

IN THE SUPREME COURT OF THE STATE OF FLORIDA

TIMOTHY T. KOILE,  
Petitioner,

v.

Case No. SC05-132

STATE OF FLORIDA  
Respondent.

\_\_\_\_\_ /

ON DISCRETIONARY REVIEW OF CERTIFIED QUESTIONS  
FROM THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT,  
AND THE NINTH JUDICIAL CIRCUIT  
IN AND FOR OSCEOLA COUNTY, FLORIDA

ANSWER BRIEF OF RESPONDENT

CHAR  
LES  
J.  
CRIS  
T,  
JR.

ATTORNEY GENERAL

BELLE B. SCHUMANN

ASSISTANT ATTORNEY GENERAL  
Florida Bar No. 397024  
444 Seabreeze Blvd. 5<sup>th</sup> Floor  
Daytona Beach, FL 32118  
(386) 238-4990  
Fax (386) 238-4997

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES.           iii

STATEMENT OF THE CASE AND FACTS           1

SUMMARY OF ARGUMENT           7

ARGUMENT 9

ISSUE ONE

THE TRIAL COURT AND DISTRICT COURT CORRECTLY DETERMINED THAT THE RESTITUTION STATUTE PERMITS AN AWARD FOR THE ESTATE OF A MURDER VICTIM OF AN AMOUNT CONSISTING OF THE LOST FUTURE INCOME OF THE VICTIM.....9

ISSUE TWO

THE TRIAL COURT CORRECTLY AWARDED RESTITUTION FOR THE LOST WAGES OF A NEXT OF KIN VOLUNTARILY ATTENDING THE MURDER TRIAL OF THE PERSON ACCUSED OF KILLING THE VICTIM.....21

CONCLUSION	30
CERTIFICATE OF SERVICE	30
CERTIFICATE OF COMPLIANCE	31

STATEMENT OF THE CASE AND FACTS

\_\_\_\_\_ On November 21, 2002, Petitioner Timothy Koile and Catherine Stanek Cousins were indicted for first degree murder in the Ninth Judicial Circuit in and for Osceola County, Florida. (V1 1-2) The murder of Sean Patrick Cousins was alleged to have occurred between May 6 and May 12, 2001, from a premeditated design, by shooting him with a firearm. Koile and Cousins were tried together before separate juries in Palm Beach County upon their election of venue. (V1 48-49) During the trial, Koile entered a plea of guilty to second degree murder, and his jury was discharged. The Cousins case proceeded to verdict, and the appeal is currently pending before the Fourth District Court of Appeal, after transfer there by the Fifth District. See, Cousins v. State, 30 Fla. L. Weekly D557 (Fla. 5<sup>th</sup> DCA Feb. 25, 2005).

On May 30, 2003, during the joint trial, Petitioner entered a guilty plea. (V2 120-122) Petitioner stipulated to the following factual basis for his guilty plea:

The State would present evidence that the defendant, Timothy Koile, was a conspirator in the premeditated murder of Sean Patrick Cousins; that prior to the murder of Sean Patrick Cousins, the defendant had conversations with the co-defendant, Cathy Cousins, concerning her desire to have her husband, Sean Patrick Cousins killed so she would benefit from an insurance policy and receive those proceeds.

The discussions included the defendant, Tim Koile's agreement to assist Cathy Cousins initially by way of contacting and discussing with Daniel Bacovich<sup>1</sup> and for Daniel Bacovich personally to do the killing. The three parties, Cathy Cousins, Daniel Bacovich and Timothy Koile discussed the killing of Sean Patrick Cousins and agreed that it could be done and discussed plans for the method of the killing and of the sharing of the proceeds of the \$1 million insurance policy.

---

<sup>1</sup>In the rest of the transcript, this name is spelled "Bakovic."

In evidence already are exhibits, including emails from defendant Tim Koile, to Daniel Bacovich discussing Daniel Bacovich's help, his \$500,000 share of the insurance proceeds, a specific agreement and plan including a plan to kill Sean Patrick Cousins on Sunday, May 6<sup>th</sup> of 2001 in the parking lot of a movie theater...(But) Daniel Bacovich did not kill the victim at that time. None of the parties, however, withdrew from the conspiracy or the agreement or from the ultimate end of the conspiracy to kill the victim and collect the proceeds of the insurance.

Timothy Koile, on May 7, 2001, went to the house of Cathy Cousins and Sean Patrick Cousins in Palm Beach County, the evidence would show that Cathy Cousins shot Sean Patrick Cousins twice. Once in the back and once in the head. One of those shots was witnessed by Tim Koile where he personally saw Cathy Cousins shoot Sean Patrick Cousins.

Tim Koile then participated in the clean up. Daniel Bacovich also participated in the cleaning up of the residence. Timothy Koile and Daniel Bacovich continued their discussions with Cathy Cousins. Conversations of sharing the proceeds of the insurance money which was the ultimate object of the killing and the consideration for the conspiracy.

Timothy Koile and Daniel Bacovich traveled through multiple counties from Palm Beach ultimately to Osceola County where they dumped the deceased body of Sean Patrick Cousins.

2  
(V34 2699-2701)

The Petitioner agreed to restitution as a condition of probation, but did not stipulate to a specific amount. (V34 2690)

Pursuant to the plea agreement, Petitioner was sentenced on September 19, 2003, to ten years in prison followed by five years of probation. (V2 156-161) Restitution was ordered, but the court reserved jurisdiction to determine the amount. (V2 155)

On October 27, 2003, a restitution hearing was held in this case. (V3 213) The victim's father testified that the costs directly associated with the funeral were \$5,238. (V3 218-221) He attended the three week trial, which resulted in lost income of \$12,000. (V3 222) Roseanne Cousins testified she lost \$1500 in wages during the three week trial. (V3 248) Patrick Cousins was employed as an airline captain for Jamaica Airlines. (V3 222) The travel expenses associated with attending the trial were \$370.33, and \$88 for parking. (V3 225) After his son's disappearance, Cousins hired a private investigator, and the fee for that service was \$2500. (V3 224)

---

<sup>2</sup>Contemporaneously with the answer brief file below, Respondent filed a Motion to Take Judicial Notice of this portion of Petitioner's joint trial with Catherine Cousins. By order entered June 28, 2004, Respondent's Motion to Take Judicial Notice was treated as a Motion to Utilize the Record of Companion Appeal, and was granted. Relevant excerpts of the companion record are contained as Exhibit A of the Appendix to the Answer Brief filed below. All briefs filed below are appended to the Petitioner's merits brief in this Court.

Patrick Cousins testified that he was in charge of all the pilots at Air Jamaica. (V3 227) At the time of his death, his son, Sean Cousins, was employed as a pilot, with a salary of \$87,998 per year. (V3 227) Within fourteen months, based on his career track, Sean would have been promoted to captain at an annual salary of \$156,882. (V3 228) As part of his contract, Cousins was required to contribute five per cent of his income to a pension plan, which was matched by the company. (V3 229)

Peter Hilera, a Certified Public Accountant at the firm of Vestal and Wiler, testified for the State. (V3 262) He testified that "very commonly" he was called upon to perform present day value calculations of future income. (V3 264) Mr. Hilera testified that he calculated the victim's future income, assuming that he would be promoted to captain in accordance with his career tracking plan, and assuming he would work until age 60. (V3 270) The formula for calculating the future income was standard in the accounting industry. "It's a very, very common formula." (V3 279) His conservative estimate of the victim's future income was \$3,322,743. (V3 279)

On December 19, 2003, the trial court entered a written order assessing restitution, finding that Patrick Cousins suffered damage or loss caused by the Defendant's offenses in the amount of \$370.33 for travel expenses, \$88 for parking and \$12,000 for lost income during the three weeks that he attended the murder trial. (V2 199) Additionally, he was awarded \$5,238 in funeral expenses. Roseanne Cousins was awarded \$1500 for lost income. The trial court also found that the State had proven by the preponderance of the evidence that the estate of Sean Patrick Cousins had suffered damage or loss caused by the Defendant's offenses in the amount of \$2,042,126. (V2 200) In reaching this amount, the trial court used the standard accounting formula and applied it to the victim's salary at his death, without considering his possible promotion to captain and the increase in salary that promotion would create.

On appeal, the Fifth District entered a decision addressing two restitution issues: whether it was appropriate for the trial court to assess as restitution the lost wages of the decedent's parents while attending the trial, and the lost future earnings of the decedent. Koile v. State, 30 Fla. L. Weekly D 168 (Fla. 5<sup>th</sup> DCA Jan. 7, 2005). The decision below reviewed the restitution statute, section 775.089, Florida Statutes (2003),

and determined that "it is inconsistent to award lost income to a victim who suffers a bodily injury that renders him or her unable to work in the future, but not to award restitution to the estate of an identical victim whose bodily injury causes his or her death." <sup>14</sup> This conclusion not only furthered the purpose of the restitution statute, but also served the rehabilitative, deterrent, and retributive goals of the criminal justice system. The district court questioned the trial court's methodology employed to arrive at the award of lost future wages, because it failed to deduct probable living expenses from probable future gross earnings.

The district court also held that the restitution statute did not permit an award of lost wages to the parents of the decedent, even though the statute specifically included the victim's next of kin. The court held, "we do not discern the 'significant relationship' between the underlying criminal offense, and the attendance at trial of what is unquestionably a very interested spectator, in the absence of a statute authorizing such an award." <sup>15</sup>

Two questions were certified to this Court for resolution:

DOES SECTION 775.089, FLORIDA STATUTES (2003), AUTHORIZE A RESTITUTION AWARD FOR THE LOST WAGES OF A NEXT OF KIN VOLUNTARILY ATTENDING THE MURDER TRIAL OF THE PERSON ACCUSED OF KILLING THE VICTIM?

DOES SECTION 775.089, FLORIDA STATUTES (2003), AUTHORIZE A RESTITUTION AWARD FOR THE ESTATE OF A MURDER VICTIM OF AN AMOUNT CONSISTING OF THE LOST FUTURE INCOME OF THE VICTIM?

SUMMARY OF ARGUMENT

Petitioner challenges the restitution award for the victim's parents reimbursing them for the lost income and travel expenses incurred while they attended the murder trial. Petitioner also challenges the award to the victim's estate for the loss of income. There is no dispute that

Petitioner participated in a criminal plan that caused the victim's death. Rather, Petitioner contends that the award of restitution for these items is not authorized by the restitution statute.

The restitution statute requires reimbursement of the victim for income lost as a result of the offense. §775.089(2)(a)(3), Fla. Stat. (2005). A victim is anyone who suffers economic loss as a direct or indirect result of the offense. The term "victim" is specifically defined to

include the estate of the victim and the victim's next of kin, if the victim is deceased. §775.089(1)(c), Fla. Stat. (2005). There is no ambiguity in the legislature's intent to award lost income to the victim's estate and next of kin in a homicide case.

There is a constitutional right for the surviving relatives of a homicide victim to attend the trial. This constitutional right is not dependent upon whether they attend under subpoena or voluntarily. The right to recover economic losses incurred in the exercise of that right includes

the entitlement to lost wages and other expenses incurred as restitution. But for the murder, the loss would not be incurred. The lost wages and travel expenses bear a direct relationship to the crime committed.

Florida courts have long recognized that lost income of the victim may provide a basis for an award of restitution. State v. Williams, 805 So. 2d 1082 (Fla. 5<sup>th</sup> DCA, 2002).

THE STATE OF FLORIDA, BY AND THROUGH THE OFFICE OF THE ATTORNEY GENERAL, PETITIONER, VS. [REDACTED], RESPONDENT.





Under standard rules of statutory construction, the primary duty of the courts is to give effect to the legislative intent, and if a literal interpretation leads to

an unreasonable result, plainly at variance with the purpose of the legislation as a whole, this Court must examine the matter further. State v. Iacovone, 660 So. 2d 1371, 1373 (Fla. 1995). The cardinal rule of statutory construction is that a statute should be construed to give effect to the intention the legislature expressed in the statute. See City of Tampa v. Thatcher Glass Corp., 445 So. 2d 578, 579 (Fla. 1984). For a court to hold otherwise would make the obvious mandate of the legislature subservient to the discretion of the court. See Ellis v. State, 622 So. 2d 991, 1001 (Fla. 1993).

Different subsections of the same statute must be read *in pari materia* and should be construed together and compared with each other. Ferguson v. State, 377 So. 2d 709, 710 (Fla. 1979). A statute should be construed in its entirety and as a harmonious whole. St. Mary's Hospital, Inc. v. Phillipe, 769 So. 2d 961 (Fla. 2000). Statutory phrases cannot be read in isolation, but must be considered within the context of the entire section and the remainder of the statutory scheme. Jones v. ETS of New Orleans, Inc. 793 So. 2d 912 (Fla. 2001).

The first section of the statute requires reimbursement to the victim for any damage or loss caused directly or indirectly by the defendant's offense. Under Petitioner's interpretation, if the victim dies, he would be no longer be responsible for indirect losses, only the direct cost of the funeral. This interpretation renders meaningless the express provision for reimbursement for indirect losses. It also

ignores the fact that the term "victim" is defined to include the victim's estate or next of kin if the victim is deceased. Under his interpretation, the estate would remain liable for medical costs and other expenses incurred by the victim as a direct result of the crime prior to the victim's death, but the estate could not recover these costs from the defendant if the victim should happen to die. This interpretation is contrary to legislative intent.

The purpose of the restitution statute is to compensate the victim and also to punish the offender. Glabuis v. State, 688 So. 2d 913 (Fla. 1997); Kirby v. State, 863 So. 2d 238 (Fla. 2003). Imposing restitution orders for the full reach of the statute on solvent defendants furthers the retributive function of penal law.

Many courts have upheld restitution awards for the victim's lost wages in homicide cases. A case from Oregon was cited to the trial court, and holds that restitution in the amount of the homicide victim's projected income is a valid award. State v. Moriarty, 742 P.2d 704 (Or. 1986). Iowa also permits restitution to the parents of a murder victim for the "present value of the projected estate" of the victim. State v. Mayberry, 415 N.W.2d 644, 645 (Iowa 1987).

In a case from Ohio remarkably similar to this case, the award of restitution for the gross amount of future earnings of the murder victim was approved. State v. Finkes, 2002 Ohio 1439, 2002 Ohio App. LEXIS 1422 (10<sup>th</sup> Dist. 2002). Ohio's restitution statute permitted the court to order a felony offender to pay restitution to the victim for economic loss, defined as "any economic detriment

suffered by a victim as a result of criminally injurious conduct and includes any loss of income due to lost time at work because of any injury caused to the victim, and any property loss, medical cost, or funeral expenses incurred as a result of the criminally injurious conduct." The trial court calculated the murder victim's life expectancy, and multiplied that term of years by his annual salary at the time of the murder to reach the appropriate award of restitution. The Ohio court concluded that "loss of income" included all projected income for a deceased murder victim. "A victim who is killed as a result of an offender's criminal conduct will foreseeably lose all income from work. Though the definition of economic loss does not specifically include future earning power of the victim, we find it reasonable, under the particular circumstances of the instant case, to include future earning power under the heading of 'loss of income.'" Id.

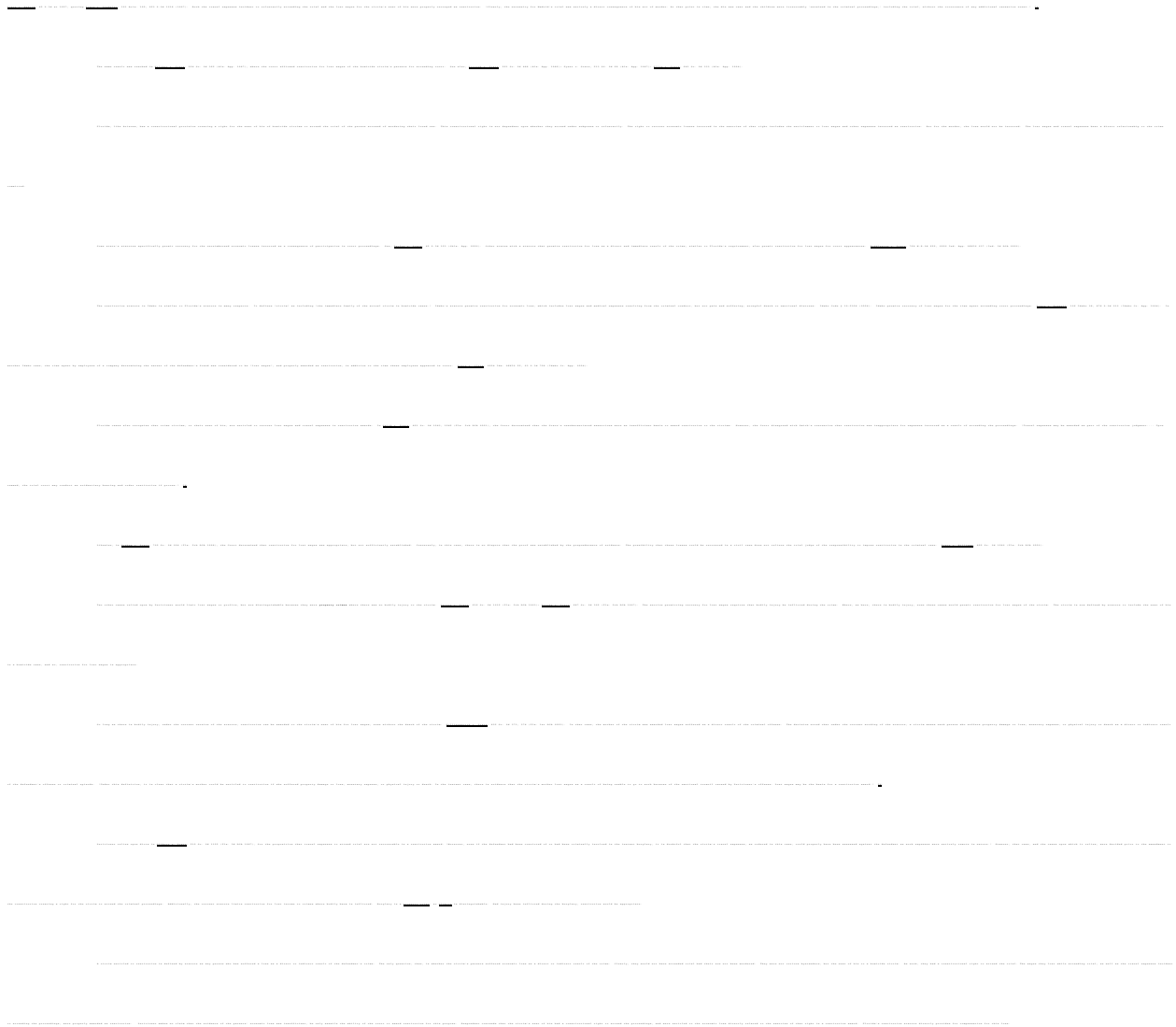
Florida courts have long recognized that lost income of the victim may provide a basis for an award of restitution. See, State v. Williams, 805 So. 2d 1082 (Fla. 5<sup>th</sup> DCA 2002); Graham v. State, 720 So. 2d 294 (Fla. 5<sup>th</sup> DCA 1998). Petitioner attempts to distinguish these cases by noting that here, the award was to the victim's

estate. However, the statutory definition of victim includes the victim's estate if the victim is deceased. §75.081(3)(c), Fla. Stat. (2005). These cases provide direct authority for the restitution award in this case for the loss of future earnings of the victim.

In Florida, it is hardly a foreign concept that compensation for the victim's survivors in homicide and manslaughter cases is recoverable as restitution. In Ward v. State, 532 So. 2d 538 (Fla. 4<sup>th</sup> DCA 1988).









—

---

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by delivery to Assistant Public Defender Marvin Clegg, 112 Orange Avenue, Suite A, Daytona Beach, Florida, 32114, via the basket at the Fifth DCA, this 8th day of April, 2005.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with

Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

CHARLES J. CRIST, JR.  
ATTORNEY GENERAL

---

BELLE B. SCHUMANN  
Florida Bar No. 397024

---

KELLIE A. NIELAN  
Florida Bar No. 618550  
ASSISTANT ATTORNEYS GENERAL  
444 Seabreeze Blvd., Suite 500  
Daytona Beach, Florida 32118-

(386)238-4990  
Fax (386)238-4997

COUNSELS FOR RESPONDENT

3951

TABLE OF AUTHORITIES

<u>Ashton v. State,</u> 790 So. 2d 1115 (Fla. 5th DCA 2001)	10
<u>City of Tampa v. Thatcher Glass Corp.,</u> 445 So. 2d 578 (Fla. 1984)	15
<u>Cliburn v. State,</u> 510 So. 2d 1155 (Fla. 3d DCA 1987)	28,29
<u>Cousins v. State,</u> 30 Fla. L. Weekly D557 (Fla. 5th DCA Feb. 25, 2005)	1
<u>Cristley v. State,</u> 573 So. 2d 167 (Fla. 4th DCA 1991)	12,18,19
<u>Ellis v. State,</u> 622 So. 2d 991 (Fla. 1993)	15
<u>Ellis v. State,</u> 641 So. 2d 333 (Ala. App. 1994)	25
<u>Ferguson v. State,</u> 377 So. 2d 709 (Fla. 1979)	15
<u>Glabuis v. State,</u> 688 So. 2d 913 (Fla. 1997)	16
<u>Graham v. State,</u> 720 So. 2d 294 (Fla. 5th DCA 1995)	8,18,27
<u>Guerrier v. State,</u> 811 So. 2d 852 (Fla. 5th DCA 2002)	14
<u>Hebert v. State,</u> 614 So. 2d 493 (Fla. 1993)	11
<u>Hollingsworth v. State,</u> 835 So. 2d 373 (Fla. 1st DCA 2003)	27,28
<u>Huddleston v. State,</u> 764 N.E.2d 655, 2002 Ind. App. LEXIS 237 (Ind. 3d DCA 2002)	25
<u>Jones v. ETS of New Orleans, Inc.,</u> 793 So. 2d 912 (Fla. 2001)	16

Kirby v. State,  
863 So. 2d 238 (Fla. 2003) 16,20,22

Koile v. State,  
30 Fla. L. Weekly D168 (Fla. 5th DCA Jan. 7, 2005)  
19,20

Kyser v. State,  
513 So. 2d 68 (Ala. App. 1987) 25

Laskey v. Smith,  
239 So. 2d 13 (Fla. 1970) 9

Meeks v. Florida Power & Light Co.,  
816 So. 2d 1125 (Fla. 5th DCA 2002) 11,14

Nettles v. State,  
850 So. 2d 457 (Fla. 2003) 14,23

Nordgren v. State,  
532 So. 2d 538 (Fla. 4th DCA 1989) 18

Osteen v. State,  
616 So. 2d 1215 (Fla. 5th DCA 1993) 27

Rose v. State,  
787 So. 2d 786 (Fla. 2001) 23

Santana v. State,  
795 So. 2d 1112 (Fla. 5th DCA 2000) 9

Smith v. State,  
801 So. 2d 1043 (Fla. 5th DCA 2001) 26

St. Marys Hospital, Inc. v. Phillipe,  
769 So. 2d 961 (Fla. 2000) 15

State v. Atkinson,  
831 So. 2d 172 (Fla. 2002) 14

State v. Finkes,  
2002 Ohio 1439, 2002 Ohio App. LEXIS 1422  
(10th District, 2002) 10,17,18

State v. Iacovone,  
660 So. 2d 1371 (Fla. 1995) 15

State v. Madrid,

85 P.3d 1054 (Az. 2004)	23,24
<u>State v. Mayberry,</u> 415 N.W.2d 644 (Iowa 1987)	17
<u>State v. Moriarty,</u> 742 P.2d 704 (Or. 1986)	17
<u>State v. Olpin,</u> 2004 Ida. LEXIS 55, 93 P.3d 708 (Idaho Ct. App. 2004)	26
<u>State v. Russell,</u> 126 Idaho 38, 878 P.2d 212 (Idaho Ct. App. 1994)	26
<u>State v. Williams,</u> 805 So. 2d 1082 (Fla. 5th DCA 2002)	8,11,18,27
<u>Stocks v. State,</u> 687 So. 2d 325 (Fla. 5th DCA 1997)	27
<u>Strough v. State,</u> 501 So. 2d 488 (Ala. App. 1986)	25
<u>Taylor v. State,</u> 45 P.3d 103 (Okla. App. 2002)	25
<u>Welcher v. State,</u> 504 So. 2d 360 (Ala. App. 1987)	24