IN THE SUPREME COURT OF FLORIDA

ERROL AUSTIN ROLLMAN,

Petitioner,

v.

CASE NO. SC03-1871
1D02-3544

STATE OF FLORIDA,

Respondent.

________________________/

ON DISCRETIONARY REVIEW FROM
THE FIRST DISTRICT COURT OF APPEAL

BRIEF OF PETITIONER ON THE MERITS

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IN THE SUPREME COURT OF FLORIDA

ERROL AUSTIN ROLLMAN, Petitioner, v. STATE OF FLORIDA, Respondent.	:	CASE NO. SC03-1871 1D02-3544

BRIEF OF PETITIONER ON THE MERITS

I PRELIMINARY STATEMENT

Petitioner was the defendant before the trial court and the appellant in the lower tribunal. A one volume record on appeal will be referred to as "I R," followed by the appropriate page number in parentheses.

Attached hereto as appendix A is the opinion of the lower tribunal, which has been reported as Rollman v. State, 28 Fla. L. Weekly D2254 (Fla. 1st DCA Sept. 26,

2003).

II STATEMENT OF THE CASE AND FACTS

By information filed below, petitioner was charged with armed robbery with a firearm (I R 5). On October 22, 2001, petitioner was found to be incompetent to stand trial and committed (I R 56-63). On January 18, 2002, the hospital informed the court that petitioner was competent to proceed (I R 64-72).

On June 12, 2002, the court found petitioner competent to proceed, and petitioner entered a plea to the charge, in exchange for a 10 year mandatory minimum maximum sentence he had negotiated directly with the judge, and to ask for youthful offender sentencing (I R 80-87; 143-52).

On August 14, 2002, petitioner appeared for sentencing, and asked for a youthful offender sentence (I R 155-61). The judge declined to do so and imposed a 10 year mandatory minimum sentence, with credit for 579 days served, followed by 10 years probation (I R 130-41; 162). Petitioner objected to the addition of probation to the sentence because it was not a part of the plea agreement, and moved to vacate the probation order, but the court denied the motion (I R 162-64).

On August 21, 2002, petitioner filed a timely notice of appeal (I R 120). The

Public Defender of the Second Judicial Circuit was later designated to represent petitioner.

On direct appeal, a majority of the First District (Judges Benton and Browning) first noted three facts: that at no time had petitioner requested to withdraw his plea; that if petitioner violated his consecutive term of probation, he could receive a life sentence; and that the judge had not cited any factor which caused him to add the probationary term.

However, the majority relied on Davis v. State, 308 So. 2d 27 (Fla. 1975), and held that petitioner was not entitled to specific performance of the 10 year plea agreement he had made with the judge, and was not entitled to have the consecutive 10 year probationary term vacated. Appendix at 2-3.

Judge Padovano concurred in the result on the theory that the 10 year maximum sentence offered by the judge was a "cap" and not a specific plea bargain which prohibited the addition of 10 years probation. Appendix at 4-5.

The lower tribunal certified the following question to this Court:

> WHERE A TRIAL COURT ANNOUNCES THE MOST SEVERE SENTENCE THAT WILL BE IMPOSED IN THE EVENT OF A PLEA, MAY THE TRIAL COURT THEREAFTER, ONCE THE PLEA HAS BEEN ACCEPTED, PRONOUNCE A MORE SEVERE SENTENCE WITHOUT ANY STATED REASON OR ANY REASON APPARENT FROM THE RECORD? IF SO, MUST THE TRIAL COURT AFFIRMATIVELY OFFER THE DEFENDANT AN OPPORTUNITY TO WITHDRAW THE PLEA?

Appendix at 3.

Petitioner filed a timely notice of discretionary review, pursuant to Fla. R. App. P. 9.030(a)(2)(A)(v), and Art. V, §3(b)(3), Fla. Const.

III SUMMARY OF THE ARGUMENT

The majority opinion in this case held that where a defendant enters into an agreement directly with the judge for a specific state prison sentence, he has no right to specific performance of that agreement when the judge sua sponte adds a term of probation to the specific state prison sentence.

The standard of review is de novo, since this case involves only a question of law.

The majority opinion is incorrect. The law is clear that where a defendant enters into a plea agreement directly with the judge for a specific sentence, the defendant is entitled to the benefit of his bargain. The lower tribunal first noted three facts: that at no time had petitioner requested to withdraw his plea; that if petitioner violated his consecutive term of probation, he could receive a life sentence; and that the judge had not cited any factor which caused him to add the probationary term.

The courts have long recognized that specific performance is the proper remedy to enforce a plea agreement.

Yet the lower tribunal relied solely on this Court's 28 year old opinion in Davis v. State, *supra*, which had not been cited by either party's brief, and held that petitioner was not entitled to specific performance of his plea agreement. Davis is not controlling authority, because the defendant there was arrested for a new crime between her plea and sentencing dates. Here, petitioner did nothing between his plea and sentencing dates to cause the judge to alter the plea agreement.

The two remedies for a violation of a plea agreement, first suggested in Davis, are not exclusive. These are offering the defendant the right to withdraw his or her plea, or asking the defendant is he or she wants to accept the altered sentence announced by the judge. Where the judge, at his own risk, makes a specific plea bargain with a defendant, and where a defendant does not desire to withdraw his plea, and where the judge does not give any justification for altering the plea agreement, the defendant is entitled to the benefit of his bargain.

Cases prior to and subsequent to Davis have recognized specific performance as one of the possible remedies for a violation of a plea agreement.

The judge clearly represented to petitioner at the plea that he would receive

between six and 10 years in state prison. The judge never mentioned his intent to impose a probationary term following the prison sentence. Petitioner relied on that representation in entering his plea. It was the judge who changed his position detrimental to petitioner when he added the probationary term.

The defendant cannot be asked to withdraw his plea or be asked to accept the newly-announced sentence. The only way to ensure that the defendant receives the benefit of his bargain is to require specific performance of the agreement he had made with the judge. Petitioner's bargain with the judge constituted a legally-binding contract.

In fact, this Court recognized in Charatz v. State, 577 So. 2d 1298 (Fla. 1991), subsequent to Davis, that specific performance is a proper remedy when the defendant acts in reliance on the plea agreement and suffers prejudice from that agreement. In fact, this Court recognized in Hunt v. State, 613 So. 2d 893 (Fla. 1993), subsequent to Davis, that specific performance is a proper remedy when the defendant does not violate a provision in a plea agreement.

This Court must answer the first part of the certified question in the negative,

reverse the opinion of the lower tribunal, and vacate the 10 year probationary term imposed by the judge. There is no need to address the second part of the certified question.

IV ARGUMENT

WHERE A TRIAL COURT ENTERS INTO DIRECT PLEA NEGOTIATIONS WITH THE DEFENDANT, AND ANNOUNCES THE MOST SEVERE SENTENCE THAT WILL BE IMPOSED IN THE EVENT OF A PLEA, THE TRIAL COURT, ONCE THE PLEA HAS BEEN ACCEPTED, MAY NOT PRONOUNCE A MORE SEVERE SENTENCE WITHOUT ANY STATED REASON OR ANY REASON APPARENT FROM THE RECORD, AND MUST GRANT THE DEFENDANT SPECIFIC PERFORMANCE OF THE PLEA AGREEMENT.

Petitioner entered into a plea agreement directly with the judge for a maximum sentence of 10 years mandatory minimum under §775.087(2)(a)1., Fla. Stat., while hoping for a six year youthful offender sentence under §958.04(2)(d), Fla. Stat.[1] The judge never advised petitioner that he was considering adding a term of probation to the plea agreement. The judge subsequently imposed the 10 year sentence, but also added a term of 10 years probation.

This was reversible error. Petitioner was entitled to the benefit of his bargain. The standard of review is de novo, since this is purely a question of law.

[1]The imposition of a youthful offender sentence would remove the need for a 10 year mandatory. *See, e.g., Drury v. State*, 829 So. 2d 287 (Fla. 1st DCA 2002).

This agreement was made <u>in direct negotiations with the judge</u>, notwithstanding the position of the prosecutor:

> MR. GEISSEL: Your Honor, if we could before we go forward. Also, I just want the record to reflect that this is a plea straight up. There's no agreement wit the state on this particular plea as far as for any cap or anything else. I don't know if the plea agreement reflects that, but that is what had come out of out discussion at the bench.
>
> THE COURT: The court has capped it at ten.
>
> MR. GEISSEL: Right, the court indicated it would cap it at the ten year minimum mandatory under the ten-twenty life statute. However, there's no agreement with the state.
>
> *   *   *
>
> THE COURT: Nobody is going to hurt you, Mr. Rollman. I need to ask you some more questions. Look over here just a minute, now. **Do you understand that by entering this plea the most you can get is ten years in the Department of Corrections** and that you would get credit toward that for any time you've already done in the hospital and in the jail?
>
> THE DEFENDANT. Yes, sir.
>
> *   *   *
>
> THE COURT: My purpose is to find out if you know what you are doing and if your plea this morning is voluntary and **if you**

> **understand the most you can get is ten years.**
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: **You're likely to get between six and ten, probably closer to the ten**. But your lawyer is going to argue for six and the state is going to argue for ten.
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: All right, under the circumstances I'm going to find the plea to be freely and voluntarily entered this morning and accept it.
>
> (I R 146; 148-49; 151-52; emphasis added).

At no time did the judge mention the possibility that a term of probation might be imposed to run consecutively to the 10 year prison sentence. In fact, the judge <u>affirmatively led petitioner to believe</u> that he was only going to receive a prison sentence between six years as a youthful offender or 10 years, with no probation to follow.

When the judge added a term of 10 years probation to the plea agreement he had made with petitioner, petitioner objected to this alteration of the plea agreement and moved to vacate the probationary term. The judge ignored the objection and

denied this motion without comment:

> MR. WEAVER: Your Honor, we're back on the record on Errol Rollman's case. I just wanted to put on the record our bench conference. I approached and explained to the court that the plea had been for an adjudication of guilt and a cap of ten years DOC and that the plea was accepted by the court about two months ago.
>
> I'm arguing to the court that the ten years probation, restitution and court costs goes beyond the cap the court had already set for the sentence. For the sake of preserving the record, I believe that goes beyond what was contemplated. I'd like to make that apart of the record.
>
> THE COURT: The record will be so noted.
>
> *   *   *
>
> MR. WEAVER, Just for the record, I make a motion to vacate the probationary part of the sentence and reduce the restitution to a civil judgment.
>
> THE COURT: That motion is denied.
>
> (I R 163-64).

Thus, the issue is fully preserved.

It is well-settled that a defendant is entitled to the benefit of his bargain when he strikes a plea agreement. After all, petitioner's bargain with the judge

constituted a legally-binding contract.

The right to make a contract is guaranteed by our fundamental law. Chiles v. United Faculty of Florida, et al., 615 So. 2d 671 (Fla. 1993) It is expressly guaranteed by Art. I, §10, Fla. Const. and Art. I, §10, Cl. 1, U.S. Const. Plea agreements are contracts governed by contract law. As this Court stated in Brown v. State, 367 So. 2d 616, 622 (Fla. 1979), *quoting* Brady v. United States, 397 U.S. 742, 752 (1970): "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.'"

In the instant case, the contract provided that the judge would sentence petitioner to no less than six and no more than 10 years in state prison. Petitioner entered a change of plea in reliance upon the express terms of the plea agreement offered directly by the judge. Most notably, petitioner gave up his constitutional right to a trial by jury in reliance upon the express terms of the plea agreement offered directly by the judge. *See also* State v. Frazier, 697 So. 2d 944 (Fla. 3rd DCA 1997) (principles of contract law are applicable to plea

agreements); and Garcia v. State, 722 So. 2d 905 (Fla. 3rd DCA 1998) (a plea agreement is governed by the rules of contracts).

When a plea rests in any significant part upon a promise or agreement of the prosecutor or the judge , 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:

> This phase of the process of criminal justice [the plea proceeding], and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on 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.

Santobello v. New York, 404 U.S. 257, 262 (1971).

Justice Douglas specially concurred and made the following observations:

> Where the "plea bargain" is not kept by the prosecutor [or the judge], the sentence must be vacated and **the state court will decide in light of the circumstances of each case whether due process requires (a) that there be specific performance of the plea bargain** or (b) that the defendant be given the option to go

> to trial on the original charges. **One alternative may do justice in one case, and the other in a different case. In choosing a remedy, however, a court ought to accord a defendant's preference considerable, if not controlling**, weight inasmuch as the fundamental rights flouted by a prosecutor's breach of a plea bargain are those of the defendant, not of the State.

Id., 404 U.S. at 267; bold emphasis added.

In the instant case, enforcement of the plea agreement and sentence is the proper remedy, especially where petitioner does not desire to withdraw his plea.

The courts have long recognized that specific performance is the proper remedy to enforce a plea agreement. In State v. Davis, 188 So. 2d 24 (Fla. 2nd DCA), *cert. den.* 194 So. 2d 621 (1966), the defendant, charged with first degree murder, entered into an agreement with the state that if he passed a polygraph test, the charge would be dismissed. But if he did not pass the polygraph test, he could nevertheless enter a plea to the lesser offense of manslaughter. Although there was evidence that he had not passed the test, the judge dismissed the charge and the state appealed.

The court affirmed because the defendant had acted in reliance on a pledge of public faith:

> Defendant had agreed to plead guilty to manslaughter if the test was not in his favor, but the state had agreed to dismiss the case if the results indicated defendant was telling the truth. This was a pledge of public faith -- a promise made by state officials -- and one that should not be lightly disregarded. As Judge Goldmann stated in his dissenting opinion in *State v. Ashby*, 81 N.J.Super. 350, 195 A.2d 635 (1963) (which case was reversed by the New Jersey Supreme Court in *State v. Ashby,* 43 N.J. 273, 204 A.2d 1 (1964)):
>
>> 'In this case the prosecutor *** promised defendant that the indictments pending against him would be dismissed. **The wisdom of the agreement aside, that promise constituted a pledge of the public faith which should not have been repudiated**. The morals of the market place are a poor guide for the sovereign's actions.' 195 A.2d at 646.

Id. at 27; bold emphasis added. The same is true here. It was the judge who promised to impose a sentence between six and 10 years in prison if petitioner were to enter a plea. It was the judge's "pledge of public faith" which induced petitioner to enter his plea.

In Butler v. State, 228 So. 2d 421 (Fla. 4th DCA 1969), the defendant also agreed to take a polygraph test, and the parties agreed that the results of the

test, favorable or not, would be admissible at trial. The judge concurred in the agreement. Mr. Butler passed the test, and the state dropped the pending rape charge. But the state then obtained another indictment on the same charge and Mr. Butler was convicted.

The court relied on State v. Davis, *supra*, cited the "pledge of public faith" language quoted above, rejected the state's argument that criminal prosecutions were not a game, and held that the indictment should have been quashed. Again, it was the judge's "pledge of public faith" which induced petitioner to enter his plea.

The lower tribunal relied solely on this Court's 28 year old opinion in Davis v. State, *supra*, which had not been cited by either party's brief, and held that petitioner was not entitled to specific performance of his plea agreement. Davis is not controlling authority.[2] Ms. Davis entered her plea on condition that she would receive probation with adjudication withheld. Between her plea and sentencing dates, she was arrested for a new crime. The judge subsequently placed her on

[2]Lest there be any confusion, the appellee in *State v. Davis, supra*, was named Sampson Davis. The petitioner in *Davis v. State* was named Vikki Zimmerman Davis.

probation, but did not withhold adjudication.

This Court held that the judge had the alternative of allowing Ms. Davis to withdraw her plea, and Ms. Davis had the alternative of accepting the sentence as announced by the judge.

That is not the situation presented here. Petitioner did nothing adverse in the time between his acceptance of the judge's plea offer and his sentencing to cause the judge to alter the plea agreement.[3]

Cases subsequent to this Court's decision in Davis v. State have recognized specific performance as one of the possible remedies for a violation of a plea

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[3]Judge Padovano's view, that petitioner's plea bargain with the judge was really only a "cap" of 10 years incarceration (appendix at 4-5), is equally erroneous. The word "cap" was not mentioned during the plea colloquy. Judge Padovano observed that the judge's reference to a maximum sentence of 10 years "was clear to everyone present that he was referring only to the portion of the sentence that would be served in the Department of Corrections" and "Those who work in the criminal justice system are accustomed to thinking this way... ." (Appendix at 4).

It certainly was not "clear" to petitioner and his lawyer, and petitioner and his lawyer were certainly not "thinking this way," because his lawyer immediately objected to the addition of 10 years probation when the judge announced it at sentencing.

agreement, as recommended by Justice Douglas in Santobello v. New York, *supra.*

In Williams v. State, 341 So. 2d 214 (Fla. 2nd DCA 1977), the defendant entered a plea to aggravated assault before the late Judge Harry Lee Coe. Judge Coe promised to defer sentence from "'day to day and term to term,'" *Id.* at 215, if Mr. Williams assisted the police as an informant. A successor judge determined the bargain was not enforceable, set aside the plea, and Mr. Williams was convicted at trial and received a five year state prison sentence. The court reversed:

> We are aware that upon vacation of an order which defers sentencing from 'day to day and term to term' a defendant is amenable to imposition of a term of imprisonment. *See State v. Bateh*, 110 So.2d (Fla. 1959). Nevertheless we have no difficulty in reaching the conclusion that appellant was prejudiced by the turn of events in this case, and under these peculiar circumstances a probationary term rather than a term of imprisonment should be imposed consistent with the plea bargain. Appellant did not complain that the plea bargain was 'unconstitutional,' and **despite the invalidity of the sentence he had a right to specific performance of that bargain because as Judge Ryder found he had affirmatively complied with a court-sanctioned bargain**. This court has previously held that **a court-approved agreement was specifically enforceable** if, as in this case, the accused satisfied the conditions of the agreement. *State v. Davis,* 188 So.2d 24 (Fla. 2d DCA 1966). *See also Butler v. State,* 228 So.2d 421 (Fla. 4th DCA 1969). The case before us is significantly different from a situation where specific

> performance of a plea bargain would not be required. *See Barker v. State*, 259 So.2d 200 (Fla. 2d DCA 1972). In *Barker* the court tentatively agreed to a plea bargain, the defendant did not change his position by acting upon the bargain, and the court subsequently became aware of facts indicating that leniency was not appropriate.

Id. at 216; bold emphasis added.

In Wright v. State, 599 So. 2d 767 (Fla. 2nd DCA 1992), Judge Coe promised a defendant that if he waived a jury trial and agreed to have the case heard by the judge alone, he would not receive any sentence greater than probation. Jude Coe found Mr. Wright guilty and imposed probation as an habitual offender. Defense counsel objected to the habitualization because it was not part of the agreement between the defendant and the judge.

The court granted specific performance of the agreement between the judge and the defendant, because the habitualization element exposed the defendant to greater penalties:

> Wright agreed to waive his right to a jury trial with the understanding that he would receive a sentence no greater than probation. **The sentence imposed did not comport with the terms of the agreement. At the point that Wright was habitualized, he was exposed to greater penalties**. Because Wright has already been

> tried and convicted, it is too late for him to withdraw his waiver. *See Charatz v. State*, 577 So.2d 1298 (Fla. 1991) (plea bargain may be specifically enforced if defendant has suffered irrevocable prejudice in reliance thereon). Accordingly, the sentence of habitualized probation is reversed and the case is remanded for imposition of straight probation as was agreed to by the state and Wright.

Id.; bold emphasis added.

The same is true in the instant case. Because the judge added 10 years of probation to petitioner's agreed-upon sentence of straight prison time, petitioner is exposed to a much greater penalty -- life in prison -- if he ever violates probation.

In Nelson v. State, 596 So. 2d 1272 (Fla. 2nd DCA 1992), the defendant agreed to plead to an armed robbery charge, in exchange for a three to seven year guidelines sentence, and with a promise to help law enforcement file charges against his codefendant. He complied with the agreement, but when he appeared for sentencing, the state withdrew the plea offer because it had discovered a number of prior convictions of which it was previously unaware. Mr. Nelson filed a motion for specific performance of the plea agreement, which the judge denied. The court held:

> We agree that Nelson's motion for specific performance of his original plea agreement should have been granted. The state makes no allegation that Nelson misrepresented his record. Rather, it appears the state just did not do its homework before making the plea offer. Nelson was clearly irrevocably prejudiced by the state's withdrawal of the original plea agreement after he had fulfilled his part of it and left himself nothing with which to bargain. *See Charatz v. State*, 577 So.2d 1298 (Fla. 1991).
>
> Accordingly, we reverse Nelson's sentence and remand with directions that the original plea agreement be reinstated.

Id. at 1273. *Accord*: Espinosa v. State, 688 So. 2d 1016 (Fla. 3rd DCA 1997).

In Spencer v. State, 623 So. 2d 1211 (Fla. 4th DCA 1992), the court rejected the state's contention that withdrawal of the plea was the only remedy for the alleged breach of a plea agreement:

> To the state's contention that the only available remedy is withdrawal of the plea, as indeed this trial judge also concluded, we respond that the law is decidedly to the contrary.

Id. at 1212.

In Eulo v. State, 786 So. 2d 43 (Fla. 4th DCA 2001), the defendant entered a plea and was sentenced to five years in prison; however, if she appeared for sentencing at 9:00 a.m., the judge promised to mitigate her sentence to six months.

She appeared 15 minutes late, because of traffic and difficulty in entering the Broward County Courthouse, and so the judge imposed the five year sentence. The court reversed, because her violation of the plea agreement was de minimis and involuntary. *Accord*: Navedo v. State, 847 So. 2d 585 (Fla. 3rd DCA 2003).

Here, petitioner fully complied with his understanding of the plea bargain he had made directly with the judge. Specific performance of the plea agreement is especially applicable when the agreement is directly with the judge, as in Eulo and Williams v. State, *supra*.

Where the judge, at his own risk, makes a specific plea bargain with a defendant, and where a defendant does not desire to withdraw his plea, and where the judge does not give any justification for altering the plea agreement, the defendant is entitled to the benefit of his bargain. The two remedies for a violation of a plea agreement, first suggested in Davis, are not exclusive, as the cases subsequent to Davis, cited above, demonstrate.

Moreover, this Court has expressly recognized that the two Davis remedies are not exclusive. In Charatz v. State, 577 So. 2d 1298 (Fla. 1991), the defendant, a

jai alai player, entered a plea to bookmaking charges and was placed on probation with adjudication withheld, since an adjudication of guilt would bar him from his profession. If he violated probation, the judge agreed to place him on community control, again with adjudication withheld. Four months later, when the state pointed out that the bookmaking statute required an adjudication of guilt, the judge reluctantly imposed it.

This Court cited Williams v. State, *supra*, and held that Mr. Charatz' original plea bargain, that the judge would withhold adjudication, must be enforced, since he had acted in detrimental reliance on it:

> Charatz lived under the restraint of community control imposed by that order rather than under the less restrictive status of probation to which he was subject prior to his plea. Under these circumstances, we think Charatz is entitled to relief.
>
> Ordinarily, a plea bargain may not be specifically enforced. *Davis v. State*, 308 So.2d 27 (Fla. 1975). **However, there are circumstances under which a plea bargain may be enforced if the defendant has suffered irrevocable prejudice in reliance thereon**. *Williams v. State*, 341 So.2d 214 (Fla. 2d DCA 1976). The order withholding adjudication had long become final when the state did not appeal, and Charatz was not guilty of any fraud that might justify setting aside the order.

Id. at 1299; bold emphasis added.

Likewise, in Hunt v. State, 613 So. 2d 893 (Fla. 1993), this Court recognized specific performance as a third possible remedy to the violation of a plea agreement. There the defendant entered guilty pleas to two counts of first degree murder and other crimes, and agreed to testify against her codefendant Fotopoulos; but the sentence which she would receive (death or life) was not contingent upon her cooperation, and would be imposed after her codefendant's trial. Ms. Hunt refused to testify against her codefendant, which the judge found to be a material breach of the plea agreement, and so he imposed the death sentences without waiting to hear the evidence in the codefendant's trial.

This Court held that she had not breached her plea agreement and was entitled to the benefit of her bargain:

> A "constant factor" insuring basic fairness in the plea bargaining process is the requirement that "when a plea rests in any significant degree on 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." *Santobello v. New York*, 404 U.S. 257, 262, 92 S.Ct. 495, 499, 30 L.Ed.2d 427 (1971). It appears that defense counsel planned to rely on much of the evidence presented by the State in the Fotopoulos case to

> establish that Hunt was under extreme emotional distress and the substantial domination of Fotopoulos at the time of the murders. Thus, it was to the defense's advantage for Hunt's sentencing judge to consider all the evidence presented in Fotopoulos' trial whether or not Hunt testified in that case. Because **Hunt was entitled to the benefit of her bargain,** which the State made clear was not contingent on her cooperation, it was error for the court to sentence her without the benefit of the evidence presented in the Fotopoulos trial.

Id. at 897-98; bold emphasis added.

Specific performance of a plea agreement does not always benefit a defendant. In Allen v. State, 642 So. 2d 815 (Fla. 1st DCA 1994), the defendant entered a plea and agreed to pay the Sheriff for medical expenses while he was in the county jail. The court held that he could not contest the assessment of medical expenses because he had expressly agreed to that condition as a part of the plea. Here, the judge expressly agreed to sentence petitioner to a state prison sentence between six and 10 years.

In Bruce v. State, 679 So. 2d 1009 (Fla. 3rd DCA 1996), the defendant entered in to a plea agreement on condition that his sentence on the new charges would run concurrently with any sentence he would receive for a control release violation.

The judge stated that he had no authority to order concurrent sentences, only to recommend them. His control release was revoked, and the Department of Corrections ran his sentence on the new charges consecutive to his sentence on the revocation of control release. The court reversed and ordered the judge to honor the terms of the plea agreement. *Accord:* Kirkland v. State, 633 So. 2d 1138 (Fla. 2nd DCA 1994).

Likewise, in Hutchinson v. State, 845 So. 2d 1019 (Fla. 3rd DCA 2003), the defendant entered into a plea agreement whereby his Florida sentence would run concurrently with an existing federal sentence. When the federal authorities declined to do so, he returned to state court and argued for specific performance of his plea bargain, and the court agreed that he was entitled to specific performance. *Accord*: Taylor v. State, 710 So. 2d 636 (Fla. 3rd DCA 1998).

This Court approved the practice of a judge engaging in direct plea negotiations with a defendant in State v. Warner, 762 So. 2d 507 (Fla. 2000). In State v. Warner, this Court reviewed the situations in other jurisdictions which prohibit judicial plea bargaining, but chose to allow it in Florida, because, as the lower tribunal noted, it leads to three benefits:

> In comparing active judicial involvement with "ratification" or "plea withdrawal" procedures, other identified advantages are directness (it provides a firm basis for reliance on a plea); simplicity (it involves a single step); decorum (it provides a formal courtroom atmosphere, as contrasted with the informality of the current process); and procedural uniformity (it provides a forum for the implementation of uniform safeguards).

Id., 762 So. 2d at 513, *quoting from* Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining*, 76 Colum. L. Rev. 1060, 1129-1136 (1976).

However, such a practice is not without its pitfalls, as the instant case demonstrates. If the judge offers the defendant a specific sentence bargain, and the defendant accepts it and enters a plea in reliance on the judge's offer, the judge may not thereafter alter the terms of the agreement.

Petitioner seeks the benefit of his plea bargain with the judge for a 10 year state prison sentence and no probation to follow. This is not a situation in which petitioner can be forced to withdraw his plea, or accept the additional probationary term, for several reasons.

First, as the lower tribunal correctly noted, petitioner has lived up to his part of the bargain by giving up his right to trial by jury and in entering a plea,

and has not left any terms of the bargain unfulfilled. Thus, Fla. R. Crim. P. 3.170(g)(2), which comes into play when the defendant does not comply with the agreement,[4] does not apply.

Next, as the lower tribunal correctly noted, the judge did not cite any factor unknown at the time he offered petitioner a straight 10 year sentence which would make him require probation added onto the prison term. Thus, Fla. R. Crim. P. 3.171(d)[5] does not apply.

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[4] (g) Vacation of Plea and Sentence Due to Defendant's Noncompliance.

(2) Unless otherwise stated at the time the plea is entered:

(A) The state may move to vacate a plea and sentence within 60 days of the defendant's noncompliance with the specific terms of a plea agreement.

(B) When a motion is filed pursuant to subdivision (g)(2)(A) of this rule, the court shall hold an evidentiary hearing on the issue unless the defendant admits noncompliance with the specific terms of the plea agreement.

(C) plea or sentence shall be vacated unless the court finds that there has been substantial noncompliance with the express plea agreement.

(D) When a plea and sentence is vacated pursuant to this rule, the cause shall be set for trial within 90 days of the order vacating the plea and sentence.

[5] (d) Responsibilities of the Trial Judge.
After an agreement on a plea has been reached, the trial judge may have made known to him or her the agreement and reasons therefor prior to the acceptance of the plea. Thereafter, the judge shall advise the parties whether other factors (unknown

Next, as the lower tribunal correctly noted, the judge never said he did not concur in the plea bargain; in fact, it was the judge who offered the 10 year cap directly to petitioner. Thus, Fla. R. Crim. P. 3.172(g)[6] does not apply.

Finally, as the lower tribunal correctly noted, petitioner has never asked to withdraw his plea; he only asked that the 10 year probationary term be set aside because it was not part of the plea agreement. Thus, he cannot be forced to withdraw his plea. As the court stated in Spencer v. State, *supra*, 623 So. 2d at 1213:

> In choosing between specific performance and withdrawal of a plea to relieve a defendant from the state's breach of an agreement, the court "ought to accord a defendant's preference considerable, if not controlling weight * * *." *Santobello [v. New York]*, 404 U.S. [257] at 265, 92 S.Ct. [495] at 501 [(1971)] (Douglas, J., concurring); *accord: U.S. v. Rewis*, 969 F.2d 985 (11th Cir. 1992). **Here, Spencer demonstrated with unmistakable clarity his strong preference for specific performance. Plainly,**

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at the time) may make his or her concurrence impossible.

[6] (g) Withdrawal of Plea When Judge Does Not Concur. If the trial judge does not concur in a tendered plea of guilty or nolo contendere arising from negotiations, the plea may be withdrawn. This is one option suggested by *Davis v. State, supra*.

> **withdrawal of the plea would not remedy the loss of his bargain or inducement in deciding to plead**. (emphasis added).

Likewise, petitioner has demonstrated a "strong preference" for his 10 year sentence as promised by the judge. If he were forced to withdraw his plea in order to avoid the probationary term added by the judge, that would not "remedy the loss of his bargain."

Likewise, in Buffa v. State, 641 So. 2d 474 (Fla. 3rd DCA 1994), the defendant entered a plea in exchange for a sentence of five years, with a three year mandatory. The probation officer recommended a guidelines sentence of seven years in prison, followed by 10 years probation. The court held:

> Here, Buffa seeks specific performance. Withdrawal of the plea would not remedy the loss of his bargain or inducement in deciding to plead.

Id. at 475.

The same is true in the instant case. The judge clearly represented to petitioner at the plea that he would receive between six and 10 years in state prison. The judge never mentioned his intent to impose a probationary term following the prison sentence. Petitioner relied on that representation

in entering his plea. It was the judge who changed his position detrimental to petitioner when he added the probationary term. The only effective means of carrying out the agreement is to grant petitioner specific performance of the agreement and to give him the benefit of his bargain.

This Court must answer the first part of the certified question in the negative and hold that petitioner is entitled to specific performance of the plea agreement he had made directly with the judge. There is no need to address the second part of the certified question.

V CONCLUSION

Based upon the arguments presented here, the petitioner respectfully asks this Court to reverse the decision of the lower tribunal and remand with directions to strike the 10 year consecutive probationary term.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to Karen Armstrong, Assistant Attorney General, The Capitol, Tallahassee, Florida; and to petitioner, #P16875, Lancaster CI, 3449 S.W. State Road 26, Trenton, Florida 32693; on this ___ day of November, 2003.

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P. DOUGLAS BRINKMEYER

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that this brief was prepared in Courier New 12 point type.

____
P. DOUGLAS BRINKMEYER

IN THE SUPREME COURT OF FLORIDA

ERROL AUSTIN ROLLMAN,

Petitioner,

v.

CASE NO. SC03-1871
1D02-3544

STATE OF FLORIDA,

Respondent.

________________________/

ON DISCRETIONARY REVIEW FROM
THE FIRST DISTRICT COURT OF APPEAL

APPENDIX TO BRIEF OF PETITIONER ON THE MERITS

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28 Fla. L. Weekly D2254a

Criminal law -- Plea -- Specific performance -- Sentencing -- Where defendant entered nolo contendere plea in exchange for trial judge's assurance that defendant would receive a sentence of no more than ten years in prison, but judge subsequently imposed probationary split sentence of ten years imprisonment followed by a ten-year probationary term, defendant is not entitled to specific performance of the plea agreement even though the judge gave no reason for the imposition of a more severe sentence -- Questions certified: Where a trial court announces the most severe sentence that will be imposed in the event of a plea, may the trial court thereafter, once the plea has been accepted, pronounce a more severe sentence without any stated reason or any reason apparent from the record? If so, must the trial court affirmatively offer the defendant an opportunity to withdraw the plea?

ERROL AUSTIN ROLLMAN, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 1D02-3544. Opinion filed September 26, 2003. An appeal from the Circuit Court for Okaloosa County. Thomas T. Remington, Judge. Counsel: Nancy A. Daniels, Public Defender; P. Douglas Brinkmeyer, Assistant Public Defender, Tallahassee, for Appellant. Charlie Crist, Attorney General; Karen Armstrong, Assistant Attorney General, Tallahassee, for Appellee.

(BENTON, J.) On direct appeal, Errol Austin Rollman seeks specific performance of what he not unreasonably took as the trial court's promise (in exchange for his plea) to sentence him to no more than ten years' imprisonment for robbery with a firearm. As we read our supreme court's decision in *Davis v. State*, 308 So. 2d 27 (Fla. 1975), we are obliged to affirm, but we also certify questions of great public importance.

At a hearing on June 12, 2002, the trial judge assured Mr. Rollman, his lawyer and an assistant state attorney (who was not a party to any plea bargain) that, if he entered a plea of nolo contendere, Mr. Rollman would receive a sentence of no more than ten years in prison:

> MR. WEAVER (defense counsel): Your Honor, Mr. Rollman is entering a plea of no contest to the charge of robbery armed with a firearm. The plea agreement that we anticipate is that he would plea[d] to a cap of an adjudication of guilt and ten years in the Department of Corrections with credit for all time served since the date of his arrest . . . .
>
> . . .
>
> MR. GEISSEL (prosecutor): . . . I just want the record to reflect . . . .[that t]here's no agreement with the state on this particular plea . . . .
>
> THE COURT: The Court has capped it at ten.
>
> MR. GEISSEL: Right, the Court indicated it would cap it at the ten year minimum mandatory . . . . However, there's no agreement with the state.

Again during the plea colloquy, the trial judge reiterated, more than once, that Mr. Rollman's maximum sentence would be ten years in prison. He asked him, for example: "Do you understand that by entering this plea *the most you can get is ten years in the Department of Corrections* and that you would get credit toward that for any time you've already done . . . ?" (Emphasis added.)

On August 14, 2002, however, the same trial judge who had accepted the plea pronounced a probationary split sentence. *See Poore v. State*, 531 So. 2d 161, 164 (Fla. 1988) (describing the possibilities for resentencing that probationary split sentences afford). He sentenced Mr. Rollman not only to ten years' imprisonment, but also to a ten-year probationary period following his release from prison, plus restitution and court costs.

Under the sentence the trial court imposed, ten years in prison is only the beginning. Because robbery with a firearm is a felony "punishable by imprisonment for a term of years not exceeding life imprisonment," § 812.13(2)(a), Fla. Stat. (2002), any subsequent revocation of probation -- and it has recently been held that a probationer's failure to file a single monthly report may justify revoking probation, *see State v. Carter*, 835 So. 2d 259, 261 (Fla. 2002) -- might mean appellant's return to prison for the remainder of his life.[1] *See* § 944.275(4)(b)(3), Fla. Stat. (2002) ("State prisoners sentenced to life imprisonment shall be incarcerated for the rest of their natural lives, unless granted pardon or clemency.").

At the sentencing hearing, defense counsel reminded the trial judge that he had said at the plea hearing that he would not impose a sentence in excess of ten years' imprisonment, if Mr. Rollman entered a plea of nolo contendere,[2] which Mr. Rollman had then done, and that the plea had been accepted.[3] The defense moved *ore tenus* to vacate the probationary portion of the sentence (and to dispense with restitution).[4] But the trial court denied the motion without stating grounds, and, in due course, the present appeal was taken. Mr. Rollman now asks us to vacate the probationary portion of the sentence he received. (He makes no argument regarding restitution.)

In *Davis v. State*, 308 So. 2d 27 (Fla. 1975), our supreme court held that Vikki Davis was not entitled to specific performance of a plea agreement she had made with the trial court. In that case, Mrs. Davis pleaded guilty to the sale of a narcotic drug in reliance on the trial court's promise

> that the Court will place you on probation and the Court will *withhold adjudication* and that a condition of the probation will be some time in the Orange County Jail; that it will be a minimum period of at least four months and a maximum of one year. And, that eight-month period depends on what the presentence investigation reveals.

Id. at 28. But “[d]uring the pendency of the presentence investigation, . . . [Mrs. Davis] was arrested for possession of less than five grams of marijuana.” *Id.* The trial court adjudicated her guilty, and sentenced her to seven years' probation, with the condition that she serve one year in the Orange County Jail.

Mrs. Davis “declined to withdraw her earlier guilty plea when given the opportunity to do so; instead, she elected specific performance of the plea agreement as her remedy,” *id.*, moving unsuccessfully to vacate the judgment on the ground that her adjudication violated the plea agreement. The district court affirmed without opinion, and the supreme court rejected Mrs. Davis's argument that she was “entitled to specific performance of the plea agreement entered into with the trial court,” explaining:

> It is our view that, even if the trial judge's indication of leniency is the *only* inducement a defendant has in pleading guilty, the court is not bound by it. If for any reason the plea bargain is not carried out, the defendant has two alternatives: (1) he may withdraw his plea[[5]] and proceed to a disposition of the matter without any of his admissions, statements, or other evidence given in the plea negotiations being used against him; or (2) he may agree to proceed with the guilty plea without being bound by any conditions or agreements. The result is that, if the trial judge decides not to fulfill the tentative plea agreement, the case is returned to the position it was in prior to the plea negotiations, thereby imposing no unfair disadvantage on a defendant.

Id. at 28-29. *See also State v. Warner*, 762 So. 2d 507, 514 (Fla. 2000) (“A judge's preliminary evaluation of the case is not binding, since additional facts may emerge prior to sentencing which properly inform the judge's sentencing discretion. If the judge later determines that the sentence to be imposed must exceed the preliminary evaluation, then the defendant who has pleaded guilty or nolo contendere in reliance upon the judge's preliminary sentencing evaluation has an absolute right to withdraw the plea.”).

The *Davis* case can be distinguished from the present case, in that the trial judge in the present case did not condition the sentence he proposed, in exchange for Mr. Rollman's plea of nolo contendere, on what the presentence investigation report might reveal; in that Mr. Rollman was not arrested for committing another offense between his plea and his sentencing; and in that, as far as the record reveals, the trial judge received no adverse information about Mr. Rollman after his plea of any kind from any source. But we read *Davis* as laying down a rule that a trial judge cannot be held even to the clearest undertaking, not even where the judge's assurances unquestionably induced a plea which may lead to life in prison.

We are not entirely certain, however, that the rule of *Davis* is intended to apply where, as here, nothing in the record explains the trial judge's change of heart; or, indeed, that the rule of *Davis* can apply here, where no "additional facts . . . [come to light] prior to sentencing," *Warner*, 762 So. 2d at 514, consistently with due process and the courts' essential attributes of reliability, integrity, and principled decision making. *See generally McCray v. State*, 28 Fla. L. Weekly D1520 (Fla. 3d DCA July 2, 2003). Accordingly, we certify as questions of great public importance:

> WHERE A TRIAL COURT ANNOUNCES THE MOST SEVERE SENTENCE THAT WILL BE IMPOSED IN THE EVENT OF A PLEA, MAY THE TRIAL COURT THEREAFTER, ONCE THE PLEA HAS BEEN ACCEPTED, PRONOUNCE A MORE SEVERE SENTENCE WITHOUT ANY STATED REASON OR ANY REASON APPARENT FROM THE RECORD? IF SO, MUST THE TRIAL COURT AFFIRMATIVELY OFFER THE DEFENDANT AN OPPORTUNITY TO WITHDRAW THE PLEA?

Endorsing judges' involvement (when asked to take part) in reaching plea bargains, our supreme court recently explained that one important advantage of judicial participation is that "it provides a firm basis for reliance on a plea." *Warner*, 762 So. 2d at 513. The criminal justice system will operate with greater fairness, predictability and efficiency -- and in a fashion more likely to inspire public confidence -- if the parties and their counsel can rely on the trial court's plea-inducing assurances, in cases where countervailing considerations do not justify a later change in position.

Affirmed. (BROWNING, J., CONCURS; PADOVANO, J., CONCURRING IN THE RESULT WITH OPINION.)

1

> [O]nce the court revokes probation . . . , the court resentences the offender on the original charge, and may "impose any sentence which it might have originally imposed before placing the probationer . . . on probation . . . ." § 948.06(1), Fla. Stat. (1995). The court then is to grant credit for time served, unless such credit has been waived as part of a plea bargain.

Cozza v. State, 756 So. 2d 272, 273 (Fla. 3d DCA 2000).

2

> MR. WEAVER: I just wanted to put on the record our bench conference. I approached and explained to the Court that the plea had been for an adjudication of guilt and a cap of ten years DOC and that that plea was accepted by the Court about two months ago.
>
> I'm arguing to the Court that the ten years probation, restitution and court costs goes beyond the cap the Court had already set for the sentence.

[3]In arguing that the state had not been a party to the agreement, the prosecutor did not take issue with defense counsel's description of the agreement:

> MR. GEISSEL: No, the Court agreed to a ten year cap. The state never agreed to a ten year cap.
>
> . . . .
>
> MR. GEISSEL: You indicated that you would do the ten year cap.

[4]

> MR. WEAVER: Just for the record, I make a motion to vacate the probationary part of the sentence and reduce the restitution to a civil judgment.
>
> THE COURT: That motion is denied.

[5]Although he argued against the probationary term, Mr. Rollman's trial counsel did not move to withdraw the nolo contendere plea. Accordingly, Mr. Rollman seeks only vacation of the probationary portion of his sentence on the present appeal; he does not seek an opportunity to withdraw his plea. *See Anderson v. State*, 215 So. 2d 618, 619 (Fla. 4th DCA 1968) ("Reversal on appeal is not to be expected in the absence of judicial error of the lower court assigned, stated and argued in appellants' brief.").

(PADOVANO, J., concurring in the result.) I join in the court's decision to affirm, but not for the reasons given in the majority opinion. When the trial judge promised the defendant a cap of ten years, it was clear to everyone present that he was referring only to the portion of the sentence that would be served in the Department of Corrections. The judge made no promise to the defendant regarding any other aspect of the sentence. Consequently, I do not think that the trial judge violated any condition of the plea by including a twelve-year probationary term.

The term "cap" is often used in plea bargaining to refer to the maximum amount of time a defendant will serve in custody. Those who work in the criminal justice system are accustomed to thinking this way, because the scoring of an offense under the Criminal Punishment Code calculates only the applicable prison term, and has no application to probation. Likewise, the scoring under every previous version of the sentencing guidelines was keyed to prison time and did not include probation. So, within this framework, the term "cap" is generally understood to signify only the incarcerative portion of the sentence.

The defendant would be entitled to relief if he had made a plea agreement with the state for a cap of ten years in the Department of Corrections and if it was clear from the agreement that no other kind of penalty was to be imposed. If the plea agreement represents the entire understanding of the parties and if it does not mention probation, the court could infer that probation is not an option. *See Green v. State*, 700 So. 2d 384 (Fla. 1st DCA 1997); *Eggers v. State*, 624 So. 2d 336 (Fla. 1st DCA 1993). But the defendant in this case had no

agreement with the state. All he had was the judge's promise that his prison term would not exceed ten years. The judge made no representation to the defendant regarding a fine, restitution, court costs, or probation, and he certainly did not lead the defendant to believe that he intended to make an agreement with him on any of these issues.

The defendant does not seek to withdraw his plea. Instead, he seeks specific performance of the promise he assumes the judge made to him before he entered the plea. Reduced to its essential terms, the defendant's argument is that the absence of a promise about any sanction other than the prison term is an implication that his sentence was to consist entirely of a prison term. Of course, that is not the only conclusion one could draw from these facts. A more reasonable explanation is that other potential sanctions were simply left open.

After the sentencing hearing, the defendant's lawyer argued that the total sentence including the probationary term exceeded the judge's promise for a cap of ten years. If there had been any possible chance the defendant had been confused about the conditions of his plea, the judge would have allowed him to withdraw the plea then and there. However, the judge immediately dismissed the argument. It was obvious to him, as it should have been to everyone else, that the defendant understood the risk he was facing when he entered his plea.

The majority opinion points out that the defendant could eventually receive more time than he bargained for, but that much could be said of anyone who is placed on probation. The weakness in this argument is that a greater sentence could be imposed only if the defendant were to commit a substantial violation of his probation. That would be a new event that would trigger a new set of rights and obligations. With an exception for those who receive suspended sentences, no defendant who violates probation has a right to a sentence that is within the terms of the original plea agreement.

I would affirm on the ground that the sentence does not violate any reasonable expectation the defendant may have had at the time he entered his plea.