IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

DONALD GENTES,

Respondent.

CASE NO. SC02-2440

AMENDED
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, Donald Gentes, 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.

The record on appeal consists of one volume, which will be referenced according to the respective number designated in the Index to the Record on Appeal, followed by any appropriate page number in parentheses.

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

STATEMENT OF THE CASE AND FACTS

On September 23, 1992, the State filed a two-count information charging Appellee, Donald Gentes, with capital sexual battery on two victims. I, 23. Each victim was alleged to have been between 8 and 9 years of age, and the defendant between 50 and 52; each accused him of placing his tongue on her vagina. I, 1, 3. He was charged with one episode against each victim, but according to a law enforcement report one victim reported more than 20 episodes during the time that Appellee was her foster father. I, 5-7.

On October 22, 1993, Appellee entered no contest pleas to five counts of lewd and lascivious assault and was sentenced to 10 years in prison on two of the counts, the sentences to be served

consecutively, to 15 years probation on two others (consecutive), and 15 years probation (concurrent with the other probation charges) on the final count. I, 42-51.[1]

On May 14, 1999, an order of probation was entered, *nunc pro tunc* to October 22, 1993. On June 20, 2001, Appellee filed a Motion to Enforce Plea Agreement and Sentence, wherein he alleged that on November 1, 1999, prior to his release from prison, the State had filed a petition pursuant to Florida's sexually violent predator (SVP) statute, the Jimmy Ryce Act. I, 89. This action breached his plea agreement, Appellee maintained, because it placed him "in a prison-like setting" and that the State had breached its contract with him and should be equitably estopped from proceeding with the SVP commitment. I, 89-90.

At a hearing on September 6, 2001, the Hon. Nikki Ann Clark, circuit judge, denied the motion orally. I, 147. A written order was entered on October 10, 2001. I, 129.

Appellant appealed and, on October 16, 2002, a panel of the First District Court of Appeals reversed, based on Harris v. State, 27 Fla. L. Weekly D946, 2002 WL 731699 (Fla. 1st DCA Apr. 26, 2002), on mots. for reh'g and reh'g en banc (Oct. 4, 2002). Gentes v. State, 828 So. 2d 1051 (Fla. 1st DCA 2002).

The lower court certified the following questions, which were certified in Harris:

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[1] The record does not reflect the filing of an amended information.

> 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?
>
> 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?

828 So. 2d at 1052.

In the interim, Appellee's civil commitment case proceeded to trial, which resulted in a jury verdict for the State, which was set aside by the trial judge and reinstated in State v. Gentes, 829 So. 2d 358 (Fla. 1st DCA 2002). Since that time, Appellee has moved to dismiss those proceedings, and the dismissal has been granted; the State has appealed that decision.

This Court also has provisionally accepted review in Harris, as case no. SC02-2172.

SUMMARY OF ARGUMENT

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 rationale that the court below had to follow, based on the First District Court of Appeals' ruling in Harris v. State, 27 Fla. L. Weekly D946, 2002 WL 731699 (Fla. 1st DCA Apr. 26, 2002), on mots. for reh'g and reh'g en banc (Oct. 4, 2002). The two-judge Harris panel had ruled that, under functionally identical circumstances, the State was estopped from pursuing civil commitment against anyone who had entered a plea in a criminal case that called for probation after the incarcerative portion of a prison sentence.

The Harris decision, which the panel below in this case criticized and which has been accepted conditionally for review here as SC02-2172, was based on faulty understanding of the facts and disregard for the weight of authority in Florida and elsewhere, and would make for poor public policy. This Court should quash the decision below and answer the three certified questions in the negative.

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?

A. STANDARD OF REVIEW

This case largely presents a legal issue, which would, therefore, be reviewed *de novo*.

B. THE TRIAL COURT'S RULING

The trial court denied Appellee's motion to enforce the plea agreement. I, 129, 147.

C. THE APPELLATE COURT'S RULING

The First District Court of Appeal reversed the trial court's order based on Harris v. State, even while it appeared to criticize the reasoning in that opinion. 828 So. 2d at 1052-1053. The court also certified the following questions from Harris:

certified the following questions, which were certified in Harris:

> 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?
>
> 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?

828 So. 2d at 1052. The court noted, however:

> 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.

Id. at 1053.

D. MERITS

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

The opinion below should be reversed, as it is based on a premise that now has been rejected by this Court. In Murray v. Regier, 2002 WL 31728885, 27 Fla. L. Weekly S1008 (Fla. Dec. 5, 2002), 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).

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, after substantial litigation in both the Fourth and Third Districts,[2] 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.[3]

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

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

[3] There is nothing in the record that shows it, but it does appear that Appellee is, in fact, on probation. The Department of Corrections website, http://www.dc.state.fl.us/ActiveOffenders/, indicates that he is on active probation until October 2, 2029.

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 basis upon which the Harris majority sought to create a distinction – prisoners with probation left to serve as opposed to those with no probation – is meaningless under Florida law.

This clear and unequivocal language in Murray thus has overruled Harris, upon which the panel below relied and had to be governed. The Fourth District Court of Appeal has recently recognized this. 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.

The ground upon which the Harris majority sought to distinguish Murray's situation from Harris,' i.e., that Murray did not preserve the issue by raising it in a timely fashion (Harris, 2002 WL 731699 at *2), is specious, as this Court's holding in Murray and the Fourth District's Faris opinion make clear. Except for the two-judge panel majority in Harris and the precedent-bound and reluctant panel here, 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 prohibits the later institution of sexually violent predator proceedings. The opinion below noted:

> [T]he *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, 740 N.E.2d 1146 (Ill.App.Ct.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, 986 P.2d 771(Wash.1999)(en banc), cert. denied, 531 U.S. 1125 (2001) (explaining

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

> 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, 953 P.2d 666 (Kan.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, 81 Cal.Rptr.2d 658 (Cal.Ct.App.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.

828 So. 2d at 1052.

Indeed, Harris (and the somewhat reluctant if precedent-bound Gentes) appear to stand alone in holding that a plea agreement that calls for probation voids a subsequent sexually violent predator action. While the language in Collie applies to the sexual predator registration and notification statute, section 775.21, Florida Statutes, and not the Jimmy Ryce Act, there is valid distinction in this context. Discussion of some of these

cases from other jurisdictions highlights the variance from the nation's jurisprudence.

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

953 P. 2d at 676.

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[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.

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 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 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

[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, 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 the panel below in this case next pointed out, Harris was not consonant with state precedent, either:

> 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); see also Kansas v. Hendricks, 521 U.S. 346 (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); Murray v. Kearney, 770 So.2d 273 (Fla. 4th DCA 2000) (finding that similar to a Baker Act commitment, a Ryce Act commitment is not part of the criminal sentence); cf. Westerheide v. State, 767 So.2d 637 (Fla. 5th DCA 2000) review granted, 786 So.2d 1192 (Fla.2001) (conducting a detailed analysis of the Ryce Act and finding that the Act is civil in nature because confinement is for treatment and not punishment); but see Parlow v. State, 813 So.2d 999 (Fla. 4th DCA 2002) (allowing withdrawal of plea based on failure to inform defendant of sexual offender registration requirement). Those cases holding that civil commitment is not part of the criminal sentence appear persuasive on the present issue.[7]

828 So. 2d 1052-1053.

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

[7] The day after this opinion was issued, the Florida Supreme Court issued its opinion in Westerheide, which affirmed the holding and the rationale of the Fifth District Court of Appeal.

collateral consequences of the criminal prosecutions that preceded them. 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 v. State, 710 So. 2d 1000 (Fla. 2d DCA 1998) demonstrates at least persuasive authority for affirming the trial court's order. The Harris majority dismissed Murray as not being procedurally similar, and 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.

Collie, which arose in conjunction with statutory requirements that sexual predators register with law enforcement authorities after completion of their sentences and that their residences be published, so that the community is aware of their existence in the community, is significant. Collie had entered a plea in a criminal case, resulting in community control and probation. Subsequently, the State sought to have him declared a sexual predator, under section 775.21, Florida Statutes (1993), for the purpose of registration with law enforcement and publication of his residence. Collie argued that the publication, registration and notification requirements violated the terms of the prior criminal plea bargain, which made no reference to them, as those requirements were alleged to constitute additional punishment. The Second District rejected that argument, finding that a collateral consequence of a plea cold not violate terms of a plea agreement:

> Collie asserts that the sexual predator designation constitutes a breach of contract because it imposes punishment beyond that to which he contractually agreed. In ***Benitez v. State***, 667 So. 2d 476 (Fla. 3d DCA 1996), the Third District Court held that the sexual predator designation was a collateral consequence of the guilty plea and the court was not required to advise the defendant of this consequence during the plea colloquy. We agree.

710 So. 2d at 1008. Thus, the Court concluded that the sexual predator designation was not punishment and, since it was not punishment, it could not violate the terms of a plea agreement which is concerned solely with criminal punishment. 710 So. 2d at 1008. See, also, Pearman v. State, 764 So. 2d 739 (Fla. 4th DCA 2000); Watrous v. State, 793 So. 2d 6 (Fla. 2d DCA 2001).

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).[8]

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

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

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.

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

The Gentes opinion finally noted:

> 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 1053. Thus, the Gentes panel framed the issue much more succinctly and neutrally. The Harris position regarding estoppel has no basis in law or logic.

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,[9] 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

[9] 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).

> 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 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 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, to the extent that it was "relied upon" by a defendant who almost certainly would have gladly accepted a plea that did not call for 30 years of supervision), 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.[10] It is not punitive, it is not a part

[10] See, also, Kansas v. Hendricks, 521 U.S. 346 (1997); In re Linehan, 557 N.W. 2d 171 (Minn. 1996), vacated and remanded

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 at the time that the person is about to be released into society, at the conclusion of incarceration.[11] 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

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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).

[11] § 394.912, Fla. Stat.

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 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 lower 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. 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 certified questions should be answered in the negative, the decision of the District Court of Appeal reported at 828 So. 2d 1051 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 April 14, 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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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

DONALD GENTES,

Respondent.

CASE NO. SC02-2440

A P P E N D I X

Donald Gentes v. State, 828 So.2d 1051 (Fla. 1st DCA 2002) Oct. 16, 2002