

IN THE SUPREME COURT OF THE STATE OF FLORIDA

OMAR WILSON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC01-2083

ON DISCRETIONARY REVIEW FROM THE
FOURTH DISTRICT COURT OF APPEAL
ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The decision below relates the historic facts of this case as follows:

"Wilson originally pled no contest to a charge of manslaughter with a firearm, and was sentenced to two years community control followed by five years probation. The state later alleged that Wilson violated his community control by failing to remain confined to his approved residence. On the date of his final hearing, he indicated that he wished to enter an open plea and admission to the violation. The following exchange then occurred:

THE COURT: Has anyone promised you anything other than the fact [the] court would revoke your probation, adjudicate you guilty if you haven't been previously adjudicated guilty, sentences you to 128 months Florida state prison with credit for time served. Do you understand that?

[DEFENSE COUNSEL]: Your honor, before you pronounce sentence, I would like the court to hear from Mr. Wilson and hear from his fiancé.

THE COURT: What is the purpose of that since this is the bottom of the guidelines and I can't go any lower than the bottom?

[DEFENSE COUNSEL]: Well, your Honor, what we would be asking, for you to reinstate Mr. Wilson.

THE COURT: I thought there was an agreement.

[DEFENSE COUNSEL]: It's an open plea, your Honor.

THE COURT: No.

[DEFENSE COUNSEL]: He still wants to admit to the violation.

THE COURT: No. Go to a final hearing. Set it down for a final hearing. Let's proceed.

[DEFENSE COUNSEL]: Could I have a moment, your Honor?

THE COURT: That's all right. Court withdraws the offer.

* * * * *

[DEFENSE COUNSEL]: Good morning again. Emilio Benitez on behalf of Mr. Wilson on page 3.

THE COURT: Are you ready to proceed to final hearing?

[DEFENSE COUNSEL]: Yes, your honor.

Before that, I'd like to address Mr. Wilson. Mr. Wilson, that's what you want to do? You want to go to a final hearing; is that correct?

[WILSON]: Yes, sir.

[DEFENSE COUNSEL]: You don't want to accept the court's offer of 128 months; is that correct?

[WILSON]: No.

THE COURT: And my advice to you was the court's offer was the bottom of the guidelines and in my opinion you should have taken it. Is that--

[WILSON]: Excuse me?

THE COURT: Okay. Let's proceed. Let's swear in the defendant.

"At the end of the hearing, the trial court found that Wilson wilfully violated his community control. The court then, without commenting on the rejected plea offer, revoked his community control and sentenced him to 150 months in prison. His sentence guidelines had ranged from 128.625 months to 214.375 months....

"We disagree, however, with Wilson's contention that his original sentence was vindictive and, therefore, he should, on remand, be resentenced by a different trial judge. A defendant may not be subjected to a more severe punishment for exercising his constitutional right to stand trial. Mitchell v. State, 521 So.2d 185, 187 (Fla. 4th DCA 1988) (Hersey, C.J.; Letts and

Walden, JJ., concur). However, as previously explained by this court:

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.

Id. at 190 (citations omitted).

"Here, the plea offer was given and was voluntarily rejected. The trial judge made no remarks which would give any indication that the harsher sentence was being imposed as a punitive measure for rejecting the previous offer. Although the judge reiterated the plea offer at the start of the hearing, he did not refer to it again at sentencing, or even at the resentencing. See, e.g., Gallucci v. State, 371 So.2d 148, 150 (Fla. 4th DCA 1979); Johnson v. State, 679 So.2d 831, 832-33 (Fla. 1st DCA 1996). Accordingly, we hold that Wilson was not improperly penalized for rejecting the plea offer, and may be

resentenced by the same judge. See Mitchell, 521 So.2d at 190." Wilson v. State, 792 So.2d 601-603 (Fla. 4th DCA 2001).

Petitioner timely sought discretionary review on the basis of conflict with the decision of Byrd v. State, 794 So.2d 671 (Fla. 5th DCA 2001). By order entered Friday, April 12, 2002, this Court accepted jurisdiction in both this case and the Byrd case, and consolidate the two cases for oral argument on August 27, 2002.

SUMMARY OF THE ARGUMENT

Petitioner argues this Court should find a presumption of vindictiveness when the sentence after jury trial exceeds the rejected pretrial plea bargain. He contends that the fifth district's view in the companion case of State v. Byrd, SC01-2333, is a necessary extension of this Court's decision in State v. Warner, 762 So.2d 507 (Fla. 2000), which permitted judicial participation in plea bargaining. Respondent replies that this view misunderstands the nature of plea negotiations, whether or not the judge is involved.

The United States Supreme Court has repeatedly held that it is constitutionally permissible to offer more lenient sentences in exchange for guilty pleas. As the fourth district recently recognized in an en banc decision, the United States Supreme Court has ruled that the presumption of vindictiveness arising from North Carolina v. Peace is inapplicable in the context of 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. 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.

It is constitutionally permissible to offer lesser sentences as a concession for a guilty plea. It does not necessarily follow that defendants who reject plea offers, proceed to trial and receive harsher sentences upon conviction are being punished more severely because of that choice. They are not being punished for going to trial, but rather, not receiving the benefits offered as inducements for a guilty plea which they voluntarily reject.

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 counterpoised 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 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. 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

JUDICIAL VINDICTIVENESS AFTER A DEFENDANT IS SENTENCED IN EXCESS OF A REJECTED PRETRIAL PLEA OFFER CANNOT BE PRESUMED. THE PLEA OFFER SHOULD NOT CREATE A SENTENCE CEILING.

Petitioner Wilson argues that when a greater sentence is imposed after unsuccessful plea negotiations involving the trial judge, the harsher sentence is presumed to be vindictive. He asks this Court to adopt the view espoused by the fifth district in the companion case of State v. Byrd, Case No. SC01-2333, instead of the well established holding of the fourth district. As an extension of this Court's endorsement of judicial participation in plea bargaining, he argues that the only appropriate remedy if the defendant rejects the offer and goes to trial is to enforce the rejected plea bargain. The State responds that this view is based upon a fundamental misunderstanding of the nature of plea bargaining. This legal issue is reviewed de novo.

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 it is constitutionally permissible to

impose a more lenient sentence in exchange for a guilty plea. Alabama v. Smith, 490 U.S. 794, 799, 109 S.Ct. 2201, 2204-6, 104 L.Ed.2d 65 (1989). 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).

The fourth district recently acknowledged that Alabama v. Smith clarified the presumption of vindictiveness analysis emanating from North Carolina v. Pearce in Morales v. State, 27 Fla. L. Weekly D1099 (Fla. 4th DCA May 8, 2002). In this en banc decision, the fourth district recognized "in 1989 the Supreme Court clarified Pearce and held that the Pearce presumption did not apply where the lower sentence was based on a plea rather than a trial." The fourth district noted that the Supreme Court expressly overruled a companion case to Pearce where the presumption had been applied in a guilty plea context, Simpson v. Rice. The en banc fourth district decision quotes from Alabama v. Smith:

The failure in Simpson v. Rice to note the distinction just described stems in part from that case's having been decided before some important developments in the constitutional law of guilty pleas. A guilty plea may justify leniency, Brady v. United States, supra; a prosecutor may offer a "recommendation of a lenient sentence or a reduction of charges" as part of the plea bargaining process, Bordenkircher v. Hayes, 434 U.S. 357, 363, 98 S.Ct. 663, 667, 54 L.Ed.2d 604 (1978), and we have upheld the prosecutorial practice of threatening a

defendant with increased charges if he does not plead guilty, and following through on that threat if the defendant insists on his right to stand trial, ibid.; we have recognized that the same mutual interests that support the practice of plea bargaining to avoid trial may also be pursued directly by providing for a more lenient sentence if the defendant pleads guilty, Corbitt v. New Jersey, 439 U.S. 212, 221-223, 99 S.Ct. 492, 498-499, 58 L.Ed.2d 466 (1978).

Part of the reason for now reaching a conclusion different from that reached in Simpson v. Rice, therefore, is the later development of this constitutional law relating to guilty pleas. Part is the Court's failure in Simpson to note the greater amount of sentencing information that a trial generally affords as compared to a guilty plea. Believing, as we do, that there is no basis for a presumption of vindictiveness where a second sentence imposed after a trial is heavier than a first sentence imposed after a guilty plea, we overrule Simpson v. Rice, *supra*, to that extent.

Morales v. State, 27 Fla. L. Weekly D1099 (Fla. 4th DCA May 8, 2002) quoting Alabama v. Smith, 490 U.S. at 802-03.

Wilson's first argument is that any greater sentence imposed

after a rejected plea offer is presumptively vindictive which can only be overcome with record evidence whenever the judge is involved in plea negotiations. The basis for this argument is North Carolina v. Pearce. However, Wilson fails to note that the Supreme Court held in Alabama v. Smith that Pearce does not apply in the context of guilty pleas. The cases upon which he relies predate the Supreme Court decision in Alabama v. Smith.

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 in Byrd 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 into an absolute requirement. Third, this requirement fails to account for other legitimate reasons why a judge may endorse a more lenient sentence in exchange for a guilty plea, like sparing a child victim of sexual abuse the emotional trauma from testifying. See, Prado v. State, 27 Fla. L. Weekly D 1047 n. 6 (Fla. 3d DCA

May 8, 2002)(Sorondo, J., concurring).

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. Contrary to Wilson's argument, the fourth district's own precedent does not require

a finding that it is "patently unconstitutional" to impose a harsher sentence after a rejected plea bargain. (Initial brief, p. 5-6) Any lingering doubt in this regard was finally put to rest in the en banc decision in Morales v. State, 27 Fla. L. Weekly D 1099 (Fla. 4th DCA May 8, 2002).

The decision in Byrd 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, "...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. 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 next in this argument. Martin v. State, 27 Fla. L. Weekly D1008 (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 fifth district court's analysis in this regard is flawed and must be reversed.

Petitioner argues that affirmance of the holding in Byrd is mandated by the decision in Warner. This Court recently endorsed the concept of a trial judge participating in plea negotiations in 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. 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, 27 Fla. L. Weekly D1008 (Fla. 5th DCA May 3, 2002). 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 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.

Adoption of the Byrd 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 an 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 chances 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.

Petitioner herein would require the State to rebut the presumption of vindictiveness with record evidence unknown at the time of the plea offer. This view 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 judge's statement was "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." Wilson v. State, 792 So.2d 601 (Fla. 4th DCA 2001). The judge's remarks were essentially that the plea offer was good and you should have taken it. That is not the equivalent of saying take this offer or you will be more severely punished. It is constitutionally permissible to reward a defendant who pleads guilty with a lesser sentence. It does not necessarily follow that a defendant who rejects a plea offer and subsequently receives a greater sentence is being punished more severely for that choice.

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.")

Finally, Petitioner argues that the only appropriate remedy is enforcement of the rejected plea offer. 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). In his brief in below, Wilson requested this very relief: remand for resentencing before a different judge. 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 affirm the decision of the Fourth District Court of Appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Assistant Public Defender Alan DeWeese, counsel for Petitioner, at 421 Third Street, West Palm Beach, FL 33401, 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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IN THE SUPREME COURT OF THE STATE OF FLORIDA

OMAR WILSON,

Petitioner,

v.

Case No. SC01-2083

STATE OF FLORIDA,

Respondent.

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APPENDIX TO RESPONDENT'S ANSWER BRIEF ON THE MERITS

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

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