

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

CASE NO. SC01-2333

DCA CASE NO. 5D99-2203

DEXTER L. BYRD,

Respondent.

ON DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT

RESPONDENT'S MERIT BRIEF

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

ROSEMARIE FARRELL
ASSISTANT PUBLIC DEFENDER
Florida Bar Number 0101907
112 Orange Avenue, Suite A
Daytona Beach, Florida 32114
Phone: (386) 252-3367

ATTORNEY FOR RESPONDENT

TABLE OF CONTENTS

	<u>PAGE NO.</u>
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF ARGUMENT	
4	
ARGUMENT	9
<p>WHETHER OR NOT IT IS PRESUMED, VINDICTIVENESS OF THE SENTENCE OF 75 YEARS FOLLOWING TRIAL IS NOT DISPELLED BY THE RECORD WHERE THE COURT ADVOCATED ACCEPTANCE OF THE FAILED PLEA OFFER OF 30 YEARS AS “A STEAL”AND NO OBJECTIVE INFORMATION OR FINDINGS IN SUPPORT OF THE INCREASE ARE CONTAINED IN THE RECORD. THE DECISION REASONABLY APPLIES THIS COURT’S HOLDING IN <u>STATE V. WARNER</u> AND MUST BE AFFIRMED. 762 SO.2d 507 (Fla. 2000).</p>	
CONCLUSION	19
CERTIFICATE OF SERVICE	20
CERTIFICATE OF FONT	20
APPENDIX	21

TABLE OF CITATIONS

PAGE

NO.

CASES CITED:

Alabama v. Smith,
490 U.S. 794 (1989) 8, 17

Bush v. State,
785 So.2d 1238 (Fla. 4th DCA 2001) 15

Byrd v. State,
770 So.2d 311 (Fla. 5th DCA 2000) 11, 16

Byrd v. State,
794 So.2d 671 (Fla. 5th DCA 2001) 4, 7, 8, 13, 14, 16-18

Capre v. State,
773 So.2d 92 (Fla. 5th DCA 2000) 11

Casselman v. State,
761 So.2d 482 (Fla. 5th DCA 2000) 11

Cottle v. State,
733 So.2d 963 (Fla. 1999) 6, 11, 16

Frazier v. State,
467 So.2d 447 (Fla. 3d DCA 1985) 8, 15, 17

Gallucci v. State,
371 So.2d 148 (Fla. 4th DCA 1979) 10

Hill v. State,
499 N.E.2d 1103 (Ind. 1986) 9, 15

Hitchcock v. Wainwright,
770 F.2d 1514 (11th Cir. 1985) 14

<u>Maddox v. State,</u> 760 So.2d 89 (Fla. 2000)	4, 5
<u>Mitchell v. State,</u> 521 So.2d 185 (Fla. 4th DCA 1988)	8, 10, 11, 14
<u>Morales v. State,</u> 27 Fla. L. Weekly D1099 (Fla. 4th DCA May 8, 2002).....	15
<u>North Carolina v. Pearce,</u> 395 U.S. 711 (1969)	17
<u>People v. Aragon,</u> 11 Cal. App.4th 749 (Cal. 1992).	9
<u>People v. Mosko,</u> 475 N.W. 2d 866 (Mich. 1991)	16
<u>Prado v. State,</u> 27 Fla. L. Weekly D1047 (Fla. 3d DCA May 8, 2002)	5, 10-12, 15
<u>Richardson v. State,</u> 809 So.2d 69 (Fla. 2d DCA 2002)	15
<u>State v. Mitchell,</u> 691 N.E. 2d 354 (Ohio 1997)	9
<u>State v. Warner,</u> 762 So.2d 507 (Fla. 2000)	8, 9, 11-14, 18
<u>Stephney v. State,</u> 564 So.2d 1246 (Fla. 3d DCA 1990)	15
<u>U.S. v. Cruz,</u> 977 F.2d 732 (C.A. 2, NY, 1992)	16

United States v. Goodwin,
457 U.S. 368, 376 (1982) 17

Wilson v. State,
792 So.2d 601 (Fla. 4th DCA 2001) 15

OTHER AUTHORITIES:

Criminal Punishment Code 10
Fla. R. Crim P. 3.800(b)(2) 10
U.S. Const., Amend V 5, 10, 12
U.S. Const., Amend. VI 5, 10, 12
U.S. Const., Amend. XIV 12

STATEMENT OF THE CASE AND FACTS

The Respondent makes the following addition to the Petitioner's statement of the case and facts. Some facts are necessarily repeated for continuity.

Following jury selection but prior to opening statements, the following colloquy occurred between counsel for the defense and the court:

Mr. Bankowitz: As I indicated to the court, Mr. Byrd asked me what the court's inclination would be for a plea to the bench, and your honor indicated thirty years.

The Court: From what I understand from the State and I haven't seen the score sheet, but apparently he's not pure driven snow and his score sheet comes out to more than 15 years.

So I think 30 years is a fair offer, considering what you would do is over 100 years, and this isn't your first robbery.

Frankly, I think-- Good God, He's got numerous armed robberies.

Mr. Bankowitz: They all arise out of one plea.

The Court: Well, there you go. They all count, though. I think 30 years is a steal. He certainly won't get that low if he goes to trial. His record is horrendous.

(T 3)¹

¹The record-on-appeal consists of four volumes: the first, containing the transcript of the plea hearing in case 98-9875, and the two severed counts (one and two) in case

Although on defense motion counts three and four in the single information had been severed for purposes of trial, the plea offer was for all cases. (R 43, 89-91, 99-101; See Appendix, A-4)

The jury returned its verdict of guilty as charged to the robbery, and guilty to the lesser-included-offense of assault on count two. (T 118; R 112-113) The Court adjudicated the Respondent guilty and ordered a presentencing investigation. (T 120-121; R 122-125)

The following day, the Respondent withdrew his pleas of not guilty to the remaining counts in 98-10536, and 98-9875. (R 1-16, 120-121) Byrd entered a “best interests,” no contest plea to all remaining charges. (R 1-5)

At sentencing on July 15, 1999, the State recommended a sentence of 40 years on all offenses. (R 18-24) Judge Russell sentenced Byrd as a habitual violent felony offender to 30 years in prison, with a 15 year minimum mandatory based upon the Prison Releasee Reoffender Act on the count one robbery; a concurrent 10 years in prison with a 5 year minimum mandatory based both on

98-10536 (R 1-16); the second containing the transcript of the sentencing hearing (R 17-38); the third containing the transcript of the documents filed with the Clerk (R 39-219); and the fourth containing a transcript of excerpt from a jury trial (T 1-122). The record also includes the State’s Exhibit at sentencing on July, 15, 2000.

habitualization as a violent felony offender and the Prison Releasee Reoffender Act, for the count two aggravated assault; and a consecutive 30 years in prison as a habitual violent felony offender, with a 15 year minimum mandatory based upon the Prison Releasee Reoffender Act for the count three robbery. (R 33-34, 139-142, 158-160) Byrd was sentenced to 60 days time served for the count four misdemeanor assault. (R 34, 160)

On 98-9875 the Appellant was sentenced as a habitual felony offender to a consecutive 15 years in prison for the count one delivery of cocaine, and 5 years for the count two possession of cocaine, concurrent to count one, but consecutive to the sentence imposed in case CR98-10536. (R 36,136-138, 156-157) The Appellant's total sentence was 75 years.

SUMMARY OF ARGUMENT

The State argues that the decision of the Fifth District Court of Appeal in Byrd must be reversed because the argument that the sentence was vindictive was unpreserved and fails to satisfy the test laid down in Maddox for making exception to that preservation requirement, that it be patent and serious. Byrd v. State, 794 So.2d 671 (Fla. 5th DCA 2001)[hereinafter “Byrd”]; Maddox v. State, 760 So.2d 89 (Fla. 2000). Next the State argues that the respondent failed to demonstrate that the original plea offer encompassed all of the charges. Continuing on this theme, the Petitioner claims without record reference or attribution that it was the State which made a plea offer, and that the offer concerned only two of the four pending charges.² The Petitioner argues that the State’s offer did not become the Court’s offer.

The State’s core arguments are that there was neither a presumption of vindictiveness nor actual vindictiveness in the dramatically harsher sentence upon entry of a plea to the remaining charges following a jury verdict on the two severed counts. Finally, the Petitioner also attacks the Byrd Court’s choice of a remedy in

² There were two cases before the court, with a total of six counts. There were four counts in case CR98-10536, two of which were severed for trial. There were two counts in case CR98-98-75.

reversing and remanding for resentencing in accordance with its prior offer of thirty years. Characterizing the Fifth District's holding as enforcement of a rejected offer, the Petitioner also claims that the Court chose the wrong remedy because of the confusion generated by its own illogic.

The Respondent believes that the issue of a vindictive sentence certainly does satisfy the test put forward by the Maddox Court of patent and serious error determining the length of sentence, apparent on the face of the record. Byrd rejects the notion advanced by the State that the only way in which a sentencing error might implicate the interests of justice is if it exceeds the statutory maximum. Vindictive sentencing is fundamental error. It is forbidden because it undermines the critical rights to plead not guilty and to have a trial by jury. Prado v. State, 27 Fla. L. Weekly D1047 (Fla. 3d DCA May 8, 2002); U.S. Const., Amend. V and VI.

For reasons unknown to the Respondent, contrary to the record-on-appeal, the Petitioner avers that the original plea offer of 30 years was only for counts three and four of case CR98-10536. (IB 7, 12) If the Court's own representation of the total of 100 years which Byrd faced on the charges cited in the State's brief is not sufficient to establish that the Court was talking about more than the second degree

felony robbery in count three and the third degree aggravated assault in count four,³ the Court's own dated summary of the rejected offer is contained in the record-on-appeal. (R 89; See Appendix A-4)

Similarly, while the record is devoid of any suggestion that the State extended a pre-trial plea offer to Byrd, the Petitioner asserts that “[t]he State offered a plea bargain to two of the four pending charges in this case.” This is entrée to the State's argument that the Court's recitation of the plea offer was simply to ensure that the defendant understood it and knowingly rejected it. See Cottle v. State, 733 So.2d 963 (Fla. 1999). The Petitioner's argument that the State's offer did not become the Court's offer is at odds with the facts of this case. The State did not even participate in the discussion between the defense and the Court. Even if it had, the Respondent takes exception to the State's insistence that it is not possible to explain a plea bargain for a specific sentence without implying that the sentence hinges upon future procedural choices. This is different than saying different choices have different outcomes; it is to predict that a different choice will have a particular negative outcome regardless of other factors.

Moreover, a trial judge can endorse a plea offer without implying that rejection of

³Byrd was convicted of simple assault as the lesser-included-offense of aggravated assault in count four.

the offer *will result* in a higher sentence.

The State expresses three complaints with the Byrd holding. The first alleged inaccuracy of the decision according to the Petitioner is that no presumption of vindictiveness arises merely because the post-trial sentence exceeds *the rejected plea offer*. The State carefully overlooks that it is the *Court's* offer, and the Court's proprietary interest in that offer which accounts for the loss of the Court's perceived, indispensable neutrality. It is the Court's movement from impartiality to the role of advocacy that leads to the presumption.

Although the Petitioner concedes that a trial judge may not constitutionally impose a greater sentence on a defendant because he exercises the right to trial by jury, she insists that a presumption of vindictiveness does not arise merely because a greater sentence is imposed upon a defendant post-trial following rejection of a plea advocated by the court. The State further contends that it is not its burden to rebut such a presumption with record evidence unknown at the time of the offer. Yet without any record evidence of additional facts or considerations apart from the trial itself which would explain a dramatically steeper sentence post-trial, isn't the conclusion inescapable that the defendant was punished for going to trial? Finally, the Petitioner's point about the State's plea offer not becoming the Court's offer is misplaced on these facts.

The Respondent maintains that the Byrd Court's expectation that a sentencing court which is about to exceed its former offer explain on the record what information it had at sentencing that it did not have at the time of plea is a logical extension of the Warner holding that a record be made of all plea discussions involving the court. State v. Warner, 762 So.2d 507 (Fla. 2000). Most if not all of the many decisions upheld on appeal wherein a judge has participated in failed plea discussions with the eventual conclusion of a higher sentence have as a fact in common that a record was made of the reasons for the higher sentence by the court. Alabama v. Smith, 490 U.S. 794 (1989); Mitchell v. State, 521 So.2d 185 (Fla. 4th DCA 1988); Frazier v. State, 467 So.2d 447 (Fla. 3d DCA 1985).

Despite the Petitioner's critique of the Byrd Court's remedy in cases such as this where the record is devoid of any objective basis or explanation for the increased sentence, remand for imposition of a sentence consistent with the original offer by the same judge is an eminently reasonable solution also in line with Warner.

ARGUMENT

WHETHER OR NOT IT IS PRESUMED,
VINDICTIVENESS OF THE SENTENCE OF 75
YEARS FOLLOWING TRIAL IS NOT DISPELLED
BY THE RECORD WHERE THE COURT
ADVOCATED ACCEPTANCE OF THE FAILED
PLEA OFFER OF 30 YEARS AS “A STEAL” AND NO
OBJECTIVE INFORMATION OR FINDINGS IN
SUPPORT OF THE INCREASE ARE CONTAINED
IN THE RECORD. THE DECISION REASONABLY
APPLIES THIS COURT’S HOLDING IN STATE V.
WARNER AND MUST BE AFFIRMED. 762 SO.2d
507 (Fla. 2000).

Against the present backdrop of a sentencing scheme which invites “no questions asked” imposition of statutory maximum prison terms for offenders with minimal to no records, the State as Petitioner appeals the holding of the Fifth District Court of Appeal below, vehemently protesting the stated expectation that a trial judge who participates in plea negotiations keep a record of such discussions and the facts relied upon so that in the event that the court elects to sentence more harshly based upon additional facts which emerge prior to sentencing, a vindictive sentencing claim might be defended.⁴ Byrd; see also Prado (J. Sorondo,

⁴Florida emerges as fairly unique among the states whose authority was consulted on the subject of vindictive sentencing in its overall nonaccountability for individual sentencing determinations. Eg., Hill v. State, 499 N.E.2d 1103 (Ind. 1986); State v. Mitchell, 691 N.E. 2d 354 (Ohio 1997); People v. Aragon, 11 Cal. App.4th 749 (Cal. 1992).

concurring) (“a judge who having been advised of the details of the case and having been actively involved in an unsuccessful plea bargaining discussion, wishes to impose a post-trial sentence more severe than that contemplated by his or her plea negotiations, would be wise to explain his or her reasons for the greater sentence in order to dispel any appearance of vindictive sentencing.”).

The Criminal Punishment Code notwithstanding, a trial court may not impose a greater sentence on a defendant because that defendant availed himself of his constitutional right to trial by jury. Gallucci v. State, 371 So.2d 148 (Fla. 4th DCA 1979); Prado; Mitchell. A defendant’s fear of retribution cannot be permitted to chill the exercise of his Fifth Amendment privilege against self-incrimination, or his Sixth Amendment right to have his guilt or innocence determined by a jury. McDonald, 751 at 58; Prado (J. Sorondo, concurring); U.S. Const., Amend V and VI.

The State first argues that this vindictive sentencing issue is unpreserved because a rule 3.800(b)(2) motion was not filed with the judge who imposed the sentence. This argument is without supporting legal authority except for a prior decision by the Fifth District Court of Appeal at odds with, and presumptively overruled by, the initial decision which granted the Respondent his appeal based upon ineffective assistance of his appellate counsel for failing to have addressed the

unpreserved vindictive sentencing issue on direct appeal. Capre v. State, 773 So.2d 92 (Fla. 5th DCA 2000); Byrd v. State, 770 So.2d 311 (Fla. 5th DCA 2000) [hereinafter Byrd I].

Vindictive sentencing is fundamental error because it needlessly undermines the invocation of critical constitutional rights to plead not guilty and to have a trial by a jury. Prado (J. Sorondo, concurring); Mitchell. Sentencing errors which constitute fundamental error may be reviewed without objection. Casselmann v. State, 761 So.2d 482 (Fla. 5th DCA 2000).

To avoid the potential for coercion a judge must neither state nor imply alternative sentencing possibilities which hinge upon future procedural choices, such as the exercise of a defendant's right to trial. State v. Warner; Byrd I. The Petitioner argues that it is not possible for the court to explain a plea bargain for a specific sentence without implying that the sentence hinges upon future procedural choices, and protests a court's inability to satisfy the mandate of Cottle without running afoul of Warner. Although not relevant to these facts, the Respondent challenges this view that a judge would be unable to depict the terms of a prosecutor's offer without conditioning sentencing outcome upon choice of procedure. Of course the outcome in terms of a "known" plea offer versus an "unknown" sentencing determination following trial, hinges upon procedural

choice. However any attempt to correlate or quantify length of sentence to procedural choice runs counter to the Warner holding and the constitutional rights that holding seeks to protect. U.S. Const., Amend. V, VI, XIV.

The Petitioner's urging that it is constitutionally permissible to give a more lenient sentence in exchange for a guilty plea is irrelevant to the matter of enhancement of a sentence post-trial without any offered, objective basis. Furthermore, in arguing that it is permissible to offer more lenient sentences in exchange for a guilty plea, the State has completely lost sight of the fact that the additional information and evidence which emerges during and following trial might also function as *mitigation*. Prado (J. Sorondo, concurring) ("The right to a trial by jury would be meaningless if the price to be paid for an adverse verdict is the *automatic* imposition of the maximum penalty, regardless of the seriousness of the facts of the particular case, the accused's age, level of culpability, prior criminal record or absence thereof, accomplishments and other mitigating factors that are always relevant to a determination of an appropriate sentence.")

While determining to permit judicial participation in plea bargaining, the Warner Court instituted safeguards to retain the function of the judge as a neutral arbiter. State v. Warner, 762 at 513. A judge may state on the record the length of sentence which appears to be appropriate for the charged offense on the basis of

information then available; a judge's neutral and impartial role is enhanced when providing a clear statement of information that is helpful to the parties. State v. Warner, 762 at 514.

Perhaps because of its zealous advocacy on behalf of the State, the Petitioner seems unable to see the vindictiveness inherent in its characterization that “whenever a trial judge endorses a plea offer which is subsequently rejected by the defendant it is at least implied that rejection of the plea offer will result in a higher sentence.” (IB 21) It is precisely such a predetermination that a higher sentence *will* as opposed to *could* or *may possibly* result from a verdict following trial that penalizes the procedural choice. Whether or not such thinking is determined to be presumptively vindictive, in the words of the Byrd Court: “the result is the same.” Byrd, 794 at 673.

The Petitioner claims to agree that a trial judge may not constitutionally impose a greater sentence on a defendant because he exercises the right to trial by jury. (IB 13) On the other hand, the Petitioner complains that the prior plea offer should not function as a “sentencing ceiling.” (IB 31) The Respondent has to ask what the Petitioner thinks the sentence following exercise of the right to trial by jury may not constitutionally be greater *than*? While the State agrees that a citizen's right to trial should not be penalized, it is quick to add that a defendant assumes the

risk of a harsher sentence by rejecting a plea offer. (IB 13) Recognizing that rejection of the plea offer is exercise of the right to trial, the risk of a harsher sentence must never, as has been threatened, become a certainty.

Looking past the growing roster of cases which recognize that a harsher sentence after trial following court involvement in a failed plea agreement gives rise to a presumption of vindictiveness, the Petitioner argues that Byrd is the exception. (IB 17) The Respondent submits that the State's reliance on Mitchell as support for its position is misplaced. In Mitchell which was factually distinguishable from this case in its anticipatory compliance with the mandate of Warner, the Fourth District Court of Appeal held that when a trial judge is involved in plea bargaining and a harsher sentence follows a breakdown in negotiations, the record must show that no improper weight was given to the failure to plead guilty. Mitchell, 521 at 188. Hitchcock v. Wainwright, 770 F.2d 1514 (11th Cir. 1985), also relied upon by the Petitioner, is a factually distinguishable capital case where the court although involved in a rejected plea offer was found to have shown that the sentence of death imposed after trial was based solely upon the facts of the defendant's case and personal history, based upon the precise reasons set forth as required by Florida statute. Hitchcock, 770 at 1519-1520. In addition to the Mitchell case overlooked by the Petitioner, Byrd in the company of decisions from the Second,

Third and Fourth District Courts of Appeal. See Stephney v. State, 564 So.2d 1246 (Fla. 3d DCA 1990); Frazier; McDonald; Bush v. State, 785 So.2d 1238 (Fla. 4th DCA 2001); Richardson v. State, 809 So.2d 69 (Fla. 2d DCA 2002); Prado. Contra Wilson v. State, 792 So.2d 601 (Fla. 4th DCA 2001); Morales v. State, 27 Fla. L. Weekly D1099 (Fla. 4th DCA May 8, 2002).

The Petitioner states that without benefit of the presumption of vindictiveness, Byrd's argument fails. On the contrary and in the alternative, even if this Court were to determine to employ a totality of the circumstances individualized analysis to determine vindictiveness of the sentence, the factual scenario of this case satisfies each of the factors put forward by the Petitioner: (1) the judge played an active role in plea negotiations; (2) the judge encouraged the defendant to plead guilty; (3) the court threatened a more severe sentence if the defendant were convicted following a jury trial; and (4) the sentence evidenced that the trial judge had penalized the defendant for going to trial. Hill, 499 at 1107.

In this case the trial court encouraged the Respondent to take the 30-year sentence it would impose if he entered a plea to the bench, characterizing it as a "steal" and reminding him that he faced over 100 years. Again losing sight of the distinction between information and advocacy, the Petitioner argues that Judge Russell was simply ensuring on the record that the defendant was aware of and

rejected the [her] plea offer, and represents that this is a good practice in view of the Cottle holding. (IB 21) The Petitioner attempts to counterpose these facts to those in two other jurisdictions and concludes that Judge Russell's comments were "ambiguous." (IB 28-29) See People v. Mosko, 475 N.W. 2d 866 (Mich. 1991); U.S. v. Cruz, 977 F.2d 732 (C.A. 2, NY, 1992).

Although the court had offered Byrd a 30-year sentence in exchange for his plea, and the State asked for a 40-year sentence following his conviction, the court imposed a 75-year sentence. A court's "up-front evaluation of the case for plea purposes ...establish[es] a presumptive sentence for the offense even if the defendant goes to trial." Byrd I. This is so because otherwise a defendant might be legitimately concerned that the overall sentence was harsher than it otherwise would be because he elected to go to trial. Byrd I; Byrd.

The Petitioner argues that a court's right to sentence a defendant more harshly after trial is a necessary corollary to permitting judicial involvement in plea negotiations. The Respondent submits that "the right" must be accompanied by acceptance of the responsibility as provided by law of basing sentencing decisions upon the considered judgment of relevant objective factors. Given the Court's participation and advocacy in the plea negotiations, the disparity in the Court's pre-trial sentencing offer and the post-conviction sentence establishes the presumption

of judicial vindictiveness. The presumption is not overcome by the record.

The Petitioner both relies upon and accuses the Byrd Court of over reading Alabama v. Smith. (IB 16) The Petitioner is eager to point out that the case holds that there is no presumption of vindictiveness where the sentence imposed following trial is greater than a vacated guilty plea. This holding recedes from North Carolina v. Pearce, 395 U.S. 711 (1969) by separating out vacated guilty pleas from vacated jury verdicts, the former falling outside of the rule that presumed vindictiveness due to the “institutional bias inherent in the judicial system against retrial of issues that have already been decided.” Frazier, citing United States v. Goodwin, 457 U.S. 368, 376 (1982). While relevant as context to the issue of sentencing, the holding does not touch the issue of presumptively vindictive sentences of judges who participate in and advocate unsuccessful plea agreements. It is interesting that even in holding that the presumption of vindictiveness based upon the institutional bias against retrial does not apply to vacated guilty pleas, the Alabama Court is careful to qualify its holding to “cases like the present one” where the relevant information available to the sentencing judge was considerably greater following trial and where the judge explained why he was imposing a harsher sentence than when he accepted the guilty plea.

According to the Warner Court, a judge’s preliminary evaluation of a

sentence is not binding since additional facts may emerge prior to sentencing which properly inform the judge's sentencing discretion. State v. Warner, 762 at 514. A defendant who has entered a plea in reliance upon the preliminary sentencing evaluation is protected from the unfairness of a higher sentence via an absolute right to withdraw the plea. State v. Warner. However, there is an absence of commensurate protection where as here a defendant exercises his right to trial, and upon his conviction receives a dramatically higher sentence than that entertained in the court's preliminary sentencing evaluation.

This Court is asked to affirm the Fifth District Court's decision in Byrd as it reasonably applies the safeguards of Warner to the scenario of the unsuccessful plea, safeguarding the right to trial.

CONCLUSION

BASED UPON the cases, authorities, and policies cited herein, the respondent requests that this Honorable Court affirm the decision of the Fifth District Court of Appeal.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

ROSEMARIE FARRELL
ASSISTANT PUBLIC DEFENDER
Florida Bar No. 0101907
112 Orange Avenue - Suite A
Daytona Beach, Florida 32114
(904) 252-3367

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to: The Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118, via his basket at the Fifth District Court of Appeal, and mailed to Dexter L. Byrd, DOC #A496748, Dorm C3109L, Okaloosa Correctional Institution, 3189 Little Silver Road, Crestview, Florida 32539-6708, on this 28th day of May, 2002.

ROSEMARIE FARRELL
ASSISTANT PUBLIC DEFENDER

STATEMENT CERTIFYING FONT

I hereby certify that the size and style of type used in this brief is 14 point Times New Roman.

ROSEMARIE FARRELL
Assistant Public Defender

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

DCA CASE NO. 5D99-2203
CASE NO. SC01-2333

Dexter L. Byrd,

Respondent,

_____ \

APPENDIX

Byrd v. State, 794 So.2d 671 (Fla. 5th DCA 2001)

A 1-3

Amended Information, CR98-10536, Page 1 of 4 Pages (R 89)

A 4