



Kyle Rittenhouse's Call of Duty Habit and Post-Arrest Silence Aren't Evidence of His Guilt

Judge Bruce Schroeder rightly reprimanded Assistant District Attorney Thomas Binger for what he called a "grave constitutional violation."

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Kyle Rittenhouse is the star witness in the Kyle Rittenhouse trial. And today the 18-year-old took the stand, testifying that he acted in self-defense when he shot three men, ultimately killing two, during unrest in Kenosha, Wisconsin, on August 25, 2020.

The testimony was arguably the climax in the proceedings against Rittenhouse, who is facing multiple homicide charges and has become symbolic of just about everything the viewer wants to see. To many on the left, he's a vigilante upholding racist structures; to some on the right, a protector who filled a void left by law enforcement.

But there was another courtroom fixture centerstage on Monday: Assistant District Attorney Thomas Binger, who—no matter how you feel about Rittenhouse—should serve as a reminder of just how pitifully low prosecutors will stoop while in pursuit of a conviction.

Binger's Rittenhouse cross-examination should have been a big moment, which it was, but not for the reasons Binger would have hoped. He began with a probe of Rittenhouse's interest in purchasing an AR-15, asserting that Rittenhouse must have declined a pistol or a shotgun because of his *Call of Duty* habit. There are a few problems here: Players use many different sorts of guns in simulation games, including pistols and shotguns. But more fraught is the implication that playing violent video games somehow makes you a murderer, or more likely to murder someone—a hysterical assumption that is not based on fact.

The questioning was desperate, but it quickly moved from breathless to potentially unconstitutional as Binger faced off multiple times with Judge Bruce Schroeder after the former noted Rittenhouse's post-arrest silence with the insinuation that it somehow indicated his guilt.

"I was astonished when you began your examination by commenting on the defendant's post-arrest silence," the judge said. "That's basic law. It's been basic law in this country" for decades, adding, "I don't know what you're up to."

They also squared off over Binger's attempt to introduce evidence to the jury that Schroeder had already said was likely inadmissible. The chain of events prompted Rittenhouse's defense to ask for a mistrial with prejudice—meaning the state would not be permitted to bring the same charges—which Schroeder said he would take under advisement. "Don't get brazen with me," Schroeder told Binger. "When you say that you were acting in good faith, I don't believe that."

Binger is not the first prosecutor to receive such admonishment.

"Prosecutorial immunity, which basically provides absolute immunity to prosecutors, has served as essentially a perverse incentive in this type of a situation," Anya Bidwell, an attorney at the public interest law firm Institute for Justice, tells *Reason*. "Prosecutors—especially when they act inside of a courtroom, like in this case—they are 100 percent immune from any kind of civil liability, so they can lie, they can bend [the facts] whichever way they want...and they will not be held accountable." A recent example: A prosecutor in Louisiana was given immunity after working to derail rape allegations against an assistant warden at the Louisiana State Penitentiary.

That case remained low-profile. High-profile cases like Rittenhouse's tend to turn a swell of brief attention to the criminal justice system, at which point people may find their preconceived notions challenged. That's doubly true here with people on both sides of the aisle holding up Rittenhouse's actions as indicative of whatever narrative they want to believe.

Consider J.D. Vance, for example, the Republican candidate for Senate in Ohio. Binger is a "lawless thug," he said—unexpected words from someone who has touted the importance of law-and-order. And then there was conservative commentator Matt Walsh, who tweeted that the prosecutor is a "corrupt piece of shit brazenly violating the constitution" as well as "a raging asshole."

"Based on what I've seen, objectively it does seem like the prosecution really messed this up. I think that's a fair assessment. But I'm not the least bit confident that folks like J.D. Vance and Matt Walsh and whoever else have just come to that decision through neutral civil libertarian principles," says Jay Schweikert, a research fellow with the Cato Institute's project on criminal justice. "On the other side, I've seen tons of nominally progressive people who in their day jobs care a lot about criminal justice, and yet seem to be howling for a conviction, and convinced that anything the judge is doing to push back against the prosecutor is because he's racist and biased."

After the trial's conclusion, both sides will probably retreat back to their respective corners. But a criminal defendant's right to due process should not hinge on how sympathetic he is, and a prosecutor's disdain for the rules is by no means constrained to the assistant district attorney in Kenosha County, Wisconsin.