IN THE SUPREME COURT OF FLORIDA

CASE NO. 01-100

CHARLES MURRAY,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

REPLY BRIEF OF PETITIONER ON MERITS

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit of Florida
1320 N.W. 14th Street
Miami, Florida 33125
(305) 545-1958

JOHN E. MORRISON
Assistant Public Defender
Florida Bar No. 072222

Counsel for Petitioner

TABLE OF CONTENTS

PAGE(s)

TABLE OF AUTHORITIES

CASES **PAGE(s)**

OTHER AUTHORITIES

ARGUMENT

I.
ALACHUA REGIONAL JUVENILE DETENTION CENTER v. T.O. SHOULD BE RECONSIDERED IN LIGHT OF THE ACTUAL TEXT OF THE CONSTITUTION AND THE PRINCIPLE OF NOT SPLITTING JURISDICTION BETWEEN DISTRICT COURTS OF APPEAL.

In *Baggett v. Wainwright*, 229 So. 2d 239 (Fla. 1969), this Court expressed the sound jurisprudential reasons for not splitting jurisdiction over a case between different district courts of appeal. In the context of habeas corpus petitions to secure belated appeals, this Court held that:

> the soundest and most expeditious procedure should require the application for a writ [of habeas corpus] challenging such alleged deprivations to be filed in the same district court which is empowered to grant the ultimate relief. *This procedure would not only operate to balance out and minimize the judicial labor in proceedings of this kind, but would also create less procedural difficulties*.

Id. at 244 (emphasis supplied here and throughout the brief).

The state's brief agrees with this principle.[1] For instance, that brief expresses concern with "two different district courts of appeal having concurrent jurisdiction as to any particular issue." (State's brief at 18). Additionally, the state notes that Florida Rule of Criminal Procedure 3.850 (and its predecessors) has "been the means by

[1]The legislature also agreed with the principle of not splitting a case between jurisdictions by requiring these civil commitment petitions normally to be filed by the State Attorney in "the circuit where that person was last convicted of a sexually violent offense." § 394.913(1), Fla. Stat. (2000).

which non-supervisory appellate courts have been kept away from the review of criminal cases other than their own." (State's brief at 23). Similarly, the state suggests a rule similar to 3.850 to keep ineffective assistance of counsel claims in these "sexual predator" commitment cases[2] from being heard "in the circuit court where the commitment facility is located." (State's brief at 24 n.15). The state's brief also expresses a hope that if petitions for civil commitment are filed while the person has more than a few weeks remaining on his prison sentence (a rare event in actual practice), the Department of Corrections should transfer the person to the county jail in part, to "eliminate any potential situations in which a habeas court is one other than the appellate court for the district in which the commitment is being tried." (State's brief at 26 n.16). The state raises issues with Mr. Murray's specific examples,[3] but

---

[2]The rule in *Alachua Regional* impacts much more than these cases. *See M.W. v. Davis*, 756 So.2d 90, 95 n.13 (Fla. 2000) (juvenile commitments).

[3]The state disagrees with the analogy to 9.140(j) because granting petitions for belated appeals does not, by itself, result in liberty for the petitioner (State's brief at 27). The issue here is not the remedy, but which court has jurisdiction to hear the petition for belated appeal. The state does not disagree with this part of the analogy to 9.140(j).

The state also takes issue with the citation to 9.040(c) because it thinks certiorari is unavailable generally in civil commitment cases, and specifically unavailable in this case because the trial court's order was oral, not written (State's brief at 27-29). Mr. Murray continues to believe that habeas corpus is the proper remedy in this case. Nevertheless, whether a court ultimately grants other remedies is a separate question from whether a court has the jurisdiction to consider alternative remedies. For Rule 9.040(c) to operate effectively, jurisdiction must not be split between district courts of appeal so one court can consider all the possible remedies. The alternative is the complicated transferring of cases between district courts of

nevertheless agrees with the principle.

The only thing that stands in the way of effectuating that principle is *Alachua Regional Juvenile Detention Center v. T.O.*, 684 So. 2d 814 (Fla. 1996). The state's brief spends a scant half page defending the reasoning in that case, quoting the provision on the court's marshal and asserting that the constitution "limits the habeas corpus jurisdiction of a district court of appeal to the 'territorial jurisdiction of the court.'" (State's brief at 17). That statement is ambiguous, however: Must the court have territorial jurisdiction over the judge entering the detention order, or the location where the state confines the petitioner? Only in a footnote does that state quote the full text of Article V, section 4(b)(3), which ties the district courts of appeal's habeas corpus territorial jurisdiction to the *circuit judges* they supervise: "A district court of appeal or any judge thereof may issue writs of habeas corpus returnable before the court or any judge thereof *or before any circuit judge within the territorial jurisdiction of the court.*"

The state does not dispute that courts often have jurisdiction to hear cases even if they must rely on comity from other courts to execute their process rather than their own marshal (Petitioner's brief at 9). The state also does not dispute that by statute the district courts of appeal's marshals can execute process statewide. *See* § 35.26(2),

---

appeal suggested by the state (State's brief at 28) with no court being able to give a final, definitive answer to the entire case.

Fla. Stat. (2000). Such statewide powers by all levels of courts are not oddities. Absent conflict, district court of appeal opinions are binding statewide unless and until overruled by this Court. *See Pardo v. State*, 596 So. 2d 665 (Fla. 1992). Even county or circuit court judges have the power to issue arrest warrants directed "to all sheriffs of the state." § 901.04, Fla. Stat. (2000); *see* § 901.01, Fla. Stat. (2000).

The state spends the bulk of its brief rehearsing various "practical" arguments about why limiting habeas corpus is a good idea (State's brief at 18-29). These arguments rest on a faulty premise. The language in *Alachua Regional* about "restrictions" and the court's inquiry being "limited" is the consequence of the split jurisdiction, not the reason for it. The rationale for that decision was the constitutional text as discussed above. The "restrictions" language was merely the resulted of this Court's attempt to deal with the obvious problems of splitting jurisdiction between district courts of appeal. The state confuses the rationale with the consequences.

What curtailed Mr. Murray's right to habeas corpus relief was the refusal of the Third District Court of Appeal to accept jurisdiction because it thought the petition was properly before the Fourth District Court of Appeal. Nothing in *Alachua Regional* suggests an intention to orchestrate such conflicts as a way to curtail the right to habeas corpus. This conflict is merely the inevitable result of splitting jurisdiction over a case among different district courts of appeal. The state's even more complicated scheme of first characterizing the claim as habeas corpus or

certiorari and then transferring accordingly would only exacerbate the problem (State's brief at 28-29). Courts simply do not always agree on how to characterize a claim or what the remedy should be. *See, e.g., Patton v. State*, 712 So. 2d 1206, 1207-08 (Fla. 1st DCA 1998) (discussing conflict between courts on whether certiorari or habeas corpus is appropriate to review commitments after determination of incompetency to stand trial).

Additionally, the state reads too much into this "limitations" language. The state does not dispute that the "limitations" in *Alachua Regional* were the general limitations on habeas corpus. Thus, the state's "principle with well-established roots, going back at least 70 years" (State's brief at 17), is actually a description of habeas corpus that goes back more than 100 years. *See, e.g., Ex parte Senior*, 19 So. 652, 653 (1896) ("As a general rule, habeas corpus does not lie to correct mere irregularities of procedure where there is jurisdiction; and in order to sustain the writ there must be illegality, or want of jurisdiction."). The case law the state cites merely picks up this language as a hortatory reminder of the substantive limits of habeas corpus. It says nothing about which court will hear the habeas petition.

Furthermore, even if that language in *Alachua Regional* is read as a limitation on which court will hear the petition, it is not a limitation on the substantive right to habeas corpus. If a district court of appeal thinks a petition for habeas corpus exceeds those limitations, the court does not deny the petition as improper, but should transfer

it to the district court of appeal with supervision over the trial court. *See Amador v. State*, 766 So. 2d 1061 (Fla. 4th DCA 2000). The state has taken a position that the Fourth District Court of Appeal was correct to dismiss Mr. Murray's habeas corpus petition (State's brief at 30: "Dismissal of the habeas petition, on the basis of *Alachua Regional* was therefore correct . . . ."). The logical implication of that position is that the state should support Mr. Murray's alternative petition for mandamus to order the Third District Court of Appeal to hear his petition for habeas corpus. Some district court of appeal must have jurisdiction to hear his petition for habeas corpus.

The state's error in reading *Alachua Regional* as a limitation on *what types* of claims can be raised, instead of *which court* will hear them, permeates much of the state's brief. To that end the state takes the following, somewhat inconsistent, positions: 1) habeas corpus claims are unnecessary because prohibition and certiorari are appropriate remedies for any meritorious pre-trial claims; 2) certiorari is not appropriate because, absent an interlocutory appeal under Rule 9.130, appeals must await a final order; 3) Rule 9.130 can be amended to allow more pre-trial relief; 4) pre-trial relief is unnecessary because of the provision for trials within 30 days.

Although a detailed response is not required given that *Alachua Regional* was never intended as a substantive limit on habeas corpus, the state's position does call into question the status of habeas corpus as a fundamental right. *See* Art. I, § 13, Fla. Const; *Allison v. Baker*, 11 So. 2d 578, 579 (Fla. 1943) ("The writ is venerated by all

free and liberty loving people and recognized as a fundamental guaranty and protection of their right to liberty."). Habeas corpus is an independent remedy to secure liberty, not an interlocutory appeal governed by Rule 9.130 (or 9.140). *See Fennell v. Felton*, 655 So. 2d 1316, 1318 (Fla. 3d DCA1997) (Refusing state's request to remand case to lower court to correct illegal detention because "[t]o honor the state's request would be to turn such an extraordinary proceedings into a general inquiry in the nature of appellate review."). Interlocutory appeals were never intended to remedy illegal detentions. Rule 9.130 itself acknowledges that extraordinary writs such as habeas corpus can challenge orders other than those on its list. *See* Fla. R. App. P. 9.130(a)(1) ("Review of other non-final orders . . . shall be by the method prescribed by rule 9.100.").

The state suggests that this Court can provide a remedy by rule amendment rather than by case law (State's brief at 22-23). Even if the rules could be amended to provide relief for illegal pretrial detentions, however, inevitably situations would arise that outside the rules and habeas corpus would still be necessary. *See, e.g., Teffeteller v. Dugger*, 734 So. 2d 1009, 1026 (Fla. 1999) (habeas corpus is the proper vehicle for ineffective assistance of appellate counsel claims). Habeas corpus is no more codifiable than any other extraordinary remedy. Such unforeseen cases are especially likely in this situation with a relatively new statute and very few appellate court decisions to guide any drafting committee.

The existence of certiorari or prohibition does not render habeas corpus superfluous. Prohibition only remedies lack of jurisdiction or courts acting in excess of their jurisdiction. *See, e.g., Mandico v. Taos Constr., Inc*., 605 So. 2d 850, 853-54 (Fla. 1992).[4] Certiorari has a very different function than habeas corpus. *See Haile v. Gardner*, 91 So. 376 (Fla. 1921). As the state's brief points out, *Harris v. State*, 766 So. 2d 1239 (Fla. 1st DCA 2000), holds that certiorari is inappropriate where an appeal could eventually release the person. Ironically, as the state's brief also points out, certiorari will remedy erroneous discovery orders resulting in the release of information. Any remedy that places greater value on the release of information than the release of illegally detained persons is not the guardian of liberty necessary for a free society. Habeas corpus, not certiorari, is the "great writ."

The statutory provisions the state cites for filing a commitment petition while the person is still serving his prison sentence are permissive, not mandatory. As of July 31, 2001 (the most recent month for which figures are available), only 29 people

[4]One effect of *Alachua Regional*, however, is that some decisions have begun providing habeas relief disguised as mandamus or prohibition so that they can maintain jurisdiction. *See Tanguary v. State*, 782 So. 2d 419 (Fla. 2d DCA 2000) (on a petition for writ of prohibition, ordering the petitioner's release pending trial, but refusing to order commitment case be dismissed for lack of jurisdiction.); *Kinder v. State*, 779 So. 2d 512 (Fla. 2d DCA 2000), *rev. granted* 786 So. 2d 1189 (Fla. 2001) (treating a petition for writ of prohibition as a petition for writ of mandamus; the action being mandated was the release of the petitioner).

subject to commitment petitions are still serving prison sentences (Supp. R. 1).[5] By comparison, 316 people's prison sentences have expired and are detained only for the civil commitment proceedings (Supp. R. 1).

In another case pending before this Court, the state is taking the position that the 30-day trial provision is not mandatory. *See State v. Kinder*, 786 So. 2d 1189 (Fla. 2001) (granting review in SC01-37). Whatever this Court's decision in that case, the vast majority of the 316 persons currently detained (Supp. R. 1) have chosen to conduct discovery and pretrial preparation, and therefore had to waive any trial within 30 days. *See Sjuts v. State*, 754 So. 2d 781, 783 n.6 (Fla. 2d DCA 2000) ("Until adequate discovery rules are promulgated which allow streamlined discovery for the detainee as well as the State, this promise of an early trial is illusory."). Although the law has been in operation for over two-and-a-half years, only 48 persons have gone to trial (Supp. R. 1).

Mr. Murray is not atypical. The state filed its petition for commitment on February 26, 1999, and discovery in his case continues. Filing a petition for habeas corpus has not delayed the efforts of the attorneys or court to bring his case to trial. Where an illegal pretrial detention can easily stretch into years, waiting for an appeal from the final order is too late.

---

[5]Throughout this brief, this abbreviation will refer to the supplemental record filed together with the brief.

In all of its reasons for limiting habeas corpus, however, the state never defends the only limitation involved in this case. The Fourth District Court of Appeal inverted the normal protection of rights by limiting habeas corpus to statutory violations, but not constitutional violations (A. 66). The state parrots this approach in its brief (State's brief at 30) without a word about why constitutional violations are not subject to habeas corpus remedy. As noted in the petitioner's jurisdictional brief, courts routinely accept jurisdiction and granted habeas relief when a detention violates the constitution but not necessarily any statute. Rather than repeat those citations, that brief is incorporated here by reference.

Thus, Mr. Murray is not seeking "an expansive habeas corpus jurisdiction, which would subject virtually every pretrial order to some form of review by a higher level court" (State's brief at 20-21). Instead he is seeking a court that will exercise the same habeas corpus jurisdiction as if the state had held him in the territorial jurisdiction of the Third District Court of Appeal.[6] The best way to accomplish this is to assign his petition to that court. The language of the constitution ties the habeas

[6]The state's brief claims that it could not forum shop because of limited resources and facilities (State's brief at 25-26). Mr. Murray does not claim the state has abused the system to date, but that a legal rule making jurisdiction turn on where the state detains someone is inherently unstable and could be subject to abuse. The state's former foray into treating sexual offenders, Chapter 917, also began with only one facility, but by the end involved three facilities, one in South Florida State Hospital, one in North Florida State Hospital, and the North Florida Evaluation and Treatment Center. The present Act will probably eventually result in a similar number of locations, although they will almost surely be located in prisons, not mental hospitals.

corpus jurisdiction of district courts of appeal to the courts they supervise. Moreover, sound jurisprudential reasons require adhering to the principle of not splitting jurisdiction of a case between different district courts of appeal. The only impediment is *Alachua Regional*, from which this Court should recede.

II.
THE STATE RAISES NO VIABLE DEFENSES TO ITS BREACH OF THE PLEA AGREEMENT.

The state argues that Mr. Murray's plea agreement with the state did not promise "that Mr. Murray will, or will not, be subjected to such civil commitment in the future." (State's brief at 32). This argument is precisely the type of "hypertechnical" argument warned against in *United States v. Rewis*, 969 F.2d 985, 988 (11th Cir. 1992). Mr. Murray's contract with the state providing for treatment under one set of conditions by necessary implication excludes other alternatives. An ancient maxim in law is *inclusio unius est exclusio alterius*. *See Espinosa v. State*, 688 So. 2d 1016, 1017 (Fla. 3d DCA 1997) (applying the maxim to a plea agreement and holding that agreement to testify truthfully did not require a defendant to testify consistently with a prior statement). Moreover, even if the state creates some ambiguity about whether the plea agreement forbids subsequent civil commitments, "a plea agreement that is ambiguous must be read against the government." *Rewis*, 969 F.3d at 988 (internal quotation omitted); *see also McCoy v. State*, 599 So. 2d 645, 648 (Fla. 1992) (construing against the state a plea agreement requiring a defendant

to testify truthfully, but not necessarily consistent with her previous statement).

The central theme of the state's brief is that plea agreements in criminal cases cannot create any obligation or effect outside the narrow confines of the case itself.[7] Plea agreements, however, are contracts. *See Brown v. State*, 367 So. 2d 616 (Fla. 1979). Contracts can cover any number of subjects. For instance, plea agreements can also prohibit the state from bringing other cases, *see State v. Frazier*, 697 So. 2d 944 (Fla. 3d DCA 1997), or from taking administrative actions, *see Williams v. Department of*

---

[7]In the companion case, the state's defense to the specific performance of its plea contract with Mr. Murray was the "collateral consequences" doctrine governing voluntariness in motions to withdraw pleas. Although the state again raises this issue (State's brief at 34-40), the state does not attempt to explain how that doctrine applies to the specific performance issue.

The reply in the companion case discusses most of the cases the state cites. One new case, however, *In re Ashman*, 608 N.W.2d 853 (Minn. 2000), holds that if a plea agreement calls for no referral for civil commitment "at the time of sentencing," a referral for civil commitment *after* sentencing does not violate the agreement. *See id*. at 858-59. A similar lesson is found in *In re Gallegos*, 1999 WL 339243, *4 (Wash. App. 1999) (unpublished opinion) where the state agreed to a definite prison term and to "not file further charges in regard to this incident." Although the state would read *Ashman* and *Gallegos* to preclude all specific performance claims, the lesson of those case is that courts must examine every contract individually. These cases point out the narrowness of Mr. Murray's claim. Unlike the contracts in those cases, Mr. Murray's plea agreement specifically covered how and under what conditions of confinement he would receive sex offender treatment.

The state also quotes a footnote in the Minnesota case, *Ashman*, questioning the ability of one of Minnesota's law enforcement arms to bind other law enforcement arms. *See id*. at 859 n.7. In Minnesota, criminal cases are brought by county attorneys but petitions for sexual offender "civil" commitments are brought by the Department of Corrections. *See id*. at 854-55. In Florida, no similar division of authority exists: state attorneys bring both criminal charges and civil commitment petitions. Thus, the concerns in Minnesota are inapplicable to Florida.

Corrections, 734 So. 2d 1132, 1133 (Fla. 3d DCA 1999).

Plea contracts can even commit the state to not bring civil actions. For instance, bringing forfeiture suits can violate plea agreements, although such suits are civil. *See In re Arnett*, 804 F.2d 1200 (11th Cir. 1986) (plea agreement calling for forfeiture of $3,000 prohibited the government from bringing forfeiture suit for defendant's house and farm). Seeking civil penalties can also violate plea agreements. *See Stern v. Shalala*, 14 F.3d 148 (2d Cir. 1994) (agreement to pay damages of no more than $190,000 violated by seeking civil penalties of $345,000); *see also United States v. Hall*, 730 F. Supp. 646 (M.D. Pa. 1990). No matter how the state violates a plea agreement, due process still forbids such a violation.

The state alternatively argues that a plea contract about future sex offender treatment is impossible because all parties lack information at the time of the contract about what the future treatment needs will be (State's brief at 32-33). The same could be said about any long-term contract. At the time of entering into such a contract, the parties necessarily cannot know future events that will have an impact on the wisdom and advantage of that contract. Foresight into the future is not a requirement of an enforceable plea contract, only "a perceived 'mutuality of advantage,'" at the time of entering the contract. *Brown v. State*, 367 So. 2d at 622 (quoting *Brady v. United States*, 397 U.S. 742, 752 (1970)). A change in the law that merely makes performance less desirable for one party does not excuse non-performance. *See*

Valencia Ctr., Inc. v. Publix Super Markets, Inc., 464 So. 2d 1267 (Fla. 3d DCA 1985) (rise in tax rates); *Lloyd v. Murphy*, 153 P.2d 47, 51 (Cal. 1944) (collecting cases holding that "laws or other governmental acts that make performance unprofitable or more difficult or expensive do not excuse the duty to perform a contractual obligation.").

Finally, the state suggests that Mr. Murray somehow violated the plea agreement by denying his guilt while in prison (State's brief at 43). Of course, the plea agreement did not require him to admit guilt while in prison, only to participate in treatment once released to probation.[8] If Mr. Murray fails to actively participate in sex offender treatment once released to probation,[9] he will be in violation of paragraph 5 of the plea agreement (A. 36-37) and subject to probation violation proceedings. Unless there is such a violation, however, the state and Mr. Murray are bound to their agreement. "[T]he state, above all parties, must keep its word." *State v. Frazier*, 697 So. 2d at 945.

CONCLUSION

[8]A failure to admit to sex crimes in prison is typical because of the violence directed against such offenders by guards and other prisoners.

[9]Contrary to the state's factual assertion, Mr. Murray's probation has been stayed pending his release from detention (Supp. R. 2). Thus, he will face the full term of treatment following his release from detention.

For the above reasons, if this Court does not decide the specific performance issue itself, it should recede from the rationale in *Alachua Regional* and assign Mr. Murray's petition for habeas corpus to the Third District Court of Appeal.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit of Florida
1320 N.W. 14th Street,
Miami, Florida 33125

BY:_____
JOHN E. MORRISON
Assistant Public Defender
Fla. Bar No. 072222

CERTIFICATES

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to Richard Polin, Assistant Attorney General, 444 Brickell Avenue, Suite 950, Miami, Florida 33131, this 13th day of August 2001.

I HEREBY CERTIFY that this brief is set in 14-point Times New Roman.

_____
JOHN E. MORRISON