

IN THE SUPREME COURT OF THE STATE OF NEVADA

TYLER CHASE NIED,

Appellant.

v.

STATE OF NEVADA,

Respondent.

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Elizabeth A. Brown
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Case No. 78147

APPELLANT'S OPENING BRIEF

**APPEAL FROM JUDGMENT OF CONVICTION AND
SENTENCING RESTITUTION AMOUNT**

SECOND JUDICIAL DISTRICT

STATE OF NEVADA

THE HONORABLE BARRY L. BRESLOW, PRESIDING

Thomas E. Vilorio, Esq.
P.O. Box 62
Reno, Nevada 89504
775/284-8888
Attorney for Appellant
Nevada Bar No.: 003833

Appellate Division
Washoe Co. District Attorney
1 South Sierra Street, 7th Floor
Reno, Nevada 89501
775/337-5752
Attorneys for Respondent

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I.
STATEMENT OF THE CASE

A. ROUTING STATEMENT

This appeal is presumptively pushed down to the Court of appeals in accordance with NRAP 17(b)(1), because it is an appeal from a judgment of conviction based on a guilty plea. However, the case raises issues of first impression and principal issues which are of statewide public importance, to wit:

- 1) Is a crime victim entitled to receive restitution in an amount based on the full amount billed by medical providers or the actual allowed amount paid by the victims health care insurer as a result of plan discounts and the amount of allowed medical treatment costs per the health plan?;
- 2) Is a criminal defendant entitled to an off-set from the restitution amount ordered by the trial court to the crime victim for the amount paid by the defendant's insurance company to a crime victim?; and
- 3) Is a crime victim entitled to double recovery?

Accordingly, the case may be retained by the Nevada Supreme Court. NRAP 17(a)(11)(12).

B. STATEMENT OF THE PROCEEDINGS BELOW

On July 20, 2018, the State filed an Amended Information against Tyler Nied alleging Mr. Nied on or about May 13, 2017 did willfully and unlawfully and recklessly drive his White Jeep upon West 4th Street in Washoe County in willful and wanton disregard of the safety of persons and property which act of driving

and neglect of duty proximately caused substantial bodily harm to Alhassan Nefga [Victim 1] and Patrick Holt [Victim 2]. AA: 1-2.

Mr. Nied entered into a guilty plea agreement. As part of the agreement Mr. Nied agreed to make full restitution in the matter as determined by the court. AA: 4.

In preparing its Presentence Investigation Report (PSI) to the court, the division of parole and probation identified three potential victims as it related to restitution: Victim 1[Alhassan Nefga] – Loss 0. AA 14. Victim 2 [Patrick Holt]-Loss victim provided a medical bill summary totaling \$459,147.26 (The defendant’s insurance paid a settlement of \$50,000), Victim 2 also received a settlement of \$25,000 for his UIM claim and \$4,678.33 for the vehicle physical damage from his insurance totaling \$79,678.33 from insurance. AA: 14 and AA: 20. Victim 3 (Victims of Crime) \$5,393.46 for medical hospital and lost wage claims paid out to Victim 1. AA: 14. The division of parole and probation recommended a total restitution amount of \$544,219.05. AA: 14-15.

This amount was allegedly supported in part by Victim 2, Patrick Holt’s Medical Bills Summary attached to the presentence investigation report. AA: 21. Victim 2 also addressed the need for restitution in his Victim Impact Statement attached to the PSI. AA: 19. In this statement, Mr. Holt acknowledged the defendant’s insurance and paid a policy limit of \$50,000 and his own insurance

had paid on the underinsured (UIM) claim an amount of \$25,000 and \$4,678.33 for his vehicle damage. AA: 20. Mr. Holt claimed he suffered lost wages, and the insurance proceeds of \$75,000 [\$50,000 from the defendant's insurance and \$25,000 from his own insurance] were used up to pay medical expenses and the 50% that he had to pay his [civil] attorney to keep liens from being placed against he and his wife. AA: 20. Victim 2, Patrick Holt claimed his medical expenses amounted to just about \$600,000, but conceded he had a great employer and insurance company who stepped up to the plate and took care of most of these expenses. AA: 20.

On January 15, 2019 Mr. Nied filed his Notice of Objection to Restitution Amount in PSI (hereinafter "Notice of Objection"). AA: 25-28. Mr. Nied noted that there was no supporting documentation for the \$5,393.46 requested by Victims of Crime to reimburse expenses for medical, hospital, and lost wage claims related to Victim 1. AA: 26. Mr. Nied also asserted in his Notice of Objection the division of parole and probation was requesting \$538,825.59 for Victim 2 [Patrick Holt] while the Medical Bills Summary totaled \$459,147.26. AA 26. Mr. Nied also asserted in his Notice of Objection Victim 2 asserted lost wages yet there was no documentation relating to the lost wage claim and Victim 2 also asserted in his Victim Impact Statement attached to the PSI his medical bills totaled \$600,000 without any documentation supporting this amount. AA 26.

In his Notice of Objection, Mr. Nied asserted: none of the underlying medical bills were provided; no documentation from Victims of Crime was provided; none of the wage loss documentation was provided; the actual amount of out-of-pocket expenses incurred by the victims and the amount of remaining unpaid medical bills were unknown; and as such the proper restitution amounts are unknown. AA: 27-28.

Mr. Nied asserted he should only be required to make restitution for unpaid medical expenses and lost wages and the victim Patrick Holt should not be awarded restitution for amounts already paid by health insurance. AA: 28. Mr. Nied further asserted that he should receive an offset for the \$50,000 received by Patrick Holt from Mr. Nied's auto policy less any fees and costs. AA: 28. Finally, Mr. Nied asserted the court could not order restitution based on the insufficient impalpable or highly suspect evidence included in and attached to the PSI. AA: 28.

At the sentencing hearing on January 16, 2019, the State marked and admitted Exhibit 1. Page 1 of Exhibit 1 was an email prepared by Victim 2 Patrick Holt's mother, Marie Holt (AA: 32). Page 2 of Exhibit 1 is a document Summary of six (6) pages of medical expenses related to separate hospitalization and resulting treatment which includes headings named: Amounts [billed], Pr. Discount, [Amount] Allowed, [Amount] Not Payable, Deductible, Paid [amounts

paid by health insurance], Copays, and Pt. [Patient] Owes (AA:32). Pages 3-8 of Exhibit 1 is a six (6) page spreadsheet chart which itemized the same medical expenses identified in in the summary medical expenses listed by headings, to wit: Claim #, Claim Date, Provider Name, Discount, Allowed, Not Payable, Deductible, Paid, Copay and PT [Patient] Owes. AA: 34-39.

At sentencing, the State called Marie Holt to testify in support of the restitution amount due Victim 2 [Patrick Holt]. AA: 94. Ms. Holt testified that she was Patrick Holt's mother and had been involved in dealing with the health insurance payments regarding the event and was the person who provided the information to the division of parole and probation when they requested restitution information. AA: 94-95.

Ms. Holt clarified she actually reached out to the health insurance provider and asked them to provide a statement of all of their expenses that began since the date of the accident [May 13, 2017]. AA: 95. All of the actual medical expenses incurred by Patrick Holt are set forth in pages 3-8 of Exhibit 1. APP: 34-39. If each of the columns is totaled in pages 3-8 of Exhibit 1 (APP: 34-39), the addition reveals: the initial Billed amount is \$277,740.43; Pr. Discount is \$51,497.80; Allowed amount is \$90,555.79; Not Payable amount is \$135,917.75; Deductible is \$900; Paid [Amount by Health Insurance] is \$87,241.84; Co-Pay is \$425; and Pt. [Patient] Owes is \$4,727.37.

Ms. Holt indicated she was only provided with a PDF so she went through the statement that was provided and pulled out the dollar amounts that were actually out-of-pocket expenses either through the deductible or those that were co-payments. AA: 55. She also asked the [civil] attorney to provide her with a listing of the expenses in the compilations they had put together from the insurance companies and such so that she could integrate the two values into the spreadsheet. AA: 95-96. The very same expenses reflected pages 3-8 of Exhibit 1 (AA: 34-39) are in the one page Summary prepared by Ms. Holt in page 2 of Exhibit 1. AA: 33 Page 2 of Exhibit 1 (AA: 33) shows Totals- UMR Claims Report for Patrick Holt (2nd Hospitalization-severe depression, Attempted Suicide) and Totals- UMR Claims Report for Patrick Holt (Hospitalization Accident). The amounts in the one page Summary in Page 2 of Exhibit 1 (AA: 33) are broke down by page numbers 1-6 which is a reference to the six (6) pages contained within Pages 3-8 of Exhibit 1. AA: 34-39. However, Ms. Holt made some math errors when putting together her Summary in AA: 33.

A careful examination of the six (6) page itemized spreadsheet of pages 3-8 of Exhibit 1 (AA: 34-39) reveals medical expenses directly caused by the defendant as a result of the May 13, 2017 crime as follows: [Amount of medical expenses] Billed [by medical providers] \$220,985.93; Pr. Discount \$43,597.54; [amount] Allowed[under the health insurance plan] \$51,323.22; Not Payable

[under the plan] \$126,068.18; Deductible \$250; [amount] Paid [by health Mr. Holt's health insurance] \$50,176.34; Copay \$425; and Pt. Owes \$2,521.80. These amounts do not include the unrelated medical expenses for treatment of Patrick Holt as a result of his attempted suicide resulting from depression beginning with the Renown Hospitalization a year after the crime on May 13, 2018 continuing with treatment through September 18, 2018.

Ms. Holt was handed the Presentence Investigation Report and asked to review the page which was attached to the back of the Victim Impact Statement [referencing the Medical Bills Summary, AA: 21]. Ms. Holt testified she was not familiar with the attached page [showing a total of \$459,147.26], but was familiar with the amounts reflected therein which were related to Patrick Holt's first hospitalization and ongoing rehabilitation care he received as a result of the injuries he sustained. AA: 96. She testified in error that the Medical Bills Summary totaling \$459,147.26 which was attached to the presentence investigation report [AA: 21] were reflective of payments made to hospitals, doctors and rehabilitation providers. AA: 96. These amounts were actually the initial amounts billed by medical providers, not the amounts that were actually paid by Mr. Holt's health insurance.

On cross-examination, Ms. Holt clarified the \$459,147.26 reflected the total amount billed by healthcare providers, but did not include Patrick Holt's second

hospitalization that occurred a year later as a result of his depression and attempted suicide. AA: 99. These unrelated medical expenses begin May 13, 2018 and end September 18, 2018 as reflected in pages 3-8 of Exhibit 1. AA: 34-35.

Ms. Holt was then shown the one page summary [which is the Page 2 of Exhibit 1]. AA: 33. AA: 100. She testified the lower totals identified as UMR Claims Report for Patrick Holt (Hospitalization Accident) was for the hospitalization directly attributable to the accident in the billed amount of \$277,503.43. AA: 100. She then explained the Summary (AA: 33) confirming Patrick Holt received a discount because of his plan provider in the amount of \$51,494.80 and of the billed amount \$135,717.85 was written down and disallowed because of the negotiated insurance pay rates, leaving an allowed billed amount of \$90,555.83. AA: 101.

The deductible arising out of the accident was \$250 and for the unrelated second hospitalization due to depression and a suicide attempt was \$650. AA: 101-102.

Ms. Holt testified the \$50,076.29 was the amount paid by the insurance of the \$51,000 allowed [exact amount was \$51,323.26] leaving a co-pay of \$425 plus Mr. Holts remaining portion of \$2,521.80. AA: 102. Ms. Holt then testified that the amount of [Patrick Holt's] out of pocket expenses for treatment related to the accident was \$425 co-pay and his balance due of \$2,521.80. AA:

Page 2 of Exhibit 1 (AA: 33) shows the medical billing for the first hospitalization directly related to the May 13, 2017 crime in the amount of \$51,323.26. Mr. Holt's health insurance paid \$50,076.29. His deductible was \$250, his co-pay was \$425 and he owed a balance of \$2,521.80. Ms. Holt testified that while she was not familiar with the Medical Bills Summary (AA: 21) which was attached to the PSI, she believed the \$459,147.26 reflected in the Medical Bills Summary (AA: 21) was the total amount billed for the treatment related to Patrick Holts accident related injuries he suffered. AA: 21; AA: 96; and AA: 99.

Ms. Holt testified that Patrick Holt was hospitalized [a second time] a year after the accident on May 13, 2018 for an attempted suicide resulting from depression. AA: 102. She then explained the second hospitalization expenses in the Page 2 of Exhibit 1 [AA: 33]: stating the amount billed was \$56,517.50; the discount was \$7,926; the allowed bill amount was \$39,232.47; the amount not payable was \$9,649.67; Mr. Holt's deductible was \$650; the amount paid by insurance was \$37,166.50; the amount Mr. Holt owed was the non-reimbursed amount of \$2,206.07 plus the deducible of \$650. AA: 102-103.

Ms. Holt then testified in explaining page 2 of Exhibit 1(AA: 33) that the total amounts included the secondary hospitalization for the suicide and depression for the total out of pocket expense of \$4,727.87 with a co-pay \$425 and she added back in to her calculations the civil PI [Personal Injury] lawyer fee of one third in

the amount of \$24,999.75 for a total out of pocket expense for Patrick Holt of \$30,152. AA: 103-104.

Ms. Holt testified that Mr. Holt's employer continued to pay him during the incident when he was unable to work and that is why she did not note any wage loss. AA: 105.

A careful examination of the six (6) page spreadsheet AA: 34-39 reveals the following medical expenses directly caused by the defendant as a result of the May 13, 2017 crime: Amount billed \$220,985.93; Pr. Discount \$43,597.54; Allowed amount \$51,323.22; Not Payable \$126,068.18; Deductible \$250; Paid [by health insurance] \$50,176.34; Copay \$425; and Pt. Owes \$2,521.80. Thus, the most Mr. Nied could have been ordered to pay in restitution to Mr. Holt is the accurate and reliable amount actually billed by medical providers to Mr. Holt's health insurance in the sum of \$51,323.22 which directly relates to the May 13, 2017 crime, less the amount paid by his health insurance of \$50,176.34 which equals \$1,146.88, plus his deductible of \$250, his Co-pay of \$425 and his Pt. Owes of \$2,512.80 for a total proper restitution Order in amount of \$4,343.68 to be paid to Patrick Holt.

The Judgment of Conviction does not identify restitution should be paid to Patrick Holt (Victim 2). However, a review of the sentencing transcript makes it clear the trial court ordered this amount of restitution for the benefit of

Patrick Holt. See AA: 126. None of the underlying medical bills were provided. Instead, the trial court relied upon Presentence Investigation Report (PSI), the testimony of Maria Holt, the summary spreadsheet, the summary attached to the PSI and Exhibit 1 at the Sentencing Hearing in ordering restitution in the amount of \$463,825.59 for the benefit of Patrick Holt (Victim 2). AA: 126.

There is no rational basis for the trial court's restitution award of \$463,825.59 and the same can only be based upon impalpable and highly suspect evidence somehow considered by the trial court. The trial court stated in reaching this amount that a mathematical certainty is not required and the court did not need every receipt, or bill, but on the other hand remarked it's clear the restitution amount has to be accurate and cannot be based on highly unreliable or unpalpable (sic) [impalpable] evidence. AA: 126.

The Judgment of Conviction was filed January 17, 2019 ordering Mr. Nied to pay restitution in the amount of \$463,825.59.

II. STATEMENT OF FACTS

All pertinent facts are contained within the Statement of the Case in the section B.
STATEMENT OF THE PROCEEDINGS BELOW.

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III. STATEMENT OF ISSUES

A. The trial court abused its discretion by ordering restitution in the amount of \$463,825.59 without establishing an accurate and sufficient basis for the restitution amount?

B. The trial court abused its discretion by ordering restitution in the amount of \$463,825.59 when the record fails to demonstrate if such amount was based upon the initial amounts billed by medical providers to Mr. Holt's insurance, not what was actually paid by his health insurance and included unrelated medical expenses which is palpable or highly suspect evidence resulting in prejudice to Mr. Nied?

C. The trial court abused its discretion by failing to offset from the restitution amount ordered the amount of \$50,000 previously paid by the Defendant's insurance to the victim to the extent the payment covered the same losses in the restitution order?

IV. ARGUMENT

A. STANDARD OF REVIEW

Restitution under NRS 176.033(1)(c) is a sentencing determination. *Martinez v. State*, 115 Nev. 9, 12 974 P.2d 133, 135 (1999). Appellate review of a sentencing decision is for abuse of discretion. *Chavez v. State*, 125 Nev. 328, 348, 213 P.3d 476, 490 (2009). So long as the record does not demonstrate prejudice

resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence, this court will refrain from interfering with the sentence imposed. *Lloyd v. State*, 94 Nev. 167, 576 P.2d 740 (1978); *Silks v. State*, 92 Nev. 91, 545 P.2d 1159 (1976). Sentencing courts are cautioned to rely on reliable and accurate evidence in setting restitution. *Martinez v. State*, 115 Nev. 9, 12 974 P.2d 133, 135 (1999). A defendant's presentence investigation report must not include information based on impalpable or highly suspect evidence; but the court will not interfere with the District Court's sentence if the defendant was not prejudiced by the consideration (or lack thereof) of the impalpable or highly suspect evidence. *Sasser v. State*, 130 Nev. 387, 392, 324 P.3d 1221, 1224 (2014) (other citations therein omitted).

B. THE TRIAL COURT ABUSED ITS DISCRETION BY ORDERING RESTITUTION IN THE AMOUNT OF \$463,825.59 WITHOUT ESTABLISHING A SUFFICIENT BASIS FOR THE RESTITUTION AMOUNT AND BY FAILING TO RELY ON RELIABLE AND ACCURATE INFORMATION IN SETTING RESTITUTION.

NRS 176.033 (1) provides in part:

1. If a sentence of imprisonment is required or permitted by statute, the court shall:

....

(c) If restitution is appropriate, set an amount of restitution for each victim of the offense....

The purpose of restitution in the context of a criminal case is to compensate the victim for costs arising from a defendant's criminal act. *Martinez v. State*, 120 Nev. 200, 202-203, 88 P.3d. 825, 827 (2004). A defendant may be ordered to pay restitution only for an offense that he has admitted, upon which he has been found guilty, or upon which he has agreed to pay restitution. *Erickson v. State*, 107 Nev. 864, 866, 821 P.2d 1042, 1043 (1991). A victim's medical costs for the treatment of their **injuries directly resulting from the crime** are the proper subject of restitution. *Norwood v. State*, 112 Nev. 438, 441, 915 P.2d 277, 279 (1996) (Emphasis added). Crime victims' unpaid medical bills are debts of those victims. *Id.*, 112 Nev. at 441, 915 P.2d at 279.

However, medical care providers who treat crime victims are not victims of crime as defined in NRS 176.015. *Martinez v. State*, 115 Nev. 9, 11, 974 P.2d 133, 134 (1999). Similarly, when an insurance company pays for the victim's medical expenses, the insurance company is not a victim as defined in NRS 176.015(5)(b) and a sentencing court may not order a defendant to pay restitution to an insurance company for the company's payment of a claim by or on behalf of a crime victim. *Martinez*, 115 Nev. at 11-12, 974 P.2d at 134-35, citing to *Hewitt v. State*, 113 Nev. 387, 390, 936 P.2d 330, 332 (1997).

This Court has stated, “[s]entencing courts are cautioned to rely on reliable and accurate evidence in setting restitution. *Martinez*, 115 Nev. at 13, 974 P.2d at 135. A defendant’s obligation to pay restitution to a victim may not be reduced because a victim is reimbursed by the [victim’s] insurance company. *Id.*, 115 Nev. at 12, 974 P.2d at 134-35 (victim’s added, see Footnote 5 of *Martinez*). However, consistent with *Norwood* when an insurance company has already paid the medical bills and the victim is not awaiting reimbursement, the victim is not entitled to a double recovery, but only the amount of unpaid medical debts or actual out of pocket expenses. Under the double recovery doctrine, there can be only one recovery of damages for one wrong or injury. *Elyousef v. O’Reilly & Ferrario, LLC*, 126 Nev. 441, 443, 245 P.3d 547, 549 (2010); see also *Major v. State*, 130 Nev. 657, 333 P.3d 235 (2014) (allowing a District Court in a criminal case to order restitution to social services to the extent that the district court’s order did not overlap with the existing [child] support obligation imposed by the family court).

A defendant is not entitled to a full evidentiary hearing at sentencing regarding restitution, but he is entitled to challenge restitution sought by the State and may obtain and present evidence to support that challenge.” *Martinez*, 115 Nev. at 13, 974 P.2d at 135. Furthermore, the restitution amount must not be based upon the consideration of information or accusations founded on facts supported

by impalpable or highly suspect evidence. Accord, *Lloyd v. State*, 94 Nev. 167, 576 P.2d 740 (1978); *Silks v. State*, 545 P.2d 1159, 1161 (1976).

In the present case, the trial court's order of restitution in the amount of \$463,825.59 is not based on reliable and accurate information. The record demonstrates there is no basis for the amount ordered. The Judgment of Conviction does not identify restitution should be paid to Patrick Holt (Victim 2). However, a review of the sentencing transcript makes it clear the trial court ordered this amount of restitution for the benefit of Patrick Holt. See AA: 126. None of the underlying medical bills were provided. Instead, the trial court relied upon Presentence Investigation Report (PSI), the testimony of Maria Holt, the summary spreadsheet, the summary attached to the PSI and Exhibit 1 at the Sentencing Hearing in ordering restitution in the amount of \$463,825.59 for the benefit of Patrick Holt (Victim 2). AA: 126.

The division of parole and probation in the Presentence Investigation Report asserted Victim 2 [Patrick Holt] suffered a loss of \$538,825.59 relying in part upon the medical bills summary totaling \$459,147.26 in the Victim Impact Statement both of which were attached to the report. AA: 14; AA: 19- 21. Mr. Holt alleged in his Victim Impact Statement that his medical bills were just about \$600,000 for the first hospitalization. AA: 20. This assertion is not supported by the Summary of medical expenses in page 2 of Exhibit 1 (AA: 33) or the testimony of Maria

Holt (AA: 99-105) and conflicts with the Medical Bills Summary (AA: 21) which was attached to the PSI showing a total of \$459,147.26.

Page 2 of Exhibit 1 (AA: 33) shows the amount billed by medical providers directly related to the May 13, 2017 crime in the amount of \$51,323.26. Mr. Holt's health insurance paid \$50,076.29. His deductible was \$250, his co-pay was \$425 and he owed a balance of \$2,521.80. Ms. Holt testified in error that while she was not familiar with the Medical Bills Summary (AA: 21) which was attached to the PSI, she believed the \$459,147.26 reflected in the Medical Bills Summary (AA: 21) was the total amount billed for the treatment related to Patrick Holts accident related injuries he suffered. AA: 21; AA: 96; and AA: 99.

Ms. Holt clarified the actual allowed amount billed to Mr. Holt's health insurance company after his health insurance plan discount and deducting the billed portion that was not allowed under his health plan was \$90,555.83. See AA: 100-101. However, this amount includes both the treatment costs directly related to the May 13, 2017 accident caused by the defendant and the unrelated medical costs incurred a year after the crime related to Mr. Holt's depression and suicide on May 13, 2018.

An examination of Page 2 of Exhibit 1 (AA: 033) reveals the amount billed for the May 13, 2017 accident related treatment as a result of Mr. Nied's criminal conduct was only \$51,323.26. The additional \$39,232.57 billed by medical

providers to Mr. Holt's health insurance is related to Mr. Holt's unrelated second hospitalization as a result of his depression and suicide attempt on May 13, 2018

Moreover, a careful examination of the six (6) page spreadsheet contained in Pages 3-8 of Exhibit 1 (AA: 34-39) reveals the actual information relating to the medical expenses directly caused by the defendant as a result of the May 13, 2017 crime if the math is added correctly: Amount [billed] \$220,985.93; Pr. Discount \$43,597.54; Allowed [amount under the health plan] \$51,323.22; Not Payable [under the health plan] \$126,068.18; Deductible \$250; Paid [by Mr. Holt's health insurance] \$50,176.34; Copay \$425; and Pt. [Patient] Owes \$2,521.80. These amounts do not include the unrelated medical expenses for treatment for Patrick Holt as a result of his attempted suicide resulting from depression beginning with the Renown Hospitalization on May 13, 2018 and treatment continuing through September 18, 2018.

Thus, the most Mr. Nied should have been ordered to pay in restitution to Mr. Holt is the actual amount billed by medical providers to Mr. Holt's health insurance company of \$51,323.22, less the amount paid by his health insurance of \$50,176.34 which equals \$1,146.88 plus his deductible of \$250, his Co-pay of \$425 and his Pt. Owes of \$2,512.80 for a total restitution amount of \$4,343.68.

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C. THE TRIAL COURT ABUSED ITS DISCRETION BY ORDERING RESTITUTION IN THE AMOUNT OF \$463,825.59 WHEN THE RECORD FAILS TO DEMONSTRATE IF SUCH AMOUNT WAS BASED ON THE AMOUNT MEDICAL PROVIDERS BILLED MR. HOLT'S HEALTH INSURANCE, NOT THE AMOUNT ACTUALLY PAID AND INCLUDED UNRELATED MEDICAL EXPENSES WHICH IS IMPALABLE OR HIGHLY SUSPECT EVIDENCE

The purpose of restitution in the context of a criminal case is to compensate the victim for costs arising from a defendant's criminal act. *Martinez v. State*, 120 Nev. 200, 202-203, 88 P.3d. 825, 827 (2004). A defendant may be ordered to pay restitution only for an offense that he has admitted, upon which he has been found guilty, or upon which he has agreed to pay restitution. *Erickson v. State*, 107 Nev. 864, 866, 821 P.2d 1042, 1043 (1991). A victim's medical costs for the treatment of their injuries directly resulting from the crime are the proper subject of restitution. *Norwood v. State*, 112 Nev. 438, 441, 915 P.2d 277, 279 (1996) (Emphasis added). Crime victims' unpaid medical bills are debts of those victims. *Id.*, 112 Nev. at 441, 915 P.2d at 279.

However, medical care providers who treat crime victims are not victims of crime as defined in NRS 176.015. *Martinez v. State*, 115 Nev. 9, 11, 974 P.2d 133, 134 (1999). Similarly, when an insurance company pays for the victim's medical expenses, the insurance company is not a victim as defined in NRS 176.015(5)(b) and a sentencing court may not order a defendant to pay restitution to an insurance

company for the company's payment of a claim by or on behalf of a crime victim. *Martinez*, 115 Nev. at 11-12, 974 P.2d at 134-35, citing to *Hewitt v. State*, 113 Nev. 387, 390, 936 P.2d 330, 332 (1997). The restitution amount must not be based upon the consideration of information or accusations founded on facts supported by impalpable or highly suspect evidence. Accord, *Lloyd v. State*, 94 Nev. 167, 576 P.2d 740 (1978); *Silks v. State*, 545 P.2d 1159, 1161 (1976).

There is no rational basis for the trial court's restitution award of \$463,825.59 and the same can only be based upon impalpable and highly suspect evidence somehow considered by the trial court. The trial court stated in reaching this amount that a mathematical certainty is not required and the court did not need every receipt, or bill, but on the other hand remarked it's clear the restitution amount has to be accurate and cannot be based on highly unreliable or unpalpable (sic) [impalpable] evidence. AA: 126.

The trial court then pronounced judgment stating based upon the information in the Presentence Investigation Report (PSI), the testimony of Maria Holt, the summary embedded in the PSI and Exhibit 1 ordered restitution to Patrick Holt (Victim 2) in the amount of \$463,825.59. AA: 126.

The PSI indicated Mr. Holt's restitution amount was \$538,825.97. AA: 14. There is absolutely nothing in the record to support this amount. Patrick Holt in his Victim Impact Statement attached to the PSI claimed he lost income. AA: 20.

However, his mother testified that his employer continued to pay him while he was unable to work and that is why there was no wage loss. AA: 105. Mr. Holt also claimed his medical expenses were about \$600,000. AA: 20. This assertion is not accurate when one considers the total amount billed to Mr. Holt's health insurance for the May 13, 2017 accident directly caused by the defendant is only \$51,323.26. Even if one adds in the medical expenses billed to Mr. Holt's health insurance for the unrelated May 13, 2018 suicide attempt in the amount of \$39,232.57, the total medical expenses billed to Mr. Holt's health insurance is only \$90,555.83.

The very same expenses reflected in Pages 3-8 of Exhibit 1 (AA: 34-39) are in the one page Summary prepared by Ms. Holt in page 2 of Exhibit 1. AA: 33. The one page Summary in AA: 33 references Pages 1-6 of AA: 34-39 of Exhibit 1. The one page summary shows Totals- UMR Claims Report for Patrick Holt (2nd Hospitalization-severe depression, Attempted Suicide) and Totals- UMR Claims Report for Patrick Holt (Hospitalization Accident) and lists the total by each page of the six (6) pages of Exhibit 1. AA: 33. However, Ms. Holt made some math errors when putting together her Summary in AA: 33.

A careful examination of the six (6) page spreadsheet AA: 34-39 reveals the following medical expenses directly caused by the defendant as a result of the May 13, 2017 crime: Amount [billed by medical providers] \$220,985.93; Pr. Discount \$43,597.54; Allowed [amount under the health plan] \$51,323.22; Not Payable

[under the plan] \$126,068.18; Deductible \$250; Paid [by Mr. Holt's health insurance] \$50,176.34; Copay \$425; and Pt. [Patient] Owes \$2,521.80.

Thus, the most Mr. Nied should have been ordered to pay in restitution to Mr. Holt is the actual amount billed by medical providers to his health insurance in the sum of \$51,323.22, less the amount paid by his health insurance of \$50,176.34 which equals \$1,146.88, plus his deductible of \$250, his Co-pay of \$425 and his Pt. [Patient] Owes of \$2,512.80 for a total proper restitution Order in the amount of \$4,343.68.

It is unknown if the trial court used the amounts initially billed by the medical providers to Mr. Holt's health insurance, instead of the amount that was actually paid in awarding \$463,825.59. It is unknown if the trial court included some lost wage amount even though Mr. Holt did not suffer any wage loss. It is unknown if the trial court awarded the medical expenses billed as reflected in Medical Bills Summary attached to the PSI (APP: 21) in the amount of \$459,147.26 and awarded the very same medical expenses reflected in Exhibit 1 resulting in a double recovery of improper amounts. In addition, it is unknown if the trial court included the unrelated hospitalization a year after the crime on May 13, 2018 and the resulting treatment.

The trial court based the restitution order upon the information in the Presentence Investigation Report (PSI), the testimony of Maria Holt, the summary

embedded in the PSI and Exhibit 1 ordered restitution to Patrick Holt (Victim 2) in the amount of \$463,825.59. AA: 126. This information as relied upon by the trial court was impalpable and highly suspect given an examination of the record only supports a restitution award of \$4,343.68. Because the trial court failed to make a record of how it determined restitution of \$463,825.59 the Judgment of Conviction should be reversed and the matter should be remanded to a different trial Judge to determine Mr. Nied's restitution obligation.

D. THE TRIAL COURT ABUSED ITS DISCRETION BY ORDERING RESTITUTION AND FAILING TO OFFSET THE \$50,000 PREVIOUSLY PAID BY THE DEFENDANT'S INSURANCE COMPANY TO PATRICK HOLT TO THE EXTENT THE PRIOR PAYMENT WAS FOR ITEMS INCLUDED IN THE RESTITUTION ORDER.

Settlement payments made to crime victim by the defendant's insurance carrier require an offset to the defendant's restitution obligation to the extent the settlement payments were for items of loss included in the restitution order. *People v. Bernal*, 101 Cal. App. 4th 155, 165-169, 123 Cal. Rptr. 2d 622, 629-632 (2002).

Mr. Nied should have received the benefit of an offset for the \$50,000 paid by his insurance company, Progressive Insurance to Patrick Holt. The trial court was required to determine how much of the \$50,000 paid to Mr. Holt was for the same items of loss included in the restitution order. If the offset amount is applied

less the 33.333 percent paid by Mr. Holt to his civil attorneys for attorney's fees in the amount of \$16,650.00, then the remaining amount of \$33,350 should have been treated as an offset if it included the same items of loss. Otherwise, the victim was awarded a double recovery.

If the items of loss to wit: medical expenses are the same, then the trial court should not have ordered Mr. Nied pay any restitution to Mr. Holt. The amount of medical bills actually billed by medical treatment providers to Mr. Holt's health insurance for the May 13, 2017 crime is \$51,323.26, less the off-set amount of \$33,350, plus the deductible of \$250 and the co-pay of \$425, plus the amount Mr. Holt owed of \$2,521.80, plus the amount paid by Mr. Holt's health insurance of \$50,174.34 results in Mr. Holt netting \$28,829.94 as a result of \$50,000 Progressive Insurance Payment. See AA: 33-39.

As such, the trial court should have ordered Mr. Nied pay restitution to Mr. Holt in the amount of \$21,170.06. (Amount of Medical Bills billed in the amount of \$51,323.26 less the off-set amount of \$33,350 plus the deductible of \$250 and the co-pay of \$425, plus the amount Mr. Holt owed of \$2521.80). See AA: 33. If this court does not permit the off-set then, restitution should have been ordered by the trial court in the amount of \$54,520.06 (\$21,170.06 plus the off-set amount of \$33,350).

Because the trial court failed to address the \$50,000 payment, the judgment ordering restitution of \$463,825.59 should be set aside and the cause remanded to a different trial Judge to determine Mr. Nied's remaining restitution obligation.

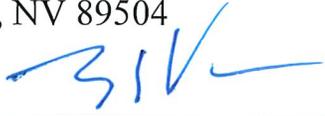
**V.
CONCLUSION**

Although the plea agreement required Mr. Nied to make full restitution, the trial court abused its discretion by: 1) failing to establish a sufficient basis for the restitution; 2) failing to rely on reliable and accurate evidence in setting restitution; 3) failing to make findings on how the trial court determined a restitution amount of \$463,825.59; 4) relying upon the PSI, the attachments thereto and Exhibit 1 which included impalpable and highly suspect evidence; and 5) failing to make any findings relating to the \$50,000 payment made by Mr. Nied's insurance company and whether this amount was offset. Accordingly, the judgment ordering restitution must be set aside and the cause remanded before a new trial Judge for a sentencing hearing to determine the proper amount of restitution.

DATED this 17th day of June, 2019.

Respectfully submitted,

Thomas E. Viloría, Esq.
P.O. Box 62
Reno, NV 89504

By: 
THOMAS E. VILORIA

ATTORNEY'S CERTIFICATE OF COMPLIANCE

I, THOMAS E. VILORIA, hereby certify as follows, pursuant to NRAP 28(e), and NRAP 32(a)(8):

I have read the Appellant's Opening Brief before signing it; to the best of my knowledge, information and belief, the Brief is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

The Brief complies with all applicable Nevada Rules of Appellate Procedure, including the requirements of NRAP 28(e), in that every factual assertion in the brief regarding matters in the record is supported by appropriate references to the record on appeal.

Further, I certify that the document complies with the formatting requirements of Rule 32(a)(4)-(6). Specifically, the brief is 2.0-spaced; it uses a mono-spaced type face which is Times New Roman 14-point; it is in a plain style; and all the margins on all four sides are at least one (1) inch.

The Brief also meets the applicable page limitation of Rule 32(a)(7), because it contains less than 14,000 words, to wit: 6,169 words.

DATED this 17th day of June, 2019.



Thomas E. Vioria, Esq., #003833

CERTIFICATE OF MAILING

The undersigned certifies that they are an employee of Thomas E. Vilorio, Esq., and that on the 17th day of June 2019, they served a true and correct copy of the foregoing document upon opposing counsel, as set forth below, by way of the court's E-flex filing system and U.S. mail:

Appellate Division
WASHOE COUNTY DISTRICT ATTORNEY'S OFFICE
1 South Sierra Street, 7th Floor
Reno, NV 89501
Attorney for Respondent

By: 
Katelyn Wolf, Legal Assistant