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Omar Wilson v. State of Florida

THE SUPREME COURT OF THE GREAT STATE OF FLORIDA IS NOW SESSION. ALL WHO HAVE CAUSE TO PLEA, DRAW NEAR, GIVE ATTENTION, AND YOU SHALL BE HEARD. GOD SAVE THESE UNITED STATES, THE GREAT STATE OF FLORIDA, AND THIS HONORABLE COURT. LADIES AND GENTLEMEN, THE FLORIDA SUPREME COURT. PLEASE BE SEATED.

CHIEF JUSTICE: GOOD MORNING, EVERYONE. THE FIRST CASE OR THE FIRST CASES, WILSON VERSUS STATE, STATE VERSUS BYRD. I UNDERSTAND YOU ALL HAVE ARRANGED YOUR TIME HERE, AND THE MARSHAL HAS GOT IT ALL LOOKED UP AND SO HE WILL GIVE YOU THE APPROPRIATE WARNINGS, SO YOU MAY PROCEED.

GOOD MORNING, YOUR HONORS. MAY IT PLEASE THE COURT. I AM ALLEN DeWEESE FROM WEST PALM BEACH, AND I REPRESENT THE PETITIONER OMAR WILSON, AND I WILL TAKE TEN MINUTES AND THEN THE STATE THE RESPONDENT ON MY CASE AND THE PETITIONER ON THE NEXT ONE, SO THEY WILL TAKE 20, AND THEN THE RESPONDENT IN THE BYRD CASE, WHO IS THE DEFENDANT, WILL TAKE TEN.

CHIEF JUSTICE: FINE.

WHAT YOU ARE CONFRONTING, TODAY, AND WHAT YOU HAVE TO DO, WHAT YOU HAVE TO DECIDE IS ACTUALLY FAIRLY LIMITED, ALTHOUGH IT MAY NOT APPEAR THAT WAY AT THE MOMENT, BECAUSE THERE HAVE BEEN A LOT OF DCA CASES RECENTLY. WHAT YOU REALLY HAVE TO DO IS SORT OF FINISH UP WARNER. WARNER WAS THE CASE THAT CAME OUT JUST TWO YEARS AGO, ABOUT JUDICIAL PLEA BARGAINING. YOU, REALLY, DID THE HEAVY LIFTING, AND YOU GRAPPLED WITH A LOT OF STUFF. YOU DECIDED TO GO WITH THE MINORITY POSITION AND ALLOW JUDICIAL PLEA BARGAINING, UNDER SOME VERY SPECIFIED AND LIMITED CIRCUMSTANCES.

BEFORE YOU GET TO THE OVERALL POLICY, COULD YOU TELL US, FROM YOUR POINT OF VIEW AND THE FACTS OF WILSON, WHETHER THAT WOULD BE A WARNER JUDICIAL INVOLVEMENT PLEA? IT IS A LITTLE BIT HARD TO TELL FROM THE COLLOQUY. COULD YOU ENLIGHTEN US ABOUT WHETHER THIS WAS THE JUDGE --

SURE.

-- GIVING THE OFFER. DID IT VIOLATE WARNER, AND JUST WHAT WAS THE STATEMENT THAT THE JUDGE MADE.

YEAH. IT IS, REALLY, THE CLEANEST CASE FOR JUDICIAL PLEA BARGAINING THAT YOU COULD HAVE. FIRST OF ALL, IT IS A VIOLATION OF PROBATION, WHERE THE TRIAL COURT IS GOING TO BE THE FACT FINDER. AT THE BEGINNING OF THE HEARING, YOU ARE RIGHT, THERE WAS A LITTLE BIT OF CONFUSION, BUT WHAT IS GOING ON THERE, BUT RIGHT BEFORE THEY STARTED THE HEARING, THE JUDGE SAID IN MY ADVICE TO YOU WAS THE COURT'S OFFER. THIS WAS THE JUDICIAL PLEA BARGAINING. THE COURT'S OFFER WAS THE BOTTOM OF THE GUIDELINES, AND IN MY OPINION, YOU SHOULD HAVE TAKEN T LET'S PROCEED.

SO ARE YOU SAYING IT WOULD VIOLATE WARNER, BECAUSE THERE WAS NO REQUEST ON THIS RECORD, NO REQUEST BY EITHER PARTY, EVEN FOR THE JUDGE TO GET INVOLVED IN THIS?

IT VIOLATES WARNER ON TWO COUNTS. THAT IS THE FIRST ONE AND, AGAIN WARNER WASN'T OUT AT THE TIME, AND THEN IT VIOLATES WARNER, BECAUSE THE COURT DID NOT MAKE A RECORD OF ANY KIND OF REASONS JUSTIFYING THE GREATER SENTENCE THAT CAME, LIKE, HALF AN HOUR OR AN HOUR LATER, RIGHT AT THE END OF THAT SAME HEARING.

DO YOU TAKE THE COURT'S COMMENT THAT MY ADVICE TO YOU WAS THE COURT'S OFFER WAS THE BOTTOM OF THE GUIDELINES. YOU SHOULD HAVE TAKEN IT, AS BEING, EVEN IF THERE WASN'T, YOU SAY THERE SHOULD BE A PRESUMPTION OF VINDICTIVENESS.

YES.

BUT EVEN IF THERE WASN'T, AS A STATEMENT THAT THE JUDGE WAS MAKING, THAT WOULD BE EVIDENCE OF AN IMPROPER MOTIVE.

YES. I MEAN, IT DEMONSTRATES HIS INTENTION TO DO SOMETHING MORE DIRE.

THE REASON I ASK THAT IS IT SEEMS THAT MOST OF THE CASES, IF YOU READ EVEN PRE AND POST WARNER, THE JUDGE HAS MADE SOME STATEMENT THAT IS COMPELLING THE APPELLATE COURTS TO SAY THERE IS SOMETHING IMPROPER GOING ON, RATHER, THEY USE PRESUMPTION, THERE IS, REALLY, SOMETHING IN THE RECORD. DO YOU AGREE WITH THAT?

WELL, THERE IS CASES THAT HAVE THE VARIOUS FACT PATTERNS, BUT THE PRESUMPTION IS GOING TO OPERATE, EVEN IF THE COURT DOESN'T SAY ANYTHING. THE COURT HAS AN AFFIRMATIVE RESPONSIBILITY TO SAY SOMETHING TO SUPPORT, ON THE RECORD, THE GREATER SENSE, AND -- THE GREATER SENTENCE, AND IT, THE PRESUMPTION IS REALLY, AND THIS IS POINTED OUT IN BYRD. BYRD IS A VERY GOOD TREATMENT OF THIS, WHICH I AM URGING YOU TO ADOPT. BYRD SAYS THAT THE PRACTICAL EFFECT OF CALLING THIS A PRESUMPTION ISN'T REALLY ANY DIFFERENT THAN SIMPLY SAYING THAT THE COURT HAS TO MAKE A RECORD OF THESE REASONS, AND YOU SAID IN WARNER THAT THE COURT HAS TO MAKE A RECORD.

WOULD IT BE REASONS, JUST ONE WOULD IT BE REASONS THAT THE JUDGE WOULDN'T HAVE KNOWN, AT THE TIME THAT THE OFFER WAS MADE OR COULD THEY JUST BE ANY REASONS? I MEAN, IN OTHER WORDS, DOES IT HAVE TO BE SOMETHING THAT DEVELOPED AFTER THE OFFER AND ACCORDING TO YOUR --.

IT HAS TO BE SOMETHING ADDITIONAL, BECAUSE IF WHAT THE JUDGE KNOWS AT THE BEGINNING, AGAIN, WHAT YOU SAID IN WARNER, IS BASED ON WHAT THE JUDGE KNOWS AT THAT POINT. IF THAT IS WHAT HE KNOWS, AND HE SAYS THIS IS AN APPROPRIATE SENTENCE, BASED ON WHAT I KNOW ABOUT THE CRIME AND ABOUT YOU AND ABOUT YOUR RECORD, AND AT THE END OF THE DEFENDANT EXERCISING HIS RIGHT TO A TRIAL, THERE IS NOTHING NEW, THAT JUDGMENT SHOULDN'T CHANGE.

BUT IN YOUR GUIDELINES, THE BOTTOM 128, HE GIVES 150. IT IS NOT MUCH OF A VARIATION. THE JUDGE CAN VARY WITHIN THE GUIDELINES. WHY WOULD THAT BE SOMETHING THAT IS PRESUMPTIVELY INAPPROPRIATE?

IT IS THE PRINCIPLE OF THE THING OF COURSE. THE AMOUNT ISN'T WHAT IS IN QUESTION. BUT BECAUSE THE RULES THAT YOU HAVE FORGED IN WARNER ARE SOMETHING ADDED, SOMETHING ON TOP OF THE GUIDELINES, SOMETHING ON TOP OF THE RULES OF CRIMINAL PROCEDURE, IT AMOUNTS TO AN INTERPRETATION OF THE RUSE OF CRIMINAL PROCEDURE ON -- OF THE RULES OF CRIMINAL PROCEDURE ON PLEA BARGAINING.

DOES WARNER REALLY SAY THAT? I MEAN, DOES WARNER REALLY REQUIRE THAT THE TRIAL JUDGE MAKE THAT, OR IS THAT A QUESTION THAT IS OPEN AND YOU ARE ASKING US TO DECIDE HERE TODAY? WHERE, IN WARNER, DOES IT SAY THAT THE JUDGE MUST MAKE THAT FINDING ON

THE RECORD?

THE FOURTH OR FIFTH OF THE RULES THAT WARNER SETS OUT IS THAT A RECORD MUST BE MADE OF ALL PLEA DISCUSSIONS INVOLVING THE COURT, AND, OF COURSE, THERE IS A WHOLE BODY OF LAW ON THAT, TOO. WHAT I AM URGING YOU TO DO IS TO TAKE WHAT IS SAID IN BYRD ABOUT WHAT THAT MEANS, WHAT THAT MEANS HOW THAT IS EQUIVALENT.

SO YOU ARE URGING US THAT THAT IS WHAT THE TRIAL JUDGE NEEDS TO MAKE, ON THE RECORD, SOME REASONS FOR A SENTENCE THAT IS BEYOND THAT TALKED ABOUT IN THE PLEA BARGAINING.

WELL, YES. I GUESS WHAT I WOULD SAY IS YOU NEED TO FLESH THAT OUT A LITTLE BIT, BECAUSE YOU HAVE SAID THAT HE NEEDS TO MAKE A RECORD. FLESH OUT WHAT THAT RECORD HAS TO BE.

WHAT IN YOUR OPINION TRIGGERS THE PRESUMPTION? DOES IT HAVE TO BE SOMETHING IN THE RECORD THAT AMOUNTS TO A REASONABLE LIKELIHOOD THAT THERE IS A VINTICTIVENESS, OR JUST, DOES THE RECORD HAVE TO HAVE THAT, BEFORE THE PRESUMPTION KICKS IN?

YES. THAT IS -- THAT IS EXACTLY WHAT A PRESUMPTION IS, IT IS BASED ON THE IDEA THAT ONE PARTY HAS BETTER ACCESS TO THE EVIDENCE OR PROOF THAT WE NEED TO LOOK AT. IN THIS CASE, WE ARE TALKING ABOUT THE JUDGE'S MOTIVATION, WHAT GOES ON INSIDE HIS HEAD. IF HE DOESN'T SAY ANYTHING, IF HE DOESN'T MAKE HIS RECORD AND GIVE HIS REASONS, THEN HOW IS THE DEFENDANT TO SAY WHAT IS IN THE JUDGE'S HEAD? THE PRESUMPTION FUNCTIONS, THEN, TO PUT THE ONUS ON THE COURT, ON THE STATE, TO REBUT THIS PRESUMPTION, IF THEY CAN.

LET'S SHIFT TO THE POLICY SIDE OF IT FOR JUST A MINUTE, AND HERE, UNDER WARNER, OBVIOUSLY WE HAVE PERMITTED SOME JUDICIAL ACTIVISM IN THE AREA OF PLEA BARGAINING, AND ORDINARILY THAT ADHERES TO THE BENEFIT OF DEFENDANTS. WOULD YOU AGREE?

WELL, WHAT YOU HAVE DONE, IS YOU HAVE MADE A DECISION IN PRESERVING SOME SLIGHT MODICUM OF JUDICIAL DISCRETION IN SENTENCING,, WHICH OF COURSE, AS WE ALL KNOW, IS --

BUT MY POINT IS ORDINARILY WE ARE TALKING ABOUT SOMETHING THAT WOULD BENEFIT DEFENDANTS. THIS IS ANOTHER OPTION THEY HAVE YOU KNOW, AND WHAT I AM CONCERNED ABOUT HERE, IS THAT, IN ARGUING ON BEHALF OF THE DEFENDANT, FOR THIS RULE, AREN'T YOU, IN EFFECT, GOING TO DISCOURAGE TRIAL JUDGES, NOW, FROM BEING WILLING TO DO THIS, BECAUSE THEY KNOW THAT, AT THE OTHER END OF IT, THAT THEY, NOW, HAVE PUT HANDCUFFS ON THEMSELVES INSOFAR AS FUTURE SENTENCING IS CONCERNED, THAT THEY HAVE, NOW, IN ESSENCE, HAVE ESTABLISHED SORT OF A MARK, A PRESUMPTIVE SENTENCE, IN THE FUTURE, THAT THEY ARE GOING TO HAVE TO COME UP WITH REASONS THAT WILL STAND UP ON APPELLATE REVIEW, FOR VARYING FROM WHAT THEY, FIRST, OFFERED THE DEFENDANT, AND ISN'T THE NET EFFECT OF THAT GOING TO WORK AGAINST DEFENDANTS? THAT IS IT IS GOING TO END UP WITH TRIAL JUDGES NOT WILLING TO DO THAT, BECAUSE THEY KNOW THAT, DOWN THE ROAD, THEY ARE GOING TO HAVE THIS PROBLEM, AND THAT THEY HAVE, REALLY, RESTRICTED THEMSELVES SEVERELY, BY DOING THAT.

WELL, I DON'T THINK SO. FIRST OF ALL, OF COURSE, WE ARE IN FAVOR OF WARNER. WARNER CAME UP FROM MY OFFICE, AND WE TOOK THE POSITION THAT JUDICIAL PLEA BARGAINING SHOULD BE ALLOWED, BECAUSE THE STATE WAS TRYING TO CUT THAT OFF, AND USURP THAT DEGREE OF DISCRETION ON THE PART OF THE TRIAL JUDGE. I THINK, I DON'T KNOW ABOUT DISCOURAGING. THE RULE I AM PROPOSING IN WARNER, CERTAINLY DOES SAY THAT THEY HAVE TO BE CAREFUL. YOU SAID, IN WARNER, THAT JUDICIAL PLEA BARGAINING IS DELICATE. YOU WENT THROUGH ALL THE POLICY CONSIDERATIONS EACH WAY.

WHAT WE WERE TALKING ABOUT PUTTING ON THE RECORD, THOUGH, IN WARNER, WAS

EVERYTHING THAT WENT ON DURING THE COURSE OF THE PLEA BARGAINING. WE WEREN'T ANTICIPATING, IN WARNER, THAT YOU PUT SOMETHING ON A RECORD DOWN THE ROAD, YOU KNOW, WERE WE? IN OTHER WORDS THAT IS NOT ON THE RECORD PORTION THAT WE WERE DISCUSSING. WOULD YOU AGREE?

I DON'T REALLY KNOW WHAT YOU ARE ANTICIPATING, BUT IT IS ONE ADDITIONAL, SMALL STEP THAT YOU NEED TO TAKE, TO COMPLETE WARNER AND I AM SORRY. I AM GOING TO HAVE TO SIT DOWN.

WE HAVE HAD A GOOD DISCUSSION.

THANK YOU VERY MUCH.

MAY IT PLEASE THE COWER. GOOD MORNING. MY NAME IS BELLE SCHUMANN. I REPRESENT THE STATE OF FLORIDA IN THESE TWO CONSOLIDATED CASES. WE ARE HERE THIS MORNING, TO ANSWER SOME OF THE QUESTIONS OR RESOLVE SOME OF THE PROBLEMS CREATED BY THE STATE VERSUS WARNER DECISION. WARNER DID --

LET ME ASK THIS FIRST OF ALL, JUST AS A PROCEDURAL MATTER. ARE YOU GOING TO ARGUE YOUR ENTIRE 20 MINUTES NOW? OR JUST ANSWER THE WILSON CASE?

WELL, I REQUESTED FIVE MINUTES' REBUTTAL.

SO YOU WILL BE ARGUING WILSON AND BYRD RIGHT NOW.

YES, MA'AM. THE WARNER DECISION ENDORSED JUDICIAL PARTICIPATION IN PLEA NEGOTIATIONS, AND THE POLICY CONSIDERATIONS UNDERLYING THAT DECISION ARE NOT GOING TO BE FULFILLED, IF THIS COURT AFFIRMS BYRD DECISION. THE JUDGES WILL BE RELUCTANT TO ENTER INTO PLEA NEGOTIATIONS, WHICH THIS COURT, IN WARNER, SAID WAS --

AS FAR AS THE BYRD DECISION IS CONCERNED, WHAT WAS, DURING THE PLEA NEGOTIATIONS, WHAT CASES WERE ACTUALLY BEING DISCUSSED IN THE BYRD?

WELL, THERE IS SOME DISAGREEMENT ON THAT. THE CASES WERE SEVERED. THERE WAS TWO SEPARATE CASES.

BURGER KING AND TACO BELL?

YES. TWO ROBBERIES. TWO SETS OF ROBBERIES.

WHICH ONE OF THOSE?

IT WAS THE ONE THAT WENT TO TRIAL T WAS, I BELIEVE, THE BURGER -- TO TRIAL. IT WAS, I BELIEVE, THE BURGERING IT. IT WAS A ROBBERY AND ALSO, I BELIEVE, THE ASSAULT CHARGE. THE JUDGE SAID IT IS 100 YEARS. THAT REFERENCE IS RELIED UPON BY MY OPPONENT, AS REFERRING TO ALL OF THE CASES, BECAUSE IN AGGREGATE, THAT WOULD BE THE MAXIMUM SENTENCE FOR ALL, ALTHOUGH THERE WERE REALLY, AT THAT POINT, ONLY TWO CASES BEFORE THE COURT AT THAT TIME. THEY WENT TO TRIAL. THE DEFENDANT REJECTED THOSE. THEY WENT TO TRIAL, AND THEN THEY CAME BACK THE NEXT DAY AND PLED GUILTY TO THE REMAINING CHARGES.

WHAT WEIGHT SHOULD BE GIVEN TO THE PLEA OFFERED AS OPPOSED TO THE FINAL SENTENCING, WHEN THE PERSON DOESN'T ACCEPT THE PLEA? IS THAT A FACTOR THAT LEADS TO A PRESUMPTION OF VINDICTIVENESS, WHEN YOU DON'T ACCEPT A PLEA, YOU GET 50 YEARS MORE THAN YOU COULD HAVE GOTTEN, IF YOU HAD SEND THE PLEA BARGAIN?

WELL, THE STATE CONTENDS THAT THAT IS THE MAIN PROBLEM WITH THE BYRD DECISION, IS THAT IT PRESUMES VINDICTIVENESS IN AN INSTANCE WHERE THE TWO ARE SIMPLY NOT COMPARABLE. THE TWO OTHER STATES THAT PERMIT JUDICIAL PARTICIPATION IN PLEA BARGAINING, BOTH, REJECT ANY SORT OF COMPARISON BETWEEN THE SENTENCE OFFERED DURING THE PLEA NEGOTIATION AND RECOGNITION OF THE CONTEXT THAT IT IS MADE.

BUT DO YOU AGREE THAT THERE IS SOMETHING IS TRIGGERED AT THAT POINT, THAT PUTS A DUTY UPON THE COURT TO EXPLAIN IN THE RECORD, WHY THIS DISCREPANCY?

WELL, I CONTEND THAT A PLEA BARGAIN IS CONSTITUTIONALLY CONSTITUTIONALLY-PERMISSIBLE TO OFFER A MORE LENIENT SENTENCE, IN EXCHANGE FOR A PLEA OF GUILTY. THAT IS A LONG-STANDING PRACTICE. A PLEA OFFER, A PLEA BARGAIN IS MADE, IN SPITE OF THE KNOWLEDGE OF THE OTHER FACTORS HAVING TO DO WITH SENTENCING. IT IS INAPPROPRIATE TO COMPARE THE REASONS, TO REQUIRE THE JUDGE TO COME UP WITH NEW REASONS, BECAUSE IF THEY DO PARTICIPATE IN THE PLEA BARGAINING, IT IS IN SPITE OF THOSE REASONS, THOSE VERY SAME REASONS, THAT, IN EXCHANGE IT IS A BARGAIN. THAT IS WHAT A BARGAIN MEANS. IF YOU PLEAD GUILTY AND WAIVE YOUR RIGHT TO A TRIAL, WE WILL GIVE YOU A LESSER SENTENCE. THAT IS NOT TO SAY THAT, IF YOU REJECT THAT PLEA BARGAIN, PROCEED TO TRIAL AND ARE CONVICTED AND ULTIMATELY RECEIVE A HIGHER SENTENCE, YOU ARE BEING PUNISHED FOR THAT CHOICE.

HOW WOULD A DEFENDANT EVER PROVE VINDICTIVENESS, IF YOU, IF THERE IS NO BURDEN AT THAT POINT?

THERE IS NO OTHER, THIS COURT HAS REJECTED VINDICTIVENESS AND THE PRESUMPTION OF VINDICTIVENESS, IN A VARIETY OF OTHER CONTEXTS. WHEN ONE DEFENDANT PLEADS GUILTY AND THE OTHER ONE GOES TO TRIAL AND THEY GET DISS DID -- AND THEY GET DISPAR AT SENTENCES, THERE IS NO COMPARISON. YOU ARE NOT ENTITLED TO THE PLEA THAT YOU GOT DURING THE BARGAIN N WARNER, ITSELF, THIS COURT SAID, IF THE PLEA BARGAIN IS REJECTED, YOU WERE NOT GOING TO AUTOMATICALLY RECUSE THE JUDGE. THAT IS WHAT RECUSAL IS ABOUT IS BIAS. YOU DON'T PRESUME VINDICTIVENESS UNDER ANY OTHER CIRCUMSTANCE, AND THE WAY YOU WOULD --

ISN'T, THIS THE CIRCUMSTANCE HERE, NOW, WE ARE TALKING ABOUT A FAIRLY NARROW SET OF CIRCUMSTANCES. I DON'T KNOW WHAT THE STATISTICS WOULD SHOW, AS TO IN THIS STATE HOW MANY JUDGES ACTUALLY INVOLVE THEMSELVES IN THIS, BUT WE WERE SAYING IT WAS A RARE CIRCUMSTANCE THAT WARNER WAS DEALING WITH. IN BYRD, THE JUDGE SAID, I THINK 30 YEARS IS A STEAL. HE CERTAINLY WON'T GET THAT LOW, IF HE GOES TO TRIAL. THAT IS WHAT THE JUDGE SAYS. NOW, WHAT I AM HAVING TROUBLE WITH, IS THIS. IS THAT WE KNOW THAT, AND IT IS RECOGNIZED, THAT A DEFENDANT, CERTAINLY WHEN THE PROSECUTION IS OFFERING THE PLEA, WILL GENERALLY RECEIVE CONSIDERATION FOR PLEADING GUILTY. THAT IS THEY WILL GET A MORE LENIENT SENTENCE. THAT IS WHAT THE CASES HAVE SAID THAT, BUT THEN, ON THE OTHER HAND, WHAT THE STATE SEEMS TO CONCEDE, IS THAT THE DEFENDANT CANNOT BE THREATENED THAT, IF HE GOES TO TRIAL, HE IS, OR EXERCISES HIS OR HER RIGHT TO GO TO TRIAL, HE WILL GET OR SHE WILL GET A HIGHER SENTENCE. AREN'T THOSE TWO CONCEPTS JUST FUNDAMENTALLY AT ODDS WITH ONE ANOTHER, AND WHEN THEY COME TOGETHER IN THE JUDICIAL PLEA BARGAINING SETTING, THEN BECOME CONCERNED THAT THE ONLY MOTIVE THAT THE JUDGE HAS, WHO OFFERED THE PLEA, IS THAT, WELL, YOU WENT TO TRIAL. IT WAS A STEAL. I TOLD YOU YOU WEREN'T GOING TO GET THIS AMOUNT. NOW YOU ARE GETTING THAT AMOUNT. SO HOW DO WE, I GUESS MY QUESTION IS I DON'T SEE HOW THOSE TWO STAND TOGETHER.

WELL, FIRST OF ALL, BOTH OF THESE CASES ARE, WERE BEFORE WARNER WAS DECIDED. I SUGGEST THAT IT MAY NOT BE AS RARE AS ONE MIGHT THINK. AND IN THE BYRD CASE, IT WAS THE DEFENDANT WHO INITIATED IT. THEY ARE GETTING READY TO GO TO TRIAL, AND THE

DEFENDANT SAID, WHAT WOULD THE COURT'S INCLINATION BE, ON A PLEA OFFER? I THINK THAT THAT IS VERY COMMON AND IF THIS CASE IS AFFIRMED, IT IS GOING TO BE EXTREMELY COMMON, BECAUSE EVERY DEFENDANT IS GOING TO DO THAT AND THEN PROCEED TO TRIAL, SECURE IN THE KNOWLEDGE THAT THEY HAVE SET THE SENTENCING CEILING. THE MAIN DIFFERENCE IS, IT IS CONSTITUTIONALLY-PERMISSIBLE, AND WELL-ESTABLISHED PRACTICE, TO OFFER A MORE LENIENT SENTENCE IN EXCHANGE FOR A GUILTY PLEA. THAT IS ALABAMA VERSUS SMITH SAYS THAT NORTH CAROLINA VERSUS PIERCE PRESUMPTION OF VINDICTIVE VINDICTIVENESS DOES NOT APPLY TO CASES, IF THE DEFENDANT REJECTS IT.

WASN'T THERE REASON THAT CAME OUT AFTER TRIAL THAT SHOWED WHY THEY WERE GIVING A HARSHER?

THAT IS WHAT THE FOURTH HELD, IN MORALES, AND THAT IS OUR READING OF ALABAMA VERSUS SMITH THAT, IT DOESN'T APPLY IN PLEA CASES. ALSO BORDENKIRCHER AND KIRBEN VERSUS NEW JERSEY HOLD THAT IT IS PERMISSIBLE TO OFFER A MORE LENIENT SENTENCE. THAT IS NOT TO SAY, IF THE DEFENDANT REJECTS THAT AND GOES TO TRIAL AND IS CONVICTED AND RECEIVES A HIGHER SENTENCE, THAT YOU CAN PRESUME THAT THE ONLY ROPE WHY THAT PERSON GOT A HIGHER SENTENCE WAS BECAUSE THEY WENT TO TRIAL. YOU ARE NOT GETTING THE LIEN YANCY THAT YOU WOULD HAVE OTHERWISE GOTTEN, BY WAIVING THE RIGHT. THAT IS NOT TO SAY THAT YOU ARE GETTING PUNISHED MORE SEVERELY, SIMPLY FOR THE FACT OF GOING TO TRIAL.

BUT THE CASE LAW IS CLEAR THAT THE JUDGE CANNOT GIVE A VINDICTIVE SENTENCE, BECAUSE YOU EXERCISED YOUR RIGHTS TO GO TO TRIAL.

THAT'S RIGHT.

THAT IS CRYSTAL CLEAR.

YES.

SO THERE MUST BE SOME WAY THAT THE DEFENDANT WOULD BE ABLE TO PROVE THAT THE SENTENCE IS VINDICTIVE.

RIGHT.

OTHER THAN THE JUDGE SAYING FROM THE BENCH, I AM GIVING YOU A VINDICTIVE SENTENCE IF YOU GO TO TRIAL. I AM GOING TO GIVE YOU MORE TIME.

RIGHT.

OTHER THAN THAT SORT OF ADMISSION FROM THE BENCH, HOW WOULD A DEFENDANT EVER PROVE IT?

WELL, YOU CAN'T PRESUME THAT A JUDGE IS VINDICTIVE. YOU DON'T PRESUME THAT IN ANY OTHER CONTEXT, AND IN FACT THERE ARE SEVERAL CASES WHERE THE JUDGE SAYS, YOU KNOW, YOU WENT TO TRIAL. YOU WASTED OUR TIME. I AM GIVING YOU A HIGHER SENTENCE. STEP ME FROM THE SECOND, AND JUDGES DO THAT. THAT'S WRONG. WE ADMIT THAT. AND THOSE ARE THE KINDS OF SITUATIONS WHERE YOU CAN ESTABLISH VINDICTIVENESS, BUT TO PRESUME IT, BASED ON THE SIMPLE FACT OF GOING TO TRIAL, IS WHERE BYRD --

YOU HAVE MORE THAN THE SIMPLE FACT. YOU HAVE A 75-OR-50-YEAR DISCREPANCY IN THE SENTENCE. THAT IS WHY MY INITIAL QUESTION WAS HOW MUCH CREDENCE IS GIVEN THAT? IS THAT ENOUGH TO TRIGGER THE PRESUMES?

ABSOLUTELY NOT. IT CAN'T BE -- THE PRESUMPTION?

ABSOLUTELY NOT. IT CAN'T BE ENOUGH, BECAUSE THAT VIEW DOESN'T TAKE INTO ACCOUNT THE FACT THAT YOU ARE RECEIVING A MORE LENIENT SENTENCE IN EXCHANGE FOR A GUILTY PLEA. THAT IS CONSTITUTIONALLY CONSTITUTIONALLY-PERMISSIBLE. THAT IS WHAT PLEA BARGAINING IS ALL ABOUT. IN EXCHANGE FOR WAIVING YOUR RIGHT TO TRIAL, WE WILL GIVE YOU A LESSER SENTENCE THAN YOU OTHERWISE DESERVE. THAT IS NOT TO SAY THAT IT CREATES A CEILING.

HOW COULD, THOUGH, I GUESS, AGAIN, IF IT IS, IF YOU SAY, WHEN THE JUDGE OFFERS IT, BECAUSE WE ARE ONLY TALKING ABOUT JUDICIAL INVOLVEMENT, THAT IF YOU ARE GOING TO GET A MORE LENIENT SENTENCE IF YOU DON'T GO TO TRIAL, WHY ISN'T THE FLIP SIDE HAS TO BE YOU WENT TO TRIAL AND NOW YOU ARE GOING TO GET A HARSHER SENTENCE, AND THAT THAT IS INAPPROPRIATE, AS A MATTER OF CONSTITUTIONAL DUE PROCESS, BECAUSE THAT IS WHAT WE ARE TALKING ABOUT. WE ARE TALKING ABOUT WHETHER DUE PROCESS REQUIRES THAT SOME OTHER RESULT GET REACHED HERE. RIGHT IN WE ARE NOT JUST TALKING ABOUT WHAT IS GOOD RULE-MAKING.

NO OTHER COURT HAS HELD THAT. WHEN THIS COURT TOOK THE MINORITY VIEW IN WARNER, NO OTHER COURT, EVEN WHEN THEY PERMIT JUDICIAL PLEA BARGAINING OR PARTICIPATION IN PLEA NEGOTIATION, NO OTHER COURT WILL COMPARE THE SENTENCE OFFERED IN A COURT, VERMONT DOESN'T. NOT EVEN MICHIGAN, WHERE YOU ADOPTED COB IN THE WARNER CASE. THE ABA CODE AND THE STATES DO NOT PERMIT ANY KIND OF JUDICIAL PARTICIPATION, THEY STILL WON'T PRESUME VINDICTIVENESS ON THE SIMPLE FACT OF A GREATER SENTENCE, WHICH IS WHAT MY OPPONENTS ARE ASKING YOU TO DO THIS MORNING.

I THOUGHT ALL THEY ARE ASKING US TO DO IS SAY THAT THE JUDGE, IF THE JUDGE IS GOING TO GIVE A HARSHER SENTENCE, TO BE ABLE TO EXPLAIN ON THE RECORD WHAT OBJECTIVE FACTORS, OTHER THAN THE FACT THAT THE PERSON WENT TO TRIAL, JUSTIFIED THE HIGHER SENTENCE. I THINK THAT THAT WAS ALL WE WERE TALKING ABOUT. IT DOESN'T SEEM LIKE THAT IS ALL THAT HIGH A BURDEN FOR THE JUDGE OR FOR THE STATE TO BE ABLE TO ESTABLISH.

WELL, THEY ARE ASKING TO PRESUME AN IMPROPER MOTIVE, ON BEHALF OF THE TRIAL JIM. THE SIMPLE FACT THAT -- ON BEHALF OF THE TRIAL JUDGE. THE HE WILL FACT THAT IT TRIGGERS PRESUMPTION -- THE SIMPLE FACT THAT IT TRIGGERS PRESUMES, ASSUMES VINDICTIVENESS VINDICTIVENESS. THE SIMPLE CIRCUMSTANCE, AND THE OTHER THING IT SHOULDN'T HAVE TO BE NEW REASONS, BECAUSE A PLEA OFFER IS OFFERED IN RECOGNITION OF THOSE AGGRAVATING FACTORS THAT EXIST. WE WILL SWALLOW THOSE. WE ACKNOWLEDGE THOSE OTHER FACTORS, BUT IF YOU ARE WILLING TO SPARE THE VICTIMS AND WAIVE YOUR RIGHT TO A TRIAL AND PLEAD GUILTY, IN EXCHANGE FOR THAT WE WILL GIVE AWE LESSER SENTENCE. THAT IS NOT TO SAY -- WE WILL GIVE YOU A LESSER SENTENCE. THAT IS NOT TO SAY IN THAT VERY SAME BARGAIN, LESSER FACTS CAN BE USED TO JUSTIFY THE SENTENCE YOU DESERVE. THAT ACKNOWLEDGES WHAT A PLEA BARGAIN IS ALL ABOUT. A PLEA BARGAIN IS SOMETHING OFFERED IN EXCHANGE FOR WAIVING A RIGHT. THAT IS CONSTITUTIONALLY CONSTITUTIONALLY-PERMISSIBLE TO DO, AND THE JUDGE SHOULDN'T HAVE TO COME UP WITH NEW REASONS AT THE TIME OF THAT PLEA OFFER, BECAUSE IT IS MADE, THAT IS WHAT THIS JUDGE WAS SAYING. IN SPITE OF THESE OTHER FACTS THAT WE KNOW. IN SPITE OF THE FACT THAT YOU HAVE ALL THESE ROBBERIES, IF YOU PLEAD GUILTY, A 30-YEAR SENTENCE IS A GOOD DEAL AND YOU SHOULD TAKE IT. THAT, ALSO, ANOTHER PROBLEM HERE IS EXACTLY WHAT DOES CONSTITUTE JUDICIAL PARTICIPATION, AND IN THIS CASE, THE DEFENDANT ON THE MORNING OF TRIAL, SAYS, WELL, YOU KNOW, WE ARE THINKING ABOUT PLEADING GUILTY. WHAT WOULD YOUR HONOR, WHAT WOULD YOU THINK WOULD BE A FAIR SENTENCE, AND THEY SAY 30 YEARS IS PROBABLY A FAIR OFFER, I SUPPOSE. WE DON'T KNOW WHERE THAT NUMBER CAME FROM. WE DON'T KNOW WHO SUGGESTED IT, BECAUSE IT WAS IN CHAMBERS. DOES THAT CREATE A PRESUMPTIVELY OR A FLOOR? IS THAT THE WHAT ABOUT IF THE JUDGE JUST, FREQUENTLY DO, I UNDERSTAND THE STATE? IT IS CERTAINLY ANYTHING THAT SAYS IMPLIES THAT THEIR SENTENCE, COURT'S, IMPLIES THAT YOUR SENTENCE IS GOING TO BE PROCEDURAL CHOICES?

WHAT ABOUT, AGAIN, BACK TO JUSTICE SHAW'S QUESTION. EVERYONE IS SAYING THIS MORNING, THAT THE DISPARITY, THAT IS BETWEEN WHAT WAS ORIGINALLY OFFERED AND WHAT WAS IMPOSED, IS IRRELEVANT, BUT THERE ARE SOME CASES, THERE IS A CASE OUT OF THE FOURTH DISTRICT, WHERE THE DEFENDANT HAD REJECTED A 90-DAY OFFER, AND THEN WAS SENTENCED TO 20 YEARS. I MEAN, SOMEPLACE WHERE WHAT IS BEING OFFERED AND THEN WHAT IS BEING IMPOSED IS SO THERE IS SUCH A DISPARITY THAT, WITHOUT AN EXPLANATION, YOU SAY THE ONLY EXPLANATION CAN BE THIS PERSON WAS PUNISHED FOR GOING TO TRIAL.

WELL, THAT WOULD BE PRESUMING VINDICTIVENESS, AND THE STATE SUGGESTS THAT THAT IS NOT ONLY INAPPROPRIATE, IT IS CONTRARY TO ANY OTHER COURT.

CHIEF JUSTICE: LET ME BE CLEAR ABOUT YOUR USE OF YOUR TIME. WERE YOU GOING TO USE YOUR WHOLE 20 MINUTES ON THIS?

I WOULD LIKE TO RESERVE A FEW MOMENTS. PERHAPS THIS IS A GOOD TIME.

CHIEF JUSTICE: RESERVE A COUPLE OF MINUTES.

THANK YOU.

CHIEF JUSTICE: GOOD MORNING.

GOOD MORNING. MAY IT PLEASE THE COURT. I AM ROWS MARIE FARRELL, AND I -- I AM ROSE MARIE FARRELL, AND I REPRESENT DEXTER BYRD. JUST TO FOLLOW UP --

LET ME FOLLOW-UP ON JUSTICE ANSTEAD'S QUESTION TO YOUR COLLEAGUE. DO YOU BELIEVE THE JUDGE'S PARTICIPATION IN THE PLEA BARGAIN PROCESS IS GOOD POLICY?

I BELIEVE IT THAT IT IS A GOOD POLICY. I THINK THAT IT IS IMPORTANT THAT THE JUDGE --

WHAT IS THE REASON IT IS GOOD POLICY?

BECAUSE I THINK THAT, IN CERTAIN CASES, WHERE THE COURT FEELS THAT IT HAS ENOUGH OF A COMMAND OF THE SITUATION, TO SEE WHAT MIGHT HAPPEN AT TRIAL AND WHAT THE RELATIVE PICTURE IS, WHAT THE ODDS ARE, OF A CONVICTION, AND THE EXPENDITURE OF RESOURCES, ET CETERA, AND KNOWS SOMETHING OF THE HISTORY OF THE DEFENDANT AND FEELS THAT A CERTAIN SENTENCE MIGHT BE FAIR.

AND DOES IT WORK TO THE ADVANTAGE OF THE DEFENDANTS, TO KNOW THAT, IF THEY ACCEPT THE BARGAIN, THAT THE JUDGE WILL IMPOSE THAT SENTENCE?

I THINK THERE IS A MUTUAL ADVANTAGE. THERE IS CONSIDERATION ON BOTH SIDES. THE DEFENDANT HAS A KNOWN, AS COMPARE WITH AN UNKNOWN, BECAUSE YOU DON'T KNOW WHAT AGGRAVATORS OR MITIGATORS WILL COME OUT AT TRIAL, BUT I DON'T THINK THAT --

NOW, BUT WHAT I AM HEARING --

IT SETS UP THE PRESUMPTION, KEEPING IN MIND THAT THE PRESUMPTION OF VINDICTIVENESS IS A TERM OF ART. IT SIMPLY MEANS THAT, UNDER THESE CIRCUMSTANCES, THIS DECISION NEEDS SOME EXPLANATION. IT IS NOT A TERRIBLY BURDENSOME REQUIREMENT. IT JUST MEANS THAT, WHERE THE COURT DEPARTS FROM ITS NORMAL IMPARTIAL POSTURE.

BUT THE THING THAT I AM HEAR HEARING THE ARGUMENT BEING, IS THAT THE DEFENDANTS WANT TO TAKE THE BARGAIN OUT OF WHAT IS GOING ON THERE. IN FACT, WHAT IS GOING ON THERE IS AN OFFER AND A DECISION WHETHER THERE IS GOING TO BE AN ACCEPTANCE AND

APPROVAL, AND THEN, IF THAT IS NOT DONE, THEN THAT DOESN'T COUNT! I MEAN, ISN'T THAT WHAT THIS PLEA BARGAIN BUSINESS SHOULD BE ALL ABOUT?

NO. NO. I WOULD DISPUTE THAT CHARACTERIZATION. I KNOW THAT HAS BEEN THE STATE'S ARGUMENT. THAT IS NOT AT ALL THE CASE. MY CLIENT WAS OFFERED 30 YEARS AS A STEAL, AND HONESTLY, LOOKED AT AND, IN FACT, WAS VINDICATED OF ONE OF THE TWO FELONIES THAT HE WAS TRIED UPON.

WHEN YOU START GETTING INTO OFFER OR JUDICIAL PLEA BARGAINING, WARNER DOESN'T CONTEMPLATE THAT THE JUDICIAL BRANCH IS PLEA BARGAINING. DOESN'T WARNER CONTEMPLATE THAT A JUDGE CAN ANSWER QUESTIONS, THAN IS IT? IT SEEMS TO ME IS WHAT YOU ARE SAYING IS YOU ARE GOING TO TURN THIS WHOLE THING RIGHT ON ITS HEAD, SO THAT WARNER IS, REALLY, BAD POLICY.

NO. I DON'T THINK WARNER SAID THAT AT ALL. I THINK IT SAYS, I THINK THE EMPHASIS IN WARNER HAS LED TO, POSSIBLY, SOME UNFORESEEN OUTCOMES, BUT I DON'T SEE THOSE AS SO MAJOR. WARNER SAID THAT, IF A COURT DEPARTS FROM THAT OBJECTIVE POSTURE, AND EITHER STATES OR IMPLIES THAT THERE IS GOING TO BE AN ALTERNATIVE SENTENCING RESULT THAT IS TIED TO THE PROCEDURAL CHOICE, THAT THAT COURT MUST BE VERY CAREFUL TO PLACE THOSE DISCUSSIONS ON THE RECORD, AND THEN THE U.S. SUPREME COURT, IN PIERCE IN ALABAMA, HAS ALWAYS --.

NOW, WARNER DOESN'T CONTEMPLATE THAT A JUDGE WOULD MAKE THOSE STATEMENTS. WARNER DOESN'T CONTEMPLATE THAT A JUDGE IS GOING TO MAKE THOSE STATEMENTS AND THEN PUT THEM ON THE RECORD. WARNER CONTEMPLATES THAT THE DISCUSSION, ITSELF, WILL BE ON THE RECORD. IF YOU VIOLATE WARNER, THEN YOU HAVE VIOLATED WARNER, AND YOU HAVE STEPPED BEYOND ITS BOUNDS. IT SEEMS TO ME IS WHAT YOU ARE COMPLAINING ABOUT HERE IS THAT THE JUDGE VIOLATED THAT POLICY THAT WAS SET FORTH IN WARNER, TO BE ABLE TO RESPOND INTELLIGENTLY AND DIRECTLY, BUT THE JUDGE HERE GOT INVOLVED IN THE COLLOQUY OF, BOY, YOU BETTER TAKE IT, BECAUSE THAT IS A GOOD DEAL, AND HE WENT WAY BEYOND. WHY IS THAT NOT THE CASE?

WELL, FIRST OF ALL, I WAS PRETTY MUCH QUOTING FROM WHAT THE WARNER OPINION SAID. I DON'T THINK THEY WENT DOWN THE ROAD, AS FAR AS WE ARE NOW, AND ANTICIPATED, OKAY, WELL, THEN, WITH THE INVOLVEMENT, IF THE COURT, THEN, STARTS ADVOCATING A CERTAIN POSITION, I THINK IT IS IMPORTANT TO KEEP IN MIND AND MAYBE FOR CLARIFICATION, THE EASIEST THING TO DO IS TO LOOK AT WHAT JUDGE GRIFFIN'S SPECIAL CONCURRENCE FOUND.

MAYBE IT OUGHT TO BE A GOOD PLACE TO START LOOKING AT WHAT WARNER SAYS.

OKAY. WELL, I FELT THAT THE COURT, BY SAYING A JUDGE'S PRELIMINARY EVALUATION OF THE CASE DURING PLEA BARGAINING IS NOT BINDING, SINCE ADDITIONAL FACTS MAY MERGE PRIOR TO SENTENCING, WHICH PROPERLY INFORM THE SENTENCING DISCRETION BUT TO AVOID THE POTENTIAL FOR COERCION, IN TERMS OF EXERCISE OF THE RIGHT OF TRIAL, A COURT WHICH DOES BECOME INVOLVED IN THE PLEA BARGAINING PROCESS, MUST BE CAREFUL TO NEITHER STATE NOR IMPLY ALTERNATIVE SENTENCING POSSIBILITIES AS BEING TIED TO THE PROCEDURAL CHOICE. I THINK THAT CONTEMPLATES THAT THE COURT IS GOING TO BE, AT TIMES, INVOLVED IN THE PLEA DISCUSSION, AND I THINK WHEN THE COURT ADVOCATES, THE FACTORS IN BYRD ARE THESE. THERE WAS A JUDICIAL INVOLVEMENT IN THE PLEA PROCESS, WHICH I THINK IS CONTEMPLATED BY THE WARNER CASE.

CHIEF JUSTICE: JUSTICE QUINCE.

I AM SORRY. WHO INITIATED THE WHOLE PLEA BARGAINING SITUATION IN THE BYRD CASE? THE DEFENDANT?

IN THE BYRD CASE IT WAS THE DEFENSE. THERE WAS NO THE COURT DIDN'T JUST SUA SPONTE DIDN'T COME IN AND MAKE AN OFFER. THE DEFENSE SAID WHAT WOULD BE THE COURT'S OFFER.

I GUESS MY PROBLEM --

-- WITH A PLEA TO THE BENCH. IN THE BIR CASE.

AT THE TIME THEY WERE DISCUSSING THE PLEA WAS THE BURGER KING CASE, CORRECT?

IT WAS, IT IS PRETTY CLEAR IN THE RECORD THERE. IS A NOTATION BY THE CLERK IN ATTENDANCE AT THE COURT, AND I CAN REFER YOU TO THE RECORD AT PAGE 83, SIGNED AND DATED, SAYING THAT A PLEA TO ALL THE CHARGES IN ALL THE CASES LISTING EACH COUNT, ROBBERY, AGGRAVATED ASSAULT, AND THE TWO DELIVER CHARGES, WOULD BE 30 YEARS, AND IT WAS REJECTED BY THE DEFENSE. THAT WAS WHAT WAS CONSIDERED, BUT IT DOES SEEM A LITTLE TRUTHFULLY, READING THE BYRD DECISIONS, THE FIFTH DISTRICT COURT SEEMS A LITTLE UNCLEAR ON WHICH OF THOSE CHARGES WERE BEFORE THE COURT, BUT I THINK GIVEN THE COURT'S STATEMENT THAT HE WOULD BE LOOKING AT OVER 100 YEARS, THE COURT HAD THE FULL SENTENCING INFORMATION BEFORE IT. THAT IS WHAT DISTINGUISHES BYRD FROM SOME OF THE OTHER CASES. THE COURT ALREADY KNEW THE RECORD OF THE DEFENDANT, WHEN IT MADE THE OFFER, AND SAID THAT IT WOULD BE A STEAL, AND THAT THE RECORD WAS HORRENDOUS. THAT STATEMENT WAS MADE AT THE PLEA.

I UNDERSTAND. I REMEMBER THAT, BUT I THOUGHT, AT THE BEGINNING OF THE PLEA, THERE WAS SOME INDICATION THAT WE WERE JUST TALKING ABOUT THE BYRD CASE, THE BURGER KING CASE, BUT I WILL LOOK AT IT AGAIN.

NO. THE RECORD AT PAGE 83.

IT SEEMS TO ME IF THE COURT WAS TALKING ABOUT THE BURGER KING CASE HAD, THAT IS EXACTLY WHAT THE DEFENDANT GOT IN THE BURGER KING CASE, WASN'T IT? THIRTY YEARS.

PERHAPS. BUT THOSE WERE SEVERED, NOT FOR PURPOSES OF THEIR DECISION. IT WAS FOR PURPOSES OF PREJUDICE AT TRIAL. IT WAS ALL ON ONE INFORMATION, THE TWO ROBBERIES CHARGED ON ONE INFORMATION. AND IT IS CLEAR IN THE RECORD AT PAGE 83. IF I MAY, THE PRESUMPTION IN THE BYRD CASE ARE A ROWS, WHERE THERE WAS -- AROSE, WHERE THERE WAS JUDICIAL INVOLVEMENT AND ADVOCACY OF A PLEA AGREEMENT, WHERE THERE WAS A FAILED PLEA BARGAINING DISCUSSION, WHERE THERE WAS A HARSHER SENTENCE, AND WHERE THERE WAS NO EXPLANATION. I THINK --

AND YOU READ WARNER, ALSO, AS REQUIRING AN EXPLANATION AS TO WHAT THE SENTENCE, WHY THE JUDGE GAVE THE SENTENCE THAT HE OR SHE GAVE.

YES. AND I, THE U.S. SUPREME COURT REQUIRES AN EXPLANATION, WHEREVER, IF YOU WOULD LOOK AT WHAT THE OFF-SIDED ALABAMA V SMITH CASE STAYS, IT STATES THAT WHERE THERE WAS AN EXPLAINED INCREASE IN THE SENTENCE, AN INCREASE, ALONE, WILL NOT JUSTIFY A PRESUMPTION OF VINDICTIVENESS. I THINK ALL THAT IS BEING ASKED OF THIS COURT, AT THIS TIME, IS TO ALLOW FOR THE POSSIBILITY THAT THERE BE SOME ACCOUNTABILITY, WHERE OTHERWISE THERE IS GOING TO BE THE A RISING OF A -- THE ARE A RISING OF A PRESUMPTION -- THE ARISING OF A PRESUMPTION, SIMPLY BECAUSE OF THE OFFENSE. I KNOW THE JUDGES BRISTLE OF THE SUGGESTION OF VINDICTIVENESS AT SENTENCING. IT IS A TERM OF ART, AND IT HAS BEEN DISCUSSED IN CASES BEFORE THIS COURT, IN TERMS OF PROSECUTORIAL VINDICTIVENESS. WE HAVE CITED CASES WHERE THE EXERCISE OF A DEFENDANT'S RIGHT FOR APPEAL, OF APPEAL, UPON BEING SUCCESSFUL, OR POST-CONVICTION RELIEF, THAT SETS UP A POSSIBLE PRESUMPTION OF VINDICTIVENESS, AND I THINK I WOULD JUST URGE THE COURT TO

DRAW SOME VERY CAREFUL DISTINCTIONS BETWEEN THESE. THE KEY DIFFERENCE BETWEEN THE BYRD CASE AND A LOT OF THE DECISIONS THAT ARE BEING COMMENDED TO THE COURT FROM OTHER STATES AND JURISDICTIONS, IS THE COURT'S ACTIVE INVOLVEMENT IN ADVOCACY OF THE PLEA, AND ALL WE ARE SAYING IS THAT, WHEN THAT OCCURS, IT IS VERY IMPORTANT FOR THE COURT TO DISPEL IT, BY SIMPLY PLACING ON THE RECORD, OR IF THE RECORD DOES IT, ALSO, POINTING OUT WHERE, IN THE RECORD, THAT DIFFERENCE IS EXPLAINED.

CHIEF JUSTICE: BEFORE YOU SIT DOWN, LET ME ASK YOU JUST ONE LAST QUESTION. IF WE IMPOSE THE REQUIREMENT, AREN'T WE GOING, ALSO, TO DISCOURAGE JUDGES FROM BEING FULLY INFORMED AT THE TIME THEY ENGAGE IN THESE PLEA NEGOTIATIONS? YOU HAVE INDICATED, IN BYRD, FOR INSTANCE, THAT THE COURT APPARENTLY HAD EVERYTHING IN FRONT OF IT AT THE TIME THAT IT MADE THE OFFER, AND IF A COURT HAD EVERYTHING IN FRONT OF IT, QUOTE, AS FAR AS ALL THE INFORMATION ABOUT PRIORS AND WHERE THE SENTENCING GUIDELINES WOULD COME DOWN AND THAT KIND OF THING, THEN IN ESSENCE, THE COURT IS NOT GOING TO BE ABLE TO COME UP WITH ANY ADDITIONAL REASONS LATER ON, TO JUSTIFY A HARSHER SENTENCE. ISN'T THAT CORRECT?

I DON'T THINK THAT IS TRUE. I THINK, IF WE ARE TALKING ABOUT GOING TO TRIAL, FOR PURPOSES OF SENTENCING, WHAT OFTEN COMES OUT AND WHAT CAN COME OUT AT TRIAL AND WHAT IN DUZ, OFTEN FERBS THE DEFENDANT TO PLEA, TO GO TO TRIAL, IS A BELIEF THAT THEY WILL -- WHAT IN DUSTS, OFTEN -- WHAT INDUCES, OFTEN, A DEFENDANT TO GO TO, TO PLEA, TO GO TO TRIAL, IS A BELIEF THAT THEY WILL BE VINDICATED. I DON'T THINK IT WILL BE FLYING BLIND AT ALL. I THINK IT IS A HEAVY LOAD.

WHAT YOU ARE SUGGESTING IS THAT THE COURT HAS TO COME UP WITH SOMETHING THAT IT DIDN'T KNOW, AT THE TIME IT EXTENDED THE OFFER. IS THAT CORRECT?

YES. THAT IT DIDN'T KNOW OR WASN'T BEFORE IT. IT COULD BE IN THE RECORD, BUT I WASN'T AWARE OF THIS, AND THAT FLYING, AND I WOULD -- AND THAT FLIES, AND I WOULD COMMEND THE MARTIN CASE AS SETTING FORT THAT FACTOR.

THANK YOU VERY MUCH.

BUT HERE THE COURT WASN'T EXTENDING AN OFFER. THE COURT WAS COMMENTING UPON AN OFFER WHICH HAD BEEN MADE. ISN'T THAT RIGHT?

RIGHT. THE COURT WAS ADVOCATING AN OFFER. THE COURT WAS SAYING THIS IS A STEAL. IF YOU GO TO TRIAL, YOU CERTAINLY WILL NOT GET THIS LOW OF A SENTENCE, AND ONCE THAT IS A DEPARTURE FROM OBJECTIVITY, WHICH SETS UP THE PRESUMPTION, THEN WE JUST SAY JUST TELL US WHY AND DISPEL THE PRESUMPTION.

CHIEF JUSTICE: THANK YOU VERY MUCH. HOW MUCH TIME DOES THE STATE HAVE LEFT? IS IT THREE MINUTES? OKAY.

LET ME ASK A QUESTION. IF WARNER, THE WARNER DECISION, WITHOUT ANY EXTENSION OF IT, IS VIOLATED, WHAT JUSTICE LEWIS SAID, IF WARNER SAID THAT, WARNER ONLY CONTEMPLATES THAT, WHEN A DEFENDANT ASKS, WHAT WOULD YOU GIVE, AND THEN THE JUDGE IS PERMITTED TO RESPOND, AND THAT IS BASICALLY ALL THAT IS CONTEMPLATED, NOT AN ACT OF ADVOCACY, YOU OUGHT TO TAKE THESE OFFERS, WHAT WOULD BE AN APPROPRIATE REMEDY, IF THERE IS A VIOLATION OF IT, IF IT IS NOT TO REQUIRE SOME TYPE OF STATING REASONS ON THE RECORD OR WHATEVER? I MEAN, HOW DO YOU, WHAT DO YOU DO WITH A SITUATION WHERE THE JUDGE DOESN'T PERSPECTIVELY FOLLOW WARNER?

WELL THAT, IS A VERY INTERESTING QUESTION, AND SOME COURTS, INCLUDING THE BYRD COURT ENFORCE THE PLEA OFFER THAT THE DEFENDANT HAS REJECTED.

NOW, WHAT I AM ASKING YOU, YOU ARE SAYING THERE SHOULDN'T AND PRESUMPTION, BUT LET'S ASSUME, NOW, WE HAVE WARNER ON THE RECORD, AND THE SAME COLLOQUY OCCURS, WHERE THE JUDGE SAYS I WANT YOU TO TAKE THIS OFFER. IT IS A STEAL, AND THERE IS NO PRESUMPTION. I MEAN, WHAT IS THE, WHAT WOULD THE STATE SAY SHOULD HAPPEN, IF A JUDGE DOES NOT, GETS INVOLVED ACTIVELY, IN PLEA BARGAINING, BEYOND THAT THAT IS CONTEMPLATED BY WARNER, WHICH IS, REALLY, A VERY, JUSTICE LEWIS SAID, A VERY LIMITED CIRCUMSTANCE THAT WAS ENVISIONED. THAT IS WHERE IT WAS A RESPONSE TO A LEGITIMATE INQUIRY BY THE DEFENDANT.

WELL, THE PROBLEM WITH WARNER AS THE STATE SEES IT, IS THAT IT REQUIRES THAT THE JUDGE NOT IMPLY, EVEN IMPLY THAT THE SENTENCE IS DEPENDENT ON THE PROCEDURAL CHOICE, WHETHER THE PERSON PLEADS GUILTY OR WHETHER THEY GO TO TRIAL, WHEN IN FACT THE PRACTICAL SITUATION IS EXACTLY THAT, SO WE WOULD ASK THIS COURT TO HARMONIZE THIS DICTA WITH THE LONG-STANDING RULE THAT IT IS CONSTITUTIONALLY CONSTITUTIONALLY-PERMISSIBLE TO OFFER A LESSER SENTENCE IN EXCHANGE FOR A GUILTY PLEA. YOU ARE NOT BEING SENTENCED IN RETALIATION FOR EXERCISING YOUR RIGHT TO TRIAL. THERE ARE TWO OTHER THINGS, AND THE TWO OTHER STATES THAT PERMIT JUDICIAL PLEA BARGAIN, DON'T EVEN COMPARE THE PRETRIAL OFFER.

WHEN YOU ASSUME WARNER, AND THE VIOLATION IS THIS. NOBODY ASKED THE JUDGE. LIKE IN WILSON, THE JUDGE JUST SAYS YOU KNOW WHAT? I HAVE GOT A BIG DOCKET TODAY, AND IF YOU PLEAD GUILTY THIS MORNING, SO I DON'T HAVE TO GO TO TRIAL THIS AFTERNOON, I AM GOING TO GIVE YOU, YOU KNOW, 90 DAYS, BUT DON'T, YOU KNOW, AND THAT IS THE CIRCUMSTANCE, AND THEN THEY GIVE 20 YEARS. THAT IS, SO IT IS NOT WARNER, BECAUSE THEY WEREN'T ASKED. THEY ARE TELLING. THEY SAID THIS IS THE DEAL FOR TODAY. WHAT SHOULD BE, SHOULD THERE BE ANY REMEDY FOR THE DEFENDANT IN THAT CIRCUMSTANCE?

WELL, THE REMEDY, IN STATES WHERE JUDGES ARE NOT PERMITTED AT ALL, THAT IS ONE FACTOR THAT WHO INITIATES IT. THERE IS A FOUR-PART TEST FROM -- TEST FROM INDIANA THAT TALKS ABOUT WHO INITIATED IT, THE DIFFERENCES IN SENTENCE, THOSE TYPES OF THINGS, SO I SUPPOSE IF WE TAKE THE PARTICIPATION COMPLETELY OUT OF PLEA OR THE INITIATION IN WARNER, THAT THERE SHOULD BE SOME EVALUATION OF THOSE FACTORS. HOWEVER, THE PRESUMPTION, YOU CAN'T PRESUME THAT, JUST BECAUSE THE PERSON GOES TO TRIAL, THEY ARE BEING PUNISHED FOR THAT, SO IF, IT IS IMPOSSIBLE TO OR VIRTUALLY IMPOSSIBLE, TO HAVE A PLEA COLLOQUY, AS YOU ARE SUPPOSED TO DO UNDER THE RULES, AND NOT AT LEAST IMPLY THAT THE SENTENCE IS DEPENDENT UPON THE PROCEDURAL CHOICE.

SO YOU DO AGREE THAT THE INDIANA TEST, WHICH, REALLY, HAD TO DO WITH WHERE A CODEFENDANT GOT A LESSER SENTENCE, WOULD LOOK AT, THE JUDGE GOT INVOLVED, SO THERE IS JUDICIAL INVOLVEMENT. SO THAT WOULD BE A CONCERN. THEY DO LOOK AT WHAT THE DISPARITY IS, SO THE FACT THAT JUSTICE SHAW WAS ASKING EARLIER, HOW MUCH OF A DIFFERENCE IT IS COULD MAKE A DIFFERENCE IN THE TOTALITY OF THE TWO CIRCUMSTANCES, THAT THOSE WOULD BE AT LEAST TWO FACTORS THAT YOU WOULD SUGGEST WOULD GO INTO ANY EVALUATION?

WELL, IN THOSE STATES, THEY DON'T EVEN PERMIT JUDICIAL PARTICIPATION, SO IF YOU WANT TO COMPLETELY BACK OFF OF WARNER AND SAY YOU KNOW, THIS IS AGAINST THE MINORITY VIEW, THE ABA AND 48 OTHER STATES, THIS IS A BAD IDEA, THEN, YES, YOU SHOULD JOT THAT FOUR-PART TEST, BUT IN THE STATES WHERE THEY DON'T EVEN ALLOW JUDICIAL PARTICIPATION, THAT IS ONE OF SEVERAL FACTORS THAT THEY LOOK AT. THE WARNER DECISION DOES NOT MANDATE BYRD. THE PRESUMPTION OF VINDICTIVE VINDICTIVENESS IS LOOKING AT THE WRONG HALF OF THE EQUATION. IT IS ONLY WHEN THE INCREASED SENTENCE IS EXPRESSLY BASED, AND SOMETIMES JUDGES UNFORTUNATELY DO. THAT THEY WILL SAY YOU KNOW, YOU WENT TO

TRIAL. YOU WASTED MY TIME. I AM DOUBLING YOUR SENTENCE. THOSE ARE THE KINDS OF INSTANCES WHERE, YES, THAT IS VINDICTIVENESS. IT IS ESTABLISHED IN THE RECORD. YOU DON'T NEED A PRESUMPTION TO RESOLVE THOSE CASES, AND IT IS ONLY IN THOSE CASES, WHERE THE GREATER SENTENCE IS IMPOSEED IN RETALIATION FOR EXERCISING THE RIGHT TO TRIAL, THAT THE INCREASED SENTENCE IS UNCONTUSIONALLY VINDICTIVE. CERTAINLY YOU SHOULDN'T HAVE TO COME UP WITH NEW REASONS. VERMONT IS ONE OF THE HANDFUL OF STATES THAT DOES PERMIT JUDICIAL PARTICIPATION. THEY SAY, LOOK, THE DIFFERENCES MAKE IT COMPLETELY INEPT. OTHERWISE THERE WILL BE AN EXPLANATION OF THE DEGREE OF DEPARTURE REASONS, HOW MUCH ARE WE, ARE THESE REASONS GOOD ENOUGH TO JUSTIFY A SENTENCE? I SEE MY TIME HAS EXPIRED. IF THERE ARE NO FURTHER QUESTIONS, I WILL RELY ON THE BRIEFS. THANK YOU.

CHIEF JUSTICE: THANK YOU VERY MUCH.