

**ORIGINAL**

**FILED**

SID J. WHITE

**SEP 25 1998**

IN THE SUPREME COURT OF FLORIDA

VICTOR BAKER,

Petitioner,

v.

Case No. 93,486

STATE OF FLORIDA,

Respondent.

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CLERK, SUPREME COURT  
By *[Signature]*  
Chief Deputy Clerk

DISCRETIONARY REVIEW OF DECISION OF THE  
DISTRICT COURT OF APPEAL OF FLORIDA  
SECOND DISTRICT

BRIEF OF RESPONDENT ON MERITS

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STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement of the case and facts with the following additions or corrections:

Petitioner struck the victim in the head, causing a laceration that required eight to nine stitches. (R57) The fight continued and the victim was shoved into the bathroom at which time a sink was ripped from a wall and embedded in the victim's leg, requiring numerous stitches. (R39, R45, R57) After the victim fell with the sink, Petitioner and his brother continued to hit or kick the victim. (R45, R57) At the time of sentencing, the victim was still receiving physical therapy for the injuries sustained to his leg. (R37) Petitioner and his brother were beating on the victim, but it was Petitioner who hit the victim in the head with what was believed to be a bottle, creating a fairly deep laceration to the victim's head. (R38) Petitioner admitted to the officer following the fight, that he, Petitioner, had enjoyed every punch he took. (R42)

SUMMARY OF THE ARGUMENT

When the need for restitution outweighs the need for a prison sentence, the trial must have determined that the victim has a need, and the defendant has the ability to pay. Because it is the victim's need for restitution which is being defined, the victim's input is critical to this process. Furthermore, if the defendant has no ability to pay such a departure sentence is meaningless.

In the instant case, the Second District Court of Appeal correctly determined, based on the record, that there was no support for the departure sentence enunciated by the trial court. That decision must be affirmed.

## ARGUMENT

### ISSUE I

**WHAT FACTORS MUST BE PROVEN BY A PREPONDERANCE OF THE EVIDENCE TO ESTABLISH THAT THE NEED FOR PAYMENT OF RESTITUTION OUTWEIGHS THE NEED FOR A PRISON SENTENCE TO JUSTIFY A DOWNWARD DEPARTURE SENTENCE.**

Although Petitioner recites the question certified by the Second District Court of Appeal, Petitioner fails to address that issue in his brief. The Second District opined that in order for the trial court to depart downward on the basis that the need for payment of restitution outweighed the need for a prison sentence, the trial court must consider the following: evidence establishing the amount of restitution or that the victim requested restitution; and evidence establishing the defendant's ability to pay restitution. State v. Baker, 713 So. 1027 (Fla. 2d DCA 1998). The court went on to state that the purpose of imposing a downward departure sentence to pay restitution "necessarily presupposes that restitution can be paid. If the defendant does not have the ability to pay restitution, the purpose of such a departure sentence is defeated." Id., at 1028.

This Court has previously acknowledged that the purpose of restitution is not only to compensate the victim, but to serve the rehabilitative, deterrent, and retributive goals of the criminal justice system. State v. Hawthorne, 573 So. 2d 330 (Fla. 1991). As

such, contrary to the arguments espoused by Petitioner, it cannot be assumed that in every situation the victim would prefer to receive a dollar amount rather than see the defendant serve time. Indeed, there may in fact be situations in which the victim, although injured, does not need reimbursement for any out-of-pocket expenses from the defendant. Moreover, the Second District Court of Appeal, in suggesting that the victim input is merely a factor in determining whether the need for restitution outweighs the need for a prison sentence is simply an acknowledgment that any need for restitution must necessarily lead to the inquiry of who's need the court is looking at. If the purported individual in need indicates that he is not, then there is no need at all, by any standard, much less by a preponderance of the evidence. On the other hand, if there is a need for restitution the amount of pecuniary damages should be established.

Furthermore, if a defendant's departure sentenced is predicated on the need for payment of restitution his ability to pay must be immediate, as the time for payment is immediate. In ascertaining a defendant's ability to pay restitution the trial court should consider the physical and mental health of the defendant; the defendant's age; education; employment circumstances, including, current employment status, vocational training, and potential for employment, i.e., whether defendant is likely to obtain employment within a six month period from the date

of the sentencing hearing; the defendant's family circumstances; and the defendant's financial condition.

Once the foregoing information is compiled the trial court would be able to prepare a restitution plan which has been proven by a preponderance of the evidence thereby sustaining a determination that restitution indeed outweighs the need for a prison sentence justifying a downward departure sentence. Without this information however, the need for restitution, which runs to the victim, not the defendant, would not have been proven and a departure sentence could not be sustained.



## ISSUE II

### **THE APPELLATE COURT CORRECTLY DETERMINED THAT THE TRIAL COURT ABUSED ITS DISCRETION BY IMPOSING A DEPARTURE SENTENCE.**

Contrary to Petitioner's arguments, the Second District Court of Appeal analyzed each of the departure reasons enunciated by the trial court and found that none were sufficient to support a downward departure sentence. State v. Baker, supra. Although Petitioner urges this court to accept that at least one factor would warrant a departure sentence, the record supports the conclusion reached by the District Court and should be affirmed.

The first reason cited by the trial court was that Petitioner lacked a criminal record which the District Court properly found was an invalid reason for departure. The trial court also found that Petitioner was a relatively minor participant and that the victim was an initiator, willing participant or provoker of the incident. However, as the District Court indicated, there was no credible evidence to support either finding. Indeed, contrary to the argument of Petitioner, the District Court did not re-weigh and re-evaluate evidence before the trial court, because they found there was no evidence presented to support the finding. A court cannot re-weigh evidence which was never presented to begin with. The District Court also properly determined that the remaining factors, the need for payment of restitution outweighed the need for a prison sentence, the offense was committed in an

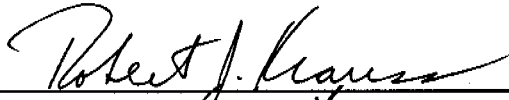
unsophisticated manner, and the offense was an isolated incident for which Petitioner had shown remorse, were not supported by a preponderance of the evidence. Since Petitioner provides nothing other than what was presented to the trial court, the conclusions reached by the District Court must be affirmed.

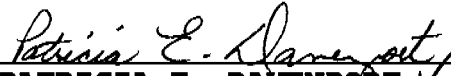
**CONCLUSION**

In light of the arguments made and authorities cited, Respondent asks this Honorable Court to affirm the decision of the Second District Court of Appeal, and adopt as minimum factors for a departure sentence to pay restitution victim input and the defendant's ability to pay.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I **HEREBY CERTIFY** that a true and correct copy of the foregoing brief of respondent on merits has been furnished by U.S. mail to Allyn Giambalvo, Assistant Public Defender, 14250 49th Street North, Clearwater, Florida 33762, on this 23rd day of September, 1998.

*Patricia E. Davenport*  
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