IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

MORRIS B. HARRIS,

Respondent.

CASE NO. SC02-2172

# PETITIONER'S INITIAL BRIEF


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## PRELIMINARY STATEMENT

Petitioner, the State of Florida, the Appellee in the First District Court of Appeal and the petitioner in the trial court, will be referenced in this brief as Petitioner or the State. Respondent, Morris B. Harris, the Appellant in the First District Court of Appeal and the respondent in the trial court, will be referenced in this brief as Respondent or his proper name.

This is a single appeal from two cases that were consolidated below. The record in 1D00-3775 consists of 13 volumes (three supplemental), three volumes of trial transcript, one volume of hearing transcript and several volumes of trial exhibits; the record in 1D00-4749 consists of one volume. These records will be referenced as follows: All references will be to Case No. 1D00-3775, with appropriate volume and page number, unless otherwise noted; the non-jury trial will be designated Tr. with a volume number (I, II or III) followed by a page number.

All emphasis through bold lettering is supplied unless the contrary is indicated.

## STATEMENT OF THE CASE AND FACTS

On November 3, 1995, Appellee was convicted pursuant to a plea, of lewd and lascivious assault on a child, and was sentenced to 15 years in prison, with eight years of the sentence suspended for probation with sexual offender counseling. I, 3-9. On May 27, 1999, the State filed a petition

for civil commitment pursuant to Florida's sexually violent predator (SVP) law, the Jimmy Ryce Act. I, 1.

On July 24, 2000, Appellee filed a Motion to Enforce Plea Agreement and Sentence in the 1995 criminal case, arguing that by seeking civil commitment the State had breached its plea agreement. 1D00-4749, I, 1. The motion was denied. 1D00-4749, I, 16. The order noted that Appellee was at that time serving probation. 1D00-4749, I, 17.

Respondent unsuccessfully sought review of this decision. Harris v. State, 766 So. 2d 1239 (Fla. 1st DCA 2000). The case proceeded to a non-jury trial on August 21, 2000, at which the following evidence was adduced:

The State called a Gadsden County Sheriff's Department Detective, Sergeant David Gainous, as its first witness. He testified that Respondent was arrested after a middle school student told investigators that on one occasion Respondent had fondled her breasts and her vagina and on another had had intercourse with her. Tr. I, 71-79. The Court took judicial notice of the statement of probable cause, the judgment and the sentence in the criminal case against Respondent. Tr. I, 79-82.

Sergeant Gainous then testified concerning another allegation by an eight-year-old child that Respondent had molested her, exposing himself to her and then lying down on top of her and, apparently, ejaculating. Tr. I, 85-89. Judicial notice of the contents of the criminal file of that case also was taken. Tr. I, 88.

The State next called Dr. Ted Shaw, who was accepted without objection as an expert in the field of forensic psychology with a specialty in evaluation and treatment of sex offenders. Tr. II, 103. Dr. Shaw testified that he examined Respondent to evaluate him for purposes of the Florida sexually violent predator (SVP) program. Tr. II, 101-105.

Dr. Shaw testified that Respondent suffers from "paraphilia NOS" and "personality disorder NOS" and that he had "features of antisocial personality disorder." Tr. II, 105. He testified that Respondent has a mental abnormality or personality disorder, and opined that Respondent was likely to engage of acts of sexual violence if not confined to a secure facility for long-term care, control, and treatment. Tr. II, 106.

Dr. Shaw elaborated:

> Well, the primary issues that I consider was his – the fact that he was convicted of a sex offense – from sex offending against one victim and subsequently reoffended with a new victim. The fact that there is a variety to his victim targets increases his risk for recidivism. The fact that both victims alleged force and violent threats. The fact that he has been deceitful and lied various times related to his offending and has remained in denial for much of the time and not afforded himself of available treatment.

Tr. II, 107. Dr. Shaw's report was entered into evidence as State's exhibit D.

The State's second witness was Dr. Alan J. Waldman, a psychiatrist, who was accepted over objection as an expert in the field of forensic psychiatry. Tr. II, 153, 157, 161. He

testified that he evaluated Respondent and that he reached a diagnosis of "pedophila, sexually attracted to females, nonexclusive type, basically means that he does not have exclusively sex with children." Tr. II, 167. Based on this diagnosis, he opined that Respondent met the criteria for civil commitment. Tr. II, 167.

The State rested. Tr. II, 194. Respondent's motion for directed verdict was denied. Tr. II, 208.

The Respondent called his mother as his first witness, and Eunice Harris testified that she and her son had a good relationship and that he was not in trouble with the law when he was growing up. Tr. II, 214-216. Respondent's next witness was K.R., one of the victims in the criminal cases of which the trial court had taken judicial notice. Tr. II, 218. She testified that Respondent had not molested her. Tr. II, 220. Another witness, the previous witness's aunt, testified that the purported victim had told her that it was another man, and not Respondent, who had molested her. Tr. II, 229-230.

On August 31, 2000, Judge P. Kevin Davey entered a verdict finding by clear and convincing evidence that the Respondent met the criteria for civil commitment. VII, 1206. On September 7, 2000, Judge Davey entered a judgment and commitment order. VII, 1209. That same day, he entered an order denying the motion to dismiss based on the plea agreement. VII, 1211.

Respondent appealed the verdict and the denial of the motion to dismiss; the cases were consolidated. On April 26, 2002, the

First District Court of Appeal reversed the decision to deny the motion to dismiss, and certified to this Court the following question:

> MAY THE STATE INITIATE DISCRETIONARY CIVIL COMMITMENT PROCEEDINGS UNDER THE RYCE ACT (PART V OF CHAPTER 394, FLORIDA STATUTES) WHERE, BY SEEKING CIVIL COMMITMENT, THE STATE WOULD VIOLATE THE TERMS OF A PLEA AGREEMENT PREVIOUSLY ENTERED INTO WITH THE DEFENDANT?

Harris v. State, 2002 WL 731699 at *5, (Fla. 1st DCA April 26, 2002.

Upon the State's motions for rehearing and rehearing en banc the court reaffirmed its decision, but added two more certified questions:

> IS A PLEA AGREEMENT FOR PRISON TIME FOLLOWED BY PROBATION VIOLATED WHEN THE STATE LATER INITIATES DISCRETIONARY CIVIL COMMITMENT PROCEEDINGS UNDER THE JIMMY RYCE ACT (PART V OF CHAPTER 394, FLORIDA STATUTES)?
>
> IN THE CIRCUMSTANCES DESCRIBED IN THE FIRST QUESTION, IS THE STATE BARRED BY EQUITABLE ESTOPPEL FROM SEEKING CIVIL COMMITMENT?

2002 WL 731699 at *11.

This appeal follows.

## SUMMARY OF ARGUMENT

ISSUE I: The District Court of Appeal erred in reversing the trial court's order that denied Appellee's motion to enforce the plea agreement that had settled his criminal case. As this Court has recently held in Murray v. Regier, 2002 WL 31728885, 27 Fla. L. Weekly S1008 (Fla. Dec. 5, 2002): "[A]ny bargain that a defendant may strike in a plea agreement in a criminal case would have no bearing on a subsequent involuntary civil commitment for control, care, and treatment."

The holding in Murray thus rejects the holding and rationale of the court below. Other district courts have acknowledged that under Murray a plea agreement in a criminal case has no bearing on subsequent civil commitment proceedings. These cases are part of an overwhelming body of decisional law, in other jurisdictions and in Florida, that demonstrates the incorrectness of the lower court's position.

Moreover, the opinion below inappropriately applied the doctrine of equitable estoppel, both factually and legally. Equitable estoppel should be applied rarely against the government, and in any event a plea agreement does not constitute a representation beyond the express terms of that agreement. Finally, the court below reached a result that would have strongly negative policy repercussions, which the Murray holding avoids.

The first certified question should be rephrased or ignored, inasmuch as it is unfairly phrased. The second and third certified questions should be answered in the negative.

## ARGUMENT

## ISSUE I

DID THE TRIAL COURT ERR BY DENYING RESPONDENT'S MOTION TO DISMISS THE PETITION?

### A. STANDARD OF REVIEW

Questions of law, such as this case presents, are reviewed *de novo*.

### B. THE TRIAL COURT'S RULING

The trial court denied Respondent's motion to dismiss twice: once on August 16, 2000 and again after the trial, on September 7, 2000. 1D00-4749, 16; VII, 1211.

### C. THE LOWER COURT'S OPINION

The First District Court of Appeals, per Judge Ervin, reversed the trial court's decision, holding initially that the State was equitably estopped from proceeding civilly against Respondent by breaching the plea agreement. The Court interpreted the State's plea offer in the criminal case of a prison term plus sex-offender probation as a representation of Respondent's "sentence." 2002 WL 731699 at *3. Respondent relied upon this representation, and the State then changed position when it proceeded to file a civil commitment petition against him. Id. The State had the discretion not to file a petition and: "In so

acting, it violated its own solemn agreement that appellant serve no more than a split sentence of incarceration and probation." As authority, the Court relied on Santobello v. New York, 404 U.S. 257, 262 (1971), wherein a prosecutor's promise not to seek any particular sentence in exchange for a plea was breached when the prosecutor recommended a maximum sentence. The only remedy that would make Respondent whole, the Court held, was "specific performance." Id. at *4. The court summed up: "In our opinion, the state breached its plea agreement to allow Harris the privilege of seeking treatment as a sexual offender during the probationary period of his sentence by seeking civil commitment shortly before he had completed the incarcerative portion of his sentence." Id. Judge Benton concurred and published a separate opinion and Judge Polston dissented.

The Court added to its opinion upon the State's motions for rehearing and rehearing en banc. First, it noted that whether Respondent was actually on probation[1] was immaterial in that he was not receiving sexual offender counseling as an out-patient or through the Department of Corrections, as he had bargained for. Id. at 11. Moreover, if he were on probation, civil commitment would change the terms of his probation, and would violate double jeopardy. Id. Again, Judge Polston dissented.

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[1] The record was devoid of any proof as to whether Respondent was or was not on probation. It turns out, he apparently was then and still is. The Department of Corrections website, http://www.dc.state.fl.us/ActiveOffenders/, indicates that he is on active probation until May 30, 2007.

**D. MERITS**

**1. This Court Has Overruled the Rationale That Supports the Decision Below.**

Case law since Harris has made it clear that the case was wrongly decided and was based on a premise that this court rejected in Murray v. Regier, 2002 WL 31728885, 27 Fla. L. Weekly S1008 (Fla. Dec. 5, 2002). In that case, which is undistinguishable from Harris, this Court held:

> Thus, we conclude that **any bargain that a defendant may strike in a plea agreement in a criminal case would have no bearing on a subsequent involuntary civil commitment for control, care, and treatment.**

Id. (emphasis supplied).

Murray and Harris are functionally identical. Murray was convicted of attempted sexual battery and entered into a plea wherein he would serve a prison term followed by probation. Id. Prior to the expiration of Murray's prison term, the State filed a petition for commitment as a sexually violent predator, and Murray first filed a motion for specific performance of the plea agreement, which was unsuccessful. Id. He then petitioned for a writ of habeas corpus, which, after substantial litigation in both the Fourth and Third Districts,[2] was denied, and he then appealed to this Court. Id.

This path, and the legal issues raised, are indistinguishable from what happened here. In both cases there was (one) a

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[2] Murray was convicted in Dade County but was being held in Palm Beach County.

conviction, (two) a sentence that called for probation following prison, (three) a petition for civil commitment as a sexually violent predator, and (four) a claim that the State could not proceed in the SVP proceedings because to do so would violate the plea agreement. The Harris court attempted to distinguish the Fourth District Court of Appeals' decision in Murray's case, Murray v. Kearney, 770 So. 2d 273 (Fla. 4th DCA 2000)(on reh'g) on the specious ground that the decision was "in a substantially different procedural position than the present case" in that Murray "did not raise the issue before the trial court of whether the state had violated its plea agreement; instead, he argued that the commitment was illegal, because it violated the plea agreement." 2002 WL 731699 at *2. In other words, while the panel majority believed that it was unfair and improper for the State to seek to institutionalize a person who was on probation, the method by which the individual raised the issue was dispositive.

The Court in Murray acknowledged the relevance of Baxstrom v. Herold, 383 U.S. 107 (1966) to this issue. In Baxstrom a New York prison inmate was declared insane and was transferred to a penal facility for such inmates. As the end of his prison term neared, a petition for civil commitment was filed, but the inmate was not transferred to a civil mental hospital, but was retained at the prison facility. He filed a petition for a writ of habeas corpus. which was dismissed, and he appealed this decision to the Supreme Court, which held that his due process

rights were violated in that there had been no jury determination that he be committed, as New York law required. 383 U.S. at 108-111. In rejecting an argument put forth by the government, the Supreme Court noted: "For purposes of granting judicial review before a jury of the question whether a person is mentally ill and in need of institutionalization, **there is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments.**" 383 U.S. at 111-112 (emphasis supplied). The inclusion of this language in Murray demonstrates that the Respondent's status as a probationer – which is vital under Harris; those with no probation to serve are treated differently – is meaningless under Florida law.

This clear and unequivocal language in Murray thus has overruled Harris, as the Fourth District Court of Appeal has recently recognized. In Krischer v. Faris, 838 So. 2d 600 (Fla. 4th DCA 2003), the Fourth District considered a State appeal from an order granting a motion to enforce a plea agreement that had called for probation after the incarcerative portion of the sentence. Id. at 600-601. The court reversed based on Murray:

> Although the *Murray* decision arises from a habeas petition, it has direct application to the instant case. The Florida Supreme Court's holding that any bargain a defendant may strike in a plea agreement in a criminal case could have no bearing on a subsequent involuntary commitment under the Jimmy Ryce Act is controlling.

Id. at 603. See also Satz v. Runion, 838 So. 2d 689 (Fla. 4th DCA 2003) (granting certiorari petition and reversing a lower court order entered upon a motion to enforce plea agreement that dismissed an SVP petition).

Similarly, the Fifth District Court of Appeal affirmed a trial court order denying a Ryce Act respondent's motion for specific performance of a plea agreement, relying on Murray. Sublette v. State, 2003 WL 1889255 (Fla. 5th DCA April 17, 2003).

Harris and the reasoning therein have not been well-received in this State. Indeed, a subsequent opinion of the same court, while acknowledging that the panel was bound by the precedent of Harris, openly questioned the Harris rationale. Gentes v. State, 828 So. 2d 1051 (Fla. 1st DCA 2002). After accepting Harris as binding precedent, the unanimous panel in Gentes said:

> We do, however, note several matters that might be significant in the event of further review of this case.
>
> First, the *Harris* holding may not be in concert with the apparent consensus of other states finding civil commitment of sexually violent predators, under similar state laws, does not violate the terms of a plea agreement. *See, e.g., In re Bailey*, 317 Ill.App.3d 1072, 251 Ill.Dec. 575, 740 N.E.2d 1146 (2000) (finding a sexually violent predator proceeding is civil, not criminal and does not subject respondent to greater punishment, therefore it does not violate the plea agreement); *In re Detention of Campbell*, 139 Wash.2d 341, 986 P.2d 771(1999)(en banc), *cert. denied*, 531 U.S. 1125, 121 S.Ct. 880, 148 L.Ed.2d 789 (2001) (explaining that because civil commitment is not criminal punishment, it was not a foregone conclusion that respondent would be civilly committed, thus commitment, like sex offender registration, is a collateral consequence of

pleading guilty and does not violate the plea agreement); *Matter of Hay*, 263 Kan. 822, 953 P.2d 666 (1998) (finding the "plea agreement is immaterial as far as proceedings under the Act are concerned" where the commitment is based on a defendant's mental ailment and present dangerousness); *People v. Moore*, 69 Cal.App.4th 626, 81 Cal.Rptr.2d 658 (1998) (holding any commitment defendant might suffer under the sexual violent predator act would not be a direct consequence of his plea); *In re Kunshier*, 521 N.W.2d 880 (Minn.Ct.App.1994) (finding that county did not violate plea agreement by invoking civil commitment statute against patient because it is not criminal punishment but civil treatment).

In addition to the decisions of other states, our sister court has previously held that subsequent designation as a sexual violent predator under Florida law does not violate a plea agreement. *See Collie v. State*, 710 So. 2d 1000 (Fla. 2d DCA 1998). "[D]esignating an offender to be a sexual predator after he or she has entered a plea bargain *does not constitute a breach of contract* because the sexual predator designation is not a form of punishment." *Id.* at 1008 (emphasis added). The Second District reasoned that the object of a plea bargain is punishment, while sexual predator designation serves remedial purposes, hence the object of the plea bargain remains unchanged by a subsequent sexually violent predator designation. *See id.*

Second, the *Harris* majority recognizes, but is not deterred by, authority holding civil commitment of a sexually violent predator under the Jimmy Ryce Act to be a collateral consequence of the plea agreement. *See, e.g.*, *Nelson v. State*, 780 So.2d 294 (Fla. 1st DCA 2001); *Pearman v. State*, 764 So.2d 739 (Fla. 4th DCA 2000); *Oce v. State*, 742 So.2d 464 (Fla. 3d DCA 1999); *Burkett v. State*, 731 So.2d 695 (Fla. 2d DCA 1998); *Benitez v. State*, 667 So. 2d 476 (Fla. 3d DCA 1996);[3] *see also Kansas*

[3] These were not sexually violent predator cases but, rather, either sexual predator or sexual offender designation cases.

> *v. Hendricks*, 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997) (finding it is a legitimate non-punitive state objective to take measures to restrict the freedom of the dangerously mentally ill while treating them for this illness). Those cases holding that civil commitment is not part of the criminal sentence appear persuasive on the present issue.
>
> Third, of the questions certified by *Harris*, only the two certified in the opinion on motions for rehearing and rehearing in banc need be considered. The certified question in the original *Harris* opinion jumps over the central issue in the case by assuming the plea agreement was breached when the State sought civil commitment. Therefore, that first question may not actually state the real issue in these cases –Whether discretionary civil commitment proceedings under the Ryce Act are somehow barred by a plea agreement for prison time followed by probation.

828 So. 2d at 1052-1053 (some citations omitted). Thus, aside from the Harris panel majority and Gentes' precedent-bound and reluctant panel, Florida courts have, along with those in other jurisdictions, recognized that there is no rational reason to prohibit the State from attempting to achieve the goals of the Jimmy Ryce Act[4] against individuals who may be sexual predators but whose underlying criminal cases ended with a plea that called for probation. The vast weight of authority from around the country demonstrates this point.

**2. Courts In Other Jurisdictions Have Rejected the Harris Rationale.**

No other court in the country has accepted the premise that a plea in a criminal case that includes a term of probation

[4] §394.910, Fla. Stat. See, also, Westerheide v. State, 831 So. 2d 93, 98, 100, 104-105 (Fla. 2002).

prohibits the later institution of sexually violent predator proceedings. Discussion of some of these cases from other jurisdictions highlights the variance from the nation's jurisprudence.

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.[5] 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.
>
> 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

[5] 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.

> immaterial as far as proceedings under the Act are concerned.

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 (Ariz. App. 1999) (since commitment is collateral consequence, it does not violate prior plea agreement).

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 re Ashman, 608 N.W. 2d 853 (Minn. 2000): Ashman had entered a plea in 1991 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.[6] When 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

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[6] 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.

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.

These cases demonstrate the weakness of the Harris position, even if Murray had not yet been decided.

**3. Harris Ignored Persuasive State Authority.**

As Gentes pointed out, Harris was not consonant with state precedent, either. Indeed, the Harris panel majority misapprended the clear import of Collie v. State and its progeny, which held that sexual predator designation under section 775.21, Florida Statutes, was not part of the sentence and was not punishment. It also ignored the seminal case of Kansas v. Hendricks, 521 U.S. 346 (1997) regarding double jeopardy in sexually violent predator cases.

The Harris panel majority clearly believed that the civil commitment the State sought was part of the sentence in the criminal case. In the original opinion, the lower court said: "By pursuing civil commitment under the Ryce Act, the state has breached the plea agreement **in regard to the terms of the sentence.**" 2002 WL 731699 at *3 (emphasis supplied). In the later version, the court asserted:

> Even if it could be said that appellant is currently on active probation while in the custody of DCFS, this would raise a double jeopardy issue, because of the change in probationary conditions his internment represents. As explained in *Lippman v. State*, 633 So. 2d 1061, 1064 (Fla. 1994), the double jeopardy provisions of the United States and Florida Constitutions protect individuals from **multiple punishments** arising from enhancement of the conditions of probation, absent proof of grounds for revocation. Here, the order establishing the terms and conditions of

> probation provided for sex-offender treatment, but not for residential sex-offender treatment. Thus, if appellant were considered to be on active probation while committed to the care and custody of DCFS, the terms of his probation have been improperly enhanced from nonresidential to residential sex-offender treatment without a violation of probation.

2002 WL 731699 at *11 (emphasis supplied).

Collie involved the Florida Sexual Predators Act, which requires certain sex offenders to register with the Department of Law Enforcement and requires local police agencies to notify people who live nearby to the sexual predator's presence in the community. See §775.21, Fla. Stat. The appellant argued that his sexual predator designation breached his contract with the state regarding his plea bargain, claiming that it imposed additional punishment. 770 So. 2d at 1008. The Second District Court of Appeal rejected this argument, finding that

> designating an offender to be a sexual predator after he or she has entered a plea bargain does not constitute a breach of contract because the sexual predator designation is not a form of punishment. As we will demonstrate later in this opinion, designating an offender to be a sexual predator is a regulatory act done for remedial purposes. The "object" of the plea bargain is the punishment, and the object remains unchanged even though the sexual predator designation is made.

Id. Similarly, Collie held that the sexual predator act did not involve double jeopardy. Id. That issue was, of course, settled as to constitutional law generally by Hendricks at the time and was later specifically settled as to the Jimmy Ryce Act by this Court in Westerheide v. State, 831 So. 2d 93 (Fla. 2002).

The Harris panel majority disregarded the fact that courts had routinely held the Sexual Predator Act to be a collateral consequence of the plea, stating that the collateral consequence status was "immaterial," in these circumstances. 2002 WL 731699 at *3. The panel majority missed the point that collateral consequences are, by definition, things that do not inhere in or are part of or modify the sentence.

Since the panel in this case filed its opinion, this Court has affirmed that sexual predator or sexual offender registration is a collateral consequence of a plea. State v. Partlow, 2003 WL 359316, 28 Fla. L. Weekly S148 (Feb. 20, 2003). This is the latest entry into a substantial body of case law to the effect that the Jimmy Ryce Act proceedings should be considered collateral consequences of the criminal prosecutions that preceded them. See, e.g., Pearman v. State, 764 So. 2d 739 (Fla. 4th DCA 2000); Watrous v. State, 793 So. 2d 6 (Fla. 2d DCA 2001). Those authorities were cited to the Harris panel, which discounted them. As noted by the dissent to the original opinion (2002 WL 731699 at *10) Collie demonstrates at least persuasive authority for affirming the trial court's order. The Harris did not address Collie except to string-cite it as one of numerous "collateral consequence" cases that do not apply. 2002 WL 731699 at *2.

Other jurisdictions have reached similar results. The same principles obviously hold true in the context of a civil commitment scheme which is civil and not penal in nature.

Illinois courts have expressly so held. In People v. Norris, 767 N.E. 2d 904 (Ill App. 2002) the court ruled that a plea colloquy in a criminal case need not advise the defendant of the possibility of SVP commitment. A federal court, in Isbell v. Ryan, 2002 WL 448279 (C.D. Ill. Mar. 20, 2002) noted that SVP proceedings were a collateral consequence of a plea in a criminal case, so failure to advise the defendant of the possibility of such commitment would not void the plea.

An even broader position was taken in In re Detention of Lindsey, 2002 WL 2022105 (Ill. App. Aug. 29, 2002). There the court considered a situation in which the State had represented in 1998 plea negotiations that it would not pursue proceedings under the "sexually dangerous persons" act, a long-standing Illinois law different from the "sexually violent persons" act. After Lindsey was released, the state did proceed under the sexually violent persons act, and the appellate court held that such an act was not barred and that the state was not acting in bad faith.

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. Major v. State, 814 So. 2d 424, 428, 431 (Fla. 4th DCA 1998).[7]

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[7] The issue of affirmative misadvice from trial counsel that the Jimmy Ryce Act would not be applicable is fundamentally

Westerheide and Hendricks have now settled the fact 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.

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different from the situation in this case. Thus, the decision in Walkup v. State, 822 So. 2d 524 (Fla. 2d DCA 2002) suggests no result contrary to what is requested here.

**4. Equitable Estoppel Does Not Apply, Factually or Legally.**

The court below concluded that the State should be estopped from pursuing civil commitment because it had, in effect, made a representation to Respondent that he relied upon and then the State had changed its mind. The Harris position regarding estoppel has no basis in law or logic.

First, there are two very practical considerations. One: the State's "representation" to Harris was that he would have to be on probation for seven years following his release from prison – it was not an express statement from which a reasonable person could infer that he would never again be detained or confined by the State. If the State is to be bound, it should be by unequivocal language. Two: Criminal defendants do not seek sentences that call for probation **after** they've served their prison terms; they may accept that further supervision and restriction upon their liberty in return for a diminished term behind bars, but it is certain without cavil that Respondent would have gladly accepted a plea to eight years in prison followed by no probation at all.

Even ignoring those facts and focusing on legal abstractions, however, the decision below was poorly reasoned. The Harris court first assumed that Appellant was not placed on probation. Then, when confronted with the strong suggestion that Harris was

actually on probation, via the DOC website,[8] the Harris court chose to reject that evidence:

> We do not agree with the state's belated argument that appellant is currently on active probation while confined under the Ryce Act to the custody of the Department of Children and Family Services (DCFS). Appellant's sentence provided that he would be placed on probation "under supervision of the Department of Corrections." Section 948.001(5), Florida Statutes (1995), defines probation as "a form of community supervision requiring specified contacts with parole and probation officers and other terms and conditions as provided in s. 948.03." Subsection 948.03(4), Florida Statutes (1995), permits out-patient treatment for sex offenders, but appellant clearly is not receiving "out-patient treatment." Subsection 948.03(7) does permit residential treatment, and section 948.01(8), Florida Statutes (1995), refers to probationary residential treatment under the jurisdiction of DOC or the Department of Health and Rehabilitative Services (now the DCFS), but neither appellant's sentence nor the order setting forth the original terms and conditions of probation imposed residential sex-offender treatment with the DCFS as a condition of his probation.

2002 WL 31202794 at *1 (footnote omitted).

Thus, Harris holds that even if a person is on probation and has a probation officer and contact with Department of Correction officials, and can be prosecuted for violating his probation (for a new crimes violation, for instance) it is not truly probation if the person is undergoing in-patient treatment by the Department of Children and Families and such was not a condition of his probation. This position is nonsensical as

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[8] This Court has found such information on state agency internet web page to be reliable. See Shadler v. State, 761 So. 2d 279, 283 (Fla. 2000).

applied to a plea that was entered in 1995, prior to the enactment of the Jimmy Ryce Act, or to the reformation of the Department of Children and Families out of the old Department of Health and Rehabilitation. Moreover, the Harris opinion draws a distinction between sex offender treatment given by the Department of Corrections and that provided by the Department of Children and Families, without any record evidence as to whether there are any distinct differences.

As noted by Judge Polston's dissent in Harris, the issue as raised in that case as here did not turn on whether the appellant was on probation; rather, it turned on the assumption that the defendant had bargained for freedom at the end of a prison term, and, in fact, he is not now free, owing to the State's discretionary action in instituting Jimmy Ryce Act proceedings. The estoppel argument was made by the Harris majority, and while it hinges on Appellant's probationary status, Appellant's argument does not. Had the issue been raised in this context below, the State could have arranged for Appellant's probation officer to appear in court and to testify as to the procedures the Department of Corrections applies when a probationer is confined under the Ryce Act. Moreover, a factual record could have been made regarding the differences, if any, between the sex offender treatment offered by the Department of Corrections and that offered by the Department of Children and Families.

As for the doctrine of equitable estoppel, it is inapplicable in this instance from a legal, as well as a factual, point of view. "Equitable estoppel will be applied against the state only in rare instances and under exceptional circumstances." State, Department of Revenue v. Anderson, 403 So. 2d 397, 400 (Fla. 1981). "In order to demonstrate estoppel, the following elements must be shown: 1) a representation as to a material fact that is contrary to a later-asserted position; 2) reliance on that representation; and 3) a change in position detrimental to the party claiming estoppel, caused by the representation and reliance thereon." Id.

In this case, the State's "representation" that Appellee would be on probation after his prison term expired, was not specific to the point raised here: That it would not at some later time seek to commit him to civil confinement because of a mental condition.

Moreover, when one is mistaken as to the applicable law, estoppel is rarely applied. See, e.g., Clifton v. Clifton, 553 So. 2d 193, 194 (Fla. 5th DCA 1989) ("her mistake, as well as everyone else's else's involved in this case, was one of law – the misapplication of Florida law to the facts and circumstances which took place. This is not a proper basis for an estoppel.") In this case the State was mistaken in the sense that it was not aware that the Legislature would pass a new law intended to apply to appellant (and others of his ilk) prior to his being released from prison.

### 5. Policy Considerations Support the Murray Holding.

The Harris opinion evinces a fundamental misapprehension of SVP commitment proceedings. As this Court recently settled in Westerheide, civil commitment of sexually violent predators is a civil, remedial matter.[9] It is not punitive, it is not a part of a criminal sentence, and it is therefore a matter that is beyond the scope of criminal proceedings. Murray reached a similar conclusion. 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.

No criminal court judge, at the time of accepting a plea, or imposing a sentence of incarceration to be 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

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[9] See, also, Kansas v. Hendricks, 521 U.S. 346 (1997); 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. 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).

at the time that the person is about to be released into society, at the conclusion of incarceration.[10] Since that time period comes, typically (as here), years after the criminal sentencing proceeding, it is not possible for any judge, prosecutor, defense counsel or criminal defendant to know whether the person might qualify for such civil commitment years in the future.

Moreover, the principals in the criminal case lack the ability to know what the likelihood might be for civil commitment proceedings. The decision whether to proceed 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 cannot constitute a bar to subsequent civil commitment proceedings, and the commencement of such proceedings cannot constitute a violation of the prior plea agreement, which does not make any promises, one way or the other, as to whether the

[10] § 394.912, Fla. Stat.

person will qualify for civil commitment in the future, or whether the person will be subjected to such civil commitment in the future.

In addition the Harris precedent would have an effect on criminal cases, as well, and would undermine valid legislative programs. The legislature has mandated sex offender treatment as a part of any probationary sentence for enumerated sex offenses. See, §948.03(4), Fla. Stat. Under Harris the State would effectively have to forgo 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 that cannot be made at the time of the plea and sentencing. Any judicial decision that 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.

**6. Certified Questions Should Be Answered in the Negative.**

As to the first certified question:

> MAY THE STATE INITIATE DISCRETIONARY CIVIL COMMITMENT PROCEEDINGS UNDER THE RYCE ACT (PART V OF CHAPTER 394, FLORIDA STATUTES) WHERE, BY SEEKING CIVIL COMMITMENT, THE STATE WOULD VIOLATE THE TERMS OF A PLEA AGREEMENT PREVIOUSLY ENTERED INTO WITH THE DEFENDANT?

The State adopts the Gentes Court's position that this question is not proper in that it assumes facts in evidence and is otherwise answered by the answers to the other questions. This question is akin to the hoary example, "have you stopped beating your wife?" To answer the question is to decide the crucial issue, i.e., whether civil commitment has any relationship at all to the plea agreement. Thus, it should be ignored or merged with the second certified question:

> IS A PLEA AGREEMENT FOR PRISON TIME FOLLOWED BY PROBATION VIOLATED WHEN THE STATE LATER INITIATES DISCRETIONARY CIVIL COMMITMENT PROCEEDINGS UNDER THE JIMMY RYCE ACT (PART V OF CHAPTER 394, FLORIDA STATUTES)?

The State asserts that this question should be answered in the negative. Whether civil proceedings will later be instituted is not a proper consideration in ending a criminal prosecution. As to the final question:

> IN THE CIRCUMSTANCES DESCRIBED IN THE FIRST QUESTION, IS THE STATE BARRED BY EQUITABLE ESTOPPEL FROM SEEKING CIVIL COMMITMENT?

The State asserts that equitable estoppel is an inappropriate remedy in an instance such as this, so the question should be answered in the negative.

## CONCLUSION

Based on the foregoing, the State respectfully submits the first certified question should struck or rephrased, and that the second and third certified questions be answered in the negative, the decision of the District Court of Appeal reported at 27 Fla. L. Weekly D. 946 should be disapproved, and the order entered in the trial court should be affirmed.

## SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Robert Friedman, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, by MAIL on April 23, 2003.

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## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

__________________________________
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STATE OF FLORIDA,

Petitioner,

v.

MORRIS B. HARRIS,

Respondent.

CASE NO. SC02-2172

**A P P E N D I X**

Harris v. State, 2002 WL 731699 27 Fla. L. Weekly D946 (Fla. 1st DCA April 26, 2002) (on reh'g).