

IN THE SUPREME COURT OF FLORIDA

GARY KENT KIRBY,)	
)	
Petitioner/Appellee,)	
)	
versus)	S.CT. CASE NO. SC02-1511
)	
STATE OF FLORIDA,)	DCA CASE NO. 5D01-2567
)	
Respondent/Appellant.)	
_____)	

**ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL**

REPLY BRIEF OF PETITIONER

JAMES B. GIBSON
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SEVENTH JUDICIAL CIRCUIT

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SUMMARY OF THE ARGUMENT

The trial court ruled correctly in denying additional restitution where the victim had executed a full and complete release. The trial court's rulings came to the appellate court with the presumption of correctness and should be affirmed if there is a valid reason to do so. Carraway v. Armour, 156 So. 2d 494 (Fla. 1963). The valid reason for affirming the trial court's ruling is the majority opinion in State v. Vandonick, 800 So. 2d 239 (Fla. 2d DCA 2001) (The Second District Court of Appeal, Salcines, J., held that victim was precluded from recovering in restitution more than she agreed to accept in the civil action.)

ARGUMENT

THE TRIAL COURT'S ORDER OF PROBATION WAS PROPER.

... "The freedom to contract includes the right to make a bad bargain." (Citation omitted). The controlling question here is whether there was *overreaching* and not whether the bargain was good or bad. Posik v. Layton, 695 So. 2d 759 (Fla. 5th DCA 1997).

Petitioner, Gary Kent Kirby, disputes the respondent's characterization that he is a cunning criminal who managed to wrangle an inadequate settlement from an injured victim. (Respondent's Answer Brief, page 10)

Liberty interests have as their source, in the first instance, the Federal Constitution and include such things as freedom from bodily restraint, **the right to contract**, the right to marry and raise children, and the right to worship according to the dictates of a person's conscience. Bowers v. Polk County Bd. of Supervisors, 638 N.W.2d 682 (Iowa, 2002).
(emphasis added)

Harold E. Baxley is *sui juris*. It was Harold E. Baxley who chose **not** to involve the State of Florida in his settlement agreement with Gary Kent Kirby.

Both Mr. Kirby and Mr. Baxley are entitled to equal protection under the laws which include their individual rights to enter into binding contracts. A statute is over broad "if in its reach it prohibits constitutionally protected conduct." State

v. Cotton, 769 So. 2d 345 (Fla. 2000). And the respondent proposes to do just that -- interpret the restitution statute in an overbroad fashion and interfere with the contracted settlement agreement freely entered into by Harold E. Baxley.

(Respondent's Answer Brief, pages 9-10)

The precise liberty at issue is the right to be free from state officials tortiously interfering with one's existing contractual relationships. " (Khan v. Gallitano, 180 F.3d 829, 833-834 (C.A.7 (Ill.),1999). The Contract Clause of the United States Constitution prohibits infringement upon the obligations of existing contracts. Cascade Ambulance Service, Inc. v. City of Bellingham, 113 Wash.App. 1054, 2002 WL 31250306 (Wash. App. Div. 1, 2002).

As in Carnell v. Carnell, 398 So. 2d 503 (Fla. 5th DCA 1981), the State has shown "no fraud, no concealment, no coercion, no overreaching" and that the agreement was based on adequate consideration (\$25,000.00). "The freedom to contract includes the right to make a bad bargain."

Mr. Baxley entered into a contract releasing Mr. Kirby for the sum of \$25,000.00. To now require Mr. Kirby to pay additional restitution would void the settlement agreement voluntarily entered into by Mr. Baxley. Voiding the agreement would deny Mr. Kirby substantive due process by the destruction of vested contract rights. *See* 20th Century Ins. Co. v. Superior Court, 109 Cal.Rptr. 2d 611 (Cal. 2d DCA 2001). By signing the release, Mr. Baxley waived his rights to

additional restitution.

Petitioner would reiterate that "it is possible to waive even First Amendment free speech rights by contract". Paul v. Friedman, 117 Cal. Rptr. 2d 82, 95 Cal.4th DCA 853, 2 Cal. Daily Op. Serv. 916, 2002 Daily Journal D.A.R. 1125 (Cal. 2d DCA 2002), and Mr. Baxley has waived his rights to additional restitution by signing the release. (Appendix D, Respondent's Answer Brief)

CONCLUSION

BASED UPON the argument and authorities contained herein, Petitioner respectfully requests that this Honorable Court reverse the opinion of the Fifth District Court of Appeal, reinstating the trial court's ruling.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the foregoing has been served upon the Honorable Charles J. Crist, Jr., Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, in his basket at the Fifth

District Court of Appeal, and mailed to Gary Kent Kirby, 219 Perry Street, Post
Office Box 265, Pomona Park, Florida 32112, on this _____ day of March, 2003.

LYLE HITCHENS
Assistant Public Defender

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CERTIFICATE OF FONT

I CERTIFY that the size and style of the type used in this brief
is 14 point TIMES NEW ROMAN, a font that is proportionately spaced.

Respectfully submitted,

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