In re: Amendments to Fla. Rules of Criminal Procedure

SC09-159

PLEASE RISE.

LADIES AND GENTLEMEN, THE

FLORIDA SUPREME COURT.

PLEASE BE SEATED.

>> THE NEXT CASE ON THE COURT'S

AGENDA IS AMENDMENTS TO THE

FLORIDA RULES OF CRIMINAL

PROCEDURE.

>> CHIEF JUSTICE, GOOD MORNING.

TOM BATEMAN ON BEHALF OF THE

CRIMINAL PROCEDURES COMMITTEE.

I HAVE STARTED TO LOSE MY VOICE

YESTERDAY.

YOU BEAT UP ON ME SO BAD

YESTERDAY.

BUT I DON'T KNOW WHAT THE

PROBLEM IS.

BUT IF YOU CAN'T HEAR ME, THAT

HAS NEVER BEEN A PROBLEM BEFORE

BUT IF YOU CAN'T, PLEASE LET ME

REPEAT.

THIS IS THE BIG RULE PACKAGE,

THE THREE-YEAR CYCLE AND SO

THERE ARE A LOT OF ISSUES IN

IT.

>> AND THE COURT, THE REASON WE

SENT OUT REVISED ORDER --

>> CORRECT.

>> -- IN THESE RULES CASES AS YOU

CAN SEE A LITTLE UNMANAGEABLE,

TO TRY TO DIRECT IN COUPLE

SPECIFIC AREAS.

THANK YOU FOR FILING THE

AMENDED APPENDIX.

THAT HELPS.

>> WHAT I WOULD LIKE TO DO IF

IT IS PERMISSIBLE AND YOUR

AGREEABLE, ADDRESS THESE FOUR

THINGS AND LIKE TO TAKE THE

EASY ONES FIRST THE ONES I

THINK WILL GENERATE THE FEWEST

QUESTIONS BECAUSE THERE IS ONE

THAT MAY BE MORE CONTROVERSIAL.

AT LEAST I HOPE IT GENERATES

MORE THAN A FEW QUESTIONS, LET

ME PUT IT THAT WAY.

LET ME START WITH, IF I CAN,

THE ISSUE NUMBER THREE YOU

RAISE, WHY, OR THE COURT

RAISED, WHY IS THE COMMITTEE

PROPOSING BASED ON THE RULES OF

JUDICIAL ADMINISTRATION A

CHANGE IN THE TITLE OF PART 7

ON THE DISQUALIFICATION AND

SUBSTITUTION OF THE JUDGE?

WHAT I WOULD JUST LIKE TO DO IS

JUST SHOW YOU THAT PART 7 SAYS,

DISQUALIFICATION AND

SUBSTITUTION OF JUDGE.

THERE IS ONE RULE IN THAT PART.

AND IT IS SUBSTITUTION OF

THE JUDGE.

THE RULE DOESN'T ADDRESS

ANYTHING TO DO WITH

DISQUALIFICATION.

SO THE TERM DISQUALIFICATION --

>> REALLY NOT BASED ON THE

RULES OF JUDICIAL

ADMINISTRATION?

>> WELL --

>> RULES OF JUDICIAL

ADMINISTRATION TALK ABOUT

DISQUALIFICATION.

>> THAT'S THE REASON.

BECAUSE IT IS COVERED IN THERE

WE TOOK IT OUT OF OUR RULES.

>> THEN YOU PUT THAT POINT

IN.

>> THAT IS ONLY REASON FOR

TAKING IT OUT OF THE TITLE

BECAUSE DISQUALIFICATION --

>> DOESN'T CONFORM --

>> CORRECT.

IF YOU LOOK IN THE RULE OF

DISQUALIFICATION THERE IS

NOTHING THERE.

SO WE TOOK IT OUT SO IT WASN'T

CONFUSING.

NUMBER FOUR, WHY IS THE

COMMITTEE PROPOSING AMENDEDDING

REMOVING AFFIDAVIT OF INDIGENCY

FROM THE FORMS?

NOW AGAIN, I WANT YOU TO RECALL

THIS STARTED LONG AGO.

THIS PARTICULAR ISSUE AFTER THE

2006 AMENDMENTS TO THE 2752.

WHICH REQUIRES THE CLERKS

ASSOCIATION TO PREPARE THE

AFFIDAVIT AND KEEP IT

UP-TO-DATE AND SUBMIT IT TO THE

SUPREME COURT FOR APPROVAL.

SO, WHEN THAT HAPPENED, THIS

CAME TO THE COMMITTEE AS A

LEGISLATIVE, ONE OF THOSE

LEGISLATIVE ISSUES AFTER THE

LEGISLATION WAS PASSED AND

BECAUSE THE CLERKS ASSOCIATION

IS NOW RESPONSIBLE FOR KEEPING

THAT RULE UP-TO-DATE, THE

COMMITTEE FELT THAT IT SHOULD

BE TAKEN OUT OF OUR RULES.

>> I MEAN THE PROBLEM IS, IF IT

IS NOT THERE --

>> WHERE IS IT?

>> AND WE JUST APPROVED IT.

SO YOU DON'T HAVE, IF WE MAKE

IT CLEAR IN THE OPINION THAT

THE COMMITTEE DOESN'T HAVE THE

RESPONSIBILITY FOR KEEPING IT

UP, WILL THAT BE --

>> THAT WAS MY POINT.

BECAUSE IN JANUARY YOU ACTUALLY

APPROVED THE NEW FORM.

>> RIGHT.

>> AND IT REALLY THE ISSUE IS

MOOT RIGHT NOW.

>> OKAY.

>> SO THAT WAS AGAIN, THAT WAS

LONG AGO AND IT'S TAKEN CARE

OF.

SHOULD RULE 3.172(D).

WHICH IS WHAT THE JUDGE'S

RESPONSIBILITY ON ACCEPTING A

PLEA, THIS HAS TO DO WITH A DNA

INQUIRY WHICH WE WERE HERE

BEFORE, YOU SOME OF YOU RECALL

A FEW YEARS AGO CAME

HERE INQUIRING ABOUT DNA.

WHAT WE HAVE PROPOSED IS A,
UNDER 341.91 AN EXTENSION OF
SPEEDY TRIAL IF IT BECOMES
KNOWN AT THE TIME OF THE PLEA
COLIQUY THAT THERE IS THE
POTENTIAL OF DNA, OF EVIDENCE
EXISTING THAT CONTAINS DNA THAT
COULD EXONERATE THE DEFENDANT.
>> SO EITHER, YOUR PROPOSAL
WOULD ALLOW THE STATE OR THE
DEFENSE TO GET THIS TESTED AND
HAVE AN EXTENSION OF SPEEDY
TRIAL?
>> EXTENSION OF SPEEDY TRIAL.
IN FACT --
>> WHEN YOU SAY EXTENSION
REFERRING TO TOLLING SPEEDY
TRIAL?
>> IF SPEEDY TRIAL, I THINK IT
REALLY, PERHAPS, TOLLING WOULD
BE, BECAUSE SPEEDY TRIAL MAY
NOT HAVE RUN AT THE TIME THE
PLEA IS ENTERED.
BUT THE TESTING, I MEAN THE
TIME MAY RUN -- OR DO WE EXTEND
IT.
I GUESS TOLLING MIGHT BE THE
BETTER TERM.

>> DIDN'T THE STATUTE
CONTEMPLATE THAT THIS WOULD BE,
IF IT'S DONE ON THE DEFENDANT'S
BEHALF IT WOULD BE ON THE
MOTION OF THE DEFENDANT.
THE IDEA THAT COULD WAIT UNTIL
THE TIME OF CLOSE TO TRIAL AND
SAY, OH, THERE'S SOME DNA
EVIDENCE WE FORGOT THAT MIGHT
HELP THE DEFENDANT.
NOW WE WANT TO, JUST HAVE AN
AUTOMATIC TOLLING THEMSELVES,
AREN'T THERE TWO DIFFERENT
VALUES INVOLVED?
>> WELL THERE MAY BE BUT THE
RULE, 3.172(D) NOW RECOGNIZES
AND SAYS THAT THE JUDGE MUST
INQUIRE OF THE DEFENDANT AND
COUNSEL FOR THE DEFENDANT AND
THE STATE.
THE DEFENDANT, THE ATTORNEYS
FOR BOTH PARTIES, IF THIS
EVIDENCE EXISTS AND THEN, IF IT
DOES EXIST, KNOWN TO EXIST,
UPON MOTION OF COUNSEL AND
COUNSEL IS USED, I BELIEVE, IN
MORE THAN ONE, MEANING MORE
THAN ONE.
CAN BE THE DEFENSE OR THE

STATE.

THE COURT MAY POSTPONE THE

PROCEEDING IN AND ORDER DNA

TESTING.

>> WHAT IS THIS RULE NUMBER?

>> RULE 3.172(D).

AND THAT IS DNA EVIDENCE

INQUIRY.

I WAS HERE, I'VE BEEN ON THIS

COMMITTEE SIX YEARS.

I'VE BEEN CHAIR TWICE.

I DON'T KNOW HOW THAT HAPPENED.

THAT USUALLY DOESN'T HAPPEN BUT

THE LAST TIME I WAS CHAIR --.

>> PROPOSED LANGUAGE WAS IN

3.191(I)4.

>> CORRECT. SPEEDY TRIAL.

>> WHATEVER WE DO IN THAT RULE

SHOULD BE CONFORMED TO THE PLEA

RULE.

BUT THE BASIC ISSUE IS, THAT

THE PUBLIC DEFENDERS HAVE BEEN

CONCERNED ABOUT, THE CAN

EXTENSION OR TOLLING BE DONE IN

THE MOTION IS BEING MADE BY THE

STATE, WHY SHOULD THAT BE

CHARGEABLE TO THE DEFENDANT?

>> WELL, I --

>> I THINK THAT, MAYBE --

>> I THINK THAT MADE BE THE ARGUMENT BUT WE HAVE TO GO BACK, WE HAVE TO GO BACK WITH THE WHOLE ARGUMENT WE HAVE ABOUT DNA AND THE RESPONSIBILITY OF THE COURT TO MAKE SURE SOMEONE WHO IS NOT GUILTY, SHOULD HAVE THE ABILITY TO SHOW THAT THEY SHOULD BE EXONERATED.
WE HAVE TO GO BACK TO THAT ARGUMENT BECAUSE THAT IS WHAT THIS IS ALL ABOUT,
THE DNA ISSUE.
IF IT IS RESPONSIBILITY OF THE COURT AND IT COMES OUT THAT THERE IS SOME EVIDENCE, NOW, THE DISCOVERY RULES REQUIRE, IN FACT, THAT'S ANOTHER RULE PROPOSED THAT IN THE DISCOVERY NOW EARLY ON THE STATE IS SUPPOSED TO SUBMIT AND TELL THE OTHER SIDE IF THE EVIDENCE EXISTS.
SO MAY BECOME A MOOT ISSUE TOO.

>> CAN THE WHOLE MATTER JUST BE RESOLVED BY NOT CHARGING --
THROUGH EITHER SIDE AND JUST

TOLLING THE SPEEDY TRIAL PERIOD

UNTIL THE DNA TEST --

>> THAT'S WHAT I THINK --

>> NOBODY LOSES THERE.

>> NOBODY LOSES.

THAT'S WHY WE PUT IT IN THE

SPEEDY TRIAL.

WE DIDN'T, WE JUST SAID IT

WOULD BE EXTENDED FOR PURPOSE

OF THE DNA INQUIRY.

I DON'T THINK IT, I DON'T THINK

IT SHOULD BE, I THINK IT SHOULD

BE, PERSONALLY I THINK THE

JUDGE OUGHT TO BE ABLE TO DO

THAT AND IT SHOULDN'T HAVE TO

BE BY THE DEFENSE ATTORNEY

BECAUSE IT WOULD BE CONSIDERED,

I GUESS A WAIVER, THEY WOULD

HAVE TO WAIVE SPEEDY TRIAL.

BUT THE JUDGE SEES THAT THERE

IS THE POTENTIAL FOR EVIDENCE

TO EXONERATE THIS DEFENDANT,

THEN THE COURT OUGHT TO BE ABLE

TO DO IT AND NOT VIOLATE THE

DEFENDANT'S STATUTORY RIGHTS OF

SPEEDY TRIAL.

I DON'T THINK IT IS A

CONSTITUTIONAL VIOLATION.

>> IN THE STATUTE THOUGH, I KNOW THERE HAVE BEEN TIMES WE SAID WE DON'T WANT YOU TO TRACK THE STATUTE.

>> YES.

>> THE STATUTE DOES SAY THE PROCEEDING ON THE DEFENDANT'S BEHALF AN ORDER DNA TESTING UPON MOTION OF COUNSEL SPECIFYING THE PHYSICAL EVIDENCE TO BE TESTED.
THAT'S ACTUALLY IN THE STATUTE.
WHY SHOULDN'T THAT BE IN THE RULE BECAUSE ALTHOUGH THAT MAY BE A PROCEDURAL WAY THAT IT'S BEING STATED, IT REFLECTS THE ACTUAL STATUTORY LANGUAGE IN SECTION 925.12(2)?

>> ONLY THING I CAN SAY TO THAT, JUSTICE PARIENTE, THE MEMBERS OF THIS COMMITTEE HAVE GENERALLY BEEN MORE CONCERNED, WHAT IS BEING DONE IS DONE FOR THE RIGHT REASONS.
IF NOBODY WANTS AN INNOCENT DEFENDANT TO BE FOUND GUILTY.
NOT EVEN LET THEM PLEAD.
I THINK THAT'S REALLY THE PHILOSOPHICAL PART OF IT.

>> BUT, I'M HAVING TROUBLE
UNDERSTANDING THIS.
BECAUSE WHAT IF THE CONTEST
SAYS I DON'T WANT IT.
THEY DON'T WANT TO TEST IT.
HE MAY NOT WANT TO TEST IT
BECAUSE IT MAY SHOW HE IS
GUILTY?
>> HE MAY NOT.
THAT IS EXACTLY RIGHT.
BUT THE QUESTION, IS THERE
EVIDENCE --
>> THE ROLE OF THE COURT IN
DECIDING, YOU KNOW, HOW TO
HANDLE THESE EVIDENTIARY
MATTERS ON ITS OWN INITIATIVE
JUST STRIKES ME AS A LITTLE
ODD.
>> WELL, AGAIN, THE RULE, THE
RULES, AS IT CURRENTLY EXISTS,
THIS IS THE FLEE COLIQUY RULE,
REQUIRES THE JUDGE TO ASK NOT
ONLY THE DEFENDANT, BUT THE
ATTORNEY FOR THE DEFENDANT AND
THE ATTORNEY FOR THE STATE IF
THIS EVIDENCE EXISTS THAT MIGHT
CONTAIN DNA AND THEN IT SAYS,
ON MOTION, UPON MOTION OF

COUNSEL.

DOESN'T SAY DEFENSE COUNSEL.

JUST SAYS UPON MOTION OF

COUNSEL. SO --

>> IS THIS COMMITTEE

CONTEMPLATING I'M A PERSON

THAT LIKES THE WHOLE PICTURE.

I ASK THE STATE IS THERE DNA?

YES THERE IS.

WAS IT TESTED, NO.

I'M THINKING I DON'T WANT THIS

CASE GOING ON TWO YEARS LATER,

THREE YEARS LATER.

YOU'RE SAYING I AS THE JUDGE

COULD ORDER THIS TESTING BE

DONE BEFORE I ACCEPT THE PLEA?

>> I THINK --

>> IS THAT WHAT THE RULE IS

INTENDING TO DO?

>> I THINK A JUDGE COULD SAY IF

THERE'S A POSSIBILITY OF

EVIDENCE EXISTING THAT CONTAINS

DNA THAT EXONERATES THIS

DEFENDANT, NOW YOU HAVE TRIAL

JUDGES ON YOUR COURT NOW, I

SUGGEST, THAT MOST JUDGES ARE

GOING TO SAY IF THAT

POSSIBILITY EXISTS I'M NOT

GOING TO ACCEPT A PLEA.

I MIGHT BE WRONG ABOUT THAT BUT
I THINK, I WOULD BE INQUIRING
OF THOSE LAWYERS AND THAT
DEFENDANT, I WOULD BE SPENDING
A WHOLE LOT OF TIME TALKING
ABOUT THAT AND I WOULD SUGGEST
THAT MOST, IN MOST
CIRCUMSTANCES THAT EVIDENCE IS
GOING TO GET TESTED.
NOW, IT MAY BE THAT THE
DEFENDANT --
>> IS IT DIFFERENT FOR THE PLEA
SITUATION THAN FOR THE TRIAL
SITUATION?
BECAUSE I THINK THAT, I CAN SEE
DIFFERENT VALUES BEING INVOLVED
WITH THE PLEA.
>> CORRECT.
>> SO WE'RE PUTTING THEM THE
TWO TOGETHER.
I'M MORE CONCERNED, I GUESS IN
CASE WHERE THE DEFENDANT IS
READY TO GO TRIAL.
JUDGE ALLOWED, SAYING NOW
BEFORE SOME SOMEONE IS GOING TO
GO TO TRIAL.
THAT HE IS GOING.
HE IS SHE IS GOING TO ORDER

EVERYTHING BEING, DNA TESTING,

EVEN IF IT IS NOT, YOU KNOW,

THERE IS NO EVIDENCE THAT IT IS

ACTUALLY HELPFUL TO THE

DEFENDANT?

>> THERE WOULD BE NO WAY FOR

THE -- YES, WE NOW PUT IN DISCOVERY OF

RULE.

STATE IS NOW OBLIGATED

TO THE IDENTIFY THOSE,

THAT EVIDENCE MIGHT CONTAIN DNA.

THEY'RE OBLIGATED UNDER ANOTHER

PROVISION WE SUGGESTED TO DO

THAT NOW.

>> DO YOU INTEND TO ADDRESS,

THE 3.132?

YOU'RE WELL INTO YOUR REBUTTAL.

THAT IS THE ONE CONCERNING

WHETHER OR NOT THE, AT THE

PRETRIAL DETENTION, THAT THE

JUDGE --

>> I WAS.

>> -- MAKES A DETERMINATION EVEN

IF THE --

>> I THINK THIS IS PROBABLY THE

HOTTEST ISSUE AND PROBABLY MOST

CONTROVERSIAL, FROM, THE,

COMMON STANDPOINT AND OURS.

BUT I WILL MAKE A COUPLE OF

OBSERVATIONS.

THEN I'M GOING TO SIT DOWN.

>> THE STATUTE, 907.041.

TRIAL DETENTION AND RELEASE

STATUTE HAS TWO SEPARATE

PROVISIONS IN IT.

ONE PROVISION UNDER (4)B,

SAYS THAT.

NO PERSON CHARGED WITH A

DANGEROUS CRIME AND THEY'RE

LISTED, 22 OF THEM SHALL BE

GRANTED NON-MONETARY PRETRIAL

RELEASE AT A FIRST APPEARANCE

HEARING.

THEN, 4-C, SAYS THE COURT MAY

ORDER PRETRIAL DETENTION, IF IT

FINDS, A SUBSTANTIAL

PROBABILITY BASED ON THE

DEFENDANT'S PAST AND PRESENT

PATTERNS OF BEHAVIOR, ANY OF

THE FOLLOWING CIRCUMSTANCES

EXIST.

>> THIS IS, AND I KNOW YOU,

HAVE SOME COMMENTS, THEY HAVE

VERY SHORT TIME.

YOU'RE ENGAGING IN STATUTORY.

>> HAVE HELD CONTRARY TO WHAT

THE PROPOSED RILE IS?

>> WE RELIED MOSTLY, THE
REASON THIS CAME TO THE
COMMITTEE, IT WAS SENT PURSUANT
TO HO, VERSUS STATE, FIFTH DCA
CASE.
CONCURING OPINION BY JUDGE
SEWIA.
IT CAME, THERE WAS A LOT OF
DISCUSSION ON THIS INTEREST
WENT THROUGH, TOOK A LONG TIME
FOR THIS TO GET RESOLVED.
ULTIMATELY IT WAS, WHAT WE
PROPOSED WAS, APPROVED 19-3.
>> ACTUALLY, I WANT TO COMMEND
YOU THAT, MOST OF THESE RULES
LOOK LIKE GOT ALMOST
UNANIMITY.
>> VERY CLOSE, VERY CLOSE.
THE ONES THAT WERE MORE, THAT
NEEDED TO COME THROUGH QUICKER,
MORE QUICKLY, WE FILED THOSE
OUT OF CYCLE AND THAT'S WHY
I'VE BEEN COMMENTING.
IT WAS APPROVED 30-0 BY THE
BOARD OF GOVERNORS.
THERE'S A GAP.
THERE'S A GAP.
THE STATUTE SAYS THAT THE STATE
MAY FILE A MOTION.

NOW, LET ME JUST SAY, AS A
PRACTICAL MATTER, BECAUSE I
WANT, I THINK YOU NEED TO
UNDERSTAND THIS.
THE ATTORNEYS THAT APPEAR, AT
FIRST APPEARANCE ARE GENERALLY
NOT, THE ATTORNEYS, LIKE
MR.^MORRISON AND, MR.^GIFFORD.
THEY ARE CERTIFIED LEGAL
INTERNS.
THEY ARE JUVENILE LAWYERS.
THEY ARE BRAND NEW ATTORNEYS AT
BOTH PUBLIC DEFENDERS IN THE
STATE ATTORNEY'S OFFICE.
THE JUDGE, AT THOSE FIRST
APPEARANCE PROCEEDINGS, HAS
MUCH MORE KNOWLEDGE AND
EXPERIENCE WITH THESE THINGS
THAN THE LAWYERS DO THERE.
AND THE LAWYERS, THERE'S VERY
LITTLE INFORMATION PROVIDED TO
THE COURT AT FIRST APPEARANCE
EXCEPT THE ARREST AFFIDAVITS
AND SOME OTHER INFORMATION, THE
PRETRIAL RELEASE PEOPLE GET
TOGETHER.
IF THE JUDGE ALLOWS A PERSON TO
BE RELEASED, ALL WE'RE SAYING

IF THE MOTION IS NOT FILED, AND
IT HAS TO BE FILED BY FIRST
APPEARANCE OR IT CAN BE FILED
LATER, BUT UNDER THIS STATUTE
IT GENERALLY IS PRACTICALLY IS
NOT GOING TO HAPPEN.
THAT THE JUDGE SHOULD BE ABLE
TO LOOK AT THE CRITERIA, AND
MAKE THE CRITERIA IF THE MOTION
IS NOT FILED OR IF A MOTION IS
FILED, IT IS LEGALLY
INSUFFICIENT, THEN THE JUDGE
OUGHT TO BE ABLE TO GO AHEAD
FORWARD WITH FIRST APPEARANCE,
USING CRITERIA IN THE -- PART
OF THE RULE.
>> MAY IT PLEASE THE COURT,
JOHN MORRISON ON BEHALF OF THE
FLORIDA PUBLIC DEFENDERS
ASSOCIATION.
I WOULD BE REMISS IF I DID NOT
THANK THE COMMITTEE FOR ALL ITS
HARD WORK IN THIS TRIANNUAL
REVISIONS AND THE FACT THAT WE
HAVE ISSUES ONLY WITH A VERY
FEW OF THEIR PROPOSALS I THINK
SPEAKS VOLUMES FOR EVERYTHING
THEY HAVE DONE.
LET ME JUST ADDRESS, HOWEVER,

THE RULE 3.132 WHICH WE WERE

JUST DISCUSSING.

THE ISSUE OF PRETRIAL

DETENTION.

I BELIEVE THAT THE PROPOSED

RULE VIOLATES BOTH THE STATUTE

AND JUDICIAL NEUTRALITY.

THE STATUTE, SPECIFICALLY SAYS

THAT FILING OF THIS WILL BE

DONE BY THE STATE ATTORNEY.

I'M QUOTING FROM 907.041.4,

SUB E.

PRIOR TO FILING BY THE STATE

ATTORNEY SEEKING PRETRIAL

DETENTION.

SUB F HAS THE EXACT SAME LANGUAGE.

HEARING SHALL BE HELD WITHIN

FIVE DAYS OF FILING BY THE

STATE ATTORNEY OF COMPLAINT

SEEKING PRETRIAL DETENTION.

WHAT I HEARD THE COMMITTEE

ESSENTIALLY SAYING THAT THE

ADVERSARIAL SYSTEM HAS BROKEN

DOWN AND THAT SORT OF

INQUESTIONS TERRYAL SYSTEM

NEEDS TO BE PUT IN PLACE AND

THERE IS GAP.

THE GAP HEAR IS THE DISCRETION

OF THE STATE ATTORNEY, OF THE
EXECUTIVE BRANCH TO MAKE A
DECISION WHETHER OR NOT TO FILE
A MOTION FOR PRETRIAL
DETENTION.
THAT IS A GAP THAT SHOULD BE
THERE.
THAT'S SEPARATION OF POWERS AND
THAT'S THE SECOND PART OF THIS.
WHEN A JUDGE STEPS OUT OF THE
ROLE OF A NEUTRAL ARBITRATOR
AND, SAYS, MR.^DEFENDANT, I
THINK YOU SHOULD BE KEPT IN
JAIL, THAT IS NOT, AND THEN,
AND, I GET TO DECIDE, NOW
HAVING MADE THAT MOTION I GET
TO NOW DECIDE WHETHER THAT'S A
VALID MOTION AND WHETHER THE
STATUTORY ELEMENTS HAVE BEEN
MET, AND THE STATE HAS MET ITS
BURDEN OF PROOF AS REQUIRED
UNDER THE STATUTE AND THE
RULES.
>> IS THERE ANYTHING THAT
PREVENTS THE JUDGE, IF THE
JUDGE SEES THAT THE MOTION
HASN'T BEEN FILED, DEALING WITH
INEXPERIENCED PROSECUTOR, I
KNOW IN SOME STATES, SOME

CIRCUITS NOW, THEY'RE GETTING
CIVIL LAWYERS TO COME IN TO
HELP OUT BECAUSE THE PROBLEMS,
IS THERE ANYTHING THAT WOULD
STOP A JUDGE FROM ASKING THE
SPECIFIC QUESTION TO THE
ASSISTANT STATE ATTORNEY, IS
THERE SOME REASON A MOTION FOR
PRETRIAL DETENTION HAS NOT BEEN
FILED?
I MEAN THAT --
>> NO, YOUR HONOR.
I HEAR IT ALL THE TIME.
JUDGE, USUAL WAY IT IS PHRASED,
STATE, WILL YOU BE FILING A
MOTION FOR PRETRIAL DETENTION?
ANY LAWYER WHO CAN NOT READ
BETWEEN THE LINES OF THAT
STATEMENT, FRANKLY, SHOULD NOT
BE A LAWYER.
AND, IN ADDITION TO THAT, EVEN
ON THE APPELLATE LEVEL, EVEN IF
THE MOTION IS NOT FILED, IT
GOES UP ON A HABEAS CORPUS, THE
DISTRICT COURTS HAVE BEEN VERY
GENEROUS GRANTING HABEAS CORPUS
BUT GIVING THE STATE ATTORNEY
STILL MORE TIME TO FILE THE

APPROPRIATE MOTION.

IF THE STATE ATTORNEY BELIEVES

THEY CAN MEET THE STATUTORY

ELEMENTS.

AND THERE'S LISTED 1-7.

I CERTAINLY WON'T REITERATE

THEM FOR THE COURT.

BUT IF THE STATE ATTORNEY

BELIEVES THEY CAN SHOULDER THE

BURDEN OF PROOF THERE.

AND I BELIEVE THAT THAT IS THE

APPROPRIATE SEPARATION OF

POWERS.

THAT, THAT'S UP TO THE

EXECUTIVE AND THE OTHERS FOR --

>> YOU SAID THAT, IN YOUR VIEW

IT VIOLATES THE STATUTE.

IT ACTUALLY VIOLATES

STATUTORY LANGUAGE.

HAS THE APPELLATE COURT SPOKEN

ON THIS ISSUE AND ACTUALLY HELD

IT DOES REQUIRE A MOTION

OF THE --

>> YES.

>> I GUESS THERE WAS ONE

CONCURRING OPINION THAT --

>> ONE CONCURRING OPINION BY

ONE JUDGE OUT OF, I CAN'T, I

DON'T REMEMBER HOW MANY CASES

THAT I CITED BUT, OTHERWISE,
UNANIMITY WITHIN THE -- THAT
REALLY, THE HO CONCURING
OPINION -- THE HO CONDITION IS
OUT LAYER.
>> I GUESS WITH OUR OPINION,
USUALLY BALANCED NO RULES COME
OUT AT LEAST WHEN WE SEND
THINGS OVER, THIS IS VOTE BY
COMMITTEE OF 19-3.
JUST FROM THE DEFENDANT'S POINT
OF VIEW, IS THERE ANYTHING
ELSE, BECAUSE YOU MADE A VERY
COMPELLING ARGUEMENT THIS WOULD
BE IMPROPER INCURSION INTO
SOMETHING THE JUDGE SHOULD NOT
BE DOING.
BUT ON THE OTHER HAND,
MR.^BATEMAN SEEMS TO ALSO MAKE
A POINT.
SO IS THERE ANY OTHER NUANCES
THAT WE'RE MISSING ON THIS AS
FAR AS, YOU KNOW THIS BEING,
QUOTE A GOOD IDEA OR HOW THIS
GOT --
>> WELL, WHETHER, I BELIEVE,
WITH ALL DUE RESPECT TO THE
COMMITTEE, THE GOOD IDEA WHAT

THEY'RE REALLY SAYING IS, GEE,
IT WOULD BE A GOOD IDEA IF THE
STATE ATTORNEYS DID THEIR JOB
BETTER AND IF NOT, THE JUDGES
SHOULD STEP IN.
AND --
>> LET ME ASK YOU.
SEEMS TO ME THAT FIRST
APPEARANCES THINGS ARE
HAPPENING VERY QUICKLY AND
JUDGE IS USUALLY GOING THROUGH
40 OR 50 CASES IN ONE
AFTERNOON.
WHAT, THE JUDGE IS PERMITTED TO
LOOK AT FACTORS SUCH AS TIES TO
THE COMMUNITY, FAMILY IN THE
AREA, JOBS, IN DETERMINING THE
AMOUNT OF BOND.
AND THE JUDGE CAN LOOK AT THOSE
FACTORS WITH WHETHER THE STATE
ATTORNEY RAISED IT OR NOT.
>> YES, SIR.
>> SO IF A JUDGE IS ABLE TO DO
THAT AND THAT DOES NOT VIOLATE
NEUTRALITY IN THE JUDGE, THEN
WHY CAN'T THE JUDGE LOOK AT
FACTS OF THE CASE AND THE
PERSON'S BACKGROUND IN
DETERMINING WHETHER OR NOT THE

FACTORS IN THE DETENTION

STATUTE APPLY?

HOW IS THAT SO OFFENSIVE?

>> I APOLOGIZE FOR STEPPING

OVER YOUR HONOR.

I BELIEVE THIS GOES BACK TO THE

CONSTITUTIONAL RIGHT.

THERE IS A CONSTITUTIONAL RIGHT

TO PRETRIAL RELEASE, UNLESS

CERTAIN FACTORS ARE SHOWN.

IT IS A CONSTITUTIONAL RIGHT TO

REASONABLE PRETRIAL RELEASE.

THE JUDGE, IN CONSIDERING THOSE

FACTORS, THAT IS THE 1.31(B),

CAN MAKE THE WHOLE SMORGASBOARD

OF POSSIBLE THINGS THEY CAN SET

AND FACTORS THEY NEED TO LOOK

AT.

THAT'S ALL PERFECTLY

PERMISSIBLE.

THAT IS WHAT THE JUDGE JUST

SETTING A REASONABLE BOND BASED

ON THIS INDIVIDUAL PERSON.

IT'S ANOTHER THING COMPLETELY

TO SAY YOU, SIR, YOU, MA'AM,

DEFENDANT, DO NOT GET A BOND AT

ALL BECAUSE YOU ARE TOO

DANGEROUS TO BE RELEASED.

THAT IS TAKING AWAY THAT

CONSTITUTIONAL RIGHT.

THAT REQUIRES A SHOWING.

THAT REQUIRES AN EVIDENTIARY

HEARING.

AND, IT IS AT THAT POINT WHERE

IT IS JUST INAPPROPRIATE FOR A

JUDGE TO BE INSERTING

THEMSELVES INTO, ESSENTIALLY AN

EVIDENTIARY MATTER.

AND STRIPPING THE RIGHT, AS

OPPOSED TO SETTING REASONABLE

BOND.

IF YOUR HONOR'S QUESTION IS CAN

THEY EFFECTIVELY SET NO BOND BY

SETTING HIGH ENOUGH BOND?

ABSOLUTELY.

THEY DO IT ALL THE TIME.

>> SEEMS TO ME ONE OF YOUR

BETTER, I THINK YOU MAKE SOME

GOOD ARGUMENTS.

I THOUGHT, IF WE'RE LOOKING AT

STATUTORY CONSTRUCTION, THE

FACT THAT 97041 DOESN'T SAY THE

COURT CAN DO IT ON ITS OWN

MOTION BUT SECTION 9.03471 WHEN

THERE IS VIOLATION OF THE

PRETRIAL RELEASE EXPRESSLY

ALLOWS THE COURT TO REVOKE BOND

ON ITS OWN MOTION.
SO, TO ME, WE'RE REALLY, THIS
IS ALWAYS A DANGEROUS AREA, IN
A RULES CASE, WE, USUALLY
ACCUSED OF LEGISLATING IN
SUBSTANTIVE CASE.
BUT YOU KNOW, IS THIS A MATTER,
I GUESS, OF, I DON'T KNOW IF IT
IS RAISED QUITE THIS WAY OF
PROCEDURE OR SUBSTANCE AS TO
WHO GETS TO MAKE THE MOTION?
>> WHO GETS TO MAKE A MOTION --
>> BECAUSE THIS IS GOING TO
COME UP NOW AND WE'RE GOING TO
TALK ABOUT DNA ISSUE.
MAYBE IT IS WHETHER THE JUDGE
UNDER A SITUATION IS, CAN SUA
SPONTE RAISE SOMETHING THAT
HASN'T BEEN RAISED BY EITHER
PARTY.
AND YOU'RE SAYING IT IS NOT
REALLY PROHIBITED BY STATUTE
BUT APPEARS THAT THE
LEGISLATURE DIDN'T INTEND FOR
THE JUDGE TO DO IT, BUT HOW
DOES THAT VIOLATE A STATUTE IF
THE JUDGE SAYS, I BELIEVE, I'M
GOING TO SUA SPONTE BRING THIS

UP.

STATE, GIVE ME THE REASON WHY?

>> THE GENERAL RULE OF

STATUTORY CONSTRUCTION IS THAT

WHAT IS EXCLUDED IS NOT THERE.

>> I GUESS WHAT I'M SAYING,

SORT OF I'M SHIFTING A LITTLE

BIT, WE'RE DOING THIS AS IF IT

IS A RULE, WE'RE DOING A

STATUTORY CONSTRUCTION BUT WHY

ISN'T THE ISSUE WHO GETS TO

BRING SOMETHING UP A MATTER OF

PROCEDURE?

>> I THINK THAT WOULD BE, YOUR

HONOR.

AND, I THINK, IT MAY, I THINK

THAT WOULD BE A LEGITIMATE

ARGUMENT.

AND MY, WISH FOR THIS COURT

WOULD BE THAT THIS COURT NOT

PUT JUDGES IN A POSITION OF

TAKING ADVERSARIAL POSITIONS TO

CRIMINAL DEFENDANTS?

I THINK THAT IS A MATTER OF

PROCEDURE.

AND I THINK THIS COURT SHOULD,

SHOULD HUE TO THAT LINE

AND STEP ACROSS

AND BECOME QUASI-PROSECUTORS.

THAT IS INAPPROPRIATE AND

DEMEANS THE JUSTICE SYSTEM.

>> I WILL ADDRESS THIS ISSUE

ABOUT THE DNA TESTING OR IS

THAT WHAT YOU PREPARED --

>> I AM PREPARED ON THAT.

THE COURT SEEMS TO UNDERSTAND

MY ARGUMENTS QUITE WELL ON

THAT.

I WOULD MORE PREFER TO DEAL

WITH RULE 131 IF I MAY, THE

STAY AWAY ORDERS.

IF THAT IS ACCEPTABLE.

>> IS THAT A DIFFERENT RULE?

>> THIS IS DIFFERENT RULE.

THIS IS RULE 3.131.

>> THAT'S WHAT YOU'VE BEEN

TALKING ABOUT?

>> NO, I'VE BEEN TALKING ABOUT

132, YOUR HONOR, PRETRIAL

DETENTION.

>> PRETRIAL RELEASE.

>> ON THE DNA ISSUE.

>> OKAY.

>> CAN THE JUDGE OR SHOULD THE

JUDGE BE ABLE TO ON BEHALF OF

THE DEFENDANT ORDER DNA

TESTING?

>> NO, WHEN THE DEFENDANT
DOESN'T WANT IT.
AND THAT'S JUST, IF THE
DEFENDANT KNOWS THERE IS
TESTABLE MATERIAL, AND SOMEONE
SUGGESTED SOMETIMES DEFENDANTS
KNOW THAT A TEST IS NOT IN
THEIR BEST INTEREST, BUT A
PLEA, IMMEDIATE PLEA THAT WILL
NOT BE DELAYED BY THIS TESTING
IS IN THEIR BEST INTEREST, THE,
THE DEFENDANT SHOULD HAVE THE
RIGHT TO WAIVE THAT, TO SAY NO,
I DON'T WANT THAT.
AND IT IS OFTEN, DNA HAS BEEN A
REAL BOMBSHELL IN THE COURTS
BECAUSE IT HAS SHOWN THAT SOME
PEOPLE WHO HAVE BEEN CONVICTED,
AND FOUND GUILTY THROUGH ALL
OUR BEST PROCEDURES WERE
ACTUALLY INNOCENT AND A REAL
WAKE-UP CALL TO US ALL.
BUT, AND HAS EXONERATED A LOT
OF PEOPLE'S LIBERTY.
WHEN DNA BECOMES A WAY TO
RESTRICTING SOMEONE'S LIBERTY,
YOU, DEFENDANT, MUST STAY
IN JAIL DEPENDING, WHERE OTHER
WISE YOU COULD PLEA OUT AND BE

RELEASED TODAY, THAT'S A

PROBLEM.

>> WELL THIS REALLY CAME OUT

ABOUT, AS YOU WERE AWARE NOT

ONLY CASES THAT ARE LITIGATED,

FULLY LITIGATED THE IMPORTANCE

OF DNA EVIDENCE BUT THE

EXPOSURE OF THOSE CASES IN

WHICH GUILTY PLEAS HAD BEEN

ENTERED.

AND THEN LATER DNA EVIDENCE

EXONERATED, SO IT CREATES THAT,

WHAT HAPPENS DOWN THE ROAD.

LET'S PLAY THIS ON OUT BECAUSE

IT COMES BACK ON COLLATERAL

REVIEW OR PETITIONS TO SET

ASIDE THE PLEA AND WITHDRAW THE

PLEA.

WHAT HAPPENS NOW?

SO THERE IS THIS MATERIAL.

AND THE DEFENDANT DOES NOT ASK

FOR IT AND THE JUDGE DOES NOT

ORDER.

PLAY IT ON OUT DOWN THE ROAD,

SHOULD HE DECIDE THAT HE WANTS

TO TEST LATER?

SEEMS TO ME IT JUST COMPLICATES

THIS COLLATERAL LOOK AT THESE

THINGS.

>> IT DOES COMPLICATE IT AND YOU MIGHT RESULT, THERE MIGHT RESULT IN MORE LITIGATION.

>> WOULDN'T THE ANSWER BE, ISN'T THE COLIQUY TO SAY, JUDGE FINDS OUT IF THERE IS DNA TO BE TESTED, AND THEN INQUIRES ABOUT WHAT IT IS, DOES, HAS IT BEEN TESTED, AND DOESN'T THE DEFENDANT THEN, I MEAN, AGAIN, I'M NOT SURE IF THIS IS IN THE COLIQUY BUT THE JUDGE SAYING, YOU HAVE NOW AFFIRMED THERE IS DNA TESTING.

ARE YOU SAYING THIS IS NOT ANYTHING THAT YOU BELIEVE WOULD EXONERATE YOU?

AND AT THAT POINT, WOULDN'T IT BE A WAIVER FOR THAT DEFENDANT?

>> IT SEEMS TO ME THAT MOST PRECIOUS CONSTITUTIONAL RIGHTS WE HAVE ARE ALL WAIVEABLE.

>> BUT WHAT ABOUT THE SITUATION WHERE, AGAIN WE'RE TALKING ABOUT, THERE IS A LOT OF PEOPLE BEING PUSHED THROUGH THE SYSTEM, AND REALLY, DNA, YOU KNOW, IF IT IS TESTED IT WOULD

SHOW INNOCENCE?

>> AND IT MIGHT.

BUT AT THE POINT WHERE

THE DEFENDANT IS MAKING A DECISION,

WE HAVE TO ULTIMATELY RESPECT

THAT PERSON'S DECISION.

MY DECISION, AND A LOT OF TIMES

DEFENDANTS ARE MAKING A

DECISIONS IF I PLEA TODAY, I

GET OUT TODAY AND THAT IS MORE

IMPORTANT TO ME.

>> SEEMS TO ME THAT IT COMES

BACK IN, YOU'RE STANDING THERE,

AS COUNSEL.

YOU DON'T KNOW WHAT IT'S GOING

TO SHOW.

SO YOU GIVE THIS ADVICE, DON'T

HAVE IT TESTED.

YET, SOMEWHERE DOWN THE ROAD,

HOW CAN YOU MAKE AND PROVIDE

EFFECTIVE ASSISTANCE OF COUNSEL

AND KNOWING, WORKING AS COUNSEL

CONTEMPLATED BY THE SIXTH

AMENDMENT AND ALL THAT LANGUAGE

WE DEAL WITH EVERY DAY, THAT

THIS EXISTS, BUT I'M NOT GOING

TO DO IT?

>> THERE ARE SO MANY SITUATIONS

LIKE THAT IN THE LIFE OF A

PUBLIC DEFENDER, YOUR HONOR.

WHERE, QUITE FRANKLY YOU KNOW

NOTHING ABOUT CASES, AND YOU

HAVE A DUTY TO CONVEY A PLEA

OFFER.

OFTEN A PLEA OFFER FOR CREDIT

TIME SERVED FOR IMMEDIATE

RELEASE.

AND THERE IS ALWAYS THAT

ETHICAL PROBLEM.

AND IT IS NOT RESTRICTED TO

THIS RULE.

AND, -- WON'T BE SOLVED BY THIS

RULE.

>> YOU DON'T SEE THAT AS --

>> I SEE IT AS A HUGE PROBLEM,

YOUR HONOR, BUT JUST MORE THAN

ENDEMIC, SYSTEMIC PROBLEM.

THIS RULE IS NOT THE PLACE TO

SOLVE THAT.

I WOULD LOVE FOR THIS COURT TO

SOLVE THAT PROBLEM, QUITE

FRANKLY.

THAT IS THE BANE OF MY

EXISTENCE MOST DAY IS.

I HAVE 30 SECONDS LEFT.

IF I COULD, GET BACK TO RULE

131.

WE JUST ASK THAT THIS COURT
INDICATE IN ITS RULES THAT AT
FIRST APPEARANCE, A JUDGE CAN
CONSIDER, THE STATUTORY
LANGUAGE, GOOD CAUSE IS SHOWN
AND JUSTICE REQUIRE, DOESN'T
HAVE TO TRACK THE STATUTORY
LANGUAGE, THAT THE ENTIRE COURT
HAS THE DISCRETION TO NOT ORDER
STAY AWAY ORDER.
GENERALLY HAPPEN WHEN THE
ALLEGED VICTIMS COME INTO FIRST
APPEARANCE.
UNDER THE ONLY OTHER WAY TO
MODIFY THAT IS UNDER 3.131(D).
AND THAT --
>> YOU JUST WANT TO TRACK THE
STATUTE ON THAT ONE?
>> YES.
AND D REQUIRES A SUBSEQUENT
MOTION LATER THAT WOULDN'T
HAPPEN AT FIRST APPEARANCE.
WHICH IS FRUSTRATING FOR
EVERYONE INVOLVED AND DELAYS
THE PROCESS.
I HAVE RUN OUT OF TIME.
I THANK YOU FOR YOUR PATIENCE
AND YOUR ATTENTION THIS

MORNING.

>> MADAM CHIEF JUSTICE, MAY

HAVE ONE MINUTE TO ADDRESS A

COUPLE OF THINGS.

REGARDING THE DNA, JUSTICE

LEWIS HAS HIT RIGHT ON THE

POINT.

IF THIS COURT WERE TO OVERRULE

ALL THE DISTRICT COURT OF

APPEALS CASE THAT ALLOWS A

DEFENDANT TO CHALLENGE A PLEA

THAT YOU HAVE GONE THROUGH AND

DONE SO MUCH WORK ON, AND THEN

THEY GO IN AND THEY CHALLENGE

THAT PLEA, AND WE HAVE PLEA

WRITTEN OUT FORMS AND WE HAVE

TRANSCRIPTS AND HAVE ALL THIS

THING AND THEY'RE STILL

PERMITTED TO ATTACK THAT PLEA,

SAYING THAT THEY MADE IT

INVOLUNTARILY OR COERCED OR

FORCED OR SOMETHING LIKE THAT,

I WOULD BUY THAT ARGUMENT.

I THINK THAT WE ARE CONTINUE TO

CREATE THIS ISSUE.

IT WILL COME UP AGAIN AND SOME

COURT IS GOING TO SAY, THIS IS

IMPORTANT.

IF HE VIOLATES IT WE'LL ALLOW

IT.

>> GUY GETTING CREDIT FOR TIME SERVED AND THE JUDGE DECIDES --

>> PRACTICAL, NO QUESTION.

NO QUESTION.

IT IS A REALLY PRACTICAL STICKY WICKET.

AS TO THE PRETRIAL DETENTION, THERE IS NO PLACE, I HAVE SCOURED THIS STATUTE AND OUR RULE PROVIDES THAT THE STATE ATTORNEY MAY FILE THIS MOTION.

THERE IS NO REQUIREMENT THAT THE STATE ATTORNEY FILE THE MOTION.

THERE IS NOT EVEN REQUIREMENT IN THE STATUTE THAT REQUIRES THE STATE ATTORNEY TO FILE THE MOTION.

BUT WHAT THE STATUTE DOES SAY IS THAT THE LEGISLATIVE INTENT OF THE PARTICULAR STATUTE IS THAT PERSONS POSING A THREAT TO THE SAFETY OF THE COMMUNITY SHOULD NOT BE RELEASED AND IT PUTS THE BURDEN ON THE COURT TO DETERMINE PRETRIAL DETENTION IF THE DEFENDANT AND UNDER 4(C)5,

IF THE DEFENDANT POSES A
THREAT TO THE COMMUNITY THE
COURT MAY SO CONCLUDE IF THAT
DEFENDANT APPEARS TO HAVE
COMMITTED A DANGEROUS CRIME AS
PUT IN THE STATUTE.
IT DOESN'T CRIER REQUIRE A
MOTION.
WE'RE TRYING TO FILL THAT CAP
BY THE RULE WHICH ALREADY
EXISTS.
>> THANK YOU VERY MUCH.
>> PERSONAL PRIVILEGE, LAST SIX
YEARS I'VE BEEN ON THE
COMMITTEE.
I CHAIRED IT TWICE.
THIS IS MY LAST APPEARANCE AS
CHAIR OF THAT COMMITTEE.
I'VE NOW BEEN APPOINTED TO
CIVIL RULES COMMITTEE AFTER
HAVING CHAIRED THE TRAFFIC
COMMITTEE.
I GUESS THEY WANT ME TO WREAK
HAVOC ON THE CIVIL RULES
COMMITTEE.
THANK Y'ALL VERY MUCH.
>> THANK YOU.
THANK YOU BOTH FOR YOUR
ARGUMENTS HERE TODAY.