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SPEAKERS

Nick DeBenedetto, Jared McClain, Anthony Sanders

A **Anthony Sanders** 00:11

You've all heard of the Texas Two Step, but there are a lot of other two steps, both in dance and in law. For a long time, there was the Chevron two step in administrative law, and there's still the reasonable expectation of privacy two step in Fourth Amendment cases. There's also the qualified immunity two step, which we've discussed on this show way too many times. But have you heard of the Kansas two step? It's a neat little practice by police officers in the state of Kansas. But is it constitutional? We'll discuss that this week, plus knives in California and a little dive into the Second Circuit 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 are recording this on Tuesday, February 10, 2026, and I have two of my Institute for Justice colleagues with me to discuss these cases from the Tenth Circuit about the Kansas two step and the Ninth Circuit about the state of California's regulation of switchblades. So all you switchblade fans out there, please stay tuned. Then at the end of the show, we will continue our series of 12 Months, 12 Circuits. This is the second time, so of course it's the Second Circuit, the federal court of appeals that covers the states of New York, Connecticut, and Vermont. So all you Second Circuit fans, you can just skip through to the end for that little bit. But for those who enjoy dancing and maybe also Fourth Amendment violations and switchblades, you will like the middle of the show. And so to get there, I first want to bring on Nick DeBenedetto. He is a colleague of mine here at IJ. He's been on the show before, and so we're happy to have him back and, a little later in the show, discuss this latest Second Amendment case. So unlike most Second Amendment cases that we're all familiar with, this is not about guns. It is about knives, about switchblades. I myself, and I suspect most listeners, have never owned a switchblade, but I am old enough, so maybe we'll get into a little generational difference here, that when I was a kid, just about every boy wanted to have a pocket knife. And the cooler pocket knives were the ones with more stuff. So the really lame ones just had a knife and maybe a bottle opener, right? But then you'd get the ones with the big knife, the little knife, the corkscrew, bottle opener. There would be something that was usually described as the thing you use to get rocks out of horses' hooves. I remember that was often the description. I don't know if I ever had one of those. So Nick, I am curious. You're a little younger than me. Are pocket knives still a thing for boys? And do they still want the thing that gets rocks out of horses' hooves?

N **Nick DeBenedetto** 03:29

Well, it's great to be back, Anthony. Thanks for having me. And I would say, yeah, pocket knives remain cool. When I was younger, I had a small collection of pocket knives that started with a Swiss Army knife that my uncle bought for me on a family vacation up to Vermont. Can't say that it got a lot of use over the years, but it was a neat thing to have. And I'm unfamiliar with tools to remove rocks from horses' hooves, but I would say the most interesting tool that I've ever used, or came near occasion to using on a pocket knife, was a glass punch from my days as an EMT. You could break car windows with a little nub on the end of the pocket knife if you needed to extricate someone trapped inside a car.

A Anthony Sanders 04:12

Oh, right, yeah. Okay, that, yeah, I've seen those. Sometimes people have them in their cars, not even with knives. But having it with the other knives sounds very handy. So, well, that's great to hear. Pocket knives are still a thing, or at least they haven't been banned quite yet. I'm sure some people are moving in that direction. But one thing that also is not banned, or is it, is the Kansas two step. So Jared is going to share with us this case from the Tenth Circuit. Jared McClain, I should say, our IJ colleague. This case is about something that seems like police officers in Kansas know they're not supposed to do, but it's really hard to get them to stop doing it because it's hard to define exactly what's wrong about it. And there's a bunch of other kind of wrong stuff in this case as well. So Jared, tell us what's going on.

J Jared McClain 05:17

Yeah, this case is a pretty good example of how hard it is to get the police to stop doing anything in the courts. The case is Shaw v. Smith out of the Tenth Circuit. It was issued January 29, and this case was brought by the ACLU years ago and went through three trials. It's an incredible factual record about this practice that the Kansas Highway Patrol put into place basically after Colorado legalized cannabis. Colorado and Kansas border one another, and the Kansas Highway Patrol thought lots of people drive on our highways, lots of people come and go from Colorado, and those people probably have weed in their cars, and we should find out. And the way they decided to do this was a two-step process that is separate from the two step itself. So yeah, a lot of two steps in this case. The first thing they were doing was targeting people who had out-of-state tags, so people who were driving through Kansas, and it looked like maybe they were coming on the highways that you would use to get to or from Colorado. And if they had out-of-state tags, they were basically treating that as reasonable suspicion to pull the car over. These out-of-staters are suspicious. They might be near Colorado. They probably have weed in their cars. And...

A Anthony Sanders 06:58

Why else would you go to Kansas?

J Jared McClain 07:00

Yeah, no, exactly. And they've admitted that they're stopping these cars because of their out-of-state tags. They say that's reasonable suspicion, and they sort of stack a few things on top of each other that are all basically the same thing. They're like, well, it's an out-of-state tag, and their destination was another state. And so all those things together give us reasonable suspicion to believe they've got weed in their car. And the thing about that policy is that the Tenth Circuit had already ruled that it was unconstitutional to do that. In a 2016 opinion called Vasquez, the court said that you can't rely on someone's out-of-state tags to pull them over, and really, you can't even use it in the conglomerate of the totality of the facts, because it's wholly innocent conduct, and there's no reason to believe out-of-staters are committing more crimes than in-staters. And that opinion came out in 2016. The legal counsel for the Kansas Highway Patrol looked at it and said, you know, I don't think this is important, I don't think it breaks new ground, and I don't think we need to tell our state troopers about it. And there was a four-year period from 2016 to 2020, essentially the time that the ACLU brought this case, where the Kansas Highway Patrol was just ignoring the Vasquez decision. So they're stopping all of these cars in violation of binding precedent at a sort of policy level. There were officers who testified at trial that they were trained to do this, and others testified that they were never told they couldn't do this. So it was both the affirmative training and the lack of training on Vasquez that allowed them to make these stops as a policy matter. And then once they did make the stops, they were performing what the court refers to as the Kansas two step. So whether they're writing a ticket or a warning, they go up to the car, they finish their business as an officer conducting a traffic stop, and then they sort of pivot and shimmy. Sometimes they take one step away, sometimes five steps away, and then they turn back around and say, hey, I've got just one more question for you.

A Anthony Sanders 09:35

It's like hey wait a minute before I go...

J Jared McClain 09:39

Right. And so all of these people thought their traffic stop was over. The officer doesn't say, you're free to go. The officer says something like, have a nice day or safe travels, and then pivots back and says, hey, I've got one more question for you. And the people who had this happen to them testified at trial that they did not feel as if they were free to go. There was evidence at trial that in a couple of these instances involving the four plaintiffs, the Kansas two step took less than one second. So there was basically a one-second break between the officer finishing the stop in the officer's mind and then re-engaging in what they're calling a consensual stop. And so that's the two step. And to show what the people were feeling as they went through this, and whether they had a chance to say no, in one of the instances the officer had his arm and head inside the car as he was asking whether he could ask another question. So one of the core questions is whether you feel free to drive away while a police officer is hanging inside your car. And if you did, am I going to get shot? And there are cases that would say the officer was in reasonable fear for his life and justified in shooting you. So the litigation goes on for years. There are trials, stipulations, concessions. The trial judge hears a lot of testimony and decides there's a policy in place of violating Vasquez. There is also a policy of

doing the Kansas two step, and the Kansas two step, at least in many iterations, violates the Fourth Amendment because, in the trial judge's determination, looking at the evidence, the videotapes, the body cam footage, and the testimony of the people this happened to, the officers are carrying out the two step in a way that would not make people feel free to leave. And so the judge issues this massive injunction that has lots of components to it, which I'll go through pretty quickly because the scope of the injunction ends up being the thrust of the case on appeal. The district court enjoins the officers from giving any weight to whether a traveler is coming from a drug source state, aka Colorado, or a suspected drug corridor, aka roads leading to Colorado. They also can't consider whether the driver is from out of state. And then the court also enjoins the Kansas two step. What the court says there is that you can't do this Kansas two step anymore without voluntary, informed consent. The court wants the consent to be a little more explicit. Let them know they have a right to leave before you ask whether they're willing to answer more questions, or get their actual consent and say, you know you could leave, but I'd like your explicit consent, rather than just, can we tell from the circumstances whether someone would have felt free to leave? Let's make it explicit. And the injunction was limited to people who drove on four different roads in Kansas because that's where they were doing this, and it would be in effect for four years. Kansas Highway Patrol also had to do some self-reporting. The court would check in a couple times a year and make sure they were adhering to the injunction. And then there were these six other series of requirements. There was data collection that would help the court monitor whether they were complying with the injunction. Troopers had to affirmatively inform people of their right to leave, like I mentioned. The court required Kansas Highway Patrol to record all of their stops so the court could monitor what was going on. Supervisors had to review the tapes of the traffic stops within 72 hours to make sure individual officers were complying. There would be new annual training on reasonable suspicion and voluntary consent, and then these reports to the court. So it's this huge win. They put together a massive record, went through a few trials, and the judge agrees with them on everything and says, look, Kansas Highway Patrol has been flouting the Constitution, and knowingly flouting the Constitution, for years. And this program was so widespread. There was an expert who said there were 50,000 additional stops in a two-year period, that people from out of state were over twice as likely to get pulled over as people from in state, and that while this Kansas two step was happening, they were having canines show up, and 90% of the canine sniffs were for people from out of state. So there was all this evidence that this was a massive, widespread problem generating a lot of revenue for Kansas, but also violating lots of people's constitutional rights in sometimes small ways, sometimes larger ways. But thousands and thousands of people had their rights violated. It was proven at trial, and the court issues this very aggressive injunction. The case goes up to the Tenth Circuit, and the main issues are whether the plaintiffs here have standing in the first place to get an injunction under the case Lyons v. City of Los Angeles, and then whether the injunction itself was appropriate, or at least whether parts of the injunction were appropriate. So the court starts with Lyons. And Lyons is this idea that, if you want to stop the cops from violating the Fourth Amendment going forward, you basically need to show that you've been harmed by their policy once and that you're likely to be harmed by it again, or there's a substantial likelihood. And what the court says is, unlike Lyons, who was held in a chokehold by LAPD where it was sort of unclear whether that was part of the policy, and the policy said only use chokeholds as a last resort, what the Supreme Court said in Lyons was there's not really a strong likelihood that Lyons can say he's going to get pulled over again, resist lawful orders, and have a chokehold used as a last resort. So we don't really need to get into whether he can stop the chokeholds from happening. And the court in Shaw, the Tenth Circuit, says, well, this case is different because there's a very substantial likelihood that you're going to get pulled over. They say traffic stops are routine. It's often beyond the driver's control. They pointed out that in one of these stops, the trooper effectively drove somebody off the side of the road and then used that as the reason to stop them. Some

of the stops were for people going seven miles an hour over the speed limit. So if you can get pulled over and subjected to this policy just for going five or seven miles an hour over the speed limit, there's a pretty strong likelihood that you're going to face this policy again so long as you're an out-of-stater driving to or from Colorado. And the court says that although there was no formal policy of violating Vasquez and using the two step, the training sort of let people know they could do this, and that's enough for Lyons because there's a pattern or practice. So they have standing. They can get this injunction. All three judges on the court agree. And then they move on to the injunction itself, and that's where things, I think, get interesting. Judge Federico at this point is writing for the majority of the court, and the first challenge to the injunction is whether it violates federalism. And what Kansas Highway Patrol is saying on appeal is And what Kansas Highway Patrol is saying on appeal is that federalism is an equitable consideration that the court is supposed to consider, and by having an injunction against a state entity and requiring them to do certain things, the federal government is interfering with federalism. And they rely on this Supreme Court case called O'Shea, where there had been a pattern of racial charging decisions in criminal cases, and the court entered an injunction that put restrictions on who could get bond, how courts could sentence people, and who would end awards of jury fees. And the Supreme Court said, you can't do that because of federalism. You're interfering with the state criminal process. The Tenth Circuit says, yeah, we have cases like Younger v. Harris with Younger abstention. Federal courts are not supposed to interfere with state trials. So O'Shea says one thing, but we're not dealing with state trials here. We're just dealing with telling the state police that they have to follow the federal Constitution. But then there's this second case called Rizzo, and after two trials in that case there was proof that Philly cops were engaging in racist behavior, and the district court required the Philly Police Department to change how they were handling citizen complaints of police misconduct. So basically, it put in this injunctive regime to make sure that Philly was taking citizen complaints of police misconduct more seriously. It goes to the Supreme Court, and the Supreme Court says, you know what, the plaintiffs here don't even have standing. So that's where the holding of the decision ends. The Supreme Court reverses on standing grounds, but the opinion is by Chief Justice Rehnquist, and he goes off on this lengthy detour to say, quote, “going beyond the considerations concerning the existence of a live controversy in this case,” comma, he doesn't think that federal equity power should be extended to the fashioning of prophylactic procedures for state agencies designed to minimize misconduct. So what he's saying is that even though there's no standing in this case, I would just like to say that federalism means federal courts don't have the power to stop state actors prophylactically from violating the Constitution. This would sort of get at Miranda warnings and stuff like that, where the Court isn't interested, or some justices on the Court aren't interested, in prophylactic measures to make sure the states comply with the Constitution. They say, you know what, a declaratory judgment is enough, an admonishment. Tell them they've been behaving badly and should do better next time, and that should be enough to protect everybody's rights. And the Tenth Circuit says, okay, Rizzo is pretty on point, and maybe we can split hairs if we need to about how to distinguish that case. But what we're going to say is we review the granting of the injunction for abuse of discretion, and we don't think the federalism concerns in this case are so strong that they outweigh the need for the injunction. So we're not going to set aside the injunction on federalism grounds under the abuse of discretion standard. And so everyone agrees to this point. There is standing, there's no Lyons problem, and granting an injunction was fine. And that's where things start to get messy, because Judge Federico loses his majority.

A Anthony Sanders 22:14

You think he got all that way?

J Jared McClain 22:16

I know, I'm reading and nodding along. I'm like, okay, yeah, good, good stuff in here. And then you get to the actual meat of the case, and Judge Hartz takes over, writing the rest for himself and Judge Kelly about the scope of the injunction. And they start by saying there's no evidence that had KHP trained its state troopers on Vasquez, it wouldn't have solved the problem. So they're saying, you have all this evidence showing they just didn't think they needed the training, and that's why all of this continued to happen. But all you had to do was enjoin them to put the training in place, and then we could reasonably believe they would follow the training. There's no evidence they wouldn't. They point out that after the plaintiffs filed this lawsuit in 2020, KHP did start training, and there was no evidence that the training was ineffective. So they say, you know, the training was good enough. We didn't need to go beyond that. And the majority says, while federalism lets you do something, you need a really strong showing of necessity. And they say that an emphatic reminder that you're violating the law is enough, and that if KHP doesn't listen, you could always bring another lawsuit or go back to the court, if it retains jurisdiction, and ask for more forceful relief in the injunction. And then they get to the Kansas two step, and they say, hey, our cases have said the Kansas two step is fine in certain contexts. So the broad injunction here was inappropriate. And they base that on some criminal cases and motions to suppress where trial courts held that the criminal defendant had given voluntary consent and that the Kansas two step was fine on the facts of those cases. And the fight then becomes over what's voluntary consent and how you tell when there's voluntary consent. And the dissent later, Judge Federico, who loses the majority, says, hey, the trial court listened to a ton of evidence and found as a factual matter that the stops here were not consensual, that the drivers did not give their knowing and voluntary consent. But the majority says it's the Fourth Amendment, so it's a totality of the circumstances test, and whether there's reasonable suspicion or probable cause is a question of law that the court should review de novo and not give deference to the trial court that heard the evidence. And so that sort of becomes the whole crux of the case. Should the court on appeal decide as a matter of law that there was voluntary consent, or should it defer to the trial judge's findings? And to me, it feels different to say whether there's probable cause or reasonable suspicion is a question of law versus whether there was actual consent in the case. To me, that feels binary. The driver either consented or they didn't. That should be a factual matter that goes up with the case on appeal, and then the court is just determining, in the absence of consent, whether the seizure was supported by reasonable suspicion or the search by probable cause.

A Anthony Sanders 26:06

It seems like it's almost like the Tenth Circuit, or at least this two-judge majority, is saying that when we're talking about an injunction, we can't just look at the facts of this case. So it almost seems like the reasoning is that you can't have an injunction against this practice because it's always going to depend on the facts.

J Jared McClain 26:29

Right. They're saying, sure, there are some... and I do think there's a more convincing way to say it, like you just did, rather than relying on some cases that have allowed the Kansas two step and then saying, well, we've allowed it sometimes, so you can never enjoin it. Yeah, and they are treating it as a facial challenge, but its not that. -even though it's not a facial challenge. And as the dissent points out, the injunction wasn't against all Kansas two steps. It was against Kansas two steps without voluntary consent. So the injunction is really just going to this issue of consent, which should be a factual determination, at least in my mind. And so that would leave it to the trial courts to decide whether there was consent, and if there wasn't, then you violated the injunction. And that seems perfectly workable to me. But the majority sort of shrugs off this idea that you can ever tell whether someone's given consent. They say, how much difference is there really between an officer taking one step away or taking five steps away? If the officer says goodbye instead of have a nice day, does that make a difference? And then they realize how far afield they're getting, and they say, we do recognize that all of these points are a little abstract. But to your point, they're saying, I guess because the Kansas two step is allowed sometimes, we then have to allow it all the time, and that a trial court has no power to enjoin unconstitutional practices.

A Anthony Sanders 28:11

Nick, curious, your thoughts about all this? First, have you ever driven through the state of Kansas?

N Nick DeBenedetto 28:17

I have not. I'm sad to say that I am not very well traveled, but the next time I do, I will be sure to try to avoid making it look like I'm coming from Colorado. So that's good. This was a really interesting case, and I had a couple thoughts as I was reading it. And I would be curious, first, as a historical question, do either of you know the origin of the Kansas two step? And I ask this because there is a Supreme Court case that I'm familiar with from my work here at IJ called Rodriguez v. United States. And the punchline of Rodriguez is that a law enforcement officer will violate the Fourth Amendment during a traffic stop if he starts doing things beyond the scope of completing the traffic stop. So one could look at the Kansas two step and say this could be a clever way to try to get around that, because on the one hand, the police officer could say, I've completed my traffic stop, and now I'm moving on to something else. So I'm curious if either of you know, was this an attempt to get around... it's not just Rodriguez. There's another Supreme Court case from around 2005. I don't know if it's Caballes or Mendenhall or one of those cases, but it had a similar holding.

A Anthony Sanders 29:28

I'm sure Jared has the info on all of that.

J Jared McClain 29:31

Yeah, I do not know the actual answer, but reading the way they set this up and the way they trained the officers, I'm almost certain that it's a response to Rodriguez. We can't extend the stop, so we just need to get consent. And you get consent by doing a little shimmy and shuffle back and then saying, hey, I've got one more question for you.

A Anthony Sanders 29:47

And often the shimmy itself may be a way to just keep the stop going, but it may also be a way to buy time for the car with the canine to get there. Then they can have the dog go around and do whatever it does and supposedly establish probable cause for the actual search to piece it together.

N Nick DeBenedetto 30:08

The piece about the canine too is interesting, because I think this case is a really good illustration of why, or how, determining consent is really a challenging thing to do. Police officers can ask for consent to search your car, and then if you deny consent, they can call in a canine, and you're detained there while waiting for the canine to show up before it does the perimeter sniff. So it's like, are you really free to go at that point? And is it really non-coercive if you understand that you're going to have to sit there and wait for the canine anyway? So that was another thing I was thinking about. This area of Fourth Amendment consensual encounters with the police is very messy, and I understand that it's fact intensive, but there is just a lot of doctrinal messiness here that I think the United States Supreme Court should probably wade into at some point.

J Jared McClain 31:09

Yeah, I think what they are trying to do, and why I said I think this is designed to get around Rodriguez, is they are trying to draw a clear line of demarcation and say, we have not extended the stop at all. We are handing them the ticket. We are saying, drive safely, have a nice day. That is the Rodriguez line. We have not crossed it. Everything that happens now is in a separate category. And as long as we get voluntary consent, we can extend this. We can extend the stop long enough for the canine to come, and we can do any investigative steps we want as long as there's consent. And I think that's why so much of this is super interesting to me and shows how hard it is to litigate these Fourth Amendment cases, given the record that the ACLU built and how they showed there was not voluntary consent in the instances involving all their plaintiffs. And then you get up to the court and there's this big fight over standard of review, which is typically taken as a pretty boilerplate, boring thing where everybody just sort of tacks it on before the argument in their brief. But it's doing all of the work here, whether or not you're going to give deference to the fact finder on whether there was voluntary consent.

N Nick DeBenedetto 32:26

And I'll just say one last note to one of the things Jared just said, which is that as I was reading the case, it was apparent to me that the architects of this case really had their ducks in a row. I mean, they worked hard to make sure their factual record was very strong, that they were prepared for the inevitable argument over Lyons. And having done a little bit of similar work here at IJ, my hat is off to them, because it's clear they took a very organized approach to this case, and they came prepared.

A Anthony Sanders 32:57

Yeah, the plaintiffs in this case are the ideal plaintiffs you'd want for the challenge. They were stopped, right? They didn't get arrested and go to jail, but their rights clearly were violated. And so the case all comes down to this kind of fourth step out of all the steps you can have with judicial restraint, which is, well, how can we avoid having to do an injunction here?

J Jared McClain 33:24

Yeah.

A Anthony Sanders 33:25

It's going to be really complicated.

J Jared McClain 33:26

And one thing that I glossed over that I wanted to get to, there were a couple good points in the dissent about this federal question and federalism question, and the power that federal courts have to stop state actors from violating the Constitution. And he's like, to me, that's what the Civil War and the Civil War Amendments were about, and all those are pretty open-and-closed questions. And I know whether federalism is in vogue switches sometimes from presidency to presidency, but if federal courts don't have a mechanism to make state bodies follow the Constitution, then there's not much point left to the Constitution. And the dissent points out here that one thing that makes the federalism concerns particularly inapt is the fact that Kansas is targeting out-of-state drivers engaged in interstate travel. And our collective federalism, as the Supreme Court has said, means you should be able to drive from state to state without being mistreated because of what state is on your license plate tags.

A Anthony Sanders 34:44

Really good point. That's kind of the apotheosis of federalism and the reason for the federal government: traveling between the states. Yeah. Well, we're going to turn from the Fourth Amendment to the Second Amendment in a context we're less used to, and that's out in California in the Ninth Circuit. So Nick, tell us the story of switchblades and whether you can ban them.

N Nick DeBenedetto 35:11

All right, so my case is called Knife Rights, Inc. v. Bonta.

A Anthony Sanders 35:16

That's a great name for your organization in the case.

N Nick DeBenedetto 35:18

It is. Knife Rights is basically a nonprofit organization that seeks to advocate for the ability to keep and bear bladed arms under the Second Amendment. So Knife Rights, Inc. and two retailers of bladed weapons brought a facial challenge to portions of the California Penal Code that banned the possession, sale, transfer, and carry of switchblade knives. This was a unanimous opinion by a three-judge panel of the Ninth Circuit. It was written by Judge Wardlaw and joined by Judges Gould and Koh. One of the things I think is interesting about this case is that the facts are far simpler than Jared's case. So what I thought I might do is give a little bit of context for the Second Amendment, particularly in the Ninth Circuit, and then, if we have time, go through the case, but also talk about some of the things that were not directly discussed in the case, which I actually think makes this opinion more interesting for the things it does not discuss than the things it does discuss. So here, California, like I just mentioned, maintains a couple different provisions of its Penal Code that severely restrict what you can do with switchblade knives. And as a starting point, some listeners may justifiably be wondering, well, why are we talking about knives? Isn't the Second Amendment about guns? And this is just kind of a friendly reminder that the Second Amendment refers to arms, which in Heller the Supreme Court explained are “weapons of offense or armor of defense,” and that the Second Amendment extends prima facie to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding. And since Heller, a couple of courts have recognized different sorts of arms that are protected under the Second Amendment. And since today is our Second Circuit episode, if memory serves, there is a case out of the Second Circuit somewhere that said that nunchucks are a protected arm under the Second Amendment.

A Anthony Sanders 37:24

That's right. I was hoping you'd bring that up- the nunchucks case.

N Nick DeBenedetto 37:27

There are other courts that have recognized that knives are protected under the Second Amendment, and the Supreme Court itself has recognized that stun guns are protected under the Second Amendment. So this is not really some sort of brave new world that we find ourselves in talking about non-firearm arms. And so the other thing we may want to define at the beginning is a switchblade knife, because that might be a little ambiguous to some listeners. California defines a switchblade knife as a knife having the appearance of a pocket knife, and includes a spring-blade knife, snap-blade knife, gravity knife, or any other similar type of knife, the blade or blades of which are two or more inches in length and which can be released automatically by flick of a button, pressure on the handle, flip of the wrist, or other mechanical device, or is released by the weight of the blade or any type of mechanism whatsoever. So listeners, if you close your eyes right now and envision a pocket knife, and take that same pocket knife and give it sort of a spring-loaded mechanism that engages the blade and brings it from the folded position to the fully extended position, you now have a switchblade knife, and that's what is covered by-

A Anthony Sanders 38:44

- two inches long or more

N Nick DeBenedetto 38:46

Correct.

J Jared McClain 38:46

So it's like a bump stock for knives?

N Nick DeBenedetto 38:48

Kind of, yeah. That's an interesting comparison. And so the court begins its analysis by saying that primitive switchblades go all the way back to at least the 18th century, but the ones we're familiar with now are fairly new and come around shortly after World War II. And so under Bruen and Rahimi, I assume most of our listeners will be familiar with the test we use now for the Second Amendment, so I won't spend too much time rehashing Bruen and Rahimi other than to say that the test is the text, history, and tradition test. So we focus now on whether a state can produce a historical analog to the type of law that's being challenged, and if the historical analog is consistent with our nation's history and tradition of regulating firearms or other kinds of arms, that's what the state would need to show to demonstrate that the law is constitutional. And the Bruen test has its detractors and its defenders, and there is a lively scholarly debate going on about that right now. But one thing that I thought might be important for listeners to know is that ever since Heller was decided in 2008, the Ninth Circuit has not been an especially hospitable place to bring Second Amendment challenges. Judge Lawrence VanDyke of the Ninth Circuit generated some controversy in the last couple of years when he pointed out in a dissent that, with an almost perfect record, every time a three-judge panel in the Ninth Circuit has found that a law violates the Second Amendment, that panel decision has been vacated and reversed by the en banc Ninth Circuit. And en banc review, as listeners probably know, is fairly rare. So part of Judge VanDyke's point is that this is something the federal appellate courts engage in infrequently, and yet every time there's been a finding that a law violates the Second Amendment, that three-judge panel decision has been reversed en banc.

A Anthony Sanders 41:08

And I should jump in here and say we did one of those rare birds a few months ago, and I frankly haven't tracked it for our “Where Are They Now?” series. And I don't even know if it's gone en banc or not, but I would not be surprised if it has or it's about to.

N Nick DeBenedetto 41:27

And so the court spends time... as I said, it opens by noting that the kind of modern switchblade knife is fairly new. It comes around after World War II, and the court states that there was an apparent uptick in the use of switchblades in criminal activity starting around the 1950s, and that's when states and the federal government got into the business of regulating them. So the court then provides us with a little summary of Bruen and Rahimi, laying out the different aspects of the Bruen test, and the Ninth Circuit says that it is going to assume, without deciding, that switchblade knives fall within the ambit of the Second Amendment, and then proceeds to the historical analog portion of the test. And when reasoning by analogy, as Bruen describes, the Supreme Court explained that there are really two questions courts should ask: how does the law being challenged burden the right, and why? And if this “how and why” is sufficiently analogous to other laws that the state can produce from our nation's history and tradition, then the law being challenged could survive constitutional challenge. And so the Ninth Circuit says that if you look back through the history of regulations of Bowie knives and other kinds of knives like this, and I'll explain a Bowie knife in a second, but things like the Bowie knife, the Arkansas toothpick, daggers and dirks, sword canes, and slung shots.

A Anthony Sanders 43:19

It sounds like a Dungeons and Dragons campaign.

N Nick DeBenedetto 43:22

It really does. And so there are these categories of weapons that states regulated, most notably by prohibiting the concealed carry of these types of weapons. And so the court concludes that because states were regulating these types of knives and slung shots, which, for those who don't know, is a piece of rope with kind of a weighted ball at the end that was used for a couple different things, but most notably if you were to sneak up on somebody and hit them over the head with it, that could do some damage at close range...

J Jared McClain 44:10

It stays attached right, it's not like a slingshot?

N Nick DeBenedetto 44:13

Correct.

J Jared McClain 44:14

It's like a tetherball court?

N Nick DeBenedetto 44:15

Yeah, I didn't have the opportunity to look up a good picture of it before sitting down to record this podcast, which I probably should have, but I imagine the effect would be much the same as if listeners recall a couple years ago there was a video of a guy at a protest who snuck up on somebody else and hit that person in the head with a sock containing a lock inside the sock- similar kind of effect.

J Jared McClain 44:42

It kind of looks like a dog chew toy, like a ball on the end of a rope.

A Anthony Sanders 44:46

I think there's a different name for, like, the medieval weapon style of that.

J Jared McClain 44:52

With like the spiky ball on it?

N Nick DeBenedetto 44:55

Isn't that a mace?

A Anthony Sanders 44:57

Well, a mace has a handle, right? Yeah, but there's one with, like, a rope and a heavy thing on the end of the rope. Anyway, we have a colleague who's really into medieval martial arts who's probably going to listen to this and shake his head at all of us. But anyway, we'll do our best to continue.

N Nick DeBenedetto 45:17

So the panel looks at this and says there is this tradition, based on the practice of several states, of prohibiting concealed carry of these types of weapons. And the purported why... so the how was you may not carry these types of weapons in a concealed manner, and the purported why is that these knives were used in fights and duels and were known to be fighting knives or intended for interpersonal combat. And as a result, in an effort to curb the crime problem, you could not carry these weapons concealed. And so the Ninth Circuit says that, although switchblades are not exactly the same thing, that is a close enough analog to justify upholding this California regulation, because the question of whether or not this is truly a ban is one of those things I want to talk about that's notable for not really being discussed in the opinion to the extent it probably should have been, or we may have wished it was. But first, to circle back to Bowie knives, what is a Bowie knife? So I found this definition courtesy of Dave Kopel. In full disclosure to the audience, Dave Kopel does a lot of Second Amendment scholarship

A Anthony Sanders 46:41

And he's been on Short Circuit.

N Nick DeBenedetto 46:43

He's been on Short Circuit. And I believe, if he did not author a brief in support of the challengers here, his work gets cited by them. So I just want the audience to be aware of that. But he says that the term Bowie knife originated after frontiersman Colonel Jim Bowie used one at a famous “sandbar fight” on the lower Mississippi River near Natchez, Mississippi, in September of 1827, and this knife had been made by his brother. The knife was intended for hunting. The length of the knife was about nine and a quarter inches long, with a width of one and a half inches. It was single edged, and its blade was not curved. And Dave Kopel notes that nothing about that was sort of unusual for the time. This resembles a hunting knife that you would have found all over the continental United States at that time. So the Arkansas toothpick is another similar rendition of this Bowie knife, but it was more common in places like Arkansas. Finally, a dagger is a straight knife with two cutting edges and a hand guard, and a dirk was originally a Scottish fighting knife with one cutting edge. And then other things that get swept up into these historical regulations are sword canes, which is exactly what it sounds like, a walking cane that concealed a sword, and then a slung shot, which we've already talked about as being a sort of rope with a heavy metal or other heavy ball at the end that you could use to strike someone. And so what's interesting, I think, and feel free to jump in as you guys have thoughts, is that there were a few things I thought were particularly interesting about this opinion. The first is that when you look at the provisions of California law being challenged, the court spends most of its time discussing the restrictions on your ability to carry a switchblade knife concealed on your person out and about. But there's another portion of the California Penal Code that says such knives have to be surrendered. So without doing a comprehensive look at the penal code, you could just look at the portions cited in this opinion and think, well, it's a little ambiguous whether this is just a restriction on carrying the knives or whether they are in fact banned outright. And that's kind of important, I think, for the rest of the analysis, because the laws that the Ninth Circuit relies on to identify the history and tradition of regulation here are all laws that prohibited concealed carry of these knives but did not make the knives illegal. And as a matter of fact, there was one state, Georgia, that had a statute banning the Bowie knife, and that statute was subsequently found unconstitutional under the Second Amendment by the Georgia high court. And that is a detail that gets left out of the three-judge opinion here. But if you go poking around in the amicus briefs filed in this case, that is some information you will discover.

J Jared McClain 50:13

Can I ask a question about that? I obviously understand the distinction between concealed carry and not, but when we're talking about a knife here, and if the law is just forcing you not to conceal it, is the point of that law just so people know not to get in a fight with that person because he's got a big knife on him? What's the government's interest there? What is concealed versus not concealed accomplishing?

N Nick DeBenedetto 50:41

So my understanding, and Anthony, I wouldn't be surprised if your historical research sheds a little more light on this, is that there was some discussion in Bruen, and then also in a law review article I'm aware of, about how carrying a weapon in a concealed manner back at the time of the founding was viewed as sort of a dishonorable practice. It was seen as the kind of thing criminals would do and that an upstanding citizen would not do. And if memory serves, Bruen dedicates a portion of the opinion to saying that the norm of concealed versus open carry has evolved since the time of the founding. However, we wouldn't understand that to completely neuter the right to bear arms in public.

A Anthony Sanders 51:37

Yeah, I think you basically nailed it there, Nick. In a society like the founding era, where a lot of people did carry arms, whether it be a sword, a knife, or a firearm, you would carry it openly. It wasn't shocking to see that. To carry it in a more concealed manner was seen as a little more unusual. So that's why you might ban the concealing. And it was just kind of common knowledge that there were going to be people walking around with it open.

J Jared McClain 52:10

So it's almost like they're linking concealment with like "you're probably going to do a crime." It's almost like prophylactic.

A Anthony Sanders 52:18

Yeah, I don't know if it's probably going to do a crime. It's that you're kind of outside the norm. And so why would you want to conceal it, right? Because you know people are walking around with arms.

J Jared McClain 52:29

And it's interesting, because I understand the history and tradition test, but that's also, like, we have a tradition, then, of like, regulating, almost like, nobility or morality around the weapon, and that seems like a weird government interest to endure.

A Anthony Sanders 52:47

I think it's really good point, Nick. I mean, it's pretty obvious too. It is quite a stretch from that kind of law to an outright ban, and in saying, well, it's just part of our history and tradition. I mean, it almost stretches credulity.

N Nick DeBenedetto 53:03

And one other thing that I think would be interesting to bring into the conversation is that here the three-judge panel of the Ninth Circuit affirms the district court, but for different reasons. And since we had no dissent in this case, I thought it was worthwhile to check out the amicus briefs just to see what the other side was arguing. In the district court, the judge upheld the California regulation by concluding that switchblade knives are not commonly used for self-defense and are dangerous and unusual. And this is significant because Bruen explicitly says this sort of analysis is not appropriate anymore. Before Bruen, there was a pattern in the lower courts where they introduced this sort of threshold test: is the thing being regulated or banned actually an arm under the Second Amendment? And if they could conclude no, or that it wasn't in common use, then the court didn't have to engage in the historical analysis and do the hard work of figuring out whether the Second Amendment appropriately covers these things. Even after Bruen, the briefs of the Second Amendment Foundation and the National Rifle Association point out that some courts have kind of reintroduced this threshold step before going on to history and tradition. Those briefs spend a lot of time talking about how considerations about what is in common use and what is dangerous and unusual belong in the historical portion of the court's analysis under Bruen. This idea about whether the Second Amendment is even implicated is, according to Bruen, supposed to be a rather low-threshold inquiry. So if you're dealing with something that is a bearable arm, the Second Amendment is implicated, and then we're on to history and tradition, where you talk about what's in common use and whether a particular weapon or arm is dangerous and unusual. And the Ninth Circuit settles on upholding the California laws on the basis of the history-and-tradition test, but it doesn't spend a lot of time talking about why the district court was wrong to do what it did, which I think is interesting, because the amicus briefs point out that the Ninth Circuit has apparently blessed this sort of threshold inquiry before we go on to history and tradition. So there's arguably a little tension within Ninth Circuit case law on this, even post-Bruen. And so for anyone who thinks this might be a trivial question about knives and whether they belong under the Second Amendment, there's a more rigorous methodological point to be made in this case as well that the amici were very eager to point out. And if the California law is in fact a ban on the possession of switchblade knives, then the government is on weaker footing, because sure, you can regulate the ways in which one could carry switchblade knives. There's a historical tradition of prohibiting concealed carry. But an outright ban would be much harder to defend under the history-and-tradition test.

A Anthony Sanders 56:53

Well, I suspect with all the intransigence, you might call it, in the Ninth Circuit, even after Rahimi and on the Second Amendment generally, and with the pending cases at the Supreme Court about the Second Amendment, where we'll get some more data points — and we don't need to go into those today, but listeners can find them and probably know a bit about them — also the one about drugs and the Second Amendment, we're going to get some more tea leaves at the low point or explicit instructions at the high point from the Supreme Court. And I think a lot of these Ninth Circuit cases are going to have to come up with a new way to deny Second Amendment rights in the Ninth Circuit than the way they've been doing it recently. But we are running long on time. I would thank you, Nick, for that great description of the case, and I encourage people to watch it, and we will continue to watch it here. But before we close, a little bit on the Second Circuit, which we did not cover today. Now, if people want to deep dive into the Second Circuit, they can go find a show we did a few years ago called “Live from New York, It's Short Circuit,” which was all about the Second Circuit. So that was Short Circuit 243, a Short Circuit Live we did in Manhattan a few years ago, which was really close, I think, to the Second Circuit courthouse, which, by the way, from what I can tell, is the only courthouse where they regularly hold argument. And you'll hear from three former Second Circuit clerks who were part of that panel that Patrick Jaicomo hosted. So we'll put a link to that in the show notes. But kind of the general information about the Second Circuit is that it covers the states of New York, Connecticut, and Vermont. So it's not big state-wise, but of course there's a fair amount of population there. It has 13 authorized seats, and as we record this, they are all currently filled, although there are 14 senior judges, so they get a fair amount of work there in the Second Circuit and have a fairly big docket. The circuit justice is Justice Sotomayor, which is appropriate. And a few other things about the Second Circuit: they are kind of notorious for very rarely going en banc. They think, you know, stick with the panel. I think that's slowly changing as the circuit makeup becomes a little more ideologically diversified. It's not exactly overwhelmingly one side of judicial ideology over the other, but it has leaned a bit in one direction for a number of years. In their opinions, I appreciate the use of Palatino font, which a couple circuits use, so they don't just go with Times New Roman or the Courier we talked about in the First Circuit. And IJ over the years, our track record in the Second Circuit... we've been there a few times. Not the greatest. We had this epic case called Brody that my colleagues Dana Berliner and, near the end of it, Bob McNamara when he was first starting at IJ litigated. It was a property rights case where our client was treated atrociously, taking his property to build a port, with some supposed improvement by a port. And so there were procedural due process claims, property rights claims, all this stuff. They had to go up and down to the Second Circuit I think three times. Anyway, we had a little bit of success in that case. Some other cases, not as much success. We had a property rights case just recently that our friend Jeff Redfern argued. At first it didn't go so well. We got three votes for cert at the U.S. Supreme Court, but that's not enough — you need four. And then the district judge amazingly awarded fees to the other side for even bringing the case in the first place. We went to the Second Circuit and said, come on. And anyway, that had a happy ending where the Second Circuit said, no, this is not justified, to award fees against the plaintiffs in this case for trying to defend their property rights. So that's another tale of the Second Circuit and IJ. We won't go on about the others. Either of you have special Second Circuit thoughts?

J Jared McClain 1:01:38

It's inhospitable. I have never felt warmly invited there with my legal arguments or my team's legal arguments. I only have maybe five anecdotal experiences to go off of, but it feels pretty status quo-oriented. It doesn't even matter who's in power, the government is likely to win, is my general sense of it. And I'm always told that it's tied up with, well, it's the banking center of the world, and so they have a different perspective on government regulation. But it seems to just sort of reach every form of government regulation, no matter who's in power and what they're regulating. In the five cases I've worked on there, none of them have ever felt like they got a real grappling with the constitutional issue, except for what was it, Judge Menashi's dissent in Redfern's case.

A Anthony Sanders 1:02:43

That's right, the first time up, yeah, yeah. So, yeah. Well, I don't think Jared is bitter. I think he's taken a measured approach from experience. But maybe we will have happier times in the future in the Second Circuit. But overall, yes, because it's the Second Circuit and it's New York, it has a lot of cases in the banking sector. A lot of admiralty law cases go through the Second Circuit. Years ago, I did a little admiralty law, and either the Second Circuit or the Fifth Circuit seemed to have most of the case law. Well, so that's the Second Circuit. Look forward in the future, dear listeners, to other circuits as we go through the circuits and months in 2026. But for now, we'll leave it there in Manhattan at the courthouse. And I'd like to thank my colleagues here for their tales of Kansas and California. Until next time, please be sure to follow Short Circuit on YouTube, Apple Podcasts, Spotify, and all other podcast platforms, and remember to get engaged.

N Nick DeBenedetto 1:03:51

Keep your nunchucks on you in the Second Circuit.