Amendments to the Florida Rules of Evidence

GOOD MORNING AND WELCOME TO THE FLORIDA SUPREME COURT. THE COURT IS, SOLELY FOR AESTHETIC REASONS, WOULD TAKE JUDICIAL NOTICE OF THE BEAUTY OF MR. GENTRY'S TIE. [LAUGHTER]

THE BEAUTY BUT NOT THE SHAPE. [LAUGHTER]

THE COURT'S CALENDAR, THIS MORNING, IS TO HAVE DISCUSSIONS OF RULES, WHICH HAVE, AND AMENDMENTS TO THE EVIDENCE CODE, WHICH ARE PROPOSED WE BEGIN THAT, WITH THE AMENDMENTS TO THE EVIDENCE CODE. SO THE PETITIONER, WHO IS GOING TO SPEAK FOR THE PETITIONER FIRST? MR. MARTINEZ?

MAY IT PLEASE THIS COURT. MY NAME IS PEDRO MARTINEZ WITH THE LAW FIRM OF GREENBERG. BUT I AM HERE ON BEHALF OF THE FLORIDA RULES AND EVIDENCE CODE COMMITTEE, AS A MEMBER OF THIS COMMITTEE, WHICH HAS BEEN WORKING ON THIS ISSUE FOR QUITE SOME TIME NOW. THE FLORIDA BAR CODE AND RULES OF EVIDENCE COMMITTEE OPENIANCE THAT CHAPTER -- OPINES THAT CHAPTER AMENDMENT SHOULD NOT BE ADOPTED AS A RULE OF EVIDENCE. BEFORE GETTING INTO THE ACTUALLY, AND I AM SENSITIVE TO THE TIME CONSTRAINTS, BEFORE GETTING INTO THE ACTUAL ARGUMENT, I THINK THAT SOME HISTORICAL PERSPECTIVE MAY BE OF ASSISTANCE TO THE COURT. IN 1979, JUNE OF 1979, THIS COURT ISSUED AN OPINION. AND IN RE FLORIDA EVIDENCE CODE 372 SO.2D 136, 1969 -- 1369, 1979. THERE THE COURT ASKED THE BAR AND INTERESTED PARTIES, TO SUBMIT ANY TYPE OF OBJECTIONS THAT THEY WOULD HAVE TO THE, THEN, NEWLY-ENACTED OR ADOPTED, I SHOULD SAY, FLORIDA CODE OF EVIDENCE. THAT CODE OF EVIDENCE HAD, IN LARGE PART, CAME FROM ITS COUNTERPART, THE FEDERAL CODE OF EVIDENCE, WHICH WAS ENACTED FOUR YEARS EARLIER. 1975. BUT NOT ALL OF IT. NOT ALL OF THE CODE CAME FROM THE FLORIDA -- FROM THE FEDERAL CODE, THE FLORIDA COUNTERPART. PARTS OF WHAT CONSTITUTED THE, THEN, CODE OF EVIDENCE, CAME FROM COMMON LAW AND OTHER STRICT YOURS. -- STRICTURES. THE FLORIDA BAR AND OTHER PARTIES DID RESPOND TO THE COURT'S INQUIRY REQUESTING COMMENTARY, AND THAT YEAR, 1979, IN RE FLORIDA EVIDENCE CODE 376 SO.2D 1161 OBSERVED THE FOLLOWING IN RESPONSE TO THOSE COMMENTS, AND I MAY ADD THAT NONE OF THE COMMENTS WERE, REALLY, OBJECTIONABLE TO THE ACTUAL ADOPTIONS. THEY WERE, MORE OR LESS, OBSERVATIONS OF A STYLISTIC NATURE, AS TO PRESENTATION WITHIN THE CODE. THIS COURT OBSERVED, HOWEVER, QUOTE, THAT OBJECTIONS TO INDIVIDUAL RULES, BASED ON CONTENT, CAN BEST BE HANDLED ON A CASE-BY-CASE BASIS. CLOSE QUOTE. I BRING THIS TO THE COURT'S ATTENTION, BECAUSE IN THOSE TWO OPINIONS, THIS COURT SAID A PRECEDENT FOR EVALUATING THE ADOPTION OF RULES, UNDER ARTICLE V, SUBSECTION 2-A, WHICH EMPOWERS THIS COURT TO ADOPT ADOPT RULES OF PROCEDURE AND PRACTICE FOR ALL COURTS. THE COMMITTEE, UNDER 2.130, OF THE RULES OF JUDICIAL ADMINISTRATION, SUBSECTION 6, HAS THE FOLLOWING MANDATE. QUOTE. THE COMMITTEES, AND IT IS REFERENCING SUBSECTION THREE, WHICH INCLUDES MULTIPLE COMMITTEES, RULES OF PROCEDURE AND ET CETERA. THE COMMITTEES SHALL VOTE ON EACH PROPOSAL. THE COMMITTEES MAY ORIGINATE EACH PROPOSAL AND ARE CHARGED WITH THE REEVALUATION AND REGULATION OF THE RULES, IN ORDER TO ADVANCE PROCEEDING IN THE ADMINISTRATION OF JUSTICE. THE COMMITTEE MAY EXCEPT -- ACCEPT PROPOSED AMENDMENTS OR MAY ADOPT PROPOSALS. HERE, AGAIN, SOME HISTORICAL PERSPECTIVE IS NECESSARY. FROM 1979 TO THE PRESENT, DURING EVERY FOUR-YEAR CYCLE, THE FLORIDA BAR CODE AND EVIDENCE COMMITTEE GATHERS PETITIONS. THAT GATHERS THOSE PORTIONS OF LEGISLATIVE ENACTMENTS

THAT THE COMMITTEE DEEMS TO BE OF EVIDENTIARY VALUE FOR THE CODE. SINCE THEN, TO THE PRESENT, HOWEVER, THERE HAS NOT BEEN ONE PETITION SUBMITTED BY THE COMMITTEE, WHICH ACTUALLY CHALLENGES A RULE. UNTIL WE GET TO THE PETITION THAT WAS FILED BEFORE THIS HONORABLE COURT THIS YEAR. THERE WE MUST ADMIT, WE BELIEVE THAT THE RULE SIMPLY SHOULD NOT BE ADOPTED, BECAUSE OF ITS PROCEDURAL -- FIRST OF ALL, WE SAY THAT IT IS PROCEDURAL INNATE, AND I WANT TO SPEAK, A LITTLE BIT, ABOUT HOW THAT DETERMINATION SHOULD BE MADE. OBVIOUSLY THERE IS --

LET ME INTERRUPT YOU JUST FOR A MINUTE. WE HAVE A TIME PERIOD, HERE, WHICH WE NEED YOU TO BE OBSERVE APARTMENT OF, BECAUSE ALL OF THE -- OBSERVANT OF, BECAUSE ALL OF THE PEOPLE WHO WANT TO SPEAK ON THIS SIDE OF THE ISSUE NEED TO BE ACCOMMODATED FOR THEIR TIME, BUT WE INTEND TO STAY WITHIN OUR TIME PERIODS.

YES, SIR. I WILL PREST IT.

THE AMENDMENT IS -- I WILL ABBREVIATE IT. THE AMENDMENT IS PROCEDURAL INNATE, AND CERTAIN OBSERVATIONS CLEARLY BRING, INTO SHARP RELIEF, ITS PROCEDURAL CHARACTERISTICS AND COMPONENTS. THE AMENDMENT DOES NOT CREATE ITSELF OR CONCERN ITSELF WITH A NEW CATEGORY OF EVIDENCE. SIMPLY THERE IS NO NEW CATEGORY BEING CREATED. THE AMENDMENT DOES NOT DEFINE ANY NEW CATEGORY OF EVIDENCE. IT DOES NOT DO THAT. THE AMENDMENT DOES NOT COMMENT ON THE SUBSTANCE OF ANY EVIDENCE. IT DOES NOT DO THAT. THE AMENDMENT IS CONCERNED EXCLUSIVELY WITH THE LIMITATION AS TO THE INTRODUCTION OF EVIDENCE. THE AMENDMENT DOES NOT CONCERN A RIGHT THAT IS INDEPENDENT FROM OR OF A PRACTICE OR PROCEDURE OF COURT. FOR EXAMPLE, THERE ARE ASPECTS OF -- THERE ARE STATUTORY ENACTMENTS, WITHIN THE CODE, THAT MAY BE DEEMED SUBSTANTIVE INNATE, SUCH AS ATTORNEY-CLIENT PRIVILEGE, AND, IN FACT, WHEN WE LOOK AT THE RULES' ENABLING ACT OF THE FEDERAL COUNTERPART, THAT IS THE ONE PORTION OF THE ACT WHERE THE UNITED STATES SUPREME COURT WAS NOT EMPOWERED WITH THE ADOPTION AND FASHIONING OF PROCEDURAL --

WHY SHOULDN'T WE TREAT THIS SOMEWHAT AS WE DO THE STANDARD JURY INSTRUCTIONS? THAT IS THAT WE HAVE COMMITTEES THAT EXTENSIVELY STUDY THE NEED FOR JURY INSTRUCTIONS AND COME TO US WITH RECOMMENDATIONS FOR PATTERN INSTRUCTIONS? AND TRADITIONALLY WE HAVE ADOPTED THOSE, ALTHOUGH WE ARE CAUTIOUS IN THAT RESPECT, TOO, BUT, THEN, WE ALWAYS DO IT WITH A CAVEAT, BUT WE ARE NOT DECLARING A LAW, IN THAT THE TRIAL COURTS ARE, STILL, RESPONSIBLE FOR GIVING JURIES CORRECT STATEMENTS OF THE LAW, AND SO WE LET THOSE ISSUES, THEN, REACH THE COURTS, ON A CASE-BY-CASE BASIS. WHY SHOULDN'T WE ADOPT THAT POLICY, IN VIEW OF THE LANGUAGE THAT YOU CITED FROM OUR EARLIER OPINION, THAT SAID IT IS BETTER LEFT TO TREAT THESE ISSUES ON A CASE-BY-CASE BASIS. WHY SHOULDN'T WE JUST ADOPT THAT MODEL, THEN, AND WAIT AND SEE WHAT HAPPENS, IN A REAL CASE?

TWO FUNDAMENTAL REASONS, YOUR HONOR. ACTUALLY THREE, THE THIRD ONE BEING THE WEAKEST. THE FIRST REASON IS THIS COURT IS EMPOWERED, UNDER ARTICLE V, SUBSECTION 2-A, ACTUALLY, TO ADOPT RULES OF PRACTICE AND PROCEDURE, BUT THAT MEANS MORE THAN SIMPLY ADOPTING. I DON'T PRETEND TO, IN ANY WAY, CHALLENGE THE COURT, IN ANY WAY, ON THIS ISSUE. WHAT THAT MEANS IS THIS IS THE BRANCH THAT MUST KEEP THE LEGISLATURE FROM INVADING THE PROVEENS INSIDE OF THIS COURT BY EVEN -- THE PROVINCE OF THIS COURT BY ENACTING EVIDENCE THAT IS PROCEDURAL, WEIGHING, ON A CASE-BY-CASE BASIS, IDENTIFIED IN THE BRIEFS AND ALL PARTIES HAVE IDENTIFIED IN THE BRIEF. THAT IS THE FIRST ISSUE. THE SECOND ISSUE, THE FIRST AND SECOND ISSUE. THE SECOND ISSUE, UNDER THE CASE BY CASE LANGUAGE, WHEN READ TOGETHER, THE FIRST TWO OPINIONS, THE ACTUAL JUNE OPINION AND THE NOVEMBER OPINION, IT IS CLEAR THAT WHAT IS MEANT BY CASE BY CASE IS RULE BY RULE, AND THAT IS -- WHEN WE READ THAT, TOGETHER WITH -- THAT MANDATE, TOGETHER WITH THE

ACTUAL FLORIDA RULES OF -- THE RULES OF JUDICIAL ADMINISTRATION AND THE PURPOSE OF THE COMMITTEES AND THE OBLIGATIONS WITH WHICH THE COMMITTEES ARE CHARGED, IT IS CLEAR THAT IT WOULD BE TREMENDOUSLY WASTEFUL AND PREJUDICIAL, ON LIT GAGETS AND THE JUDICIAL -- ON LITIGANTS AND THE JUDICIARY, TO WEIGH, ON A CASE-BY-CASE BASIS, ON THE NATURE OF THIS ISSUE, WHICH IS VERY DIFFERENT. I KNOW THERE ARE TIME CONSTRAINTS, SO I WILL YIELD THE PODIUM TO MY OTHER COLLEAGUES. THANK YOU VERY MUCH.

MR. WARREN.

MAY IT PLEASE THE COURT. I THINK I WAS DESIGNATED 20 MINUTES' TIME, AND I WOULD GLADLY GIVE TEN MINUTES. I WANT TO VOLUNTARILY OFFER THAT.

ALL RIGHT. THANK YOU. WE WILL ACCEPT THAT OFFER, SO THAT WE WILL ALLOW THERE TO BE AN ADDITIONAL TEN MINUTES FOR THE PETITIONER'S SIDE. BUT YOU ALL NEED TO KEEP TABS OF WHERE YOU ARE HERE.

I WILL, JUSTICE WELLS. MAY IT PLEASE THE COURT. JOHN SKY, FROM THE PUBLIC DEFENDER'S OFFICE IN HILLSBOROUGH COUNTY. LET ME, IN ORDER TO BE AWARE OF THE TIME CONSTRAINTS, ESSENTIALLY ECOWHAT HAS BEEN SAID, IT IN THE BRIEFS, FROM ATLA AND THE COMMITTEE AND WAS, ALSO, SAID, IN MY COMMENT TO THE COURT, CONSIDERING THE FACT THAT I CONSIDER THIS, WE, ALL, CONSIDER THIS STATUTE TO BE THOROUGHLY PROCEDURAL AND, THEREFORE, PROBABLY NOT CONSTITUTIONAL. ALTHOUGH I KNOW THAT PARTICULAR ISSUE IS NOT BEFORE THE COURT.

I WANT TO MAKE SURE ABOUT THAT. IF WE DON'T ADOPT THIS AS A RULE OF PROCEDURE, THE ISSUE AS TO WHETHER SOMEBODY COULD, STILL, OFFER A DEPOSITION IN COMPLIANCE WITH THE STATUTE IS STILL UNRESOLVED, SO WE ARE NOT MAKING A DECISION, BY ADOPTING IT, THAT IT IS UNCONSTITUTIONAL.

NO, MA'AM, JUSTICE PARIENTE, I DON'T THINK THAT YOU ARE MAKING THAT DECISION. HOWEVER, WHAT I WAS GOING TO CONCLUDE WITH, AND I WILL APPROACH IT, NOW, IN MY COMMENT, I NOTE THE RODRIGUEZ CASE, THE GREEN CASE, AND, I THINK, THE SMITH CASE, AND THOSE ARE ONLY THE TIP OF THE ICEBERG, THOSE ARE THE TIP OF THE ICEBERG THAT WAS A HUGE AMOUNT OF LITIGATION, IN THE DCA'S AND THE SUPREME COURT, IN THE PAST DECADE, TRYING TO DETERMINE THE IDENTIFICATION OF 94 SUBPARAGRAPH 2-A, WHEN THE WITNESS IS UNAVAILABLE, AND IT TOOK YEARS AND YEARS OF LITIGATION, UNTIL WE, FINALLY, GOT THE RODRIGUEZ AND THE GREEN CASE, WHICH RESOLVED THE LEGAL ISSUES IN THAT PARTICULAR STATUTE, AND SO MY PARTICULAR REQUEST IS THAT, WHATEVER THE COURT DOES, WITH RESPECT TO THIS ISSUE, BE AS CLEAR AND AS PRECISE AS POSSIBLE, SO AS TO GUIDE THE TRIAL COURTS, BOTH ON THE CIVIL AND THE CRIMINAL SIDE OF LIFE, SO THAT WE DON'T HAVE TO REDO THAT ALL, AGAIN, WITH THIS NEW BUT ESSENTIALLY IDENTICAL STATUTE. I HAPPEN TO BELIEVE IT IS PROCEDURAL.

EXCUSE ME. WE HAVE NO AUTHORITY, NOW, TO DECLARE THAT STATUTE UNCONSTITUTIONAL. SO ANYTHING WE WOULD SAY WOULD BE --

BY SIMPLY NOT ADOPTING IT AS A RULE OF EVIDENCE, WOULD BE MY POSITION, AND I JOIN THE OTHER -- MY COLLEAGUES IN THAT AND NOT ADOPTED AS A RULE OF EVIDENCE, BECAUSE, IN FACT, IT IS PROCEDURAL, AND IT IS A BAD PROCEDURAL RULE. IT IS PROCEDURAL BECAUSE OF EVERYTHING SAID IN THE BRIEFS AND, ALSO, A SPECIFIC CRIMINAL RULE WHICH NO ONE ELSE MENTIONED, WHICH IS 340, WHICH COVERS TESTIMONY IN CRIMINAL CASES AND IS ABSOLUTELY CONTRARY TO STATUTE, SO THAT IS ANOTHER REASON I BELIEVE IT TO BE PROCEDURAL. I WOULD ECOWHAT ATTORNEY GENERAL HAS SAID IN HIS BRIEF, IN THAT IT BE, SOMEHOW, LIMITED, BY THE COURT, TO APPLY ONLY TO A CERTAIN CLASS OF CIVIL CASES. I AM NOT SO CONCERNED ABOUT THAT, BUT THE ATTORNEY GENERAL, ALSO, SAYS THAT IT BE LIMITED TO

NOT APPLY TO CRIMINAL CASES, BECAUSE, AS HIS BRIEF VERY AMPLY POINTS OUT, IT WAS NEVER INTENDED TO APPLY TO CRIMINAL CASES. NOW, THAT MUCH BEING SAID, YOUR HONORS, I DON'T KNOW HOW YOU DO THAT, FRANKLY. I UNDERSTAND THE PROBLEM YOU ARE GRAPPLING, WITH AND I DON'T HAVE AN ANSWER FOR YOU, BUT I DON'T KNOW HOW THIS COURT PIECEMEAL LIMITS THE EFFECTIVENESS OF THE STATUTE. MAYBE THE ATTORNEY GENERAL, THEN, CAN GIVE YOU SOME ADVICE ON THAT. LET ME JUST FINISH UP BY SAYING THAT ALL OF THE PROBLEMS MENTIONED IN THE BRIEF, WITH RESPECT TO DUE PROCESS, IN THE BRIEFS, WITH RESPECT TO DUE PROCESS AND RIGHT OF CONFRONTATION AND CROSS-EXAMINATION IN CIVIL CASES ARE EXPONENTIALALLY MAGNIFIED. IN CRIMINAL CASES, I DON'T NEED TO STAND HERE AND GIVE THIS COURT A RECITATION OF THE LAW AND THE CITATIONS ON THE IMPORTANCE OF CROSS-EXAMINATION IN CRIMINAL CASES. THE STATUTE, IF IT WERE ADOPTED AS A RULE OF PROCEDURE, WOULD SEVERELY DAMAGE AND DILUTE THAT RIGHT, AND FOR ALL OF THOSE REASONS, I WOULD URGE THE COURT TO NOT ADOPT THIS RULE OR THE STATUTE, RATHER, AS A RULE OF PROCEDURE. THANK YOU.

MR. EARHART.

MAY IT PLEASE THE COURT. MY NAME IS CHARLES EARHART, FROM THE FLORIDA STATE UNIVERSITY, COLLEGE OF LAW, AND I WOULD LIKE TO MAKE A COUPLE OF COMMENTS, VERY BRIEFLY, THAT I THINK THE COURT IS AWARE OF. AS YOU KNOW, THE EVIDENCE CODE IS A PRODUCT OF THE FLORIDA LAW REVISION CONSULT, WHICH WAS AN ORGANIZATION, AN AGENCY, IN WHICH THE BOARD OF GOVERNORS OF THE FLORIDA BAR, THE SPEAKER, AND THE PRESIDENT OF THE SENATE, APPOINTED MEMBERS. THEY WERE RESPONSIBLE FOR LEGISLATION, SUCH AS THE FLORIDA ADMINISTRATIVE CODE, ONE OF THE EARLY FLORIDA CORPORATIONS ACT, AND THEY TOOK IT UPON THEMSELVES TO HAVE A FLORIDA EVIDENCE CODE. IN THE EARLIEST DRAFTING OF THAT, THERE WAS THIS ISSUE. IS THIS AN APPROPRIATE SUBJECT FOR THE LEGISLATURE TO ADDRESS? IS IT SUBSTANCE OR PROCEDURE? AND THE SUPREME COURT HEARD JUSTICE ATKINS, WHO, THEN, WAS CHARGED WITH THAT RESPONSIBILITY. HE HAD CONVERSATIONS WITH ME AND WITH THE EXECUTIVE DIRECTOR OF THE LAW REVISION CONSULT, AND HIS THOUGHTS WERE THAT THE LEGISLATURE SHOULD PROCEED, THAT THERE WAS PROBABLY SECTIONS OF THE CODE THAT WERE PROCEDURAL. PROBABLY SECTIONS OF THE CODE THAT WERE SUBSTANTIVE, BUT IT WAS NECESSARY, IF WE WERE GOING TO HAVE A CODE, TO HAVE IT IN ONE PLACE. WE HAD TO HAVE IT IN A SINGLE UNITARY SOURCE, AND HE THOUGHT IT WAS APPROPRIATE TO HAVE IT IN THE STATUTES, THAT THE COURT WOULD, THEN, ADDRESS THOSE PORTIONS OF THE CODE THAT WERE PROCEDURAL, IN AN APPROPRIATE MANNER, AND IF THE LEGISLATURE GOT IT TOO WRONG, IN A PARTICULAR SECTION, THE COURT WOULD NOT BE ADVERSE, IF IT WAS A PROCEDURAL MATTER, TO STEP IN AND MAKE WHATEVER ADJUSTMENTS WERE APPROPRIATE. AND I THINK THOSE CONCERNS AND THAT PHILOSOPHY IS WHAT HAS BEEN FOLLOWED, IN THE 0-SOME YEARS THAT THE CODE HAS BEEN IN EXISTENCE. THE COURT HAS EXAMINED THOSE PORTIONS OF THE CODE THAT HAVE BEEN ADDED, AND THROUGH ITS ORDER, ORDERS, HAVE SAID WE ARE ADOPTING THOSE PORTIONS OF THOSE AMENDMENTS TO THE CODE, AS ARE PROCEDURAL, AS A RULE OF COURT. I GUESS WHAT MY CONCERNS ARE, TWO OR THREE, ONE IS, IF THIS COURT DOES NOT ADOPT THIS AS A RULE OF COURT, LAWYERS AND JUDGES WILL BE SPECULATING AS TO WHAT THAT MEANS. HAVE YOU SAID WE ARE NOT ADOPTING IT AS PROCEDURAL. WE ARE NOT ADOPTING IT BECAUSE IT IS PROCEDURAL, AND THEREFORE IT IS UNCONSTITUTIONAL.

AND WHAT YOU ARE SAYING ABOUT THAT, THAT MAKES NO SENSE, SINCE THE COMDI HAS BEEN THAT, EVEN IF IT -- THE COMEDY HAS BEEN THAT, EVEN IF IT IS PROCEDURAL, MOST OF THE RULES SEEM LIKE THEY ARE APPROPRIATE RULES. WE HAVE ADOPTED IT TO AVOID ANY PROBLEM, SO YOU WOULDN'T WANT US TO SAY WE ARE NOT ADOPTING IT BECAUSE IT IS PROCEDURAL, WHEN, IN THE PAST, WE HAVE, REALLY, ADOPTED THINGS JUST TO MAKE SURE THAT, IF THEY ARE PROCEDURAL, THEY ARE PROTECTED?

IF THE LEGISLATURE GETS IT WRONG, IF THE LEGISLATURE, FOR WHATEVER REASON, MAKES A

BAD POLICY JUDGMENT, ON A QUESTION THAT IS PROCEDURAL, I THINK IT IS APPROPRIATE FOR THIS COURT TO SAY WE ARE NOT GOING -- WE DISAGREE, AND UNDER OUR RULE-MAKING POWER, UNDER THE CONSTITUTION, THAT IT WILL NOT BE EFFECTIVE. WHAT THE SUGGESTION THAT I HEARD FROM THE BENCH WAS THAT WE SIMPLY NOT DO -- THAT YOU SIMPLY NOT DO ANYTHING. THAT YOU SIMPLY SAY WE ARE NOT GOING TO ACT ON WHETHER IT IS SUBSTANCE OR PROCEDURE, AND SAVE THAT FOR ANOTHER DAY, WHEN IT IS IN A CASE OF CONTROVERSY. MY CONCERN WITH THAT IS IN THE WAY YOU WOULD DO THAT, MAKING CLEAR THAT YOU ARE NOT -- IF WHAT YOU INTEND TO DO IS NOT EXPRESS AN OPINION, MAKE CLEAR TO THE COURTS AND TO THE LAWYERS THAT THAT IS WHAT YOU ARE DOING. MY CONCERN, I GUESS, IS CLARITY, IN WHAT ORDER WOULD FLOW FROM THIS ARGUMENT TODAY.

WELL, IF IT IS SUBSTANTIVE, IN THE PAST WE HAVE ADOPTED THINGS NOT, REALLY, WORRYING WHETHER THEY WERE SUBSTANTIVE PROCEDURE. IF IT IS SUBSTANTIVE, AND WE HAVE QUESTIONS ABOUT ITS CONSTITUTIONALITY, THAT IS WHERE MY CONCERN COMES IN. HOW DO YOU, THEN, IN A RULES OPINION, MAKE THAT DECISION?

IF IT IS SUBSTANTIVE, IT SEEMS TO ME IN A RULES OPINION, YOU DO NOT. AND YOU SAVE THAT FOR AN ACTUAL CASE OF CONTROVERSY. AS YOU DID --

DO WE SAY THAT, IN THE OPINION? AND I THINK --

MY VIEW OF THE COURT IS THAT THE COURT CAN SAY, IN AN OPINION, WHAT IT BELIEVES IS APPROPRIATE TO SAY.

OR NOT SAY WHAT IT WANTS TO.

IN A CASE CALLED CONNERS, THAT YOU ALL DECIDED TWO OR THREE YEARS AGO, WHICH WAS A CASE INVOLVING THE ELDERLY, EXCEPTION TO THE HEARSAY RULE, 803.22, YOU SAID THAT THAT WAS UNCONSTITUTIONAL ON ITS FACE, AS APPLIED TO CRIMINAL CASES.

THAT WAS NEVER ADOPTED AS A RULE OF EVIDENCE, WAS IT, OR WAS IT?

I AM NOT SURE.

I WAS TRYING TO THINK ABOUT THAT, AND THAT CAME UP AS AN ACTUAL CASE FOR CONTROVERSY, WITHIN A PARTICULAR CASE, THAT STATUTE WAS DECLARED UNCONSTITUTIONAL.

IT WOULD SEEM TO ME THAT THE QUESTION OF CONFRONTATION AND SO FORTH, WHICH WAS, REALLY, THE ISSUE THAT WAS PRESENT IN CONNOR, WHETHER OR NOT THAT HEARSAY RULE APPLIED WITH THE CONFRONTATION CLAUSE. THAT IS NOT AN ISSUE BEFORE YOU TODAY. AND REGARDLESS OF WHAT YOU WOULD DO WITH THIS PETITION, THAT YOU WOULD NOT DECIDE THE FACIAL CONSTITUTIONALITY, IF YOU ADOPTED SOMETHING OF RULE OF COURT OR DIDN'T. I SIMPLY THINK THAT IS NOT BEFORE YOU. I GUESS THE OTHER THING I WANTED TO SAY WAS THAT I HOPE THE COURT'S RULING ON THIS MATTER WILL BE NARROW AND CONFINED TO 803.22, BECAUSE I THINK THE DOCTRINE OF UNINTENDED CONSEQUENCES, COULD COME INTO PLA. THERE ARE OTHER HEARSAY EXCEPTIONS, UNDER WHICH DEPOSITION TESTIMONY MAY AND HAVE BEEN ADMITTED IN EVIDENCE IN FLORIDA. IN FACT, IN THE RODRIGUEZ CASE, WHICH THE SOLICITOR GENERAL CITES, AND WHICH COUNSEL CITED, THIS COURT, EIGHT YEARS AGO, SAID IT IS GENERALLY ACCEPTED, THAT, WHEN AN EXCEPTION TO THE RULE EXCLUDING DEPOSITIONS AS HEARSAY IS NOT FOUND IN THE RULES OF CIVIL PROCEDURE, THE EVIDENCE CODE MAY PROVIDE SUCH AN EXCEPTION IN A CIVIL PROCEEDING. WHICH IS IN CONFORMITY WITH WHAT THE FEDERAL COURTS HAVE RULED, AND SO I WOULD HOPE THAT THIS COURT WOULD NOT SAY THAT THIS THE ADMISSIBILITY OF DEPOSITIONS IS GOVERNED, EXINCLUDES I FEEL, BY THE RULES OF CRIMINAL -- EXCLUSIVELY, BY THE RULES OF CRIMINAL OR CIVIL PROCEDURE. THAT WOULD BE

THE POSITION THAT THIS COURT HAS TAKEN, BEFORE, AND I WOULD SUBMIT THAT THE COURT SHOULD LIMIT WHATEVER IT DOES TO THE PROVIDING PROVISION BEFORE IT.

WELL, ISN'T -- I MEAN -- TO THE PROVISION BEFORE IT.

WELL, ISN'T -- I MEAN, IT SEEMS TO ME THAT THE PROBLEM THAT WE ARE TRYING TO CONFRONT IS THAT, WHEN JUSTICE ADKINS MADE THE RECOMMENDATION, APPARENTLY, THAT THE COURT NOT GET INTO THE PROCEDURAL SUBSTANTIVE DEBATE WITH THE EVIDENCE CODE, THAT THAT WAS SOMETHING HE WAS -- I RECOGNIZE THERE WAS A CAVEAT THAT YOU COULD DO IT AT A LATER DAY, IF THINGS REALLY GO AS STRAY. HOWEVER, ONCE YOU START DOWN THAT ROAD, HOW DO YOU AVOID IT BECOMING AN ISSUE, WHENEVER THERE IS AN AMENDMENT THAT IS PASSED BY THE LEGISLATURE, AND BECAUSE WHAT -- YOU ARE SUBLIMB NATURALLY DOING IS MAKING THE -- SUBLIMINALLY DOING IS MAKING AN ADOPTION, BECAUSE THERE IS THAT SUBSTANTIAL QUESTION OUT THERE. HOW DO YOU HAVE IN MIND THIS BEING WRITTEN SO NARROWLY THAT YOU DON'T GET INTO THAT QUAGMIRE?

I DON'T KNOW, JUDGE. I THOUGHT A LOT ABOUT WHAT THE COURT OUGHT TO DO OR WHAT I WOULD THINK THE COURT OUGHT TO DO, AND I AM NOT SURE. IT SEEMS TO ME THAT THE COURT CAN SAY IT IS PROCEDURAL. THIS IS PROCEDURAL. AND THEREFORE VIOLATIVE OF VARIOUS CONSTITUTIONAL PERSPECTIVES. THEREFORE YOU CAN SAY IT STANDS. OR CAN TAKE SOME SORT OF POSITION, SUCH AS THE SOLICITOR GENERAL IS SUGGESTING. ONE OF MY CONCERNS IS THAT, IF WE HAVE A STAULT STATUTE IN THE EVIDENCE -- A STATUTE IN THE EVIDENCE CODE, THAT THIS COURT HAS SAID IT DOES NOT PASS CONSTITUTIONAL MUSTER, WE DO NOT ADOPT AS A RULE, BECAUSE IT IS PROCEDURAL, MANY LAWYERS, LET'S SAY, READ THE TEXTBOOK OR PUT IT INTO WESTLAW, ARE GOING TO RELY ON WHAT IS IN THE STATUTES. HOW DO WE GET THE LEGISLATURE TO RETREAT?

THAT IS JUST INHERENT IN THE ORIGINAL DECISION, TO GO WITH AN EVIDENCE CODE, IS IT NOT?

THAT'S RIGHT. THAT'S RIGHT.

IT IS NOT SOMETHING THAT WE CAN -- OKAY.

THANK YOU.

THANK YOU VERY MUCH. MR. GENTRY.

THANK YOU, YOUR HONOR. I WAS SITING WITH MR. WARNER, SO HE WOULDN'T BE ALONE OVER THERE. I AM WC GENTRY. HERE ON BEHALF OF THE ACADEMY OF FLORIDA TRIAL LAWYERS. THIS IS A BAD RULE. IT WAS INITIALLY PROPOSED BY THE OWNS ACCORDING, WHEN -- OWENS-CORNING, WHEN I WAS CHAIR OF THE SUBCOMMITTEE, AND THIS RULE HAD SOME GAVE GUARDS IN IT. THIS DEPOSITION WOULD ONLY BE ADMISSIBLE, IF IT SERVED THE INTEREST OF JUSTICE, SO IT GAVE SOME PROTECTIONS AT THE CIRCUIT COURT LEVEL. IT, ALSO, HAD NOTICE REQUIREMENTS. THEY HAD TO TELL YOU THE NAME OF THE PERSON, THE ADDRESS, AND ALL SORTS OF DUE PROCESS PROTECTIONS, APPARENTLY RECOGNIZING, TO GET IT THROUGH AS A RULE OF CIVIL PROCEDURE, IT WOULD HAVE TO HAVE DUE PROCESS PROTECTIONS. IT WAS ULTIMATELY REJECTED, BY THE CIVIL RULES COMMITTEE, 44-0, AND THOSE OF YOU WHO KNOW THE COMMITTEE, KNOW THAT THE COMMITTEE RARELY DOES ANYTHING UNANIMOUSLY, AND SUBSEQUENTLY, HAVING NOT BEEN ABLE TO GO THROUGH THE PROCESSES THAT THIS COURT HAS ESTABLISHED, TO ESTABLISH RULES, THEY WENT TO THE LEGISLATURE, AND IN THE LEGISLATURE, THEY STRIPPED OUT ALL THOSE PROTECTIONS, WHICH THE CIVIL PROCEDURE COMMITTEE DID NOT THINK WERE ADEQUATE, GIVEN THE NATURE OF THIS RULE, AND CAME UP WITH A RULE THAT WILL ALLOW DEPOSITIONS TO BE BOOT-STRAPPED INTO FLORIDA COURTS THAT ARE TAKEN WITHOUT THE OPPORTUNITY TO CROSS-EXAMINE.

BUT YOU AGREE IT WAS NEVER INTENDED FOR CRIMINAL PROCEEDINGS?

I DON'T THINK IT WAS EVER INTENDED FOR CRIMINAL PROCEEDINGS, YOUR HONOR. I THINK IT WAS A CIVIL RULE. IT WAS A-EN-CORNING RULE, AND THE FACT IS THERE IS -- IT WAS AN OWEN-CORNING RULE, AND IN FACT THERE HAS BEEN VERY CONSIDERABLE DEBATE ABOUT WHAT WE SHOULD DO, AND WE HAVE COME DOWN, AND I HOPE THE ACADEMY WILL, ALWAYS, COME DOWN, THAT WE SHOULDN'T HAVE RULES THAT FAVOR ONE PARTY OR ANOTHER. IT IS A GOOD RULE OR IT IS A BAD RULE. IT IS A PROCEDURAL RULE. THE GLEN DENYING CASE HAS DISCUSSED THIS. -- THE GLEN DENNING CASE HAS DISCUSSED THIS. IT DOESN'T ESTABLISH RIGHTS OR THE BURDEN OF PROOF. IT SIMPLY HAS TO DO WITH THE MODE OF PUTTING ON EVIDENCE, SO IT IS PROCEDURAL. WE WOULD URGE THE COURT TO REJECT THIS AS A RULE, BECAUSE IT IS A BAD RULE. THE EVIDENCE COMMITTEE HAS NEVER COME BEFORE THIS COURT, IN 20 YEARS, ASKING YOU TO REJECT A RULE. THEY, ALSO, UNANIMOUSLY RECOGNIZE THAT IT IS NOT A GOOD RULE. WHAT DOES THAT DO? YOUR HONOR, YOU ASKED THE QUESTION. CAN BE DECLARED UNCONSTITUTIONAL. I DON'T THINK THIS COURT, IN THIS CONTEXT, NEEDS TO DECLARE IT UNCONSTITUTIONAL. I WOULD URGE THE COURT, HOWEVER, TO LOOK AT THE RULE, ACCEPT THE RECOMMENDATION OF THE EVIDENCE COMMITTEE, REJECT IT AS A RULE OF PROCEDURE, AS A RULE, AND IN THAT OPINION, I THINK THE COURT CAN SAY ? PROCEDURAL, AND WE DEEM IT TO BE AN UNACCEPTABLE RULE OF PROCEDURE, AND WE REJECT IT. THAT, THEN, LET'S ALL THE CIRCUIT COURTS KNOW THAT THIS COURT HAS RECOGNIZED THAT IT IS PROCEDURAL, AND WE WON'T HAVE A PROBLEM IN THE COURTS. BECAUSE IT WILL NOT BE APPLIED IN THE COURTS. BECAUSE THE LAWYERS ARE SMART ENOUGH TO KNOW TO ARGUE THAT IT IS UNCONSTITUTIONAL, BECAUSE IT IS PROCEDURAL. AND WE RECOMMEND THAT YOU, THE COURT, DO THAT, AND WE THINK IT IS IMPERATIVE THAT THE COURT DO IT. THIS WAS -- CLEARLY IS A POLITICAL RULE, AND UNFORTUNATELY, JUSTICE WELLS, I KNOW WHAT HAPPENED IN 1979, BUT IF WE GET TO A SITUATION IN THIS STATE, WHERE THE LEGISLATURE STARTS USING THE EVIDENCE CODE TO SERVE THE INTERESTS OF SOME SPECIAL POLITICAL GROUP, THIS COURT, I THINK, IS GOING TO HAVE TO NOT PERMIT IT. WHEN IT IS PROCEDURAL. IF IT IS SUBSTANTIVE, IF THEY WANT TO CHANGE THE BURDEN OF PROOF, IF THEY WANT TO CHANGE PRIVILEGES OR ADJUST THOSE SORT OF THINGS, IF THEY PASS CONSTITUTIONAL MUSTER, ON A CASE-BY-CASE BASIS, CERTAINLY THE LEGISLATURE CAN DO THAT. BUT THE LEGISLATURE CANNOT PASS RULES OF PROCEDURE THAT THIS COURT DEEMS TO BE UNACCEPTABLE. AND YOU HAVE SAID THAT VERY RECENTLY, IN ALLEN VERSUS BUTTERWORTH, AND, ALSO, IN THE JOHNSON CASE, AND I KNOW THE COURT CHOOSES AND WANTS TO EXERCISE COMEDY, BUT COMEDY SHOULD WORK BOTH WAYS. IT WOULD BE WONDERFUL IF THE PROCEDURE WERE THAT THE LEGISLATURE WOULD PASS A RESOLUTION, ASKING THIS COURT TO CONSIDER A RULE, WHICH THIS COURT WOULD, THEN, SEND TO THE EVIDENCE COMMITTEE OR THE CIVIL PROCEDURE COMMITTEE, AND WE WOULD BRING IT BACK AROUND AND DO IT THE RIGHT WAY, AND THAT IS SORT OF WHAT HAS HAPPENED IN THE PAST, BUT THAT IS NOT WHAT HAPPENED HERE.

MR. GENTRY, YOU ARE INTO THE REBUTTAL TIME. THANK YOU. MR. HOGAN, ARE YOU GOING -- THANK YOU. MR. WARNER.

> MAY IT PLEASE THE COURT. ONE REASON THAT I RELINQUISHED SOME OF MY TIME IS THAT I HAVE BEEN STRUGGLING, BOTH LAST NIGHT AND THIS MORNING, TO FIGURE OUT WHAT IT IS THAT I COULD OFFER THE COURT THIS MORNING, IN ADDITION TO WHAT HAS BEEN SAID IN THE BRIEFS, AND I CERTAINLY DIDN'T WANT TO HAVE TO ANSWER QUESTIONS FOR 20 MINUTES, AND LISTENING TO THE ARGUMENTS, I HAVE CHANGED MY MIND AGAIN, A COUPLE OF TYPES, AS TO WHAT I MIGHT OFFER, BUT LET ME TRY THIS. ARTICLE III, SECTION 11, OF THE CONSTITUTION, DEALS WITH PROHIBITED SPECIAL LAWS, AND I THINK IT IS PERTINENT TO KEEP THAT IN MIND, AND I THINK THE COURT DOES HAVE IT IN MIND, AS IT IS LOOKING AT THIS PROBLEM, THAT CLEARLY THE CONSTITUTION IS NOT A GRANT OF POWER. IT IS A LIMITATION ON POWER, AND THERE WOULD BE NO NEED TO HAVE A SPECIAL PROVISION THAT THE LEGISLATURE CAN'T PASS A SPECIAL OR LOCAL LAW ON EVIDENCE, IF IT HAD NO POWER TO PASS LAWS IN REGARD TO THE

EVIDENCE CODE, TO START WITH, SO, CLEARLY, THE CONSTITUTION CONTEMPLATES THAT THE LEGISLATURE MAY PASS STATUTES AND LAWS IN REGARD TO EVIDENCE. CLEARLY, ALSO, ARTICLE V, SAYS THAT THE COURT IS SUPPOSED TO ADOPT RULES, IN REGARD TO PRACTICE AND PROCEDURE. I THINK WE NEED TO HARMONIZE THAT, AND I THINK THE PROBLEM THAT WE ARE FACING, HERE, FOR THE FIRST TIME SINCE JUSTICE ATKINS' OPINION AND HOW WE ADOPTED THE ORIGINAL EVIDENCE CODE, IS WE HAVE FINALLY COME UP WITH A PROBLEM OF WHERE THERE IS A DIFFERENCE OF OPINION ON WHETHER THIS IS A GOOD IDEA FOR THE EVIDENCE CODE OR NOT. WE HAVE SAID, IN OUR BRIEF, THAT WE DON'T THINK IT IS PRODUCTIVE, TO TRY TO DETERMINE WHETHER THIS WAS PROCEDURAL OR SUBSTANTIVE, BECAUSE ONCE YOU OPEN THAT DOOR AND LOOK THROUGHOUT THE EVIDENCE CODE, YOU ARE GOING TO HAVE PROBLEMS WITH THAT AND UNINTENDED CONSEQUENCES, IF YOU START DOWN HA ROAD. I WAS -- DOWN THAT ROAD. I WAS SITTING HERE THINKING ABOUT, YOU CAN BUILD A CASE THAT HEARSAY IS PROCEDURAL, BUT IT SEEMS TO ME THAT I REMEMBER, SOMETIME IN MY PRACTICE, 20 OR 25 YEARS AGO, THAT WE USED TO CONSIDER A PHOTO COPE TO BE HERE SAY OF A -- A PHOTO COPY TO BE HERE SAY OF A -- TO BE HEARSAY OF A DOCUMENT. AND OBVIOUSLY WE BROKE THAT CODE. IT IS BOTH PROCEDURAL AND SUBSTANCE. THE QUESTION, HERE, IS WHY RAISE IT, AND I THINK ONE REASON IS BECAUSE WE HAVE BEEN PRESENTED WITH IT, BECAUSE OF THE WAY WE STARTED OUT, 20 YEARS AGO, IN DEALING WITH THE EVIDENCE CODE, BUT OBVIOUSLY IT HAS SOME EFFECT ON WHAT YOU PERCEIVE YOUR CHOICES TO BE, TO TRY TO RESOLVE THIS PROBLEM THAT WE HAVE. NOW, THE OPPONENTS --

COULD I ASK JUST ONE QUESTION?

SURE. IT SEEMS AS IF WE ARE HEADED DOWN, IF WE ACCEPT YOUR INITIAL THESIS, THAT THE IN ESCAPEABLE CONCLUSION IS THAT THEY, ALL, MUST THEN BE ACCEPTED.

I AM SORRY. WHAT?

THAT THEY ALL MUST, JUST, THEN BE ACCEPTED. WHATEVER IS PROPOSED MUST BE ACCEPTED, IF WE ADOPT THAT INITIAL THESIS. IT SEEMS WELL ARE HEADING THAT WAY, BECAUSE WE DON'T TALK ABOUT THAT. WE JUST ADOPT IT, BECAUSE IF IT IS A SUBSTANTIVE PROVISION, IT MAY HAVE SOME LIMITATIONS ON WHAT WE CAN OR CANNOT DO. IF IT IS PROCEDURAL, IT DOES NOT HAVE THAT LIMITATION, SO THE JUDICIAL SYSTEM CAN ACT, SO BY ADOPTING YOUR POSITION OR THAT THESIS, IT LEADS TO THE INESCAPABLE CONCLUSION THAT YOU JUST MUST ADOPT IT, IT SEEMS TO ME.

WELL, LET ME TRY TO EVADE THAT RESULT BY SAYING THIS, THAT I THINK YOU ARE RIGHT, THAT IF THE COURT WERE TO DECIDE THAT IT DOESN'T LIKE THIS RULE, IT CAN USE ITS POWER TO SAY YOU HAVE INTRUDED ON OUR AREA, HERE. THIS IS PROCEDURAL. SO WE ARE GOING TO GET RID OF THIS RULE, AND THAT, IN FACT, IS WHAT THE OPENENTS OF THIS RULE ARE, REALLY, SAYING. THEY ARE SAYING WE DON'T LIKE THIS RULE. THEY WANT YOU TO DECLARE IT PROCEDURAL, SO THAT YOU CAN SAY THE HONOR OF THE COURT HAS BEEN INTRUDED UPON BY THE LEGISLATURE. WELL, I THINK YOU CAN DO THAT, BUT IS THAT, REALLY, A GOOD IDEA? AND THAT QUESTION, UNFORTUNATE UNFORTUNATELY, WAS PUT THERE AND UNRESOLVED, WHEN WE STARTED WITH THE EVIDENCE CODE. THE QUESTION, IS IT A GOOD IDEA TO STRIKE DOWN A RULE THAT, MAYBE, SOME PEOPLE DON'T LIKE, BY SAYING THAT THE LEGISLATURE HAS INTRUDED UPON US? IS IT A GOOD IDEA TO GET INTO AN FIGHT WITH THE LEGISLATURE OVER THIS? CLEARLY, I THINK JUSTICE ATKINS HAD IT RIGHT. BECAUSE OF THE CONSTITUTION, IT HAS TO BE A COOPERATIVE EFFORT, AND THE REAL QUESTION, HERE, IS HOW ARE YOU GOING TO TRY TO RESOLVE A DISPUTE OVER THIS RULE, AND THE UNFORTUNATE THING IS THAT, HAVING DEALT WITH THIS ISSUE, MYSELF, IS THAT I THINK WE HAVE A RULE THAT WASN'T INTENDED TO END UP THE WAY IT DID, OR AT LEAST WHEN I WAS LOOKING AT THE RULE, IT IS IN A DIFFERENT FORM THAN I SAW IT ORIGINALLY, SO AS I SAID, THE OPPONENTS WANT TO, WHY IS IT IMPORTANT TO DESIGNATE IT AS PROCEDURAL OR SUBSTANCE? THE OPPONENTS WANT YOU TO DESIGNATE IT AS PROCEDURAL,

BECAUSE THEY WANT YOU TO SAY THIS THING IS NO GOOD AND WE ARE NOT GOING TO DO IT.

WHY ISN'T THE BEST SOLUTION, IN A SITUATION LIKE THIS, THOUGH, TO SAY THAT THERE -- THAT THE COMMITTEE THAT THIS COURT HAS LONG CHARGED WITH THE RESPONSIBILITY FOR REVIEWING THE EVIDENCE CODE HAS MADE A RECOMMENDATION TO THE COURT THAT THIS RULE NOT BE ADOPTED. THE COURT IS NOT MAKING A DETERMINATION AT THIS TIME, AS TO WHETHER THE RULE IS OR IS NOT PROCEDURAL, BECAUSE THAT ISSUE HAS TO COME UP THROUGH A CASE IN CONTROVERSY. AND ALLOWING IT TO COME THAT WAY. THE REASON THAT MY CONCERN IS THAT WE HAVE 20 YEARS, NOW, IN WHICH WE HAVE NOT, AND WE HAVE GOT A LOT OF CONVICTIONS, AND WE HAVE GOT A LOT OF FINAL JUDGMENTS THAT ARE BASED UPON, AND THE DECISIONS THAT WE ARE GOING TO ALLOW WHAT IS OBVIOUSLY, IF WE REALLY FINE STRAINED IT, PROCEDURAL MATTERS, IN THE EVIDENCE CODE. AND THAT -- WHAT IS GOING TO HAPPEN, IN RESPECT TO THOSE?

WELL, I THINK THE POINT -- ONE OF YOUR CHOICES, OBVIOUSLY, WOULD BE TO TAKE NO ACTION. THE STATUTE IS ON THE BOOKS. IT IS A LAW. AND I GUESS, AS CASES FILTER UP HERE, THERE WILL BE QUESTIONS RAISED ABOUT THE CONSTITUTIONALITY, IF IT IS TRIED TO BE APPLIED IN CRIMINAL CASES. THERE WILL BE ISSUES OF CONSTITUTIONALITY OF CERTAIN ASPECTS OF IT, PERHAPS, EVEN IN CIVIL CASES. BUT EVENTUALLY, IF ONE OF THE GROUNDS THAT EVENTUALLY GETS TO YOU IS THAT THIS RULE SHOULD BE IGNORED BECAUSE IT IS PROCEDURAL AND STRUCK DOWN BECAUSE IT INTRUDES ON THE SEPARATION OF POWERS, YOU, REALLY, ARE BACK TO WHERE YOU STARTED FROM, AND WHAT I WOULD SAY TO THIS COURT IS THAT YOUR POWER TO STRIKE DOWN A LAW, BECAUSE IT IS PROCEDURAL, WHETHER IT IS THIS EVIDENCE CODE OR ANY OTHER LAW, IS A TREMENDOUS WEAPON TO PROTECT THE COURT FROM UNWASHINGTONED INTRUSIONS BY -- UNWARRANTED INTRUSIONS BY THE LEGISLATURE INTO YOUR FUNCTIONING, AND IF YOU THINK THAT THAT IS WARRANTED, YOU, CERTAINLY, SHOULD DO THAT. YOU CAN USE IT IN A LOT OF CASES. IT IS LIKE A NUCLEAR WEAPON. YOU CAN DROP A NUCLEAR WEAPON IN MANY CASES. IS IT A GOOD IDEA TO DO THAT? AND I THINK THE QUESTION IS, IS THE ISSUE HERE THAT EVERYONE THINKS THIS IS A BAD RULE, AND THEREFORE THEY --

ISN'T THAT THE ISSUE?

YES.

BECAUSE, BEFORE, WE HAVE, AGAIN, RESPECTED THE IDEA THAT, EVEN IF THE LEGISLATURE, IN THIS AREA, IF THE LINES WERE BLURRED, IF THERE WAS NO OPPOSITION TO THE RULE, AND IT WAS A GOOD IDEA, WE WOULD ADOPT IT, THERE BY ELIMINATING ANY CONSTITUTIONAL CONCERN, BUT HERE IS THE FIRST TIME THAT THERE ARE SOME GENUINE CONCERNS FOR THE SCOPE OF THE RULE, WHICH, YOU AGREE, NEEDS TO BE NARROWED, AND IT IS VER -- AND ITS VERY FAIRNESS FOR BOTH SIDES IN LITIGATION. SO THAT IS A GOOD ENOUGH REASON NOT TO ADOPT IT. ISN'T IT?

THAT IS ONE OF YOUR CHOICES, BUT YOU ARE, REALLY, EVADING THE QUESTION, BECAUSE SOMEBODY IS GOING TO BRING THIS TO YOU EVENTUALLY, SAYING STRIKE THIS DOWN BECAUSE IT IS BAD PROCEDURE, AND YOU CAN STILL DO THAT.

OR THAT IT IS SUBSTANTIVE OR UNCONSTITUTIONAL.

RIGHT. YOU CAN DECLARE THAT IT IS SUBSTANTIVE.

I AM NOT SURE, THOUGH, WHAT POSITION YOU ARE ADVOCATING, NOW, HERE, DURING THE COURSE OF --

WHAT I ADVOCATE IS --

WHAT POSITION ARE YOU ADVOCATE SOMETHING.

I THINK TRADITIONALLY THE COURT HAS VIEWED EVIDENCE MATTERS AS BOTH PROCEDURAL AND SUBSTANTIVE. IF WE WENT THROUGH EVERY PROVISION OF THE CODE, WE WOULD HAVE MUCH DIFFICULTY, PROBABLY, AGREEING ON IT, AND I SEE NO REASON TO GO DOWN THAT ROAD NOW. I THINK IT HAS BOTH PROCEDURAL AND SUBSTANTIVE ASPECTS, IF YOU NEED TO DECLARE SOMETHING, BUT AS TO WHETHER YOU ADOPT THE RULE AND LEAVE IT OPEN TO CHALLENGES ON ITS ASPECTS OF CONSTITUTIONALITY, OR WHETHER YOU JUST DON'T TAKE ANY ACTION AND WAIT FOR IT TO COME BACK TO YOU THAT, IS A DIFFICULT CHOICE, BUT, PERHAPS, IF IT IS A COOPERATIVE EFFORT, THERE MIGHT BE A WAY, WITH WHATEVER OPINION YOU WRITE IN THIS, AS TO COMMUNICATE BACK TO THE LEGISLATURE THAT YOU THINK THERE MAY BE SOME PROBLEMS WITH THIS RULE THAT MIGHT BE AVOIDED, IF IT WERE AMENDED IN SOME FASHION. I THINK THIS IS AN UNUSUAL CIRCUMSTANCE THAT MAY NOT NECESSARILY BE THE ORDINARY WAY TO DO IT.

IF WE DECIDE TO AMENDMENT IT -- TO AMEND IT, ARE WE, THEN, STATING THAT IT IS, IN FACT, PROCEDURAL? BECAUSE ONE OF THE PROPOSALS IS THAT WE SAY THAT THIS IS -- JUST APPLIES TO CIVIL CASES, AND IF WE DO THAT, ARE WE SAYING IT IS PROCEDURAL?

WELL, I THINK YOU COULD GET AWAY WITH SAYING IT IS A MIXTURE OF PROCEDURAL AND SUBSTANCE, AND THEREFORE YOU ARE ALLOWED TO PROPOSE A MODIFICATION TO IT OR ADOPT IT AS A MODIFIED RULE, BUT I DIDN'T EVER PRETEND TO PRESENT TO YOU THAT IT WAS AN EASY ANSWER TO THIS QUESTION. WE TRIED TO BE HELPFUL, FROM THE STANDPOINT OF ADDING SOME BALANCE. I THINK THE CONCERN WE HAVE IS THAT, AS I SAID, YOU SHOULD BE CAUTIOUS TO GRAB THIS TOOL AND SAY, WELL, THESE PEOPLE DON'T LIKE THIS RULE. IS THE BAR COMMITTEE THE ONLY WAY THAT A RULE OF EVIDENCE CAN COME BEFORE THIS COURT AND BE PROPER? I MEAN, THIS THAT IS THE OTHER IMPLICIT ARGUMENT HERE, IS THAT, WELL, THE BAR COMMITTEE DIDN'T LIKE THIS RULE AND DIDN'T GO THROUGH THAT PROCEDURE, SO THE LEGISLATURE HAS NO BUSINESS PROPOSING.

BUT WE HAVE NEVER FOLLOWED --

NO, YOU SHOULDN'T.

BUT ALL OF THIS STEMS FROM THE FACT THAT THE INITIAL CHRAB TICH -- COLLABORATIVE EFFORT WAS, REALLY, A RULE THAT TOOK ALL OF THE CASE LAW ON EVIDENCE, AND, REALLY, THERE WAS A SUBSTANTIAL CONSENSUS, WITH REFERENCE TO, YOU, KNOW, THAT CODE, AND SO IT WAS INEVITABLE THAT IT WAS GOING TO BE A TIME. IT IS, REALLY, JUST SURPRISING TO ME THAT IT HAS TAKEN THIS LONG, THAT THERE WAS GOING TO AND CASE LIKE THIS, AND WE JUST HAVE TO DECIDE HOW TO GO.

AGAIN, IN CLOSING, WE DIDN'T TAKE A POSITION IT WAS WHETHER YOU SHOULD ACCEPT OR REJECT THE RECOMMENDATION OF THE BAR COMMITTEE OR ADOPT OR REJECT THE RULE. I THINK, UNFORTUNATELY, THE COURTS HAVE A DIFFICULT DECISION. WHAT WE THINK YOU SHOULD AVOID IS UTILIZING THAT WEAPON, MERELY BECAUSE THERE IS A DISAGREEMENT OF WHETHER THIS IS A GOOD RULE OR A BAD RULE. IF IT, REALLY, INTRUDES ON THE COURT, AND YOU WANT TO TELL THE LEGISLATURE TO STAY OUT OF IT, FINE, BUT I THINK THERE OUGHT TO BE SOME MIDDLE GROUND TO TRY RESOLVE THIS DISPUTE OR LET IT BUBBLE UP THROUGH THE COURTS ON THE MERITS, IN REAL CASES IN CONTROVERSY.

MAY I ASK ONE QUESTION?

THANK YOU.

DO YOU AGREE? WE TRIED TO DO A FULL ANALYSIS AND COVER EVERY JURISDICTION. IS THERE

ANY JURISDICTION, ANYWHERE, THAT YOU HAVE BEEN ABLE TO LOCATE, THAT HAS THIS RULE?

NOT IN THIS FORM. I THINK WHAT WE RAISED IN THE BRIEF IS THERE IS SOME QUESTION ABOUT WHETHER THERE WAS MEANING TO THE PHRASE OF SIMILAR RIGHT OR SIMILAR INTEREST OR SIMILAR REASON, AND THAT PHRASE HAS BEEN UTILIZED IN OTHER EVIDENCE CODE PROVISIONS, SO THAT IS NOT A FOREIGN PHRASE, FROM THE STANDPOINT OF NEVER BEING USED, BUT A RULE EXACTLY IN THIS IDENTICAL TO THIS, NO, WE DON'T FIND ANY, AND IT IS NOT IDENTICAL TO THE ONE THAT I SAW, EITHER. THANK YOU.

REBUTTAL.

MAY IT PLEASE THE COURT. THERE IS AN ABSOLUTELY NO COMPABLE RULE IN ANY OF THE 50 STATES OR US TERRITORIES OR COMMONWEALTH OF PUERTO RICO THAT, IN ANY WAY, SHAPE OR FORM, RESEMBLE THE RULE THAT IS BEFORE THIS COURT. 21 YEARS OF PEACE, WHERE THIS COMMITTEE HAS BEEN SUBMITTING SUSTAINED ANALYSIS TO THIS COURT, IN THE FORM OF PETITIONS, AFTER REVIEWING LEGISLATION AFTER LEGISLATION, HAS, NOW, BEEN TWISTED AND CONVERTED INTO A WEAKNESS. THIS COURT HAS NOT BEEN RUBBER-STAMPING THOSE PETITIONS. THIS COURT HAS BEEN ADOPTING THOSE PETITIONS, TO THE EXTENT THAT THEY ARE PROCEDURAL. THEREFORE NOT REJECTING THIS PROPOSED AMENDMENT, THIS AMENDMENT, WILL NOT OPEN UP THE DOOR TO GO BACK AND REVIEW ALL OTHER PARTS OF THE CODE THAT ARE ACTUALLY PROCEDURAL INNATE. THERE IS A SECOND POINT THAT, I THINK, MERITS OBSERVATION. THIS COURT WILL, NOW, HAVE TO ADDRESS THE ISSUE OF WHETHER OR NOT THIS PIECE OF LEGISLATION IS PROCEDURAL OR SUBSTANTIVE INNATE. WHY WAIT FOR A CASE BY CASE DECISION? WHY OBVIATE AND DELAY WHAT IS, NOW, BEFORE THE COURT? THE WHOLE PURPOSE OF HAVING THIS COMMITTEE WORK IS TO BE ABLE TO ASSIST THE COURT, IN ITS JUDGMENT OF THOSE ASPECTS OF THE EVIDENCE CODE THAT ARE PROCEDURAL INNATE. THERE IS ABSOLUTELY NO AUTHORITY DIVESTING THIS COURT FROM ITS AUTHORITY, TO PASS ON THAT. THIS COURT HAS COMPLETE AUTHORITY TO REJECT THE LEGISLATION, AS PROCEDURAL. IT DOESN'T HAVE TO RULE ON ITS CONSTITUTIONALITY AND, ACTUALLY, IT CANNOT, AT THIS POINT. THERE IS NO CASE IN CONTROVERSY. THERE IS ABSOLUTELY NO CONSTITUTIONAL WAY OF GETTING IT THERE, REACHING THAT CONCLUSION, BASED ON THIS PROCEDURAL MECHANISM. WHAT THE COURT CAN DO IS ISSUE AN ORDER THAT WILL HELP THE PRACTICING BAR, AND IN THAT ORDER, SIMPLY STATE THAT IT IS REJECTING THE RULE, AS IT IS PROCEDURAL. WHAT, THEN, IS THE PRACTICAL CONSEQUENCE? WELL, THE PRACTICAL CONSEQUENCE IS THAT IT DOES NOT HAVE THE FORCE OF LAW. WILL THERE BE CONFUSION BECAUSE IT STAYS IN THE BOOKS? TO THAT EXTENT, YES, THERE WILL BE. AND THERE YOU WILL HAVE TO FACE PROBLEMS OF CONFUSION. IT DOES STAY IN THE BOOK. IT WILL NOT BE STRICKEN FROM THE BOOK, BUT, THERE, THEN, IS SOME AUTHORITY GUIDING THE BENCH AND BAR, AS TO WHETHER OR NOT IT HAS THE FORCE OF LAW, AND INEVITABLY THERE WILL AND CASE IN CONTROVERSY, BUT IN THE INTERIM, WHAT THIS COURT IS PRACTICALLY DOING, IS MITIGATING WHATSOEVER DAMAGE FLOWS FROM THIS BAD RULE. IT IS A BAD RULE, AND THERE IS ABSOLUTELY NO --

SO WE ARE NOT REJECTING IT BECAUSE IT IS PROCEDURAL. WE WOULD BE REJECTING IT BECAUSE IT IS BAD PROCEDURE. ISN'T THAT AN IMPORTANT DISTINCTION TO MAKE, FOR, IF WE, FOR THE FUTURE, BECAUSE --

YES, IT IS. THAT IT IS PROCEDURAL BRINGS IT WITHIN THE AMBIT OF YOUR JURISDICTION. IT GIVES YOU THE POWER TO SAY THE LAW AS TO THIS AMENDED PART OF THE CODE. AND THAT IT IS BAD IS SOMETHING THAT THIS COURT CAN, ALSO, STATE CLEARLY. WHAT THE COURT CANNOT DO, AT THIS JUNCTURE, IS PASS ON ITS CONSTITUTIONALITY, THAT IS CREATES -- THAT IT CREATES CONFUSION THAT, IT MAY CREATE ECONOMIC PROBLEMS, BURDEN-SHIFTING PROBLEMS. THAT IT DOES NOT HAVE THE DESIRABILITY OF THE OTHER 24 EXCEPTIONS TO 803, EXCITED UTTERANCE, SPONTANEOUS STATEMENTS, THEN-EXISTING MENTAL, EMOTIONAL STATES, ALL OF THEM.

THANK YOU. YOUR TIME IS UP. THANK YOU VERY MUCH. THANK ALL COUNSEL FOR BEING HERE.