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OCT 1 1991
CLERK, SUPREME COURT
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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 78,553

DAVID MICHAEL MCLEOD,

Respondent.

_____/

# PETITIONER'S BRIEF ON THE MERITS

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## PRELIMINARY STATEMENT

Petitioner was the prosecuting authority in the trial court and the appellant in the First District Court of Appeal, and will be referred to as "the state" in this brief. Respondent was the defendant in the trial court and the appellee in the First District Court of Appeal, and will be referred to as "McLeod" in this brief. The record will be referred to as "R" followed by the appropriate page number, both within parentheses. Exhibits listed in the appendix to this brief will be referred to as "Ex." followed by the appropriate letter, both within parentheses.

## STATEMENT OF THE CASE AND FACTS

Petitioner, the State of Florida, on February 23, 1990, charged the respondent, David Michael McLeod with one count of driving under the influence of alcoholic beverages or controlled substances with a blood alcohol level of .10% or higher, and by reason of his impaired operation causing serious bodily injury to Julie A. Lindsey in violation of §316.193(3)(c)2, Florida Statutes. (R 1). McLeod entered a plea of no contest to the charge, (R 16-17), and was sentenced on June 21, 1990 (R 18-22). The state sought restitution as part of McLeod's sentence. (R 65).

The trial court retained jurisdiction as the issue of restitution at the sentencing. (R 22). The court reserved jurisdiction to determine the amount of restitution due, if any. The lower court held the restitution hearing on July 16, 1990, and heard oral argument both for and against the award of restitution. (R 63-91). On July 31, 1990, the trial court entered an order denying the state's motion for restitution (R 47-54). The state then filed a timely notice of appeal (R 55) and an initial brief in the cause before the First District Court of Appeal.

On May 1, 1991, McLeod filed a motion to dismiss the appeal. The district court then entered an order to show cause why the motion to dismiss should not be granted on May 10, 1991. The state filed its response to the district court's order on May 20, 1991. On June 21, 1991, the

district court entered its order on McLeod's motion to dismiss and dismissed the appeal for lack of jurisdiction, finding that the lower court's order denying the state's motion for restitution was not an appealable order when the lower court gave reasons for its denial of restitution (Ex. B).

The State then filed a motion for rehearing and certification, along with a motion for rehearing en banc. The district court, in a per curiam opinion issued on August 21, 1991 (Ex. A), denied the state's motion for rehearing but granted the motion for certification and found that the following question was one of great public importance:

> WHETHER A TRIAL COURT'S ORDER DENYING A MOTION FOR RESTITUTION PURSUANT TO SECTION 775.089, FLORIDA STATUTES (1989) MAY BE APPEALED BY THE STATE?

The State next filed its notice invoking the discretionary jurisdiction of this Court on September 3, 1991. This Court then entered its order postponing decision on jurisdiction and directing the state to file its brief on the merits on or before September 30, 1991. This brief follows.

## SUMMARY OF ARGUMENT

This Court should answer the certified question in the positive. A trial court's order that denies a motion for restitution by the state is appealable by the state since such an order produces an illegal sentence considering the mandatory nature of restitution, the statutorily unauthorized factors considered by the trial court in entering its order, and the repeated legislative reductions of trial courts' sentencing discretion regarding restitution. Not allowing an appeal from a trial court's order denying restitution is also a violation of a victim's right to be heard at all crucial stages of criminal proceedings given under Article I, Section 16, of the Florida Constitution. Also, the trial court in the present case denied restitution to the victim as a matter of law. When the state appeals from a ruling on a matter of law adverse to it, the appellate court is statutorily required to decide the question.

Further, the trial court in the present case erred when it denied the State's motion for restitution because a prior insurance settlement does not bar the state from seeking restitution for a victim of crime. In denying the motion, the trial court imposed an illegal sentence and committed reversible error. This Court, should it choose to reach the merits of this issue, should reverse the trial court's order denying restitution and remand the case for a hearing on the amount of restitution.

## ARGUMENT

### ISSUE

WHETHER THE STATE MAY APPEAL FROM A TRIAL COURT'S ORDER DENYING THE STATE'S MOTION FOR RESTITUTION.

The Court should answer the certified question in the positive. Section 775.089, Fla. Stat. (1989) reads in pertinent part:

(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 clear and compelling reasons not to order such restitution....The court shall make the payment of restitution a condition to probation in accordance with §948.03.

(b) If the court does not order restitution, or orders restitution of only a portion of the damages, as provided in this section, it shall state on the record in detail the reasons therefor.

(6) The court, in determining whether to award 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 present and potential future financial needs and earning ability of the defendant and his dependents, and such other factors which it deems appropriate.

Section 921.187(2), Fla. Stat. (1989) reads in pertinent part:

> (2) The court shall require an offender to make restitution pursuant to §775.089, unless the court finds clear and compelling reasons not to order such restitution as provided in that section. If the court does not order restitution, or orders restitution of only a portion of the damages, as provided in §775.089, the court shall state on the record in detail the reasons therefor.

Under both these statutory sections restitution is mandatory absent clear and compelling reasons not to order it. Grice v. State, 528 So.2d 1347 (Fla. 1st DCA 1988) ("these statutes reflect clear legislative mandate for imposition of restitution as part of a sentence."); Dickens v. State, 556 So.2d 782 (Fla. 2nd DCA 1990) ("Under this section [775.089], the court must award restitution for 'damages or loss caused directly or indirectly by the defendant's offense."). The reasons submitted by the trial court to deny restitution in the instant case were neither clear or compelling, nor were the reasons cited by the court permitted to be considered under the restitution statute. Thus the state now contends that based on the mandatory nature of restitution and the trial court's consideration of improper factors outside the purview of the restitution statute, the trial court's order denying the state's motion for restitution created an illegal sentence which authorizes this appeal.

The continually heightened standard to not award restitution also supports the contention that the state may appeal from a trial court's order denying restitution on the ground that such an order results in an illegal sentence. The district court's order below would disallow appeal by the state of a trial court's order denying restitution if the lower court gave any reasons on the record to not order restitution. The clear and compelling standard in the statute is thus rendered meaningless, contrary to principles of statutory construction. To not allow an appeal from the denial of restitution also violates the constitutional right of victims to be heard at each crucial step in a criminal proceeding given under Article I, Section 16 of the Florida Constitution. Further, the trial court in the present case denied the victim restitution by its ruling on a question of law; whether a civil settlement between the victim and the defendant and his insurer bars the state form seeking restitution. When the state appeals from a ruling on a question of law adverse to the state, the appellate court is statutorily required to answer the question.

I. The Problem Facing the State

At first glance, the problem facing the state in the proceeding is convincing this Court that a trial court's order denying the state's motion for restitution is an order from which the state may appeal. Orders from which the state may appeal are listed in §924.07, Fla. Stat. (1989)

and Fla.R.App.P. 9.140(c) and orders denying restitution are not included on either list. However, the effect of the trial court's order denying restitution was the imposition of an illegal sentence, from which the state may appeal. §924.07(1)(e), Fla. Stat. (1989) (the state may appeal from the sentence, on the ground that it is illegal). The state is apparently not required to show the illegality of the sentence, but merely required to allege that the sentence is illegal. See, State v. Pilcher, 443 So.2d 366 (Fla. 5th DCA 1983) ovr'rld on other grounds, Williams v. State, 517 So.2d 681 (Fla. 1988) (state may appeal from an alleged illegal sentence).

Thus, the actual problem in this appeal is to prove to this Court that a trial court's order denying restitution results in an illegal sentence. This problem is principally caused by the wording of the restitution statute, which directs that the trial court shall order the defendant to pay restitution to the victim unless the court finds clear and compelling reasons not to order restitution. §775.089(1)(a), Fla. Stat. (1989). The factors the trial court may consider in making its decision whether to award restitution and in what amount are found in §775.089(6), supra, and include the amount of the loss sustained by the victim as a result of the offense, the financial resources of the defendant, the present and potential future financial needs and earning ability of the defendant and his dependents and such other factors as the court deems

appropriate. While the amount of the defendant's insurance policy was mentioned by the trial court in its order denying the state's motion for restitution, the court did not consider any of the statutorily-required factors. (R 47-54). The one reason the court relied on to deny restitution was the victim's guardian signing a release and settlement agreement upon payment of the proceeds of the defendant's insurance policy by his insurer. (R 48). In sum, the court's order was unauthorized under the terms of the restitution statute and imposed an illegal sentence.

II. Why The Trial Court's Order Was Statutorily Unauthorized.

The order was unauthorized because it did not consider the factors §775.089(6), Fla. Stat. (1989) requires to be considered when a court determines whether to award restitution. (R 47-54). Further, the one reason the court relied on, the release and settlement agreement, could not be considered by the terms of subsection (6). The subsection, supra, sets out specific factors the court must consider, which are followed by a general statement that the trial court may consider such other factors which it deems appropriate.

Under the principle of *ejusdem generis*, where a statute employs general words after a class is particularly enumerated, the general words are construed to be limited to the same class or character as those specifically

enumerated. See, Doe v. Naval Air Station, Pensacola, Fla., 768 F.2d 1229 (11th Cir. 1985); Soverino v. State, 356 So.2d 269 (Fla. 1978) (classes of persons); State ex rel. Soodhalter v. Baker, 248 So.2d 468 (Fla. 1971); D.A.O. v. Department of Health and Rehabilitative Services, 561 So.2d 380 (Fla. 1st DCA 1990). Thus, under §775.089(6), the trial court's consideration of "such other factors which it deems appropriate" is limited to consideration of other factors within the same class or of the same character as the specifically enumerated factors; the losses of the victim and the financial needs and resources of the defendant. The trial court in the present case, however, did not limit its consideration to such factors but went completely outside of the permitted factors and considered a contractual obligation entered into by the victim's guardian, a contract to which the state was not even a party. Such a consideration is not in conformance with the terms of the statute and a sentence imposed by a trial court must conform to all other statutory provisions. §921.001(5), Fla.Stat. (1989). While a trial court's sentencing order that is imposed within the bounds of a statute is not subject to appellate review, Gallucci v. State, 371 So.2d 148 (Fla. 4th DCA 1979), the trial court's consideration of factors not authorized by the restitution statute while not considering the required factors plainly moved the sentence outside the bounds of the statue. The court's order, therefore, was erroneous. See, Olivero v. State, 16 F.L.W. D2002 (Fla. 4th

DCA July 31, 1991) (sentence imposing restitution without consideration of the required factors was error requiring reversal and remand).

III. Why The Trial Court's Order Resulted In An Illegal Sentence.

Besides being in error, a trial court's sentencing order that is not statutorily authorized results in a sentence that is illegal and appealable by the state. See, State v. Allen, 553 So.2d 176 (Fla. 4th DCA 1989) (order mitigating sentence by procedural circumvention of the sentencing guidelines is appealable by the state as an illegal sentence under §924.07(1)(e), Fla. Stat.); Zimmerman v. State, 467 So.2d 1119 (Fla. 1st DCA 1985) (failure to impose statutorily mandated fine resulted in an illegal sentence even though sentence could be mitigated on motion by the state); Easton v. State, 472 So.2d 1369 (Fla. 3rd DCA 1985) (sentencing order unauthorized by statute and infringing on executive authority was wholly erroneous and should be stricken); see also, Kelly v. State, 359 So.2d 493 (Fla. 1st DCA 1978) (20 year sentence imposed when statutory minimum sentence was 30 years was illegal). In short, in the face of a legislative mandate to award restitution, the trial court in the present case took it upon itself to consider factors totally outside the purview of the restitution statute and mitigate the required sentence when a defendant is placed on probation, §775.089(1)(a) ("The

court shall make the payment of restitution condition of probation...) and the defendant's offense has resulted in bodily injury to the victim. §775.089(2), Fla. Stat. (1989). Such a sentence is illegal and the state may appeal it.

Further, the state would compare the trial court's denial of the state's motion for restitution for statutorily unauthorized reasons to a trial court's departure from the sentencing guidelines for unauthorized reasons. The role of an appellate court in applying the old standard (since removed) in sentencing guidelines cases was to review the reasons given to support departure and determine whether the trial court abused its discretion in finding those reasons to be clear and convincing. Davis v. State, 517 So.2d 670, 672 (Fla. 1987); State v. Mischler, 488 So.2d 523, 525 (Fla. 1986). The appellate court's role in the instant case should be similar, as restitution in mandatory absent clear and compelling reasons. In short, like guidelines sentences, restitution is required unless the trial court's reasons to not award it meet the statutory standard.

An appeal by the state from the issue of whether the reasons given by the trial court meet the clear and convincing standard for departure is a matter of right. Mitchell v. State, 458 So.2d 10 (Fla. 1st DCA 1984) (pursuant to §921.001(5), Fla. Stat.). This Court in Albritton v. State, 476 So.2d 158 (Fla. 1985) stated:

> The district court affirmed on the basis that "a departure sentence can be upheld on appeal if it is supported by any valid ("clear and convincing") reasons without the necessity of a remand in every case." The district court also held the extent of departure from the guidelines is not subject to appellate review provided there is no violation of the maximum statutory sentence authorized by the legislature for the offense in question. We disagree on both points.

Id., at 159 (citations omitted); see, Deer v. State, 476 So.2d 163, 164 (Fla. 1985) ("In Albritton..., we held that the extent of departure is subject to appellate review in order to determine whether the departure was excessive.")

Just as the state may appeal from a trial court's sentencing order that is based on improper reasons for departure the state should be allowed to appeal from a trial court's sentencing order regarding restitution when that order is based on improper reasons. The trial court's order refused to impose restitution as a condition of McLeod's probation and may be appealed. See, State v. McGraw, 474 So.2d 289 (Fla. 3rd DCA 1985) (order of probation may be appealed as an illegal sentence, being a dispositive order upon conviction). The trial court's order in the present case also struck the entirety of the state's and victim's claim of restitution, another reason to allow an appeal. See, Gries Investment Co. v. Chelton, 388 So.2d 1281 (Fla. 3rd DCA 1980) (an order which strikes the entirety of a claim is the equivalent of an order which dismisses, and

either is final and appealable). The trial court's order denying restitution, in sum, was an unlawful mitigation of a statutorily mandated sentence for reasons unauthorized by the statute. The court's order refused to impose restitution as a condition of McLeod's probation as the statute directs and also effectively struck the state's and victim's claim for restitution. The order was therefore improper, unauthorized, and resulted in an illegal sentence which may be appealed.

IV. Why The Sentence Was Illegal Rather Than Incomplete

There are several cases from Florida appellate courts that apparently hold a trial court's failure to award restitution results in an incomplete sentence rather than an illegal one: Grice v. State, supra; State v. Butz, 568 So.2d 537 (Fla. 4th DCA 1990); State v. Martin, 16 F.L.W. D1661 (Fla. 1st DCA June 21, 1991); and the instant case (Ex. B). But in all of these cases, bar the instant one, the question of whether the failure to award restitution resulted in an illegal sentence was either not reached or was decided based on a factual or procedural situation peculiar to that case.

In Grice, supra, the court simply found it unnecessary to determine whether the original sentence in the case, which did not include restitution, was either illegal or incomplete. Grice, 528 So.2d at 1350. In Butz, supra, the Fourth District agreed that the failure to impose restitution resulted in an incomplete sentence, but then

went on to state that under the facts of the case, it could not say the failure to include restitution resulted in an illegal sentence. Butz, 568 So.2d at 537. The factual situation the court alluded to was the state failing to request restitution, along with the trial court's failure to order it or to even enter reasons for not ordering it. The trial court finally denied the state's motion to impose restitution based on a lack of jurisdiction. Id. That is not the present case. In the present case, the state explicitly requested restitution and the trial court refused for improper reasons. The trial court plainly had jurisdiction to enter an order imposing restitution within the sixty-day limitation of Fla.R.Crim.P. 3.800.

In Martin, supra, the First District stated:

> The failure to impose restitution did not make the sentence an illegal one, which would be subject to correction at any time. Instead, the failure to order restitution must be brought to the trial court's attention and corrected within 60 days. The failure to impose restitution does not result in an illegal sentence, only an incomplete sentence which is subject to modification. That modification, however, must be made within 60 days.

Id., 16 F.L.W. at D1001 (citations omitted).

The state would make two points regarding Martin and the present case: first, the trial court in the present case did not fail to order restitution, it refused to order restitution when the state requested it. The refusal was

based on reasons that were neither considerations permitted under the statute nor reasons that fulfilled the clear and compelling standard. Second, even if the trial court's actions in the present case were to be regarded as a failure to order restitution which only resulted in an incomplete, unappealable sentence, Martin plainly specifies that the sentence must be corrected or modified to include restitution during the period of the trial court's jurisdiction. The trial court did not correct its sentence while it had jurisdiction and thus the sentence was illegal and subject to appeal by the state.

## V. Why The "Clear and Compelling" Standard Compels Appellate Review

The First District's order on McLeod's motion to dismiss (Ex. B) set out the court's reasons for not finding the denial of restitution to be an illegal sentence:

> This court is...presented with the question for the first time of whether the state may seek review of the trial court's order on restitution where no jurisdictional defect was present in the lower tribunal.
>
> We find that the trial court's order does not result in an "illegal sentence" even if this court were to agree with the state that the trial court's reasons for denying restitution were insufficient. This proceeding is not unlike a defendant's attempt to appeal an order denying a Rule 3.800(b) motion for mitigation of sentence. Such orders have been held not appealable because the granting of relief is discretionary with the trial

court. Johnson v. State, 543 So.2d 1289 (Fla. 4th DCA 1989).

(Ex. B, p. 3-4).

The district court, in giving its reasons to find that the trial court's order did not result in an illegal sentence ignored points of both law and fact. The fact is the law on restitution states that restitution is mandatory, absent clear and compelling reasons. §775.089(1)(a) and 921.187(2), Fla. Stat. (1989); Grice, supra. If the district court were to agree that the trial court's reasons were insufficient, that they did not meet the clear and compelling standard, then restitution was mandatory in the present case and the trial court's sentence was illegal and subject to appeal. §924.07(1)(e), Fla. Stat. (1989); Fla.R.App.P. 9.140(c)(I). In fact, the district court in its order dismissing the state's appeal stated that restitution was required under the circumstances (Ex. B, p.3.).

A. The Curtailment of Sentencing Discretion

Further, the court citing to Johnson, supra, for supporting authority totally misapprehends what Johnson actually holds. The thrust of Johnson is not that denial of Rule 3.800(b) motions are not appealable, but that denials of Rule 3.800(b) motions, concerning illegal sentences, are appealable because the trial court's discretion has been curtailed, exactly as a trial court's discretion in awarding restitution has been curtailed.

In sum, Johnson held that 3.800(a) motions, appeals from illegal sentences, were appealable because the sentencing discretion of the trial court had been significantly curtailed by the enactment of the mandatory sentencing guidelines. The appeal in the present case is also an appeal from an illegal sentence, and is appealable because the discretion of the trial court to not award restitution has been significantly curtailed by the Legislature's mandating of the imposition of restitution absent clear and compelling reasons and by the Legislature specifying what factors may be considered in deciding whether to award restitution. The clear and compelling standard alone is a significant curtailment of the trial court's sentencing discretion. The legislative history of the restitution statute bears this contention out.

B. The Legislative History of the Curtailment

Section 775.089(1), Fla. Stat., supra, was first enacted in 1977. Ch. 77-150, Sec. 5, Laws of Florida. As first enacted, the statute only stated that "the court may order the defendant to make restitution to the aggrieved party...." Id. In 1984, however, the Legislature curtailed the courts' discretion regarding restitution, amending the statute to read "the court shall order the defendant to make restitution to the victim,...unless the court finds reasons not to order such restitution." Ch. 84-363, Sec. 5, Laws of Florida. In 1988, the Legislature further curtailed the

trial court's sentencing discretion concerning restitution, again amending the statute to state "the court shall order the defendant to make restitution to the victim...unless it finds clear and compelling reasons not to order such restitution." Ch. 88-96, Sec. 2, Laws of Florida. The statutory standard for reasons to not award restitution remains in this form today.

Further, the list of factors that must be considered when a court is deciding whether to award restitution also limits the court's discretion. The factors, contained in §775.089(5), were first enacted in Ch. 77-150, Sec. 5, Laws of Florida as considerations for the court in determining the amount and method of restitution. Under that law, the court was only required to consider the financial resources of the offender and the burden the payment of restitution would impose on the defendant. In 1984, the Legislature amended the statute to require the court to consider certain factors in determining whether to award restitution and the amount of restitution. Ch. 84-363, Sec. 5, Laws of Florida. The required factors were nearly identical to the present statute, with the exception of the requirement that the court consider the present and potential future financial needs and earning ability of the defendant and his dependents. The "present and potential future [financial needs]" language was added in 1988. Ch. 88-96, Sec. 2, Laws of Florida. The factors required of a trial court to consider when deciding whether to award restitutio were made

increasingly more explicit with a corresponding loss of discretion on the trial court's part, a loss comparable to the reduction of discretion in ordering restitution at all.

Under Florida caselaw, a significant curtailment or reduction in a trial court's sentencing discretion compels a corresponding grant of appellate review. See, Johnson, supra ("Establishment of the sentencing guidelines with which a trial court's compliance is mandatory has resulted in a significant curtailment of the trial court's discretion in sentencing. We believe that this reduction in discretion below compels a corresponding grant of appellate review, whereby an error by the trial court in refusing to correct a sentence...can be reviewed and corrected by the district court."). The entire legislative history of the restitution statute has been a continued curtailment of the court's discretion to not order restitution and the reasons that may be considered in making that decision. The trial court in the present case exercised its severely limited discretion for unauthorized reasons and in the process created an illegal sentence from which the state may appeal.

VI. Why The "Clear and Compelling" Standard Cannot Be Ignored.

The restitution statute breaks down into two sections: one, a mandate to award restitution; two, a standard for reasons to not award restitution. While the state has shown that the mandate for restitution can shed light on the

Legislature's intent and thus the legality of the sentence, the main issue in this proceeding may succinctly be expressed as "who decides what is a clear and compelling reason?" The state contends that the "who" is an appellate court, the defendant and the First District Court of Appeal would have the trial court make a final, unreviewable decision. In fact, the First District in its order stated that where the trial court gives reasons to not award restitution, it found no authority to review those reasons by appeal (Ex. B, p.4).

This approach is at best disingenuous. If an appellate court may not review the reasons given by a trial court for its denial of restitution because the trial court merely gave reasons for the denial, what purpose of force does the clear and compelling standard possess? If we are to follow the First District's decision the statutory clear and compelling standard is without meaning and is, for all practical purposes, nonexistent. But this Court in Johnson v. Feder, 485 So.2d 409, 411 (Fla. 1986) stated:

> We are compelled by well-established norms of statutory construction to choose that interpretation of statute and rules which renders their provisions meaningful. Statutory interpretations that render statutory provisions superfluous "are, and should be, disfavored." Patagonia Corporation v. Board of Governors of the Federal Reserve System, 517 F.2d 803, 813 (9th Cir. 1975). See also, Smith v. Piezo Technology and Professional Administrators, 427 So.2d 182, 184 (Fla. 1983) (courts must assume that

> statutory provisions are intended to have some useful purpose). Courts are not to presume that a given statute employs "useless language." Times Publishing v. Williams, 222 So.2d 470, 476 (Fla. 2nd DCA 1969).

The state contends that the clear and compelling standard set by the Legislature for reasons to not award restitution is not useless language and may only be given its proper, useful purpose through its application by an appellate court. The very idea that a trial court may simply give any reason for denying restitution and not be subject to any standard at all is given lie by the legislative history of the restitution statute set out above.

If the clear and compelling standard for reasons to not award restitution is to have any effect, any useful purpose, the standard must be applied on appellate review. If the standard is to be applied only by a trial court it will become a mere technicality, a phrase to be automatically set out in an order's opening statement, e.g., "For the following clear and compelling reasons..." Such a result is contrary to the purpose of the standard, to limit a trial court's discretion. For that matter, the trial court in the present case never bothered to designate its reasons to deny restitution as clear and compelling (R 47-54). For the standard to have any useful purpose it must be applied by an appellate court on review of a trial court's order denying restitution.

VII. Why The Denial Of The State's Appeal Violates The Constitutional Rights of Victims.

Article I, Section 16(b) of the Florida Constitution states:

> Victims of crime or their lawful represenatives...are entitled to the right to be informed, to be present, and to heard when relevant, at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused.

In this criminal appellate proceeding concerning restitution, the state is the lawful representative of the victim. The wording of the restitution statute bears out this assertion. Section 775.089(5); "an order of restitution may be enforced by the state, or a victim named in the order to receive the restitution, in the same manner as a judgment in a civil proceeding." Section 775.089(7); "The burden of demonstrating the amount of the loss sustained by the victim as a result of the offense is on the state attorney." As the lawful representative of the victim, the state has a constitutional right to be present and to be heard when relevant at all crucial stages of a criminal proceeding of which an appeal is one. See, Coleman v. State, 215 So.2d 96, 101 (Fla. 4th DCA 1968) ("The entry of an appeal is a step in the case and not a new action."); Lee v. State, 204 So.2d 245, 250 (Fla. 4th DCA 1967) (appeal is the continuation of an action, and authorized attorney

has authority to appeal). The assertions made by the state in this brief are plainly relevant to the proceeding and do not interfere with the constitutional rights of the defendant in this proceeding.

Thus, the denial of the state's right to appeal the trial court's order denying restitution violates the constitutional right of victims or their representatives to be present and heard in a crucial stage of a criminal proceeding; an appeal from the denial of the statutory right to restitution. This Court should not countenance such a denial of a victim's constitutional rights, but should instead direct that the state be heard in this proceeding as the lawful representative of the victim.

VIII. The State Has A Statutory Right To An Answer On a Question Of Law.

When only one conclusion can be drawn form the admitted facts the question of liability (here liability for restitution) is a question of law. Loftin v. McGregor, 14 So.2d 574, 575 (Fla. 1943) (liability for negligence). The admitted facts of the present case are that McLeod pled no contest to felony DUI causing serious bodily injury to the victim and that the victim's medical bills for treatment of her injuries total over $500,000. The Florida Legislature has mandated that offenders pay restitution for a victim's medical bills. §775.089(2), Fla. Stat. (1989). It is not admitted, however, that the settlement reached between the

victim's guardian and McLeod and his insurer barred the state from seeking restitution. Thus there is only one conclusion that may be drawn from the admitted facts: McLeod owes $500,000 in restitution to the victim. The question of McLeod's liability for restitution in this case is thus one of law. Loftin, supra; Order Denying State's Motion For Restitution (R 47-54) (trial court treated entire question of contractual bar of restitution as a matter of law).

When the state appeals from a ruling on a question of law adverse to the state, the appellate court must decide the question. §924.37(2), Fla. Stat. (1989). The trial court in the present case ruled that the settlement between the victim and McLeod and his insurer barred the state from seeking restitution as a matter of law (R 47-54). The state has appealed this ruling on a question of law and this Court should reverse the First District's order dismissing the appeal and remand this case so that the district court may consider the issues presented.

IX. Why A Prior Insurance Settlement Does Not Bar The State From Seeking Restitution For A Victim Of Crime.

The trial court, in its order denying the state's motion for restitution, mischaracterizes a victim's right to restitution as an inchoate right (R 47). An inchoate right is a right that is partial or unfinished; e.g., in patent law, the right of an inventor to his invention while his

application is pending which matures as "property" when the patent issues. Black's Law Dictionary 686 (5th ed. 1979). The right to restitution is not inchoate, but instead is statutory, arising from §775.089, Florida Statutes (1989). That statute reads, in pertinent part:

> (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 clear and compelling reasons not to order such restitution . . . The court shall make the payment of restitution a condition to probation in accordance with §948.03.(b). If a court does not order restitution . . . as provided in this section, it shall state on the record in detail the reasons therefor.
>
> * * * *
>
> (2) When an offense has resulted in bodily injury to a victim, a restitution order entered pursuant to subsection (1) shall require that the defendant:
>
> (a) Pay the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with recognized method of treatment.
>
> (b) Pay the cost of necessary physical and occupational therapy and rehabilitation.
>
> (c) Reimburse the victim for income lost by such victim as a result of the offense.
>
> * * * *
>
> (4) If a defendant is placed on probation or paroled, complete satisfaction of any restitution ordered under this section shall be a condition of such probation or parole.

> (5) An order of restitution may be enforced by the state, or a victim named in the order to receive the restitution, in the same manner as judgment in a civil action.
>
> (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 present and potential future financial needs and earning ability of the defendant and his dependents, and such other factors which it deems appropriate.
>
> * * * *
>
> (8) The conviction of a defendant for an offense involving the act giving rise to restitution under this section shall estop the defendant from denying the essential allegations of that offense in any subsequent civil proceeding. An order of restitution hereunder will not bar any subsequent civil remedy or recovery, but the amount of such restitution shall be set off against any subsequent independent civil recovery. (emphasis added).

Restitution is mandatory as part of a sentence in a criminal case. The statute says the court shall order restitution, unless the court provides clear and compelling reasons not to order it. Sec. 775.089(1)(a), F.S. (1989). The reasons the trial court submits in its order denying restitution do not meet the clear and compelling standard. In fact, the order and the reasoning it contains are an abuse of the trial court's discretion and an improper delegation of its authority, as well as creating an illegal sentence. The court's reasoning is that the victim,

through her guardian, has settled all her claims against McLeod and that bars the state from seeking restitution. This reasoning is fallacious, as will be shown below.

A. The Nature of Restitution.

The trial court has misunderstood the nature of restitution. Restitution is a criminal sanction and the state, not the victim, is the party seeking a monetary award as a criminal sanction. The United States Supreme Court wrote on the nature of restitution in Kelly v. Robinson, 479 U.S. 36, 52, 107 S.Ct. 353, 367, 93 L.Ed.2d 216, 230 (1986):

> The criminal justice system is not operated for the benefit of victims, but for the benefit of society as a whole. Thus, it is concerned not only with punishing the offender, but also with rehabilitating him. Although restitution does resemble a judgment "for the benefit of" the victim, the context in which it is imposed undermines that conclusion. The victim has no control over the amount of restitution or over the decision to award restitution. Moreover, the decision to impose restitution generally does not turn on the victim's injury, but on the penal goals of the State and the situation of the defendant. As the Bankruptcy Judge who decided this case noted in Pellegrino, "Unlike an obligation which arises out of a contractual duty, here the obligation is rooted in the traditional responsibility of a state to protect its citizens by enforcing its criminal statutes and to rehabilitate an offender by imposing a criminal sanction intended for that purpose." (citation omitted) . . . Because criminal proceedings focus on the

> State's interests in rehabilitation and punishment, rather than the victim's desire for compensation, we conclude that restitution orders imposed in such proceedings operate "for the benefit of" the State. Similarly, they are not assessed "for . . . compensation " of the victim. The sentence following a criminal conviction necessarily considers the penal and rehabilitative interests of the State.

Kelly, at 52.

The trial court in this case based its entire order on the assumption that the benefit of restitution was for the victim, and that the victim here had already received that benefit in the settlement. The trial court has misunderstood the nature of restitution because as the Supreme Court stated, the benefit is for the State. The state has not settled and is entitled to seek restitution as a criminal sanction for McLeod's crime, and as monetary compensation for the victim as her lawful representative.

The Florida Supreme Court has also written on the nature of restitution in Spivey v. State, 531 So.2d 965 (Fla. 1988):

> 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. (citations omitted).

Id. at 967.

The trial court's order denying restitution ignores the nature of restitution, ignores these goals, and should be reversed. The trial court posited that, while the Florida Supreme Court provided some ancillary objectives for restitution in Spivey, supra, once the primary objective of providing recovery in damages for the victim is satisfied, there is no legal basis for pursuit of one of the other objectives. (R 51). The court also opined that once a criminal defendant who has paid restitution in full cannot be made to pay it again simply because that might have a "rehabilitative, deterrent, or retributive" effect. (R 51).

B. The Purposes of Restitution Have Not Been Satisfied.

The primary purpose of restitution has not been satisfied in this case. The victim in the present case suffered actual damage to the extent of $500,000. (R 67, 74). She received $125,000 in an insurance settlement for the limit of McLeod's policy, not in restitution. The victim has a right to restitution for the extent of her actual damage and loss, Sec. 775.089, F.S. (1989), and the state has a right to seek restitution as compensation for the victim and as a criminal sanction of McLeod for his crime. Spivey, supra. The trial court's order holding otherwise must be reversed.

Further, the objectives of restitution that the trial court disparages as "ancillary" are in fact the central objectives of any criminal sanction. Rehabilitation, deterrence, or retribution are the central purpose behind criminal sanctions whether the sanction is incarceration, probation, or restitution. See Freeman v. State, 382 So.2d 1307 (Fla. 3rd DCA 1980), rev. den., 401 So.2d 1334 (Fla. 1980); Spivey, supra. The trial court calling these objectives ancillary exemplifies the trial court's complete misunderstanding of the criminal sanction of restitution. Since criminal sanctions are not ancillary to civil proceedings, this Court should reverse the trial court's order denying restitution and remand for hearing on the amount of restitution should it choose to reach the merits of the order.

X. The State's Sovereign Power Cannot be Bound by an Agreement to which it was not a Party.

According to the trial court, the fact that the state was not a party to the civil settlement does not nullify the effect of the release between the parties. Since the state has a right to pursue a claim of restitution on behalf of the victim primarily because the state was party to the underlying criminal prosecution of the appellee, the victim is thus the real party in interest in restitution proceedings and the state is bound by the victim's and appellee's settlement, states the trial court. (R 50). The

trial court continued that, considered from a different perspective, the state cannot assert a right in a restitution proceeding greater than the right of the victim for whom restitution is sought. Once again, the trial court has misunderstood the nature of restitution.

A. The State Can and Is Asserting a Right Greater than that of the Victim.

Restitution is not only for the benefit of the victim. It is a criminal sanction sought by the state and the state is the real party and interest in the criminal proceeding, not the victim. The state does act as the victim's lawful representative, but the state can and is asserting a right greater than that of the victim, i.e., the state's sovereign and constitutional power to seek criminal sanctions for criminal offenders. Parties cannot enter into a contract to bind the state in the exercise of its sovereign power. Gamble v. Wells, 450 So.2d 850 (Fla. 1984) (parties cannot bind legislature's power over claims bill). The power to prosecute and punish an individual for a criminal offense is perhaps the purest form of the State's sovereign power.

Under Florida's constitution, the decision to charge and prosecute is an executive responsibility, and the state attorney has complete discretion on deciding whether and how to prosecute. Article II, Sec. 3, Fla. Const. (citations omitted) (emphasis added). State v. Bloom, 497

So.2d 2 (Fla. 1986). Article II, sec. 3, of the Florida Constitution prohibits the judiciary from interfering with this kind of discretionary executive function of a prosecutor. Id., at 3. The trial court's order denying restitution in the present case interferes with the state's discretion by limiting decisions to seek restitution to the terms of settlement agreements with insurance companies.

B. The Trial Court Improperly Delegated its Decision on Restitution.

A trial court cannot delegate the determination of the amount of restitution to a nonjudicial officer when restitution is ordered. Huffman v. State, 472 So.2d 469 (Fla. 1st DCA 1985), rev. den., 482 So.2d 348 (Fla. 1985); Perry v. State, 513 So.2d 254 (Fla. 2d DCA 1987); Milloway v. State, 567 So.2d 1073 (Fla. 3rd DCA 1990). But the trial court's order in the present case would require a court to delegate the decision of whether to award restitution to victims, defendants and insurance companies; persons and organizations that are not part of the criminal justice system, much less officers or judges. If a trial court cannot delegate the decision regarding the amount of restitution, it certainly cannot delegate the decision of whether to award restitution at all. The trial court in the present case abused its discretion when it allowed its decision to be dictated by the terms of the settlement agreement between the victim and McLeod and his insurer.

See Gamble, supra. The state was not a party to the settlement agreement, as the trial court admits (R 50), and cannot be bound by the agreement. Id.

XI. The State is Not Seeking to make McLeod Pay Restitution in Excess of the Amount of Actual Damages suffered by the Victim.

The trial court's next contention is a criminal defendant cannot be made to pay restitution in excess of the actual damages suffered by the victim. (R 51). The trial court cites two cases in support of its contention; Abbot v. State, 45 2So.2d 411 (Fla. 1st DCA 1989), and Wilson v. State, 452 So.2d 84 (Fla. 1st DCA 1984). The state, however, is not attempting to make McLeod pay restitution in excess of the actual amount of the victim's loss. While the victim's actual loss is in excess of $500,000 (R 67, 74), McLeod's insurer paid her only $125,000. Even with a set off, over $375,000 of the victim's actual loss was not covered by the settlement payment. The state, as the victim's lawful representative, is attempting to make McLeod pay the amount of the victim's actual loss, $500,000, not an amount greater than her actual loss. The amount awarded in restitution may be set off by the amount given in settlement, but that question is not the subject of this appeal. The trial court can set off the amount on remand.

A. The Actual Amount of the Victim's Loss was Not Determined by the Settlement Agreement.

In support of its argument that the state may not seek to make McLeod pay restitution in excess of the amount of the victim's actual loss, the trial court states that the actual amount of the loss was conclusively determined by the settlement agreement between the parties. (R 52). Having settled the claim in full, the defendant is in precisely the same position as if he had paid the claim in full, according to the trial court. (R 52). The trial court is wrong.

The settlement agreement was made part of the record on appeal. The plain language of the agreement shows that trial court's interpretation is clearly erroneous. The release language of the agreement makes absolutely no mention of the actual amount of the victim's loss. The agreement only releases McLeod and his insurer from any civil claims arising from the accident in which the victim was injured. The amount of the victim's actual loss is not mentioned in the agreement and in fact could not be mentioned in agreement since McLeod and his insurer settled for the limit of McLeod's policy (R 48), not the victim's actual loss of $500,000. The insurer, State Farm, would only pay the claim to the extent of its obligation under the policy, $125,000, no more. The actual amount of the victim's damage did not enter into the coverage or the

settlement agreement. The defendant's settling the civil claim for the limit of his policy does not place him in the same position as if he had paid the full amount of the actual loss in restitution, contrary to the trial court's assertion. McLeod has not paid the actual loss caused by his crime, and if the trial court's order is affirmed he will not pay the actual loss as required by s. 775.089, F.S. (1989).

B. The Restitution Sought by the State Arose from McLeod's Crime, Not the Automobile Accident Itself.

Further, the settlement agreement only releases McLeod and his insurer from any claim arising from or instant to the automobile accident itself. (R 49). The restitution sought by the state arises from McLeod's crime of the felony DUI causing serious bodily injury. §316.193(3)(c), F.S. (1989). If McLeod had not had any insurance at all, the state could still seek restitution for his crime. If McLeod had not been drunk when he drove into the other car, the state may not have been able to seek restitution, at least not for a felony DUI. But McLeod was drunk and injured the victim so badly she was declared incompetent and faced with medical bills of $500,000. The civil claim against McLeod arose from the accident and was settled. The claim for the criminal sanction of restitution arose from the crime and the state's sovereign right to punish the crime and it has not been settled. This Court should

reverse the trial court's order and remand this case for a hearing on the amount of restitution so that it may be settled.

XII. The Application of Principles of Civil Law to Criminal Restitution Proceedings Does Not Bar the State from Seeking Restitution.

The trial court in its order also addressed the fact that Florida courts have applied principles of civil law to restitution proceedings even though such proceedings are technically a part of the criminal law. (R 52). These civil concepts include subrogation, Amison v. State, 504 So.2d 473 (Fla. 2d DCA 1987); Jawardi v. State, 521 So.2d 261 (Fla. 2d DCA 1981), and the collateral source rule, M.E.I. v. State, 525 So.2d 467 (Fla. 1st DCA 1988). (R 52). If these principles of civil law apply in restitution hearings, then certainly the more fundamental civil concepts of settlement and release must also be applied in such proceedings, according to the trial court. (R 52).

What the trial court does not mention is that in each of these cases the appellate court applied the respective civil law principle to reach a decision that restitutio is not barred by an insurance settlement. Amison and Jawardi both hold that it is correct for a trial court to order restitution even when a victim has recovered damages from an insurance company resulting from a defendant's conduct. Jawardi, 521 So.2d at 262, see, Amison, 504 So.2d at 474.

M.E.I. contains the same holding. See, M.E.I., 525 So.2d at 468.

In Amison and M.E.I., the victim was reimbursed by his own insurance company. However, in Jawardi, the victim was apparently reimbursed by the defendant's insurance company, exactly as in the present case. None of the courts in these three cases allowed the payment of damages in settlement by an insurance company to bar restitution. This Court should apply the holdings of these three criminal cases and reverse the trial court's order denying the state's motion for restitution.

## XIII. The Foreign Cases relied on by the State in Support of its Argument are Not Distinguishable from the Present Case.

### A. Dupin v. State

The trial court's erroneously believed that the two foreign cases were distinguishable from the present case. The court distinguished the first case, Dupin v. State, 524 N.E.2d 329 (Ind.App. 4th Dist. 1988), because the release executed by the parties in that case specifically exempted any obligation to pay restitution. (R 53). The release in the present case did not exempt any obligation to pay restitution.

However, as the state pointed out in its memorandum of law supporting its motion for restitution (R 39-46), the

court in Dupin based its decision primarily on the principle that settlement in civil cases can have no effect upon sentence meted out in criminal cases. The language of the release was a secondary consideration. See, Dupin, 524 N.E.2d at 331. The Dupin court went even further to state that a partial civil settlement is not a substitute for restitution in criminal proceedings. Ids., at 331. It is not a substitute in the present case either. Dupin is not distinguishable from the present case, is directly on point, and should be recognized as persuasive authority for reversing the trial court's order and remanding this case for a hearing on the amount of restitution.

In fact, even assuming, arguendo, that the State is bound by the terms of the settlement agreement between the victim and McLeod, the agreement is silent on the question of restitution. These is not one word in the agreement stating that the state is precluded from seeking restitution from McLeod.[1]

B. People v. Clifton

The trial court distinguished the second foreign case, People v. Clifton, 219 Cal.Rptr. 904, 172 Cal.App.3d 1164 (1985), on the grounds that California's restitution statute allows recovery beyond the actual loss suffered by

[1] The state of course contends that it is not bound by the agreement, since it was not a party to the agreement. Gamble, supra.

the victim of a criminal act. (R 53). The California statute even allows restitution to a restitution fund if the crime did not involve a victim, which, according to the trial court, makes restitution in California actually a fine. (R 53). How the higher ceiling of payment in the California statute distinguishes the Clifton case from the present case escapes the state. The point is that an insurance settlement of a civil claim does not bar restitution in a criminal case, regardless of the amount of the settlement. The settlement may set-off the amount of restitution, but it does not bar restitution.

The fact that the California statute allows restitution to a fund if the crime did not involve a victim also does not distinguish Clifton from the present case. A fine is just another criminal sanction, the same as restitution. The fact that California places the money in a restitution fund instead of giving it to a victim is of no consequence to the Clifton court's holding that the fact that the victim may have settled with the defendant's insurance company prior to the sentencing hearing is irrelevant to the trial court's power to order restitution. Clifton, 219 Cal.Rptr. at 905. It is equally irrelevant in the present case. Clifton is not distinguishable from the present case. In fact it is directly on point, and should also be recognized as persuasive authority for reversing the trial court's order and remanding the case for a hearing on the amount of restitution.

XIV. The Settlement Between the Victim and McLeod Did Not Waive the State's Right to Seek Restitution.

The trial court's final assertion was that victims, as well as criminal defendants, may waive their constitutional and statutory rights. While the victim may have had a potential right to seek restitution under Sec. 775.089, F.S. (1989), the trial court stated, that right was foreclosed by the release and settlement agreement in the guardianship proceedings. (R 53-54).

While the state agrees that a victim may waive her constitutional and statutory rights, she cannot waive the state's sovereign and constitutional rights. The state has the sovereign and constitutional prerogative to seek criminal sanctions for criminal offenders. Article II, Sec. 3, Fla. Const. One of the sanctions the state may seek is restitution. Sec. 775.089(1)(a), F.S. (1989). The victim and McLeod cannot waive the state's sovereign right to seek such sanctions. Gamble, supra. That right has not been foreclosed for the reasons set out above. The trial court abused its discretion in holding the right to be foreclosed, and this Court should reverse the trial court's order and remand the case for a hearing on the amount of restitution.

XV. The Trial Court's Order Holding that the Insurance Settlement between McLeod and the Victim Bars Restitution is Bad Precedent and Worse Police.

If the trial court's order in the present case is affirmed, it will be setting a precedent that takes the power to award restitution away from the state's trial courts and gives it to insurance companies doing business in Florida. An affirmance, in effect, would allow the state's sovereign power to seek criminal sanctions to be bought and sold in the market place as a rider on an insurance policy barring restitution. This cannot be allowed to happen. The decision of whether to award restitution must remain with the trial court, and not be delegated to a contract to which the state is not even a party.

The trial court in the present case, basing its decision solely on the terms of the settlement agreement, improperly delegated its authority to decide the question of restitution to parties that were not even before it, i.e., the victim and McLeod's insurer. The real parties in the present case are the state and McLeod, and they have reached no settlement on restitution. The trial court's order holding the state's sovereign power to seek criminal sanctions can be barred by a contract to which the state is not even a party must be reversed. This Court should reverse the order and remand the case for a hearing on the amount of restitution.

## CONCLUSION

For the reasons set forth above, the state respectfully requests this Honorable Court to find that a trial court's order denying restitution is an order appealable by the state. Should this Honorable Court choose to reach the merits of the trial court's order, the state respectfully requests that the order be reversed and the case remanded for a hearing on the amount of restitution.

Respectfully submitted,

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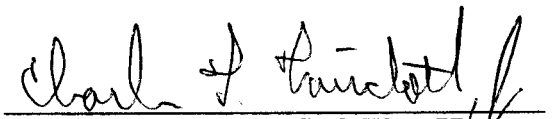

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing answer brief has been furnished by U.S. Mail to Mark King Leban, 2720 Southeast Financial Center, 200 South Biscayne Boulevard, Miami, FL. 33131-5302, this 30th day of September, 1991.

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