Amendments to Florida Rules of Criminal Procedure

> THE NEXT MATTER ON THE ORAL ARGUMENT CALENDAR THIS MORNING IS THE AMENDMENTS TO THE RULES OF CRIMINAL PROCEDURE. YOU MAY PROCEED.

GOOD MORNING, MY NAME IS RAYMOND RAFOOL. I AM THE CHAIRMAN OF THE FLORIDA RULES OF CRIMINAL PROCEDURE. WE ARE HERE FOR THE TWO-YEAR CYCLE REPORT, AND I UNDERSTAND FROM READING THE MATERIALS, THAT YOU HAVE ALL GONE THROUGH THOSE ALREADY, SO I WILL HIT THE REASONS WHY WE ADDRESSED THESE. THE RULES WERE BASICALLY ADOPTED 30 VOTES TO 2, FOR RULE 3.11 SUBSECTION B SUBSECTION 1, THE 3.170 SUBSECTION L, WHICH WAS AN EDITORIAL CHANGE, WAS ADOPTED UNANIMOUSLY. THE RULE 3.190 SUBSECTION H, SUBSECTION 4 IN COMMITTEE NOTE WAS ADOPTED 32-TO-2. THE AMENDMENT TO RULE 3.361 WAS ADOPTED UNANIMOUSLY, AND THE FORM WAS ADOPTED UNANIMOUSLY. THE FIRST PROVISION, WHICH DEALS WITH RULE 3.111 SUBSECTION B-1, IS CONCERNING THE INDIGENT OR PARTIAL INDIGENT DEFENDANT AND THE APPOINTMENT OF COUNSEL. AS THE COURT KNOWS, COUNSEL WILL BE APPOINTED FOR ALL CASES, TO BE DONE WHERE THERE IS A FORMAL CHARGE, AS SOON AS FEASIBLE, AFTER CUSTODIAL RESTRAINT FOR THE FIRST APPEARANCE. THE ASPECTS RELATIVE TO A MISDEMEANOR OR VIOLATION OF MAUNIES PAL ORDER -- MUNICIPAL ORDINANCE, ALLOWS FOR DISCOUNT, IF THE ORAL OR WRITTEN STATEMENT AS IT CURRENTLY IS, IS NONIMPRISONMENT.

IT SEEMS TO BE THAT THE CONTROVERSY HERE IS THAT THERE WERE CERTAIN ITEMS THAT NEEDED TO BE LOOKED AT, AND THAT IS WHY THIS PARTICULAR RULE HAD BEEN DEFERRED PREVIOUSLY. AND AS I UNDERSTAND THE COMMENTS THAT HAVE COME IN, THAT THESE PARTICULAR ITEMS DON'T SEEM TO BE ADDRESSED BY THIS RULE. PARTICULARLY I AM A BIT CONCERNED ABOUT THE ONE THAT IS ABOUT, EVEN THOUGH YOU SAID THERE IS NO IMPRISONMENT, IF SOMEONE IS PLACED ON PROBATION, YOU MAY LATER BE PUT IN PRISON. IMPRISONED, PURSUANT TO A VIOLATION OF PROBATION. SO WHEN A COMMITTEE WAS LOOKING AT THIS PARTICULAR RULE IN THE FORM, WERE THOSE ITEMS ADDRESSED AND WHAT IF ANYTHING, WAS SAID ABOUT THOSE?

YES, YOUR HONOR. THEY WERE ADDRESSED, AND QUITE FRANKLY, THE RULE PROVIDES SUBSTANTIAL DISCRETION TO THE TRIAL COURTS, BECAUSE MOST OF THESE ISSUES ARE FACTUAL, AND THEY ARE CASE BY CASE RELATED. THE ISSUES THAT WERE PARTICULARLY ADDRESSED, NUMBER ONE, IS WHAT HAPPENS WHEN YOU HAVE A SUBSTANTIVE CHARGE, AND THIS ACTUALLY, WHEN YOU LOOK AT THIS, YOU MUST TAKE INTO CONSIDERATION THAT WE CREATED AN ORDER TO GO ALONG WITH THAT, BUT IF YOU HAVE, ON THE SUBSTANTIVE CHARGE, THERE IS THE CONSIDERATION THAT IF THEY VIOLATE, THAT THEY COULD GO TO JAIL AT THAT TIME. COUNSEL, AT THAT POINT, WOULD BE ALLOWED. IT IS WHERE THEY ARE DISCHARGED OF COUNSEL AND THE SUBSTANTIVE, WHICH IS THE ORIGINAL CASE, THOSE CONSIDERATIONS WERE DISCUSSED, AS WELL AS, AND I HAVE OUTLINED IN MY BRIEF, THE AS SPEKTS -- ASPECTS OF WHERE THEY GO AND THE STATE ATTORNEY, IN THAT IT IS NOT SEEKING INCARCERATION, DISCHARGE IT, AND THEN CONTINUE THE CASE FOR A LATER PERIOD OF TIME. WE, ALSO, CONSIDERED PASSING OUT PLEA FORMS AT THE ORIGINAL, WHICH HAPPENS ALL THE TIME. YOU WALK IN. MOST PEOPLE DON'T UNDERSTAND WHAT THEY ARE DOING. THEY HAVE BEEN THERE MAY BE FOR THE SECOND TIME, THIRD TIME, OR THEY WANT TO GET OUT BECAUSE THEY CAN'T AFFORD A LAWYER AND DON'T UNDERSTAND ALL THE ASPECTS AND SO THAT WAS CONSIDERED, RELATIVE TO THE DISCHARGE. PLACING THE DEFENDANT, WHICH IS NUMBER THREE, WE DISCUSSED THAT ASPECT, WHICH WAS PLACING THE DEFENDANT ON, FIRST OF ALL, DOING AN

ORDER OF NONIMPRISONMENT AND THEN SUBSEQUENTLY THEY GO THROUGH THE CASE. THEY ARE PUT ON PROBATION. THEY COME BACK AFTER A VIOLATION OF PROBATION, AND THEY ARE LOOKING AT PRISON TERM. WELL, OF COURSE, THOSE ASPECTS ARE DISCUSSED. OF COURSE THEY ARE GOING TO CONSIDER THAT IN THE PLEA COLLOQUY. WE EXPECT THE TRIAL COURTS, AS WHAT THEY ARE DOING AND WHAT IS REQUIRED, TO DISCUSS THE ASPECTS OF THE VIOLATION.

SO YOU THINK THAT THESE ITEMS ARE COVERED UNDER THAT ASPECT OF THE RULE THAT SAYS THAT, IF IT IS DETERMINED THAT THE DEFENDANT IS SUBSTANTIALLY DISADVANTAGED, THEN NOT TO DISCHARGE THE PUBLIC DEFENDER, THEN THAT WOULD COVER THOSE PARTICULARITY SNEMS.

WELL, I THINK THAT THE TRIAL COURT IS GOING TO LOOK AT THE INDIVIDUAL DEFENDANT. WHEN YOU LOOK AT A MISDEMEANOR OR VIOLATION OF A MUNICIPAL ORDINANCE, IF YOU SEE SOMEONE THAT COMES IN WITH A RAP SHEET THAT IS VERY LONG, THE REASON, THEN YOU HAVE CONSIDERATIONS OF NUMBER ONE, IS THIS GOING TO BE AN IMPRISONMENT CASE OR NOT? THE OTHER ASPECT IS, IF YOU GO TO A VIOLATION OF PROBATION, IF IT IS THE FIRST, SECOND, THIRD CHARGE, WHICH IS USUALLY THE PRACTICAL EFFECT OF THESE, WHEN THEY VIOLATE, DEPENDING ON WHAT IT IS, A TECHNICAL VIOLATION AND A NEW CHARGE VIOLATION, THEN THOSE ASPECTS ARE COMPLETELY DIFFERENT, AND I THINK WITH THE DISCRETION OF THE TRIAL COURT, THE COURT IS GOING TO LOOK AT THE INDIVIDUAL DEFENDANT AND DETERMINE WHETHER IT IS TO THE INDIVIDUAL DEFENDANT'S ADVANTAGE OR DISADVANTAGE TO HAVE COUNSEL. SO MAYBE YOU DON'T AGREE, BUT THAT IS, I THINK, THE TRIAL COURTS HAVE TO HAVE THAT DISCRETIONARY ASPECT. WE CAN'T WRITE A RULE. WE HAVE TRIED FOR EVERY SITUATION, ALMOST, BUT YOU CAN'T DO THAT, AND IT IS A CONCERN, AND I THINK THAT THE TRIAL COURTS, AND ONE GOOD THING ABOUT BRINGING THIS TO THE FOREFRONT, IS THAT THE TRIAL COURTS NEED TO CONSIDER THAT, WHEN DETERMINING WHETHER THEY ARE GOING TO DISCHARGE, EVEN IF THERE IS AN ORDER OF NONIMPRISONMENT, DOESN'T MEAN THAT THEY DISCHARGE. AND WE WOULD PROVIDE THE RULE, EXCUSE ME, THE COMMITTEE NOTE THAT PROVIDES SOME MORE GUIDANCE TO THEM. THEY CAN. THEY DON'T HAVE TO. AND SO WHEN YOU SEE A DEFENDANT THAT HAS WHAT YOU KNOW, IF THEY COME BACK, AND IT HAPPENS. I USED TO BE A PROSECUTOR, MYSELF. YOU SEE THIS PERSON, NOT A GOOD CASE, DON'T WORRY, WE WILL GET HIM LATER, BUT THE COURTS, I THINK, HAVE TO CONSIDER THAT. AND I THINK THAT THE PARTY, THE PERSON THAT IS THERE, THE DEFENDANT, USUALLY IF THEY HAVE BEEN INVOLVED IN THE SYSTEM, I CAN TELL YOU THEY KNOW, SOMETIMES, MORE THAN THE LAWYERS AND THEY CAN HAVE THE RIGHT TO ASK OR TO HAVE THE COUNSEL MAINTAINED. THAT RULE PROVIDES FOR THE COMMITTEE NOTE, AND, REALLY, WHAT WE ARE TRYING TO DO IS ADDRESS THE ISSUE, TO PROVIDE THE TRIAL COURT WITH THE DISCRETION AND IF YOU WILL NOTICE, I WOULD LIKE TO POINT OUT, IF I COULD, THE ORDER THAT WE DID, THE ORDER ACTUALLY GIVES EVEN MORE DETAIL, WHICH IS SOMETHING THAT I THINK IS IMPORTANT. WE HAVE AMENDED IT TO A WRITTEN STATEMENT. WRITTEN STATEMENTS ARE OBVIOUSLY NOT SUFFICIENT, AND AN ORDER IS WHAT THE COURTS USUALLY END UP WITH. PEOPLE USUALLY END UP WITH THE ORDER OF NONI AM PRISONMENT, WHICH -- OF NONIMPRISONMENT, WHICH IS OUR FORM IN CONJUNCTION WITH THE RULE AMENDMENT, 3.994, WHICH PROVIDES MORE INFORMATION, PARTICULARLY IN PARAGRAPH 4, IF THIS ORDER IS WITHDRAWN, THERE SHALL BE A REDETERMINATION NATION OF INDIGENT FEE AND APPOINTMENT OF COUNSEL. THE RULE CONSIDERING THAT LAWYERS AND JUDGES ARE GOING TO DEAL MOSTLY WITH, THAT DOESN'T NECESSARILY SAY THAT. WHAT IT SAYS IS IF THEY QUALIFY AGAIN. THIS ORDER, WHICH IS WHAT WE BELIEVE THE DEFENDANTS WILL HAVE WHEN THEY HAVE THE ORDER OF NONIMPRISONMENT, PROVIDES THEM WITH MORE INFORMATION, AND THAT IS WHY WE THINK THAT TO BE APPROPRIATE. THE NEXT RULE IS A TECHNICAL. THEY AMENDED THE FLORIDA RULES OF APPELLATE PROCEDURE --

SO IT IS THE POSITION, I TAKE IT, OF THE COMMITTEE, THAT THIS IS A RULE TO IMPLEMENT THE STATUTE, 27.512. WHICH IS THE ORDER OF NO IMPRISONMENT.

THAT'S CORRECT, YOUR HONOR.

AND IS THERE A VARIANCE BETWEEN WHAT IS PROPOSED AND WHAT IS STATED IN THE RULE?

YOUR HONOR, I DON'T KNOW THAT RIGHT NOW. I AM SORRY. I WILL LOOK AT THAT, AND IF I COULD ADDRESS THAT ON THE REBUTTAL. THANK YOU. IF THERE IS NO OTHER QUESTIONS, ON THAT RULE, I WILL MOVE TO THE NEXT. AS TO THE NEXT ONE, AS I SAID, IT IS AN EDITORIAL CHANGE. THE NEXT RULE IS CONCERNING THE STATE VERSUS GAINS, WHICH IS THIS COURT'S DECISION, AT 777 SO.2D 1221. WE REVIEWED THE RULE AS IT IS IN PLACE, AND THIS RULE, OF COURSE, WE HAVE DEALT WITH IN THE PAST, AND I BELIEVE WE ARE DEALING WITH IT AGAIN, BUTS ESSENTIALLY HOW THE -- BUT ESSENTIALLY HOW THE RULE READS IS THAT THE THE TIME OF FILING A MOTION TO SUPPRESS SHALL BE MADE BEFORE TRIAL, UNLESS OPPORTUNITY BEFORE DID NOT EXIST OR THE DEFENDANT WAS NOT AWARE OF THE GROUNDS FOR THE MOTION, BUT THE COURT MAY ENTERTAIN A MOTION OR AN APPROPRIATE OBJECTION AT THE TRIAL. WHAT WE DID IN THIS RULE IS, WE CONSIDERED THE EXISTING RULE. WE CONSIDERED WHAT THE LAW WAS WITH THE COURT ESTABLISHED, AND WE READ THE GAINES CASE TO NOT NECESSARILY TALK ABOUT AN AMENDMENT TO THE RULE BUT AN EXPLANATION OF THE RULE, AS IT APPLIES TO THE DOUBLE JEOPARDY.

BUT WHAT ABOUT, YOU HAVE GIVEN THE EXPLANATION THAT WE GAVE IN GAINS, AS FAR AS AWAY TO AVOID THE PROBLEM, BUT WHAT ABOUT THE ISSUE WHERE IT IS RAISED, AS IT WAS IN GAINS, AFTER THE JURY IS SELECTED, AND THERE IS A, AND THE JUDGE DETERMINES THAT THERE IS, AFTER TRIAL, THAT IT SHOULD BE, MATTERS, THERE SHOULD BE THE GRANTING OF A MOTION TO SUPPRESS. DID YOU CONSIDER WHETHER TO, THAT THAT SHOULD BE MADE, A STATE RIGHT OF APPEAL, AND SPECIFICALLY PROVIDE FOR THAT, OR, AND THAT WAS REJECTED?

IT WASN'T REJECTED. IT IS ALREADY THERE.

WHERE IS IT?

IT IS IN YOUR OPINION. LET ME TELL YOU WHAT YOU HAVE IS IS THE STATE HAS THE RIGHT TO APPEAL, BASED ON WHEN THE COURT DOES THE RULINGS, AND NOTHING WAS REALLY CHANGED, AND BASICALLY GAINS JUST EXPLAINED --

THAT WOULD ONLY BE APPLICABLE IF THE JUDGE, IN FACT, USES THAT LANGUAGE OF "MAY RESERVE RULING" UNTIL AFTER HE HEARS, YOU KNOW, THE MOTION OR JUDGMENT OF ACQUITTAL OR MOTION FOR A NEW TRIAL, BUT WHAT IF HE DOESN'T? WHAT IT, AT THE POINT -- WHAT IF AT THE POINT OF THE HEARING, ACTUALLY THE MOTION TO SUPPRESS, THE JUDGE DECIDES AT THAT POINT, TO GRANT THE MOTION TO SUPPRESS. WE ARE STILL IN THE SAME POSTURE THEN THAT, THE STATE WOULD HAVE NO RIGHT TO APPEAL. CORRECT?

WELL, NO, NOT NECESSARILY. YOU KNOW, THE RULES, WE, AT THE CRIMINAL RULES, AND I THINK IT IS ADOPTED UNIFORMLY, IS WE TRY TO CREATE CONSISTENCY. WE TRY TO ESTABLISH, BUT WE CAN'T MICROMANAGE A LAW PRACTICE. IT IS SORT OF LIKE THE CONTEMPORANEOUS OBJECTION RULE. WE COULD WRITE THAT IN THE RULES BUT WE KNOW THAT. WE KNOW IT, BECAUSE WE HAVE OPINIONS.

MAYBE, THE COURT SPECIFICALLY SAID THAT IT IS NOT CLEAR HOW THE CURRENT RULES WOULD PROVIDE THE STATE WITH THE IMMEDIATE RIGHT TO APPEAL AN ADVERSE RULING ON A MOTION TO SUPPRESS, ANSWERED AFTER THE JURY HAD BEEN SWORN. NOTHING IN THE COMMENTS EXPLAIN WHETHER, BECAUSE THAT IS STILL NOT CLEAR THAT THAT CAN'T BE, IT CAN'T BE DONE UNDER THE RULES, AS TO WHETHER THE DECISION WAS MADE NOT TO OPPOSE AN AMENDMENT, BECAUSE THERE WERE CONCERNS THAT THAT WOULDN'T BE, THERE WOULD BE DUE PROCESS ISSUES. THERE IS NOTHING EXPLAINING WHY THAT WAS, WHY AN AMENDMENT WAS REJECTED.

BECAUSE WE FELT THAT IT WAS NOT NECESSARY.

THE STATE, WELL, WOULD SHOW --

BECAUSE THE STATE, WELL, IN GAINS, YOU SAY IF THIS HAPPENS, THIS HAPPENS. NOW, OKAY, WE COULD GO BACK AND WRITE A RULE THAT SAYS ALREADY WHAT YOU SAID, BUT IT IS REALLY NOT NECESSARY. THE RULE, AS IT IS, DOESN'T SAY IF YOU AVOID RULING AT THIS POINT, THEN THIS HAPPENS. YOU KNOW, WE PRESUME THAT, WHEN YOU PRACTICE LAW, YOU PASS THE BAR. YOU KNOW. NOW, FOR INSTANCE, THE JUDGE SHOULD KNOW. WE PROVIDE THIS COMMENT AND THEN THE RULES, BECAUSE IT IS A GUIDE. IT IS NOT NECESSARILY THE RULE, BECAUSE WHAT YOU ARE TALKING ABOUT IS THE STATE'S RIGHT TO APPEAL. THIS IS THE TRIAL COURT LEVEL.

BUT IF THE TRIAL COURT DOESN'T WITHHOLD RULING ON THE MERITS OF THE MOTION, IF FACT THE DEFENDANT MAY NOT WANT THE JUDGE TO WITHHOLD RULING. MAYBE IF, IT IS A REALLY GOOD MOTION AND THEY DON'T REALLY WANT TO GO TO JURY VERDICT, AND THEN THE JUDGE DECIDES THAT IT SHOULD BE GRANTED AFTER TRIAL. I MEAN, IS IT SPECIFIC RIGHT OF APPEAL, BEFORE THE JURY IS SWORN FOR THE STATE TO BE ABLE TO APPEAL AN ADVERSE RULING ON A MOTION TO SUPPRESS? SO AT THE TIME AFTER, THERE IS A RULE, THE JUDGE DECIDES TWO RULES, WE ARE STILL BACK IN THE GAINES SITUATION, AND ALL I AM WANTING, YOU ARE TALKING ABOUT GOING TO LAW SCHOOL, AND I AM NOT UNDERSTANDING, I FEEL LIKE WE ARE CROSSING --

I DON'T THINK WE ARE CROSSING. MAYBE I AM NOT EXPRESSING MYSELF AS WELL, JUSTICE PARIENTE. IT IS NOT ABOUT. THAT IT IS BASICALLY WHAT YOU ARE SAYING IS THAT, FIRST OF ALL THE COURT IS GOING TO ALLOW THE MOTION, AND YOU HAVE TO UNDERSTAND THAT WE HAVE CONSIDERED THAT ISSUE, WHEN IT SHOULD BE DONE. WHEN IT IS NOT, MANY TRIAL COURTS HAVE A PRETRIAL ORDER THAT SAYS WHEN YOU CAN DO. THIS IS NOT NECESSARILY THE NORM. THIS BASICALLY SAYS, IF YOU READ IT, IT NOT EXISTS OR THE DEFENDANT WAS NOT AWARE OF IT. WELL, THAT IS NOT REALLY, THOSE ARE VERY LIMITED PARAMETERS, AND THEN WHAT YOU HAVE, WHAT I WAS TALKING ABOUT LAW SCHOOL, AND I AM SORRY THAT, IF THAT ANALOGY WAS VAGUE ABOUT BASICALLY WHAT I AM SAYING, IS THAT YOU TELL THE JUDGE, JUDGE, HERE IS WHAT HAPPENED. HERE IS GAINES. IF YOU DON'T RULE ON THAT, WHICH NUMBER ONE IS THEY ARE GOING TO FIGHT LIKE YOU KNOW WHAT, NOT TO HAVE THE MOTION EVEN BROUGHT UP UP AT THAT TIME, BECAUSE THE RULE SAYS THIS, THIS AND THIS, AND WE HAVE DEALT WITH THAT BEFORE AND WE DIDN'T MAKE THE CHANGE, BECAUSE WE FELT THAT THERE HAD TO BE THOSE DISCRETIONARY ASPECTS FOR THE COURT, BUT IF YOU DO THAT, THE PROSECUTOR IDENTIFIES, JUDGE, IF YOU DO THIS, THIS IS WHAT IS GOING TO HAPPEN. I MEAN, THOSE THINGS ARE THERE. THAT IS WHAT THE LAWYERS DO, AND THAT IS WHAT I WAS TRYING TO GET TO. WHAT I AM, ALSO, SAYING IS THAT YOU CANNOT GIVE EVERYBODY EVERY SINGLE RULE ON EVERY SINGLE ISSUE.

LET ME ASK IT THIS WAY. WAS THERE A DISCUSSION, AT THE COMMITTEE LEVEL, OF AN AMENDMENT TO RULE THAT SAYS YOU SHALL BRING A MOTION TO SUPPRESS, PRIOR TO TRIAL, AND/OR IF, FOR GOOD CAUSE SHOWN, YOU BRING IT DURING TRIAL, THE JUDGE SHALL RESERVE RULING. I MEAN, WAS THERE ANY DISCUSSION OF THAT KIND OF NATURE?

YES. JUSTICE QUINCE. WE HAD A DISCUSSION ON THAT, TO, THIS ACTUALLY CAME AT OR AFTER WE DECIDED WHEN YOU COULD BRING THESE. MOTIONS. AND THERE WAS THE REAL ISSUE OF BRINGING THEM DURING THE TRIAL, AND WE HAD TRIAL COURT JUDGES ON THERE. WE HAD PROSECUTORS. WE HAD DEFENSE ATTORNEYS, AND WE AFTER WE ENDED UP GOING THROUGH ALL THOSE REALMS, WE TALKED ABOUT TEN DAYS BEFORE, REASONABLE TIME BEFORE, ET CETERA. WE WENT THROUGH ALL THAT. AND SO THOSE CONSIDERATIONS WERE THERE, BUT WHAT WE KEPT COMING BACK TO IS THE TRIAL COURTS' RIGHT TO MAINTAIN HIS DISCRETION HIS DOCKET. THEN WE WAIVED THOSE AND DISCUSSED THE CONSTITUTIONAL ASPECTS OF THE DEFENDANT, AND THEN WE TALKED ABOUT THE EFFECTIVENESS OF COUNSEL. I MEAN, WHEN YOU

ARE DEALING WITH THAT, YOU ARE, AS YOU KNOW, WE ARE DEALING WITH THE DEFENDANT'S RIGHTS FOR THE SUPPRESSION ISSUES, THE CONSTITUTIONAL RIGHTS. WE ARE DEALING WITH THE TRIAL COURT'S RIGHTS, WELL, NOT RIGHTS BUT THE TRIAL COURT'S DUTIES IN WEIGHING AND HAVING ITS CALENDAR DISCRETION AND THEN WE ARE LOOKING AT THE STATE. IT SORT OF FALLS IN BETWEEN AND WHAT IT CAN DO, BUT I REALLY DON'T SEE THAT NECESSARILY AS A PROBLEM, BECAUSE, AND THE COMMITTEE DIDN'T FEEL IT TO BE A PROBLEM, BECAUSE IF YOU DIDN'T READ GAINES, WHICH YOU KNOW, YOU ARE PRACTICING LAW. YOU SHOULD BE. WE PUT IT IN THE NOTE.

CHIEF JUSTICE: YOU ARE IN YOUR REBUTTAL.

I AM SORRY. JUST VERY BRIEFLY, THE OTHER ONE CHANGE, WAS TO SIMPLIFY THAT RULE, TAKE OUT A LOT OF THE LEGALESE AND MAKE THE UNDERSTANDING THAT, WHEN YOU DEAL WITH BRINGING DOCUMENTS TO TRIAL, THAT IT, ALSO, HAS THE ISSUES RELATIVE TO CONTEMPT, AS IT WOULD BE WITH TESTIMONY, AND THEN IT GAVE A SINGLE CONTEMPT. THANK YOU. MR. CHIEF JUSTICE

THANK YOU. MS. DANIELS. YOU ALL ARE SPLITING YOUR TIME.

YES, YOUR HONOR. MAY IT PLEASE THE COURT.

CHIEF JUSTICE: BE COGNIZANT.

NANCY DANIELS REPRESENTING THE FLORIDA PUBLIC DEFENDERS ASSOCIATION AND JOHN MAYORS ONE WILL PRESENT THE SECOND HALF OF OUR ARGUMENT. AS THE COURT ACKNOWLEDGED A BIT AGO, THIS RULE, 3.111, WHICH WE ARE COMMENTING ON, WAS SENT BACK TO THE COMMITTEE, AFTER THE RULE CYCLE TWO YEARS AGO. WE ARE THE ONES THAT REQUESTED THAT TO HAPPEN, AND WE ARE HAPPY THAT IT IS HAPPENING. WE JUST THINK THE RULE SHOULD GO A LITTLE FURTHER. WE ACKNOWLEDGE THAT THE RULE IMPLEMENT LTS THE STATUTE -- IMPLEMENTS THE STATUTE, THE STRICT LETTER OF THE STATUTE. IT, ALSO, IMPLEMENTS THE VERY WORDING OF THIS COURT'S 1994 OPINION IN GABE RELY O, WHICH WE LITIGATED BACK THEN -- OF GABRIEL O, WHICH WE LITIGATED BACK THEN WITH ORERS OF CONSISTSENS. EVEN THOUGH THERE IS NO LITIGATION SINCE THEN, THERE IS FOUR PROBLEM AREAS, ONE IS THE PROBLEM THAT OCCURRED IN GABRIEL O, WHERE THE PUBLIC DEFENDER IS DISCHARGED FROM THE CASE AFTER INITIALLY BEING APPOINTED. WE DID A STATEWIDE SURVEY, IN ANTICIPATION OF THIS ARGUMENT TODAY, AND THE PD DISCHARGE PROBLEM OCCURS IN SIX CIRCUITS CURRENTLY. A SECOND PROBLEM IS PRETRIAL DETENTION, EVEN WHERE AN ORDER OF NO IMPRISONMENT HAS BEEN ISSUED. SO EVEN THOUGH SOMEONE CAN'T BE SENTENCED TO JAIL, FOR A CRIME, THEY CAN REMAIN IN JAIL, AWAITING DISPOSITION, AND IN OUR SURVEY, THERE ARE FOUR CIRCUITS WHERE THAT IS HAPPENING. A THIRD PROBLEM IS PEOPLE BEING SENT TO JAIL ON A VIOLATION OF PROBATION, EVEN THOUGH AN ORDER OF NO IMPRISONMENT HAS BEEN ENTERED PREVIOUSLY, AND THAT IS HAPPENING IN SIX CIRCUITS, AND THE FOURTH PROBLEM IS PEOPLE BEING HELD IN PRETRIAL DETENTION AWAITING A VIOLATION OF PROBATION HEARING, EVEN THOUGH AN ORDER OF NO IMPRISONMENT HAS BEEN ENTERED, AND THAT IS HAPPENING IN FOUR CIRCUITS.

IS IT YOUR POSITION THAT IT IS NOT NECESSARY FOR THE RULE TO BE CONSISTENT WITH THE STATUTE?

NO, YOUR HONOR. WE THINK IT NEEDS TO BE CONSISTENT WITH THE STATUTE, BUT THE STATUTE HAS BEEN EXPANDED A LOT IN YOUR VARIOUS JURISPRUDENCE ON RIGHT TO COUNSEL. PD'S AREN'T JUST APPOINTED, AND THOSE FOUR THINGS LISTED IN THE STATUTE. WE ARE NOW APPOINTED FOR POSTCONVICTION MATTERS, UNDER RUSSO VERSUS ACRES. WE ARE APPOINTED FOR STANDBY COUNSEL MATTERS, UNDER BEAR VERSUS BELL. GOING WAY BACK TO THE SEVENTIES, YOUR JURISPRUDENCE HAS ALWAYS SAID THAT, IF A DEFENDANT CANNOT FAIRLY

PRESENT THEIR CLAIMS WITHOUT THE ASSISTANCE OF COUNSEL, THE COURT HAS THE DISCRETION TO APPOINT THE PUBLIC DEFENDER.

BUT THIS IS A VERY EXPLICIT PROVISION IN THIS STATUTE. THE COURT SHALL IMMEDIATELY TERMINATE PUBLIC DEFENDER SERVICES.

THAT'S CORRECT, AND THAT IS THE LEGISLATIVE VIEW OF IT, BUT WE THINK THE COURT HAS A DUTY TO GO BEYOND THAT AND SAY THAT, IF THERE IS A DUE PROCESS PROBLEM WITH DISCHARGING THE PUBLIC DEFENDER, THE COURT CAN STILL KEEP US ON THE CASE. IT IS NOT THAT WE ARE LOOKING FOR MORE CASES OR MORE BUSINESS, BUT WE ARE SEEING THE INJUSTICE OF THIS, WHEN WE HAVE BEEN REPRESENTING SOMEONE. WE ARE PREPARED, PREPARING FOR TRIAL, AND THEN ALL OF A SUDDEN WE ARE OFF THE CASE. THIS IS AN INDIGENT PERSON, SO THEY CANNOT AFFORD TO HIRE COUNSEL, AND WE THINK THERE IS AN INJUSTICE HERE THAT SHOULD BE ADDRESSED IN THE RULE. AND WE, ALSO, KNOW FROM THIS LAST EIGHT YEARS OF EXPERIENCE, AFTER ALL, THAT THESE ISSUES ARE STILL ARE A RISING AND AND STILL PERSIST TODAY, SO MR. MORRISON IS GOING TO GO INTO MORE DETAIL, ABOUT THE PROBLEMS AND THE LITIGATION WHICH HAS OCCURRED, BUT WE DO HAVE SOME VERY SPECIFIC SUGGESTIONS TO BOLSTER THE RULE, AND IF YOU DON'T FEEL THAT WE ARE AT THE POINT OF GOING ALL THE WAY TOWARDS --

GOING INTO THE SPECIFIC SUGGESTIONS OR DO YOU HAVE SPECIFIC LANGUAGE THAT YOU WOULD LIKE THE COURT TO CONSIDER?

HE AND HIS, IN THE COMMENTS WE FILED, WE DID THAT, AND IT IS WE STRUCK THROUGH PARTS OF THE STATUTE AND ADDED THINGS AND TRIED TO ADDRESS EACH ONE OF THESE FOUR PROBLEM AREAS FOR THE COURTS. YOU MAY THINK THAT WE NEED MORE STUDY IN THE COMMITTEE PROCESS, AND IF SO, WE, YOU KNOW, WE STANDBY WILLING AND VERY WILLING TO ENGAGE IN MORE COMMITTEE PROCESS.

YOU MEAN YOU STRUCK THROUGH PARTS OF THE RULE. YOU SAID YOU STRUCK THROUGH PARTS OF THE STATUTE.

YOU ARE RIGHT. I MISSPOKE. WE STRUCK THROUGH PARTS OF THE PROPOSED RULE AND ADDED ADDITIONAL LANGUAGE IN PLACES, AND ADDED LANGUAGE TO TRY TO SPECIFICALLY AND VERY CLEARLY ADDRESS THESE FOUR PROBLEM AREAS.

I TAKE IT THAT YOUR VIEW IS THAT THE STATUTE SORT OF CONTEMPLATES THE SIMPLE STRAIGHTFORWARD SITUATION, AND THAT THAT IS FINE FOR THAT SIMPLE, STRAIGHTFORWARD SITUATION, AND IT IS ALL WORKING OUT THAT WAY, BUT IN REALITY, THIS ARE THESE OTHER THINGS THAT HAPPEN, AND IT IS BETTER TO HAVE A RULE THAT CONTEMPLATES WHAT REALLY HAPPENS OUT THERE.

EXACTLY. THANK YOU, AND I WILL TURN IT OVER TO JOHN MORRISON.

MAFS THE -- MAY IT PLEASE THE COURT. I AM JOHN EDDY MORRISON, ON BEHALF OF THE FLORIDA PUBLIC DEFENDERS ASSOCIATION.

WOULD YOU START WITH THE PREMISE, TOO, THAT OBVIOUSLY WE HAVE TO LOOK AT THE STATUTE FIRST AND GIVE EFFECT TO THE STATUTE.

CERTAINLY.

WOULD YOU START THAT PROPOSITION AND THEN GO WITH SUGGESTION.

CERTAINLY, YOUR HONOR. THE IDEA IS THERE IS A STATUTE. IT ALLOWS ORDERS OF NO

IMPRISONMENT, AND I BELIEVE THE SUGGESTED AMENDMENTS TO THE PROPOSED RULE THAT THE FLORIDA PUBLIC DEFENDER ASSOCIATION HAS SUGGESTED, DOES NOT DO AWAY WITH FLORIDA'S -- WITH FLORIDA'S NO IMPRISONMENT OR ANYTHING OF THAT NATURE. HOWEVER, THERE ARE TWO TYPES OF PROBLEMS. ONE IS THAT THE PROPOSED RULE SIMPLY TRACKS THE CONSTITUTIONAL MINIMUM. WE THINK THAT IS APPROPRIATE IN A RULE. THE CONSTITUTIONAL MINIMUM HAS PRETTY MUCH ALREADY BEEN DECIDED AND PRETTY MUCH THE AMENDMENTS TO 3.111, UNLESS I MISSED SOMETHING, ESSENTIALLY, JUSTICES CODIFY ALL. WE BELIEVE THAT THE RIGHT TO COUNSEL IS A SUFFICIENT IMPORTANCE TO THE PROPER FUNCTIONING OF THE JUDICIARY. THE RULE SHOULD HAVE SOME LANGUAGE INDICATING THE COURTS HAVE THE DISCRETION AS COUNSEL FOR THE COMMITTEE HAS INDICATED, TO LOOK AT A CASE AND DECIDE, IN THIS SITUATION, FAR TOO OFTEN WHAT HAPPENS IN THE REAL WORLD IS, AND I, IF I SEEM TO -- IF I HAVE SEEN ONE, I HAVE SEEN 100 OF THESE, THE PROSECUTOR STANDS UP AND SAYS THE STATE CERTIFIES NO JAIL. THE JUDGE SAYS, OKAY, PUBLIC DEFENDER IS DISCHARGED. AND IT JUST HAPPENS ROUTINELY. THERE IS NO UNDERSTANDING ON THE PART OF THE JUDGES, THAT THIS IS A DISCRETIONARY DECISION THEY NEED TO MAKE. SO A GOOD DEAL OR COMMENT, THE FIRST SECTION OF THE COMMENTS, AND THE GOOD DEAL OF THE PROPOSED AMENDMENT, DEAL WITH ENCOURAGING THE JUDGES TO MAKE THAT SORT OF DISCRETIONARY DECISION. THE SECOND PART --

IN REAL LIFE, DOES THE PUBLIC DEFENDER BRING IT TO THE JUDGE'S ATTENTION THAT, HEY, JUDGE, MAYBE THIS ISN'T A CASE WHERE WE OUGHT TO BE DISCHARGED, THAT YOU KNOW, XYZ MAY BE THE CASE SOMEWHERE ALONG THE LINE?

IN REAL LIFE, WHAT HAPPENS IS YOUNG ATTORNEYS WILL DO THAT, UNTIL THEY GET IGNORED ENOUGH THAT THEY STOP DOING IT. JUST IN REAL LIFE, WHAT IS REALLY HAPPENING, THIS IS, AND I SPEAK PRIMARILY FROM MY EXPERIENCE, OF COURSE, OUT OF MY EXPERIENCE IN MIAMI-DADE COUNTY, BUT THAT IT IS JUST, IT IS SORT OF NOT WORTH YOUR TIME ARGUING, TO BE PERFECTLY FRANK, AND THAT IS SORT OF THE ROUTINEIZED PROCEDURE THAT WE ARE SEEING AND IT IS WRONG, AND WE ASK THIS COURT TO ENCOURAGE JUDGE TO SAY MAKE DISCRETIONARY DECISIONS. OBVIOUSLY THIS COURT CAN'T CONTROL THEM, AND WHAT THEY WANT TO DO IN A PARTICULAR CASE, WE ARE NOT ASKING THIS COURT TO DECIDE. THERE IS, HOWEVER, ANOTHER PART OF THIS, WHICH IS BEYOND THAT, BY TRYING TO DRAFT THE RULE JUST TO MATCH THE CONSTITUTIONAL MINIMUMS. THE RULE ALLOWS SOME CONSTITUTIONAL MISSTEPS, AND THIS IS NOT A QUESTION OF DISCRETION. THE TWO VERY SPECIFIC SITUATIONS ARE PRETRIAL DETENTION SITUATION AND THE PROBATION VIOLATION SITUATION, THAT JUSTICE QUINCE MENTIONED EARLIER IN THE ARGUMENT. IN THE PRETRIAL DETENTION SITUATION, LET ME JUST EXPLAIN WHAT HAPPENS, AN INDIGENT DEFENDANT IS ARRESTED ON THE SET. THE PERSON CANNOT MAKE BAIL. THE PERSON SITS IN JAIL FOR TWO WEEKS, THREE WEEKS, WAITING FOR A FIRST HEARING. AT THAT HEARING, THE STATE WILL SAY THEY ARE NOT CERTIFYING JAIL. THE PUBLIC DEFENDER OR APPOINTED COUNSEL WILL BE DISCHARGED, AND THEN SOMETHING WILL HAPPEN. OFTEN IT IS THAT THE STATE ATTORNEYS DON'T OFFER A PLEA AT THAT, LARGELY IN MIAMI-DADE COUNTY, BECAUSE THEY HAVEN'T HAD CONTACT WITH THE VICTIM YET, AND THERE IS A POLICY IN THE OFFICE THAT THEY CAN'T OFFER PLEAS UNTIL THEY HAVE HAD CONTACT WITH THE VICTIMS. SOMETIMES BECAUSE A DEFENDANT REJECTS A PLEA. RARELY THE COURT WILL REJECT A PLEA. WHATEVER HAPPENS, THE DEFENDANT, THE CASE IS RESET AND THE DEFENDANT REMAINS SITTING IN JAIL. AT THIS POINT, SITTING IN JAIL WITHOUT COUNSEL. WE FINALLY HAVE GOT THIS ISSUE OFF, BECAUSE THE JUDGE IS WILLING TO CERTIFY THE QUESTION, AND THE CASE IS HARDY V STATE, IN THE THIRD DISTRICT COURT OF APPEAL, ADDRESSED THIS ISSUE, VERY SPECIFICALLY SAYING YOU CANNOT BE IN JAIL AND INDIGENT AND NOT HAVE AN ATTORNEY. BASIC CONSTITUTIONAL LAW. UNFORTUNATELY THE RULES DON'T, AND THE PROPOSED FORM DOES NOT DEAL WITH THIS. RULE 3.111 ONLY TALKS ABOUT THE DEFENDANT WILL NOT BE IMPRISONED IF CONVICTED. IT DOESN'T TALK ABOUT PRETRIAL. 3.994, THE NEW PROPOSED FORM, SIMPLY TALKS ABOUT IT WILL NOT SENTENCE A DEFENDANT TO IMPRISONMENT. AGAIN, DOES NOT ADDRESS THE PRETRIAL SITUATION. AND WE BELIEVE THAT, AT

A MINIMUM, THE RULE SHOULD CONFORM WITH THE CONSTITUTIONAL REQUIREMENT AS SET FORTH IN HARDY, AND HARDY IS BASED ON, OBVIOUSLY, A LONG HISTORY OF CASES WHICH COME OUT OF --

YOU HAVE TWO CASES COMING OUT OF THE THIRD DCA THAT SEEMS TO ADDRESS THE SITUATIONS, HARDY AND TERR. DO YOU THINK THEY ADDRESS THE PRETRIAL SITUATION, AND DO YOU THINK TERR ADDRESSES VIOLATION OF PROBATION?

HARDY ADDRESSES THE PRETRIAL SITUATION. WE BELIEVE THAT THE RULE SHOULD ENFORCE, TO JUDGES, THIS BASIC PROPOSITION. SPECIFICALLY BECAUSE, AND I CAN SEE THIS COMING, IF THIS COURT DOESN'T, WHEN YOU ADOPT THE RULES, I AM GOING TO HAVE JUDGES SAYING YOU KNOW WHAT? THE SUPREME COURT SUBSALENTO OVERRULED HARDY AND I AM GOING TO HAVE TO GET IT BACK UP AGAIN. WHAT HAPPENED WAS I WAS BEFORE THIS COURT TWO YEARS AGO, BRINGING THIS PROBLEM TO THE COURT'S ATTENTION AND THE QUESTION WAS ASKED CAN YOU DEAL WITH THIS ON WRITS? SO I DID MY DARNDEST TO GET THESE OUT. BOTH HARDY AND TERR ARE MY CASES.

CAN YOU SEE THESE RULES, IF WE ADOPT THESE RULES, THEY WOULD BE CONTRARY TO HARDY?

I BELIEVE THEY WOULD, BECAUSE THEY ONLY, THEY, IN THE FAMOUS MET FORE FROM SHERLOCK HOLMES, THIS IS THE DOG THAT DOES NOT BARK. IF CONVICTED OR IN THE PROPOSED FORM, THE SENTENCE, ARE PROPER, IT CERTIFIES THAT YOU WON'T SEND THEM TO PRISON OR TO JAIL, IF CONVICTED. I BELIEVE THAT IS CONTRARY TO HARDY, BECAUSE HARDY SAYS MORE THAN THAT. IT IS BEFORE CONVICTION, TOO. IT IS PRETRIAL, AND I BELIEVE THAT IS CONTRARY TO HARDY. TO ADDRESS THE QUESTION --

ARE THE JUDGES FOLLOWING THAT DECISION?

THAT IS A HARD QUESTION TO ANSWER FROM MIAMI-DADE COUNTY, BECAUSE OF THE NUMBER. I HAVE NOT HEARD OF A JUDGE DOING THIS SINCE THEN, BUT PLEASE UNDERSTAND I GET ONLY WHIFFS OF WHAT COMES UP FROM THE FROM THE TRIAL COURTS, AND SOMETIMES TRIAL LAWYERS HAVE QUITE INNOVATIVE WAYS OF DEALING WITH PROBLEMS, SHORT OF CONTACTING THE APPELLATE DIVISION, AND SO TO THE BEST OF MY KNOWLEDGE, YOUR HONOR, YES, BUT MY KNOWLEDGE IS LIMITED.

AND HOW DO YOU SAY WE GET AROUND THE MANDATORY LANGUAGE OF THE STATUTE? HOW --

I AM NOT ASKING YOUR HONOR TO GET AROUND THE MANDATORY LANGUAGE OF THE STATUTE. THE MANDATORY LANGUAGE OF THE STATUTE ONLY SAYS, IF YOU ORDER THE ONI, THEN YOU SHALL, THEN YOU SHALL DISCHARGE THE PUBLIC DEFENDER. THE QUESTION IS WHETHER THE COURT ISSUES THE ORDER OF NO IMPRISONMENT, AND WE BELIEVE THE RULE SHOULD SAY YOU CANNOT ENTER THE ORDER OF NO IMPRISONMENT WHILE A PERSON IS CURRENTLY IN PRISON. NOW, I KNOW THAT SORT OF SEEMS ALMOST PATHOLOGICAL, BUT IT HAPPENS. IT HAPPENS A LOT IN A LOT OF DIFFERENT CIRCUITS, AND I CANNOT SPEAK FROM THE SURVEY THAT THE PUBLIC DEFENDERS OFFICE CONDUCTED. IT IS NOT CLEAR THAT THE OTHER CIRCUITS ARE PAYING AS MUCH ATTENTION TO HARDY AS MY PARTICULAR CIRCUIT IS. I THINK THERE MAY HAVE BEEN A SECOND QUESTION THAT I COULD ONLY GET TO ONE OF THEM.

YOU WERE GOING TO SPEC TO TERR.

I WAS GOING TO SPEAK TO TER, SO I WILL. THANK YOU, YOUR HONOR. THE SITUATION THERE, THE SHORT ANSWER IS TERR HAS ONLY HALF SOLVED THE PROBLEM. THE SITUATION THERE IS THAT AN ORDER OF NO IMPRISONMENT IS ISSUED, A CLIENT TAKES A PLEA, ALMOST INVARIABLY PROBATION. AS WE ALL KNOW, 50 PERCENT OF THE PEOPLE PLACED ON PROBATION, VIOLATE PROBATION. WHEN THEY COME BACK, THE TERR SITUATION IS THAT THEY WILL, THEN, BE

SENTENCED TO JAIL ON THAT VIOLATION. I AM NOT SURE IF I HEARD COUNSEL FOR THE COMMITTEE CORRECTLY. I BLIEVE THE COMMITTEE MAY BE UNDER THE IMPRESSION THAT, AS LONG AS THERE IS COUNSEL AT THAT PROBATION VIOLATION HEARING THAT IS CONSTITUTIONAL. IT IS NOT. THAT IS WHAT TERR SAYS. THIS IS FROM A LONG LINE OF CASES, FROM ARGOSINGER ON, 30 YEARS FROM NOW THAT, SAYS IF YOU HAVE AN UNCOUNSELED CONVICTION, YOU CANNOT LOSE YOUR LIBERTY INTEREST. THAT IS THE CONSTITUTIONAL LINE. IF THERE IS A LIBERTY INTEREST INVOLVED, THERE HAS TO BE COUNSEL. WHAT HAS HAPPENED POST-TERR, IS THAT JUDGES HAVE BEGUN TAKING PEOPLE IN CUSTODY ON A PROBATION VIOLATION, SCHEDULED THE PROBATION VIOLATION HEARING FOR THREE WEEKS DOWN THE ROAD, AND THEN, AT THAT HEARING, OF COURSE THEY TAKE THE CTS PLEA FOR TIME SERVED, AND IT IS ESSENTIALLY THE BACK SIDE OF TERR, INSTEAD OF SENTENCING THEM TO A SENTENCE YOU HAVE THEM DO THE SENTENCE FIRST AND THEN WORK IT OUT THAT WAY. IT IS VIOLATION. I HAVE NOT BEEN ABLE TO GET THIS OUT. THESE CASES ARE VERY DIFFICULT TO GET UP, TO WHERE I CAN CREATE OPINIONS. IT REQUIRES THE JUDGE TO VIOLATE THE CONSTITUTION AND THEN GIVE ME A CERTIFIED QUESTION ON THE ISSUE. IT IS PULLING TEETH, TO DO THESE IN TERR AND HARDY.

BUT YOU ARE SAYING THAT PRACTICE, THAT IS JUDGES, AFTER AN UNCOUNSELED PLEA, VIOLATION OF PROBATION, ACTUALLY THAT THE HEARING IS SET SEVERAL WEEKS --

THREE WEEKS LATER.

AND THEY ARE IN JAIL THAT WHOLE TIME.

YES.

AND THAT IS HAPPENING IN DADE COUNTY?

YES. YES. WHAT, I MEAN, I WILL TELL YOU WHAT, IN DADE COUNTY, WE DO TO AVOID THIS, WHICH IS PARTIALLY WHY I HAVEN'T BEEN ABLE TO GET THIS UP. IT IS A CONFLICT OF INTEREST WITHIN THE PUBLIC DEFENDERS OFFICE, BECAUSE DADE COUNTY HAS A SPECIAL JAIL CASES DIVISION. EVERYONE WHO IS IN JAIL GOES TO A DIFFERENT DIVISION, SO AS SOON AS A JUDGE TAKES SOMEONE INTO CUSTODY ON A PROBATION VIOLATION THEY ARE OUT OF THAT JUDGE'S DIVISION. I KNOW THAT SOUNDS WEIRD, BUT THAT IS JUST HOW IT WORKS. WHAT WE DO IS WE CALL IN A FEW CHIPS, AND WE GET THE PERSON SENT TO THE JAIL CASES DIVISION WITHIN A DAY OR TWO, WHERE WE CAN TRY TO GET THEM RELEASED ON A CTS PLEA, SO THAT THEIR CREDIT FOR TIME SERVED IS A FEW DAYS, AS OPPOSED TO A FEW WEEKS, AND THAT IS PARTIALLY WHY I HAVEN'T BEEN ABLE TO GET A WRIT UP ON IT BECAUSE I CAN'T LEAVE A CLIENT SITTING IN JAIL WHILE I AM TRYING TO GET A WRIT. I DON'T HAVE MANY CLIENTS WHO VOLUNTEER FOR SUCH SORT OF SACRIFICIAL DUTY IN THE BENEFIT OF THE LAW, SO, BUT, THAT DOES HAPPEN. THAT ABSOLUTELY DOES HAPPEN, AND IT IS WRONG, BECAUSE PEOPLE SHOULD NOT HAVE LOST THEIR LIBERTY. THAT WAS AN UNCOUNSELED PLEA. TERR DEALS WITH THIS. UNFORTUNATELY --

WHAT HAPPENS IN THOSE CASES, IS, WHEN THEY ARE ENTERING THEIR PLEA, ARE THEY TOLD THAT, IF THEY VIOLATE THEIR PROBATION, THAT THEY COULD SERVE JAIL TIME?

YES. USUALLY. BUT THAT IS IRRELEVANT.

BECAUSE YOU ARE SAYING THAT IS --

THAT IS AN UNCOUNSELED PLEA. THE JUDGE MAY TELL THEM, AS A METHOD OF TRYING TO ENCOURAGE PROBATION COMPLIANCE. THAT IS FINE. BUT JUST BECAUSE YOU TELL THEM YOU MAY SERVE DOES NOT SOLVE THE ARGOSINGER PROBLEM. YOU DON'T JUST TELL SOMEONE AND THAT AND SOLVES THE ARGOSINGER PROBLEM. IT IS NOT A WAIVER ISSUE. YOU HAVE A CONSTITUTIONAL RIGHT TO COUNSEL BEFORE YOU TAKE A PLEA, THEY MIGHT SUBJECT YOU TO PRISON. SOMETIMES THEY DO. THEY WILL THREATEN THE DEFENDANTS WITH JAIL, BUT THE LAW

IS THEY CAN'T, AND THAT HAS BEEN THE LAW FOR 30 YEARS. THE RULE DOES NOT DEAL WITH THIS. THE RULE DOES NOT DISCUSS THE PROBATION VIOLATION. NEITHER DOES THE FORM. ALSO, BOTH THE RULE AND THE FORM INDICATE THAT ORDERS OF NO IMPRISONMENT CAN BE WITHDRAWN AT ANY TIME. THAT IS SIMPLY NOT THE LAW, AFTER TERR. IT HASN'T BEEN THE LAW AFTER ARGOSINGER, FRANKLY. THEY CAN'T BE WITHDRAWN, ONCE THERE IS A CONVICTION, BASED ON AN UNCOUNSELED PLEA.

WHAT IS YOUR PROPOSAL FOR HOW THE RULE SHOULD EITHER BE AMENDED TO DEAL WITH THE TERR--.

THE PROPOSALS, I HAVE ATTACHED THE LAST FOUR PAGES OF THE SPDA COMMENTS. THEY ARE A LITTLE LONG, BUT BASICALLY THEY NEED TO DO THREE THINGS. FIRST IT NEEDS TO DEAL WITH PRETRIAL DETENTION, THAT A PERSON WILL NOT BE IMPRISONED BEFORE OR AFTER. SECOND, IT NEEDS TO BE CLEAR THAT, ONCE THERE IS ANOTHER COUNSEL CONVICTION, THE PERSON WILL NOT LOSE THEIR LIBERTY, NO MATTER WHAT, PARTICULARLY WITH RELATION TO PROBATION, AND THIRD WHERE THERE HAS BEEN A CONVICTION ENTERED AS A MATTER OF, AS A RESULT OF UNCOUNSELED PLEA. THAT ORDER OF NO IMPRISONMENT CANNOT BE WITHDRAWN. I SEE THAT I AM OUT OF TIME. I THANK THE COURT FOR THE ATTENTION TO THIS MATTER, AND I WOULD EAGERLY AWAIT THE COURT'S AIDING US IN THIS SERIOUS PROBLEM. MR. CHIEF JUSTICE

THANK YOU. REBUTTAL.

MY REBUTTAL WILL BE LIMITED TO THE COMMENTS. ACTUALLY, THE ISSUES BROUGHT UP BY THEM, I THINK, ARE VERY GOOD ISSUES. THE THING THAT I FIND IS NOT REALLY NECESSARY IS THE PRETRIAL DETENTION ISSUE. IT DOESN'T MAKE LOGICAL SENSE THAT YOU HAVE NO JAIL, AND I DON'T DOUBT THAT IT DOESN'T HAPPEN. AND I AGREE WITH HIM THAT IT DOESN'T MAKE LOGICAL SENSE THAT, IF YOU ARE GOING TO SAY YOU ARE NOT GOING TO SEEK PRISON OR JAIL AND THEN THERE FOR THEY STAY. AND --

SO WHY WOULDN'T IT BE MORE IN KEEPING WITH NOT ALLOWING THE PUBLIC DEFENDER NOT HAVING THE JUDGE DISCHARGE THE PUBLIC DEFENDER UNDER THOSE CIRCUMSTANCES?

WELL, I THINK THAT THAT IS A CONSIDERATION THAT THE TRIAL COURT SHOULD MAKE, IN DETERMINING WHETHER THEY DO A DISCHARGE OR NOT. BUT WHAT WE ARE, REALLY, LOOKING AT IS, DO WE WANT TO PUT, IN IN THE RULES, NOT WHETHER IT IS THE LAW OR NOT, BUT DO WE WANT TO PUT IN THE RULES THOSE ISSUES. IN OTHER WORDS DO WE WANT TO PUT IN THE RULE THAT, IF YOU DO THE ORDER OF NONIMPRISONMENT, THAT THEY WILL BE RELEASED, IF, IN A PRETRIAL DETENTION, WOULD, WELL, YOU KNOW, JUSTICE, I CAN'T THINK OF A GOOD REASON WHY YOU WOULDN'T PUT THAT IN THERE, QUITE FRANKLY, AND YOU KNOW, WE TRY TO CONSIDER EVERYTHING, AND I REALLY, I THINK THE COMMENTS THAT THEY HAVE MADE, I WILL TELL YOU, ARE --

COMMENTS CONSIDERED BY THE COMMITTEE?

NOT THE PRETRIAL DETENTION ISSUE.

WERE THEY PRESENTED TO THE COMMITTEE?

I DON'T BELIEVE THAT THEY WERE. AND THAT IS WHERE I WAS GOING IS REALLY, WE TRY TO ADDRESS THOSE ISSUES. WE OPEN UP THE SUBCOMMITTEES. I DON'T BELIEVE -- LET ME TELL YOU, I DON'T BELIEVE RECOMMITTEE RE--

BUT WEREN'T THESE CONCERNS OF JUDGE EATON AND THEY WENT BACK TO THE COMMITTEE, AND THE COMMITTEE, DIDN'T IT CONSIDER ALL OF THESE? WEREN'T THEY DIRECTED TO CONSIDER IT?

WELL, JUSTICE SHAW, LET ME TELL YOU WHAT THE SUBCOMMITTEE CONSIDERED, I DON'T RECALL THE REPORT THAT THEY MADE BACK TO THE COMMITTEE, THAT THAT WAS THE PRETRIAL DETENTION ISSUE. I KNOW THAT THE PROBATION ISSUE, THE ISSUES THAT WE OUTLINED WERE CONSIDERED BY THE COMMITTEE. I CANNOT SAY. IT MAY HAVE BEEN, BUT I CANNOT SIT HERE AND TELL THE COURT THAT THE PRETRIAL DETENTION ISSUE WAS CONSIDERED, BECAUSE I DON'T RECALL THAT BEING CONSIDERED. I DO KNOW THAT THE PROBATION ISSUE WAS CONSIDERED. I DO KNOW OF THE EARLY TIME PERIODS, WHEN THE PROSECUTORS WOULD BE THERE, HANDING OUT PLEAS. THOSE WERE CONSIDERED. THE MAIN ISSUES, AS I OUTLINED IN MY BRIEF, THOSE WERE CONSIDERED.

WOULD YOU LIKE TIME TO RECONSIDER OR TO CONSIDER THEM? THE ISSUES YOU DIDN'T CONSIDER.

WELL, JUDGE, I TELL YOU, YES, IT WOULD BE NICE, BUT I TELL YOU WHAT, I REALLY DON'T KNOW THAT IT IS NECESSARY. AND I WILL TELL YOU WHY. I THINK THAT WE HAVE GONE TO THE POINT THAT WE HAVE HAD CONSIDERATIONS. THEY HAVE HAD HAD INPUT. I THINK THAT IT IS A GOOD IDEA. JUSTICE HARDING SAID SHOULDN'T YOU PUT IT IN? YEAH. I THINK IT PROBABLY SHOULD GO IN. I DON'T KNOW THAT SENDING IT BACK TO US TO GO AHEAD AND DEAL WITH THAT AND PUT IT BACK IN, IS GOING TO BE AN EFFICIENT TIME CONSIDERATION, AND I THINK, YEAH IT PROBABLY SHOULD BE PUT IN. IT IS A GOOD IDEA.

CHIEF JUSTICE: THANK YOU.

THANK YOU.

CHIEF JUSTICE: WE APPRECIATE THE COMMITTEE WORKING ON THESE MATTERS, AND COMING, AND THE INPUT FROM THE PUBLIC DEFENDERS AND THE EFFORT PUT IN FOR THE COURT'S CONSIDERATION. THANK YOU VERY MUCH. THE COURT WILL BE IN RECESS FOR 15 MINUTES.