DISSENT BY ACOBA, J., IN WHICH DUFFY, J., JOINS

With all due respect, although the Intermediate Court of Appeals (ICA) reached the correct conclusion with respect to the appeal of Petitioner/Defendant-Appellant Afa Tuialii (Petitioner), its analysis of the issues presented and discussion of relevant law, if left standing, would call into question the proper test our courts must apply with respect to plea colloquies. Whether a colloquy is required turns on whether a consequence of the plea is direct or collateral. See Foo v. State, 106 Hawai‘i 102, 102 P.3d 346 (2004); State v. Nguyen, 81 Hawai‘i 279, 916 P.2d 689 (1996). The ICA opinion does not mention Foo and Nguyen, which are the controlling precedents in this jurisdiction on direct and collateral consequences and which were raised by the parties. The application of these cases bear directly on whether court ordered restitution is a direct consequence of a plea agreement, thereby requiring judges to address a defendant in open court of the possibility of a restitution order; or whether it is a collateral consequence of a no contest plea, containing no such requirement. The ICA opinion refers to the terms “direct consequence” and “collateral consequence” only in a footnote. Similarly, the only relevant Hawai‘i case the ICA did discuss, State v. Gaylord, 78 Hawai‘i 127, 890 P.2d 1167 (1995), is addressed in the same footnote. Gaylord is only noted in relation to cases from foreign jurisdictions that are unnecessary to the disposition of this

case. Such treatment of relevant Hawai‘i case law should be sufficient to warrant accepting certiorari.

Furthermore, with all due respect, the ICA opinion is ambiguous as to the basis for its holding. The opinion concludes that a statement of the maximum prison sentence and fine that could be imposed on Petitioner satisfies the colloquy requirement without discussing why. Before concluding that the court was not required to address Petitioner in open court as to the possibility of a restitution order, the ICA opinion refers to the fact that Petitioner had read and discussed with his attorney the written no-contest-plea form containing a reference to a possible court order of restitution. That this fact preceded the conclusion would lead one to believe that the ICA's holding rests, at least in part, on the fact that a defendant's reading and execution of a plea form in consultation with an attorney is sufficient to satisfy the Hawai‘i Rules of Penal Procedure (HRPP) Rule 11(c) requirement that judges address defendants in open court as to the maximum possible punishment that may result from their plea. Such a holding, however, directly conflicts with this court's holding in State v. Sorino, 108 Hawai‘i 162, 166, 118 P.3d 645, 649 (2005). See discussion infra. Finally, the ICA's decision on the issue of whether a restitution order is illegal when it requires a defendant to recompense a victim for amounts indemnified by insurance relies heavily on cases from foreign jurisdictions and failed to consider relevant Hawai‘i

case law, Bynum v. Magno, 106 Hawai‘i 81, 101 P.3d 1149 (2004), even though it was raised by one of the parties.

Hence, I respectfully dissent to the rejection of the Application for Writ of Certiorari by Petitioner inasmuch as this court should clarify the ICA's decision.[1] An examination of the facts and relevant case law is set forth below with respect to clarification of the ICA opinion.

I.

The essential matters following, some verbatim, are from the record and the submissions of the parties.

A.

Petitioner started working for Principle Hotels, LLC (PH) in October of 2005 as a payroll/accounts payable clerk. His employment was transferred to Principle Hotels and Resorts, LLC (PH&R) in November of 2006. According to Petitioner's supervisor, Wayne Tome (Tome), Tome discovered irregularities in the payroll reports in February of 2007; specifically, Tome found Petitioner's name on PH's payroll, even though Petitioner should only have been on the payroll of PH&R. Tome's follow-up investigation revealed other transfers into an account in Petitioner's name at the Hawai‘i State Federal Credit Union

[1] See State v. Mikasa, 111 Hawai‘i 1, 1, 135 P.3d 1044, 1044 (2006) (affirming ICA decision, but granting certiorari "to clarify the application by [the ICA] of the law relevant to a defendant's claim that a sentencing court relied on an uncharged crime in imposing sentence"); Nacino v. Koller, 101 Hawai‘i 466, 467, 71 P.3d 417, 418 (2003) (affirming the ICA, but granting certiorari "to clarify the law regarding Hawai‘i Revised Statutes (HRS) § 346-37, the statute involved"); Korsak v. Hawai‘i Permanente Med. Group, 94 Hawai‘i 297, 300, 12 P.3d 1238, 1241 (2000) (granting certiorari "to clarify several aspects of the ICA opinion").

beginning in September of 2006. On March 8, 2007, Petitioner was charged with committing Theft in the First Degree, in violation of HRS § 708-830.5. Petitioner entered a plea of no contest and moved to defer his plea.

B.

At the September 6, 2007 hearing on Petitioner's Change of Plea and Motion for Deferred Acceptance of No Contest Plea, the court engaged in the following colloquy with Petitioner:

> Q: Mr. Tuialii, I have before me a motion to defer no contest plea form. It seems to bear your signature. Did you sign it today?
> A: Yes, Your Honor.
> Q: Did you read it over and carefully discuss it with your attorney?
> A: Yes, Your Honor.
> . . . .
> Q: If you plead guilty or no contest you will not have a trial. You'll give it up; right?
> A: Yes.
> Q: You understand you can do ten years prison, be fined $20,000, or both?
> A: Yes, Your Honor.
> Q: And you also could get a deferral or probation with --for five years with up to one year in jail. Do you understand?
> A: Yes, Your Honor.
> Q: And I don't know the [Immigration and Naturalization Service (INS)] rules, but a conviction or plea could cause you to be deported, denied naturalization, or excluded from admission to the United States. Do you understand that?
> A: Yes, Your Honor.
> Q: And I don't know Homeland Security and INS rules, and so I'm working with your attorney to allow you this option to stay in the United States. Do you understand that?
> A: Yes, Your Honor.
> Q: Anybody promised you any leniency here?
> A: No, Your Honor.
> Q: Just straight up? Okay. Having talked to [your attorney] and gotten his advice, how do you plead?
> A: No contest, Your Honor.

(Emphases added.) The court's colloquy did not discuss the possibility of Petitioner having to pay restitution. However, the no contest plea form which the court referred to and which

Petitioner asserted that he had signed, stated in relevant part, "I understand that the court may impose any of the following penalties for the offense(s) to which I now plead: . . . restitution; a fine; a fee and/or assessment; community service; probation with up to one year of imprisonment and other terms and conditions." (Emphasis added.) At the November 26, 2007 sentencing hearing, the court accepted Petitioner's plea and adjudged him guilty. As part of his sentence, Petitioner was ordered to "[p]ay restitution in the amount of $76,285.19 to [PH.]"[2]

C.

On February 8, 2008, Petitioner filed the Illegal Sentence Motion. Petitioner asserted that the court's sentence requiring restitution to PH was illegal because PH had received the entire amount, less a $500 deductible payment, from its insurance carrier, Mitsui Sumitomo Insurance (MSI). At the hearing on the Illegal Sentence Motion, Petitioner argued that the language of HRS § 706-646(2) required the court to order restitution only for "verified losses." According to Petitioner, because PH's insurance carrier, MSI, indemnified PH for the total loss, the only verified loss to Petitioner was the $500 deductible payment. The court denied the motion.

[2] The ultimate restitution amount of $76,285.19 was apparently a reduction of the original amount stolen because Petitioner brought a $10,000 check to the sentencing hearing to present to the prosecutor. However, at the May 5, 2008 hearing on Petitioner's Motion for Correction of Illegal Sentence (Illegal Sentence Motion), it was disputed whether that check was received by the prosecutor or representatives of the victim.

II.

Petitioner lists the following questions in his Application:

> 1. Whether the ICA gravely erred in concluding that the trial court was not required to engage in a colloquy with [Petitioner] to determine that he understood that restitution could be imposed as a punishment and consequence of his no contest plea prior to accepting that plea.
> 2. Whether the ICA gravely erred in concluding that the trial court's restitution order was not illegal despite the fact that the order required [Petitioner] to pay restitution to his victim for amounts that had been previously indemnified by the victim's insurer.

Respondent/Plaintiff-Appellee State of Hawai‘i (Respondent) did not file a memorandum in opposition.

III.

As to the first question, the ICA concluded that the court "was not required by HRPP Rule 11(c)(2) to further advise [Petitioner] that restitution may be imposed as part of his sentence." State v. Tuialii, 121 Hawai‘i 135, 139, 214 P.3d 1125, 1129 (App. 2009). The ICA acknowledged that "[t]he plain language of HRPP Rule 11(c)(2) requires that the court advise a defendant of the maximum penalty provided by law and maximum extended term of imprisonment." Id. The ICA noted that the court advised Petitioner in open court "that the maximum sentence that could be imposed for theft in the First Degree was ten years of imprisonment and a fine of $20,000. [Petitioner's] written no-contest-plea form, which he confirmed he had read carefully and discussed with his attorney, states that he may be subject to restitution." Id.

Consequently, the ICA concluded that the court "was not required by HRPP Rule 11(c)(2) to further advise [Petitioner] that restitution may be imposed as part of his sentence." Id. The ICA thus "reject[ed Petitioner's] request to remand this case to allow withdrawal of his no contest plea." Id. at 137, 214 P.3d at 1127. However, it is unclear whether the ICA's basis for this conclusion was due to the recitation of the maximum penalty and that Petitioner had read and signed the no-contest-plea form, or because restitution was a collateral consequence of his plea.

IV.

A.

With respect to the first question presented, this court has stated that "under Hawai‘i law [a defendant is] entitled to withdraw his plea of 'no contest' after imposition of sentence only upon a showing of manifest injustice." Nguyen, 81 Hawai‘i at 292, 916 P.2d at 702 (citing State v. Cornelio, 68 Haw. 644, 646, 727 P.2d 1125, 1126-27 (1986). "Manifest injustice occurs when a defendant makes a plea involuntarily or without knowledge of the direct consequences." Id. However, "[t]here is no manifest injustice when a trial court has made an affirmative showing through an on-the-record colloquy between the court and the defendant which shows that the defendant had a full understanding of what his or her plea connoted and its direct consequences." Id. (citing Cornelio, 68 Haw. at 646-47, 727 P.2d at 1127).

It should be observed at the outset that, with respect to the ICA's reference to restitution being mentioned in the plea form, in Sorino, 108 Hawai'i at 166, 118 P.3d at 649, this court held the requirement of HRPP Rule 11 that a defendant be addressed in "open court" as to certain consequences of his or her plea is not satisfied by incorporation by reference in the plea form. This court explained that the "open court" language in HRPP Rule 11 mandates that a court orally recite specific advisements. Id. Because the "court failed to administer the HRS § 802E-2 advisement to [the petitioner], . . . the court's query as to whether [the petitioner] had read and understood the change of plea form in its entirety failed to satisfy HRPP Rule 11[.]" Id. Hence, Sorino renders the fact that Petitioner read and signed the plea form irrelevant to the colloquy question.

B.

The transcript of the court's colloquy with Petitioner at his sentencing hearing shows, and Respondent concedes, that no mention of the possibility of a restitution order was made.[3] Whether the court was required to engage in a colloquy with Petitioner to determine that he understood the court could order restitution depends on whether restitution was a direct or a

[3] It should be noted that when a defendant successfully argues that a direct consequence of his plea was not addressed in the colloquy, this court has concluded that the case must be remanded to allow the defendant to withdraw his or her plea. See Foo, 106 Hawai'i at 111, 102 P.3d at 357.

collateral consequence of his plea.[4] See Foo, 106 Hawai‘i at 113, 102 P.3d at 357. This court has addressed the issue of direct and collateral consequences in Foo and Nguyen.

In Foo, the petitioner argued that he should be allowed to withdraw his guilty plea "because the court erred in failing to advise [him] that he must register as a 'sex offender.'" Id. at 112, 102 P.3d at 356. This court noted that

> [a] direct consequence is one which has a definite, immediate and largely automatic effect on defendant's punishment. Illustrations of collateral consequences are loss of the right to vote or travel abroad, loss of civil service employment, loss of a driver's license, loss of the right to possess fire arms or undesirable discharge from the Armed Services.

Id. at 113, 102 P.3d at 357 (quoting Nguyen, 81 Hawai‘i at 288, 916 P.2d at 698) (emphasis in original) (citation omitted)). The Foo court concluded that sex offender registration was a collateral consequence because "the registration requirements of HRS chapter 846E [were] similar to the restrictions on the right to travel or the loss of a driver's license that are collateral consequences of a guilty plea." Id. at 114, 102 P.3d at 358 (citation and internal quotation marks omitted). "Although sex offender registration is triggered upon one's conviction, it does not have a definite, immediate and largely automatic effect on [a] defendant's punishment. Id. (emphasis in original) (internal quotation marks and citation omitted). This court also noted that collateral consequences involve "actions taken by agencies

[4] Collateral is defined as "[s]upplimentary; accompanying, but secondary and subordinate to[.]" Blacks Law Dictionary 297 (9th ed. 2009).

the court does not control." Id. (citation omitted). In Foo, "the attorney general and county police departments, both agencies not controlled by the judiciary, are required to administer the registration of convicted persons and the release of information to other law enforcement and government agencies to the public." Id. These facts further supported the conclusion that the sex offender registration was a collateral consequence.

Similarly, in Nguyen, eight years after entering a plea of guilty, the defendant sought to set aside the plea because the court had not notified him that as a consequence of the plea INS might deport him. 81 Hawai'i at 285-86, 916 P.2d at 695-96. The defendant argued that deportation was a direct consequence of his plea. This court disagreed, concluding that "[d]eportation is a collateral consequence of convictions because it is a result particular to the individual's personal circumstances and one not within the control of the court system." Id. at 288, 916 P.2d at 698 (citations omitted). In Nguyen, the "circumstances . . . not within the control of the court" was the decision of INS to initiate deportation proceedings. Id.

C.

To prevail, Petitioner must establish the restitution order was a direct consequence of Petitioner's plea. Factors previously identified are as follows: the (1) restitution order has "a definite, immediate and largely automatic effect on [Petitioner's] punishment"; (2) the order "is [not] a result

particular to the [Petitioner's] personal circumstances"; and (3) the order was "not within the control of the court system[,]" id., or involved "actions taken by agencies the court does not control[,]" Foo 106 Hawai'i at 114, 102 P.3d at 358 (citation omitted).

The first factor does not support the conclusion that the restitution order was a direct consequence of the Petitioner's punishment. The restitution order was not "definite," "immediate," and "largely automatic[,]" inasmuch as HRS § 706-646 mandates that "[t]he court shall order the defendant to make restitution . . . when requested by the victim." (Emphasis added.) Restitution is triggered only upon the request of the victim. If restitution is conditioned on the victim's request, it cannot be considered "definite," "immediate," and "largely automatic[.]" Foo, 106 Hawai'i at 114, 102 P.3d at 358. Rather, it is a possible consequence dependent on the victim's choice.

The second factor does not support the conclusion that the restitution order is a direct consequence of Petitioner's punishment, inasmuch as the order is "a result particular to the [Petitioner's] personal circumstances." Nguyen, 81 Hawai'i at 288, 916 P.2d at 698. In Nguyen, the INS deportation proceedings were not applicable to any offender. Rather, they were the result of the petitioner's particular circumstances, in that he was not a naturalized citizen. Id. Similarly, restitution is

particular to the offender in that similar to the first factor, the victim has the discretion of whether to demand restitution.

The final factor supports the conclusion that the restitution order was a collateral consequence of Petitioner's punishment. The restitution order does not "inexorably follow" from Petitioner's no contest plea. Foo, 106 Hawai'i at 113, 102 P.3d at 357 (citing In re Resindiz, 25 Cal. 4th 230, 105 Cal. Rptr. 2d 431 (2001)). HRS § 706-646(c)(2) divests the court of any discretion to refrain from ordering restitution when the victim requests it. Again, the restitution order is dependent upon the victim requesting restitution. While Petitioner and Respondent dispute whether the amount set forth in the order was correct, neither party disputes that the victim requested it and the court was required to comply with that request. Thus, although the order is granted by the court, it cannot be said that it is "within the control of the court[.]" Nguyen, 81 Hawai'i at 288, 916 P.2d at 698.

D.

The Foo court also noted that HRPP Rule 11(c) mandates that the court "'shall not accept a plea of guilty . . . without first' determining that the defendant understands, inter alia, 'the maximum penalty provided by law, and the maximum sentence.'" Foo, 104 Hawai'i at 113, 102 P.3d at 358 (citing HRPP Rule 11(c)) (emphases in original). As noted before, this court determined that, "although sex offender registration is triggered upon one's

conviction, it does not have a definite, immediate and largely automatic effect on [a] defendant's punishment." Id. (emphasis added).

While the ICA did not discuss it in detail, this court addressed whether restitution can be considered a punishment in Gaylord. In Gaylord, the defendant challenged his sentence to three consecutive terms, two for Theft in the First Degree and one for Theft in the Second Degree. 73 Hawai'i at 136, 890 P.2d at 1176. At the time the defendant was sentenced, the restitution statute provided that a restitution order could only be enforced by the paroling authority as long as it had jurisdiction over the parolee. Id. at 133, 890 P.2d at 1173.

In its analysis, Gaylord considered the legislative history of HRS § 706-605. The report of the House Committee on Judiciary stated that restitution orders benefit society twice because "[t]he victim of the crime not only receives reparation and restitution, but the criminal should develop or regain a degree of self[-]respect and pride in knowing that he or she righted, to as great a degree as possible, the wrong that he or she had committed." Id. at 151, 890 P.2d at 1191 (quoting Hse. Stand. Comm. Rep. No. 425, in 1975 House Journal, at 1148) (brackets in original). The report of the House Committee on Judiciary reached a similar conclusion, stating that "[t]here is a dual benefit to [restitution]: The victim is repaid for his loss and the criminal may develop a degree of self-respect and

pride in knowing that he or she has righted the wrong committed." Id. at 152, 890 P.2d at 1192 (quoting Sen. Stand. Comm. Rep. No. 789, in 1975 Senate Journal, at 1132) (emphasis added).

This same language had been previously discussed in State v. Murray, 63 Haw. 12, 621 P.2d 334, 336-39 (1980). Murray concluded that HRS § 706-605 had a "purpose and design to encompass the punishment and the rehabilitation of the offender." Id. at 15-19, 621 P.2d at 336-39. However, Gaylord disagreed with this conclusion, stating that although restitution does have a rehabilitative component, it cannot be considered punitive. Gaylord, 78 Hawai'i at 152, 890 P.2d at 1192. The Gaylord court explained that a fine "is a retributive payment due the sovereign." Id. (citation omitted). It went on to state that

> [r]estitution, on the other hand, is compensation for the victim as an adjunct of punishment of the offender, which is designed, as far as possible, to make the victim whole. Conflicting as it does, with traditional criminal justice goals and procedures, restitution is quasi-civil, and in strict legal theory . . . is the task of civil courts.

Id. (emphasis added) (internal quotation marks, citation, and brackets omitted).

The conclusion that restitution is rehabilitative rather than punitive is relevant to the instant case because Petitioner asserts that the possibility of a restitution order is "part of the 'maximum penalty imposed by law under' HRPP Rule 11(c)(2)." As discussed previously, this court concluded that restitution orders are rehabilitative in nature, not punitive.

Therefore, it cannot be considered part of the "maximum penalty imposed by law" inasmuch is it is not designed as a penalty.

V.

With respect to the second question presented, the following addresses Petitioner's arguments and the proper analysis based on Hawai‘i case law.

A.

In its conclusions of law, the court stated:

> The [c]ourt disagrees with [Petitioner's] interpretation of Section 706-646(2), H.R.S. Although [Petitioner] acknowledges that he stole $76,285.19 from [PH], he implies that he can keep the entire amount, minus a $500 deductible, simply because the victim was reimbursed by their [sic] insurer. There is nothing in case law or legislative history that supports [Petitioner's] interpretation of Section 706-646(2), H.R.S.

This conclusion implies a finding that the victim was reimbursed by its insurance carrier. The ICA did not address the information in the presentence diagnosis report or the standard of substantial evidence to support the court's finding. The presentence diagnosis report contains a statement by PH's representative to the probation officer indicating that the victim's insurance carrier, MSI, indemnified PH for the theft and agreed to pay it $87,093.25. This is the entire amount stolen, less the $500 insurance policy premium deductible.

B.

In the instant case, the court's reliance on statements by representatives of PH in the presentence diagnosis report indicating the name of insurer, its contact information, and the

indemnification amount is credible evidence that PH has in fact been indemnified by MSI, a matter the ICA apparently assumed. Although the restitution statute requires a defendant to pay for "reasonable and verified losses suffered by the victim[,]" HRS § 706-646(2) (emphasis added), the statute does not clearly define what constitutes a "loss." As the ICA noted, the statute provides in relevant part:

> [r]estitution shall be the dollar amount that is sufficient to reimburse any victim fully for losses, including but not limited to:
>
> (a) Full value of stolen or damaged property, as determined by replacement costs of like property, or the actual estimated cost of repair, if repair is possible;
>
> (b) Medical expenses; and
>
> (c) Funeral and burial expenses incurred as a result of the crime.

HRS § 706-646(3) (Supp. 2007) (emphasis added). Restitution is defined as "an act of restoring or a condition of being restored, . . . [r]einstatement [or] restoration of a thing or institution to its rightful state or form[.]" Webster's Third New Int'l Dictionary 1936 (1961).

Petitioner's basic argument is that stolen money cannot be considered a loss if the loss is ultimately covered by insurance. However, the operative words in the statute, are "reasonable and verified losses suffered by the victim[.]" HRS § 706-646. The statute does not indicate that an initial loss is no longer considered as such if an insurance company eventually indemnifies the victim. Petitioner's interpretation inserts a temporal aspect regarding losses that the statute does not contain. It is not denied that Petitioner's theft of the money

resulted in an initial loss to PH. To the extent that loss was later mitigated by PH's insurance policy does not alter the fact that Petitioner's theft resulted in a loss to PH.

C.

Petitioner further asserts the legislative history supports the conclusion that restitution should not be ordered for amounts indemnified by insurance inasmuch as it does not serve the purpose of making the victim whole. The Gaylord court noted that restitution is "quasi-civil" inasmuch as it differs from "traditional criminal justice goals and procedures[.]" Gaylord, 78 Hawai'i at 152, 890 P.2d at 1192 (citation omitted) (emphasis added). The intended benefit of making the victim whole is also present in the civil context. In that context, this court has addressed whether insurance payments and third party benefits should reduce a tortfeasor's payments to a victim.

In Bynum, 106 Hawai'i at 89, 101 P.3d at 1157, this court examined whether the plaintiffs' damages award should be reduced to reflect the discounted medicare and medicaid payments actually made, as opposed to the standard rates charged by health care providers. It was concluded that the damage award against the defendants should not be reduced simply because the plaintiffs were eligible for discounted rates. Id. That conclusion was based on the collateral source rule, which "provides that benefits or payments received on behalf of a plaintiff, from an independent source, will not diminish recovery

from the wrongdoer. Id. at 86, 101 P.3d at 1154 (citing Ellsworth v. Schelbrock, 611 N.W.2d 764, 767 (Wis. 2000)). Bynum adopted the reasoning of other jurisdictions which held that "[t]he collateral source rule seeks to place upon the tortfeasor full responsibility for the loss he has caused," such that the tortfeasor "is not entitled to reap the benefit of [plaintiff's] eligibility for public assistance or from the government's economic clout in the health care market place." Id. at 90, 101 P.3d at 1158.

Similar justifications weigh in favor of concluding that indemnified losses should not relieve an offender of the "full responsibility" of providing a victim with restitution for the injury inflicted. Restitution is rehabilitative in nature. The same rationale supporting the conclusion that a tortfeasor should not escape paying special damages because a plaintiff has been compensated in some way by third parties applies with equal force to a "quasi-civil" restitution scheme. Id. Consequently, restitution for indemnified amounts does not interfere with the intended benefit of giving the victim of the crime "reparation and restitution[.]" Hse. Stand. Comm. Rep. No. 425, in 1975 House Journal, at 1148.

Nor does restitution for indemnified losses interfere with the second intended benefit of having an offender "develop or gain a degree of self respect and pride in knowing that he or she has righted, to as great a degree as possible, the wrong that

he or she had committed." Id. The express language of HRS § 706-646(3) forbids any consideration by the court of the defendant's ability to pay. "In ordering restitution, the court shall not consider the defendant's financial ability to make restitution in determining the amount of restitution to order." HRS § 706-646(3). Thus the legislature's goal of rehabilitation and developing "a degree of self respect" would not be frustrated by payment of indemnified losses.

Petitioner raises concerns about restitution resulting in double recovery and becoming a windfall for victims. From the standpoint of the offender who has been ordered to pay restitution as part of his rehabilitation, the victim has only recovered once. HRS § 706-646 does not address arrangements between a victim and insurance companies to indemnify losses, however, such agreements do not interfere with the two benefits of compensating the victim and rehabilitating the offender discussed in Gaylord. In regard to compensation, the collateral source rule "provides that benefits received on behalf of a plaintiff, from an independent source will not diminish recovery from the wrongdoer." Bynum, 106 Hawai'i at 86, 101 P.3d at 1154. As observed before, no convincing rationale supports the proposition that a criminal wrongdoer should be permitted to avoid restitution because a third party had indemnified the loss.

Moreover, it should be observed that nothing in the record or the court's findings indicates that there is a

subrogation agreement between PH and MSI requiring PH to remit restitution payments to MSI. This fact was apparently assumed by both parties. In his Illegal Sentence Motion, Petitioner only argued that he should not have to pay restitution for amounts already indemnified.

VII.

For the reasons set forth above, I must respectfully disagree with the ICA's analysis and would have accepted the application for certiorari in order to clarify our law.