IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. CASE NO. 94,842

JOHN WARNER,

Respondent.
_____/

CORRECTED
RESPONDENT'S ANSWER BRIEF ON THE MERITS

RICHARD JORANDBY
Public Defender

DAVID J. MCPHERRIN
Assistant Public Defender
15th Judicial Circuit of Florida
Criminal Justice Building
421 Third Street/6th Floor
West Palm Beach, Florida 33401
(561) 355-7600

Attorney for John Warner

TABLE OF CONTENTS

PAGE

AUTHORITIES CITED

CASES CITED — PAGE

FLORIDA CONSTITUTION

FLORIDA RULES OF CRIMINAL PROCEDURE

FEDERAL RULES OF CRIMINAL PROCEDURE

WEST VIRGINIA RULES OF CRIMINAL PROCEDURE

PRELIMINARY STATEMENT

Respondent was the appellee in the Fourth District Court of Appeal and the defendant in the Seventeenth Judicial Circuit, In and For Broward County, Florida. Petitioner was the appellant and prosecution below. In this brief the parties will be referred to as they appear before the Court.

The symbol “R” will denote the one-volume record on appeal, which includes both the relevant documents filed below and the transcript.

In accordance with the Florida Supreme Court Administrative Order, issued on July 13, 1998, and modeled after Rule 28-2(d), Rules of the United States Court of Appeals for the Eleventh Circuit, counsel for respondent hereby certifies that the instant brief has been prepared with 12 point courier new type, a font that is not spaced proportionately.

STATEMENT OF THE CASE AND FACTS

Respondent was charged by information with three alcohol related driving offenses, one felony and the other two misdemeanors. (R 28-29). On May 2, 1997, the trial court, after an unrecorded bench conference, ordered the preparation of a pre-plea presentence investigation. (R 3). During the change of plea hearing held on July 25, respondent's counsel made the following statement:

> The Court at sidebar the other day warned us what the Court would consider for plea, and we would like to go forward with it.
>
> It was two years house arrest. Special condition of house arrest 364 days in Broward County Jail. Followed by three years of probation.

Both the trial court and petitioner agreed counsel accurately stated the court's offer. (R 13). After accepting respondent's plea, the court adjudicated him guilty and placed him on two years of community control, a special condition of which was 364 days in the county jail, followed by three years drug offender probation. (R 17-18, 30-37). Respondent's sentencing guideline score sheet recommended a sentence of between 65 and 108 state prison months. (R 38-40). Petitioner objected to the three grounds relied upon by the court to impose a downward departure sentence, arguing that they were either invalid or not supported by record evidence. (R

22-23).

The Fourth District Court of Appeal reversed respondent's sentence, finding one of the three departure reasons invalid and the other two lacking record support. State v. Warner, 721 So. 2d 767, 769 (Fla. 4th DCA 1998). In its decision, the fourth district addressed a decision of the Fifth District Court of Appeal, State v. Gitto, 23 Fla. L. Weekly D1550 (Fla. 5th DCA June 26, 1998), disagreeing with its holding that prohibited trial courts from telling a defendant the sentence it intended to impose, prior to the entry of a plea, upon acceptance of a guilty or no contest plea to the crimes as charged by the state. Id. at 769.

SUMMARY OF THE ARGUMENT

The issue presented in this appeal is whether the trial court can advise a defendant, before a plea is entered, what lawful sentence it intends to impose upon acceptance of a guilty or no contest plea to the crimes as charged by the state. Petitioner, citing separation of powers, the rules of criminal procedure, and public policy concerns, argues that pre-plea sentencing pronouncements are not permitted. Responded disagrees.

The constitutional responsibility of determining what criminal charges to file and how to proceed with their prosecution rests with the executive branch, while the judicial branch has the responsibility of determining the sentence to impose. A pre-plea sentencing pronouncement to the crimes as charged does not violate the separation of powers doctrine. In addition, our rules of criminal procedure do not prohibit trial courts from making pre-plea sentencing pronouncements. To the contrary, the committee notes accompanying the rules suggest that the practice is permitted. Furthermore, although petitioner's public policy concerns are not insubstantial, they can be addressed without taking the drastic measure of prohibiting pre-plea sentencing pronouncements in their entirety. Accordingly, this Court should permit trial court's to make pre-plea sentencing pronouncements.

ARGUMENT

POINT ON APPEAL

THE TRIAL COURT WAS PERMITTED TO TELL RESPONDENT, PRIOR TO HIS ENTERING A PLEA, THE SENTENCE IT INTENDED TO IMPOSE IF HE PLED GUILTY OR NO CONTEST TO THE CRIMES AS CHARGED.

In Brown v. State, 245 So. 2d 41 (Fla. 1971), which permitted withdraw of a guilty plea where the defendant's sentence was more severe than what he understood the trial court intended to impose, it was said:

> This Court is aware of the changing attitudes of those concerned with criminal justice on the question of "plea bargaining." Many have considered it improper for a court directly, or through the prosecuting attorney, to negotiate with a defendant concerning the punishment to be imposed upon a plea of guilty. Present conditions, with almost universal representation of criminal defendants by counsel and a growing crime rate crowding of criminal courts, warrant the adoption of a more practical and reasonable approach to plea bargaining. If the State and defense counsel agree upon a specific statement of facts constituting the crime to be admitted and with the further understanding regarding the effect of subsequent presentence investigation, we see no reason why a judge should not, if he chooses, make a specific announcement of the sentence he will impose upon a guilty plea.

Id. at 44.

Despite this Court's approval of pre-plea sentencing pronouncements, in State v. Gitto, 23 Fla. L. Weekly D1550 (Fla.

5th DCA June 26, 1998)(en banc) rehearing and request for certification denied, 24 Fla. L. Weekly D1054 (Fla. 5th DCA April 30, 1999),[1] the Fifth District Court of Appeal, reversing downward departure sentences agreed to by the trial court and defendants, but imposed over the state's objection, condemned the practice of trial courts agreeing to a specific sentence in advance of a plea.[2] In State v. Warner, 721 So. 2d 767 (Fla. 4th DCA 1998), the Fourth District Court of Appeal also reversed a downward departure sentence agreed to by the trial court and the defendant, where the reasons for the departure were invalid and lacked evidentiary support, but "disagree[d] with Gitto to the extent that it holds that a court can never, over the state's objection, advise a

[1] Five separate cases, all involving the same issue, were consolidated for appeal. After the original opinion issued, appellee Silas filed a motion for rehearing and certification, which resulted in the second opinion. The Gitto opinions have not yet been published in the Southern Reporter. Undersigned counsel was advised by the Fifth District Clerk's Office that because the second opinion was 'non-dispositive' only the first opinion would be published. A telephone call to West Publishing Company revealed that it received copies of both opinions from the district court. However, the West representative was unable to say what would be published.

[2] Although concerned with the validity of the grounds relied upon to sustain the departure sentences, Gitto, 23 Fla. L. Weekly at D1552 n. 6, the district court was more concerned with the trial court's participation in the process leading up to the entry of the pleas, stating, "[i]t is immaterial whether the trial court articulated valid reasons for departure in imposing sentence on these defendants since the court's involvement in plea negotiations has tainted the entire sentencing process." Id. at D1552.

defendant of the sentences it would impose if the defendant pleads guilty to the charges filed by the state." Id. at 769.[3]

The question presented by this appeal is:

> CAN A TRIAL COURT TELL THE DEFENDANT, PRIOR TO A PLEA BEING ENTERED, WHAT LAWFUL SENTENCE IT WILL IMPOSE UPON A PLEA OF GUILTY OR NO CONTEST TO THE CRIMES AS CHARGED BY THE STATE?[4]

Petitioner, asserting separation of powers, the rules of criminal procedure, and public policy concerns, argues that the question should be answered in the negative, while respondent contends it requires an affirmative response.

I

SEPARATION OF POWERS

Article II, section 3, of the Florida Constitution reads:

---

[3] Warner agreed with the fifth district that absent the state's consent, an agreement between the court and defendant cannot serve as the sole basis for a downward departure sentence. 721 So. 2d at 769 n.2; See also State v. Odum, 24 Fla. L. Weekly D1245 (Fla. 4th DCA May 26, 1999); State v. Kennedy, 698 So. 2d 349 (Fla. 4th DCA 1997). However, that does not preclude the trial court from advising a defendant that it intends to impose a downward departure sentence upon a plea of guilty to the charged offenses, where valid grounds sustaining the departure exist and are supported by record evidence.

[4] It matters not whether the pre-plea sentencing pronouncement is characterized as a 'plea-bargain' or 'plea-suggestion,' since the court is not bound to impose either the bargained for or suggested sentence. Goins v. State, 672 So. 2d 30, 31 (Fla. 1996); Tilghman v. Culver, 99 So. 2d 282, 286 (Fla. 1957) cert. denied, 356 U.S. 953, 78 S.Ct. 918, 2 L.Ed. 2d 845 (1958).

> The powers of state government shall be divided into legislative, executive, and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

This constitutional provision "divides government into three separate and distinct branches.... [K]nown as the 'separation of powers' clause, [it] embodies one of the fundamental principles of our federal and state constitutions and prohibits the unlawful encroachment by one branch upon the powers of another branch." Simms v. State, Dept. of Health & Rehab., 641 So. 2d 957, 960 (Fla. 1994) rev. denied, 649 So. 2d 870 (Fla. 1994). Two prohibitions are found in the clause: "no branch may encroach upon the powers of another.... [And] ... no branch may delegate to another branch its constitutionally assigned power." Chiles v. Children A,B,C,D,E, & F, 589 So. 2d 260, 264 (Fla. 1991). The encroachment prohibited by Article II, section 3, is the exercise by one branch of government of a power exclusively granted to another. Simms, 641 So. 2d at 960. "If a power is not exclusive to one branch, the exercise of that non-exclusive power [by another branch] is not unconstitutional." Id. The exclusive powers each branch possesses are generally not delineated in the Constitution or statutes, but are determined "by considering the language and intent of the

Constitution as well as the history, nature, powers, limitations and purposes of our form of government." Id. at 960-961.

Enacting statutes that define criminal offenses and establish penalties for those offenses is the responsibility of the legislative branch. B.H. v. State, 645 So. 2d 987, 992 (Fla. 1994) cert. denied, 515 U.S. 1132, 115 S.Ct. 2559, 132 L.Ed. 2d 812 (1995); Dorminey v. State, 314 So. 2d 134, 136 (Fla. 1975). "[T]he decision to charge and prosecute is an executive responsibility, and the state attorney has discretion in deciding whether and how to prosecute." State v. Bloom, 497 So. 2d 2, 3 (Fla. 1986); accord Cleveland v. State, 417 So. 2d 653, 654 (Fla. 1982). Sentencing is a matter left for the judiciary, "judges hav[ing] traditionally had the discretion to impose any sentences within the maximum or minimum limits prescribed by the legislature." Smith v. State, 537 So. 2d 982, 985-986 (Fla. 1989); accord Grimes v. State, 616 So. 2d 997 (Fla. 1st DCA 1993) rev. dism'd, 617 So. 2d 319 (Fla. 1993). While the decision to prosecute, and what charges to file, rests with the executive branch, immune from judicial interference, see State v. Jogan, 388 So. 2d 322, 323-324 (Fla. 3rd DCA 1980), the judicial branch, subject to the executive's decision to prosecute under an enhanced or mandatory sentencing statute and the sentencing parameters fixed by the legislature, is solely

responsible for determining the appropriate sentence to impose. See Id. at 323-324; Woods v. State, 24 Fla. L. Weekly D831, 832 (Fla. 1st DCA Mar. 26, 1999). The state attorney can seek imposition of a specific sentence, State v. Wise, 24 Fla. L. Weekly D657, 658 (Fla. 4th DCA Mar. 10, 1999), but it cannot, even by agreeing with the defendant to recommend a certain sentence in exchange for a guilty plea, control the court's sentencing decision, Rigabar v. State, 658 So. 2d 1038, 1042 (Fla. 4th DCA 1995) rev. denied, 664 So. 2d 248 (Fla. 1995).

The trial court told respondent the sentence it intended to impose if he pled guilty to the crimes petitioner charged him with committing. Petitioner's constitutional powers to charge and prosecute were not encroached upon by the court's announcement. People v. Cobbs, 505 N.W. 2d 208, 212 (Mich. 1993).[5] "[S]eparation of powers does not mean that every governmental activity is classified as belonging exclusively to a single branch of government." Simms, 641 So. 2d at 960. Although the state attorney can negotiate a settlement with the defendant,[6] which may include

[5] The trial court would have encroached upon the powers of the executive branch if it offered to reduce the severity of the offenses pled to or agreed to dismiss other charges in exchange for the plea. See Fla. R. Crim. P. 3.170(h); Cox v. State, 412 So. 2d 354 (Fla. 1982); Warner, 721 So. 2d at 769.

[6] The fifth district cited Young v. United States ex rel. Vuitton et Fits S.A., 481 U.S. 787, 107 S.Ct. 2124, 95 L.Ed. 2d 740

both charge and sentencing concessions, it cannot impose sentence, only the court can. Rigabar, 658 So. 2d at 1952. The Florida Constitution neither requires trial courts to remain silent on the issue of sentencing until after the defendant enters a plea nor grants the executive branch sole authority to engage in pre-plea sentencing discussions. Accordingly, the trial court did not violate the separation of powers clause of the Florida Constitution.[7]

II

THE RULES OF CRIMINAL PROCEDURE

Contrary to petitioner's assertion, our rules of criminal

(1987), for the proposition that the exclusive authority to enter plea bargains with the defendant rests with the prosecutor. Young, which condemned the practice of appointing the recipient of a favorable court order as a private attorney general to prosecute its violation, merely acknowledged that prosecutors have considerable discretion in deciding what charges to file and whether to enter into, and the terms of, plea bargains. 481 U.S. at 807, 107 S.Ct. at 2137. The Supreme Court was not addressing the separation of powers argument raised herein when it listed the powers of the prosecutor and it did not hold that the Constitution prohibits courts from making pre-plea sentencing pronouncements.

[7] As noted in Warner, the out-of-state cases relied upon by the fifth district to support its proposition that a violation of the separation of powers doctrine occurs when a trial court accepts a plea over the prosecutor's objection are inapposite. 721 So. 2d at 768 and n.1. The comments in those cases were made in reference to actions taken by the trial court that encroached upon the powers of the executive branch to determine the appropriate charges to bring and how to proceed with the prosecution, not to pleas that were entered to the crimes as charged with the understanding that a lawful sentence would be imposed.

procedure do not prohibit trial courts from making pre-plea sentencing pronouncements.[8] Rules 3.170, 3.171, and 3.172 address pleas, plea discussions and agreements, and the acceptance of pleas. Rule 3.171 states, in relevant part:

> Ultimate responsibility for sentence determination rests with the trial judge. However, the prosecuting attorney and the defense attorney, or the defendant when representing himself or herself, are encouraged to discuss and to agree on pleas that may be entered by the defendant.
>
> * * *
>
> After an agreement on a plea has been reached, the trial judge may have known to him or her the agreement and reasons therefor prior to the acceptance of the plea. Thereafter, the judge shall advise the parties whether other factors (unknown at the time) may make his or her concurrence impossible.

Fla. R. Crim. P. 3.171(a) & (d).

Petitioner insists that because rule 3.171 encourages the parties to enter plea agreements and adopts a procedure for making the agreement known to the trial court, trial courts are precluded from making pre-plea sentencing pronouncements. The committee notes following the rule state that it was adopted to curtail

---

[8] Some jurisdictions have a rule of procedure specifically prohibiting judges from making pre-plea sentencing pronouncements. See Fed. R. Crim. P. 11(e)(1) (United States); W. Va. R. Crim. P. 11(e) (West Virginia).

excessive post-conviction litigation involving plea agreements between the parties, ordinarily entered off-the-record. Rule 3.171 specifically addresses plea agreements between the parties not because that is the only type of authorized plea agreement, but because that was the type in need of reform. The rule was not adopted to prohibit pre-plea sentencing pronouncements. To the contrary, rule 3.171 clearly states that the "[u]ltimate responsibility for sentence determination rests with the trial judge." Id. Neither rule 3.170 nor rule 3.172 contain language prohibiting trial courts from pronouncing the sentence to be imposed upon acceptance of a plea to the crimes as charged.

Although the rules do not specifically authorize pre-plea sentencing pronouncements, the committee notes to rule 3.171 suggest the practice is permitted. The committee notes state that section (c), addressing the responsibilities of the trial judge,[9] adopted standard 3.3 of the American Bar Association standards relating to pleas of guilty "except for omission of that part of standard which prohibits trial judge from participating in plea

[9] Originally found in section (c), In re Florida Rules of Criminal Procedure, 272 So. 2d 65, 94 (Fla. 1973), the responsibilities of the trial judge are now found in section (d), In re Florida Rules of Criminal Procedure, 343 So. 2d 1247, 1253-1254 (Fla. 1977).

discussions."[10] The refusal to adopt the prohibitory language of standard 3.3 strongly suggests that the option of making a pre-plea sentencing pronouncement is available to trial courts in this State. See Brown, 245 So. 2d at 44; See also Goins v. State, 672 So. 2d 30 (Fla. 1996)(recognizing that there are many types of plea agreements and that judges occasionally participate in plea discussions); Davis v. State, 308 So. 2d 27 (Fla. 1975)(failing to condemn agreement entered between defendant and court while holding that plea withdraw, not specific performance, is proper remedy when court unable to impose contemplated sentence); Barker v. State, 259 So. 2d 200 (Fla. 2d DCA 1972)(refusing to condemn participation in, and initiation of, plea bargaining by trial judge).[11]

III

PUBLIC POLICY CONCERNS

A number of courts, including the fifth district, and petitioner have posited a list of public policy concerns in opposition to pre-plea sentencing pronouncements. See Gitto, 24 Fla. L. Weekly at D1054; State v. Buckalew, 561 P.2d 289, 291-292

---

[10] Standard 3.3(a), adopted in 1968, stated, "[t]he trial judge should not participate in plea discussions."

[11] Well aware that Brown, decided in 1971, authorized pre-plea sentencing pronouncements, the Court surely would have included the prohibitory language of standard 3.3 if it intended the rules of criminal procedure, adopted the following year, to end the practice.

(Alaska 1977); People v. Clark, 515 P.2d 1242 (Colo. 1973); Commonwealth v. Corey, 826 S.W. 2d 319, 322 (Ky. 1992); Commonwealth v. Evans, 252 A.2d 689, 690-691 (Pa. 1969); State v. Starcher, 465 S.E. 2d 185, 197 (W.Va. 1995); United States v. Werker, 535 F.2d 198, 201-202 (2d Cir. 1976) cert. denied, 492 U.S. 926, 97 S.Ct. 330, 50 L.Ed. 2d 296 (1976).[12] The concerns expressed are not insubstantial, but can be addressed, as explained in People v. Cobbs, 505 N.W. 2d 208 (Mich. 1993), without taking the drastic measure of prohibiting pre-plea sentencing pronouncements in their entirety. The Michigan Supreme Court articulated four procedural safeguards that eliminate the concerns posited in opposition to pre-plea sentencing pronouncements. Id. at 212-213. First, the pre-plea sentencing pronouncement cannot be initiated by the trial court, but must be in response to a request by one of the parties.

[12] Those concerns include: (1) judicial participation in plea discussions can leave the impression in the defendant's mind that rejection of the proposed offer will result in an unfair trial; (2) judicial participation in the discussions makes it difficult for the judge to objectively determine the voluntariness of the plea; (3) promising a certain sentence is inconsistent with the theory behind using presentence investigation reports; (4) the risk associated with rejecting the court's offered disposition may be so great that even the innocent will plead guilty; (5) infringement upon the right of crime victims to be heard on the issue of sentencing at a meaningful time; (6) the potential for vindictive sentencing; and (7) public perception of the judge as less than an impartial dispenser of justice when he or she barters with the parties over the terms of the deal advocated by the bench.

Second, the trial court is prohibited from suggesting alternative sentences that might result should the case proceed to trial. Third, a judicial change of mind is permitted, and the plea allowed to be withdrawn, if additional facts emerge in the presentence investigation or during the sentencing hearing that make it necessary for the court to recede from its preliminary sentencing determination. Fourth, the victim must be given the opportunity to participate fully in the proceedings.[13]

Prohibiting the court from initiating the pre-plea sentencing pronouncement eliminates the concerns that defendants will fear appearing before a judge whose desired resolution of the case was rejected, that courts will be unable to objectively evaluate the

---

[13] The decision of the Michigan Supreme Court allowing trial courts to make pre-plea sentencing pronouncements was not one arrived at without careful consideration. When first confronted with the issue the court agreed with the reasoning found in some of the other out-of-state cases mentioned in this brief and prohibited trial judges from involving themselves in the plea negotiation process. People v. Killebrew, 330 N.W. 2d 834 (Mich. 1982). After acquiring the knowledge that only eleven years of experience can impart, the court recognized its error and adopted a more practical approach to the issue. The Supreme Court of South Carolina has also receded, although to a lesser extent, from its initial hard-line opposition to judicial involvement in the plea process. Compare State v. Cross, 240 S.E. 2d 514 (S.C. 1977) with Harden v. State, 277 S.E. 2d 692 (S.C. 1981) cert. denied, 454 U.S. 970, 102 S.Ct. 518, 70 L.Ed. 2d 388 (1981) and Medlin v. State, 280 S.E. 2d 648 (S.C. 1981). Although strongly discouraging judicial participation in plea negotiations, it appears that the Ohio Supreme Court allows it to occur. See State v. Byrd, 407 N.E. 2d 1384 (Ohio 1980).

voluntariness of a plea, that innocent people will enter guilty pleas rather than run the risk of trial, that the post-trial sentence was vindictive, and that the public will perceive judges to be less than impartial. See Id. at 212; Cf. Flanning v. State, 597 So. 2d 864 (Fla. 3rd DCA 1992)(although the defendant can waive right to jury unanimity, the coercive influence of allowing the judge, who can impose a harsher sentence upon one who refuses the offer, requires the proposal originate from the defendant) rev. denied, 605 So. 2d 1266 (Fla. 1992). If the pre-plea sentencing pronouncement is initiated by the defendant, rather than the trial court, the defendant is given no reason to believe that the court prefers a plea over a trial or that a penalty will be exacted for proceeding to trial. The pronouncement is merely a response to the defendant's inquiry, it is not an affirmative attempt to direct the course of the proceedings. In addition, when the pronouncement is made in response to the defendant's inquiry the court will have no reason to believe that anything it said or did prompted the defendant to consider waiving the right to a trial. The defendant who seeks a pre-plea sentencing pronouncement is already considering resolution by plea. Furthermore, the danger that innocent persons will plead guilty after the trial court responds to his or her sentencing inquiry is no greater than it is when the

same person hears of the charge and sentencing concessions the state is willing to make in exchange for a guilty plea. Protecting the innocent from being induced to waive their trial rights because of the risks associated with rejecting a beneficial plea offer can only be accomplished by requiring all criminal cases to proceed to trial. Moreover, a judge who is merely responding to a party's request based upon the present state of his or her knowledge will not appear to be bartering justice for a desired resolution. "Justice is advanced and not hindered when fair questions are answered honestly." Cobbs, 505 N.W. 2d at 212. Judicial secrecy is much more likely to leave the public with a poor perception of the criminal justice system.

Prohibiting the trial court from mentioning alternative sentences that could be imposed if the case proceeded to trial reduces the possibility that a more sever sentence was the result of judicial vindictiveness. Compare Clark, 515 P.2d at 1242-1243. The court making a pre-plea sentencing pronouncement without suggesting alternative sentences is merely telling the defendant what it would impose based upon the knowledge it possessed at the time. The court is not saying that it will impose a more sever sentence if the case proceeds to trial and, as a result, it cannot be said the court subsequently carried out that threat. After

trial, when the judge has heard all the evidence first hand, he or she may justifiably feel that a more severe sentence is warranted. See Mitchell v. State, 521 So. 2d 185, 187-188 (Fla. 4th DCA 1988).

Pronouncing the intention to impose a specific sentence prior to the entry of a plea need not be inconsistent with the theory behind the use of presentence investigation reports. First, preparation of a presentence report is mandatory in only two classes of cases, where a sentence other than probation is imposed upon a first time felony offender or a felony offender under 18 years of age, and even then can be waived by the defendant. Fla. R. Crim. P. 3.710; See Hardwick v. State, 630 So. 2d 1212, 1215 (Fla. 1st DCA 1994). Second, the rules of criminal procedure permit preparation of a presentence report prior to a finding of guilt if consented to by the defendant, and allow pre-plea inspection by the trial court if requested by the parties. Fla. R. Crim. P. 3.711. Third, if a report prepared post-plea uncovers information which causes the court to conclude it must impose a sentence more severe than that previously pronounced, the court is not bound to impose the less severe sentence, although it must give the defendant an opportunity to withdraw his plea. Goins, 672 So. 2d at 31.[14] Since

[14] Adverse judicial rulings do not give rise to grounds for disqualification of the trial court. Cobbs, 505 N.W. 2d at 212.

presentence investigative reports are mandatory in only a limited class of cases, can be prepared and reviewed prior to the entry of a plea, and can be relied upon by the trial court to change its mind, pre-plea sentencing pronouncements are not inconsistent with the theory behind their use.

The rights of crime victims to be heard at a meaningful time and pre-plea sentencing pronouncements are not mutually exclusive. Trial courts inclined to respond to a defendant's request for a pre-plea sentencing pronouncement should allow the state to make a sentencing recommendation and present all information relevant to that determination, which may include making the victim's wishes known to the court or allowing the victim to speak before pronouncement is made. See Cobbs, 505 N.W. 2d at 212-213. A problem would arise if the trial judges of this State began to dispose of cases without allowing the state attorney to participate by making a meaningful sentencing recommendation. However, there is no reason to believe our trial judges cannot be trusted to perform their tasks judiciously, according all concerned the opportunity to be heard in a meaningful manner.

CONCLUSION

"If every criminal charge were subject to a full-scale trial, the States ... would need to multiple by many times the number of

judges and court facilities." Santobello v. New York, 404 U.S. 257, 260, 92 S.Ct. 495, 498, 30 L.Ed. 2d 427 (1971). As a result, "'plea bargaining' is an essential component of the administration of justice." Id. Although the plea-bargaining discussed in Santobello took place between the state and the defendant, this Court relied upon the same concerns when it said that a trial judge can "make a specific announcement of the sentence he will impose upon a guilty plea." Brown, 245 So. 2d at 44. The factors which led to this Court's statement in Brown have not lessened in the nearly three decades since it was decided. More recently, the Michigan Supreme Court considered the practice of making pre-plea sentencing pronouncements, concluding that it has a place in the judicial system. Respondent is not asking this court to require trial courts to make pre-plea sentencing pronouncements, but merely asks it to refrain from depriving trial courts of a tool that in some circumstances may prove invaluable to resolving a case. This Court should reaffirm the principle announced in Brown and permit trial judges to make pre-plea sentencing pronouncements at their discretion and in the manner they see fit. Should this Court be unwilling to approve the unfettered use of pre-plea sentencing pronouncements, it should follow the view of the Michigan Supreme Court, one that is both practical and worthy of adoption.

WHEREFORE, this Court should disapprove the opinion of the fifth district in Gitto, prohibiting pre-plea sentencing pronouncements in its entirety, and approve the fourth district's decision in Warner, permitting its use in the discretion of the trial court.

Respectfully submitted,

RICHARD JORANDBY
Public Defender
15th Judicial Circuit of Florida
Criminal Justice Building
421 Third Street/6th Floor
West Palm Beach, Florida 33401
(561) 355-7600

DAVID J. MCPHERRIN
Assistant Public Defender
Florida Bar No. 0861782

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Myra Fried, Assistant Attorney General, 1655 Palm Beach Lakes Blvd., Third Floor, West Palm Beach, Florida 33401 by courier this 2nd day of JULY, 1999.

Attorney for John Warner