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IN THE SUPREME COURT OF FLORIDA

CASE NO. 78,553

FIRST DCA CASE NO. 90-2938

STATE OF FLORIDA,

Petitioner,

vs.

DAVID MICHAEL MacLEOD

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

LAW OFFICES OF MARK KING LEBAN, P.A.
2720 Southeast Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131-5302
(305) 374-5500
Fla. Bar No. 147920

BY: MARK KING LEBAN
Counsel for Respondent

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INTRODUCTION

Petitioner, the State of Florida, was the prosecution in the trial court and the appellant in the First District. Respondent was the defendant in the trial court and the appellee in the First District. The parties will be referred to as the State and the defendant, respectively. The symbol "R" represents the record on appeal. Attached hereto is an appendix, consisting of the ORDER APPROVING SETTLEMENT (A.1-2), and two RELEASES (A.3-6),[1] the trial court's ORDER DENYING STATE'S MOTION FOR RESTITUTION (A.7-14; R.47-54), and the First District's decision in State v. MacLeod, 583 So.2d 701 (Fla. 1st DCA 1991). A.15-17. All emphasis herein is added unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Defendant accepts the State's statement of the case and facts with the following additions and clarifications:

As the State recites, see State's Brief, hereinafter SB at page 2, the trial judge held a restitution hearing on July 16, 1990, and heard arguments for and against an award of restitution to the victim. R.63-91. At that hearing, the prosecutor conceded that, while it was the State that was seeking restitution, any award of restitution would be paid to the victim, and not the State, and that the State had no "better [claim] than the victim's claim." R.66. Moreover, the State asserted that "the victim would

[1]At the restitution hearing in this case, the State and the defense stipulated that these documents were to be considered as evidence at the hearing. See R.83.

be in breach of contract if she entered a claim in any court for restitution. . .". Id.

During the hearing, the trial judge raised the issue of whether the release and settlement entered into in this case is "a partial civil. . .settlement here or is it complete." R.70.[2]

The trial judge examined the release executed by the victim's guardian and found that "the [release] is an all inclusive broad language kind of release that covers any kind of claim, no matter what the nature. Any claims regardless of the nature." R.74.

The State asserted that the total amount of damages sustained by the victim was approximately $500,000. The trial court posed a hypothetical question, and inquired if the defendant had paid the entire $500,000, could the State "ask for it again now on the grounds that the State is a different party?" R.75. The prosecutor responded that the State could do so. Id.[3] The trial judge responded that he did not believe the law "would allow [restitution] to be done more than once." R.80.

The defense argued that the release and settlement agreement was accepted by the victim's guardian as adequate payment for the damages and that the victim "has been paid in full." R.81.

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[2]Subsequently, the court answered its own question in its order, expressly finding that the release effectuated a complete settlement of the victim's claim for damages. See R.49; A.9. The judge's ORDER will be discussed, infra.

[3]But see section 775.089(8), Florida Statutes (1989), providing that while a criminal order requiring restitution will not bar a civil recovery, "the amount of such restitution shall be set off against any subsequent independent civil recovery."

Moreover, public policy dictates that the settlement be enforced and that "the intention of the parties" must control. R.81.

Defense counsel asserted that Florida's restitution statute requires that restitution be paid "to the victim, not to the State," citing section 775.089(1)(a), Florida Statutes. R.82. Under the Florida Statute, the State is not to receive any portion of the restitution, and it all goes to the victim. Id. In addition, the defense asserted that the release "settles [the victim's] entire claim." R.83. Under Florida's restitution statute, "you can't make somebody pay for more than the damage." Id. The release signed by the victim's guardian in this case expressly states that it adequately compromises the damages. Id.

Subsequently, the prosecutor conceded that if the victim received the full amount of her damages, the State would have to request a "setoff in that amount." R.88. In response to the State's earlier argument that it is the State, "not the victim," that seeks the restitution, see R.65, the trial judge posed the question if the victim had been paid the full amount of her claimed damages, must not the court "deny your claim even though you [the State] are a different party because the restitution is fully paid at that point?" R.88. The prosecutor conceded that the court would have to deny the State's request for restitution. Id. However, the prosecutor continued its argument that the victim signed the "release. . .so that she could get the full amount of the claim." Id. The court observed that the victim "didn't have to take that. She could have filed a suit and the insurance company would have been on the hook for the policy limits no matter

what. And she could have filed a suit and gotten a judgment way in excess of the policy limits against the Defendant in this case." R.88-9.[4] The State agreed that the release was voluntarily entered into in this case. R.89. The trial judge reserved ruling on the question of restitution. R.91.

The release and settlement documents in this case, introduced as evidence at the restitution hearing (R.83), and appended hereto, are in three parts. The first is an ORDER APPROVING SETTLEMENT, signed by Circuit Judge William L. Gary, in which the court finds the settlement "to be reasonable and in the best interest of" the victim. See A.1. The second is the release executed by the victim's guardian on January 16, 1990. This release acknowledges "the adequacy" of the settlement in the amount of $100,000 to be paid by State Farm Mutual Automobile Insurance Company to the victim's guardian. A.3. This release also "forever discharge[s] David MacLeod and [the insurer]. . .from any and all claims, demands, damages, causes of action or suits of any kind or nature directly or indirectly arising out of any claim, demand, cause of action, or obligation of any nature whatsoever arising from or instant to [the] automobile accident. . .". A.3. In addition, this release states the intention of the victim "to settle and completely extinguish any claim or right whether known or unknown, both persons and property, arising out of the accident identified above. . .". A.3. Finally, the release declares that

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[4]It is prudent to observe at this point that pursuant to section 95.11(1), Florida Statutes (1989), a party may commence an action on a judgment of a court of record in this State within a twenty-year period.

"the terms of this settlement have been completely read and are fully understood. This Release is given voluntarily for the sole purpose of making full and final compromise, adjustment, and settlement of any and all claims, disputed or otherwise, on account of the injuries or damages mentioned above and for the express purpose of precluding forever any further or additional claims arising out of the event described in this release." A.4. Finally, the third document is another release signed by the father of the victim's minor child, as guardian, which acknowledges that "it is in the best interest of [the victim] and [the victim's child] that the settlement negotiated with the State Farm and Aetna be ratified and approved." A.6. Accordingly, the guardian of the victim's child "releases and forever discharges David MacLeod, [and the insurers]. . .from any and all claims, demands, damages, causes of actions, or suits based in whole or in part on a claim for damages. . .in connection with bodily injury sustained by [the victim] in [the] automobile accident," which gives rise to the this cause. A.6

The trial court, having reserved ruling, entered its written ORDER DENYING STATE'S MOTION FOR RESTITUTION, on July 31, 1990. R.47-54; A.7-14. After making several findings of fact, and discussing the legal issues involved, the court "determine[s] that there is no basis for a further award of restitution." R.54; A.14.[5] The court's order contains several pertinent findings. The

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[5]The finding of no basis for any "further" restitution, apart from the amount agreed to in the settlement has significance in that the State repeatedly asserts error in the denial of any restitution. See Argument, infra.

court found that the victim "settled all. . .civil claims against the defendant and his insurance carrier for a total of $125,000.00." R.48; A.8. The court further agreed with the defendant's assertion that "the release is not limited to a settlement of [defendant's] potential civil liability," and that the "language of the release is broad enough to foreclose recovery under the restitution statute." Id. The court found "from the plain wording of the release," that its terms released the defendant "from all future claims." Id. [Trial court's emphasis].

After quoting from pertinent portions of the victim's release, the trial judge expressly found:

> By the express terms of the release, the defendant has fully satisfied his financial obligation to the victim. The victim's guardian was not forced to settle the claim for less than the full amount of actual damages incurred.***If the parties wished to make an exception for a civil recovery in a restitution hearing, they should have made that intention clear in the release. Otherwise, the plain wording of the release compels a conclusion that the victim intended to accept the $125,000.00 in full settlement of all of her claims against the defendant. R.49-50; A.9-10.

Answering the State's assertion that since it was not a party to the civil settlement, it could not be bound by the release, the court found that while "[t]he State has a right to pursue a claim of restitution on behalf of the victim. . .the real party [in] interest in such proceedings is the victim, not the State." R.50.[6]

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[6]As will be observed, infra, the trial judge's finding that it is "the victim, not the State," that is the "real party in interest," finds support in section 775.089(1)(c), Florida Statutes

In further response to the State's claim that it was not a party to the settlement agreement and could not be bound thereunder, the trial court found:

> [T]he State of Florida cannot assert a right in a restitution hearing that is greater than the right of the victim for whom restitution is sought. For example, if the defendant had paid the victim in full in a civil case, this Court could not order that restitution be made once again in a criminal case simply because the State is a new party. The State cannot have a greater interest than the interest of the victim. Therefore, although the State was not a party in the civil case, the State is now limited by the actions taken by the victim in that proceeding. R.50-51; A.10-11. [Trial court's emphasis].

The court's ORDER further considers the statutory provisions governing an award of restitution and finds that "the primary object[ive] of restitution is to compensate aggrieved victims." R.51.[7] The court also found that the defendant had paid restitution "in full" and that such a defendant "cannot be made to pay it again simply because that would have 'a rehabilitative, deterrent, or retributive' effect." R.51; A.11.

After reviewing Florida decisional law providing that "a criminal defendant cannot be made to pa[y] restitution in excess of

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(1989), which defines "victim" as "the aggrieved party." Moreover, §775.089(1)(a), provides that any restitution is to be made "to the victim for damage or loss caused directly or indirectly by the defendant's offense. . .". As for the court's finding that the State has "a right to pursue a claim of restitution on behalf of the victim," (R.50), this finding again finds support in §775.089(5), which provides that any order of restitution "may be enforced by the state. . ." Thus, the statute envisions the State's role as one of enforcement of whatever restitution the trial judge decides to "order."

[7]As noted, this finding is derived from §775.089(1)(a) and (c), Fla.Stat.

the actual damages suffered by the victim," (R.51; A.11), the court finds that "the actual amount of the loss was conclusively determined by the settlement agreement between the parties. Having settled the claim in full, the defendant is in precisely the same position as if he had paid the claim in full." R.52; A.12.

The court's order also considers the public policy of this State concerning "fundamental civil concepts of settlement and release. . .". Id.

After considering the two foreign decisions cited by the State, and distinguishing them or declining to follow them (R.52-3; A.12-13), the court concludes as follows:

> Victims are now afforded greater rights and remedies under the criminal law, but these rights are. . .subject to waiver. While the victim in this case may have had a potential right to seek restitution under §775.089 Fla.Stat. (1989), that right has now been foreclosed by the release and settlement agreement in the guardianship proceedings.
>
> For each of these reasons, the Court ha[s] determined that there is no basis for a further award of restitution. R.53-4; A.13-14.

Thereafter, the State timely filed its notice of appeal in which the State asserts: "The nature of the order is a final order denying the State's Motion for Restitution." R.55.[8]

In the State's initial brief filed in the First District, the State repeatedly argued that the trial judge's order denying

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[8]As will be demonstrated, infra, it is significant that the State's notice of appeal does not assert that the nature of the order appealed is "an illegal sentence." See Rule 9.140(c)(1)(I), Fla.R.App.P.; and see section 924.07(1)(e), Florida Statutes, providing that the State may appeal from a "sentence, on the ground that it is illegal."

restitution constituted "an abuse of discretion." See State's Initial Brief in the First DCA at pages 9-10, 15, 21, 28. After the State's initial brief was filed, the defendant filed his MOTION TO DISMISS APPEAL, on the grounds that the trial judge's order was not appealable since it was not "an illegal sentence," and that there was no statutory or rule authority for the State's appeal of the order denying further restitution. It was not until after this MOTION TO DISMISS was filed that the State, for the first time, argued that the trial judge's order appealed herein was "an illegal sentence."

On June 21, 1991, the First District entered its ORDER ON APPELLEE'S MOTION TO DISMISS. See State v. MacLeod, 583 So.2d 701 (Fla. 1st DCA 1991). A.15-17. The First District addressed the defendant's assertion that the trial court's order "did not impose an illegal sentence. Rather, the trial court entered an order which complies with section 775.089(1)(b), Florida Statutes (1989), by setting forth reasons for denying restitution." 583 So.2d at 702. A.16. The First District agreed and held that where the trial judge's order sets forth his or her reasons for denying restitution, as required by the statute, the judge engages in a discretionary function and such an order "does not result in an 'illegal sentence'. . .". Id. at 703. A.17. Thus, the First District held that "[w]here, as here, the trial court gives reasons, we find no authority for this court to review them by appeal." Id.

Subsequently, on the State's motion, the First District denied rehearing but certified to this Court the question of

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. 583 So.2d at 703. A.17. On September 5, 1991, this Court entered its order postponing its decision on jurisdiction and setting forth a schedule for briefs on the merits.

QUESTIONS PRESENTED

POINT I

WHETHER THE FIRST DISTRICT CORRECTLY HELD THAT A TRIAL COURT'S ORDER DENYING FURTHER RESTITUTION WHICH FULLY SETS FORTH REASONS THEREFOR AS REQUIRED BY STATUTE DOES NOT CONSTITUTE AN "ILLEGAL SENTENCE" AND IS THUS NOT APPEALABLE BY THE STATE ABSENT STATUTORY OR RULE AUTHORITY FOR SUCH APPEAL.

POINT II

WHETHER THE TRIAL COURT'S ORDER DENYING FURTHER RESTITUTION BASED UPON THE UNEQUIVOCAL SETTLEMENT AGREEMENT WHICH EXTINGUISHED ANY AND ALL POSSIBLE CLAIMS ARISING OUT OF THE DEFENDANT'S ACT WAS LEGALLY CORRECT, AND FULLY CONSISTENT WITH THE PUBLIC POLICY OF FLORIDA ENCOURAGING AND FAVORING THE SETTLEMENT OF CONTROVERSIES.

SUMMARY OF ARGUMENT

Neither section 924.07(1)(e), Florida Statutes, nor Rule 9.140(c)(1)(I), Fla.R.App.P., provides for a State appeal of an order denying restitution, and since the State's right to appeal is purely statutory, and statutes which afford the right to a state appeal must be narrowly construed, the First District correctly determined that the State had no right to appeal in this case. This Court's decisions repeatedly refuse to judicially legislate a State right to appeal particular orders where the statutes do not expressly provide for an appeal, and the legislature properly

responds in such circumstances where it deems appropriate. The State's argument here is best directed to the legislature, and not to this Court.

The trial court's detailed and well reasoned order fully complied with Florida's restitution statute's requirement of stating reasons for a partial or complete denial of restitution, and those reasons were well within the broad discretion conferred by the statute upon the trial court. The statute is not nearly as limited as the State asserts, and the trial judge's careful consideration of the terms of the civil settlement agreement voluntarily entered into by the victim is directly related to the "amount of loss" factor specifically enumerated by the restitution statute.

There is no analogy between sentencing guideline departures, from which the State may appeal by express statutory authorization, and restitution orders which are directed to the trial courts' broad discretion and from which there is no express, or even implied, statutorily authorized appeal. Far from limiting and restricting the trial courts' discretion in making restitution decisions, the legislature has broadened that discretion, a fact this Court emphasized in its Spivey decision. An order denying further restitution which is based on detailed and written reasons is not an illegal sentence, but one within the trial court's broad discretion.

A trial judge's discretionary order is to be distinguished from an illegal order for purposes of appellate review, a distinction which is crucial and fatal to the State's

appeal in this case. A discretionary act is unreasonable only where no reasonable person would take the view of the trial court. If reasonable people can differ, there is no abuse of discretion and certainly no illegality. Since the trial court's order here did not result in an illegal sentence, the State has no right to appeal. Thus, the certified question should be answered in the negative.

On the merits, the trial court did not abuse its broad discretion in considering the victim's voluntary settlement in order to determine the amount of the victim's damages, as required by statute. Enforcement of settlement agreements is favored in Florida and such settlements well serve the public policy of this State. Such a factor can and should properly impact the trial court's discretionary resolution of the victim's "amount of loss" and the court's resulting decision as to the amount of restitution, if any, it will impose upon the defendant, without doing violence to the separate penal goals accomplished by ordering restitution.

The decisions of Florida courts recognize the broad discretion conferred upon trial judges by Florida's restitution statute. Consideration of the settlement agreement in no way binds the State or precludes it from exercising its sovereign power to prosecute or to seek restitution over and above the amount of the settlement agreement. It is for the court, not the State, to determine punishment in the proper exercise of its discretion so long as the punishment is within statutory limits. The trial judge did not delegate his decision as to the amount of restitution to the victim, the defendant, or the insurance companies; instead, the

court itself determined the amount of restitution, if any, it would order. The court did so after engaging in a careful analysis of the terms and intent of the voluntary settlement agreement here.

No Florida decision relied upon by the State requires the trial judge to award restitution notwithstanding such an equivocal release as exits here. The foreign decisions relied upon by the State are clearly distinguishable and do not compel a result contrary to that reached by the trial court. Florida public policy highly favors settlement agreements and there is no express or implied prohibition of releases in Florida's restitution statute. The trial court's well reasoned order denying further restitution must be affirmed.

ARGUMENT

POINT I

THE FIRST DISTRICT CORRECTLY HELD THAT A TRIAL COURT'S ORDER DENYING FURTHER RESTITUTION WHICH FULLY SETS FORTH REASONS THEREFOR AS REQUIRED BY STATUTE DOES NOT CONSTITUTE AN "ILLEGAL SENTENCE" AND IS THUS NOT APPEALABLE BY THE STATE ABSENT STATUTORY OR RULE AUTHORITY FOR SUCH APPEAL.

The defendant submits that the First District correctly held that a trial court's order denying the State's motion for restitution based upon articulated reasons for such denial does not constitute an "illegal sentence" and that, accordingly, it lacks jurisdiction to entertain the State's appeal pursuant to Rule 9.140(c)(1)(I), Fla.R.App.P.[9]

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[9]Although not expressly cited by the First District, its lack of jurisdiction is additionally predicated upon the lack of statutory authority for the State's appeal of an order denying restitution pursuant to section 924.07(1)(e), Florida Statutes.

While the defendant is aware that this Court has temporarily postponed its decision on jurisdiction, and directed the parties to brief the merits, inasmuch as the State has addressed both questions, and the jurisdictional question is inextricably bound to the merits, the defendant, in an abundance of caution, will first proceed with an analysis of the jurisdictional issue.

We begin with the statutory and rule authority for State appeals. Section 924.07(1), Florida Statutes (1989), sets forth the statutory authority for State appeals. Only two subsections of the statute are at all pertinent to the case at bar. Section 924.07(1)(e), Florida Statutes, provides that "[t]he state may appeal from. . .[t]he sentence on the ground that it is illegal." Section 924.07(1)(j), Florida Statutes, provides that the State may appeal from "[a] sentence imposed outside the range recommended by the guidelines authorized by s.921.001." Clearly, it is only subsection (e) that impacts the case at bar.

The statute's counterpart in the rules of appellate procedure is Rule 9.140(c)(1)(I), Fla.R.App.P., providing that "[t]he State may appeal. . .[a]n illegal sentence."[10] This Court has repeatedly held that "[t]he state's right to appeal is purely statutory and is found in Sectio[n] 924.07. . .". Whidden v. State, 159 Fla. 691, 32 So.2d 577, 578 (Fla. 1947); State v. Creighton, 469 So.2d 735, 737 (Fla. 1985); Ramos v. State, 505

[10]The Court's Commentary to this rule states that "[s]ubsection (c)(1) lists the only matters which may be appealed by the State. . .".

So.2d 418, 420 & n.2 (Fla. 1987). Recognizing this longstanding rule, the State makes a great effort to transform the trial judge's order denying further restitution in the case at bar into "an illegal sentence," arguing that "the effect of the trial court's order denying restitution was the imposition of an illegal sentence, from which the state may appeal." SB at 8. This is so, notwithstanding (1) the fact that the State's own notice of appeal characterizes the trial court's order as "a final order denying the State's Motion for Restitution," and (2) the fact that the State never argued that the order appealed resulted in an "illegal sentence" anywhere in its Initial Brief filed in the First District.[11]

In any event, this Court has persistently refused to broadly construe the statutory bases upon which the State may appeal, steadfastly adhering to the rule that "statutes which afford the government the right to appeal in criminal cases should be construed narrowly." State v. Jones, 488 So.2d 527, 528 (Fla. 1986). In Jones, this Court refused to construe section 924.07(1)(a), Florida Statutes, which allows the State to appeal an order dismissing an indictment or information, to permit a State appeal of a trial court's order discharging an affidavit of violation of probation. Here, too, only if the trial judge's order denying further restitution can be construed as an "illegal sentence" would section 924.07(1)(e), Florida Statutes, allow an

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[11]Instead, the State repeatedly merely characterized the trial court's order as "an abuse of discretion." See State's Initial Brief in the First DCA at pages 9-10, 15, 21, 28.

appeal by the State. Such a construction of subsection (1)(e) would violate the mandate of Jones affording only a narrow construction of the State's statutory right to appeal. The State has failed to demonstrate why an order denying restitution constitutes an "illegal sentence," and indeed, the appellate courts of this State have consistently refused such a construction.[12]

Much of the State's arguments have been answered unfavorably by this Court's decisions refusing to read into section 924.07 a right to appeal where none exists by the clear, and narrowly construed, terms of the statute. Thus, in State v. Creighton, 469 So.2d 735 (Fla. 1985), this Court held that since a trial court order granting a motion for judgment of acquittal "is not among the rulings set out in the statute and thereby identified as appealable by the state in criminal cases," the State could simply not appeal such an order. Id. at 737. This Court, citing Whidden, observed that "it is now generally held that, unless expressly provided for by statute, in criminal cases the state is

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[12]In addition to the First District's decision in the case at bar, State v. MacLeod, 583 So.2d 701 (Fla. 1st DCA 1991), see State v. Martin, 577 So.2d 689, 690 (Fla. 1st DCA 1991)(trial court's order striking previously imposed restitution requirement "is not an order which may be appealed by the state pursuant to [the statute and rule]."); Dailey v. State, 575 So.2d 237, 238 (Fla. 2d DCA 1991)(characterizing sentence not imposing restitution as "incomplete" but not "illegal"); State v. Butz, 568 So.2d 537 (Fla. 4th DCA 1990)(refusing to hold that trial judge's order failing to include restitution, "without stat[ing] its reasons for not so doing," results in an illegal sentence); Grice v. State, 528 So.2d 1347 (Fla. 1st DCA 1988)(failure to order restitution results in "incomplete" sentence); see also State v. Bober, 16 FLW C113, 114 n.2 (12th Judicial Circuit, July 25, 1991)(collecting cases and observing that the First, Second, and Fourth Districts "have held that the failure to order restitution, even though mandated by law does not make a sentence illegal but merely incomplete.").

not entitled to appeal adverse judgments and orders." Id. at 740. Once again, the Court "reaffirm[ed] the principle that the state's right of appeal in criminal cases depends on statutory authorization and is governed strictly by statute." Id.[13]

In Ramos v. State, 505 So.2d 418 (Fla. 1987), this Court construed section 924.07(4), Florida Statutes (1983), which provided for a State appeal from "a ruling on a question of law when the defendant is convicted and appeals from the judgment." The issue was whether the State could maintain a cross-appeal where the defendant voluntarily dismissed the underlying appeal, and this Court, strictly construing the statutory provision there at issue, held that "a cross-appeal by the state cannot survive the main appellant's voluntary dismissal of the main appeal." 505 So.2d at 421.[14] Again, this Court adhered to the rule that "the state has only those rights of appeal as are expressly conferred by statute. Substantive rights conferred by law can neither be diminished nor enlarged by procedural rules adopted by this Court." Id.

Similarly, in State v. Jones, 488 So.2d 527 (Fla. 1986), this Court refused to construe the statute providing for an appeal

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[13]When this Court strictly construed §924.07 as not allowing a State appeal, the legislature responded to Creighton by amending §924.07(1), adding subsection (j), providing for a State appeal of "[a] ruling granting a motion for judgment acquittal after a jury verdict." See chapter 87-243, §46, Laws of Florida.

[14]Once again, the legislature responded to this Court's proper reading of the then existing statutory authorization for State appeals by amending the statute to provide that "[o]nce the state's cross-appeal is instituted, the appellate court shall review and rule upon the question raised by the state regardless of the disposition of the defendant's appeal." §924.07(1)(d). This amendment, as was the case with Creighton, was effectuated by chapter 87-243, §46, Laws of Florida (1987).

from order dismissing an indictment or information to permit a State appeal of an order discharging an affidavit of violation of probation. While it was certainly arguable that an affidavit of violation of probation was analogous to an indictment or information, this Court insisted on a "narrow construction" of §924.07, "reject[ing] [the State's] argument that a discharge of an affidavit of a violation of probation should be construed as equivalent to dismissing an information or indictment, thereby bringing such an appeal within the ambit of section 924.07, Florida Statutes." 488 So.2d at 528.[15]

In State v. C.C., 476 So.2d 144 (Fla. 1985), this Court held that section 924.07 provided no statutory basis for State plenary or interlocutory appeals in juvenile cases. Even though, as this Court observed, juvenile delinquency matters are "criminal in nature, they are separate proceedings that are controlled by Chapter 39, Florida Statutes." Id. at 146. Thus, this Court refused to apply Chapter 924 to juvenile proceedings, effectively precluding the State from appeals in juvenile cases.[16] See also E.N. v. State, 484 So.2d 1210 (Fla. 1986). For yet another example of this Court's refusal to judicially create a State right to

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[15]Again, the legislative response to Jones was to amend §924.07(1)(a), by expressly including in the list of dismissals from which the State may appeal "an order. . .dismissing an affidavit charging. . .the violation of probation. . .". See chapter 90-239, §1, Laws of Florida.

[16]Again, the legislative response was the passage of Chapter 86-251, §1, Laws of Florida, creating section 39.069(1)(b)(1)-(8), Florida Statutes (1990), and section 39.0711, Florida Statutes (1990), providing for State appeals of adverse rulings in juvenile delinquency matters.

appeal where none exists pursuant to statute, see State v. Diers, 532 So.2d 1271 (Fla. 1988), holding that the State could not appeal a Youthful Offender Act sentence even though that sentence was less than that prescribed by the sentencing guidelines. The controlling statute at the time was section 958.04, Florida Statutes (1985).[17]

These decisions, and the legislative responses, clearly demonstrate that this Court will strictly construe the statutes providing for State appeals, regardless of what might appear to be a harsh result. The cases and the legislative responses also demonstrate the proper balance between the branches of government. It is clearly not for the Court to rewrite or judicially legislate the law. Clearly, the State's argument here is best addressed to the legislature, and not to this Court.

In this regard, the State cogently points to the requirement in the restitution statute that if the trial judge denies restitution, or only orders a portion of restitution of damages incurred by a victim, the court must find "clear and compelling reasons not to order such restitution," §775.089(1)(a), and the court "shall state on the record in detail the reasons therefor." §775.089(1)(b). The State argues that if there is no right to appellate review of those reasons, "what purpose of force does the clear and compelling standard possess?" SB at 21. By finding no right to appeal, as did the First District, the "compelling standard is without meaning and is, for all practical

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[17]The legislature, by enactment of chapter 87-110, §3, Laws of Florida, amended section 958.04(3), by providing for an appeal of such orders pursuant to §924.07.

purposes, nonexistent." SB at 21. In support, the State cites Johnson v. Feder, 485 So.2d 409, 411 (Fla. 1986), where this Court applied the rule of statutory construction "to choose that interpretation of statutes and rules which renders their provisions meaningful." There is, however, a vast difference between choosing an interpretation of a statute so as to render its terms meaningful on the one hand, and judicial legislation of an entirely different statute to effectuate such a "meaningful" construction of its terms on the other hand. The State's request for this Court to read into section 775.089 a right to a State appeal of the "clear and compelling reasons" stated by the trial judge in denying restitution in whole or in part, runs afoul of this Court's steadfast adherence to the rule that "statutes which afford the government the right to appeal in criminal cases should be construed narrowly." State v. Jones, supra at 528.

An example of this distinction appears in State v. Graydon, 506 So.2d 393 (Fla. 1987), where the defendant was charged with resisting an officer with violence, involving a State correctional officer; at the time, section 843.01, Florida Statutes, while including within its ambit a vast array of law enforcement officers, did not expressly include "state correctional officers." This Court refused the State's invitation to "construe" state correctional officers into the statute, holding:

> The state argues it is absurd to suggest that the legislature intended to criminalize resistance to county and municipal, but not state, correctional officers. The state further contends that since correctional officers are legally authorized to execute process on prisoners, they are included under

> section 843.01 even if they are not specifically identified in the statute. We reject these arguments. We are not going to speculate why the legislature did not include state correctional officers within the statute. This Court does not have the authority to legislate, and only the legislature can include state correctional officers within the provisions of section 843.01. 506 So.2d at 394-5.

Despite the "absurdity" pointed out by the State, this Court refused to do precisely what the State asks of the Court in the case at bar, to construe from the requirement in §775.089 that the trial court state on the record its reasons in detail and that such reasons be "clear and compelling" for not ordering restitution, a State right to appeal emanating from §924.07(1)(e)'s provision permitting a state appeal from a sentence "on the ground that it is illegal." Such a "construction" would constitute no less an act of judicial legislation than this Court refused to undertake in State v. Graydon, supra.[18] The legislature has not hesitated to respond to this Court's refusal to do its work for it.

As part of its effort to demonstrate, for the first time in these review proceedings in this Court, that the trial judge's order denying further restitution is "illegal," the State makes numerous arguments. One of these is that the trial judge's stated reasons for denying further restitution "were neither clear [n]or compelling, nor were the reasons cited by the court permitted to be considered under the restitution statute." SB at 6. Since the trial judge utilized "improper factors outside the purview" of the

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[18]In response to Graydon, the legislature enacted ch. 88-381, §50, Laws of Florida, to include state correctional officers within the ambit of §843.01. See §943.01(1), Fla.Stat. (1988).

statute, his order denying further restitution "created an illegal sentence which authorizes this appeal." Id. However, the State's argument is belied by the express statutory terms of the restitution statute. Sections 775.089(6) and (7) contain no limitation on the factors which the trial judge may properly consider in determining whether to impose restitution, in whole or in part, or whether to deny it totally. Subsection (6) provides as follows:

> (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 financial needs and earning ability of the defendant and his dependents, and such other factors which it deems appropriate.

Subsection (7) allocates the burden of demonstrating the amount of loss factor and places this burden on the prosecution; the burden of demonstrating the defendant's resources and his financial needs and those of his dependents is placed on the defendant. The statute then provides that the "burden of demonstrating such other matters as the court deems appropriate is upon the party designated by the court as justice requires." It is submitted that these two subsections clearly confer a broad discretion upon the trial judge, and far from limiting the factors that the court must consider, the entire statutory scheme contemplates a wide range of factors to inform the trial court's discretion.[19]

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[19]For instance, the restitution statute fully anticipates the impact of civil proceedings on any award of restitution. See §775.089(5), providing that enforcement of any restitution order may be had "in the same manner as a judgment in a civil action."

Since it is clear that the restitution statute contemplates that any civil recovery will impact the criminal restitution award, the State's argument that the trial judge's reasons for denying further restitution, namely, the conclusive effect of the particular release signed by the victim's guardian here, are "outside the purview of the restitution statute," SB at 6, is wrong.

In support of its argument, the State asserts that the trial judge "did not consider any of the statutorily-required factors." SB at 9. This failure purportedly renders the judge's order "an illegal sentence." However, the trial judge expressly considered and determined in its well reasoned order the actual "amount of the loss sustained by [the] victim as a result of the offense," as determined by the settlement agreement voluntarily entered into by the victim. See R.52; A.12. Contrary to the State's argument, the factors which the trial judge should consider are not those limited in subsection (6), but include "such other matters as the court deems appropriate," as provided in subsection (7), see Oliverio v. State, 583 So.2d 412 (Fla. 4th DCA 1991)(expressly citing subsections (6) and (7) of the restitution

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§775.089(8) provides that criminal restitution is no bar to a civil recovery but any criminal restitution award must be "set off against any subsequent independent civil recovery." §775.089(10) provides that any default in payment is subject to civil enforcement proceedings. Consistent with these provisions, the courts have held that imposition of an award of restitution in addition to any recovery of civil damages is discretionary. See, e.g., Daniels v. State, 581 So.2d 970, 971 (Fla. 5th DCA 1991) ("Sentencing judges have long used their discretion in imposing criminal sanctions to give victims of crime an additional benefit by conditioning criminal sanctions upon payment of restitution.").

statute as containing those factors which the trial judge should consider), as well as the effect of "any subsequent civil remedy or recovery," as provided in subsection (8).

The State's reading of subsection (6)'s provision for "such other factors which [the trial court] deems appropriate," is far too limited. See SB at 9-10. The State asserts that this phrase must be construed and "limited to the same class or character as" the enumerated factors in the same subsection, namely, "the losses of the victim and the financial needs and resources of the defendant." SB at 10. The defendant submits that even if the phrase "such other factors which it deems appropriate" is to be so limited, the trial judge's consideration of the effect of the civil settlement is just such a proper factor, as it relates to the "amount of the loss sustained by [the] victim as a result of the offense. . ." The State's reading of the "amount of loss" factor is far too crimped. The civil recovery is directly related to the "amount of the loss." Thus, the trial judge's detailed analysis of the effect of the civil settlement is precisely one of those factors contemplated by the restitution statute which must be considered in determining "whether to order restitution and the amount of such restitution." §775.089(6).

The State asserts at SB8 that it is "apparently not required to show the illegality of the sentence, but required to allege that the sentence is illegal." In support, the State cites State v. Pilcher, 443 So.2d 336 (Fla. 5th DCA 1983), for the rule that the State may appeal an alleged illegal sentence. SB at 8. Pilcher, however, is unavailing for there, the sentencing order was

facially illegal because it did not impose a minimum mandatory three-year sentence. In contrast, as the First District expressly held in the case at bar, the trial court's order facially complied with section 775.089(1)(a) and (b), Florida Statutes, by setting forth in great detail, in its eight page order, its reasons for declining to order further restitution. Of more significance is the fact that the State is not merely "required to allege" that a sentence is illegal before it may properly appeal that sentence. First, the question of jurisdiction may not be hurtled by so facile a rule. Second, the State here did not even "merely. . .allege" illegality of the sentence. As earlier observed, neither the State's notice of appeal, nor its initial brief, ever even so much as alleged that the sentence was "illegal."

The State next launches into a comparison of the restitution order in the case at bar with "a trial court's departure from the sentencing guidelines for unauthorized reasons." See SB at 12-13. The analogy must fail. Of course, such sentencing guideline departures are expressly made appealable pursuant to section 924.07(1)(j), Florida Statutes, as well as section 921.001(5), Florida Statutes. Moreover, as the State itself argues, the standard of review in such guideline departure cases is "abuse of discretion," which, as the defendant will shortly demonstrate, is not at all analogous to an <u>illegal</u> sentence, the jurisdictional prerequisite for a State appeal of a sentence, apart from guideline departures. As the State itself correctly observes, an appeal by the State from a sentence which departs from the guidelines "is a matter of right." Section

921.001(5), Florida Statutes. See also Rule 9.140(c)(1)(J), Fla.R.App.P. No such statutory authorization exists in the case at bar.

Next, the State seeks to distinguish the decisions relied upon by the First District here for its holding that an order denying restitution results only in an incomplete, not an illegal, sentence. See SB at 14-16. And see note 12, supra. In Grice v. State, 528 So.2d 1347, 1350 (Fla. 1st DCA 1988), the court held that where the trial court "properly performed its duty in correcting an incomplete sentence," which did not initially include restitution, the court found it "unnecessary to determine whether the original sentence was illegal or merely incomplete and subject to modification. . .". However, Judge Zehmer's dissenting opinion did opine that the applicable restitution and probation statutes, including sections 775.089, and 921.187, Florida Statutes, "leave the imposition of restitution as part of a criminal sentence to the discretion of the trial judge and only require that if full restitution is not ordered, the trial judge shall state on the record the reasons for doing so." 528 So.2d at 1350, Zehmer, J., dissenting. Moreover, Judge Zehmer observed as follows:

> The original sentence was neither illegal nor ineffective because the trial court failed to consider the statutory requirements relating to restitution at the time of sentencing or state on the record his reasons for not imposing it. Id. at 1351.

The State undervalues the Fourth District's decision in State v. Butz, 568 So.2d 537 (Fla. 4th DCA 1990), where, the trial judge's initial sentencing order neither included restitution, "nor

stated its reasons for not so doing." 568 So.2d at 537. Within the sixty-day period permitted for modification of sentence pursuant to Rule 3.800(b), Fla.R.Crim.P., the State moved for restitution but the trial judge did not act within that sixty-day period and denied restitution. The issue on appeal was whether the failure to impose restitution as part of the sentence resulted in an illegal sentence, correctable at any time pursuant to Rule 3.800(a), Fla.R.Crim.P., or was "merely incomplete, which would be correctable only within the sixty -day window." Id. The Fourth District concluded that the sentence, which failed to order restitution and also failed to state any reasons for not so doing, was not illegal, but merely incomplete. Of course, if the restitutionless sentence was "illegal," it could be corrected at any time. The Fourth District, however, refused to characterize it as illegal, and thus, would not apply the "at any time" remedy afforded by Rule 3.800(a), Fla.R.Crim.P., to "correct an illegal sentence. . .". It is submitted that if the sentence in Butz, which not only failed to order restitution, but failed to state any reasons for not so doing (as is required by §775.089(1)(a) and (b), Florida Statutes) was not illegal, clearly the eight page sentencing order issued in the case at bar, with its detailed and thoughtful analysis and reasons for refusing to order further restitution, is also not "illegal."

Finally, the State would distinguish State v. Martin, 577 So.2d 689 (Fla. 1st DCA 1991), by asserting that there, the trial judge merely "fail[ed] to order restitution," whereas in the case at bar, the court "refused to order restitution. . .". SB15. The

State misreads Martin, where the trial court expressly struck its prior restitution, which is a far cry from simply "failing" to order restitution as if that is a distinction at all. Nevertheless, the First District held:

> The order of the trial court which struck the restitution requirement is not an order which may be appealed by the state pursuant to section 924.07, Florida Statutes (1990) or Rule 9.140, Florida Rules of Appellate Procedure. 577 So.2d at 690.

It is submitted that these cases point to the inevitable conclusion that the detailed order in the case at bar is not an illegal sentence which is subject to a State appeal.

Next, the State attacks the First District's reliance in the case at bar upon Johnson v. State, 543 So.2d 1289 (Fla. 4th DCA 1989). There, the Fourth District noted the distinction between Rule 3.800(a) motions seeking the correction of "illegal" sentences, as opposed to Rule 3.800(b) motions which involve discretionary judgments guided by the trial judge's lenity. The court simply construed the motion there under review as one filed under Rule 3.800(a), which is appealable. 543 So.2d at 1291. The First District's analogy to Johnson in the case at bar, see 583 So.2d at 703 (A.17), was clearly not controlling. The First District correctly held that so long as the trial court gives reasons for its denial of restitution, it has exercised its discretion and that exercise does not render the resulting sentence "illegal" nor is that exercise of discretion appealable: "Where, as here, the trial court gives reasons, we find no authority for this court to review them by appeal." Id. This is entirely

consistent with the statute's broad grant of discretion and the distinction in the law between the exercise of such discretion on the one hand and an illegal order on the order. See Discussion, infra.[20]

Perhaps the linchpin of the State's argument is that the ever narrowing discretion of trial courts in deciding restitution issues is "comparable to the reduction of discretion in ordering restitution at all." SB at 20. The State traces the legislative history of section 775.089 which, over the years, added factors for the trial court to consider "in determining the amount and method of restitution." SB at 19. Rather than restrict the trial judge's discretion, these legislative enactments have served to broaden that discretion. By ever increasing the factors to be considered, the statute more plausibly may be read to widen, not lessen, the trial judge's discretion. This Court, reviewing the 1985 version of the statute in Spivey v. State, 531 So.2d 965, 967 (Fla. 1988), quoted §775.089(6), Florida Statutes (1985), including that portion of the statute which provides that the trial judge should consider the amount of loss sustained by any victim, the financial resources of the defendant, the financial needs and earning capacity of the defendant and his dependents, "and such other factors which it deems appropriate." [This Court's emphasis]. This Court viewed

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[20]At SB17, the State asserts: "In fact, the district court in its order dismissing the state's appeal stated that restitution was required under the circumstances." The State then cites to 583 So.2d at 702 of the First District's decision. The State badly misreads the court's decision. At the cited page, the court is merely reciting the State's arguments, arguments which the court subsequently rejects.

this particular subsection of the restitution statute as "reinforce[ing] the discretion of the trial court in ordering restitution." Id.

In any event, since the statute clearly contemplates a complete denial of restitution, §775.089(1)(a), or only a partial award, §775.089(1)(b), and expressly provides factors for the court to consider in determining whether to order restitution at all, §775.089(6), including "such other factors," id., and "such other matters as the court deems appropriate," §775.089(7), the entire restitution question is well within the trial judge's discretion and, absent express statutory authorization, there is simply no right to a state appeal from the exercise of that purely discretionary function. State v. Creighton, 469 So.2d 735, 737 (Fla. 1985); Whidden v. State, 159 Fla. 691, 32 So.2d 577, 578 (Fla. 1947).

This brings us to a discussion of the distinction between an abuse of discretion on the one hand and an illegal order on the other. This Court has spoken at length on this crucial distinction. In Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980), this Court defined an abuse of discretion as a "'judicial action [which] is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.'" Canakaris, supra at 1203, quoting Delno v. Market Street Railway Company, 124 F.2d 965, 967 (9th Cir.

1942). This Court further observed that "[i]f reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion." 382 So.2d at 1203.

This Court went on to distinguish between an abuse of discretion and an illegal action: "Where a trial judge fails to apply the correct legal rule. . .the action is erroneous as a matter of law." 382 So.2d at 1202 [original emphasis]. This Court held that "appellate courts must recognize the distinction between an incorrect application of an existing rule of law and an abuse of discretion." Id. Where a trial judge enters an illegal order, he has not merely "abused his discretion." This Court held that "where the action of the trial judge is within his judicial discretion. . .the matter of appellate review is altogether different," from the situation where the action of the trial judge is erroneous "as a matter of law." Id. Illegal connotes right or wrong; what is "reasonable" (where reasonable people could differ as to the propriety of the action taken), is not "illegal."[21]

The Canakaris distinction finds continued support by this Court. Thus, in Walter v. Walter, 464 So.2d 538, 539 (Fla. 1985), the Court stated: "The correction of an erroneous application of law and the determination that the trial court abused its

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[21]The First District in the case at bar notes that the defendant here "points out that in the initial brief the State has characterized the order on appeal as an abuse of discretion, which contradicts any theory that this is an illegal sentence." 583 So.2d at 702. A.16. Of course, the First District was not necessarily agreeing with the defendant's observation. However, the "abuse of discretion" versus "illegal act" dichotomy finds credence in Canakaris, supra.

discretion are two separate and distinct appellate functions." Again, that distinction is crucial, and fatal to the State, in the case at bar.

The State's position, if correct, would require the issuance of a writ of mandamus to compel a trial judge to grant restitution in every case in which the trial judge refused to do so, even where, as here, the judge complied with §775.089(1)(b)'s requirement of stating reasons for the denial. Yet surely, where the judge does state reasons for denying further restitution, the State would not be entitled to a writ of mandamus, any more than a party could seek mandamus to "compel" the exercise of discretion to its own liking. Once the trial judge exercises its discretion (by setting forth its reasons in detail for the denial of further restitution), the judge has fully complied with the statute as written and has rendered a "legal" sentence, even if one with which the State disagrees. No mandamus will lie for the exercise of a court's discretionary function, only for the failure or refusal to exercise a discretion bestowed upon the court. Moore v. Florida Parole and Probation Commission, 289 So.2d 719, 720 (Fla. 1974)(mandamus "would not command the respondent's discretion, but rather would compel the respondent to exercise its discretion. . .". (e.s.)); Glosson v. Solomon, 490 So.2d 94, 95 (Fla. 3d DCA 1986)("Where a court is given discretion to act on a matter, the refusal to exercise such discretion is error. . .which may be remedied by mandamus.").

Florida's restitution statute clearly, and repeatedly, grants trial judges a broad discretion, not the niggardly

discretion the State reads into the statute. Since the trial judge here fully complied with all of the statute's requirements, his act did not result in an "illegal" sentence and there is simply no statutory authority for the State to seek appellate review of the purely discretionary function lawfully exercised by the judge. That "the State does not view the trial court's reasons as clear or compelling," State v. MacLeod, supra at 702, (A.16), i.e., an abuse of discretion however broadly or restrictively conferred upon the court by the statute, does not render the sentence legally erroneous as a matter of law. Surely, it cannot be said that no "reasonable men [or women] could differ as to the propriety of the action taken by the trial court," Canakaris, supra at 1203. Thus, by definition, the reasons given by the judge in his carefully considered and detailed order (R.47-54; A.7-14) are not "unreasonable" and "there can be no finding of an abuse of [the] discretion" Canakaris at 1203, which the State admits the trial judge had. Therefore, the sentence is not "illegal" and the State has no right to appellate review.

The State also seeks refuge in the victim's constitutional right to be heard. See Article I, Section 16(b), Florida Constitution. Of course, as with all constitutional rights, such a right may be waived.[22] The State argues that the victim has a right to be heard at all crucial stages "of which an

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[22]At the restitution hearing, the trial judge posed the question as to whether "the right to restitution [can] be waived?" R.74. The prosecutor replied that such a right to restitution could be waived "by the State of Florida but not by the victim." Id.

appeal is one." SB at 23. Again, absent statutory authorization, there is no right to a State appeal of an order denying further restitution. By this argument, the State could appeal any trial court ruling, even mid-trial, that was adverse to any victim's interest. Yet, we know this not to be our law.

Next, the State argues that since "[t]he question of McLeod's [sic] liability for restitution in this case is thus one of law," SB at 25, the State has a right to appellate review of that question pursuant to section 924.37(2), Florida Statutes (1989). First, the question of the defendant's liability for restitution in this case is not in dispute. Second, the cited statute,[23] presupposes a lawful basis for the State's appeal. Were this statute to control, virtually every ruling "on a question of law adverse to the State" would be appealable. Yet, as State v. Creighton, supra, and the other decisions cited in this brief illustrate, this rationale is inapplicable. Were it otherwise, Creighton, and all of the cited decisions of this Court, would have been wrongly decided.

It is submitted that the above discussion clearly demonstrates that the trial judge's order denying further restitution did not result in an illegal sentence, and that there is, accordingly, no statutory basis for the State's appeal. Thus, the certified question must be answered in the negative. We will now proceed, however, to the merits of the propriety of the trial

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[23]Section 924.37(2), Fla.Stat. provides: "When the state appeals from a ruling on a question of law adverse to the state, the appellate court shall decide the question."

judge's order, assuming arguendo the jurisdiction of the First District, or of this Court to entertain those merits.[24]

POINT II

THE TRIAL COURT'S ORDER DENYING FURTHER RESTITUTION BASED UPON THE UNEQUIVOCAL SETTLEMENT AGREEMENT WHICH EXTINGUISHED ANY AND ALL POSSIBLE CLAIMS ARISING OUT OF THE DEFENDANT'S ACT WAS LEGALLY CORRECT, AND FULLY CONSISTENT WITH THE PUBLIC POLICY OF FLORIDA ENCOURAGING AND FAVORING THE SETTLEMENT OF CONTROVERSIES.

The State commences its discussion of the merits with the proposition that the trial judge "misunderstood the nature of restitution." SB at 28. The State asserts that restitution is "a criminal sanction and the state, not the victim, is the party seeking a monetary award as a criminal sanction." Id.[25] In support of this proposition, the State cites Kelly v. Robinson, 479 U.S. 36, 52, 107 S.Ct. 353, 362 (1986), a decision involving the issue of whether restitution ordered pursuant to Connecticut's restitution statute imposed an obligation which was subject to discharge in bankruptcy proceedings under Chapter 7. Connecticut's restitution statute, quite unlike Florida's, did "not require imposition of restitution in the amount of the harm caused." 479

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[24]Hopefully, much of what has been said points the way toward a resolution of the "merits" question.

[25]It is submitted that this is not an accurate characterization of Florida's statutory restitution scheme. Sec. 775.089(1)(a) and (c) make it clear that the restitution is for the benefit of the victim, which the statute defines as "the aggrieved party." Moreover, sec. 775.089(5) makes it clear that the State's role is to enforce any award of restitution ordered by the trial judge for the benefit of the victim. In addition, sec. 775.089(7) indicates that the State's only role in enforcing an award of restitution is on behalf of the victim.

U.S. at 53, 107 S.Ct. at 362.[26] As the Kelly Court observed, "[t]he victim has no control over the amount of restitution or over the decision to award restitution." Id.

Thus, the State's argument that the trial judge erroneously "based its entire order on the assumption that the benefit of restitution was for the victim," SB at 29, is itself erroneous since the entire focus of Florida's restitution statute is on the victim and the victim's loss. The State argues in the same appellate breath that the State is the "victim's lawful representative," SB at 29, 34, but is nonetheless entitled to seek restitution apart from the voluntary settlement agreement entered into by its "client," notwithstanding the civil settlement. Under Florida's restitution scheme, the State's argument is wrong.

It is no startling principle that a civil proceeding can, in the exercise of a trial court's sound judicial discretion, impact and restrict the otherwise criminal restitution sanction, notwithstanding the purely criminal purposes of restitution which involve "the penal goals of the State," i.e., rehabilitation and punishment. See Kelly v. Robinson, supra at 52, 107 S.Ct. at 362. In Pennsylvania Department of Public Welfare v. Davenport, ___U.S.___, 110 S.Ct. 2126 (1990), the Supreme Court held that a criminal restitution obligation constituted a "debt" which could be extinguished in civil bankruptcy proceedings. The Court equated

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[26]As is by now clear, the Florida restitution statute is designed primarily to benefit the victim and compensate him or her for the amount of damage or loss caused by the defendant's offense. Sec. 775.089(2)(a)-(d) sets forth the type of damages the trial judge must consider, all of which concern reimbursement of the loss to the victim or the victim's next of kin.

"debt" with a "liability on a claim" and a "claim," in turn, as "a right to payment." The victim (Department of Welfare) asserted that it did not "stan[d] in a traditional creditor-debtor relationship with the criminal offender," expressly arguing that, pursuant to Kelly v. Robinson, supra, "the special purposes of punishment and rehabilitation underlying the imposition of restitution obligations," remove the criminal defendant's obligation from the purview of traditional civil bankruptcy proceedings. 110 S.Ct. at 2131. The Supreme Court rejected the victim's reasoning:

> Contrary to petitioners' [victim's] argument, however, the [Kelly] Court's prior characterization of the purpose underlying restitution orders does not bear on our construction of the phrase "right to payment" in [the Bankruptcy Code].***The plain meaning of the "right to payment" is nothing more nor less than an enforceable obligation, regardless of the objectives the State seeks to serve in imposing the [restitution] obligation.
>
> Nor does the State's method of enforcing restitution obligations suggest that such obligations are not "claims."***[T]he obligation is enforceable by the substantial threat of revocation of probation and incarceration. That the Probation Department's enforcement mechanism is criminal rather than civil does not alter the restitution order's character as a "right of payment." 110 S.Ct. at 2131.

Thus, even though the State has independent penal and rehabilitative goals in seeking restitution, quite apart from compensation to the victim, restitution constitutes a claim against the defendant which is subject to complete discharge pursuant to civil bankruptcy proceedings. Similarly, here, a civil settlement

which well serves public policy concerns,[27] as does bankruptcy, can properly impact upon the trial court's discretionary resolution of the victim's "amount of loss" and resulting decision as to the amount of restitution, if any, it will impose upon the defendant, without doing violence to the State's "right" to prosecute, punish and rehabilitate.

The defendant does not dispute that restitution serves "the rehabilitative, deterrent, and retributive goals of the criminal justice system." Spivey v. State, 531 So.2d 965, 967 (Fla. 1988). The State's reliance on Spivey, and its quotation at SB29 from Spivey, however, misses the import of this Court's decision in that case. Ironically, the trial judge in his well reasoned order, also quotes from Spivey, A.11, but includes the following sentence, omitted in the State's quotation, which follows immediately after that quotation: "The trial court is best able to determine how imposing restitution may best serve those goals in each case." Id. The State chooses to ignore this Court's repeated emphasis in Spivey on the discretion vested by Florida's restitution statute in the trial court. The Spivey court noted that Florida's "statutory provisions requiring the imposition of restitution recognize the discretion of the trial court in determining the amount of restitution." 531 So.2d at 966. In support, this Court pointed to and emphasized that portion of section 775.089(6), providing for the various factors the judge should consider, including "such other factors which it deems

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[27]See Discussion, infra, concerning Florida's public policy of enforcing settlement agreements.

appropriate." Id. [This Court's emphasis]. The Court considered this provision as "reinforc[ing] the discretion of the trial court in ordering restitution." Id.

Moreover, the Spivey Court quoted with approval from Pollreisz v. State, 406 So.2d 1297, 1298 (Fla. 1st DCA 1981), which had held that "'the method of prorating any required restitution is a matter within the discretion of the trial judge.'" Spivey at 967. Finally, this Court held that "it is within the discretion of the trial court to require [a] defendant to pay the full amount of restitution, or to apportion restitution in any appropriate manner." Id. That is precisely what the trial judge here did after a careful weighing of the meaning and intent of the defendant and the victim in voluntarily entering into the settlement agreement in order to determine "the amount of the loss sustained by the victim. . .". Sec. 775.089(6), Florida Statutes (1989).

As part of the State's argument that since it was not a party to the settlement agreement, it cannot be bound thereby, the State repeatedly relies upon Gamble v. Wells, 450 So.2d 850 (Fla. 1984), for the rule that "[p]arties cannot enter into a contract to the bind the state in the exercise of its sovereign power." SB at 32. First, the settlement agreement in no manner bound the State in the exercise of its sovereign power, since the State was free, as it did, to seek restitution over and above the amount involved in the settlement agreement. Contrary to the State's argument, the trial judge's order denying further restitution in the case at bar interferes in no way with "the state's discretion by limiting decisions to seek restitution to the terms of settlement agreements

with insurance companies." SB at 33. The State is free to "charge and prosecute" in the exercise of its "executive responsiblity" regardless of the trial judge's decision as to the amount, if any of restitution. While the State has generally unfettered discretion in charging decisions, it is uniquely and purely a judicial decision to punish within statutory limitations.

Second, the State's reliance upon Gamble v. Wells, supra, is entirely misplaced. Gamble is completely distinguishable from the case at bar. There, this Court held that a claims relief bill is a matter of grace, that it is within the legislature's discretion to award or not award damages, and that if it decides to make such a discretionary award, it can set whatever conditions it chooses including a limitation on attorney's fees. In the case at bar, section 775.089, Florida Statutes, is a preexisting statute which, by its terms, grants broad discretion to the trial court to award all, no, or only partial restitution sought by the victim. The settlement between the victim and her guardian on the one hand, and the defendant and his insurer on the other, far from a limitation on the legislature's sovereign power to enact statutes, is encompassed within the obvious intent of the restitution statute, which requires the trial court to consider, inter alia, "the amount of the loss" and "such other factors which [the court] deems appropriate," section 775.089(6), and which expressly recognizes an interaction between any "civil recovery" and the award of restitution. Section 775.089(8).

Gamble is also distinguishable in that there, the victim's attorney went to the legislature "to obtain relief for

[the victim] by means of a private relief act," and in so doing, the attorney was hardly "in a position to demand that the legislature grant compensation" but "could only request that the legislature grant the compensation sought. The legislature then, as a matter of grace, could allow compensation, decide the amount of compensation, and determine the conditions, if any, to be placed on the appropriation." 450 So.2d at 853. No such facts exist in our case where the trial court was afforded discretion under the restitution statute to consider the settlement agreement and release in determining "the amount of the loss sustained by [the] victim. . .". Section 775.089(6), Florida Statutes (1989). Since the trial judge was free to apportion the amount of the settlement agreement to satisfy all, part, or none of the "amount of the loss" sustained by the victim, it simply cannot be validly asserted that the settlement agreement bound the legislature's power, nor the State's exercise of its sovereign power." SB at 32.

The State next engages in the fiction that the trial judge, by considering the release as having settled the "amount of loss" suffered by the victim, somehow "delegated" the restitution decision to the victim, defendant, and the insurance companies. SB at 33. The State relies upon decisions which hold that the trial judge may not delegate the amount of restitution to others, such as probation officers. We have no quarrel with the decisions cited by the State; however, they are inapposite here. The cited decisions all deal with a trial judge's delegation to a probation officer as to the amount of restitution, not the decision itself to order restitution, a decision undertaken here exclusively by the trial

judge. There was simply no "delegation" here. The trial judge, after carefully reviewing the settlement and its terms, made the decision that "the amount of the loss" was satisfied by the release.

The State next disagrees with the trial judge's finding that the terms of the settlement agreement determined the "actual amount of the victim's loss." SB at 34. The State asserts that the amount of that actual loss is approximately $500,000, and that even after setting off the $125,000 settlement amount, over $375,000 of the victim's "actual loss" remains. Id. The State asserts that it is "the victim's lawful representative [and] is attempting to make McLeod [sic] pay the amount of the victim's actual loss. . .". Id. Here is the State's real complaint: It wishes to step into the shoes of the victim and vitiate the victim's release and settlement.

To support its argument that the settlement agreement did not determine the "actual amount of the victim's loss," the State refers to the "plain language of the agreement. . .", SB at 35, but fails to point to any of the language therein which supports its argument. In point of fact, as the trial judge found, the terms of the release are unequivocal and contemplate that the release "completely extinguish[es] any claim or right" which the victim may thereafter make. A.3. Moreover, contrary to the State's argument that the agreement merely releases the defendant and his insurer "from any civil claims arising from the accident," the agreement contemplates a release "from any and all claims, demands, damages, causes of action or suits of any kind or nature directly or

indirectly arising out of any claim, demand, cause of action, or obligation of any nature whatsoever. . .". A.3.

Nevertheless, the State complains that the victim merely "settled for the limit of McLeod's [sic] policy. . ., not the victim's actual loss of $500,000." SB at 35. The State ignores the fact that the victim agreed to forebear a litigated recovery from the defendant beyond these policy limits in return for immediate lump sum payment; moreover, even if the defendant was unable to pay beyond the policies limits, pursuant to section 95.11(1), Florida Statutes (1989), the victim would have had twenty years within which to maintain an action on any judgment from such a litigated recovery. However, the victim voluntarily entered into the settlement for immediate payment. Finally, it is not the defendant who settled the civil claim "for the limit of his policy," but the victim as well.

As for the State's argument at SB36 that its claim for restitution arises from the "state's sovereign right to punish the crime," a right which has not been settled, the State again confuses its sovereign right to prosecute with the court's right to impose whatever punishment is deemed appropriate within statutory limits.

The State next directs its attention to the few criminal cases in Florida applying principles of civil law to restitution proceedings. SB at 37-8. The trial judge also considered these cases as supporting his decision. A.12. While it is true that such cases as Amison v. State, 504 So.2d 473 (Fla. 2d DCA 1987), and Jawardi v. State, 521 So.2d 261 (Fla. 2d DCA 1981), hold that

it is proper for a trial judge to order restitution even when a victim has recovered damages from an insurance company, these cases do not hold that the trial court must order restitution in such circumstances. And, again, while it is also true that none of the courts in these decisions "allowed the payment of damages in settlement by an insurance company to bar restitution," SB at 38, there was no showing in any of the cited decisions of a binding settlement agreement which reasonably could be said to conclusively determine the full amount of the victim's damages.

Next, the State relies upon the two foreign decisions dealing with this issue. The first such decision, Dupin v. State, 524 N.E.2d 329 (Ind. App. 4th Dist. 1988), is easily distinguishable. There, the "sole issue" was "whether the trial court abused its discretion by ordering Dupin to pay the victims of his crime [DUI resulting in injury] $31,680 without crediting against that sum a prior $100,000 settlement paid to the victims by his insurance to settle civil claims arising from the same transaction." 524 N.E.2d at 330. The settlement in Dupin expressly stipulated that "the releases given by the victims in return for the settlement by the surety was to 'have no application to any obligation to pay restitution. . .imposed upon the said Charles S. Dupin'" by the trial judge in the criminal case. Id. As the Dupin court said:

> Dupin's insurance company and the victims specifically contracted against the set-off for which Dupin so earnestly contends, as a condition of their settlement. Thus. . . the parties involved have specifically contracted against Dupin's relief by way of set-off against the restitution payment

ordered by the lower court. Id. at 331.

Dupin is thus totally distinguishable. First, that case obviously involved a statutory restitution scheme that did not provide for any set-off of a civil settlement against a criminal restitution order, contrary to Florida's express statutory mandate of such a set-off. Section 775.089(8), Florida Statutes (1989). Second, the express terms of the release in Dupin prohibited any application of the settlement money toward any criminal restitution order, contrary to any reasonable reading of the unequivocal release executed by the victim here. Finally, in Dupin, the "sole issue" was whether the trial court "abused its discretion" in not allowing the civil settlement to affect its restitution decision. Here, the trial court exercised the broad discretion afforded it under Florida's restitution statute to reach a different result under totally distinguishable circumstances, i.e., a clear and unequivocal release of any and all future claims, see A.3-4, arising out of the accident giving rise to the damages.

The second foreign decision, People v. Clifton, 219 Cal.Rptr. 904, 172 Cal.App.3d 1165 (1985), is also distinguishable, for there, the restitution statute did "not. . .authorize credit from a civil settlement to the amount payable pursuant to a restitution order in [the] criminal case." 219 Cal.Rptr at 905-6. Moreover, the Clifton settlement is totally unlike the all encompassing release involved in the case at bar. Since the respective restitution statutes in the two states are materially different, as are the settlement agreements here and in Clifton, and for the reasons expressly addressed by the trial judge, see

R.53; A.13, the defendant submits that Clifton is of minimal persuasive value, and that adherence to it would be contrary to Florida law and the strong policy reasons for upholding the settlement agreement reached here.

This leads us to the State's final argument that consideration of the settlement agreement as precluding further restitution is "bad precedent and worse polic[y]." SB at 41-2.[28] To the contrary, the public policy of this State augers in favor of encouraging settlements which a reversal here would thwart.

It has long been the law of this State that "[s]ettlement agreements are highly favored in the law and will be upheld whenever possible because they are means of amicably resolving doubts and preventing law suits. . ., and should not be invalidated or. . .collaterally defeated. . .unless there is (1) failure of the agreement to satisfy required elements for a contract, (2) illegality, (3) fraud, (4) duress, (5) undue influence or, (6) mistake. . .". Lotspeich Co. v. Neogard Corp., 416 So.2d 1163, 1164-5 (Fla. 3d DCA 1982). Where the terms of a settlement agreement are unequivocal, they will be enforced. Thus, in In re Lupola, 293 So.2d 354 (Fla. 1974), this Court held that an unequivocal settlement barred a subsequent claim for death benefits by a widow. The settlement there provided in pertinent part that "this constitutes all the payments to be made by the employer-carrier and that no further benefits of any nature under the

[28]It is significant that the State fails to cite any decisional authority for its proposition about bad precedent and worse policy.

Workman's Compensation Act will be claimed by the employee." 293 So.2d at 357. This agreement was entered into pursuant to a statute which contemplated a "wash-out" releasing an employer from responsiblity "for any further or future benefits of any nature under the Workman's Compensation Act, in return for the present lump sum payment to the employee." Id. Enforcing the agreement, this Court held that "a. . .'washout' settlement, freely entered into by both parties, releases the employer/carrier from responsibility for any further or future benefits of any nature. . .". Id. [This Court's emphasis].

In Bellefonte Insurance Company v. Queen, 431 So.2d 1039 (Fla. 4th DCA), rev. denied, 440 So.2d 353 (Fla. 1983), an agreement releasing a school board from "all claims and demands, actions and causes of action, damages, costs, losses of services, expenses, and compensation on account of or in any way growing out of [the accident]. . .", was signed by a victim's parents; despite this broad and all-encompassing language, the parents later claimed that they intended to release the school board from certain types of claims, but not others. The Fourth District held that even if that were true, the language of the agreement was clear and unambiguous and unequivocally released the school board from all claims. For other examples of Florida decisions effectuating the policy of this State to encourage and enforce settlement agreements, see Hardage Enterprises, Inc. v. Fidesys Corporation, N.V., 570 So.2d 436, 437 (Fla. 5th DCA 1990); Ryter v. Brennan, 291 So.2d 55, 57 n.4 (Fla. 1st DCA), cert. denied, 297 So.2d 836 (Fla. 1974).

Moreover, where Florida law contemplates that enforcement of settlements is not in the best interests of this State, express prohibitions are enacted by the legislature to effectuate that policy. See section 443.051(2), Florida Statutes, providing that benefits under the unemployment compensation laws "shall not be. . .released, or commuted. . .". No such express or implied prohibition of releases appears in Florida's restitution statute. "The law favors compromise and settlement since it is to the best interest of the state and the parties that there should be an end to litigation." Coe v. Diener, 159 So.2d 269, 272 (Fla. 2d DCA 1964). The State's argument here that consideration of the unequivocal release and settlement agreement entered into by the victim is "bad precedent and worst policy" flies in the face of settled decisional and statutory law set forth herein. The trial judge correctly determined that the release voluntarily entered into here settled the "amount of the victim's loss" and that no further award of restitution would be made.

CONCLUSION

Based upon the above and foregoing abundant and controlling authority and policy, the defendant respectfully submits that the First District correctly determined that it lacked jurisdiction to hear the State's appeal from the trial judge's order denying restitution, and that this Court should deny review. Alternatively, the defendant submits that the trial judge correctly determined the issue of restitution and this Court should affirm the trial court's well reasoned order.

Respectfully submitted,

LAW OFFICES OF MARK KING LEBAN, P.A.
2720 Southeast Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131-5302
(305) 374-5500
Fla. Bar No. 147920

BY: Mark King Leban
MARK KING LEBAN
Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail upon Charles T. Faircloth, Jr., Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32399-1050, and David MacLeod, 2994 Raymond Diehl Road, Tallahassee, Florida 32308, this 28th day of October, 1991.

Mark King Leban

IN THE SUPREME COURT OF FLORIDA

CASE NO. 78,553

FIRST DCA CASE NO. 90-2938

STATE OF FLORIDA,

Petitioner,

vs.

DAVID MICHAEL MacLEOD

Respondent.

APPENDEX TO RESPONDENT'S BRIEF ON THE MERITS

INDEX

CERTIFIED A TRUE COPY
HOLAS THOMAS, Clerk Circuit Court Gadsden County, Florida
DEPUTY CLERK

O.R. BOOK 365 PAGE 786

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR GADSDEN COUNTY, FLORIDA.

PROBATE DIVISION
CASE NO.: 89-295-GRA

IN RE: Guardianship of

JULIE ARNOLD LINDSEY,

Incompetent.

ORDER APPROVING SETTLEMENT

THIS CAUSE came on for consideration of the Guardian's Petition to Approve Settlement filed by the guardian of the person and property of Julie Arnold Lindsey. The Court has reviewed the petition and finding the proposed settlement to be reasonable and in the best interest of the ward, it is

ORDERED AND ADJUDGED:

1. That Martha G. Arnold, as guardian of the person and property of Julie Arnold Lindsey, incompetent, is authorized to settle the personal injury claim of her ward under the terms and conditions of settlement set forth in her petition.

2. Petitioner is authorized to pay $5,000 out of settlement proceeds to the law firm of Douglass, Cooper, Coppins & Powell as reasonable attorneys' fees incurred in the negotiation and execution of the settlement.

3. Petitioner is authorized to execute any documents or instruments that may be necessary to effect the settlement.

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4. Petitioner is authorized to deposit the net settlement proceeds into fully insured, interest bearing accounts or obligations secured by the full faith and credit of the United States, in the name of Martha G. Arnold, Guardian of the Person and Property of Julie Arnold Lindsey, incompetent.

5. The Court reserves jurisdiction to conduct such further proceedings under this guardianship as may be necessary.

DONE AND ORDERED in chambers, Quincy, Gadsden County, Florida, this 10th day of January, A.D., 1990.

WILLIAM L. GARY, Circuit Judge

Copies furnished to:

Michael F. Coppins, Esquire
Ms. Martha G. Arnold, Guardian

9000215

FILED, RECORDED AND
RECORD VERIFIED
NICHOLAS THOMAS, CLERK CIR. CRT
GADSDEN COUNTY, FLA.
BY Peggy Parrish D C

O.R. BOOK 365 PAGE 786-787
NICHOLAS THOMAS, CLERK
GADSDEN COUNTY, FLORIDA

'90 JAN 11 PM 12 15

RELEASE

FOR THE SOLE CONSIDERATION of One Hundred Thousand and no/100 Dollars ($100,000.00) paid by State Farm Mutual Automobile Insurance Company to Martha G. Arnold, Guardian of the Person and Property of Julie Arnold Lindsey, incompetent, the adequacy and receipt whereof is hereby acknowledged, the undersigned release and forever discharge David M. MacLeod and State Farm Mutual Automobile Insurance Company, its agents, assigns, successors, employees, officers, directors, and shareholders, none of whom admit liability but all expressly denying liability; from any and all claims, demands, damages, causes of action or suits of any kind or nature directly or indirectly arising out of any claim, demand, cause of action, or obligation of any nature whatsoever arising from or instant to an automobile accident on or about July 4, 1989 in Tallahassee, Leon County, Florida. It is the intention of the undersigned to settle and completely extinguish any claim or right whether known or unknown, both persons and property, arising out of the incident identified above, with exception of a claim for property damage under collision provisions of policy issued by State Farm in favor of David M. MacLeod.

The undersigned do agree that there is no outstanding right of subrogation or indemnification in any person or company who may have provided benefits or compensation to them, or to any person claiming through them, as a result of the accident described above which gave rise to the claim hereby settled. The undersigned agree to indemnify the parties released against any claim of

subrogation or indemnification arising out of any obligation, or demand for reimbursement made against the persons released hereby and in addition to repay any expenses incurred by the persons released hereby as a result of any such claim or demand.

The undersigned declare that the terms of this settlement have been completely read and are fully understood. This Release is given voluntarily for the purpose of making full and final compromise, adjustment, and settlement of any and all claims, disputed or otherwise, on account of the injuries or damages mentioned above and for the express purpose of precluding forever any further or additional claims arising out of the event described in this Release.

DATED this 16 day of January, 1990.

MARTHA G. ARNOLD, Guaridan of person and property of JULIE ARNOLD LINDSEY

Approved by:

MICHAEL F. COPPINS
Attorney For Plaintiff

RELEASE

WHEREAS, Julie A. Lindsey, the mother and natural guardian of Andrea Lindsey, a minor, sustained significant and disabling permanent injuries as a result of a motor vehicle accident which occurred on July 4, 1989; and

WHEREAS, Martha G. Arnold, the guardian of the person and property of Julie A. Lindsey, incompetent, has alleged that the injuries sustained by Julie A. Lindsey were caused by the negligence of one David M. MacLeod; and

WHEREAS, Martha G. Arnold has negotiated a settlement with State Farm Mutual Automobile Insurance Company, the insurer of David M. MacLeod, and with Aetna Casualty and Surety Company, the uninsured motorist insurer of Julie A. Lindsey; and

WHEREAS, the settlement negotiated by Martha G. Arnold with State Farm and Aetna represent the policy limits of all available insurance available to any person by virtue of the injuries sustained by Julie A. Lindsey; and

WHEREAS, the settlement negotiated by Martha G. Arnold with State Farm and Aetna has been approved by the Court having jurisdiction over the guardianship of Julie A. Lindsey by Order dated January 10, 1990; and

WHEREAS, the anticipated future medical expenses and other out-of-pocket expenses to be incurred on behalf of Julie A. Lindsey substantially exceed the net recoveries made in the settlement of the claims against David M. MacLeod; and

WHEREAS, section 768.0415, Florida Statutes, provides that a dependent child whose parent sustains a significant permanent injury resulting in permanent total disability may have a derivative claim for loss of the parent's consortium; and

WHEREAS, W. Scott Lindsey is the father and natural guardian of Andrea Lindsey, a minor, and is the former husband of Julie A. Lindsey; and

WHEREAS, W. Scott Lindsey agrees that it is in the best interest of Julie A. Lindsey and Andrea Lindsey, a minor, that the settlement negotiated with State Farm and Aetna be ratified and approved.

NOW, THEREFORE, in consideration of the above, W. Scott Lindsey, father and natural guardian of Andrea Lindsey, a minor, agrees as follows:

1. For and in consideration of ONE HUNDRED THOUSAND AND NO/100 DOLLARS ($100,000.00) paid by State Farm Mutual Automobile Insurance Company and TWENTY-FIVE THOUSAND AND NO/100 DOLLARS ($25,000.00) paid by Aetna Life and Casualty Insurance Company to Martha G. Arnold, as guardian of the person and property of Julie A. Lindsey, incompetent, the undersigned releases and forever discharges David M. MacLeod, State Farm Mutual Automobile Insurance Company, Aetna Life and Casualty Company, their agents, assigns, successors, employees, officers, directors, and shareholders from any and all claims, demands, damages, causes of actions, or suits based in whole or in part on a claim for damages under section 768.0415, Florida Statutes, in connection with bodily injury sustained by Julie A. Lindsey in an automobile accident on or about July 4, 1989, in Tallahassee, Leon County, Florida.

DATED this 13th day of February, 1990.

W. Scott Lindsey

Andrea Lindsey by W. Scott Lindsey, Father and Natural Guardian of Andrea Lindsey, a minor

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IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT IN
AND FOR LEON COUNTY, FLORIDA

CASE NO. 90-415

8-2-90

44813

STATE OF FLORIDA,

v.

DAVID MACLEOD,

Defendant.

_____/

ORDER DENYING STATE'S MOTION FOR RESTITUTION

This matter is before the Court on the State's motion for an order requiring the defendant to make restitution to the victim. In opposing the motion, the defendant contends that the inchoate right to restitution in this case has been foreclosed by a release and settlement agreement signed by the parties, and approved by a circuit judge in a related civil case. For the following reasons, the Court finds that the defendant's legal position is correct, and that the State's motion for restitution must be denied.

The defendant entered a plea of nolo contendere to driving under the influence (causing serious bodily injury), a third degree felony offense, and he appeared before the Court for sentencing on June 21, 1990. At that time, the Court withheld formal adjudication of guilt and placed the defendant on probation for five years with various conditions including a requirement that he serve 120 days in the Leon County Jail. The Court expressly reserved jurisdiction to resolve the issue of restitution.

The offense occurred on July 4, 1989 while the defendant was driving an MG automobile owned and occupied by the victim, Julie Arnold Lindsey. A collision caused by the defendant's alcohol impairment left Ms. Lindsey so severely injured that she was incapable of handling her own affairs. Her mother, Mrs. Martha G. Arnold, was appointed as a guardian in a related civil proceeding. See In Re Guardianship of Julie Arnold Lindsey. (Second Judicial Circuit Case No. 89-295).

Ultimately, Mrs. Arnold settled all of Ms. Lindsey's civil claims against the defendant and his insurance carrier for a total of $125,000.00. While the amount of the settlement is apparently the limit of the applicable insurance policy, it is considerably less than the actual damages Ms. Lindsey incurred as a result of the collision. Upon payment of the proceeds by the defendant's insurance company, Mrs. Arnold signed a release and settlement agreement, which were approved by a circuit judge in the guardianship proceeding. These papers were made a part of the record in the restitution hearing before this Court.

The defendant contends that the release is not limited to a settlement of his potential civil liability and that the language of the release is broad enough to foreclose recovery under the restitution statute. A reading of the release bears this out. It appears from the plain wording of the release that the victim intended to release the defendant from all future claims. By its

terms, the release applies to:

> "any and all claims, demands, damages, causes of action or suits of any kind or nature directly or indirectly arising out of any claim, demand cause of action, obligation of any nature whatsoever arising from or instant to an automobile accident on or about July 4, 1989 in Tallahassee Leon County, Florida. It is the intention of the undersigned to settle and completely extinguish any claim or right whatever known or unknown, to both persons and property, arising out of the incident identified above with exception of a claim for property damage under collision provisions of policy issued by State Farm in favor of David M. MacLeod. (emphasis supplied)
>
> * * *
>
> The undersigned declares that the terms of this settlement have been completely read and are fully understood. This release is given voluntarily for the purpose of making full and final compromise, adjudgment and settlement of any and all claims, disputed or otherwise, on account of the injuries or damages mentioned above and for the express purpose of precluding forever any further or additional claims arising out of the event described in this release." (emphasis supplied)

Defendants Exhibit - A, Pages 1-2

By the express terms of the release, the defendant has fully satisfied his financial obligation to the victim. The victim's guardian was not forced to settle the claim for less than the full amount of actual damages incurred. Perhaps she intended to leave the door open to an award of damages under the restitution statute while settling only the matter civil damages under common law concepts of negligence, but that is not clear from the wording of the release. If the parties wished to make an exception for a civil recovery in a restitution hearing, they should have made that intention clear in the release. Otherwise, the plain wording of the release compels a conclusion that the victim intended to accept

the $125,000.00 in full settlement of all of her claims against the defendant.

The State argues that entitlement to restitution under §775.089 Fla.Stat. (1989) is not foreclosed or even limited by the execution of the release and settlement agreement. The contentions raised in support of this argument are: (1) that the State was not a party to the release and settlement and; (2) that the purpose of the restitution statute is not limited to a recovery of funds due to a victim. These arguments are unavailing for the reasons given below.

It is true that the State was not a party to the civil settlement, but that does not nullify the effect of the release between the parties. The State has a right to pursue a claim of restitution on behalf of the victim primarily because the State was a party to the underlying criminal prosecution of the defendant. Although restitution hearings are held in the context of a criminal case, the real party and interest in such proceedings is the victim, not the State.

Considered from a somewhat different perspective, the State of Florida cannot assert a right in a restitution hearing that is greater than the right of the victim for whom restitution is sought. For example, if the defendant had paid the victim in full in a civil case, this Court could not order that restitution be made once again in a criminal case simply because the State is a new party. The State cannot have a greater interest than the interest of the victim. Therefore, although the State was not a

party in the civil case, the State is now limited by the actions taken by the victim in that proceeding.

The State also contends that the release signed by the victim did not preclude recovery in this proceeding because the purpose of the restitution statute is not limited to providing compensation for victims. In support of this argument, the State relies on the following passage from the opinion of the Supreme Court in Spivey v. State, 531 So.2d 965, 967 (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 system. The trial court is best able to determine how imposing restitution may best serve those goals in each case.

A reading of §775.089 Fla.Stat. (1989) compels a conclusion that the primary objection of restitution is to compensate aggrieved victims. While there may be some ancillary objectives, as the Court observed in Spivey, there is no legal basis for the pursuit of one of those objectives if the primary objective of providing recovery in damages has been fully satisfied. A criminal defendant who has paid restitution in full cannot be made to pay it again simply because that would have a "rehabilitative, deterrent, or retributive" effect.

Numerous Florida cases hold that a criminal defendant cannot be made to paid restitution in excess of the actual damages suffered by the victim. See e.g. Abbott v. State, 543 So.2d 411 (Fla. 1st DCA 1989); Wilson v. State, 452 So.2d 84 (Fla. 1st DCA 1984). If the defendant's liability for restitution is limited to

the actual amount of the damages, then additional amounts cannot be imposed to achieve some other objective of the restitution statute. In this case, the actual amount of the loss was conclusively determined by the settlement agreement between the parties. Having settled the claim in full, the defendant is in precisely the same position as if he had paid the claim in full.

The Florida courts have applied principles of civil law to restitution proceedings even though such proceedings are technically a part of the criminal code. In resolving restitution issues under the criminal laws, the appellate courts have applied the civil concept of subrogation, Amison v. State, 504 So.2d 473 (Fla. 2d DCA 1987); Jawardi v. State, 521 So.2d 261 (Fla. 2d DCA 1981) as well as the collateral source rule M.E.I. v. State, 525 So.2d 467 (Fla. 1st DCA 1988). If these principles of civil law apply in a restitution hearing, then certainly the more fundamental civil concepts of settlement and release must also be applied in such proceedings.

Finally, the state has relied on two cases from foreign jurisdictions in support of its argument. Counsel for the State is to be commended for the research,[1] but the Court is not persuaded by either of the cases. The case of Dupin v. State, 524 N.E.2d 329 (Ind.App. 4th Dist. 1988) is distinguishable on the ground that the release specifically exempted and "had no

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[1] The two cases cited by counsel for the State appear to be the only cases in the United States dealing directly with the issue. Independent research by the Court did not reveal any additional cases.

application to any obligation to pay restitution..." Dupin, 524 N.E.2d at 330. As previously explained, the release in this case contains no exception for an award of damages in a restitution hearing.

The decision of the Court in People v. Clifton, 219 Cal.Rptr. 904, 172 Cal.App. 3d 1165 (Ct.App. Cal. 1985), is equally unavailing. Unlike the Florida restitution statute, §1203.04 of the California Penal Code allows recovery beyond the actual loss suffered by the victim of a criminal act. It is even possible under the California scheme for a judge to order a criminal defendant to pay up to $10,000.00 to a restitution fund "if the crime did not involve a victim." §1203.04(2). Under California law, restitution can include a financial obligation that could actually be described as a fine.

In spite of this distinction, the decision of the California Court of Appeals in People v. Clifton, does support the argument made by the State in this case. However, this Court declines to adopt the decision in Clifton to the extent that it would invalidate the settlement between the victim and the defendant.

Criminal defendants have many constitutional and statutory rights under our system of justice, but many of these rights can be waived. Victims are now afforded greater rights and remedies under the criminal law, but these rights are also subject to waiver. While the victim in this case may have had a potential right to seek restitution under §775.089 Fla.Stat. (1989), that right has now been foreclosed by the release and settlement

agreement in the guardianship proceedings.

For each of these reasons, the Court had determined that there is no basis for a further award of restitution. Accordingly, the State's motion for restitution is denied.

DONE AND ORDERED in Chambers at Tallahassee, Leon County, Florida this 31 day of July, 1990.

PHILIP J. PADOVANO
Circuit Judge

Copies furnished to:

Francine Small
Assistant State Attorney

Baya Harrison
Attorney for the Defendant

Does the jury follow what I have tried to explain? And does this answer the question that you have?

JUROR: It does in one sense of the way, but I can't go further beyond that.

THE COURT: What I'm trying to explain, there should not be two findings of guilty of possession of cocaine.

JUROR: In other words, they are the same?

THE COURT: That under the facts of this case, would be the same identical offense.

The jury retired once again and found Willis guilty on both counts.

Willis filed a motion for a new trial on the grounds that the evidence was entirely circumstantial and that the jury was confused and misled by the ambiguous verdict form. The motion argued in the alternative that the evidence only sustains a conviction for the lesser included offense of possession. At the sentencing hearing, which also became a hearing on the motion for a new trial, the trial judge agreed that the jury should not have been given the option of finding Willis guilty of both charges; but he felt the evidence supported the charge of possession with intent to deliver, for which Willis was adjudged guilty and sentenced. We reverse.

The jurors were confused. They were not told and did not understand that Willis could not be convicted on both counts.

[1] "[T]he court should not give instructions which are confusing, contradictory, or misleading." *Butler v. State*, 493 So.2d 451, 452 (Fla.1986). The test as to whether a misleading or confusing jury instruction constitutes reversible error is whether there exists a reasonable probability that it contributed to the conviction. *Id.* at 453; *accord Veliz v. American Hospital, Inc.*, 414 So.2d 226 (Fla. 3d DCA 1982) (jury instruction which tends to confuse rather than enlighten the jury is cause for reversal if it may have misled the jury and caused it to reach a conclusion that it otherwise would not have reached).

[2] When the jury came out and said they reached a verdict as to the simple possession count, it is clear the verdict was guilty. They did not know, however, whether—having found Willis guilty of simple possession—they should also find him guilty of what was described in the other count as the lesser included offense of simple possession. The judge told them they could not; and it is unknown whether they found Willis guilty of possession with intent to deliver because they thought he had the intent or because they thought finding him not guilty on the second count would be contrary to the guilty finding on count one because count one was also the lesser included offense of count two.

There is no reasonable probability, however, that the confusing jury instructions contributed to the guilty verdict on the simple possession charge. Therefore, instead of remanding for a new trial, we remand for resentencing for possession of cocaine only.

BARFIELD, J., and CAWTHON, Senior Judge, concur.

STATE of Florida, Appellant,

v.

David Michael MacLEOD, Appellee.

No. 90–2938.

District Court of Appeal of Florida, First District.

June 21, 1991.

On Motion for Rehearing and Certification Aug. 21, 1991.

Defendant pled nolo contendere to DUI causing serious bodily injury. State's motion for restitution was denied by the Circuit Court, Leon County, Philip Padovano, J. State appealed. The District Court of Appeal, held that: (1) failure to order restitution did not result in illegal sentence; (2)

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review by writ of certiorari was not available to State; and (3) trial court's stated reasons for denial of restitution motion could not be reviewed by appeal.

Dismissed, and question certified.

1. Criminal Law ⇐1208.4(2)

Restitution is mandatory part of sentencing and must be imposed absent clear and compelling reasons for refusing to do so. West's F.S.A. § 775.089(1)(b).

2. Criminal Law ⇐1024(9)

State may not obtain review of order denying restitution where reasons given by trial court for its ruling do not result in illegal sentence, even if trial court's reasons were insufficient. West's F.S.A. § 775.089; West's F.S.A. RCrP Rules 3.800, 3.800(b).

3. Criminal Law ⇐1024(9)

Even if trial court's stated reason for denying restitution, that release given by victim's guardian in civil proceedings barred restitution, were insufficient, denial did not result in illegal sentence; thus, District Court of Appeal lacked jurisdiction to review restitution order by appeal. West's F.S.A. §§ 775.089, 775.089(1)(b); West's F.S.A. RCrP Rules 3.800, 3.800(b).

4. Criminal Law ⇐1011

State could not obtain review of order denying restitution by writ of certiorari, even if stated reason that release by guardian of victim in civil proceeding barred restitution was insufficient.

Robert A. Butterworth, Atty. Gen., and Charles T. Faircloth, Jr., Asst. Atty. Gen., for appellant.

Mark King Leban, Miami, for appellee.

ORDER ON APPELLEE'S MOTION TO DISMISS

PER CURIAM.

MacLeod pleaded nolo contendere to DUI causing serious bodily injury, a third degree felony. On June 21, 1990, he was sentenced to 120 days in the county jail to be followed by five years of probation. The trial court expressly reserved jurisdiction on the question of restitution. On July 31, 1990, an order was entered which denied the State's motion for restitution. This order found that a release executed by the victim's guardian in a civil proceeding acted as a bar to restitution. The provisions of the release and the legislative intent of Florida's restitution statute, § 775.089, Fla.Stat. (1989), were analyzed and discussed by the trial court. The State filed a timely notice of appeal and has served an initial brief that argues the trial court incorrectly denied the motion for restitution.

The appellee now moves to dismiss this appeal for lack of jurisdiction. It is argued that Florida Rule of Appellate Procedure 9.140(c)(1)(I) is the only possible authority for this appeal and it authorizes review of an illegal sentence. MacLeod contends that an order which denies restitution is not part of an illegal sentence. Appellee relies on this court's opinion in *State v. Martin*, 577 So.2d 689 (Fla. 1st DCA 1991). Appellee contends that the trial court here did not impose an illegal sentence. Rather, the trial court entered an order which complies with section 775.089(1)(b), Florida Statutes (1989), by setting forth the reasons for denying restitution. Appellee points out that in the initial brief the State has characterized the order on appeal as an abuse of discretion, which contradicts any theory that this is an illegal sentence.

[1] The State opposes the motion to dismiss. Appellant takes the position that the failure of the trial court to order restitution resulted in an illegal sentence appealable under Rule 9.140(c)(1)(I). Restitution is a mandatory part of sentencing and must be imposed absent clear and compelling reasons for refusing to do so. *Grice v. State*, 528 So.2d 1347 (Fla. 1st DCA 1988). As the State does not view the trial court's reasons as clear or compelling, it argues that MacLeod's sentence is illegal. Restitution is required under these circumstances under both sections 775.089(1)(a) and 775.089(2). Appellant distinguishes the *Martin* case, arguing that it is not controlling in

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hese proceedings. The State asks, in the lternative, that if the order is found to be ot appealable, that this court treat this roceeding as a petition for a writ of certiorari.

[2] This appears to be a question of irst impression and our research has revealed no prior instances of a State appeal f a restitution order. We agree with appellant that the *Martin* case is distinguishble but it does not necessarily follow that is order is appealable. In *Martin* the ial court first entered a restitution order utside the 60 day time limitation provided or by Florida Rule of Criminal Procedure .800(b). When the defendant successfully oved to strike the restitution order on is jurisdictional basis, the State took an ppeal. This court found that it did not ave jurisdiction. In the instant case, the ial court acted within the 60 day window rovided for by Rule 3.800. This court is herefore presented with the question for ie first time of whether the State may eek review of the trial court's order on estitution where no jurisdictional defect as present in the lower tribunal.

[3] We find that the trial court's order oes not result in an "illegal sentence" ven if this court were to agree with the ate that the trial court's reasons for deying restitution were insufficient. This roceeding is not unlike a defendant's atmpt to appeal an order denying a Rule 800(b) motion for mitigation of sentence. uch orders have been held not appealable ecause the granting of relief is discretiony with the trial court. *Johnson v. State*, 43 So.2d 1289 (Fla. 4th DCA 1989).

[4] We do not reach the question of hether the State could obtain review of an der denying restitution where no reasons e given by the trial court for its ruling. here, as here, the trial court gives reasons, we find no authority for this court to view them by appeal. We also find that view by writ of certiorari is not available the State. *Jones v. State*, 477 So.2d 566 la.1985). We therefore grant appellee's motion and the appeal is dismissed for lack of jurisdiction.

DISMISSED.

SHIVERS, C.J., and JOANOS and ZEHMER, JJ., concur.

ON MOTIONS FOR REHEARING AND CERTIFICATION

PER CURIAM.

Appellant's motion for rehearing is denied. We grant the motion for certification and find that the following question is 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?

JOANOS, C.J., SHIVERS and ZEHMER, JJ., concur.

Jeff T. TREVISOL, Appellant,

v.

FORD MOTOR CREDIT COMPANY, Appellee.

STATE FARM MUTUAL AUTO INSURANCE CO., Appellant,

v.

FORD MOTOR CREDIT COMPANY, Appellee.

Nos. 89-1691, 89-1692.

District Court of Appeal of Florida, Fourth District.

June 26, 1991.

Rehearing Denied Sept. 5, 1991.

Suit was brought by plaintiff injured in automobile accident against long-term les-

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