don't know the full extent of the check fraud allegations, but compared to those violent crimes, it just doesn't seem to be in the same league.

A Anthony Sanders 29:01

One very last thing, just for maybe some listeners- you mentioned the Heck bar, so that is the doctrine, if I'm right, from this case called Heck, which has nothing to do with heck or hell, that if someone is suing about malicious prosecution, meaning the prosecution already happened, they can't bring a claim if they have been convicted for the crime- whether they pled guilty or a jury found them guilty. The conviction has to have been thrown out or in some way resolved so that they are no longer found guilty; otherwise, they can't challenge it later. Is that basically right?

D Dan Alban 29:43

That's right, yeah, and it sometimes gets extended to related or subsidiary charges, but even if you just plead guilty to a crime, that can bar your ability to bring a civil rights claim later, even if you uncover evidence of serious wrongdoing. The courts simply say that's a bar to pursuing a malicious prosecution claim. Sometimes it wipes out not just malicious prosecution claims related to that conviction, but also a bunch of related claims. Here, it's hard to know which claims would have been related or not, but he did not plead to any of them, so there was no actual Heck bar at issue. There was a sort of proto-Heck bar in his 2009 cases, but since the charges were still pending, the courts couldn't rule on it at the time.

A Anthony Sanders 30:49

This is the kind of Goldilocks problem you mentioned earlier, and now we're moving into another major issue in a very long-running case that many viewers and listeners may have heard about some years ago, or at least read about at one point- the case of Rodney Reed. He has been on death row for many, many years now and has had multiple trips up and down through the court system. A lot of people, including journalists and legal analysts, have written extensively about his case, including evidence that's come to light beyond the material we're discussing today, which suggests he was wrongfully convicted. We won't be covering all of that other evidence right now, but if listeners want, we'll provide some links in the show notes to

some of the best journalistic coverage of his case. The latest chapter in Rodney Reed's saga involves DNA evidence related to the murder he was accused of committing back in the 1990s. His case even made its way to the Supreme Court, where he won a very important victory- the right to have this new DNA evidence considered on remand. However, on remand, the Fifth Circuit recently ruled against him, denying relief. So, with that background, take it away- this is just a small piece of a very complicated and long-running case, but it's a very serious matter, and we're really curious to hear your analysis.

A An Altik 32:25

I'm just going to give the basic, bare-bones facts of the case because it's very complex, and I want to focus on the Supreme Court decision and the Fifth Circuit decision. So, Rodney Reed was convicted of murder by a jury trial back in 1996, and he did receive a death sentence. More recently, in 2014, he filed a lawsuit asking for retesting of DNA evidence on certain objects related to his trial. Interestingly, there was another way for him to do that- he could ask the prosecutor outside of the judicial system whether they were willing to order some retesting, and that did happen in this case, but not for all the items he requested. I believe he asked for over 40 items to be retested at the state trial level, but the state denied his claim, finding that he would probably still be convicted regardless of the results and that he was likely trying to unreasonably delay his sentence. The date he filed that lawsuit was also the date they were going to choose a date for his execution, so understandably, he was trying to delay that. At the appellate level, the Appeals Court affirmed the state trial court's findings and ultimately denied a rehearing on the matter. The issue then went up to the Supreme Court, which had to decide whether the statute of limitations for him to challenge this decision started when the state trial court denied the claim or when the appeals court denied the rehearing. I believe the main circuit split was with the 11th Circuit, but it was an issue that was right for Supreme Court review. At the Supreme Court, a majority of the justices found that the correct time to start that clock was when the appellate court denied rehearing, rather than when the state trial court denied it the first time. There were a couple of dissents: Justice Thomas dissented, mainly stating that the Rooker-Feldman doctrine should have applied, and Justice Alito, joined by Gorsuch, dissented separately, arguing that the correct timing was when the state trial court denied his claim, not the Court of Appeals. Ultimately, Reed won at the Supreme Court, which meant his suit was timely and he was still able to bring a due process claim challenging the denial. That's what the Fifth Circuit recently decided, allowing the case to get to the merits. Reed brought three main arguments, and I think the first one is the best one, so I'll save that for last. His second claim was that the statute unfairly incriminates third parties. This is a little harder to assess with his facts, and might be different with other facts, but the statute basically says that unless this evidence is retested and you are completely cleared and no longer convicted, they will deny a chance to retest the evidence. Reed's main theory was that he was having an affair with the victim and that the real killer may have been her jealous fiancé, so testing other pieces of evidence could point to the fiancé. However, this didn't really work out because of the nature of the murder scene and the fact that finding the fiancé's evidence in his own car or around his own fiancé isn't necessarily surprising or indicative unless they were apart for an extended time. So that was really a factual issue that didn't favor him. His next claim was that it was not an unreasonable delay to bring the retesting claim, because holding that against him would mean he would have had to predict future DNA evidence and methods. While that's true in theory, in this case, he had plenty of time to bring the claim. The whole Supreme Court issue was about whether the suit was filed within the statute of limitations, and

it was clear he did not bring the case immediately when he could have, and he didn’t ask for retesting until the date his execution was supposed to be set. Those facts did not help his argument that the delay was reasonable.

A Anthony Sanders 33:57

Yeah, it seemed like the coincidence of the date, if you want to call it that, the court was quite suspicious of that.

A An Altik 37:12

Yeah.

D Dan Alban 37:13

But the touch DNA technology had only recently been developed, right? I don't remember the exact timeline, but I remember, but that was some new technology that you could not predict would be available-

A Anthony Sanders 37:27

certainly not 1996

D Dan Alban 37:30

No. I mean, I don't remember what the time frame is that it was developed. And maybe they're saying, "well, you should have filed something three years ago instead of one year ago."

A An Altik 37:38

Yeah, I do think it was actually around that time frame- I believe it was developed in 2011- so yes, it’s really a matter of a couple years, but perhaps in this case, they found that was enough to say you maybe should have filed it two years earlier. His first claim is the non-contamination claim, which basically argues it’s not fair to hold it against prisoners if the state messes up handling custody of evidence so that they can’t perform retesting satisfactorily or get actual results. The Fifth Circuit sort of punts by saying yes, he was convicted, so a lower standard applies because he’s lost his presumption of innocence, and while that’s true, it doesn’t really answer the question of how prisoners are supposed to deal with the fact that the government is the one handling all the evidence. Then the government says well, someone has to keep custody, and it will be the government, and they sort of revert back to a good faith basis, saying they believe the government is trying their best to take care of the evidence. And sure, that’s probably true, and to some extent we hope that very crucial pieces of evidence are well cared for by the government, but in the off chance that they’re not, it’s really hard to prove that the state mishandled the evidence, and prisoners have no way to know that. So for the

panel to point to that as a way to get around this is, to me, a non-starter, because proving mishandling is going to be nearly impossible unless there is some scandal or some way that it's revealed that the evidence mishandled. The only thing that makes me feel a little better in general about the panel's holding- that there was no due process violation and that the statute sort of works- is that it actually requires a lot of different factors. I think if they could deny all retesting based solely on contamination, that would obviously be a huge issue, because we wouldn't be able to really inquire into whether the evidence was mishandled at all. But since there are other factors like not wanting to unreasonably delay and whether the DNA testing results could actually change the conviction by a preponderance of the evidence, I think that at least gives us a little more faith in the process. But I'd love to hear your thoughts on it.

A Anthony Sanders 40:28

Yeah. Dan?

D Dan Alban 40:30

Yeah, the part of the opinion I thought was weakest- and where the court really punted- was the discussion around "somebody's got to hold on to the evidence," and since it's implausible that anyone besides the state would do it, we must therefore afford a presumption of good faith to how the state keeps that evidence. I just think that's a leap in logic that doesn't align with how these things work in most other legal contexts. Generally, if a party is in custody of evidence- say there's a series of emails revealing fraud within a company, and those emails go missing or get destroyed- you don't say, "Well, there's a good faith presumption that people keep their emails because they're supposed to." Instead, you have evidentiary presumptions against the party that fails to produce evidence, which is called spoliation. Lots of legal principles work that way. One simple example from early 1L contracts is the presumption against the drafter when interpreting ambiguous contracts. Yes, somebody has to hold onto the evidence, but that doesn't mean they automatically get a presumption in their favor. It's like the cake-cutting rule- sure, someone has to cut the cake, but the best way to ensure you get an even amount for both people, is for the other person to get to pick their piece first. Here, the court just says, "Yeah, someone has to cut the cake," and then gives the government the presumption of good faith, effectively letting them have first pick, only allowing testing if they agree to it. I just found that logic very odd and unpersuasive.

A Anthony Sanders 42:36

And one confusing part about the opinion to me is that, in a sense, this is a challenge to the constitutionality of this state rule about DNA testing. So in a sense, it's kind of not about the procedures for his own DNA being tested. It's whether this law allowed him process when he tried to use it in state court- which kind of put another layer of, you know, buffer on the state side. Do I have that right?

A An Altik 43:11

Yeah, that's actually something I believe Justice Thomas brought up in his dissent, and in some ways it was more like him asking for appellate review again rather than addressing the due

ways it was more like him asking for appellate review again rather than addressing the due process claim about the statute itself. Something else I think was in the dissent is that Reed actually appealed the very initial denial of rehearing by the Court of Appeals to the Supreme Court, but they declined to grant cert on that, and then he proceeded to bring the Section 1983 due process claim. So yeah, it's an extra level of intricacy.

D Dan Alban 43:52

I think he also had both facial and as-applied due process claims. Here, the facial claim, as courts interpret them these days- and certainly how the Fifth Circuit does- is that in every instance the statute is applied, it's unlawful. That seems like biting off way more than he could chew, because in some cases, people presumably get the testing they want, which could lead to exoneration or at least affect the outcome of their case.

A Anthony Sanders 44:27

It seemed like the court wasn't too impressed by that part.

D Dan Alban 44:30

Yeah, and given the court's willingness to bend over backwards and imagine scenarios where someone might overcome this presumption of good faith using who knows what evidence, the idea that you'd prevail on a facial claim seems really unlikely. Just for viewers who might not be familiar, a facial claim challenges a statute in all its applications- not just against the person bringing the claim, but anyone it might be applied to. So literally, anyone in Texas who wants their DNA tested under, I think it's Chapter 64 of the Texas Code, anyone convicted who wants testing could argue that statute denies them due process. By contrast, an as-applied claim challenges how the statute applies specifically to the individual, like Mr. Reed, claiming his due process rights were violated. It's generally much easier to succeed on an as-applied claim than on a facial claim.

A Anthony Sanders 45:42

Yeah, well, we'll see where this case goes. Given the nature of it, I'm sure it will go back up to the Supreme Court again. Capital litigation, of course, is often incredibly complicated, incredibly long, and always very serious. So An, thank you for walking us through that. And Dan, thank you for the earlier case. I was also corrected- I think I said we were in 2024 at the beginning of the show, but actually, it's now 2025. You'll be happy to know it took me until May to figure that out. Maybe one of these months, I'll get it right. So thank you both for coming on. And thank you everyone for listening. Please be sure to follow Short Circuit on YouTube, Apple Podcasts, Spotify, and all other podcast platforms. And remember to get engaged.