IN THE SUPREME COURT OF FLORIDA

CHRISTOPHER HEBERT AND
LAWRENCE BYRD, :

Petitioners, :

v. : CASE NO. 80-229

STATE OF FLORIDA, :

Respondent. :

_____ :

PETITIONERS' INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS~

The state charged Christopher Hebert and Lawrence Byrd jointly, with one count of third degree grand theft. R.l. Pursuant to plea agreements, Hebert and Byrd pled no contest to the reduced charge of petit theft. R.37-8,41-2,137,150. The trial court withheld adjudication and sentenced Hebert and Byrd to the following: six months probation, 40 hours of community service and restitution. R.39-40-2. A hearing was later held to determine the amount of restitution.

At the hearing, the state's witnesses established the following. Walter Rayburn and his partner Mike Norman are the co-owners of Rooster's Colorado Club, a Tallahassee restaurant. R.72. Gary Pearce is the restaurant's general manager. R.97. Hebert and Byrd were employed at the restaurant as waiters, serving the public food and drinks. R.97-8.

The restaurant's waiters use a triplicate ticket pad to place orders. The triplicate tickets consist of a white, pink and hard carbon copy. R.74-8. Waiters are to mark through each copy when placing orders. The white copy *goes* to the "pit", where the steaks are prepared. R.76. The pink copy *goes* to the kitchen, where other food items are prepared. R.76. The cashier gets the hard copy, (the third in the triplicate pad). R.76. By placing another ticket in front of

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'Citation to the one-volume record on appeal will be as R.(page number),

the hard copy, a waiter could order food without marking on the cashier's copy, and thus not charge a customer. R.76. In such a case, the cashier's copy would show only drink orders. R.74,78.

A friend told Rayburn that Hebert, Byrd and two other employees were "stealing a lot" and to "watch them". R.74. Rayburn responded by checking the tickets assigned to Hebert and Byrd for the first weekend in September, 1990. R.75. By matching up their assigned triplicate tickets, Rayburn discovered that Hebert and Byrd had placed food orders without marking the cashier's copies. R.78. The tickets introduced as State's Exhibit 1 showed that during the September weekend, Hebert placed food orders totaling $195.01, without charging. R.78. State's Exhibit 2 showed that on the same weekend, Byrd placed food orders totaling $149.73, without charging. R.79.

Pearce had been checking all tickets every night from the beginning of 1990 through May, 1990. R.98,101. Since May, Pearce had been checking randomly, (i.e., twice a week). In all this time, Pearce never found evidence of other fraud. R.80,88,98,101. Consequently, State's Exhibits 1 & 2 are the only tickets the state was able to introduce at the hearing, which prove fraud. R.80.

After Rayburn discovered the fraudulent tickets, he called the Leon County Sheriff's Department. R.80. Rayburn did not

file a complaint then.[2] R.107. Rayburn, Pearce and Norman confronted Hebert and Byrd in an attempt to work out a pay back plan and to obtain information on others who might have been involved. R.82. Hebert and Byrd told them that "everybody was stealing". R.82. Hebert and Byrd said that an ex-employee, Sean Carbonell, had showed them how to steal. R.82. Hebert and Byrd admitted stealing between $150 and $200 per weekend. R.82,88,104. Sometimes the two would steal during the week making an additional $50. R.82,88,104. They did this for about four months. R.82,88,104. When Norman told Hebert and Byrd that they owed about $1600, they disagreed and gave a specific amount. R.82-3,104. Rayburn testified:

> They only admitted to six hundred dollars. And my partner [Norman] said, "Well ya'll can't add very good." And they said well that's all they think they had stolen was six hundred dollars.

R.83. Hebert and Byrd agreed to pay back six hundred dollars, yet Rayburn refused to accept this amount. R.83-5. The two also agreed to tell Rayburn who else was taking money. Hebert and Byrd subsequently wrote several letters detailing which employees were stealing, and how they were doing so. R.87-8.

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[2] Nonetheless, Detective Dick Parro of the Leon County Sheriff's Department took Hebert and Byrd to the station that night and obtained statements from them. R.108. The two admitted to the ticket fraud that weekend. R.109. Byrd admitted to stealing about $100 and Hebert admitted to $195. R.109-110. Hebert also admitted stealing, for a period of time before then. R.129.

Several weeks later, Rayburn filed a complaint and had the two arrested on the grand theft charge. R.1A-7,107.

Rayburn testified that during the time Hebert and Byrd were employed at the restaurant, the "meat count wasn't coming up right'' and he knew something was wrong. R.85. However, Rayburn admitted there was not a noticeable shortfall during the times he employed Hebert and Byrd, and that the restaurant was "showing a profit". R.86. Rayburn said: "I think every restaurant in the world comes up short. It's just very, very hard to track everything. You have a lot of theft, you have a lot of spoilage." R.86.

Both Hebert and Byrd testified at the hearing. They both admitted to stealing during one weekend. R.117,128. However, they denied stealing at any other time and explained that on that one weekend Pearce and an assistant manager had gone out of town. R.113. They used this rare opportunity to give out free food to friends and to pocket some cash. R.112. They denied ever saying that they were stealing $150 a week. R.117. The two felt intimidated during the meeting and wanted to appease Rayburn in order to avoid going to jail on the charge.[3]

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[3]Pearce described the meeting as "very intense", and agreed that there were threats made to elicit admissions from Hebert and Byrd. R.99-100. Rayburn admitted to telling them that he was thinking of putting them in jail. R.90. Rayburn told Byrd that he was going to see what he could do about keeping him out of law school. R.90. Norman admitted to telling the two that he "was going to knock their fucking heads off". R.104.

Consequently, they wrote letters to Rayburn in which they admitted taking around $600. R.118,130. They felt that this figure, although inaccurate, was closer to what Rayburn "wanted to hear." R.118,130.

After the hearing and argument by counsel, the trial court determined restitution to be $2,530 for Hebert and Byrd individually. R.61,61,145. The trial court explained how it arrived at this amount as follows:

> I did not charge two hundred dollars a week. I went at a hundred and fifty dollars a week, 4.3 weeks in a month, It was four months, testimony of four months. it came to two thousand five hundred and eighty dollars. From that, I deducted fifty dollars, which appears to be unrebutted testimony that that was Mr. Byrd's last check that he didn't receive, And I arrived at two thousand five hundred and thirty dollars from that.

R.146.

Hebert and Byrd appealed to the first district court of appeal. R.53 The district court affirmed the trial court's order in a written opinion, reported at 17 FLW D1585 (Fla. 1st DCA June 25, 1992). The district court held that the state had carried its burden of proving the victim's loss, by a preponderance of the evidence. Id.

In affirming, the district court rejected petitioner's preliminary argument that their pleas to petit theft prevented the trial court from imposing restitution in excess of $300. Id. The district court disagreed with a conflicting decision of the fifth district court of appeal "in situations involving a plea agreement which does not specifically limit the state to

recovering an amount certain in restitution." Id. The district court reasoned that petitioners entered into plea agreements which beneficially reduced the charged offenses to petit theft. Id. Since the offense remained defined as theft [theft being defined in section 812.014(1), Florida Statutes (1989), and "merely" its degree being defined in subsection 812.014(2)], the trial court could properly imposed restitution in excess of $300 because the preponderance of the evidence showed such damages were caused by petitioner's offense of theft. Id.

Nonetheless, the district court certified the following question as being one of great public importance:

> **WHERE A DEFENDANT ENTERS INTO A PLEA AGREEMENT THAT IS NOT THEREAFTER CHALLENGED AND BY WHICH THE CHARGE OF FELONY GRAND THEFT IS REDUCED TO MISDEMEANOR PETIT THEFT, BUT WHICH AGREEMENT DOES NOT RESTRICT THE AMOUNT OF RESTITUTION THAT MAY BE IMPOSED, AND WHERE THE STATE IN FACT PROVES BY A PREPONDERANCE OF THE EVIDENCE AN AMOUNT CONSISTENT WITH THE ORIGINAL CHARGE, IS THE TRIAL COURT NONETHELESS RESTRAINED BY THE PLEA TO PETIT THEFT TO IMPOSE AN AMOUNT OF RESTITUTION NO GREATER THAN $300?**

Id.

SUMMARY OF ARGUMENT

The trial court erred reversibly in imposing restitution in the amount of $2,530. When petitioners pled to petit theft, the grand theft charges were effectively nolle-prossed, so any restitution in excess of $300 could not have been caused by the offenses to which petitioners pled. Since the convicted offense was theft of items having a value of $300 or less, the maximum value of the items for which defendant can be ordered to pay restitution is also $300. This position is not at odds with a recent decision of this court holding the value of the property stolen merely defines the degree of theft and does not constitute separate crimes. Even though the elements of each degree of theft are the same and defined in section 812.014(1), the various degrees of theft cause differing amount of damages. Hence the offenses here, for purposes of the restitution statute, are petit theft. Since there is nothing in the record to indicate that the state reserved the right to seek restitution in excess of $300, this court should quash and remand for entry of a restitution order not to exceed $300.

Alternatively, this court should quash the district court's order since it affirmed the trial court's order which was based on a speculative estimate. The trial court erroneously calculated restitution based on petitioners' vague admissions when their conflicting admissions were more specific. Moreover, here the victims could not testify to a recorded loss beyond the two sets of tickets introduced as evidence,

ARGUMENT

I. THIS COURT SHOULD QUASH THE DISTRICT COURT'S DECISION SINCE PETITIONERS' PLEA TO PETIT THEFT LIMITS THE TRIAL COURT'S ABILITY TO IMPOSE RESTITUTION IN EXCESS OF $300.

Petitioners were initially charged with grand theft of property valuing $300 or more, but less than $20,000, a third degree felony. R.2,4; Fla. Stat. § 812.014(1)(c)1. Petitioners pled no-contest to the reduced charge of petit theft, a misdemeanor offense. R.37,41. At the restitution hearing, the state attempted to prove damages in excess of $300. R.68. The trial court ultimately set restitution at $2,530 for each petitioner, despite the fact they pled to petit theft. R.146. This finding was error, and thus this court should quash the district court's decision, Hebert v. State, 17 FLW D1585 (Fla. 1st DCA June 25, 1992), affirming the trial court.

The district court rejected petitioner's preliminary argument that their pleas to petit theft limited restitution to $300. 17 FLW at D.1586. For the following reasons, this court should quash that decision.

The restitution statute allows the trial court to order restitution "for damage or loss caused directly or indirectly by the defendant's offense." § 775.089(1)(a), Fla. Stat. (1991)(emphasis supplied). Petit theft is statutorily defined as theft of property with a value less than $300. § 812.014(1)(d), Fla. Stat. (1991). The degree of petitioners' offenses were misdemeanors, petit thefts. When petitioners

pled to petit theft, the grand theft charges were effectively nolle-prossed, so any restitution in excess of $300 could not have been "caused by the offenses to which appellant(s) pled". See L.A.R. v. State, 563 So.2d 836,837 (Fla. 5th DCA 1990) (The court reversed the restitution order and stated: "The losses on which the order was based were clearly not caused by the offenses to which petitioner pled guilty. The remaining charge was nolle-prossed on a negotiated plea with no reservation for restitution.")

The district court premised its decision on the fact that the negotiated plea maintained the offense as theft, although the "plea agreement, and not the value of the property stolen, determined the degree of the offense." 17 FLW at D1586. (emphasis in original). The district court cited this court's decision in Johnson v. State, 597 So.2d 798 (Fla. 1992), for the proposition that section 812.014(2), "merely defines the degree" of the offense and not the offense itself. Although section 812.014(1), defines theft, this does not mean that when a defendant pleads to petit theft, his offense should be considered the same as grand theft for restitution purposes. The better view is expressed in the fifth district court of appeal's holding in Peralta v. State, 596 So.2d 1220 (Fla. 5th DCA 1992). As is the case here, in Peralta, the defendant was charged with grand theft, but pled to petit theft, agreeing to pay unspecified restitution. In reversing that portion of the restitution order in excess of $300, the court held:

> Because here the convicted offense was theft of items having a value of $300 or less, the maximum value of the items for which defendant can be ordered to pay restitution is also $300.

Id. at 1221.

This court's decision in Johnson does not undermine the Peralta holding. In Johnson, this court stated: "[t]he degree of the crime of theft depends on what was taken.'' Id. at 799. This court held: "the value of the goods or the taking of a firearm merely defines the degree of the felony and does not constitute a separate crime." Id. Thus this court found that the grand theft of cash and the grand theft of a firearm were not two separate crimes because the thefts were simultaneously accomplished in one purse snatching. Id. Although all degrees of theft have the same general elements, this does not affect the Peralta holding that a defendant convicted of petit theft can cause no more than $300 in damages.

Even though the elements of each degree of theft are the same and defined in section 812.014(1), the various degrees of theft cause differing damage. This is so because the value of the property stolen is an essential element in determining the degree of theft. § 812.014(2), Fla. Stat. (1991). A jury must specifically find that the state has proven the specified value in order to obtain a grand theft conviction. See. Fla. Std. Jury Instr. (crim.) § FS **812.014.** If the property's value is less than $300, than the defendant can only be convicted of petit theft, a misdemeanor. § **812.014(2)(d),** Fla. Stat. (1991). Since the various degrees of theft cause differing

damage, the convicted offenses, for restitution purposes, also vary in degree.

Although "it is not necessary that the offense charged describe the damage done", the damage must bear a "significant relationship to the convicted offense". J.S.H. v. State, 472 So.2d 737, 738 (Fla. 1985). The convicted offenses here are thefts, generally speaking, but for purposes of the restitution statute they are petit theft because the difference in degree is directly linked to the damage caused. Thus, where the convicted offenses are petit thefts, (i.e., thefts where the value of the property is less than $300), any damages above $300 does not bear a significant relationship to the petit theft.

There is nothing in the record to indicate that the state reserved the right to seek restitution in excess of $300. Nonetheless, the district court, although stating Peralta "is facially logical and legally pristine", disagreed with its approach "in situations involving a plea agreement which does not specifically limit the state to recovering an amount certain in restitution." 17 FLW at D1586. Thus, the district court believes the sky's the limit, where a defendant does not get a limitation into the record. This court should reject this approach. When pleading to misdemeanor petit theft, defendants could more reasonably assume their restitution liability is limited to the $300 statutory limit, as they assume any incarceration is limited to 60 days. §§ 775.082(4)(b); 812.014 (2)(d), Fla. Stat. (1991). In the

absence of a specified agreement, the limitation should be $300 and not unlimited, as the district court holds.

Although citing to the holding in Hoover v. State, 530 So.2d 308 (Fla. 1988), the district court overlooked the fact that the Hoover Court ultimately "remanded to the trial court for a determination of the sentencing terms of the plea agreement because the record is silent on that point." Id. at 309. (emphasis supplied). The record here is silent on whether the plea contemplated a limitation on damages, At the very least, as the court did in Hoover, the district court should have remanded for clarification.

The trial court erred reversibly in ordering restitution in an amount which exceeded the value limit of petit theft, the offense for which petitioners were convicted. This court should quash the district court's decision affirming the imposition of restitution in excess of $300.

II. THIS COURT SHOULD QUASH THE DISTRICT COURT'S DECISION SINCE IT ERRONEOUSLY AFFIRMED THE TRIAL COURT'S RESTITUTION ORDER WHICH WAS BASED ON PETITIONERS' SPECULATIVE ADMISSIONS.

Even if this court were to disagree with the argument in part I, it should still quash the district court's decision since it erroneously affirmed the trial court's imposition of restitution based on a speculative estimate.

The evidence of the victims' loss consists of two conflicting admissions. During their meeting with the victims, petitioners admitted taking around $200 a week for about four months but they also said that they took no more than $600 total. R.82-3. The trial court calculated restitution based on $150 a week for four months, thereby rejecting petitioners' statements that they took no more than $600. R.146. The trial court erred reversibly in basing restitution on the vague per week figures and rejecting petitioners' specific admission of $600 total.

In Morel v. State, 547 So.2d 341 (Fla. 2d DCA 1989), petitioner admitted taking an average of $600 per week for 28 weeks. However, petitioner also admitted taking a total of only $1200. The court reversed and remanded with directions that restitution be set at the $1200 figure. Id. at 342. This court should approve Morel and quash the district court's decision.

As in Morel, the per week figures here were vague estimates, thus the trial court's calculations were speculative. The per week figures do not reflect an exact

dollar amount. The petitioners' admissions were mere estimates ranging between $150 to $200 per week. R.82,88,104. The petitioners' admissions were also estimating the length of time to be "about four months." R.82,88,104. Hence the trial court entered an amount based on the average number of weeks in a month being 4.3. R.146. Yet petitioners were adamant and specific about the total amount taken. When pressed by Norman and Rayburn, petitioners repeatedly maintained that they had **stolen no more than $600.**

In Fresneda v. State, **347 So.2d** 1021 (Fla. **1977),** this court stated: **"a** condition of probation requiring **a** probationer to pay money to, and for the benefit of, the victim of his crime cannot require payment in excess of the amount of damage the criminal conduct caused the victim. Id. at 1022; See also Wilson v. State, **452 So.2d 84** (Fla. 1st **DCA** 1984). If this court does not quash, then petitioners' restitution would require payment in excess of the amount of damage admitted since it is more than ***$600.***

Moreover, the victims could not testify that they recorded any losses due to petitioners' conduct. **See** Epperley v. State, 568 So.2d 1336 (Fla. 4th **DCA** 1990) (reversing restitution order where state failed by preponderance to prove the amount of victim loss because the victims provided no evidence of expense or loss). In Morel, supra., an auditor testified to shortages in excess of $25,00 during the critical periods, although some shortages could have been due to the victim's withdrawal of funds. The trial court imposed restitution in the amount of

$16,800 based on the per week figure. Id. Since "the auditor testified that there was no audit trail and no procedure he could use to determine who took the money or how it was taken", the state failed to establish by a preponderance of the evidence that the petitioner caused the victims damages in the amount of $16,800. Id.; See § 775.089(7), Fla. Stat. 1989.

Here, there was no evidence that the restaurant recorded a loss as a result of petitioners' conduct. Other than the two sets of tickets, the state failed to introduce evidence of a recorded loss. Rayburn testified that during the time petitioners were employed at the restaurant, the "meat count wasn't coming up right" and he knew something was wrong. R.85. However, Rayburn admitted that there was not a noticeable shortfall during the times petitioners were employed at the restaurant and that they were "showing a profit". R.86. As in Morel, there exists no proof in the way of an "audit trail".

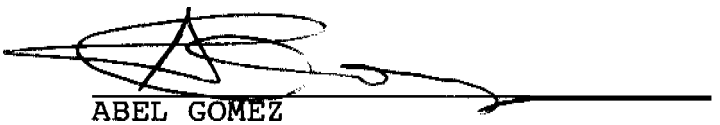
Hence restitution should be limited to the loss the victims actually proved, i.e., the loss shown in State's Exhibit 1 & 2. See Thomas v. State, 480 So.2d 158 (Fla. 1st DCA 1985) (reversing restitution order and directing that trial court impose amount shown as actual loss by victim, Sears).

CONCLUSION

Based on the foregoing argument, this court should quash the decision of the district court. This court should hold the restitution order can not exceed the $300 limit for petit theft. This court should order the trial court enter restitution in an amount not greater than that proved by State's Exhibits 1 & 2. Alternatively, this court should order restitution be set at $600, the specific amount petitioners admitted taking.

CERTIFICATE OF SERVICE

I certify that a copy of this brief has been hand delivered to Assistant Attorney General Charles T. Faircloth, Tallahassee, Florida; and copies have been mailed to petitioners, on 24 August 1992.



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APPENDIX TO PETITIONERS' INITIAL BRIEF ON THE MERITS

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IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

CHRISTOPHER HEBERT and LAWRENCE BYRD,

Appellants,

V.

STATE OF FLORIDA,

Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND DISPOSITION THEREOF IF FILED.

CASE NO. 91-1344

Opinion filed June 25, 1992.

An Appeal from the Circuit Court for Leon County. William Gary, Judge.

Nancy A. Daniels, Public Defender; Abel Gomez, Assistant Public Defender, Tallahassee, for appellants.

Robert A. Butterworth, Attorney General; Charles T. Faircloth, Jr., Assistant Attorney General, .Tallahassee, for appellee.

WIGGINTON, J.

We affirm the trial court's orders of restitution in the amount of $2530 imposed as conditions of appellants' probation, agreeing with the state that it carried its burden of proving the amount of loss suffered by the victim in this case by a preponderance of the evidence. However, in affirming, we must

address appellants' initial contention that the trial court was restrained from imposing restitution in an amount in excess of $300 by virtue of appellants' pleas to the lesser included offense of petit theft. For the following reasons, we disagree with that proposition.

Appellants were initially jointly charged by information with one count of third-degree grand theft, contrary to section 812.014(2)(c)1., .Florida Statutes (1989). However, they both ultimately entered into plea agreements with the **state**, agreeing to plead guilty to the misdemeanor offense of petit theft, section 812.014(2)(d), in exchange for a maximum six months of probation. The plea agreement specifically left "restitution to be determined by court." The trial court ultimately accepted the plea, withheld adjudication of guilt and placed appellants on probation for a period of six months. One of the conditions of their probation required that appellants "make complete restitution as determined by the written order of the Court."

Appellants make no contention that their plea was not freely and voluntarily entered and do not seek to withdraw their plea. Instead, they argue that whereas they plec no contest to petit theft, which is statutorily defined as theft of property with a value less than $300, and whereas there is nothing in the record to indicate that the state reserved the right to seek restitution in *excess* of $300, and, whereas the grand theft charges were effectively nol-prossed as a result of the plea agreements, any restitution in *excess* of $300 was not caused by

their offenses to which they pled no contest. Thus, as their argument goes, the trial court's orders of restitution in excess of $300 requires reversal.

In support of their argument, appellants have submitted to this court a recent decision from the Fifth District Court of Appeal holding, on facts apparently identical to those in the instant case, that

> . . . because here the convicted offense was theft of items having a value of $300 or less, the maximum value of the items for which defendant can be ordered to pay restitution is also $300.

See Peralta v. State, 17 F.L.W. D917 (Fla. 5th DCA, April 10, 1992). Accordingly, the Fifth DCA quashed the restitution order (that was admittedly based on evidence establishing a value of the items the defendant was charged with stealing as being well in excess of $300) with instructions to limit restitution for the property stolen to $300. See, also, L.A.R. v. State, 563 So.2d 836 (Fla. 5th DCA 1990).

The result reached by the Fifth District in Peralta is facially logical and legally pristine, but, upon deeper consideration of the issue, we must disagree with its approach in situations involving a plea agreement which does not specifically limit the state to recovering an amount certain in restitution. Unquestionably, a defendant may not plead to an illegal sentence, Williams v. State, 500 So.2d 501 (Fla. 1986), and we hold that appellants did not do so in the instant case. It is beyond cavil that an otherwise valid and unassailed plea

places the defendant's case in a different posture for reasons that are clearly convenient and beneficial to the defendant. Often, the plea redesigns and redefines the case in such a manner as to place it seemingly entirely at odds with the original charging document, not too unlike the sometimes inexplicable verdicts rendered by juries pursuant to their pardon power. For instance, the Florida Supreme Court has ruled that it is not fundamental error for a defendant to agree to plead to a related offense where the evidence clearly established that the defendant could not have possibly committed that particular related crime. See Hoover v. State, 530 So.2d 308 (Fla. 1988). In Hoover, the supreme court specifically held that if "a defendant voluntarily and knowingly enters into a plea to a related lesser charge, the plea is valid." Id. at 309. Indeed, the court went on to say that the focus, instead, should have been on the "real issue which was directed to the terms of the plea agreement itself, specifically, the sentence that would be imposed upon Hoover." Id.

In the instant case, appellants entered into plea agreements which beneficially reduced the charged offense from felony grand theft to the lesser misdemeanor of petit theft. In that regard, it must be kept in mind that ordinarily subsection 812.014(1) defines the crime of theft, whereas subsection 812.014(2), "merely defines the degree" of the felony by virtue of the value of the property stolen. See Johnson v. State, 17 F.L.W. S259, 260 (Fla. April 30, 1992). Here, however, the

offense remained defined as theft, but the plea agreement, and not the value of the property stolen, determined the degree of the offense. Yet, the agreement nonetheless undeniably left to the trial court the responsibility of ordering restitution under section 775.089(1)(a), Florida Statutes, for loss occasioned by appellants' offense of theft. That section provides that in addition to any punishment, the trial court "shall order the defendant to make restitution to the victim for damage or loss caused directly or indirectly by the defendant's offense. . . ." [emphasis added].

Based on the foregoing, and under the circumstances presented, absent any challenge to the validity of the plea itself, and absent any specific restriction contained within the plea agreement as to the amount the state could seek in restitution from the defendants, we hold that since the state in fact proved by a preponderance of the evidence that the amount of restitution it sought was caused by the defendants' offense, the order of restitution conforming thereto are AFFIRMED. However, in light of the apparent conflict this decision creates with the Fifth District's decision in Peralta, we hereby certify the following question as being one of great public importance:

> WHERE A DEFENDANT ENTERS INTO A PLEA AGREEMENT THAT IS NOT THEREAFTER CHALLENGED AND BY WHICH THE CHARGE OF FELONY GRAND THEFT IS REDUCED TO MISDEMEANOR PETIT THEFT, BUT WHICH AGREEMENT DOES NOT RESTRICT THE AMOUNT OF RESTITUTION THAT MAY BE IMPOSED, AND WHERE THE STATE IN FACT PROVES BY A PREPONDERANCE OF THE EVIDENCE AN AMOUNT CONSISTENT WITH THE ORIGINAL CHARGE, IS THE TRIAL COURT

NONETHELESS RESTRAINED BY THE PLEA TO PETIT THEFT TO IMPOSE AN AMOUNT OF RESTITUTION NO GREATER THAN $300?

ERVIN and KAHN, JJ., CONCUR.