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THE NEXT CASE IS STATE OF FLORIDA -VS- JOHN WARNER.

GOOD MORNING. MAY IT PLEASE THE COURT. MY NAME IS JOSEPH TRENGALI, AND I REPRESENT THE STATE OF FLORIDA IN THIS MATTER. THIS CASE UNUSUAL, IN THAT IT HAS LANGUAGE THAT REVEILED. HOWEVER, THERE IS LANGUAGE IN THAT PROVISION WHICH IS OF GREAT CONCERN TO THE STATE AND WHICH APPEARS TO BE IN DIRECT CONFLICT WITH LANGUAGE OF THE FIST DISTRICT COURT OF APPEAL -- OF THE FIFTH DISTRICT COURT OF APPEAL, AND THAT WAS THE REASON FOR OUR COMING BEFORE THIS COURT.

IF WE DON'T FIND THERE IS A SEPARATION OF POUFER POWERS PROBLEM, JUST -- OF POWERS PROBLEM, JUST ASSUMING THAT, IS IT THE STATE'S POSITION THAT IT IS STILL THIS TYPE OF PROCEDURE WHERE, WHICH IS REALLY, I GUESS, PEOPLE TALK ABOUT IT AS SORT OF A PREPLEA SENTENCING ANNOUNCEMENT, IS THIS SOMETHING THAT THE COURT SHOULD NEVER GET INVOLVED IN AND THAT ONLY THE ABA STANDARD IS AN APPROPRIATE ROLE FOR THE COURT? IN OTHER WORDS LEAVE ASIDE THE SEPARATION, JUST INTEGRITY OF THE PROCESS?

YOUR HONOR, I WOULD SUBMIT TO THIS COURT, AND I WILL SAY, NOW, WHAT I WAS GOING TO SAVE TO THE END, I THINK THE POSITION THIS COURT SHOULD TAKE, IN THESE CASES, IS DON'T DO IT. DON'T DO IT, AND YOU WILL HAVE NOTHING TO EXPLAIN. THE PROBLEM WITH THE ENTIRE PROCESS IS THAT, OR THE PROBLEM WITH WARNER, THE PROBLEM WITH THIS PROCESS IS THAT THE STATE OR, EXCUSE ME, THE TRIAL COURT, BY DEGREES, TENDS TO ENTER INTO THE PLEA BARGAINING PROCESS. NOW --

COULD YOU TELL US EXACTLY WHAT HAPPENED IN THIS CASE? BECAUSE I CAN'T UNDERSTAND WHETHER THIS WAS SOMETHING THAT THE DEFENDANT INITIATED A REQUEST, WHETHER THIS JUDGE OR HAS IT BEEN POSSIBLE TO EVEN CONSTRUCT THAT, BASED ON THIS RECORD?

UNFORTUNATELY MOST OF THE RECORD CONSISTS OF THE PHRASE "OFF-THE-RECORD". ESSENTIALLY WHAT HAPPENED IN THIS CASE IS THERE WAS A DUI ACCIDENT IN BROWARD COUNTY. THE DEFENDANT LEFT THE SCENE OF THE ACCIDENT, INVOLVING PROPERTY DAMAGE AND PERSONAL INJURY. BECAUSE IT WAS LEAVING THE SCENE OF AN ACCIDENT WITH PERSONAL INJURY, IT WAS A FELONY. THERE WERE A NUMBER OF HEARINGS IN THE CIRCUIT COURT. THERE WERE A NUMBER OF CALENDAR CALLS, STATUS CHECKS, AND VARIOUS OTHER APPEARANCES. AT ONE POINT, THE TRIAL JUDGE, AND THIS APPEARS, I BELIEVE, ON PAGE 13 OF THIS RECORD, WHICH IS MADE UP OF TRANSCRIPTS OF VERY, VERY BRIEF APPEARANCES, BUT ALONG ABOUT PAGE 12 OR 13, THE TRIAL COURT SAYS, "LAST TIME ARNIE OFFERED HIM", AND THEN THERE -- LAST TIME AROUND, I OFFERED HIM", AND THEN THERE IS A DISCUSSION OF A PLEA. AT SOME POINT, THE ASSISTANT STATE ATTORNEY SAYS I BELIEVE THAT WOULD CONSTITUTE A DOWNWARD DEPARTURE, I AM NOT SURE YOU CAN DO. THAT THE JUDGE, AT THAT POINT, SAID, WELL, LET'S SEE WHERE IT GOES, AND IMMEDIATELY LAUNCHES INTO A PLEA COLLOQUY. AT THE END OF THAT PLEA COLLOQUY, THE ASSISTANT STATE ATTORNEY IN THE COURTROOM OBJECTED TO THE PROCEEDING, BASED ON THE DOWNWARD DEPARTURE SENTENCE, AND THAT WAS THE ISSUE BEFORE THE FOURTH DISTRICT COURT OF APPEAL, WHETHER OR NOT THE COURT PROPERLY DOWNWARDLY DEPARTED, AND THE FOURTH DISTRICT SAID, NO, IT DID NOT PROPERLY DOWNWARDLY DEPART, AND SO IT REVERSED THE CASE, ESSENTIALLY THE STATE WON, AND SENT THE CASE BACK FOR SENTENCING WITHIN THE GUIDELINES. UNFORTUNATELY, IN DOING THAT, THE FOURTH DISTRICT MADE THE FOLLOWING STATEMENT. QUOTE, WE THERE FOR RESPECTFULLY DISAGREE WITH STATE -VS- GIDDO, WHICH CAME OUT OF THE FIFTH DISTRICT, TO THE EXTENT THAT IT HOLDS THAT A COURT CAN NEVER, OVER THE STATE'S OBJECTION, ADVISE A DEFENDANT OF THE SENTENCE IT WOULD IMPOSE, IF THE DEFENDANT PLEADS GUILTY TO THE

CHARGES FILED BY THE STATE, AND WE SUBMIT TO THIS COURT THAT THAT IS THE CRITICAL FACTOR, HERE, IN THIS CASE, AND THAT THAT IS THE PROBLEM.

YOU ARE -- YOU ARE SAYING THAT THE STATE HAS A SENTENCING RESPONSIBILITY? AND THAT THE COURT CANNOT OVER OBJECTION IMPOSE A SENTENCE, A LAWFUL SENTENCE, UNLESS THE STATE ONE SEEDS AND CONSENTS.

I SUBMIT THAT THE STATE HAS A RIGHT TO BE HEARD. CLEARLY SENTENCING IS ALWAYS WITHIN THE PROVINCE OF THE COURT, BUT THERE ARE A NUMBER OF CRITICAL FACTORS, HERE, THAT THE COURT NEEDS TO CONSIDER. ONE IS THE RIGHT OF THE STATE TO BE HEARD, AND TO HAVE A MEANINGFUL HEARING.

THIS, IN THIS PARTICULAR CASE, THE STATE HAD A RIGHT TO BE HEARD AND OBJECTED.

CORRECT.

AND OSTENSIBLY COULD HAVE APPEALED.

AND DID. AND THE STATE, THEN, WON. THE PROBLEM BECOMES INTO THE FINER ASPECTS OF THIS. FOR EXAMPLE, THE FIFTH DISTRICT POINTED OUT, IN GIDDO, THAT WE HAVE A STATUTORY PROVISION, NOW, BASED ON A CONSTITUTIONAL PROVISION, IN WHICH THE VICTIM, ALSO, HAS A RIGHT TO BE HEARD, AT EACH CRITICAL STAGE OF THE PROCEEDING, INCLUDING SENTENCING.

WHY COULD THAT NOT BE COMPATIBLE, WITH DISCUSSION OR AT LEAST RESPONDING TO QUESTIONS, WITH REGARD TO THAT? WHAT IS THE IN COMPATIBILITY WITH THOSE TWO THAT YOU SEE?

THE IN COMPATIBILITY IS WITH THE CUTTING OFF OF THE VERY PROCESS AT THE VERY BEGINNING. AS THE FIFTH DCA SAID IN GIDDO, THE FACT THAT A PARTY HAS THE RIGHT TO BE HEARD MEANS THAT A PARTY HAS RIGHT TO A MEANINGFUL HEARING, NOT THAT THE PARTY GETS TO COME BEFORE THE TRIAL COURT AND ATTEMPT TO CHANGE ITS MIND.

WAS THE ISSUE OF THE VICTIM'S NOT BEING PRESENT RAISED AT THE TRIAL COURT?

NO, IT WAS NOT, NOT IN WARNER.

ALL RIGHT. SO HAS A RIGHT TO BE HEARD. IN THIS CASE THE STATE WAS HEARD. THERE WAS AN OBJECTION. THERE WAS AN APPEAL. AND THE CASE WAS REVERSED.

CORRECT.

NOW, THE VICTIM HAS THE RIGHT TO BE PRESENT, BUT THAT WAS NOT RAISED AS AN ISSUE.

CORRECT. AGAIN, YOUR HONOR, THIS IS UNUSUAL, IN THE SENSE THAT WE ARE APPEALING FROM WHAT AMOUNTS TO A NONADVERSE DECISION FOR THE STATE. WE ARE CONCERNED ABOUT THE CONFLICT EXPRESSED BY THE DISTRICT COURT OF APPEAL, IN ITS VERY LANGUAGE. AND WHAT --

LET ME ASK YOU THIS, IF I CAN. LET'S SAY YOU HAD A PUBLIC DEFENDER AND THE STATE ATTORNEY TOGETHER, IN THE JUDGE'S OFFICE, IN THE PROCESS OF GOING OUT, AS YOU GATHER, THAT YOU ARE FAMILIAR WITH, AND THE DOCKET IS BEING DISCUSSED.

CORRECT.

IF THE JUDGE SAYS, IN THE PRESENCE OF EVERYBODY, LOOK, YOU CAN PROSECUTE HIM, MR. PROSECUTOR, IF YOU WANT HIM, BUT EVEN IF YOU GET A CONVICTION, I AM NOT GOING TO GIVE HIM OVER THREE YEARS. IS THAT A VIOLATION THERE?

-- IS THAT A VIOLATION OF THE SEPARATION OF POWERS?

IF IT ISN'T A VIOLATION OF THE SEPARATION OF POWERS, IT CERTAINLY IS GETTING CLOSE. AND WE HAVE THAT EXACT SITUATION IN THE REVERSE, IN A CASE OUT OF THE FOURTH DCA CALLED GALUCCI, IN WHICH JUSTICE ANSTEAD WROTE THE OPINION, AND IN THAT CASE THE SITUATION WAS THE EXACT REVERSE, WHERE THE TRIAL JUDGE SAID, WELL, THE PLEA OFFER IS PROBATION, BUT IN THIS COURT NOBODY GETS PROBATION AFTER THEY GO TO TRIAL. NOW, I WOULD SUBMIT TO THIS COURT THAT THAT --

HAVEN'T YOU CROSSED A RUBICON AT THAT POINT? AND GOING OVER INTO SENTENCING?

WELL.

AND THAT IS A JUDICIAL.

WHAT I AM SUBMITTING, WHAT I SUGGEST TO THIS COURT IS THAT IS THE OTHER SIDE OF THIS SAME COIN, AND WHAT JUSTICE ANSTEAD SAID, IN THAT CASE, WAS, WELL, EVEN THOUGH THE SENTENCE MIGHT BE WITHIN -- THAT WAS EVENTUALLY IMPOSEED WAS WITHIN THE GUIDELINES, IT DOES NOT DO WELL FOR THE SYSTEM OF JUSTICE TO ALLOW THAT SORT OF CONDUCT TO TAKE PLACE, AND THEREFORE --

BUT THE REASON FOR THAT IS THAT THERE WAS NO MEANINGFUL HEARING. RIGHT?

CORRECT.

AND THAT IS THE THING YOU ARE COMPLAINING ABOUT HERE.

I AM --

SO THAT, I MEAN, WE HAVE NOT BEEN MADE OF COOKIE CUTTERS.

CORRECT.

AND SO THAT JUDGE ERRED BECAUSE HE OR SHE DID NOT GIVE A MEANINGFUL HEARING ON THE ISSUE OF A SENTENCE.

ABSOLUTELY, AND WE ARE SUBMITTING TO THIS COURT THAT THERE WOULD NOT BE A PROBLEM IN WARNER, OR IN THE FACTUAL SCENARIO OF WARNER, IF THE DEFENDANT HAD COME IN, OBVIOUSLY, IF HE WANTS TO COME IN AND PLEAD GUILTY, BECAUSE HE IS, INDEED, GUILTY, THAT IS FINE, BUT WHEN YOU HAVE THE JUDGE INTERJECTING THE -- WHAT AMOUNTS TO A COMMITMENT OR AN INCLINATION OR A RECOMMENDATION OR A SUGGESTION OR ALL OF THOSE WORDS THAT WE USED TO USE, BACK IN THE '70s, WHEN WE DID THAT PLEA PROCESS PRESANTIBELLO, PREBROWN, WHICH CAME OUT OF THIS COURT.

YOU AGREE THAT THE PROSECUTOR AND THE DEFENDANT CAN NEGOTIATE AND COME UP WITH A PROPOSAL AND THEN GO TO THE JUDGE AND RUN IT BY HER.

ABSOLUTELY.

AND GET SOME INDICATION FROM THE JUDGE, YOU KNOW, BASED ON LAYING OUT EVERYTHING THAT THEY KNOW, WHETHER THE JUDGE WOULD BE INCLINED TO GO ALONG WITH THAT OR NOT.

I HESITATE TO AGREE TO THE IN CHRINATION -- THE INCLINATION IDEA.

DOESN'T THAT HAPPEN BY THE THOUSANDS IN THE STATE OF FLORIDA EVERYDAY?

I SUBMIT THAT WHAT HAPPENS IS THAT THE PROSECUTOR AND DEFENSE ATTORNEY, IF THEY ARE DOING THEIR JOBS, COME TO THE COURT WITH AGREED-UPON PLEA AND SENTENCE, AND THE COURT, THEN, SITS, DOES ITS JOB, SITS IN JUDGMENT, AND DECIDES WHETHER OR NOT IT WILL ACCEPT THAT PLEA.

ISN'T THAT WHAT JUSTICE ANSTEAD IS SAYING?

YOU ARE SAYING THAT THE COURT CAN'T, BASED ON EVERYTHING YOU ALL LAID OUT HERE, THE DEFENDANT'S RECORD AND THE BACKGROUND, THE CIRCUMSTANCES, THE FACT THAT THE VICTIM HAS SIGNED OFF ON THIS, THAT, UNLESS SOMETHING SHOCKING, YOU KNOW, CAME OUT AT THE LAST MINUTE, THAT, I THINK, THAT THAT SOUNDS LIKE IT IS A DISPOSITION THAT I WOULD AGREE TO. THE COURT COULDN'T DO THAT?

I WOULD BELIEVE THAT THE COURT COULD DO THAT. CERTAINLY.

LET ME MOVE FROM THAT, IF THE COURT CAN DO THAT. LET ME SAY I MUST BE VERY NAIVE, BECAUSE AS I INDICATED, I THOUGHT THAT WAS GOING ON BY THE THOUSANDS OUT THERE IN THE STATE EVERYDAY. NOW, LET'S MOVE FROM THAT, AND LET'S SAY THE PROSECUTOR AND THE DEFENDANT HAVE DONE THE SAME THING THAT I JUST DESCRIBED, BUT THEY COME TO AN UNDERSTANDING, BETWEEN THEMSELVES, BUT THEY CAN'T AGREE ON WHETHER THE DEFENDANT SHOULD HAVE TO BE ON PROBATION FOR ONE YEAR OR FOR TWO YEARS. IN ADDITION TO WHATEVER EVERYTHING ELSE IS. NOW THEY COME TO THE TRIAL JUDGE, AND THEY SAY, JUDGE, YOU KNOW, WE HAVE HAMMERED THIS THING OUT, AND WE HAVE THOUGHT WE CAME TO A, YOU KNOW, SOMETHING THAT IS GOING TO SERVE THE VICTIM AND THE STATE AND THE DEFENDANT, BUT WE CAN'T AGREE ON THIS THING, BUT WE DON'T WANT THAT TO INTERFERE WITH THE -- THERE BEING A RESOLUTION OF THIS WITHOUT A WEEK-LONG TRIAL AND THE RISK OF, YOU KNOW, WHAT MAY HAPPEN. COULD YOU GIVE US -- WE ARE GOING TO GIVE YOU EVERYTHING WE KNOW, AND, OF COURSE, IT IS GOING TO BE IMPORTANT TO THE DEFENDANT. COULD YOU GIVE US YOUR INCLINATION, NOW, ABOUT THAT, BECAUSE THAT IS GOING TO, YOU KNOW, RESOLVE THE DEAL, AND THE JIM SAYS, WELL, MY IN CHRIN -- AND THE JUDGE SAYS, WELL, MY INCLINATION IS I THINK, PROBABLY, ONE YEAR OF PROBATION WOULD PROBABLY BE ENOUGH, ASSUMING I KNOW EVERYTHING AND NOTHING IS GOING TO BLOW UP IN MY FACE. IS THERE ANYTHING WRONG WITH THAT?

THE AMERICAN BAR ASSOCIATION SAYS NO. SAYS THERE IS NOTHING WRONG WITH THAT. THE RULES OF CRIMINAL PROCEDURE, I SUGGEST, SAY, YES, THERE IS. THAT --

WHAT IS WRONG WITH IT? BECAUSE THE STATE IS BEING HEARD. THE STATE SAYS WE ARE ONLY GOING TO SIGN OFF AND ACTUALLY RECOMMEND IT, IF IT IS TWO YEARS' PROBATION, AND THE DEFENDANT ONLY WANTS TO DO THIS IF THERE IS ONE, BUT, OF COURSE, WE NEED TO KNOW THE OPINION.

WHAT I SUBMIT TO THIS COURT WE ARE PROTECTING IS NOT ONLY THE DOING OF JUSTICE BUT THE APPEARANCE OF THE DOING OF JUSTICE, AND THAT REQUIRES AN IMPARTIAL JUDGE WHO DOES NOT GET INVOLVED IN THE GIVE AND TAKE OF THE PLEA BARGAINING PROCESS.

WHAT IS IMPARTIAL OR LACKING IN PARSIALITY ABOUT THAT?

WHAT IS LACKING IS -- AND I WOULD SUBMIT TO THE COURT WHAT IS LACKING IS THAT WE APPEAR TO BE DOING SOMETHING TO EXPEDITE JUSTICE, SIMPLY FOR THE SAKE OF EXPEDITIOUSNESS. WE ARE SAYING, WELL, THE STATE --

BUT YOU ARE INDICATING -- YOU ARE TELLING ME THAT A JUDGE IS LACKING IMPARTIALITY, IF PRESENTED WITH THIS OPTION OF ONE-OR-TWO-YEAR PROBATION, AND HE SAYS, BASED ON MY

UNDERSTANDING I WOULD GIVE ONE YEAR, AND ACCEPT THE PLEA ON THAT BASIS?

I AM NOT SAYING THE JUDGE IS LACKING IN IMPARTIALITY, BUT I AM SAYING, IN ADDITION TO BEING IMPARTIAL, HE MUST APPEAR TO BE IMPARTIAL, AND WHAT WE ARE IN EVIDENTLY -- INEVITABLY LEANING TOWARD IS THE DEFENSE ATTORNEY ESSENTIALLY SAYS, WELL, I CAN'T, SAYS TO HIS CLIENT OR ANYONE, I CAN'T GET WHAT I WANT OUT OF THE STATE, BUT JUDGE DOE IS A GOOD GUY. I KNOW I CAN GET IT OUT OF HIM, ESPECIALLY IF I THREATEN HIM WITH AN ONE-WEEK TRIAL OR, YOU KNOW, WHICH --

THE REVERSE IS TRUE IN THIS SITUATION. THE JUDGE MAY SAY TWO YEARS.

THE REVERSE IS CERTAINLY TRUE.

I THINK TWO YEARS IS WHAT, AND SO NOW THE PLEA GOES DOWN THE TUBES, BUT WHERE HAS THE JUDGE DONE ANYTHING, REALLY, DIFFERENT THAN HE DID WHEN BOTH THE STATE AND THE DEFENDANT CAME AND SAID WE WORKED IT ALL OUT? WHERE HAS THE JUDGE DONE ANYTHING DIFFERENT THAN HE DOES IN THAT SITUATION?

HE HAS DONE SOMETHING DIFFERENT, AGAIN, BY INVOLVING HIMSELF OR HERSELF IN THE PROCESS, WHICH IS NOT THE FUNCTION OF THE JUDICIARY.

THE JUDGE INVOLVED HIMSELF IN THE PROCESS WHEN THE STATE AND THE DEFENDANT, BOTH, CAME TO HIM AND ASKED HIM FOR AN ADVISORY OPINION.

WITH A SITUATION IN WHICH ALL THE TERMS WERE AGREED AND HAD SAID --

PLENTY OF THOSE PLEA DEALS ARE TURNED DOWN BY JUDGES.

YES, THEY ARE. I HAVE BEEN THERE, DONE THAT.

OKAY. SO THE JUDGES GO, YOU KNOW, ALL KINDS OF WAYS ON THOSE THINGS, DO THEY NOT?

WELL, BUT, THE PROBLEM HERE, WHAT WE ARE SEEKING TO DO IS TO KEEP THE JUDICIARY OUT, TO KEEP THE JUDICIARY SANCOSANCT.

IT SEEMS TO ME THAT WHAT YOU ARE TRYING TO DO IS TO KEEP THE STATE IN THE SENTENCING, AND THAT, WHY ISN'T THAT SO? IF A JUDGE CAN APPROVE A DEAL, THAT IS WORKED OUT BETWEEN THE -- OR CANNOT APPROVE A DEAL, WHY CAN'T A JUDGE IMPOSE AN ALTERNATIVE SENTENCE?

BECAUSE THE NEXT STEP TO THAT PROCESS, ONCE WE START IT, AND I WOULD SUBMIT TO THIS COURT WE HAVE MOVED A LONG WAY AWAY FROM THE OLD STYLE PLEA BARGAINING, AND THE NEXT STEP IN THAT PROCESS, TO USE JUSTICE ANSTEAD TO MOVE JUST HALF A STEP, THE NEXT HALF STEP IS WHEN THE DEFENSE ATTORNEY WALKS IN AND SAYS, IN OPEN COURT, YOUR HONOR, MY CLIENT WOULD PLEAD GUILTY STRAIGHT UP, IF HE KNEW HE WASN'T GOING TO GET ANYTHING MORE THAN TWO YEARS. AND THEN, OF COURSE, THE EFFICIENT THING TO SAY IS, WELL, GO AHEAD AND PLEAD GUILTY.

SO IS THE PROBLEM, HERE, THAT THERE MIGHT BE SOME IMPLICATIONS ON WHETHER OR NOT THIS PLEA IS REALLY VOLUNTARY?

I SUGGEST THAT IT IS CERTAINLY THERE IS THAT PROBLEM. THERE IS THE PROBLEM OF WHETHER IT IS VOLUNTARY OR NOT, IT APPEARING NOT TO BE VOLUNTARY, BECAUSE WHAT WE ARE DOING IS WE ARE SAYING, IN ORDER TO SPEED UP THE PROCESS, LET'S SHORT CIRCUIT THINGS. I URGE THIS COURT NOT TO ALLOW THAT TO HAPPEN, AND I WILL RESERVE THE ONE MINUTE THAT I

HAVE REMAINING FOR REBUTTAL, IF I MAY.

THANK YOU. YOU MAY DO SO. THANK YOU, MR. TRINGALI.

GOOD MORNING. MAY IT PLEASE THE COURT. MR. TRINGALI. MY NAME IS DAVID McPHERRIN. I AM WITH THE PUBLIC DEFENDERS OFFICE, THE FIFTEENTH JUDICIAL CIRCUIT. I THINK THE THEME OF THIS ARGUMENT IS, IF IT IS NOT BROKEN, THIS COURT SHOULDN'T MAKE ANY ATTEMPT TO FIX IT. IN 1971, THIS COURT DID ISSUE AN OPINION, BROWN, IN WHICH IT STATED THAT IT DIDN'T SEE ANY PROBLEM WITH TRIAL JUDGES MAKING PREPLEA SENTENCING PRONOUNCEMENTS. LETTING THE PARTIES KNOW WHAT THEY THOUGHT WAS AN APPROPRIATE SENTENCE, BASED ON THE INFORMATION BEFORE THE COURT. ADMITTEDLY THAT WASN'T THE HOLDING OF THE COURT IN THAT CASE. THE ISSUE WAS SOMETHING DIFFERENT, BUT THE COURT DID TAKE PAINS TO WRITE, I FELT, A VERY THOROUGH PARAGRAPH, EXPLAINING WHY THEY THOUGHT THIS WAS A GOOD IDEA, SO I WOULD URGE THIS COURT NOT TO CHANGE THAT AND TO REAFFIRM THAT PRINCIPLE THAT WAS STATED IN BROWN.

HOW ABOUT SPEAKING TO JUDGE GRIFFIN'S OPINION ON THE REHEARING, WHEN SHE WAS DEALING WITH WARNER? ON THE SPECIFIC PROBLEM OF THE JUDGE DECIDING, THEREAFTER, THAT THAT IS NOT WHAT THE JUDGE WAS GOING TO DO, AND RENEGEING ON WHAT HE SAID OR SHE SAID LOOKED GOOD TO HER, AND BEFORE THE VICTIM CAME IN AND HAD A SAY. I MEAN, ISN'T THAT A PROBLEM?

IT COULD BE. SURE.

YOU CAN'T BIND THE JUDGE.

I TEND TO TRUST TRIAL JUDGES IN THIS STATE, THAT THEY ARE GOING TO EXERCISE THEIR DISCRETION IN A SOUND MANNER, AND WHEN CONFRONTED WITH THE QUESTION, JUDGE, WHAT DO YOU THINK WOULD BE AN APPROPRIATE SENTENCE, BASED ON WHAT YOU KNOW NOW, THAT THEY ARE GOING TO TAKE THE TIME TO LEARN THE INFORMATION THAT IS GOING TO HELP THEM MAKE THAT DECISION. IN THAT SITUATION, YOU MAY HAVE A JUDGE SAYING, FIRST, YOU CAN HAVE A JUDGE SAYING I DON'T DO THAT. SORRY. I AM NOT GOING TO ACKNOWLEDGE THAT QUESTION. BUT IF THE JUDGE IS INCLINED TO DO SO, SAYING, STATE, I HAVE BEEN ASKED THIS QUESTION, WHAT IS YOUR RECOMMENDATION AND WHY, AND IT MIGHT BE IN THAT SITUATION A JUDGE SAYING I NEED TO HEAR FROM THE VICTIM, IF I AM GOING TO MAKE AN INFORMED, PRE-PLEA SENTENCING AT THE SAME TIME. -- STATEMENT.

DOESN'T THE JUDGE HAVE AN OBLIGATION, IN 1999, TO HEAR FROM THE VICTIM?

YES, BUT IT MAY NOT BE DIRECTLY FROM THE VICTIM. THE JUDGE COULD SAY, STATE, HAVE YOU HAD VICTIM CONTACT? DOES YOUR VICTIM WANT TO COME INTO COURT AND TESTIFY AT A SENTENCING HEARING, OR IS YOUR VICTIM HAPPY JUST MAKING A RECOMMENDATION TO YOU AS A REPRESENTATIVE TO THEM AND THEN YOU TELLING IT, SO IT IS KIND OF --

BUT IT IS KIND OF, ALMOST, A SHAM, IF, IN FACT, THE JUDGE HAS MADE AN INDICATION OF WHAT THE JUDGE IS GOING TO DO AND, STILL, YOU HAVE GOT TO HEAR FROM SOMEBODY ELSE. I MEAN IT SEEMS TO ME THAT YOU HAVE GOT KIND OF A TIME SEQUENCE OUT OF WHACK.

I THINK YOU ARE ASSUMING, THERE, THAT THE JUDGE WOULD PUT A QUANTITY ON THE SENTENCE BEFORE HEARING.

ISN'T THAT WHAT WAS ASKED TO BE? THAT IS PART OF --

NOT NECESSARILY, NO. WHAT IS -- WHAT THE FOURTH DISTRICT SAID, HERE, IS THAT THE JUDGE CAN TELL THE DEFENDANT, PRIOR TO THE DEFENDANT PLEADING GUILTY OR NO CONTEST, WHAT

THE SENTENCE WOULD BE, PROBABLY, IF THAT PLEA WAS FORTHCOMING. THE FOURTH DISTRICT DIDN'T SAY THAT THE VICTIM OR THE STATE REPRESENTING THE VICTIM CAN'T GIVE THE TRIAL COURT NECESSARY INFORMATION BEFORE THE PLEA IS ENTERED, SO YOU COULD HAVE THE JUDGE SAYING I AM INCLINED TO GIVE A PREPLEA SENTENCING PRONOUNCEMENT, BUT I WANT TO HEAR FROM THE VICTIM BEFORE I PUT A LENGTH OF TIME ON SOMETHING, IN WHICH CASE YOU WOULDN'T HAVE TO HAVE THE JUDGE CHANGING HIS OR HER MIND AT A LATER TIME.

ONE OF THE THINGS THAT YOU MENTION, IN YOUR BRIEF, IS THE 1993 MICHIGAN CASE OF PEOPLE - VS- COBS, WHICH HAS, I GUESS, AT LEAST FOUR DIFFERENT PROCEEDINGSS -- PROTECTION IN HIS THERE, ONE BEING THAT THE PRE-PLEA SENTENCING ANNOUNCEMENT CANNOT BE INITIATED BY THE TRIAL COURT. FROM THE RECORD HERE, IT LOOKS LIKE THAT IS WHAT HAPPENED, THAT THIS TRIAL JUDGE -- WHAT WE WANT TO GET AWAY FROM, AT THE VERY LEAST, HIS TRIAL JUDGES WANTING TO CLEAR THEIR DOCKET AND SAYING, LISTEN, IF ANYONE WANTS TO PLEA TODAY, THIS IS WHAT THEY ARE GOING TO GET, AND MY CONCERN IS CERTAINLY WE WANT TO RELY ON JUDGES TO EXERCISE THEIR DISCRETION BUT YOU ARE SAYING THAT SOME JUDGES WON'T DO THIS AT ALL. THERE ARE SOME JUDGES, MAYBE, GOING THE OTHER WAY, AND HOW DOES THIS COURT, YOU KNOW, IN TERMS OF EXERCISING ITS JUDICIAL SUPERVISORY RESPONSIBILITY, SHOULD THERE BE THESE ADDITIONAL PROTECTIONS, AT THE VERY LEAST?

I DON'T KNOW IF I MADE THIS CLEAR IN THE BRIEF. MY REQUEST IS THAT YOU DON'T GO DOWN THE ROAD OF COBBS, AND THAT YOU JUST REAFFIRM BROWN SAYING THAT TRIAL COURTSING GOOD -- COURTS ARE GOING TO EXERCISE THEIR DISCRETION AND WE DON'T NEED THESE PROTECTIONS. I THINK THERE ARE CONCERNS RAISED BY THE COURTS THAT ARE IN SUBSTANTIAL, AND IF YOU ARE NOT INCLINED TO SAY, WELL, WE DON'T WANT UNFETTERED DISCRETION ON THE PART OF THE COURT. WE DO WANT SOME PROTECTIONS HERE. CERTAINLY HAVING THE COURT INITIATE THIS TYPE OF THING COULD LEAD TO SOME OF THE PROBLEMS THAT COURTS HAVE TALKED ABOUT, WITH COERCION AND THINGS ALONG THOSE LINES, SO COBBS DOES GIVE A GOOD WAY TO DEAL WITH THAT. IN TERMS OF THIS CASE, AS MR. TRINGALI MENTIONED, BECAUSE OF THE RECORD AND THE OFF-RECORD DISCUSSIONS, I AM NOT SO SURE THAT YOUR CHARACTERIZATION IS CORRECT THERE, THAT THE COURT INITIATED THIS.

BUT, AS JUSTICE QUINCE IS MENTIONING, THERE IS, ALSO, THE VOLUNTARYNESS OF PLEAS, AND IF YOU HAVE THIS DISCUSSION OFF-THE-RECORD, HOW DO YOU REALLY KNOW, IN FACT, WHAT WENT ON?

I THINK THE SUGGESTION WOULD BE LET'S NOT HAVE OFF-RECORD DISCUSSIONS. I THINK IN THE CRIMINAL COURT ALL DISCUSSIONS SHOULD BE ON THE RECORD, SO THAT THE COURT KNOWS WHAT HAS GONE ON, IN TERMS OF A RECORD, BUT IT HAS BEEN THREE DECADES SINCE BROWN, AND I HAVE NOT SEEN, IN LOOKING AND DOING RESEARCH, A FLOOD OF LITIGATION, WHERE PEOPLE HAVE RAISED CLAIMS, ADDRESSING THE ISSUES THAT SOME OTHER COURTS IN OTHER STATES HAVE LISTED AS TO WHY THEY DON'T WANT JUDGES INVOLVED IN THIS PRE-PLEA SENTENCING PRONOUNCEMENT AREA, SO I DON'T KNOW THAT WE ACTUALLY HAVE THOSE PROBLEMS. IF WE HAD, AND MAYBE SOME OF YOU THAT HAVE BEEN ON DISTRICT COURTS OF APPEAL HAVE A DIFFERENT OPINION OF THAT, WITH HAVING MORE YEARS OF EXPERIENCE. I DON'T KNOW, AND MAYBE MR. TRINGALI DOES, ALSO, BUT I HAVEN'T SEEN A FLOOD OF LITIGATION, SO I AM NOT SO SURE --

INJUSTICE ANSTEAD'S HYPOTHETICAL, WHERE THE DEFENDANT AND THE STATE COULD NOT AGREE. THEY AGREED THAT HE WAS GOING TO ENTER A PLEA, BUT THEY COULD NOT AGREE ON WHETHER IT WOULD BE TWO YEARS OF PROBATION OR ONE YEAR OF PROBATION, AND THEY GO BEFORE THE JUDGE, AND THE JUDGE SAYS, WELL, I AM INCLINED TO GIVE HIM ONE YEAR OF PROBATION. HOW DOES THAT NOT AFFECT WHETHER OR NOT THE DEFENDANT IS GOING TO ENTER A PLEA, WHEN HE HAS ALREADY SAID I WANT THE ONE AND THE STATE HAS SAID I WANT THE TWO, AND WE ARE AT AN IMPASSE.

I THINK THE DEFENDANT SAID I AM GOING TO ENTER THAT HE PLEA, BUT IT IS VOLUNTARY.

IF THE DEFENDANT ENTERS THE PLEA AND HE COMES BEFORE THE COURT, AND THE COURT SAYS, WELL, YOU KNOW, THEY DON'T WANT TO DO THAT, THEN YOU CERTAINLY WOULD HAVE -- I DON'T WANT TO GIVE YOU THE ONE. I AM NOT GOING TO GIVE YOU THE ONE. YOU, CERTAINLY, WOULD HAVE AN INVOLUNTARY PLEA SITUATION, WOULDN'T YOU?

WELL, IN THAT SITUATION, AND THIS COURT HAS ADDRESSED, ON A NUMBER OF OCCASIONS, I THINK THE FACTS OF WHAT YOU SAID THERE, YOU WOULD HAVE A RIGHT TO WITHDRAW THE PLEA. THE DEFENDANT WOULD HAVE TO BE GIVEN THE OPPORTUNITY TO WITHDRAW, BECAUSE THE JUDGE HAS MADE A PRETTY CONCRETE STATEMENT THAT YOU ARE GOING TO GET ONE.

JUST IT REALLY BOTHERS ME THAT, YOU KNOW, YOU HAVE A SITUATION WHERE THE DEFENDANT IS, REALLY, LISTENING. MAKING HIS DECISION, HIS OR HER DECISION, ON WHETHER TO ENTER THE PLEA, BASED ON WHAT THE JUDGE IS GOING TO POTENTIALLY DO, AND I DO SEE --

THAT IS WHERE THAT PROTECTION OF ALLOWING THEM TO WITHDRAW THEIR PLEA, AND THIS COURT, IN GOINS, WHICH WAS IN '96 AND A NUMBER OF CASES, EVEN, BEFORE THAT, AND THAT WAS THE ISSUE IN BROWN, AS A MATTER OF FACT, THAT A DEFENDANT WHO IS ACTUALLY TOLD BY THE COURT HEARS WHAT YOU ARE GOING TO GET.

I STILL, IN THIS CASE, HIM REALLY NOT SURE OF HOW WE GOT TO THE ACTUAL SENTENCE.

NEITHER AM I.

WAS THE PLEA PREMISED ON THAT SENTENCE? 2 IT IS HARD FOR ME TO TELL, FROM THIS -- IT IS HARD FOR ME TO TELL, FROM THIS RECORD, WHAT WENT ON, BECAUSE IT SEEMS TO ME THERE MAY EVEN BE A PROBLEM, HERE, WITH WHETHER OR NOT THE DEFENDANT SHOULD BE ALLOWED TO WITHDRAW THE PLEA.

I THINK YOU ARE RIGHT. FROM THE RECORD IT IS DIFFICULT TO SAY THAT THIS WAS SOMETHING SO CONCRETE THAT, IF IT WASN'T MATERIALIZED, WHETHER THE DEFENDANT WOULD BE OFFERED THE OPPORTUNITY TO WITHDRAW, OR WHETHER THIS WAS SOME GENERAL PRINCIPLE THAT THE COURT ANNOUNCED. IT COMES ACROSS, TO ME, AS THE DEFENSE APPROACHING THE COURT. ASKING FOR SOME TYPE OF OFFER FROM THE COURT, AND THAT IS WHY WE HAD A PRE-PLEA SENTENCE, A PRESENTS INVESTIGATION DONE, AND THEN THE -- A PRESENTENS INVESTIGATION DONE, AND THEN THE COURT SAYING THIS IS WHAT I AM WILLING TO DO. IF THE COURT DOESN'T DO THIS, THE DEFENDANT SHOULD BE ALLOWED TO WITHDRAW HIS PLEA, IF HE WANTS TO.

IF THE COURT WERE WILLING TO ACCEPT THE RULE THAT IT SHOULD NOT BE A PER SE RULE THAT WE ARE GOING TO DEAL WITH, WOULD YOU LIST WHAT YOU SEE TO BE THE VERY ESSENTIAL SAFEGUARDS, THE VERY MINIMUM SAFEGUARDS THAT YOU WILL HAVE TO USE TO AVOID THOSE PROBLEMS, OR, AGAIN, CAN THOSE PROBLEMS BE A VOTED?

I THINK THE COBBS, MICHIGAN SUPREME COURT CASE, IS A VERY PRACTICAL CASE THAT DEALS WITH PRE-PLEA SENTENCING PRONOUNCEMENTS ARE SOMETHING THAT IS NOT -- THEY ARE NOT BAD. THEY CAN BE GOOD. WE ARE NOT GOING TO TELL JUDGES THEY HAVE TO DO IT, BUT IT IS A TOOL THEY MAY WANT TO USE. HOWEVER, IF YOU ARE GOING TO DO IT, WE WANT TO ADDRESS THE CONCERNS THAT A LOT OF OTHER STATE COURTS HAVE LISTED, AND THOSE CONCERNS, PRIMARILY, COME FROM THE ABA STANDARDS RELATING TO GUILTY PLEAS, AND THEY -- TO THEY PUT OUT FOUR PROCEDURAL PROTECTIONS, ONE THAT THE PRESENTS BE INITIATED BY BE ON HE -- THE PRESENTENS BE INITIATED BY ONE OF THE -- THE PRE-SENTENCE BE INITIATED BY ONE OF THE PARTIES. I THINK THE VOLUNTARYNESS AND THE COHESIVE NATURE THAT IT COULD

BE, IF THE STATE WERE TO GET THE COURT TO PRONOUNCE SOMETHING, ITSELF, SO I WOULD CHANGE A LITTLE BIT OF WHAT THE MICHIGAN SUPREME COURT SAID THERE, AND SAID IT WOULD BE DEFENSE INITIATED, AND THAT ALLEVIATES SOME PROBLEMS, BECAUSE IF THAT IS THE CASE, WE NOW KNOW THAT WE HAVE A PERSON WHO IS, AT LEAST, CONTEMPLATING A PLEA, AT THIS POINT, AND WANTS TO RESOLVE THE CASE WITHOUT A TRIAL, AS POPE -- AS OPPOSED TO, IF YOU HAVE A JUDGE COMING OUT AND INITIATING THIS, MAYBE YOU HAVE A PERSON THAT WANTS A TRIAL AND THEY SAY, HEY, THIS JUDGE SEEMS TO PREFER A PLEA OVER A TRIAL AND COULD I GET A MORE SEVERE SENTENCE IF I MADE A PROPOSAL? THAT IS ONE. SECONDLY IS NOT THAT THE COURT SHOULD GET INTO PLEA BARGAINING, AND BY THAT I MEAN TALKING ABOUT ALTERNATIVE SENTENCES. THE COURT HAS BEEN ASKED A SPECIFIC QUESTION. WHAT WOULD YOU IMPOSE, BASED ON THIS INFORMATION? AND I THINK THE COURT SHOULD JUST SAY HERE IS WHAT I THINK IS THE FAIR SENTENCE. THAT IS WHAT I AM GOING TO DO, AND NOT GET INTO A GIVE AND TAKE, SO THAT YOU HAVE ALTERNATIVES TO PLEA BARGAINING.

LET ME ASK, IN REGARD TO THE VICTIM AND WHAT THE PRACTICE IS, I DON'T KNOW WHETHER YOU FOLKS LABOR IN THE VENUE OF THE TRIAL COURT OR WHETHER YOUR APPELLATE LAWYERS -- WHETHER YOU ARE APPELLATE LAWYERS OR NOT, BUT IN GENERAL PRACTICE NOW, I KNOW THAT VICTIMS ARE GIVEN NOTICE AND GIVEN THE OPPORTUNITY TO BE PRESENT, AND WHEN A PLEA IS DISCUSSED, A PLEA AGREEMENT. IS THERE NORMALLY SOME ANNOUNCEMENT BY THE STATE OF WHAT THE DEFENDANT'S WISHES ARE, OR IS THE DEFENDANT, IS THE VICTIM NORMALLY PRESENT?

THE EXPERIENCE I HAVE HAD IS THAT IT GOES BOTH WAYS. THE VICTIMS ARE GIVEN THE OPPORTUNITY, FROM THE STATE ATTORNEY'S OFFICE, TO COME IN AND BE HEARD IN PERSON.

DO WE KNOW WHETHER THE VICTIM WAS GIVEN NOTICE OF THIS PROCEEDING?

NO.

THAT WE ARE DEALING WITH TODAY?

NO, WE DON'T.

AND DO WE KNOW WHETHER OR NOT THE, IF THE JUDGE HAD IMPOSED A SENTENCE WITHIN THE GUIDELINES, THERE WOULD HAVE BEEN A DELAY BECAUSE THE VICTIM WAS NOT PRESENT?

WE DO NOT KNOW THAT. THE ONLY THING I WOULD POINT OUT IS THAT THE CONCERNS THAT THE FIFTH DCA EXPRESSED, THOSE WEREN'T RAISED IN AN OBJECTION IN THIS CASE, ALTHOUGH THE STATE ATTORNEY'S OFFICE, AT THE TRIAL COURT LEVEL, DID OBJECT TO THE IMPOSITION OF A DOWNWARD DEPARTURE. IT WAS SIMPLY ON THE GROUNDS THAT THOSE GROUNDS RELIED UPON WERE EITHER INVALID OR NOT SUPPORTED BY THE EVIDENCE. THEY DIDN'T OBJECT AND SAY THIS IS A SEPARATION OF POWERS PROBLEM, THAT THIS IS A CRIMINAL PROCEDURE RULE PROBLEM OR THIS IS A PUBLIC POLICY PROBLEM, BECAUSE WE HAVE A VICTIM THAT IS NOT GOING TO BE HEARD, SO WE DIDN'T HAVE THAT RAISED IN THIS OBJECTION.

I AM CONCERNED, STILL, ABOUT THE IDEA, AND MAYBE IT IS WHAT JUDGE GRIFFIN IS TALKING ABOUT, THAT THE -- THAT SHE CRITICIZES WHAT THE FOURTH SAID IS BEING SORT OF THE WORSE OF ALL WORLDS. THEY ARE COMMITTING JUDICIAL REPRESENTATIONS BUT THAT AREN'T REALLY PLEA BARGAINS, BECAUSE THE COURT CAN JUST GO BACK ON IT. DOESN'T THAT, REALLY, RAISE JUST FURTHER PROBLEMS TO THE INTEGRITY OF THE PROCESS, WHICH IS THE COURT SAYS THIS IS WHAT I AM GOING TO GIVE, BUT I HAVEN'T SEEN EVERYTHING, AND THEY SEE EVERYTHING AND THEY SAY, NO, NOW I AM NOT GOING TO GIVE IT, SO NOW LET'S GO THROUGH A PROCESS OF YOU WITHDRAWING THE PLEA. WHAT -- ISN'T THAT -- ISN'T THERE JUST SOMETHING WRONG WITH THAT PROCESS?

YES. BUT IT IS NOT LIMITED TO A SITUATION WHERE A TRIAL JUDGE GIVES A PRE-PLEA SENTENCING PRONOUNCEMENT. YOU CAN HAVE A SITUATION WHERE THE PARTIES ACTUALLY AGREE ON A SET SENTENCE, AND THE JUDGE, AT THE PLEA COLLOQUY HEARING, SAYS I AM WILLING TO ACCEPT THAT, AND AT A LATER TIME, BUT THAT IS NOT THE SENTENCING HEARING. THAT IS JUST PLEA COLLOQUY THAT DAY, THE SENTENCING HEARING WILL BE A MONTH AWAY AND I WILL IMPOSE WHAT YOU ALL HAVE AGREED ON, AND AFTER FURTHER REVIEW THE JUDGE SAYS I CAN'T DO THAT AND OFFERS THE DEFENDANT A --

ISN'T SOMETIMES THE PRESENTS INVESTIGATION DETERMINATIVE IN THAT -- A PRE-SENTENCE INVESTIGATION IS DETERMINATIVE IN THAT, UNLESS THE PRE-SENTENCE INVESTIGATION REVEALS SOMETHING THAT WE ARE NOT AWARE OF, THAT I WOULD IMPOSE THAT SENTENCE?

CORRECT.

AND SO, UNTIL SUCH TIME THAT THE ACCEPTS IS ACTUALLY IMPOSEED, THERE IS NO -- NOTHING COMMITTED.

CORRECT. THE TRIAL JUDGE IS NEVER BOUND TO IMPOSE, EVEN IF THEY AGREE TO IT.

AND THE REMEDY IS TO WITHDRAW THE PLEA, IF THE PROPOSED SENTENCE CANNOT BE IMPOSEED BY THE JUDGE.

THAT IS CORRECT. SO I DON'T THINK IT IS JUST LIMITED TO THAT ONE, THE SCENARIO THAT WE ARE ARGUING ABOUT TODAY. IT COULD HAPPEN IN OTHER SITUATIONS.

BUT, YEAH, IN OTHER SITUATIONS, THE VICTIM HAS FULLY AGREED AND THE STATE HAS AGREED, AND THEY HAVE ALL THE INFORMATION, AND THEN -- YOU KNOW, IF WE ARE LOOKING AT INTEGRITY, THAT IS WHY THE ABA SITUATION IS SORT OF PROTECTS THAT ASPECT, BECAUSE YOU HAVE GOT THE VICTIM INPUT AND THE STATE INPUT IN AGREEING TO THIS.

COBB, ALSO, PROTECTS IT, AND COBB SANCTIONED PRE-SENTENCING PLEA PRONOUNCEMENTS, AND THE THIRD PROCEDURAL PROTECTION, FOURTH PROCEDURAL PROTECTION THAT COBB ANNOUNCED WAS THAT THE VICTIM BE GIVEN AN OPPORTUNITY TO EXPRESS HIS OR HER VIEWS ON SENTENCING, BEFORE THE PRE-PLEA SENTENCING PRONOUNCEMENT IS MADE.

SO THAT COULDN'T HAVE HAPPENED IN THIS CASE, WHERE A JUDGE, AT SIDE BAR, SAYS I AM GOING -- I AM INCLINED TO GIVE THIS SENTENCE, IF YOU PLEAD. THAT WOULD BE, SOMETHING LIKE THAT, WOULD BE NOT WITHIN THE PURVIEW OF THOSE -- OF THE SIDE LIKES -- SIDELINES.

THAT IS ASSUMING THAT, ON THE OFF RECORD DISCUSSION HERE THAT, THE JUDGE DIDN'T SAY TO THE STATE, STATE, DO YOU HAVE A VICTIM WHO WANTS TO COME IN AND BE HEARD IN AMERICAN, OR MAYBE -- IN PERSON, OR MAYBE THE STATE GAVE THE RECOMMENDATION OFF THE RECORD IT IS UNFORTUNATE WE DON'T HAVE THAT, SO WE DON'T KNOW. COBB DIDN'T DEAL WITH THAT, SO IF YOU ARE IN CHRIND TO SAY WE DON'T WANT TRIAL COURTS TO HAVE TOO MUCH DISCRETION IN THIS AREA. WE DO WANT SOME PRORBL PROTECTIONS, THAT -- SOME PROCEDURAL PROTECTIONS, I WOULD SUGGEST THAT YOU REALLY LOOK CLOSELY AT COBB AND ITS PROVISIONS.

WHAT WOULD BE WRONG WITH CONCLUDING THAT, AS IT CONCERNS SENTENCING, THAT IT BE ON THE RECORD, NOT OFF-THE-RECORD?

I WHOLEHEARTEDLY AGREE. ONE THING I WANTED TO SAY, IN CONCLUDING, AND I KNOW IF ANYONE HAS ANY QUESTIONS ABOUT THE SEPARATION OF POWERS ARGUMENT, WHERE THE RULES OF CRIMINAL PROCEDURE, I CERTAINLY WOULD BE MORE THAN HAPPY TO ANSWER THOSE. THEN, BARRING THAT, IN CONCLUSION, THE AMERICAN BAR ASSOCIATION HAS STANDARDS ON --

RELATING TO GUILTY PLEAS. THEY CAME OUT WITH A TENTATIVE DRAFT, IN 1968, WHICH SAID THE TRIAL COURTS SHALL NOT PARTICIPATE PRE-PLEA, IN THE DISCUSSIONS. IN 1980, THEY, THEN, CAME OUT WITH A REVISED DRAFT, WHICH, I THINK, NOW, IS THEIR FINAL VERSION, AND THEY MOVED AWAY FROM THAT HARD-LINE STANCE, AND THEY SAID YOU KNOW WHAT? THAT IS TOO MUCH. WE CAN'T HAVE JUDICIAL -- WE CAN HAVE JUDICIAL VOCHT BEFORE A PLEA IS ENTERED, AND THE -- JUDICIAL INVOLVEMENT BEFORE A PLEA IS ENTERED, AND THE WAY THEY ALLOW IS IT DOESN'T GO SO FAR AS SAYING WHAT CAN HAPPEN, BUT THE DOES SHOW THAT THE AMERICAN BAR ASSOCIATION, OVER THE YEARS, DID INVOLVE THAT VIEW, AND TEN YEARS FROM NOW, THEY ARE GOING TO INVOLVE EVEN FURTHER AND SAY, YOU KNOW WHAT? IN 1971, OR IN 1973, WHAT THE MICHIGAN SUPREME COURT SAID WITH COBB, OR IN 1971 WITH BROWN, THEY WOULD DO THIS, AND THOSE COURTS WERE HAED AHEAD OF THEIR TIME. SO I WOULD -- WERE AHEAD OF THEIR TIME. SO I WOULD ASK YOU --

THE TRIAL COURT HAS NO AUTHORITY TO STRIKE OR DISMISS CHARGES OR ANYTHING LIKE THAT PART OF ANYTHING LIKE THIS, WITHOUT THE AGREEMENT OF THE STATE.

THAT'S RIGHT. THIS PRE-PLEA SENTENCING PRONOUNCEMENT ABSOLUTELY HAS TO BE TO EACH AND EVERY CRIME THAT IS CHARGED BY THE STATE, AND IT WOULD NOT BE ANYTHING THAT WOULD ENCROACH ON THE STATE'S AUTHORITY TO CHARGE CRIMES. SO I WOULD ASK YOU TO APPROVE THE WORDING OF THE FOURTH DISTRICT COURT OF APPEAL AND AS CONCERNS PRE-PLEA SENTENCING PRONOUNCEMENTS, AND DISAPPROVE THE FIFTH DCA'S CONTRARY VIEW. THANK YOU VERY MUCH.

THANK VERY MUCH, MR. McPHERRIN. MR. TRINGALI?

I WOULD SUBMIT THAT WHAT HAPPENED IN BROWN, IS THAT THIS COURT REVERSED AND REMANDED TO THE TRIAL COURT, BECAUSE WHAT HAPPENED, IN FACT, WAS EXACTLY THE KIND OF THING THAT WE HAVE BEEN CONCERNED ABOUT. A JUDGE GAVE AN INDICATION, WITH THE CLIENT STANDING OUT IN THE HALLWAY, BY THE WAY. THIS WAS DONE OFF THE RECORD IT WAS DONE IN CHAMBERS. THE DEFENDANT ENTERED THE PLEA, AND THEN SOME WEEKS OR MONTHS DOWN THE LINE, THE SENTENCE, WHICH WAS IMPOSEED, WAS NOT THE, QUOTE, INDICATED SENTENCE, AND THIS COURT SAID THAT, WHEN ALL IS SAID AND DONE, THAT MUST BE RETURNED SO THAT THE PLEA CAN BE WITHDRAWN. I SUBMIT TO THIS COURT THAT THE BETTER PRACTICE IS THE PRACTICE WHICH IS OUTLINED IN GITTO, THAT EVERYTHING NEEDS TO BE ON THE RECORD, THAT THE JUDGE NEEDS TO BE AN IMPARTIAL ASHY TORE AT ALL TIMES -- ARBITOR AT ALL TIMES. AS JUDGE GRIFFIN SAID, IN THE REHEARING, JUDICIAL PARTICIPATION IN THE PLEA BARGAINING PROCESS DEAPPRECIATES THE IMAGE OF THE TRIAL JUDGE THAT IS NECESSARY TO PUBLIC CONFIDENCE. THAT SIMPLY CANNOT BE SAID BETTER. I WOULD URGE THIS COURT TO UPHOLD GITTO AND TO CAUTION THE DECISION OF THE FOURTH DCA, TO THE EXTENT THAT IT CONFLICTS WITH GITTO. THANK YOU.

THANK YOU, COHEN COUNSEL. THANKS TO BOTH OF YOU. -- THANK YOU, COUNSEL. THANKS TO BOTH OF YOU. WE ARE GOING TO TAKE A FIVE-MINUTE RECESS. BAILIFF: PLEASE RISE.