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Ordering Criminal Restitution: An Exercise In Overstepping Statutory Authority

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# ORDERING CRIMINAL RESTITUTION: AN EXERCISE IN OVERSTEPPING STATUTORY AUTHORITY

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I. INTRODUCTION

No one could have known the unfortunate events that would unfold on the morning of June 25, 2012. Jeffrey Roof and Jeffrey Meyn were just ordinary guys on the way to work when tragedy struck. The stoplight turned yellow when Roof pulled out of the dry cleaner’s driveway towards the highway. While many cars had stopped, Meyn kept going and careened into Roof’s car. Roof was later declared dead at the hospital that morning.

After originally being charged with manslaughter, Meyn pleaded to the lesser charge of negligent homicide. As part of the plea, Meyn “stipulated to a prison term of a year and a half and restitution that would not exceed $1 million.” Meyn served his time, but the battle over restitution continued.

After nearly five years, the court finally issued a ruling that ordered Meyn to pay one million dollars to Roof’s wife. The primary reason for the delay in obtaining the order of restitution against Meyn was that the law did not allow for a victim to present his or her case at a restitution hearing.

Roof’s father-in-law, Dick Coffinger, filed a notice of appearance in Meyn’s criminal case on his daughter’s behalf. While it is not out of the ordinary for victims in criminal cases to be represented by counsel, nevertheless, Judge Bruce Cohen denied Coffinger’s request to appear on his daughter’s behalf at the restitution hearing. Subsequently, Coffinger appealed the denial, and in January, 2015, the Arizona Court of Appeals upheld the ruling. The court reasoned that “[t]he purpose of restitution proceedings would be subverted if the victim’s counsel were allowed” because “such an arrangement would essentially transform a criminal sentencing into a civil damages trial.”


2 Id.
3 Id.
4 Id.
5 Id.
6 Id.
7 Id. “Meyn was sentenced to 18 months in prison. He was [incarcerated] on March 31, 2014, and with good time, he was released 13 months later on June 26, 2015. Meanwhile, Hyder and Roof’s father-in-law . . . battled it out over restitution.” Id.
8 Id.
9 Id.
10 Id.
11 Id.
13 Id. at 437–38.
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for the victim."

However, Coffinger continued his pursuit by taking the issue to the Arizona Legislature. A bill was introduced in 2016 that added a paragraph to the statutes on criminal restitution. The new enumerated right included in the amendment read, “Notwithstanding any other law and without limiting any rights and powers of the victim, the victim has the right to present evidence or information and to make an argument to the court, personally or through counsel, at any proceeding to determine the amount of restitution.”

Restitution is generally viewed as compensation for a loss incurred as a result of a crime committed. In criminal cases, a court orders restitution as part of the sentencing process “to make the parties whole, to rehabilitate the defendant and to compensate the victim for his or her financial loss.”

The boilerplate language found in plea agreements generally places a “cap” or limitation on the amount of restitution. However, while it is commonplace to include a cap in a plea agreement, “collecting a million dollars” is not as equally common. Unlike judgments in a civil suit, which are subject to discharge in bankruptcy proceedings, restitution is not dischargeable.

While the life changing events of the above account illustrate the function and application of restitution in the criminal context, the question remains: where does the source of the authority to order a defendant to make restitution originate? More specifically, does the doctrine of restitution in the criminal context inherently flow from the court’s punitive function in pursuing justice or rehabilitative interests in criminal cases, or does it come from somewhere else?

Courts often, to some varying degree, rely on the statutory authority in determining whether they may order restitution. This Note will show that the West Virginia restitution law has a broader scope of application than the Mandatory Victims Restitution Act in terms of what conduct falls within the authority of the courts to order restitution. Then, this Note will show how West Virginia's law differs from others.

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14 Id. at 437.
15 Kiefer, supra note 1.
16 See ARIZ. REV. STAT. § 8-416(E) (LexisNexis 2017).
17 Id.
18 Restitution, BLACK’S LAW DICTIONARY (10th ed. 2014).
19 Kiefer, supra note 1.
20 Id.
21 Id.
22 Id. “Collecting a million dollars as restitution, on the other hand, is not common; it’s more like the money that might be awarded in a wrongful-death lawsuit in civil court. But wrongful-death awards can be sidestepped by bankruptcy. Restitution cannot.” Id.
23 See infra Section II.A.2.
Virginia's restitution statute experiences shortcomings because West Virginia's law does not explicitly define "victim." Finally, this Note will argue that West Virginia courts exceed their statutory authority when ordering restitution pursuant to a plea agreement that includes restitution for offenses contained in the indictment to which the defendant had not pleaded guilty. To remedy the problems in West Virginia's restitution statute, the legislature must either enact a new law or modify the current law so courts can exercise efficient and proper authority when ordering restitution.

Part II of this Note examines the history and policy that led to the enactment of federal and state restitution laws. Part II also discusses the interplay between plea agreements as contracts and federal and state courts' authority to order restitution as illustrated through statute and case law. Part III of this Note analyzes the scope and application of the Mandatory Victims Restitution Act and West Virginia's restitution law. It also argues that absent an explicit definition of "victim" in West Virginia's statute, only a limited application is available: an application that is contrary to the legislative purpose. Most alarmingly, however, Part III also argues that West Virginia courts are exceeding their statutory authority in ordering restitution pursuant to a plea agreement when the agreement assigns the defendant restitution for offenses contained in the indictment to which the defendant had not pleaded guilty.

The West Virginia Legislature must either enact a new law or modify the current law so as to allow for courts to exercise efficient and proper authority when ordering restitution.

II. BACKGROUND

Part II of this Note examines the history and policy that led to the enactment of federal and state restitution laws, and also explores the interplay between plea agreements, contract law, and federal and state courts' authority to order restitution as illustrated through statutory and case law. Section II.A will introduce the policy behind restitution in the criminal system and will describe how it differs from a remedy in the civil context. It will also cover the history of restitution and its variety in application and limitation at the state and federal levels. Section II.B of this Note explores the use and history of plea agreements in the criminal justice system and how a plea agreement is used in conjunction with restitution. Next, Section II.C explores the federal restitution statutes in depth by introducing the statute and laying out the provisions shared with West Virginia's restitution statute. The Section then introduces federal case law highlighting the interplay between plea agreements, contract law, and the courts' authority to order restitution to victims of a multi-count indictment. Finally, Section II.D examines West Virginia's restitution statute and its pertinent parts while also exploring West Virginia case law addressing the interaction between plea agreements, contract law, and the courts' authority to order restitution to victims of a multi-count indictment.
A. Making Amends: The Heart and History of Restitution

This Section explores the modern-day policy and purposes behind restitution in the criminal system. Then, it highlights the historical aspect of criminal restitution and some of the specific provisions that states have included within their respective restitution statutes.

1. The Heart: The Purpose Behind Restitution

In the criminal justice system, the term "restitution" refers to "payment[s] by an offender to the victim for the harm caused by the offender's wrongful acts."25 The economic losses suffered by victims nationally—including medical, property, and lost earnings—were approximately $15 billion in 2007.26 To counteract the losses sustained by victims after the fallout often created by criminal conduct, states have adopted legislation that allows for the judicial system to order restitution.27 The purpose behind restitution is to assist victims of crimes.28 For example, the West Virginia Legislature has stated the following:

[T]he purposes of [the restitution laws] are to enhance and protect the necessary role of crime victims and witnesses in the criminal justice process and to ensure that the State and local governments do all that is possible within the limits of available resources to assist victims and witnesses of crime without infringing on the constitutional rights of the defendant.29

While some states find that "the purpose of [restitution law is] to encourage the compensation of victims by the person most responsible for the loss incurred by the victim,"30 some other states have additionally recognized that there are costs incurred after the commission of the crime that the victim may acquire as a result of participating and assisting in criminal justice hearings.31 However, the categories included in restitution statutes have become "increasingly broad" in some states, thus allowing for restitution to move "far

27 NCVC, supra note 25.
29 Id.
beyond its traditional purpose” by becoming a “mechanism of imposing additional punishment.”

Still, others contend that restitution “serve[s] to appease the victim” and deter “retaliation by the victim or victim’s family” towards the offender. Others still find that restitution addresses a moral obligation of the defendant to the victim by creating a legal obligation to compensate the victim. Regardless of the purpose for implementing restitution, restitution attends to multiple functions, including both a restorative and punitive purpose.

2. The History: Legislating Restitution, Limitations, and Use Across the States

The principle of restitution is an integral part of virtually every formal system of criminal justice, of every culture and every time. It holds that, whatever else the sanctioning power of society does to punish its wrongdoers, it should also insure that the wrongdoer is required to the degree possible to restore the victim to his or her prior state of well-being.

The idea of restoring and assisting the victim or disgorging the offender of what has been illegally obtained is not a new concept. Restitution in the criminal context has roots “as far back as biblical times[.]” However, restitution

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34 See COLO. REV. STAT. § 18-1.3-601(1)(b) (2017).


37 See supra Section II.A.1.

38 Clermont, supra note 33, at 369; see also Leviticus 6:1–5 (NIV).

The LORD said to Moses: If anyone sins and is unfaithful to the LORD by deceiving a neighbor about something entrusted to them or left in their care or about something stolen, or if they cheat their neighbor, or if they find lost property and lie about it, or if they swear falsely about any such sin that people may commit—when they sin in any of these ways and realize their guilt, they must return what they have stolen or taken by extortion, or what was entrusted to them, or the lost property they found, or whatever it was they swore falsely about. They must make restitution in full, add a fifth of the value to it and give it all to the owner on the day they present their guilt offering.
became available in 1925 when Congress adopted the Federal Probation Act,\textsuperscript{39} giving the courts the power to “place an offender on probation.”\textsuperscript{40} Subsequently, as a result of the Act, courts could also exercise a discretionary power, which “permitted federal courts to issue restitution orders as a condition of probation.”\textsuperscript{41} Still, between 1925 and 1982, restitution remained “infrequently used as a tool,” and its use did not increase until the late 20th century victims’ rights movement.\textsuperscript{42}

The victims’ rights movement arose out of the public sentiment that the focus of the criminal justice system was misplaced by being overly focused on the offender while the victim generally went unnoticed.\textsuperscript{43} As a result of this sentiment, federal legislation granted courts direct authority to order restitution under the Victim and Witness Protection Act (“VWPA”).\textsuperscript{44} However, the legislation did not pass through unscathed: opponents challenged the constitutionality of the statute on Fifth, Sixth, Seventh, Eighth, and Fourteenth Amendment grounds.\textsuperscript{45} However, all of these challenges were unsuccessful in their attempts to overturn the law.\textsuperscript{46}

Nevertheless, the structure of restitution changed in 1996 when Congress enacted the Mandatory Victims Restitution Act (“MVRA”), making restitution mandatory in the majority of cases where the “victim suffered an identifiable monetary loss from an enumerated crime.”\textsuperscript{47} The MVRA “partially superseded and augmented the VWPA”\textsuperscript{48} and, consequently, federal courts were no longer able to exercise their discretionary power to order restitution, but were instead required to order restitution.\textsuperscript{49}

Since the federal promulgation of statutory restitution, every state has given courts the statutory authority to order restitution.\textsuperscript{50} However, the variation of restitution laws and implementation from state to state can be very wide.

\textsuperscript{39} 18 U.S.C. § 3651 (repealed 1987).
\textsuperscript{40} Clermont, supra note 33, at 372–73.
\textsuperscript{41} Id. at 373.
\textsuperscript{42} Id. at 374–75.
\textsuperscript{43} Id. at 375.
\textsuperscript{44} See 18 U.S.C. § 3663 (2012); Clermont, supra note 33, at 375–76.
\textsuperscript{45} Clermont, supra note 33, at 376–77.
\textsuperscript{46} Id. at 375–76.
\textsuperscript{47} See 18 U.S.C. § 3663A(a)(1) (2012); Clermont, supra note 33, at 379.
\textsuperscript{48} Brian Kleinhaus, Serving Two Masters: Evaluating the Criminal or Civil Nature of the VWPA and MVRA Through the Lens of the Ex Post Facto Clause, the Abatement Doctrine, and the Sixth Amendment, 73 FORDHAM L. REV. 2711, 2712 (2005).
\textsuperscript{49} See United States v. Dolan, 571 F.3d 1022, 1025–26 (10th Cir. 2009). “As its name suggests, the Mandatory Victims Restitution Act is all about mandating restitution. No longer is the decision whether to order restitution for certain crimes left to the discretion of the district court.” Id. (emphasis omitted).
However, it would seem that despite the variations between states, the authority to order restitution is statutory. Consider the following examples.

First, a defendant is convicted of theft in Georgia. The stolen property, a rental car, was taken by the defendant from a parking lot where it had been parked by the victim ("lessee"). Subsequently, restitution was ordered to be paid to the lessee in the amount of $600. Although the amount of restitution had been in dispute, the lessee failed to appear at the hearing, and the prosecutor and defendant stipulated to a restitution amount of $600. After being notified of the $600 restitution amount, the lessee sought modification and, thus, filed a motion to modify the restitution order to provide for additional restitution in the amount of $2,623.99, which was the balance due on the amount demanded of lessee by the lessor. A second restitution hearing was scheduled on the matter concerning the lessee’s motion, and the court granted the modification of the restitution. The defendant appealed, and the appellate court affirmed the modification, stating that section 17-14-12 of the Georgia Code granted the court authority “to modify a restitution order at any time before the expiration of the relief ordered.” Nevertheless, upon appealing the case to the Supreme Court of Georgia, the restitution modification was reversed. The Supreme Court of Georgia reasoned that criminal restitution “is inextricably linked to the punitive aspects of the offender’s sentence.” Therefore, the court reversed the modification because restitution is a punishment when ordered as part of a criminal sentence and because once the defendant has begun to serve his sentence, courts lack the authority to modify it without the defendant’s consent.

Second, in Nevada, a defendant was involved in an altercation in which he pulled out a gun and shot one victim in the chest. A second bullet ricocheted and struck the second victim in the leg. The defendant entered a guilty plea of two counts of battery with use of a deadly weapon. The lower court ordered that restitution be paid in the amount of $67,208.86 to the hospital, ambulance company, and insurance company. On appeal, the defendant argued that the

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52 Id.
53 Id.
54 Id.
55 Id.
56 Id.
57 Ga. Code Ann. § 17-14-12 (2017); Harris, 410 S.E.2d at 124.
58 Harris v. State, 413 S.E.2d 439, 441 (Ga. 1992).
59 Id.
60 Id.
62 Id.
63 Id.
64 Id. at 133–34.
lower court improperly ordered him to pay restitution to an ambulance company, a hospital, and the insurance company because they were not victims under Nevada law, and thus the court lacked the authority to order restitution to such entities.\textsuperscript{65}

The appellate court began its analysis by stating that "authority to impose restitution is not an inherent power of the court, but is derived from statutes."\textsuperscript{66} It then turned to the Nevada statute that provided "[i]f a sentence of imprisonment is required or permitted by statute, the [sentencing] court shall: . . . [i]f restitution is appropriate, set an amount of restitution for each victim of the offense."\textsuperscript{67} The court proceeded to turn to the definition of a victim.\textsuperscript{68} The law provided that a "[v]ictim includes: (a) A person, including a governmental entity, against whom a crime has been committed; (b) A person who has been injured or killed as a direct result of the commission of a crime; or (c) A relative of a person described in paragraph (a) or (b)."\textsuperscript{69} Lastly, the court noted that the definition of victim permitted sentencing courts to "properly order a defendant to pay restitution to . . . county social services . . . and state welfare agencies[.]."\textsuperscript{70} The court concluded that the statutory authority defining victim includes hospital and ambulance companies as social welfare agencies but not the insurance company.\textsuperscript{71}

Third, after causing a vehicle accident in Florida, a police officer was convicted of a DUI and ordered to pay restitution.\textsuperscript{72} Before the order was entered, however, the victim entered into a settlement agreement with the defendant's insurance carrier that contained a stipulation that absolved the defendant of all future liability.\textsuperscript{73} Thus, after the order for restitution was entered, the defendant challenged the order based on the fact that the settlement agreement contained a release of liability.\textsuperscript{74} Therefore, the issue before the court was "whether the

\textsuperscript{65} Id. at 134.
\textsuperscript{66} Id.
\textsuperscript{67} NEV. REV. STAT. ANN. § 176.033 (LexisNexis 2017).
\textsuperscript{68} Martinez, 974 P.2d at 134.
\textsuperscript{69} See NEV. REV. STAT. ANN. § 213.005 (LexisNexis 2017).
\textsuperscript{70} Martinez, 974 P.2d at 134.
\textsuperscript{71} Id. at 134–35.

The situation is different regarding an insurance company. When an insurance company pays for a victim's medical expenses, it does so pursuant to a contractual obligation to its insured. The insurance company is not a victim as defined in NRS 176.015(5)(b). Further, it does not suffer an unexpected harm or loss, as the very purpose of insurance is to cover such expenses. Therefore, a sentencing court may not order a defendant to pay restitution to an insurance company for the company's payment of a claim by or on behalf of a crime victim.

\textsuperscript{72} Kirby v. State, 863 So. 2d 238, 240–41 (Fla. 2003).
\textsuperscript{73} Id. at 240.
\textsuperscript{74} Id.
victim and defendant may foreclose the trial court’s obligation to impose restitution by entering into a settlement agreement that contains a release of liability in a civil action prior to the disposition of the criminal case involving the same incident.\textsuperscript{75} The court began its analysis by turning to the Florida statute which was the source of the trial court’s authority.\textsuperscript{76} After noting that the trial courts have the authority to order restitution under the statute and that the statute requires the order of restitution, the court held that “a settlement and release of liability on a civil claim for damages between private parties does not prohibit the trial court from fulfilling its mandatory obligation to order restitution in the criminal case.”\textsuperscript{77}

The authority to order restitution has varying degrees of limitation.\textsuperscript{78} For example, 18 states have included provisions within their constitutions that give victims a constitutional right to restitution.\textsuperscript{79} Still, some states allow a court to order criminal restitution if there is damage to persons or property as a result of a criminal offense and if the victim specifically requests it,\textsuperscript{80} while others extend the recovery of restitution beyond the victim by also including dependents of the victim.\textsuperscript{81} Nevertheless, while the variations of restitution law are undoubtedly wide, there is an additional dimension created by plea bargains.

\textbf{B. Making a Deal with the Devil}

Many criminal prosecutions in the United States are resolved outside of court by having both sides come to an agreement.\textsuperscript{82} This resolution is achieved through a settlement process, like that in the civil context, called plea bargaining.\textsuperscript{83} Plea bargains are a common occurrence, as approximately 90% of

\textsuperscript{75} Id. at 241.
\textsuperscript{76} See FLA. STAT. ANN. § 775.089 (LexisNexis 2017); Kirby, 863 So. 2d at 241.
\textsuperscript{77} Kirby, 863 So. 2d at 240.
\textsuperscript{78} Subrogation, supra note 50.
\textsuperscript{80} CONN. GEN. STAT. § 53a-28(c) (2017). If a person is convicted of an offense resulting in injury to another, the victim requests financial restitution, and the court finds that the victim has suffered injury as a result of such offense, the court shall order the offender to make financial restitution. Id.
\textsuperscript{81} Mo. Rev. Stat. § 559.021(2) (2017). “[T]he court may order such conditions as the court believes will serve to compensate the victim, any dependent of the victim, any statutorily created fund for costs incurred as a result of the offender’s actions, or society.” Id.
\textsuperscript{83} Id.
the criminal defendants convicted in state and federal courts plead guilty rather than exercise their right to stand trial before a court or jury.84

During the plea agreement process, prosecutors generally agree to reduce the defendant’s punishment to either a lower offense or a diversion program to obtain a defendant’s guilty plea.85 However, “[s]ome plea bargains [may] require defendants to do more than simply plead guilty.”86 For example, a plea bargain allowing for a lesser sentence may require a defendant to testify in a particular case against another defendant.87 Another example includes restitution amounts set forth in a plea agreement requiring a defendant to pay in order to obtain a lesser charge.88

Some legal experts purport that plea bargaining— unlike restitution—is a tool that was not used with frequency until the 19th century.89 Until the latter half of the nineteenth century, when the practice of prosecutorial plea bargaining emerged, the common judicial practice was to discourage guilty pleas.90 “[I]n the decades following the American Civil War, the overwhelming reaction” regarding plea bargains was one of strong disapproval.91 This heightened disapproval has led some scholars to note the possibility that the United States Supreme Court could have invalidated the practice if given the opportunity to review the issue.92

Despite strong disapproval, plea bargaining nevertheless became a prevalent method of resolving criminal cases towards the end of the 19th century and into the 20th.93 By the 1920s, various crime commissions had revealed that plea bargaining was a common vehicle in the route to conviction as compared to the preceding decades.94 As a result of this revelation, the practice was brought to the public eye for the first time, “and once again the general reaction—of scholars, of the press, and of the crime commissions themselves—was

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86 Id.
87 Id.
89 Alschuler, supra note 84, at 5.
90 Id.
91 Id. at 6.
92 Id.

Indeed, although the propriety of plea bargaining did not come before the United States Supreme Court during this formative period, there are indications that the Court would have invalidated the practice had the issue been presented—a development that might (or might not) have brought the brief history of plea bargaining to a speedy conclusion.

93 Id.
94 Id.
disapproval."³⁵ It still seemed possible, as late as 1958, that the Supreme Court might hold the practice unconstitutional, and as such, the Department of Justice had taken "dubious steps" to help the issue evade the Court’s reach.³⁶ However, in 1970, the Supreme Court decided Brady v. United States³⁷ and concluded that plea bargaining remained "inherent in the criminal law and its administration."³⁸

Generally, the process of plea bargaining is a private one, but it has since changed as a result of victims’ rights groups pressing for laws that allow for a victim to provide "input" during the plea bargaining process.³⁹ The policy behind supporting plea bargaining in the criminal justice system is "prevalent for practical reasons."⁴⁰ For example, "[d]efendants can avoid the time and cost of defending themselves at trial, the risk of harsher punishment, and the publicity a trial could involve."⁴¹ Additionally, plea bargains can save the courts the burden of conducting a trial and spare the prosecution and defense the uncertainty of a trial.⁴²

C. Federal Enactment and Limitations on Restitution

This Section explores the statutory force of federal restitution and precedent regarding federal restitution. First, Section II.C.1 will explore the federal restitution statutes in depth by introducing the particular statute and comparing provisions with West Virginia’s restitution statute. Next, Section II.C.2 will analyze the federal case law concerning restitution and the interplay between plea agreements, contract law, and the courts’ authority to order restitution to victims of a multi-count indictment.

1. Restitution on the Federal Level

Under the Mandatory Victims Restitution Act, "[n]otwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order . . . that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim’s estate."⁴³ The section goes on to explain:

For the purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the

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³⁵ Id.
³⁶ Id.
³⁸ Alschuler, supra note 84, at 6.
³⁹ Plea Bargaining, supra note 82.
⁴⁰ Id.
⁴¹ Id.
⁴² Id.
commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant’s criminal conduct in the course of the scheme, conspiracy, or pattern. ¹⁰⁴

Furthermore, the MVRA has a limited scope in that only certain crimes, like crimes of violence and offenses against property, fall within the statutory scheme allowing for restitution to be ordered. ¹⁰⁵

Both the federal statute and the West Virginia statute state that restitution “shall” be ordered, rendering restitution mandatory rather than permissive. ¹⁰⁶ However, unlike West Virginia’s restitution statute, ¹⁰⁷ the MVRA has a limited scope and explicitly allows for courts to order restitution to “persons other than the victim of the offense” where the parties agree in a plea agreement. ¹⁰⁸ The provisions of the MVRA are further illustrated in federal case law addressing issues of restitution. ¹⁰⁹

2. Federal Jurisprudence of Restitution

The following illustrations demonstrate who is considered a victim for purposes of restitution within the scope of the MVRA. Additionally, these cases illustrate that the authority to order restitution is statutory.

In United States v. Freeman, ¹¹⁰ the court grappled with the issue of whether the purported victim must be a victim of the offense of conviction under the federal restitution laws. ¹¹¹ The defendant pleaded guilty to one count of obstructing an official proceeding. ¹¹² The plea agreement stated that “[t]his court may . . . order [the defendant] to make restitution pursuant to [the federal statute],” but the plea agreement did not reveal any agreement between the defendant and the government with regards to restitution. ¹¹³ The facts leading up to the indictment and plea are interesting: the defendant was a minister between 1991 and 2003, and during this time, he formed and incorporated three

¹⁰⁴ Id. § 3663A(a)(2) (emphasis added).
¹⁰⁵ Id. § 3663A(c)(1)(A). While there are other statutes under which courts are granted the authority to order restitution, those statutes go beyond the scope of this Note.
¹⁰⁶ See infra Section II.D.1.
¹⁰⁷ Id.
¹⁰⁸ 18 U.S.C. § 3663A(a)(3) (2012). “The court shall also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.” Id.
¹⁰⁹ See infra Section II.C.2.
¹¹⁰ 741 F.3d 426 (4th Cir. 2014).
¹¹¹ See id at 428.
¹¹² Id.
¹¹³ Id.
churches.\textsuperscript{114} The defendant served as the pastor and leader of all three entities and ultimately began to accumulate a substantial number of assets, "including a $1.75 million residence and luxury automobiles in the names of members of the church."\textsuperscript{115} Although many of the assets were in the names of church members, the defendant maintained the payments.\textsuperscript{116} Eventually, the defendant fell on hard times and was forced to file for Chapter 13 bankruptcy, and in his filing, the defendant reported several falsities to cover the true value of his assets.\textsuperscript{117} After entering into the plea agreement, several of the church members sought restitution for the houses and cars in their names and the damage sustained to their credit.\textsuperscript{118} The trial court ordered restitution in the amount of $631,050.52 to cover the damages alleged by the victims.\textsuperscript{119} The defendant appealed the order.\textsuperscript{120}

The court ultimately concluded that the harm suffered by the victims was not caused by the offense of conviction for which the defendant was convicted.\textsuperscript{121} It reasoned that the "offense of conviction" was a single count of obstructing a court proceeding.\textsuperscript{122} As such, the court noted that the harm of obstructing the court proceeding was not the type of offense that would lead to the harm suffered by the purported victims.\textsuperscript{123}

The foundation for Freeman was likely set by the Ninth Circuit case Karrell v. United States.\textsuperscript{124} In Karrell, the defendant was convicted for "knowingly causing to be made false certificates and papers concerning claims for veterans' home loan guaranty benefits."\textsuperscript{125} As a result of the conviction, the defendant was ordered to pay restitution to several affected veterans.\textsuperscript{126} Still, the issue of restitution surfaced on appeal because the defendant was charged in the indictment with 17 counts, each associated with a different veteran.\textsuperscript{127} However, the defendant was acquitted on two counts, he was found guilty of six, and nine were dismissed.\textsuperscript{128}

\begin{footnotesize}
\begin{enumerate}
\item[114] Id.
\item[115] Id.
\item[116] Id. at 428–29.
\item[117] Id. at 429.
\item[118] Id. at 430.
\item[119] Id. at 431.
\item[120] Id.
\item[121] Id. at 439.
\item[122] Id. at 435.
\item[123] Id. at 438.
\item[124] 181 F.2d 981 (9th Cir. 1950).
\item[125] Id. at 981.
\item[126] Id. at 983.
\item[127] Id. at 986.
\item[128] Id. "It will be recalled that appellant was charged upon an indictment containing seventeen counts, each of which concerned a different veteran and that appellant was acquitted by the trial court.
\end{enumerate}
\end{footnotesize}
Ordering Criminal Restitution

On appeal, the court concluded that the trial court erred in ordering restitution to any veteran other than the ones directly concerned in the six counts upon which the defendant stood convicted because restitution ordered is limited to “actual damages or loss caused by the offense for which conviction was had.” After noting that the indictment contained 17 counts, each concerning a different victim, and that the defendant was only convicted of six of those counts, the Ninth Circuit held that the trial court erred in ordering restitution to victims not connected with the six counts on which the defendant was convicted.

In a later Ninth Circuit case, United States v. Snider, the court concluded that restitution at the federal level is only permissible when statutory authority permits, and since the defendant did not fall within the scope of the available restitution statutes because the crime of conviction was not one of the enumerated, the lower court erred in ordering restitution. In Snider, the defendant pleaded guilty to “structuring [a] financial transaction to evade federal reporting requirements” and was “ordered to pay $183,250 in restitution.” However, the conviction arose out of a single transaction in which the victim suffered a loss of $18,750. The defendant had signed a plea agreement stating that “[the defendant] acknowledges that the Court may direct him to pay restitution up to the amounts listed in the column captioned ‘Fee (15%)’ in the Stipulated Factual Basis for Plea.” The amount in the “Fee Column” totaled $183,250. After noting that “[f]ederal courts have no inherent power to order restitution” and that the available statutes do not apply to the defendant because the crime of conviction is not one of the enumerated crimes in the restitution statute, the court reversed the restitution order.

Overall, these cases illustrate the dichotomy between who is and is not considered a victim within the scope of the MVRA. These cases further show that federal courts are limited in ordering restitution because the power to order restitution is statutorily based.

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129 Id. at 986–87.
130 Id. at 987.
131 957 F.2d 703 (9th Cir. 1992).
132 Id. at 706.
133 Id. at 705.
134 Id.
135 Id.
136 Id.
137 Id. at 706. Although the applicable statute in the case was the VWPA, the VWPA had limitations concerning the scope of enumerated crimes similar to the MVRA.
D. West Virginia’s Law on Restitution

Section II.D.1 explores the West Virginia restitution statute in depth. Section II.D.2 introduces West Virginia case law concerning restitution and the interplay between plea agreements, contract law, and the authority of the courts to order restitution to victims of a multi-count indictment. Lastly, Section II.D.3 examines a line of West Virginia case law on the use of contract principles governing plea agreements.

1. Statutory Restitution in West Virginia

After setting forth the Legislative Findings and Purpose, the provision allowing for victim testimony at the sentencing hearing, and provisions of the crime victims’ compensation funds, West Virginia’s Victim Protection Act makes its first operative thrust concerning restitution in section 61-11A-4 of the West Virginia Code.138 Section 61-11A-4(a) states:

The court, when sentencing a defendant convicted of a felony or misdemeanor causing physical, psychological or economic injury or loss to a victim, shall order, in addition to or in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of the offense, unless the court finds restitution to be wholly or partially impractical as set forth in this article.139

Furthermore, under section 61-11A-4(b), the order of restitution shall require that the defendant—in cases resulting in damage or loss of property—either return the property140 or “pay an amount equal to the greater of” the value of the property where it is “impractical or inadequate” to return.141

Additionally, section 61-11A-5(a) enumerates several factors that a court should consider when determining whether to order restitution.142 Section 61-11A-5(a) states:

The court, in determining whether to order restitution under this article, and in determining the amount of such restitution, shall consider the amount of the loss sustained by any victim as a result of the offense, the financial resources of the defendant, the financial needs and earning ability of the defendant and the

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139 Id. § 61-11A-4(a) (emphasis added).
140 Id. § 61-11A-4(b)(1)(A).
141 Id. § 61-11A-4(b)(1)(B).
142 Id. § 61-11A-5(a).
defendant’s dependents, and such factors as the court deems appropriate.\textsuperscript{143}

Both sections revolve around the element of the “offense” for which the defendant is “convicted” when determining who is a victim and the amount of restitution to be paid.

2. The Supreme Court of Appeals of West Virginia:Determining Restitution

The Supreme Court of Appeals of West Virginia has spent some time examining issues created by plea bargains and restitution. One such examination of restitution begins in \textit{State v. Whetzel}.\textsuperscript{144} In \textit{Whetzel}, the defendant was indicted on six counts, including accessory after the fact to second-degree arson.\textsuperscript{145} Plea negotiations took place, and as a result of entering into a plea bargain, the defendant agreed to plead guilty to three charges.\textsuperscript{146} The plea agreement, however, “provided that sentencing would be left to the discretion of the circuit court.”\textsuperscript{147} It was further agreed within the plea bargain that the defendant would “pay restitution . . . in the amount of $846.39.”\textsuperscript{148}

Before the defendant’s sentencing hearing, the victims of the crimes had filed victim impact statements.\textsuperscript{149} One statement claimed that the victim had suffered a loss of $30,000 as a result of the arson.\textsuperscript{150} Subsequently, the lower court ordered the defendant to pay the additional restitution amount.\textsuperscript{151} On appeal, the sole issue was “whether [the defendant] can legally be required to pay $30,000.00 restitution to [the victim] for the burning of [the victim’s] barn.”\textsuperscript{152}

The defendant argued on appeal that the plea agreement had already been entered, and thus “the circuit court erred in ordering restitution because the restitution requirement did not comport with the terms of his plea agreement.”\textsuperscript{153}

\textsuperscript{143} \textit{Id.} (emphasis added).
\textsuperscript{144} 488 S.E.2d 45 (W. Va. 1997).
\textsuperscript{145} \textit{Id.} at 45.
\textsuperscript{146} \textit{Id.} “[T]he appellant agreed to plead guilty to being an accessory after the fact to second degree arson . . . and also agreed to plead guilty to the two counts charging him with conspiracy . . . .” \textit{Id.} at 46.
\textsuperscript{147} \textit{Id.}
\textsuperscript{148} \textit{Id.}
\textsuperscript{149} \textit{Id.}
\textsuperscript{150} \textit{Id.}
\textsuperscript{151} \textit{Id.} at 47.
\textsuperscript{152} \textit{Id.}
\textsuperscript{153} \textit{Id.} at 48. The plea agreement only required the defendant to pay $846.39, and thus the defendant argued that the lower court erred in ordering restitution beyond the agreed amount in the plea bargain. \textit{Id.}
The Supreme Court of Appeals of West Virginia pointed out that the plea agreement was not binding because it had explicitly agreed to leave sentencing to the circuit court.\textsuperscript{154} The court further concluded that the additional restitution outside of the plea agreement was permissible because "the charges of being an accessory are not independent, but to a certain extent, are entwined with, and partake of, the principal offense."\textsuperscript{155}

In \textit{State v. Cummings},\textsuperscript{156} the defendant was an office manager at a medical office.\textsuperscript{157} The defendant had embezzled from the medical business "by stealing cash, forging checks, improperly using the company credit card, retaining the proceeds from the sale of a storage building, and granting himself an unauthorized raise."\textsuperscript{158} After confessing to the conduct, the defendant was indicted for a multiple counts of criminal conduct.\textsuperscript{159} The defendant entered into a plea agreement upon which he pleaded "no contest" to "one count of embezzlement, one count of forgery, and one count of uttering."\textsuperscript{160} Also within the plea agreement, the defendant agreed to "make restitution in the amount to be determined at a Restitution Hearing."\textsuperscript{161}

At the restitution hearing, the lower court determined that the total amount of restitution of $48,778.98 should be paid to the victim.\textsuperscript{162} A total of $12,000 of the $48,778.98 was based on income the victim lost as a result of court appearances.\textsuperscript{163} The court noted that absent a "statutory scheme" allowing for such restitution, "courts have not been inclined to expand the scope of statutorily-defined restitution."\textsuperscript{164} The court further noted that other jurisdictions have adopted rules stating that "a defendant may be ordered to pay restitution only for an offense that he has admitted, upon which he has been found guilty, or upon which he has agreed to pay restitution."\textsuperscript{165} Interestingly, though, the court stated the following in a footnote:

We tangentially note that situations may arise in which, through the process of plea bargaining, a defendant and the State might propose a plea bargain which includes restitution for offenses contained in the indictment to which the defendant had not pled guilty. In such instance, the inclusion of such other items of

\textsuperscript{154} \textit{Id.} at 49.  
\textsuperscript{155} \textit{Id.} at 48.  
\textsuperscript{156} 589 S.E.2d 48 (W. Va. 2003) (per curiam).  
\textsuperscript{157} \textit{Id.} at 50.  
\textsuperscript{158} \textit{Id.}  
\textsuperscript{159} \textit{Id.}  
\textsuperscript{160} \textit{Id.}  
\textsuperscript{161} \textit{Id.}  
\textsuperscript{162} \textit{Id.}  
\textsuperscript{163} \textit{Id.}  
\textsuperscript{164} \textit{Id.} at 53.  
\textsuperscript{165} \textit{Id.} at 52 (emphasis added).
restitution would rest within the sound discretion of the lower court in its consideration of the plea bargain agreement.\(^{166}\)

But the court concluded that the value of lost wages should be excluded from the restitution order “because the West Virginia statute governing this matter does not include restitution for loss of wages incurred by the victim while attending court proceedings.”\(^{167}\)

Yet another case addressing restitution is *State v. Atwell*.\(^{168}\) In *Atwell*, the defendant was charged with burglary and larceny after taking a refrigerator and a stove from the victim’s home.\(^{169}\) The defendant pleaded guilty to both counts and was sentenced to 1 to 15 years for the burglary charge and 1 to 10 years for the larceny charge.\(^{170}\) Despite the defendant’s admission to taking only a refrigerator and a stove, the trial court ordered the full amount of restitution, which included other items purportedly stolen.\(^{171}\) On appeal, the State argued that “as part of the [defendant’s] guilty plea, he agreed to pay the amount recommended by the Adult Probation Department, which . . . amounts to $50,013.00.”\(^{172}\) The Supreme Court of Appeals of West Virginia ultimately reversed and remanded for further determination on the amount because the trial court had failed to consider “all of the pertinent circumstances in determining the practicality of an award of full restitution.”\(^{173}\) However, several justices disagreed, hinging their reasoning upon the plea agreement.

Justice Menis Ketchum, in his dissent, agreed with the State’s logic that “[t]he agreement provided that the defendant agreed to pay the amount of restitution recommended by the Adult Probation Department” and stated that the trial court correctly ordered the amount recommended.\(^{174}\) Still, Justice Allen Loughry, who concurred in part and dissented in part, pointed out that the “plea agreement provides that [the defendant] will pay restitution ‘in an amount to be determined by the Adult Probation Department.’”\(^{175}\) However, Justice Loughry reasoned that “[l]ogic dictates . . . that the defendant believed that he was agreeing to Adult Probation determining the value of the stove and the refrigerator—the only items to which [the defendant] had agreed to plead guilty to stealing.”\(^{176}\) As such, Justice Loughry concluded that because the plea agreement did not list any additional items that were lost, the costs should be

\(^{166}\) Id. at 53 n.4.

\(^{167}\) Id. at 53.

\(^{168}\) 765 S.E.2d 182 (W. Va. 2014).

\(^{169}\) Id. at 183.

\(^{170}\) Id.

\(^{171}\) Id. at 183–84.

\(^{172}\) Id. at 184.

\(^{173}\) Id.


\(^{175}\) Id. at 186 (Loughry, J., concurring in part and dissenting in part).

\(^{176}\) Id.
limited to the "'loss sustained by [the] victim as a result of the offense' for which the defendant was charged and convicted: grand larceny for the theft of a stainless steel stove and refrigerator."177

3. Plea Agreements and Contracts in West Virginia

Among West Virginia case law discussing the interplay between restitution and plea agreements, there are cases that explore the binding power of plea agreements as enforceable contracts. This Section highlights the importance of the interaction between plea agreements and restitution within West Virginia. This interaction helps in setting the foundation in exposing judicial overstepping when West Virginia courts order restitution pursuant to parties agreeing to pay additional amounts outside the offense for which the defendant was convicted.

In Brewer v. Starcher,178 the defendant entered into a plea agreement with the state that stated, inter alia, that the defendant would possibly pay a fine and restitution for all of the victim's medical expenses.179 Subsequently, at a later hearing, the state prepared a sentencing order at the court's request, which mirrored the oral order given during the hearing.180 However, the judge rejected the proposed order and sent another written order that ultimately modified the prior agreement.181 The second modified order "kept the earlier terms of the plea agreement, but ordered the [defendant] to pay $5,000 for the pain and suffering of the victim in addition to the $2,500 fine . . . and the restitution for the medical expenses[.""]182 The Supreme Court of Appeals of West Virginia ultimately concluded that "when a defendant enters into a plea agreement with the prosecution, the circuit court must ensure the defendant receives what is reasonably due to him under the agreement"183 and that a circuit court may not "unilaterally modify"184 a plea agreement that has been accepted by the defendant, prosecution, and court.185

The court went on to say that "when a plea rests in any significant degree on a promise or agreement . . . so that it can be said to be part of the inducement or consideration, such promise must be fulfilled."186 The court reasoned that plea agreements require defendants to waive fundamental constitutional rights, and

177 Id. at 187.
179 Id. at 190.
180 Id.
181 Id.
182 Id.
183 Id. at 192.
184 Id. at 193.
185 Id.
186 Id. at 192 (quoting Santobello v. New York, 404 U.S. 257, 262 (1971)).
subsequently, courts and prosecutors are to be held to a higher, more
“meticulous” standard in ensuring that the defendant receives both the promise
and performance for which he bargained by giving up the considerable rights
preserved by the Constitution. 187

In Thompson v. Pomponio, 188 the defendant was indicted with
conspiracy to commit a felony (Count I) and delivery of a controlled substance
(Count III). 189 At the time of the indictment, the defendant was “at large” for
some time before he was apprehended and charged with a breaking and entering
charge along with a grand larceny charge. 190 The defendant entered into a plea
agreement in which he pleaded guilty to Count I for the dismissal of Count III
and the pending breaking and entering charge. 191 The circuit court accepted the
defendant’s plea to the first count and stated that it would dismiss the pending
breaking and entering charge against the defendant. 192

After the case was closed, a new prosecutor reviewed the file and noticed
that the plea agreement “did not identify the breaking and entering charge by
case number, did not mention the grand larceny charge, and did not specify
whether the dismissal of charges was with prejudice.” 193 Thus, the new
prosecutor presented the charges to a grand jury who then returned an indictment
for breaking and entering and grand larceny. 194

The defendant sought two things: (1) to quash the indictment and (2) a
motion for specific performance of the plea agreement that was previously
entered. 195 However, the circuit court denied the defendant’s motion because
there was no mention of “with prejudice” in the plea agreement. 196 Thus, because
there was no mention of “with prejudice” in the plea agreement, the charge could
be pursued once more. The defendant then sought a writ of prohibition to prevent

187 Id. at 193 (holding that “[b]ecause a plea agreement requires a defendant to waive
fundamental rights, we are compelled to hold prosecutors and courts to the most meticulous
standards of both promise and performance”); see also Lombrano v. Superior Court, 606 P.2d 15
(Ariz. 1980) (in banc) (finding that because the acceptance of the defendant’s guilty plea places
him or her in jeopardy, a trial court could not sua sponte set aside the plea); People v. Matthews,
419 N.Y.S.2d 192, 193 (N.Y. App. Div. 1979) (finding that “in the absence of fraud the court had
no power to set aside the plea agreement without the defendant’s consent”); People v. Damsky,
366 N.Y.S.2d 13, 15 (N.Y. App. Div. 1975) (per curiam) (holding that the trial court is without
power to withdraw a defendant’s plea of guilt).
188 757 S.E.2d 636 (W. Va. 2014).
189 Id. at 639.
190 Id. at 638–39.
191 Id. at 639 (accepting defendant’s guilty plea of conspiracy to commit a felony and
dismissing Count III of delivery of a controlled substance and the pending breaking and entering
charge but failing to make any mention of the pending grand larceny charge).
192 Id.
193 Id.
194 Id.
195 Id. at 640.
196 Id.
the prosecution of the charges and to "procure his immediate discharge from custody." 197

In reviewing the defendant’s request, the court began by pointing out that the “contract” right that he sought to exercise is one rooted in the Constitution and that a “broken government promise that induced [a] guilty plea implicates [the] due process clause because it impairs voluntariness and intelligence of plea[s].” 198 Subsequently, the court turned to federal case law, and ultimately agreed with the reasoning that the government bears “a greater degree of responsibility than the defendant . . . for imprecisions or ambiguities in plea agreements.” 199 Thus, the court concluded that “the state bears the primary responsibility for insuring precision and unambiguity in a plea agreement because of the significant constitutional rights the defendant waives by entering a guilty plea. If a plea agreement is imprecise or ambiguous, such imprecision or ambiguity will be construed in favor of the defendant.” 200

III. ANALYSIS

There are three issues that arise with West Virginia’s restitution law. First, it has a broader scope of application than the Mandatory Victims Restitution Act, and thus, West Virginia’s statute has the pitfall of requiring defendants to pay restitution well exceeding the monetary loss incurred by the victim. Second, it lacks an explicit definition of “victim,” which creates a limited application. Third, and most alarmingly, West Virginia courts are exceeding their statutory authority in ordering restitution pursuant to a plea agreement when the agreement assigns the defendant restitution for offenses contained in the indictment to which the defendant had not pleaded guilty. To remedy these issues, the West Virginia Legislature must either enact a new law or modify the current law so as to allow for courts to exercise efficient and proper authority when ordering restitution.

Section III.A explores the scope of both the MVRA and section 61-11A-4 of the West Virginia Code and determines the application of the statutes on prior case law through each statutory lens. Section III.B advocates that, despite the absence of an explicit definition of a restitution eligible victim in section 61-11A-4, there is an extrapolated definition, and this definition has its pitfalls when juxtaposed against the MVRA. Lastly, Section III.C argues that courts are going beyond their statutory authority in instances where lower courts are following the suggestion made in Cummings by allowing parties to agree to restitution

197 *Id.*
198 *Id.* at 642 (citing Mabry v. Johnson, 467 U.S. 504, 509 (1984)).
199 *Id.* (citing United States v. Harvey, 791 F.2d 294, 300 (4th Cir. 1986)).
200 State ex rel. Thompson v. Pomponio, 757 S.E.2d 636, 643–45 (W. Va. 2014) (concluding that “the circuit court exceeded its legitimate authority in allowing the instant prosecution to proceed through its denial of the [defendant’s] motion to quash and seeking specific performance of the subject plea agreement, as reflected in its order entered on August 5, 2013”).
beyond the victim of the offense for which the defendant was convicted. The Legislature must either enact a new law or modify the current law so as to allow for courts to exercise efficient and proper authority when ordering restitution to remedy these issues that arise out of the state's restitution law. The modification of West Virginia's law on restitution may involve mirroring the MVRA.

A. The Statutory Scope of the MVRA and West Virginia Code § 61-11A-4

It seems to be well settled that federal courts do not have the inherent power to order restitution absent statutory authority. The scope of the MVRA is limited in that only particular conduct and crimes permit courts to order restitution to victims of those crimes. Thus, for a court to order that restitution be paid by a convicted defendant, not only must a court have authority by statute, but the crime must also be one enumerated within the statute. Snider illustrates the limitations and scope of federal restitution by recognizing that where the crime of structuring finances to evade reporting requirements is not enumerated or not within the scope, courts lack the authority to order restitution.

On the other hand, although no explicit case addresses the issue of whether West Virginia courts have the authority to order restitution absent statutory authority, the holdings in Starcher and Cummings suggest that the authority to order restitution is entirely derived by statute and that, as is the case in federal case law, there is no inherent authority of the courts to deviate or expand beyond this statutory grant of authority. Thus, there is no reason to think that restitution in West Virginia is exempt from requiring statutory authority. On the contrary, the precedent suggests the need for the Legislature to give courts the ability to order restitution.

Furthermore, unlike the MVRA, the West Virginia statute does not have a scope limited by enumerated conduct. Consequently, the West Virginia statute reaches broadly so as to include any crime where a physical, psychological, or economic injury occurs as a result of the offense. Thus, even though case law suggests that West Virginia courts must still have statutory authority to order restitution.

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201 See United States v. Snider, 957 F.2d 703, 706 (9th Cir. 1992); United States v. Barany, 884 F.2d 1255, 1260 (9th Cir. 1989) ("The court's discretion in ordering restitution is not unlimited."); United States v. Angelica, 859 F.2d 1390, 1392–93 (9th Cir. 1988) (noting that because neither statute applied, the district court lacked the power to require restitution); United States v. Signori, 844 F.2d 635, 640 (9th Cir. 1988) (finding that the district court lacked the statutory authority to order restitution).


203 Id. § 3663A.

204 Snider, 957 F.2d at 703.

205 See State v. Cummings, 589 S.E.2d 48, 50 (W. Va. 2003) (per curiam) (finding that ordering restitution to a victim for losses incurred by attending court proceedings was not within the statutory authority granted by the legislature); State ex rel. Brewer v. Starcher, 465 S.E.2d 185, 194 (W. Va. 1995).
restitution, because the West Virginia statute is inclusive of most crimes, there is hardly an instance where a court lacks the authority to grant restitution.

For instance, consider the case of Snider, where the victim suffered a loss of $18,750, but the defendant entered a plea agreement which included a provision that the defendant would pay restitution in the amount of $183,000.206 If the facts in Snider were in a case before a West Virginia court, the result would be contrary to the federal holding due to the broad scope of authority provided by the Legislature. Under West Virginia’s statute, the defendant in Snider would be responsible for the restitution ordered by the lower court because of the overly sweeping coverage of the state’s statute. Thus, under West Virginia’s statute, the defendant in Snider would be responsible for paying upwards of $183,000 in restitution to the government despite the victim suffering a total loss of $18,750.207 Although the greater amount was derived and agreed to by the parties in the form of a plea bargain, the court in Snider nevertheless recognized that the initial order of restitution was not viable since the restitution statute employed was not applicable in Snider.208

It is clear that the scope of the West Virginia statute is much broader than the MVRA because it is not limited to particular conduct and crimes but instead includes any crime where physical, psychological, or economic injury occurs. Nevertheless, while prosecutors likely celebrate the breadth of the statute, and defense lawyers cringe at what seems an uphill battle, the statute’s broad sweep and lack of definition still leave a glaring hole in determining when restitution is appropriate.209 The real damage from West Virginia’s wide sweeping statute and precedent210 is apparent when defendants who are in scenarios similar to that described in Snider are ordered to pay restitution far exceeding the monetary loss the victim incurred.

Furthermore, this damaging and wide-sweeping effect of the statute contradicts the West Virginia policy as set forth in the legislative purpose.211 That is, the application of West Virginia’s statute to cases similar to Snider does not align with the legislative purposes of the law, which are “to enhance and protect the necessary role of crime victims and witnesses in the criminal justice system.”212 West Virginia’s legislature has observed, through the enactment of its statute, that the primary purpose of restitution falls on the premise that there is an interest in protecting and assisting the victims of crime.213 By allowing instances where victims recover substantially more than the loss incurred by the

206  Snider, 957 F.2d at 706.
207  Id.
208  Id.
209  See infra Section III.B.
210  See supra Section II.D.3.
212  Id.
213  Id.
crime, the purpose of restitution deviates from the clear articulation by the West Virginia Legislature and becomes punitive in nature and perhaps more similar to a potential award in a civil suit.\textsuperscript{214} Thus, although differences are far and wide in restitution laws across the country, West Virginia’s current codification allows too wide of a sweep that permits instances contrary to the West Virginia legislative findings and recovery of injuries well beyond the injuries the victim actually incurred. Therefore, to close the range of West Virginia’s restitution statute, the law should not only either enact a new law or modify the current law, but the new law or modified law should also mirror the scope of the MVRA so as to prevent unprecedented scenarios as described above.

\section*{B. Who Is a “Victim” Within the Statutory Scheme?}

Recovery under the MVRA is limited to a victim’s losses that are (1) directly caused by the offense of conviction, (2) caused by all of the acts included within the scope of the scheme or conspiracy, if a “scheme, conspiracy or pattern of criminal activity” is an element of the offense, or (3) amounts otherwise expressly agreed to in a plea agreement.\textsuperscript{215} These three means of recovery come from the language of the MVRA including the definition of a victim.\textsuperscript{216} Freeman and Kerrell illustrate who is considered a victim under the MVRA.\textsuperscript{217} Both Freeman and Kerrell recognize that the “victims,” while undeniably victims of a crime, are not victims for the purposes of restitution because they are not victims whose losses are directly and proximately caused by the offense of the conviction.\textsuperscript{218}

Under the MVRA, a victim is also considered as such for the purposes of restitution when the victim is injured as a result of a crime where a scheme, conspiracy, or pattern is an element of the crime.\textsuperscript{219}

Consider the following: assume that an individual conspires with another to defraud two insurance agencies by writing and passing fake checks as if issued by the insurers. Imagine further that the individual is indicted for only one count of conspiracy to defraud the first insurance agency. Assuming now that the defendant pleaded guilty and was ordered to pay restitution to both victims, this would be allowed under the MVRA because the crime in which the conviction

\textsuperscript{214} See supra Section II.A.1 (discussing the purpose and policy behind restitution within different jurisdictions).

\textsuperscript{215} See supra Section II.C.1.

\textsuperscript{216} Id.

\textsuperscript{217} See supra Section II.C.2.

\textsuperscript{218} See United States v. Freeman, 741 F.3d 426, 430 (4th Cir. 2014) (finding that the offense of obstructing justice by failing to report financial earnings is not a crime of conviction for which the victims of fraud are able to recover restitution); Kerrell v. United States, 181 F.2d 981, 987 (9th Cir. 1950) (finding that victims of dismissed counts were not victims who suffered losses arising out of the offense of the conviction and were therefore not able to recovery restitution).

occurs is one in which the conspiracy is the element of the crime. More specifically, under the MVRA, the second insurer may be able to recover restitution—despite the count missing from the indictment—because the victim may have suffered a loss as a result of the offense for which the defendant is convicted, and conspiracy was an element of that conviction. Therefore, the MVRA, although limited in other ways, is broader than the West Virginia statute in its definition of who is an eligible victim for purposes of restitution.

Unlike the MVRA, the West Virginia statute does not provide an explicit definition of a victim eligible for restitution. The statute provides that "the court . . . shall order . . . that the defendant make restitution to any victim of the offense." The statute further states that the order is only available "when sentencing a defendant convicted of a felony or misdemeanor causing physical, psychological, or economic injury . . . ." Thus, while the statute does not contain an explicit definition of an eligible victim, one can be extrapolated. Under this extrapolated definition, a victim is a person who has suffered a physical, psychological, or economic injury from the offense of which the defendant has been convicted.

This two-part definition requires (1) that the victim suffer either a physical, psychological, or economic loss, and (2) that the loss arise out of the offense in which the defendant was convicted. Turning now to the conspiracy example recounted above, under section 61-11A-4 of the West Virginia Code, the victim of the count never indicted clearly meets the first prong of the definition in that he or she has suffered one of the three proscribed injuries. However, the victim of the second count falls short of being able to recover restitution because of the second prong.

The victim of the second count that was never indicted does not have a loss arising out of the offense of the defendant’s conviction because the conviction pertains to conspiracy to defraud the first insurance agency. Thus, section 61-11A-4, unlike the MVRA, does not allow for restitution where the offense of the conviction contains an element of conspiracy. While one may suggest that a defendant should not be ordered to pay restitution for a crime of which he or she was not convicted because the language of the statute is clear, this creates a problem in the context of criminal conspiracy for the tribunal, prosecution, victim(s), and defendant. For example, under West Virginia law, the prosecution would have to list each conspiracy charge in the plea agreement, the defendant is less likely to take a plea deal which includes multiple counts of conspiracy, and consequently, the court could have to hear a case containing multiple conspiracy charges (potentially taking a substantial amount of time). In order to sidestep the drawbacks listed above, the prosecution is enticed into dismissing some counts of conspiracy to encourage the defendant to enter into a

220 See supra Section III.A.
222 Id.
223 Id.
plea. However, such prosecutorial conduct includes complete disregard for the victim(s). Overlooking victims is undoubtedly contrary to the purpose of restitution.\textsuperscript{224} Thus, while the argument that the defendant should not pay restitution for crimes of which he is not convicted seems sensible, abiding by such a plain reading of the statute in terms of criminal conspiracy charges entirely forgoes the purpose of protecting and assisting victims of crime.

Nevertheless, because of West Virginia’s limited definition of an eligible victim, prosecutors must precisely determine who is a victim, specifically in crimes of conspiracy, in order to further the Legislative purpose of West Virginia’s restitution law.\textsuperscript{225} Alternatively, to correct this deficiency in the statute, the Legislature should take action to broaden the scope and definition of a restitution eligible victim.

\textbf{C. How Far Can Plea Bargaining Go?}

Consider the scenario where an accountant works for two separate business offices: offices X and Y. During the accountant’s employment, he begins to embezzle from both X and Y by removing small denominations from the weekly deposits. Subsequently, the accountant’s conduct is discovered and he is indicted on two counts of embezzlement: Count I pertaining to office X and Count II pertaining to office Y. After some time, the prosecution and the accountant (defendant) reach an agreement that Count II will be dismissed for the defendant’s guilty plea to Count I. Suppose further that there is a clause stating that the defendant agrees to pay restitution to the victim, in an amount to be determined by adult probation. The court accepts the plea and enters the order. Do both victims recover restitution despite Count II being dismissed?

Here, because embezzlement falls within the realm of the MVRA’s enumerated conduct of theft, there is no dispute that the crime is within the scope of the MVRA. Furthermore, as was previously mentioned, recovery under the MVRA includes amounts agreed to in a plea agreement.\textsuperscript{226} Congress has expressly given federal courts authority to order restitution agreed to in a plea agreement, and thus a federal court does not overstep when doing so.\textsuperscript{227} Therefore, under the MVRA, the plea agreement would be enforced, and because office Y, the victim of Count II, was not a victim of the offense of conviction

\textsuperscript{224} See supra Section II.A.1.

\textsuperscript{225} W. VA. CODE ANN. § 61-11A-1(b) (LexisNexis 2017).

\textsuperscript{226} See supra Section II.C.1.

\textsuperscript{227} 18 U.S.C. § 3663A(a)(3) (2012) (“The court shall also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.”).
(Count I) office Y will not be able to recover under the MVRA. This reasoning parallels the reasoning in *Freeman* where the court did not allow recovery of restitution to victims who were not the victim of the crime of conviction. 228

The analysis of the above example would likely have the same result under West Virginia's restitution law because the language of section 61-11A-4 requires that the restitution be paid to the "victim of the offense." 229 Even though the prosecution may contend that the plea agreement was meant to include both victims originally named in the indictment, the holding in *Starcher* lends to the argument that the deficiency in the drafting of the plea agreement should be interpreted in favor of the defendant. Thus, if the phrase "the victim" was a typographical error, and the prosecution instead meant "the victims," the agreement should still be interpreted so as to only apply to the one victim because the defendant is waiving a right. 230 The Due Process Clause is implicated because entering into the agreement where the prosecution drafts the agreement and breaks its promise "impairs voluntariness and intelligence of plea[s]." 231 Just like in *Thompson*, where the court concluded that the government bears "a greater degree of responsibility than the defendant . . . for imprecisions or ambiguities in plea agreements," 232 here, too, it will be recognized that the drafting error implicates the voluntariness and intelligence of the defendant entering a plea. For instance, the defendant in the hypothetical may not be as likely to enter into the agreement having the knowledge that he is agreeing to make restitution to office Y.

Furthermore, a West Virginia court's acceptance or rejection of a plea agreement plays an important role 233 because the entering of the plea agreement by the parties and the acceptance of it by the judge make it so that the plea agreement cannot be revoked. 234 Still, because the defendant is offering his

228 United States v. Freeman, 741 F.3d 426, 428 (4th Cir. 2014) (finding that the crime of obstructing justices by making false statements in an affidavit before the bankruptcy court does not warrant restitution to the victims of the defendant's fraud when the defendant is not on trial for fraud).
230 State *ex rel.* Brewer v. Starcher, 465 S.E.2d 185, 192 (W. Va. 1995). This prospective argument should fail on other grounds pertaining to West Virginia courts lacking the statutory power otherwise. However, the Author included the argument here as a means of illustrating deference in favor of the defendant when interpreting ambiguities or drafting errors in a plea agreement.
232 *Id.* (citing United States v. Harvey, 791 F.2d 294, 300 (4th Cir. 1986)).
233 *Starcher*, 465 S.E.2d at 194.

Plea bargaining is "an essential component of the administration of justice" and the requirement of Rule 11 that a circuit court make a definite announcement of acceptance, rejection, or deferral of its decision concerning the plea agreement is indispensable to a criminal justice system so heavily dependent on the plea agreement processes.

*Id.* (citation omitted).

234 *Id.* at 193.
constitutional right as consideration for the bargaining of leniency, West Virginia
courts have shifted the drafting responsibilities onto the state.235

While the above hypothetical is in line with West Virginia precedent,
consider the same example above, but this time, the agreement states that the
defendant is to pay restitution to both the victims, despite Count II of the
indictment being dismissed. It is under this second embezzlement example that
the West Virginia statute and supporting precedent exceed the statutory
authority.

In Cummings, the Supreme Court of Appeals of West Virginia noted that
there are instances in which a defendant can agree to pay more in restitution to a
victim other than the victim of the offense when the count pertaining to the victim
was dismissed but originally included in the indictment.236 Furthermore, the
Justices who dissented in Atwell relied on the reasoning in Cummings to disagree
with the outcome of reversing the defendant's restitution order.237 Justice
Ketchum reasoned that the defendant agreed to pay an amount to be determined
by the adult probation and that this agreement is permissible and should be
enforced pursuant to Cummings.238 Justice Loughry agreed in part with Justice
Ketchum but relied more on the subjective belief of the defendant when he
entered into the agreement with the state.239

[W]e believe that a circuit court’s unilateral modification of a specific
judicially accepted plea agreement presents a clear violation of [criminal
procedure] Rule 11 . . . . Once a circuit court unconditionally accepts on the
record a [plea] agreement, the circuit court is without authority to vacate the
plea and order reinstatement of the original charge. Furthermore, after a
defendant is sentenced on the record in open court, unilateral modification of
the sentencing decision by the circuit court is not an option contemplated
within the rule.

Id. at 192–93.

235 See id.; Pomponio, 757 S.E.2d at 642.


237 State v. Atwell, 765 S.E.2d 182, 185–86 (W. Va. 2014) (Ketchum, J., dissenting) (Loughry,
J., concurring in part and dissenting in part).

238 Id. at 187 (Ketchum, J., dissenting).

To be clear, I firmly believe that a criminal defendant should be required to
pay restitution in an amount that fully compensates his or her victim for the
loss sustained as a result of the offense. If the State believed that other items
should have been included in the grand larceny charge, the State could have
included those other items. For whatever reason or purpose, it did not.
Consequently, on remand, I believe the trial court should determine the
appropriate amount of restitution based on the “loss sustained by [the] victim
as a result of the offense” for which the defendant was charged and convicted:
grand larceny for the theft of a stainless steel stove and refrigerator.

Id. (citation omitted).

239 Id. at 186 (Loughry, J., concurring in part and dissenting in part). “Logic dictates . . . that
the defendant believed that he was agreeing to Adult Probation determining the value of the stove
and the refrigerator—the only items to which [the defendant] had agreed to plead guilty to
stealing.” Id.
While the "tangential" suggestion made in *Cummings* would be permissible under the MVRA because the statute allows for ordering restitution agreed to in a plea agreement regardless of whether the restitution goes beyond the victim of the offense, the West Virginia statute is absent any such grant of authority. Thus, the dissenting Justices in *Atwell*, although justified in relying on *stare decisis*, are suggesting an exercise of authority that West Virginia's law does not authorize. Despite the broad scope of the statute, courts within West Virginia are limited to ordering restitution in instances where the "victim" is the victim of the offense of the conviction, regardless of whether the parties agree otherwise. This does not mean that the court cannot order restitution agreed to in a plea agreement. It does mean, however, that the agreement of restitution cannot be ordered when it includes restitution to victims other than those for the offense of the conviction. In other words, if West Virginia courts adopt and apply the reasoning in *Cummings* as a means of justifying an order of restitution that goes beyond the offense of the conviction, those courts would be overstepping by exercising authority not available under the statute. Therefore, if courts are to order restitution in such circumstances, a change to the current law giving courts additional authority is required.

IV. CONCLUSION

On June 25, 2012, Roof would lose his life in a fatal car accident and Meyn would be sentenced to prison and ultimately ordered to pay $1 million dollars in restitution. Roof's wife would endure a nearly five-year battle to obtain the restitution order against Meyn. Just as the change in Arizona required the legislature to act before the courts would allow victims to make an argument before the court, West Virginia's statute must also be amended and changed in order to provide clarity and allow courts to make an order of restitution in instances not currently permitted under the statute. This change may include mirroring the MVRA.

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240 *Cummings*, 589 S.E.2d at 53 n.4.

We tangentially note that situations may arise in which, through the process of plea bargaining, a defendant and the State might propose a plea bargain which includes restitution for offenses contained in the indictment to which the defendant had not pled guilty. In such instance, the inclusion of such other items of restitution would rest within the sound discretion of the lower court in its consideration of the plea bargain agreement.

*Id.*


242 *See supra* Section III.A.

243 *See supra* Section III.B (discussing the eligibility for restitution for victims under section 61-11A-4 of the West Virginia Code).

244 § 61-11A-4.


246 *Id.*
Thus, this Note answers the two questions set out earlier. First, where does the source of the authority to order a defendant to make restitution originate? Second, does the authority to order restitution inherently flow from the court's punitive function in pursuing justice in criminal cases, or does it come from somewhere else?

The ability to order restitution is undeniably derived from statute. Given the examples illustrated above and the exploration of West Virginia and federal precedent, West Virginia requires statutory authority to order restitution. Additionally, restitution plays more of a rehabilitative and restorative role than a punitive one. The West Virginia statute, despite its breadth, is narrow in its definition of a victim and, as such, may exclude victims from recovery. Furthermore, West Virginia courts would be going beyond the permissible statutory authority they rely on the suggestion in Cummings as justification for ordering restitution to victims of a dismissed count originally in the indictment. To remedy the unauthorized exercise of judicial power and lack of definition, the West Virginia Legislature must either enact a new law or modify the current law to allow for courts to exercise the authority that Cummings suggests. Without amending the current law, courts should otherwise refrain from ordering restitution in instances in which the note in Cummings suggests.

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247 See supra Part I.

* J.D. Candidate, West Virginia University College of Law, 2018; B.A. in English and Philosophy, San Diego State University, 2010. This Article is dedicated to my mother for her unwavering love and support, without which I would not be where I am today. Thank you to Kyle Pajarito for countless hours of editing and review and to Joe Limer and Lisa Burns for the motivation to pursue a legal education and inspiring such endeavors. Finally, special thanks to everyone at the Kanawha County Public Defender's Office who encouraged the selected topic and acted as a mentor throughout.