

*The following is a real-time transcript taken as closed captioning during the oral argument proceedings, and as such, may contain errors. This service is provided solely for the purpose of assisting those with disabilities and should be used for no other purpose. These are not legal documents, and may not be used as legal authority. This transcript is not an official document of the Florida Supreme Court.*

## **Gary Kent Kirby v. State of Florida**

THE NEXT CASE IS DIR BIVERSUS STATE. -- IS KIRBY VERSUS STATE. 4 GOOD MORNING.

GOOD MORNING. MY NAME IS LYLE HITCHENS AND I REPRESENT MR. GARY KIRBY, FOUND GUILTY OF DUI RESULTING IN SERIOUS BODILY INJURY AND SUBSEQUENTLY THERE WAS A RESTITUTION HEARING AND THE STATE CONCEDE THAED VICTIM, HAROLD BAXLEY, HAD ALREADY SIGNED A CIVIL RELEASE AND SETTLEMENT AGREEMENT FOR \$25,000, AND BASED ON A SECOND DCA CASE, STATE VVANDONICK, WHERE THE VICTIM HAD ALSO EXECUTED A RELEASE, JUDGE NICHOLS REFUSED TO AWARD ANY ADDITIONAL RESTTITUTION.

WAS THAT POLICY LIMITS?

YES. THAT WAS POLICY LIMITS.

YOU SAID CONCEDED THAT THERE HAD BEEN A SETTLEMENT RELEASE, BUT THE STATE DIDN'T CONCEDE THAT THEY WEREN'T GOING TO, THEN, SEEK ON BEHALF OF THE VICTIM, ADDITIONAL RESTITUTION. THAT THERE WAS ADDITIONAL OUT OF POCKET MEDICAL EXPENSES, DEDUCTIBLE AND LOST WAGE THAT IS EXCEED THE POLICY LIMITS.

YES. WELL, IN FACT, THE STATE ARGUED THAT IT WAS NOT A PARTY TO THE SETTLEMENT, AND I WOULD SUBMIT THAT IT WAS UP TO THE VICTIM TO INCLUDE THE STATE, IF MR. BAXLEY HAD WANTED THE STATE INVOLVED AS A PARTY TO THE SETTLEMENT.

BUT ISN'T THAT THE ISSUE? THE ISSUE IS REALLY THAT THERE ARE TWO DIFFERENT PROCEEDINGS THAT HAVE TWO DIFFERENT PURPOSES, AND JUSTICE BELL IS POINTING OUT, THIS ISN'T A SITUATION WHERE SOMEBODY RECEIVED THEIR FULL SAYINGS. THERE WAS \$-- THEIR FULL COMPENSATION. THERE WAS \$25,000 INSURANCE LIMITS, SO THERE WAS A PRACTICAL RELEASE OF THE DEFENDANT OF ANYMORE CIVIL LIABILITY FROM ANY INSURANCE COMPANY, BUT WHAT IS THE POLICY REASONS THAT SAY THAT THE STATE, THEN, SHOULDN'T BE ABLE TO SEEK, ACCORDING TO THE STATUTORY MANDATE, RESTITUTION?

WELL, I SUBMIT MR. BAXLEY IS THE VICTIM NOT THE STATE OF FLORIDA, AND THE POLICY ARGUMENT, WE WOULD MAKE HERE IN, IS THAT THE I VOIDING OF A CIVIL SETTLE -- IS THAT THE VOIDING OF A CIVIL SETTLEMENT AND RELEASE OF FURTHER LIABILITY, WOULD INHIBIT THE VOLUNTARY SETTLEMENT OF CASES THAT WOULD OTHERWISE BE LAWSUITS.

IS THERE ANY REFERENCE TO THE CRIMINAL PROCEEDINGS OR THE RESTITUTION IN THE DOCUMENTS?

I DON'T BELIEVE SO. I BELIEVE IT WAS JUST A STANDARD RELEASE.

HAVING THE STATE AGREE TO IT AT THE TIME OF THE CIVIL SETTLEMENT BEING REACHED, AND IF THEY ARE AGREEABLE THAT IS THE END OF IT AND IF THE ISSUE IS BUT THE VICTIM SAYS, LISTEN, I HAVE NO CHOICE. I AM SHORT ON FUNDS. I HAVE BEEN TOLD THIS IS THE ONLY AMOUNT OF MONEY THAT THE INSURANCE COMPANY HAS, AND I NEED THE MONEY, AND THEN THE STATE CAN HELP ADVISE AS TO WHETHER THIS IS A GOOD IDEA, AS FAR AS RELEASING ANYTHING FURTHER, AND BE A PARTY TO IT.

I --

THAT IS ALL, REALLY, THEY WERE REQUIRING.

I THINK BUT THE, I, THAT WASN'T THE TERMS OF THE AGREEMENT. I SUBMIT THAT THE STATE IS NOT OFFERING RETURN OF THE \$25,000 CASH SETTLEMENT. THEY BASICALLY WANT THEIR CAKE AND EAT IT, TOO. THEY ARE ASKING ONLY ONE SIDE OF THE SETTLEMENT BE NULLIFIED AND THAT THEY GO AHEAD AND CONTINUE THE ORDER OF RESTITUTION.

WON'T THERE BE A SET-OFF? IN OTHER WORDS IF THERE IS A SETTLEMENT AND THE VICTIM RECEIVES FULL COMPENSATION, THEN THAT WILL BE CONSIDERED BY THE TRIAL JUDGE IN DETERMINING WHETHER ADDITIONAL RESTITUTION IS REQUIRED. THAT IS HOW IT IS FACTORED IN.

BUT IT FLIES IN THE FACE OF THE TERMS OF THE RELEASE. THE STATE ARGUED THAT THE VICTIM BE MADE WHOLE AND THAT WAS THE REASON FOR THE \$25,000 PAYMENT TOWARD THE MEDICAL BILLS AND THE \$6,000 OR \$7,000 PAYMENT FOR THE MOTORCYCLE.

WHAT IF THAT DIDN'T SATISFY THE MEDICAL EXPERIENCES, AND -- EXPENSES, AND LIKE MANY CASES, THE STATE BECOMES THE INSUROR, THE STATE BEARS THE BURDEN, LIKE MANY PEOPLE, BEARS THE BURDEN OF LOST INCOME AND OTHER LOSSES OF THIS VICTIM BECAUSE OF THE CRIMINAL CONDUCT. WHAT YOUR ARGUMENT IS BASICALLY THEY CAN SET UP POLICY LIMITS, NO OUT-OF-POCKET EXPENSE TO YOUR CLIENT, \$25,000 INSURANCE COVERAGE. THAT IS IT. NO LIABILITY FOR LOST INCOME, LOST WAGES, MEDICAL EXPENSES, ALL OF THE OTHER THINGS THAT WOULD NORMALLY BE DONE --

NO, SIR, THAT IS NOT MY ARGUMENT. MY ARGUMENT IS THAT MR. BAXLEY WAS ADULT. HE WAS SUED JURIS. HE HAD THE OPPORTUNITY TO GO TO TRIAL AND HAVE ALL THOSE THINGS TAKEN INTO CONSIDERATION. IT WAS MR. BAXLEY THAT DECIDED NOT TO GO TO TRIAL AND VOLUNTARILY SIGN A RELEASE.

AND PUT THE BURDEN UNILATERALLY UPON THE STATE. POSSIBLY. IN THIS OR OTHER CASES, TO PAY HIS MEDICAL EXPENSES, HIS SSI DISABILITY, AND THESE OTHER INCOMES THAT WERE THE RESULT OF CRIMINAL CONDUCT BY YOUR CLIENT. ISN'T THAT CORRECT?

THAT WOULD BE CORRECT, BUT I WOULD ALSO SUBMIT THAT MR. KIRBY WAS A LAW ENFORCEMENT OFFICER AT THE TIME THAT HE WAS CHARGED WITH DUI, AND HE LOST HIS LAW ENFORCEMENT CREDENTIALS, I UNDERSTAND, AND SO THE ACTUAL ABILITY OF MR. KIRBY TO PAY RESTITUTION, I WOULD THINK, WOULD COME INTO QUESTION.

BUT YOU TAKE THAT INTO ACCOUNT ON ANY CRIMINAL RESTITUTION HEARING IS THE NEED AND ABILITY TO PAY. THAT IS THE SECOND HALF OF THE FORMULA. BUT THAT FORMULA IS NOT EVEN ADDRESSED. THE STATE, IN THE COURT, NEVER GETS AN OPPORTUNITY TO ADDRESS NEED AND ABILITY TO PAY, IF THEY HAVE AN UNILATERAL SETTLEMENT AGREEMENT.

WELL, THE, I DON'T BELIEVE IT WAS AN UNILATERAL SETTLEMENT AGREEMENT, BECAUSE MR. BAXLEY SIGNED IT, AND MR. KIRBY'S REPRESENTATIVE SIGNED IT.

I MEAN UNILATERAL AS TO NOT INCLUDING THE STATE AS PARTY.

BUT THERE AGAIN, WE WOULD SUBMIT THAT MR. BAXLEY WAS THE ONE THAT SHOULD HAVE INCLUDED THE STATE, SINCE THE STATE IS ALLEGEDLY REPRESENTING HIS INTERESTS IN DEMANDING ADDITIONAL RESTITUTION.

WELL, WHAT WAS THE, WHAT ARE THE AMOUNT OF THE MEDICAL BILLS THAT MR. BAXLEY SUSTAINED? DO WE KNOW FROM THIS RECORD?

I, NO, I DON'T KNOW, EXCEPT THAT THEY WERE IN EXCESS OF THE \$25,000.

THE MEDICAL BILLS, THEMSELVES, WERE IN EXCESS OF \$25,000.

HIS TOTAL OUT-OF-POCKET EXPENSES, I UNDERSTOOD, WERE MORE THAN \$25,000. AS FAR AS --

DID MR. BAXLEY TESTIFY AT THE HEARING AS TO THAT HE HAD NO INTEREST IN PURSUING ADDITIONAL RESTITUTION AGAINST THE STATE? I MEAN, AND AGAINST THE DEFENDANT?

NO. I DON'T BELIEVE THAT WAS IN THE RECORD. IT WAS THE STATE ACTING ON BEHALF MR. BAXLEY.

WHAT WERE, DO WE KNOW WHAT THE INJURIES MR. BAXLEY SUSTAINED WERE?

I JUST KNOW THAT THEY WERE DETERMINED BY THE JURY AS SERIOUS BODILY INJURY, BUT THE EXTENT OF THE INJURIES, THE SPECIFICS --

WAS RESTITUTION ORDERED HERE?

NO. THE JUDGE NICHOLS DENIED --

BECAUSE OF THE --

BECAUSE OF, RIGHT, AND THEN THE FIFTH DCA --

WHAT HAVE OTHER STATES DONE IN THESE CIRCUMSTANCES?

WELL, THE FIFTH WENT TO OTHER STATES, AND FOUND SOME STATES TO SUPPORT THEIR POSITION, BUT I WOULD SUBMIT THE SECOND DISTRICT COURT, IN THE CITING OF -- IN DECIDING, IN VANDONICK, CONSTRUED THE CONTRACT LAW.

WHAT IS THE RATIONALE OF THE OTHER STATES THAT HAVE ALLOWED RESTITUTION UNDER THESE CIRCUMSTANCES?

THAT THE RESTITUTION IS IN CONJUNCTION WITH THE CIVIL SETTLEMENTS. THAT ONE WOULD NOT NECESSARILY PREVENT THE OTHER, AND WE WOULD SUBMIT, ON BEHALF OF MR. KIRBY, WHERE YOU EITHER GO TO COURT AND YOU GET A MONEY JUDGMENT, AND THEN THE INSURANCE POLICY PAYS, OR, AS IN THIS CASE, WHERE THE POLICY LIMITS WERE PAID, THAT WOULD BE OFFSET AGAINST THE RESTITUTION, BUT WE WOULD ALSO SUBMIT THAT, SINCE, IN ADDITION TO THE POLICY LIMITS --

DOES YOUR CLIENT HAVE AN ARGUMENT, WHEN THIS GOES BACK FOR, IF THIS GOES BACK FOR HEARING, TO DETERMINE RESTITUTION, DOES YOUR CLIENT HAVE AN ARGUMENT, ANY KIND OF ARGUMENT THAT MR. BAXLEY CAN ONLY RECEIVE THE \$25,000 THAT HE HAS BARGAINED FOR IN THE SETTLEMENT?

WELL, I BELIEVE THAT WOULD BE HIS POSITION. IN VIEW OF THE RELEASE, THAT MR. BAXLEY SIGNED. THAT MR. BAXLEY AGREED TO ACCEPT THE \$25,000 AS COMPLETE PAYMENT IN SETTLEMENT.

BUT DON'T YOU THINK, I GUESS THIS IS THE PROBLEM THAT I HAVE, IS THAT I CAN SEE, ENVISION ONE CASE WHERE, SAY THERE HAS BEEN A JURY TRIAL AND THERE IS FULL, YOU KNOW, THE JURY AWARDS AN AMOUNT OF MONEY AND THAT IS WHAT THE SETTLEMENT IS, THAT THAT CONSTITUTES THE DAMAGES.

UM-HUM.

BUT THIS IS A CASE WHERE, AGAIN, YOU HAVE AGREED THAT AT LEAST FROM WHAT WE KNOW, THESE MEDICAL BILLS ALONE EXCEED \$25,000, SO LOGIC TELLS US THAT THE ONLY REASON THAT MR. BAXLEY WOULD HAVE COMPROMISED ON WHAT WOULD BE A VERY SUBSTANTIAL, EVEN OUT OF POCKET CLAIM, WAS BECAUSE THERE WAS ONLY THAT MUCH INSURANCE COVERAGE, AND AS CIVIL LAWYERS, WE KNOW THAT THAT IS JUST SORT OF THE NECESSITY. YOU KNOW, HE IS SITING THERE AND HE MUST HAVE A GREAT AMOUNT OF BILLS AND HE SORT OF HAS NO CHOICE, BECAUSE TO GO THROUGH A CIVIL TRIAL WOULD BE EXPENSIVE, SO IN THAT SITUATION, ISN'T THAT DIFFERENT THAN, SAY, SOMEBODY WHERE THEY HAVE SETTLED WITH A DEFENDANT WHO HAD UNLIMITED RESOURCES, AND THEY SAY, WELL, YOU HAVE AGREED THAT IS THE VALUE OF YOUR CLAIM. NOW YOU ARE TRYING TO COME BACK AND GET MORE. DON'T YOU SEE THOSE AS BEING TWO DIFFERENT CIRCUMSTANCES, THAT THE TRIAL JUDGE COULD CONSIDER IN THE LATTER SITUATION, THAT IS WHERE THERE WAS NO COMPROMISE, COULD SAY WELL, REALLY HAVEN'T YOU AGREED ON AN AMOUNT AND YOU ARE KIND OF ESTOPPED, VERSUS THIS SITUATION WHERE IT IS VERSUS LIMITS OF INSURANCE COVERAGE?

WELL, I WOULD SUBMIT MOST DEFENDANTS PROBABLY DON'T HAVE UNLIMITED FINANCES, AND MOST POLICIES DO HAVE A LIMIT, AND IT WAS NOBODY IS SAYING THAT MR. KIRBY FORCED MR. BAXLEY TO SIGN THE RELEASE.

LET ME, THIS IS A DUI.

YES.

AND YOUR CLIENT BARGAINED FOR APPARENTLY, WITH THE STATE, A DOWNWARD DEPARTURE FROM MANDATORY STATE PRISON SENTENCE, AND THE BASIS FOR THE DOWNWARD DEPARTURE IS THE NEED FOR PAYMENT OF RESTITUTION, WHERE THIS PAYMENT AS I UNDERSTAND IT UNDER THIS POLICY, WAS PRIOR TO THE TRIAL IN THE CASE AND PRIOR TO --

AS FAR AS THE RELEASE BEING SIGNED BEFORE TRIAL, YES, AND AS FAR AS THE DOWNWARD DEPARTURE SENTENCE, I SEE WHERE THE ATTORNEY GENERALS OFFICE SAID THIS MIGHT HAVE BEEN CONSIDERATION OF THE JUDGE.

I MEAN, IT WAS CHECKED ON THE REASONS FOR DEPARTURE AS ONE OF THE TWO REASONS WAS THE NEED FOR PAYMENT OF RESTITUTION.

AND --

HAVING TRIED A BUNCH OF THESE AT TRIAL LEVEL, THE ARGUMENT ALL OF THE TIME -- THE ARGUMENT ALL OF THE TIME AND THE DEFENSE STRATEGY IS WE ARE TRYING TO AVOID THIS OFFICER GOING TO PRISON BECAUSE WE KNOW WHAT HAPPENS TO LAW ENFORCEMENT OFFICERS IN PRISON. HOW CAN WE STOP IT? HOW DO WE AVOID IT? TRY TO GET THE VICTIM ON OUR SIDE AND PAY SOME RESTITUTION AND THIS GUY'S ATTORNEY SAYS, JUDGE, RESTITUTION IS MORE IMPORTANT, ET CETERA, ET CETERA, AND I DON'T KNOW WHAT WENT ON IN THIS CASE BUT THE REASON FOR THE DEPARTURE STATEMENT WAS THE NEED TO PAY RESTITUTION, WHICH IS COMMON IN A SERIOUS BODILY INJURY DUI CASE, SO NOW YOU ARE SAYING WE PAID HIM OUR 25, GO ON, AND WE HAVE AVOIDED STATE PRISON.

MR. KIRBY DID AVOID STATE PRISON AND DID PAY THE RESTITUTION BY VIRTUE OF HIS INSURANCE POLICY, YES, BUT WE SUBMIT THE FIFTH DCA, IN THE CASE CARNELL V CARNELL SAID THAT THE STATE HAD SHOWN NO FRAUD OR COERCEMENT AND THAT THE FREEDOM TO CONTRACT INCLUDES THE RIGHT TO MAKE A BAD BARGAIN AND WOULD SUBMIT MR. KIRBY AND THE VICTIM, BOTH, ENTERED INTO THE RELEASE KNOWINGLY AND VOLUNTARILY, AND NOW THAT SHOULD BE UPHELD. THANK YOU.

HOW DO YOU RECOLLECT ONCE THE -- HOW DO YOU RECOLLECT THE LANGUAGE IN THE STATUTE WHICH -- HOW DO YOU RECOLLECT ONCE THE LANGUAGE IN THE -- HOW DO YOU RECONCILE THE LANGUAGE IN THE STATUTE WHICH SAYS THAT, ONCE THE DEFENDANT HAS PAID SOME MONIES AND GOTTEN A RELEASE, THAT THE TRIAL JUDGE NOW CANNOT ORDER RESTITUTION?

WELL, I WOULD RECONCILE THAT IN, BY SAYING THAT THE CRIMINAL COURT'S RESTITUTION POWER SHOULD BE USED IN THOSE CASES WHERE THE VICTIM HAS NOT MADE A CIVIL SETTLEMENT. THERE ARE MANY MORE CRIMINAL CASES WHERE THE DEFENDANT DOES NOT HAVE INSURANCE TO COVER DAMAGES, AND WHERE THERE IS NO INDEPENDENT RELEASE AND SETTLEMENT OF DAMAGES BY THE VICTIM, AND IT IS IN THOSE CASES WHERE THERE ARE NO INSURANCE SETTLEMENTS, THAT I BELIEVE RESTITUTION WOULD BE PROPER. THANK YOU.

CHIEF JUSTICE: THANK YOU.

GOOD MORNING. MY NAME IS KELLY NEAL, AND I AM HERE ON BEHALF THE STATE OF FLORIDA. THE DE NOVO REVIEW IN THIS CASE AND THE TRIAL COURT IN THIS CASE NOT FOLLOWING ANY --

COULD YOU TELL US WHAT HAPPENED IN THE HEARING? THE STATE, JUST, WAS ANY EVIDENCE PUT ON OF THE MEDICAL BILLS? WAS THERE A FULL HEARING OR DID THE TRIAL JUDGE SAY, LISTEN, I AM BOUND BY WHAT THE SECOND DISTRICT HAS ALREADY DECIDED?

THE TRIAL JUDGE IMMEDIATELY SAID THAT IT WAS BOUND BY THE SECOND DCA AND NO TESTIMONY WAS TAKEN, SO WE DON'T KNOW DIRECTLY WHAT MR. BAXLEY'S BILLS ARE OR HIS WORK LOSS OR ANYTHING.

BUT IN EXCESS OF THE \$25,000.

YES.

YES.

AND DID DO WE KNOW IN TERMS OF WHO HAS PAID -- AND DO WE KNOW TERMS OF WHO HAS PAID THOSE BILLS SO FAR, WHETHER IT IS INSURANCE OR SOMETHING, AGAIN THAT, THE STATE OF FLORIDA IS BEARING THROUGH MEDICAID OR MEDICARE?

NO. THERE IS ABSOLUTELY NOTHING IN THE RECORD TO INDICATE THAT.

HOW DOES THIS WORK PRACTICALLY? I MEAN, IF THE STATE GOES IN AND THE JUDGE ORDERS RESTITUTION AND THE DEFENDANT WRITES A CHECK, WRITES IT TO THE STATE OF FLORIDA, I TAKE IT, IS THAT CORRECT?

IT IS HANDLED THROUGH THE CLERK'S OFFICE. IF YOU ARE ON PROBATION IT IS HANDLED THROUGH THE CLERK'S OFFICE. IF YOU ARE INCARCERATED, THEN IT IS HANDLED --

WHAT DOES THE STATE DO WITH THE MONEY?

I BELIEVE THAT IT IS DISPERSED TO THE VICTIMS, ANYONE THAT IS ENTITLED TO IT.

UNDER THE STATUTE, IT WOULD GO DIRECTLY TO THE VICTIM.

I BELIEVE SO, YES.

SO IN EFFECT, IT IS A SITUATION IN WHICH, IF THIS WERE A CIVIL PROCEEDING, IT WOULD BE THE STATE OF FLORIDA FOR THE USE AND BENEFIT OF THE VICTIM. CORRECT?

YES AND NO. THIS IS THE STATE OF FLORIDA PURSUING A CRIMINAL DEFENDANT. IT IS, CRIME ISN'T JUST AGAINST A SINGLE VICTIM. WHEN A CRIME OCCURS, IT IS AGAINST SOCIETY AND THE STATE AS A WHOLE. SO, NO, WE ARE NOT PURSUING THIS SPECIFICALLY ON BEHALF OF THIS VICTIM. IT IS SIMPLY THE PEOPLE HAVE SPOKEN, IN PASSING A RESTITUTION LAW THAT, IF YOU COMMIT A CRIME, YOU NEED TO MAKE THE VICTIM WHOLE AGAIN. SO --

THE, WHAT I AM TRYING TO STRUGGLE WITH IS THIS CONCEPT THAT, BECAUSE THE STATE WAS NOT A PARTY TO THE RELEASE, THAT THAT RELEASE DOES NOT AFFECT THE VICTIM, AND IT SEEMS TO ME THAT THERE IS SOME KIND OF CHARADE GOING ON, IF IN FACT, WHAT IS GOING ON IS THAT THE REAL PARTY IN INTEREST IN BOTH THE PURSUIT OF THE RESTITUTION AND THE PURSUIT OF THE INDIVIDUAL CLAIM, IS THE VICTIM! WE CAN CERTAINLY HOLD TO THE FACT THAT THE STATE HAS GOT, IS, HAS GOT TO BE A PARTY TO THIS RELEASE, IN ORDER TO RELEASE THE STATE'S INTEREST, BUT THAT IS KIND OF FICTION SHUN, ISN'T IT? IF -- FIX, ISN'T IT -- THAT IS KIND OF FICTION, ISN'T IT, IF IN FACT THE MONEY IS ALL GOING TO THE VICTIM.

NO, FIRST OF ALL, WHEN A CONTRACT IS ENTERED, ALL LAWS IN EFFECT BECOME PART OF THE CONTRACT. THE RESTITUTION LAW WAS IN EFFECT AT THE TIME THAT THE SETTLEMENT WAS SIGNED. THE PARTIES CERTAINLY WERE ON NOTICE OF THE RESTITUTION LAWS, WHEN THIS WAS ENTERED INTO. SECOND OF ALL, YOU SEED THAT THIS IS FOR THE BENEFIT OF THE VICTIM. I DON'T THINK THIS IS FOR THE BENEFIT OF THE VICTIM. THE VICTIM HAS BEEN SERIOUSLY INJURED HERE BY SOMEONE ELSE. HE IS NOT GETTING ANY WINDFALL OUT OF THIS. THE WHOLE IDEA OF THE STATUTE IS TO SIMPLY PUT THE VICTIM IN THE SAME FINANCIAL POSITION THAT THEY WERE IN BEFORE THE DEFENDANT COMMITTED THIS CRIME.

THAT IS FOR THE BENEFIT OF THE VICTIM. I MEAN, YOU HAVE JUST RESTATED THE SAME LANGUAGE FOR THE BENEFIT --

IT IS NOT BENEFITTING THE VICTIM THOUGH. IT IS SIMPLY PUTTING THE VICTIM IN A FINANCIAL POSITION THAT HE WOULD HAVE BEEN, IF THIS DEFENDANT HAD NEVER COMMITTED THIS CRIME.

BUT THAT IS A BENEFIT TO THE VICTIM AS OPPOSED TO NOT GETTING HIS BILLS PAID. HE GETS HIS BILLS PAID, AND MOST PEOPLE WOULD CONSIDER THAT TO BE A BENEFIT, WOULD THEY NOT?

IN TERMS OF THAT, BUT HAD THE DEFENDANT NEVER COMMITTED THIS CRIME, THE DEFENDANT WOULDN'T BE IN THAT POSITION.

THIS IS A CIRCULAR REASONING. CLEARLY RESTITUTION WAS PUT INTO THE STATUTE FOR THE BENEFIT OF VICTIMS OF CRIME, IS IT NOT?

YES.

ISN'T THAT THE WHOLE THERE I HAVE RESTITUTION?

THERE IS A TWO-FOLD PURPOSE. IT IS TO COMPENSATE THE VICTIM AND ALSO TO SERVE THE DETERRENT, REHABILITATIVE AND RETRIBUTION PURPOSES OF THE CRIMINAL JUSTICE SYSTEM.

WAS THERE A PLEA IN THIS CASE?

NO. HE WENT TO TRIAL.

NO. AS FAR AS IN THIS CASE, WOULD THE STATE, BEFORE SEEKING ADDITIONAL RESTITUTION, SIT DOWN WITH THE VICTIM TO FIND OUT, YOU KNOW, THE REASON THE SETTLEMENT WAS ENTERED INTO? IN OTHER WORDS I GUESS, SINCE WE ARE SO CONCERNED ABOUT VICTIMS, IT WOULD BE, ALTHOUGH I SEE THE ISSUE BEING THAT THERE IS DIFFERENT DAMAGES THAT ARE BEING

SOUGHT, MY CONCERN IS THAT, SHOULD THE JUDGE, IN A SUBSEQUENT HEARING, ACTUALLY HEAR FROM THE VICTIM, AS TO THE VICTIM'S NEEDS AND THE VICTIM'S OUT-OF-POCKET EXPENSES AND WHETHER THE VICTIM INTENDED THAT THIS \$25,000 COVER WHATEVER HE NEEDED, AND SHOULD THAT STILL, BECAUSE THAT IS 'TIL NOT IN THE RECORD, RIGHT? -- BECAUSE THAT IS STILL NOT IN THE RECORD, RIGHT? WE HAVE NOT HEARD FROM THE VICTIM.

CORRECT.

DOES THE STATE DO THIS AND IS IT IN CONJUNCTION WITH THE VICTIM OR IS IT WE DON'T CARE WHAT THE VICTIM SAYS. WE ARE JUST GOING OUR OWN WAY.

IN THE RESTITUTION STATUTE THERE ARE ONLY CERTAIN THINGS THAT ARE COVERED AND THROUGH CASE LAW, TOO, WHICH HAS EVOLVED. IT IS THE STATE'S BURDEN TO PRESENT PROOF OF ANY EXPENSES THAT THE VICTIM WOULD BE ENTITLED TODD, IN TERMS OF RESTITUTION. IT IS THEN MANDATORY UPON THE TRIAL JUDGE TO IMPOSE RESTITUTION, UNLESS THERE ARE CLEAR AND COMPELLING REASONS NOT TO IMPOSE RESTITUTION.

WELL, WHAT DO YOU CONSIDER, THEN, TO BE THE STATUS OF THE SETTLEMENT AGREEMENT? IS THAT AGREEMENT JUST A NULLITY UNDER THESE FACTS?

I DON'T THINK IT IS A NULLITY. IT WAS AN AGREEMENT ENTERED INTO BETWEEN THE INSURANCE COMPANY, THE DEFENDANT AND THE VICTIM. WHAT WE HAVE HERE IS A SEPARATE STATE PROCEEDING. THE VICTIM DOES NOT HAVE THE ABILITY TO WAIVE THE STATE'S RIGHT TO PURSUE RESTITUTION.

IF IT IS NOT A NULLITY, WHAT DO YOU DO ABOUT THE LANGUAGE IN IT THAT SAYS THAT THE DEFENDANT IS FOREVER DISCHARGED FROM PAYING BASICALLY ANYMORE MONEY TO THE VICTIM?

THE STATE DID NOT DISCHARGE THE DEFENDANT FROM PAYING ANY FURTHER MONEY, AND AS I POINTED OUT, THE RESTITUTION STATUTE WAS IN EFFECT AT THE TIME THAT THIS AGREEMENT WAS ENTERED INTO.

SO WOULD THE ADDITIONAL MONIES BEYOND THE \$25,000 ESCHEW TO THE STATE? WOULD MR. BAXLEY NOT BE ENTITLED TO IT THEN, IF THIS AGREEMENT IS STILL IN FULL FORCE AND EFFECT?

THE \$25,000 WOULD BE OFFSET AGAINST ANY FUTURE DAMAGES THAT WOULD BE DETERMINED.

I AM TALKING ABOUT FUTURE DAMAGES BEYOND THE \$25,000. WHO WOULD BE ENTITLED TO THEM?

WHOEVER SUFFERED THE DAMAGE, WHICH IN THIS CASE WOULD PROBABLY BE THE VICTIM. I DON'T KNOW IF THERE ARE OTHER ENTITIES INVOLVED.

RIGHT. I MEAN, WHAT WE DON'T KNOW HERE IN THIS RECORD, MAY, THIS MAY BE A SITUATION, MAY BE WE HAVE GOT NO LOST WAGES BUT WE HAVE GOT A \$100,000 HOSPITAL BILL, AND THAT HOSPITAL BILL IS STILL OUTSTANDING. IT MAY BE THAT, ALTHOUGH, AND THIS IS IN TERMS OF THE STATE'S POSITION, THAT ALTHOUGH THE VICTIM WOULD INDIRECTLY BE THE INJURED PARTY THAT, THERE ARE MEDICAL PROVIDERS THAT HAVE STILL NOT BEEN PAID, AND WE DON'T KNOW THAT IN THIS RECORD, AND IT SEEMS TO ME THAT THOSE ARE ALL THINGS THAT THE JUDGE SHOULD BE ABLE TO TAKE INTO CONSIDERATION, IN DECIDING WHETHER THE \$25,000 ADEQUATELY COMPENSATES THE VICTIM UNDER THESE CIRCUMSTANCES.

ABSOLUTELY.

SO IT IS NOT A HARD AND FAST RULE THAT WE WANT TO IMPOSE, BUT WHAT YOU ARE SEEKING TO SAY THAT THE FACT OF THIS SETTLEMENT ALONE FOR THE POLICY LIMITS, SHOULD NOT PRECLUDE THE STATE FROM AT LEAST PUTTING ON EVIDENCE AS TO THE OTHER MEDICAL BILLS OR, AND LET JUDGE THEN TAKE A LOOK AT THAT AND SEE WHETHER THERE ARE, IN FACT, OTHER IN DIRECT VICTIMS, SUCH AS MEDICAL PROVIDERS THAT HAVEN'T BEEN PAID.

EXACTLY. AND I MEAN, ALSO THE WHOLE BASIS OF THIS, IN WHICH THE CASE IS CITED BY THE FIFTH DCA THAT OTHER STATES HAVE FOUND, IS THAT A CRIMINAL PROSECUTION IS A SEPARATE PROCEEDING. THE VICTIM CANNOT WAIVE, AND RESTITUTION IS A PART OF THAT PROCEEDING. THE VICTIM --

IS IT ALSO TRUE THAT THE DOWNWARD DEPARTURE, ONE OF THE REASONS WAS THE NEED FOR PAYMENT OF RESTITUTION?

YES.

SO AS FAR AS THIS DEFENDANT IS CONCERNED, HE HAS NOT HAD TO PAY ANY OUT-OF-POCKET EXPENSES TO DATE.

CORRECT.

IN A GENERAL RESTITUTION CASE, AND WE ARE NOT TALKING ABOUT WHERE ANYONE HAS SETTLED TORE ANYTHING, BUT WHEN THE COURT DECIDES TO ORDER RESTITUTION, DOES THE COURT EVER APPORTION THESE MONEY, I MEAN, GIVE THEM TO OTHER PROVIDERS OTHER THAN THE VICTIM? I MEAN DOES THE COURT SAY, OKAY, THE RESTITUTION IN THIS CASE IS \$50,000. \$25,000 OF WHICH WILL GO TO THE VICTIM AND \$10,000 TO HOSPITAL X, AND \$5,000 TO DR. WHY?

I THINK IT WOULD DEPEND ON WHO WAS -- TO DR. Y?

I THINK IT WOULD DEPEND TO WHO IS ENTITLED AT THE TIME. I CANNOT THINK AFTER CASE WHERE THAT HAS BEEN AN ISSUE, BUT IN THIS CASE IF WE WENT BACK, IT HAS BEEN SO MANY YEARS NOW SINCE THIS HAS HAPPENED, SO I DON'T KNOW IF THE HOSPITAL HAS HAD TO WRITE OFF BILLS, IF INSURANCE HAS COVERED THIS. THAT WOULD HAVE TO BE SOMETHING THAT WOULD HAVE TO BE DEALT WITH WHEN WE WENT BACK TO THE TRIAL COURT. I THINK IN THIS CASE, IF A VICTIM, BY SIGNING A CIVIL SETTLEMENT AGREEMENT, PRIOR TO TRIAL, WAIVES RESTITUTION WHICH IS PART OF THE CRIMINAL PROCEEDING, TAKING THAT TO ITS LOGICAL END, YOU WOULD BE HOLDING THAT A CRIME VICTIM CAN WAIVE THE CRIMINAL PROSECUTION!

IT IS A LITTLE MORE COMPLICATED THAN THAT. EVERY CIVIL CASE RESOLVES ITSELF THROUGH THE RESOLUTION OF HOSPITAL LIENS, THE RESOLUTION OF DOCTORS' BILLS, AND THAT IS ALL PART OF GENERALLY WHEN YOU PUT THESE THINGS TOGETHER BECAUSE THEY HAVE A CLAIM DIRECTLY AGAINST THE INSURANCE COMPANY AND THE DEFENDANT, SO A HOSPITAL LIEN, AN INSURANCE COMPANY CAN'T GET RID OF THOSE, SO IT IS A LITTLE MORE COMPLEX THAN JUST SAYING THAT, SO I THINK WE REALLY NEED TO KNOW WHAT IS, HOW DO YOU, WHAT YOU ARE REALLY GOING TO DO IS UNRAVEL AND GO BACK BEHIND EVERY CIVIL SETTLEMENT TO DO THIS IS WHAT YOU HAVE TO DO, IF YOU ARE GOING TO GIVE ANY CREDENCE TO THE SETTLEMENT AGREEMENT. YOU HAVE TO UNRAVEL EVERY DOCTOR'S CLAIM THAT WAS RESOLVED, EVERY HOSPITAL LIEN THAT WAS SETTLED, AND THEN GO BEHIND ALL OF THAT AND SAY, NO, WE REALLY DIDN'T MEAN THAT, ALTHOUGH WE HAVE GOT A RELEASE OF LIEN FROM A HOSPITAL, SO THAT IS WHAT WOULD HAVE TO HAPPEN, THEN, CORRECT, IF WE ARE GOING TO PAY RESTITUTION TO HOSPITALS THAT HAVE RELEASED THEIR LIENS. ARE WE GOING TO DO THAT?

DEPENDING ON THE CIRCUMSTANCES. WHAT YOU NORMALLY HAVE IS A VICTIM OUT OF POCKET HAS SO MANY HOSPITAL BILLS THAT GENERALLY HOW WOULD THE STATE PROVE AN AMOUNT OF RESTITUTION IN A SERIOUS BODILY INJURY CASE.



AS A PRACTICAL MATTER ON THE GROUND, HOSPITALS HAVE CERTAIN LIENS, ARE YOU AWARE OF THAT?

YES.

AND HOSPITAL LIENS TAKE PRIORITY OVER IF AN INSURANCE COMPANY PAYS A CLAIMANT AND DOES NOT SATISFY THE HOSPITAL LIEN, THEY HAVE TO PAY AGAIN, ARE YOU AWARE OF THAT?

YES.

SO I DON'T UNDERSTAND WHEN YOU SAY THIS IS ALL WE KIND OF CONSIDER SOME OF IT. WE NEED TO HAVE, I THINK, SOME PARAMETERS OR WE ARE SAYING WE ARE UNRAVELING EVERY SETTLEMENT AND WE ARE GOING TO GO BEHIND IT AND MAKE PAINT, WHETHER IT HAS BEEN RESOLVED OR NOT.

I DON'T THINK YOU ARE UNRAVELING ANYTHING. YOU ARE SIMPLY HOLDING AS ALL OF THE COURTS WHO HAVE LOOKED AT THIS ISSUE HOLD, THAT RESTITUTION IS PART OF THE CRIMINAL PROCEEDING. A VICTIM DOES NOT HAVE ANY POWER TO WAIVE THE STATE'S RIGHTS IN A CRIMINAL PROCEEDING.

LET ME JUST ASK ONE QUESTION F A HOSPITAL LIEN HAS BEEN RESOLVED AND SETTLED AS PART OF THE PAYMENT OF A POLICY LIMIT, HOW MUCH RESTITUTION DOES THAT HOSPITAL RECEIVE THROUGH YOUR CRIMINAL PROCEEDING? DO THEY RECEIVE ANYTHING?

PROBABLY NOT.

OKAY.

LET ME FOLLOW YOU HAVE UP ON THAT -- LET ME FOLLOW-UP ON THAT, WITH A HOSPITAL LIEN, GENERALLY IN MY EXPERIENCE, A HOSPITAL LIEN DOES TAKE PRIORITY, BECAUSE THERE IS EITHER A STATUTE OR AN ORDINANCE WHICH SAYS THAT IT TAKES PRIORITY AND PUTS EVERYBODY ON NOTICE THAT YOU CAN'T SETTLE A CLAIM, WITHOUT SETTLING OUT WITH THE HOSPITAL. NOW, THIS STATUTE DOES NOT DO THAT, THOUGH, DOES IT? THE RESTITUTION STATUTE DOESN'T DO. THAT.

NO.

AND SO THE RESTITUTION STATUTE IS SILENT ON WHETHER THERE IS, WHETHER SOMEBODY, THE VICTIM CAN CONTINUE TO HAVE A RIGHT, EVEN THOUGH THE VICTIM HAS RELEASED ALL RIGHTS AGAINST THE PERSON WHO IS MAKING RESTITUTION. THAT IS THE STATE OF THIS SITUATION, IS IT NOT?

BUT IT IS THE STATE THAT IS SEEKING RESTITUTION. THE STATE WAS NOT A PARTY TO THE SETTLEMENT AGREEMENT. THE STATE CANNOT WAIVE A RIGHT TO SEEK RESTITUTION IN THIS CASE, EVEN THOUGH IT MAY BE THE VICTIM BENEFITTING FROM IT, AS I SAID BEFORE IT IS SOCIETY AS A WHOLE THAT IS BENEFITING FROM THIS.

DO YOU AGREE, IF THE DOCTORS BILLS AND HOSPITAL BILLS WERE COMPROMISED AS RESULT OF THE \$25 SETTLEMENT, THEN THERE WOULD NOT BE THOSE ADDITIONAL BILLS TO PUT ON IN THE RESTITUTION HEARING, CORRECT?

CORRECT.

BECAUSE WE REALLY DON'T KNOW, BECAUSE THIS IS NOT DEVELOPED, BUT THOSE WOULD BE, IN TERMS OF THIS CASE, THAT THE SETTLEMENT AGREEMENT DOES HAVE SOME EFFECT IN TERMS OF

BOTH BEING AN ABSOLUTE SET OFF TO WHATEVER WAS, AND THEN IF THERE ARE COMPROMISES THAT HAVE OCCURRED, WITH MEDICAL BILLS, AND HOSPITAL BILLS, THAT THAT, THEN THEY HAVE BEEN COMPROMISED AND SATISFIED, THEN THAT, THEN THE STATE COULD NOT CLAIM THEM AGAIN.

EXACTLY. THIS IS, THESE ARE ALL MATTERS THAT WOULD HAVE TO BE RESOLVED AT A RESTITUTION HEARING.

SO THAT WE DON'T KNOW, AGAIN, AND I GUESS THIS WOULD HAVE BEEN NICE IF WE HAD HAD A PROFFER AS TO WHAT THE ADDITIONAL BILLS WERE IN THIS CASE, BUT YOU ARE REPRESENTING THAT NOT ALL BILLS WERE SATISFIED OUT OF THIS \$25,000. IS THAT WHAT YOU, YOUR REPRESENTATION TODAY?

YES. YES.

DO YOU HAVE ANY INDICATION THAT HOW MANY, THIS IS UNUSUAL TO ME, TO SEE THE SETTLEMENT PRECRIMINAL SENTENCING, BECAUSE MOST PEOPLE WAIT UNTIL THE CRIMINAL OUTCOME, BECAUSE IF YOU ARE EITHER ADJUDICATED GUILTY OR PLEAD GUILTY, THEN THAT PRETTY MUCH TAKES CARE OF THE LIABILITY PORTION IN THE CIVIL CASES. AND CRIMINAL CASES TYPICALLY RUN A LITTLE FASTER THAN A TRUE CIVIL CASE. AND I WILL ASK YOU TO RESPOND TO THAT, TOO, BUT IS THIS A COMMON OCCURRENCE?

NO. I DON'T THINK IT IS THAT COMMON, AND THAT IS A UNIQUE THING, AND THE ONLY DIFFERENCE IN THIS CASE WAS A MATTER OF TIMING. SIMPLY BECAUSE VICTIM SETTLES OUT FOR A POLICY LIMITS AT THE TIME WHEN HE REALLY NEEDED THE MONEY SHOULDN'T BEAR, ON THE STATE'S RIGHT ON THE IMPOSITION OF RESTITUTION AT A LATER TIME. THE RESTITUTION STATUTE SPECIFICALLY STATES THAT, EVEN IF RESTITUTION IS IMPOSED A VICTIM MAY STILL PURSUE CIVIL REMEDIES, AND A FINING IN A CRIMINAL TRIAL MEANS AN ABSOLUTE -- AND A FINDING IN A CRIMINAL TRIAL MEANS AN ABSOLUTE LIABILITY ON THE DEFENDANT'S PART. IT IS SIMPLY A MATTER OF TIMING AND IT IS SIMPLY A CASE WHERE I DON'T THINK AN INSURANCE COMPANY WOULD BE ABLE TO COME IN AND SAY THERE IS A RESTITUTION ORDER FROM THE TRIAL COURT, SO WE ARE NOT LIABLE FOR THAT. THERE ARE TWO SEPARATE PROCEEDINGS.

THE DEFENDANT GOT AN ENORMOUS BENEFIT FROM A \$25,000 RELEASE, BECAUSE THERE WAS A DRUNK DRIVING CASE. THERE WAS PROBABLY PUNITIVE DAMAGE AND HUNDREDS OF THOUSANDS OF DOLLARS THAT COULD HAVE BEEN SOUGHT AGAINST THE DEFENDANT IN PAIN AND SUFFERING DAMAGES, MENTAL ANGUISH. NONE OF THOSE ARE RECOVERABLE IN A RESTITUTION HEARING, CORRECT?

THAT'S CORRECT.

THIS IS ONLY FOR OUT OF POCKET, SO FOR THE DEFENDANT, THE DEFENDANT, REALLY, IF WE TAKE THE DEFENDANT'S POSITION, WILL BENEFIT DOUBLY. HE STAYS OUT OF JAIL, BECAUSE SUPPOSEDLY HE HAS TO PAY RESTITUTION. HE GETS SAVED AN ENORMOUS JUDGMENT THAT WOULD HAVE BEEN RENDERED AGAINST HIM IN WHAT MUST HAVE BEEN A CLEAR LIABILITY ACCIDENT FOR PAIN AND SUFFERING OF PUNITIVE DAMAGES, AND THEN HE IS SORT OF HOME FREE.

ABSOLUTELY, AND IT CERTAINLY WOULD BEN ANYTIME ANY FUTURE UNDERINSURED DEFENDANTS AS WELL. AND I SEE I AM RUNNING OUT OF TIME HERE, SO I WOULD ASK THIS COURT TO HOLD THAT THE RESTITUTION STATUTE DOES OPERATE INDEPENDENTLY OF ANY CIVIL AGREEMENTS IN THIS CASE, AS THE FIFTH DCA DID, AND APPROVE THAT OPINION. THANK YOU.

CHIEF JUSTICE: THANK YOU. MR. MARSHAL, HOW MUCH TIME LEFT ON REBUTTAL? ABOUT FIVE MINUTES.

THANK YOU. I WOULD BELIEF THE -- I WOULD BELIEVE THE SECOND DISTRICT COURT, WHEN THEY DECIDED VANDOBNIK AND HAVE DONE SO AFTER PROPER CONSIDERATION AND STILL BELIEVE THAT WOULD BE THE PROPER HOLDING IN THIS CASE.

WHAT WAS THE RATIONALE OF THE SECOND DISTRICT?

I BELIEVE THE RATIONALE OF THE SECOND DISTRICT WAS BASED ON CONTRACT LAW. AND I WOULD SUBMIT THAT LIBERTY AT ISSUE HERE IS THE RIGHT TO BE FREE FROM STATE OFFICIALS INTERFERING WITH ONE'S EXISTING CONTRACTUAL RELATIONSHIPS, THE CONTRACT LAWS OF THE UNITED STATES CONSTITUTION, PROHIBITS INFRINGEMENT UPON THE OBLIGATIONS OF EXISTING CONTRACTS.

WAS THE PLEA AGREEMENT OR THE SENTENCE IMPOSEED BEFORE THE SETTLEMENT WAS REACHED?

NO. THE RELEASE AND SETTLEMENT, THE CIVIL RELEASE AND SETTLEMENT WAS SIGNED AND SEALED AND DELIVERED BEFORE THE TRIAL.

SO DID THE DEFENDANT HAVE AN OBLIGATION AT THE SENTENCING HEARING, WHEN THE JUDGE DECIDED TO DOWNWARDLY DEPART BECAUSE OF THE NEED FOR PAYMENT OF RESTITUTION? TO AFFIRMATIVELY ADVISE THE JUDGE THAT THAT WAS NOT EVEN A VALID DEPARTURE REASON, BECAUSE HE HAD ALREADY BEEN RELEASED FROM ANY LIABILITY?

I DON'T KNOW IF HE WAS AWARE OF IT AT THE TIME.

WHAT DO YOU MEAN HE WASN'T AWARE OF IT? THE AGREEMENT WAS ALREADY SIGNED.

AS FAR AS DEFENSE COUNSEL. YES.

IS SO ISN'T THAT SORT OF A MISREPRESENTATION TO THE COURT? I MEAN, SHOULDN'T WE, I MEAN, IF WE ARE GOING TO, AGAIN, DOESN'T IT WORK BOTH WAYS? I DON'T KNOW HOW THE DEFENDANT SHOULD GET THE ADVANTAGE OF A DOWNWARD DEPARTURE THAT SAYS THAT HE HAS, THAT THERE IS A NEED TO PAY RESTITUTION AND STAY OUT OF JAIL AND STILL SAY THAT HE IS A PRIOR RELEASE BARS THE ABILITY TO RECOVER ADDITIONAL OUT-OF-POCKET EXPENSES.

WELL, THAT IS IT. WE DON'T KNOW IF THE JUDGE'S DECISION TO DOWNWARD DEPART WAS BASED ON THE ABILITY TO PAY RESTITUTION OR IF IT WAS BASED ON THE FACT THAT THIS JUDGE KNEW THIS WAS A LOCAL LAW ENFORCEMENT OFFICIAL AND WHAT CUSTOMARILY HAPPENS TO LAW ENFORCEMENT OFFICERS WHEN THEY ARE INCARCERATED.

DO YOU THINK THAT IS ONE OF THE STATUTORY REASONS FOR DOWNWARD DEPARTURE?

NO. IT IS NOT A STATUTORY REASON. BUT I THINK IT MIGHT HAVE ENTERED INTO THE JUDGE'S DECISION.

BUT IF NOT, IF IT WASN'T FOR A VALID REASON, WHICH IS THE NEED FOR, I DIDN'T EVEN KNOW THAT WAS A VALID ROPE, BUT IF IT WAS CHECKED I GUESS IT IS, THE PAYMENT OF RESTITUTION, THEN THAT WOULD, THAT IS THE ONLY VALID REASON THAT WOULD HAVE EXISTED FOR DEPARTURE.

RIGHT. OKAY. BUT, WELL, IN, NOT CONCERNING WHETHER HE WAS INCARCERATED OR NOT BUT AS FAR AS THE RELEASE,, BOTH MR. KIRBY AND MR. BAXLEY ENTERED INTO THE RELEASE.

BUT MR. KIRBY RECEIVED AN ENORMOUS BENEFIT, WOULD YOU AGREE WITH THAT, FROM A, GETTING OFF OF THE CIVIL LIABILITY WITH \$25,000, QH HE -- WHEN HE CAUSED AN ACCIDENT

DRIVING DRUNK, THAT WOULD HAVE RESULTED IN POTENTIAL PUNITIVE DAMAGES AGAINST HIM, AND AN ENORMOUS CIVIL JUDGMENT, FAR BEYOND ANY MEDICAL BILLS.

WELL, I DON'T KNOW THAT HE RECEIVED AN ENORMOUS BENEFIT, IF HE IS GOING TO BE SUBJECT TO AN ADDITIONAL RESTITUTION ORDER BY THE CIRCUIT COURT.

I GUESS IN THE SUBSEQUENT HEARING, WE COULD PUT, YOU KNOW, HAVE AN OPPORTUNITY TO PUT ON HIS CIVIL ATTORNEY AS TO WHY THE SETTLEMENT FOR THE \$25,000 AND THE INSURANCE AS TO WHAT THE VALUE OF THIS CLAIM WAS, TO REALLY FIND OUT, YOU KNOW, WHERE THE EQUITIES ARE IN THIS SITUATION, AND WE HAVEN'T HEARD THAT YET.

NO, WE HAVEN'T, RIGHT.

CAN YOU SPEAK TO THE VICTIM'S COMPENSATION FUND ISSUE AS REPRESENTATIVE OF ONE OF JUDGE NORTHCUTT'S DISSENT? ABOUT THE VICTIM'S COMPENSATION FUND. YOU ARE AWARE THAT, IF THE VICTIM CANNOT BE FOUND OR REFUSES TO ACCEPT PAYMENT OR WHATEVER, THE STATUTE PROVIDES AUTHORITY FOR THE COURT TO REQUIRE RESTITUTION TO BE PAID TO THE VICTIMS COMPENSATION FUND, SO THAT VICTIMS WHO CANNOT GET PAYMENT FROM THEIR INDIVIDUAL DEFENDANTS BECAUSE THEY ARE EITHER INCARCERATED OR UNABLE TO PAY, HAVE A FUND, A TRUST FUND FOR LACK OF A BETTER WORD, IN ORDER TO BE MADE WHOLE. SO IN ANITION TO -- IN ADDITION TO THE, YOU KNOW, THE INDIVIDUAL NEED IN THIS CASE FOR THE VICTIM TO BE MADE WHOLE, THERE IS ALSO RECOGNIZED IN THE STATUTORY SCHEME, A VICTIMS COMPENSATION FUND.

EXACTLY.

HOW DOES YOUR ARGUMENT FIT WITH THAT ADDITIONAL NEED?

WELL, THE, UNFORTUNATELY, I DON'T BELIEVE WHEN MOST OF US HAVE A CLAIM THAT WE ARE EVER MADE WHOLE BY INSURANCE OR RESTITUTION, AND WE CAN ATTEMPT TO MAKE THE VICTIM AS WHOLE AS POSSIBLE, BUT I DON'T EVER THINK WE CAN MAKE THEM COMPLETELY WHOLE, AND JUST AGAIN, THAT I BELIEVE THE STATE WAS NOT A VICTIM. THE STATE WAS NOT A PARTY TO THE RELEASE, AND MR. BAXLEY, MR. KIRBY VOLUNTARILY ENTERED INTO A BINDING CONTRACT, I BELIEVE.

CHIEF JUSTICE: ALL RIGHT. WE HAVE TO LEAVE IT ON THAT NOTE. THANK YOU BOTH VERY MUCH.

THANK YOU.

CHIEF JUSTICE: THE COURT WILL TAKE ITS MORNING RECESS. WE WILL BE IN RECESS UNTIL 10 CHRR 30. -- UNTIL 10:30.

MARSHAL: PLEASE RISE.