

ShortCircuit434

📅 Sat, Jun 27, 2026 9:59PM ⌚ 45:51

SUMMARY KEYWORDS

Midwestern jail fees, SWAT tactics, Eighth Circuit, Seventh Circuit, Black Hawk County, Madison Wisconsin, abusive fines, confession of judgment, due process, qualified immunity, excessive force, exigent circumstances, police tactics, civil forfeiture, legal standing.

SPEAKERS

Michael Soyfer, Anthony Sanders, McCarley Maddock



Anthony Sanders 00:11

Midwestern jail fees and SWAT tactics this week here on Short Circuit, your podcast on the federal courts of appeals. I'm your host, Anthony Sanders, Director of the Center for Judicial Engagement at the Institute for Justice. We are recording this on Monday, June 1, 2026. And yes, we have two cases from the Great Midwest, one from the Eighth Circuit and one from the Seventh Circuit, but they're right next door to each other, one in Iowa and one in Wisconsin, and they are about some pretty terrible things that sometimes happen when you get involved with the courts and law enforcement, and we'll see what the courts thought about that along the way. Joining me today are two of my Institute for Justice colleagues, they are Michael Soyfer and McCarley Maddock, and we will hear from Michael in just a moment about our Eighth Circuit case, which comes out of Black Hawk County, Iowa. I'm pretty sure Waterloo, Iowa, is the biggest town in that jurisdiction. And then later we will hear from McCarley about this lawsuit that comes out of Madison, Wisconsin, which makes me excited, because I spent a very brief and poor but interesting year in Madison when I was a grad student, and so I hear McCarley, you have spent some time there as well, so are you a Madison fan?



McCarley Maddock 01:39

am a Madison fan, but I have only been in the warm weather, and I feel like that colors my view of Madison a little bit. But yeah, it's beautiful. It's right on the lake. They have a great little farmer's market that I've been to, really fantastic.

A

Anthony Sanders 01:54

Walked up and down State Street, I imagine.

M

McCarley Maddock 01:57

Yes, definitely.

A

Anthony Sanders 01:57

State Street. I went there. I went back there a couple years ago, and State Street still has very affordable hot dogs if you're a student in a pinch, so I always appreciated that place. But we're gonna go to Madison later. For now, we're going to go over to Iowa, which is Black Hawk County. This place is kind of just central northwestern Iowa, maybe some people don't think there's a lot going on there, but actually there were some nefarious practices at the county jail, which now have been called out by the Eighth Circuit. So Michael, tell us the story of this case, and it's a case actually where the Institute for Justice, along with some other organizations, filed an amicus brief.

M

Michael Soyfer 02:45

We did not—me personally, but you know, hopefully this case is the Waterloo for abusive revenue-generating fines and fees. Very good, very impressive.

A

Anthony Sanders 02:57

Thank you.

M

Michael Soyfer 02:58

Yes, the tie-in there. I'll see myself out. No, I'm kidding. We'll slog through the standing analysis in this. So this county has a policy of charging people in the county jail for their stay. It charges a flat fee, and then a daily fee per day of their stay. These two specific plaintiffs were both incarcerated there for DUIs, one collectively for nine days, so not really very long, the other one for 57 days, although that was apparently not consecutive, so maybe should be getting behind the wheel a little bit less after drinking. In any event, upon release, they're both handed these pieces of paper called Confessions of Judgment, and they allege they are forced to sign them or coerced into signing them because they're told they won't be given their personal effects back if they don't sign them.

A

Anthony Sanders 04:11

So they could leave but they couldn't get their stuff,

M

Michael Soyfer 04:21

Right, you can check out of the Black Hawk County Jail anytime you want, but you can never leave unless you sign a confession of judgment, which is what they both did, and the confession of judgment sort of operates like a cheat code for state debt collection cases, where instead of having to file a lawsuit and slog through all of the defenses and actually litigate the case and do discovery, they can just file the confession of judgment. The confession of judgment says, yeah, I owe this amount of money, I'm not going to fight it as a stipulation of signing this sheet of paper, and they can just go collect the money, so the confession of judgment also allows them to keep whatever money the person had on them when they entered the jail, and they actually take \$75 from one of the plaintiffs in this case, based on that. It also says that they have to make \$25 minimum monthly payments until they're paid off. So one of the plaintiffs, she's struggling to make the payment, she basically can't pay and support her family at the same time. They send her a debt collection letter. The letter threatens to go to state court to collect this money, and says that she might face additional penalties if she doesn't pay something. They also send a sheriff's deputy to her house, who says, if you just pay \$5 a month, we won't bother you. So she makes a few of those payments, and then she stops. The other guy made a few payments, and eventually stopped. The county didn't actually file confessions of judgment in any court to collect from either of them, and so that's essentially where things stand now. They sue, arguing that was a deprivation of their due process rights. The county deprived them of money and deprived them of all of these defenses that they might have in state court. If the county had to go through a collection lawsuit, it would bear the burden of proving that they actually owe the debt. They could argue that the fees weren't correctly calculated, or that they were constitutionally excessive. When they're forced to sign the confession of judgment, they lose all of that.

A

Anthony Sanders 06:56

It's kind of like they've signed a settlement agreement, so to speak, and all that is at issue at that point is: you owe this chunk of money, instead of, well, the chunk of money isn't as big as it should be because I wasn't in that many days, or whatever it might be.

M**Michael Soyfer 07:11**

Exactly, and the settlement basically says, we won't even assert defenses to this. We owe it; have at our bank accounts, or whatever. And so predictably the district court says they don't have standing and they haven't been deprived of anything because they voluntarily signed these documents. That seems kind of crazy. The Eighth Circuit pretty straightforwardly rejects both of those on appeal. So first, the court on appeal talks about standing. Standing is essentially whether you have the right to sue: injury, traceability, redressability, kind of the three elements of standing. The court goes through each of those for each of the types of relief that the plaintiffs request. So first they have damages. One of the plaintiffs only paid because she was forced to sign this document and then threatened with legal action, and so that's the only reason she paid any money. The other plaintiff, they kept all of the cash he had on him when he was released, and they could only do that because he'd signed this confession of judgment, and then he'd paid additional money under the threat of this confession of judgment. And the court says, well, money is property. They've been deprived of property. That's an injury to them. That's traceable to the county's policy. It pretty straightforwardly rejects this notion that they just signed these papers voluntarily. It's at the motion to dismiss stage. We have to accept their legal theory for standing purposes. We have to accept all of their plausible factual allegations as true, and certainly it's plausible that they signed this under coercion, and it could be redressed by a judgment that says give them their money back. Very straightforward.

A**Anthony Sanders 09:18**

It wasn't coercion, even if it was voluntary. I don't get how that's a standing issue, wouldn't that —isn't that just on the merits, this is you waived your rights to argue about, whether it was enough, however much the money you owed, you waived your right to tweak that, because you signed this, but I don't get how that's standing.

M**Michael Soyfer 09:46**

They kind of get mushed together because of the traceability analysis, and the defendants are arguing this isn't traceable to our conduct because they made a voluntary decision. Yeah.

A**Anthony Sanders 09:58**

Well, a lot of things are called standing when they're not standing, so I guess that's what's going on there. Yeah.

M

Michael Soyfer 10:04

Yep. And so then the court has to conclude that they have standing to seek injunctive and declaratory relief as well. Do they have a threat of future harm such that they can get those forward-looking types of relief? And the court says, yeah, they do. The county points out, we haven't actually filed the confessions of judgment in the court. We haven't concretely said that we would. But the court says, well, there's still a prospect. They're out there, they have been signed, and the county is defending this practice tooth and nail in the district court and the Eighth Circuit, so there's certainly a possibility that the county will file these. That kind of reminded me of the Supreme Court's crisis pregnancy center case from a few months ago, where the Court revived this quote from a Justice Marshall dissent to the effect that the point of the sword of Damocles is that it hangs, not that it falls, and that's what these confessions of judgment are doing. So the court again concludes that they have an injury, that it's traceable, and that it would be redressable through forward-looking relief while this is still hanging out there and the county is still enforcing this policy. And then finally the court gets around to the district court's dismissal on 12(b)(6) grounds for failure to state a claim. Basically, the district court dismissed because it said that they hadn't been deprived of anything. There was no deprivation. Their central claim is a due process claim, and to prove a due process claim, you have to prove a deprivation of life, liberty, or property through constitutionally inadequate process. The district court held that they hadn't proved that first part, the deprivation, and the court of appeals is pretty breezy in rejecting that. They lost money; they lost this opportunity to contest these collection actions in state court. That's a pretty clear deprivation. Straightforward. And then, in the very last paragraph of its opinion, it says, well, they also have to prove that the process of coercing these confessions of judgment was constitutionally inadequate. But, you know what, the district court didn't address that, and the parties haven't really argued that on appeal, so we'll just send it down to the district court to take another crack at it. And my guess is that it will see these same parties again, perhaps in a year or two, arguing about—

A

Anthony Sanders 12:59

Qualified immunity?

M

Michael Soyfer 13:00

Yes, arguing that issue.

A

Anthony Sanders 13:02

Right.

M

Michael Soyfer 13:02

Yep, and so they won on standing grounds, they won on half of their claim, but there's still another way for the district court to get rid of this case if it wants.

A

Anthony Sanders 13:14

And I'm guessing that the amicus brief was pointed at the merits issues, right? So, at least, even though the court didn't rule on the merits, it's at least more educated now in the background as to what this case is all about.

M

Michael Soyfer 13:28

Yeah, our amicus brief—which I didn't work on, just to put that out there; some of our colleagues did—argued the standing issue, and then it pointed out all of the ways that profit-motivated policing distorts incentives, as we see in case after case with coercive and extractive fines and fees, with civil forfeiture, and here with, forcing people to sign away their rights, so that they can be released from jail, get their belongings back, but have to, pay for their lodging.

A

Anthony Sanders 14:12

McCarly, your thoughts about the case?

M

McCarley Maddock 14:14

I had a couple. I think the first one is, if these people don't have standing, who would? I mean, the thing that struck me about the county's argument, and if I'm understanding it correctly, was that they didn't even say we won't enforce these, they just said we haven't yet. Which is kind of a bold argument in my opinion, You're not even going to say we're not going to enforce these two, so this is not appropriate to be litigating, so That just seemed like a weird argument from the county, If you go through all the trouble of litigating this, then at least say you won't enforce these two, I guess. And then the other thing was just the butchering, for lack of a better term, of the 12(b)(6) standard, It's very odd to say there was no coercion when it was alleged that they were coerced into signing these things That just seemed like basic 12(b)(6) rules: you don't get to decide facts, you have to go by the complaint, so I was just a little confused as to why some of these issues were even up on appeal.

A

Anthony Sanders 15:27

And Michael, I'm guessing also that to McCarley's point, that the fact that the county says, well, we haven't enforced these yet, right, they're kind of saying that this issue isn't even ripe, but if they did enforce them, if they did actually go to small claims court, or whatever it is in Iowa state court, and do that, then there would be like an abstention problem, right, for the federal courts getting involved with this kind of lawsuit.

M

Michael Soyfer 15:54

Yeah, we deal with that in one of my cases, where we were challenging Wayne County's abusive civil forfeiture practices, and one of our clients had her car seized, and while our federal case was ongoing, there was also a parallel state court case that she won in the trial court and at the Michigan Supreme Court, and while the proceedings were ongoing, in the trial court and on appeal, they argued successfully for abstention. And then, when we won in the Michigan Supreme Court, they said, "Oh, well, res judicata, you can't raise your constitutional claims, even though the Michigan Supreme Court didn't address them. So it's a little bit like the waiting for Godot style of litigation where we have a claim that never ripens until it's res judicata, and—

A

Anthony Sanders 16:56

I should add, listeners who want to hear more about such things as abstention and shell games between state and federal courts can learn about it on our latest season of Bound by Oath, which has a couple episodes—actually, by the time this is being heard, maybe three or four episodes out in our current season—about abstention doctrines and how people have to deal with these issues. What I have to add to this is I got some flashbacks reading this case about confession of judgment because, in my old private litigation days, I dealt with confessions of judgment in Illinois state court. They always struck me as—so they are actually a thing used in private litigation—but it always struck me as kind of on the verge of something that might be unconstitutional, even though it's between private parties when they use the state court system. And what would happen is, I represented some trust funds, and we'd have someone who hadn't made their payments to the trust fund, usually an employer, and to square away the debt, they'd go on a payment plan and they'd sign this pre-written thing. It was a form contract, and it had confession-of-judgment language. What it said was basically, if you miss a payment, we don't have to sue you for breach of contract. We could just go to court, get this judgment. The judge just signs it right there on the spot, and then we can go collect on the judgment, although I think they had a chance to cure it within 21 days or so. Actually, you don't have to give notice when you do that; you just go to court without having sent anything to the debtor. And I actually did this a couple of times, and one of the times the judge—I had never seen anything like this before, it was just some ordinary Cook County, Illinois, judge—she's like, "I'm not doing that." I give her credit for that, and so we didn't. It was some small judgment in this little dinky case, but I always thought about what her instincts were there. When this seems like it's a coerced situation with holding someone's stuff when they've been in jail, of course I think it's much worse. But that issue has kind of always been out there. I was surprised there isn't a lot of case law on confessions of judgment and due process and all that. This seemed like a pretty unusual case in that way. Michael?

M

Michael Soyfer 19:34

Yeah, it's pretty interesting that they just found this kind of somewhat unusual procedural mechanism to avoid the ordinary litigation process, and then they made it into their standard practice, right? They're just elevating this rare, somewhat rarely used tool into the county's official policy for releasing anyone from jail for a DUI.

M

McCarley Maddock 20:03

And then sending a sheriff to someone's house to negotiate a payment plan is something I haven't seen either. That was shocking.

M

Michael Soyfer 20:12

Yeah, I wonder if they put that in the job description: 5% debt collection, or maybe it's more than that. I don't know.

A

Anthony Sanders 20:20

I guess it goes with delivering summons, a lot of sheriff's offices spend half their time doing, so maybe it rolls into that. Well, thanks, Michael, for that Eighth Circuit story. We're now going to go to the Seventh Circuit in Madison, a different kind of case in that it is about SWAT tactics, but more importantly, qualified immunity. I think people could maybe differ whether the police were in the right here. I think they seemed, at least to some extent, in the wrong. The plaintiff himself is not exactly the most upstanding citizen, but it presents an interesting story about qualified immunity. So tell us what's going on here, McCarley.

M

McCarley Maddock 21:07

So, this case happens on December 13, 2019, and the facts are weird enough that I looked it up to see if it was in fact a Friday the 13th, and it was. So this seemed like an appropriate story for Friday the 13th. This is Frederick Jackson v. City of Madison. Frederick Jackson was at his soon-to-be ex-wife's house on a Friday night, and he was drinking, it sounds like, very heavily. He gets intoxicated enough that his wife, Sherry, just takes his keys and leaves the house, and she leaves him at her house. Around 7:30 he goes to ask a neighbor for a ride home, and the neighbor says no. Then Mr. Jackson leaves the neighbor's house, and the neighbor thinks he hears a gunshot, but he doesn't see anything; he just thinks he hears a gunshot, and he calls the police. The police show up five minutes later, and there are six officers dispatched to Mr. Jackson's wife's house, where Mr. Jackson is. The police think, when they get there, that they see a man holding something over his head. They think it might be a gun; it sounds like that's the implication. They think they're hearing pops. Some of the officers describe the pops differently. One thinks it may have been a car that was going by, another one thinks it's a gunshot, and they see this man, presumably Mr. Jackson, walk into the house and shut the garage door behind him.

A

Anthony Sanders 22:40

And he was holding something right, although it was unclear.

M

McCarley Maddock 22:44

Yeah he's got something over his head, but no one can tell what it is for sure. No one knows what it is. So he goes into the garage and he closes the garage, and then they hear two more sounds that could be gunshots. But basically the officers are trying to piece together information, and they're talking to the neighbor, and they figure out that Mr. Jackson suffers from alcoholism, that he has a weapons history—whatever that means; that's not specified either in the district court opinion or in the circuit court opinion—and they're told by a neighbor that he does have weapons in the home. So the officers think they're dealing with an armed man who has maybe fired a weapon, who's intoxicated enough that his wife has left him alone in the house, presumably just to get away. But where they go from there is where I think there are de-escalatory options, and then there's doing what they do, which is call a SWAT team, a crisis negotiator, and an armored vehicle to the house. They think they may have probable cause to arrest him for disorderly conduct or reckless endangerment. So I looked both of those up in Wisconsin, and they are both misdemeanors. So at this point you have an armored vehicle—what's called, I learned, a BearCat—outside of a guy's house because he may have committed a misdemeanor, but nobody's sure about it.

A

Anthony Sanders 24:12

We've had all kinds of BearCat law, I guess you might say that we've dealt with at IJ in some of our SWAT takings cases that we've discussed on Short Circuit in the past, but yeah, it seems like police departments, they get some extra money from the feds to buy some toys, and they often like buying these massive Bearcat tanks, essentially, that then they, you know, seem eager to use at times.

M

Michael Soyfer 24:41

There was a whole period of time when police departments were buying old Army equipment, and they would have these tactical Humvees, tanks. I think some police departments even had submarines at points in time.

A

Anthony Sanders 24:59

Huh. Well, you could take it out in the lake, in front of UW Madison, perhaps.

M

Michael Soyfer 25:05

Yeah, it wouldn't have been helpful in this scenario, I don't think.

M

McCarley Maddock 25:09

Disorderly conduct on a boat, maybe, is what the submarines get used for.

M

Michael Soyfer 25:13

Yeah true. This story is weird enough to begin with, so we'll leave it at that.

M

McCarley Maddock 25:19

So, once they have the armored vehicle outside his house, they're trying to call him, they're trying to get in touch with him, and he's not responding. Then they're using loudspeakers, and they're not getting a response. Then they turn the emergency lights and sirens on, and there's still no response. Although all I could think about reading this part of the opinion was how disruptive this must be to the poor neighbors. I mean, at this point you're getting late into the night. This is a residential area, and there's an army vehicle and sirens and loudspeakers going on.

A

Anthony Sanders 25:48

And it took hours for it to even show up, right? So they're just all sitting out there for hours. He might have gone to bed, for all we know.

M

McCarley Maddock 25:56

That's what—and the implication is he was fairly intoxicated, so it would make sense for him to lie down at that point. But he never responds, and so the officers finally get a command from their remote command center, and they say, just break into the house. So simultaneously, it sounds like they bust through the back windows and they use the BearCat to knock down the front door. At 1:30 in the morning, the officers are standing at the door, and now Mr. Jackson finally responds. It sounds like the way the house is set up, you open the front door and you're looking directly at the stairs in the house. And so he comes out of the upstairs hallway, and he's standing, it sounds like, at the top of the landing, and he's just in his underwear. He's not armed. He's not holding anything. I would be very confused at this point, and he is yelling at the officers. The officers say, "Come down with your hands up." Mr. Jackson is yelling at the officers. He's telling them to get out. He's asking them what they're doing there. At no point can I figure out a spot where the officers said, "We're here to arrest you," or, "We're here because there was a disturbance call." So all we know at this point is that this guy has presumably woken up from being asleep to five officers breaking into his home, and he's still yelling at them. He won't listen. He won't come down the stairs. And the officers pull out non-lethal rounds and shoot him multiple times with foam bullets, which are non-lethal, but it sounds like they're pretty painful to get shot with. He had, it sounds like, severe bruising. So at that point he doesn't start listening to them; he doubles over in pain because he's just been shot, and they're still yelling. Then he finally starts coming down the stairs, and once he's down the stairs, he's still being belligerent, but it doesn't sound like he's being physical with the officers. He's just continuing to yell at them to get out of his house. Then the officers start to give conflicting commands, so one of them is yelling to walk one way, one of them is yelling to get on your knees. He then sees an officer separate from the ones that are at his front door through his kitchen window in the back of the house. That officer is now involved, and eventually another officer shoots him again with a foam bullet. At that point he's down, they tackle him, and they arrest him. But it sounds like a pretty awful way to spend a Friday night to me. So they eventually arrest him for presumably disorderly conduct and reckless endangerment. He's actually eventually charged with being a felon in possession under the—

A

Anthony Sanders 28:59

That's always the easy way to get someone if you don't know anything else, if they are a felon and there's a gun nearby.

M

McCarley Maddock 29:05

Well, in theory, it should be easy, but he's actually acquitted. Yeah, that's the most impressive part.

M Michael Soyfer 29:12
That's one of many facts that they don't elaborate on.

A Anthony Sanders 29:17
Do you know, McCarley, from doing a little extra research, if it was a jury trial, or how was that? How did that happen?

M McCarley Maddock 29:23
I don't know if it was a jury trial or not. I know that they just argued that they didn't have any proof. They tested—there's no gunshot residue on his hands, they can't find any shell casings, there's no proof anywhere in the house that anything's been fired.

A Anthony Sanders 29:38
I thought maybe his wife was the owner of whatever gun was in the house because she was the one living there? But they didn't even have a gun.

M McCarley Maddock 29:45
As far as I can tell, there is no gun. I don't know.

A Anthony Sanders 29:48
So the shots probably were not him.

M McCarley Maddock 29:51
He maintains that the shots were not him. He says the officers were lying about hearing gunshots at one point.

A

Anthony Sanders 30:01

I revise my original remarks about whether you could argue about whether the police did the right thing here or not. It sounds like it was all pretty bad.

M

McCarley Maddock 30:09

It's definitely an overreaction. I think in a lot of these cases we see it's not the best on any side.

A

Anthony Sanders 30:16

Yes, people.

M

McCarley Maddock 30:17

I don't know that Mr. Jackson was on his absolute best behavior, and he certainly did not comply without complaint, but he's got real reason to be confused and upset. And I don't know that for a misdemeanor I would ever encourage a SWAT vehicle outside a home, that just seems like maybe we could agree that's a baseline overreaction. But anyway, so Mr. Jackson eventually recovers from his very severe bruising, and he files suit in federal court after he's acquitted of the gun charges, and he brings a whole bunch of claims under the Fourth and Fourteenth Amendment, but what makes it up on appeal is he says you arrested me without a warrant, which you weren't allowed to do, and it was excessive force for you to shoot me with foam bullets, when at most I was passively resisting, I was not actively resisting or fleeing, I just wasn't listening perfectly. Although he does argue at one point that he was compliant, which I think is stretching a little bit, but he's definitely not actively resisting. So once he gets to the district court, the district court says you can't bring these claims because they had exigent circumstances to come into the house and arrest you, and they're shielded by qualified immunity, no matter what happens here. So it gets dismissed because of qualified immunity, and it goes up on appeal, and the Seventh Circuit is going to affirm both claims, although on slightly different grounds than the district court did. So the Seventh Circuit starts with the exigent circumstances argument and basically says, you know, you actually do need probable cause to arrest somebody. Exigent circumstances may work to get into the home, it's not going to work to arrest him without probable cause. You still need probable cause, but that's almost just to modify the district court's reasoning, because then they say there was probable cause here. They had heard that there were gunshots fired. They had Mr. Jackson actually admitted that the officers thought they heard gunshots at the district court level, which maybe was not the best admission on his part.

A

Anthony Sanders 32:24

No.

M

McCarley Maddock 32:26

And so the Seventh Circuit is like, well, they had probable cause to arrest. We have to decide whether qualified immunity shields them or not on this exigent-circumstances argument. Basically, exigent circumstances means there's such an emergency that they have to do it without a warrant; they can't go get one. So you're typically looking at things like immediate flight, harm to yourself or others. I mean, this is supposed to be a rare, cabined doctrine. Mr. Jackson says, you were outside my house for five hours, you definitely could have gotten an arrest warrant. And the Seventh Circuit says, well, that might be true, it might not be true, but even though it may or may not be true—and they do say at one point it's a close call with the five hours—qualified immunity still applies, because you have to point to a case that will show us some degree of specificity, and you just haven't done that. Jackson points to a Supreme Court case, *Minnesota v. Olson*, where the getaway driver for a murderous robber is in somebody's apartment, and the police have surrounded the apartment, and the Minnesota Supreme Court says you could have gotten a warrant; the police were surrounding the apartment. Jackson says, well, that applies to me because there were police surrounding my apartment, plus the crime you suspected me of was much less than being the getaway driver for a murderer. And the Seventh Circuit says that's not really close enough, because he could have gotten a weapon here, we don't know, they think he was intoxicated. So they look at some other cases and decide nothing fits, so qualified immunity shields the exigent circumstances. Then they move to excessive force, and unfortunately it's the same story here. He just can't point to a case that fits exactly, because one of the cases he points to, it was daytime and not nighttime, and one of the cases he points to, the person may or may not have been intoxicated. So the Seventh Circuit says, well, you don't have a case on point, and you waived the argument that this was so clearly unlawful that the officers just should have known, which, again, would not have been my choice to omit that argument at the district court. But the Seventh Circuit says you waived it, so you can't bring it.

A

Anthony Sanders 34:57

It probably wouldn't have worked just because that's such a narrow exception, but, yeah, that doesn't help if you don't raise it properly at all.

M

McCarley Maddock 35:04

So the majority says qualified immunity shields you from everything; it shields officers from everything. Dismissal affirmed. And then there's a really interesting concurrence from Judge Jackson-Akiwumi, and it almost sounds to me like it might have initially been a dissent. But the Supreme Court decided a case in March of this year called Zorn, where they granted a qualified immunity case and then they slapped a circuit court down, basically, and said you should have applied qualified immunity. And the concurrence says, well, under that I really can't deviate. I have to apply qualified immunity. I don't love all these problems with qualified immunity, which is nice to read from a federal judge, but it's also a little bit like these have been problems with qualified immunity for years. Why are we talking about this now? She basically says the facts are so weird in this case, what was he going to point to? That happens with a lot of cases. These cases are very often strange; you can't make some of these facts up. So I don't know why it's just hitting now.

A

Anthony Sanders 36:19

She could have been reading and listening to Short Circuit for the last 10 years, and learned a lot of those things. Now I'm sure she's well familiar with it, but her placing the blame for having to concur on this recent Supreme Court case does seem a little random.

M

McCarley Maddock 36:35

Yeah, especially since a lot of the problems she has with qualified immunity have again been talked about for years. She mentions the original history and purpose of Section 1983, which is something we've been talking about a lot here at IJ. This is a law designed to protect constitutional rights, and we've turned it into something—or the courts have turned it into something, not we—that is just a total and complete shield. She talks about how rights never get established, and she says it's ironic that citizens can lose freedom by unknowingly violating the law, but officers can't even be subjected to a jury trial, which I thought was a very nice line. Especially since, if I had shot somebody with a rubber bullet, I would definitely be on trial for assault in state court, but these officers aren't even going to be liable for money damages. But she basically ends by saying, I blame the Supreme Court's recent opinion in Zorn, so I can't do anything else. My hands are tied.

A**Anthony Sanders 37:39**

Michael, do you think she's casting, I mean, who knows why, but casting a little too much blame on this Zorn case, which, to let people know, came out a couple months ago, it was one of these summary reversals, so it didn't get like oral argument at the court, and it was more of an articulation about how qualified immunity works by looking at the most on-point case from the circuit where you're litigating and in that way it clarified things, it was a little new in that way, but otherwise it was pretty bog standard, qualified immunity for the last few decades. So what are your thoughts?

M**Michael Soyfer 38:20**

Qualified immunity is so amorphous, and the way courts express the doctrine differs so wildly from one case to another, and often seems to be more results-driven than anything. I think, in fairness to her, you know, the Supreme Court sometimes sends conflicting signals to the lower courts, and the signals lately have been toward more robust qualified immunity. There was a time period when they were summarily reversing Fifth Circuit opinions granting qualified immunity, and now the pendulum has sort of swung back. So I do think, in fairness to her, lately the Supreme Court really has been beating the very specific on-point case requirement into the circuit courts.

M**McCarley Maddock 39:15**

It's really interesting. So I clerked on a district court in the Seventh Circuit, and I had a couple civil rights cases that went to trial, and one of them was an excessive force case, and the jury said the officer wasn't liable, so it seems like this would have been a really interesting fact pattern, I think, to put in front of a jury and say, under the Fourth Amendment's reasonableness standard, was this reasonable behavior, I just think that would have been a very interesting trial to sit through. I think it's a shame.

M

Michael Soyfer 39:47

I think oftentimes these courts are resolving for themselves what was in an officer's mind, what happened, and what was reasonable for the officer to conclude under those circumstances. And those always seem to me like classic jury questions, because it's surely up to the finder of fact. Now, in this case, the plaintiff, unfortunately, made a lot of terrible concessions and failed to make a bunch of arguments before the district court that would have probably better supported that argument, and I do see this court leaning into forfeiture waiver a ton to dismiss his arguments on appeal, but even still, like I said earlier, there's so much that's left unexplained in the court's recitation of the facts, that's sort of curious, whether the gunshots ever happened, what they actually were, was there a weapon in the house, and it all results in a judgment that this man, who was shot multiple times in his boxers while not actively resisting arrest and receiving all of these conflicting orders from the cops while he is blackout drunk, just gets nothing for all of these physical injuries he suffered, and property damage.

A

Anthony Sanders 41:22

One fact that they don't say much about, but really jumped out to me that might have made all this happen was that, it seems, they did get a search warrant, but not an arrest warrant, and yet I don't think they ever told him they had a warrant. Do you get what happened there, McCarley?

M

McCarley Maddock 41:44

So, I listened to the oral argument because I was trying to get some kind of clarity on the facts, and the Seventh Circuit judges also had questions about whether or not he was told, and it sounded, from the oral argument, and from my read of the district court opinion, he never gets told whether or not they have a warrant, why they're there, anything, and it seems like that might have been helpful for them to share.

A

Anthony Sanders 42:09

It's bizarre to me. You have all this stuff there, you're saying we need to come into your house to arrest you, and you don't say you have a warrant, and yet it sounds like they really did. It's just so weird.

M

McCarley Maddock 42:24

A lot of this is weird. You had time to call a SWAT team, and an armored vehicle, but you didn't have time to get an electronic warrant, right?

A

Anthony Sanders 42:32

Well, you had one kind, but not the other kind.

M

McCarley Maddock 42:36

Yeah.

A

Anthony Sanders 42:36

Okay.

M

Michael Soyfer 42:37

I feel like this exemplifies a category of case where it's really the police who are creating the emergency and the police who are creating the atmosphere that gives them the rationale to do all of these things instead of the defendant. There are so many cases where, for relatively minor things, they just convene a whole SWAT task force at the house, and then the emergency atmosphere that they've created is really the rationale for doing all of this: for damaging a bunch of property, breaking into a bunch of houses, shooting someone with foam or real bullets. All that happened here was they heard some gunshots, which were never explained. We don't even know if they're gunshots. They had this report from the neighbor, who said he had some sort of weapons history, whatever that means. Then they just surround his house. They make all of these efforts to contact him. They're out there staking it out for hours and hours. Nothing is going on in all of those hours. The only emergency at the scene is the one that they've created, and then they start shooting through the windows of his house and shooting him with rubber bullets while he's drunk in his boxers and totally unarmed. It's an emergency of their own creation over, as McCarley said, misdemeanors, and this isn't that uncommon. There are lots of cases like this where the police are the emergency, and then that emergency is the rationale for the police committing a bunch of constitutional violations, and then qualified immunity means never having to say you're sorry.

M

McCarley Maddock 44:23

Well, it was dangerous for them too, I would imagine, because if he actually has a weapon in the house and he doesn't know why you're there, there's a version of this story that goes horribly wrong for everyone involved, right?



Michael Soyfer 44:35

That was what happened to Breonna Taylor.



Anthony Sanders 44:37

Right. Well, I think that's well said by both of you, and we'll leave it there. Qualified immunity has not met its Waterloo yet, but perhaps this concurrence is a tiny step in that direction. We've had a number of these concurrences over the years now, or even just majority opinions, where courts will say, yeah, I have to rule for the government, but it's super bad, because qualified immunity is terrible, and then they go on. So add another one to the list, maybe we'll put a—



McCarley Maddock 45:08

From across the spectrum



Anthony Sanders 45:10

Yeah, absolutely, from across the spectrum, and maybe we'll put a list of those together sometime. That would be a fun Short Circuit side project. But for our main project for today's podcast, thank you both for coming on. Very much appreciate it. And dear listeners, please be sure to follow Short Circuit on YouTube, Apple Podcasts, Spotify, and all other podcast platforms, and remember to get engaged.