

IN THE CIRCUIT COURT OF THE
NINETEENTH JUDICIAL CIRCUIT IN AND FOR
INDIAN RIVER COUNTY, FLORIDA

CASE NO. 312018CF000406A

JUDGE DAN L. VAUGHN

STATE OF FLORIDA,

Plaintiff,

vs.

BRIAN S. BURKEEN,

Defendant.

RESENTENING

This cause came on for Resentencing on February 19, 2021,
before the Honorable Dan L. Vaughn, at the Indian River County
Courthouse, Vero Beach, Florida.

The appearances were as follows:

FOR THE STATE:

M. LEVERING EVANS
Assistant State Attorney
411 2nd Street
Fort Pierce, Florida 34950

FOR THE DEFENDANT:

MICHELLE M. RHODEBACK
Assistant Public Defender
2000 16th Avenue
Suite 235
Vero Beach, Florida 32960

1 RESENTENCING ON FEBRUARY 19, 2021

2 P R O C E E D I N G S

3 THE COURT: State versus Brian S. Burkeen, case 18CF406.
4 Ms. Rhodeback is present. Mr. Evans and Ms. McCarter are here
5 for the State. Good morning, Mr. Evans.

6 MR. EVANS: Good morning, your Honor.

7 THE COURT: Sorry to keep you all waiting. All right.
8 Mr. Burkeen, you can go ahead and have a seat there. Mr.
9 Burkeen is present. You can go ahead and have a seat right,
10 right there behind you, sir. Okay. The Fourth District Court
11 of Appeal had issued an opinion followed by a mandate, which
12 was issued February 5, 2021, remanding the case back to the
13 trial court for a de novo sentencing hearing as there was a
14 scoresheet error that the State conceded error on. Mr. Evans,
15 you all ready to proceed?

16 MR. EVANS: We are, your Honor.

17 THE COURT: Ms. Rhodeback, you all ready to proceed?

18 MS. RHODEBACK: Yes, sir.

19 THE COURT: Okay. Do you have a corrected scoresheet?

20 MR. EVANS: Yes, your Honor. We have a corrected
21 scoresheet showing 56 points, leaving a range of 21 months to
22 30 years. We also have a stipulated restitution order in
23 favor, favor of Indian River County in the amount of \$5,000, a
24 restitution order in favor of Goodyear Tire and Rubber in the
25 amount of \$26,477.45 and a restitution order in favor of

1 Hanover Insurance in the amount of \$287,125.87. And finally,
2 we do have a investigator expense to the State Attorney's
3 office investigation department in the amount of \$517.66.

4 THE COURT: Okay. All right. Ms. Rhodeback, Mr. Evans
5 provided you with a copy of the new scoresheet?

6 MS. RHODEBACK: Yes, your Honor, the 56 points with the
7 lowest permissible of 21 months.

8 THE COURT: Okay. And the issue on appeal was, there was
9 points assessed as, alleging it was a white collar offense and
10 it's not. So you all didn't score those points on this
11 scoresheet.

12 MR. EVANS: It, it is I didn't charge it correctly.
13 That's, that was the error.

14 THE COURT: Okay. All right. Ms. Rhodeback, any other
15 legal reason then why he shouldn't be resentenced?

16 MS. RHODEBACK: No, your Honor.

17 THE COURT: All right. Now, Mr. Evans advised me the
18 restitutions amount that are contained in the restitution
19 orders that were agree upon by the Defense?

20 MS. RHODEBACK: Yes, your Honor. Mr. Burkeen is agreeing
21 to those.

22 THE COURT: Okay. All right. Mr. Evans, anything you
23 want to present first and I'll hear from the Defense?

24 MR. EVANS: Yes, your Honor. We have Jason Brown
25 representing the, the, the county.

1 THE COURT: Okay. Sir, can you raise your right hand,
2 please.

3 (Mr. Brown was sworn by the Court.)

4 MR. BROWN: I do.

5 THE COURT: Okay. Thank you.

6 MR. EVANS: Would you state your name, please.

7 MR. BROWN: Jason Brown.

8 MR. EVANS: How are you employed, Mr. Brown?

9 MR. BROWN: I'm a county administrator for Indian River
10 County.

11 MR. EVANS: For how long?

12 MR. BROWN: For about four and a half years.

13 MR. EVANS: You're familiar with the Burkeen case and
14 you're here on behalf of the people of Indian River County.
15 Do you have some comments you'd like to make to the, to the
16 Court?

17 MR. BROWN: Yes, if I could, please.

18 MR. EVANS: Yes, yes. If you would like to use the
19 podium, feel free.

20 MR. BROWN: Sure. Thank you.

21 MR. EVANS: With the Court's permission.

22 THE COURT: Yes, sir. Wherever you're more comfortable.
23 That's fine.

24 MR. BROWN: All right. Thank you, your Honor, for the
25 opportunity to speak to the, to the impact of Mr. Burkeen's

1 crimes on Indian River County. Mr. Burkeen was employed as
2 the, the assistant fire chief for Indian River County, which
3 is a position of great public trust by necessity. If you'll
4 indulge me by way of background during the --

5 THE COURT: Take your time. Take your time, Mr. Brown.

6 MR. BROWN: Thank you, sir. During the great recession,
7 the County had to cut back significantly. In our fire and
8 rescue department, our revenues were down over thirty percent.
9 In an effort to be able to keep providing front-line services,
10 we had to make sure that we kept all of our front-line fire
11 fighters and paramedics employed, so we cut things like
12 administrative staff. At one time we had four assistant
13 chiefs. We cut down to one assistant fire chief and that was
14 Mr. Burkeen. So a great deal of control and public trust was
15 placed in Mr. Burkeen's hands and he violated that trust.
16 Sir, I want to mention that he was given, he was given extra
17 oversight and responsibility due to, due to the need to, to
18 cut back and he violated that trust and stole nearly \$300,000
19 from county fire rescue and also from the taxpayers and
20 citizens of Indian River County.

21 During these difficult times that we were cutting back
22 for our fire fighters went many years with no raises. We
23 deferred capital replacements, things like fire trucks,
24 ambulances. You may or may not recall there was even an
25 article in the paper with a broken-down ambulance that the

1 county had because we were having some maintenance issues
2 because we had fallen behind on our replacement of those
3 things. Obviously if we had the nearly \$300,000 that,
4 available to us, that could have purchased at least another
5 ambulance.

6 So this had a tremendous moral impact on the fire rescue
7 staff. And while myself and the county attorney were the only
8 two here, this had a significant impact on the nearly 300
9 employees of fire rescue and the nearly 900 county employees
10 overall, 99.9 percent of which are honest, hard-working folks
11 who would never, never think to, to steal money from the
12 taxpayers. And Mr. Burkeen's story, whenever you have a story
13 like this, obviously it makes the news and it can cast a pall
14 over all county employees, all public employees and the public
15 can lose trust in the, and in those public servants who most
16 of which go to work hard every day serving the public. So
17 it's just a significant impact on the county workforce and
18 fire rescue overall during this time.

19 Finally, I want to say that, that Mr. Burkeen stole not
20 from just one entity, fire rescue, of the county, but the
21 residents and tax payers of Indian River County overall. And
22 that is not to, to say that if someone steals from a private
23 entity or one entity, that's, that's some lesser crime or
24 something that shouldn't be dealt with harshly, but I think
25 there's a special, special thing when someone steals from the

1 public, that that should be treated in a way that, that is, is
2 resultant with the, with, with the crime.

3 So I would ask you to impose a strong penalty on Mr.
4 Burkeen that fits the magnitude of the crime that he has
5 committed against the taxpayers and the public. So thank you,
6 sir.

7 THE COURT: Yes, sir. Mr. Evans, do you want to ask
8 anything?

9 MR. EVANS: No, your Honor.

10 THE COURT: Ms. Rhodeback.

11 MS. RHODEBACK: Yes, your Honor, just briefly. Mr.
12 Brown, the county is requesting \$5,000 in restitution; is that
13 correct?

14 MR. BROWN: Yes.

15 MS. RHODEBACK: Just directly for the county. And that
16 was for the insurance's premium or copay or something?

17 MR. BROWN: I believe that was the deductible under our
18 insurance.

19 MS. RHODEBACK: Deductible. I'm sorry. Okay. And then
20 your insurance covered, it looks like Hanover covered
21 \$287,125.87? Is that your understanding?

22 MR. BROWN: I believe so.

23 MS. RHODEBACK: Okay. And do you know if they are
24 requesting restitution?

25 MR. BROWN: I believe they've requested restitution under

1 the, under this, I don't, I don't think the county's received
2 any restitution to my knowledge at this point.

3 MS. RHODEBACK: Okay. Thank you, sir.

4 MR. BROWN: Okay.

5 THE COURT: All right. Thank you, Mr. Brown.

6 MR. BROWN: Thank you, your Honor.

7 THE COURT: You can go ahead and have a seat.

8 MR. EVANS: Your Honor, I would just ask that you take
9 judicial notice of the, the arrest affidavit in this case,
10 which I know you already have and recall the, the hearing that
11 we had on the, on the psychological issues before. And the
12 State has no, no further evidence.

13 THE COURT: Okay. Is there any comment you want to make,
14 Mr. Evans?

15 MR. EVANS: Well, if I could, I'd wait until their
16 evidence --

17 THE COURT: Okay.

18 MR. EVANS: -- so I can --

19 THE COURT: Ms. --

20 MR. EVANS: -- be fair.

21 THE COURT: -- Rhodeback, do you all wish to present any
22 testimony?

23 MS. RHODEBACK: Yes, your Honor. Mr. Burkeen has a
24 letter that he wishes to read to the Court.

25 THE COURT: Yes, sir.

1 MR. BURKEEN: Good morning, your Honor. Let me first
2 start by saying that I understand the severity of the crime of
3 which I've pled to. I understand it's quite severe and I want
4 to say I'm sorry, first of all to my family, the taxpayers of
5 Indian River County, and to my employer and to this courtroom
6 for having to be back here again to readdress this situation.

7 Seven months and three days ago I appeared here in this
8 courtroom before you. I received a sentence of 12 years in
9 prison, 18 years of probation. I've spent 12 days in the
10 county jail following that sentence, then I transferred to the
11 Central Florida Reception Center where I spent 87 days with 56
12 of those in a COVID quarantine, quarantine not wearing a mask,
13 much part of the day in an open dorm area with 57 other
14 inmates. The inmates were sick. Day after day, watching
15 those affected by the virus stay in their bunk for days,
16 sleeping, not feeling well, nothing being done for the rest of
17 us. But when not in the dorm, we were in our cells with a
18 roommate, all the time praying and hoping that our roommate or
19 myself would not catch this virus. I was scared.

20 I had plenty of time to think about what had transpired
21 in the courtroom on July 16th of 2020. I questioned myself,
22 was the crime that bad, was the sentence not enough, was the
23 sentence too much. I had no idea. I was thoroughly confused
24 and angry. I went searching for help to better understand the
25 feelings I had had, psychological advisors, classification

1 officers. They could only explain the quantitative values.
2 I've already done the math in my head a thousand times and
3 more than understood it. I had a anger inside of me that I
4 couldn't understand why.

5 I started occupying my time by reading books, as many
6 books as I could. One day a guy gave, a gentleman gave me his
7 bible to read and I found all my answers. Before I could,
8 before God could forgive me, I had to forgive others. So I
9 did. I forgave everybody in my life. I felt a large burden
10 lifted off of my shoulders and I've been able to move on.

11 After 87 days, I was loaded onto a bus, dropped off and
12 the Florida State Prison in Raiford, Florida. What a humbling
13 experience prison life is. I sit in my bunk in an open dorm,
14 only three feet away from the inmate next to me. Look around
15 the room, 67 others with the same goal, surviving. I see gang
16 members, robbers, child molesters, murderers, drug dealers,
17 those convicted of manslaughter. Many of those inmates with
18 life sentences who don't care about me or what they need to do
19 to survive within that razor wire fences. I've seen the sale
20 and use of any drug of your preference, watching the snorting
21 of cocaine, popping of pills, use of marijuana and smoking of
22 K2 until it left them unconscious, vomiting and having
23 seizures on the bathroom floors. We don't talk about prison
24 rapes. Inmates stabbings are common. Many are not reported.
25 Just three weeks ago a corrections officer in our compound was

1 stabbed for doing his job. I'm in constant fear of walking on
2 the compound, constant fear of walking around the dorm or even
3 sleeping, not knowing what may happen to me, am I the next
4 victim. Always being on the defensive side, trying to stay
5 where the cameras can see you, not that the camera will save
6 your life, but it will record the truth.

7 As I sit in my bunk, I try to make acquaintances with
8 the, with the people next to me. I can't call them friends,
9 as many get moved out as fast as they get moved in. Building
10 a rapport with them so that maybe they can help watch your
11 back. The guy to my left, life sentence for murder. The guy
12 to my right, ten years for armed robbery with felony prior
13 convictions. Across from me, the embezzler of two million
14 dollars serving five years.

15 When my family asks how I'm doing, I respond with I'm
16 okay. Never will I be good. Never will I be great. Never
17 will I be well or fine as long as I'm behind those bars. At
18 58 years old, I'm ashamed to have to give them that answer. I
19 know they worry about me dearly. Some of us in this courtroom
20 today are near my age and this could happen to any, any one of
21 us or our family members in the blink of an eye, just one bad
22 decision. This doesn't make us a bad person, just a poor
23 decision maker.

24 Then I go back to the math of my prison sentence that was
25 given, 12 years of prison with, with 85 percent gain time

1 equates to approximately ten years, four months, releasing me
2 from prison at the age of 67 years old. What did this
3 accomplish? Upon my release, what kind of work does a
4 67-year-old felon do to start repaying restitution? 18 years
5 or probation to pay restitution, coming off of probation at 85
6 years old. How much restitution will actually be paid?

7 The state of Florida prison system, Department of
8 Corrections, is over populated, severely understaffed to the
9 point that one complete dorm housing 150 inmates is closed.
10 Many of the correction officers working 22 to 30 days a month,
11 12-hour shifts. Last year our State Legislators acquired
12 funds to increase the salaries of corrections officers as well
13 as to lower the minimum age of a correction officer to the age
14 of 18 to entice employment.

15 Senate bill 232, it's in the House, it's in the Senate,
16 I'm sorry, as part of the Prison Reform Act. It's backed by
17 Senator Jeff Brandes of St. Petersburg. And I've written to
18 Senator Brandes in order to get a better understanding of the
19 content of the bill. As reported in the capitol update, the
20 bill looks at decreasing prison inmate costs. This can only
21 be done by cutting a few items, taking in the fact that
22 officers' salaries were increased last year. The COVID crisis
23 created a backlog of some 25,000 cases. As the cases are
24 tried, many will be added to the Department of Correction
25 inmate, increasing the prison population once again. Can you

1 cut the food qual-- can you but the food quality in prisons to
2 decrease cost? The answer's no. Can you delete the education
3 and vocational classes to eligible inmates? The answer is no.
4 Please remember that these are not my answers. These are
5 Senator, these are Senator Brandes'. Can the prison
6 population be decreased? Yes. The average inmate costs \$40
7 to \$60 per day to house. Those with medical problems and
8 elderly can cost well over \$100 per day to care for with
9 medical care procedures and medications to play into this.

10 I've reiterated by Senate bill 232 as Rule 3.701(b)(7).
11 Because the capacities of the state and local correctional
12 facilities are finite, the use of incarcerative sanctions
13 should be limited to more serious offenses or those who have
14 longer criminal histories. To ensure such usage of finite
15 resources, sanctions, sanctions used in sentencing convicted
16 felons should be the least restrictive necessary to achieve
17 the purpose of the sentence. So how do you, how do you cut
18 the cost? Senator Brandes states that alternative sanctions
19 to those offenders who committed nonviolent crimes,
20 eliminating prison time for those who are over the age of 55,
21 nonviolent crimes, and the changing of gain time calculations
22 to 65 percent.

23 Your Honor, I'm asking, I'm asking please and I'm begging
24 for an alternative to prison time. House arrest, community
25 service, probation, whatever I may, whatever I may (inaudible)

1 to repay restitution while I'm still able to. As long as I'm
2 behind prison walls, I can't do this.

3 I need to be in a healing proce-- a healing process for
4 my brain that was injured in that auto accident August 2019.
5 Since being in prison, I have four to six migraine headaches
6 per week. Before prison, I was, and being treated, I had one
7 to two per week. This is just a tip of my injuries that are
8 not being addressed. My confusion, thought process and memory
9 continue to decline. If I don't write it down, I'll forget it
10 and then I sill ask where did I write it down and then I
11 question myself how, how do I complete the task. During my
12 first few months, I didn't perform a function correctly on a
13 food cart, resulting in cutting my thumb and requiring six
14 stitches in it.

15 I live in fear daily of dying in prison. With COVID,
16 there is no social distancing as we sleep three feet apart.
17 Noncompliance of mask wearing by inmates and staff. We eat
18 together in close proximity. And inside the medical offices,
19 three of us sit shoulder to shoulder waiting to see the
20 doctors. I could go on with poor sanitizing, poor food
21 qualities and ventilation issues, but these are all the
22 realities of prison that any of us are or our family could be,
23 could be in by making one poor decision.

24 My crime, my crime was nonviolent in nature and I
25 understand that I was sentenced for what was wrong and how I

1 betrayed the trust I had with many people. I have remorse for
2 my actions and like in the previous sentencing, I'm truly
3 sorry for these actions. Not a day goes by that I don't think
4 about it. It's painfully sad.

5 Your Honor, I'm asking you to consider my pleas. There
6 must be an alternative to the years of prison. I'm open to
7 conversation to any remedies. Please consider that I have no
8 prior criminal record. I do require specialized treatment for
9 a mental disorder that's unrelated to substance abuse or
10 addiction or for a physical disability and I'm amenable to
11 those treatments. The need for payment or restitution to the
12 victim outweighs the need for prison assistance, outweighs the
13 need for the prison sentence and a legitimate remorse for my
14 actions. I'm in no way downplaying my actions by bringing to
15 light that the prison, just bringing to light that a prison
16 sentence for me will provide nothing good at the end of it.

17 Let me close with, your Honor, I am not a bad person,
18 just a bad decision maker. Again, I apologize to all the
19 taxpayers of Indian River County. I want to tell my former
20 employer, Indian River County, that I am sorry, so very sorry
21 for betraying their trust in me and finally to say that I am
22 sorry to this Court for having to even address the situation.
23 If I could tuck my tail between my legs any further, I would.
24 In the Bible I found a verse that says, when it's in your
25 power, don't withhold good from the one for whom it belongs.

1 And that's in proverbs chapter 30 verse 27.

2 And I just want to close with saying, your Honor, thank
3 you for your time and I ask that you listen to your heart.

4 THE COURT: Okay. Thank you. Ms. Rhodeback, do you all
5 have any other testimony you wish to present?

6 MS. RHODEBACK: No other testimony, your Honor. He does
7 have family there in the back. They're here for moral
8 support, but they do not want to speak at this time.

9 THE COURT: Okay. That's fine.

10 MS. RHODEBACK: And I do have letters from character
11 witnesses as well as a letter from Dr. Roberta Rose saying
12 that she was treating him back in July for postconcussion
13 syndrome, posttraumatic epilepsy, traumatic brain injury and
14 chronic migraines and then there's also an ambulatory summary
15 just showing some of the dates she treated him as well as a
16 letter from Dr. Weiss who also I guess tested him.

17 THE COURT: Mr. Evans, you've had a chance to look at
18 this?

19 MR. EVANS: Yes, I did read them. I just object to the
20 characterization that this was a treating doctor. This was an
21 IME doctor. This is much different than a treating.

22 THE COURT: Okay.

23 MR. EVANS: And, your Honor, we went through this prior
24 to the last sentencing, as you recall, with this, the
25 psychological and malingering issues before.

1 THE COURT: Okay. All right. I'll take a look at them.

2 MS. RHODEBACK: (Inaudible.)

3 THE COURT: Make them a part of the record. Just give me
4 a minute and I'll read.

5 MS. RHODEBACK: Yes, sir. Thank you.

6 THE COURT: Okay. I'll make these a part of the record
7 here, give them to the clerk.

8 MS. RHODEBACK: Thank you, sir.

9 THE COURT: Ms. Rhodeback, anything you want to say on
10 his behalf?

11 MS. RHODEBACK: Yes, sir. So just to clarify, Dr. Weiss
12 was the independent medical exam related to his Workers' Comp
13 case. Dr. Roberto Rose is board-certified neurologist. She
14 was not part of the Workers' Comp case. She was the treating
15 physician since his release from the hospital after the crash.

16 Okay. And just procedural matters before I get into my
17 sentencing. My office is requesting costs in the amount of
18 \$725 for Shanlis medical review and \$432 for transcripts. And
19 then as far as credit for time served, I'm not sure how your
20 Honor wants to do it. He initially had one day credit. He's
21 been since July 16th, so that would be an additional 219 days
22 but I don't know if that's already considered credit.

23 THE COURT: No, what, what I would do is nunc pro tunc
24 the sentence imposed today for back in, I don't remember, I'll
25 check it, but the July date.

1 MS. RHODEBACK: Okay.

2 THE COURT: Because --

3 MS. RHODEBACK: So --

4 THE COURT: -- he may have --

5 MS. RHODEBACK: -- July 16th.

6 THE COURT: -- he may be entitled to gain time rather
7 than day for day credit, so.

8 MS. RHODEBACK: Yes, sir. Okay. So, so he had one day
9 credit --

10 THE COURT: Yes, ma'am.

11 MS. RHODEBACK: -- before July 16th.

12 THE COURT: Uh-huh.

13 MS. RHODEBACK: Okay. And I do have some case law for
14 the Court.

15 THE COURT: Okay.

16 MS. RHODEBACK: Did you want a copy (inaudible)?

17 MR. EVANS: No.

18 MS. RHODEBACK: May I approach?

19 THE COURT: Yes, ma'am.

20 MS. RHODEBACK: Okay, Judge. Okay. So I'll start, I
21 think I have them in the same order that I have them here. I
22 think that's what I gave to you.

23 THE COURT: Okay.

24 MS. RHODEBACK: So I'll start with Forman (phonetic) v.
25 State. It's a 2020 case out of the Second District. The

1 citation is 2020 W.L. 7062653. So that case is just stating
2 that a resentencing is a de novo proceeding. The Court has
3 discretion to impose a new sentence and is not merely
4 performing a ministerial act. So we do, basically at this
5 point we're starting from scratch.

6 Then I move on to Davis v. State, which is from the
7 Fourth. It's a 2017 case with a citation 219 So.3d 863. So
8 this states that a resentencing proceeding must be the clean
9 slate, meaning that the defendant's vacated sentence becomes a
10 nullity. So resentencing should proceed de novo on all issues
11 bearing on the proper sentence.

12 Then I move on to State v. Jules from the Fourth from
13 2011. The citation is 60 So.3d 1138. This state (sic) is
14 about the need for restitution outweighing the need for a
15 prison sentence. In this case the Court requires competent,
16 substantial evidence that the victim's need for restitution
17 outweighs the need for incarceration. A downward departure
18 sentence maybe justified if the harm suffered by the victim as
19 a result of the offense was greater than normally expected and
20 restitution could mitigate that increased harm. Reversal is
21 warranted, however, where there is no evidence of a pressing
22 need for restitution or that a downward departure is required
23 to ensure that restitution is in fact made. So in that case,
24 the owner of the business whose window was broken did not
25 testify at the restitution hearing and there was no testimony

1 that the owner needed or even requested restitution. So in
2 that case there was also no evidence regarding the amount of
3 loss, only the prosecutor's unsworn, unverified statement. So
4 in that case, downward departure was not warranted and not
5 proper.

6 Moving on to Hardie -- oh gosh. My mask is going in my
7 mouth. Moving on to Hardie v. State. That's a 2015 case out
8 of the Second District. 162 So.3d 297. This case was about a
9 church pastor who took over \$115,000 of church funds and
10 \$26,000 in donations that were supposed to be in the
11 benevolent and the mortgage account of the church. In that
12 case, under 921.002(6) the court may downward depart when the
13 need, again, the need for repayment, outweighs the need for a
14 prison sentence. The defendant must present some evidence of
15 the victim's needs in order to qualify for downward departure.
16 In that case, the church specifically came to the hearing.
17 They said they forgave him and that the community was trying
18 to come up with the funds for the church and that they did not
19 want him to pay any restitution. So in that case, downward
20 departure was improper.

21 Moving on to Walker v. State, 919 So.2d 501. It's a 2005
22 case out of the Third. That case cites Cyrus v. State from
23 the Fourth, which will be my next case. That case says that
24 an insurance company is subrogated to the rights of the victim
25 or insured, making the defendant responsible for restitution

1 to the insurance company. And then the Cyrus v. State case
2 out of the Fourth from 1998 is 712 So.2d 811. So under, under
3 775.089, that, that statute orders the court to make restitu--
4 sorry, make, orders the defendant to make restitution for
5 damages caused by his offense. The insurance company who pays
6 on a claim is subrogated to the rights of the insured to the
7 victim, so they have the legal right to collect that debt.

8 Last but not least is L.S. v. State, a 1992 case out of
9 the Fifth, 593 So.2d 296. So that again states that 779.089
10 requires the court to order restitution. The argument that
11 the insurance company is not entitled to restitution would be
12 meritless. The perpetrator should not escape paying for his
13 action simply because he chose a victim who was insured, so
14 that, they're saying that that would be without logic. So
15 they shouldn't luck out because there's an insurance company.

16 So, Judge, we are requesting a downward departure under
17 921.0026. He does require treatment for his medical issues
18 due, sorry, from, stemming from the accident and from the
19 migraines. So he's requesting downward departure under
20 921.0026(2)(d), that he requires specialized treatment for a
21 mental disorder that's unrelated to substance abuse or
22 addiction or physical disability and that he is amenable to
23 treatment.

24 More importantly, I think what would be a bigger issue in
25 this case is 921.0026(2)(e), the need for repayment of

1 restitution to the victim outweighs the need for a prison
2 sentence.

3 So I will move on from the case law. So, Judge, this,
4 this is clearly a crime of opportunity and greed. He lost a
5 very substantial pension as a result of this. At this point
6 he's only entitled to the return of his accumulated
7 contributions as of the date of his termination. So that is
8 under Florida Statute 121.091, that basically anyone who was
9 found guilty or pleas on a charge where they're basically
10 stealing from, stealing, embezzling from the employer, would
11 forfeit all rights and benefits under this chapter except the
12 return of his or her accumulated contributions as of the date
13 of termination. He did work for the county for 21, sorry, for
14 29 years, so he would be entitled to whatever that
15 contribution is for 29 years, which he would pay back to the
16 county and to Goodyear and to the Hanover Insurance.

17 So, Judge, this case came back obviously for a scoresheet
18 error. We had it scored as a level eight. It should have
19 been a level seven, which now is a 21-month minimum prison
20 sentence. It was remanded because the appellate court could
21 not determine conclusively from the record that the trial
22 court would have imposed the same sentence despite the
23 erroneous scoresheet. So at this point he's entitled to a
24 clean slate and a de novo resentencing. So that basically
25 means that the default is not 12 years in Department of

1 Corrections followed by 18 years of probation. This is a
2 whole new resentencing.

3 At the prior sentencing we, we were all under the
4 impression that this was a grand theft with a white collar
5 aggravator and now we've been corrected, that we're only here
6 on a charge of first degree grand theft. So the fact that he
7 could have been charged with an aggravated white collar crime
8 should not be a consideration for the Court at this time since
9 that's not what's before the Court. The proper sentence to be
10 imposed is the sentence that would make the victim whole,
11 whether that's the victim the county or the victim the
12 insurance company. So just like the case law says that a
13 defendant shouldn't get a pass because the victim is insured,
14 so shouldn't he be punished more harshly because the money
15 would go to an insurance, to an insurance company versus the
16 county. He's now 58 years old. Downward departure would be
17 appropriate for restitution because of work purposes mostly.
18 If he gets out in the somewhat near future, within this year,
19 next year, if he gets out, you know, at 58, 59, 60, he could
20 find work. He could start to pay restitution. But if the
21 Court gives a lengthier sentence, one that would lead to his
22 release closer to when he turned 70, it would be very
23 difficult for him to find a job at 70 as a convicted felon
24 without work experience in over a decade.

25 This is, again, I just ask, remind the Court that this is

1 a nonviolent offense. He is a first-time offender. The
2 offense occurred in his mid to late 50s. So at this time we
3 are asking the Court to downward depart under 921.0026. Thank
4 you.

5 THE COURT: Thank you. Mr. Evans.

6 MR. EVANS: Yes. Thank you, your Honor. Your Honor,
7 this, this was not a momentary lapse of reason type of a
8 crime. Mr., Mr. Burkeen was issued a pickup truck from the
9 fire department, trusted him with that, that pickup truck. He
10 took that pickup truck and almost on a weekly basis went to
11 Goodyear with a trailer owned by the fire department, loaded
12 the pickup truck and the trailer with tires that the charged
13 to the people of, of Indian River County and sold on the
14 internet while he was working for the fire department.

15 He was in a position of trust. We'd ask that you
16 consider his, the ongoing nature of the crime. Again, this
17 wasn't a bar fight where he, he lost control or, as he said,
18 one bad decision, this was dozens if not hundreds of bad
19 decisions. This was a theft from the public that paid him,
20 that trusted him. It's not a crime of poverty. He was the
21 assistant fire chief. He had good money, a huge pension
22 waiting for him. This was pure greed. This, he's not a
23 minor. He's not, you know, someone whose brain hasn't been
24 developed. He's old enough to, he was old enough to know
25 better. He did know better.

1 With regard to his downward departure claims, he made
2 bond almost immediately upon, upon being arrested. And, and
3 we heard that he was working all during that time. The
4 reasonable thing to do when you have overwhelming evidence
5 against you is to start paying or at least create a fund to
6 start paying back the people that he stole from. Not a dime
7 came back, came back to the people. You would think at the
8 sentencing hearing, look, I've made ten grand, twenty grand,
9 here it is. No. We, we don't hear that from him.

10 With regard to his, his medical claims, again, he's made
11 a remarkable recovery from what, what you saw in court today
12 versus what you saw in his claims that he couldn't stand trial
13 because of brain damage in, what was it, 2000-- late 2019.
14 This, I suggest that, that the, you know, and I will not go
15 into a speech about what's wrong with the, with, with the
16 criminal justice system, but the, the, the people of, of
17 Indian River County will do much better paying for his
18 incarceration than the, what we see he's, he is like when he's
19 not incarcerated.

20 We'd ask, we'd, again, I think we ask for, I think the,
21 the county wants the maximum penalty. As you know, the case
22 law is against you if you, if you deviate from your, your
23 prior sentence. We'd ask that you stick with your prior
24 sentence based upon everything you've heard today.

25 THE COURT: Okay.

1 MR. EVANS: Thank you.

2 THE COURT: Thank you. If you all can bear with me, I'll
3 step off real quickly, look at the authority and then I'll
4 come back and pronounce sentence. So if you all can just bear
5 with me, I'll be back shortly. Okay? We'll go off --

6 THE BAILIFF: All rise. Court will be in a brief recess.
7 (Off the record.)

8 (Back on the record.)

9 THE COURT: We're on the record. Mr. Burkeen is present.
10 Mr. Evans and Ms. Rhodeback are present also. Again, thank
11 you all for bearing with me. As far as the additional costs,
12 Ms. Rhodeback, have you spoken to Mr. Burkeen about the \$725
13 cost for the Shanlis exam and the \$432 transcription cost? He
14 has a right of course to have a hearing on those if he wishes.

15 MS. RHODEBACK: He does, your Honor. We have not spoken
16 about that. (Ms. Rhodeback spoke to Mr. Burkeen.) He would
17 agree, your Honor.

18 THE COURT: Okay. And the State was seeking costs in the
19 amount of -- I just had it here.

20 MR. EVANS: It's five seventeen for, for the
21 investigator and then our standard, what is it, a hundred, two
22 hundred? Whatever --

23 THE COURT: Two hundred. That was part of the original
24 plea.

25 MR. EVANS: Yes.

1 THE COURT: The State is seeking \$517.66 in additional
2 costs. Mr. Burkeen as a right to have a hearing on that also
3 if he wishes.

4 MS. RHODEBACK: He would waive that right, your Honor.
5 He agrees.

6 THE COURT: Okay. All right. Thank you. All right.
7 Mr. Burkeen had entered a no contest plea with counsel on
8 March 2nd of 2020. Of course he was out on bond while the
9 case was pending here in court. After his plea was entered,
10 sentencing was postponed several times, as I recall, due to
11 illness of Mrs. (sic) Burkeen's wife, as I recall. But there
12 were some medical reasons and the sentencing was postponed.
13 Sentencing was, original sentencing was conducted on July 16
14 of 2020. Subsequent to the sentencing, an appeal was filed,
15 alleging a criminal punishment code scoresheet error. On
16 appeal, the State, to their credit, conceded error and that
17 the original scoresheet had been improperly calculated. The
18 appellate court remanded the case back to this Court for a de
19 novo resentencing hearing with a corrected scoresheet of
20 course. That mandate by the appellate court was issued
21 February 5th of 2021. Today is February 19, 2021 of course.

22 I recognize, based on the Forman cases and the others,
23 cases presented by the Defense and cited in the Forman case
24 that Mr. Burkeen is entitled to a de novo resentencing hearing
25 with a, starting with a, to use the appellate court's phrase,

1 a clean slate. I've also read the other cases presented by
2 the Defense here at the sentencing hearing.

3 In determining what a proper sentence is, this Court has
4 taken judicial notice of the court file, specifically that is
5 the allegations contained in the affidavit in support of the
6 warrant that was obtained for Mr. Burkeen's arrest. Also the
7 staggering amounts of money stolen from Indian River County
8 and others while Mr. Burkeen was in a position of trust with
9 the county, including the number of instances each incident of
10 the offenses occurred and over a significant period of time.
11 I've considered the information contained in the presentence
12 investigation that was originally presented by the Department
13 of Corrections to the sentencing court back last summer that
14 you all had access to of course. I've also considered the
15 psychological reports and information contained, that's
16 contained in the court file. I've considered the comments of
17 Mr. Brown here this morning on behalf of Indian River County,
18 considered the comments and the letters presented on Mr.
19 Burkeen's behalf and the medical reports detailing his
20 physical and mental condition that'll all be made a part of
21 the court file. Also considered the comments from Mr. Burkeen
22 this morning, from Ms. Rhodeback presented this morning on his
23 behalf and from Mr. Evans presented on behalf of the State. I
24 also recognize Mr. Burkeen has no prior convictions, prior to
25 this case. I've also considered his age, also the time of

1 this offense was committed, which in all candor, did not in
2 any way prevent him from committing this offense. Further, I
3 acknowledge I could depart from the minimum guideline sentence
4 of 21 months that's reflected on the corrected scoresheet if
5 the Court considers that appropriate.

6 One of the tendered reasons presented by the Defense for
7 the Court to consider departing from the minimum guideline
8 sentence is the need for restitution outweighs the need for
9 incarceration and of course that is a reason the Court could
10 use in the appropriate case in departing from the minimum
11 guideline sentence. I note, however, none of the entities
12 involved, either Indian River County, the insurance company,
13 Hanover Insurance, or the Goodyear Tire and Rubber Company are
14 in here seeking restitution in lieu of incarceration. So I've
15 considered that also.

16 I've considered the other grounds presented by the
17 Defense, but I like not to depart from the minimum guideline
18 sentence, although I recognize I have that authority if I
19 consider it appropriate.

20 All right. Mr. Burkeen, I'll adjudicate you guilty of
21 first degree grand theft pursuant to a scheme or course of
22 conduct, once that's done, so you need to be fingerprinted
23 here in open court, please, to your right and then I'll
24 pronounce sentence.

25 All right. He's been fingerprinted in my presence in

1 open court as required by law. Sir, I'll sentence you to
2 serve 12 years in the Department of Corrections, nunc pro tunc
3 this sentence back to July 16th of 2020. After your release,
4 be on 18 years of probation with the Department of Corrections
5 with these conditions. That you make restitution in these
6 amounts, which is agreed upon between the State and the
7 Defense. To Hanover Insurance Company in the amount of
8 \$287,125.87, Goodyear Tire and Rubber Company in the amount of
9 \$26,477.45, the Indian River County Board of County
10 Commissioners in the amount of \$5,000, plus the statutory
11 required court costs, \$50 cost of investigation to the
12 Sheriff's office, \$517.66 cost to the State Attorney's Office,
13 including a \$200 cost of prosecution, \$725 to the Public
14 Defender's Office for Shanlis psychological exam costs and
15 \$432 to the Public Defender's Office for transcription costs
16 in at least equal monthly installments while, after your
17 release.

18 One other comment. In the appellate opinion, the
19 appellate court wrote, moreover, the record does not
20 conclusively show that the same sentence would have been
21 imposed using a correctly computed scoresheet. The Court
22 cited Anderson, 905 So.2d 115, requiring reversal of a
23 sentence. If an appellate court, quote, cannot determine
24 conclusively, conclusively from the record that the trial
25 court would have imposed the same sentence despite the

1 erroneous scoresheet, unquote. If there is any further
2 appellate review of this case and any other scoresheet errors
3 detected by the appellate process or conceded to by the State,
4 this court can announce for the record that I would impose the
5 same sentence notwithstanding any erroneous scoresheet errors
6 that may be detected based on the criteria I've referenced
7 above.

8 Mr. Burkeen, you have 30 days to appeal the judgment and
9 sentence of the Court. If you're unable to afford a lawyer,
10 one will be appointed to represent you. Thank you, sir.
11 That's all.

12 (Proceedings concluded.)

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C E R T I F I C A T E

I, Susan J. Wright, certify that I transcribed the Resentencing on February 19, 2021 in Case No. 312018CF000406A, State of Florida v. Brian S. Burkeen and that the preceding pages, numbered 1 through 31, inclusive, constitute a true and accurate transcription of the proceedings from the electronic recording, to the best of my ability.

I further certify that the dates March 2, 2020, June 24, 2020, July 1, 2020 and July 16, 2020 that were requested in the Designation to Reporter have been previously transcribed and filed in the case.

DONE AND SIGNED this 22nd day of March, 2021.

/s/ Susan J. Wright

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