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### State v. Foeller Appellant's Reply Brief Dckt. 47777

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**IN THE SUPREME COURT OF THE STATE OF IDAHO**

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 47777-2020
	)	
v.	)	KOOTENAI COUNTY
	)	NO. CR28-18-20682
	)	
MELISSA KAY FOELLER,	)	REPLY BRIEF
	)	
Defendant-Appellant.	)	
_____	)	

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**REPLY BRIEF OF APPELLANT**

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**APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF KOOTENAI**

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**HONORABLE SCOTT WAYMAN  
District Judge**

---

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## STATEMENT OF THE CASE

### Nature of the Case

This case presents an important question not previously addressed by Idaho's appellate courts regarding the interpretation of Idaho's criminal restitution statute, I.C. § 19-5304. Specifically, this Court is asked to decide whether the Idaho legislature intended the "economic loss" that is compensable as restitution to include income taxes.

Melissa Kay Foeller pled guilty to grand theft for embezzling from her employer, and to willfully evading her state income tax obligations related to the embezzled funds and the income from her employment. Over Ms. Foeller's objections, the district court entered a restitution order against Ms. Foeller that included an award of \$48,775 to the Idaho Tax Commission, based upon the Tax Commission's estimate of the taxes owed on all of Ms. Foeller's unreported income. The district court additionally awarded \$540,952.87 to the victims of the embezzlement, notwithstanding Ms. Foeller's objection that she will not ever be able to repay that amount of restitution.

On appeal, Ms. Foeller challenges the district court's award of restitution, asserting two claims of error. Her first claim is that the district court erred as a matter of law by awarding restitution to the Idaho Tax Commission. She takes the position on appeal, as she did in the district court, that estimated income tax is not an "economic loss" within the meaning of the restitution statute. She argues that the legislature did not intend that the Tax Commission use the criminal restitution statute to collect income tax as "economic loss," without going through the statutory assessment and collection process. She asserts that estimated income tax is not the type of loss that the restitution statute is intended to cover.

Ms. Foeller's second claim is that the district court abused its discretion by entering an order of restitution without properly considering her ability, in the foreseeable future, to repay the amount awarded, as was required by the restitution statute.

This Reply Brief is necessary to address the State's preservation and waiver arguments, and to demonstrate that, contrary to the State's assertions, Ms. Foeller's appellate claims and arguments are properly before this Court. Additionally, this Reply Brief responds to some of the State's arguments on the merits.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Ms. Foeller's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference.

## ISSUES

- I. Should this Court vacate the restitution order because the district court erred, as a matter of law, when it included an award to the Idaho State Tax Commission for estimated income tax?
  
- II. Should this Court vacate the restitution order because the district court abused its discretion by failing to adequately consider Ms. Foeller's ability to ever repay the amount of the award that it ordered?

## ARGUMENTS

### I.

#### This Court Should Vacate The Restitution Order Because The District Court Erred, As A Matter Of Law, When It Included An Award To The Idaho State Tax Commission For Estimated Income Tax

##### A. The District Court Erred By Interpreting The Restitution Statute To Include Estimated Income Tax As An “Economic Loss,” And Therefore Erred In Awarding Restitution To The Tax Commission

Ms. Foeller’s first claim on appeal is that the district court erred as a matter of law by awarding restitution to the Idaho Tax Commission. Estimated income tax is not an “economic loss” within the meaning of the statute, and the district court erred as a matter of law when it interpreted the statute to authorize an award of restitution to the State Tax Commission. (Appellant’s Br., pp.6-10.) When interpreting a statute, the court’s aim is “to derive the intent of the legislative body that adopted the act.” *State v. Owens*, 158 Idaho 1, 3 (2015).

The plain language used in the statute defining “economic loss” supports Ms. Foeller’s argument:

“Economic loss” includes, *but is not limited to*, the value of property taken, destroyed, broken, or otherwise harmed, lost wages and direct out-of-pocket loss or expenses, such as medical expenses resulting from the criminal conduct, but does not include less tangible damage such as pain and suffering, wrongful death or emotional distress.

I.C. § 19-5304(1)(a) (emphasis added). (*See* Appellant’s Br., p.7.) Estimate income tax “does not fit within the type of items delineated” and “is not expressly excluded by the statute’s list of ‘less tangible damages.’” (Appellant’s Br., p.7.) Thus, the question is whether the district court erred by reading the statute’s “not limited to” language to include estimated income taxes as an economic loss to the Idaho State Tax Commission. (Appellant’s Br., p.7.)

1. The Provisions of the Idaho Income Tax Act Support Ms. Foeller’s Position On The Issue She Raised Below, And Are Properly Argued On Appeal

Contrary to the State’s assertions (Resp.Br., pp.11-13), Ms. Foeller’s appellate argument regarding the Idaho Income Tax Act fits squarely within the Idaho Supreme Court’s recent precedent regarding issue preservation; specifically, the Court’s holdings that (1) “both the issue *and* the party’s position on the issue must be raised before the trial court,” *State v. Gonzalez*, 165 Idaho 95, 99 (2019) (citing *Ada County Hwy. Dist. v. Brooke View, Inc.*, 162 Idaho 138, 142 n.2 (2017)); and (2) “so long as a substantive issue is properly preserved, a party’s appellate argument may evolve on appeal.” *State v. Hoskins*, 165 Idaho 217, 223 (2019) (citing *Brooke View*, 162 Idaho at 142 n.2). In *Hoskins*, the Supreme Court distilled the salient points of *Brooke View* as follows:

The case involved a takings claim after the Highway District used eminent domain to install a drainage ditch and walkway on Brook [sic] View’s property. Brook View first contested the amount paid in just compensation, but the litigation shifted its focus to separate damages when the Highway District’s construction destroyed portions of a decorative dividing wall. After repeatedly rejecting the Highway District’s argument that the damage should not be considered as part of the just-compensation calculus, the district court held that the damage was part of the takings claim. On appeal, the Highway District maintained its position, *but supplemented its argument with citation to two relevant Idaho statutes* dealing with the interpretation of the just-compensation statute. *This Court rejected Brook View’s argument that this additional authority represented an unpreserved issue on appeal.* We held that the Highway District could fine-tune its argument because the issue was properly raised below and its position on that issue had not changed.

165 Idaho at 224 (emphasis added).

Just like the Highway District in *Brooke View*, Ms. Foeller raised the issue below and her position on that issue has not changed. In the district court, Ms. Foeller objected to awarding restitution to the Idaho Tax Commission, taking the position that that the lost income tax revenue claimed by the Tax Commission “does not fit the definition of economic loss,” and that the

losses being claimed by the Tax Commission were only “estimates.” (Tr., p.61, L.20 – p.62, L.16, p.149, Ls.18-20.) The district court concluded otherwise, and it expressly ruled that the amount sought by the Tax Commission “falls within the definition of economic loss.” (Tr., p.65, L.19 – p.66, L.14.) Thus, the issue of whether the statute’s definition of “economic loss” encompasses the estimated income tax, and Ms. Foeller’s position on that issue, were presented to and decided by the district court.

Moreover, and contrary to the State’s mischaracterization, (Resp. Br., p.12), Ms. Foeller’s argument is *not* that the provisions of the Income Tax Act *operate to preclude* an award of restitution to the Commission. Rather, her appellate argument is that the provisions of the Idaho Income Tax Act “indicate that the legislature *did not intend that* income taxes be included in the restitution statute as ‘economic loss.’” (Appellant’s Br., p.8 (emphasis added).) In short, the provisions of the Income Tax Act lend support to Ms. Foeller’s interpretation of *restitution statute*, and her position that “economic loss” does not include estimated income tax.

Thus, because both the issue and her position on that issue were raised in the district court, Ms. Foeller’s supplemental statutory authority in support of her interpretation of the restitution statute is properly before this Court. *Gonzalez*, 165 Idaho at 99.

2. An Interpretation Of “Economic Loss” To Include Estimated Income Taxes Conflicts With The Provisions Of The Idaho Income Tax Act, And Is Contrary To Legislative Intent

As noted above, Ms. Foeller argues that the provisions of the Idaho Income Tax Act indicate the legislature did not intend that income taxes be included in the restitution statute as “economic loss.” (Appellant’s Br., pp.8-10.) The State has submitted various arguments in opposition. (*See* Resp. Br., pp.14-17.) Ms. Foeller addresses four of those arguments below.

First, the State cites three sections<sup>1</sup> of the Idaho Income Tax Act for the proposition that the remedies available under the Act are “in addition to” other legal remedies. (Resp. Br., p.17.) However, contrary to the State’s assertions, these three statutes actually support a finding that the legislature did not intend the restitution statute to be a substitute for the assessment procedures set forth in the Income Tax Act. These three statutes deal only with the *collection*, not the *assessment*, of income tax. Nothing in these code sections relieves the State of its duty to comply with the assessment procedures of the Income Tax Act. Section 63-3050 deals with the collection of income tax deficiency (*e.g.*, collection of tax, interest, penalties, and erroneous refunds). I.C. § 63-3050. As explained in the Appellant’s Brief, there cannot be a deficiency unless and until the tax has been assessed. (Appellant’s Br., p.8.) Further, the income tax cannot be assessed unless and until the *statutory* notice of the proposed deficiency has been sent to the taxpayer, and income tax assessment procedures have been complied with.<sup>2</sup>

Similarly, Section 63-3063 likewise deals only with *collection*, not *assessment*, stating that the distraint provisions of the Act “shall be in addition to any and all other existing remedies provided by law for the enforcement of the revenue laws of the state of Idaho.” I.C. § 63-3063. Ms. Foeller submits that it would be unreasonable to conclude the criminal restitution statute is a “law for the enforcement of the revenue laws of the state.” In any event, Section 63-3063 does nothing to relieve the State from complying with the assessment procedures of the Income Tax Act. Similarly, Section 63-3064(a) deals only with collection of tax “due under the provisions of this act.” As stated previously, a tax is not due under the act until it has been assessed, and the assessment procedures of the act have been complied with.

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<sup>1</sup> The State cites to Idaho Code sections 63-3050, 63-3063, and 63-3064(a). (Resp. Br., p.17.)

<sup>2</sup> The assessment procedures are set forth in I.C. § 63-3045(1) and (2). (*See* Appellant’s Br., p.8.)

Second, the State asserts that the legislature's restrictions on the State Tax Commission's authority to pursue payment of income taxes "are irrelevant" to whether the State *prosecutor* may request the district court to order payment of the same unpaid taxes as criminal restitution. (Resp. Br., p.17.) This is incorrect. Contrary to the State's assertion, the legislature's restrictions on the assessment and collection of income tax *is relevant* to the question of legislative intent, and whether it can reasonably be said that the legislature intended to treat unassessed income tax, which has only been "estimated," as "economic loss" under its criminal restitution statute. Furthermore, it is unreasonable to conclude the legislature would restrict the State Tax Commission, which it has charged with assessing and collecting income tax, and yet intend to allow its assessment procedures to be ignored by the Kootenai County Prosecutor.

Third, the State argues "there is no reason to believe that there was no notice and assessment here." (Resp.Br., p.15.) The State is incorrect for several reasons. First, the State's assertion is pure speculation. The State introduced no evidence at the hearing that the Tax Commission had sent the required Notice of Deficiency or had complied with the statute's assessment procedures. (*See generally* Tr.) On the contrary, the State's witness testified that the amounts requested were "estimates" of the anticipated amount of unpaid tax that will be due. (Tr., p.51, L.23 – p.52, L.11.)

The State additionally, and incorrectly, claims that Ms. Foeller "had notice of a tax deficiency" which "became an assessment when she failed to protest" within the statutory time. (Resp. Br., p.15.) This claim is not supported by the tax statute or the evidence in the record. The purported "notice" cited by the State is a letter from the Tax Commission *to the prosecutor* setting forth amounts being requested "for the embezzlement." (*See R.*, pp.71-73.) While this letter, if delivered to Ms. Foeller, might constitute "notice" in the due process sense, it does not

meet the statutory requirements prescribed by the legislature for a notice of tax deficiency. *See* Section 63-3045(1)(a)(a).<sup>3</sup>

Fourth, the State argues that the restitution statute is *not* being substituted for the law governing the determination of an individual's income tax liability. (Resp. Br., pp.18-19.) However, the State fails to explain how taxable events occurring *after* the restitution hearing would be taken into account in determining the amount of the tax liability. As noted in the Appellant's Brief, the Idaho Income Tax Act provides for after-the-fact adjustments; the restitution statute does not provide for any such future adjustments. (*See* Appellant's Br., p.9.)

Moreover, the Idaho Income Tax Act expressly incorporates federal tax law. Idaho Code § 63-3011B defines "taxable income" to mean federal taxable income as determined by the Internal Revenue Code. Similarly, Idaho Code § 63-3011 states that "gross income" means "gross income" as defined in section 61(a) of the Internal Revenue Code. Idaho Code § 63-3011A defines "adjusted gross income" with reference to Section 62 of the Internal Revenue Code. Thus, the Idaho legislature has expressly and unambiguously made its intent clear that federal tax law, with minor modifications,<sup>4</sup> is to govern the determination of a taxpayer's state income tax liability. This immense body of federal law includes not only the Internal Revenue Code itself and the supporting Treasury regulations (26 CFR §§ 1.01-1 – 1.1552-1.ch.A), but also a large body of federal case law from the United States Tax Court (26 U.S.C. § 7441 *et seq.*), the United States district courts and courts of appeal (26 U.S.C. § 6330), the United States Court

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<sup>3</sup> In contravention of the clearly stated requirements of I.C. § 63-3045(1)(a), the referenced letter was *not* sent to the taxpayer, Ms. Foeller, nor to her last known address, but was sent instead to Casey Simmons, the Kootenai County prosecutor; the purported notice was not sent by first class mail or other commercial delivery service providing proof of delivery; and the purported notice did not advise the taxpayer of her right to seek administrative appeal. (*See* R., p.73.)

<sup>4</sup> *E.g.*, I.C. § 63-3022.

of Federal Claims (28 U.S.C. § 1346), and occasionally the United States Bankruptcy Court (11 U.S.C. § 505(a)(1)).

Ultimately, and importantly, this Court’s interpretation of “economic loss” – whether it includes or does not include estimated income tax to the State Tax Commission – has ramifications far beyond Ms. Foeller’s case. Should this Court step outside of the legislature’s intended tax system, as is being urged by the State, it may thrust the already overburdened criminal courts, their public prosecutors and public defenders into a complicated and largely unfamiliar body of law.

B. Applying The Reasoning Of *State v. Straub*, The Type Of Loss Claimed By The Tax Commission Is Not Compensable Under The Criminal Restitution Statute

As observed by the Idaho Supreme Court, Idaho’s criminal restitution statute is not a substitute for every type of civil action to recover money from a criminal defendant. *State v. Straub*, 153 Idaho 882, 890 (2013). Thus, in addition to her argument regarding the provisions of the Idaho Income Tax Act, Ms. Foeller urges this Court to apply the reasoning of *Straub*, 153 Idaho at 890, to conclude that estimated income tax is not an “economic loss” that the Tax Commission may recover under the criminal restitution statute. (Appellant’s Br., pp.10-11.) As argued in the Appellant’s Brief, this Court should not allow the assessment and collection of income tax to be “clothed” as criminal restitution. *Straub*, 153 Idaho at 890. Instead, and as in *Straub*, this Court should conclude that the claimed loss falls outside of the criminal restitution statute. *Id.* (Appellant’s Br., p.11.)

The State’s arguments in opposition to this argument are unremarkable, and Ms. Foeller respectfully refers this Court to the argument in her Appellant’s Brief as her argument in reply.

## II.

### This Court Should Vacate The Restitution Order Because The District Court Abused Its Discretion By Failing To Adequately Consider Ms. Foeller's Ability To Ever Repay The Amount Of The Award That It Ordered

Ms. Foeller's second appellate claim is that the district court abused its discretion by ordering the amount of restitution without properly considering her ability to ever repay that amount in the future as was required by statute, pursuant to *State v. Garcia*, 166 Idaho 661, \_\_\_, 462 P.2d 1125, 1145 (2020). (Appellant's Br., pp.12-15.)

The State asserts that Ms. Foeller waived this claim when she entered the plea agreement and agreed to pay restitution. (Resp.Br., pp.21-22.) The State is incorrect. Ms. Foeller did *not* agree to pay the full amount of the losses actually incurred by the victims; she agreed to pay restitution "per statute." (R., p.56.) Contrary to the State's suggestion, the plea agreement did not alter the operation of the Idaho restitution statutes. *State v. Nienburg*, 153 Idaho 491, 497-98 (Ct. App. 2012) (holding that defendant's agreement to pay restitution "did not alter the operation of the Idaho restitution statutes.")

The provisions of the restitution statute *require* that, in determining the amount of the award, the district court "*shall consider . . . the financial resources, needs and earning ability of the defendant,*" in addition to the amount of the loss sustained by the victim. *Garcia*, 166 Idaho 462 P.2d at 1145. The Idaho Supreme Court has held that these provisions *require* the district court to take into account the defendant's ability to repay the award amount in the future. *Id.* Nothing in the plea agreement waived Ms. Foeller's right to have the district court determine the restitution amount in accordance with the requirements of the statute and the controlling precedent of this Court; on the contrary, she agreed to pay "per" the requirements of the statute. The State's waiver argument should be rejected.

As to the merits of Ms. Foeller's abuse of discretion argument, and as set forth in the Appellant's Brief, the district court's failure to find that Ms. Foeller *could* in the foreseeable future be able to pay the amount ordered, demonstrates a failure of reason and constitutes an abuse of discretion. (Appellant's Br., pp.12-16.) The State's arguments in opposition (Resp. Br., pp.22-29), are unremarkable and Ms. Foeller respectfully refers this Court to the arguments in her Appellant's Brief as her arguments in reply.

### CONCLUSION

For the reasons set forth in her Appellant's Brief, and those herein, Ms. Foeller respectfully asks this Court to vacate the restitution order, except for the \$5,000 award to Silverwood to which she had agreed, and remand her case for the district court to (1) exclude any award of restitution to the State Tax Commission; and (2) consider Ms. Foeller's foreseeable ability to pay at some point in the future, when it considers the amount of restitution to order.

DATED this 25<sup>th</sup> day of January, 2021.

/s/ Kimberly A. Coster  
KIMBERLY A. COSTER  
Deputy State Appellate Public Defender

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25<sup>th</sup> day of January, 2021, I caused a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, to be served as follows:

KENNETH K. JORGENSEN  
DEPUTY ATTORNEY GENERAL  
E-Service: ecf@ag.idaho.gov

/s/ Evan A. Smith  
EVAN A. SMITH  
Administrative Assistant

KAC/eas