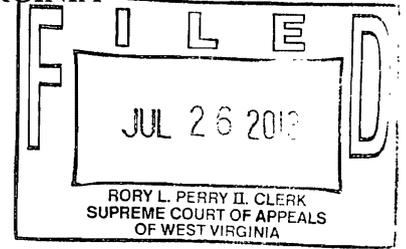


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

REBECCA F

Defendant Below, Petitioner.

DOCKET NO.: 13-0311  
(Berkeley County Case No.: 11-F-46)

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**RESPONDENT STATE OF WEST VIRGINIA'S BRIEF**

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## **PETITIONER'S ASSIGNMENTS OF ERROR**

- I. WHETHER THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR BY SENTENCING THE PETITIONER TO DETERMINANT SENTENCES WITHIN STATUTORY GUIDELINES FOR THE CRIMES OF CONVICTION, AND ELECTING TO IMPOSE INCARCERATION ON SOME CONVICTIONS AND SUSPENDING OTHERS FOR PROBATIONARY TERMS?
- II. WHETHER THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR BY ORDERING THE PETITIONER TO PAY RESTORATIVE RESTITUTION TO THE VICTIM?

## **STATEMENT OF THE CASE**

The Petitioner was indicted by a Berkeley County Grand Jury in February of 2011 for eleven (11) felony counts of Child Abuse with Bodily Injury and eight (8) felony counts of Identity Theft. [Appendix Record, hereinafter referred to as AR, pg. 17-24.]

On or about the 2<sup>nd</sup> day of April, 2012, the Petitioner entered knowing and voluntary pleas of guilty under Alford circumstances to counts twelve (12) through nineteen (19) of the indictment, charging eight (8) felony counts of Identity Theft. [AR, pg. 14-16, 25-34, 104-212.] As a part of that plea, the remaining counts of the indictment charging Child Abuse with Bodily Injury were to be scheduled for trial. [Id.] Sentencing, which was only partially binding to the court under the plea agreement of the parties, was rescheduled to obtain a presentence investigation report. [Id.]

On July 9, 2012, in consideration of the presentence investigation report and the objections thereto, the court continued sentencing for both amendment of the presentence investigation report and to obtain a diagnostic evaluation of the Petitioner from the Division of Corrections. [AR, 30-31, 59-69.] On January 14, 2013, considering the fully updated presentence investigation report with the addendums, the diagnostic report from Lakin Correctional Center, the statement and presentation of the Defendant, the statement of the victim, and all arguments of counsel, the court sentenced the Petitioner to a determinate term of five (5) years of incarceration on each of the eight (8) felony counts of Identity Theft. [70-103, 231-

235.] Pursuant to the plea agreement, the sentences for counts 12, 13, 14, and 15 were ordered to run concurrent with each other, and the sentences for counts 16, 17, 18, and 19 were to run concurrent with each other but consecutive to the sentences for counts 12, 13, 14, and 15. [AR, 14-16, 70-103, 231-235.] The court then chose to suspend the sentences for counts 16, 17, 18, and 19 and order five (5) years of supervised probation. [Id.] However, the court ordered that the Defendant serve the sentences of incarceration for counts 12 and 13. The court then ordered the sentence for counts 14 and 15 suspended for five (5) years of supervised probation. [Id.]

The Petitioner was also ordered to pay restitution as follows:

- \$1,370.32 to Applied Bank
- \$1,114.98 to Barclay Card UC
- \$1,232.00 to Zentih Acquisition Corporation
- \$3,753.00 to Chase Card Services
- \$630.44 to HSBC Card Services
- \$2,842.00 to SST/Columbus Bank and Trust
- \$10,000.00 to Caitlin Shaunacy Sigler

[Id.] The parties agreed that the court would order the Petitioner to pay fines as well; however, the court used its discretion to decline to order the Petitioner to pay fines based upon the interests in making sure full restitution is paid. [Id.]

### **SUMMARY OF ARGUMENT**

The trial court properly sentenced the Petitioner within statutory guidelines as well as within the bounds of the plea agreement of the parties and did not err in ordering the Petitioner to serve a term of incarceration while suspending the remaining terms of incarceration in favor of probation. Furthermore, the court was also within its discretion to order the Petitioner to pay

restitution to the victim under the circumstances of this case.

### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

The State avers that none of the issues presented are of first impression to the Court, there existing decided authority as precedent to the dispositive issues; that the facts and legal arguments are adequately presented in the briefs and record on appeal; and that the decisional process would not be significantly aided by oral argument. As such, oral argument would be unnecessary in this matter pursuant to Rule 18. If, however, this Court were to find oral argument necessary, the State believes argument pursuant to Rule 19 would be appropriate.

### **ARGUMENT**

#### **I. THE TRIAL COURT PROPERLY SENTENCED THE PETITIONER WITHIN THE STATUTORY GUIDELINES FOR THE CRIMES OF CONVICTION.**

##### **A. Standard of Review**

“The Supreme Court of Appeals reviews sentencing orders...under an abuse of discretion standard, unless the order violates statutory or constitutional commands.” Syl. Pt. 1, State v. Lucas, 201 W.Va. 271, 496 S.E.2d 221 (1997). “Sentences imposed by the trial court, if within statutory limits and if not based on some impermissible factor, are not subject to appellate review.” Syl. Pt. 7, State v. Layton, 189 W.Va. 470, S.E.2d 740 (1993); Syl. Pt. 4, State v. Goodnight, 169 W.Va. 366, 287 S.E.2d 504 (1982).

##### **B. Discussion**

The Petitioner was sentenced to a determinate term of five (5) years in the penitentiary for each of her eight (8) convictions for Identity Theft. **W.Va. Code §61-3-54.** [70-103, 231-235.] Pursuant to the plea agreement, the sentences for counts 12, 13, 14, and 15 were ordered to run concurrent with each other, and the sentences for counts 16, 17, 18, and 19 were to run concurrent with each other but consecutive to the sentences for counts 12, 13, 14, and 15. [AR,

14-16, 70-103, 231-235.] The court then chose to suspend the sentences for counts 16, 17, 18, and 19 and order five (5) years of supervised probation. [Id.] However, the court ordered that the Defendant serve the sentences of incarceration for counts 12 and 13. The court then ordered the sentence for counts 14 and 15 suspended for five (5) years of supervised probation. [Id.]

The Petitioner concedes that the sentences imposed by the trial court are within the statutory limits for the crimes of conviction and that they are not based upon impermissible factors. The State would, therefore, argue that they are not subject to appellate review. State v. Layton, supra., State v. Goodnight, supra.

The Petitioner instead states that the sentencing court erred in denying the Petitioner alternative sentencing, more specifically probation, for the entirety of her sentences. In support of that argument, the Petitioner states that her incarceration does not benefit society or promote rehabilitation and cites prison overcrowding within the West Virginia Division of Corrections.

The Petitioner argues that the court should have given more weight to her employment and education history. The Petitioner also states that she “had no criminal history besides some worthless check charges that were resolved well in advance of sentencing.” [Petitioner’s brief, pg. 10.] Lastly, the Petitioner cites her diagnostic evaluation from Lakin Correctional Center which states “Cognitive testing indicated Ms. F is functioning within the Superior range and is thus capable of complying with the typical requirements of the sentencing options...if appropriate.” [AR, 229.]

**W.Va. Code §61-11-21** provides that

“when any person is convicted of two or more offenses, before the sentence is pronounced for either, the confinement to which he may be sentenced upon the second or any subsequent conviction, shall commence at the termination of the previous term or terms of confinement, unless, in the discretion of the trial court, the second or subsequent conviction is ordered by the court to run

concurrently with the first term of imprisonment.”

This statute provides by default that sentences for separate crimes run consecutively unless the trial court chooses in its discretion to mandate otherwise, such that where an order makes no provision that two sentences shall run concurrently, under the provisions of **W.Va. Code** §61-11-21, they must run consecutively. *See* State ex rel. Cobbs v. Boles, 149 W.Va. 365, 368, 141 S.E.2d 59, 61 (1965). Based upon this statute, this Court holds that “where a defendant has been convicted of two separate crimes, and the legislature has authorized a distinct punishment for each, the defendant has no constitutional right to serve less than the cumulative total.” Miller v. Luff, 175 W.Va. 150, 153, 332 S.E.2d 111, 114 (1985).

Relative to the terms of **W.Va. Code** §61-11-21, this Court holds that there is no absolute right to probation:

“We have recognized that probation is a privilege of conditional liberty bestowed upon a criminal defendant through the grace of the circuit court. *See, e.g., State ex rel. Winter v. MacQueen*, 161 W.Va. 30, 32-33, 239 S.E.2d 660, 661-662 (1977)(‘[A] defendant convicted of a crime has no absolute right to probation, probation being a matter of grace only, extended by the State to a defendant convicted of a crime, in certain circumstances and on certain conditions,’ *quoting State v. Loy*, 146 W.Va. 308, 318, 119 S.E.2d 826, 832 (1961)); *State ex rel. Riffle v. Thorn*, 153 W.Va. 76, 81, 168 S.E.2d 810, 813 (1969)(‘Probation or suspension of sentence comes as a grace to one convicted of a crime,’ *quoting Escoe v. Zerbst*, 295 U.S. 490, 492, 55 S.Ct. 818, 819, 79 L.Ed. 1566, 1568 (1935)); Syl. Pt. 2, *State ex rel. Strickland v. Melton*, 152 W.Va. 500, 165 S.E.2d 90 (1968)(‘Probation is not a sentence for a crime but instead is an act of grace upon the part of the State to a person convicted of a crime.’)”

State v. Duke, 200 W.Va. 356, 364, 489 S.E.2d 738, 746 (1997). “The decision as to whether the imposition of probation is appropriate in a certain case is entirely within the circuit court’s discretion.” State v. Shaw, 208 W.Va. 426, 429, 541 S.E.2d 21, 24 (2000)(per curiam).

Therefore, “the decision of a trial court to deny probation will be overturned only when, on the

facts of the case, that decision constituted a palpable abuse of discretion.” Syl. Pt. 2, State v. Shafer, 168 W.Va. 474, 284 S.E.2d 916 (1981).

In the case at hand, the lower court certainly recognized the Petitioner’s education and employment history. [AR, 93.] However, the court also looked at the Petitioner’s criminal history. She had approximately twenty-five (25) worthless check charges, which preceded the eight (8) felony Identity Theft offenses for which the Petitioner was convicted in this case. [AR, 37-39.] Furthermore, while the Petitioner highlighted only that one sentence of the diagnostic report from Lakin Correctional Center, the court specifically noted that the report also indicated that “deceitfulness, irresponsibility and poor judgment” was evidenced by the Petitioner’s pattern of legal charges for worthless checks and identity theft. [AR, 77, 229.] The court was also concerned by the Petitioner’s statement, made when asked what her plans were to avoid future legal difficulties if released, that “I thought I was living my life right in the first place.” [AR, 77, 227.]

In imposing sentence as it did, the court found as follows:

“I can’t just give you straight probation even with the time you served [for the evaluation]. It’s not enough because of the impact and the continued frequency of it and that’s why you’re going to have to serve...[the] sentence which I think is justified under all the circumstances in this case.

I will be honest with you. I paid particular attention to you when I discussed what the report said from the penitentiary and when your daughter spoke. You have a continued denial in your mind of wrongdoing. You can see it. The record can’t reflect it, but you seem to feel that the charges against you are wrong and should somebody do something against you, you emanate no, that’s not really what happened and it is. That’s what the test showed from the psychologist at the penitentiary, continued deceitfulness, untruthfulness.”

[AR, 94-95.]

The court also encouraged the Petitioner to take advantage of the counseling and other services offered during her term of incarceration due to her almost “non-acceptance” of the fact that she committed crimes by her actions. It was clear that the court believed that the Petitioner had justified her crimes in her mind as something that she had to do for her family rather than something she did that irrevocably injured her daughter. The court continued

“...it’s easy to stand up and say I did it and I’m remorseful, but until such time as you recognize the true victimization of people and, in this case, I mean, you did this to a kid. Until you recognize that, I’m afraid your life is going to be terribly fraught with this type of crime.”

[AR, 96.]

A reading of the record demonstrates that the court believed a term of incarceration was both necessary and appropriate for the Petitioner under the facts and circumstances of the case and did serve to both promote the rehabilitation of the Petitioner by attempting to make her honestly reflect on the impact of her crimes and benefit society by insuring the Petitioner did not believe that such criminal acts would be without consequence.<sup>1</sup>

The State again notes that the sentencing court imposed sentences within the statutory guidelines for each of the crimes of conviction, followed the binding terms of the parties’ plea agreement in ordering some of the Petitioner’s sentences to run concurrently rather than consecutively pursuant to **W.Va. Code §61-11-21**, and chose not to suspend the entirety of the Petitioner’s terms of incarceration based upon its well-articulated findings of fact.<sup>2</sup>

Based upon the above, the Petitioner fails to demonstrate that the lower court abused its

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<sup>1</sup> The Petitioner also cites prison overcrowding. The State avers that the existence of prison overcrowding does not change the necessity or appropriateness of the Petitioner’s incarceration as ordered by the court.

<sup>2</sup> The Petitioner makes a bald assertion that the sentences imposed violate the Eighth Amendment of the United State Constitution and Article III of the West Virginia Constitution but fails to indicate how in light of the fact that the court followed the plea agreement with regard to concurrency and suspended the imposition of most of the terms of incarceration in favor of the granting of supervised probation. The State relies on the previous discussions in support of the Constitutionality of the Petitioner’s sentence.

discretion in sentencing the Petitioner. State v. Lucas, *supra.*, State v. Shaw, *supra.*, State v. Shafer, *supra.*

## **II. THE COURT WAS WITHIN ITS DISCRETION TO ORDER RESTITUTION TO THE VICTIM**

### **A. Standard of Review**

“The Supreme Court of Appeals reviews sentencing orders, including orders of restitution made in connection with a defendant's sentencing, under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands.”

Syl. Pt. 1, State v. Lucas, 201 W.Va. 271, 496 S.E.2d 221 (1997).

### **B. Discussion**

At the sentencing hearing in this matter, the lower court ordered restitution to be paid as follows:

- \$1,370.32 to Applied Bank
- \$1,114.98 to Barclay Card UC
- \$1,232.00 to Zentih Acquisition Corporation
- \$3,753.00 to Chase Card Services
- \$630.44 to HSBC Card Services
- \$2,842.00 to SST/Columbus Bank and Trust
- \$10,000.00 to Caitlin Shaunacy Sigler

West Virginia's restitution statutes, codified as the Victim Protection Act of 1984, predicates an award of restitution upon a defendant's conviction of a felony or misdemeanor and upon the ‘physical, psychological or economic injury or loss to a victim.’ **W.Va. Code** §61-11A-4; *See also* State v. Whetzel, 200 W. Va. 45, 48, 488 S.E.2d 45, 48 (1997). The legislative

intent behind the Victim Protection Act is set forth in **W.Va.Code** §61–11A–1, which provides in relevant part:

“The Legislature declares that the purposes of this article are ... to ensure that the state and local governments do all that is possible within the limits of available resources to assist victims ... of crime ...”

**W.Va.Code** § 61–11A–1(b).

“Read *in pari materia*, the provisions of **W.Va.Code**, §61–11A–1, **W.Va.Code**, §61–11A–4(a), **W.Va.Code**, §61–11A–4(d), **W.Va.Code**, §61–11A–5(a) and **W.Va.Code**, §61–11A–5(d), establish that at the time of a convicted criminal defendant's sentencing, a circuit court should ordinarily order the defendant to make full restitution to any victims of the crime who have suffered injuries, as defined and permitted by the statute, unless the court determines that ordering such full restitution is impractical.”

Syl. Pt. 2, State v. Lucas, 201 W.Va. 271, 496 S.E.2d 221 (1997).

In this case, the Petitioner was convicted of eight (8) felony counts of Identity Theft.

From the time the Petitioner's daughter, Caitlin Sigler, became a teenager, the Petitioner began to use her daughter's name, social security number, and date of birth (but with a different year, making her seem of age) to procure revolving credit accounts. [AR, 35, 44-46, 87-88.] The Petitioner admitted that she had done so, knowing that it was against the law, and stated that she could not even recall how many lines of credit she had opened using her daughter's identity. [AR, 35.]

The extent of the Petitioner's crimes was not truly discovered or appreciated by the victim until she reached adulthood. [AR, 44-46, 87-88.] Ms. Sigler described receiving multiple phone calls from credit and collections companies at all hours of the day and night for bills that she did not even know existed. [Id.] Ms. Siger further described for the court what it had been like for her starting her life with her credit completely destroyed. She had applied for but kept getting turned down for employment based on her poor credit. She was not able to secure

housing on her own because she was unable to qualify for any rental agreements based upon her credit history. When the hand-me-down car that her father had given her broke down, Ms. Sigler attempted to purchase a vehicle but was turned down for any type of loan. Ms. Sigler was further notified that the Petitioner opened a student loan in her name, and, as a result, not only would she be ineligible for educational financial assistance, but there were multiple “incompletes” reported in her name, rendering her grade point average very poor should she choose to enroll in college courses in the future. [Id.] The Petitioner affected every aspect of the victim’s life – her own daughter’s life-- by committing these crimes.

Since all of the credit accounts opened in Ms. Sigler’s name were fraudulently opened (and, as discussed, many were in collections before Ms. Sigler so much as became aware of them), Ms. Sigler had not paid anything directly towards those accounts. [AR, 45.] Therefore, there would be no restitution for any such payments owed to Ms. Sigler directly. [Id.] However, Ms. Sigler requested from the court restitution equal to the amount of debt that the Petitioner had incurred in her name so that she could try to combat the negative effects of her ruined credit that have created an inability for Ms. Sigler to obtain a vehicle, housing, employment or continued education. [AR, 44-46, 87-88.]

As discussed above, in State v. Whetzel, *supra.*, this Honorable Court observed that the West Virginia restitution statute “predicates an award of restitution upon a defendant's conviction of a felony or misdemeanor and upon the ‘physical, psychological or economic injury or loss to the victim.’” 200 W.Va. at 48, 488 S.E.2d at 48.

“The Whetzel Court further explained that the clear intention of the Legislature in enacting W. Va.Code § 61-11A-4(a) was to enable trial courts to require convicted criminals to pay **all losses sustained by victims in the commission of the crime giving rise to the conviction.** Any other interpretation would run counter to

the legislative intent that ‘all that is possible’ be done, an intent set forth in W. Va.Code § 61-11A-1(b). Id. (emphasis supplied).”

State v. Cummings, 214 W. Va. 317, 320, 589 S.E.2d 48, 51 (2003).

In State v. Cummings, *supra.*, this Court found that the sentencing court properly included as a basis for restitution certain amounts separate from the bare amounts actually “stolen” from the victim as a part of the defendant’s fraudulent scheme. Such amounts were for interest paid by the victim on a line of credit, accounting fees in ascertaining the victim’s actual losses, and costs and fees charged for obtaining bank records. The Court found that these were financial losses incurred by the victim which “would not have been necessary had the defendant not engaged in criminal activity.” Id., 214 W.Va. at 318, 589 S.E.2d at 49. The Court also found that the defendant’s convictions

“...permitted the inclusion of the items of restitution enumerated by the lower court, based upon the principle that the clear intention of the restitution statute is to require criminals to ‘pay all losses sustained by victims in the commission of the crime giving rise to the conviction.’ Whetzel, 200 W.Va. at 48, 488 S.E.2d at 48. “

Id., at 322, 53.

As outlined in the Petitioner’s brief, the Petitioner would have the sentencing court order the Petitioner to pay the amounts remaining as owed to all of the creditors on the accounts fraudulently opened by the Petitioner in the victim’s name but pay nothing in restitution to the victim despite her demonstration of devastating financial harm as a direct result of the crimes committed against her by the Petitioner. The lower court’s award of restitution to the victim for costs associated with rectifying “the wrongful credit,” deemed “restorative restitution” by the court, was plainly for losses sustained by the victim in the commission of the Petitioner’s crimes giving rise to the convictions. State v. Whetzel, *supra.*, State v. Cummings, *supra.* This is

precisely the type of restitution a sentencing court should ordinarily order a defendant to make pursuant to the Victim Protection Act. State v. Lucas, *supra*.

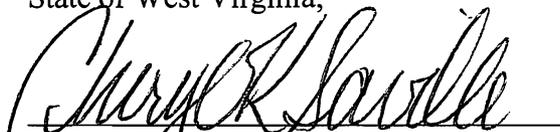
Furthermore, the plea agreement of the parties contemplated the payment of fines by the Petitioner for each of the eight (8) convictions. [AR, 14-16.] If ordered in the maximum amount of \$1,000 per count, pursuant to **W.Va. Code** §61-3-54 and as recommended in the signed plea agreement of the parties, the Petitioner would have been ordered to pay \$8,000 in fines. [Id.] In order to prioritize the payment of restitution and make it more practical for the Petitioner, the sentencing court declined to assess fines although the payment of both restitution and fines had been contemplated and agreed to by both parties. [AR, 14-16, 96-97.]

Based upon the above, the Petitioner has failed to show that the sentencing court abused its discretion in ordering restitution be paid to the victim under the facts and circumstances of this case. State v. Lucas, *supra*.

### CONCLUSION

For the foregoing reasons, this Court is respectfully requested to refuse the Petition for Appeal.

Respectfully submitted,  
State of West Virginia,



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**CERTIFICATE OF SERVICE**

I, Cheryl K. Saville, Assistant Prosecuting Attorney, hereby certify that I have served a true and accurate copy of the foregoing Respondent State of West Virginia's Brief by mailing of the same, United States Mail, postage paid to the following on this 23<sup>rd</sup> day of July, 2013:

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