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Duane Edwin Sutton v. State of Florida

MARSHAL: PLEASE RISE. HEAR YE. HEAR YE. HEAR YE. THE SUPREME COURT OF THE GREAT TAFL IS NOW IN SESSION. ALL WHO HAVE CAUSE TO PLEA, DRAW NEAR, GIVE ATTENTION AND YOU SHALL BE HEARD. GOD SAVE THESE UNITED STATES, THE GREAT STATE OF FLORIDA AND THIS HONORABLE COURT. LADIES AND GENTLEMEN, THE FLORIDA SUPREME COURT. PLEASE BE SEATED.

CHIEF JUSTICE: BEFORE BEGINNING, FIRST OF ALL, WELCOME TO THE FLORIDA SUPREME COURT. BEFORE CALLING THE FIRST CASE, I WOULD FIRST OF ALL, LIKE TO MAKE TWO ANNOUNCEMENTS. ONE IS THAT THIS WEEK IS LAW WEEK, AND THE THEME OF LAW WEEK IS JURY APPRECIATION, AND IT IS A THEME THAT IS BEING FELT THROUGHOUT OUR COUNTRY, THE APPRECIATION FOR JURIES AND OUR SYSTEM OF DEMOCRACY. MY SECOND ANNOUNCEMENT IS I WOULD LIKE TO WELCOME THE EIGHTH GRADE HONOR STUDENTS FROM FOREST LAKE EDUCATION CENTER IN SEMINOLE COUNTY. I UNDERSTAND THAT THE SCHOOL WAS FOUNDED IN 1929, AS A PRIVATE, NONPROFIT SCHOOL, THROUGH EIGHTH GRADE, AND STUDENTS ARE ESCORTED, TODAY, BY THEIR HISTORY TEACHER, LINDA PACE. WELCOME TO ALL OF YOU THIS MORNING. AND WITH THAT, I WILL CALL THE FIRST CASE. IT IS SUTTON VERSUS THE STATE OF FLORIDA. MR. COSDEN, ARE YOU READY?

GOOD MORNING, YOUR HONOR. MAY IT PLEASE THE COURT. MY NAME IS CHRISTOPHER COSDEN. I AM AN ASSISTANT PUBLIC DEFENDER FROM SARASOTA. IN THESE SIX CASES, WHICH HAVE BEEN CONSOLIDATED, FIRST, I WOULD LIKE TO THANK THE COURT IF I MAY, PLEASE, FOR ALLOWING US TO SUBMIT THE RECORD ON CD-ROM, AND AS THE COURT WILL RECALL, THERE WERE PROBLEMS RECONSTRUCTING THE RECORD. IT HAD BEEN LOST IN ALL SIX CASES IN THE SECOND DISTRICT, AND THE COURT, I AM SURE COUNSEL WILL AGREE WITH ME, THAT THE COURT HAS SAVED US CONSIDERABLE EFFORT, BY ALLOWING US TO SUBMIT THE RECORD AS WE DID. THE ISSUE PRESENTED, IS WHETHER PERSONS WHO ARE SUBJECT TO POST SENTENCE CIVIL COMMITMENT CAN BE REQUIRED TO TESTIFY AGAINST THEMSELVES IN THE CONTEXT OF A PRETRIAL DEPOSITION.

CHIEF JUSTICE: BEFORE YOU GET TO THE MERITS OF THE ARGUMENT, I WOULD LIKE YOU TO ADDRESS OR READDRESS THE JURISDICTIONAL BASIS FOR OUR TAKING THIS CASE. WHAT IS THE, WHAT CASE IS THIS IN CONFLICT WITH, AND IT SEEMS, THE CASES THAT MAY BE CITED ARE CERTAINLY FACTUALLY VERY DIFFERENT.

THE CASES ARE FACTUALLY VERY DIFFERENT, BUT THEY ARE LEGALLY THE SAME. THIS CASE A TODAY IS IN DIRECT CONFLICT WITH THIS COURT'S HOLDINGS IN VINING VERSUS FLORIDA REAL ESTATE COMMISSION AND CARSEARIS VERSUS FLORIDA REAL ESTATE COMMISSION. IT ALSO CONFLICTS WITH THE DECISION IN THE ROMANICK CASE AND THE FIRST DISTRICT'S DECISION IN MACDONALD VERSUS DEPARTMENT OF REGULATION. IN THOSE CASES, THE COURTS HELD THAT PERSONS WHO WERE SUBJECT TO A LOSS OF PROFESSIONAL LICENSURE, COULD NOT BE REQUIRED TO TESTIFY AGAINST THEMSELVES. THIS COURT AND THE DISTRICT COURTS, APPLIED THE FIRST OR THE FIFTH AMENDMENT, RATHER, TO THE U.S. CONSTITUTION.

THERE IS NO CASE UNDER THE "JIMMY RYCE" ACT.

THAT IS CORRECT, YOUR HONOR. WHAT WAS FORMERLY CALLED THE "JIMMY RYCE" ACT, IS NOT

AT DRESSED YESTERDAY IN THIS CONFLICT NOT AD DRESS ED YET, IN THIS CONT EXT .

WE HAVE QUESTIONS THAT ARE ASKED HERE, INCLUDING S OME ME DICAL BACKGROUND OR HISTORY WITH REFERENCE TO WHERE YOU HAVE LIVED AND THOSE KINDS OF THINGS LIKE THAT . HOW WO UL D THE ANSWERING OF THOSE QUESTIONS , LEAD TO INCARCERATION OR LOSS O F LICENSURE OR SOME ANALOGOUS PENALTY IN THESE PROCEEDINGS?

ANS WERING THE QU ESTIONS WOULD LEAD TO LOSE OF LIBERTY.THE STATE IS SEE KING I N EVERY ONE OF THESE CASES , LOSS OF L I BERTY POTENTIALLY FOR LI FE. IN FACT, NO ONE HAS EVER COM PLETED THE PROGRAM AT THE F LORIDA CI VIL COMMITMENT CENTER AND BEEN RELEASED.

HOW WOULD THE LOSS , IN THE CIVIL , IN OTHER WORDS , ARE YOU SAYING THAT, BY GIVING THE INFORMATION, THAT THE CIVIL COMM ITMENT WILL BEBASED ON THE INFORMATION THAT IS G IVEN BY THE DEFENDANT , THE RESPONDENT?

PRESUMABLY THAT IS WHAT THE STATE IS SEEK ING TO D O. THE STATE HAS ASKED A LONG SERIES OF QUESTIONS.OF COURSE THEY ARE IN THE RECORD. BUT THE STATE ASKS ABOUT THINGS SUCH AS WHERE WOULD YOU LIVE , WHEN YOU ARE RELEASED FROM PRISON. WHAT , WOULD THERE BE ANY CHILDREN LIVING IN THE SAME NEIGHBORHOOD. THAT IS AL MOST VERBATIM , WHE N YOU ARE REL EASED FROM PRISON. THAT IS AN IMPOSSIBLE QUESTION TO ANSWER , BECAUSE

THAT IS A SEPARATE ISSUE , IS IT NOT?

CORRECT.

ALL RIGHT. LET'S TAKE SOMETHING TO WHERE THERE IS SOME INFORMATION ASKED FOR, FOR INSTANCE , WHAT HAVE YOUR RESIDENCES BEEN OVER THE PAST 20 YE ARS . HOW WOULD ANSWERING THAT QUESTION LEAD TO THE INCARCERATION UNDER THE "JIMMY RYCE" ACT ?

ANSWERING THOSE KIND OF QUESTIONS COULD LEAD TO INCARCERATION UNDER CRIMINAL L AW. WE DO NOT KNOW WHAT THE STATE IS INVESTIGATING ABOUT OUR C LIENTS ' PAST. WE DO NOT KNOW WHAT MIGHT BE OUT THERE THAT COULD E ASILY TRIP A CL IENT . IF, FOR EXAMPLE.

BUT DON'T YOU KNOW THAT WHAT THE STATE IS INVESTIGATING IS WHETHER ORNOT THIS PERSON SHOULD BE SUBJECT TO CONTINUED CONFINEMENT , ALTH OUGH, IN A M ENTAL FACILITY , BASED ON THEIR PROPENSITY , NOT PROPENSITY BUT THEIR INABILITY TO CONT ROL THEIR DANGEROUSNESS. I SN'T THAT , REALLY, WHAT THESTATE IS INVESTIGATING AT THIS PO INT ?

ON THIS CASE , YES . AND THE STATE , IN EVERY CASE , HAS HAD THE OPPORTUNITY T O CONDUCT TWO FACE TO FACE PSYCHOLOGICAL ASSESSMENTS OF THE CLIENT. IF THERE WERE QUE STIONS THAT WERE NECESS ARY TO AN APPROPRIATE PSYCHOLOGICAL ASSESSMENT , THE STATE HAD THE OPPORTUNITY TO , IN EVERY CASE, TW ICE , T O ASK THOSEQUESTIONS.

HOW DOES THIS DIFFER FROM , SAY , ANY OT HER CIVIL CASE,WHERE THERE IS A ME NTAL HEALTH ISSUE, AND THE PERSON HAS IN FACT , BEEN EXAMINED BY MENTAL H EALTH EXPERTS , AND THEN THE OPPOSING PARTYWANTS TO ACTUALLY DE POSE THE PERSON? HOW DOES THIS DIFF ER FROM THAT?

I N EVERY OTHER MENTAL HEALTH COMMITMENT CASE , SPECIFICALLY IN "BAKER" ACT CASES , THERE IS A STAT UTORY PROTECTION AGAI NST REQ UIRING THE RESPON DENT T O TES TIFY.

BUT CAN WE, REALLY , ANALOGIZE THIS TO A "BAKER" ACT , WHEN WE ARE REALLY TALKING ABOUT A SITUATIONWHERE THERE IS VERY SHORT-TERM COMMITMENT IN THE "BAKER" ACT ,

WHEREAS WE ARE TALKING ABOUT SOMETHINGELSE. ISN'T IT A FACT , HERE , THAT THE STATE , REALLY , NEEDS AS MUCH INFORMATION , AND SO DOES THE DEFENDANT, IN ORDER TO BE ABLE TO PROCEED IN THIS KIND OF SITUATION.

YOUR HONOR , THE FACT THAT THE STATE, REALLY, NEEDS THE INFORMATION, REALLY , SHOULD NOT ENTER INTO THE CALCULATION AT ALL. IN A CRIMINAL CASE, THE STATE MAY REALLY NEED INFORMATION AND MAY REALLY WANT TO TALK TO THE DEFENDANT, BUT, OF COURSE, THE STATE CAN'T DO THAT.

JUSTICE CANTERO HAS A QUESTION .

CAN I GET BACK TO THE CONFLICT FOR A SECOND.IT SEEMS TO ME THAT THE BASIS FOR CONFLICT IS THAT, IN THESE OTHER CASES , THERE WAS A STATUTE THAT REQUIRED A DEFENDANT TO TESTIFY UNDER OATH , IN A WAY THAT MAY INCRIMINATE HIM , AND IF HE DID NOT DO THAT, THEN , HIS LICENSE WAS AUTOMATICALLY SUSPENDED. SO THE QUESTION IN THOSE CASES , WERE , CAN THE STATE AUTOMATICALLY SUSPEND SOMEONE'S LICENSE AND LIVELIHOOD, FOR REFUSING TO ANSWER A QUESTION THAT MAY INCRIMINATE HIM, AND IN THOSE CASES THE COURT SAID NO. THIS STATUTE DOES NOT PROVIDE THAT KIND OF PENALTY , DOES IT, FOR FAILING TO ANSWER A QUESTION , AND THERE IS NOTHING IN EITHER THE STATUTE OR THE RULES , THAT REQUIRES A DEFENDANT IN THESE CASES, TO ANSWER A QUESTION THAT MAY CRIMINALLY INCRIMINATE HIM. IS THAT CORRECT ?

IN THE LICENSURE CASES , THERE WAS NO QUESTION THAT THE PERSON MIGHT BE INCRIMINATED . AT LEAST IN THE REPORTS OF THE CASES , NOW , I OBVIOUSLY HAVEN'T GONE BACK AND SPOKEN WITH THE LITIGANTS AND RESEARCHED THE ENTIRE HISTORY OF THE CASE , BUT IN THE REPORTS OF THE CASES , THERE IS ABSOLUTELY NOTHING TO SUGGEST THAT THE PEOPLE WHO WERE , PERHAPS , GOING TO LOSE THEIR LICENSES , WERE IN ANY WAY GOING TO BE SUBJECT TO A CRIMINAL PENALTY OR LOSE THEIR LIBERTY.

THAT WASN'T THE BASIS OF THE DECISIONS , WAS IT? THE BASIS WAS THAT THE STATUTE REQUIRED AN ANSWER , UNDER OATH , EVEN IF HE HAD A FIFTH AMENDMENT RIGHT NOT TO TESTIFY , IT REQUIRED TESTIMONY UNDER OATH , OR BE SUBJECT TO THE AUTOMATIC SUSPENSION OF THE LICENSE?

WELL, THAT IS WHAT IS GOING ON HERE. EXCEPT WE ARE NOT TALKING ABOUT LICENSE. WE ARE TALKING ABOUT LIBERTY.

DIDN'T THE JUDGE SPECIFICALLY EXCLUDE CERTAIN QUESTIONS THAT WOULD LEAD TO INCRIMINATING EVIDENCE?

YES.

OKAY. SO OBVIOUSLY THERE ISN'T A REQUIREMENT IN THESE CASES , THAT THE DEFENDANT TESTIFY OR AUTOMATICALLY BE SUBJECT TO CIVIL COMMITMENT .

BY THE FACT NOT OF

BY THE FACT NOT OF WHAT HE TESTIFIES TO BUT WHAT HE DIDN'T TESTIFY TO , WHICH IS THE BASIS FOR THOSE CASES. YOUR CLIENT COULD BE SUSPENDED NOT FOR TESTIFYING BUT FOR NOT TESTIFYING.IS THERE ANYTHING IN HERE THAT COMMITS MENT TO TESTIFY SOMETHING.

THERE IS NOTHING TO REQUIRE HIM TO TESTIFY , BUT HE COULD EASILY LOSE HIS LIBERTY FOR NOT TESTIFYING,BASED ON CONTEMPT.

ISN'T YOUR CONFLICT LESSON THAT POINT ALONE, REGARDING THE MERITS HERE?

YOU JUST SAID

NO.

IN ANY CIVIL CASE , SOMEBODY DOESN'T, REFUSES TO ANSWER A QUESTION, AND THEY HAVE TO GO THROUGH , BECAUSE DURING THE RULES OF CIVIL PROCEDURE AND THEY ARE SANCTIONED, AND IF THEY ARE IN CONTEMPT OF COURT , THEY MAY END UP HAVING A SANCTION THAT MAY INCLUDE INCARCERATION. THAT WOULD BE A CIRCULAR REASON, IF ALL OF THOSE CASES COULDN'T IMPOSE CONTEMPT BECAUSE IT MIGHT CAUSE A LOSS OF LIBERTY, SO I THINK YOU NEED TO CLARIFY THAT, AND, AGAIN , RESPONDING DIRECTLY TO WHAT JUSTICE CANTERO IS ASKING , IS THAT THE , THERE IS NO DIRECT PENALTY UNDER THE STATUTE THAT IS , YOU DO NOT ANSWER, AND YOU SHALL BE COMMITTED UNDER THE "JIMMY RYCE" ACT . CORRECT? I MEAN , THAT IS NOT

THAT IS CORRECT.

THAT DOES NOT OCCUR. IN OTHER WORDS, IF YOUR CLIENT CHOOSES NOT TO ANSWER QUESTIONS FOR , FIRST OF ALL , IT INVOKES HIS RIGHT TO SELF-INCRIMINATION, RIGHT AGAINST SELF-INCRIMINATION , THE JUDGE WOULD DETERMINE WHETHER THAT PRIVILEGE WAS PROPERLY INVOKED OR NOT. IF AT THAT POINT , YOU , STILL , YOUR CLIENT REFUSES TO TESTIFY , THERE IS NOTHING IN THERE WHERE THE STATE WOULD BE ABLE TO AUTOMATICALLY COMMIT , HAVE YOUR CLIENT COMMITTED UNDER THE "JIMMY RYCE" ACT .

YOUR HONOR , THE CONSTITUTIONAL PROVISIONS, BOTH THE STATE AND THE FEDERAL PROVISIONS , PREVENT THE STATE FROM COMPELLING A DEFENDANT IN A CRIMINAL CASE , TO BE A WITNESS AGAINST HIMSELF . THAT IS EXACTLY WHAT WE ARE ASKING HERE.

EXCEPT THE PROBLEM WE HAVE HERE IS THAT, EVERY SINGLE CASE INCLUDING OUR CASES , HAVE SAID THAT COMMITMENT UNDER THE "JIMMY RYCE" ACT , IS NOT A CRIMINAL PROCEEDING. AND WHETHER I MIGHT DISAGREE WITH THAT FUNDAMENTAL DISTINCTION , THAT IS THE LAW IN THIS STATE, AND IN THIS COUNTRY , ABOUT THESE TYPES OF CIVIL COMMITMENT PROCEEDINGS .

IN VINING AND CARSIORITZ AND OTHER CASES , THIS COURT HAS EXTENDED THAT PROVISION TO CIVIL CASES. CLEARLY THESE LICENSURE CASES WERE NOT CRIMINAL. TO CIVIL CASES , WHERE THE MOST , THE MAXIMUM PENALTY WOULD BE LOSS OF A LICENSE TO SELL HOMES . HERE I AM ASKING THE COURT TO INCLUDE , WITHIN THAT UMBRELLA , CIVIL CASES WHERE THE MAXIMUM PENALTY IS LOSS OF LIBERTY.

BUT DON'T , TO DO THAT, WE WOULD BE IN DIRECT CONFLICT WITH ALLEN VERSUS ILLINOIS , THE U.S. SUPREME COURT.

NO , YOUR HONOR , NOT AT ALL.

VINING RELIED ON GALT , AND THEY LIMITED , DISTINGUISHED GALT AND SAID THE PURPOSE OF THIS TYPE OF ACT IS NOT PUNISHMENT BUT TREATMENT.

NOT AT ALL , YOUR HONOR. ALLEN APPLIED THE PRINCIPLE AND QUOTE EXPLICITLY IT DID IN THE LAST PARAGRAPH OR TWO OF THE OPINION , QUOTE EXPLICITLY APPLIED THE PRINCIPLE OF FEDERALISM TO STATE PROCEEDINGS, WHERE A PERSON COULD BE COMPELLED TO TESTIFY AGAINST HIMSELF. ALLEN DID NOT STAND FOR THE PROPOSITION THAT WE CAN NOT EXTEND THE FIFTH AMENDMENT PRIVILEGE TO THESE CASES . ALLEN STOOD FOR THE PROPOSITION THAT THE STATES MAY DECIDE WHETHER OR NOT TO EXTEND THE PRIVILEGE. NOW , ALLEN IS , ALSO , DISTINGUISHABLE ON OTHER GROUNDS. FOR INSTANCE , IN ALLEN, AND THIS IS RIGHT AT THE BEGINNING OF THE OPINION.

LET ME BACK UP . I AM READING THAT AND QUOTING THE LAST PARAGRAPH , AND IT SAYS HERE AS IN ADDINGTON , THE ES SENCE OF FEDERALISM IS THAT STATES MUST BE FREE TO DEVELOP A VARIETY OF SOLUTIONS TO PROBLEMS AND NOT BE FORCED INTO A COMMON UNIFORM MOLD OF THE SORT URGED BY PETITIONER . AND THE N THEY INTERPRET THE ILLINOIS ACT , WHICH SEEMED TO BE VERY SIMILAR. IN FACT , OUR ACT IS A FTER THE FINDING OF G UILT UNDER THE ILLI NOIS ACT. IN ALLEN, THERE WAS ACT UALLY A CIVIL PROCEEDING GOING ON AT THE SAME TIME CRIMINAL CHARGES WERE PENDING . AND HERE WE DON'T DEAL WITH THE "JIMMY RYCE" ACT TYPE PROCEEDINGS , UNTIL AFTER THERE HAS BEEN THE CONVICTION.

WELL, YOUR HONOR , IN THE L AST PARAGRAPH OF ALLEN , THE COURT STATES , D UE PROCESS DOES NOT INDEPENDENTLY REQUIRE APPL ICATION AS A PRIVILEGE.IT DOES NOT SAY THAT DUE PROCESS DOES NOT PREVENT APPLICATION OF THE PRIV ILEGE . DUE PROCESS DOES NOT REQUIRE THE APPLICATION OF THE PRIVILEGE TO THE FACTS I N ALLEN , BUT G IVEN THE STATE OF THE LAW IN FLORIDA , I THINK DUE PROCESS DOES REQUIRE APPLICATION

YOU ARE GOING FROM SELF INCRIMINATION , FI FTH AMENDMENT FEDERAL CASE , TO STATE DUE PROCESS?

IN PARTICULAR , YOUR HONOR , BOTH, WE ARE PROCEEDING UNDER, OF COUR SE, THE STATE CASES THAT HAS EXTENDED THE PRIVILEGE TO CIVIL MATTERS. W E ARE NOT ASKING THE COURTT TO APPLY FEDERAL DUE PROCESS , PER SE. THE FEDERAL PRIVILEGE I S SOMEWHAT NARROWER . THE FEDERAL PRIVILEGE , EXCUSE ME , IS ADDRESSED IN ANY NUMBER OF CASES , PROBABLY THE MOST TE LLING IS SPEVAK V KLEIN , WHERE THE U.S. SUPREME COURT DISBAND PROCEEDINGS TO DISB ARMENT PROCEEDINGS TO AN IT ATTORNEY.

ARE YOU TALKING ABOUT SELF-INCRIMINATION OR DUE PROCESS, BECAUSE THERE IS NOT A SELF-INCRIMINATION CLAUSE IN THE FLOR IDA CONSTITUTION, JUST FEDERA L.

YOUR HONOR , AR TICLE I SECTION 9 OF THE CONSTITUTION IMPLIES THAT N O WITNESS SHALL BE FORCED TO TESTIFY AGAINST HIMSELF.

YOU ARE ASKING US TO INTERPRET THAT

I HIM ASKING THE COURT TO INTERPRET THAT MORE BROADLYTHAN THE FEDERAL LAW.

CHIEF JUSTICE: YOU ARE INTO YOUR REBUTTAL.

YOUR HONOR , IF I MIGHT RESERVE THE REST OF MY TI ME FOR REB UTTAL , PLEASE.

MAY IT PL EASE THE COURT . DIANA BO CK, AS SIST ANT A T ATTORNEY G ENERAL REPRESENTING THE STATE IN THIS CASE .

I AM LOOKING AT VINING AND WO NDERING IF THOSE CASES ARE ST ILL GOOD LAW, IN LIGHT OF SUBSEQUENT DEVELOPMENTS. HOW DO YOU INTERPRET WHAT THIS COURT DECIDED IN VINING , BASED ON SPEVAK AND ALSO THE CARSOWITZ CASE.

THE VINING CASE AS WELL AS SP CHLT PE VAK AS WELL AS SPEVAK, ARE NOT GOOD LAW ANYMORE, AND MOST PARTICULARLY IN ILLINOIS , WHICH TALKS ABOUT IN REGAULT, WHICH TALKS ABOUT VINING AND ITS COMPANION CASE , BUT WHAT IS MORE IMPORTANT HERE IS THE DIFFERENCE BETWEEN THE "JIMMY RYCE" ACT AND THOSE ACTS OR ADMINISTRATIVE PROCEEDINGS DEALT WITH IN VINING AND THE COMPANION CASES. IN FACT, WHAT JUSTICE CANTERO AL ALLUDED TO IS EXACTLY ON POIN T. JUSTICE CANTERO ALLU DED TO IS EXACTLY ON POINT , WITH A DEFINITION OF A FIFTH AMENDMENT PRIVILEGE. AUTOMATICALLY THERE IS A SHIFT , AND NO LO NGER DOES THE ADMINIST RATIVE PROCEEDING REQUIRE A BU RDEN OF PRO OF TO BE HAD UPON THE LICENSURE DEPARTMENT. THAT DOESN'T HA PPEN IN A RYCE CASE.

THE QUESTION IS, CAN IT. IN OTHER WORDS, IF THE DEFENDANT, OR RESPONDENT, WHATEVER THEY ARE CALLED.

RESPONDENT BELOW.

RESPONDENT DECIDES THAT THEY WILL NOT ANSWER QUESTIONS, AND NOW IT IS LIKE THIS IS A CIVIL PROCEEDING, AND I THINK ABOUT A DEFENDANT IN A CIVIL PROCEEDING NOT ANSWERING QUESTIONS. THERE ARE SANCTIONS FOR NOT ANSWERING QUESTIONS, INCLUDING STRIKING PLEADINGS, ENTERING A DEFAULT, CAN THAT HAPPEN UNDER THE RYCE ACT, OR WOULD YOU SAY THAT, IF THAT WAS APPLIED IN THAT WAY, THEN IN THAT CIRCUMSTANCE, THAT THERE WOULD BE A POTENTIAL VIOLATION OF PRIVILEGE AGAINST SELF-INCRIMINATION.

I THINK THAT, BELOW AS WITH ANY OTHER CIVIL CASE, WHICH WAS THE CASE HERE WHEN THE JUDGE STRUCK CERTAIN QUESTIONS, THAT THE FIFTH IS AVAILABLE TO CIVIL DETAINEES, AND IN FACT, THE STATE DOES NOT TAKE THE POSITION THAT THEY HAVE BEEN STRIPPED OF THEIR PRIVILEGES. WE SIMPLY ARE HERE FOR THE CONTENTION THAT THEY DO NOT HAVE A BLANKET FIFTH AMENDMENT IMMUNITY, BASED ON THE PROCESS, ITSELF, WHICH IS EXACTLY WHAT WAS CONSIDERED IN ALLEN VERSUS ILLINOIS. WHETHER OR NOT THE PROCESS, ITSELF, TRIGGERED A FIFTH AMENDMENT IMMUNITY, THE COURT SAID NO. THAT "NO" APPLIES TO THE RYCE ACT. WHAT WE HAVE HERE IS THE ABILITY FOR A CIVIL DETAINEE TO RAISE UP AN UNION DETAINEE TO RAISE UP A UNIQUE CLAIM FOR PRIVILEGES THAT EXIST WITHIN THE CIVIL SYSTEM. I BELIEVE THAT WHAT YOU ARE ASKING, CHIEF JUSTICE, IS WHETHER OR NOT THERE COULD BE SANCTIONS FROM A REFUSAL TO ANSWER. THE TRIGGERING MECHANISM IN BOTH VINING AND THE COMPANION CASE WAS THE ASSERTION OF THE FIFTH. THAT ALONE, TRIGGERED WHAT WAS A COST TO THIS PARTICULAR INDIVIDUAL IN THAT PROCEEDING.

WOULD YOU ADDRESS, THOUGH, WITHIN THE SCHEME, EXCUSE ME, IT DOES APPEAR THAT THE STATUTORY SCHEME CONTEMPLATES THAT MAYBE THE PEOPLE IN THIS SITUATION, IT CONTEMPLATES THAT THEY DO HAVE THE RIGHT NOT TO COOPERATE OR NOT TO ENGAGE IN THE EXAMINATION PROCESS, AND ISN'T THERE A STATUTORY PROVISION, MAYBE NOT AS STRONGLY WORD BUT HOW DOES THIS FACTOR INTO THE ANALYSIS OR DOES IT FACTOR INTO THE ANALYSIS THAT THE 9155 ADDRESSES A REFUSAL TO COOPERATE, AND THIS WOULD KIND OF BE LIKE THAT, SO COULD YOU ADDRESS HOW THAT APPLIES IN THIS CONTEXT.

I THINK THE ISSUE WAS ALSO RAISED BY JUDGE ANSTEAD BELOW IN THE SECOND DCA. IN HIS OPINION, HE RAISED A CONCERN ABOUT WHAT APPEARED TO BE INCONSISTENCY.

CHIEF JUSTICE: I THINK YOU MEAN JUDGE ALTENBERND.

I APOLOGIZE, JUSTICE.

DON'T APOLOGIZE. I TAKE THAT AS A COMPLIMENT.

I THINK WHAT JUSTICE ALTENBERND FOUND AS A PROBLEM AND WHAT YOU ARE ASKING ME, JUSTICE LEWIS, IS WHETHER OR NOT WE CAN BALANCE THOSE TWO PROVISIONS, THE PROVISION THAT SAYS THAT THEY DO NOT HAVE TO COOPERATE IN AN EVALUATION, AND, YET, WE ARE GOING TO REQUIRE THEM TO ATTEND A CIVIL DEPOSITION AND PROVIDE INFORMATION AS IN ANY OTHER CIVIL CASE. THE ISSUE HERE, IS TIMING. THE EVALUATION IS DONE BY THE MULTIDISCIPLINARY TEAM, AND THAT IS BEFORE THERE IS ANY PROBABLE CAUSE DETERMINATION MADE. IN FACT, IN MANY INSTANCES, AT THE POINT IN TIME THAT WOULD OCCUR, THEY WOULD STILL BE WITHIN THE CONFINES OF THE PRISON SYSTEM. DOC WOULD STILL BE WHERE THEY WERE HOUSED. THAT IS NOT THE SITUATION, AT THE TIME WE ARE TAKING A CIVIL DEPOSITION. AT THAT POINT, THERE HAS BEEN A DETERMINATION BY THE MULTIDISCIPLINARY TEAM. THIS INDIVIDUAL IS FOUND TO HAVE SOME TYPE OF PROBABLE

CAUSE TO BE MOVED FORWARD WITHIN THE COMMITMENT PROCESS , AND NOW WE NEED ALL THE INFORMATION WE CAN GET , AND THAT IS NOT ONLY FOR THE PROTECTION OF THE INDIVIDUALS IN THE STATE THAT NEED PROTECTION , THOSE VULNERABLE PEOPLE IN SOCIETY THAT WE ARE ATTEMPTING TO PROTECT BY THIS ACT , BUT IT , ALSO , PROTECTS THE CIVIL DETAIN EE , AND LIKE WO ODY HAYES SAYS, YOU PUT A BALL IN THE AIR AND TWO OR THREE THINGS CAN HAPPEN AND TWO ARE BAD , IF WE ARE GOING TO GO INTO A CIVIL PROCEEDING WITH A PROPER ASSESSMENT , THREE THINGS CAN HAPPEN AND TWO ARE BAD. EITHER SOMEONE WHO SHOULD BE COMMITTED WILL BE COMMITTED OR SOMEONE THAT WILL BE COMMITTED SHOULD NOT BE COMMITTED , SO YOU HAVE TWO BAD THINGS THAT IS CAN HAPPEN, IF WE DON'T HAVE A FULL EVALUATION.

WHAT ABOUT IF WE ACCEPT THAT VINING IS GOOD LAW AND THAT LINE OF CASES ARE GOOD LAW.

OKAY.

AND SO ONE OF THE WAYS THAT I READ VINING , SUGGESTS TO ME THAT THE CASE IS SAYING THAT, IF THE REALTOR , FOR INSTANCE, IS BEING QUESTIONED, AND THEY ARE ASKED, REALLY , HOW MANY TRANSACTIONS DID YOU PARTICIPATE IN , IN MAY OF LAST YEAR , FOR INSTANCE , AND A REALTOR SAYS, WELL , I AM NOT GOING TO ANSWER THAT QUESTION, BECAUSE I AM NOT GOING TO HELP YOU PROVE A CASE AGAINST ME, IN ORDER TO TAKE MY LICENSE . ALL RIGHT. IS THAT A FAIR INTERPRETATION?

OF VINING?

OF VINING.

I DON'T BELIEVE SO , YOUR HONOR.

LET ME GO A STEP FURTHER, THEN, BECAUSE THAT IS ONE WAY THAT I READ VINING.

OKAY.

IS THAT EXTENDING THIS RIGHT IN THAT KIND OF SITUATION , WHERE THERE IS A PENALTY , SUGGESTS THAT THE RESPONDENT IN THOSE PROS IN THOSE PROCEEDINGS, CANNOT BE COMPELLED TO ASSIST THE LICENSING ORGANIZATION, OKAY, IN PROVING A CASE AGAINST THEM, TO TAKE THEIR LICENSE , AND ONE OF THE WAYS THAT THEY WOULD BE COMPELLED TO ASSIST, IS TO TALK ABOUT HIS REAL ESTATE PRACTICE, YOU KNOW, SO HE PROVIDES THE RAW MATERIAL FOR THE LICENSING AGENCY TO PROCEED . IN THESE PROCEEDINGS , IT SEEMS TO ME THERE , IS THERE NOT AN ANALOGY, THEN , THAT THE STATE CANNOT COMPEL THE DEFENDANT HERE OR THE RESPONDENT HERE , TO, ALSO , SUPPLY INFORMATION THAT THE STATE MAY, THEN , USE AGAINST HIM IN PROVING THEIR CASE UNDER THE "JIMMY RYCE" ACT , WHICH WILL , THEN , ULTIMATELY LEAD NOT TO A LOSS OF LICENSE OR A PRIVILEGE BUT WILL LEAD TO HIS LOSS OF FREEDOM INDEFINITELY . ASSUMING THAT YOU CAN READ VINING , AND I REALIZE THE WHOLE AREA IS UP IN THE AIR NOW , WITH THE LATER CASE LAW, BUT ASSUMING THAT THAT IS A PROPER INTERPRETATION OR ONE ASPECT OF VINING , WHY WOULDN'T THAT INTERPRETATION BAR QUESTIONS HERE THAT WOULD HELP SUPPLY THE RAW MATERIAL FOR THE STATE ? I AM MAKING THOSE ASSUMES , AND THOSE ARE A COUPLE ASSUMPTIONS , AND THOSE ARE A COUPLE

GIVEN THOSE ASSUMPTIONS , FIRST OF ALL , WE GO BACK AND LOOK AT WHAT THE COURT IN VINING LOOKED AT , AND IT WASN'T A SITUATION UNDER A DEPOSITION POSTURE. IT WAS THAT , AT THE INITIATION AFTER PETITION , THE BURDEN WOULD SHIFT AND THERE WOULD BE A LEGAL PRESUMPTION OF CORRECTNESS OF THE ALLEGATIONS SET FORTH IN A PETITION , IF AND WHEN AT THE MOMENT THE FIFTH AMENDMENT WAS ASSERTED . THAT IS DIFFERENT THAN WHAT YOU ARE NOW DISCUSSING , WITH A CIVIL, A PRETRIAL DEPOSITION. IN A PRETRIAL DEPOSITION ,

WHAT WE ARE LOOKING AT ARE INDIVIDUAL QUESTIONS THAT CAN BE RESPONDED TO BY AN OBJECTION, WHICH WAS DONE BELOW, AND IN FACT, BELOW IT WAS DETERMINED THAT CERTAIN OF THOSE QUESTIONS WERE BEYOND THE SCOPE AND SHOULD BE CURTAILED, AND THEY WERE CURTAILED BY THE TRIAL COURT.

WHY SHOULDN'T THE RESPONDENT BE ABLE TO SAY AT THE OUTSET, THAT OBVIOUSLY THE STATE HAS A PURPOSE IN TAKING THIS DEPOSITION, AND PART OF THAT PURPOSE IS TO AID THE STATE IN THESE PROCEEDINGS. THE STATE

TO DETERMINE THE TRUTHFULNESS, YOUR HONOR, NOT TO CONVICT AND NOT TO NECESSARILY FIND THAT HE IS COMMITTABLE BUT RATHER TO KNOW THE TRUTH OF IT.

ISN'T THAT A SLIPPERY SLOPE, BECAUSE OBVIOUSLY THE STATE COULD MAKE THAT ARGUMENT IN CRIMINAL PROCEEDINGS. AND SAY ALL WE ARE AFTER IS THE TRUTH HERE BUT GOING BACK TO THE ROOTS OF THE PRIVILEGE REALLY DO REST IN THE FACT THAT IT IS ABHORRENT TO OUR PRINCIPLES TO COMPEL A PERSON TO GIVE EVIDENCE THAT MIGHT PROVE THE CASE AGAINST THAT PERSON.

IN A CRIMINAL CONTEXT.

HERE, WHEN WE ARE TALKING ABOUT IT MAY NOT BE A CRIMINAL PROSECUTION, BUT IT COMES AS CLOSE TO A CRIMINAL PROSECUTION, WHY WOULDN'T THAT FUNDAMENTAL RIGHT, THEN, BE ANALOGOUS TO THAT SITUATION?

THE COURT ADOPTED THAT REASONING OF THE COURT, THAT THE LOSS OF LIBERTY ALONE, DOES NOT MORPH WHAT IS A CIVIL LAW, WITHOUT PENAL RAMIFICATIONS, INTO A PENALTY TYPE OF SITUATION, WHICH IS THE SECOND POINT I WOULD HAVE GOTTEN TO, AND THAT IS THAT WE ARE NOT DEALING WITH A PENALTY AS A RESULT OF THE EXERCISE OF THE FIFTH AMENDMENT. THAT IS WHAT HAPPENED IN VINING. THAT IS WHAT HAPPENED IN THE COMPANION CASE, INCLUDING SPEVAK, WHICH IS THE BAR CASE THAT CAME LATER. IN THE RICE ACT, WHEN THE IN THE RYCE ACT, WHEN THE FIFTH IS PLED AND DETERMINED TO BE ADEQUATE BELOW, THERE IS A PROTECTION TO THAT INDIVIDUAL WHO HAS EXERCISED THE FIFTH. WE STILL MOVE FORWARD, THE STATE BEARS THE BURDEN BY THE STRONGEST STANDARD AVAILABLE, CLEAR AND CONVINCING EVIDENCE, TO PROVE THAT THIS INDIVIDUAL MEETS THE PARAMETERS OF COMMITMENT AS A VIOLENT SEXUAL PREDATOR.

SO YOU ARE SAYING IN AN INDIRECT ANSWER TO MY EARLIER QUESTION, THAT IF A DEFENDANT RESPONDENT DETERMINED THAT HE OR SHE WAS NOT GOING TO ANSWER THE QUESTIONS, THAT THE STATE WOULD STILL BE HELD TO ITS BURDEN OF PROOF TO PROVE THAT THIS PERSON SHOULD BE COMMITTED.

ABSOLUTELY.

OKAY.

WHAT SANCTIONS COULD A TRIAL COURT IMPOSE, IF A RESPONDENT REFUSED TO ANSWER CERTAIN QUESTIONS THAT WEREN'T DIRECTLY INCRIMINATING BUT DIDN'T FEEL LIKE ANSWERING THEM? WHERE ARE YOU GOING TO LIVE AFTER YOU GET OUT OF JAIL? I REFUSE TO ANSWER THE QUESTION.

I THINK AT THAT POINT THE TRIAL COURT MIGHT HAVE TO CRAFT THE APPROPRIATE RESPONSE TO THOSE TYPE OF DENIALS, IF THEY ARE NOT VALID DENIALS, BASED ON A GOOD FAITH ASSERTION OF A PRIVILEGE THAT EXISTS. HOWEVER, I DO NOT BELIEVE THAT IT WILL, AT ANY TIME, SHIFT THE BURDEN FROM THE STATE, TO PROVE BY CLEAR AND CONVINCING EVIDENCE, THAT THIS INDIVIDUAL FALLS WITHIN THE PARAMETERS FOR CIVIL COMMITMENT. THAT WILL NEVER

HAPPEN.

I GUESS WHAT YOU ARE SAYING, THEN, IS THAT ONE OF THE SANCTIONS THAT IS NOT AVAILABLE IN THE CIVIL COMMITMENT CONTEXT THAT IS USUALLY AVAILABLE, UNDER THE RULES OF CIVIL PROCEDURE, IS YOU CANNOT GRANT THE DEFAULT JUDGMENT TO THE STATE.

THERE WOULD NOT AND DEFAULT JUDGMENT, YOUR HONOR. AND I CAN'T POINT YOU TO ANY SPECIFIC AREA WITHIN THE CIVIL RULES THAT SAYS THAT, BUT WHAT I CAN TELL YOU IS THAT THE APPLICATION THAT IS HAVE BEEN MADE IN THE TRIAL COURTS BELOW WILL NOT PROVIDE FOR THAT. THERE IS A VERY HEAVY BURDEN TO THE STATE HERE. CLEAR AND CONVINCING IS THE HEAVIEST BURDEN WE CAN GET TO. ADDINGTON VERSUS TEXAS, THE UNITED STATES SUPREME COURT SET THAT STANDARD. WE FOLLOW THAT STANDARD. THE ONLY SANCTION THAT IS MIGHT BE APPLICABLE, MIGHT BE EVIDENCE THAT WOULD BE BROUGHT IN THAT WOULD BIND SIDE THE STATE, PERHAPS, SOMETHING, PERHAPS AN EVALUATION DONE INDEPENDENT THAT WE HAVE NO ACCESS TO, NO WAY TO ASSESS THAT THAT BE BROUGHT IN THE DAY OF TRIAL AND CASE, BASICALLY, TRIAL BY AMBUSH. THAT MIGHT BE THE PROPER RESTRICTION.

WHAT ABOUT JAIL TIME, AS IT WOULD IN A REGULAR, IN A CONTEMPT PROCEEDING, IN 30 DAYS IN JAIL FOR CONTEMPT OF COURT?

I THINK IT MIGHT BE A POSSIBILITY, BUT GIVEN THE POSTURE OF THE INDIVIDUAL HERE, THE CIVIL DETAINEE, THAT MIGHT BE A TAD REDUNDANT. IT MIGHT BE A SIMPLE RELOCATION. BUT THAT RESTRAINT IS STILL SOMETHING WITHIN THE CIVIL CONTEXT. THE COURT FOUND THAT.

CHIEF JUSTICE: JUSTICE LEWIS.

I DON'T KNOW THAT YOU FINISHED YOUR ANSWER WITH REGARD TO WHAT I WAS ATTEMPTING TO INQUIRE ABOUT AND PROBE, AND THAT WAS, IS IT ONLY, THE TIMING WITH REGARD TO 9155, THAT CONTEMPLATES THAT YOU DON'T HAVE TO COOPERATE? IS IT ONLY THE TIMING, BECAUSE HERE IS MY CONCERN. AN INDIVIDUAL SAYS I AM NOT GOING TO COMPLY. THAT DOES NOT PROHIBIT, AS I UNDERSTAND IT, A, THE RIGHT OF THE STATE TO CONTINUE FORWARD, DOES IT?

THAT IS CORRECT, YOUR HONOR.

SO THEY CAN PROCEED FORWARD, SO ESSENTIALLY THEY COULD, THEN, USE THE DEPOSITION TO CONDUCT THE EXAMINATION THAT THE STATUTE SAYS THAT THE PERSON DOES NOT HAVE TO SUBMIT TO.

EXACTLY. IN FACT, THAT IS THE ONLY OPPORTUNITY THAT WOULD BE HAD AT SOME POINT, FOR ANY INDIVIDUAL DOING A PSYCHOLOGICAL EVALUATION, TO WATCH THE DEMEANOR AND TO BASICALLY TRY TO SEE INTO THE PSYCHE OF THE INDIVIDUAL, BECAUSE THE ISSUE HERE, THE QUESTION HERE, BEING ASKED, IS THIS PERSON WITHIN THE COMMITMENT PARAMETERS OF THE "JIMMY RYCE" ACT AS A SEXUALLY VIOLENT PREDATOR? THE ONLY WAY YOU GET TO THAT ANSWER IS TO KNOW ALL THE FACTS.

LET ME ASK YOU THIS.

I AM SO RRY.

IN THESE CASES.

YES, YOUR HONOR.

IF THIS COURT EITHER DISCHARGED JURISDICTION OR AFFIRMED, WHAT IS GOING TO HAPPEN

NEXT IN THESE CASE S?

IN THESE CASES, THEY WILL M OVE FORWARD WITH WHAT INFORMATION IS AVAILABLE TO THE STATE. THE STATE WILL MOVE FORW ARD. THESE INDIVIDUALS HAVE BEEN DETERMINED, UNDER THE MULTIDISCIPLINARY TEAM'S RULING , TO BE SUBJECT TO THIS COMM ITMENT PROCEEDING.

SO WHAT HAPPENS NEXT , AS FAR AS THE T A KING OF THE DEPOSITION?

IF THE CASE BELOW ARE AFFIRMED, THE CASES WOULD MOVE FORWARD IN THE CONTEXT AFTER DEPOSITION. IF THIS COURT WERE TO RULE AGAINST THAT

IN SO FAR AS REA CHING THE ISSUE OF SANCTIONS, IF THE QUESTIONS ARE NOT ANSWERED , IS THERE ANY OF THESE CASES THAT REAC H THAT POINT?

AT THIS POINT, NO , THEY HAVE NOT, YOUR HONOR , BUT THAT WOULD BE SOMETHING TO BE CRAFTED BY THE TRIAL COURT THAT IS IN THE BEST POSITION TO UNDERSTAND THE CIRCUMSTANCES SURROUNDING EACH INDIVIDUAL CLAIM. THAT IS THE K EY HERE.

ARE ANY OF THESE CL AIMS , THE SITUATION THAT WE DISCUSSED BE FORE, WHERE THE INDIVIDUAL SAYS I AM NOT COOPERATING WITH ANY OF THIS AS A PRED ICATE , ARE ANY OF THESE CASES IN THAT CATEGORY?

NOT AT THIS TIME , YOUR HONOR.

NONE OF THOSE. OKAY.

I G U ESS I AM STILL CONCERNED WITH THE FACT THAT YOUR ANSWER TO JUSTICE L EWIS 'S QUESTION A FEW MINUTES AG O, SEEMS TO ME , WE GET BACK TO THE SAME PROBLEM WITH , DOESN'T THIS DEPOSITION, AND ISN'T, THIS CAN'T THIS DEPOSITION BE USED TO CIRCUMVENT THE OTHER PORTION OF THE STATUTE WH ICH SAYS THAT A DEFENDANT DOESN'T REALLY HAVE TO COOPERATE WITH THE DOCTORS. THEY CAN GO ON AND DO THE EVALUATION, WITHOUT THE DEFENDANT. SO THE DEFENDANT HAS NOT COO PERATED WITH THE DOCTORS. NOW HE HAS TO S U BMIT T O THE DEPOSITION, AND THAT DEPOSITION IS , NOW , GOING TO BE USED IN THE SAME MANNER THAT HIS COOP ERATION WITH THE DOCT ORS WOULD HAVE BEEN USED.

I THINK IT GOES BACK TO THE TIMING , YOUR HONOR, AND I DON'T SEE ANY KIND OF DISCONNECT HERE. WHAT YOU HAVE GOT IS THE ABILITY TO BE

WHETHER BEFORE OR A FTER , IT STILL, THE DEFENDANT'S O WN WO RDS O R STATEMENTS , BEING USED BY THE PROFESSIONAL TO

- - EVALUATE.

SU PPORT THE CLAIM THAT HE NE ED S TO B E KEPT CON FINED BEYOND HIS ACTUAL SENTENCE.

THAT IS ACCURATE. HOWEVER , UNDER THE STATUTE , THAT OC CURS AF TER A PROBABLE CAUSE DETER MINATION. WE ARE IN A TOTALLY DIFFERENT PO STURE , AT THE TIME THAT DEPOSITION WOULD BE TAKEN, THAN WE ARE AT THE TIME THE IN ITIAL EVAL UATION IS DONE.

I AM SOR RY. I DON'T UNDERSTAND. YOU KEEP SAYING IT IS A TOTALLY DIFFERENT POSTURE, BEC AUSE IN ONE SITUAT ION YOU HAVE AN EVALUATION AND NO WORDS COMING FROM THE INDIVIDUAL, AND THAT IS THE SAME POSTURE YOU ARE IN , UNTIL YOU FORCE SOMEBODY TO ANSWER THESE QUESTIONS AT DEPOSITION, SO I AM NOT SURE THAT THIS TIMING THIN G IS REALLY THE ANSWER TO THE SUBSTANTIVE QUESTION THAT IS BEING POSED. A CONC ERN , HOW DOES THIS OPERATE? I MEAN, CERTAINLY WHETHER YOU DO THE DEPOSITION FIRST OR YOU TRY

TO DO THE EXAM FIRST, YOU CAN USE THE DEPOSITION TO , IN SOME WAY

IN THE FINAL COMMITMENT PROCEEDING, CORRECT.

TO CONDUCT AN EXAMINATION, AGAIN , THE JUSTICE QUINCE AND I, BOTH , ARE ASKING ABOUT , IS ONE THAT YOU WOULD HAVE THE RIGHT NOT TO DO.

THE UNDERSTANDING IN THE EVALUATION PROCESS, THAT IS DONE BY THE MULTIDISCIPLINARY TEAM PRIOR TO DETERMINATION, WHETHER OR NOT THIS INDIVIDUAL QUALIFIES DETERMINATION , WHETHER OR NOT THIS INDIVIDUAL HAS AT THAT POINT IN TIME QUALIFIED.

NO STATUTE.

THEY COOPERATE.

THEY MOVE FORWARD WITH A PROCEEDING.

WITH A PROCEEDING THAT DETERMINES WHETHER OR NOT THEY ARE QUALIFIED FOR THE COMMITMENT PROCESS, NOT WHETHER THEY ARE COMMITTABLE , BUT WHETHER THEY, IN FACT , FALL WITHIN THE PARAMETERS OF THE COMMITMENT PROCESS. THAT OCCURS BY THE REVIEW OF THE MULTIDISCIPLINARY TEAM . WHAT THE LAW PROVIDES IS THAT THOSE INDIVIDUALS CAN BE REVIEWED BY PAPER REVIEW. WE CAN LOOK AT THE RECORDS OF THE DEPARTMENT OF CORRECTIONS. WE CAN LOOK AT PRIOR EVALUATIONS THAT MAY HAVE BEEN DONE. WE CAN LOOK AT THE CRIMINAL CONVICTIONS WHICH OCCURRED. AND ALL OF THOSE THINGS ARE SUFFICIENT TO FIND THAT HE , THERE IS PROBABLE CAUSE TO , NOW , HOLD THAT PERSON FOR THE COMMITMENT PROCEEDING.

IF THEY HAVEN'T, THEN , SUBMITTED TO THE EXAMINATION BUT NOW THEY HAVE , THERE HAS BEEN A PROBABLE CAUSE DETERMINATION , CAN THE STATE AVAIL ITSELF OF RULE 1.360 , EXAMINATION OF PERSONS? CAN THEY, THEN , REQUEST , AFTER THIS DETERMINATION IS MADE , CAN , IS THE CIVIL RULES OF PROCEDURE APPLIED TO THAT EXTENT, THAT YOU COULD

I DON'T KNOW THE CIRCUMSTANCE WHERE THAT HAS HAPPENED, YOUR HONOR, AND I TRULY DON'T KNOW HOW TO ANSWER THAT. I WOULD THINK THAT CERTAINLY THAT WOULD BE SOMETHING THAT MIGHT BE AVAILABLE.

I GUESS WHAT WE ARE HAVING TROUBLE WITH , IT SEEMS THAT IT WOULD BE EQUALLY INTRUSIVE TO , EITHER , BE , IT BEING EXAMINED AND BE ASKED QUESTIONS , BECAUSE THAT IS WHAT THE EXAMINATION , IT IS NOT A PHYSICAL EXAMINATION , PER SE.

RIGHT.

THEY ARE NOT GOING TO FIND SOME NEUROLOGICAL BASIS FOR THE UNDERLYING DISEASE , AND THE , ANSWERING DEPOSITION QUESTIONS THAT ARE ASKED IN THE EXACT SAME THING. DO YOU NOT SEE THAT AS BEING IN CONFLICT?

NO , YOUR HONOR. I DON'T. I DON'T , AGAIN, BE CAUSE OF THE CONTEXT OF THE ACT , THE PURPOSE FOR THE INFORMATION AND THE TIMING , AND I UNDERSTAND JUSTICE WELLS , EXCUSE ME , JUST TIS LEWIS JUSTICE LEWIS IS SAYING THE TIMING MAY NOT BE THE ONLY ANSWER. IT IS NOT THE ONLY ANSWER. IT IS ONE OF THE ANSWERS. THIS IS A VERY INTRICATE PUZZLE TYPE OF PROCEEDING , AND I THINK THAT WHAT WE NEED TO HAVE HAPPEN BELOW IS TO ALLOW THE TRIAL COURT , WHICH IN THIS CASE IT DID , TO MAKE THOSE INITIAL ASSESSMENTS , AND IF THE INFORMATION IS NOT NEEDED FOR THE STATE TO CARRY ITS BURDEN, THEN IT WILL NOT BE HAD BY THE STATE, AND I THINK THE APPROPRIATE PLACE FOR THAT TO BE DETERMINED IS THE TRIAL COURT AND NOT ON APPELLATE REVIEW.

CAN I ASK YOU ONE QUESTION. COULD A STATE ELIMINATE A PROVISION SUCH AS THE PROTECTION THAT I S IN 91 55 , AND HAVE A VIABLE , CONSTITUTIONALLY SOUND PROCEDURE?

Y ES. I DO BELIEVE SO.

THEY HAVE DONE THAT. OKAY.

BUT WITH THAT COST IMMUNITY IN THE CASES THAT I AM FAMILIAR WITH , AND IN FACT, I BELI EVE THAT JUSTICE ALTENBERND ALSO REFERENCES THE POSSIBILITY OF TRIGGERING YOU MEAN UNIT TRIGGERING IMMUNITY , IF THERE I S A COMPELLING O F AN INDIVIDUAL TO RESPOND IN SOME WAY THAT MAY TRIGGER A PRIVILEGE , THAT AT THAT TIME THERE MAY BE AN AB ILITY TO ASSESS WHETHER OR NOT THE PRIVILEGE DOES APPL Y, AND IF IT IS IN S OME WAY BREACHED , WHETHER IMMU NITY CAN THEN APPLY TO THAT PARTICULAR ANSWER.

THAT IS WAY BE YOND WHEREWE ARE RIGHT NOW.

IT IS BEYOND WHERE WE ARE , BUT IT MAY AND RES ULT OF WHE RE WE ARE GOING .

CHIEF JUSTICE: IS THAT ALL?

FOR ANY THING I HAVEN'T ARGUED , I WILL RE LY ON THE B RIEF OF THE STATE. THANK YOU .

MR . COSDEN , MAYBE YOU CANANSWER THE QUESTION OF, IF THERE I S PROBABLE CAUSE THAT HAS BEEN FOUND , TO PROCEEDWITH THE JIMMY R YCE COMMITMENT , WHAT IS NEX T? CAN A DEFENDANT BE ACT UALLY COMPELLED TO BE EXAMINED F URTHER BY ME NTA L HE ALTH EXPERTS?

IN MY EXPERIEN CE, THE STATE HAS NOT SOUGHT TO DO THAT, SO THE QUESTION , REALLY , HASN'T AR ISEN , BUT I THINK, NO , THE STATUTES PROVIDES FOR EXAMINATION IN A QUALI FIED PRIVILEGE TO REFUSE. THE PRIVILEGE IS QUALIFIED, BECAUSE SANCTIONS FOR REFUSAL TO COMPLY WITH THE STATE'S REQUEST FOR A FACE TO FACE EXAMINATION , CAN RESULT I N SERT SANCTIONS, ANDTHE SANCTI ONS ARE SET OUT SPECIFICALLY IN THE STATUTE. SO TO TRY TO DO AN END AROUND AND SAY , WELL , GEE, WE WA NT TO D O AN EXAMINATION OF P ERSONS UNDER 1 .360 , WOULD POTENTIALLY B E A CONFLICT OF , A CONFLICT OF P OWERS I S SUE .

DOESN'T THE STATUTE SPECIFICALLY PROV IDE THAT THE RULES OF CIVIL PROCEDURE APPLY ?

YES, YOUR HONOR . THE STATUTE SAYS THAT, BUT UNFORTUNATELY , THERE ARE SEVERAL PLACES IN THE STATUTE, THIS BEING ONE OF THEM, WHERE THE STATUTESEEMS TO CONFLICT WITH WHAT THE RULES PROVIDE . NOW , AS THE COURT IS WELL A WARE , SE CTION 2 PROVIDES THAT THE COURT IS THE FINAL ARBITER OF RULES OF CIVIL PROCEDURE , NOT THE LEGISLATURE, SO WE CAN GETINTO A SEPARATION OF PO WERS ARGUMENT, BUT I DON'T THINK THAT THIS IS THE CASE T O DO IT. WE REALLY HAVEN'T REACHED THAT POINT YE T.

LET ME DI RECT BACK TO THESE CASES. THESE CASES STA ND IN THE POSTURE THAT THEY WENT UP ONE TIME , BEC AUSE THE INDIVIDUALS SA ID THEY WEREN'T GOING TO ANSWER ANY QUESTIONS. CORRECT? THAT WAS THE FIRST TIME.

CO RRECT.

WENT BACK DOWN AND WHAT HAPPENED THEN?

OKAY. THE FIRST TIME THE CASES WENT UP , THE TRIAL JU DGE S IMPLY ORDERED THE DEFENDANTS TO RESPOND TO DEPOSITION. THERE WE RE NO QUESTIONS PROPOSED. THERE WERE N O QUESTIONS ASKED.

IT WENT BACK DOWN. THEY PROPOSED QUESTIONS.

EXACTLY .

THE DEFENDANTS REFUSED TO ANSWER ALL THE QUESTIONS.

EXACTLY.

THEN IT WENT BACK UP.

CORRECT.

AND THE SECOND DISTRICT HAS SAID YOU HAVE GOT TO ANSWER THESE QUESTIONS. YOU HAVE GOT TO ANSWER THE QUESTIONS.

THAT'S CORRECT .

SO THERE HASN'T BEEN ANY SANCTIONS ENTERED. THERE HASN'T BEEN ANYTHING OTHER THAN THE FACT THAT NOW THAT THEY HAVE BEEN INDIVIDUAL QUESTIONS POSED, THERE HAVE BEEN OBJECTIONS MADE TO THOSE INDIVIDUAL QUESTIONS.

PROCEDURALLY THAT'S CORRECT. OF COURSE

THE DISTRICT COURT HAS SAID, NO, YOU HAVE GOT TO ANSWER THE QUESTIONS.

THAT'S CORRECT . THE DISTRICT COURT HAS COMPELLED THESE INDIVIDUALS TO TESTIFY AGAINST THEMSELVES , IN THIS PROCEEDING, WHICH WILL WHICH , WHILE NOT A CRIMINAL PROCEEDING IS A FLEEING COULD RESULT IN LOSS OF LIBERTY. DUE PROCESS, WE PROVIDE MUCH GREATER DUE PROCESS , WHERE THE POTENTIAL LOSS TO THE DEFENDANT IS GREATER. THE GREATEST DUE PROCESS IS PROVIDED IN THE DEATH-PENALTY CASE .

THE REASON FOR MY QUESTION, THOUGH, IS I WANTED TO SEE WHERE THIS THING STOOD IN THE PROCEDURAL POSTURE AS TO WHETHER OR NOT AS TO THE COURT , AN EVALUATION OF WHAT SANCTIONS ARE AVAILABLE IS REALLY NOT BEFORE US . OR IT WASN'T BEFORE THE DISTRICT COURT, CORRECT?

THAT IS CORRECT , YOUR HONOR. THIS IS NOT ABOUT SANCTIONS. THIS IS ABOUT VIOLATION AFTER CONSTITUTIONAL RIGHT. THE DIFFERENCES BETWEEN THIS CASE AND ALLEN , FOR INSTANCE , AND THE CASES UPON WHICH ALLEN IS BASED , TURN IN PART , ON THE POINT RAISED BY COUNSEL, ABOUT IMMUNITY. THERE IS, IN ALLEN , APPARENTLY, FROM THE REPORT OF , FROM THE SUPREME COURT REPORT OF ALLEN AND FROM THE ILLINOIS SUPREME COURT COURT OF ALLEN, APPARENTLY A GRANT OR A POTENTIAL GRANT OF IMMUNITY, IF ALLEN WERE TO ANSWER THE QUESTIONS THAT WERE POSED TO HIM. UNDER THE FLORIDA STATUTE , GOVERNING IMMUNITY , THAT IS NOT AVAILABLE HERE . OF COURSE THAT IS NOT BEFORE THE COURT, BUT THAT IS AT LEAST , A DISTINGUISHING , ANOTHER DISTINGUISHING FACTOR IN ALLEN .

CHIEF JUSTICE: YOUR TIME HAS EXPIRED , IF YOU WOULD LIKE TO CONCLUDE.

THANK YOU, YOUR HONOR. I WOULD ASK THE COURT TO REVERSE THE OPINION OF THE DISTRICT COURT AND IN SO DOING , I WOULD ASK THE COURT TO KEEP IN MIND THAT A DEPOSITION BY A LAWYER IS NOT A PSYCHOLOGICAL ASSESSMENT . THESE ARE VERY , VERY DIFFERENT THINGS , AND THE COURT SHOULD NOT ALLOW THE STATE TO GO AROUND THE STATUTE , PROVIDING FOR PSYCHOLOGICAL ASSESSMENTS BY ALLOWING THE STATE TO DO THE SAME THING IN THE

COURSE OF A DEPOSITION BY A LAWYER. THANK YOU VERY MUCH .

CHIEF JUSTICE: THANK YOU TO BOTH COUNSEL FOR BEING RESPONSIVE TO OUR QUESTIONS AND BEING VERY KNOWLEDGEABLE ABOUT THE SUBJECT MATTER. THANK YOU .