IN THE SUPREME COURT OF THE STATE OF FLORIDA

OMAR WILSON,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. SC01-2083
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
_____	)	

PETITIONER'S REPLY BRIEF ON THE MERITS

On Review from the District Court of Appeal,
Fourth District

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PRELIMINARY STATEMENT

Petitioner was the defendant in the Circuit Court, Seventeenth Judicial Circuit, in and for Broward County, and the appellant in the Fourth District Court of Appeal; Respondent was the prosecution and the appellee.

In the brief, the parties will be referred to as they appear before this Court.

The following symbols will be used:

R = Record on Appeal

T = Transcript

ARGUMENT

THIS COURT MUST APPROVE AND ADOPT BYRD V. STATE, 794 SO. 2D (FLA. 5TH DCA 2001), IN ORDER TO HARMONIZE WITH EXISTING LAW THE SAFEGUARDS ON JUDICIAL PLEA BARGAINING RECENTLY ESTABLISHED BY THIS COURT IN STATE V. WARNER, 762 SO.2D 507 (FLA. 2000).

Since its decision in the instant case, the Fourth District has strayed even further from the course this Court set in State v. Warner, 762 So. 2d 507 (Fla. 2000). In Morales v. State, 27 Fla. L. Weekly D1099 (Fla. 4th DCA May 8, 2002), the en banc court certified conflict with the Second, Third and Fifth Districts over the presumption of vindictiveness. The Fourth District thus has indicated plainly that it believes this Court should overrule a long line of Florida and federal precedent. It has openly declared its displeasure with Byrd v. State, 794 So. 2d 671 (Fla. 5th DCA 2001), and shown that it does not understand, or that it rejects, Warner. As in its decision in the instant case, the court in Morales did not even mention Warner, even after Byrd showed it to be the key to the issue as this Court must now confront it.

The Third District, meanwhile, has aligned itself with Byrd. See, Prado v. State, 27 Fla. L. Weekly D1047 (Fla. 3rd DCA May 8, 2001) (discussing and following Warner; citing Byrd), and Charles v. State, 27 Fla. L. Weekly D1051 (Fla. 3rd DCA May 8, 2002) (citing Byrd). In both cases, as in Byrd, the appellate

court reversed for imposition of the sentence offered by the court in plea bargaining.

Also since the decision in the instant case, the Fifth District has shown more clearly what Warner and Byrd do and do not mean. In Martin v. State, 27 Fla. L. Weekly D1008 (Fla. 5th DCA May 3, 2002), the court explained the difference between judicial plea bargaining and bargaining between the parties, a distinction which the state in its answer brief before this Court has confused or glossed over. "As in all such cases, what the record reveals about what the trial judge said or did is critical," said the court. In the case before it, the court refused to indulge the presumption of vindictiveness because the transcript showed that the judge had not participated in plea bargaining but merely had inquired carefully of the defendant to ensure that he was fully aware of, and knowingly rejecting, the *state's* plea offer. The appellate court further noted that, as required by Warner, the judge stated reasons on the record at sentencing for the greater sentence. The Fifth District in only two opinions, Byrd and Martin, has shown how Warner must be applied and has harmonized it with existing law. This Court should adopt Martin as well as Byrd.

Martin has the further virtue of dispelling the false alarms raised by the state with regard to Cottle v. State, 733 So. 2d

963 (Fla. 1999). Martin shows how the trial judge, guided by Warner, can avoid committing himself to a plea bargain while also ensuring that the defendant is made aware on the record of any offer by the state.

The state in its brief also has confused or glossed over the all-important distinction between cases where a conviction or plea is entered and cases where the plea is not entered. The main case the state relies on, Alabama v. Smith, 490 U.S. 794 (1989), shows the error in the state's thinking. There, the first sentence was imposed pursuant to a guilty plea actually entered by the defendant. The increased sentence then came at a trial after the plea was vacated. Completely left out of the equation in Smith was the crucial fact of judicial participation in the plea bargaining. Warner's concerns and safeguards simply do not enter into this picture. In North Carolina v. Pearce, 395 U.S. 711 (1969), on the other hand, the defendant never entered a plea but was retried and resentenced after his first *trial* conviction was reversed on appeal.

The focus here and in Warner, Byrd and Martin is first on the plea process and only second on sentencing. The concerns are first to prevent the court from entering into plea bargaining with an express or implied threat of a vindictive sentence, and then second to prevent the court from carrying out

the threat. These two concerns raise two legal issues: voluntariness of pleas and vindictiveness in sentencing. The voluntariness issue is entirely absent in Smith and in the state's thinking. It explains why the presumption of vindictiveness applied in Pearce and why it did not in Smith.

The voluntariness issue adds as factors the subjective feelings of the defendant and the "institutional" pressure to plead guilty. Warner recognized that judicial plea negotiations are "delicate," 762 So. 2d at 510; discussed concerns including "the defendant's perception of coercion, the defendant's fear of reprisal," 762 So. 2d at 511; and stated that "judicial involvement must be limited 'to minimize the potential coercive effect on the defendant,'" as well as to retain the judge as a neutral arbiter and to preserve public perception of the judge as neutral, 762 So. 2d at 513, quoting People v. Cobbs, 443 Mich. 276, 505 N.W.2d 208, 212 (1993). As shown in Petitioner's initial brief, due process focuses on the defendant: it "requires that a defendant be freed of apprehension of such a retaliatory motive...." North Carolina v. Pearce, 395 U.S. 711, 725 (1969). The evil is "institutional pressure" or "institutional bias." Thigpen v. Roberts,468 U.S. 27, 31 (1984); Frazier v. State, 467 So. 2d 447, 449 (Fla. 3rd DCA 1985).

The subjective element combined with the delicacy of judicial plea bargaining would justify a presumption of vindictiveness even if it were not justified where the judge was not involved as allowed by Warner (which it is, but which is not the case before this Court). Legal presumptions are created, in part, because direct evidence of the claim underlying the presumption is difficult to obtain. State v. Rolle, 560 So.2d 1154, 1158 (Fla.1990)(Barkett, J., specially concurring), cert. den., 498 U.S. 867 (1990)("[P]resumptions exist to enhance trial fairness, as when an imbalance results from one party's superior access to proof; or to avoid an impasse, as when there is no probability to believe that one fact was more likely to have occurred than another; or for procedural convenience, as when the same name appears on a chain of title first as grantee and then as grantor, in which event those names are presumed to refer to the same person.") (emphasis added); Basic, Inc. v. Levinson, 485 U.S. 224 (1988)("Presumptions typically serve to assist courts in managing circumstances in which direct proof, for one reason or another, is rendered difficult."); Charles W. Ehrhardt, Florida Evidence § 303.1, at 100 (2002 ed.) ("Frequently, these presumptions involve situations when it is difficult to prove that an event occurred."); McCormick on Evidence § 343, at 455 (4th ed. 1992) (noting that a presumption

is based "upon the difficulties inherent in proving that the ... event in fact occurred"). What could be more difficult to prove than the reasoning behind a trial judge's sentencing decision? (After all, a judge can't be called as a witness or cross-examined.) And what could be easier to require than a statement from the judge explaining his or her reason for sentencing a defendant more harshly than the tendered plea offer? This is precisely what Warner requires.

This Court has made Warner a part of Florida criminal law and procedure. The decision is based in part on Fla.R.Crim.P. 3.171. Definition of “vindictiveness” as a “term of art” is a Florida development, see, Frazier v. State, 467 So. 2d 447, 449 fn. 4 (Fla. 3rd DCA 1985); McDonald v. State, 751 So. 2d 56, 59 (Fla. 2d DCA 1999); and Richardson v. State, 809 So. 2d 69 (Fla. 2d DCA 2002), which can be a basis for this Court to forge its own rule complementary to Warner. This Court has only to fill out Warner by explaining the consequences of violation of this Court’s rules governing judicial plea bargaining.

This Court must scrupulously avoid, and direct the trial courts to scrupulously avoid, the gaming model of plea bargaining, which the state blatantly advocates in its brief (pp. 21-25), concluding with the analogy that “all bets are off” (p. 25). The state’s open concern to avoid “more trials,” its

view that the judicial system "cannot accommodate" trials in every criminal case, and its cry for "incentives" to plead (p. 21), all offend the basic constitutional notions upon which Warner is built. Judicial plea bargaining in Florida may operate only within the narrow confines of Warner, and violations of those confines must have some consequence.

In the instant case, Warner was violated in the first instance because the trial court, and not Petitioner, initiated the plea bargaining. This violation of Warner is alone sufficient to require reversal. Even if it were not, however, and even if the resulting greater sentence were not presumed vindictive, which it must be, the judge's comments show that it was vindictive under the specific facts in the record. In either case, the judge did not make the record required by Warner, which is yet a third ground requiring reversal.

CONCLUSION

Based on the foregoing arguments and the authorities cited therein, Appellant respectfully requests this Court to reverse the judgment and sentence of the trial court and to remand this cause with proper directions.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by U.S. Mail to Belle Schumann, Assistant Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, Florida 32118, and to Rose Marie Farrell, Assistant Public Defender, 112 Orange Avenue, Daytona Beach, Florida 32114 this _____ day of June, 2002.

__ALLEN J. DeWEESE
Counsel for Petitioner

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately this _____ day of June, 2002.

_____
ALLEN J. DeWEESE
Counsel for Petitioner