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

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

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**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 Tax Commission may use the criminal restitution statute to collect income tax. This question turns on 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 to the State Tax Commission, arguing that an estimated income tax liability is not an "economic loss" within the meaning of Idaho's criminal restitution statute. She argues that because the legislature did not include "income tax" among the items delineated as constituting "economic loss" within the meaning of the restitution statute, and because in Idaho Income Tax Act, the legislature provided the exclusive mechanism by which the Commission must assess and collect income tax, including tax on unreported income, the district court erred by awarding restitution to the Idaho Tax Commission.

Additionally, Ms. Foeller asserts 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.

Ms. Foeller asks this Court to vacate the district court's order of restitution and remand her case for a redetermination of the restitution award.

### Statement of the Facts and Course of Proceedings

Ms. Foeller worked as a payroll accountant for Silverwood Theme Park ("Silverwood") from 2008 until 2017, when her employment was terminated. (Conf.Docs., pp.9-12, 24.) A subsequent investigation revealed that Ms. Foeller and the company's then-chief financial officer, Christopher Wyatt, had been embezzling from Silverwood for several years. (Conf.Docs., pp.9, 71.) As Ms. Foeller later explained, she used the money to feed her severe, ten-year gambling addiction, or to pay bills that had resulted from that addiction. (Conf.Docs., pp.10-11.)

In December 2017, the State filed an Indictment charging Ms. Foeller with five counts of grand theft, for taking money from Silverwood in 2013, 2014, 2015, 2016, and 2017. (Conf.Docs., p.1.) The State claimed the combined amounts taken from Silverwood by Ms. Foeller and Mr. Wyatt totaled nearly \$1,000,000. (R., p.51.)

A newspaper article about the case caught the attention of an Idaho State Tax Commission employee, Kristin Lewis, and she contacted the prosecutor. (Tr., p.133, Ls.5-13.) According to Ms. Lewis's later testimony, the Tax Commission investigated the matter to determine whether Ms. Foeller had reported the embezzled funds on her tax returns. (Tr., p.133, Ls.5-13.) As a result of that investigation, the Commission found that Ms. Foeller filed her 2013 tax return but did not report the embezzled income, and for the subsequent reporting years, 2014

through 2017, Ms. Foeller had filed no tax returns, and had thus reported none of her income for that period. (Tr., p.134, L.5 – p.138, L.11.)

The State subsequently filed an Amended Indictment<sup>1</sup> that combined the theft charges into two counts, and added a new count: tax evasion. (R., p.63.) Pursuant to the terms of a plea agreement with the State, Ms. Foeller pled guilty to those charges and agreed to pay restitution “if applicable, per statute.” (R., p.56; Tr., p.98, Ls.5-24.) Ms. Foeller was sentenced to an aggregate term of fourteen years, with three years fixed, without probation or retained jurisdiction. (R., p.91; Tr., p.114, L.21 – p.115, p.2.)

The State filed a request seeking \$540,952.87<sup>2</sup> in restitution for the victims of the theft charges; specifically, \$535,952.87 to Travelers Casualty, the insurer who had covered Silverwood’s loss; and \$10,000 to Silverwood, representing the insurance deductible amount. (R., p.103). The State additionally sought restitution for the income tax evasion. (R., pp.103-04.) The State requested an award to the Idaho Tax Commission of \$48,775 – an amount purportedly representing the estimated tax on all of Ms. Foeller’s unreported income. (R., pp.103-04; *see* Tr., p.132, L.12 – p.1438, L.7.)

At the subsequent restitution hearing, the parties stipulated that Ms. Foeller’s restitution obligation to Silverwood was \$5,000, representing a portion of Silverwood’s insurance deductible. (Tr., p.154, Ls.2-3.) However, Ms. Foeller objected to the State’s request that she be ordered to pay the full \$540,927 incurred by Traveler’s on the basis of her inability to ever repay

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<sup>1</sup> The Amended Indictment omitted the 2013 theft, and alleged: Count I, Grand Theft, for taking money from Silverwood in 2014 and 2015; Count II, Grand Theft, for taking money from Silverwood in 2016 and 2017; and Count III, Tax Evasion, pursuant to the Idaho Income Tax Act, Section 63-3075(b), Idaho Code, for willfully evading state income tax obligations for the years 2014 through 2018. (R., pp.56, 63-64; Tr., p.93, L.1 – p.98, L.22.)

<sup>2</sup> The State had previously filed a request seeking \$987,431 to Silverwood and Travelers, to be paid joint and several with her former co-worker, Christopher Wyatt, the defendant in the related theft case, CR28-18-20683. (R., pp.51, 71.)



an amount of that magnitude. (Tr., p.147, L.8 – p.61, L.17.) In support of her objection, Ms. Foeller cited her financial indigence, lack of financial resources, her documented disability for severe mental health disorders, and her significantly diminished future earning capacity. (Tr., p.149, L.8 – p.150, L.17.) She also noted that the interest that will accrue on such amount will be “astronomical” by the time she is released from prison, and that it will continue to grow. (Tr., p.149, L.8 – p.150, L.17.) Ms. Foeller argued that, based on the record, there was every indication that she would *never* be able to pay any significant amount of such an award. (Tr., p.149, L.8 – p.150, L.17.)

Additionally, Ms. Foeller objected to the \$48,775 requested on behalf of the Idaho State Tax Commission. (See Tr., p.133, Ls.18-25.) She argued that the income tax claimed by the Tax Commission did not meet the restitution statute’s definition of “economic loss.” (Tr., p.61, L.20 – p.62, L.16.) She also objected that the dollar amounts requested by the Idaho Tax Commission were “estimates.” (Tr., p.149, Ls.18-20.)

The district court overruled Ms. Foeller’s objections and awarded all of the items requested by the State, in the full amounts requested: \$5,000 to Silverwood (as stipulated by the parties); \$535,952.87 to Travelers; and \$48,775.00 to the State Tax Commission. (Tr., p.155, Ls.6-12; R., pp.103, 105.) The district court additionally ordered that interest begin to accrue from the date of its order. (R., p.105.)

Ms. Foeller filed a Notice of Appeal that is timely from the restitution order. (R., p.108.)

## 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?

## ARGUMENT

### 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. Introduction

Idaho's criminal restitution statute, I.C. § 19-5304, authorizes the district court to order restitution to victims for "economic loss" actually suffered as the result of a defendant's crime. Ms. Foeller argues that estimated income tax is not an "economic loss" within the meaning of the statute, and that 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.

##### B. Standard Of Review

The district court's interpretation and application of the restitution statute presents a question of law over which the appellate court exercises free review. *State v. Straub*, 153 Idaho 882, 885 (2013). 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) (quotation marks and citations omitted). "Statutory interpretation begins with the statute's plain language," giving words "their plain, usual, and ordinary meanings." *Id.* When the statute's language is unambiguous, the legislature's clearly expressed intent must be given effect, and the court must not go beyond the statute's plain language to consider other rules of statutory construction. *Id.*

However, "if the statute is ambiguous" or "arguably in conflict with other laws," a court is required to engage in statutory construction. *Arambarri v. Armstrong*, 152 Idaho 734, 739 (2012). Whenever the court must engage in statutory construction, it has the duty to give effect to legislative intent. *Id.* In so doing, the court examines the proffered interpretations and

considers the “context in which the language is used,” the “public policy behind the statute,” as well as legislative history. *Saint Alphonsus Regional Medical Center v. Gooding County*, 159 Idaho 84, 87 (2015). Additionally, because Section 19-5304 is a criminal restitution statute, the rule of lenity should apply to construe the statute in favor of Ms. Foeller. *State v. Anderson*, 145 Idaho 99, 103 (2008) (“The rule of lenity states that criminal statutes must be strictly construed in favor of defendants.”).

C. The District Court Erred In Interpreting The Statute To Include Estimated Income Tax As An “Economic Loss” Within The Meaning Of The Statute, And Therefore Erred In Awarding Restitution To The Tax Commission

Ms. Foeller submits that estimated income tax does not meet the definition of “economic loss” provided in the restitution statute. As defined in that section:

“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).

Estimated income tax plainly does not fit within the items delineated as economic loss, *i.e.*, estimated income tax owed is not “property taken, destroyed, broken or otherwise harmed,” nor is it “lost wages” or an “out-of-pocket loss or expense.” On the other hand, estimated taxes is not expressly excluded by the statute’s list of “less tangible damages.” The question then is whether the statute’s “not limited to” language should be read to expand the statute to include income taxes as an economic loss to the Idaho State Tax Commission.

1. An Interpretation Of “Economic Loss” To Include Estimated Income Taxes Conflicts With The Provisions Of The Idaho Income Tax Act

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.” The provisions of the Idaho Income Tax Act, which are set forth in chapter 30, Title 63 of Idaho Code, provide the *exclusive* means for assessing and collecting Idaho income tax. As demonstrated herein, the district court’s interpretation of the criminal restitution statute are in conflict with those provisions.

Section 63-3045(1)(a) requires the State Tax Commission to send a Notice of Deficiency when it believes there is a deficiency in tax. I.C. § 63-3045(1)(a). The Act also provides that the Tax Commission must give the taxpayer 63 days to file a protest with the Commission after the Commission mails the Notice of Deficiency to the taxpayer, and additionally affords the taxpayer the right to an administrative hearing. I.C. § 63-3045(1) and (2). Significantly, until the Tax Commission has complied with the prescribed notice requirements and provided the taxpayer an opportunity to appeal the deficiency, Idaho Code § 63-3045(1)(c) explicitly precludes both the assessment of tax and any judicial proceedings for the collection of tax:

(c) No assessment of a deficiency in respect to the tax imposed by this chapter, and *no* distraint or *proceedings in court for its collection, shall be made, begun, or prosecuted until* such notice has been mailed to the taxpayer, nor until all appeal rights relating to the deficiency have become final.

I.C. § 63-3045(1)(c) (emphasis added).

Similarly, Section 63-3045A(1) expressly precludes judicial proceedings to collect tax, until the provisions of the statute are complied with:

Assessment of tax. (1) Except as provided in subsection (2) of this section, no tax commission activities to enforce collection of tax may be conducted, *nor may a proceeding to collect a tax be instituted*, until taxes are assessed in accordance with the provisions of this section.

I.C. § 63-3045A(1)(emphasis added).

These statutes demonstrate that the legislature intended the statutory scheme set forth in Idaho Income Tax Act to be the *exclusive* mechanism for assessing and collecting Idaho income tax. Therefore, this Court should not permit the Tax Commission to sidestep and avoid its statutory obligations under these statutes by seeking to collect tax as a “victim” under the restitution statute, instead of going through the legislatively-prescribed assessment and collection procedures.

Moreover, a single restitution statute is a poor substitute for the entire tax code in determining tax liability. For example, under the Idaho Income Tax Act, a taxpayer may have a tax liability now, which may be eliminated later by events occurring in future years such as net operating losses carried back to the present year.<sup>3</sup> See I.C. § 63-3022(c)(2). Similarly, if a taxpayer receives income in one year and later restores (*e.g.* pays it back) that income, the taxpayer may in some circumstances receive a deduction in the later tax year under the “claim of right doctrine.” See I.C. § 63-3022F. In contrast to the Idaho Income Tax Act, the criminal restitution statute has no mechanism for making adjustments to a tax liability for events occurring after the restitution hearing. See *generally* I.C. §§ 19-5304.

Furthermore, the Tax Commission is unlike those crime victims who are ill-prepared to pursue a civil action to recover a loss caused by criminal activity, and for whom the criminal restitution statute is intended to assist. See *State v. Cottrell*, 152 Idaho 387, 398 (Ct. App. 2012) (stating that “one of the purposes of the restitution is to obviate the need for victims to incur the cost and inconvenience of a separate civil action in order to gain compensation” and that in this sense, restitution is about “victim assistance.”) In contrast to the less-capable crime victim, the

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<sup>3</sup> In the event of a net operating loss carry back, the taxpayer can file an amended return for the earlier year. I.C. § 63-3022(c)(2).

Tax Commission is in the very business of collecting taxes and is well-equipped to do so with specific statutory authority to collect taxes. *See generally* I.C. § 63-3001 *et seq.* In any event, and as detailed above, the legislature has laid out specific procedures in the Idaho Income Tax Act that the Tax Commission must follow to protect taxpayer rights and ensure accurate determinations. The Commission should not be permitted to avoid compliance with those procedures by offering itself as a “victim” and seeking restitution for amounts it has only “estimated.”

2. The Type Of Loss Claimed By The Tax Commission Is Not Compensable Under The Criminal Restitution Statute

In *State v. Straub*, the Idaho Supreme Court observed that the criminal restitution statute is not a substitute for every type of civil action to recover money from a criminal defendant. 153 Idaho 882, 890 (2013). There, the Court specifically addressed whether a claim for lost future earnings was compensable under the criminal restitution statute. *Id.* 153 Idaho at 890. The Court explained,

The restitution statute was never meant to be a substitute for a civil action where the law is settled as to damages and the quantum of admissible proof needed to prove those damages. If we allow all foreseeable damages to be clothed in criminal restitution, we will draw to a standstill an already overburdened criminal court process. Prosecutors and criminal defense attorneys would then have to engage in civil discovery and trials of a civil nature on top of already complex criminal procedure and trials.

*Id.*

Ms. Foeller submits that, applying the reasoning of *Straub*, because the law is settled as to the procedures that must be followed for the “assessment” of tax that the Commission believes to be owed and due, which is a prerequisite to collecting the tax, *see e.g.*, I.C. §§ 63-3045(1), 63-3045A, and because there is no substantial evidence in the record showing those mandatory procedures were followed or that an “assessment” of the tax was ever made in this case (*see*

*generally* Tr.; R.; Conf.Docs), 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.*

Additionally, and to be clear, the Commission was not a victim of the embezzlement. On the contrary, the Commission seeks compensation as a *beneficiary* of that embezzlement. In this regard, the Commission’s attempt to collect the lost tax revenue is more akin to a civil claim to recover lost profits. The Idaho Supreme Court has stated that, like civil lawsuit seeking compensation for “future earnings,” claims for “lost profits” must be proved with “reasonable certainty.” *Todd v. Sullivan Const. LLC*, 146 Idaho 118, 122 (2008) (“Compensatory damages for lost profits and future earnings must be shown with a reasonable certainty.”) To the extent the Tax Commission’s claim is one that seeks to recover for lost tax revenue, and resembles a claim for “lost profits” or “future earnings,” this Court should conclude that, under the reasoning of *Straub*, estimated income tax is not an “economic loss” and is not recoverable under the restitution statute.

For the above reasons, this Court should conclude that estimated income tax is not “economic loss” within the meaning of the restitution statute and that the district court erred in concluding otherwise. Therefore, the district court’s decision to award restitution to the State Tax Commission should be reversed.



## 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

#### A. Introduction

Ms. Foeller does not dispute that Travelers incurred economic loss as the result of her criminal conduct, nor does she challenge the calculation of the amount of the economic loss as \$535,952.87. (Tr., p.149, Ls.10-17.) Rather, she asserts the district court abused its discretion by ordering such a substantial amount of restitution, noting also the accruing interest, without properly considering her ability to *ever* repay that amount in the future. Under the Supreme Court's holding and reasoning in *State v. Garcia*, 166 Idaho 661 (2020), 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. The district court's restitution order should be vacated and Ms. Foeller's case should be remanded.

#### B. Standard Of Review

When reviewing a district court's order of restitution for abuse of discretion, the appellate court examines whether the district court: (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently with the legal standards applicable to the specific choices available to it; and (4) reached its decision by the exercise of reason. *State v. Garcia*, 166 Idaho 661, \_\_\_, 462 P.3d 1125, 1145 (2020).

#### C. The District Court Abused Its Discretion By Ordering Restitution In An Amount That It Recognized Ms. Foeller Would Not Be Able To Repay In The Foreseeable Future

"Whether to order restitution, and in what amount, is within the district court's discretion and is guided by consideration of the factors set forth in Idaho Code section 19-5304(7)."

*Garcia*, 462 P.3d at 1145 (citations and internal bracket omitted). Under that section of the statute, the district court “*shall consider* the amount of economic loss sustained by the victim as a result of the offense, the financial resources, needs and earning ability of the defendant, and such other factors as the court deems appropriate.” I.C. § 19-5304(7)). The statute provides that the “immediate inability to pay restitution by a defendant shall not be, in and of itself, a reason to not order restitution.” *Id.*

Additionally, under this Court’s precedent, “[a] court may order restitution based on a foreseeable ability to repay the award.” *Garcia*, 462 P.3d at 1145 (citations omitted). Whether a defendant has a foreseeable ability to repay the award requires a factual finding, and such a finding will not be disturbed on appeal so long as it is supported by substantial evidence in the record. *Id.* 462 P.3d at 115-16.

In *Garcia*, the Idaho Supreme Court concluded the district court had abused its discretion in entering an order of restitution requiring the defendant to pay \$162,285.27, by failing to properly consider the defendant’s ability to repay that amount in the future. *Id.* 462 P.3d at 1145. There, the Court observed that the district court had correctly acknowledged the proper factors to consider in crafting an order of restitution, and had correctly identified that the “immediate inability to pay” was not a reason to not order restitution. *Id.* However, the Court observed a defendant’s “*immediate* inability” to pay was a separate concept from “*foreseeable* ability” to repay the award.” *Id.* (Emphasis added.) The Court went on to explain that,

the district court abused its discretion by not showing an exercise of reason. The district court’s analysis with respect to *Garcia*’s ability to pay consists of one sentence: “Having considered *Garcia*’s economic circumstances, the Court concludes that an order of restitution is appropriate in this case.” The Court of Appeals affirmed the district court in *Bybee*, noting that the district court had acknowledged both the magnitude of the restitution and *Bybee*’s business acumen. *See State v. Bybee*, 115 Idaho 541, 543 (Ct. App. 1989). This Court observed that the district court in *Wisdom* had specifically found that *Wisdom*

could expect her employment situation to improve; this Court found that “[t]he presentence materials serve[d] as substantial evidence supporting that conclusion.” *State v. Wisdom*, 161 Idaho 916, 919 (2017). There is no similar analysis provided by the district court here, even though nothing in the presentence materials serves as “substantial evidence” that Garcia has any foreseeable ability to repay the amount of restitution awarded.

*Garcia*, 462 P.3d at 1146-47.

The Court concluded that, unlike in *Bybee* and *Wisdom*, “the district court did not address Garcia’s future ability to repay at all” and that the failure to address the defendant’s future ability to repay the award was a “failure to show an exercise of reason, and therefore constitutes an abuse of discretion.” *Id.* 462 P.3d at 1146.

As in *Garcia*, the district court in Ms. Foeller’s case court failed to make any finding “that a defendant has the foreseeable ability to repay the award,” and the district court entered the award anyway. *See Garcia*, 462 P.3d at 1146. In addressing Ms. Foeller’s claim of inability to pay, the district court stated:

because the defendant is not going to be incarcerated forever, the defendant does have the ability to earn money and does have *the ability to pay some of this back at some point*. I do not find that an order of restitution would be inappropriate or undesirable. In fact, given the nature of this crime and the amounts taken, the Court finds that it is absolutely appropriate and desirable that the victims in this case be fully compensated.

(Tr., p.154, L.20 – p.67, L.5 (emphasis added).)

These findings fall critically short of a determination that Ms. Foeller has “the foreseeable ability to repay *the award*.” *See Garcia*, 462 P.3d at 1146 (emphasis added). The district court acknowledged only Ms. Foeller ill have the ability “to pay *some of this back*” in the foreseeable future, but the court did not address the magnitude of the award amount and Ms. Foeller’s ability to repay *that award*. Rather, the district court’s finding implicitly

recognizes that Ms. Foeller will *never* be able to repay *the amount* that the district court awarded.<sup>4</sup>

Moreover, there is no substantial evidence in the record to support a finding that Ms. Foeller will be able to repay the amount of restitution ordered in the foreseeable future. The evidence before the district court established that Ms. Foeller was currently indigent and disabled. (Conf.Doc., pp.9, 61.) She was [REDACTED] unemployed, and had qualified for Social Security benefits due to her significant mental health disability.<sup>5</sup> (Conf.Doc., pp.9, 18-20, 61.) Upon her release from prison, Ms. Foeller will likely be a single woman and barely able to provide for her own needs. (Tr., p.148, Ls.4-14; Conf.Docs., p.23.) Though Ms. Foeller had a once-valuable experience and education in accountancy (Conf.Docs., pp.18-19), her mental disability and felony conviction for embezzlement significantly reduce her future earning capacity. *See, e.g.*, I.C. § 54-2019(1)(1) (imposing restrictions on the practice of accountancy). Moreover, Ms. Foeller's sentence requires that she spend three years in prison, and she therefore will owe an additional ninety thousand dollars in accrued interest<sup>6</sup> to pay on the amount awarded, even before she is released on parole. (R., pp.105; I.C. § 28-22-104(2)).

Just like in *Garcia*, the district court in this case made no finding, nor engaged in any analysis, showing that Ms. Foeller had any foreseeable ability to repay the amount of the

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<sup>4</sup> Even the prosecutor did not attempt to argue that Ms. Foeller would ever be able to pay the amount of the award, only that she would have the ability to find employment at some point “and start reimbursing” for “all the restitution she owes,” and so “it’s appropriate to order restitution in full.” (Tr., p.146, Ls.13-18.)

<sup>5</sup> Ms. Foeller has diagnoses including bipolar disorder, borderline personality disorder, depression and schizoaffective disorder, with a history of commitments to psychiatric institutions. (Conf.Docs., pp.20, 26, 40-42.)

<sup>6</sup> By the time Ms. Foeller is eligible for parole, the interest that will have accrued on the amount ordered by the district court will exceed \$90,000, and will continue at the annual rate of 7.125. *See* I.C. § 28-22-104(2)); <https://sto.idaho.gov/Reports/Legal-Rate-of-Interest> (last visited August 25, 2020).

restitution awarded, and there is no substantial evidence in the record that would support such finding. Just as in *Garcia*, “[t]his is a failure to exercise reason, and therefore constitutes an abuse of discretion.” 462 P.3d at 1147. Therefore, under the holding and reasoning of *Garcia*, this Court should vacate the restitution award with respect to the amount of restitution to which Ms. Foeller did not agree, and remand this case for a proper, reasoned consideration of all of the factors identified in Section 19-5304(7), including Ms. Foeller’s future ability to repay.

### CONCLUSION

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 24<sup>th</sup> day of August, 2020.

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

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24<sup>th</sup> day of August, 2020, I caused a true and correct copy of the foregoing APPELLANT’S 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