

OPEN NINTH:

CONVERSATIONS BEYOND THE COURTROOM

RIGHT TO RELEASE

EPISODE 49

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HOSTED BY: FREDERICK J. LAUTEN

>>Welcome to another episode of “Open Ninth: Conversations Beyond the Courtroom” in the Ninth Judicial Circuit Court of Florida.

Now here’s our host, Chief Judge Frederick J. Lauten.

>>**CHIEF JUDGE LAUTEN:** I’m here with my colleague and good friend, Jenifer Harris who is a circuit court judge and has been on the circuit court in the Ninth Judicial Circuit since 2009. And Judge Harris has sat in criminal court, family court, domestic court and juvenile court. You’ve sat almost everywhere I guess, but have you sat in civil? I thought you did sit in civil.

>>**JUDGE HARRIS:** Everywhere except civil.

>>**CHIEF JUDGE LAUTEN:** All right. Well, great, welcome.

>>**JUDGE HARRIS:** Thank you.

>>**CHIEF JUDGE LAUTEN:** We’re going to talk today about bond in criminal cases, bond in criminal cases as opposed to some sort of civil bond on a construction project.

>>**JUDGE HARRIS:** Yes, sir.

>>**CHIEF JUDGE LAUTEN:** And I know that that’s a topic that interests you and you’ve done a lot of reading about the topic, and research on a regional level and a statewide level and a national level. Let’s start, if we could, by sort of educating our listeners at the very beginning, which is, what is a bond in a criminal case, and we’ll talk about the sources for defendants getting bonds. Why don’t you tell our listeners what bond is?

>>**JUDGE HARRIS:** Well, as I see it, and as we all understand it, I believe, is that bond is there when a person gets arrested. Before they see a judge, there is opportunity where they can bond out. That, according to our policy, tends to be based on a bond schedule.

>>**CHIEF JUDGE LAUTEN:** Right.

>>**JUDGE HARRIS:** And then also soon after, they’ll come in front of a judge in the morning, and then bond conditions will be set.

>>**CHIEF JUDGE LAUTEN:** Right. So in theory if we wanted to do this, everyone who is arrested, let's say in the afternoon or evening could sit in the Orange County Jail until 8:30 the next morning when court starts first appearance sessions?

>>**JUDGE HARRIS:** Absolutely. Historically, that's how it was done.

>>**CHIEF JUDGE LAUTEN:** And in part judge's might, under that theory, or system get called in the middle of the night, Your Honor, would you consider releasing, you know, my client's son or daughter who got arrested and we'll guarantee you they will appear, but they don't want to spend six to eight hours in jail. And the judge may or may not entertain that call. And to sort of stop that we years and years ago wrote this bond schedule that says without seeing a judge, for example, on a petit theft, you can post a \$250.00 bond and get out of jail.

>>**JUDGE HARRIS:** Right. Depending on the case, depending on the severity, depending on if the law allows it.

>>**CHIEF JUDGE LAUTEN:** Right. So if it were a major drug case, it might be a \$15,000.00 bond or a \$25,000.00 bond, but for a low-risk misdemeanor, it might be a \$250.00, \$500.00 bond.

>>**JUDGE HARRIS:** Exactly. And of course, as you're using the terms, bond would be that you would have someone that you could actually go to a bondsman, theoretically, and get a bond or you could post the entire bond.

>>**CHIEF JUDGE LAUTEN:** Right.

>>**JUDGE HARRIS:** So some sort of monetary condition for getting out of jail.

>>**CHIEF JUDGE LAUTEN:** And the reason for doing that, the purpose of the bond is?

>>**JUDGE HARRIS:** Historically, the idea was, there's got to be some way that we assure that people will be there in court. Now, our law is set up also where the idea behind under our law is, it is both for protection of the public and for assuring that they return to court.

>>**CHIEF JUDGE LAUTEN:** So I did a little research some time ago. And if you go back far enough, in common law, in Great Britain, the King appointed the sheriff, the sheriff

would arrest people, they'd throw them in the local jail, and they'd wait until the judge's rode the circuit and got there, so they might be there for months and months.

>>**JUDGE HARRIS:** Hence, circuit judge, right, riding the circuit.

>>**CHIEF JUDGE LAUTEN:** Riding the circuit. But when they were there, they couldn't work for the few Lords. The Lords went to the King and said, you're killing us. Our work force is sitting in jail.

>>**JUDGE HARRIS:** Right.

>>**CHIEF JUDGE LAUTEN:** And the King said, well, how do I know they'll show up? And what started was, people would pledge that they would guarantee someone's appearance, usually a family member.

>>**JUDGE HARRIS:** That makes sense.

>>**CHIEF JUDGE LAUTEN:** And back in that common law era, if the person didn't show up, they would hold the trial, and if they were convicted, you would serve their sentence.

>>**JUDGE HARRIS:** That puts a whole different light on it.

>>**CHIEF JUDGE LAUTEN:** That was problematic because for all felonies, the penalty was death. So they said, how about instead of us guaranteeing, I will pledge my land or some chattel or money rather than my very life, and that ultimately through statute was the guarantee that people would show up by pledging property or chattel, or in our system, money. Kind of interesting history behind it. I like the sort of, you serve the sentence if they don't show up.

>>**JUDGE HARRIS:** Can you imagine how many people you would be willing to do that for?

>>**CHIEF JUDGE LAUTEN:** Yeah, not too many. I guess our jails would be pretty crowded. So anyway, today you post money to guarantee your appearance. And you and I know how it works, but let's just use an example for our listeners. So let's say someone was arrested and the court said it's a \$2,500.00 bond. Why don't you tell our listeners kind of practically how that would work if you didn't have \$2,500.00 in your pocket?

>>**JUDGE HARRIS:** Well, again, the first thing you could do, if you do have \$2,500.00 in your pocket, you could actually post the bond, or a friend, family member could post that full amount.

>>**CHIEF JUDGE LAUTEN:** Deposit that money with the clerk.

>>**JUDGE HARRIS:** Well, again, the first thing you could do, if you do have \$2,500.00 in your pocket, you could actually post the bond.

>>**CHIEF JUDGE LAUTEN:** Right.

>>**JUDGE HARRIS:** Or a friend, family member could post that full amount.

>>**CHIEF JUDGE LAUTEN:** Just deposit that money with the clerk.

>>**JUDGE HARRIS:** Deposit the amount. And the advantage of that, of course, is if in fact once the whole case is over, you'd get the entire amount back. However, we have this industry, the bond industry, and they make it where you can actually go see a bondsman instead. Not only does a bondsman post part of the money, but they are able to get the money from you, a smaller amount of money, but they also know the system so kind of helps them get through the bond situation. Normally, it's 10 percent.

>>**CHIEF JUDGE LAUTEN:** So in my example, you'd give the bondsman \$250.00.

>>**JUDGE HARRIS:** Exactly. And then maybe there would need to be some other collateral.

>>**CHIEF JUDGE LAUTEN:** Right, a car, title to your house, something like that.

>>**JUDGE HARRIS:** The bondsman would sign guaranteeing the showing back up to court.

>>**CHIEF JUDGE LAUTEN:** And that's basically like an insurance contract.

>>**JUDGE HARRIS:** Kind of like an insurance contract. And you know, a little bit in addition to an insurance contract though, bondsmen do make phone calls sometimes letting them know when their court dates are and kind of stay in touch with them during that time. And then at the end, as long as everyone shows up, we're all good again.

>>**CHIEF JUDGE LAUTEN:** Yeah, but when you – under that system, if you’re the defendant and you show up and you go to your trial, then the bondsman doesn’t have to pay the \$2,500.00 to the court. That’s just cancelled.

>>**JUDGE HARRIS:** But you don’t get your 250 back.

>>**CHIEF JUDGE LAUTEN:** The 250 stays with the bondsman.

>>**JUDGE HARRIS:** Right.

>>**CHIEF JUDGE LAUTEN:** And that’s how they make their profit.

>>**JUDGE HARRIS:** Of course.

>>**CHIEF JUDGE LAUTEN:** Right. If you fail to appear, tell our listeners what happens.

>>**JUDGE HARRIS:** Then the bond can be revoked, and the bondsman may have to come up with the entire amount.

>>**CHIEF JUDGE LAUTEN:** Right, so sitting on the bench, you or I would say, it’s trial day and then call John Smith, and John Smith doesn’t show up so we would utter these words, we revoke the bond, issue a capias –

>>**JUDGE HARRIS:** Issue a capias; revoke the bond.

>>**CHIEF JUDGE LAUTEN:** And a capias for our listeners is really an arrest warrant.

>>**JUDGE HARRIS:** And issue a no bond.

>>**CHIEF JUDGE LAUTEN:** Right, no bond. But capias means arrest warrant. I mean, you’re going to get arrested.

>>**JUDGE HARRIS:** Of course.

>>**CHIEF JUDGE LAUTEN:** Then the bondsman has all kinds of power at that point, right?

>>**JUDGE HARRIS:** They have a lot of power.

>>**CHIEF JUDGE LAUTEN:** They can go just snatch the person from almost anywhere.

>>**JUDGE HARRIS:** Yes.

>>**CHIEF JUDGE LAUTEN:** Take possession of them.

>>**JUDGE HARRIS:** And bring them back.

>>**CHIEF JUDGE LAUTEN:** Bring them to court.

>>**JUDGE HARRIS:** Which of course, they have a high motivation to do that at that point because otherwise they may in fact lose their entire amount of money, although they don't have to serve the sentence instead of the person.

>>**CHIEF JUDGE LAUTEN:** That's true. That is a change from old English days. But as you and I know, we don't need to get too much into this, there is a schedule where if the bondsman finds the person and brings them in a certain amount of time, they get a hundred percent of the bond back, 95 percent, then 90, then 85, 80, depending on how long it takes.

>>**JUDGE HARRIS:** Right.

>>**CHIEF JUDGE LAUTEN:** All right, so we have this system of sort of monetary bond, and it's kind of been our culture here – one thing I think we should mention to our listeners because I don't know, sometimes I wonder if the media doesn't – I don't know, or maybe lack of civics education, we've lost this concept. An arrest is based on probable cause and not on proof beyond a reasonable doubt. And then the other feature of our constitution is you're presumed to be innocent. So we're holding people in jail if we don't let them post bond when they're presumed to be innocent with less than proof beyond a reasonable doubt. And so almost everyone is entitled to some bond.

>>**JUDGE HARRIS:** Right.

>>**CHIEF JUDGE LAUTEN:** And who's not.

>>**JUDGE HARRIS:** And of course, constitutionally, we care about this and we care about our society of making sure that it is beyond a reasonable doubt at that point, you know, before – before someone serves a sentence. And we have the eighth amendment, of course, that

says no excessive bonds so we care about that enough as a culture to have it specifically delineated in our constitution.

>>**CHIEF JUDGE LAUTEN:** And in the Florida Constitution, in Article 1, Section 14, which is entitled right to pre-trial release, it tells the citizens you have a right to be released in all cases except –

>>**JUDGE HARRIS:** Capital, punishable by life.

>>**CHIEF JUDGE LAUTEN:** Right, so if you're arrested for an offense where you could serve life or be put to death.

>>**JUDGE HARRIS:** So murder –

>>**CHIEF JUDGE LAUTEN:** Armed robbery with a firearm.

>>**JUDGE HARRIS:** Armed robbery with a firearm, sexual battery on children –

>>**CHIEF JUDGE LAUTEN:** Right.

>>**JUDGE HARRIS:** Things that we know there's such a high severity level that suddenly that right to have that constitutional right kind of gives a little way towards those under certain circumstances.

>>**CHIEF JUDGE LAUTEN:** Right because even with those cases, punishable by life or death, a person has a right to bond unless the proof is very high.

>>**JUDGE HARRIS:** Proof evident, presumption great, which although we don't discuss it very often, is actually a higher standard than beyond a reasonable doubt.

>>**CHIEF JUDGE LAUTEN:** Right, so the case law says, you need almost confessions or photographs or video of a crime to say that the proof is so evident, presumption is so great that you committed a murder that the motive for you to flee is so great that we're going to hold you without bond. Other than that, you're entitled to bond.

>>**JUDGE HARRIS:** You're entitled to bond.

>>**CHIEF JUDGE LAUTEN:** Now, that bond has to be a reasonable amount.

>>**JUDGE HARRIS:** Right.

>>**CHIEF JUDGE LAUTEN:** And for trafficking, that might be \$50,000 or even \$100,000 because of the profit motive in trafficking in drugs, but for a petit theft you set a \$100,000 bond, that would be likely reversed by the appellate courts because it's way too high.

>>**JUDGE HARRIS:** Absolutely. And of course it depends on the situation of the person, not just on the crime itself but what their resources are. \$100,000 bond to one person is very different to another person, depending on their financial abilities.

>>**CHIEF JUDGE LAUTEN:** That's a great point. So we look at how much money people make, community ties, stability.

>>**JUDGE HARRIS:** Right. And of course, historically – in other situations too, we have that PTR –

>>**CHIEF JUDGE LAUTEN:** Tell our listeners what PTR is.

>>**JUDGE HARRIS:** Pre-trial release. And we have it locally where there's an office that does a little bit of background investigation on them. Then they'll also have certain conditions during the time of that release. The reason I say this is because we are looking at all types of factors to determine what's most important, and what factors will make sure that people return to court and don't commit any new crimes during the time they're released which those are the two things we care about. Sometimes we have thought historically that money will help that. Of course, sometimes it's not about money. As we all know, some people wouldn't leave this community no matter what. No matter what they were facing, their whole community is here. And so they wouldn't leave to another country or another state if they were released.

>>**CHIEF JUDGE LAUTEN:** Right.

>>**JUDGE HARRIS:** Other people might be willing to take that risk, depending on their resources but also just depending on their ties as you said.

>>**CHIEF JUDGE LAUTEN:** So what you're saying is bond is a very individualized decision?

>>**JUDGE HARRIS:** It should be a very individualized decision.

>>**CHIEF JUDGE LAUTEN:** And one thing the listeners might not know is that the rules and the statutes – so there's the constitution that says you have the right to bond, unless you're charged with a life or capital offense. And then there's statutes that sort of list these criteria that we should look at when deciding bond. And there's rules of procedure that tell us what order we should analyze the issue, and both the statutes and the rules say there is a presumption in favor of non-monetary bond.

>>**JUDGE HARRIS:** Absolutely.

>>**CHIEF JUDGE LAUTEN:** And so when you look at it, saying to somebody, you're going to post money is like the fourth criteria.

>>**JUDGE HARRIS:** Right. If you can't be assured that they will appear and that they will not commit any new crimes, the safety of the community, by those other means, by other criteria, then you're supposed to go to monetary decisions.

>>**CHIEF JUDGE LAUTEN:** All right. And so in Florida, and regionally we've kind of leaned heavily on monetary bonds. But I understand there is sort of a nationwide analysis, or movement, a little bit away from monetary bonds with this kind of primary consideration: A \$500.00 bond, as you said earlier, might be easy for a citizen in a certain community to post and be out and a \$500.00 might be impossible for someone in a different community to post even if the facts of the case and their background was relatively similar.

>>**JUDGE HARRIS:** Right.

>>**CHIEF JUDGE LAUTEN:** So for one person \$500.00 is easy, I'm out, and for another person, it's I can't get out before my trial.

>>**JUDGE HARRIS:** And for one person a \$500.00 might be something that might make them want to return to court, and for another it might be pocket change from dinner that night.

>>**CHIEF JUDGE LAUTEN:** That's right.

>>**JUDGE HARRIS:** And not have any motivation.

>>**CHIEF JUDGE LAUTEN:** And so the current sort of analysis is, we don't want people to stay in jail who ought to get out if the only reason they're in jail is they don't have the resources to post the bond that someone else could easily post. Is that a fair statement?

>>**JUDGE HARRIS:** That is a fair statement. One statement beyond that which is, we don't want to make decisions when those decisions have disparate or an unequal effect on people. We don't want to make decisions that have an effect of punishing people because of money, but we also don't want to make decisions based on punishing people that might have higher punishing on people of color, of different ethnic groups, and the studies show that monetary conditions can have that disparate impact.

>>**CHIEF JUDGE LAUTEN:** So some localities like I know the state of Kentucky – the state of Kentucky has outlawed surety bonds as a practice. So they don't have a surety bond industry like we have. And a surety bond is a bondsman or bondswomen. There, they use risk assessment instruments to assess whether someone who is in jail poses a risk of flight, that is they won't appear, or a risk of harm to the community. And if they're low risk with low needs, most of those people are released on a pre-trial release like you referred to earlier with not having to post any money. And then if they're a moderate risk, they are released but they have to check in weekly in person or on the phone, perhaps provide urinalysis for drugs to see if they are taking drugs. Might have a supervision officer looking at them. And then at some point if you're high risk and high needs you might not get out.

>>**JUDGE HARRIS:** That's right. And probably about, gosh, I think it was like six years ago now, we started studying that one time when I was at a seminar. There was a big movement where it was just starting to be looked at. And the studies were showing, and the studies came out before that, of showing that perhaps money doesn't have an effect of bringing people back anyways.

>>**CHIEF JUDGE LAUTEN:** Interesting.

>>**JUDGE HARRIS:** So not only the amount of money, from what -- and I've read a lot of these studies. Not only the amount of money doesn't have a difference, whether you're setting bond at a \$100,000, whether you're setting bond at \$10,000, whether you're setting bond at a \$1,000, there's no studies, there's no evidence showing that that makes the difference on

them returning to court, nor does it make any statistical difference on whether or not they commit new crimes. As a matter of fact, if there's any evidence, it's exactly the opposite. That setting money bond and the higher bond is more likely to have more an effect of committing crimes, rather than the opposite effect.

>>**CHIEF JUDGE LAUTEN:** Well, that's interesting. That perspective – what I have heard is that – well, first of all we should tell our listeners, we use a risk assessment instrument. It's the Virginia Risk Assessment Instrument, self-named because it was started in the state of Virginia. And they use this sort of scientific tool where they assess a person based on points. You get – you don't get a point if you have employment; if you don't have employment, you get a point. If you have stable housing, you don't get a point. If you don't have stable housing, you get a second point.

>>**JUDGE HARRIS:** Talking about ties to the community.

>>**CHIEF JUDGE LAUTEN:** Ties to the community. Where you would – just like you said earlier, I wouldn't leave because my whole life is here so I'm not going to leave no matter what I'm charged with. And then we can look at that instrument and go, this person is low risk to not appear in court and low risk to commit a crime. And some of them low needs, like they don't have a lot of needs.

>>**JUDGE HARRIS:** Right.

>>**CHIEF JUDGE LAUTEN:** They commit an offense, which they're very unlikely to ever commit again and they're going to appear at trial. And those studies show that if you keep those people in jail, the longer you keep them in jail, the more likely they will become recidivists because they're going to learn how to commit better crimes --

>>**JUDGE HARRIS:** That's exactly right.

>>**CHIEF JUDGE LAUTEN:** -- from the people they're hanging around with.

>>**JUDGE HARRIS:** And not only will they – they might have some sort of educational level in jail –

>>**CHIEF JUDGE LAUTEN:** Right.

>>**JUDGE HARRIS:** But also, the fact is, is that if you're in jail, you've lost your job. You may have lost your home. A lot of factors, a lot of connections that help people or encourage people to commit crimes. So it's exactly the opposite of what the research says. Obviously, if people have homes and jobs, and families, they're less likely to commit crimes rather than if they don't have those ties.

>>**CHIEF JUDGE LAUTEN:** So there's a movement, and we're part of this movement, I think it's fair to say, to assess risks and if it's low risk, low need, the smart decision of kind of a criminogenic perspective is get those people out of jail.

>>**JUDGE HARRIS:** As quickly as possible, and touch them as little as possible. Don't do as much to them and affect their lives in negative ways, and the likelihood is that they won't ever commit another crime.

>>**CHIEF JUDGE LAUTEN:** It's very likely that they'll show up in court. Their case is going to be resolved one way or the other and the likelihood of you seeing them again is pretty minimal. Then there's the intermediate class and then there's, of course, the class of high-risk, high need. So we're kind of moving in that direction. You mentioned pre-trial release and we're going to talk about the state attorney's statement about her position internally in her office, about what her lawyers are going to do, but for the public's benefit, right now we have 545 on pre-trial release from the Orange County Jail. So they're supervising 545 people who, rather than being in jail, are out in the community. Some of them, it's just a phone call, are you still at the same house, you still have the same job. Some percentage of them have to come in and be drug tested because they were arrested on a drug case and they want to screen them. That's pre-trial release.

ROR, which we toss those acronyms around, is release on one's own recognizance. That's just saying, we're letting you out of jail, and here's your trial date, show up. We don't need to hear or see from you until that day.

>>**JUDGE HARRIS:** And the condition is you promise you will come back.

>>**CHIEF JUDGE LAUTEN:** Right, and if you don't, we'll arrest you and then you're probably not going get an ROR again, not only in this case, but probably ever again.

>>**JUDGE HARRIS:** Right.

>>**CHIEF JUDGE LAUTEN:** And you'll probably have to post money. But we do have a pretty vibrant pre-trial release program. And the other thing is, this week, the State Attorney said that within her office – she didn't change – she sort of said she's changing the bond policy, but the bond policy hasn't really changed. The case law is still the same. The constitution is the same. Our administrative order is the same. She announced that her employees will not object, or might even advocate for a release on one's own recognizance or pre-trial release for individuals charged with misdemeanors, less serious crimes that have some community ties. She's kind of told her folks, I want you to not object to ROR or even raise the issue with the judge to say get them out of jail under the same theory that keeping them in jail is doing nobody any good at all. Not a change in the bond policy, but a change in her office's policy.

>>**JUDGE HARRIS:** Policy.

>>**CHIEF JUDGE LAUTEN:** Her office's policy and position. There is that intermediate group of people that will still have to post monetary bond. Do you agree with that? Like they failed to appear in the past, so the likelihood that they might fail to appear again is greater and so we might say, I'm insecure releasing you on your own recognizance so you're going to have to post money.

>>**JUDGE HARRIS:** I think right now, how it stands, that is our culture. Will it always be, I don't know that. And I don't know if you look an ideal situation whether it's ever ideal, in that again, the research doesn't show that the amount of bond affects the return rate nor whether there's bond at all versus no bond.

>>**CHIEF JUDGE LAUTEN:** But let me play devil's advocate a little bit on that.

>>**JUDGE HARRIS:** Absolutely.

>>**CHIEF JUDGE LAUTEN:** If a bondsman posted a \$15,000 bond, I would think, or \$25,000, or a \$100,000 bond, I would think that they would – they would be motivated to make sure that their client appeared so they might be calling them, as you said earlier, reminding them, hey, you got a court date tomorrow and you better be there or I'm going to lose \$50,000. I mean, in that sense I would think if you post a large amount of money, at least the bond industry would be kind of pressuring you, you better show up.

>>**JUDGE HARRIS:** Right. I mean, that certainly makes sense. Again, I've looked at the studies and it doesn't show that there's any difference in that. That doesn't mean it's not true, of course. Studies are studies however, the science shows that they're not able to see a statistical effect on that.

>>**CHIEF JUDGE LAUTEN:** Interesting. Because intuitively, you think boy you – I mean, if you had \$100,000 bond and you sign over title to your house, you're going to lose your house if you don't –

>>**JUDGE HARRIS:** Right. You would.

>>**CHIEF JUDGE LAUTEN:** On the other hand, you're worried about yeah, I'm going to prison for 30 years, so what good is my house going to do me, maybe you might not show up.

>>**JUDGE HARRIS:** Right. Viscerally, you're right. You would think – I think that's the reason why we had the policies in the first place is viscerally it makes sense, that would affect people and their willingness to come back to court. However, think of the other ties we have that are part of our system. Almost always in situations like that they have a lawyer.

>>**CHIEF JUDGE LAUTEN:** Right.

>>**JUDGE HARRIS:** That lawyer is also incredibly interested in getting them to court.

>>**CHIEF JUDGE LAUTEN:** Right.

>>**JUDGE HARRIS:** So I wonder if having a second person, is that more effective than having a lawyer? I don't know.

>>**CHIEF JUDGE LAUTEN:** Interesting.

>>**JUDGE HARRIS:** And I haven't seen any studies on that at all.

>>**CHIEF JUDGE LAUTEN:** Right, that's interesting. Well, one of the – one of my little pet peeves, and I don't want to overstate it, but every now and then on the news, you'll hear sort of the anchor say, so and so was arrested for whatever the offense is, and they've already bonded out of jail, kind of rolling their eyes, or at least their voice is intoned in such a way where it's sort of incredulous that this person has a bond. But our basic civics and our constitution is you are entitled to be released before your trial, if something, whether it's your promise or

money, or commitment of some form or another is that you'll show up for your trial. That's the main reason we have – and you're entitled to that.

>>**JUDGE HARRIS:** And again presumed innocent. We all know that, but that's how it plays out in our system is you should be presumed innocent. And again, the studies also show that if you keep people in custody rather than let them out of custody, there's a higher chance they will be convicted rather than not convicted. And unfortunately, sometimes that conviction may in fact not be a correct conviction. So if you think this through, the reason why people are more likely to be convicted if they're in custody, we all know viscerally is they want to get out of custody. They want to get out and the way they get out a lot of times is by accepting a plea. So they may be willing to accepting a plea that allows for probation or time served before they would be able to have a trial date. So they plea to something they may think that – that they're not guilty of simply because they need to get out of jail.

>>**CHIEF JUDGE LAUTEN:** So you were an assistant public defender for how long?

>>**JUDGE HARRIS:** For 12 years, I think.

>>**CHIEF JUDGE LAUTEN:** So just for our listeners benefit, so you represented individuals who by definition were indigent –

>>**JUDGE HARRIS:** Right.

>>**CHIEF JUDGE LAUTEN:** -- in order to get the services of the public defender's office. And so you, I imagine, lived and had real life experiences with clients saying to you, I'm not guilty of this but I've got to get out here and I've got to get back to my family. I'll take probation rather than –

>>**JUDGE HARRIS:** All the time.

>>**CHIEF JUDGE LAUTEN:** -- wait.

>>**JUDGE HARRIS:** All the time.

>>**CHIEF JUDGE LAUTEN:** You had experiences –

>>**JUDGE HARRIS:** From the first conversation you have with them until the minute they plea, you would hear that from a number of people. Now, mind you, a number of people

would say, I did this, can you get the best deal possible, you know. But a strong number of people will say, they're not guilty, they're innocent but they need to get out of custody so badly that they'd rather go ahead and be convicted of something than go to trial.

>>**CHIEF JUDGE LAUTEN:** Right. And you know for our listeners benefit, no one goes to trial that quickly. I mean, you have 90 days speedy trial for a misdemeanor; 180 days for a felony. That's three months or six months and that's fast for a trial. Those are fast trials.

>>**JUDGE HARRIS:** That's fast, because it's not just about the right to trial, it's about the fact the attorneys, the state attorneys, the attorneys for the defense wanting to be prepared for those trials.

>>**CHIEF JUDGE LAUTEN:** So most of the time the trials were continued. That speedy trial time window was waived and the cases – it would be fast for a case to be tried in three to six months. A felony in six months; a misdemeanor in three.

>>**JUDGE HARRIS:** Incredibly quick. It's normally what, in felony, you would think more between like six months and a year would be more typically what you'd see.

>>**CHIEF JUDGE LAUTEN:** Because lawyers are interviewing witnesses called discovery and taking depositions, sworn statements and doing research, and doing legal research and factual research.

>>**JUDGE HARRIS:** Absolutely.

>>**CHIEF JUDGE LAUTEN:** And in your office where you worked, and I've always said, I think that they're the most admirable lawyers in the system because they're not paid privately to defend someone. They are salaried employees of the state and they're caseloads are at times just crushing to get the work done.

>>**JUDGE HARRIS:** The case numbers were high, but sometimes I think that makes people even more astute as to the law at that time and able to handle things –

>>**CHIEF JUDGE LAUTEN:** Right, yeah, because they were in – they certainly knew their judge because they were in some of the – in front of the same judge every day. Even though they get this bad kind of rap from defendants, a lot of public defenders know the judge better than anyone else.

>>**JUDGE HARRIS:** Absolutely. And not only just know the judge, but know that area of the law incredibly well at that time because they're seeing it every day.

>>**CHIEF JUDGE LAUTEN:** Right. Right. Let's go back to the bond schedule that we have for just a moment because we've had this schedule for a long time. It's 70 pages long. It's got a section on pre-trial release. It's got a section on notices to appear. And a notice to appear is where a police officer in a misdemeanor case says, I'm not going to even drive you down to the jail, sign this piece of paper, kind of like a traffic ticket, but it's a little different where you agree to appear in court, and we don't even have to process you through the jail. So that's in here.

>>**JUDGE HARRIS:** Right.

>>**CHIEF JUDGE LAUTEN:** There's a section on mental health pre-trial release so people who are suffering from mental illness might be diverted into a release program where we get them counseling awaiting their trial. And then there's lots of information about here's the bond schedule amount of bond for this charge. And since there are so many crimes in Florida, it takes 50, 60 pages to list the bond amount for every single crime.

>>**JUDGE HARRIS:** Yes.

>>**CHIEF JUDGE LAUTEN:** But I want to remind our listeners in part that arose out of this system where when you're arrested, the jail can just turn to the right page and say, well, the judge said that your bond for this third degree felony is \$1,000 and so you don't have to sit here all night. You can get out of jail if you, or your family, or a bondsman will post \$1,000 bond for you.

>>**JUDGE HARRIS:** Right.

>>**CHIEF JUDGE LAUTEN:** Now, I think it may be a fair statement to say the other way that this bond schedule has worked is, particularly for, let's say for a new judge, or a judge new to criminal, he or she might look in the bond schedule when they're presented with an arrest affidavit or even doing these first appearances, and go, well, what – in what universe should the bond amount be for this offense, and anchor a little bit to our bond schedule if they're going to set a monetary bond. That might provide them that anchor to say, well, I can start there and I can

go lower or I can go higher. So honestly, I mean, I think it's had that affect too. It kind of gives some guidance to our new judges. Don't you think that's a fair statement?

>>**JUDGE HARRIS:** That's a fair statement. I think that if – as you know, the difficulty of being a judge is trying to predict what things you should order that have the affect you want. So in this particular situation, what bond amount in order to make sure that someone shows up and doesn't commit new crimes. And as you know, that is a very hard decision. So if you can look at something and say, well, someone else thought this was a good amount, then maybe we can start there.

>>**CHIEF JUDGE LAUTEN:** And then for crimes of violence, while the person is presumed to be innocent, but someone was hurt and the police have probable cause to believe it's this defendant, whether that turns out to be the case or not, those cases usually are going to result in a monetary bond. And that's not going to change no matter who changes the policy. I mean, that kind of culture is going to remain. Do you think that's fair or not? Do you think that might change over time?

>>**JUDGE HARRIS:** I do. I do –

>>**CHIEF JUDGE LAUTEN:** So even for violent offenders?

>>**JUDGE HARRIS:** I do. I think that over time as the culture changes, and it has been changing nationally, I think it's not about the type of crime, but the other factors that are being looked at. So whether or not someone has been hurt, it's certainly a factor in trying to determine what the protection to the community needs to be. But again, when we know, if we all know and if we all accept as true, the studies showing the amount of bond doesn't matter for making sure that someone doesn't commit newer crimes, then why do it? You know, it's like making them wear red, if it doesn't make any difference, then why order it? We want to order things that have effect on what we're doing. You know, we want to do our good job of making sure we can accomplish that.

>>**CHIEF JUDGE LAUTEN:** So that kind of takes us back to this risk assessment, like, what risk does this person present? What needs do they have?

>>**JUDGE HARRIS:** So interestingly, I thought of this when you talked about the risk assessment earlier. Two things, one, something to say for it and something to say against it. Something to say for it right away. Yesterday, I believe on MPR, don't remember exactly the source, don't remember exactly how it was mentioned, but what they were talking about was probation officers. And they were saying, the most experienced best probation officers, working with the person that they've developed a relationship with, they've done studies and they say, what's the percentage they can predict that that person will not commit another crime.

>>**CHIEF JUDGE LAUTEN:** Will not commit a crime.

>>**JUDGE HARRIS:** Will not commit a new crime. So protection of the community. That's what we're looking for. We're trying to make sure they're not committing –

>>**CHIEF JUDGE LAUTEN:** All right. So these are experienced probation officers.

>>**JUDGE HARRIS:** Experienced people who know their probationer who is sitting in front of them.

>>**CHIEF JUDGE LAUTEN:** Yeah, how well did they do?

>>**JUDGE HARRIS:** Fifty percent.

>>**CHIEF JUDGE LAUTEN:** What, it's a coin toss? Really?

>>**JUDGE HARRIS:** Yeah, toss of the coin. So risk assessments, from what they've seen so far, in this particular situation, risk assessments is 70 percent.

>>**CHIEF JUDGE LAUTEN:** Oh, so more valid than a human.

>>**JUDGE HARRIS:** More valid than a human which theoretically that also will apply to judges the same way.

>>**CHIEF JUDGE LAUTEN:** Right. So you threw us in there.

>>**JUDGE HARRIS:** Except judges have less of a relationship.

>>**CHIEF JUDGE LAUTEN:** Right, that's true.

>>**JUDGE HARRIS:** You know, but theoretically, you know trying to predict whether someone is going to commit a crime in the future, that's kind of a tricky thing for people. So risk

assessments are at 70 percent which of course is better. Of course, 30 percent they're wrong on, just like 50 percent you're wrong if you're trying to predict it is a human. So that's the thing that kind of says –

>>**CHIEF JUDGE LAUTEN:** But on this one – on this one point, aren't our listeners going to automatically go through this common sense analysis, the best way for you to predict whether someone is going to commit a crime in the future is have they committed a crime in the past?

>>**JUDGE HARRIS:** Well, that obviously is one of the factors in risk assessments.

>>**CHIEF JUDGE LAUTEN:** Right. Well, I guess we should make that point. You get points on a risk assessment instrument if you have prior criminal history.

>>**JUDGE HARRIS:** Right.

>>**CHIEF JUDGE LAUTEN:** Now, at trial we don't let jurors hear about whether someone has committed a crime in the past because we're afraid, as a policy matter, that once they hear that, they'll stop listening to everything else.

>>**JUDGE HARRIS:** Because – for exactly the same reason that we just said it's valuable information as determining what someone is going to do in the future. It can be very affected by what they've done in the past. However, in trial, of course, the problem with that is that doesn't determine whether or not they committed this particular crime.

>>**CHIEF JUDGE LAUTEN:** Correct. And people might naturally just stop listening. You committed a burglary in the past, I'm going to convict you for this one whether there's proof of it or not.

>>**JUDGE HARRIS:** Right, because you probably did it.

>>**CHIEF JUDGE LAUTEN:** Yeah, and so as a policy, the courts won't allow that. But in our decision making about bond or even sentencing –

>>**JUDGE HARRIS:** And sentencing.

>>**CHIEF JUDGE LAUTEN:** -- we're going to look at what have you done in your past.

>>**JUDGE HARRIS:** Absolutely.

>>**CHIEF JUDGE LAUTEN:** So what was the other point? You said there was two.

>>**JUDGE HARRIS:** So the second thing is an interesting Harvard study that was written just – it was in the last year, I think it was just February. And what they said about the worry about risk assessments, because we're quick to go to some of these things sometimes, the worry about it is, remember the problem we had with Federal sentencing guidelines? Some of the factors you use can have a disproportionate effect on people of color, different ethnic groups because depending on the factors you're using. So although using a risk assessment can be good, we have to be very careful what we're using in making sure that we are not using factors that are having different effects on different people.

>>**CHIEF JUDGE LAUTEN:** Right, interesting. Right, I hope the scientists have been able to design a test that neutralizes those kind of factors like, you know, whether – yeah, but I don't know. Honestly, I don't know.

>>**JUDGE HARRIS:** Right. And that's what we have to continue to look for. A second concern with risk assessments, I went to a – something – some sort of meeting before out in – at NJC, National Judicial College. And they brought a bunch of different people together nationwide to talk about why we don't go to risk assessments more than having judges input on sentencing as well as bond decisions. And many people who aren't in law, they see that as a very good thing, however, of going to risk assessments, meaning some computer factors and things such as that. But you and I both know the importance of having the human element in it, otherwise we could just have computers sentence people.

>>**CHIEF JUDGE LAUTEN:** Right, right.

>>**JUDGE HARRIS:** We wouldn't need humans. And you and I both know the factors that we look at as a judge, that sometimes they're not as tangible and you want to take those things into consideration.

>>**CHIEF JUDGE LAUTEN:** Right, certainly in sentencing. And really in pre-trial release too.

>>**JUDGE HARRIS:** Many of the same factors.

>>**CHIEF JUDGE LAUTEN:** Factors, right. The risk instrument is helpful in bond but at sentencing I wouldn't want it to be all computerized and that's sort of the debate right now because of articles about is there bias in sentencing. Is our scoresheet valid as a guidepost to sentencing.

>>**JUDGE HARRIS:** Right.

>>**CHIEF JUDGE LAUTEN:** Interesting.

>>**JUDGE HARRIS:** So any time we can have more information as judges, that's a good thing.

>>**CHIEF JUDGE LAUTEN:** I agree.

>>**JUDGE HARRIS:** But I think any time we start to have discretion limited, that can be a bad thing.

>>**CHIEF JUDGE LAUTEN:** I agree with that too.

>>**JUDGE HARRIS:** So I think that's the balance that we need to do as we are going forward.

>>**CHIEF JUDGE LAUTEN:** But if we were to emphasize to the public in a kind of elementary presentation about bond, I want to kind of go back to the beginning. One, it's, people are entitled to be released under our constitution and statutes.

>>**JUDGE HARRIS:** Absolutely.

>>**CHIEF JUDGE LAUTEN:** And so when we release them, even if they're charged with something that's pretty serious, even if there's strong proof in the public's mind, they're still entitled to be released until they're convicted by a jury of their peers.

>>**JUDGE HARRIS:** Absolutely.

>>**CHIEF JUDGE LAUTEN:** And for some reason that – I don't know if it's movies or what it is, but that principle has kind of been weakened it seems to me in our society where people look at us askance if we release people prior to trial. I wish I could put my finger on why that is. Lack of civics? Lack of stressing our constitution? I don't know what –

>>**JUDGE HARRIS:** Yeah, I don't know why that is either.

>>**CHIEF JUDGE LAUTEN:** Do you feel that too?

>>**JUDGE HARRIS:** Absolutely. There is kind of this statement of well, the judge let him get out.

>>**CHIEF JUDGE LAUTEN:** Right, before trial.

>>**JUDGE HARRIS:** Before trial. Before the person was convicted.

>>**CHIEF JUDGE LAUTEN:** And then the other thing to emphasize is, you know, our system is one where you're presumed to be innocent until you're proven guilty by a jury of your peers, and that's an overriding constitutional principle since the founding of our country. And so that ties into the whole bond issue, because you're presumed to be innocent so why are we locking you up until we convict you beyond a reasonable doubt.

>>**JUDGE HARRIS:** Absolutely.

>>**CHIEF JUDGE LAUTEN:** And then the monetary aspect of it has been around for a long time, but there is this movement about should we look at things other than just how much money do you have in making this decision about how we should release people who are entitled to be released.

>>**JUDGE HARRIS:** Because what we want and our goal is to make sure people show back up to court because if they don't, that can have terrible monetary consequences on the court system, of course, as well as we want people to come back for court and trial and accountability.

>>**CHIEF JUDGE LAUTEN:** Right.

>>**JUDGE HARRIS:** And then the second thing is how do we get to the goal of making sure that the public is protected – community is protected during the time where someone is being charged before they're convicted.

>>**CHIEF JUDGE LAUTEN:** Right. So our jail holds just over 5,200 inmates at its maximum capacity. It's like 5,226, something like that. Today we have about 22 to 2300 people so we're at about 50 percent capacity. And once we were bursting at the seams where the county

might have had to build a new jail. Nonetheless, of those 2,500, 70 percent of those inmates have not been sentenced to that jail; 70 percent are pre-sentenced inmates.

>>**JUDGE HARRIS:** Wow. I've seen that nationwide where the number is 60 percent, but I didn't know ours was 70.

>>**CHIEF JUDGE LAUTEN:** So you know in almost every jail in America, more than half the people haven't been convicted of the crime that's keeping them in the jail.

>>**JUDGE HARRIS:** Right.

>>**CHIEF JUDGE LAUTEN:** And that's a pretty amazing statistic when you think about it which ties into what we're talking about.

>>**JUDGE HARRIS:** Sometimes their punishment occurs before their conviction.

>>**CHIEF JUDGE LAUTEN:** Sometimes. And we don't want a system – we're not happy with a system that way. You know, some people are there, they've been tried, convicted, but there's a – there's sort of a pre-sentence investigation that's going on and so, we've convicted you, you are no longer entitled to bond. You got to sit there until we actually sentence you. But when the state attorney announced her change in policy last week, I called the jail and said, can you tell me how many defendants are in jail on a misdemeanor -- because her policy was about misdemeanors only.

>>**JUDGE HARRIS:** Right.

>>**CHIEF JUDGE LAUTEN:** -- who have been there more than five days on a \$1,000 bond or less. Guess what that number was?

>>**JUDGE HARRIS:** I don't even have a guess.

>>**CHIEF JUDGE LAUTEN:** 160 inmates. So it's not a – it's not a really high number. And if some of those inmates are there for domestic violence, for example, her policy is not ROR for domestic violence, to ask for monetary bond. So I appreciate what she did and what she said, and for the most part, I'm in agreement with her. It will be interesting to study a little further, to dig down a little bit more and see how many people under her new policy would we be releasing now that's she's going to advocate or at least not object to a ROR. And we know

it's no more than 160 people, and it might be 60 people. I mean, it might be of those 160, 100 are there for first degree misdemeanors that involve domestic violence where there's still sort of the thought that probably they should have to post bond, monetary bond rather than – rather than just be ROR'd or PTR'd. And that might change, as you said, over time, but right now I'm just curious about what is –

>>**JUDGE HARRIS:** What effect, if any.

>>**CHIEF JUDGE LAUTEN:** Yeah, it might be – well, we know it's not more than 160 people. On the other hand, the state attorney is absolutely right, that of all inmates, that's felony and misdemeanor inmates, men and women, 70 percent are there without having been sentenced. They call them pre-sentenced defendants. They're there pre-sentence, either pre-sentence investigation, but really most of them probably on monetary bond, unable to post the bond, or don't have a bond. And so it will be interesting as we go forward with her kind of proposed change to really drill down and say, how many people might this effect. And I'm still fascinated by the state of Kentucky that has said, you cannot write a monetary bond, be a surety bond – in fact, Kentucky went so far as to say, if you write a bond, if you engage in the business, you've committed a crime.

>>**JUDGE HARRIS:** Wow.

>>**CHIEF JUDGE LAUTEN:** So I really want to contact some more people in Kentucky and say, tell me how your system is working. I know that it's based on risk assessments. They release people based on risk.

>>**JUDGE HARRIS:** Yeah, and we're going to see more of it. We're going to see it and we're going to be looking back at this at some point and realizing, wow, we – we were on the right track –

>>**CHIEF JUDGE LAUTEN:** Yeah, and we'll probably look back and go, it was sort of a civil rights issue that we didn't spot early enough. It's a right that people ought to have.

>>**JUDGE HARRIS:** Yeah.

>>**CHIEF JUDGE LAUTEN:** Well, thank you so much for sharing your thoughts. This was fascinating.

>>**JUDGE HARRIS:** Thank you for having me.

>>**CHIEF JUDGE LAUTEN:** I hope it was helpful to our listeners. Criminal bail bonds are a fascinating issue at Inside the Courts, or I'm sure you get it in your – often people want to stop and talk to us about bonds. So I hope that this was helpful to our listeners.

>>**JUDGE HARRIS:** Good. Again, thanks for having me.

>>**CHIEF JUDGE LAUTEN:** Thanks for joining me.

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