IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

MORRIS HARRIS,

Respondent.

CASE NO. SC02-2172

PETITIONER'S REPLY BRIEF

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

JAMES W. ROGERS
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 325791

THOMAS H. DUFFY
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 470325

OFFICE OF THE ATTORNEY GENERAL
PL-01, THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300 EXT. 4595
(850) 922-6674 (FAX)

RICHARD L. POLIN
Florida Bar No. 0230987
Senior 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)

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

STATE CASES

STATEMENT OF THE CASE AND FACTS

The State relies upon its statement of the case and facts from the Initial Brief, except to clarify that Respondent was in prison on the day civil commitment proceedings were commenced. I, 32; II, 260-261.

ARGUMENT

ISSUE I

DID THE TRIAL COURT ERR BY DENYING APPELLEE'S MOTION TO ENFORCE A PLEA AGREEMENT ON THE GROUNDS THAT SUBSEQUENT SEXUALLY VIOLENT PREDATOR CIVIL COMMITMENT PROCEEDINGS BREACHED THAT AGREEMENT?

1. Respondent Has Improperly Raised a Constitutional Claim

In his Answer Brief Respondent suggests to this Court what he never suggested in the trial court or at the District Court of Appeal: The Jimmy Ryce Act is unconstitutional by violating his right to contract and impairing his vested contractual rights, specifically his "right" to probation after being released from prison. This issue is not cognizable here, inasmuch as it is an "as applied" challenge that was not raised below. Trushin v. State, 425 So. 2d 1126 (Fla. 1982).

Moreover, the right to contract that Respondent relies upon is not quite so "sacrosanct" as he says. In fact, the kinds of obligations that cannot be improperly impaired (some impairments are permissible; see below) are property rights. State v. Dade County, 142 So. 2d 79, 87 (Fla. 1962) (constitutional provisions regarding impairment of contracts "have reference only to those contracts which involve property rights" rather than political rights); Mahood v. Bessemer Properties, 18 So. 2d 775, 779 (Fla. 1944) ("contract rights protected by the provisions of the Federal Constitution relate to property rights); State v. City of Miami, 137 So. 261, 264 (Fla. 1931) (the "constitutional provision protecting the inviolability of contracts has

reference only to those contracts involving property rights and has no application whatever to political rights and privileges." Respondent's purported "right" to probation is political, not property. The oft-repeated reference to plea bargains as "contracts" thus should not be taken literally, though some aspects of contract law may be appropriate. Clearly there are different purposes when, say, one company agrees to buy products from another company and the State and a criminal defendant agree to a plea and punishment. The constitution does not govern the second situation, and Respondent's argument must fail.

2. The Government May, In Fact, Impair Contracts.

Respondent's position appears to be that if the Jimmy Ryce Act alters his "contract" with the State, it may not be applied to him. He places too much emphasis on the impairment doctrine. In Nationwide Mutual Fire Insurance Co. v. Bryar, 349 So. 2d 1221, 1223 (Fla. 2d DCA 1977), the court said:

> Article I, Section 10, Florida Constitution prohibits the passing of any law which impairs a contract. The federal constitution contains a similar provision. However, it has long been recognized by the courts of this state that the constitutional prohibition of the impairment of contracts stands on no higher plane than other constitutional provisions; i. e., that this provision should not itself "impair" the legitimate exercises of legislative authority. *Shavers v. Duval County*, 73 So.2d 684 (Fla.1954); *Miami Bridge Co. v. State Railroad Commission*, 155 Fla. 366, 20 So.2d 356 (1944); *Setzer v. Mayo*, 150 Fla. 734, 9 So.2d 280 (1942).

Even if the constitutional prohibition against impairing existing obligations were to apply, the outcome would not be

settled. In certain instances governments may impair existing contracts in the lawful exercise of their police power. “In determining whether legislation violates the contract clause, the question is not whether the legislation affects contracts incidentally, directly or indirectly, but whether it is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end.” Mahood, 18 So. 2d at 779.

The Jimmy Ryce Act is a legitimate exercise of the State’s police power to protect its citizens. This Court has so recognized in Westerheide v. State, 831 So. 2d 93, 104 (Fla. 2002), when in rejecting an equal protection argument against the Act, it held: “The state's purposes for the Ryce Act–long-term mental health treatment for sexual predators and protection of the public from them–are both compelling and proper.” It provisions are reasonable and necessary to secure the public’s safety from a certain narrow class of deviant criminals. §394.910. Thus, passage of the Act was completely proper, even if Respondent’s “contract” was impaired.

3. Respondent Has Not Been Denied the Benefit of His Bargain.

Even accepting with a straight face the notion that the probationary term of his sentence was a condition Respondent desired and bargained for (rather than, as is certainly the case, being imposed at the insistence of the State, which wanted to exert more control over him), Respondent’s argument is without merit. He has received precisely what he bargained for.

He was promised probation and is on probation. The Department of Corrections website, http://www.dc.state.fl.us/ActiveOffenders/, indicates that he is on active probation until May 30, 2007. 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). Respondent's "contract" has been completely fulfilled. Moreover, not even the court below found the existence of a contract. Rather, the panel found that the doctrine of equitable estoppel, and not contract law, should apply.

Respondent argues that the probation he is serving is not actually probation, on the grounds that section 948.001(5) precludes such a construction. That section reads: "'Probation' means a form of community supervision requiring specified contacts with parole and probation officers and other terms and conditions as provided in s. 948.03." Nothing in this definition is inconsistent with civil commitment proceedings that are filed after the individual has entered a plea to a sentence that will include probation.

4. Equitable Estoppel Is Inappropriate, Factually and Legally.

Respondent argues that the State should be equitably estopped from proceeding against him as a sexually violent predator. As was the case with the panel majority below, Respondent has made some fatal analytical errors.

The doctrine of equitable estoppel 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.

Respondent argues that the State's plea offer was in fact a representation that he would go free at the end of his prison term. That was not what the State did, however. The State required Respondent to accept an additional term of supervision beyond his release from prison, and did not say that the State itself would never seek to have him confined again. Were the State to seek to increase Respondent's actual prison term or his probation, the estoppel argument would apply. But, since civil detention is not punishment (Westerheide, 831 So. 2d at 100-101; Kansas v. Hendricks, 521 U.S. 346, 361 (1997)), but, rather, involuntary confinement for treatment, the State made no representation regarding any future actions. Likewise, it did not change its position, because it never took a position on whether Respondent would be civilly committed as a sexual predator.

Respondent also tries to bootstrap State v. Atkinson, 831 So. 2d 172 (Fla. 2002) onto this argument, saying that if he had

been released on probation the State would not have been able to proceed against him. Inasmuch as Respondent was still in prison at the time commitment proceedings commenced however, it is difficult to follow Respondent's logic. Atkinson merely holds that persons not in lawful custody on the date the Jimmy Ryce Act was passed are not amenable to civil commitment under the Act. 831 So. 2d at 174. That is not the situation that pertains to Respondent.

5. Harris Has Been Overruled by Murray v. Regier.

Respondent's eleventh-hour contract-law argument demonstrates recognition that the basis for reversal below has now vanished. Murray v. Regier, 2002 WL 31728885, 27 Fla. L. Weekly S1008 (Fla. Dec. 5, 2002) overruled the rationale set out by the First District Court of Appeal this case: **"[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."**

Respondent attempts to avoid Murray by attempting to narrow its holding. This argument does not bear up under scrutiny, however.

The Murray case was functionally identical to this one. He 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 was denied, and 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 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.

Murray is dispositive, as the Fourth and Fifth District Courts of Appeal have recognized. Garcia v. State, 2003 WL 1969053 (Fla. 4th DCA April 30, 2003); Satz v. Runion, 838 So. 2d 869 (Fla. 4th DCA 2003); Krischer v. Faris, 838 So. 2d 600 (Fla. 4th DCA 2003); Sandillo v. State, 2003 WL 1889291 (Fla. 5th DCA April 17, 2003); Sublett v. State, 842 So. 2d 314 (Fla. 5th DCA 2003). No district court has adopted the position set forth by Respondent, that Murray was narrowly decided and only applies to cases procedurally identical.

The language in Murray could not be broader or clearer: ""[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." Harris held otherwise, and Harris must be reversed.

CONCLUSION

Based on the foregoing discussion and the discussion in the Initial Brief, the State respectfully submits the certified questions should be answered in the negative, the decision of the District Court of Appeal reported at 27 Fla. L. Weekly D946 (Fla. 1st DCA April 26, 2002) (on reh'g) should be disapproved, and the order entered in the trial court denying the motion to enforce the plea agreement 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 May 19, 2003.

Respectfully submitted and served,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

_____
JAMES W. ROGERS
Tallahassee Bureau Chief,
Criminal Appeals
Florida Bar No. 325791

_____
RICHARD L. POLIN
Florida Bar No. 0230987
Senior 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)

_____
THOMAS H. DUFFY
Assistant Attorney General
Florida Bar No. 470325

Attorneys for State of Florida
Office of the Attorney General
Pl-01, the Capitol
Tallahassee, Fl 32399-1050
(850) 414-3300 Ext. 4595
(850) 922-6674 (Fax)

[AGO# L02-1-16904]

CERTIFICATE OF COMPLIANCE

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

_____
Thomas H. Duffy
Attorney for State of Florida

[T:\BRIEFS\Briefs pdf'd\02-2172_rep.wpd --- 5/21/03,8:28 am]

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

DONALD GENTES,

Respondent.

CASE NO. SC02-2440

INDEX TO APPENDIX

Appendix A