

IN THE SUPREME COURT OF THE STATE OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

Case No. SC01-2203

DEXTER L. BYRD,

Respondent.

ON DISCRETIONARY REVIEW FROM THE
FIFTH DISTRICT COURT OF APPEAL
ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

PETITIONER'S INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

On June 1, 1998, Dexter Byrd was released from prison after completing a twelve year sentence for nine felony cases, including several counts of robbery and burglary. (R 19) Just forty days later, on July 10, 1998, Byrd robbed a Burger King restaurant, threatening the cashier and other patrons. Two days after that, on July 12, 1998, Byrd robbed a Taco Bell restaurant. This crime was caught on the restaurant's security camera. Three days after the second robbery, on July 15, 1998, Respondent sold cocaine to an undercover police officer. (R 8) Byrd confessed to these crimes after arrest.

All of the robbery counts were originally charged in the same information as case number CR98-10536. The two criminal episodes were severed. (R 99-101) Counts one and two, robbery and aggravated assault at the Burger King, were severed from counts three and four, the same charges from the Taco Bell robbery. Counts three and four were set for trial on April 19, 1999. After the jury was selected, but prior to opening statements, defense counsel asked "what the court's inclination would be for a plea to the bench, and your Honor indicted 30 years." (Vol. 1, p. 3) The court responded, "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....I think 30 years is a steal. He certainly won't get that low if he goes to trial. His record is horrendous." (Vol. 1, p. 3) Byrd went to trial and was found guilty of robbery and assault.

The next day, on April 20, 1999, Respondent entered no contest pleas to the remaining robbery and assault counts, and also, the sale of cocaine charge. He explained to the trial judge, "The only reason I went to trial, I was offered a 30 year plea bargain. I'm 40 years old now. I had nothing to lose." (Vol. 2, p. 13-14)

On July 15, 1999, Byrd appeared before the court for sentencing on all counts. Prior to imposing sentence, the trial judge stated,

I don't know anybody who has done as many robberies as you, maybe Jerry Rogers, but you did more robberies than I've ever seen anybody with...I am shocked. I don't see any excuse for it. You know, nobody is safe on the streets when you're out there....(A) month and a half (after being released from prison)...you commit two new robberies. That's outrageous. I can't think of any reason why you should ever be on the streets again and it would be my intention to make sure that you're not. (R 31)

The State introduced certified copies of the nine prior felony convictions, and other predicates for habitual offender sanctions. The trial court imposed prison sentences of 30 years as both a HVFO and PRR on count one, followed by 30 years on count three, followed by 15 years on the drug charge, for a total of 75 years.

Notice of appeal was filed on July 26, 1999. Appointed counsel filed a 3.800 (b) motion on December 27, alleging that it was improper to sentence Appellant as both a habitual offender and prison releasee reoffender. This motion was granted on January 20, 2000, by the sentencing judge, and the PRR sentences were vacated. Ultimately, this argument was rejected by this Court in Grant v. State, 770 So.2d 655 (Fla. 2000). After jurisdiction returned to the district court, counsel filed an Anders¹ brief on February 7, 2000. On May 2, 2000, the District Court of Appeal issued its per curiam: affirmed decision in this case, and mandate issued.

On August 21, 2000, Byrd filed a Petition for Writ of Habeas Corpus requesting this Court grant him another appeal. The Fifth District Court of Appeal granted the petition by decision entered November 9, 2000. Byrd v. State, 770 So.2d 311 (Fla. 5th DCA 2000). In part, the Court held, “The problem with the sentence entered herein is created by the judicial plea negotiating which took place in this case....This was truly a plea ‘deal’ in which the court offered one sentence if defendant pled and another if

Anders v. California, 386 U.S. 738 (1967).

he insisted on his right to go to trial. [State v. Warner [762 So.2d 507 (Fla. 2000)] specifically rejects this approach.” The appeal was reinstated.

After briefs from the parties, the District Court issued its decision in this case. Byrd v. State, 794 So.2d 671 (Fla. 5th DCA 2001). Judge Charles Harris, writing for the majority, began:

This case reflects the hazards of judicial plea negotiations. The supreme court held in State v. Warner, 762 So.2d 507 (Fla. 2000), that Florida recognizes a form of judicial plea negotiation even over the objection of the State. The form approved is that the court may make a pre-trial evaluation of what an appropriate sentence for the offense would be regardless of whether the defendant pleads or goes to trial, based on the information then available to the judge. Warner cautioned that judges should neither state nor imply that the sentence would vary depending on the choice made by defendant.

Byrd v. State, 794 So.2d 671, 672 (Fla. 5th DCA 2001).

The court framed the issue presented by Byrd as whether a presumption of vindictiveness arises when a defendant rejects a pretrial plea offer, and is subsequently convicted and sentenced to a greater sentence than the rejected plea offer, and whether such a presumption was rebutted in this case. The court relied upon the second district’s decision in McDonald v. State, 751 So.2d 56 (Fla. 2d DCA 1999), that

created a presumption of vindictiveness.

That is a reasonable method of dispelling a defendant's legitimate fear of retribution should he exercise his constitutional right to a jury trial. The supreme court may well have had such a presumption in mind when it required that "[a] record must be made of all plea discussions involving the court." See Warner, 762 So.2d at 514....In any event, if the trial court elects to sentence more harshly based on additional facts which may emerge prior to sentencing, should the judge not at least put on record what the additional facts are and how those facts changed the judge's view? If the judge can change his or her mind merely by saying that after hearing the testimony he or she is convinced that a harsher sentence is justified, then there is no protection against vindictiveness in rejection of plea cases.

Whether we call it an un rebutted presumption or merely hold that the court has failed to explain on the record what information it had at sentencing that it did not have at the time of the plea offer and how such information would have made a difference, the result is the same.

Byrd v. State, 794 So.2d 671, 672-3 (Fla. 5th DCA 2001).

The remedy imposed for this error was to enforce the rejected plea bargain.

The concurring opinion of Judge Griffin found a violation of Warner, but

rejected the presumption of vindictiveness analysis, finding, “...the Second District's opinion in McDonald creates the ‘presumption of vindictiveness’ almost out of whole cloth based on an overreading of Stephney v. State, 564 So.2d 1246 (Fla. 3d DCA 1990).” Byrd v. State, 794 So.2d at 674. There was record evidence in the Stephney case that established judicial vindictiveness. “In this case, there is simply no similar record basis to find a presumption of vindictiveness. The sentence imposed on this defendant for these crimes, including the West Colonial Drive Taco Bell robbery, were well within the guidelines and less by twenty-five percent than what the court had told the defendant he would face if he was convicted.” Id. Judge Griffin joined the majority’s conclusion that the trial judge ran afoul of Warner. “The error requiring reversal in this case occurred when the trial court suggested there may be an advantage to the defendant if he were to enter a plea rather than to go to trial.” Id.

Rehearing was denied by order entered September 19, 2001. Notice to Invoke this Court’s jurisdiction was filed October 18, 2001. This Court accepted jurisdiction on April 12, 2002. This brief follows.

SUMMARY OF THE ARGUMENT

The lower court overlooked the fact that the plea offer extended before trial encompassed only two of the four charges. The criminal episodes had been severed. The plea offer before trial on counts 3 and 4 was 30 years' incarceration, and the sentence on these counts after jury trial was exactly the same: 30 years. This issue is not preserved for review.

The district court's decision below was flawed in many respects. The lower court finds a presumption of vindictiveness when the sentence after jury trial exceeds the rejected pretrial plea bargain. The majority of states hold that no presumption of vindictiveness arises, instead applying a totality of the circumstances test where the burden is on the defendant to establish actual vindictiveness. The mere disparity between the pretrial plea offer and the ultimate sentence is not enough to show that the sentence was harsher because the right to trial was exercised. The United States Supreme Court has repeatedly held that it is constitutionally permissible to offer more lenient sentences in exchange for guilty pleas. Other states do not fix the prior plea offer as a sentencing ceiling in recognition of the context that an offer is made.

This Court permitted judges to participate in plea negotiations in the Warner decision. This Court cautioned that a judge must neither state nor imply that the sentence hinge upon future procedural choices. This holding is counter poised against

the holding of Cottle, which makes it sound practice for a trial judge to place the plea offer on the record, to ensure that the defendant is personally aware of and voluntarily rejects the offer. How is a judge to ensure that a defendant is aware of and rejects a plea offer without at least implying that the judge is advocating the acceptance of the offer? The practical reality is just that: accept the plea and get the specific bargained-for sentence, or proceed to trial, and if convicted, face a sentence up to the statutory maximum. The explanation must include the fact that the ultimate sentence may hinge on future procedural choices. The combination of these two cases has the result of plea bargaining becoming a hollow exercise where a defendant has nothing to lose by going to trial because he can get the benefit of a rejected plea bargain after a jury trial. The plea offer cannot create a sentencing ceiling. It is impossible to successfully navigate the treacherous waters between Warner and Cottle without the result of unnecessary trials in nearly every criminal case.

Very few states permit the trial judge to participate in plea bargaining. Vermont, which like Florida permits judicial participation, faced the same issue presented here. The Court correctly concluded that the practical and policy considerations involved in plea bargaining made it too dissimilar to compare the sentence imposed after the offer was rejected and the defendant was convicted at trial. The comparison was “inapt”, and further, such a rule was ripe for abuse. “If defendants could demand the

same sentence after standing trial that was offered in exchange for a guilty plea, all incentives to plead guilty would disappear... The reality of plea bargaining is that once the defendant elects to go to trial, all bets are off.” State v. Davis, 115 Vt. 417, 584 A.2d 1146, 1148 (1990). If this Court continues to endorse judicial participation in plea negotiations as was approved in Warner, then the necessary corollary is that the plea offer does not create a sentence ceiling because the considerations involved in plea bargaining are too dissimilar to the situation where any lawful sentence can be imposed after a jury trial. The fourth district’s view is correct.

The trial judge’s remarks here did not establish that the sentence was vindictive punishment. Rather, the remarks are an opinion on the evidence, and said essentially, the plea offer is good and you should take it. Judge Griffin’s concurring opinion correctly finds “there is simply no record basis to find a presumption of vindictiveness.” Byrd v. State, 794 So.2d at 674. Even where actual vindictiveness is demonstrated, the remedy of enforcing rejected plea offers after a full and fair jury trial is illogical. The defendant rejected the bargained-for sentence. The prior plea offer should not create a sentence ceiling. The remedy should be remand for resentencing before another judge.

ARGUMENT

THE DISTRICT COURT’S DECISION

FAILS TO FOLLOW CONTROLLING
PRECEDENT BY PRESUMING JUDICIAL
VINDICTIVENESS AFTER A
DEFENDANT IS SENTENCED IN EXCESS
OF A REJECTED PRETRIAL PLEA
OFFER. THE PLEA OFFER SHOULD NOT
CREATE A SENTENCE CEILING.

In this case, the State seeks de novo review of the district court's decision which was flawed in many respects. First, the issue of judicial vindictiveness in sentencing was not preserved for review. Second, there is no showing that the sentence was any greater than the pre-trial offer. There is nothing to demonstrate that the 30 year offer encompassed any charges other than those before the court at that time. The plea offer was not to resolve all pending charges. On the merits, the district court's decision departs from state and federal precedent to find that the mere disparity in sentence imposed after a jury's verdict and the sentence the defendant rejected in a pretrial plea offer creates a presumption of vindictiveness. This presumption must be overcome by the State by demonstrating record evidence not known at the time of the plea offer that justifies the increase in sentence, erroneously held the decision below. The requirements imposed by Warner and Cottle are irreconcilable. In other states like Florida where the Judge is permitted to participate in plea negotiations, the reality of the plea bargaining process makes "inapt" the comparison between the plea offer and the sentence after verdict. The plea offer is not

a sentencing ceiling, because the two situations are so different. The same result should be reached here.

A. Issue Is Not Preserved

The posture of this case is a direct appeal from imposition of sentence. In this case, the defendant claims that he received an improper vindictive sentence because he elected to go to trial. The issue was not raised below, nor was it raised in a 3.800(b) motion to correct sentence. He was sentenced on June 15, 1999, during the Maddox window.

In Maddox v. State, 760 So.2d 89 (Fla. 2000), this Court held that to be cognizable on appeal despite the failure to preserve the sentencing issue, the claim had to be patent and serious. Patent errors are apparent from the face of the record, and a fundamental sentencing error “... will be one that affects the determination of the length of the sentence such that the interests of justice will not be served if the error remains uncorrected.” Maddox v. State, 760 So.2d 89, 100 (Fla. 2000).

The total sentence imposed here was well within the maximum permitted sentence. The simple fact that a sentence imposed after a jury trial exceeded the pretrial plea offer does not constitute a violation of due process or present a fundamental issue that can be raised despite the failure to raise it below. See, e.g. Capre v. State, 773 So.2d 92 (Fla. 5th DCA 2000).

B. Original Offer Did Not Encompass All Charges

Even if subject to review in this court, no error is presented. Respondent failed to demonstrate that the original plea offer of 30 years was designed to include all cases pending. He was sentenced after jury trial to 30 years on the Burger King robbery, which is exactly the offer he rejected immediately prior to the trial on those counts.

It is important to recall the context in which this plea offer was made. The two robbery episodes had been severed. The jury had been selected to try the Burger King robbery, counts 3 and 4. Counsel asked what would be the sentence if he pleaded guilty, and the court answered 30 years. Nothing in this exchange supports the assumption that this offer was intended to include counts not then before the court, or indeed, even other pending cases which were wholly unrelated. Therefore, the record does not support the claim that he received a higher sentence after exercising his right to jury trial. He got exactly the same sentence on these counts after trial as was offered before trial: 30 years. The district court's decision fails to recognize this threshold question. There was no increase in the ultimate sentence for the only counts subject to the offer and the rejected plea bargain for those counts.

C. Judicial vindictiveness cannot be presumed

In the decision below, Byrd's argument was framed as "when the defendant rejects the court's offer and is subsequently convicted, if the court exceeds its former

offer, a presumption of vindictiveness arises and such presumption cannot be overcome...without explain(ing) on the record what information it had at sentencing that it did not have at the time of the plea offer and how such information would have made a difference..." Byrd v. State, 794 So.2d at 672-673. There are three inaccuracies in this holding: first, no presumption of vindictiveness arises merely because the post trial sentence exceeds the rejected plea offer; second, it is not the State's burden to rebut any such presumption with record evidence unknown at the time of the offer; and third, the State's plea offer does not become the Court's plea offer just because the judge wisely explains on the record to the defendant the terms of the plea offer, explains that the offer expires if he goes to trial, and that he risks a greater sentence if convicted. The fourth district's view is correct.

The State agrees that a trial judge may not constitutionally impose a greater sentence on a defendant because he or she exercises the right to a trial by jury. See, e.g. Willard v. State, 717 So.2d 631 (Fla. 5th DCA 1998); North Carolina v. Pearce, 395 U.S. 711 (1969). That being said, it is equally true that a defendant who rejects a pretrial plea offer "assumes the risk of receiving a harsher sentence." Frazier v. State, 467 So.2d 447 (Fla. 3d DCA 1985). Acceptance of the fifth district's reasoning would require the "destruction of the (plea bargaining) process through the elimination of the shared understanding of its essential elements which forms its very foundation."

Mitchell v. State, 521 So.2d 185, 188 (Fla. 4th DCA 1988).

The United States Supreme Court has clearly rejected the notion that a presumption of vindictiveness arises where the sentence imposed after trial was greater than a sentence previously imposed after a guilty plea. Alabama v. Smith, 490 U.S. 794, 799, 109 S.Ct. 2201, 2204-6, 104 L.Ed.2d 65 (1989). This is so because the Supreme Court recognizes that it is constitutionally permissible to offer more lenient sentences in exchange for a guilty plea; a plea bargaining process advances mutual interests. Bordenkircher v. Hayes, 434 U.S. 357, 363, 98 S.Ct. 663, 667, 54 L.Ed.2d 604 (1978). “To punish a person because he has done what the law plainly allows him to do is a due process violation....But in the “give-and-take’ of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution’s offer.” Id. See also, Corbitt v. New Jersey, 439 U.S. 212, 221, 99 S.Ct. 492, 58 L.Ed.2d 466 (1978).

Most other states recognize that no presumption of vindictiveness arises when a defendant is sentenced more harshly after trial than a rejected plea offer. “There is no presumption a harsher sentence offered to, but rejected, by a defendant during plea negotiations is the product of vindictiveness.” State v. Mitchell, 117 Ohio App.3d 703, 691 N.E.2d 354 (1997).

There is no presumption of vindictiveness even in those instances where the

judge has followed the plea bargain and the plea is later withdrawn. “If a trial judge has agreed to impose a particular sentence pursuant to a plea bargain, as was the case here, this does not restrict him from imposing a more severe sentence if the Defendant elects to go to trial and is convicted.” State v. Aleman, 809 So.2d 1056, 1066 (La. 5th Cir. 2002). The judge’s agreement to impose a lenient sentence during negotiations “should not be understood as setting a limit for the justifiable sentence...the better view, we think, is that the plea proposal is a concession from the greatest justifiable sentence, the concession being made because of the circumstances surrounding the plea.” Id. This view acknowledges that the risk of more severe punishment may have “a discouraging effect on the Defendant’s assertion of his trial rights”, but recognizes that these difficult choices are an inevitable “attribute of any legitimate system which tolerates and encourages the negotiation of pleas.” Id., citing Chaffin v. Stynchcombe, 412 U.S. 17, 93 S.Ct. 1977, 36 L.Ed.2d 714 (1973).

Most states employ a test that examines the totality of the circumstances to determine whether a sentence is vindictive. See, e.g. State v. Kelly, 256 Conn. 23, 770 A.2d 908, 947 (2001). Indiana courts apply a test with many factors to determine whether a judge imposed a harsher sentence because a defendant exercised his right to trial; the mere disparity does not create a presumption. “Whether the severity of a particular sentence was improperly influenced by a defendant’s jury trial election

requires an individualized consideration.” Hill v. State, 499 N.E.2d 1103, 1107 (Ind. 1986). The factors considered are 1) the role the judge played in the plea negotiations; 2) whether the judge encouraged the defendant to plead guilty; 3) the presence of threats from the judge of a more severe sentence if convicted following a jury trial; and 4) any evidence that the trial judge penalized the defendant for going to trial. Id.; see also, Pauley v. State, 668 N.E.2d 1212 (Ind. 1996).

The majority of jurisdictions follow the United States Supreme Court and find no presumption of vindictiveness, opting instead to consider the totality of the circumstances, and placing the burden on the defendant to establish that his sentence was lengthened as punishment for exercising his right to trial. The decision below improperly placed the burden on the State to establish record evidence, unknown at the time of the plea offer, that justifies an increased sentence to rebut the presumption of vindictiveness. This notion is based on an over reading of Alabama v. Smith, supra. First of all, this case holds that there is no presumption of vindictiveness where the sentence imposed after trial is greater than a vacated guilty plea. Second, the Court’s observation that the difference in sentence “may” be explained by factors that come out during trial was improperly transformed by the court below into an absolute requirement.

In Florida, with the exception of the decision in Byrd, it is the defendant’s

burden to demonstrate a presumption of vindictiveness, and the bare disparity in the sentence imposed and the plea offer is not enough to make this showing. Mitchell, *supra*; Hitchcock v. Wainwright, 770 F.2d 1514 (11th Cir. 1985), reversed on other grounds, 481 U.S. 393 (1987).

We believe that the record neither supported an inference of the judge's vindictiveness nor indicated that he gave any improper weight to appellant's failure to accept the plea offer. In fact, the judge specifically advised appellant, when he made the plea offer during trial, that he would sentence him to seven years imprisonment with a minimum mandatory of three years if the jury convicted him as charged.

Gardner v. State, 699 So.2d 798, 800 (Fla. 4th DCA), review denied, 707 So.2d 1124 (Fla. 1997). The situation at hand is much less coercive than Gardner. In Gardner, the trial court advised the defendant to plead now, or get a seven year sentence with a three year mandatory minimum if the jury convicts. The fourth district upheld this sentence, finding that Gardner had no right to the rejected plea offer. Here, the judge's remarks may be interpreted as a correct observation that a prison term was a lawful sentence if Byrd's gamble with the jury was not successful. In context, the judge's

remarks do not demonstrate vindictiveness.

The decision below adopted the analysis of the second district in McDonald v. State, 751 So.2d 56 (Fla. 2d DCA 1999), the first Florida case to create a presumption of judicial vindictiveness where the sentence after trial is greater than the rejected pretrial plea offer. As Judge Griffin noted in the concurring decision below, “...the Second District's opinion in McDonald creates the ‘presumption of vindictiveness’ almost out of whole cloth based on an over reading of Stephney v. State, 564 So.2d 1246 (Fla. 3d DCA 1990).” Byrd v. State, 794 So.2d at 674. There was record evidence in the Stephney case that established judicial vindictiveness. “In this case, there is simply no similar record basis to find a presumption of vindictiveness.” Id. Moreover, as argued next, it was not until Warner that judicial participation in plea negotiations was endorsed by this Court. This creates new considerations not present before this practice was adopted.

The second district has recently clarified its approach, holding that no presumption of vindictiveness arises when the defendant received a longer sentence than was offered by the plea bargain. Richardson v. State, 27 Fla. L. Weekly D355, 356 (Fla. 2d DCA Feb. 8, 2002). “In the absence of judicial involvement in plea negotiations, the burden was on (the defendant) to prove actual vindictiveness on the part of the sentencing judge, and that burden has not been met.” Id. Therefore, the

second district no longer presumes vindictiveness merely because the sentence exceeds the pretrial plea offer. The next question becomes what exactly constitutes involvement by the judge. This “minefield of problems” is addressed in the next section of argument. Martin v. State, Case No. 5D00-3127 (Fla. 5th DCA May 3, 2002).

The rejected plea offer should not create a presumptive maximum sentence. Other states do not fix the prior sentence offer as the sentencing ceiling. See, e.g. People v. Aragon, 11 Cal.App.4th 749, 759, 14 Cal.Reptr.2d 561, 567 (1999). In other contexts, the notion of presumed vindictiveness and a fixed sentence is roundly rejected by Florida courts. It is well established that a criminal defendant who successfully attacks a negotiated plea, either collaterally or by motion to withdraw his plea, loses the benefit of the bargained-for sentence, and the subsequent sentence can be any lawful sentence, even if greater than the plea bargain sentence. Booth v. State, 687 So.2d 335 (Fla. 3d DCA 1997); Moreland v. Smith, 664 So.2d 1039 (Fla. 2d DCA 1995). Similarly, no presumption of vindictiveness or unconstitutional disparity in sentence is established where one codefendant receives a more lenient sentence as a result of a plea bargain. See, e.g. United States v. Sparks, 2 F.3d 574 (5th Cir. 1993); Howell v. State, 707 So.2d 674 (Fla. 1998).

It is illogical to presume vindictiveness where a defendant voluntarily rejects a

plea offer and then receives a higher sentence after conviction by a jury. A lenient sentence is offered in plea bargaining as an incentive to avoid trial. There is nothing constitutionally suspect in this practice. After jury verdict, any lawful sentence can be imposed. The district court's analysis in this regard is flawed and must be reversed.

D. The State's plea offer does not become the Court's offer

The State offered a plea bargain to two of the four pending charges in this case. The State's interest was avoiding a trial with all its potential pitfalls. In exchange, the defendant would receive a sentence of 30 years on a robbery and aggravated assault, considerably less than the potential sentence he was facing. The trial court said, "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....I think 30 years is a steal. He certainly won't get that low if he goes to trial. His record is horrendous." (Vol. 1, p. 3) The district court held that this response violated this Court's decision in Warner, because it suggested that there would be an advantage to the defendant if he were to enter a plea instead of going to trial. The State contends that it is not possible to explain a plea bargain for a specific sentence to a defendant without at least implying that the sentence "hinge(s) upon

future procedural choices.”

This Court recently endorsed the concept of a trial judge participating in plea negotiations. State v. Warner, 762 So.2d 507 (Fla. 2000). The Court cautioned that "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." Id. 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. This concern was at the heart of Judge Harris' concurrence in State v. Gitto, et al., 731 So.2d 686 (Fla. 5th DCA 1999). The State shares these valid concerns, but respectfully suggests that Warner is not the whole picture.

The trial judge in this case ensured on the record that the defendant was aware of and personally rejected the offer. This is a good practice after this Court's case of Cottle v. State, 733 So.2d 963 (Fla. 1999). Cottle held that it is a valid claim that despite a full and fair trial, counsel's failure to advise his client to accept a plea offer can be ineffective assistance of trial counsel. Inquiring on the record prior to trial that the defendant personally was aware of and rejected the plea bargain is the only way to avoid potential Cottle claims. Contrary to Byrd's argument below, Cottle does not bind only defense attorneys. It is the trial court's responsibility to ensure that the defendant knowingly exercises his rights. Placing plea offers on the record is the only

way to ensure that the defendant personally rejected the offer.

The combination of these two cases creates treacherous waters to navigate. Any mention of a plea bargain could at least "imply" that going to trial will result in a higher sentence. Failure to mention a plea bargain permits the defendant to allege that he would have accepted the plea bargain but for the erroneous advice to reject the offer, or that he was never told of the offer. How is a judge to ensure that a defendant is aware of and personally rejects the plea offer without at least implying that he or she "advocates the plea offer"? McDonald v. State, 751 So.2d 56 (Fla. 2d DCA 1999). It is a weak offer indeed that is not less than a potential sentence after trial. Simply stating the obvious renders every plea offer subject to enforcement even after it is rejected and the defendant voluntarily elects to proceed to trial.

The fifth district has recognized that the judge's role in plea bargaining is difficult. "It presents a minefield of problems and concerns around which trial judges must maneuver. First, they must assure themselves the defendant fully understands the content of the plea offered. Second, they must preserve their own impartiality in the matter so as to defend their ability to depart from the sentence should other pertinent factors later come to light. Third, they must not place themselves in the position of coercing a plea or later being accused of having imposed a harsher sentence because a defendant elected to go to trial." Martin v. State, Case No. 5D00-

3127 (Fla. 5th DCA May 3, 2002). The minefield was made more treacherous by the decision under review. This Court should provide guidance to trial judges to successfully navigate this minefield.

The net result of Warner and Cottle is to enforce plea bargains offered before trial by creating an artificially low sentence ceiling even where the defendant rejects the offer and proceeds to trial. This is unfair to the State, the victims, and ultimately, citizens who must pay for a trial that is held simply to play out the usually slim chance that the jury will acquit. This is an especially egregious result for defendants such as Byrd who agree that their trial was constitutionally fair and error-free. The State does not get any benefit of their bargain, but is bound to its side of the deal after all incentive to make the deal is gone. In this case, the State did absolutely nothing improper, and yet the defendant is asking for the benefit of a rejected plea offer. Byrd himself remarked here, “I had nothing to lose.” If a trial court follows both Warner and Cottle, that analysis is entirely correct: every defendant has nothing to lose by rejecting a plea bargain, going to trial, and if convicted, insisting that the rejected plea offer be enforced.

Adherence to the lower court’s view will give both sides no incentive to negotiate to resolve criminal cases by plea negotiations. That is because a defendant can negotiate the best deal possible, then reject it, secure in the knowledge that he had

created a maximum permitted sentence. The prosecution will soon determine that they do not benefit from plea offers to lesser sentences, and specific plea offers will evaporate. Likewise, judges will be reluctant to indicate what their inclination may be in open pleas because the sentencing ceiling will have been set should the defendant reject the offer. Each of these considerations will mitigate in favor of more trials, the exact opposite of proposals favoring mediation and resolution. The judicial system cannot accommodate trials in every criminal case.

Very few states permit the judge to participate in the plea bargaining process like this Court permitted in Warner. This rule is in derogation of both the federal rule and the ABA standards. Like Florida, Vermont permits judicial participation in plea bargaining. Vermont addressed the same dilemma presented here in the case of State v. Davis, 115 Vt. 417, 584 A.2d 1146 (1990). In that case, the trial judge participated in a pretrial plea offer of “a sentence of somewhere in the neighborhood of one to five years split with perhaps four months to serve...” The defense rejected the offer, and after a guilty verdict, the defendant was sentenced to one to three years to serve. The defendant contended that the sentence should be presumed vindictive.

The Supreme Court of Vermont rejected this argument, concluding that “the analogy is inapt and that the presumption of vindictiveness does not arise when the sentencing judge has participated in a plea bargain discussions that did not lead to an

agreement.” The court concluded that the complex practical and policy considerations made too dissimilar a offer in plea bargaining and a sentence for the same offense after trial. The Vermont court was concerned with the same practical consideration animating this argument, namely, that such a rule of law is ripe for abuse.

(B)arring a court from giving a greater sentence after trial than one it merely suggested as part of a plea bargain would invite abuse of the plea-bargaining system: defendants could bargain for the best deal, then refuse to enter into the deal but still retain the benefit. Once a judge ‘committed’ to a sentence, a defendant could take his or her changes with a jury knowing that no matter what information came out at trial, the defendant would risk no greater sentence. If defendants could demand the same sentence after standing trial that was offered in exchange for a guilty plea, all incentives to plead guilty would disappear. Defendant would lose nothing by going to trial. The reality of plea bargaining is that ‘(o)nce the defendant elects to go to trial, all bets are off.’”

State v. Davis, 584 A.2d at 1148 (citations omitted). The Vermont Supreme Court relied upon the fourth district’s decision in Mitchell v. State, 521 So.2d 185 (Fla. 4th DCA 1988) as further support for this reasoning.

Absent a demonstration by the defendant of judicial vindictiveness or punitive action, a defendant may not

complain simply because he received a heavier sentence after trial. A disparity between the sentence received and the earlier offer will not alone support a finding of vindictiveness. . . . Having rejected the offer of a lesser sentence, [the defendant] assumes the risk of receiving a harsher sentence. Were it otherwise, plea bargaining would be futile.

Mitchell v. State, 521 So. 2d 185, 190 (Fla. 4th DCA 1988). It is this rule of law that the Wilson court relied upon to reject the contention that a presumption of vindictiveness arises from the mere fact that a defendant receives a harsher sentence after a jury trial than was offered during failed plea negotiations. This Court should also determine that the two situations are simply not analogous, and that the risk for abuse of the plea bargaining process is too great to follow the fifth district's reasoning. The fourth district's line of cases is correct.

This Court's decision in Warner adopted the Michigan's test from People v. Cobbs, 505 N.W.2d 208 (1995). In subsequent cases, Michigan courts have rejected the notion that the concession of leniency that may be offered should a defendant plead guilty or waive a jury trial creates a presumption of vindictiveness. People v. Godbold, 230 Mich. App. 508, 585 N.W.2d 13, 18 (1997). The expectation of leniency, or indeed counsel's express promise that the judge will sentence more

leniently if jury trial is waived and more harshly if not, does not render the sentence vindictive. Giving a concession in sentence in exchange for a guilty plea is “the accepted practice regarding guilty pleas and is not unconstitutional.” Id. So, the fact that the state which originated the Warner rule finds no constitutional infirmity with giving a lesser sentence for a guilty plea than the sentence imposed if the defendant proceeds to jury trial should be very persuasive authority that this Court should also find nothing irregular in this “accepted practice.”

Even where judges participate in plea negotiations, this Court should follow Vermont and Michigan and hold that the sentence concession given to defendants who plead guilty is constitutionally permissible, and those individuals who receive a harsher sentence after exercising their right to trial by jury are not being unfairly punished for exercising that right. This rule is a necessary corollary to permitting judicial participation in plea negotiations. If the plea offer negotiated with the judge is rejected by the defendant, all bets are off and the judge may impose any lawful sentence.

E. No vindictiveness is established in this case.

The district court’s decision improperly requires the State to rebut the presumption of vindictiveness with record evidence unknown at the time of the plea offer. This is erroneous because it misunderstands the nature of a plea offer. The

bargain is made even with the knowledge of the aggravating facts in exchange for foregoing the time and expense of a trial. Here, the judge's comments are most appropriately interpreted as expressing an opinion on the evidence. The offer was fair, given Byrd's "horrendous" record.

Confronted with remarks similar to the judge's in this case, other jurisdictions require remarks by a trial judge to explicitly threaten a defendant with a lengthier sentence should he decide to go to trial, or else indicate that the sentence was based on that choice. See, e.g. United States v. Cruz, 977 F.2d 732, 733 (2d Cir. 1992)("I'm the kind of judge where you get a fair trial...but if I find that after the trial you didn't have any defense at all, you're going to get the maximum because you're playing games with me."); People v. Mosko, 190 Mich.App. 204, 475 N.W.2d 866 (1991)("I am very concerned about this case...because it was a case that went to trial..and to get up on the stand and be sanctimonious...and you're guilty, that seems to me to be something that is beyond deceit.")

Where, as here, the comments are more ambiguous, generally courts reject the claim that the sentence was imposed as punishment for exercising the right to trial. See, e.g. State v. Brown, 131 Idaho 61, 951 P.2d 1288 (1998)("You want to maintain your innocence, that's fine. The evidence shows otherwise. And you have to suffer that consequence. I find that you have abused the justice system and you are paying

a consequence because of that.”); United States v. Tracy, 12 F.3d 1186, 1202 (2d Cir. 1993)(The defendant “claims there was really nothing going on here and that he has been unjustly and unfairly and illegally prosecuted by the government.”); Shpikula v. State, 68 S.W.3d 212 (Tx 2002)(“I wish you would have come in here and taken responsibility, but you didn’t do that.”)

In the consolidated case of Wilson v. State, 792 So.2d 601 (Fla. 4th DCA 2001), the judge’s statement was found not vindictive, and he said “my advise to you was that the court’s offer was the bottom of the guidelines and in my opinion you should have taken it.” The judge’s remarks here were essentially the same: the plea offer is very good and you should take it. The district court erred in concluding that the judge’s remarks in this case demonstrate vindictiveness. The sentence imposed for all of these offenses were 25 years less than the statutory maximum. The judge did not refer to the plea offer at sentencing.

Judge Griffin’s concurring opinion correctly found that “In this case, there is simply no similar record basis to find a presumption of vindictiveness. The sentence imposed on this defendant for these crimes, including the West Colonial Drive Taco Bell robbery, were well within the guidelines and less by twenty-five percent than what the court had told the defendant he would face if he was convicted.” Byrd v. State, 794 So.2d at 674. This view is correct. Without the presumption of vindictiveness,

Byrd's argument fails because no actual vindictiveness is established in this case.

F. The remedy should not be enforcing the rejected plea bargain.

The problem of the appropriate remedy is not easily resolved. Some Florida courts have reversed for imposition of any lawful sentence by a new judge. Jones v. State, 750 So.2d 709 (Fla. 2d DCA 2000). Other courts have reversed for "record findings supportive of the more severe sentence." Fraley v. State, 426 So.2d 983 (Fla. 3d DCA 1983). Still other courts reverse for imposition of a specific sentence, sometimes the bargained for sentence, sometimes a compromise sentence in between. Jackson v. State, 613 So.2d 610 (Fla. 3d DCA 1993); McDonald v. State, 751 So.2d 56 (Fla. 2d DCA 1999). This confusion is borne by the illogical circumstance of enforcing a rejected offer. The remedy should be to remand for resentencing before another judge. See, Wemett v. State, 567 So.2d 882 (Fla. 1990). Not even the McDonald court would impose the sentence rejected by the defendant in plea negotiations. This result is especially unfair to the state after a full and fair trial.

The fourth district's view is correct. The mere disparity between a rejected plea offer and the ultimate sentence imposed after jury trial does not create a presumption of vindictiveness. The majority of states hold that no presumption of vindictiveness arises, instead applying a totality of the circumstances test where the burden is on the

defendant to establish actual vindictiveness. The United States Supreme Court has repeatedly held that it is constitutionally permissible to offer more lenient sentences in exchange for guilty pleas. Other states do not fix the prior plea offer as a sentencing ceiling in recognition of the context that an offer is made.

This Court must address the tension created by its decisions in Warner and Cottle. How is a judge to ensure that a defendant is personally aware of and voluntarily rejects a pretrial plea offer without at least implying that the judge is advocating the offer? Any explanation of the practical situation must include the bare fact that the plea offer expires upon commencement of trial, and if convicted, the defendant faces a sentence of up to the statutory maximum. The explanation of the plea offer by the judge by necessity must at least imply that the sentence may hinge on procedural choices.

Very few states permit judicial plea bargaining. Vermont, like Florida, follows the minority rule. Faced with the same issue, that Court correctly concluded that the practical considerations involved in plea bargaining made comparisons to the ultimate sentence after a rejected offer inapt and dissimilar. That Court concluded that such a rule was ripe for abuse. Michigan's test was adopted in Warner, and that state also permits a greater sentence after rejection of a judicially endorsed plea offer, recognizing that the concession offered to defendants who waive the right to trial and plead guilty

is constitutionally permissible and part of the reality inherent in plea bargaining. This Court should reach the same conclusion, and affirm the fourth district's decision. Otherwise, there will be no incentive for either side to resolve criminal cases by negotiation, and the result will be many, many more trials.

CONCLUSION

Based upon the foregoing argument and authority this Court should quash the decision of the Fifth District Court of Appeal and remand for further proceedings.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by basket delivery to Rosemarie Farrell, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32114-4347, this day of May, 2002.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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