

>> ALL RISE.

[BACKGROUND SOUNDS]

>> SUPREME COURT OF FLORIDA IS NOW IN SESSION.

PLEASE BE SEATED.

>> GOOD MORNING.

>> WE'RE IN PLANK V. STATE.

>> GOOD MORNING AND MAY IT PLEASE THE COURT.

MY NAME IS COLLEEN MULLEN ON BEHALF OF PETITIONER, NOEL PLANK.

I WOULD LIKE TO RESERVE FIVE MINUTES FOR REBUTTAL, PLEASE. THIS IS A CERTIFIED CONFLICT BETWEEN THE FIRST AND SECOND DISTRICT OF WHETHER A PERSON HAS THE RIGHT TO COUNSEL IN A DIRECT CRIMINAL CONTEMPT PROCEEDING. I ASK THAT THIS COURT HOLD THAT THERE IS THE RIGHT TO COUNSEL AND APPROVE THE DECISIONS IN WOODS AND--

[INAUDIBLE]

AND QUASH THE FIRST'S DECISIONS IN PLANK AND SAUNDERS.

>> BEFORE WE GET TO THAT, WHAT IF-- YOU'VE MADE AN ALTERNATIVE ARGUMENT THAT THIS WAS ACTUALLY NOT DIRECT CRIMINAL CONTEMPT. AND IT APPEARS THERE'S A LOT OF FACTS THAT WOULD SUPPORT THAT INCLUDING THAT, APPARENTLY, HE WAS REMOVED AFTER JURY SELECTION AND GIVEN A BREATHALYZER, AND SO THE-- SO IF WE FOUND THAT THIS WAS NOT DIRECT CRIMINAL CONTEMPT, HOW DOES THAT AFFECT, I MEAN, THE CONFLICT'S STILL THERE, BUT IT REALLY ISN'T ACTIVE AS TO THIS CASE, THE OTHER CASES.

>> I THINK THE COURT CAN STILL FIND THAT THIS IS DIRECT CRIMINAL CONTEMPT, BUT RATHER THAT IT WAS NOT AN IMMEDIATE PROCEEDING WHICH IS WHAT WAS CONTEMPLATED IN THE OLIVER DECISION.

AND THAT WOULD MAKE THE

EXCEPTION MUCH GREATER--

>> I DON'T UNDERSTAND,  
EXPLAIN-- I DON'T UNDERSTAND  
WHAT YOU'RE SAYING.

>> UNDER THE OLIVER EXCEPTION  
WHERE IMMEDIATE PROCEEDINGS  
PRESERVE THE DIGNITY OF THE  
COURT ARE NECESSARY, THE  
PROCEEDING THAT'S CONTEMPLATED  
UNDER RESPONDENT'S ARGUMENT THAT  
THERE IS NO RIGHT TO COUNSEL,  
THAT COULD BE AN ARGUMENT FOR  
THIS CASE BECAUSE MR. PLANK WAS  
NOT IMMEDIATELY HELD IN  
CONTEMPT, AND THE HEARING WAS  
NOT HELD IMMEDIATELY, IT WAS  
HELD TWO HOURS LATER.

>> LET'S SEE IF WE CAN--

[INAUDIBLE]

WHAT ARE THE ACTIONS OF--

[INAUDIBLE]

TOOK PLACE IN FRONT OF, ISN'T  
THAT WHAT A DIRECT CRIMINAL  
CONTEMPT IS ABOUT?

THOSE ACTIONS THAT TOOK PLACE IN  
FRONT OF THE JUDGE?

>> RIGHT.

THE FACT THAT HE FELL ASLEEP  
DURING JURY SELECTION--

>> I'M SORRY?

>> I'M SORRY.

THE FACT THAT HE FELL ASLEEP  
DURING JURY SELECTION COULD  
BE--

>> AND SHE SAID SHE OBSERVED  
THAT?

>> YES.

>> OKAY.

WHAT ELSE?

>> AND SHE ALSO THEN OBSERVED HE  
WAS DISTRACTING TO THE OTHER  
JURORS AND ALSO THAT HIS--

>> AND WAS THAT BASED ON HER  
OBSERVATION OR WHAT THE OTHER  
JURORS SAID?

>> I BELIEVE IT WAS BASED ON  
BOTH, WHAT SHE OBSERVED AND WHAT  
OTHER JURORS SAID.

AND IN ADDITION, THE FACT THAT  
HE WAS NOT AS RESPECTFUL AS HE

COULD HAVE BEEN DURING  
QUESTION--

>> OKAY, SO--

>> WHAT QUESTION--

>> WOULD THOSE THINGS HAVE LED  
HER TO HOLD HIM IN CONTEMPT, THE  
FACT THAT HE FELL ASLEEP, WAS  
DISTRACTING TO THE OTHER JURORS  
AND NOT AS RESPECTFUL TO HER AS  
HE COULD HAVE BEEN, WOULD THOSE  
THREE THINGS HAVE BEEN ENOUGH TO  
HOLD HIM IN DIRECT CRIMINAL  
CONTEMPT?

>> I BELIEVE THAT THEY COULD  
HAVE BEEN, BUT I THINK THAT  
BECAUSE THE BROADER ISSUE HERE  
IS WHETHER OR NOT IN DIRECT  
CRIMINAL CONTEMPT PROCEEDINGS HE  
HAS THE RIGHT TO AN ATTORNEY,  
THAT IS WHAT SHOULD HAVE BEEN  
VINDICATED AT THE FIRST DISTRICT  
COURT RATHER THAN A HOLDING OF  
WHETHER OR NOT HE WAS IN DIRECT  
CRIMINAL--

>> WELL, OKAY.

YOU'RE, I KNOW YOU'RE HERE FOR A  
BROADER ISSUE, BUT WE'RE ALSO  
LOOKING AT THIS CASE AND WHAT  
THIS CASE HOLDS VERSUS OLIVER  
VERSUS PERRY, THESE OLD SUPREME  
COURT CASES.

LET'S TAKE A SITUATION WHERE THE  
JUROR IN RESPONSE TO THE JUDGE'S  
QUESTIONS STARTS TO USE  
PROFANITY.

>> RIGHT.

>> AND IN THE PROCESS IS,  
CONTINUES TO USE PROFANITY.  
WHAT-- UNDER YOUR THEORY THAT,  
WOULD THE JUDGE NOT HAVE THE  
ABILITY TO SAY I FIND YOU IN  
DIRECT CRIMINAL CONTEMPT BECAUSE  
YOU HAVE SAID THIS, AND I AM  
REMOVING YOU FROM THE JURY PANEL  
UNLESS THEY FIRST APPOINTED AN  
ATTORNEY OR SAID YOU HAVE THE  
RIGHT TO AN ATTORNEY?  
HOW WOULD THAT-- IN A  
SITUATION, I DON'T KNOW THAT  
THIS IS THE SITUATION, BUT I

WANT TO UNDERSTAND FROM A POINT  
OF VIEW OF THE NARROW CLASS OF  
DIRECT CRIMINAL CONTEMPT--

>> RIGHT.

>>-- WHICH IS SOMEONE'S BEING  
DISRUPTIVE TO THE COURT.

THE COURT HAS TO ACT ON IT  
IMMEDIATELY--

>> RIGHT.

>>-- TO REMOVE THAT OBSTRUCTIVE  
BEHAVIOR.

HOW WOULD STOPPING AND SAYING,  
AND I'M GOING TO FIND YOU AN  
ATTORNEY, HOW WOULD THAT WORK IN  
MY HYPOTHETICAL?

>> IN YOUR HYPOTHETICAL THEY  
WOULD REMOVE THEM FROM THE  
COURTROOM, POSSIBLY HOLD THEM UP  
TO 4 HOURS AND A-- 24 HOURS AND  
APPOINT AN ATTORNEY--

>> THAT ISSUE OF THE PROCEDURE.  
SO YOU'RE SAYING IT WOULD BE IF  
THE JUDGE IS GOING TO ONLY HOLD  
THEM FIRST FOR 24 HOURS OR THE  
JUDGE IS GOING THE SAY, WELL, I  
AM GOING TO HAVE YOU COME BACK  
TOMORROW, AND I'M GOING TO HAVE  
YOU PERFORM COMMUNITY SERVICE OR  
A FINE--

>> RIGHT.

>> BUT WHERE IS IT THAT JUST  
THEY CAN HOLD THEM FOR 24 HOURS  
WITHOUT APPOINTING AN ATTORNEY?  
WHERE ARE WE GETTING THAT FROM?  
BECAUSE I DIDN'T SEE THAT IN  
YOUR--

>> IF THE JUDGE CONTEMPLATES  
ONLY COMMUNITY SERVICE OR A  
FINE, THAT DOES NOT INVOLVE ANY  
RESTRICTIONS OF LIBERTY FOR THE  
PERSON BEING HELD AT WHICH POINT  
THEY DON'T HAVE THE RIGHT TO AN  
ATTORNEY.

>> WELL, BUT THEY HAVE--

[INAUDIBLE]

>> RIGHT.

[INAUDIBLE]

>> CORRECT.

>> THAT DOES NOT REQUIRE A  
LAWYER?

>> I'M SORRY?  
>> THAT DOES NOT REQUIRE THE APPOINTMENT OF A LAWYER?  
>> NOT UNDER THE STANDARDS OF THIS COURT IN KELLY AND FOLLOWING ANY, ANY OF THE LAWS OF THE STATE OF FLORIDA. ALL OF THEM, ALL OF WHICH HAVE EXCEPTIONS FOR WHERE THERE IS NO INCARCERATION.  
>> I'M TRYING TO PICTURE, YOU KNOW, WHAT GOES ON IN A COURTROOM BECAUSE I'VE BEEN THERE QUITE A FEW YEARS. AND THESE DISRUPTIONS DON'T OCCUR OFTEN.  
>> RIGHT.  
>> BASICALLY AN ABERRATION.  
>> RIGHT.  
>> AND MOST JUDGES HANDLE IT QUITE WELL.  
I DON'T RECALL SEEING A CONTEMPT CASE SINCE I'VE BEEN HERE. AND, BUT HERE'S MY, WHAT I'M PICTURING--  
>> WE LOCK 'EM UP WITHOUT LAWYERS, RIGHT?  
[LAUGHTER]  
>> THEY'RE STILL IN CUSTODY. YOU HAVEN'T HEARD FROM 'EM SINCE.  
BUT HERE'S WHAT I'M PICTURING. I'M PICTURING SOMETHING HAPPENING IN THE MIDDLE, SAY, A MEDICAL MALPRACTICE CASE.  
>> OKAY.  
>> YOU'RE THREE WEEKS INTO IT, GOT A JURY, TIRED, EVERYBODY'S LISTENING TO IT. AND YOU HAVE SOMEONE WHO BECOMES DISRUPTIVE IN COURT--  
>> RIGHT.  
>>-- AND REFUSES TO OBEY THE JUDGE'S ORDER.  
>> RIGHT.  
>> JUDGE SAYS DON'T DO THAT, KEEPS DOING IT. DON'T DO THAT, KEEPS DOING IT. GOES ON AND ON.  
WHAT YOU'RE SAYING IS AT THIS

JUNCTURE THE COURT CAN NO LONGER  
ASK THE THREE MAGIC QUESTIONS,  
YOU KNOW, THAT A JUDGE HAS TO GO  
THROUGH FOR DIRECT CRIMINAL  
CONTEMPT--

>> RIGHT.

>> EVEN THE OPPORTUNITY TO  
PRESENT MITIGATION AND SO ON AND  
ON.

THE JUDGE CAN NO LONGER DO THAT.  
AS SOON AS THE JUDGE SAYS I AM  
NOW CONSIDERING HOLDING YOU IN  
DIRECT CRIMINAL CONTEMPT, AT  
THAT POINT IN TIME YOU'RE SAYING  
THE JUDGE NEEDS APPOINT COUNSEL.

>> THEY SHOULD APPOINT  
COUNSEL--

>> OKAY.

>> AND THEY SHOULD--

>> SO THEN WHAT HAPPENS?

>> I THINK IT'S ACTUALLY BETTER  
FOR THE FLOW OF THE TRIAL  
CURRENTLY UNDERWAY TO REMOVE THE  
ALLEGED CONTEMPTOR FROM THE  
COURTROOM--

>> WELL, LET'S SAY THE  
CONTEMPTOR IS STILL TESTIFYING,  
AND YOU NEED HIM TO KEEP  
TESTIFYING, SAY HE'S THE ONE--  
[INAUDIBLE]

>> I'M SORRY?

>> A DISRUPTIVE DOCTOR  
TESTIFYING, DOESN'T WANT TO  
ADHERE NO THE RULES OF THE  
COURT, WHATEVER.

I MEAN, THE GUY'S STILL THERE.  
WHAT DO I DO?

DO I STOP THE TRIAL, SEND FOR  
QUESTION HIM OR HER ABOUT THE  
INDIGENCY STATUS, AND IF HE OR  
SHE CANNOT AFFORD A LAWYER,  
APPOINT THE PUBLIC DEFENDER'S  
OFFICE AS BY STATUTE?

>> YES.

>> FIRST THING YOU'RE GOING TO  
DO, JUDGE, I NEED A TRANSCRIPT  
OF WHAT HAPPENED.

>> RIGHT.

>> ARE YOU GOING TO WANT  
DISCOVERY?

>> IT'S NOT ALLOWED FOR UNDER THE RULE--  
>> IF JAIL IS CONTEMPLATED, ISN'T DISCOVERY ALLOWED?  
>> YES, YOUR HONOR--  
>> WHICH IS WHY WE'RE APPOINTING COUNSEL.  
>> RIGHT.  
>> SO LET'S SAY DISCOVERY IS ALLOWED.  
WHAT WOULD YOU WANT TO DO?  
>> I WOULD WANT TO KNOW MORE ABOUT WHY THE DOCTOR WAS ACTING THE WAY HE WAS.  
BUT THE MAIN QUESTION HERE IS WHETHER OR NOT COUNSEL IS PROVIDED FOR UNDER THE RULES AND UNDER THE CONSTITUTION, AND THIS IS A MUCH BROADER RULE AND BROADER RIGHT THAN THE RULES OF DISCOVERY AND CRIMINAL--  
>> WELL, JUST MY WHOLE CONCERN IS GOING BACK TO THE SUPREME COURT OPINIONS THAT ESTABLISH THE JUDGE'S OBLIGATION, PERHAPS, TO SUMMARILY HOLD SOMEBODY IN CONTEMPT.  
>> RIGHT.  
>> THIS TAKES AWAY FROM THAT.  
>> RIGHT.  
>> I MEAN, AT THAT MOMENT THE JUDGE CAN NO LONGER SAY I FIND THAT YOU'RE IN CONTEMPT, I FIND YOUR EXPLANATIONS TO BE UNACCEPTABLE, I HEREBY SENTENCE YOU TO TEN DAYS IN THE COUNTY JAIL.  
THAT'S OVER UNDER YOUR ARGUMENT. THAT COULD NEVER HAPPEN ANYMORE.  
>> WELL, BUT THE FACT IS THAT SUMMARY PROCEEDINGS ARE HELD ALL THE TIME IN COURTS SUCH AS FIRST APPEARANCES OR ARRAIGNMENTS. AND AT THOSE POINTS AND THOSE JUNCTIONS, ATTORNEYS ARE APPOINTED FOR PEOPLE WHO ARE INDIGENT LOOKING WHO MAY BE INCARCERATED, AND THOSE ARE JUST AS MARRY PROCEEDINGS-- SUMMARY PROCEEDINGS AS A DIRECT

CRIMINAL--

>> WELL, BUT THEY'RE PLANNED.

>> RIGHT.

>> I MEAN, THE JUDGE KNOWS THIS IS GOING TO HAPPEN, AND PEOPLE ARE GOING TO BE THERE, AND PEOPLE CAN BE ON DECK.

BUT WITH A DIRECT CRIMINAL CONTEMPT, BY NATURE IT IS UNPLANNED, IT IS UNEXPECTED.

>> RIGHT.

>> IT IS OUT OF THE ORDINARY. AND IT SEEMS TO ME THE CHIEF JUSTICE HAS KIND OF HIT ON A CORE POINT HERE ABOUT HOW YOU'RE REALLY GOING TO HAVE A SUMMARY PROCEDURE.

>> RIGHT.

>> AND HAVE THE IMPOSITION OF DIRECT CRIMINAL CONTEMPT SUMMARILY WHEN YOU'VE GOT TO GO GET A PUBLIC DEFENDER POTENTIALLY, OR A MORE COMPLICATED MATTER, YOU'VE GOT TO GO GET A PRIVATE COUNSEL.

>> RIGHT.

>> AND SO IT SEEMS TO TAKE THOSE CIRCUMSTANCES SEEM TO TAKE THIS OUT OF SOMETHING THAT COULD REALLY BE CONSIDERED A SUMMARY PROCEDURE, ISN'T THAT RIGHT?

>> IT WOULD BE LESS IMMEDIATE BUT NOT NECESSARILY ANY LESS SUMMARY BECAUSE THE SUMMARY PROCEEDING COULD BE SOMETHING WHERE THERE ARE NO OPENING AND CLOSING STATEMENTS OR THINGS LIKE THAT.

IN A DIRECT CRIMINAL PROCEEDING--

>> SO IT'S NOT SO MUCH, IT'S NOT SO MUCH WHEN IT OCCURS AS HOW IT OCCURS WHEN IT DOES CAN.

OKAY.

LET ME ASK YOU THIS, ANOTHER QUESTION I HAVE.

IS THE RIGHT TO COUNSEL A SUBSTANTIVE RIGHT?

>> YES.

>> OKAY.



IT SEEMS TO ME THAT IN LARGE PART YOUR ARGUMENT HERE HINGES ON OUR RULES OF PROCEDURE.

>> RIGHT.

>> IS THAT CORRECT?

>> YES.

>> WELL, HOW CAN OUR RULES OF PROCEDURE BE READ IN SUCH A WAY THAT THEY BRING IN EXISTENCE A SUBSTANTIVE RIGHT IN A CONTEXT?

>> THEY DON'T.

IT COMES FROM THE FLORIDA CONSTITUTION AND THE FLORIDA STATUTE WHICH BOTH PROVIDE ALSO FOR COUNSEL, ESPECIALLY FOR INDIGENT DEFENDANTS.

AND THE RULE OF PROCEDURE--

>>'S THAT IN THE STATUTE? --

WHERE'S THAT IN THE STATUTE?

>> FLORIDA STATUTE 2751 ALLOWING FOR THE--

>> WELL, LET ME ASK YOU THIS, THAT'S NOT ONLY DEALING WITH INDIGENTS--

>> YES.

>> BUT IS IT YOUR POSITION THAT ACTUALLY CREATES A SUBSTANTIVE RIGHT FOR COUNSEL THAT EXTENDS TO THE NONINDIGENTS AS WELL?

>> IT THINK IT'S THE LEGISLATURE'S INTENTION THAT ALL DEFENDANTS WHO MAY POSSIBLY BE INCARCERATED LOSE THEIR LIBERTY WOULD HAVE COUNSEL AT EVERY PROCEEDING AGAINST THEM.

>> WELL, WHY COULDN'T THAT BE VIEWED AS RATHER THE LEGISLATURE'S MAKING, ESTABLISHING A FRAMEWORK FOR THE PROVISION OF COUNSEL, THE INDIGENTS WHENEVER THERE IS A SUBSTANTIVE RIGHT TO COUNSEL?

>> BUT THERE IS THE SUBSTANTIVE RIGHT UNDER THE FLORIDA TUESDAY TO COUNSEL IN ALL CASES WHERE INCARCERATION MAY RESULT.

SO THE LEGISLATURE MERELY WAS USING SECTION 25--

>> BUT ULTIMATELY YOUR POSITION-- SO YOU'RE SAYING THE

SUBSTANTIVE RIGHT DOESN'T COME FROM THE RULES OF COURT?

>> NO, IT COMES--

>> DOESN'T COME FROM THE STATUTE EITHER.

>> IT MANIFESTS ITSELF IN THE STATUTE AND PROVIDES--

>> BUT ULTIMATELY, THE SUBSTANTIVE RIGHT COMES NECESSARILY FROM THE TEXT OF THE CONSTITUTION.

>> YES, YOUR HONOR.

>> WHAT HAPPENS IF THE PERSON WHO THE JUDGE IS CONSIDERING HOLDING IN CONTEMPT HAPPENS TO BE A LAWYER IN THE COURTROOM? A DISRUPTIVE LAWYER IN THE COURTROOM?

A LAWYER THAT KEEPS DISOBEYING THE JUDGE'S ORDER OVER AND OVER AND OVER AGAIN AS IT HAPPENS OFTEN?

>> RIGHT.

>> SO WHAT-- AND I GUESS I WOULD HAVE TO CONDUCT UNDER YOUR THEORY AN INDIGENCY HEARING ON THIS LAWYER--

>> RIGHT.

>> BECAUSE HE MAY NOT WANT TO REPRESENT HIMSELF OR HERSELF. SO WHAT HAPPENS THERE?

DOES-- ASSUMING THAT I FIND THAT THIS LAWYER'S NOT INDIGENT, DOES THIS PERSON HAVE A RIGHT TO COUNSEL AS WELL IN.

>> YES, YOUR HONOR.

JUST AS A CRIMINAL OR JUST AS AN ATTORNEY WOULD HAVE THE RIGHT TO COUNSEL IN ANY OTHER CRIMINAL CASE--

>> SO LET'S SAY THAT LAWYER DECIDES TO REPRESENT HIMSELF OR HERSELF--

>> YES.

>>-- AND WE DO THE SUMMARY PROCEEDINGS THAT YOU REQUEST AT A LATER TIME AFTER THE MEDICAL MALPRACTICE CASE IS OVER--

>> RIGHT.

>> THAT LAWYER WOULD HAVE AN

OPPORTUNITY TO CONDUCT  
DISCOVERY, TO SEE-- INCLUDING,  
PERHAPS, EVEN DEPOSING THE  
JUDGE, WOULDN'T HE?

>> I BELIEVE SO, YES, SIR.

>> I MEAN, I DON'T KNOW.

I'M ASKING YOU, BECAUSE THE  
JUDGE IS THE ONE WHO MAY HAVE  
BEEN INSULTED, THE JUDGE IS THE  
ONE THAT FELT SOMEHOW THE  
COURT'S DIGNITY AND SO ON HAS  
BEEN VIOLATED.

WOULD THAT LAWYER HAVE A RIGHT  
TO QUESTION HOW I FELT ABOUT  
THOSE THINGS?

I'M JUST, I'M WORRIED ABOUT THE  
CAN OF WORMS THAT WE'RE GOING TO  
OPEN HERE.

>> RIGHT.

BUT THE CAN OF WORMS THAT MAY BE  
OPENED BY NOT ALLOWING ATTORNEYS  
TO REPRESENT DEFENDANTS WHO MAY  
HAVE THEIR LIBERTY TAKEN AWAY IS  
A MUCH WORSE CAN OF WORMS.

THE POSSIBLE DELAYS THAT ARE  
ASSOCIATED WITH THIS DISCOVERY  
AND TAKING DEPOSITIONS AREN'T  
QUITE THE SAME AS TAKING AWAY--

>> WELL, WE DON'T HAVE TO, YOU  
KNOW, AND I APPRECIATE YOUR  
ANSWERING THESE QUESTIONS.

WE'RE TALKING-- WHAT I HEARD  
YOU SAY EARLIER IS YOU'VE GOT A  
CONTEMPT OCCURRING IN FRONT OF A  
JUDGE.

>> RIGHT.

>> AND YOU AGREE THAT THE JUDGE  
OUGHT TO HAVE THE ABILITY TO  
SUMMARILY ADDRESS IT BY REMOVING  
THAT PERSON FROM THE COURTROOM  
AND HAVING THAT PERSON TAKEN  
INTO CUSTODY.

>> YES.

>> OKAY.

IN THIS CASE THIS JUROR WHO  
SHOWED UP AND AS FAR AS I CAN  
SEE REALLY DIDN'T-- HE WAS  
DRUNK, APPARENTLY--

>> YES.

>> BUT HE WAS SLEEPING WHETHER

THAT'S DISRUPTIVE, AND HE'S  
TAKEN AWAY.  
JURY SELECTION HAS ALREADY BEEN  
COMPLETED--  
>> YES.  
>> HE'S THERE FOR AN HOUR, COMES  
BACK IN HANDCUFFS--  
>> RIGHT.  
>> AND IS THAT ESTABLISHED IN  
THE RECORD THAT HE'S NOW IN  
HANDCUFFS?  
>> IT-- HE STATES IN THE RECORD  
THAT HE CAN'T GET CAN UP WITH  
THESE BRACELETS ON, WHICH I TOOK  
TO MEAN HE WAS WEARING  
HANDCUFFS.  
>> HE WAS REQUIRED TO BE, TO  
TAKE A BREATHALYZER TEST.  
>> RIGHT.  
>> NOBODY TOLD HIM HE DIDN'T  
HAVE THE-- HE HAD A RIGHT TO  
REFUSE IT, I'M ASSUMING.  
AND NOW HE'S STILL DRUNK, SHE  
APPARENTLY THINKS, AND THEY ASK  
HIM WHAT EVIDENCE DO YOU HAVE  
THAT WOULD BE MITIGATING?  
>> RIGHT.  
>> IT'S-- SO YOU'RE SAYING, I  
MEAN, SO THIS CASE AS FAR AS  
THIS EXAMPLE OF THIS DISRUPTING  
THE COURT, I MEAN, I SORT OF  
AGREE, BUT I'M CONCERNED ABOUT  
WHAT YOUR ANSWERS ARE.  
I DON'T SEE WHY THERE WOULD HAVE  
TO BE DISCOVERY TAKEN OR  
ANYTHING OTHER THAN THIS  
OCCURRED--  
>> RIGHT.  
>> IT'S EITHER CONTEMPT OR NOT  
TO, AND WHAT'S THE PROPER  
PUNISHMENT?  
AND THE PUNISHMENT, THE JUDGE--  
HE IS SOMEBODY THAT HAS A  
DRINKING PROBLEM--  
>> RIGHT.  
>> AND YOU'RE SAYING THAT COULD  
BE DONE 4 HOURS, 24 HOURS, NOT  
DELAYED.  
>> IT'S NOT PROVIDED IN THE  
RULES THAT IT COULDN'T BE DONE

IN A SHORT AMOUNT OF TIME AS EXACTLY YOUR POINT, THAT THE ONLY THINGS THAT REALLY NEED TO BE DISCOVERED WOULD BE WHETHER OR NOT IT WAS CONTEMPT, AND ANY MITIGATING OR EXCUSING CIRCUMSTANCES WHICH ARE PROVIDED FOR UNDER--

>> SHE'S GOT TO INFORM HIM OF THE CHARGES--

>> RIGHT.

>> WHICH, AND THEN HE'S GOT TO BE ABLE TO RESPOND TO THEM.

>> RIGHT.

AND THE RIGHT TO RESPOND WITHOUT THE RIGHT TO AN ATTORNEY IS ALMOST MEANINGLESS FOR SOMEONE WHO'S NOT LEARNED IN THE SCIENCE OF LAW.

>> WELL, PLUS IS DRUNK AT THE TIME TOO.

>> YES, YOUR HONOR.

>> YOUR POSITION, JUST SO I'M CLEAR ANSWERING JUSTICE PARIENTE'S QUESTIONS, IS THE RIGHT TO COUNSEL WOULD ENCOMPASS ONLY A LAWYER APPEARING AT THE TIME THAT THE JUDGE IS CONSIDERING WHETHER OR NOT TO ADJUDICATE HIM AND SENTENCE THE PERSON?

>> THAT'S THE ONLY QUESTION BEFORE THE COURT RIGHT NOW, IS WHETHER OR NOT--

>> WELL, I UNDERSTAND THAT, BUT WE'VE GOT A BIGGER QUESTION HERE.

YOU'RE TALKING ABOUT APPOINTING COUNSEL.

IS COUNSEL'S JOB ALSO TO LOOK INTO WHETHER OR NOT THE ACTUAL ACTIONS WERE CONTEMPTUOUS PURSUANT TO LAW--

>> RIGHT.

>> AND THEN ALSO TO REPRESENT HIM AS FAR AS THE SENTENCING? BECAUSE THAT WOULD REQUIRE, OBVIOUSLY, DISCOVERY.

>> I DON'T KNOW THAT IT NECESSARILY WOULD REQUIRE

DISCOVERY OTHER THAN THE  
TRANSCRIPT.  
BECAUSE FOR DISTRICT CRIMINAL  
CONTEMPT, ALL THAT IS ALLOWED,  
ALL THAT CAN BE USED AS EVIDENCE  
IS WHAT THE JUDGE SAW OR HEARD.  
IN THIS CASE JUDGE DEMPSEY DID  
NOT SEE OR HEAR MR. PLANK  
STATING HE INTENTIONALLY CAME TO  
COURT DRUNK--

>> BUT THAT'S WHERE WE STARTED  
WHICH IS WHY THIS IS PROBABLY  
NOT A DIRECT CRIMINAL CONTEMPT  
CASE WHICH POINTS OUT SOME OF  
THE PROBLEMS WHERE YOU'RE REALLY  
TRYING TO BALANCE THIS IDEA LIKE  
IN TERRY WHO, BY THE WAY, WAS A  
LAWYER.

>> RIGHT.

>> THE 1888 CASE.  
THE GUY WAS A LAWYER WHO  
ASSAULTED A MARSHAL.

>> RIGHT.

>> THAT'S WHAT HE DID.  
AND YOU'RE BALANCING THESE  
IMMEDIATE NEED WHO, TO PUNISH AN  
AFFRONT TO THE DIGNITY OF THE  
COURT VERSUS WHETHER YOU'RE  
GOING TO INCARCERATE SOMEONE UP  
TO SIX MONTHS IN JAIL.

>> THAT'S CORRECT.

>> SO LET ME SEE IF I UNDERSTAND  
YOUR BOTTOM LINE HERE.  
YOU CAN HAVE A SUMMARY CONTEMPT  
PROCEEDING WITHOUT A LAWYER IF  
YOU'RE NOT GOING TO INCARCERATE  
THEM.

>> CORRECT.

>> OKAY.

BUT IF YOU'RE GOING TO EVEN  
INCARCERATE THEM FOR A DAY, YOU  
MUST APPOINT A LAWYER.

>> CORRECT.

>> DO YOU HAVE--

>> I THOUGHT YOU SAID THEY COULD  
STAY FOR 24-- THAT'S A DAY IN  
MY-- I THOUGHT 24 HOUR IS THE  
DAY.

>> YES.

>> I'M LOOKING AT THE

PRACTICAL--

>> OH, SO YOU CAN DO 24 HOURS.

>> WOULD YOU HAVE TO ARTICULATE THAT AHEAD OF TIME, OKAY?

I AM NOT CONSIDERING HOLDING YOU IN CONTEMPT, BUT IF I DO, I'M NOT GOING TO THROW YOU IN JAIL, SO FORGET A LAWYER.

>> RIGHT.

>> TELL ME WHY I SHOULD NOT HOLD YOU IN CONTEMPT, SHOW ME MITIGATION, BLAH, BLAH, BLAH.

>> CORRECT.

>> YOU WOULD HAVE TO SAY THAT UP FRONT, THAT'S WHAT YOU'RE SAYING.

>> YES.

>> BECAUSE OTHERWISE THE PERSON WOULD NOT KNOW WHAT THE JUDGE WAS THINKING AND WOULD ASK A LAWYER ANYWAY.

>> YES.

>> AND IF THE CONTENDER CONTINUES IN HIS CONTEMPTUOUS BEHAVIOR AS OPPOSED TO APOLOGIZING FOR WHAT HE-- THEN AT THAT POINT IT MAY BE THAT THE JUDGE SAYS, WELL, I AM NOW CONSIDERING A PRISON-- A JAIL SENTENCE FOR YOU OF UP TO SIX MONTHS.

>> RIGHT.

>> THAT MAY SOBER THAT PERSON UP REAL QUICKLY.

[LAUGHTER]

AS FAR AS--

>> MAYBE NOT.

>> NO.

[LAUGHTER]

YOU'VE GOT TO BE THERE.

IT DOESN'T WORK THAT WAY.

>> I SEE THAT I'M OUT OF TIME--

>> WHAT I'LL DO IS I'LL GIVE YOU A COUPLE OF MINUTES WHEN YOU COME BACK IN REBUTTAL.

>> I APPRECIATE THAT.

>> ACTUALLY, I JUST HAD ONE OTHER-- HOW DID THE PUBLIC DEFENDER'S OFFICE GET INVOLVED IN THIS CASE?

IS THAT IN THE RECORD?  
YOU'RE REPRESENTING, YOU KNOW,  
THE JUDGE SAID YOU HAVE 30 DAYS  
TO APPEAL WHICH IS PRETTY FUNNY  
CONSIDERING IT'S A 30-DAY  
SENTENCE.  
>> RIGHT.  
>> AND THEN APPARENTLY MITIGATES  
IT AFTER 15 DAYS.  
>> RIGHT.  
>> AND NOW THE PUBLIC DEFEND  
OR'S THERE.  
DO WE KNOW ANYTHING ABOUT-- SO  
THE PUBLIC DEFENDER TAKES THE  
POSITION THAT HE HAD A RIGHT TO  
COUNSEL FOR APPEAL.  
>> RIGHT.  
>> BUT OR THAT THEY JUST JUMPED  
IN THERE.  
>> ALL THAT'S IN MY RECORD IS  
THAT ONE OF THE PEOPLE IN CHARGE  
OF OUR OFFICE FILED THE APPEAL  
ON BEHALF OF MR. PLANK.  
AND THAT--  
>> WE DON'T KNOW HOW.  
BUT THERE WAS A PUBLIC DEFENDER  
ACTUALLY IN THE, APPARENTLY, AND  
AN ASSISTANT STATE ATTORNEY IN  
THE COURTROOM WHEN ALL THIS WAS  
GOING ON.  
>> THAT'S WHAT'S IN THE RECORD,  
ALTHOUGH I'M NOT CERTAIN THAT'S  
ACTUALLY CORRECT EITHER.  
THANK YOU.  
>> THANK YOU.  
>> MAY IT PLEASE THE COURT,  
VIRGINIA HARRIS ON BEHALF OF THE  
STATE OF FLORIDA.  
I'D LIKE TO STATE FROM THE  
OUTSET THAT THE INDIVIDUAL FACTS  
OF PETITIONER'S CASE ARE NOT THE  
PRIMARY CONCERN OF STATE.  
>> I KNOW, BUT IT'S REALLY-- I  
APPRECIATE IT'S NOT YOUR PRIMARY  
CONCERN, BUT IT'S HARD WHEN  
WE'RE LOOKING TO SAY, AND I  
APPRECIATE WHAT JUSTICE LABARGA  
AS A TRIAL JUDGE IS SAYING, THAT  
WHEN YOU'VE GOT A DISOBEDIENT  
WITNESS OR DEFENDANT OR JUROR,



YOU'VE GOT TO BE ABLE TO DEAL WITH THAT IN A SUMMARY WAY. AND WE TALK ABOUT THIS BEING A NARROW QUEST.

WHAT I'M CONCERNED ABOUT FOR THIS CASE IS THAT YOU'VE GOT A JUROR WHO MAY HAVE BEEN SLEEPING AND NOW FINDS HIMSELF 30 DAYS INCARCERATED IN JAIL FOR WHAT IS, TO ME, CLEAR FROM THE TIME HE-- HE DOESN'T REALLY UNDERSTAND WHAT'S GOING ON.

I DON'T UNDERSTAND WHY THE FACTS WOULD BE-- I THINK THE STATE WOULD BE SAYING SOMETHING DIFFERENT IF THE FACTS WERE THAT THE JUROR PUNCHED OUT THE BAILIFF IN FRONT OF JUDGE, OKAY? YOU'D BE WANTING TO TALK ABOUT THOSE FACTS.

>> WILL WELL, YOUR HONOR, TO BE HONEST-- AND I'LL TELL YOU UP FRONT THAT MY BACKGROUND IS SIMILAR TO JUSTICE LABARGA'S-- WHAT STRUCK ME ABOUT WHAT PETITIONER DID AND BOTHERED ME AS A LONGTIME TRIAL ATTORNEY IS THAT HE WAS DISRUPTING THE TRIAL OF ANOTHER PERSON AND INFRINGING ON THAT PERSON'S RIGHTS.

AND THE JUDGE DIDN'T JUST SAY YOU'RE BEING DISRESPECTFUL BECAUSE YOU'RE DRUNK AND FALLING ASLEEP, SHE SAID THAT HE WAS DISTRACTING THE OTHER JURORS.

>> SHE SAID-- HERE'S THE PROBLEM WHAT HAPPENS, IS JURY SELECTION'S GOING ON.

WE DON'T HAVE-- WE ONLY HAVE HIS ANSWER.

SO IF SOMEBODY ON A JURY IS BEING DISRESPECTFUL AND DISTRACTING, DON'T YOU THEN CALL THAT JUROR UP AND SAY I AM-- AND THE ATTORNEYS WHO ARE REPRESENTING EITHER SIDE-- I AM GOING TO REMOVE THIS JUROR FROM THE COURTROOM NOW?

I WILL DEAL WITH HIM LATER. THAT'S NOT WHAT HAPPENED.

JURY SELECTION WENT FROM 11:00  
TO 2:00.

HE WAS NOT, FROM THE RECORD,  
REMOVED UNTIL AFTER-- OR THERE  
ANYTHING IN THE RECORD THAT SAYS  
HE WAS REMOVED DURING--

>> IT'S A LITTLE CONFUSING.

THE JUDGE'S ORDER SAYS HE WAS  
REMOVED DURING A BREAK AT 2:55.  
AND IT REFLECTS THAT THE JURORS  
COULD NOT GET OUT BECAUSE THEY  
HAD TROUBLE WAKING HIM.

I HAVE COMPARED THAT TO THE  
RECORD, AND THIS IS WHAT I  
THINK, I THINK WHEN IT SAYS  
"JURY SELECTION CONCLUDED," THAT  
IT'S TALKING ABOUT THE EXCERPT.  
BECAUSE THE JUDGE'S ORDER  
CLEARLY REFLECTS THAT JURY  
COLLECTION IS STILL ONGOING--  
SELECTION IS STILL ONGOING,  
BECAUSE SHE SAID IT WAS A BREAK  
AND THEY HAD TROUBLE GETTING OUT  
AT 2:55.

SO THAT'S THE ONLY WAY I CAN  
RECONCILE THOSE TWO FACTS.

>> SHE REMOVES HIM, AND THEN  
SHE-- HE'S TAKEN DOWNSTAIRS.  
WELL, HE COMES BACK AN HOUR  
LATER IN HANDCUFFS AND HAVING  
HAD A BREATHALYZER TEST.

>> YEAH, AND UNFORTUNATELY WE  
DON'T KNOW THE CIRCUMSTANCES OF  
HOW THAT HAPPENED BECAUSE IT'S  
NOT A PART OF THE--

>> DID THE BREATHALYZER COME  
FROM?

BECAUSE IT TAKES A LOT OF  
TIME--

>> WE DON'T KNOW.

WE DON'T KNOW IF IT WAS  
REQUIRED, WE DON'T KNOW IF HE  
AGREED TO IT.

IT IS NOT EXPLAINED IN ANY FORM  
IN THE RECORD HOW THAT CAME  
ABOUT.

WE JUST KNOW THAT WHEN HE CAME  
BACK, SHE STATED THAT SHE DID  
BELIEVE HE WAS DRUNK AND THAT HE  
HAD HAD A BREATHALYZER AND TOOK

TESTIMONY.

>> SHE SEEMS TO BE MORE WORRIED THAT HE HAD DRIVEN TO COURT DRUNK.

>> WELL--

>> I MEAN, THIS IS WHAT AND, AGAIN, I KNOW YOU DON'T WANT TO GO INTO THE FACTS, AND I DON'T WANT TO KEEP ON DISTRACTING YOU WITH THE FACTS, BUT--

>> WELL, I DIDN'T MEAN THAT THE WAY THAT IT SOUNDED.

WHAT I MEANT WAS WHEN I SAID THAT IS THE STATE'S PRIMARY CONCERN IS THE PARADE OF HORRIBLES THAT PETITIONER DID NOT WANT TO DISCUSS.

SPITTING ON PEOPLE, THROWING FECES, THREATENING--

>> IS THAT DEFENDANT WHO'S FACING JAIL TIME REPRESENTED BY AN ATTORNEY?

>> WELL, THAT DEPENDS.

NOT ALWAYS.

I MEAN, I FOCUS A LOT ON DEFENDANTS, I ADMIT, THAT'S MY BACKGROUND.

THAT WAS MY CONCERN, THAT'S WHAT I'VE SEEN.

BUT THAT CAN HAPPEN IN ANY COURTROOM.

THAT CAN HAPPEN IN CIVIL COURTROOMS.

I'VE HEARD THAT FAMILY COURT CAN BE AN ESPECIALLY HOSTILE PLACE TO BE.

>> OH, YEAH.

>> BUT WE'RE TALKING ABOUT BEING ABLE TO PUNISH SOMEONE FOR UP TO SIX MONTHS IN JAIL.

BECAUSE EVEN THE U.S. SUPREME COURT SAYS AFTER SIX MONTHS YOU GET A JURY TRIAL.

>> YEAH.

AND WE AGREE WITH THAT.

>> SO SOMEHOW WE DON'T THINK SIX MONTHS IN JAIL FOR SOMEBODY WHO CAME INTO COURT TO, YOU KNOW, WHO APPARENTLY HAS A DRINKING PROBLEM AND HAS SOME OTHER

MENTAL ISSUES CAN BE DONE  
BECAUSE THIS PARTICULAR JUDGE  
FOUND IT OFFENSIVE AND COULDN'T  
WAIT A DAY AND HAVE HIM COME  
BACK WHEN HE WASN'T DRUNK TO  
ADJUDICATE WHAT THE PROPER  
PUNISHMENT WOULD BE?

I'M, YOU KNOW, I'M LOOKING AT  
THE OTHER HORRIBLES, OKAY?

>> WELL, NOT TALKING ABOUT THE  
PARTICULAR FACTS OF THIS CASE,  
JUST IN GENERAL WE AGREE WITH  
THE UNITED STATES SUPREME COURT  
IN THE SENSE THAT THERE ARE  
CERTAIN STANDARDS OF CONDUCT  
THAT YOU HAVE TO ABIDE BY WHEN  
YOU SHOW UP TO OUR COURTS AND  
THAT YOU DO NOT COME INTO OUR  
COURTROOM AND START CUSSING OUT  
OUR JUDGES, THREATENING THE  
JUDGE AND THE STAFF AND ENGAGING  
IN DISGUSTING BEHAVIOR.

AND IT'S ALMOST AS THOUGH THE  
COURT IS SAYING, LOOK, THAT  
BEHAVIOR IS ABSOLUTELY  
UNACCEPTABLE.

YOU CANNOT DO THAT.

AND BECAUSE IT OCCURRED IN FRONT  
OF OUR TRIAL JUDGES, WE CONSIDER  
THAT TO BE MORE RELIABLE.

>> OKAY, SO NOW LET ME ASK YOU  
THIS.

WHAT IF THE, IF AFTER THE  
WITNESS WALKS OUT OF THE  
COURTROOM, SAY TOSS THE  
BAILIFF-- SAYS TO THE BAILIFF  
SOMETHING THAT IS A STATEMENT  
AGAINST THE DIGNITY OF THE  
COURT?

>> THAT IS INDIRECT.

>> WHAT HAS TO HAPPEN WITH  
INDIRECT?

THE JUDGE CAN'T EVEN PRESIDE  
OVER THAT?

WHY IS THAT?

>> WELL, I GUESS, AND THAT'S  
KIND OF WHAT WOULD HAPPEN IN  
THIS CASE, IF YOU DO WHAT  
THEY'RE ASKING FOR BECAUSE, IN  
THE REPLY BRIEF YOU NOTICE THEY

DON'T JUST SAY WE WANT DUE PROCESS, THEY ACTUALLY ASK FOR THE DUE PROCESS REQUIREMENTS FROM INDIRECT CRIMINAL CONTEMPT AND THAT HAS ME WORRIED BECAUSE THAT ACTUALLY ENCOURAGES SOMEONE TO--

>> YOU DON'T HAVE TO WORRY ABOUT IT BECAUSE NO ONE IS CHANGING THE, LET'S JUST STICK TO WHAT I'M ASKING YOU.

>> OKAY.

>> ONCE THAT HAPPENS AND IT IS NOT DIRECTLY IN THE JUDGE'S VIEW, THERE IS ALL THIS, ALL THESE OTHER PROTECTIONS COME IN. EVEN THOUGH THE AFFRONT TO THE DIGNITY JUST OCCURRED RIGHT OUTSIDE THE COURTROOM.

>> YOU DON'T HAVE THAT RELIABILITY BECAUSE THE JUDGE DIDN'T SEE IT. AND IF THE JUDGE DIDN'T SEE IT, YOU NEED TO HAVE A LAWYER AND YOU NEED TO HAVE IT INVESTIGATED.

>> BUT IF WE DON'T KNOW EXACTLY WHAT HAPPENED HERE, BECAUSE THE RECORD IS NOT CLEAR, HOW DOES THAT, YOU'RE ALMOST SAYING THAT SHOULD WORK TO THE DISADVANTAGE OF THE, THE DEFENDANT WHO IS NOW INCARCERATED FOR UP TO SIX MONTHS?

>> I WOULDN'T BE SAYING THAT IF THE ISSUE BEFORE THE COURT WAS THE ACTUAL BREATHALYZER. THE STATE'S POSITION IS THAT SHE STATED, AND A LOT OF TIMES THESE THINGS ARE NOT GOING TO BE ON THE RECORD.

FOR EXAMPLE, THE JUDGE OBSERVING JURORS BEING DISTRACTED AND COMPLAINING IS NOT GOING TO BE ON THE RECORD BECAUSE THE COURT REPORTER IS NOT TAKING ABOUT THE LAWYERS ARE SAYING AND HOW THE JURORS ARE RESPONDING AND THEY CAN NOT PUT DOWN ALL THIS STUFF.

THAT IS WHY IT IS SO IMPORTANT TO HAVE A RECITAL OF THE FACTS. WHAT SHE WAS SAYING WE THOUGHT WAS THE MOST IMPORTANT WAS THAT HIS, SMELL OF HIS CLOTHES AND HIS DRUNKEN BEHAVIOR WAS DISTRACTING THE JURORS AND JURORS WERE COMPLAINING ABOUT HIM.

AND OUR POSITION HIS ACTUAL BLOOD-ALCOHOL LEVEL IS IRRELEVANT BECAUSE THE TRUTH IS, WHY DOES IT MATTER WHAT HE ACTUALLY BLEW?

>> BUT THAT IS NOT, THE JUDGE HAD A DIFFERENT VIEW ABOUT THAT. I MEAN, AND, WHAT SHE DID WAS, AT LEAST IN PART BASED ON THE BLOOD-ALCOHOL LEVEL, ISN'T THAT THE CASE?

>> WELL, AND, I DON'T SEE WHERE THE LAW IS COMPLETELY CLEAR ON THIS.

ALL OLIVER SAYS, THAT ALL OF THE ESSENTIAL HE WILL MOMENTS HAVE TO BE OBSERVED BY THE JUDGE AND SO IT DOESN'T ACTUALLY PROHIBIT EXTRINSIC EVIDENCE.

THE EXTRINSIC EVIDENCE JUST CAN NOT BE USED FOR AN ESSENTIAL ELEMENT.

SO THE QUESTION IS, IS HER USING THAT AS A SENTENCING FACTOR, DOES THAT MAKE IT AN ESSENTIAL ELEMENT?

>> IT SEEMS TO ME THAT IN THIS CASE SHE WAS REALLY CONCERNED ABOUT HIS DRUNKENNESS AND IT WAS ONLY FROM THE JURORS THAT SHE KNEW THAT EVEN-- AS I READ THIS RECORD, SHE NEVER SAID SHE SMELLED ALCOHOL ON HIM OR, AND SO, IT SEEMS TO ME, EVEN IF YOU'RE TALKING ABOUT THE ESSENTIAL ELEMENTS, SHE GOT THAT INFORMATION FROM SOMEONE OTHER THAN HERSELF.

>> WELL THAT'S WHERE WE DISAGREE BECAUSE I DON'T VIEW HER STATEMENTS AS SAYING, I AM

PUNISHING YOU BECAUSE YOU'RE DRUNK.

I VIEW HER STATEMENTS AS SAYING, THAT YOUR DRUNKEN BEHAVIOR, THE SMELL, DISTRACTED THE JURORS. BECAUSE SHE SAID THEY WERE COMPLAINING.

>> SHE KNEW IT WAS DISTRACTING THE JURORS BECAUSE THEY SAID SO.

>> BECAUSE THEY WERE COMPLAINING.

THAT'S WHAT WE SAID IN HER ORDER.

>> EXACTLY.

>> RIGHT.

>> MY WHOLE POINT HERE IS, THAT WHAT WE'RE TALKING ABOUT ARE ACTIONS THAT SHE DIDN'T ACTUALLY OBSERVE.

SHE, OR SHE DIDN'T ACTUALLY SMELL BUT THAT SHE GOT THE INFORMATION FROM OTHER PEOPLE AND HOW IS THAT DIRECT CRIMINAL CONTEMPT?

>> WELL IT IS DIRECT CRIMINAL CONTEMPT BECAUSE SHE OBSERVED THE DISTRACTION OF THE JURORS AND SHE OBSERVED THEM COMPLAINING ABOUT THE SMELL.

>> DID SHE SAY THAT OR DID SHE SAY THE JURORS TOLD HER THAT THEY WERE DISTRACTED.

>> SHE SAID THE JURORS WERE COMPLAINING AND THE ORDER REFLECT IT IS WAS IN HER PRESENCE.

>> WHEN WAS THE ORDER ENTERED IN THIS CASE?

DO WE KNOW?

>> IT IS REQUIRED TO BE DONE SAME DAY ACCORDING TO THE RULE. AT LEAST YOU HAVE TO SAY IN OPEN COURT THE SAME DAY.

>> WE WOULD TO LOOK EXACTLY WHAT SHE SAID IN OPEN COURT.

>> RIGHT.

>> TO SEE IF THERE IS A VARIANCE.

>> AND BUT, THE ISSUE OF THE, THE ISSUE OF THE BREATHALYZER

PRESENTS AN INTERESTING WRINKLE BECAUSE I'VE SEEN A LOT OF DIRECT CRIMINAL CONTEMPT AND I'VE NEVER SEEN THAT BEFORE AND I THINK, PROBABLY, THE JUDGE'S ACTIONS WERE THAT SHE WANTED TO MAKE SURE THAT HE WAS JUST DRUNK AND THAT THERE WASN'T SOMETHING GOING ON AND--

>> I JUST WANT TO COMMENT ON, WELL, DIFFERENT JUDGES HAVE DIFFERENT SENSITIVITIES. I SAT ON THE WORST OF THE THREE DIVISIONS, YOU KNOW, WHERE THESE TYPE OF THINGS HAPPEN.

I NEVER HELD ANYBODY IN DIRECT CRIMINAL CONTEMPT. THERE ARE OTHER WAYS JUDGES CAN HANDLE RUNNING A COURTROOM. IN THIS CASE, FOR EXAMPLE, THAT GUY SHOWS UP DRUNK IN MY COURTROOM, I WOULD HAVE HIM REMOVED AND HOPING TO NEVER SEE HIM AGAIN.

THAT WOULD HAVE ENDED THAT. I WOULD HAVE KEPT ON JURY SELECTION.

A DIFFERENT JUDGE MAY HAVE A DIFFERENT SENSITIVITY ABOUT THE DIGNITY OF THE COURTROOM.

-- I HOPE THAT WAS NOT REASON BECAUSE IF THERE WERE, YOU CAN NOT GET THROUGH A EMINENT DOMAIN CASE WITHOUT HOLDING 12 JURORS IN CONTEMPT.

>> I WILL SAY THAT, A TRIAL LAWYER, TO ME, AND I WAS A DEFENSE ATTORNEY, WHEN JURY SELECTION IS VERY IMPORTANT, AT LEAST TO ME AND I THINK A LOT OF LAWYERS WOULD AGREE, WHO YOU PICK TO DETERMINE YOUR CLIENT'S FATE MAKES YOUR WHOLE CASE AND LAST THING-- I'M SORRY.

>> LET ME ASK YOU THIS BECAUSE WE TALKED A LOT HERE BUT I'M REALLY NOT SURE I UNDERSTAND WHAT YOUR POSITION IS IN THIS.

>> RIGHT.

>> IF IN FACT IT WAS DIRECT



CRIMINAL CONTEMPT, AND TELL ME, IF I'M WRONG, IF IT WAS, IN FACT DIRECT CRIMINAL CONTEMPT, ACTIONS THAT WERE OBSERVED BY THE TRIAL JUDGE, THE TRIAL JUDGE CAN SUMMARILY PUNISH THE PERSON FOR UP TO WHAT?

>> 179 DAYS.

>> OKAY.

AFTER THAT YOU GET A JURY TRIAL.

>> IF IT WAS INDIRECT CRIMINAL CONTEMPT, THE THINGS THAT THE TRIAL JUDGE DID NOT PERSONALLY OBSERVE, THE TRIAL JUDGE HAS TO DO WHAT?

>> THE TRIAL JUDGE HAS TO GIVE HIM A RIGHT TO COUNSEL AND ALL THE DUE PROCESS RIGHTS GO ALONG WITH THAT AND THAT MAKES SENSE BECAUSE YOU DON'T HAVE THE RELIABILITY OF THE TRIAL JUDGE SEEING IT, AND ALSO, IT APPEARS TO ME, FROM LOOKING AT THE CASE LAW, AND UNITED STATES SUPREME COURT IN OLIVER, THAT EVEN IF IT IS DIRECT CRIMINAL CONTEMPT, IF IT IS NOT PUNISHED IMMEDIATELY, YOU'RE STILL ENTITLED TO A LAWYER BECAUSE THE EXCEPTIONS SAY, NOT ONLY DO ALL OF THESE ESSENTIAL ELEMENTS HAVE TO BE IN FRONT OF THE JUDGE, AND THAT IT DISRUPTS THE COURT PROCEEDING, THAT IT HAS TO HAVE IMMEDIATE PUNISHMENT.

>> LET ME ON THAT ONE.

>> OKAY.

>> THE, JUSTICE LABARGA, WOULD HAVE TREATED THIS, THIS GUY'S DRUNK AND WOULD HAVE HAD HIM TAKEN FROM THE COURTROOM AT THE BEGINNING.

WE DON'T KNOW HERE BUT YOU'RE SAYING SHE HAD HIM REMOVED AT THE TIME OF THE BREAK.

>> THAT IS WHAT IT APPEARS.

>> WE HAD, YOU WERE MENTIONING ABOUT JUDGES, COURT REPORTERS CAN'T GET EVERYTHING DOWN BUT THAT IS WHY WE DON'T HAVE A GOOD

RECORD HERE, BUT WE'RE ALSO TALKING ABOUT TAKING SOMEONE'S FREEDOM FOR 30 DAYS.

WHY AT THE VERY LEAST IF WE'RE GOING TO HAVE SOMETHING SUMMARY, WOULD STILL REQUIRES THE JUDGE TO ENTER AND, NOTIFY THE DEFENDANT OR THE OF THE CHARGES AGAINST HIM OR HER AND ALSO GIVE HIM OR HER THE OPPORTUNITY TO PRESENT MITIGATING EVIDENCE, IT SAYS EVIDENCE--

>> HE DID AND I ACTUALLY THOUGHT HE DID A PRETTY GOOD JOB PRESENTING EVIDENCE.

>> OBVIOUSLY, CAN I JUST?

>> SORRY.

>> BUT IT DIDN'T OCCUR IMMEDIATELY.

IT WAS TWO HOURS AFTER THIS ALL ALL STARTED AND WHAT IS, WHAT IS THE PROBLEM?

JUDGES HAVE DIFFERENT SENSITIVITIES.

JUSTICE LABARGA WOULDN'T HAVE HELD THIS PERSON IN CONTEMPT. ANOTHER JUDGE MAY HAVE.

TO SAY THAT, I'M REMOVING THIS PERSON FROM THE COURTROOM, YOU ARE, I AM, AND, YOU CAN NOT DISRUPT THIS COURTROOM, I AM TAKING YOU INTO CUSTODY, A BAILIFF, TAKE THE PERSON INTO CUSTODY, AND HAVE HIM GO INTO THE JAIL AND I WILL, WE WILL, REVISIT THIS IN THE MORNING, WITH, YOU EITHER HAVE YOUR LAWYER PRESENT, OR IF YOU DON'T WANT A LAWYER, OR, I AM GOING TO APPOINT THE PUBLIC DEFENDER TO TALK TO YOU TONIGHT.

NEXT MORNING COMES, WE NOW LOOK AT, A CONTEMPT THAT THE JUDGE HAS NOW PUT ON THE RECORD, BECAUSE IT SHOULD BE CLEAR THAT THE PD SHOULD BE ABLE TO LOOK AT THE TRANSCRIPT AND BE IN AS GOOD A POSITION TO OBSERVE IT, THIS DEFENDANT MAY NOT HAVE BEEN ABLE TO.

WHY ISN'T THAT, IN TERMS OF THE CONSTITUTIONAL ISSUES AN IMPORTANT DISTINCTION SO THAT ONE HAPPENS, YOU GO AND YOU ASSAULT THE BAILIFF, RIGHT IN FRONT THE JUDGE?

OKAY?

I AM, YOU JUST ASSAULTED THE BAILIFF.

NOT ONLY ARE YOU, I PUT THAT ON THE RECORD, THAT YOU HAVE ASSAULTED THE BAILIFF, AND NOW, I AM SAYING, DO YOU HAVE ANY REASON WHY I SHOULDN'T HOLD YOU IN CONTEMPT FOR ASSAULTING BAILIFF?

>> WELL--

>> AND THEN THAT'S IMMEDIATE, RIGHT?

IT'S IMMEDIATE OF.

>> RIGHT.

>> IF YOU'RE DELAYING IT LIKE IT WAS DELAYED HERE, WHY WOULDN'T THAT BE THE DISTINCTION?

>> WELL IF IT IS TOO MUCH OF A DELAY, YOU'RE CORRECT ABOUT THAT BUT, AND IT WOULD BE GREAT IF THIS COURT WOULD WHEN EXACTLY, WHEN IS SUMMARY AND WHEN IS TOO LONG.

IN THIS CASE OUR CONCERN IS THAT, IN CERCI, THE THIRD DISTRICT CASE KIND OF POINTS OUT THAT THAT DEFENDANT WAS AGITATED AND THAT A SHORT BREAK WOULD DO HIM GOOD TO CALM HIM DOWN SO HE COULD COLLECT HIS THOUGHTS AND RESPOND.

WELL, IN THIS CASE, THIS PERSON IS DRUNK AND, HE WAS APPARENTLY SLEEPING OR IN A STUPOR AND THEY HAD DIFFICULTY WAKING HIM.

SO WOULDN'T A SHORT PERIOD BE IN ORDER FOR HIM TO RESPOND TOO?

WHEN IT WAS ACTUALLY JUST A LITTLE BIT OVER AN HOUR.

AND THERE IS ALSO CIRCUMSTANCES WHERE, WHAT IF, IN THE COURTROOM SOMEBODY DOES SOMETHING VIOLENT AND THEY'RE DANGEROUS?

THE COURT'S PRIMARY PURPOSE IS GOING TO BE TO SECURE THE COURTROOM AND PROBABLY, TO REMOVE THIS PERSON, SHOULDN'T THE COURT BE ABLE TO DELAY IT, AT LEAST FOR A SHORT PERIOD OF TIME?

>> THEY WERE SUGGESTING THAT YOU WOULD NOT TURN IT IN DIRECT. YOU WOULD HAVE THE TERN THERE, IF WAS NECESSARY TO ADVOCATE FOR WHAT SHOULD HAPPEN, SHOULD IT BE A, 179-DAY PUNISHMENT? SHOULD IT BE COMMUNITY SERVICE? SHOULD THIS PERSON GO THROUGH A DRUG TREATMENT, IF HE IS A ALCOHOLIC, SHOULD HE GO THROUGH, WE HAVE ANOTHER OPTION FOR HIM. HE CAN DO COMMUNITY SERVICE, TO BE ABLE TO ADVOCATE FOR THE WHAT THE BEST WAY TO DEAL WITH WHAT IS AN, WHAT WE DO NOT WANT. WE DON'T WANT JURORS SHOWING UP DRUNK BUT, AS JUSTICE LABARGA SAID, IF THE ISSUE IS WE DON'T WANT JURORS SLEEPING, WE GOT A DIFFERENT ISSUE THAN AS TO HOW YOU PUNISH THEM.

>> SHE MADE A FINDING THAT IT HINDERED AND EMBARRASSED THE COURT.

YOU ALSO HAVE TO REMEMBER, SHE WAS THERE, AND SHE GOT TO OBSERVE THIS CONDUCT, AND I'M SURE SOME OF YOU HAVE BEEN TRIAL LAWYERS AND HAD THE OPPORTUNITY TO SOMETIMES READ A TRANSCRIPT OF A HEARING THAT YOU DID. YOU DON'T ALWAYS GET THE SAME EFFECT FROM--

>> THE PROBLEM IS, IF THE JUDGE SAYS I DON'T FIND SOMEONE CREDIBLE AND I'M NOT GOING TO TELL YOU WHY, I COULD LOOK AT THAT VICTIM'S LANGUAGE I COULD TELL.

WHAT WOULD WE DO WITH THAT FINDING OF CREDIBILITY?

>> WELL YOU HAVE TO DEFER TO THE TRIAL COURT'S CREDIBILITY

FINDING.

>> COUNSEL, I WOULD LIKE TO ASK YOU A QUESTION.

YOU EMPHASIZED THE POSSIBLE NEED TO DELAY THINGS A LITTLE BIT, WHEN THERE'S BEEN AN ARGUABLE DIRECT CRIMINAL CONTEMPT, JUST TO SECURE THE COURTROOM, LET THE CONTEMNER CALM DOWN TO RESPOND OR WAKE UP.

SO HE CAN RESPOND.

I, SO I THINK, I ACTUALLY THINK THAT MAKES SENSE.

SINCE I DON'T THINK, I DON'T THINK ANYONE WOULD SUGGEST THERE COULD NOT BE SOME BRIEF INTERVAL BEFORE THE COURT TAKES ACTION BUT ISN'T IT A DISTINGUISHING FACTOR HERE THAT IN THAT INTERVAL WE WEREN'T JUST HAVING A COOLING-OFF PERIOD OR A A SECURING THE COURTROOM PERIOD, OR A MAYBE, SOBERING UP OR WAKING UP PERIOD BUT WE'RE HAVING A, TAKING OF EVIDENCE PERIOD?

>> RIGHT.

>> WHERE, WHERE THE COURT IS, HAS APPARENTLY INSTRUCTED THAT EVIDENCE BE OBTAINED THROUGH THE USE OF THE BREATHALYZER.

IS THERE ANY CASE INVOLVING DIRECT CRIMINAL CONTEMPT WHERE A COURT HAS DONE SOMETHING LIKE THAT?

>> I DID NOT FIND--

>> I'M SURE YOU LOOKED.

>> YES, I DID.

ALL I'M, GOING AS I STATED UP FRONT, WE ARE LESS CONCERNED WITH WHETHER OR NOT YOU VIEW THIS CASE AS BEING DIRECT OR INDIRECT.

IT IS OUR POSITION THAT THE ESSENTIAL ELEMENTS WERE IN FRONT OF THE JUDGE.

OUR PRIMARY CONCERN IS THAT YOU DO NOT REMOVE THE TRIAL COURT'S AUTHORITY TO SUMMARY PUNISH PEOPLE AND THE SITUATIONS THAT

WE DESCRIBED.

AND IF YOU DECIDE, IF THIS COURT DECIDES THAT, IF YOU START PRESENTING EXTRINSIC EVIDENCE FOR SENTENCING OR WHATEVER THAT YOU THINK A LAWYER SHOULD BE APPOINTED IN THAT CIRCUMSTANCES, THAT'S DIFFERENT FROM THE TYPE OF INTEREST THAT WE'RE TRYING TO PROTECT.

OUR POSITION IS THAT THE ESSENTIAL ELEMENTS WERE IN FRONT OF HER AND THAT THE ACTUAL BLOOD-ALCOHOL LEVEL IS NOT AN ESSENTIAL ELEMENT OF HIM DISTRACTING THE JURORS.

BUT, THAT IS NOT REALLY WHAT OUR PRIMARY CONCERN HERE IS.

>> THANK YOU.

>> COUNSEL, I GIVE YOU A FEW MINUTES.

>> TO CLARIFY, JUDGE DEMPSEY NEVER SAID THAT SHE NOTICED HIS ACTIONS DISTRACTING OTHER JURORS.

IN HER ORDER SHE STATES THAT ONLY SEVERAL OTHER JURORS COMPLAINED THAT HE SMELLED STRONGLY OF ALCOHOL.

AND--

>> IN YOUR MIND THAT MAKES IT INDIRECT?

>> IN MY MIND, YES, BUT AGAIN THAT'S, THE BROADER ISSUE IS THE RIGHT TO COUNSEL.

NOW, IN IN RE, OLIVER, RESPONDENT WAS STATING THAT OUTSIDE INFORMATION CAN COME IN, ONLY NECESSARY, THE ESSENTIAL ELEMENTS MUST BE BEFORE THE COURT.

THAT IS ACTUALLY INCORRECT. KNOWLEDGE ACQUIRED FROM TESTIMONY OF OTHERS OR EVEN FROM THE CONFESSION OF THE ACCUSED WOULD NOT JUSTIFY CONVICTION WITHOUT A TRIAL WHICH THERE WAS OPPORTUNITY FOR DEFENSE INCLUDING AN ATTORNEY. THAT'S WHAT IN RE OLIVER STATES.

THAT IS MUCH BROADER PROPOSITION IS THAT, IN THIS CASE, HE WAS NOT IMMEDIATELY HELD IN CONTEMPT.

AND I AGREE WITH, WHAT I, SEE AS THE POINT YOU WERE MAKING JUDGE PARIENTE.

WHERE BECAUSE HE WAS NOT IMMEDIATELY HELD IN CONTEMPT, THEY COULD HAVE PROVIDED HIM AN ATTORNEY AND IMMEDIATE VINDICATION OF THE COURT'S DIGNITY IN THIS CASE IS WHAT THE NRE OLIVER DECISION IS MAKING THE EXCEPTION FOR, AND NOT FOR SUMMARY PROCEEDINGS THAT MAY BE HELD HOURS LATER, NOT IN FRONT OF THE PEOPLE WHOSE DIGNITY WAS HURT.

>> IN THIS SITUATION DO WE KNOW IF JURY SELECTION CONTINUED? WE DON'T KNOW ONE WAY OR THE OTHER?

>> IS NOT IN THE RECORD. I READ THAT ACTUALLY AS THE JURORS WERE EXCUSED SO THAT BOTH SIDE COULD MAKE THEIR DECISIONS AS TO WHETHER OR NOT THEY WANTED THE MEMBERS OF JURY PANEL AND WHO TO STRIKE AND WHO TO ASK FOR CAUSE REMOVAL AND THAT AFTERWARDS, THAT'S POTENTIALLY WHEN MR. PLANK WAS REMOVED AND THEN AFTERWARD, IT CON, JURY SELECTION CONCLUDED.

>> YOU HAVE NO PROBLEM WITH THE JUDGE HAVING REMOVED HIM, I JUST WANT TO MAKE SURE, FROM THE JURY PANEL, WHICH MUST HAVE BEEN DONE I GUESS WITH THE AGREEMENT OF BOTH SIDE, TO, HE IS NOT GOING TO BE, HE IS NOT BEING REMOVED FOR CAUSE.

HE IS DISCUSS BEING REMOVED? YOU HAVE NO PROBLEM WITH THAT OCCURRING?

>> I HAVE A PROBLEM WITH THEM REMOVING HIM AND HOLDING HIM AND THEN GIVING HIM A BREATHALYZER, RATHER THAN, LETTING HIM JUST GO

HOME, WHICH IS WHAT  
JUDGELABARGA SEEMS TO BE SAYING  
HE WOULD HAVE DONE IN THIS CASE.

>> DRIVE HOME DRUNK?

>> NO, I DON'T KNOW ABOUT  
DRIVING.

>> POSSIBLY WOULD HAVE CALLED A  
TAXI.

>> DROVE BACK?

>> I'M SORRY?

>> DROVE TO THE COURT, RIGHT?

>> RIGHT.

>> JUST RELEASING HIM TO DRIVE  
BACK HOME DRUNK.

>> HE COULD HAVE CALLED A TAXI.  
THAT IS NOT IN THE RECORD.

>> BOTTOM LINE-- MONDAY MORNING  
QUARTERBACKING THESE TYPE OF  
THINGS, THIS IS THOSE INSTANCES  
WHERE ONE REALLY NEEDS TO BE  
THERE.

>> RIGHT.

>> AND ACTUALLY GET THE  
ATMOSPHERE, WHAT IS GOING ON IN  
THAT COURTROOM AND LOOK AROUND  
WHAT JUDGES TRIAL JUDGES DO  
PARTICULAR ANY IN THE CRIMINAL  
DIVISION.

EVERYTHING THAT A JUDGE HAS TO  
DO, A JUDGE HAS TO PERTAIN TO.  
YOU HAVE THE JURORS, YOU HAVE  
GOT TO DEAL WITH.

GOT BACK THERE, THAT IS GOING  
ON.

YOU HAVE A DEFENDANT WHO MAY BE  
IN CUSTODY, WHO MAY BE  
DISRUPTIVE.

>> RIGHT.

>> AND THEN YOU'VE GOT ALL THESE  
THINGS GOING ON IN YOUR MIND AND  
THEN SOMEONE COMES IN, MAY NOT,  
ONE OCCASION I HAD THIS ONE  
WOMAN WITH A BIG SLURPEE, BIG  
GULP, AND SHE HAD A STRAW AND  
WAS SUCKING OUT OF IT, AND  
SOUNDED LIKE IT WAS DRILLING  
FOR OIL.

SHE WOULDN'T STOP.

DEPUTY WENT AND GOT IT AND  
CAUSED A DISRUPTION.



I HAD HER EXCUSED FROM THE  
COURTROOM.

BUT A DIFFERENT JUDGE, MIGHT  
HAVE SAID, LOOK, THIS IS A  
COURTROOM.

THERE ARE, THERE ARE STILL  
SOMEPLACES IN OUR SOCIETY THAT  
WE HAVE TO RESPECT AND THIS IS  
ONE OF THEM.

YOU WALK IN HERE DRINKING A BIG  
CUP OF COCA-COLA, AND MAKE A  
DISRUPTION AND WHEN CALLED IT ON  
IT, CAUSED PROBLEMS.

YOU HAVE DISRUPTED THE DIGNITY  
OF THE COURT.

I COULD SEE THE JUDGE THROWING  
PERSON IN JAIL, SUMMARILY,  
HANDCUFF AND TAKE HER.

I CAN SEE AND PERHAPS JUDGES  
SHOULD HAVE THAT AUTHORITY.

BUT, THAT'S A DIFFERENT JUDGE.

>> IF THIS COURT HAS NO FURTHER  
QUESTIONS I ASK THAT THIS COURT  
HOLD THAT THERE IS A THE RIGHT  
TO COUNSEL AND APPROVE THE  
DECISIONS IN WOODS AND AL-HAKIM.

>> THANK YOU.

THANK YOU FOR YOUR ARGUMENTS.