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IN THE SUPREME COURT OF FLORIDA

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STATE OF FLORIDA,
Petitioner,

v.

Case No.: 75,747

DENNIS HAWTHORNE,
Respondent.

PETITIONER'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	2
SUMMARY OF THE ARGUMENT	3
ARGUMENT	
<u>ISSUE</u>	
WHETHER FLA. STAT. 8775.089 (1987) REQUIRES TRIAL COURTS TO UTILIZE FAIR MARKET VALUE AS THE SOLE STANDARD BY WHICH TO DETERMINE AMOUNTS OF RESTITUTION.	5
CONCLUSION	11
CERTIFICATE OF SERVICE	12
APPENDIX	A 1

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGE(S)</u>
<u>Abbott v. State,</u> 543 So.2d 411 (Fla. 1st DCA 1989)	3,8-10
<u>Dickens v. State,</u> 15 F.L.W. D392 (Fla. 2d DCA 1990)	3,6-8,10,11
<u>Garrison v. State,</u> 553 So.2d 1337 (Fla. 2d DCA 1989)	6,9
<u>Hawthorne v. State,</u> 15 F.L.W. D711 (Fla. 1st DCA 1990)	2
<u>Norman v. State,</u> 468 So.2d 1063 (Fla. 1st DCA 1985)	7
<u>Spivey v. State,</u> 531 So.2d 965 (Fla. 1988)	6-7
<u>OTHER AUTHORITIES</u>	<u>PAGE(S)</u>
Fla. Stat. 3775.089 (1987)	4,5,10
Fla. Stat. §775.089(1)(a) (1987)	5,6
Fla. Stat. §775.089(6) (1987)	4,5,6,10
Fla. Stat. §775.089(7) (1987)	2,7-8
Fla. Stat. 3948.03 (1987)	5,6
Note, <u>Victim Restitution in the Criminal Process: A Procedural Analysis,</u> 97 Harv.L.Rev. 931 (1984)	7

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, the prosecuting authority in the trial court and appellee below, will be referred to in this brief as the state. Respondent, DENNIS HAWTHORNE, the defendant in the trial court and appellant below, will be referred to in this brief as respondent. References to the record on appeal will be noted by the symbol "R"; references to the appendix will be noted by the symbol "A". All references will be followed by the appropriate page numbers in parentheses.

STATEMENT OF THE CASE AND FACTS

The state appeals that portion of the First District's decision in Hawthorne v. State, 15 F.L.W. D711 (Fla. 1st DCA 1990) which deals with the trial court's failure to utilize fair market value as the standard for determining the amount of restitution to be paid by respondent to the victim.

The trial court placed respondent on two years' community control, and ordered him as a condition of that sentence to make restitution to the victim for the loss of her automobile (A 1). At the evidentiary hearing on the issue of restitution, defense counsel did not present any evidence at the conclusion of the state's evidence (A 1). Because Fla. Stat. §775.089(7) (Supp. 1988) placed the burden of demonstrating financial resources and needs on respondent, the First District affirmed on this point (A 1) and the trial court's requirement that respondent reimburse the victim \$250.00 for transportation costs (A 1).

The state did not present direct testimony as to the fair market value of the victim's automobile, utilizing instead an alternative valuation method (A 1). Specifically, the victim testified at the restitution hearing as to the losses she sustained which were a direct result of respondent's theft of her car: (1) she purchased her car in 1985 for \$1,530.00 (R 68); (2) the book value of her car at that time was \$1,650.00 (R 68); (3) respondent stole her car one year after she had purchased it (R

69); (4) she had her car repaired just before the theft and the car was in good operating condition (R 69); (5) after her car was discovered after the theft, its value was nothing because it had been burned completely (R 71); and (6) the company from which she bought her car informed her that mileage would not affect the value of her car as long as it was in good mechanical condition (R 72).

Because the state presented no evidence concerning the percentage of depreciation as apparently required by Abbott v. State, 543 So.2d 411 (Fla. 1st DCA 1989), the First District reversed and remanded the case for further proceedings "at which additional evidence may be received on the valuation issue." (A 1). However, the First District acknowledged and certified conflict with Dickens v. State, 15 F.L.W. D392 (Fla. 2d DCA 1990), in which "the Second District took a more liberal view of the state's burden in determining the amount of loss for inclusion in restitution orders." (A 1).

The state timely filed its notice to invoke this Court's discretionary jurisdiction, and this brief on the merits follows.

SUMMARY OF THE ARGUMENT

Based on the explicit language of Fla. Stat. 8775.089 (1987), the proper standard for the determination of restitution amounts is simply trial court discretion. Other than considering the items listed on section 775.089(6), trial courts are not mandated to use any particular standard, such as fair market value. **As** long as trial courts abide by the statute, the amount of restitution is properly left to their discretion. Because the trial court in the instant case fully abided by the terms of the statute, it did not abuse its discretion and the First District erred in reversing on this issue.

ARGUMENT

ISSUE

WHETHER FLA. STAT. 5775.089 (1987) REQUIRES
TRIAL COURTS TO UTILIZE FAIR MARKET VALUE AS
THE SOLE STANDARD BY WHICH TO DETERMINE
AMOUNTS OF RESTITUTION.

Section 775.089, Florida Statutes (1987), provides:

(1)(a) In addition to any punishment, the court shall order the defendant to make restitution to the victim for damage or loss caused directly or indirectly by the defendant's offense, unless it finds reasons not to order such restitution. Restitution may be monetary or nonmonetary restitution. The court shall make the payment of restitution a condition to probation in accordance with s. 948.03.

* * * *

(6) The court, in determining whether to order restitution and the amount of such restitution, shall consider the amount of the loss sustained by any victim as a result of the offense, the financial resources of the defendant, the financial needs and earning ability of the defendant and his dependents, and such other factors which it deems appropriate.

Thus, trial courts are mandated to award restitution for damages caused by a defendant's offense and to consider the amount of loss sustained by the victim. In the present case, the trial court fully abided by the terms of the above statute in considering the amount of the victim's loss and inquiring of respondent as to his financial ability.

In Dickens v. State, 15 F.L.W. D392, D393 (Fla. 2d DCA 1990), the Second District noted that "[f]air market value at the time of the offense is clearly an appropriate way to determine the amount of the loss . . . [but] it is not the only way." See also Garrison v. State, 553 So.2d 1377, 1379 (Fla. 2d DCA 1989) (emphasis added) ("Fair market value of the property at the time of the theft is a well established measure for restitution.") That court continued:

The legislature could easily have prescribed fair market value at the time of the offense as the point from which the computation should begin; however, it did not do so. In fact, section 948.03, Florida Statutes (1987), which provides for victim restitution as a condition of community control, expressly leaves the determination of the amount of restitution to the discretion of the trial court. It states:

(1) The court shall determine the terms and conditions of probation or community control and may include among them the following, that the probationer or offender in community control shall:

* * * *

(e) Make reparation or restitution to the aggrieved party for the damage or loss caused by his offense *in an amount to be determined by the court. . . .*

(emphasis added). Section 775.089(1)(a) refers to this section and requires the trial court to make restitution a condition of probation in accordance with it.

The Florida Supreme Court has noted the legislature's recognition of the trial court's discretion in these statutes. Spivey

v. State, 531 So.2d 965 (Fla.1988), involved a trial court order which required one of two perpetrators to bear the full amount of restitution. In affirming the order, the court said:

Unlike civil damages, restitution is a criminal sanction. The purpose of restitution is not only to compensate the victim, but also to serve the rehabilitative, deterrent, and retributive goals of the criminal justice system. See Note, Victim Restitution in the Criminal Process: A Procedural Analysis, 97 Harv.L.Rev. 931 (1984). The trial court is best able to determine how imposing restitution may best serve these goals.

531 So.2d at 967. Although this case involved apportioning restitution rather than computing the amount, Spivey's reasoning applies. Limiting the trial court's discretion to a determination of the fair market value of the property involved at the time of the crime does not further its ability to serve the goals of the restitution program.

It is true that in cases dealing with the determination of value as an element of a crime, fair market value at the time of the offense is the appropriate standard. However, there seems to be no reason to impose upon this type of action the same rigidities of proof that are required in criminal cases. See Norman v. State, 468 So.2d 1063 (Fla. 1st DCA 1985) (Nimmons, J., dissenting). The burden of proof, for the purposes of restitution, is a preponderance of the evidence. Section 775.089(7) states:

Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense is on

the state attorney. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant and his dependents is on the defendant. The burden of demonstrating such other matters as the court deems appropriate is upon the party designated by the court as justice requires.

In this case, the court had before it the testimony of the owner of the shop from which the car was stolen and that of the owner of the car. While the court clearly rejected the fair market value standard in favor of charging the defendant the amount paid for the car plus improvements, the only evidence before it supported that figure and the defendant presented nothing to controvert it. The state thus made its showing of loss to the victim by a preponderance of the evidence. We note in passing that if the 1976 Chevrolet had any salvage value after its sojourn in the bay, the defendant could have presented evidence of it.

15 F.L.W. at D393 (emphasis added).

Similarly, in the present case, the evidence before the trial court supported the figures presented by the victim and respondent offered no evidence to controvert the figures. "The state thus made its showing of loss to the victim by a preponderance of the evidence" as required by Fla. Stat. §775.089(7) (1987). However, the First District once again chose to adhere to the view that "the value of property at the time of the offense is the way of determining the amount of loss for inclusion in the restitution provision of a probation order," citing Abbott v. State, 543 So.2d 411 (Fla. 1st DCA

1989). 15 F.L.W. at D711. In Abbott, the First District stated that restitution "should be based on the fair market value of property at the time of the theft" and noted that fair market value could be determined through the presentation of evidence on (1) the original market cost, (2) the manner in which the property was used, (3) the property's general condition, and (4) the percentage of depreciation. 543 So.2d at 412. See also Garrison, 553 So.2d at 1379 (emphasis added) ("A trial court is entitled to consider evidence of an item's market cost, its use, its general condition, and its percentage of depreciation in determining fair market value for restitution.") Because the state's evidence in the present case satisfied only the first three Abbott criteria, the First District reversed the trial court's determination of restitution concerning the victim's car. 15 F.L.W. at D711.

The First District apparently overlooked its own language in Abbott that restitution "should be" based on fair market value, and that fair market value "may be" determined by consideration of the listed criteria. Use of the phrases "should be" and "may be" is significant in that it connotes discretion, as opposed to the mandatory nature of the phrases "must be" and "shall be." In the present case, the trial court discretionarily considered only three of the four criteria, and in so doing, did not abuse his discretion or contradict the plain terms of Abbott. There, the victim testified solely as to

the purchase price of her stolen jewelry, and the First District simply concluded that, based on case law, the "'cost of the stolen property is insufficient itself to establish value.'" 543 So.2d at 412 (citation omitted).

Additionally, the state contends that Abbott is incorrect in its holding that restitution "should be" based on the fair market value of the property at the time of the theft. As shown above in the lengthy passage from Dickens, the statute simply does not require fair market value as the sole standard for determining restitution amounts; the statute in fact lists no standard other than trial court discretion. The holding that fair market value is the standard for restitution determinations flies in the face of very obvious legislative intent: Determinations of restitution are to be left to the discretion of trial courts.


Thus, the state contends that, based on the explicit language of Fla. Stat. 8775.089 (1987), Dickens enunciates the proper standard for the determination of restitution amounts, i.e., trial court discretion. Other than considering the items listed on section 775.089(6), trials courts are not mandated to use any particular standard, such as fair market value. As long as trial courts abide by the statute, the amount of restitution is properly left to their discretion. Because the trial court in the instant case fully abided by the terms of the statute, it did not abuse its discretion and the First District erred in reversing on this issue.

CONCLUSION

Based on the above cited legal authorities and arguments, the state respectfully requests this Honorable Court to adopt the rationale of Dickens, affirm the trial court's method and determination of restitution, and reverse that portion of the decision of the First District Court of Appeal which requires trial courts to utilize fair market value as the sole standard for determining restitution.

Respectfully submitted,

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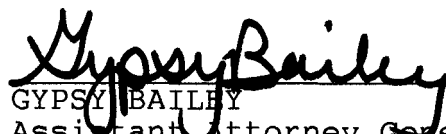
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to P. DOUGLAS BRINKMEYER, Deputy Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 23rd day of April, 1990.



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