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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC13-_____
LOWER TRIBUNAL NO. 3D10-206

PHILLIP DAVIS,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

BRIEF OF PETITIONER ON JURISDICTION

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

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INTRODUCTION

This is a petition for discretionary review on the grounds that the district court opinion expressly and directly conflicts with decisions of this Court. In this brief of petitioner on jurisdiction, all references are to the slip opinion in the appendix attached to this brief, identified as "A." followed by page numbers.

STATEMENT OF THE CASE AND FACTS

In its opinion, the district court described the facts of this case as follows: Davis was charged with one count each of organized fraud, aggravated white-collar crime, and third-degree grand theft; two counts of second-degree grand theft; and twenty-five counts of money laundering. Prior to the commencement of trial, the trial court inquired about the status of plea negotiations between the State and Davis. The following exchange occurred between the trial court, counsel and Davis:

> [STATE]: Judge the State has offered a plea to a single count of aggravated white collar crime, which is count two of the information. First degree felony, level nine open to the Court. The guidelines on that would score out to bottom of 48 month and on top of 30 years.
>
> [DEFENSE COUNSEL]: And Judge, that's the first I've heard of this plea offer.
>
> THE COURT: Okay.
>
> [DEFENSE COUNSEL]: The plea that was given to me before was, basically, an open plea to the Court. There was no discussion or reference by the State to nolle prose [sic] of any particular counts.
>
> THE COURT: All right. Well now you know. Mr. Davis's plea offer was four years to 30 years with a plea straight up or open to the Court with no promises. All I say to that is, thank you.
>
> ....
>
> THE COURT: Okay.... So why don't you speak to your client[ ] about that plea. I don't know anything about the case, so I would have to hear extensively from the

lawyers before impose [sic] a sentence.

[DEFENSE COUNSEL]: Judge, I—

THE COURT: But they would know that the bottom is four years.

[DEFENSE COUNSEL]: Judge, I can tell you this, at least from my discussions with Mr. Davis, he's not interested in any pleas that would have the bottom of the guidelines of state imprisonment. We had discussed in generalities based upon what the State had told me before.

THE COURT: All right. So let me just colloquy him on that.

Mr. Davis, raise your right hand, please.

(Thereupon, Mr. Phil Davis was duly sworn and testified under oath as follows:)

THE COURT: Okay. You've heard the number, you heard the plea. The State's new plea offer this morning in essence, a guideline plea straight up to the Court with the possibility of a sentence four years to 30 years. Are you interested in pleading guilty within that—knowing that your sentencing would be anywhere between that range?

[THE DEFENDANT]: It could be 30 years.

THE COURT: Okay.

[THE DEFENDANT]: Could be as high as 30 years or as low as four years.

THE COURT: That's right.

[THE DEFENDANT]: Straight up to the Court. No, ma‘am.

> THE COURT: Okay.
>
> THE COURT: Well, let me ask you this. Would … you take four? Bottom of the guidelines?
>
> [THE DEFENDANT]: No, Your Honor.
>
> THE COURT: All right. Because I consider four right now. Okay. So I don't know anything about the case, but it is a guideline in the sentence, so all right. Very well.

(A. 2-4). The cause proceeded to trial, and the jury found Mr. Davis guilty. The judge sentenced him to 20 years in prison – five times the court's pretrial offer. (A. 5).

Mr. Davis appealed, arguing that the sentence was vindictive. In passing on this issue, the district court concluded that the judge did not initiate plea negotiations in violation of this Court's decisions in *State v. Warner,* 762 So. 2d 507 (Fla. 2000) and *Wilson v. State*, 845 So. 2d 142 (Fla. 2003). It stated that the judge was permitted to offer the four-year sentence because it was authorized to inquire into the status of plea negotiations:

> The trial court then asked Davis whether he would be willing to accept four years, the minimum sentence under the guidelines. *See generally Vondervor v. State*, 847 So. 2d 610, 614 (Fla. 5th DCA 2003) ("Prior to trial, a judge may ask the attorneys if a plea offer has been extended, and may ask the defendant if he is aware of a pending plea offer without violating *Warner* 's restrictions."). The trial court expressed her willingness to consider four years given her knowledge of the case at that point. This is permissible under *Warner*. *See Warner*, 762 So.2d at 514 ("The judge may state on the record the length of sentence which, on the basis of information then available to

the judge, appears to be appropriate for the charged offense.").

(A. 9). Having excluded the trial court's violation of *Warner* from the totality of the circumstances that would support a presumption of vindictiveness, the district court affirmed.

SUMMARY OF ARGUMENT

The Third District's decision in this case expressly and directly conflicts with this Court's decisions in *State v. Warner,* 762 So. 2d 507 (Fla. 2000), and *Wilson v. State*, 845 So. 2d 142 (Fla. 2003). Mr. Davis rejected the State's offer of an open plea of four to thirty years. The district court held that – **after Mr. Davis rejected the State's offer, and without invitation from either party** – the judge could make her own offer:

> The trial court then asked Davis whether he would be willing to accept four years, the minimum sentence under the guidelines. *See generally Vondervor v. State*, 847 So. 2d 610, 614 (Fla. 5th DCA 2003) ("Prior to trial, a judge may ask the attorneys if a plea offer has been extended, and may ask the defendant if he is aware of a pending plea offer without violating *Warner* 's restrictions."). The trial court expressed her willingness to consider four years given her knowledge of the case at that point. This is permissible under *Warner*.

(A. 9). The district court thus equated what a judge may do on her own motion ("ask the attorneys if a plea offer has been extended, and if the defendant is aware of a pending plea offer"), with what she may do only if invited. This holding negates *Warner* and *Wilson*. The Court can and should exercise its jurisdiction based on conflict with those cases.

ARGUMENT

THE DISTRICT COURT'S OPINION EXPRESSLY AND DIRECTLY CONFLICTS WITH THIS COURT'S DECISIONS IN *STATE v. WARNER*, 762 So. 2d 507 (Fla. 2000), AND *WILSON v. STATE*, 845 So. 2d 142 (Fla. 2003).

The district court held that, upon learning that the State had made a plea offer and that the defendant rejected it, a judge could properly insert herself into the plea negotiations and make an offer of her own – without invitation by the State or defense. This cannot be reconciled with the Court's decisions in *State v. Warner*, 762 So. 2d 507 (Fla. 2000), and *Wilson v. State*, 845 So. 2d 142 (Fla. 2003).

In *Warner* and *Wilson*, the Court has laid down strict limitations on a judge's involvement in plea negotiations. In *Warner* the Court held: "**The trial court must not initiate a plea dialogue**; rather, at its discretion, it may (but is not required to) participate in such discussions **upon request of a party.**" *Id.* at 513 (emphasis supplied). In *Wilson* the Court explained: "***Warner* involved a very narrow holding that permits a trial judge to respond to a request from a defendant as to what sentence the judge would impose in exchange for a guilty plea.**" *Id.* at 152 (emphasis supplied). It is only after the defendant makes this request that a judge may "discuss potential sentences and comment on proposed plea agreements." *Id.* at 514. Without an invitation from defense, the judge may only

make a status inquiry as to whether the defendant is aware 1) of the state's plea offer, and 2) the maximum penalty should the defendant be convicted. *Id* at 516 n.9 (quoting *Prado v. State,* 816 So. 2d 1155, 1158 n.2 (Fla. 3d DCA 2002) (Sorondo, J., concurring)).

The district court, however, expressly held that the judge could ask Mr. Davis if he would accept an alternate plea from the bench as part of this status inquiry. After defense counsel stated Mr. Davis would not accept a plea to prison time, and after Mr. Davis personally rejected the State's offer, the judge countered with a four-year prison offer. The district court explained why it thought this proper:

> The trial court then asked Davis whether he would be willing to accept four years, the minimum sentence under the guidelines. *See generally Vondervor v. State*, 847 So. 2d 610, 614 (Fla. 5th DCA 2003) ("Prior to trial, a judge may ask the attorneys if a plea offer has been extended, and may ask the defendant if he is aware of a pending plea offer without violating *Warner* 's restrictions."). The trial court expressed her willingness to consider four years given her knowledge of the case at that point. This is permissible under *Warner*. *See Warner*, 762 So. 2d at 514 ("The judge may state on the record the length of sentence which, on the basis of information then available to the judge, appears to be appropriate for the charged offense.").

(A. 9). The court could not have made its error more clear. It expressly equated what the judge could do as part of the status inquiry with what she could do only upon invitation from the defense. The conclusion that a judge may enter

negotiations as part of the status inquiry negates the safeguards established by *Warner* and *Wilson*.

The district court did not claim that the defense invited the judge to enter negotiations, though it observed that, "Davis expressed concern about the potential of being sentenced to thirty years under the guidelines." (A. 8). Instead, it relied on the judge's power to perform a status inquiry, as discussed above. In any event, the opinion demonstrates there was no invitation. Mr. Davis stated the terms of the State's offer, and rejected it:

> THE COURT: Okay. You've heard the number, you heard the plea. The State's new plea offer this morning in essence, a guideline plea straight up to the Court with the possibility of a sentence four years to 30 years. Are you interested in pleading guilty within that—knowing that your sentencing would be anywhere between that range?
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> [THE DEFENDANT]: It could be 30 years.
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> THE COURT: Okay.
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> [THE DEFENDANT]: Could be as high as 30 years or as low as four years.
>
> THE COURT: That's right.
>
> [THE DEFENDANT]: Straight up to the Court. No, ma'am.

(A. 3-4).

The Court should accept discretionary jurisdiction in this case. Under the Third District's holding, a judge may ask a defendant if he will accept the

prosecution's plea offer and, upon his rejection, insert herself into the negotiation and make an offer of her own. This conflicts with both *Warner* and *Wilson*.

CONCLUSION

For the foregoing reasons, the Court should grant discretionary jurisdiction based upon express and direct conflict of decisions, where the district Court's opinion expressly and directly conflicts with this Court's opinions in *State v. Warner*, 762 So. 2d 507 (Fla. 2000), and *Wilson v. State*, 845 So. 2d 142 (Fla. 2003).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered electronically to CrimAppMia@MyFloridaLegal.com and Nikole.Hiciano@myfloridalegal.com, to counsel for the Respondent, Nicole Hiciano, Assistant Attorney General, Office of the Attorney General, Department of Legal Affairs, 444 Brickell Avenue, Suite 950, Miami, Florida 33131, on this 4th day of July, 2013.

/s/Andrew Stanton
ANDREW STANTON
Assistant Public Defender

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that the type used in this brief is 14 point proportionately spaced Times New Roman.

/s/Andrew Stanton
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