IN THE

DISTRICT COURT OF APPEAL

FIRST APPELLATE DISTRICT OF FLORIDA

LOGAN M. STEELE, Petitioner, v. STATE OF FLORIDA, Respondent.	Case No. 1D18- Original Proceeding 2nd Jud. Cir. Case No. 2016-CF-3029

PETITION FOR WRIT OF MANDAMUS

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The Petitioner, LOGAN M. STEELE, by and through undersigned counsel and pursuant to Florida Rule of Appellate Procedure 9.100, petitions the Court for a writ of mandamus, and alleges:

I . BASIS FOR INVOKING JURISDICTION

This Court has jurisdiction to issue a writ of prohibition under article V, section 4(b)(3) of the Florida Constitution, and Florida Rule of Appellate Procedure 9.030(b)(3). A petition for writ of mandamus is the proper vehicle by which to seek review of a trial court's order refusing to grant a motion to enforce the terms of a pretrial intervention contract. *See, e.g., Moore v. Pearson*, 789 So. 2d 316, 317 (Fla. 2001) (". . . Pearson filed a petition for a writ of mandamus with the circuit court to compel DOC to give effect to the plea agreement provision that his sentence run coterminous with his earlier imposed sentence.").[1]

II . STATEMENT OF THE FACTS

The Petitioner was arrested on October 4, 2016, and charged with burglary with assault or battery and six counts of battery. (A-5).[2] An information was filed by the

[1] If there is another, more appropriate basis for the Court to review this matter, the Petitioner respectfully requests the Court to treat this pleading pursuant to that basis. *See* Fla. R. App. P. 9.040(c).

[2] References to the documents included in the appendix to this petition will be made by the designation "A" followed by the appropriate page number.

State on October 21, 2016, charging the Petitioner with the same offenses. (A-3). On May 18, 2017, the parties agreed to a "Pretrial Intervention Agreement" – also known as a "Deferred Prosecution Agreement" – the terms of which were drafted by the Office of the State Attorney. (A-5). The "Pretrial Intervention Agreement" is included in the appendix to this petition. (A-11). On May 18, 2017, the parties filed a copy of the "Pretrial Intervention Agreement" – which was signed by all parties – with the Clerk of the Second Judicial Circuit. (A-5-6).

Notably, the "Pretrial Intervention Agreement" refers to itself as a "contract." (A-6). The contract called for the prosecution of the Petitioner to be deferred for twelve months. (A-11). The end of the contract states:

> If you comply with these conditions during the period of deferred prosecution, *the criminal charges will be dismissed*.

(A-12) (emphasis added). But the contract also had a special condition which stated that there would be

> Early termination upon completion of community service hours if in full compliance.

(A-12).

The contract called for the Petitioner to follow certain rules (paragraphs 1-11 of the contract) and certain special conditions (paragraph 12 of contract). (A-11-12). The first special condition of the contract was a payment of $100 to the Office of the

State Attorney at the time that the contract was filed. (A-11). This condition was satisfied in May of 2017 and documented with an Office of the State Attorney receipt. (A-13). The second special condition of the contract was completion of 150 hours of community service. (A-11). This condition was satisfied when 158.41 hours were completed on July 26, 2017 and documented on the State of Florida Department of Corrections Public Service Hours form. (A-14-15). This documentation of completion was submitted to the State via an email to the Petitioner's monitoring officer at horace.catherine@mail.dc.state.fl.us on July 26, 2017. (A-16). The third special condition of the contract was "not to consume any illegal narcotics." (A-11). There is no competent, substantial evidence that this condition was violated during the time that the "Pretrial Intervention Agreement" was in effect.

Most importantly, the fourth special condition of the contract was "[e]arly termination upon completion of community service hours if in full compliance." (A-12). It is legally significant that the State – the party drafting the contract – used the language "early termination upon completion" rather than "the agreement may terminate early" or "the Defendant may petition to terminate early." Thus, the Petitioner submits that the contract terminated, and the period of deferred prosecution ended, when the Petitioner – who was in full compliance with the terms of the contract – completed his community service hours and submitted proof of such

completion to the State (i.e., the other party in the contract) on July 26, 2017.

On August 9, 2017, the State revoked the Petitioner's participation in the contract based on an August 6, 2017, arrest for a DUI in Palm Beach County. (A-7). The Petitioner's arrest was prosecuted but eventually dismissed by the Office of the State Attorney for Palm Beach County. Significantly, the arrest in Palm Beach County occurred on August 6, 2017 – *after* the July 26, 2017, termination of the "Pretrial Intervention Agreement."

On August 1, 2018, the Petitioner filed in the circuit court a "Motion to Enforce Terms of Pretrial Intervention Contract or in the Alternative Dismiss Information." (A-5). A hearing on the motion was held on September 25, 2018. (A-18-42).[3] On October 23, 2018, the circuit court (the Honorable Robert E. Long, Jr.) rendered a written order denying the Petitioner's motion (A-17).

[3] A transcript of the motion hearing is included in the appendix to this petition.

III. THE NATURE OF THE RELIEF SOUGHT

The nature of the relief sought by this petition is a writ of mandamus directing the circuit court to enter an order granting the Petitioner's "Motion to Enforce Terms of Pretrial Intervention Contract or in the Alternative Dismiss Information."

IV. ARGUMENT

"A [pretrial intervention] agreement is in the nature of a contract, similar to a plea agreement[; t]hus, rules of contract law apply." *State v. Dempsey*, 916 So. 2d 856, 859 (Fla. 2d DCA 2005). Applying the rules of contract to the instant case, the Petitioner (1) completed/complied with all conditions of his contract with the State and (2) pursuant to the plain language of the terms of the contract, the contract "terminat[ed] upon completion of community service hours."[4] Accordingly, the Petitioner is entitled to specific performance of the contract – i.e., the criminal charges in this case should be dismissed.

In support of his argument, the Petitioner relies on this Court's decision in *State v. Simons*, 22 So. 3d 734 (Fla. 1st DCA 2009). The facts of *Simons* were as follows:

> The defendant, Stuart Simons, was accused of three criminal offenses: theft of a trade secret, taking and disclosing trade secrets, and

[4] "When a contract is clear and unambiguous, 'the actual language used in the contract is the best evidence of the intent of the parties, and the plain meaning of that language controls.'" *Maher v. Schumacher*, 605 So. 2d 481, 482 (Fla. 3d DCA 1992).

grand theft. The state alleged that he had appropriated a quilting machine and computerized business records belonging to the alleged victim, who was then the defendant's employer. The quilting machine was manufactured from a proprietary design owned by the victim, and the business records included supplier lists, customer lists, and other business information alleged to be trade secrets. At the time these criminal charges were filed, the defendant and the victim were engaged in civil litigation over the same controversy.

The parties entered into an agreement for a full settlement of the criminal case, as well as a related civil case. They agreed that the defendant would be admitted to the pretrial intervention program on the charge of disclosing a trade secret, that the two other charges would be dismissed, and that the defendant would make restitution to the victim in the amount of $4,500.00. As a part of the agreement, the victim agreed to release the defendant from civil liability and to dismiss the civil suit. The agreement was reduced to writing and signed by the assistant state attorney, the defendant's lawyer, the defendant, the victim, and the victim's lawyer in the civil case.

The trial judge approved the agreement and incorporated it into an order directing the parties to comply. A short time later, the defendant sent the victim a restitution check in the amount of $4,500.00. With the restitution in hand, the victim attempted to back out of the settlement by refusing to sign the consent form for the defendant's admission to the pretrial intervention program.

This abrupt change in position prompted the defendant to file a motion to enforce the settlement agreement. The prosecutor opposed the motion but did not offer any evidence or argument to excuse the victim's noncompliance. At one point in the hearing, the prosecutor suggested that after the agreement had been signed, the defendant committed an act that "could be construed as a criminal offense." This rather speculative remark had something to do with the fact that the defendant had attended a trade show in another state, but it is not apparent from the record why this would have been unlawful. The prosecutor offered no evidence or explanation.

The trial judge entered an order granting the defendant's motion to enforce the settlement agreement and allowed the state two weeks to nolle pros the charges in the information. When it became apparent that

> the state would not enter a nolle pros, the trial judge entered an order dismissing the case. The state filed a timely appeal to this court to seek review of the order.

Simons, 22 So. 3d at 735. On appeal, the Court affirmed the trial court's order dismissing the criminal charges against the defendant as a remedy for the State's refusal to comply with the settlement agreement:

> Th[e trial court's] decision [directing the State to comply with the agreement] did not encroach on the prosecutor's discretion. The entire agreement was not voidable at the option of the prosecutor merely because it contained a pretrial intervention agreement among its terms. *If that were the case, the settlement agreement would be nothing more than a set of illusory promises. The agreement would be enforceable by the state and the victim but not by the defendant*.
>
> Reduced to its essence, the state's argument in this case is: (1) the prosecution has a right to decide whether a defendant may enter or remain in a pretrial intervention program; (2) the defendant was the one who breached the settlement in this case because he did not complete the pretrial intervention agreement; and (3) the defendant's breach justified the state's failure to comply with the settlement agreement. This is a circular argument. The only reason the defendant did not enroll in the pretrial intervention program is that he was denied enrollment by the state. There was no real breach of the agreement by the defendant and therefore no justification for the state's refusal to honor it.
>
> It is significant that the state attempted to withdraw from the settlement agreement after the defendant had partly performed the agreement by making restitution. *If that conduct is acceptable, the promise of pretrial intervention could be used as a device to collect restitution and could then be withdrawn once the restitution is paid*. This possibility is particularly troubling in a case like this one, which is closely related to a civil dispute between the defendant and the alleged victim. *It is not fair to allow the alleged victim to withdraw his agreement in the criminal case after he has successfully employed the threat of prosecution to collect the money that was at issue in the civil*

case.

The trial judge did not break any new ground by enforcing the agreement the parties made in this case. To the contrary, it is a settled principle of criminal procedure that, if the government fails to honor a plea agreement, the court may either enforce the agreement or allow the defendant to withdraw the plea. *See Santobello v. New York*, 404 U.S. 257 (1971); *Tillman v. State*, 522 So. 2d 14 (Fla. 1988); *Spencer v. State*, 623 So. 2d 1211 (Fla. 4th DCA 1993); *State v. Borrego*, 445 So. 2d 666 (Fla. 3d DCA 1984); *Barker v. State*, 259 So. 2d 200 (Fla. 2d DCA 1972). As the Supreme Court explained in *Santobello*, the appropriate remedy in a given case is within the discretion of the trial judge.

In some situations it may be proper to allow the defendant to withdraw the plea, but in others the only fair remedy is to enforce the agreement. For example, *Florida courts have held that specific performance is a proper remedy if the defendant has partly performed the agreement*, *see Williams v. State*, 341 So. 2d 214 (Fla. 2d DCA 1976) (the state breached its promise after the defendant had assisted the police), or if withdrawal of the plea would deprive the defendant of the benefit of the bargain, *see Buffa v. State*, 641 So. 2d 474 (Fla. 3d DCA 1994) (the state breached its promise to recommend a more lenient sentence). As these cases illustrate, justice is not always served merely by allowing the defendant to withdraw the plea and start over.

The power to enforce an agreement between the prosecution and defense applies not only to plea agreements, but also to settlement agreements that do not require the defendant to enter a plea. *See State v. Davis*, 188 So. 2d 24 (Fla. 2d DCA 1966); *Butler v. State*, 228 So. 2d 421 (Fla. 4th DCA 1969). The underlying principle is the same. *When the parties agree to settle a case they should be bound by their agreement. The incentive to settle a case by plea bargaining or by an agreement not requiring a plea would quickly disappear if one party could renege on an agreement without any consequence*.

On the facts of this case, we support the trial judge's decision to enforce the agreement. The defendant had partially complied by making restitution and he was prepared to comply with all of his other obligations. He was prevented from doing so only because the victim backed out of the agreement without justification.

Simons, 22 So. 3d at 736-737 (emphasis added).

Based on *Simons*, the circuit court in the instant case erred by denying the Petitioner's "Motion to Enforce Terms of Pretrial Intervention Contract or in the Alternative Dismiss Information."[5] The argument for specific performance in this case is even stronger than it was in *Simons* because unlike *Simons* – where the defendant had only "partly" performed his obligations under the agreement, the Petitioner in this case *completely* satisfied all of the requirements of the contract. As explained by the Court in *Simons*, if it is acceptable for the State to withdraw from a pretrial intervention contract *after* a defendant has performed under the contract, then the promise of pretrial intervention could be used as a device to collect from the defendant – in this case in the form of a $100 payment and 150 hours of community service – and could then be withdrawn after the defendant followed through on his end of the bargain. As stated by the Court in *Simons*:

> When the parties agree to settle a case they should be bound by their agreement. The incentive to settle a case by plea bargaining or by an agreement not requiring a plea would quickly disappear if one party could renege on an agreement without any consequence.

Simons, 22 So. 3d at 737. *See also State v. Kaczmarski*, 772 N.W.2d 702, 708 (Wis.

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[5] Because the issue in this case presents a question of law, the Court's standard of review is *de novo*. *See Dempsey*, 916 So. 2d at 859 ("Because the issue in this case presents a question of law, our standard of review is *de novo*. *Cf. Escobar v. United Auto. Ins. Co.*, 898 So. 2d 952 (Fla. 3d DCA 2005) (holding that the question of ambiguity in an insurance contract is a question of law for the court, not a question of fact for the jury).").

Ct. App. 2009) ("Applying our construction of the agreement to this case, we conclude that the district attorney was without authority under the terms of the deferred prosecution agreement to resume prosecuting Kaczmarski after the contract ended on October 31, 2005 . . . .").[6]

In denying the Petitioner's "Motion to Enforce Terms of Pretrial Intervention Contract or in the Alternative Dismiss Information," the circuit court indicated that it thought the contract in this case was contrary to some of the provisions of section 948.08, Florida Statutes. (A-38-39). Initially, undersigned counsel asserts that the contract in this case is more akin to the "settlement agreement" described in *Simons* as opposed to the formal "pretrial intervention program" described in section 948.08. In fact, the contract signed by the Petitioner and the prosecutor makes no reference to section 948.08. Hence, section 948.08 does not apply to this case. But even assuming *arguendo* that section 948.08 does apply to this case, the failure to comply with a specific provision of section 948.08 does not render the contract in this case void. In support of this argument, the Petitioner relies on this Court's decision in *Carson v. State*, 37 So. 3d 884 (Fla. 1st DCA 2010). In *Carson*, the Court considered

[6] In *Kaczmarski*, the Wisconsin court cited the contract principle that "[w]e are not free to revise an unambiguous contract in order to relieve a party to a contract from any disadvantageous terms to which he or she has agreed." *Kaczmarski*, 772 N.W.2d at 707.

the question of whether a criminal defendant who accepts the benefits of a negotiated plea bargain could later collaterally attack his negotiated sentence as "illegal." The defendant in *Carson* entered into a negotiated plea bargain with the State and was sentenced to drug offender probation. The defendant later challenged the drug offender probation because such probation could only be imposed on those defendants convicted of the purchase or possession of a controlled substance (and the defendant was convicted of felony of battery on a pregnant woman). In holding that a defendant was *not* permitted to withdraw his plea, the Court held:

> We also reject Appellant's claim on the merits. In the State's response to our show cause order, it correctly cited this court's case law holding that *a person who "bargained for [an] obligation [has] thereby waived any objection to the legality of the sentence containing [a] condition of probation*." *Allen v. State*, 642 So. 2d 815, 816 (Fla. 1st DCA 1994). The State further cited case law holding that because a plea agreement is a contract, Appellant contracted for drug offender probation. *See* [*State v.*] *Gutierrez*, 10 So. 3d [158,] 159 [(Fla. 3d DCA 2009)] (holding that trial court is without authority to mitigate sentence imposed pursuant to negotiated plea); *see also State v. Simons*, 22 So. 3d 734 (Fla. 1st DCA 2009) (holding that it is a settled principle of criminal procedure that courts may force the government to honor a plea agreement). As we stated in *Allen*, "Having accepted the benefits of his plea bargain, [Appellant] will not be relieved of his burdens under the contract." 642 So. 2d at 816.
>
> Once a defendant receives the very real benefit of probation in a plea agreement and then violates that probation, it is too late to consider an argument that he should not have received the probationary sentence. In our view, it is not "illegal" to allow a defendant to agree to serve a special type of probation, e.g., because of a substance abuse problem, even though the trial court could not impose such a condition on an unwilling defendant convicted at trial. *Ackermann* [*v. State*], 962 So. 2d

> [407,] 408 [(Fla. 1st DCA 2007)]. As the State noted in its response, courts have recognized that "once a defendant has enjoyed the benefits of probation without challenging the legality of [the] sentence, the defendant is thereafter precluded from an order revoking probation." *Matthews v. State*, 736 So. 2d 72, 75 (Fla. 4th DCA 1999) (quoting *Gaskins v. State*, 607 So. 2d 475 (Fla. 1st DCA 1992), *overruled on other grounds*, *State v. Powell*, 703 So. 2d 444 (Fla. 1997)). In *Gaskins*, we stated in clear terms that a defendant who accepts the benefits of a probationary sentence will not be heard to claim the sentence was improper after the probationary sentence is revoked. *Id.* at 476.

Carson, 37 So. 3d at 886 (emphasis added). Pursuant to *Carson*, once the State accepted the benefit of the contract in this case – and after the Petitioner fully performed all of his obligations under the contract – the State was thereafter precluded from challenging the legality of the contract and any argument regarding the legality of the contract has been waived (and the State should therefore not be relieved of its burdens under the contract). *See also In re Hudgens*, 233 P.3d 566, 569 (Wash. Ct. App. 2010) ("[A] defendant is entitled to specific performance even when the terms of the plea agreement conflict with the law.").[7]

Accordingly, for all of the reasons set forth above, and pursuant to *Simons*, the Court should grant the instant petition.

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[7] Undersigned counsel further notes that "where the language of [a] contract is ambiguous, its provisions should be construed against the drafter." *Langford v. Paravant, Inc.*, 912 So. 2d 359, 361 (Fla. 5th DCA 2007) (citing *Ellsworth v. Insurance Co. of North America*, 508 So. 2d 395, 400 (Fla. 1st DCA 1987)). The contract in the instant case was drafted by the State.

V. CONCLUSION

This Court should issue a writ of mandamus and direct the circuit court to enter an order granting the Petitioner's "Motion to Enforce Terms of Pretrial Intervention Contract or in the Alternative Dismiss Information."

Respectfully submitted,

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CERTIFICATE OF SERVICE

Undersigned counsel certifies that a true and correct copy of the foregoing instrument has been furnished to:

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CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this petition complies with the font requirements of Florida Rule of Appellate Procedure 9.100(l).

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