IN THE SUPREME COURT OF FLORIDA

FILED
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ERIC LEE GLABUIS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No. 88,413

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, Eric Lee Glabuis[1], was the defendant in the trial court and the Appellant in the Fourth District Court of Appeal. He will be referred to by name or as Petitioner in this brief. Respondent was the prosecution in the trial court and the Appellee in the district court.

In the brief, the parties will be referred to as they appear before this Honorable Court.

The following symbols will be used:

"R" = Record on Appeal documents

"T" = Record on Appeal transcripts.

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[1] This is the spelling which was reflected in the style of the Notice of Appeal (R 37). In its decision, the Fourth District Court of Appeal spelled the last name "Glaubis" in the style of the case, although the decision correctly utilized the Glabuis spelling. To further complicate matters, it now appears that the actual spelling of Petitioner's last name is "Glaubius." Petitioner moved in the fourth district to correct the spelling to Glaubius, and planned to then so move in this Court. However, the fourth district has yet to rule on the motion. This Court adopted the misspelling used by the fourth district in the style of the decision, rather than the Glabuis spelling utilized by Petitioner in his Notice to Invoke Discretionary Jurisdiction. At this point, Petitioner will utilize the Glabuis spelling, as that was the spelling utilized in the fourth district in all but the style of the decision which was obviously an error.

STATEMENT OF THE CASE AND FACTS

Petitioner, Eric Lee Glabuis, was charged by Information filed in the Nineteenth Judicial Circuit with grand theft (R 7-8).

On December 13, 1994, Petitioner filed a written petition to enter a plea of nolo contendere as charged (R 18-23). On January 10, 1995, Petitioner appeared for sentencing and a restitution hearing. The parties had agreed to recommend a sentence of three (3) years probation with withheld adjudication of guilt (T 2-3, R 27-33). The parties had not agreed as to the matter of restitution and that was left open to the court (T 2-3). The court placed Petitioner on probation for a period of five (5) years with the condition that the probation could be terminated in three (3) years if he had fulfilled all the conditions of his probation. He was ordered to pay $255 in court costs; $200 in attorney fees; $25 in "costs of investigation" to the Okeechobee County Sheriff's Office; and restitution to Beall's in an amount to be determined in the restitution portion of the hearing. Numerous special conditions of probation were also imposed (T 11-14, R 30-33).

The court then conducted a restitution hearing at which the following evidence was presented:

Gregory Sherrell, regional loss prevention manager, conducted an investigation at Beall's Outlet which was initiated when Manager Rebecca Lee contacted him about her suspicions concerning refund transactions. She noted there were some similarities in handwriting and that when Petitioner was working, there were some sizeable refunds compared to when other supervisors worked. Sherrell, his counterpart on the other coast, and Sherrell's boss, Dan Doyle, met twice on a weekday for an hour and a half each time to review refund slips from the store (T 18-20, 42). Sherrell also spent three hours at the store investigating the theft and setting up a surveillance camera (T 42). Ms. Lee was also there to open and close the store. One clerk did approximately 12 hours

of research (T 43). Sherrell spent about 15 hours reviewing video tape from the camera. He also claimed six hours total drive time for two round trips from Orlando to Okeechobee (T 44). Taking into consideration the installation of the electronic hidden camera system over the register, his time and the time the other three investigators spent reviewing video tapes and refund slips, he approximated that 40 hours were involved in the internal investigation. When asked what cost per investigative hour was being sought for restitution, Sherrell stated, "Well, that would be a somewhat arbitrary figure. I mean none of us are really paid hourly, but again the equipment, the gas money, the company vehicles and the time, I would think that $40 an hour would be fair." Subsequent to Sherrell's investigation, he and Brown confronted Petitioner on November 2, 1994 (T 21). Petitioner admitted to taking merchandise and money from the store. He admitted to removing $360 cash from the register or the office, some of which he admittedly paid back. In other words, the store would incur a shortage and then maybe an overage a day or two later when Petitioner repaid it (T 22). He also admitted to taking merchandise, but the majority of the theft was refund fraud (T 23). At the time of the interview, Sherrell had a random sampling of refunds from the store, some of which were not done by Petitioner. Petitioner went through and initialled the ones he admitted were fraudulent. Petitioner would complete customer information when no customer was present and input into the register system fraudulent merchandise returns which were also not present and then he would pocket the cash. The total of the fraudulent refunds to which Petitioner admitted was $792.62 (T 24). Sherrell and Petitioner tried to estimate totals including the fraudulent receipts and the theft of merchandise and cash. Petitioner's fraudulent activity did not begin when he was first employed. Sherrell believed Petitioner said the thefts began when he became a supervisor which was approximately June 1994. The way the figure was ultimately agreed upon was by going through all the admittedly

fraudulent refunds plus others to which Petitioner did not admit. About three months of refunds were represented in the cross-sampling, and they had already ascertained that the occurrences lasted over three months, so Sherrell asked Petitioner for an estimate of the others during the length of his employment. Petitioner gave a figure of $3,660 for total thefts, which included $3,000 for fraudulent refunds, $360 cash and $300 merchandise. Sherrell did not use pressure, threats or coercion to get Petitioner to make this statement (T 27, 33, 38-39). The interview began on November 2 at 1:55 p.m. and Petitioner left the store at 5:00 p.m. (T 34). Petitioner asked if he would be arrested and that was when Sherrell stated that he certainly was not a police officer or a judge, that he was simply trying to balance the books for Beall's (T 35, 37). At no time during the interview did he advise Petitioner that if he admitted to this amount, the police would not be involved. After the interview, Sherrell had Petitioner write a letter detailing his admission of theft. Petitioner was shown state's exhibit 2 and agreed that it was his handwriting (T 28). He agreed that he wrote and signed it. State's exhibit 2 was entered into evidence. Beall's sought $3,660 in restitution for the thefts and $1,600 in investigative "costs" (T 28-29). He is on salary and received no additional payments. In terms of salary, there was no additional loss to the company as a result of this investigation (T 31). He was asking for Beall's to be reimbursed for money they had already spent for his employment. Sherrell agreed that was what he was employed to do (T 32). Sherrell said Petitioner paid all the money back that he took from the cash register. This was paid back with Petitioner's own money and money from fraudulent refunds. When defense counsel suggested this should be deducted from the total, Sherrell stated it should be multiplied, claiming that if you take $30 from the register and pay it back with fraudulent refund money, the company loss is doubled from the fraudulent refund (T 40). Sherrell had no idea what the store's losses were for the year (T 41).

Petitioner began his employment at Beall's on September 20, 1993. He was not sure when he was made a supervisor because there was a period of time where he was doing the duties and was not getting the compensation for it (T 47). He did not always work the cash register but he always had access to it. Approximately nine employees had access to the register (T 48). A supervisor was required to give out refunds. There were three supervisors including Petitioner (T 50). Petitioner asked approximately three times for the police to be called and Sherrell's response was "Do you want to go to jail?" Petitioner said no and Sherrell said, "Well, we could keep this between me, you and Beall's. There's no reason to call the cops if we don't have to." After he said Petitioner was a valued employee and they had put a lot of money into him, Petitioner would again ask to call the police. This was prior to the time he wrote the statement. Petitioner was under the impression that they would not call the police because Sherrell had said they did not have to be involved, that they were making a civil demand rather than pressing criminal charges. The $3,660 figure came from Sherrell. Sherrell told him he had been researching this and asked how much was taken. Petitioner told him he did not know because he was not sure. He did not want to throw out a figure. Sherrell threw out a figure of $10,000 and Petitioner said no. Sherrell kept throwing outrageous amounts out, which was why it took two hours before he wrote the statement. Sherrell kept saying the cops would not be called (T 51-52). Sherrell thought when he took the $360 from the safe and then paid it back, he was doubling that. In actuality, the money was taken, then paid back; it was not taken twice. He was getting scared and although he knew he did not take the amount of money Sherrell was talking about, he thought if he promised to pay the restitution to keep him happy, the police would not be involved (T 53). Petitioner said when he would take $10, for instance, from the safe, he would replace the same amount the next day. Hence, they were not missing $20. There was no proof it

was paid back with fraudulent refund money, but even if he had, there was not $20 missing, there would have been $10 missing from the refund because the other $10 was paid back. Petitioner did not admit the $360 in cash was missing (T 55). He admitted to Detective Suttle the $700 in initialled refund slips was the correct loss (T 53, 56). He also admitted he used his roommate and a friend to take merchandise from the store (T 57).

Defense counsel contended that there was only proof of loss by a preponderance of the evidence for $792 (T 62-63). The court found that the evidence was "ample" to establish losses of $3,660 in merchandise and cash and that $1,600 investigative "costs" was reasonable, for a total of $5,260. The court ordered Petitioner to pay all of the sums ordered to be paid at a minimum of $100 per month (T 63). The court waived costs of supervision (T 63-64).

Timely Notice of Appeal was filed by Petitioner to the Fourth District Court of Appeal (R 37).

The fourth district in a 2-1 written opinion, *Glaubis [sic][2] v. State*, 21 Fla. L. Weekly D1323 (Fla. 4th DCA June 5, 1996)[*see* Appendix], affirmed the assessment of restitution, which included $1,600 in internal investigative "costs" and $360 for "cash loss." The district court concluded that these internal investigative "costs" were incurred in uncovering Petitioner's wrongdoing and determining the extent of the loss. Because the district court concluded "that a victim's investigative costs may constitute a proper item for restitution under section 775.089, Florida Statutes (1993)," the court affirmed. *Id.* In doing so, the fourth district certified conflict with *Powell v. State*, 595 So. 2d 223 (Fla. 1st DCA), *review denied*, 601 So. 2d 553 (Fla. 1992), and *Ahnen v. State*, 565 So. 2d 855 (Fla. 2d DCA 1990), as it was unable to distinguish these cases, which were relied on

[2] See footnote in Preliminary Statement.

by Petitioner. In addition, the fourth district struck a condition of probation requiring Petitioner to pay costs of supervision as the trial court had waived the costs of supervision at the sentencing hearing. *Id.* at 1324.

On June 21, 1996, the fourth district issued its mandate.

Timely Notice of Discretionary Review was filed by Petitioner on July 2, 1996. On July 12, 1996, this Court issued its Order postponing a decision on jurisdiction and setting a briefing schedule.

SUMMARY OF THE ARGUMENT

POINT I

The Fourth District Court of Appeal's decision at bar is certified to be in conflict with *Powell v. State*, 595 So. 2d 223 (Fla. 1st DCA), *review denied*, 601 So. 2d 553 (Fla. 1992), and *Ahnen v. State*, 565 So. 2d 855 (Fla. 2d DCA 1990). Thus, this Court has jurisdiction. Petitioner contends that this decision also conflicts with this Court's holding in *State v. Williams*, 520 So. 2d 276 (Fla. 1988).

The trial court erred in assessing $1,600 in internal investigative "costs" as part of the restitution Petitioner was ordered to pay as a condition of his probation. This Court must reduce the total restitution of $5,260 ordered to be paid as a condition of his probation by the $1,600 amount.

POINT II

Additionally, the $360 for "cash loss" ordered to be paid as part of the restitution was not proven by a preponderance of the evidence and must also be deducted from the total restitution amount assessed.

internal investigative "costs," $360 for "cash loss," $300 for merchandise loss and $3,000 for fraudulent refunds (R 31, T 63). This was error, requiring reversal.

Petitioner challenges the assessment of $1,600 internal investigative "costs" as the amount was not proven by a preponderance of the evidence and, in addition, Beall's was not entitled to be awarded $1,600 in restitution for claimed *internal* investigative "costs" (*see also* Point II).

Section 775.089(1)(a), *Florida Statutes* (1993), provides that:

> the court shall order the defendant to make restitution to the victim for:
>
> 1. Damage or loss caused directly or indirectly by the defendant's offense; and
>
> 2. Damage or loss related to the defendant's criminal episode.

Before restitution may be awarded, there must be a significant relationship between the crime committed and the damages sustained, plus proof that the defendant's conduct directly or indirectly caused the loss. *State v. Williams*, 520 So. 2d 276.

Further, the state bears the burden of establishing the victim's losses by producing sworn victim's testimony to demonstrate the loss by a preponderance of evidence. *Epperley v. State*, 568 So. 2d 1336 (Fla. 4th DCA 1990); *Peters v. State*, 555 So. 2d 450 (Fla. 4th DCA 1990) (absent sufficient predicate showing basis for opinion on value of property, mere opinion of victims as to value of their lost property was insufficient to establish that value, for purposes of determining restitution required to be paid by defendant). Additionally, the second district has held that the state does not meet its burden of demonstrating loss by a preponderance of the evidence if no documentary evidence is presented. *Williams v. State*, 645 So. 2d 594 (Fla. 2d DCA 1994). A victim's

estimate of the loss is insufficient evidence supporting the loss. *Peters v. State*, 555 So. 2d at 451.

It is also well settled that 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 causes the victim." *Fresneda v. State*, 347 So. 2d 1021, 1022 (Fla. 1977); *Wilson v. State*, 452 So. 2d 84 (Fla. 1st DCA), *review denied*, 461 So. 2d 116 (Fla. 1984); *Smith v. State*, 590 So. 2d 1112 (Fla. 2d DCA 1991)(amount of restitution cannot exceed amount of damages or loss caused directly or indirectly by defendant's offense); *Reeves v. State*, 560 So. 2d 1368 (Fla. 5th DCA 1990). "Courts cannot require probationers to pay over random sums of money." *Fresneda v. State*, 347 So. 2d at 1022.

Here, the state sought reimbursement to Beall's for an estimated $1,600 in investigative "costs." Mr. Sherrell, a Beall's regional loss prevention manager, testified that various employees spent an estimated 40 hours reviewing refund slips, installing a video camera, reviewing video tapes and driving to and from Orlando (T 18-20, 42-44). When asked by the state what cost per investigative hour Beall's was seeking for restitution, Mr. Sherrell stated, "Well, that would be a somewhat arbitrary figure. I mean none of us are really paid hourly, but again the equipment, the gas money, the company vehicles and time, I would think that $40 an hour would be fair." (T 21). Mr. Sherrell testified that in terms of salary, there was no additional loss to the company as a result of this investigation (T 31). He agreed he was asking for Beall's to be reimbursed for money that Beall's had already spent for his employment. Mr. Sherrell also agreed that was what he was employed to do (T 32).

Petitioner therefore contends that the trial court erred in ordering Petitioner to reimburse Beall's for $1,600 in investigative "costs." *Powell v. State*, 595 So. 2d 223;

Ahnen v. State, 565 So. 2d 855; *see also Smith v. State*, 590 So. 2d 1112 (trial court improperly ordered restitution for the victim's lost wages as the amount of restitution a probationer is required to pay the victim of a crime cannot exceed the amount of damages or loss caused directly or indirectly by a defendant's offense); *Osteen v. State*, 616 So. 2d 1215 (Fla. 5th DCA 1993)(as restitution awarded must be based upon a significant relationship between crime committed and damages sustained by victim and upon proof that defendant's conduct directly or indirectly caused the loss, court reversed award of restitution for loss of business expenses in this case because the measure of damages was speculative and difficult to prove); *compare Hodge v. State*, 603 So. 2d 1329 (Fla. 4th DCA 1992).[4]

In the instant case, the fourth district affirmed the assessment of $1,600 in internal investigative "costs" as restitution, concluding that these internal investigative "costs" were incurred in uncovering Petitioner's wrongdoing and determining the extent of the loss. *Glaubis [sic] v. State*, 21 Fla. L. Weekly at D1323. The fourth district further concluded "that a victim's investigative costs may constitute a proper item for restitution under section 775.089, Florida Statutes (1993)." *Id.* In doing so, the fourth district certified conflict with *Powell v. State*, 595 So. 2d 223, and *Ahnen v. State*, 565 So. 2d 855, as it was unable to distinguish these cases, which were relied on by Petitioner. *Id.* at D1324.

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[4] Petitioner would submit that *Hodge v. State*, 603 So. 2d 1329, was also wrongly decided. In that case, the defendant was convicted of theft and the employer's fidelity bond premium was increased. The time spent by the victim and the cost necessary to determine and document the extent of the monetary loss, as required by the fidelity bonding company, was held to be recoverable in restitution. In addition, *Hodge v. State* is distinguishable for several reasons. In *Hodge*, the investigation was required by the fidelity bonding company; it was not initiated purely by the victim as in the case at bar and as in *Powell v. State* and *Ahnen v. State*. In contrast, at bar, Beall's suffered no additional monetary loss as a result of the investigation conducted by the security department. Further, the investigation did not even reveal the amount of the loss. Beall's and the state relied *solely* on Petitioner's statement to determine the amount of the loss.

In *Powell v. State*, 595 So. 2d 223, Powell's employer contacted the police about losses from his store, which apparently occurred over a period of time. Because the police indicated that discovery of the wrongdoer would be difficult, the victim hired a firm of private investigators. A private investigator videotaped Powell transferring materials from the company truck to his pick-up. Subsequently, Powell was confronted, acknowledged guilt, and the items he was charged with stealing were recovered. As part of its requested restitution, Powell's employer sought restitution for $1,347.75 for private investigators and $721.84 for costs of management employee time spent in the investigation. *Id.* at 224. The first district, applying the standard enunciated by this Court in *State v. Williams*, 520 So. 2d 276, held that it was error to include the costs of investigation in the restitution order. The first district concluded that restitution for the incidental costs incurred for the private investigator and the internal investigation contemplated reimbursement for damages in excess of those caused by the convicted offense as the evidence did not establish a significant causal relationship between the loss and the convicted offense. *Id.* at 225.

Similarly, in *Ahnen v. State*, 565 So. 2d 855, the victim hired a private investigator to locate his stolen property, because he believed the sheriff's office had suppressed evidence and concealed information. *Id.* The second district also applied *State v. Williams* to hold that the defendant could not be ordered to reimburse the victim for the private investigator's fee, because the incidental cost of a private investigator would be only remotely the result of the defendant's criminal activity, and not reasonably foreseeable by him. *Id.* at 856.

Petitioner submits that the first and second district courts in *Powell* and *Ahnen*, respectively, properly applied the test enunciated by this Court in *State v. Williams*, in contrast with the fourth district's holding in *Glaubis [sic]*. Thus, Petitioner further

submits that the holding in the instant cause is also in conflict with this Court's holding in *State v. Williams.*

The circumstances in the instant case are comparable to those in *Powell* and *Ahnen.*

At bar, the time spent in the *internal* investigation was expended by salaried employees who were retained in the loss prevention office to do exactly the work they did in this case. This is a normal part of doing business in the retail market. Indeed, Mr. Sherrell testified that Beall's did not incur any additional loss to the company as a result of this investigation. The research into the matter was a normal part of the duties of the loss prevention office. That is what the employees are paid for. As in *Ahnen* and particularly *Powell*, Beall's is not entitled to restitution for this internal investigation. This is especially true here where the record reflects that the store suffered no loss or additional salary expenses due to this internal investigation.

Further, this investigation was not needed to determine the amount of the loss as in fact it was not determined. There was never any testimony adduced as to the loss the store suffered even overall during that time period (T 41). Indeed, according to Mr. Sherrell, the loss claimed by Beall's was based totally on Petitioner's estimate of the amount of the loss.

Additionally, and quite significantly, the $1,600 amount that Beall's requested reimbursement for was not even proven by a preponderance of the evidence as it was purely an arbitrary amount as Mr. Sherrell admitted. He provided no salary figures for the various employees and noted that they were all salaried employees and not hourly employees. Utilizing Mr. Sherrell's admittedly "arbitrary" figure of $40 per hour and a 40-hour work week amounts to an *average* $83,200 annual salary for the clerk, investigator and managers. Mr. Sherrell's $40 per hour figure and approximation of 40

hours spent in the internal investigation were merely "guesstimates" and therefore the trial court erred in basing this $1,600 amount on them.

A victim is not entitled to be reimbursed for more than the loss incurred, which certainly appears to be the result at bar. *See Fresneda v. State*, 347 So. 2d 1022; *Wilson v. State*, 452 So. 2d 84.

Assuming *arguendo* this Court determines that in *some* limited circumstances a victim's investigative costs may be recoverable as restitution, Petitioner further submits that the instant case would not fall into that category for several reasons. First, the internal investigative "costs" in this case simply do not meet the test enunciated in *State v. Williams*. Second, the investigation at bar was not necessary to determine the extent of the loss as, in fact, the record reveals it did not do so. Finally, and quite significantly, it is undisputed that there was no loss to Beall's as a result of this *internal* investigation.

Thus, the $1,600 restitution awarded Beall's for internal investigative "costs" must be deducted from the total restitution ordered, resulting in a restitution assessment of $3,300.

Therefore, this Honorable Court should accept jurisdiction of this cause, approve the decisions in *Powell* and *Ahnen*, and reverse the instant decision of the Fourth District Court of Appeal, in part, wherein it affirms the assessment of $1,600 in internal investigative "costs." The total amount of restitution of $5,260 should be reduced by this amount.

POINT II

THE TRIAL COURT FURTHER ERRED IN ORDERING PETITIONER TO PAY $360 IN RESTITUTION FOR "CASH LOSS."

At sentencing, the trial court also required Petitioner to repay Beall's Outlet for $360 in "cash loss" as part of the $5,260 restitution Petitioner was ordered to pay as a condition of his probation (R 31, T 63). The trial court also erred in imposing this amount of restitution.[5]

The award of restitution must be reduced by the $360 assessed for "cash loss" as this loss was not proven by a preponderance of the evidence.

As set forth in Point I, it is the *state* which bears the burden of establishing the victim's losses by producing sworn victim's testimony to demonstrate the loss by a preponderance of evidence. *Epperley v. State*, 568 So. 2d 1336 (Fla. 4th DCA 1990); *Peters v. State*, 555 So. 2d 450 (Fla. 4th DCA 1990). A victim's estimate of the loss is insufficient evidence supporting the loss. *Peters v. State*, 555 So. 2d at 451. Additionally, documentary evidence may even be required before the state will be deemed to have met its burden of demonstrating loss by a preponderance of the evidence. *Williams v. State*, 645 So. 2d 594 (Fla. 2d DCA 1994).

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 causes the victim." *Fresneda v. State*, 347 So. 2d 1021, 1022 (Fla. 1977); *Wilson v. State*, 452 So. 2d 84 (Fla. 1st DCA), *review denied*, 461 So. 2d 116 (Fla. 1984). "Courts cannot require probationers to pay over random sums of money." *Fresneda v. State*, 347 So. 2d at 1022.

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[5] The fourth district affirmed this amount without comment.

The testimony presented by the state was that Petitioner paid this amount back, either with his own funds or through fraudulent refunds (T 40). Additionally, Petitioner denied that the $360 in cash was missing. He explained that if he took money from the safe, $10 for instance, he would replace the same amount the next day. Therefore, the store was not missing $20. Petitioner contended that there was no proof he paid it back with fraudulent refund money. But even if he had, $20 would not be missing, there would only be $10 missing (from a fraudulent refund) because the other $10 would have been paid back (T 55).

If the $360 amount is allowed to stand, as Petitioner was also ordered to pay $3,000 restitution for the estimated loss due to fraudulent refunds, the store would be doubly reimbursed. This is true even if Petitioner had used *only* fraudulent refunds to reimburse the cash register or the office. As Mr. Sherrell admitted the amounts taken from the cash register or the office were replaced, the store at most only suffered the loss from the fraudulent refunds. And Petitioner is already *separately* ordered to pay the total amount of $3,000 in fraudulent refunds. Therefore, the amount of $360 must be deducted from the $3,660 restitution ordered for cash and merchandise loss ($3,000 in fraudulent refunds, $360 "cash loss" and $300 in merchandise), leaving a final restitution amount to Beall's of $3,300 [$5,260 - $1,600 (*see* Point I) - $360]. *See G.R. v. State*, 564 So. 2d 207 (Fla. 3d DCA 1990) (trial court erred in requiring defendant to pay restitution to American Express for stolen traveler's checks where purchaser paid for checks and was refunded money when they were stolen, and defendant was unsuccessful in cashing them, so that American Express suffered no loss).

Thus, Petitioner requests that this Honorable Court further reduce the assessment of $5,260 in restitution by $360 for the non-existent "cash loss." When this reduction

is combined with the $1,600 reduction required in Point I, Petitioner's restitution assessment would be $3,300.

CONCLUSION

Petitioner prays this Honorable Court will exercise its discretion to review the instant decision of the district court which is certified to be in conflict with *Powell v. State*, 595 So. 2d 223 (Fla. 1st DCA), *review denied*, 601 So. 2d 553 (Fla. 1992), and *Ahnen v. State*, 565 So. 2d 855 (Fla. 2d DCA 1990).

This Honorable Court should reverse the decision of the Fourth District Court of Appeal in *Glaubis [sic] v. State*, in part, wherein it affirms the amount of $1,600 in internal investigative "costs" and reduce the total restitution ordered by this amount. This Court should further reduce the amount by deducting the $360 assessed for "cash loss," leaving a final restitution assessment of $3,300.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Joseph A. Tringali, Assistant Attorney General, Third Floor, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2299 this 6th day of August, 1996.

Susan D. Cline

Attorney for Eric Lee Glabuis

IN THE SUPREME COURT OF FLORIDA

ERIC LEE GLABUIS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No. 88,413

APPENDIX

random testing for alcohol serves no discernible purpose in this case. *See Biller*. On the other hand, random testing for illegal substances could be said to be related to conduct which is itself criminal, related to future criminality or otherwise broadly directed toward rehabilitation and, therefore, is a valid condition of probation which need not be scrutinized on a case-by-case basis for relevancy. *See Biller*; *Zeigler*; *Nank v. State*, 646 So. 2d 762 (Fla. 2d DCA 1994).

Accordingly, we strike that portion of the condition of probation requiring defendant to pay the costs of random testing and direct that upon remand the trial court restrict the condition of probation to random testing related to illegal drug use. In all other respects we affirm the order of probation in accordance with *Hart* and *Biller*. We certify conflict with *Hayes* in the hope that our supreme court may clear up any confusion concerning whether random testing is subject to a *Biller* analysis. (KLEIN and STEVENSON, JJ., concur.)

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[1]The pre-printed form order entered by the trial court lists this condition as special condition 5:

> You will submit to urinalysis, breathalyzer or blood tests at any time requested by your officer or the professional staff of any treatment center where you are receiving treatment, to determine possible use of alcohol, drugs or controlled substances. You shall be required to pay for such tests unless otherwise waived by your officer.

The verbiage of this condition is identical to the supreme court's form order of probation, Rule 3.986, also listing this condition as a special condition with space for the trial court to check off.

[2]In 1994, section 948.03 was amended. Ch. 94-294, § 1, Laws of Fla. By the amendment, effective July 1, 1994, the provision for random testing, formerly contained in section 948.03(1)(j), was renumbered as section 948.03(1)(k)1.

* * *

Declaratory judgment—Action brought by husband alleging ambiguity in judgment of dissolution of marriage was improperly dismissed for failure to state cause of action—Although husband's name alone was on promissory note secured by mortgage on marital home, sentence in final judgment requiring husband to be responsible for debts in his name does not clearly and unambiguously mean that he must pay entire mortgage before receiving any share of the proceeds from the sale of marital home—Such interpretation appears to be inconsistent with portion of final judgment dealing with disposition of marital home—Remanded for further proceedings

RALPH HENRY DI GIACINTO, Appellant, v. WENDY LYNNE DI GIACINTO n/k/a WENDY LYNNE WRAY, Appellee. 4th District. Case No. 95-2761. Opinion filed June 5, 1996. Appeal from the Circuit Court of the Fifteenth Judicial Circuit, Palm Beach County; Richard L. Oftedal, Judge. L.T. Case No. CD 93-2508. Counsel: Bruce F. Silver of Bruce F. Silver, P.A., Boca Raton, for appellant. Timothy W. Gaskill and Meredith E. Level of DeSantis, Gaskill, Smith & Shenkman, P.A., North Palm Beach, for appellee.

(KLEIN, J.) The former husband filed this action for declaratory relief, alleging ambiguity in a judgment of dissolution, in accordance with *de Marigny v. de Marigny*, 43 So. 2d 442 (Fla. 1949) (declaratory relief appropriate where judgment is ambiguous). The trial court dismissed the complaint for failure to state a cause of action, finding no ambiguity. The husband appeals and we reverse.

The portion of the judgment which the husband claims is ambiguous pertains to the proceeds of the sale of the marital home. Although most provisions in the final judgment were determined by the court, the final judgment reflects that the parties had agreed on the disposition of the marital home, and that agreement was incorporated into the final judgment:

> Per agreement of the parties, the Wife shall have exclusive possession of the marital abode located at 100 B Vision Court in Palm Beach Gardens, Florida, until such time as the youngest child reaches the age of eighteen (18) or graduates from high school, whichever occurs last. At that time, the property shall be sold and the proceeds divided equally between the Husband and the Wife. Should the parties be unable to agree on a procedure for selling the home, either party may apply to the Court for an Order requiring partition of the property. In the meantime, the Husband shall pay one-half (1/2) of the taxes, insurance, assessments and monthly mortgage payments (approximately $437.00 per month) directly to the Wife, so she can keep these payments current. The Husband shall receive a credit at closing for the payments he makes from now through the sale of the home. If the Husband fails to make these payments, and the Wife does, the Wife shall be entitled to a full credit for all the payments she makes.

In a different paragraph of the final judgment the court required the wife to be responsible for debts incurred on her credit cards, and provided that the husband would be responsible for "all of the debts incurred by him and in his name." It is this provision which has resulted in the dispute, because the husband alone is on the promissory note secured by the mortgage, although husband and wife are both on the mortgage. The wife contends that the entire mortgage debt is the responsibility of the husband, and that she therefore is entitled to one-half of the proceeds from the sale of the home without consideration of the mortgage.

We agree with the husband that the sentence requiring the husband to be responsible for debts in his name does not clearly and unambiguously mean that he must pay the entire mortgage before receiving any share of the proceeds from the sale of the home. That interpretation would appear to be inconsistent with that portion of the judgment pertaining to the home. We therefore reverse and remand for further proceedings. (DELL and STONE, JJ., concur.)

* * *

Criminal law—Sentencing—Restitution—Defendant pleading no contest to charge of grand theft of merchandise and cash from employer—Investigative costs incurred by employer in uncovering defendant's wrongdoing and determining extent of loss were proper item for restitution—Conflict certified—Probation order to be corrected to reflect trial court's oral waiver of costs of supervision

ERIC LEE GLAUBIS, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 95-0273. Opinion filed June 5, 1996. Appeal from the Circuit Court for the Nineteenth Judicial Circuit, Okeechobee County; Edward A. Miller, Judge. L.T. Case No. 94-499-CFA. Counsel: Richard L. Jorandby, Public Defender, and Susan D. Cline, Assistant Public Defender, West Palm Beach, for appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Joseph A. Tringali, Assistant Attorney General, West Palm Beach, for appellee.

(STEVENSON, J.) Appellant, Eric Glabuis, pled no contest to a charge of grand theft of merchandise and cash from his employer, Beall's Outlet. The trial court placed Glabuis on probation for three years and ordered restitution. The issue which we write to address in this appeal is whether the trial court properly awarded restitution to Beall's Outlet for the *investigative costs which it incurred in uncovering Glabuis's wrongdoing and determining the extent of the loss*. Because we conclude that a victim's investigative costs may constitute a proper item for restitution under section 775.089, Florida Statutes (1993), we affirm.

At the restitution hearing, Gregory Sherrell, Beall's regional loss prevention manager, testified that he conducted an investigation at the store after he was contacted by the manager, Rebecca Lee, regarding her suspicions concerning appellant's refund transactions. Lee had noticed that there were sizable refund transactions when appellant was working as compared to when other supervisors were working. Sherrell and Dan Doyle, appellant's boss, met twice on a weekday for an hour and a half each time to review refund slips from the store. Sherrell also spent time at the store investigating the theft, setting up surveillance equipment and reviewing the tapes. After Sherrell's investigation, he confronted appellant regarding thefts from the store. Appellant then admitted to taking merchandise from the store and money from the cash register by way of false refund transactions.

Sherrell's investigative efforts cost Beall's approximately $40 per hour. The trial court awarded Beall's $1,600 in investigative costs as restitution. We agree with the state that the investigative costs in question were incurred by Beall's as a "direct or indirect" result of appellant's criminal offense. See § 775.089(1)(a), Fla. Stat. (1993).

In *Hodge v. State*, 603 So. 2d 1329 (Fla. 4th DCA 1992) this court held that restitution could be ordered for the reasonable value of time necessarily spent and costs incurred by the victim to determine and document the extent of his loss caused by the employee's criminal conduct. There, the victim, his wife, son, accountant and two members of his office staff had worked to determine the extent of the loss in the detail which would be necessary for the victim to be indemnified under an employee fidelity bond. This court approved restitution for all of the costs and expenses necessarily and reasonably incurred by the victim in his investigation.

> As to the reasonable value of the time necessarily spent and the costs necessarily incurred by the victim in order to determine and document the extent of the loss as required by the bonding company, we have no difficulty in concluding that such is likewise a loss caused at least indirectly, if not directly, by the appellant's offense. There is a significant relationship between that loss and the crime, *State v. Williams*, 520 So. 2d 276 (Fla. 1988), and we think it would be illogical to conclude otherwise.

Id. at 1330.

We note that two districts appear to disagree with this approach and have held that investigative costs incurred by the victim are not a proper item for restitution. *See Ahnen v. State*, 565 So. 2d 855 (Fla. 2d DCA 1990), and *Powell v. State*, 595 So. 2d 223 (Fla. 1st DCA 1992). In *Ahnen*, the second district held the victim was not entitled to restitution for monies that he paid to a private investigator to locate his missing property because he believed the sheriff's department had been "suppressing evidence and concealing information." 565 So. 2d at 855. The court explained that "even if the victim's suspicions were justified, the investigative costs would only be remotely the result of Ahnen's criminal activity, and not reasonably foreseeable by Ahnen." *Id.* at 856.

In *Powell*, the first district refused to approve an order of restitution where the victim, suspicious over losses from his store, contacted the local police but was told that discovery of the wrongdoer would be difficult. The victim decided to hire a firm of private investigators to investigate. One of the private investigators videotaped the defendant transferring materials from the company truck to his pick-up truck, and covering them with a tarpaulin. When confronted with the incriminating evidence, the defendant confessed and all of the missing items were recovered. The defendant later pled no contest to grand theft of building supplies. The trial court ordered restitution for the expenses which the victim incurred in hiring the private investigator and for costs of management employee time incurred during an internal investigation. The first district reversed the award of restitution stating:

> Restitution for the incidental costs incurred for the private investigator and the internal investigation in this case contemplate reimbursement for damages in excess of those caused by the convicted offense. Although the loss contemplated by a restitution order "need not be directly encompassed within the legal elements of an offense," the evidence must establish a significant casual relationship between the loss and the convicted offense.

Id. at 225, quoting *Denson v. State*, 556 So. 2d 823 (Fla. 1st DCA), *review denied*, 562 So. 2d 347 (Fla. 1990).

In *Hodge*, this court, without so holding, mused that *Ahnen* and *Powell* might be distinguished on the basis that the investigations in those cases were conducted at the "whim" of the victims. 603 So. 2d at 1330. Judge Owen, writing for the majority, remarked that:

> To the extent there is no valid distinction between those cases and this case, we are simply in disagreement as to what loss or damage is "indirectly" caused by the defendant's offense. We would, in any event, question these cases because they imply, if not hold, that (1) the damages must be such as were reasonably foreseeable (the test of causation relating to breach of contract damages), and (2) the element of causation is likened to the proximate causation requirement in tort (which is generally limited to damages caused directly by the tort), standards more restrictive than the clear language of Section 775.089(1)(a), Fla. Stat. (1991).

603 So. 2d at 1331 n. 4. We do not believe that *Ahnen* and *Powell* can be distinguished; therefore, we certify conflict.

The state concedes that the written order of probation must be corrected because the trial court waived the costs of probation supervision at the hearing, but those same costs were somehow included in the order of probation. It is well settled that a trial court's oral pronouncement controls over a written order of probation. Therefore, that condition of probation is stricken. *See, Justice v. State*, 21 Fla. L. Weekly S219 (Fla. May 23, 1996).

We have considered the other issues raised by appellant and find no error. In all other respects, the matter on appeal is AFFIRMED. (GLICKSTEIN, J., concurs. KLEIN, J., dissents with opinion.)

(KLEIN, J., dissenting.) The restitution statute, section 775.089(1)(a) provides:

> In addition to any punishment, the court shall order the defendant to make restitution to the victim for:
>
> 1. Damage or loss caused directly or indirectly by the defendant's offense; and
>
> 2. Damage or loss related to the defendant's criminal episode,...

The restitution here was to compensate the store for the hours put in, during their regular hours of employment, by the company's regional loss prevention manager and a store employee. The evidentiary basis for the award was a statement by the regional loss prevention manager: "Well, that would be a somewhat arbitrary figure. I mean none of us are really paid hourly, but again the equipment, the gas money, the company vehicles and time, I would think that $40 an hour would be fair." He estimated that the store employees spent 40 hours reviewing refund slips, installing a video camera, reviewing video tapes, and in travel, and that is how the court arrived at $1,600.

I do not think that the legislature intended to compensate a victim for this type of in-house work, and I would therefore reverse.

* * *

Criminal law—Sentencing—Guidelines—Scoresheet—Error to include points for possession of firearm and two prior DUI offenses—No error in assessing points for severe victim injury—Sentence of fifteen years in jail followed by five years on probation exceeded statutory maximum of fifteen years

BILLY BLACKMON, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 95-1193. Opinion filed June 5, 1996. Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Jeffrey E. Streitfield, Judge. L.T. Case No. 94-6238. Counsel: Richard L. Jorandby, Public Defender, and Susan D. Cline, Assistant Public Defender, West Palm Beach, for appellant. Robert A. Butterworth, Attorney General, Tallahassee, and James J. Carney, Assistant Attorney General, West Palm Beach, for appellee.

(PER CURIAM.) After pleading guilty to two counts of attempted first degree murder and one count of aggravated battery, appellant argues that his sentence, is improper. The state concedes error in guidelines scoresheet points for possession of a firearm and two prior DUI offenses. The state also concedes error in the appellant having been sentenced to fifteen years in jail followed by five years on probation, because the maximum term of imprisonment for that charge is fifteen years. We therefore reverse and

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Joseph A. Tringali, Assistant Attorney General, Third Floor, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2299 this 6th day of August, 1996.

Susan R. Clive
Attorney for Eric Lee Glabuis