IN THE SUPREME COURT OF FLORIDA

CASE NO. 01-100

CHARLES MURRAY,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General

RICHARD L. POLIN
Florida Bar No. 0230987
Assistant Attorney General
Office of the Attorney General
Department of Legal Affairs
444 Brickell Avenue, Suite 950
Miami, Florida 33131
(305) 377-5441
(305) 377-5655 (fax)

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STATEMENT OF THE CASE AND FACTS

In 1993, Charles Murray was charged with one count of capital sexual battery, in the Eleventh Judicial Circuit, Dade County, Florida. In January, 1994, he entered into a written plea agreement, which called for a sentence of 10 years state prison, to be followed by 15 years of probation, with a special condition of actively participating in and successfully completing a Mentally Disordered Sexual Offender Treatment Program. (Pet. App. 35-39). [1] The plea was accepted by the trial court on January 24, 1994, and Murray was sentenced in accordance with the plea agreement. (Pet. App. 1-28).

Murray was scheduled to be released from his incarcerative sentence with the Department of Corrections on or about March 1, 1999. (Pet. App. 41). However, on February 26, 1999, the State Attorney for the Eleventh Judicial Circuit filed a petition seeking the involuntary civil commitment of Murray, as a sexually violent predator,

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[1] The pleadings, transcripts and other materials referred to in this Statement of the Case and Facts were included in the Appendixes which were filed by the parties in the Fourth District Court of Appeal below, in the prior, lower court habeas corpus proceedings. Due to the expedited briefing schedule in this Court, the record on appeal from the lower court is currently not due to be transmitted to this Court, and, as the lower court proceeding was an original writ proceeding, there was no record on appeal from the trial court. As a result, the Statement of the Case and Facts herein is being prepared without references to any record citations. Pet. App. refers to the Appendix submitted by Murray in the lower court. Resp. App. refers to the Appendix submitted by the State in the lower court.

pursuant to section 916.31, et seq., Florida Statutes (Supp. 1998).[2] (Pet. App. 40). This petition alleged that Murray had a prior conviction for a sexually violent offense, that he suffered from a mental abnormality or personality disorder, and that the mental abnormality or personality disorder made him likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care and treatment.

The commitment petition attached written evaluations of Murray, prepared by two psychologists, in February, 1999, shortly prior to the filing of the commitment petition.[3] The evaluations were done as a part of the multidisciplinary team evaluation process required by the sexually violent predators commitment act, towards the conclusion of the individual's incarcerative sentence.[4] Each report reflects that the examining psychologist reviewed a wide array of documentary materials regarding Murray, and that each psychologist interviewed Murray as a part of the clinical evaluation. Dr. Ted Shaw's evaluation set forth the following Summary and Conclusions:

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[2] Effective May 26, 1999, the sexually violent predators act was amended and moved to chapter 394, where it currently appears as section 394.910, et seq., Florida Statutes.

[3] These written evaluations were included in the State's Appendix to Response, filed in the Fourth District Court of Appeal. (Resp. App. A and B).

[4] See sections 916.33, Florida Statutes (Supp. 1998); 394.913, Florida Statutes (1999).

> Mr. Charles Murray is a 23 year old African American/Hispanic male who was referred for evaluation under the provisions of the Jimmy Ryce Act. He presents with a lengthy criminal history including one sex offense related to the anal rape of his 6 year old cousin. Mr. Murray scores high on instruments developed to predict violent reoffending and sexual reoffending. Because the sex offense was violent it is believed that the VRAG is a better predictor of his likelihood of reoffense than his RRASOR score. Moreover, Mr. Murray has not received sex offender treatment while incarcerated and consistently denies his sex offense in spite of the physical evidence. Although it was not able to be corroborated during the current evaluation, it was also reported in the first phase of the evaluation that a witness stated Mr. Murray had attempted this behavior before.
>
> In regard to whether or not Mr. Murray meets the definition of a Sexually Violent Predator the following is offered: Mr. Murray meets the first criterion of being "convicted of a sexually violent offense" in that he has been convicted of an Attempted Sexual Battery. He meets the second criterion of "suffering from a mental abnormality or personalty disorder. . ." in that he can be diagnosed with an Antisocial Personality Disorder.
>
> Accordingly, it is the conclusion of this examiner to a reasonable degree of scientific certainty that Mr. Murray should be considered a Sexually Violent Predator as defined in FS 916 and should therefore NOT be released into the community upon his release date.

(Resp. App. A, pp. 8-9). The VRAG score to which Dr. Shaw referred reflected a probability of reoffending of 76 percent over seven years; 82 percent over 10 years - "a very high risk score." Id. at p. 8. Two other risk assessment instruments placed

Murray in a moderate to high risk category for reoffending. Id. at pp.7-8. During his incarceration, Murray was "screened for sex offender counseling and was found to be ineligible because he denied guilty." Id. at p. 5. As recently as 1997, Murray still denied his guilt, according to a Department of Corrections psychologist, asserting that he had merely "bathed his cousin's daughter as he had been asked to do. . . ."[5] Id.

The second clinical evaluation, in February, 1999, had been prepared by Dr. Benoit. Dr. Benoit's conclusions were similar to those of Dr. Shaw:

> Mr. Charles Murray is a 23-year-ld African-American male with a short-term history of alleged sexual assaults of two females, one child and one adult. He is nearing the end of a ten-year sentence for sodomizing his six-year-old cousin. Results of the current evaluation are inconclusive with respect to paraphilias, due to the apparent brevity of his assault history and his denial of deviant fantasies. Nevertheless, he satisfies criteria for Alcohol, Marijuana and Cocaine Abuse by history, together with Antisocial Personality Disorder. Although the actuarial screening suggested his profile is not consistent with individuals who are at high risk for recidivism, he denies responsibility for his actions, lacks remorse, empathy, and insight into the dynamics of his personality which drive his behaviors. He has refused Sex Offender Treatment during his incarceration, by virtue of which he has precluded any

[5] While Murray was actively denying having committed the offense for which he was convicted, during his incarceration, between 1994 and 1997, at his January, 1994 plea colloquy (Pet. App. 16), when asked whether there was a stipulation to the facts set forth in the A-form, defense counsel, in the presence of Murray, responded affirmatively. The defendant, thereafter, was asked: "Are you pleading guilty because you are guilty and for no other reason?" Murray responded: "Yes." (Pet. App. 18).

> opportunity to make gains in these areas. Mr. Murray suffers from a personality disorder which makes him likely to engage in acts of sexual violence if not contained in a secured facility for a long-term control, care and treatment. . . .

(Resp. App. B, p. 6). In addition to the pre-1994 criminal history which Dr. Benoit considered, several aspects of the clinical diagnosis focused on Murray's behavior during his post-conviction incarceration. Thus, Dr. Benoit's report, found it relevant that Murray had 11 disciplinary reports while incarcerated, including disorderly conduct, assault, and destruction of state property, among others. Id. at p. 3. Dr. Benoit also emphasized the significance of Murray's post-conviction refusal to participate in treatment available through the Department of Corrections, as well as the post-conviction recantation of his prior confession and his post-conviction denial of guilt. Id. at p. 5. As recently as the February 25, 1999 interview with Benoit, Murray was still denying the commission of the offense to which he pled guilty and the offense, which he expressly admitted, in open court, during the plea colloquy, that he committed. Id. at pp. 4-5.

On the basis of the commitment petition and its attachments, the trial court entered an order finding probable cause that Murray was a sexually violent predator, who should be held by the Department of Children and Families in an appropriate secure facility pending further proceedings in the commitment case. (Pet. App. 54).

A warrant was also executed, authorizing the Department of Corrections to transport Murray to the Department of Children and Families Martin County Treatment Center. (Pet. App. 56).

On or about July 8, 1999, Murray filed a "Motion to Enforce the Specific Performance of His Plea Agreement by Dismissing this Case." (Pet. App. 29). The motion bore two separate case numbers - the prior Dade County circuit court case number from the felony to which he entered his plea (F93-26749), and, the new civil commitment case number (99-5094 CA 13).[6] Based on the facts related to the 1994 plea in the criminal case, Murray alleged that he was entitled to specific performance of his plea agreement, by ordering the commencement of probation and the dismissal of the commitment petition.[7]

A hearing on this motion was held on July 9, 1999. The trial court judge denied the motion. (Pet. App. 3-5). However, due to the fact that Murray was being held in

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[6] In the Eleventh Judicial Circuit, the sexually violent predator commitment cases are assigned to the division of the judge who heard the prior criminal case which resulted in a conviction, and the case is further given a new civil commitment petition case number. Both sets of case numbers appear on pleadings, as with this particular motion.

[7] The conclusion of the motion stated: "WHEREFORE, the Respondent respectfully requests that this Honorable Court dismiss the state's petition in order to enforce the specific performance of the plea contract and order the respondent's immediate release to probation supervision." (Pet. App. 34).

the Department of Children and Families' commitment facility, pending his commitment trial, the judge effectively modified the conditions of probation, so that probation would run while Murray was confined to the commitment facility, but he would not have to report or perform any other conditions of probation, except for his obligation to avoid violating the law by committing new crimes. (Pet. App. 7-9). The oral pronouncement denying the motion for specific performance of plea agreement was never reduced to a signed, written order.

On September 3, 1999, Murray filed a petition for writ of habeas corpus, in the Fourth District Court of Appeal, in Fourth District Case No. 99-2970. The petition alleged that it was being filed in the Fourth District Court of Appeal because Murray was currently being held in the Martin County Treatment Center, which was operated by the Department of Children and Families, within the territorial limits of the Fourth District. The petition alleged: "A writ of habeas corpus must be brought in the district court of appeal with jurisdiction over the place where the person is being held." This habeas corpus petition reiterated the foregoing arguments with respect to enforcing the plea agreement through Murray's release for probation and the dismissal of the pending trial court commitment petition. On September 8, 1999, the Fourth District, sua sponte, issued an order which transferred the case to the Third District Court of Appeal:

> This Court not having jurisdiction over the matter raised in the above-styled petition for writ of habeas corpus, see Alachua Regional Juvenile Detention Center v. T.O., 684 So. 2d 814, 186 (Fla. 1996), it is
>
> ORDERED *sua sponte* that this case is transferred to the Third District Court of Appeal of the State of Florida.

Five days later, the Third District, on September 13, 1999, issued its own order, finding that it lacked jurisdiction for the habeas corpus petition, and transferred the case back to the Fourth District:

> This Court not having jurisdiction over the matter raised in the above-styled petition for writ of habeas corpus, see Alachua Regional Juvenile Detention Center v. T.O., 684 So.2 d 814, 816 (Fla. 1996), it is
>
> ORDERED sua sponte that this case is transferred to the Fourth District Court of Appeal of the State of Florida.

The Fourth District then, on October 7, 1999, issued another order, dismissing the petition, and explaining why it lacked habeas corpus jurisdiction, even though custody was within the Fourth District, and further explaining that the transfer to the Third District had been for the purpose of enabling that Court to consider whether it would review the trial court's order by certiorari or some other method of review apart from habeas corpus:

> ORDERED that this petition is dismissed. While a habeas petition generally should be filed in the District Court having jurisdiction over the county in which the petitioner is detained, this Court does not have jurisdiction

> over the matters raised in the present petition for writ of habeas corpus since petitioner has not alleged or established that the trial court was without jurisdiction or that the challenged order is void or illegal. See Alachua Regional Juvenile Detention Center v. T.O., 684 So. 2d 814 (Fla. 1996). This dismissal is without prejudice to petitioner obtaining a written, rendered order on his motion for specific performance of his plea agreement, if no such order has yet been entered, and seeking appellate or certiorari review of that order, if available, in the Third District Court of Appeal. This dismissal is also without prejudice to petitioner filing in the Circuit Court of Dade County a motion to withdraw plea.

Murray sought rehearing of the dismissal order and the Fourth District withdrew its order of dismissal and directed the State to "respond both to this court's jurisdiction and the merits of the petition with [sic] twenty (20) days from the date of this order and address Alachua Regional Juvenile Detention Center v. T.O., 684 So. 2d 814 (Fla. 1996)."

Subsequent to the filing of the State's Response (with an Appendix including further pleadings or other materials from the trial court) and Murray's Reply, the Court issued an opinion on April 12, 2000. Murray v. Kearney, 25 Fla. L. Weekly D924 (Fla. 4th DCA 2000). The Court first found that any denial of a motion for specific performance of a plea should be brought by either an appeal under Rule 9.140(b)(1)(C), Florida Rules of Appellate Procedure or by certiorari petition. Alternatively, if review is being sought in the civil commitment case, it should be

through a certiorari petition. However, habeas relief was not appropriate where another form of appellate review is available. Certiorari relief appeared to be unavailable, at that time, however, since certiorari relief can proceed only from a rendered, written order, and "it does not appear that there is a written order denying the motion."

The Court further addressed the reasons why habeas relief would be improper in the Fourth District. Murray's petition, according to the Court, did not allege that commitment was "illegal, except insofar as that commitment breaches a condition of his plea agreement." The Court continued:

> When a court reviewing a habeas petition does not have appellate jurisdiction over the trial court that issued the challenged order or process, as is the case here, the scope of the appellate court's inquiry is limited to whether the challenged order was entered without jurisdiction or is void or illegal. The appellate court may not discharge the petitioner if the detention order is merely defective, irregular or insufficient in form or substance. *See Alachua Reg'l Juvenile Detention Ctr. v. T.O.*, 684 So. 2d 814, 816 (Fla. 1996); *Leichtman*, 674 So. 2d at 891.
>
> The order denying the motion to enforce the plea was not illegal, nor was the order of civil commitment. Petitioner's's remedy was to enforce the plea, or he could have moved to withdraw his plea. . . . The trial judge did not consider the civil commitment to be a violation of his probation because the probationary period continued to run while petitioner was civilly committed.

Thus, the petition was dismissed.

After the filing of a motion for rehearing, the Court withdrew its prior opinion, and issued a new opinion on November 1, 2000. Murray v. Kearney, 770 So. 2d 273 (Fla. 4th DCA 2000). The Court again concluded that it lacked jurisdiction for a habeas corpus petition and dismissed the petition. The new opinion modified the factual background, adding a statement that there was no written order from the trial court on the denial of the motion for specific performance of the plea agreement. The opinion also deleted the previous assertions as to appellate review or certiorari being the appropriate courses of action for Murray to pursue in the Third District Court of Appeal. The Court then explained its limited habeas corpus jurisdiction, and the basis for the dismissal of the petition:

> Our habeas jurisdiction is limited to determining whether the challenged order was entered without jurisdiction or is illegal. See Alachua Reg'l Juvenile Detention Ctr. v. T.O., 684 So. 2d 814, 816 (Fla. 1996). There is no question that the trial court had jurisdiction over the cause. Petitioner challenges the order of commitment as illegal, because he claims that the commitment violates his plea agreement which would have permitted him to be released into the community for probation and completion of a sex offender treatment program. However, the commitment order was not entered in the criminal proceeding, in which the court may consider whether the state violated the plea agreement. Instead, the Department of Children and Families instituted a new civil commitment proceeding, based upon clinical evaluations of petitioner's present state.
>
> Although we recognize that the petitioner views his

> continued confinement as part of his incarceration from his plea, the law does not make this legal joinder any more than it would if the petitioner were committed under the Baker Act after his incarceration had been completed and while he was on probation. Moreover, the trial judge considered that petitioner's probation continued while he was committed under the Involuntary Civil Commitment for Sexually Violent Predators Act. Therefore, the trial judge was well aware that he was dealing with two separate proceedings.
>
> Petitioner has not cited to us any case law holding that the order of commitment is illegal. Even if we considered it a violation of the plea agreement, it still would not make the civil commitment illegal. His present confinement is the result of proceedings instituted against him in February of 1999 because he now qualifies as a sexually violent predator under section 916.32, Florida Statutes (Supp. 1998). [FN3][omitted] While habeas corpus applies to civil commitment proceedings . . . petitioner has raised no argument that his argument violates the requirements of the act under which his confinement was obtained. [FN4]
>
> The petition is dismissed.
>
> . . .
>
> [FN4]. Petitioner's allegations sound more in the nature of alleging an equitable estoppel against the state pursuing civil commitment, particularly because petitioner substantially changed his position by agreeing to his plea and sentence seven years ago, serving the incarcerative portion and then not getting the bargained for benefit of release from confinement by the state. This too, however, is not an issue of illegality for habeas jurisdiction to lie.

Murray thereafter filed a notice seeking the discretionary jurisdiction of this Court, based on an alleged conflict between the Third and Fourth District's orders

transferring jurisdiction to one another. This Court accepted review. Murray also filed an independent habeas corpus petition in this Court, in Case No. SC01-174, and this Court directed the State to respond to that petition and set the petition for oral argument on the same date as the argument for the instant case.

SUMMARY OF ARGUMENT

While the Fourth District Court of Appeal below had custodial jurisdiction for purposes of habeas corpus proceedings, that Court lacked appellate or supervisory jurisdiction over the Eleventh Judicial Circuit, in which active, ongoing pretrial proceedings were being conducted, in an involuntary civil commitment case. Under such circumstances, the Fourth District had limited habeas jurisdiction, extending to matters which are void or illegal. The matter which Murray sought review of did not fall within that limited jurisdiction. Furthermore, given the scope of review of pretrial orders which can be obtained through either appellate rules or through writs of certiorari or prohibition, within the appellate court with appellate jurisdiction, and given the need for expediting commitment cases in the trial courts, there are no compelling reasons for creating a more expansive habeas corpus jurisdiction.

The imposition of a criminal sentence, which includes probation and sex offender treatment after incarceration, does not constitute a bar to the pursuit of involuntary civil commitment at the conclusion of the incarceration. The civil commitment is based on a mental condition and dangerousness at the conclusion of incarceration; it is not a form of punishment. The prior plea agreement is not violated through the pursuit of matters which were not within the scope of the criminal case or the plea agreement.

ARGUMENT

I. THE LOWER COURT PROPERLY APPLIED THE CONTROLLING PRINCIPLES OF *ALACHUA REGIONAL JUVENILE DETENTION CENTER v. T.O.*, AND THERE IS NO REASON FOR RECONSIDERING THAT DECISION.

The instant case presents the rare situation of a district court of appeal, in an original habeas corpus proceeding, being asked to review the order of a trial court, in pretrial proceedings, where the habeas court has jurisdiction by virtue of custody existing within its territorial limits, but does not have supervisory or appellate jurisdiction over the trial court whose order is being reviewed. For both constitutional and policy reasons, this Court's decision, in Alachua Regional Juvenile Detention Center v. T.O., 684 So. 2d 814 (Fla. 1996), was properly applied in the instant case, and there are no viable reasons for reconsidering the principles enunciated therein.

In Alachua Regional, juvenile delinquency proceedings were pending in the Circuit Court for Putnam County, while T.O. was held in a detention center in Alachua County. After the trial court denied a motion for release, T.O. filed a habeas corpus petition in the First District Court of Appeal, which had territorial jurisdiction over the detention center. However, the Fifth District Court of Appeal, which did not have such territorial jurisdiction over the detention center, was the appellate court with supervisory and appellate jurisdiction over the Putnam County Circuit Court. Thus,

after noting the general principle that habeas corpus jurisdiction rests in the county in which custody exists (as the proper respondent is the custodian), the question was presented as to the scope of habeas corpus jurisdiction in the First District Court of Appeal, as an appellate court lacking appellate or supervisory jurisdiction over the trial court, and this Court concluded that while such habeas corpus jurisdiction existed, it was of a limited nature:

> The next question is whether the First District Court of Appeal, not having supervisory or appellate jurisdiction over the Putnam County trial court, had the authority to review its detention order. We conclude that it did. *See State ex rel. Scaldeferri v. Sandstrom*, 285 So. 2d 409 (Fla. 1973) (holding that circuit court may entertain habeas corpus proceeding and discharge petitioner held under an illegal or void order issued by a court over which there is no appellate jurisdiction); *State ex rel. Perky v. Browne*, 105 Fla. 631, 142 So. 247 (1932) (permitting circuit judge to issue writ of habeas corpus in his county to inquire into cause of detention of person held in custody in that county under void process, though issued by circuit judge of another circuit); *Janes v. Heidtman*, 272 So. 2d 207 (Fla. 4th DCA 1973); *Yates v. Buchanan*, 170 So.2 d 72 (Fla. 3d DCA 1964). Though these cases address the ability of a circuit court to review the order of another circuit court, we see no reason why the same principle should not apply when the reviewing court is a district court of appeal. We therefore answer the certified question in the affirmative.
>
> As the district court below correctly acknowledged, however, certain restrictions apply when the court entertaining the habeas corpus petition does not have supervisory or appellate jurisdiction over the court that issued the order or other process under challenge. In such

> a case, the scope of the reviewing court's inquiry is limited to whether the court that entered the order was without jurisdiction to do so or whether the order is void or illegal. The reviewing court may not discharge the detainee if the detention order is merely defective, irregular, or insufficient in form or substance. . . .

684 So. 2d at 816.

The foregoing principles derive from both the Florida Constitution and practical considerations. First, as noted in this Court's opinion in Alachua Regional, Article V, section 4(c) of the Florida Constitution grants the marshal of a district court of appeal "the power to execute the process of the court throughout the territorial jurisdiction of the court." Thus, that power did not "extend beyond those physical boundaries." 684 So. 2d at 816. Similarly, Article V, section 4(b)(3), limits the habeas corpus jurisdiction of a district court of appeal to the "territorial jurisdiction of the court."[8]

The foregoing limitation of the habeas jurisdiction of a court lacking appellate or supervisory jurisdiction over the relevant trial court is a principle with well-established roots in Florida, going back at least 70 years. Frederick v. Rowe, 105 Fla. 193, 140 So. 915 (1932); State ex rel. Perky v. Browne, 105 Fla. 631, 142 So. 247

[8] "A district court of appeal . . . may issue writs of habeas corpus returnable before the court . . . or before any circuit judge within the territorial jurisdiction of the court."

(Fla. 1932).[9]

Compelling practical reasons exist to support the foregoing principle. First, a contrary principle could effectively result in two different district courts of appeal having concurrent jurisdiction as to any particular issue, as review might plausibly be sought in one appellate court through a habeas corpus petition, while comparable review is sought in another appellate court through certiorari or prohibition proceedings.

Second, there is no compelling need for any expansive habeas corpus jurisdiction with respect to pretrial orders in civil commitment proceedings. Florida appellate courts have long recognized that habeas corpus proceedings should not be utilized as a substitute for other available review proceedings.[10] As commitment proceedings are civil in nature, the right to obtain appellate review of pretrial orders is limited to those which are enumerated in Rule 9.130, Florida Rules of Appellate Procedure. In addition to the significant list of appealable orders set forth therein, matters which go to the trial court's alleged lack of jurisdiction can be reviewed by

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[9] Numerous other cases enunciating the same principle are set forth both in this Court's Alachua Regional opinion, 684 So. 2d at 816, and in the Third District Court of Appeal's opinion in State ex rel. Gerstein v. Schulz, 180 So. 2d 367, 368 at n. 2 (Fla. 3d DCA 1965).

[10] See, e.g., State ex rel. Donaldson v. Kelly, 139 So. 2d 730 (Fla. 3d DCA 1962); Gilbert v. Singletary, 632 So. 2d 1104 (Fla. 4th DCA 1994).

the district court of appeal with appellate jurisdiction, through either a prohibition or certiorari petition. Other orders, which result in a departure from the essential requirements of law, and which cause substantial harm throughout the remainder of the trial proceedings, and for which there is no adequate remedy by way of appeal, can be reviewed by the district court of appeal with appellate jurisdiction, through a certiorari petition. Allstate Insurance Co. v. Langston, 655 So. 2d 91 (Fla. 1995). Through this combination of authorized interlocutory appeals and writ proceedings, few significant orders, if any, resulting in appreciable harm to the detained individual, would escape review through the district court of appeal with appellate jurisdiction. Orders which would escape such review would, by definition, be orders which do not warrant pretrial review. Such orders should, in the normal course of events, abide by the principle that piecemeal review should be discouraged, with most rulings of a trial court having to await the conclusion of the trial court proceedings before being amenable to appellate review.[11]

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[11] The First District Court of Appeal, in Harris v. State, 766 So. 2d 1239, 1240 (Fla. 1st DCA 2000), when confronted with a certiorari petition in which the respondent in a sexually violent predators civil commitment proceeding sought to review the denial of a motion to dismiss, alleging that the commitment case violated the terms of a prior plea agreement calling for probation, noted the abuse to which expansive use of pretrial writs would be subjected. The Fourth District, in its original, April 12, 2000 opinion in the instant case, had observed that certiorari review may well be available as to the denial of a motion to dismiss a commitment case because "an improper refusal to dismiss the Ryce Act proceedings would cause

The petitioner, in the instant proceedings, is essentially trying to create an expansive habeas corpus jurisdiction, which would subject virtually any pretrial order

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petitioner irreparable harm that oculd not be remedied on appeal since he will be in detention during the proceedings, and nothing on appeal can cure that." Murray v. Kearney, 25 Fla. L. Weekly D924 (Fla. 4th DCA April 12, 2000). The Fourth District's opinion on rehearing completely withdrew such language. As to the language which the Fourth District ultimately withdrew, the First District, in Harris, had expressed disagreement, because of the adverse effect which that language could have had on opening the doors of appellate courts to extensive pretrial review proceedings:

> . . . While this statement [the quote from the Fourth District's original Murray opinion], on its face, has a certain force of logic, we decline to accept the principle for two reasons. First, it appears to be contrary to the established law of this state. [citations omitted]. Second, extended to its logical conclusion, adoption of this reasoning would open the door for interlocutory review of denial of motions to dismiss (and other potentially dispositive defense motions) in all criminal and involuntary commitment proceedings. The delays which would follow in trial court proceedings and the increase in the workloads of the appellate courts of this state would both be unacceptable.

766 So. 2d at 1240-41. Those sentiments should be equally applicable to efforts to create expansive pretrial habeas corpus jurisdiction in appellate courts. It should be noted that the Fourth District, with a similar split of custodial/territorial and appellate/supervisory jurisdiction, has found some issues to warrant pretrial habeas review in pretrial commitment proceedings. Valdez v. Moore, 745 So. 2d 1009 (Fla. 4th DCA 1999) (entitlement to pretrial adversarial probable cause hearing). Other issues have not justified that court's exercise of pretrial habeas jurisdiction. Amador v. State, 766 So. 2d 1061 (Fla. 4th DCA 2000) (failure to proceed to trial within statutory 30-day period).

to some form of review by a higher level court, thereby circumventing the general principle of restricting such pretrial review to matters of a serious magnitude, which cannot await appellate review after final judgment. For the reasons stated by the First District in Harris, supra, the effect of the petitioner's argument would have serious adverse effects on the appellate courts of this State.

Furthermore, in the context of civil commitment cases, the legislature has envisioned reasonably quick trials, within 30 days of the initial probable cause determination, which is typically made on the date of the filing of the commitment petition.[12] The commitment petitions are also expected, in the normal course of events, to be filed with several months of the individual's final year of incarceration in the Department of Corrections still remaining.[13] Thus, absent waivers by the defense, most commitment cases should be tried either within the last year of incarceration with DOC, or shortly after the expiration of the prison sentence. No need for pretrial habeas review (as to commitment cases) would ever exist within that last year of incarceration with DOC. In addition to expedited trials, the First District has noted that given the nature of confinement in commitment cases, "it will afford expedited consideration to appeals from orders of involuntary commitment." Harris,

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[12] See section 394.916, Florida Statutes.

[13] See sections 394.913, 394.914, Florida Statutes.

766 So. 2d at 1241; see also, Everett v. State, 524 So. 2d 1091 (Fla. 1st DCA 1988). Given the entitlement to such expedited proceedings, at both the trial and appellate court levels, there is no compelling need for expanding the potential scope of pretrial habeas corpus review, especially when the reviewing court is one which lacks appellate or supervisory jurisdiction over the trial court. Virtually all pretrial orders should have to await the finality of the trial court litigation as a prerequisite to any form of appellate court review, barring the limited circumstances which currently justify appeals under Rule 9.130, prohibition proceedings based on a lack of jurisdiction, and certiorari proceedings for such serious violations which cannot effectively be reviewed in subsequent appeals.[14]

The State would also note that the issue raised by the petitioner herein is one which can be considered by an appropriate rules committee of this Court. It may be that such a committee would decide that pretrial appellate review should be limited to those orders which are currently enumerated in Rule 9.130, or which currently satisfy the stringent requirements for certiorari review. Alternatively, such a committee might decide that there are other classes of pretrial orders which should be reviewable in civil commitment proceedings. While the State believes, as noted

[14] The classic example of such an order would be a pretrial order mandating discovery disclosures which disclosures can not be undone once they have been made.

above, that the norm should be review after final judgment, whether the pretrial appeals are limited to those currently set forth in Rule 9.130, or those determined to be appropriate for commitment cases through a newly developed rule, the answer is to limit pretrial review to those orders in the approved rule. Any form of pretrial review, whether by appeal or writ, simply serves to delay trial court proceedings for cases which are supposed to proceed to quick trials. Clear limitations on the availability of pretrial review, whether by appeal or writ, will encourage the litigants to proceed to such trials quickly and to seek appropriate appellate review after trial, through appeals which could, as the First District has held, be expedited.

The use of procedural rules to limit the potential situations in which appellate courts with custodial, but lacking appellate, jurisdiction would entertain habeas corpus petitions, has been the means by which non-supervisory appellate courts have been kept away from the review of criminal cases other than their own. Prior to the adoption of Rule 1.850, Florida Rules of Criminal Procedure, the predecessor to Rule 3.850, post-conviction, collateral review proceedings were handled through habeas corpus petitions. This raised the possibility that the custodial court, which would hear the habeas corpus case, would be one other than the trial court which entertained the criminal action. Rule 3.850 and its predecessor were thus designed to utilize a court-approved rule to replace habeas corpus proceedings, and to keep those proceedings

in the trial court which heard the criminal case. See Roy v. Wainwright, 151 So. 2d 825 (Fla. 1963); State v. Broom, 523 So. 2d 639, 640 (Fla. 2d DCA 1988). As the instant case involves a question of determining what pretrial orders should be reviewable by a higher level court, as opposed to the determination of what trial court would hear post-trial collateral review proceedings, the issue in the instant case should be controlled by the limitations on interlocutory appeals under rule 9.130, or any other court-approved rule which may expand the scope of such pre-trial appeals.[15] Enumerated pretrial orders will be reviewable on appeal in the local appellate court; other matters, barring the exceptional ones governed by prohibition and certiorari proceedings, will have to await final judgment in the trial court. Habeas corpus should then effectively be eliminated.

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[15] It should be noted that a variation of the habeas corpus jurisdictional issue currently before the court will also arise in the context of post-commitment verdict proceedings, when the committed individual, after exhausting a direct appeal, will return with collateral proceedings raising the question of ineffective assistance of trial counsel. As the current law stands, unless a rule of procedure, comparable to Rule 3.850 in criminal cases, is adopted by this Court, such ineffective assistance claims will have to be brought by habeas corpus petitions, in the circuit court where the commitment facility is located. Given the greater familiarity that the court which heard the commitment case will have, given the availability of records in the commitment court, and given the presence of assistant state attorneys and assistant public defenders in the circuit which heard the commitment case, the undersigned believes that there will be a need, in the foreseeable future, for adopting a procedural rule which gives commitment courts the same type of jurisdiction, for post-commitment collateral review proceedings, that rule 3.850 created for criminal cases.

The petitioner herein suggests several reasons for revisiting the limitations set forth in Alachua Regional. First, it is suggested that the State could forum shop by moving the petitioner from one facility to another. That is simply disingenuous. The location of commitment facilities is limited by budgetary concerns and the availability of facilities. During the first two years of the operation of the sexually violent predators act, the State had just two facilities, both of which were located within the territorial limits of the Fourth District - the Martin Treatment Center and the South Bay Detention Center. The Martin facility has recently been closed and moved to a facility in Arcadia, and the South Bay facility should be closed by the end of this year, and the Arcadia facility will then be the only facility operated by the Department of Children and Families for the sexually violent predators commitment proceedings. Moreover, to the extent that pre-petition evaluations are processed more expeditiously, with cases being filed further in advance of the expiration of the Department of Corrections sentence, the commitment case would proceed while the person is still serving the DOC prison sentence, and determinations regarding where the person is held would, at that stage, be the sole decision of DOC, as the Department of Children and Families would not have any custody until the end of the prison sentence.[16] Not

[16] To the extent that the commitment cases can proceed while the individual is still finishing the DOC incarcerative sentence, DOC may very well have the ability to transfer the individual to the local county jail, in the county where the commitment

only is there an absence of commitment facilities with which the State could play the games which the Petitioner disingenuously presumes the State will play, but, the custodian, who determines the facility, is the Department of Children and Families, and DCF is not a party to the commitment case and has no interest in whether a particular individual is committed or not - there is no motive for DCF to move individuals from one facility or another for the purpose of having one appellate court or another vested with habeas jurisdiction as to matters affecting the commitment case itself.

The petitioner further suggests that the limited scope of habeas jurisdiction as defined in Alachua Regional is somehow in conflict with the rules governing habeas corpus petitions seeking belated appellate review. Pursuant to Rule 9.140(j), Florida Rules of Appellate Procedures, such petitions are filed in the appellate court which has jurisdiction for a direct appeal; not in the appellate court where the person is incarcerated. This analogy is without merit for several reasons. First, the remedy of

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proceedings are being conducted, just as such individuals are transferred to county jails when they may appear as witnesses in other criminal cases. This would serve to keep the individual in close proximity to the commitment court, and would eliminate any potential situations in which a habeas court is one other than the appellate court for the district in which the commitment case is being tried. Such a utilization of the county jail facilities, however, would terminate when the DOC incarcerative sentence ends, and would also hinge on the willingness of the county jail to hold the DOC inmate.

a petition for writ of habeas corpus for a belated appeal is not the discharge of an individual; it is simply a belated direct appeal. Any ultimate decision to release the individual would then flow from the appellate court's normal appellate jurisdiction. The appellate court would not be ordering a custodian, beyond its territorial limits, to produce and/or discharge an individual. Second, as noted above, this Court, through its rule-making capacity, clearly has the power to promulgate rules enumerating what pretrial matters are reviewable by the appellate court with normal appellate jurisdiction, and, by adding or subtracting from the enumerated list, this Court can obviously provide for methods of review which render habeas review unnecessary. That was what was done through Rule 3.850. It is also something which has implicitly been done through existing Rule 9.130, which the petitioner herein wishes to circumvent.

The petitioner further argues that Alachua Regional is somehow inconsistent with Rule 9.040(c), Florida Rules of Appellate Procedure, which provides that "[i]f a party seeks an improper remedy, the cause shall be treated as if the proper remedy had been sought." The petitioner argues that the Fourth District herein, absent habeas jurisdiction, could not treat the case as a certiorari petition, as the court with normal appellate jurisdiction would have been able to. Apart from the question of whether

certiorari would even be an appropriate remedy to pursue in the instant case,[17] the petitioner's example is contrived and does not raise any problem. If, for the sake of argument, the issue were reviewable by certiorari, even though the Fourth District would lack certiorari jurisdiction, the Fourth District would have been able to apply Rule 9.040(b), in conjunction with 9.040(c). Whereas Rule 9.040(c) would call for treating the proceeding as if the right remedy had been sought, Rule 9.040(b) would authorize the Fourth District to transfer a habeas corpus proceeding to the Third District, which could, if it deemed appropriate, treat the case as a certiorari proceeding.[18] In the instant case, the Fourth District's initial order did attempt to transfer the case to the Third District. Although the Third District, lacking custody with that territory, did not have habeas jurisdiction, if the Third District believed the issue to be reviewable by certiorari, it would have had the authority to do so by virtue of rules 9.040(b) and 9.040(c) operating in conjunction with one another. The principal problem in the instant case, which precluded the Third District from doing

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[17] The Fourth District's original opinion suggested that certiorari would be an appropriate remedy to raise the issue herein. Murray, 25 Fla. L. Weekly at D924. The Fourth District later withdrew that language. The First District, in Harris, supra, has clearly held that the issue is not reviewable by certiorari and must await a final direct appeal.

[18] Rule 9.040(b) Provides: "If a proceeding is commenced in an inappropriate court, that court shall transfer the cause to an appropriate court."

that, was the fact that the petitioner herein never procured a written order denying the motion at issue. Absent such written order, certiorari jurisdiction would not exist in any court. Rule 9.100(c), Florida Rules of Appellate Procedure. Had the petitioner procured such a written order, and sought initial review of it, whether by habeas or certiorari, within the 30 days allowed for certiorari review, the Fourth District could have transferred the case, and the Third District could have decided whether it believed the issue to be reviewable by certiorari. That court could then have either found that the issue was not of sufficient magnitude to warrant certiorari review, or, the court could have reviewed it on the merits if it believed certiorari jurisdiction existed. In either event, the petitioner's alleged dilemma based on rule 9.040(c) would have been nonexistent.

The foregoing discussion has, to a large extent, assumed that the trial court's oral order herein is one which was part of the civil commitment case, and not a part of the prior, closed criminal case. Although the order sought the specific performance of the prior plea agreement, by having Murray released on probation, it sought to do so through the dismissal of the commitment case. Absent such a dismissal of the commitment case, no such result could ever be attained. Thus, regardless of the title of the motion, or any characterization of it, it is clearly part and parcel of the

underlying civil commitment case.[19]

In view of the foregoing, the principles enunciated in Alachua Regional do not warrant reconsideration, and they do not result in any problems in the context of pretrial orders in civil commitment cases. Dismissal of the habeas petition, on the basis of Alachua Regional was therefore correct, since the order permitting the commitment case to proceed, with Murray's continued detention pending the commitment trial and its verdict, did not result from a lack of jurisdiction of the trial court, and did not constitute a void or illegal order.

As the Florida legislature has created a civil commitment scheme for sexually violent predators, section 394.910, et seq., Florida Statutes, where it is alleged that the respondent in the trial court has a qualifying prior conviction for a sexually violent offense, and currently has a qualifying mental abnormality or personality disorder which renders the person likely to commit further sexually violent offenses, the trial court clearly has jurisdiction to proceed with the commitment case. Under such circumstances, there is similarly nothing "illegal" about proceeding with a commitment case.

Moreover, as will be set forth in the ensuing Argument in Point II of this brief,

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[19] When review of such an order was sought, through certiorari, in the First District in Harris, that court clearly believed that the order to be reviewed was one emanating from the commitment case.

the existence of a prior plea agreement and/or sentence calling for probation at the conclusion of incarceration, would never constitute an impediment to the pursuit of a civil commitment based upon the person's mental condition and dangerousness at the time of the completion of his incarceration.

II. THE IMPOSITION OF A PROBATIONARY SENTENCE, SUBSEQUENT TO INCARCERATION, AFTER ACCEPTING A PLEA, DOES NOT CONSTITUTE A BAR TO THE SUBSEQUENT FILING OF A PETITION FOR INVOLUNTARY CIVIL COMMITMENT AS A SEXUALLY VIOLENT PREDATOR.

Murray's underlying claim is that the pursuit of involuntary civil commitment of Murray, as a sexually violent predator, constitutes a violation of a prior criminal plea agreement, pursuant to which he received a sentence of incarceration, to be followed by probation with sex offender treatment. He argues that the commitment proceeding violates the plea agreement by interfering with the probation which the prior criminal sentence called for.

Civil commitment of sexually violent predators is a civil, remedial matter.[20]

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[20] See Kansas v. Hendricks, 521 U.S. 346 (1997); Westerheide v. State, 767 So. 2d 637 (Fla. 5th DCA 2000), review granted, SC00-2124 (Fla. 2000); Hubbart v. Superior Court, 969 P. 2d 589 (Cal. 1999); In re Linehan, 557 N.W. 2d 171 (Minn. 1996), vacated and remanded for reconsideration, 522 U.S. 1011 (1997), reconsidered, 594 N.W. 2d 867 (Minn. 1999); In re Young, 857 P. 2d 989 (Wash. 1993); State v. Post, 541 N.W. 2d 115 (Wis. 1995); In the Matter of Hay, 953 P. 2d 666 (Kan. 1998); Martin v. Reinstein, 987 P. 2d 779 (Ariz. App. 1999); Grosinger v. M.D., 598 N.W.

It is not punitive, it is not a part of a criminal sentence, and it is therefore a matter which is beyond the scope of criminal proceedings. As civil commitment is beyond the scope of criminal proceedings, it is not for a judge in a criminal case to either impose such civil commitment, or promise that such civil commitment will not ensue. It is simply a matter beyond the scope of what the criminal court can deal with.

In the instant case, the plea colloquy/sentencing transcript reflects that Murray was sentenced to a term of years, to be followed by probation with sex offender treatment. The colloquy does not refer to, or discuss, the possibility, one way or the other, as to whether Murray might be subjected to civil commitment at the conclusion of his incarceration. As such, there are no "promises" that Murray will, or will not, be subjected to such civil commitment in the future.

No criminal court judge, at the time of accepting a plea, or imposing a sentence of incarceration, followed by probation, could even know whether the individual being sentenced might be subjected to commitment proceedings years in the future. The sexually violent predator commitment proceeding focuses on the individual's mental condition and dangerousness at the time that the person is about to be released

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2d 779 (N.Dak. 1999); In re Detention of Samuelson, 727 N.E. 2d 228 (Ill. 2000); Commonwealth v. Bruno, 735 N.E. 2d 1222 (Mass. 2000); In re the Detention of Garren, 2000 WL 1855129 (Iowa 2000); In the Matter of the Commitment of W.Z., 2001 WL 410294 (N.J. App. April 23, 2001).

into society, at the conclusion of incarceration.[21] As that time period comes, in the instant case, and in many similarly situated cases, years after the criminal sentencing proceeding, it is not possible for any judge, assistant state attorney, assistant public defender, or criminal defendant, to know whether the person might qualify for such civil commitment years in the future. That decision will ultimately hinge on psychological evaluations occurring near the end of the person's incarceration, based on the person's condition and dangerousness at that time. It will also be based on considerations, by mental health professionals, of the person's conduct during the intervening years, while incarcerated. All of those matters are obviously beyond the range of anyone's knowledge at the time of a prior plea agreement and criminal sentencing proceeding. Under such circumstances, the imposition of a sentence of incarceration followed by probation, with sex offender treatment, can not constitute a bar to subsequent civil commitment proceedings; and, the commencement of such commitment proceedings can not constitute a violation of the prior plea agreement, since the prior plea agreement does not make any promises, one way or the other, as to whether the person will qualify for civil commitment in the future, or whether the person will be subjected to such civil commitment in the future.

Claims such as the one advanced by Murray have routinely been rejected by

[21] Section 394.912, Florida Statutes.

courts in jurisdictions with sexually violent predator commitment proceedings. In In the Matter of Hay, 953 P. 2d 666 (Kan. 1998), Hay had pled guilty to five counts of assorted sex offenses in 1993. The following year, Kansas enacted its sexually violent predators involuntary civil commitment act, and, when Hay was getting released from his incarceration, the civil commitment petition was filed.[22] Hay thereafter claimed that the filing of the commitment petition violated his plea agreement, and the state supreme court rejected the claim:

> Hay's claim that the filing of the commitment petition in this case violated his plea agreement is likewise without merit. Hay's argument is unpersuasive for several reasons.
>
> Hay's involuntary commitment is grounded solely on his mental ailment and present dangerousness. His earlier convictions were not the basis for his commitment and served only to identify him as a member of the pool of people potentially subject to the Act. Hay's present confinement is not punishment for any offense, but merely civil commitment based on his mental condition.
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> Civil commitment following the service of a sentence is collateral to a plea and independent of the criminal case. *See George v. Black*, 732 F. 2d 108, 110-11 (8th Cir. 1984). In addition, the plea agreement is immaterial as far as proceedings under the Act are concerned.

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[22] The Hay opinion does not specify the incarceration release date. However, the Kansas statute is structured similarly to Florida's, and calls for evaluations, and the filing of commitment petitions, during the last few months of the prison sentence. See, Kan. Stat. Ann. s. 59-29a03.

953 P. 2d at 676.

A Wisconsin appellate court, in State v. Zanelli, 569 N.W. 2d 301 (Wis. App. 1997), reached the same conclusion, where the original criminal plea agreement called for five years incarceration, to be followed by ten years of probation. When the State filed its sexually violent predator commitment petition, at the conclusion of the incarceration, Zanelli unsuccessfully argued that the commitment petition violated the prior plea agreement. The court noted that the criminal plea agreement was "silent regarding future" commitment proceedings. 569 N.W. 2d at 305. "Thus, the record does not reflect that Zanelli bargained for the State's promise to forego a future [commitment] proceeding." Id. Furthermore, the future commitment process was viewed as a collateral consequence of the plea, which is not within the realm of criminal punishment. Thus, the court concluded "that under the circumstances, there was no breach of the criminal plea agreement by virtue of the State's pursuit of a sexual predator petition following completion of the criminal sentence." Id. See also, In re the Commitment of Connelly, 1998 WL 769858 (Wis. App. 1998) (same); Martin v. Reinstein, 987 P. 2d at 805-806 (since commitment is collateral consequence, it does not violate prior plea agreement).

Other courts have come to the same conclusion. Thus, an Illinois appellate court stated that "[t]he fact that the State may have been unhappy with the plea results

is irrelevant to whether respondent is a sexually violent individual requiring treatment. . . . Because the proceedings are civil, respondent is not being subjected to greater punishment." In re Detention of Bailey, 740 N.E. 2d 1146 (Ill. App. 2000) (citing Hay). A Washington appellate court engaged in similar reasoning:

> Finally, Mr. Gallegos contends his plea agreement was breached by the State when it filed the petition because the State previously agreed to recommend "71 months incarceration" and "will not file further charges in regard to this incident." Mr. Gallegos's status as a sexually violent predator will be determined in a separate, independent trial. The proceeding is civil, not criminal, and a civil involuntary commitment petition filed pursuant to RCW 71.09 is not further charges.

In re the Detention of Gallegos, 1999 WL 339243 (Wash. App. 1999) (unpublished opinion).

In In re Ashman, 608 N.W. 2d 853 (Minn. 2000), Ashman had entered a plea, in 1991, as to one count of criminal sexual conduct. At the time, by virtue of his prior history of sexually violent conduct, he was subject to either enhanced criminal sentencing, or referral for civil commitment as a psychopathic personality.[23] When

[23] Minnesota has several civil commitment statutes. The one which is most analogous to Florida's sexually violent predators commitment act is the Minnesota sexually dangerous persons act. See, Linehan, supra. The psychopathic personality act is also similar, but has a higher burden of proof and requires proof of a habitual course of sexual misconduct, evidenced by an utter lack of power to control one's behavior. In re Blodgett, 510 N.W. 2d 910 (Minn. 1994).

the commitment proceedings were commenced, Ashman claimed that this violated the prior plea agreement, stating that it was his understanding of the plea that no civil commitment proceedings could be filed against him unless he committed further sexual offenses. The Minnesota Supreme Court evaluated the plea agreement in accordance with principles of contract law, and found that there was no promise, in the plea proceedings, that commitment proceedings would not be pursued on completion of the incarcerative sentence. The 1991 plea agreement was construed as providing that there would not be any judicial recommendation for commitment at the time of sentencing; the agreement was deemed silent as to a subsequent time period, such as the conclusion of incarceration, years in the future. In addition to finding that there was no promise in the plea agreement not to institute commitment proceedings years in the future, the court suggested that a criminal court should not have the power to make promises as to whether a future civil remedy - commitment - would be pursued:

> We have strong reservations as to whether either the county attorney or the district court had authority to enter into a plea agreement that would preclude the filing of a petition for civil commitment as appellant claims, but we need not reach that issue. In *Call v. Gomez*, 535 N.W. 2d 312, 320 (Minn. 1995), we held that civil commitment is remedial because it is for treatment purposes, not for preventive detention and in *In re Linehan*, 557 N.W. 2d 171, 187-89 (Minn. 1996), we held that the purpose of Minn. Stat. § 253B.02 subd. 18c, which established

> procedures for civilly committing criminally dangerous people, was for treatment, and thus the act was facially civil and not punitive. As the court of appeals observed, we note that a determination of good cause to initiate a petition for civil commitment involves different considerations than a county attorney's decision whether to accept a plea.

608 N.W. 2d at 859, n. 7.[24]

Similar reasoning has been used by Florida's Second District Court of Appeal, in conjunction with statutory requirements that sexual predators register with law enforcement authorities after completion of their sentences, and, that their residences be published, so that the community is aware of their existence in the community. Collie v. State, 710 So. 2d 1000, 1008 (Fla. 2d DCA 1998). Collie had entered a plea in a criminal case, resulting in community control and probation. Subsequently, the State sought to have him declared a sexual predator, under section 775.21, Florida Statutes (1993), for the purpose of registration with law enforcement and publication of his residence. Collie argued that the publication, registration and notification requirements violated the terms of the prior criminal plea bargain, which made no reference to them, as those requirements were alleged to constitute additional

[24] Other courts note, without discussing, facts which indicated that commitment petitions were filed either after criminal plea agreements or after sentences which included probationary terms after incarceration. See, e.g., State v. Wofford, 1998 WL 463037 (Wis. App. 1998) (unpublished opinion); State v. Watson, 595 N.W. 2d 403 (Wis. 1999) (commitment petition filed after incarcerative sentence imposed on a guilty plea).

punishment. The Second District rejected that argument, finding that a collateral consequence of a plea cold not violate terms of a plea agreement:

> Collie asserts that the sexual predator designation constitutes a breach of contract because it imposes punishment beyond that to which he contractually agreed. In *Benitez v. State*, 667 So. 2d 476 (Fla. 3d DCA 1996), the Third District Court held that the sexual predator designation was a collateral consequence of the guilty plea and the court was not required to advise the defendant of this consequence during the plea colloquy. We agree.

710 So. 2d at 1008. Thus, the Court concluded that the sexual predator designation was not punishment and, since it was not punishment, it could not violate the terms of a plea agreement which is concerned solely with criminal punishment. 710 So. 2d at 1008. The same principles obviously hold true in the context of a civil commitment scheme which is civil and not penal in nature.

Many other courts have touched on this issue, at least indirectly, when they have consistently concluded that civil commitment of sexually violent predators is a collateral consequence of a plea, and the criminal court, when accepting the plea, need not advise the criminal defendant of the collateral consequence of commitment. See People v. Moore, 81 Cal. Rptr. 2d 658 (Cal. App. 1999); State v. Bollig, 593 N.W. 2d 67 (Wis. App. 1998); State v. Zanelli, 569 N.W. 2d 301 (Wis. App. 1997); Paschke v. State, 909 P. 2d 1328 (Wash. App. 1996); Martin v. Reinstein, supra; In the Matter of Hay, supra. Two district courts of appeal have reached the same conclusion as to

Florida's sexually violent predators commitment act. Pearman v. State, 764 So. 2d 739 (Fla. 4th DCA 2000); Watrous v. State, 26 Fla. L. Weekly D686 (Fla. 2d DCA Mar. 7, 2001). The same conclusion has been reached with respect to general civil commitment statutes. Cuthrell v. Patuxent Institution, 475 F. 2d 1364 (4th Cir. 1973); George v. Black, 732 F. 2d 108 (8th Cir. 1984). Direct consequences, which must be covered in a plea colloquy, are those which are both direct and penal in nature. Daniels v. State, 716 So. 2d 827 (Fla. 4th DCA 1998). The foregoing cases have concluded that the consequence of civil commitment is not penal in nature; it is remedial, for the protection of the public, and for the treatment of the committed person. Furthermore, the consequence is not direct. The consequence of commitment is contingent upon a multitude of intervening factors - the person's mental condition, years in the future, when the incarceration ends; the recommendation of the mental health professionals at that point in time; the state attorney's review of the case and decision as to whether to pursue commitment; the person's conduct during the incarceration years.

Since the consequence of commitment is collateral, and need not be covered in plea colloquies, it further follows that it is a subject with which the criminal court should not be concerning itself, as the facts and decisions affecting any ultimate commitment petition are simply unknown at the time of the criminal plea.

Several Florida courts have already concluded that the existence of a prior criminal plea agreement should not provide a basis for an individual to obtain a pretrial bar to the subsequent commitment proceedings. The Fourth District, in the instant case, dismissed the pretrial habeas petition based on a jurisdictional assessment of Alachua Regional. However, the Court did go further, and implicitly rejected any challenge to the State's right to pursue commitment in the aftermath of the plea: the Court analogized the sexually violent predator commitment proceeding to a general civil commitment proceeding under the Baker Act, and stated:

> Although we recognize that the petitioner views his continued confinement as part of his incarceration from his plea, the law does not make this legal joinder any more than it would if the petitioner were committed under the Baker Act after his incarceration had been completed and while he was on probation.

770 So. 2d at 274. Likewise, the First District, in Harris, supra, found that there was no right to engage in any pretrial challenge based on allegations that the commitment proceeding violated a prior plea agreement. See also, Baxstrom v. Herold, 383 U.S. 107 (1966) (civil commitment proceeding is permitted at conclusion of criminal incarcerative sentence if such commitment requires proof of requisite mental condition and current dangerousness).

In addition to the foregoing, it is significant to note two other factors. First, the trial court, expressly held that probation was running while Murray was being

confined to the sexually violent predator commitment facility. Murray was relieved of all reporting obligations while he was so confined, and his probation meant that he would have to live within his current community while not violating the law through the commission of new criminal acts which could otherwise result in a probation violation. As probation was running while the commitment detention persisted, Murray can not argue that the commitment proceeding violates his probationary status.[25]

The second significant factor is that the decision to pursue commitment in the instant case is based, in significant part, on conduct of Murray which occurred subsequent to his plea and subsequent to the imposition of his criminal sentence. A criminal plea is routinely predicated upon an admission of the facts regarding the underlying offense. Rule 3.172(d), Florida Rules of Criminal Procedure. Indeed, in the instant case, after an apparent pretrial confession, Murray, through his counsel, at the plea colloquy, expressly acknowledged the validity of the facts set forth in the arrest form. Notwithstanding such an admission, which formed the predicate for the plea at the plea colloquy, Murray subsequently disavowed that admission and recanted

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[25] At least one other court has found that criminal probationary status can proceed while a person is civilly committed. See State v. Keith, 1998 WL 514709 (Wis. App. 1998) (parole and sexually violent predator commitment could run simultaneously). But see, Commonwealth v. Sheridan, 743 N.E. 2d 856 (Mass. App. 2000) (probation commenced after sexually violent predator commitment).

his confession. This is significant for two distinct reasons. First, Murray himself has violated the factual underpinning of his own plea agreement. Second, this disavowal of guilt, coming after the plea, is indicative of post-plea conduct, and that post-plea conduct is an integral part of the psychological assessment in the instant case. Both of the psychologists who evaluated Murray for the Department of Children and Families' multidisciplinary team, found that Murray was not admitting his guilt in the instant case, to which he pled and had been convicted, and that he had therefore not participated in offered treatment. This is a factor of psychological significance, as both doctors found that a refusal to acknowledge responsibility, and a similar failure to accept treatment, have a significant correlation to current and future dangerousness. Considerable psychological literature is consistent with that assessment. See, Lile v. McKune, 224 F. 3d 1175, 1191 (10th Cir. 2000), cert. granted, 149 L.Ed. 2d 752 (2001) ("In fact, most mental health experts agree that 'a sex offender must admit his guilt for treatment and rehabilitation to be successful.' Brendan J. Shevlin, Between the Devil and the Deep Blue Sea: A look at the Fifth Amendment Implications of Probation Programs for Sex Offenders Requiring Mandatory Admissions of Guilt, 88 Ky. L. J. 485, 485 (2000); see also, Jonathan Kaden, Therapy for Convicted Offenders: Pursuing Rehabilitation Without Incrimination, 89 J. Crim. L. and Criminology 347 (1998)." see also, R. Karl Hanson, "What Do We Know About Sex

Offender Risk Assessment?, 4 Psychology, Public Policy, and Law 50, 57 (1998) (failure to complete treatment as significant predictor of sexual offense recidivism); Henry M. Hoberman, "Expert Witness Report and Testimony in Sexual Predator Civil Commitment Proceedings," p. 9-43, in Anita Schlank and Fred Cohen, eds., The Sexual Predator: Law, Policy, Evaluation & Treatment (Civic Research Inst., Kingston, N.J. 1999) (importance of amenability of offender to treatment and offender's acknowledgment and acceptance of responsibility). Furthermore, the current assessment of the mental condition - antisocial personality disorder - and dangerousness, was also based, in part, on Murray's violent and disruptive behavior while incarcerated, as evidenced by numerous disciplinary reports. As the commitment is therefore being predicated not simply on a prior conviction, but on subsequent conduct, a current mental condition, and current and future dangerousness, the existence of a prior plea agreement in a criminal case can not constitute a bar to the commitment proceeding.

Any contrary conclusion would clearly undermine valid legislative programs. The legislature has mandated sex offender treatment as a part of any probationary sentence for enumerated sex offenses. See, section 948.03(4), Florida Statutes. If the imposition of such mandatory sex offender treatment through probation, after an incarcerative sentence, bars future commitment proceedings, the State would

effectively have to forego probation as an option in all criminal sentencing proceedings for sex offenses, in order to hold open the option for future, necessary civil commitment. Years in advance of the anticipated prison release date and commencement of probation, the State would have to resort to sheer speculation, in deciding whether to accept a sentence which includes probation, or to forego it, to keep open the possibility of future civil commitment. Those are decisions which can not be made at the time of the plea and sentencing. Any judicial decision which effectively coerces the State to make a binding decision at that time, not only precludes consideration of subsequent conduct and future mental conditions and dangerousness, but also serves to undermine protection which the general public is lawfully entitled to receive, and undermines the valid legislative goal of providing long-term treatment, in a secure setting, when it is warranted.

CONCLUSION

Based on the foregoing, the lower court's order dismissing the habeas corpus petition should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

RICHARD L. POLIN
Florida Bar No. 0230987
Assistant Attorney General
Office of the Attorney General
Department of Legal Affairs
444 Brickell Avenue, Suite 950
Miami, Florida 33131
(305) 377-5441
(305) 377-5655 (fax)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Respondent was mailed this _____ day of July, 2001 to JOHN MORRISON, Assistant Public Defender, Office of the Public Defender, 1320 N.W. 14th Street, Miami, Florida 33125.

RICHARD L. POLIN

CERTIFICATE REGARDING FONT SIZE AND TYPE

I HEREBY CERTIFY that the foregoing Answer Brief of Respondent has been typed in Times New Roman, 14-point type.

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RICHARD L. POLIN