IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :

Petitioner, :

v. : CASE NO. **SC02-2440**

DONALD GENTES, :

Respondent. :

_____/

RESPONDENT'S BRIEF ON THE MERITS

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RESPONDENT'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Respondent was the respondent in the Circuit Court of the Second Judicial Circuit, in and for Leon County, Florida, and the Appellant in the District Court of Appeal, First District. Petitioner was the petitioner and Appellee in the lower court. The parties will be referred to as they appear before this Court.

References to the record on appeal shall be by the letter "R" followed by the page number.

The symbol "PB" will denote Petitioner's Brief.

STATEMENT OF THE CASE AND FACTS

Respondent's offenses occurred between April 1, 1981 and August 30, 1982. A complaint was filed on August 28, 1992, and a change of plea was entered into on October 22, 1993. (R 1-7, 42-43) Respondent entered a plea of no contest in 1993 to five counts of lewd and lascivious assault. In accordance with the plea agreement, he was sentenced to a term of 20 years in state prison. At the end of the 20 years of imprisonment Respondent should have been released and placed on probation for 30 years. Prior to his release, however, Petitioner filed a petition in the Circuit Court for Respondent's involuntary civil commitment pursuant to the Jimmy Ryce Act, Chapter 394, Part V, Florida Statutes (1999). Respondent moved to enforce the plea agreement and sentence on the basis that the involuntary civil commitment proceedings under the Jimmy Ryce Act violated the terms of the plea agreement in that the State should be equitably estopped from maintaining a position inconsistent with its position which was entered into at the time of the plea agreement. (R 89-107) The trial court denied the Motion to Enforce Plea Agreement and Sentence. (R 129, 147)

On October 16, 2002, the First District Court of Appeal, following the precedent set by the First District in Harris v.

State, 27 Fla. Law Weekly D946 (FL 1st DCA April 26, 2002), on mots. for reh'g and reh'g en banc, 27 Fla. Law Weekly D2175 (FL 1st DCA October 4, 2002), reversed and remanded the judgement of the Circuit Court for further proceedings as in Harris. Gentes v. State, 828 So.2d 1051 (Fla. 1st DCA 2002) In Harris, the First District reversed Harris' Final Order of Civil Commitment with directions that the plea agreement and sentence be specifically enforced. Harris was entitled to specific performance of his plea agreement. The First District found that the State was equitably estopped from maintaining a position inconsistent with the position it asserted at the time of the plea agreement by the filing of a Petition for Civil Commitment, a discretionary act; the exercise of which breached the plea agreement. On Rehearing, in Harris, the First District denied the State's Motion for Rehearing and Rehearing En Banc. In so doing, the First District rejected Petitioner's newly asserted argument on Rehearing that Harris was on active probation while civilly committed and that therefore there was no breach of the plea agreement.

Petitioner filed a Notice to Invoke this Court's Discretionary Jurisdiction. On March 11, 2003, this Court postponed its decision on jurisdiction of this case and

ordered briefs on the merits. This brief follows.

SUMMARY OF ARGUMENT

The right to contract is one of the most sacrosanct rights guaranteed by our fundamental law. It is expressly guaranteed by Article I, Section 10 of the Florida Constitution and Article I, Section 10, Clause 1 of the United States Constitution. A contract incorporates the law as it exists at the time the contract is made. A legislative enactment may not be applied retroactively if doing so would impair or destroy existing rights.

Here, the enactment of a new law, the Jimmy Ryce Act, violated the constitutional prohibition against laws impairing the right to contract. Respondent bargained for and was led to believe that in exchange for his agreement to give up certain constitutional rights, most notably, that of trial by jury, he would be released and placed on probation after serving the incarcerative portion of his sentence. The enactment of the Jimmy Ryce Act has given the State the power to unilaterally modify the terms and conditions of the agreement. This unilateral modification is not based on any conduct or changed mental condition of the Respondent but rather on the enactment of a new law in violation of Respondent's right to contract.

The First District Court of Appeal correctly held, in

Gentes v State, 828 So.2d 1051 (Fla. 1st DCA 2002), following the precedent set by the First District in Harris v. State, 27 Fla. Law Weekly D946 (Fla. 1st DCA April 26, 2002), on mots. for reh'g and reh'g en banc, 27 Fla. Law Weekly D2175 (Fla. 1st DCA October 4, 2002) that Respondent was entitled to specific performance of his plea agreement. In Harris, the First District reversed Mr. Harris' Final Order of Civil Commitment with directions that the plea agreement and sentence be specifically enforced. In holding that Harris was entitled to specific performance of his plea agreement, the court found that the State was equitably estopped from maintaining a position inconsistent with the position it asserted at the time of the plea agreement by the filing of a Petition for Civil Commitment, a discretionary act; the exercise of which breached the plea agreement. Here, as in Harris, Respondent entered into the plea agreement in reliance upon the prior inconsistent conduct of the State. On Rehearing, in Harris, the court denied the State's Motion for Rehearing and Rehearing En Banc. In so doing, the court rejected the State's newly asserted argument on Rehearing that Harris was on active probation while civilly committed and that therefore there was no breach of the plea agreement.

In the instant case, the State entered into an agreement

with Respondent about what would happen after his release from prison. In exchange for him agreeing to plead no contest and serve a prison sentence, the State would release and place Respondent on probation. The State waited until Respondent had completed his prison sentence and then reneged on the deal. The State has breached its contract by having Respondent incarcerated in a prison-like setting rather than fulfilling its obligation by releasing him into the community to complete his probation. Probation means a form of community supervision and not incarceration in a prison-like setting under the guise of a civil detainee. The filing of the Petition for Commitment under the Jimmy Ryce Act is a discretionary act; the exercise of which breached the agreement. The State should be equitably estopped from maintaining a position inconsistent with its position which was entered into at the time of the plea agreement. Respondent entered into the plea agreement in reliance upon the prior inconsistent conduct of the State.

Contrary to Petitioner's assertion, this Court's recent decision in Murray v. Reiger, 27 Fla. Law Weekly S1008 (Fla. December 5, 2002) is not dispositive. The Murray decision concerns only two issues. The first issue defines and explains the jurisdiction of the District Court of Appeal on

original Petitions for Writs of Habeas Corpus. The second issue addressed the breadth of unlawful detention within the context of habeas corpus claims which included not only unlawful detention under state statute but detention which violates an individual's constitutional rights as well. In exercising its discretion to review issues in addition to those upon which its conflict jurisdiction was invoked, this Court held that the Murray Petitioner's Habeas Corpus claim was without merit because his detention awaiting trial as a sexually violent predator was not unlawful as it did not violate the constitutional prohibition against double jeopardy nor did it affect his rights to substantive due process of law. Simply stated, this Court's holding in Murray is that detention under the Jimmy Ryce Act after completion of the incarcerative portion of a plea bargain split sentence without the opportunity to commence probation is neither statutorily nor constitutionally unlawful to sustain a valid habeas corpus claim.

Absent from the Murray decision is any discussion about or citation to the First District Court of Appeals decisions in Harris and Gentes which was predicated upon a breach of contract and equitable estoppel theory of law. To this extent, Murray did not in effect overrule the First District

Court of Appeal's holdings in Harris and Gentes.

ARGUMENT

THE FIRST DISTRICT COURT OF APPEAL WAS CORRECT IN FOLLOWING THE PRECEDENT SET BY THE COURT IN HARRIS V. STATE, 27 FLA. LAW WEEKLY D946 (FLA. 1ST DCA APRIL 26, 2002), ON MOTS. FOR REH'G AND REH'G EN BANC, 27 FLA. LAW WEEKLY D2175 (FLA. 1ST DCA OCTOBER 4, 2002) WHICH HELD THAT RESPONDENT WAS ENTITLED TO SPECIFIC PERFORMANCE OF HIS PLEA AGREEMENT IN THAT THE STATE WAS EQUITABLY ESTOPPED FROM MAINTAINING A POSITION INCONSISTENT WITH THE POSITION IT ASSERTED AT THE TIME OF THE PLEA AGREEMENT BY THE FILING OF A PETITION FOR CIVIL COMMITMENT, A DISCRETIONARY ACT; THE EXERCISE OF WHICH BREACHED THE PLEA AGREEMENT.

As Petitioner correctly points out, because the issue presented in this appeal is strictly a legal one, the standard of review is de novo.

The right to contract is one of the most sacrosanct rights guaranteed by our fundamental law. Chiles v. United Faculty of Florida, et al., 615 So.2d 671 (Fla. 1993) It is expressly guaranteed by Article I, Section 10 of the Florida Constitution and Article I, Section 10, Clause 1 of the United States Constitution. A contract incorporates the law as it exists at the time the contract is made. Moreover, contracts are made in legal contemplation of the existing applicable law:

> The laws which exist at the time and place of the making of a contract enter into and become a part of the contract made, as if they were expressly referred to and incorporated in its terms, including those laws which affect its construction, validity, enforcement or discharge.

Northbrook Property and Casualty Insurance Company v. R and J Crane Service, Inc., 765 So.2d 836 (Fla. 4th DCA 2000); Brandt v. Brandt, 525 So.2d 1017 (Fla. 4th DCA 1988); Southern Crane Rentals, Inc. v. City of Gainesville, 429 So.2d 771 (Fla. 1st DCA 1983) It is well settled that in the absence of an express legislative declaration that a statute have retroactive affect, the statute will be deemed to operate prospectively only, and that even a clear legislative expression of retroactivity will be ignored by the courts if the statute impairs vested rights, creates new obligations, or imposes new penalties. Alamo Rental Car, Inc. v. Mancusi, 632 So.2d 1352 (Fla. 1994); State v. Lavazzoli, 434 So.2d 321 (Fla. 1983)

Here, the enactment of a new law, the Jimmy Ryce Act, violated the constitutional prohibition against laws impairing the right to contract. Respondent bargained for and was led to believe that in exchange for his agreement to give up certain constitutional rights, most notably, that of trial by jury, he would be released and placed on probation after serving the incarcerative portion of his sentence. The enactment of the Jimmy Ryce Act has given the State the power to unilaterally modify the terms and conditions of the agreement. This unilateral modification is not based on any

conduct or changed mental condition of the Respondent but rather on the enactment of a new law in violation of Respondent's right to contract[1].

In the instant case, Respondent entered pleas of no contest in 1993 to five counts of lewd and lascivious assault. In accordance with the plea agreement, he was sentenced to a term of 20 years in state prison. At the end of the 20 years imprisonment, Respondent should have been released and placed on probation for 30 years. Prior to his release, however, Petitioner filed a petition in the Circuit Court for Respondent's involuntary civil commitment pursuant to the Jimmy Ryce Act, Chapter 394, Part V, Florida Statutes (1999). Respondent moved to enforce the plea agreement and sentence on the basis that the involuntary civil commitment proceedings under the Jimmy Ryce Act violated the terms of the plea agreement and that the State should be equitably estopped from maintaining a position inconsistent with its position which was entered into at the time of the plea agreement by the filing of a Petition for Civil Commitment, a discretionary act; the exercise of which breached the agreement.

Plea agreements are contracts governed by contract law.

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[1] Here, Respondent's mental condition is a static condition, whereas, in the context of a Baker Act Commitment, for example, one's mental condition is a changed one.

"Bargained guilty pleas, then are in large part similar to a contract between society and an accused entered into on the basis of perceived mutuality of advantage." Brown v. State, 367 So.2d 616, 622 (Fla. 1979) (quoting Brady v. United States, 397 US 742, 752 (1970)) In the instant case, the contract provided that the State would release Respondent on probation at the end of the incarcerative portion of the sentence. Respondent entered a change of plea in reliance upon the terms and conditions of the plea agreement. When a plea rests in any significant part upon a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled. When an agreement with a defendant has not been fulfilled, the defendant is entitled to specific performance of the unfilled performance or to withdrawal of the plea. Santobello v. New York, 404 US 257, 262-263, 92 S.Ct. 495, 499 (1971). In the instant case, enforcement of the plea agreement and sentence is the adequate remedy. State v. Frazier, 697 So.2d 944 (Fla. 3rd DCA 1997); Buffa v. State, 641 So.2d 474 (Fla. 3rd DCA 1994); United States v. Rewis, 969 F.2d 985 (11th Cir. 1992)

The filing of a Civil Commitment Petition under the Jimmy Ryce Act, under the plain language of the statute, is a discretionary act. See, Section 394.9135(3) and 394.914,

Florida Statutes (1999)[2] Thus, under the plain language of the statute, the State Attorney may file a petition; not shall file a petition. In the instant case, the State is making a discretionary decision that is tantamount to its reneging on its plea agreement. This is true because the recommendations of the Multi-disciplinary Team and the Department of Children and Families are not binding on the State. See, Senate Staff Analysis and Economic Impact Statement, Committee on Children and Families CF/SB 2192 (March 30, 1999) p.5 ("Regardless of what is actually recommended by the multi-disciplinary team, the State Attorney always makes the final determination as to whether a petition to civilly commit a person will be filed.")

The doctrine of equitable estoppel precludes the State from breaching the terms of a plea agreement and entitles Respondent to enforcement of the plea agreement and sentence.

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[2] 394.9135(3) provides in pertinent part, within 48 hours after receipt of the written assessment of recommendation from the multi-disciplinary team, the State Attorney, as designated in section 394.913, may file a petition with the Circuit Court alleging that the person is a Sexually Violent Predator and stating facts sufficient to support such an allegation. Section 394.914 provides in pertinent part: Following receipt of the written assessment of recommendation from the multi-disciplinary team, the State Attorney, in accordance of section 394.913, may file a petition with the Circuit Court alleging that the person is a sexually violent predator and stating facts sufficient to support such an allegation. (emphasis added)

The doctrine of equitable estoppel is based on public policy and is designed to promote justice. It may be applied when representation of one party reasonably leads another to believe in a certain state of affairs and in reliance on such representations the latter changes his position to his detriment. In short, equitable estoppel precludes a person from maintaining a position inconsistent with another position which was asserted at a previous time. The elements necessary to establish an equitable estoppel are 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. Mandarin Paints and Flooring Inc. v. Potura Coatings of Jacksonville, Inc., 744 So.2d 482 (Fla. 1st DCA 1999). One seeking to invoke the doctrine of equitable estoppel against the government first must establish the above elements of estoppel and then show that the government's act will cause serious injustice and that imposition of estoppel will not unduly harm the pubic interest. Alachua Co. v. Cheshire, 603 So.2d 1334 (Fla. 1st DCA 1990).

In the instant case, pursuant to the plea agreement, the State represented to Respondent that in exchange for his

change of plea that he would be released on probation after he served the incarcerative portion of the sentence. Respondent relied upon the representation in changing his plea. Now the State seeks to change its position by filing a Petition for Involuntary Civil Commitment to Respondent's detriment and keep him incarcerated indefinitely under the guise of a civil detainee in a prison-like setting. The action taken by the State is a serious injustice to Respondent and an estoppel will not unduly harm the public interest because Respondent would be released on probation and if he failed to abide by the terms or conditions of his probation as set forth in the plea agreement, he would again be subject to a prison sentence.

In short, the State reneged on its plea agreement with Respondent. The State agreed to release Respondent on probation after he served the incarcerative portion of his sentence. The State then breached that agreement by filing the Petition for Civil Commitment. Had Respondent been released on probation after serving his incarcerative portion of the sentence as relied upon by him at the time he entered his change of plea, the State would have been precluded from filing a Petition for Civil Commitment because Respondent would not have been in custody which is a jurisdictional

prerequisite for the filing of a petition under the Jimmy Ryce Act. State v. Atkinson, 831 So.2d 172 (Fla. 2002); State v. Siddal, 772 So.2d 555 (Fla. 3rd DCA 2000)

Petitioner's argument that Respondent is on active probation via its hearsay reference and subsequent remedial reference to the Department of Corrections website is unavailing. (PB 19-20) Probation means a form of community supervision and not incarceration in a prison-like setting under the guise of a civil detainee. Section 948.001(5), Florida Statutes (1995) In the instant case, the First District correctly followed the precedent set by the court in Harris v. State, 27 Fla. Law Weekly D946 (Fla. 1st DCA April 26, 2002), on mots. for reh'g and reh'g en banc, 27 Fla. Law Weekly D2175 (Fla. 1st DCA October 4, 2002) In Harris, the First District reversed Harris' Final Order of Civil Commitment with directions that the plea agreement and sentence be specifically enforced. Harris was entitled to specific performance of his plea agreement. The court found that the State was equitably estopped from maintaining a position inconsistent with the position it asserted at the time of the plea agreement by the filing of a Petition for Civil Commitment, a discretionary act; the exercise of which breached the plea agreement. Here, as in Harris, Respondent

entered into the plea agreement in reliance upon the prior inconsistent conduct of the State. On Rehearing, in Harris, the court denied the State's Motion for Rehearing and Rehearing En Banc. In so doing, the court rejected the State's newly asserted argument on Rehearing that Harris was on active probation while civilly committed and that therefore there was no breach of the plea agreement.

Contrary to Petitioner's assertions otherwise, this Court's recent decision in Murray v. Reiger, 27 Fla. Law Weekly S1008 (Fla. December 5, 2002) is not dispositive of the instant case. (PB 6-9) The Murray decision concerns only two issues. The first issue defined and explained the jurisdiction of the District Court of Appeal on original Petitions for Writs of Habeas Corpus. The second issue addressed the breadth of unlawful detention within the context of habeas corpus claims which included not only unlawful detention under state statute, but detentions which violate an individual's constitutional rights as well. In exercising its discretion to review issues in addition to those upon which its conflict jurisdiction was invoked, this Court held that the Murray Petitioner's habeas corpus claim was without merit because the detention awaiting trial as a sexually violent predator was not unlawful as it did not violate the

constitutional prohibition against double jeopardy nor did it affect his rights to substantive due process of law. The Murray decision is limited not only upon its facts, but upon the narrow legal issue concerning habeas corpus. To that extent, this Court's holding is that detention under the Jimmy Ryce Act, Chapter 394, Part V, Florida Statutes (1999), after completion of the incarcerative portion of a plea bargain split sentence without the opportunity to commence probation is neither statutorily nor constitutionally unlawful to sustain a valid habeas corpus claim. The Murray decision was quite precise in that denied the habeas corpus petition because "Murray's constitutional claim is without merit and he was not entitled to release from detention on that basis."

Absent from the Murray decision is any discussion or citation to the First District decision in Harris which was predicated upon a breach of contract and an equitable estoppel claim. To this extent, Murray did not in effect overrule the First District's holdings in Harris and Gentes. Here, as in Harris, Respondent's Motion to Enforce Plea Agreement and Sentence was predicated upon a breach of contract and equitable estoppel theory of law[3].

[3] Finally, this Court should reject the notion that commitment under the Jimmy Ryce Act is a collateral consequence of a plea given the severity of the consequences

Accordingly, the opinion of the First District Court of Appeal must be upheld.

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under the Jimmy Ryce Act. (PB 14-18) This is true because as the Court in Watrous v. State, 793 So.2d 6 (Fla. 2nd DCA 2001) acknowledged and recommended, because of the severity of the consequences under the Jimmy Ryce Act, the trial court or counsel should advise all defendants who potentially could be affected by the Jimmy Ryce Act that they could be subject to indefinite civil commitment upon completion of the incarcerative portion of their sentence. As Judge Blue, in dissent, observed in Watrous, "[A] sense of justice and fair play render a strict application of the rule regarding collateral consequences inappropriate to a sanction as severe as the one faced in this case," for Watrous would undergo automatic pretrial confinement of no remedial value while his eligibility for sexually violent predator commitment was being assessed and was at risk of long term confinement if he was committed.

CONCLUSION

Based on the foregoing arguments, and the authorities cited therein, Respondent requests this Court to uphold the opinion of the First District Court of Appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Thomas H. Duffy, Assistant Attorney General, at The Capitol, PL-01, Tallahassee, FL 32399-1050, on this date, April 25, 2003.

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that, pursuant to Florida Rule of Appellate Procedure 9.210, this brief was typed in Courier New 12 Point.

Respectfully submitted,

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