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SPEAKERS

Bob Belden, Nick DeBenedetto, Anthony Sanders

A **Anthony Sanders** 00:16

Police arrive and find a woman next to a bath. She's not breathing and her heart has stopped, but she's still warm. They notice her hair is wet, but her body is not. They're unable to revive her, and later her husband is found guilty of murder. But it turns out the lead detective is a serial fabulist. Was the husband unconstitutionally convicted? This story from the Sixth Circuit, plus DEI lists in the Fifth Circuit- this week on Short Circuit, your podcast on the federal courts of appeals. I'm your host, Anthony Sanders, Director of the Center for Judicial Engagement at the Institute for Justice. We're recording this on Thursday, May 29, 2025. So I have that murder mystery in the Sixth Circuit coming your way in a little bit. First, we're going to hear about what's going on down in the Fifth Circuit. But I want to introduce who's going to be doing our Sixth Circuit case in a little bit, and that's Nick DeBenedetto from IJ. Nick, how you doing?

N **Nick DeBenedetto** 01:17

Hi Anthony. Thanks for having me back. I'm doing very well.

A **Anthony Sanders** 01:19

Well, great. We'll hear a little bit from Nick later, but first, Bob. Now, this is a case that, in some ways, there's not a lot going on. I know people are passionate about these issues, and no disrespect to the parties or the lawyers involved- but in some ways, it's a little bit of a case about nothing. It's about lists of what gender and race people have at broadcast studios, but it really reveals a lot about how the administrative state works and all the machinations that go on with it. So Bob Belden, who knows his way around the Fifth Circuit, what is going on in this case, and what's Judge Elrod talking about?

B **Bob Belden** 02:15

Well, thanks for having me, Anthony. I'm happy to be here with you and Nick today. Agreed, my case doesn't have the same level of interesting facts as Nick's, but we'll get through it and get to the interesting stuff here. Mine is National Religious Broadcasters versus FCC, and I think folks are probably familiar with the FCC. It's the federal regulatory body that deals with radio and TV broadcasters. And what's going on in the case, as you point out, is at some point, the FCC decided it would start to require broadcasters, both radio and TV, to submit annual forms. This annual form called form 395B.

A Anthony Sanders 03:02

Nothing better than an annual form for the federal government to require you to file, The Supreme Court never took that case. Maybe the Clinton administration, never even tried to take at the Supreme Court. It's just like everything's kind of been frozen in amber, other than these forms, because of that DC Circuit ruling.

B Bob Belden 03:06

Right? And as far as annual forms go at the federal level, this actually doesn't seem to be that onerous of a form. You can print it off- it's nine pages on paper, and it's mostly instructions, like almost all federal forms are. You fill out information on basically two pages. The FCC started collecting this kind of demographic data from broadcasters in the 1970s, and over the course of about two decades, they were collecting it. Then Congress said, we need to do a little bit more- there's not enough diversity in broadcasting. In 1992, Congress adopted something called the Cable Act, which basically said: broadcasters, you need to adopt equal employment opportunity programs, and we're going to have you continue collecting this data and making it available to the FCC so we can assess whether you're making enough progress on hiring minorities and women into broadcasting roles. About six years after that Act went into effect, the D.C. Circuit enjoined the FCC from enforcing it. And for about the next, I don't know, two and a half decades, the FCC did not actually collect Form 395-B or anything like it. Right. Yeah, after the DC Circuit ruling, the FCC tried to fix the underlying issues with the Equal Employment Opportunity Programs, but the FCC left the kind of form, collection, data collection piece, you know, in abeyance, I guess, for about two decades. And I'm curious, Anthony and Nick, what's the longest you have had a motion or a request for relief held pending by a court or a government body. I think I'm probably around like, a year and a half, maybe and that seems very, very long to wait for a decision. I'm curious.

A Anthony Sanders 05:37

I've waited over a year for an opinion.

N Nick DeBenedetto 05:42

Well, I was not around in 1992 so listeners may be surprised to learn that in my young career, so far, I have not had many motions pending that the Court has held onto for a long time. But I will cheat a little bit and say that during a previous position at the Cato Institute, when I was working at the Center for Constitutional Studies, we filed an amicus brief, several amicus briefs,

actually, but one in particular at the Texas Supreme Court in a case called BVorgeld, which took a very long time to reach a final decision. I think I had had since left my position at Cato for over a year before the the opinion actually came down.

B **Bob Belden** 06:21

Oh man, well, that is a long time. And I felt like waiting more than a year was a long time. But I raised this issue because while the FCC held this data collection, they paused it for about two decades under the Biden administration in 20 I think 2021 or 2024 the FCC decided, hey, we're actually going to start collecting this data again, and we're going to have broadcasters submit this form again. And they made a couple changes to the form, but they did it in the context of ruling on a motion for reconsideration that had been pending since 2004 so the point that the order at issue in this case actually comes out, you know, some group of broadcasters somewhere has been waiting 20 years.

A **Anthony Sanders** 07:10

So is that a motion like in the rulemaking process, or what "court" was it even in?

B **Bob Belden** 07:17

So it was before the FCC—I think it was part of the usual notice-and-comment rulemaking process. I believe it was a comment, and then the FCC made the final version of the regulations available in 2004. You could submit additional requests to change things, and because Form 395-B—this data collection—was just going to be paused, I guess the FCC just left the reconsideration request hanging out there and only formally ruled on it when it entered the order at issue here.

A **Anthony Sanders** 07:49

I wonder how many attorneys over the years, like filed things that they had left the firm, and the new attorney was now making an appearance- probably no one did anything but I wouldn't be surprised if the attorneys who originally filed that were like long gone by the time the motion was ruled on.

B **Bob Belden** 08:10

They certainly hadn’t thought about it in a while, I’m sure. So, the FCC enters this order in February 2024 and says, hey, this form is back on- you need to be submitting this data. They expanded the categories of jobs that were covered in the form and added a couple of categories of demographic information that could be included on it. But a group of broadcasters sued almost immediately to enjoin its enforcement, and the FCC denied all requests to avoid being subjected to it. So the broadcasters- like I said, you don’t technically file anything in a district court or file a complaint- you petition directly to the Fifth Circuit for review of the agency order, and that’s what a group of broadcasters did here. There’s an interesting point in

the opinion, a couple of pages where the Fifth Circuit talks about associational standing. I don’t know if either of you have strong viewpoints on that issue that you want to get out right now. I understand from people who are more keyed into the issue that it might be on shaky foundation at present, but...

A Anthony Sanders 09:24

Yeah, and it was perhaps going to be a thing in the birthright citizenship oral argument, and didn't really come up, because I know some justice and Supreme Court have been skeptical about it lately. But yeah, it seems like Fifth Circuit, you know, is just accepting that it's still a thing and moving on.

B Bob Belden 09:44

Yeah, not not an issue, but the court stops on it for a couple pages and then moves into the merits. And there are basically two arguments that the FCC is making here. The first is, we're a federal agency, and like every other Federal Agency, we are authorized to do things in the public interest. And so what happens after that is the FCC is made to try to identify statutory hooks somewhere to hang their public interest objective, and use that as sort of a basis to collect this data. And the court looks at a few of the options that the FCC offered and says at the end of the day for each of them, the FCC never really explains how collecting demographic data from every broadcaster in the country is connected to the FCC core function of actually licensing those broadcasters. The beginning of the opinion talks about life before the SEC and how it was total chaos, trying to go on to the AM or FM spectrum,

A Anthony Sanders 10:55

That's a questionable history, by the way, but we don't need to bring that up right now. I know Jesse Walker has written about that

N Nick DeBenedetto 11:04

While reading this case, actually, I texted some friends of mine that I keep in close contact with from Cato, and said, I want to hear the libertarian sort of counter history to the great and good government coming in to regulate the wild wild west that was, you know, the radio airwaves.

A Anthony Sanders 11:21

What do you hear back?

N Nick DeBenedetto 11:23

They didn't provide me with anything interesting. So I guess it's going to be a homework assignment that I have to do

B Bob Belden 11:29

Well, I've learned my lesson- next time I'll get to the bottom of it before I present the case, so we can talk about it. But at the end of the day, the FCC never really explains why it needs this demographic data to help it do A, B, or C- something tied to its core function as a federal agency. So the court rejects the argument that collecting this data is justified simply because it's in the public interest. The court takes a view of agency power that's different from what many people are probably used to over the past few decades- it really focuses hard on the statutory authorization from Congress and says public interest is not some freewheeling power that you can invoke as a totem to justify new programs or burdens. The second basis the FCC offered to justify collecting the data was the 1992 Cable Act. The FCC argued that, when Congress adopted that Act, it said the FCC shall not revise the forms that were being used to collect this kind of data. And the court walks through how, yes, that's true- that is what Congress said- but Congress was referring only to two of three potentially relevant regulations. And those two regulations had already been overturned in the 1998 case that led the FCC to put the data collection on the back burner and essentially leave it dormant for two decades.

A Anthony Sanders 13:14

So it's like Congress was referring to something that now doesn't exist- is basically the argument

B Bob Belden 13:20

Yeah, you can collect this data to help you with programs that currently exist, but you know, 20 years hence, if those programs no longer exist, you can't collect data to promote them. And so that is kind of the end of that opinion. The Fifth Circuit sends the FCC back to the drawing board because they don't have statutory authority to force the collection of this data. And you know, the broadcasters had raised other, probably more interesting, free speech and I think property rights claims that the court just doesn't reach because there's no statutory authority. But that's my really interesting case. And now, if you guys want to talk about little habeas. I'm happy to do that.

A Anthony Sanders 14:04

Well, let's first get a Nick's take on on what's going on here in the in the Fifth Circuit. This is a hard opinion to read through, I think, because it really does depend on every jot and tittle in these statutes, and it's a close examination that you don't often see in these kinds of cases, because usually they just say, "well, there's authority here, and it's close enough, and the agency wins."

N Nick DeBenedetto 14:36

I agree. I was struck by that as I was reading the opinion, and I couldn't help but read this opinion without putting my glasses of the Supreme Court's recent skepticism towards

opinion without putting my glasses on the Supreme Court's recent skepticism towards administrative power and administrative agencies, although things like the major questions doctrine are not directly invoked in this case. It's hard for me to decouple the tight statutory analysis from sort of the vector that that is moving through the wall right now that seeks to limit agency power and restrain it- basically to the four corners of whatever Congress authorized it to do in its statute. So did either of you see that as well? Do you think that there is kind of a broader, sort of major questions flavor to this case, or is it just good old fashioned statutory interpretation? Because this you know, issue goes back to the 1990s

A **Anthony Sanders** 15:36

Yeah, I mean, I wouldn't see it as major questions other than just major questions doctrine as part of this whole general ambiance about being skeptical of regulatory authority, but it's definitely a kind of, you might say, a hard look at the authority that Congress has given the agency. I'm reminded of- like, this is a question in administrative agencies about whether they have authority that Congress has given them. There's a very parallel question in local government law, where a state legislature has given a local government- usually a city or a county, but sometimes special governments- whether they have certain powers. And this almost reads like a case from the 19th century, where that was read a lot more closely. So there's a lot of cases that today we kind of read in IJ as, like, economic liberty cases or property rights cases, but they're not actually constitutional cases. They're cases about whether the city has the power to, say, license peddlers- that was an issue that came up a lot- and they would very closely read the grant of authority to the city and say, look, you may have the authority to license this one thing, but you don't have the authority to license this, or yeah, this kind of tax and not this kind of tax. And then later, the deference got much, much greater. So, just- there's police powers, and police power's pretty broad, and so the city can, you know, do all this stuff. You kind of have a similar evolution in agency law, and this is a little bit of a step back. So, I mean, I would love to see this kind of skepticism of agency power in a lot of areas. I got to say, I am a little skeptical that this would happen in, you know, all kinds of other things that agencies do. I think the whole political explosiveness of the demographic data is definitely driving some of this. So, I mean, we'll see- it is the Fifth Circuit, and maybe they're skeptical of a lot of agency stuff these days, so maybe that's what's going on. But, you know, I won't hold my breath in future cases on, you know, something that's much more mundane, perhaps. But maybe it portends a trend in that direction.

B **Bob Belden** 18:06

Yeah, the vibes are definitely that administrative power is at its low point right now, at least in recent memory. And I I like that the opinion that it doesn't tend to emphasize too much the nature of the additional information that the FCC was saying broadcasters had to collect. Anthony's right, that the FCC added stuff like gender identity and a number of other things- whatever side you're on, people feel strongly about them- but the the opinion does a good job, I think, of saying, Here's a statutory provision and that doesn't link up to what you're trying to do. And I'd love to see more of that.

N **Nick DeBenedetto** 18:46

I thought before we close out on this, tee up one other question for you guys. In recounting the history of the statute, the panel talks about congressional findings that there were not enough

history of the statute, the panel talks about congressional findings that there were not enough women and minority individuals in management positions in the broadcast industry. And again, I don't want to take us too far afield, but this gave me a flashback to my federal courts class, and I think- if I remember correctly- we were discussing either Morrison or Lopez, the Commerce Clause cases, and my Fed Courts professor got very exercised that the Court went against congressional findings, saying that the relevant laws in those cases were necessary or at least relevant to the regulation of interstate commerce. So do we at IJ spend a lot of time thinking about congressional findings and the role that they should- and the role that they should- play in legal interpretation?

A **Anthony Sanders** 19:47

Yeah, I mean, definitely congressional findings are legislative findings- or often city council findings- which is all kind of the same idea: that the legislature, whatever level of government, has come up with certain facts and justified its actions with those facts. We do like that, right? We like laws that have some facts behind them. But then the question is whether you're able to second-guess those facts with your own facts in a lawsuit. And I know often when people are justifying laws, they say, once Congress or the legislature has put those facts forward, you can't second-guess them. I think that was a big part of Morrison and Lopez and other cases in that area, where you already have a rational basis standard under the Commerce Clause, so, hey, what are you even trying to do if you have those facts in the record, so to speak?

B **Bob Belden** 20:52

Yeah, I don't have much to add to that. I think it pops up a lot in our zoning cases that you'll have, like a local government official at a hearing saying, well, we all know that trash is a serious problem, and then it's a big issue, if, for the rest of time, it's a legislative fact that trash is a serious problem. But you know, if we can go in and ask, Where's all the trash, then, I think that's fine, but I don't have anything useful to add to Anthony's institutional knowledge about IJ.

A **Anthony Sanders** 21:26

Well, I think, I think Bob has given us plenty of useful thoughts about this latest news from the Fifth Circuit. So we're now going to move to the Sixth Circuit. So, this case is unpublished, which kind of is a head scratcher to me, because the court spend a lot of time on it, and it does seem useful in habeas law, though not useful from a defense attorneys point of view. But Nick, this is one of those cases where you read it and you're like, Wow, if I was on the jury, I don't know where I'd come out with all this- but it it sure is interesting.

N **Nick DeBenedetto** 22:03

It is very interesting. And as you teed it up very well, Anthony, this case is unpublished, but the underlying facts are the stuff of true crime podcasts. So I don't know if anyone in the Short Circuit listening audience has any crossover interest in those sorts of podcasts, but if you do, this is for you. At root, this case is an appeal from the Southern District of Ohio after the district court denied a man named Ryan Widmer's habeas corpus petition. He was convicted back in

2011 after being tried three times for murdering his wife. The panel in this case was made up of Judges Moore, Clay, and Thapar, and Judge Clay wrote the unanimous opinion of the court. I'll flag at the outset here for listeners that there is a lot going on in this case, and I commend it to you, but time probably will not permit us to cover every single issue. So I'm going to give you the facts that you need to tee you up to do a little bit of additional exploration, and we will cover the flagship issue about the dishonest detective. On the night of August 11, 2008, dispatch in Hamilton Township, Ohio received a 911 call reporting that a woman had drowned in her bathtub. The call was placed by her husband, Ryan Widmer, who said he believed his wife, Sarah, had fallen asleep in the bathtub and was now dead. When the police arrived on scene, they observed Sarah lying naked on the floor of the Widmers' bedroom. She was unresponsive, not breathing, but still warm to the touch. Somewhat strangely, her hair was damp, but her body was dry. Mr. Widmer was present and dressed only in boxer shorts. When emergency personnel arrived, the police did not observe any injuries on him, and as EMS and other first responders attempted to perform CPR, they noticed a pink frothy discharge coming from Sarah's mouth and nose, which only increased as the crew performed CPR.

A Anthony Sanders 24:07

And that pink stuff- you never really find out what it was. Now, that's really creepy.

N Nick DeBenedetto 24:14

I would be curious if in the trial documents, they talk more about what they think that was or whether or not the jury was presented with that

B Bob Belden 24:27

I'm sure the jury sent out a note if they didn't.

N Nick DeBenedetto 24:29

They had to have. Additionally, another strange wrinkle in this case is that police and EMS noticed there were no signs of obvious trauma on Sarah's body. The emergency responders continued trying to revive her as they transported her to the hospital, but they were ultimately unsuccessful, and she was pronounced dead about 30 minutes after arriving. While at the hospital, Widmer told the charting nurse that he had found Sarah in the bathtub, not breathing but facing up. The county coroner's office dispatched its investigator to respond to the emergency room. The coroner, like police and EMS personnel, observed no obvious signs of trauma on Sarah. He also noticed her body was dry and her hair damp, and he saw there was no pruning on her fingers, which would suggest she had not spent significant time in water. (Listeners can think about swimming in a pool when their fingertips get wrinkly like raisins.) The investigator then spoke to Widmer, who reported he was watching football downstairs when Sarah went upstairs to take a bath. Widmer said he was afraid Sarah would fall asleep in the tub, and about an hour later, when he went upstairs, he found her unresponsive, face down in the water underneath the faucet. Now the main character, or perhaps most important character in our story, Detective Jeff Braley arrived at the Widmers' home as Sarah was being transported

to the hospital. He was there to process the scene and collect evidence. On a preliminary tour of the house, he noticed a few things: first, the bathroom and floor were more dry than expected for someone who had just taken a bath and been removed from the tub. At some point, things were oddly dry. The floor of the bathroom was likewise dry, and there were two pinkish-red stains on the carpet. Braley obtained consent to search the home and packaged and processed additional evidence: water samples, bath products used, Lysol wipes, some towels from the bathroom, and a carpet sample from where Sarah had been laying in the bedroom when emergency responders first arrived. The Miami Valley Crime Lab tested these samples, focusing in particular on some DNA recovered from underneath Sarah's fingernails, which the coroner's investigator had preserved by placing bags over her hands when he arrived at the hospital. That DNA revealed only Sarah's and an unknown female's.

A Anthony Sanders 27:27

That's another real mystery

B Bob Belden 27:28

We never find out who she is.

N Nick DeBenedetto 27:31

We never find out who the unknown female is. But there was no DNA found traceable to Widmer under Sarah's fingernails, according to the court, which undermines the theory that there was a struggle or that she took defensive action to prevent being drowned. The following day, the Warren County Coroner, Dr. Russell Uptegrove, performed an autopsy. At this point, Detective Braley already considered Sarah's death suspicious, and Dr. Uptegrove shared with him a preliminary opinion that Sarah had drowned and that her cause of death was homicide. Dr. Uptegrove observed external bruising on Sarah's face and neck, deep muscle hemorrhaging in her neck, and contusions to her scalp. At Widmer's third trial, Dr. Uptegrove testified to his final conclusion that her death was a homicide, largely because he believed Sarah was dead when first responders began administering CPR, so her injuries were not caused by resuscitation efforts. Another pathologist testifying for the state agreed that Sarah's injuries were unexplained by CPR. If it's useful, I can add a bit of color here- I was an EMT before law school. Intubating someone would have been beyond my scope of care at least in Pennsylvania as an EMT basic, but I was trained on a dummy, and it's not easy to do. EMTs tried to intubate Sarah several times but were unsuccessful. This involves inserting a metal, curved instrument like a tongue depressor into the patient's airway to depress the tongue and lift the jaw, then inserting a tube to assist breathing. This can cause injury, usually to teeth, from the pressure. The defense's pathologist, who also performed an autopsy, suggested some of Sarah's injuries could have been caused by resuscitation efforts, including CPR, which can cause broken ribs and bruising. Defense pathologist Dr. Spitz agreed Sarah drowned but said due to the possibility of injuries from resuscitation efforts, the cause of death should be undetermined rather than homicide. The defense also produced a second pathology expert, Dr. Michael Balko, who agreed with Dr. Spitz and suggested Sarah may have died from Long QT syndrome, a cardiac condition linked to sudden drowning deaths. Friends of the Widmers testified Sarah had

a habit of falling asleep at odd times and places and a history of persistent headaches. Sarah's mother testified she had a heart murmur and cleft palate as a child, all associated with Long QT syndrome.

A Anthony Sanders 31:47

You kind of wonder why she was taking a bath at that condition in the first place.

N Nick DeBenedetto 31:51

Yeah, I would imagine that even though that condition is associated with some drowning deaths, it's still probably very rare that the stars align so that someone actually drowns from it. On August 13, 2008- two days after Sarah's death- Widmer was charged with aggravated murder and arrested. Police executed a search warrant on his home, which enabled Detective Braley to conduct a more thorough search than before. Most significantly for our purposes, he dusted the bathtub for fingerprints, and upon dusting, he observed streak marks he believed were made by human hands but was not able to lift any prints fit for comparison from the tub. Subsequently, the Miami Crime Lab- the same one that analyzed the DNA under Sarah's fingernails- also dusted the tub for prints on two occasions using different methods, once at the scene and once in the lab, but was also unable to recover any prints of comparison value. Staying on the bathtub for a moment, three months later the state had William Hillard, a senior criminalist with the City of Cincinnati, examine the tub. He didn't apply any additional treatments but testified that from the existing fingerprint powder already applied, he was able to identify a forearm impression he believed was made by an adult male, which he opined overlaid circular marks on the bathtub likely left by bottles. He also indicated there were white marks in the tub suggesting someone had attempted to clean it. What he couldn't say was when any of those impressions were made or when the tub was wiped.

B Bob Belden 31:52

Could he say what the bottles were? Were they shampoo bottles? Or is the implication that they were like cleaning materials or something?

N Nick DeBenedetto 33:38

I don't recall off the top of my head, if the panel describes exactly what he thought they were, but the inference is that they were likely cleaning materials for the tub

A Anthony Sanders 34:12

This seems like stuff that can happen every day.

B Bob Belden 34:15

You put your forearms in a bathtub every time you get in

N Nick DeBenedetto 34:22

And so, as I said before, Widmer was tried three times. The first trial occurred in July 2009, where he was convicted of murder but successfully moved for a new trial based on juror misconduct. The second trial happened in May 2010 and ended in a mistrial when the jury was unable to reach a verdict. Finally, the third trial occurred in January 2011, and he was subsequently convicted of murder in February 2011. Now the plot thickens even more, because prior to the third trial, the state developed a new witness named Jennifer Crew. She claimed that in October 2009, Widmer confessed to Sarah's murder directly to her. Crew met Widmer when they began regularly communicating via a website established just to support Widmer's innocence. She claimed they began communicating fairly regularly after first meeting through the website, and that he called her one day crying and confessed to the murder, saying it happened during a physical altercation after Sarah confronted him about cheating, pornography, drinking, and smoking. Widmer then allegedly claimed he confronted Sarah in the bathroom and hit her, causing her to bang her head, then blacked out and came to at the side of the bathtub. When he did, he saw that Sarah was not breathing, but her hair was wet. According to Crew, he attempted to cover up the death, including by cleaning up the water. However, the defense produced rival testimony by another supporter of Widmer, who testified she had a two-hour phone conversation with him on the night of that alleged confession, which ended around 11 p.m., and that he did not seem emotionally distraught or upset after the call.

A Anthony Sanders 36:19

So now that's not necessarily contradictory, because, he hung up, and then six minutes later he could have confessed. I mean. Weird things happen with murder suspects.

B Bob Belden 36:32

Or confessed, and then six minutes later felt better.

N Nick DeBenedetto 36:35

Absolutely. And I also thought that if Widmer is the type of person capable of murdering his wife and convincingly cleaning up the evidence, the fact that he didn't sound distraught on the phone probably wouldn't indicate very much. To save the listening audience a lot of procedural history, I'll just say Widmer pursued various appeals and lost them all. At this point, he's left with a habeas petition in the Western District of Ohio, which rejected his petition but certified that he could appeal certain claims raised in it. For our purposes today, we'll discuss the main event, but it's worth noting the Sixth Circuit had a very deferential standard of review in this case. That standard is governed by the Antiterrorism and Effective Death Penalty Act of 1996—I'll call it AEDPA. AEDPA bars federal courts from granting habeas relief on claims adjudicated on the merits in state court unless the decision was contrary to or involved an unreasonable application of clearly established federal law as determined by the Supreme Court, or was based on an unreasonable determination of facts in light of the evidence presented in the state

court proceeding. Basically, the court that adjudicated these claims on the merits had to have gotten the decision so egregiously wrong that there's no room for disagreement about the outcome. So this is an extremely deferential standard that federal courts must apply.

A Anthony Sanders 38:26

I often say- and it's not exactly the same- but think qualified immunity- it's got to be really wrong in order to to hit the standard.

N Nick DeBenedetto 38:37

And so, I signposted earlier that Detective Braley is a key person of interest in this case. Before Widmer's second trial, his defense counsel obtained an employment application that Braley submitted to the Hamilton Township Police Department in 1996. Based on irregularities in the application, defense counsel suspected Braley was lying and began subpoenaing records from his prior employers to verify the information he provided. Unsurprisingly, the state and Braley moved to quash the subpoenas. At a hearing on the motion conducted May 5, 2010, Braley acknowledged some inaccurate information in the employment application, including claims that he had a master's degree and had attended a college in Florida. Other background details were revealed to be inaccurate or false- for example, he claimed to have worked as a postal inspector for two years, but in fact had only worked as a clerk at the post office for a few weeks. However, during the hearing, Braley maintained that he did not fabricate the application and, in fact, never wrote the application at all. He claimed the application itself had been fabricated later in the same hearing

A Anthony Sanders 40:00

So he is basically saying I never applied for the job- is basically what its excuse was.

N Nick DeBenedetto 40:05

Yeah, it certainly feels like one of those situations where the effort to deny is worse than the lie itself. Later in that same hearing, Braley testified that not only did he never send in this application, but he never filled out any application. The Ohio trial court eventually concluded that despite this inconsistency, any probative value in introducing questions about the fabrications in the application would be outweighed by undue prejudice and the likelihood of misleading the jury, given that the application was remote in time to the events of the case and there were questions about its veracity. The court granted the state's motion to quash the subpoena. In other words, the trial court was concerned this would lead the jury too far afield from the main issues. Before Widmer's third trial in November 2010, the Ohio Bureau of Criminal Identification and Investigation issued a forensic analysis of the handwriting on the 1996 application and concluded it belonged to Braley, contrary to his testimony at the motion to quash hearing. The bureau did not find evidence the application had been altered after Braley allegedly completed it. Following the bureau's report, Widmer moved to cross-examine Braley about the dishonesty in the application at his third trial and to present as a defense that Braley's dishonesty may have impacted the investigation of Sarah's murder. The trial court

again denied the motion, finding the authenticity of the application was still contested and the issue of whether Braley lied on it was collateral to the trial issues. The plot thickens yet again: after Widmer's conviction in February 2011, the Hamilton Township trustees hired an outside law firm to conduct an independent investigation of Braley based on the background questions raised during trial. If I remember correctly, the opinion says this action took place the day after Widmer's conviction, which is tough.

B Bob Belden 42:28

Convenient timing.

N Nick DeBenedetto 42:31

So after the firm completed its investigation, it issued a written report to the trustees in June 2011. The report found misinformation about Braley's background in the employment application and a resume letter he sent to the police chief. The report also concluded both documents were authentic but never led to his promotion or hiring. It further detailed that Braley had falsely told numerous members of the township police department that he was formerly in the Special Forces- specifically, that he was a pararescue jumper in the Air Force. When interviewed by the firm during the investigation, Braley denied ever being in the Special Forces or telling anyone that, though he did serve in the military. However, the report explained it was "everyone's understanding" that Braley's false Special Forces background was why he was put in charge of the township's THOR unit, a Special Operations tactical unit established around 2002 or 2003 that conducted police raids. Nevertheless, the report concluded Braley's lies had "no particular impact on the township," but recommended the trustees conduct a pre-disciplinary hearing regarding his misconduct. Now, where the Sixth Circuit picks up, Widmer raises related arguments about two U.S. Supreme Court cases: Napue v. Illinois (1959) and Brady v. Maryland (1963). In Napue, the Supreme Court held that due process is violated when the state knowingly uses perjured testimony to obtain a conviction. To succeed on a Napue claim, a petitioner must show: first, there was a statement that was actually false; second, the statement was material; and third, the prosecution knew it was false. For a statement to be material under Napue, it must have the effect of influencing the jury's ultimate conclusions about guilt or innocence. Related to Napue is Brady, where the Supreme Court held that suppression by the prosecution of evidence favorable to the accused violates due process when the evidence is material to guilt or punishment, regardless of the prosecution's good or bad faith. Both impeachment and exculpatory evidence are subject to Brady. To establish a Brady violation, a petitioner must show: first, the evidence is favorable to the accused, either because it is exculpatory or impeaching; second, the evidence was suppressed by the state, willfully or inadvertently; and third, the evidence was material.

A Anthony Sanders 45:51

And essentially all of this absolute lies that this guy told they had nothing to do with this investigation, right?

N Nick DeBenedetto 46:03

And that is where the Sixth Circuit ultimately comes down. The court had to determine whether the Ohio Court of Appeals' conclusions- which rejected Widmer's claims under Napue and Brady- were reasonable. The punchline is that materiality here goes to innocence; Braley's background and lies about it don't significantly affect whether Widmer actually murdered Sarah. These issues were considered remote and collateral to what the jury was tasked with deciding. The Sixth Circuit noted that even assuming Braley lied, he still attended the police academy, became a detective, was promoted to lieutenant while at the Hamilton Township Police Department, and had held that rank for about four years before the Widmer investigation. There was no reason to suspect he testified dishonestly regarding his experience related to evidence collection or crime scene processing. As a final nail in the coffin on materiality, the court pointed out that even if Braley's credibility was completely undermined, other key witnesses- such as other police officers, EMS personnel, and presumably the coroner- corroborated everything he said about the crime scene. So even if Braley couldn't be trusted, others backed up essentially everything he reported. Because Widmer couldn't establish materiality, the Sixth Circuit concluded the Ohio Court of Appeals did not err and affirmed the denial of his habeas petition.

A Anthony Sanders 48:21

Yeah, at the end of the day, it didn't kind of matter. I mean, that's the court's opinion. But while there, we get this wild ride about this guy's background. Bob, were you convinced by how the court weighed these facts? Or do you smell a rat there somewhere?

B Bob Belden 48:43

You know, I think that the lead investigator influences what happens in an investigation like this, so much that if there were credible evidence that, yeah, he applied or didn't apply or lied about that and then lied about his experience, in addition to having an absence of actual, real experience, I think that that could have been material to a jury. But again, I think Nick pointed out the standard of review here it is so far removed from whether you think the jury actually did the right thing. It's about whether the appellate court judges at the state level were so wrong about their review of what happened at the trial that we should overturn what they did. So I think they probably reached the right result under edpa and you know, the habeas regime as it exists now. But I think if I were a juror in this case, I would certainly want to know that Braley had these issues, and I think it would have influenced what I thought about the case.

A Anthony Sanders 49:51

Yeah because I mean that it seems like the state's argument, is that sure he was this serial fabulist to get this job. But after that he could have just been a honest person and done everything on the up and up.

B Bob Belden 50:08

We promoted him to Lieutenant. You know, what more do you want? He got a promotion. He's an honest guy.

A Anthony Sanders 50:14

And, we talk about character evidence. Most people know that character can change, sure, but often it doesn't. And this is only four years later in this guy's life. It's not like this was something in his youth, and it's 40 years later. So it does seem like, if I was a juror, I would want to know this guy is, is a big time liar. But the fact that they had this other the evidence so it didn't matter in the end anyway. I mean, you make a good point, Bob, that the detective can influence them, and maybe their memories were influenced by him influencing them. But that's crime investigations.

N Nick DeBenedetto 51:02

And Anthony flagged at the beginning of the program that he thought it was interesting that this case was unpublished, and that got me thinking about, you know, why that might be as I was as I was reading the opinion. This was something that I was I was contemplating, and I think that the court may be reluctant to close the door on future, you know, dishonest investigators. And I was trying to put my shoes in the judge, my feet in the shoes of one of the judges, excuse me and think about, you know, what would be the future implications of this case if it were published, and both as a judge and maybe as a potential juror, I would think differently about a similar situation if you could establish a sort of continuous history of Fabrications by the lead investigator. So for example, if it also came out that detective Braley had lied on police reports and had lied while working his job as a lieutenant detective in the Hamilton Township Police Department. Then I think we inch closer and closer to materiality and and certainly as a juror, I would, I would want to know that.

A Anthony Sanders 52:16

Yeah, well, that is quite a story, and readers and viewers can make up and listeners can make up their own minds. Oh, just one word

B Bob Belden 52:26

of caution to the listeners or viewers or readers. If you're arrested for a long you're arrested and incarcerated for a long time, do not be like Mr. Widmer. Don't make friends on the outside that you've talked to about your crimes, because one of them may be a person who shows up later and says, Yeah, you know, Nick confessed to me. We talked on the phone all the time. Just don't do that. Don't do it.

A Anthony Sanders 52:49

It shows you just how amazing and contradictory and complicated people are, that that could happen. You know, whether, whether he's guilty or not that those exchanges took place, but yeah, we'll see. But for everyone else, thank you guys for coming on, but please be sure to

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