

---

---

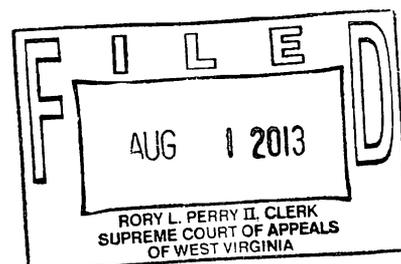
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 13-0367

STATE OF WEST VIRGINIA,  
*Plaintiff below,*  
*Respondent,*

v.

ANTHONY SOUSTEK,  
*Defendant below,*  
*Petitioner.*



---

RESPONDENT'S BRIEF

---

PATRICK MORRISEY  
ATTORNEY GENERAL

CHRISTOPHER S. DODRILL  
ASSISTANT ATTORNEY GENERAL  
812 Quarrier Street, 6th Floor  
Charleston, WV 25301  
Telephone: (304) 558-5830  
State Bar No. 11040  
Email: [csd@wvago.gov](mailto:csd@wvago.gov)  
*Counsel for Respondent*

---

---

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	ii
ASSIGNMENTS OF ERROR .....	1
STATEMENT OF THE CASE.....	2
STATEMENT REGARDING ORAL ARGUMENT AND DECISION .....	5
I.    Standard of Review .....	6
II.   Soustek’s Use of His Brother’s Identifying Information in Applying for Bail Violated § 61-3-54.....	6
III.  Soustek’s Use of His Brother’s Identifying Information in Applying for State-Appointed Counsel Violated § 61-3-54. ....	10
CONCLUSION.....	12

## TABLE OF AUTHORITIES

### Cases

<i>Chrystal R.M. v. Charlie A.L.</i> , 194 W. Va. 138, 459 S.E.2d 415 (1995).....	6
<i>Davis Mem'l Hosp. v. W. Va. State Tax Comm'r</i> , 222 W. Va. 677, 671 S.E.2d 682 (2008).....	6
<i>DeVane v. Kennedy</i> , 205 W. Va. 519, 519 S.E.2d 622 (1999) .....	6
<i>Meadows v. Meadows</i> , 196 W. Va. 56, 468 S.E.2d 309 (1996) .....	7
<i>State v. Gen'l Daniel Morgan Post No. 548, V.F.W.</i> , 144 W. Va. 137, 107 S.E.2d 353 (1959)....	6
<i>Wisconsin v. Peters</i> , 263 Wis.2d 475, 665 N.W.2d 171 (2003) .....	8, 9

### Statutes

W. Va. Code § 62-1C-2 .....	8
W. Va. Code § 62-1C-3 .....	9
W. Va. Code § 29-21-16(b) .....	10
W. Va. Code § 61-3-54 .....	6
Wisc. Stat. § 943.201(2) .....	8

### Other Authorities

Allison Klein, <i>Stolen Name, Sullied Record, Lingering Harm</i> , Baltimore Sun, Dec. 26, 2002, at 1A .....	9
Astrid Galvan, <i>Program for Identity Theft Victims Delayed</i> , Albuquerque Journal, July 5, 2011. 9	
Black's Law Dictionary .....	7
Brian Maass, <i>Case of Identity Theft Ends up with Victim Behind Bars</i> , Denver Rocky Mountain News, Feb. 9, 2005, at 10A .....	9

## **ASSIGNMENTS OF ERROR**

The Petitioner asserts the following assignments of error in his Brief:

1. The Circuit Court erred by finding that the Criminal Bail Agreement is a financial transaction as contemplated by W. Va. Code § 61-3-54. Such an interpretation encompasses conduct which was not intended to be regulated by this law.
2. The Circuit Court erred by finding that the Affidavit for Appointed Counsel is a financial transaction as contemplated by W. Va. Code § 61-3-54. Such an interpretation encompasses conduct which was not intended to be regulated by this law.

(Pet'r's Br. 1.)

## STATEMENT OF THE CASE

Anthony Daniel Soustek is appealing his two convictions for Taking Identity of Another Person (commonly known as “identity theft”), in violation of West Virginia Code § 61-3-54. The facts of this case are not contested; instead, this appeal centers solely on an issue of statutory interpretation. Soustek’s appeal asks whether intentionally using his brother’s name and personal information in entering into a bail agreement and applying for state-appointed counsel constitutes identity theft under § 61-3-54. Or, more pointedly, whether those actions are “financial or credit transactions,” as that phrase is used in the statute.

This case started with a fairly routine traffic stop in Berkeley Springs, West Virginia, on April 6, 2012. (J.A. 28, 37.) At 11:45 p.m. Soustek was pulled over by a Morgan County deputy sheriff outside of the Berkeley Springs bowling alley for driving with a broken tail light. When asked for his identification, Soustek was unable to produce a driver’s license (his had been revoked) or proof of insurance. (*Id.*) And rather than giving the deputy his own name, Anthony Daniel Soustek, Soustek gave the deputy the name of his brother Alexander Jacob Soustek. (*Id.*)

After detecting the scent of alcohol emanating from the vehicle, the deputy required Soustek to undergo a field sobriety test, which Soustek failed. (*Id.*) Soustek also failed a preliminary breath test after registering a blood-alcohol content of .085. (*Id.*) He was placed under arrest and put in the backseat of the deputy’s vehicle. (*Id.*) Police ultimately searched Soustek’s vehicle and found a marijuana “roach” in the ashtray and three pills containing 0.5 mg of Alprazolam, a controlled substance. (*Id.*)

After being arrested, Soustek appeared before a Morgan County magistrate judge for arraignment. Soustek signed several documents during his arraignment, including a Conditional Bail Agreement and an Affidavit for Appointed Counsel. (J.A. 29-31, 38-40.) Consistent with

what Soustek had told police, both forms listed *Alexander* Soustek's name, address, date of birth, and social security number. (*Id.*) Although Soustek appears to have (nearly illegibly) signed his own name—*Anthony* Soustek—at the bottom of the forms, he initialed his “Initial Appearance: Rights Statements” with “AJS,” his *brother's* initials. (J.A. 30.) Under the Criminal Bail Agreement, which was based on *Alexander* Soustek's personal information, the magistrate set Soustek's bail at \$1700. (J.A. 38.) And in the “Affidavit: Eligibility for Appointed or Public Defender Counsel,” Soustek signed a sworn statement, two lines above brother's name, that he was eligible for the State to pay for his lawyer. (J.A. 29.)

It was not until the following day, April 7, 2012, that authorities learned from Alexander Soustek that Anthony Soustek had been using his brother's name. (J.A. 28.) Therefore, in addition to five misdemeanor charges for DUI and controlled-substance possession, Soustek was also indicted by a Morgan County grand jury on September 11, 2012, on two counts of identity theft under West Virginia Code § 61-3-54. (J.A. 6-8.) Soustek sought to dismiss the identity-theft charges, contending that his use of Alexander Soustek's name on the bail agreement and affidavit were not “for the purpose of making financial or credit transactions.” (J.A. 3-4.) The Circuit Court rejected that argument and concluded that bail is a financial transaction. (J.A. 1-2, 21.)

Soustek subsequently entered a conditional guilty plea, reserving the right to appeal the Circuit Court's ruling on this issue. (J.A. 10.) He was sentenced to two years in prison for his violation of the identity theft statute and ninety days in jail for possessing a controlled substance, and he was fined \$100 for the DUI. Soustek's sentence was suspended, however, and he was placed on three years' probation. (*Id.*) This appeal ensued.

## SUMMARY OF ARGUMENT

Soustek's appeal raises a pure question of statutory interpretation: are entering into a bail agreement and applying for a court-appointed lawyer "financial or credit transactions" under West Virginia Code § 61-3-54? The answer to that question is "yes."

Both entering into a bail agreement and applying for a court-appointed lawyer are "financial or credit transactions," as both transactions alter the legal commitments of the parties involved. Bail is a transaction in which a defendant acts as his own surety, putting a deposit down as a guarantee of his appearance at a later time. Using another person's identity has the potential of changing the amount of bail a person may be required to pay, thus altering the legal status of the parties. And applying for court-appointed legal services is a request for social services, whereby a person's stated financial abilities dictates whether he is entitled to have the state fund his legal defense. These are quintessential financial transactions. Moreover, they are within the scope of protection that was intended by the identity-theft statute, as each transaction could negatively impact the victim's financial and personal status. Soustek's use of his brother's name and other personal information to engage in these transactions thus violated § 61-3-54, and his convictions must be affirmed.

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

Oral argument is not necessary in this case. The briefs and records on appeal adequately present the facts and legal arguments. Oral argument would not significantly aid the decisional process, and a memorandum decision affirming Soustek's convictions would appropriately dispose of this appeal.

## ARGUMENT

### I. Standard of Review

This case concerns a pure matter of statutory interpretation, which is reviewed *de novo*. Syl. pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995) (“Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review.”) Section 61-3-54—the statute in question—is unambiguous. As such, this Court must apply it as written, without resort to canons of interpretation. *Davis Mem’l Hosp. v. W. Va. State Tax Comm’r*, 222 W. Va. 677, 682-83, 671 S.E.2d 682, 687-88 (2008); *see also DeVane v. Kennedy*, 205 W. Va. 519, 529, 519 S.E.2d 622, 632 (1999) (“Where the language of a statutory provision is plain, its terms should be applied as written and not construed.” (citations omitted)); Syl. pt. 5, *State v. Gen’l Daniel Morgan Post No. 548, V.F.W.*, 144 W. Va. 137, 107 S.E.2d 353 (1959) (“When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute.”).

### II. Soustek’s Use of His Brother’s Identifying Information in Applying for Bail Violated § 61-3-54.

Soustek’s identity theft convictions must be affirmed. West Virginia Code § 61-3-54 defines the crime of Taking Identity of Another Person, or “identity theft,” as follows:

Any person who [1] knowingly takes the name, birth date, social security number or other identifying information of another person, [2] without the consent of that other person, [3] with the intent to fraudulently represent that he or she is the other person [4] for the purpose of making financial or credit transactions in the other person’s name, is guilty of a felony . . . .

Notably, § 61-3-54 does not require a completed act of identity theft: a defendant must only have had the “intent” to take the identity of another with the “purpose” of using that identity in a

“financial or credit transaction.” The statute does not require that the defendant actually achieve his criminal goal.

While Soustek seeks a narrow reading of the term “financial or credit transaction,” an examination of that phrase undermines his argument. Black’s Law Dictionary defines a “transaction” broadly as “[a]ny activity involving two or more persons.” Black’s Law Dictionary 1635 (9th ed. 2009). And in another context, this Court has explained that “the word ‘transaction’ includes a business deal where the legal relationship of the parties is altered.” *Meadows v. Meadows*, 196 W. Va. 56, 62, 468 S.E.2d 309, 315 (1996) (exploring meaning of “transaction” as it is used in dead man’s statute). A “transaction” is thus not limited solely to those circumstances where goods and services are exchanged.

Soustek’s use of his brother’s personal information—including his name, address, drivers’ license number, and social security number—was “for the purpose of making financial or credit transactions” in his brother’s name. Soustek clearly intended to use his brother’s identification information to improve his legal status before the magistrate court. Soustek initialed one document as “AJS,” which are his brother’s initials. And even though he signed the documents as “Anthony Soustek,” his signature was messy enough that a person believing they were dealing with “Alexander Soustek” could easily miss the distinction. Even if he did not fill out the forms using his brother’s information, Soustek nevertheless ratified the inclusion of his brother’s personal information by signing the documents. Both Soustek’s bail agreement and his application for a court-appointed lawyer were “financial or credit transactions” that altered the legal relationship between Soustek and the court, and his convictions must be affirmed.

The Supreme Court of Wisconsin has considered this issue under Wisconsin’s identity-theft statute and concluded that the use of the name of another in applying for bail is a financial

transaction. In *Wisconsin v. Peters*, 263 Wis.2d 475, 665 N.W.2d 171 (2003), the defendant falsely represented herself as someone else during her initial appearance. *Peters*, 263 Wisc. 2d at 173, 665 N.W.2d at 479. Her bail was subsequently set based on that information. *Id.* On appeal, the Supreme Court of Wisconsin addressed whether that use of another’s identity constituted identity theft. The court concluded that it did, as it was used to obtain “credit, money, goods, services or anything else of value.” *Id.* at 174, 480. The court explained that while “bail does not have ‘commercial value’ or ‘market value’ in the sense that it is not bought, sold, or traded in the marketplace,” it nevertheless “plainly has monetary value, is expressed in terms of cash or a bond, and operates as a form of credit.” *Id.* at 175-76, 484. The court thus reasoned that “[b]ecause bail can be cash, a bond, or both, and operates as a form of credit, the misappropriation of another’s identity to obtain lower bail meets the statute’s requirement that the perpetrator misappropriate an identity to obtain credit or money.” *Id.* at 176, 485.

While the exact language of Wisconsin’s statute is different from § 61-3-54, the same rationale nevertheless applies.<sup>1</sup> The West Virginia Code provides that “[b]ail is security for the appearance of a defendant to answer to a specific criminal charge before any court or magistrate at a specific time or at any time to which the case may be continued.” W. Va. Code § 62-1C-2. In posting bail, a defendant acts as his own surety, depositing money with the court as a guarantee that he will return. In setting the amount of bail, a court considers a variety of factors, such as the

---

<sup>1</sup> The Wisconsin identity theft statute at issue in *Peters* was entitled “Misappropriation of personal identifying information or personal identification documents,” and read as follows:

Whoever intentionally uses or attempts to use any personal identifying information or personal identification document of an individual to obtain credit, money, goods, services or anything else of value without the authorization or consent of the individual and by representing that he or she is the individual or is acting with the authorization or consent of the individual is guilty of a Class D felony.

Wisc. Stat. § 943.201(2).

individual's ability to pay, criminal history, likelihood of flight, and the severity of the offense. W. Va. Code § 62-1C-3. A defendant's identity is critical to this determination. Who a person is, or at least who he represents himself to be, dictates the amount of bail that the court will set. In this sense, an individual's identity and background in bail proceedings is very similar to a person's commercial credit score. A court, much like a lender, examines the person's background and determines whether he is likely to uphold his end of the bargain. *See Peters*, 263 Wis.2d at 484, 665 N.W.2d at 175 (recognizing that "a misappropriated identity that is used to obtain a lower bail obtains: 1) a reduced cash bail; 2) a signature bond with a lower money forfeiture; or 3) both"). Thus, contrary to Soustek's argument, bail is a *quintessential* financial and credit transaction, and Soustek therefore violated the identity theft statute when he intentionally used his brother's name in applying for bail.

This Court should reject Soustek's attempt to characterize his offense as harmless. (*See* Pet'r's Br. 5.) The misappropriation of identity for bail agreements is not a "victimless" crime. Criminal identity theft could dramatically and negatively impact the person whose identity has been stolen. Bail agreements are public record. The identity theft might show up in any number of news reports or background checks, negatively impacting the victim's reputation and credit. *See, e.g.,* Astrid Galvan, *Program for Identity Theft Victims Delayed*, Albuquerque Journal, July 5, 2011 ("Even if identity-theft victims get their criminal records expunged by the courts, they will always be associated with their perpetrators because they'll be listed as the perpetrator's alias."); Allison Klein, *Stolen Name, Sullied Record, Lingering Harm*, Baltimore Sun, Dec. 26, 2002, at 1A ("[Criminal record identity theft is] so common in Baltimore that victims have recently been overwhelming the prosecutor's office."); Brian Maass, *Case of Identity Theft Ends up with Victim Behind Bars*, Denver Rocky Mountain News, Feb. 9, 2005, at 10A (victim

arrested on warrant after others had used her identity in traffic stops). Reading the statute in the narrow manner that Soustek suggests would leave victims exposed to this serious threat. This is exactly the type of behavior that § 61-3-54 was intended to prevent, and Soustek was properly charged and convicted under that statute.

### **III. Soustek's Use of His Brother's Identifying Information in Applying for State-Appointed Counsel Violated § 61-3-54.**

As with his bail agreement, Soustek's use of his brother's identity to complete the Affidavit for Appointed Counsel was also a "financial or credit transaction." West Virginia Code § 29-21-16(b) requires that "[a]ll persons seeking legal representation made available under the provisions of this article shall complete the agency's financial affidavit form, *which shall be considered as an application for the provision of publicly funded legal representation.*"

(emphasis added.) As a matter of law, when a person completes the affidavit, he is applying for the State to pay for his lawyer.

Soustek was attempting to use his brother's identity to obtain court-appointed legal services. In his "Initial Appearance: Rights Statements" form, Soustek signed his brother's initials, "AJS," next to the statement "I want an attorney appointed to represent me." (J.A. 30.) Then, on the affidavit that Soustek submitted to show his eligibility for a court-appointed lawyer, Soustek allowed his brother's name, date of birth, phone number, social security number, and address to be used, and he signed the affidavit at the bottom, which also listed his brother's name. (J.A. 29.) Soustek then submitted this form so he could have the State pay his legal costs. Clearly this was done for the purpose of a "financial or credit transaction." Soustek was using his brother's information to be granted legal services from the State. Had Soustek used his brother's personal information to apply for other social services, such as Medicaid, he most certainly

would have violated the statute; Soustek's use of his brother's personal information to enter into a bail agreement and apply for a court-appointed lawyer was no different.

Soustek's arguments against his convictions are unavailing. The fact that Soustek failed to maintain his brother's identity is irrelevant. (*See* Pet'r's Br. 5 (arguing that "by the time the Bond listed on the Criminal Bail Agreement was actually utilized and a transaction actually occurred, the name had already been corrected.")) Section 61-3-54 does not require a completed act of identity theft. Rather, it criminalizes the intentional use of another's identity *for the purpose* of a financial or credit transaction. Furthermore, Soustek's argument that there was no transaction here because "[n]o money or credit was ever exchanged, nor any benefit derived," (*id.*), is simply wrong. There was an application for both money and credit in the application for a court-appointed lawyer and the bond agreement; the fact that Soustek was unsuccessful is irrelevant. Had Soustek's true identity not been uncovered, the State would have supplied a lawyer for him *at the State's expense* based on his brother's identity. And had the magistrate judge known that the Defendant was Anthony Soustek rather than Alexander Soustek, bail may have been set at a higher rate. Thus, both aspects of Soustek's statement are inaccurate: had Soustek been successful, money *and* credit would have been exchanged, and Soustek would have derived a benefit from his use of his brother's identity.

## CONCLUSION

For the reasons stated above, the judgment of the Circuit Court of Morgan County must be affirmed.

Respectfully submitted,

STATE OF WEST VIRGINIA,  
*Respondent,*  
By counsel,

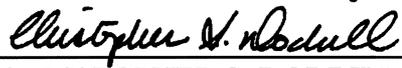
PATRICK MORRISEY  
ATTORNEY GENERAL

  
\_\_\_\_\_  
CHRISTOPHER S. DODRILL  
ASSISTANT ATTORNEY GENERAL  
812 Quarrier Street, 6th Floor  
Charleston, WV 25301  
Telephone: (304) 558-5830  
State Bar No. 11040  
Email: [csd@wvago.gov](mailto:csd@wvago.gov)  
*Counsel for Respondent*

**CERTIFICATE OF SERVICE**

I, Christopher S. Dodrill, Assistant Attorney General and counsel for the State of West Virginia, hereby verify that I have served a true copy of "Respondent's Brief" upon counsel for the Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 1st day of August, 2013, addressed as follows:

Joseph R. Kinser, Esq.  
Public Defender Corporation  
295 Monroe Street  
Martinsburg, WV 25404

  
\_\_\_\_\_  
CHRISTOPHER S. DODRILL