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Anthony Sheppard v. State of Florida

SC08-1452

>> THE NEXT CASE ON THE COURT'S AGENDA IS SHEPPARD VERSUS STATE.

CARD TODAY MOAN.

>> GOOD MORNING, IF IT PLEASE THE COURT.

MY NAME IS RICHARD ALBERTINE REPRESENTING ANTHONY SHEPPARD. I HAVE A BASIC QUESTION FOR YOU.

ARE YOU WITH THE PUBLIC DEFENDERS'S OFFICE THAT REPRESENTED SHEPPARD AT THE TRIAL COURT?

>> NO. I'M WITH MORMON OFFICE ON THE 10th.

THE PUBLIC DEFENDER THAT REPRESENTED HIM AT TRIAL COURT WAS IN THE 13th.

>> THIS WAS CONFLICTED OUT THEN.

>> HOW DID IT GET HERE?

>> NO, NO.

HOW DID IT GET TO YOU? IN OTHER WORDS THERE WAS PUBLIC --

>> CENTRALIZE THAT.

>> PUBLIC DEFENDER FOR THAT AREA.

>> YOU'RE AT SECOND, BUT YOU WOULD REPRESENT THE 13th?

>> YES ON APPEALS, RIGHT. SECOND DCA RIGHT.

>> THERE WAS OBVIOUS CONFLICT OF INTEREST.

I DON'T UNDERSTAND WHY COUNSEL BELOW THAT YOU ARE NOW, THAT THE PUBLIC DEFENDER IS --

DEFENDER IN THE CASE ADVISE THE COURT THERE WAS CONFLICT OF INTEREST AND ASK TO INTEREST AND CONFLICT FREE COUNSEL

>> THAT COUNSEL AT SHEPHERD

REPRESENTED SHEPPARD AT HEARING
IS STILL COUNSEL OF RECORD?

>> AS FAR AS I KNOW.

>> DOESN'T AT THAT STRIKE YOU,
ESPECIALLY WHEN YOU READ THE
SECOND DISTRICT WENT OUT OF ITS
WAY TO DO, JUDGE FULLMER AND
GRANGER, WHEN THESE HAPPEN.
PUT DEFENDANTS UNEQUIVOCALLY
DISCHARGE COUNSEL BUT THE
COUNSEL EITHER HAS TO ADOPT THE
MOTION AND PROCEED TO REPRESENT
THE DEFENDANT, OR, MOVE TO
WITHDRAW.

>> I COULDN'T AGREE WITH YOU
MORE.

IF YOU'RE ASKING ME WHY, IF I
GUESS YOUR QUESTION IS WHY
DIDN'T CONFLICT, DIDN'T FILE
CONFLICT OUT?

>> THERE STILL HAS NEVER BEEN,
RIGHT.

THAT WE STILL HAVE THE SAME
LAWYERS REPRESENTING
MR.^SHEPPARD AS OCCURRED, AS IN
THE TRIAL COURT?

YOUR OFFICE IS REPRESENTING
MR.^SHEPPARD --

>> WE'RE DESIGNATED PUBLIC
DEFENDER FOR THE SECOND.
FINE.

I DIDN'T SEE CONFLICT WITH OUR
OFFICE HANDLING THE APPEAL AND
13th.

>> YOU AGREE THAT LAWYER SHOULD
HAVE DONE THAT?

>> ABSOLUTELY.

I AGREE THAT LAWYER SHOULD HAVE
ADOPTED PRO SE MOTION AND THEN
ASKED FOR CONFLICT COUNSEL AT
THE TRIAL COURT.

THAT IS ONE WAY HE COULD HANDLE
CASE.

DIDN'T DO THAT OBVIOUSLY.
ENDED UP TAKING A POSITION AND
TESTIFYING AGAINST -- SORRY.

>> HE PLED GUILTY HERE
ACCORDING TO THE ADVICE GIVEN
TO HIM BY COUNSEL.

HE PLED STRAIGHT OUT TO THE
COURT.

AND THEN HE GOT A 10-YEAR
SENTENCE.

NOW LATER ON HE FILES THIS PRO

SE MOTION, WHERE HE SAYS, I
PLED STRAYED UP BECAUSE COUNSEL
GAVE ME ADVICE I WOULDN'T GET
THAT MUCH, WHATEVER.

AT THAT POINT IN TIME, I MEAN
SHOULD HE NOT SAY, WAIT A
MINUTE, I SHOULD BE OFF THIS
CASE IF HE ACCUSING ME OF
THESE THINGS?

I SHOULD BE OFF THE CASE AND
JUDGE APPOINT CONFLICT COUNSEL,
NOT EVEN ARGUE ANYTHING.

WHAT IS HE GOING TO SAY?
YEAH I DIDN'T MISADVISE HIM?
SHOULDN'T HE GOT OFF THAT
PARTICULAR POINT AS SOON AS PRO
SE MOTION TO CHANGE THE PLEA OR
WITHDRAW THE PLEA FILED.

>> I WOULD AGREE WITH THAT.

>> SHOULD HE NOT HAVE SAID HE
IS ACCUSING ME OF THESE THINGS,
I SHOULDN'T BE ON THIS CASE?

>> I WOULD AGREE WITH THAT.
IF YOU'RE ASKING ME DID THE
PUBLIC DEFENDER IN THE 13th
HANDLE THE CASE PROPERLY, MY
ANSWER WOULD BE UNEQUIVOCALLY
NO.

>> WE HAVE A SITUATION HERE WE
END UP FOLLOWING SECOND
DISTRICT AND HAVE TO STRIKE THE
MOTION. THE MOTION THEN WILL BE
TIMELY AND THEN MR.^SHEPPARD
WILL BE IN A POSITION OF HAVING
TO FILE AN INEFFECTIVE
ASSISTANCE OF COUNSEL CLAIM
AGAINST THE PUBLIC, BASED ON
THE PUBLIC DEFENDER'S FAILURE
TO DO WHAT I JUST, WHAT JUSTICE
LABARGA AND I SUGGESTED SHOULD
BEEN DONE.

I MEAN --

>> COME BACK TO ME WITH THAT
ONE MORE TIME.

>> COUNSEL, IF THE SECOND
DISTRICT OPINION IS, OUT OF THE
SECOND, SHEPPARD IS SECOND
DISTRICT.

>> YES.

>> IF IT IS UPHELD, INEFFECTIVE
COUNSEL BY HIS OR HER ACTIONS
PRECLUDED THIS PROPERLY FILED
MOTION?

>> YES.

>> AND THEN -- HE HAS A RIGHT TO 38.50 ON THAT.

>> ONLY OPTION WOULD BE POST CONVICTION RELIEF.

>> YEAH, I THINK THAT'S CORRECT.

>> WHICH WOULD SEEM TO BE A WASTE OF JUDICIAL RESOURCES.

>> I AGREE WITH EVERYTHING YOU SAID. THAT'S THE POINT.

THAT IS EXACTLY THE POINT.

>> DIDN'T SAY ANYTHING WRONG.

>> LET ME ASK YOU FROM A DIFFERENT PERSPECTIVE.

WE'VE SEEN WHAT HAPPENED. THAT QUESTIONING HAS COME ABOUT.

SEEMS AS THOUGH THIS HAS DEVELOPED FROM OUR JURISPRUDENCE IN LOGAN AND A FOLLOWING CASE THAT TALKS IN TERMS WHEN YOU HAVE A PRO SE FILING CERTAIN THINGS, AND I WENT BACK AND READ THOSE OPINIONS.

AND BOY, THAT SECOND ONE REALLY SEEMS TO HAVE SUCH-SWEEPING APPLICATION THAT IT IS ALMOST FRIGHTENING.

AND DOES SUGGEST THAT UNLESS THERE IS AN ABSOLUTE REQUEST, WITHOUT EXCEPTION, WHAT IT APPEARS ON THE FACE OF THAT OPINION, THAT IT IS TO BE STRICKEN AND THAT IS NOT A MOTION THAT CAN BE FILED.

I'M NOT SAYING NOW IN RETROSPECT I AGREE WITH ALL THAT.

ISN'T THAT WHAT LOGAN AND ITS FOLLOW-UP CASE SAYS OUT OF THIS COURT WITH REGARD TO FILINGS, PRO SE, WHEN YOU REPRESENTED BY COUNSEL?

>> WELL, YES.

BUT, YOU HAVE TO REMEMBER, WE'RE IN THE CONTEXT OF A RULE 3.170-L MOTION WHICH APPEARS WITHIN 30 DAYS AFTER THE PLEA AND SENTENCE IS RENDERED.

OKAY.

FINE.

AT THAT POINT WHAT HE IS TRYING TO DO, COUNSEL IS TRYING TO

PRESERVE THE ISSUE, IN THIS CASE, THE PRO SE DEFENDANT IS TRYING TO PRESERVE THE ISSUE.

>> NO, I UNDERSTAND.

BUT AGAIN, DO YOU READ THE CASE LOGAN AND ITS FOLLOW-UP, AS BROADLY AS READING IT? IT SAYS YOU MUST IN THAT MOTION DISCHARGE COUNSEL.

IT'S ALMOST LIKE A TECHNICALITY?

UNDERSTAND WHAT I'M SAYING.

>> ABSOLUTELY.

I AGREE WITH THAT.

>> IN THAT CONTEXT.

>> YES.

>> BUT IT DOESN'T SAY IN CONTEXT.

I READ LANGUAGE IN THAT FOLLOW-UP CASE AS BROAD AS THE WORLD.

SAYS IN ANY KIND OF CRIMINAL PROCEEDING --

>> JOHNSON, CORRECT.

>> YEAH.

THAT IS IT REALLY OVERBREADTH IF YOU RECOGNIZE THIS DISCUSSION YOU JUST HAD.

>> I DO.

THAT IS EXACTLY THE POINT. THE EXCEPTIONS SHOULD BE CONSIDERED BY THIS COURT.

>> JOHNSON DID NOT?

YOU AGREE WITH THAT, LOGAN AND JOHNSON DIDN'T ADDRESS THAT KIND OF CONCEPT?

>> NO.

I MEAN, CERTAINLY NOT ON THE FACTS OF THEIR CASE.

>> BUT, IT ANNOUNCED VERY BROAD PRINCIPLES.

>> IT CERTAINLY DID.

>> SO YOU ARE URGING THAT WE THEN RECEDE FROM THOSE TO THE EXTENT THAT IT'S CONSIDERED IN THIS CONTEXT THEN?

>> ABSOLUTELY.

>> OKAY.

MAKE SURE WHERE WE ARE HERE. THAT WE'RE NOT TALKING PAST ONE ANOTHER.

>> NO, NO, WE'RE NOT AT ALL ALL.

>> OKAY.

>> JUSTICE PARIENTE, YOU I
THINK TO BE, AND JUSTICE
LABARGA TALKING PAST EACH
OTHER.

I AGREE WITH WHAT YOU'RE
SAYING.

YOUR QUESTION IS WHY DIDN'T I
CONFLICT OUT?

>> I WAS CONCERNED IT WAS THE
SAME PUBLIC DEFENDER'S OFFICE.

>> NO.

>> NORMALLY WHEN SOMEBODY IS
SAYING SOMEBODY DID SOMETHING
WRONG, IT'S, I THOUGHT THAT THE
EVEN THE APPELLATE PUBLIC
DEFENDER HAS TO CONFLICT OUT?

>> NOT AWARE OF THAT.

IF I WAS AWARE OF THAT I WOULD
HAVE CONFLICTED OUT.

TO BE HONEST WITH YOU, I
UNDERSTAND WHAT YOU'RE SAYING
BUT I DON'T SEE A CONFLICT
BETWEEN --

>> AS OF THIS DAY, MR. ^SHEPPARD
IS REPRESENTED BY COUNSEL, THE
SAME COUNSEL THAT REPRESENTED
HIM IN THE PLEA.

>> AT THE PLEA.

>> AND ALSO AT THE HEARING
WHERE THE LAWYER DID NOT
REPRESENT.

>> WELL PUBLIC DEFENDER
REPRESENTATIVE ON APPEAL.
THE CASE GOT HERE ON A MOTION
FOR REHEARING AND A MOTION FOR
CERTIFICATION OF DIRECT
CONFLICT.

THE COURT DENIED NOTION FOR
REHEARING IN PART AND, GRANTED
THE MOTION FOR A DIRECT
CONFLICT.

AND CERTIFIED IT TO THIS COURT.

>> THERE SEEMS TO BE A CONCERN,
THIS RULE THAT CAME ABOUT, THE
RULE THAT THIS DEFENDANT WAS
SEEKING TO WITHDRAW HIS PLEA ON
HAS BEEN MISUSED, OVERUSED.

I KNOW THAT IS NOT PART OF THE
CERTIFIED QUESTION BUT IT
CONCERNED ME IN THE WAKE OF THE
CRIMINAL JUSTICE REFORM ACT,
THERE WAS A LOT, TRYING TO DO
SO THAT DEFENDANTS COULD
PRESERVE ISSUES.

AND ONE OF THEM WAS YOU HAD TO SAY YOUR PLEA WAS INVOLUNTARY. MIGHT NOT BE IN HIS INTEREST DO THAT.

SO DO YOU, I KNOW THAT IS NOT THE DIRECT ISSUE IT SEEMED TO BE RAISED BY JUDGE ALTERNBURN A COUPLE YEARS AGO THEY RECOMMENDED DOING AWAY WITH THIS RULE ALL TOGETHER.

>> NO, I THINK THE RULE HAS ITS PLACE.

I UNDERSTAND THE RULE FOR ITS PURPOSE TO TRY TO GET THE THING RESOLVED IN THE TRIAL COURT, AND PRESERVE FOR DIRECT APPEAL, RATHER THAN GOING TO A 3850 PROCEEDING AND ACCOMPANYING USE OF TIME ON THAT.

UNDERSTAND THAT.

BUT, --

>> LET ME ASK YOU SOME SORT OF BACKGROUND INFORMATION ON THIS. THIS MAN PLED GUILTY IN LIKE AUGUST OF WHATEVER YEAR THAT WAS. 2005?

>> YES.

>> AND, NORMALLY AFTER THAT POINT, YOU HAVE 30 DAYS TO FILE YOUR NOTICE OF APPEAL OR, 15 -- HOW MANY DAYS?

>> 30 DAYS.

>> 30 DAYS TO FILE NOTICE OF APPEAL AND TRIAL COUNSEL, IS IT STILL THE RULE TRIAL COUNSEL IS STILL COUNSEL OF RECORD UNTIL THE NOTICE OF APPEAL IS FILED?

>> CORRECT.

>> SO WAS THERE A NOTICE OF APPEAL FILED IN THIS CASE BEFORE MR.^ --

>> NO.

>> SHEPPARD FILED HIS PRO SE MOTION?

>> NO.

>> OKAY.

SO, AT THAT POINT HE WAS STILL THE COUNSEL OF RECORD? THAT WAS A PROBLEM I WAS HAVING HERE, WHETHER OR NOT HE STILL WAS.

>> WELL THE JUDGE CONSIDERED THE MOTION AND ONCE HE DETERMINED THERE WAS GOING TO

BE AN EVIDENTIARY HEARING HELD
ON REAPPOINTED PUBLIC DEFENDER
FOR PURPOSES OF THAT HEARING.
PUBLIC DEFENDER SHOWED UP
AND --

>> REAPPOINTED THE SAME PUBLIC
DEFENDER?

>> YES.

PUBLIC DEFENDER'S OFFICE.

>> AND THE IN THE 13th?

>> YES.

>> AND SO THE SAME ATTORNEY
SHOWED UP AS BEING APPOINTED
COUNSEL AND TESTIFIED AGAINST --

>> HIMSELF.

>> -- HIS CLIENT.

>> CORRECT.

NOW YOU CAN BEGIN TO UNDERSTAND
WHAT THE PROBLEM IS.

THE COURT MADE THE RULE.

LAI D DOWN THE RULE.

BUT THERE'S REALLY BEEN NO ROAD
MAP AS TO HOW TRIAL COURTS ARE
SUPPOSED TO HANDLE THESE.

HOW THE STATE ATTORNEY IS
SUPPOSED TO HANDLE THIS AND
WHAT DEFENSE COUNSEL IS
SUPPOSED TO DO.

AND WE HAVE THIS BURGEONING
CASELOAD OF AUTHORITY ON THINGS
LIKE, CRITICAL STAGE
CONFLICT-FREE COUNSEL, SO ON,
SO FORTH.

BUT IF WE GO TO YOUR POINT,
JUSTICE LEWIS, ON LOGAN
AND JOHNSON AND TAKE THAT AND
EXTEND IT HERE, WHAT HAPPENS?
WHAT HAPPENS, HOW DO WE DEAL
WITH?

>> SO THE DEFENDANT BASICALLY
INSO THE DEFENDANT BASICALLY
INCLUDES ALLEGATION TO
DISCHARGE HIS COUNSEL?

WHAT HAPPENS?

JUSTICE PARIENTE IN A FOOTNOTE
IN CUNNINGHAM, YOU, POINTED OUT
AT THE BEST WAY TO DO IT WAS TO
HANDLE A NELSON HEARING FIRST
AND THEN MAKE A DETERMINATION
ON THAT.

AND THEN GO TO THE MOTION TO
VACATE.

THIS WAS BEFORE.

>> WAS THIS OPINION FROM THE

FOURTH DISTRICT?

>> YES.

>> I KNEW THERE WAS SOMETHING --

>> YEAH, YOU WERE THERE, ROBERTS AND CUNNINGHAM WHICH ARE FREQUENTLY CITED BY THE COURT IN THE --.

TO GO TO YOUR POINT, YOUR QUESTION EARLIER.

THERE'S GOOD REASON FOR THE RULE RIGHT NOW BECAUSE IT WILL ACCOMPLISH WHAT THIS COURT, IN 1996 WANTED TO DO IS TO TRY TO CONFORM WITH THE CRIMINAL REFORM ACT AND HAVE MORE THINGS, ACCORDING TO THE LEGISLATURE HANDLED AT THE TRIAL COURT.

ALL WELL AND GOOD.

BUT YOU'VE GIVEN NO GUIDANCE TO TRIAL COUNSEL, DEFENSE OR THE STATE, AS TO HOW TO HANDLE IT.

LOOK AT THIS STATE.

THE STATE, THE DEFENDANT HAS A BURDEN TO SHOW MANIFEST INJUSTICE.

WHO IS PRESENTING THE CASE? THE STATE.

>> SAYING THE PUBLIC DEFENDER NEEDED GUIDANCE FROM THE COURT WHEN HE IS TESTIFYING AGAINST HIS CLIENT, THAT WAS ALL OF A SUDDEN A CONFLICT?

>> NO. I'M NOT SAYING THAT.

I'M SAYING THAT IF YOU'RE GOING TO, IF YOU'RE GOING TO, EXCUSE ME, HAVE LOGAN AND JOHNSON APPLY AND NULLTY RULE, UNLESS IT HAS THIS REQUEST TO DISCHARGE, APPLY TO 3.170-L MOTIONS THEN YOU HAVE TO GET SOME GUIDANCE TO THE COURTS HOW TO HANDLE THIS.

>> I CAN TELL YOU THIS, AND I'M LOOKING AT JOHNSON, WHEN THIS COURT IS INUNDATED AND, EVERYONE NEEDS IT UNDERSTAND THIS, WITH PRO SE FILINGS OF PETITIONS FOR WRITS OF MANDAMUS AND WRITS OF PROHIBITION AND WRITS OF HABEAS CORPUS FROM PRISONERS WHO ARE ACTIVELY BEING REPRESENT IN THE TRIAL

COURTS AND APPELLATE COURTS BY
FUNCTIONING COUNSEL.

AND SO OUR OPINION IN LOGAN WAS
NOT IN THE LEAST BIT MEANT TO
TEAL, I'M GOING TO ASK THE
STATE ABOUT THIS, DEAL WITH A
SITUATION WHERE IT IS IN THE
TRIAL COURT.

YOU KNOW, LOGAN WAS ABOUT WHAT
THIS COURT AND APPELLATE COURTS
WERE GETTING WHERE THERE WAS
REPRESENTATION BELOW AND WE'RE
GETTING PRO SE FILINGS.

NOW, JOHNSON I'VE GOT TO LOOK
AT BECAUSE AS JUSTICE LEWIS
SAID, THERE IS BROADER LANGUAGE
BUT I THINK WE WERE TRYING TO
SHOW THIS OCCURRED, THAT WHEN
THERE WERE FILING HERE, IF IT
WAS ALSO GOING ON, THERE WERE
PROCEEDINGS IN THE APPELLATE
COURT WHERE THEY WERE
REPRESENTED BY COUNSEL OR IN
THE TRIAL COURT WE ALSO WEREN'T
GOING TO ENTERTAIN IT.

I DIDN'T SEE IT AS BEING

SOMETHING, THIS SCENARIO --

>> SECOND DCA DID UNFORTUNATELY.

AND THEY TOOK IT AND RAN WITH
IT.

AND JOHNSON IS GOING TO BE --

>> YOU UNDERSTAND, AS A PUBLIC,
THESE THINGS WERE HAPPENING AND
CONTINUE TO HAPPEN, WHICH IS
PRISONERS, DEFENDANTS ARE
FILING IN THIS COURT OR IN
APPELLATE COURTS, WHEN THEY'RE
REPRESENTED BY COUNSEL IN THE
TRIAL COURT UNTIL ONGOING
PROCEEDINGS.

>> I UNDERSTAND.

I APPRECIATE WHAT YOU'RE SAYING
AND I AGREE.

>> THAT DOESN'T NEED GUIDANCE.
YOU TELL YOUR CLIENT DON'T BE
FILING THESE THINGS IN THE
SUPREME COURT BECAUSE WE'RE
REPRESENTING YOU.

IF YOU DO, THEY'RE GOING TO
STRIKE IT.

I DON'T KNOW WHAT IS DIFFICULT
BILLION THAT RULE.

>> I UNDERSTAND AND I AGREE BUT
WHY AREN'T, WHY AREN'T DEFENSE

COUNSEL, WHY AREN'T THEY PLEA AS ENTERED, WHY AREN'T THEY CONSULTING WITH THEIR CLIENT 30 DAYS BEFORE NOTICE OF APPEAL TO CUT IT OFF, HAVE YOU HAD SECOND CONSIDERATIONS? DO YOU WANT TO FILE MOTION TO PLEA?

WHAT ARE THEY?

>> WE DON'T SOLVE THAT PROBLEM. THAT SEEMS TO BE EDUCATION. PUBLIC DEFENDERS AS JUSTICE POLSTON WAS SAIDING, WHAT IS NEEDED FOR A LAWYER TO UNDERSTAND THAT THEY CAN'T TESTIFY AGAINST THEIR CLIENT.

>> I APPRECIATE WHAT YOU'RE SAYING AND.

>> JUST TRIPLED THE CASELOAD OF EVERY JUDGE IN EVERY CIRCUIT. WHY ISN'T THE SOLUTION, THE SOLUTION WHAT THEY SUGGESTED EARLIER THAT JUSTICE PARIENTE SUGGESTED IN THE FOOTNOTE? IF THAT SITUATION CAME TO ME AS A TRIAL JUDGE AND THE DEFENDANT IS TELLING ME, LOOK, YOU SENTENCED ME.

I PLED GUILTY STRAIGHT UP TO YOU BECAUSE MY CLIENT, MY LAWYER MISREPRESENTED CERTAIN THINGS TO.

I THINK AT THAT POINT IN TIME, IF THE JUDGE JUST CONDUCTING A QUICK, NELSON INQUIRY AND FIND OUT WHAT THE PROBLEM WAS, AND THE CLIENT TOLD HIM, THIS IS WHAT THE PROBLEM IS, AND, THEN, OKAY, COUNSEL, OBVIOUSLY THERE IS ADVERSARIAL RELATIONSHIP BETWEEN TWO OF YOU, YOU'RE OFF THE CASE AND I'M APPOINTING SOMEONE ELSE.

THAT WOULD HAVE STOPPED ALL OF THIS.

>> IT WOULD STOP SOME OF IT. IN THIS CASE, FROM HIS MOTION, IT SEEMS TO ME CLEAR THAT THERE IS AT LEAST COERCION AND MISREPRESENTATION, MISADVICE, ON THE FACE OF THE MOTION. IT IS NOT REBUTTED BY THE RECORD.

>> SO WHAT RULE DO YOU WANT FROM US?

WHAT ARE YOU ASKING US TO SAY?
THAT THESE THREE POINTS, 170
MOTIONS ARE FILED AND THERE IS
ANY ALLEGATION THAT THE
ATTORNEY DID SOMETHING WRONG,
THEN, IT IS OKAY?

WHAT IS THE RULE?

>> THINK IT SHOULD BE MORE
NARROW THAN THAT.

FOURTH DCA JUST ABOUT HAS
RIGHT.

>> WHICH IS?

>> WHICH IS THEY'RE TALKING
ABOUT WHEN THERE IS ALLEGATION
OF COERCION AND OR, MISADVICE
WHICH CREATES AN ADVERSARIAL
RELATIONSHIP BETWEEN COUNSEL
AND THE DEFENDANT, PRO SE
DEFENDANT, THEN THAT'S ENOUGH
SUFFICIENT TO NEGATE THE
PROHIBITION AGAINST HYBRID
REPRESENTATION, THE NULITY
RULE.

THAT WOULD, THAT WOULD DO IT.
1.70 MOTIONS THOSE ARE GOING TO
BE THE TWO AREAS WHERE, IT IS
NO COINCIDENCE THAT JUSTICE
WARNER IN HIS CONCURRING
OPINION IN WILLIAMS NOTES THAT,
GEE, WE'RE GETTING A LOT OF
THESE KINDS OF MOTIONS THAT ARE
RAISING ISSUE OF COERCION AND
MISADVICE.

WELL, OF COURSE.

IT'S, IT'S THE IDEA OF, IN ROE,
THIS COURT WROTE ABOUT, THAT, A
PROMISE WAS, MORE THAN, WHEN IT
COMES FROM YOUR COUNSEL, IT IS
MORE THAN JUST A PROMISE IN THE
ORDINARY SENSE OF THE WORLD
WORD.

YOU CAN RELY ON IT.

THAT COUNSEL IS SUPPOSED TO BE
PRACTICING IN THAT COURT ALL
THE TIME.

HE KNOWS JUDGES.

WHAT WORKS, WHAT WON'T WORK,
WHAT WILL GO, WHAT WON'T GO.

WHEN HE TELLS A CLIENT DON'T
TAKE THE PLEA, DON'T TAKE
THE PLEA THEY'RE OFFERING A
YEAR AND FOUR YEARS SEX
OFFENDER PROBATION, I CAN GET
YOU TWO YEARS.

>> PROBATION.

>> PROBATION.

>> WHAT DID HE GET?

HE GOT TEN YEARS?

>> HE GOT TEN YEARS.

HE GOT FIVE AND FIVE.

THIS IS, WE'RE NOT TALKING ABOUT A HARDCORE WITH A LONG CRIMINAL RECORD.

I THINK HE HAD A PETTY THEFT.

AND OF COURSE HE HAD THE ATTEMPTED SEX BATTERY.

>> YOU'RE WELL INTO YOUR REBUTTAL.

YOU HAVE A FEW SECONDS LEFT, IF YOU WANT TO --

>> THANK YOU.

>> GOOD MORNING, YOUR HONOR.

MAY IT PLEASE COURT.

PATRICIA McCARTHY APPEARING ON BEHALF OF RESPONDENT, STATE OF FLORIDA.

STATE SUBMIT THE NULITY RULE SHOULD BE STRICTLY APPLIED TO CONTEXT OF 3.70-L.

FOR THE REASON THAT DEFENDANTS ARE NOT AUTOMATICALLY ENTITLED TO SUBSTITUTE OR CONFLICT-FREE COUNSEL ANY TIME THEY MAKE A COMPLAINT AGAINST COUNSEL, PRECONVICTION OR EVEN POSTPLEA IN THE CONTEXT OF A MOTION TO WITHDRAW THE PLEA.

THE COURT IN THE NELSON SETTING DOESN'T AUTOMATICALLY APPOINT SUBSTITUTE COUNSEL OR WHAT WE CALL CONFLICT-FREE COUNSEL, USE THAT TERMINOLOGY.

>> DO WE ENCOURAGE THOUGH, IN THIS SITUATION, WHAT WE REALLY HAVE IS TRULY A CONFLICT HERE BECAUSE THE ATTORNEY ACTUALLY TESTIFIED IN THIS SITUATION AGAINST, WHO WE SAY, OR THE COURT HAS SAID, IS HIS CLIENT. HE IS SAYING YOU CAN'T FILE THIS WILL PRO SE BECAUSE YOU HAVE AN ATTORNEY.

WE GET TO THE HEARING.

AND THE PERSON WHO IS SUPPOSED TO BE THE ATTORNEY REPRESENTING THIS PERSON AND THAT'S WHY HE CAN'T FILE THIS PRO SE IS

ACTUALLY TESTIFYING AGAINST HIM.

>> YOUR HONOR, IN ANSWER THE DEFENDANT CAN SOMELY SAY, AS WE REQUIRE HIM TO DO IN THE NELSON SETTING, I WANT TO DISCHARGE COUNSEL.

ALL RIGHT?

WHEN HE COMES TO THAT HEARING AND THAT MOTION TO WITHDRAW PLEA OR ON THAT MOTION TO WITHDRAW COUNSEL --.

>> LET ME ASK YOU THIS.

WHY DID THE COURT FEEL IT NECESSARY TO REAPPOINT THE PUBLIC DEFENDER OFFICE IF HE WAS ALREADY BEING REPRESENTED BY THE THAT PUBLIC DEFENDER'S OFFICE?

>> THERE WAS JUST AN ORDER APPOINTING THE PUBLIC DEFENDER ONCE THAT MOTION TO WITHDRAW WAS APPOINTED.

IT MAY BE THAT THE COURT, WE DON'T KNOW WHAT THE COURT SUBJECTIVELY THOUGHT BUT WE KNOW HE DID HAVE COUNSEL IT WAS THE SAME ATTORNEY THAT REPRESENTED HIM.

UNDER 3.170 WE KNOW YOU HAVE A RIGHT TO COUNSEL IN THESE PROCEEDINGS.

>> I WONDER IF THE COURT THOUGHT HE WAS NOT REPRESENTED -- EXCUSE ME.

>> I'M SORRY.

>> IF HE FELT THE NEED TO REAPPOINT COUNSEL, I'M WONDERING IF HE THOUGHT HE WAS NOT BEING REPRESENTED BY COUNSEL AT THAT POINT?

>> THE REAPPOINTMENT WAS PRIOR TO THE HEARING, AND IT WASN'T UNTIL INTO THE HEARING, JUSTICE THAT THE COURT ASKED, IS HE PROCEEDING PRO SE?

AND I THINK THERE IS AN INDICATION IN THE RECORD EITHER THE PROSECUTOR -- I THINK IT WAS ATTORNEY HIMSELF SAID YES.

SO I THINK THERE WAS A MISUNDERSTANDING.

BUT HE WAS APPOINTED.

WE'RE NOT TRYING TO DEFEND,

YOUR HONOR, THIS AS A PERFECT PROCEEDING BUT WHAT WE CAN SAY IS, HE WASN'T, MR. SHEPPARD WASN'T ENTITLED TO SUBSTITUTE COUNSEL.

WHY?

BECAUSE A NELSON INQUIRY WOULD HAVE BORNE OUT SIMPLY WHAT THIS ATTORNEY SAID ON THE RECORD, AND THAT WAS, I DIDN'T BASICALLY I DIDN'T FIND THERE A BASIS TO BE, TO SEEK PLEA WITHDRAWAL.

IF COUNSEL IS ACTING AS WE EXPECT COUNSEL TO ACT POSTPLEA --

>> BUT YOU THINK THE COUNSEL, THIS IS WHAT MR. SHEPPARD SAID. HE SAID HE SPOKE WITH COUNSEL WHO INFORMED HIM OF ONE DAY YEAR AND ONE DAY AND FOUR YEARS PROBATION.

THE DEFENDANT SAID HE WOULD LIKE TO ACCEPT THE STATE'S OFFER.

COUNSEL REFUSE TO ALLOW THE DEFENDANT'S COUNSEL.

TOLD HIM HE WAS SURE HE COULD GET HIM TWO YEARS OF PROBATION IF HE ENTER AN OPEN PLEA. THAT MAY BE TOTALLY NOT CREDIBLE.

BUT THAT IS WHAT HE SAYS.

IF THAT'S NOT THE CLEAREST STATEMENT OF AN ADVERSARIAL RELATIONSHIP, AND YOU, I DON'T KNOW WHAT IS.

I DON'T UNDERSTAND HOW THIS LAWYER COULD HAVE IN GOOD FAITH IN THIS PROCEEDING, HAVE ALLOWED THE COURT TO GO AHEAD WITH THE PROCEEDING, HAVE THE ASSISTANT PUBLIC, STATE ATTORNEY CALL THE LAWYER, TO TESTIFY AGAINST HIS OWN CLIENT WHO IS THERE REPRESENTED BY WHO?

THE LAWYER?

>> WE'RE NOT SUGGESTING THAT ABSENT A NELSON HEARING THAT THAT SHOULD HAVE BEEN THE PROPER COURSE BUT IF I MAY, JUSTICE, THE STATE SUBMITS THIS WOULD HAVE BEEN THE CORRECT

PROCEDURE.

YOU STRIKE ALL PRO SE PLEADINGS THAT, DEFENDANT THAT WANTS TO GET OUT OF A PLEA WHEN HE HAS COUNSEL.

THE COURT AFFORD THIS IS REMEDY.

THE COURT AFFORDED HIM COUNSEL. WE STRIKE THESE UNLESS HE SAYS AFFIRMATIVELY UNLESS HE SAYS PRECONVICTION I WANT TO GET RID OF MY LAWYER.

IT IS THAT SIMPLE.

AND THEN --

>> YOU GET ANOTHER LAWYER BECAUSE YOU ALREADY ADMIT IN THIS NARROW CONTEXT OF RULE 3.170, WE'RE NOT TALKING ABOUT DURING TRIAL OR AFTER TRIAL OR ON APPEAL, WE'RE TALKING ABOUT A VERY NARROW SITUATION. IS IT, THEN THAT THE COURT THEN ADVISE THE DEFENDANT THAT YOU HAVE, UNDER THIS CIRCUMSTANCE I AM GOING TO APPOINT YOU ANOTHER LAWYER TO REPRESENT YOU?

>> REFULLY NO BECAUSE COUNSEL, BECAUSE UNDER THE NELSON LINE OF THEORY, OF PROCEDURE, YOU LOOK TO SEE WHAT COUNSEL IS DOING.

IF HE IS NOT ACTING BELOW PREVAILING NORMS, BASICALLY NELSON IS THE DEFICIENCY PRONG OF STRICKLAND, ISN'T IT?

IT IS ESSENTIALLY INQUIRY ASK HIM PRECONVICTION.

ONLY NOW, COUNSEL'S RESPONSIBILITIES ARE LESS BECAUSE WE'RE MOVING TOWARDS FIRST TIER REVIEW, DIRECT REVIEW, AREN'T WE, IN TERMS OF THE NOTICE OF APPEAL.

IF COUNSEL IS DOING EVERYTHING HE NEEDS TO BE DOING, WHY ARE WE AUTOMATICALLY APPOINTING SUBSTITUTE COUNSEL TO REPRESENT THIS DEFENDANT WHEN HE INTONES ANYTHING WE WANT TO SAY?

>> BECAUSE YOU'RE TESTIFYING AGAINST HIM.

>> WELL, AGAIN, THE STATE IS NOT SUGGESTING THAT THIS WAS THE CORRECT PROCEDURE BUT, HAD

COUNSEL NOT BEEN PLACED UNDER OATH THE COUNSEL COULD HAVE SAID THE VERY SAME THING IN A NELSON INQUIRY RIGHT AT LECTURN.

THERE WASN'T ANYTHING INAPPROPRIATE COUNSEL WAS DOING. HE WASN'T FAILING TO DO ANYTHING.

>> BUT THE ALLEGATIONS THAT WERE READ HERE, IF COUNSEL HAD PROMISED THAT HE WAS GOING TO GET HIM PROBATION, THAT COULD BE PROBLEMATIC.

>> WELL, THE ALLEGATION WAS WASN'T THAT HE PROMISED. HE WAS SURE HE COULD GET HIM PROBATION. WE COULD --

>> I'M NOT SURE, I'M NOT SURE THAT IS MUCH DIFFERENT.

>> EVEN FOR THE SAKE OF ARGUMENT THAT THAT IS AN EXPRESS ALLEGATION OF INEFFECTIVENESS ACCUSATION, HOW WE WANT TO DESCRIBE IT, THE LESS IF WE HAVE AN OUTRIGHT ACCUSATION PRECONVICTION WE DON'T AUTOMATICALLY APPOINT COUNSEL.

IF COUNSEL IS NOT DOING ANYTHING WRONG OR SUBSTANDARD IN THE CONTEXT OF THE VOLUNTARINESS OF THE PLEA, WHY ARE WE HAVING TO GO AND APPOINT SUBSTITUTE COUNSEL?

LET'S GIVE THE DEFENDANT THE OPTION.

>> WE DON'T KNOW THAT. THE POINT IS, YOU DON'T KNOW THAT. AT THAT POINT THE MAN HAS PUT AT ISSUE AN ADVERSARIAL RELATIONSHIP WITH HIS ATTORNEY. WE DON'T KNOW IF IT IS TRUE OR NOT.

AND HE'S CAUGHT REALLY, AS I SEE THIS, IN A CATCH-22.

THEORETICALLY, THIS CASE WAS REALLY OVER BUT, THE TIME FOR FILING A NOTICE OF APPEAL HAD NOT EXPIRED AND SO THE WAS STILL THE ATTORNEY OF RECORD. SO THE DEFENDANT IS CAUGHT IN A CATCH-22.

IF HE GOES TO HIS ATTORNEY AND

SAYS, I WANT TO WITHDRAW MY
PLEA BECAUSE YOU DID SUCH AND
SUFFICIENT YOU THINK THE
ATTORNEY IS GOING TO FILE SUCH
A MOTION ON HIS BEHALF?
IF HE FILES IT HIMSELF HE IS
REPRESENTED BY COUNSEL.
SO WE HAVE TO STRIKE IT.
>> IF HE SEEKS IF HE FILES
EITHER A SEPARATE MOTION --
>> SO THE ONLY THING HE COULD
DONE WAS FILED THIS AND SAY, OH
BY THE WAY, I WANT TO GET RID
OF MY ATTORNEY.

THAT'S THE STRICT PLEADING THAT
HE WOULD HAVE TO FILE IN ORDER
TO BE ABLE TO FILE THAT MOTION.
>> AND THIS STRICT REQUIREMENT
IS ROUTINELY DONE IN MANY
SETTINGS.

WE REQUIRE DEFENDANTS TO DO
THINGS AFFIRMATIVELY.
RIGHT TO REMAIN SILENT.
WAIVER, ASKING TO REPRESENT
YOURSELF.

THERE ARE MANY DIFFERENT
SETTINGS WE'VE ASKED THE
DEFENDANT TO SAY SOMETHING
SIMPLY AND CLEARLY
UNEQUIVOCALLY.

WHAT WE'RE SIMPLY SAYING THIS
CASE, THE SECOND DISTRICT
DIDN'T TALK ABOUT STEP TWO,
WHAT WHEN THAT MOTION TO
WITHDRAW SAYS HE WANTS TO
DISCHARGE.

WHAT THE THRESHOLD REQUIREMENT
WE'RE ASKING THE COURT TO
ADHERE TO IS, HE'S GOT TO SAY
HE WANTS TO GET RID OF A LAWYER
THAT THIS COURT HAS SAID HE IS
ENTITLED TO.

>> BUT THAT LAWYER HAD AN
ETHICALLABILITY BEFORE
TESTIFYING AGAINST --
RESPONSIBILITY, BEFORE
TESTIFYING AGAINST MR.^SHEPPARD
TO WITHDRAW.

THAT'S WHY THESE THINGS DON'T
COME UP ALL THE TIME BECAUSE
THAT'S WHAT LAWYERS DO.
SOMETIMES THEY DO IT WHEN THEY
SHOULDN'T DO IT.
WHEN THEY THINK THEY'RE JUST

CLAIMING, THEY'RE FILING A BAR COMPLAINT AND THEY WANT TO GET OUT OF IT USUALLY, THAT IS WHY THIS WAS SORT OF REMARKABLE FOR ME TO SEE THIS IS A, SOMEBODY WHO IS A COMPETENT DEFENSE LAWYER, WOULD NEVER GO AHEAD AND TESTIFY AGAINST HIS CLIENT WHILE, AND LEAVE THE CLIENT THERE, WITHOUT REPRESENTATION.

>> WE HAVE MANY --

>> WHAT WE'RE DEALING WITH, I'M CONCERNED REALLY ABOUT THE DERELICTION OF THE DEFENSE ATTORNEY AND THE COURT HERE, AND YOU'RE SAYING WOULD BE, ALL OF THIS WOULD CHANGE IF IN THIS THREE, HOW MANY PAGES?

LET'S SEE.

FOUR-PAGE, FIVE-PAGE, HANDWRITTEN MOTION, THE LAST SENTENCE WAS, INSTEAD OF I HEARBY CERTIFY AND I HEARBY MOVE TO DISCHARGE THIS COUNSEL THAT DID ALL THESE THINGS? THAT WOULD MAKE ALL THE DIFFERENCE?

>> IT WOULD MAKE THE DIFFERENCE IF HE WOULD GET TO GO TO COURT AND THERE WOULD BE A NELSON INQUIRY, JUST LIKE WE DO BEFORE THE CONVICTION.

TURN TO COUNSEL.

COUNSEL HAVE YOU DONE ANYTHING, HAVE YOU HAD A FAILURE IN TERMS OF THE VOLUNTARINESS OF THE PLEA, SEEKING PLEA WITHDRAWAL? COUNSEL DISAGREES WITH HIS POSITION.

YOU GIVE HIM THE OPPORTUNITY TO PROCEED BECAUSE YOU DON'T FIND A BASIS TO --

>> NELSON, NELSON IS ARE REQUIREMENT, AND I WILL GO BACK, I MUST HAVE SAID THIS IN CUNNINGHAM.

I COULDN'T REMEMBER WHERE THIS OCCURRED.

NELSON DOESN'T SAY THAT THE HEARING TAKES PLACE WHEN THERE'S A ALLEGATION OF WANTING TO DISCHARGE.

NELSON IS WHERE THERE IS CONTINUING COMPLAINTS ABOUT THE

MOUTH, INCOMPETENCE OF COUNSEL,
IS THAT CORRECT?

>> YOUR HONOR, --

>> AM I WILL CORRECT ON THAT?

>> NO, YOUR HONOR.

>> IN OTHER WORDS, NELSON ONLY
TAKES PLACE WHEN THE DEFENDANT
SAYS I WANT TO DISCHARGE MY
LAWYER.

>> HE HAS TO.

>> I THOUGHT THAT IS, NOT
CONTINUING COMPLAINTS ABOUT THE
LAWYER?

>> TRIGGER NELSON INQUIRY HE
HAS GOT TO BE CLEAR --

>> YOU AGREE, IN SOME NELSON
PRECONVICTION NELSON INQUIRIES
THERE ARE CIRCUMSTANCES WHICH
THE COURT DECIDES, NO MATTER
HOW HARD THE JUDGE TRIES TO GET
THE TWO OF THEM TO MAKE UP,
WHERE HE SAYS, THAT I THINK THE
SITUATION HERE IS SUCH THAT THE
ADVERSARIAL, IT IS AN
ADVERSARIAL RELATIONSHIP AND I
THINK IT IS BEST YOU GET TO THE
POINT WHERE THEY'RE NOT TALKING
TO EACH OTHER, THINK THE POINT
COMES TO NEW COUNSEL.

>> THE WHAT ARE WE DOING WHEN
WE'RE SAYING WE'VE GOT, IF WE
WERE TO ADOPT THE PETITIONER'S
RECOMMENDATION HERE TO, TO
RETREAT FROM LOGAN AND JOHNSON,
3.70?

WHAT WE'RE SAYING IS DEFENDANTS
ARE GOING TO BE ENCOURAGED TO
CLAIM INEFFECTIVE ASSISTANCE OF
COUNSEL.

THEY ARE AND THEN WHAT HAPPENS
IS, I KNOW I'M GOING TO GET
ANOTHER LAWYER.

AND WE DON'T WANT THAT.

AS A POLICY.

>> YOU'RE OPENING YOU'RE MAKING
THIS, YOU KNOW, YOU'RE OPENING
THE COURTHOUSE DOOR OR THE
FLOODGATES ARGUMENT NOW, HAVING
BEEN INVOLVED IN THIS COURT FOR
OVER NOW, A DECADE AND BEING
INVOLVED WITH LOGAN AND
INVOLVED WITH JOHNSON, I KNOW,
WHATEVER THE COURT SAYS, WHAT
WE'RE DEALING WITH IS WHAT I

SAID PREVIOUSLY, WHICH IS THAT PRO SE PLEADINGS UP HERE ABOUT WHAT'S GOING ON IN THE TRIAL COURT OR THE APPELLATE COURTS, WE CAN'T HAVE THAT HYBRID REPRESENTATION. HOWEVER, IF YOU'RE TELLING ME THAT IN THE TRIAL COURT, IF THE DEFENDANT, DAY AFTER, BEFORE TRIAL BEGINS SAYS, YOUR HONOR, MY LAWYER, HAS MADE THESE REPRESENTATIONS TO ME, THAT I NOW KNOW ARE FALSE, ARE YOU SAYING THAT, THE JUDGE OR THE LAWYER HAS NO OBLIGATION WHEN THOSE KINDS OF ALLEGATIONS ARE MADE TO DO ANYTHING?

>> IF THE ATTORNEY FEELS THERE'S A BASIS FOR PLEA WITHDRAWAL, THAT IS HIS ETHICAL OBLIGATION --

>> I'M ASKING YOU, IN ANY SITUATION, THE COUNSEL, DEFENDANT SAYS, MY LAWYER HAS BEEN, IS LYING TO ME.

HE SAYS THESE WITNESSES AREN'T AVAILABLE.

THEY ARE AVAILABLE, YOUR HONOR. YESTERDAY I HAD A CONVERSATION WITH MY LAWYER, MY LAWYER SAID THIS.

THIS IS NOT THE TRUTH.

NO, THE DEFENDANT, I MEAN THE DEFENSE LAWYER NOR THE TRIAL COURT HAS ANY OBLIGATION TO DO ANYTHING ONCE THE DEFENDANT SAYS THAT?

>> I THINK, YOU'RE TALKING ABOUT PRECONVICTION?

>> YES, IN TERMS OF PRECONVICTION?

>> IF THEY, IN THEIR COMMUNICATIONS INTERNALLY, HE ACCUSES HIM OF LYING, --

>> SAYING IT IN FRONT OF THE TRIAL COURT THAT MY LAWYER IS TELLING ME THESE THINGS AND THESE THINGS I NOW FOUND OUT ARE NOT TRUE.

MY LAWYER HAS LIED TO ME.

MY LAWYER HAS FORCED ME TO GO TO TRIAL.

THIS IS ALL PRECONVICTION.

>> THE COURT CAN SIMPLY

ASCERTAIN FROM, ARE YOU SEEKING TO DISCHARGE COUNSEL.

NELSON INQUIRY IS TRIGGERED.

>> SO YOU'RE SAYING THAT THE COURT WOULD ASK, ARE YOU SEEKING TO DISCHARGE COUNSEL?

>> THE COURT WOULD IN THAT INSTANCE BUT I DON'T THINK THAT WE SHOULD, I RECOMMEND THAT WE NOT PUT IN PLACE A RULE THAT PUTS ANY AFFIRMATIVE OBLIGATION ON THE TRIAL COURT TO FIGURE OUT WHAT HE MEANS BY THE ACCUSATION.

>> GIVE YOU EXAMPLE.

>> OKAY.

>> THE LAW AS IT IS NOW AND SCENARIO JUSTICE PARIENTE OUTLINED TO YOU IN THE PRECONVICTION PROCEEDINGS, IF IN THAT HAPPENS, WOULD THE JUDGE HAVE AN OBLIGATION TO ASK THAT QUESTION?

>> I THINK IN THAT INSTANCE THE TRIAL COURT WOULD BE PROPER TO TURN TO THE DEFENDANT AND SAY, ARE YOU SEEKING TO DISCHARGE?

>> OKAY.

>> COUNSEL.

>> DOES THE JUDGE HAVE OBLIGATION TO DO THAT?

>> I THINK IF IT CAME UP IN OPEN COURT LIKE THAT I WOULD GO SO FAR TO SAY YES.

>> HOW IS THIS DIFFERENT IN PRINCIPLE THEN.

>> BECAUSE WE'RE LOOKING AT THESE FACTS IN THIS PARTICULAR CASE BUT IN THE PROD SPECTRUM ANY MOTION TO WITHDRAW PLEA, IF JUST A MERE ACCUSATION IS ENOUGH TO TRIGGER NELSON BUT NOT ENOUGH TO AUTOMATICALLY APPOINT SUBSTITUTE COUNSEL. THAT'S WHERE WE'RE DRAWING THE LINE.

FIRST YOU'VE GOT TO BE CLEAR THAT THE DEFENDANT IS SAYING HE WANTS TO GET RID OF COUNSEL.

THAT IS THE FIRST STEP.

THAT IS THE THRESHOLD INQUIRY. THAT ONLY THING SECOND DISTRICT UNDERTOOK.

THEN IF WE GET PAST THAT,

WHATEVER ALLEGATIONS HE SAYS IS ENOUGH, WE HAVE MOVED PAST LOGAN, WE'VE MOVED PAST JOHNSON.

NOW WHAT DO WE DO?

WE DO THE SAME THING BEFORE WE HAVE A JUDGEMENT.

NOW ALL THE MORE REASON.

WE HAVE RENDERED JUDGEMENT.

RIGORS OF A PLEA COLIQUY TAKEN PLACE.

HAVE A COUNSEL WITH EVERY MEANING OF IT.

>> CALM DOWN.

IN GRANGER, DID JUDGE FULLMER NOT SAY THERE WERE THREE ERRORS THAT TOOK PLACE?

THE FIRST ERROR WAS, THAT THE DEFENSE, THE DEFENDANT DIDN'T, CAN'T USE MAGIC WORDS, I MOVE TO DISCHARGE BUT HE GOES ON TO SAY, THE NEXT ERROR WAS THE TRIAL COUNSEL'S ERROR, THAT COUNSEL COULD HAVE ADOPTED MOTION AND PROCEEDED TO REPRESENT GRANGER.

>> RIGHT.

>> BUT THE NEXT ERROR THAT OCCURRED WAS ON THE PART OF DEFENSE, THE DEFENSE COUNSEL WHO INEXPLICABLY, NOT ONLY FAILED TO ACT IN REPRESENTATIVE CAPACITY FOR GRANGER BUT BECAME AN ADVERSE WITNESS AGAINST HIS CLIENT AT THE INVITATION OF THE TRIAL JUDGE.

SO I GUESS WHAT I'M TALKING ABOUT IS THAT, IN THAT COUNSEL'S FAILURE TO ACT IN REPRESENTATIVE CAPACITY FOR GRANGER LAID THE GROUNDWORK FOR THE THIRD ERROR WHICH OCCURRED WHEN THE TRIAL COURT PROCEEDED TO ENTERTAIN THE MOTION ON ITS MERITS WITHOUT PROVIDING CONFLICT-FREE COUNSEL.

I'M JUST FOCUSED THERE THAT THERE WERE TWO OTHER ERRORS IN THIS PROCEEDING THAT OCCURRED IF WE DON'T, SOLVED BUT, THE PLEADING AND THEREFORE, THAT IS WHY I THINK THE FOURTH DISTRICT'S NARROW EXCEPTION MAKES SENSE BECAUSE, OTHERWISE,

YOU, WE WOULD REVERSE IT ON BASIS THERE ARE OTHER ERRORS HERE.

THERE ARE TWO OTHER ERRORS. THE TRIAL COURT ERRED IN PROCEEDING AND THE DEFENSE LAWYER ERRED IN NOT ADVISING THAT THE OBVIOUS, THAT SHE COULDN'T, OR HE COULDN'T TESTIFY BECAUSE HE OR SHE WAS A IN AN ADVERSE RELATIONSHIP WITH HIS CLIENT.

>> WELL WE RESPECTFULLY DISAGREE THAT THERE WOULD BE REVERSIBLE ERROR IN NOT -->> YOU DO NOT AGREE WITH JUDGE FULLMER'S OPINION IN -->> COURT'S DECISION RESTS ON LOGAN. IT RESTS ON THE NULITY RULE.

>> IF IT RESTS ON LOGAN, IT ERRONEOUSLY RESTS ON LOGAN BECAUSE LOGAN DOESN'T ADDRESS THIS SITUATION.

>> WE ASK THE COURT TO ADHERE TO IT IN THIS CONTEXT. IF WE CRAFT A RULE IF YOU SAY YOUR COUNSEL IS EFFECTIVE ENCOURAGE INEFFECTIVE CLAIMS.

I THINK THE COURT TALKED ABOUT AT THE BEGINNING THAT THE OVERUSE OF 3.170.

BUT, SEPARATE AND APART FROM THAT, EVEN IF HE SAYS, UNEQUIVOCALLY HE WANTS TO DISCHARGE COUNSEL, THERE SHOULD BE NO RULE ADOPTED BY THIS COURT AT THAT SAYS, WE'RE GOING TO AUTOMATICALLY JETTISON COUNSEL.

THERE SHOULD BE SOME SHOWING UNDER NELSON, A MODIFIED, LIMITED NELSON THAT COUNSEL IS NOT ACTING AS COUNSEL THAT HE NEEDS TO DO.

IF HE IS, IF THERE IS NO REASON TO QUESTION THAT, THEN THE DEFENDANT CAN BE GIVEN THE OPPORTUNITY TO PROCEED PRO SE WHICH IS EXACTLY WHAT HAPPENED HERE.

>> BUT WITH THIS KIND OF SITUATION, COUNSEL CAN'T BE ACTING AS COUNSEL IF HE IS TESTIFYING AGAINST HIS CLIENT.

>> RIGHT BUT I RETURN TO YOUR HONOR, WHAT I SAID BEFORE. I THINK HAD COUNSEL NOT BEEN PLACED UNDER OATH HE COULD HAVE SAID THE SAME THING AT THE PODIUM.

UNDER A LIMITED NELSON INQUIRY AND, THERE WAS NOTHING SHOWN THAT WOULD SAY HE WAS INEFFECTIVE.

IF HE SAID THOSE VERY SAME THINGS, IN TERMS OF DEFENDANT, WOULD BE THE PROPOSAL AND SAY, IF YOU WOULD LIKE TO PROCEED WITH THIS PRO SE MOTION, I'M NOT GOING TO APPOINT SUBSTITUTE COUNSEL.

I'M NOT GOING TO AUTOMATICALLY DO IT. I DON'T FIND A BASIS TO DISCHARGE COUNSEL.

NOTWITHSTANDING YOUR ACCUSATION.

>> SECOND DISTRICT, SINCE THE DEFENDANT DIDN'T TESTIFY SAY I'M NOT STRIKING IT AS NULITY, DIDN'T FILE AND DEFENDANT DIDN'T PREVAIL BECAUSE THERE WAS ADVERSE TESTIMONY, WOULD THAT BE ALTERNATIVE BASIS TO AFFIRM IN RELIEF?

>> NO.

I THINK THE BETTER WAY TO VIEW IT IS THAT, BECAUSE I'M NOT DEFENDING THAT COUNSEL SHOULD GET ON THE STAND IN THIS FORMAT BUT THAT WHAT HE SAID FUNCTIONALLY ON THE STAND IS WHAT HE COULD HAVE SAID RIGHT THERE BESIDE THE DEFENDANT IN A NELSON INQUIRY.

AND THE COURT CAN AFFIRM ON BECAUSE HE DID PROCEED PRO SE. WASN'T ENTITLED TO SUBSTITUTE COUNSEL.

BUT I WOULD LIKE TO POINT OUT, I WOULD SUBMIT IS THE RIGHT CASE FOR THIS COURT.

IT IS A VIOLATION CASE.

IT IS NOT A PLEA CASE.

IN THIS CASE WE NODE IN THE MID '80s THE COURT GRANTED RIGHT OF COUNSEL AS STATE-CREATED REMEDY IN PROBATION, REVOCATION COMMUNITY CONTROL REVOCATION

CASES.

BUT NOW WE'RE EVEN ONE FURTHER
STAGE BACK.

NOW WE'RE IN THE VIOLATION.
NOT JUST TAKING OF PLEA AND
MOVING TO WITHDRAW PLEA TO
CHARGES.

NOW GOT A FELLOW WHO WANTS TO
DRAW HIS ADMISSION TO VIOLATING
PROBATION OR COMMUNITY, IN THIS
CASE, COMMUNITY CONTROL.

AND THIS IS THE RIGHT CASE TO
DECIDE THE PARAMETERS OF WHAT
IS GOING TO HAPPEN WHEN YOU
PROCEED PRO SE TO SPEAK PLEA
WITHDRAWAL.

WE ASK THE COURT TO FIND
JURISDICTION SHOULD BE
DISCHARGED BUT, EVEN IF THE
COURT WERE TO DISAGREE, WE
WOULD URGE THE COURT, LOOK,
THAT LOGAN AND JOHNSON ARE
ADEQUATE.

THEY'RE ADEQUATE
TO MEET OUR NEEDS IN 3.170.

NOW WE HAVE GONE TO JUDGMENT.
THERE IS NO REASON TO RELAX A
PLEADING REQUIREMENT AT THIS
STAGE.

>> WITH THAT, MISS McCARTHY, YOU
HAVE EXCEEDED YOUR TIME.

>> AND THANK YOU, YOUR HONOR.
ASK YOU TO APPROVE THE SECOND
DISTRICT'S DECISIONS.

THANK YOU.

>> AND YOU HAVE ONE MINUTE TO
SUM UP.

>> THANK YOU, YOUR HONOR.
SUM UP BY JUST SAYING, ASK THE
COURT TO ADOPT THE, ADDITIONAL
EXCEPTIONS ARTICULATED IN
BERMUDEZ AND PETERSON BY THE
FOURTH DC.

AND APPROVE THOSE FOR THE
LIMITED PURPOSE OF THE 3.17-L
MOTIONS.

>> WHEN THERE IS AN ALLEGATION
IN THE ATTORNEY IS THE REASON
WHY IT WAS INVOLUNTARY PLEA?

>> CORRECT.

ALLEGATION OF COERCION OR,
MISADVICE OR EVEN THE FIFTH DCA
TALKS ABOUT PATENT CONFLICT
BETWEEN I WOULD ASK THE COURT

TO NOTE IT SHOULD BE ON THE
FACE OF THE MOTION, IN ORDER TO
BE ENTITLED TO CONFLICT-FREE
COUNSEL.

I'M NOT SURE THAT HAVING A
NELSON INQUIRY IS THE BEST WAY
TO GO BECAUSE WE'RE RIGHT BACK
TO THE DEFENDANT NOT BEING
REPRESENTED IN A CRITICAL
STAGE.

AT LEAST MOST OF THE DCAs HAVE
ALL RULED THAT RULE 3.170-L
MOTIONS ARE CRITICAL STAGE SO
THAT COUNSEL HAS A RIGHT TO BE
REPRESENTED AND WITH THAT I SEE
MY TIME IS UP.

THANK YOU SO MUCH.

>> THANK YOU VERY MUCH.

THANK BOTH OF YOU FOR YOUR
ATTENTION.

THE COURT IS NOW ADJOURNED.

>> PLEASE RISE.

>> THE SUPREME COURT IS NOW
ADJOURNED.