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State v. Nelson Appellant's Reply Brief Dckt. 42628

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. JAMIE LEE NELSON AKA RINEHART, Defendant-Appellant.	)	NO. 42628 ADA COUNTY NO. CR 2012-8075 REPLY BRIEF

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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District Judge

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STATEMENT OF THE CASE

Nature of the Case

After this case was remanded for a restitution hearing because the State had not presented sufficient evidence in support of its restitution request (it relied only on the prosecutor's unsworn oral assertion of the time he spent and his rate of pay), the district court entered a higher restitution award based on the same information (the prosecutor's still-unsworn representation, this time, presented in a written document). Ms. Nelson appeals again, contending that the restitution award in this case should be vacated for several reasons: the restitution statute (I.C. § 37-2732(k)) is unconstitutional as applied to her; the increased restitution award, which was not based on new information, constituted vindictive sentencing by the district court; and the State again failed to meet its burden of proof in the restitution hearing.

The State has not contested one of the points Ms. Nelson raised – that the restitution award in this case is erroneous because it includes restitution for time spent solely prosecuting Ms. Nelson's co-defendant on a persistent violator charge; rather, it simply disputes the proper remedy for that error. (*See* Resp. Br., p.25 (arguing for an opportunity to adjust the claim accordingly on remand).) Based on that apparent concession, this Court should grant some form of relief in this case. Thus, the only question is whether this Court should remand this case at all, and, if it does, whether and what instructions it should give to the district court about the rules applicable to an ensuing decision. The State makes several responses to Ms. Nelson's arguments on these other issues, none of which are meritorious.

As such, Ms. Nelson maintains that, since the State has already had two opportunities to meet its burden of proof regarding restitution and has failed to present any evidence, much less sufficient evidence, in support of its claim for restitution both times, this Court should not remand this case again. Instead, it should simply vacate the order for restitution.

Statement of the Facts and Course of Proceedings

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

ISSUE

Whether the district court erred in ordering Ms. Nelson to pay $4,746 in restitution for the prosecution costs in this case.

ARGUMENT

The District Court Erred In Ordering Ms. Nelson To Pay $4,746 In Restitution For The Prosecution Costs In This Case

A. The Restitution Statute Is Unconstitutional As It Is Applied To Ms. Nelson

1. The State's Attempt To Bar Ms. Nelson's As-Applied Challenge Under The Law Of The Case Doctrine Misunderstands That Doctrine

Despite focusing its argument on the merits of Ms. Nelson's challenge to the constitutionality of employing I.C. § 37-2732(k) against her (*see* Resp. Br., pp.6-10), the State "questions whether [this] claim is barred by law of the case." (Resp. Br., p.6 n.2.) The answer to the State's question is, "No, it is not." That answer is based on a proper understanding of what the law of the case doctrine requires in terms of raising issues prior to a remand.

As the Idaho Supreme Court has recently reaffirmed, "the law of the case doctrine 'prevents consideration on a subsequent appeal of alleged errors that might have been, but were not, raised *in the earlier appeal*.'" *State v. Hawkins*, 155 Idaho 69, 72 (2013) (quoting *Taylor v. Maile*, 146 Idaho 705, 709 (2009) (emphasis added). If the record *in the earlier appeal* is insufficient for the party in question to have raised the issue, then the law of the case doctrine does not prevent that party from raising the issue for the first time on the ensuing remand. *Id.*

That is the case here. The record in the initial appeal was not sufficient for Ms. Nelson to have raised the constitutional challenge *in the initial appeal*, primarily because it had not been preserved to the district court beforehand. That conclusion is particularly obvious in this case given the fact that, prior to the first appeal, defense

counsel had asked for an evidentiary hearing to explore the validity of the prosecutor's oral, unsworn representation at the sentencing hearing, but was denied in that request. *See State v. Nelson*, 2014 Unpublished Opinion No.387, 2014 WL 708467, p.4 (Ct. App. 2014), *rev. denied.* It was at such a hearing that defense counsel would be expected reasonably to have raised the constitutional challenge, and that is precisely what happened, when the case was remanded for that hearing.

Since that issue was not raised, nor could it have been effectively raised, in the initial appeal, the law of the case doctrine does not bar Ms. Nelson from raising the as-applied challenge for the first time on the ensuing remand. Thus, the issue is appropriately asserted in this appeal.

2. The State's Argument As To The Merits Of The As-Applied Challenge Misunderstands, And So, Misapplies The United States Supreme Court's Precedent On That Point

Ms. Nelson argues that, pursuant to *United States v. Jackson*, 390 U.S. 570 (1968), ordering her to pay restitution pursuant to I.C. § 37-2732(k) is unconstitutional because it would create the impermissible effect of objectively appearing to punish her for exercising her rights, and so, chill the exercise of the constitutional right to a trial. (*See* App. Br., pp.8-16) The State responds, asserting that the rule in *Jackson* has not been embraced by subsequent decisions, and so, no longer constitutes good law. (Resp. Br., pp.9-10.) The State misunderstands those subsequent decisions.

Jackson clearly remains good law, as the United States Supreme Court continues to apply it when the facts warrant it. *See, e.g., Saenz v. Roe*, 526 U.S. 489, 499 n.11 (1999) (reiterating and relying upon the *Jackson* rule). The State's argument to the contrary is based on the analysis in the Ninth Circuit case, *United*

States v. Chavez, 627 F.2d 953 (9th Cir. 1980). However, the State's argument ignores the details of the Ninth Circuit's analysis. Those details reveal that Ms. Nelson's as-applied challenge is actually still a valid argument to raise even under *Chavez*.

Chavez, like a line of United States Supreme Court decisions before it, simply recognizes that *Jackson* does not establish a *per se* rule of unconstitutionality whenever a statute impacts the exercise of a constitutional right; rather, those decisions recognize that application of the *Jackson* rule depends on the specific facts and statutes at issue in a particular case. *Chavez*, 627 F.2d at 956; *see, e.g., Corbitt v. New Jersey*, 439 U.S. 212, 218-19 (1978). Thus, the rule emerges: "*not every* assertion that a statutory scheme has chilled the exercise of a constitutional right results in the finding of unconstitutionality." *Chavez*, 627 F.2d at 956 (emphasis added).

Ms. Nelson does not actually make any claim to the contrary. She has not argued that I.C. § 37-2732(k) could never be constitutionally applied (*i.e.*, made an argument that it is facially unconstitutional). (*See generally* App. Br.) Rather, she claims that, based on the unique facts of her case and the particular statute at issue, I.C. § 37-2732(k) is unconstitutional *as it has been applied to her.* (App. Br., pp.15.) *Chavez* itself reaffirms that this sort of claim is a proper and viable claim to raise, as it explains, while there may be legitimate government interests in a statute, such that costs of prosecution may be authorized "for [another] purpose or effect than to chill the assertion of constitutional rights . . . . *The question remains, however, whether the provision is constitutionally infirm because it needlessly encourages the waiver of constitutional rights.*" *Chavez*, 627 F.2d at 956 (emphasis added).

Thus, the flaw in the State's argument becomes evident. Those other decisions did not hold that *Jackson* was wrong, or its rule is no longer good law. Rather, they distinguished *Jackson* based on the specific facts and statutes at issue in those subsequent cases. For example:

> [*Fuller v. Oregon*], the Court said, was *fundamentally different* from those decisions which invalidated laws that placed a penalty on the exercise of a constitutional right [*i.e.*, *Jackson*]. "Oregon's system for providing counsel quite clearly does not deprive any defendant of the legal assistance necessary to meet (their) needs." An indigent's knowledge that he might someday be required to repay the costs of his legal services in no way affect his eligibility to obtain counsel.

Chavez, 627 F.2d at 956 (quoting *Fulmer v. Oregon*, 417 U.S. 40, 52 (1974) (emphasis added). What *Fulmer* actually stands for, according the Supreme Court itself, is that, where the statute in question is appropriately tailored to address the government interests, such that it does not *needlessly* chill the exercise of the right, the *Jackson* rule does not apply. *Fulmer*, 417 U.S. at 54.

The *Jackson* rule did not apply in *Corbitt* for similar reasons: "The Court upheld the New Jersey statute [at issue in that case] and stated that *Jackson* did not require otherwise. 'The principal difference is that the pressures to forgo trial and plead guilty to the charge [in *Corbitt*] are not what they were in *Jackson*.'" *Chavez*, 627 F.2d at 956 (quoting *Corbitt*, 439 U.S. at 218). Specifically, the Supreme Court explained that, while the guilty plea process will impact on the trial right, that burden was not "needless" because the guilty plea still had to be knowing, intelligent, and voluntary in regard to the waiver of the trial right. *Corbitt*, 439 U.S. at 219 n.9; *see also id.* at 220-21.

Ms. Nelson's case is more like *Jackson* than *Fulmer* and *Corbitt* because the effect of enforcing I.C. § 37-2732(k) in this case does directly punish Ms. Nelson's

choice to exercise her right to a trial. (*See* App. Br., pp.13-16.) That is particularly obvious from the fact that Ms. Nelson had to stand on her rights during the first trial so that she would not be deprived of a fair trial by the improper presentation of evidence during the State's case. (*See, e.g.,* Supp. R., pp.154-55 (documenting the mistrial).) Despite that fact, the State has now sought and received an order for restitution for the time the prosecutor spent preparing for and appearing at the second trial. (*See, e.g.,* R., pp.38-39 (order for restitution attempting to exclude only the time the prosecutor spent *in court* for the first trial, not the time preparing for that trial).) The time to prepare for and present the second trial was only necessary because the State erred in its first presentation of the case. Thus, forcing Ms. Nelson to pay the costs of that prosecution is a needless burden on the exercise of her right to a fair trial. *Compare Corbitt*, 439 U.S. at 220-21, 219 n.9 (finding the imposition of the burden on the affected right was narrowly tailored to the purpose and thus, not "needless"); *Fulmer*, 417 U.S. at 54 (same). This is also true as it relates to Ms. Nelson's decision to stand on her right to a trial in the first place. (App. Br., pp.13-16.)

It is important to remember that the applicable analysis is objective. It considers whether a reasonable person (which encompasses the perspective of others still incarcerated), would see the act as a punishment for exercising a constitutional right, such that they would not exercise that right themselves for fear of being subjected to the same punishment. *North Carolina v. Pearce*, 395 U.S. 711, 724 (1969) (quoting *Jackson*, 390 U.S. at 581-82). Since an objective review of the facts in Ms. Nelson's case shows she was subjected to higher restitution because of her decision to exercise her rights to a jury trial and a fair trial, a reasonable person would see the order for

restitution as punishment against Ms. Nelson for exercising her rights, and, as a result, the reasonable person would not exercise her rights for fear of similar reprisal. Therefore, as in *Jackson*, enforcing that statute caused a needless chill upon the exercise of the rights afforded by the Constitution. Thus, I.C. § 37-2732(k) is unconstitutional *as it was applied to Ms. Nelson.* (App. Br., pp.8-16.)

As such, the State's arguments against *Jackson*, which fail to appreciate the whole body of precedent and the distinctions drawn between the relevant cases, are erroneous and should be rejected. Based on a proper understanding of precedent, this Court should vacate the restitution order in this case because ordering it violates Ms. Nelson's constitutional rights.

B. The District Court's Decision To Order Restitution For A Higher Amount Than The One Originally Vacated Without New Evidence Affirmatively Appearing in The Record To Support That Order Was Vindictive

The State makes two arguments in regard to the merits of Ms. Nelson's vindictive sentencing claim[1]: (1) since the district court examined the record to try and understand its error, its decision was not malicious, and so, was not vindictive; (2) the *Pearce* presumption[2] does not apply to the remand in this case, since the point of the initial remand was to allow for the presentation of new evidence. (Resp. Br., pp.14-19.) Neither of these arguments is meritorious, since (1) Ms. Nelson is not required to show actual vindictive intent or malice by the district court judge to show vindictive

[1] As will be discussed in Section B(1)(b), *infra*, the restitution in this case under this particular statute qualifies as a punitive consequence of conviction, and so, may be challenged as vindictive "sentencing."
[2] *Pearce*, 395 U.S. at 726 (holding that, if the same court orders a higher sentence on remand, it is presumed to be vindictive).

sentencing, and (2) even though the State had the opportunity to present new evidence, it did not take advantage of that opportunity.

However, it is first necessary to discuss the State's procedural argument in regard to the whether this claim needs to be analyzed under the fundamental error standard. (Resp. Br., pp.12-14.) This claim is adequately preserved for appeal pursuant to *State v. Grist*, 152 Idaho 786, 794 (Ct. App. 2012), and *State v. DuValt*, 131 Idaho 550, 553 (1998). However, even if this Court decides otherwise, this claim is not only cognizable under the fundamental error framework, but Ms. Nelson has met all three prongs of that test, as well. Either way, this Court should consider the merits of this claim, and in so doing, vacate the order for restitution in this case.

1. The Vindictive Sentencing Claim Is Properly Raised In This Appeal

a. The Vindictive Sentencing Claim Was Adequately Preserved For Appeal

The State's argument – that the vindictive sentencing claim was not adequately preserved for appeal (Resp. Br., pp.12-14) – is based on a misunderstanding of the difference between a claim of vindictive sentencing and vindictive prosecution. The State believes that, since Ms. Nelson could have argued the prosecutor's request for restitution was vindictive, she had an opportunity to raise the question of vindictiveness generally, and thus, cannot raise the issue of vindictive sentencing by the district court for the first time on appeal. (*See* Resp. Br., p.12.) That is incorrect.

In fact, as the Idaho Court of Appeals has said, a defendant is "not required to make a contemporaneous objection to the district court at the time of resentencing to

afford the district court an opportunity to rebut the *Pearce* presumption."[3] *Id.* The reason behind that conclusion is: "We agree with the majority of federal circuits, and specifically with the dissent in *Vonsteen*[4], that the Supreme Court's use of the word 'must' in *Pearce* means that, in imposing a more severe sentence upon remand, the district court bears the burden to make the reasons for such sentence part of the record." *Grist*, 152 Idaho at 794. "Otherwise," the Court of Appeals acknowledged, "*Pearce*'s holding loses its meaning." *Id.* As such, this issue of vindictive sentencing by the district court is properly presented for the first time on appeal.

The State's assertion that the claim should and could have been presented as a challenge to the prosecutor's request for restitution also fails to appreciate the difference between vindictive sentencing and vindictive prosecution. That distinction is based on the actor whose actions are being challenged: "Unlike the circumstances presented [in previous] cases, however, in the situation here the central figure is not the judge or the jury, but the prosecutor." *Blackledge v. Perry*, 417 U.S. 21, 27 (1974). Thus, vindictive sentencing occurs because "due process also requires that a defendant be freed of apprehension of such a retaliatory motivation *on the part of the sentencing judge*." *Pearce*, 395 U.S. at 725 (emphasis added). Contrarily, in vindictive prosecution claims, it is the prosecutor's charging decisions which are improperly retaliatory. *See Blackledge*, 417 U.S. at 27-28.

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[3] This statement appears to be *dicta*, as the defendant in *Grist* had raised his claim of vindictive sentencing solely under the fundamental error standard, and so, the Court was only analyzing the claim under the fundamental standard. *See Grist*, 152 Idaho at 791-95. However, as it is consistent with the majority rule from other courts, and the *Grist* Court's rationale regarding the propriety of that rule is sound, this Court should continue applying that rationale.

[4] *United States v. Vonsteen*, 950 F.2d 1086, 1094 (5th Cir. 1992).

In this case, Ms. Nelson has raised only a vindictive sentencing claim based on the district court's restitution order. (App. Br., pp.16-22.) An argument against the prosecutor's request for restitution would not have been a sufficient opportunity to challenge the district court's ensuing actions because, by its nature, a claim of vindictive sentencing can only be raised after the district court makes a sentencing decision. Until the district court has made such a decision, there is nothing for the defendant to challenge or argue about. Since the defendant has to wait for the district court to actually render that decision, she will not have a meaningful opportunity to challenge the district court's decision in the hearing preceding that decision. (*See* Tr., p.48, Ls.3-6 (the district court indicating that, once the parties briefed the issue, it would consider the matter fully submitted for its subsequent decision).) This is precisely why the Idaho Supreme Court has held a decision by the district court on an issue will preserve that issue for appeal. *DuValt*, 131 Idaho at 553. Therefore, Ms. Nelson has properly challenged *the district court's* restitution decision for the first time on appeal under the *DuValt* rationale.

Furthermore, the fact that there are other arguments the defendant might have, but did not, raise does not mean that the argument she did raise was improper or incorrect. Thus, the strawman argument the State identified (and responded to by calling it a "disingenuous" representation of the facts (Resp. Br., p.13)) is based on a fundamental misunderstanding of the claim Ms. Nelson actually raised. As such, that strawman argument should be rejected.

Applying the proper analysis, this Court should consider the merits of the issue Ms. Nelson actually raised as preserved error.

b. Alternatively, The Claim Of Vindictive Sentencing In A Restitution Order May Be Raised As Fundamental Error

Even if this Court determines Ms. Nelson's challenge to vindictive sentencing was not sufficiently preserved under *Grist* and *DuValt*, it can still review that decision as fundamental error. *See State v. Perry*, 150 Idaho 209, 226 (2010) (defining the fundamental error test).

As an initial matter, the State asserts that, because restitution is a civil proceeding attendant to the criminal case, Ms. Nelson cannot challenge a restitution order as fundamental error. (Resp. Br., p.13 (citing *State v. Mosqueda*, 150 Idaho 830, 833 (Ct. App. 2010).) The State's reliance on *Mosqueda* is misplaced, and *Mosqueda* is itself revealed to be an improper decision, because restitution has, and continues to be, successfully challenged as fundamental error. *See, e.g., Grist*, 152 Idaho at 791-95 (finding vindictive sentencing constituted fundamental error post-*Perry* and post-*Mosqueda*); *State v. Robbins*, 123 Idaho 527, 530 (1993) (same, pre-*Perry*). Those decisions are proper because, as the United States Supreme Court and the Idaho Court of Appeals have recognized, a civil penalty may actually be so punitive as to rise to the level of criminal punishment. *See, e.g., Hudson v. United States*, 522 U.S. 93 (1997) ("Even in those cases where the legislature 'has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme is so punitive either in purpose or effect, as to transform what was clearly intended as a civil remedy into a criminal penalty.") (internal quotations omitted); *Buell v. Idaho Dep't of Transportation*, 151 Idaho 257, 262 (Ct. App. 2011) (identifying and applying the *Hudson* factors); *State v. McKeeth*, 136 Idaho 619, 622-23 (Ct. App. 2001) (same).

As such, contrary to the State's position, the mere fact that restitution occurs in a civil proceeding does not *ipso facto* mean that it cannot be reviewed as a criminal penalty. Furthermore, the State has not refuted Ms. Nelson's analysis that the restitution order in this case was so punitive that it rises to the level of criminal punishment. (*See* App. Br., pp.9-13; *see generally* Resp. Br.) Thus, as is uncontested by the State, the restitution award under I.C. § 37-2732(k), by the plain language of that statute, establishes a punitive punishment which is subject to vindictive sentencing analysis. (*See* App. Br., pp.9-13.) Thus, such a claim may be raised as fundamental error if it was not adequately preserved below. *See, e.g., Grist*, 152 Idaho at 794; *Robbins*, 123 Idaho at 530.

That also means the decision in *Mosqueda*, upon which the State relies in this regard, is manifestly wrong, since it does not comport with this understanding of the plain language of I.C. § 37-2732(k). *See, e.g. Verska v. Saint Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889, 893 (2011) (holding that, if the plain language of the statute, read as a whole, is clear, the courts are to give effect to the law as written). The State has made no effort to defend the propriety of the *Mosqueda* decision in light of these other decisions, such as the subsequent decision in *Buell* and *Grist*. (*Compare* App. Br., p.13 n.4 (asserting that *Mosqueda* should be overruled or recognized as abrogated based on its inconsistency with these other decisions).) Therefore, in rejecting the State's argument on this point, this Court should also overrule, or at least recognize as abrogated, the decision in *Mosqueda*, as it is manifestly wrong and doing so is necessary to vindicate plain, obvious principles of law set forth by the United States Supreme Court, which have been recognized and adopted by the Idaho courts. *See,*

e.g., Houghland Farms v. Johnson, 119 Idaho 72, 77 (1990) (discussing the standard for overruling precedent).

Since restitution under I.C. § 37-2732(k) is a punitive consequence of the conviction, this means that, if this Court decides this issue must be analyzed under the fundamental error framework, as discussed in depth the Appellant's Brief at page 16, Ms. Nelson has satisfied the three prongs of that test: it constitutes a prejudicial violation of her unwaived constitutional rights clear from the face of the record.

2. The State's Arguments On The Merits Of The Vindictive Sentencing Claim Are Erroneous

a. Since The State Did Not Present New Evidence On Remand, The *Pearce* Presumption Of Vindictiveness Applies In This Case

Even if this Court concludes that Ms. Nelson has not shown vindictiveness on the record, the presumption of vindictiveness, which exists if the same judge imposes a harsher sentence on remand, applies in this case. *See, e.g., Alabama v. Smith*, 490 U.S. 794, 798-99 (1989); *Pearce*, 395 U.S. at 726. As it is a presumption of error, the State bears the burden to prove the presumption inapplicable to the facts of the case. *See Smith*, 490 U.S. at 798-99. To meet that burden, the State must show the harsher sentence is based on new information "affirmatively appear[ing]" in the record before the district court on remand. *See id.* at 800-01; *Pearce*, 395 U.S. at 740.

In that regard, the *Smith* Court held that presumption does not apply after a new trial under the common-sense idea that actually having a trial will inevitably present information that had not been presented during a previous guilty-plea proceeding. *See Smith*, 490 U.S. at 801 (1989) ("[T]he relevant sentencing information available to the

judge after the plea will usually be considerably less than that available after a trial."). Thus, it was because there was sufficient evidence in the record, as a result of the new evidence *actually presented* at the trial, which distinguished *Smith* from *Pearce*. *Id.* at 801-02 ("[W]e think there are enough justifications for a heavier second sentence that it cannot be said to be more likely than not that a judge who imposes one is motivated by vindictiveness."). Nevertheless, the *Smith* Court reaffirmed, "any unexplained change in the sentence is therefore subject to a presumption of vindictiveness." *Id.* at 802.

As such, this is not a matter of Ms. Nelson wanting the Court to enter the same order on remand (*see* Resp. Br., p.16), but rather, it is a demand, supported by United States Supreme Court and Idaho Court of Appeals' precedent, for the State to have met its burden in refuting the *Pearce* presumption by actually presenting new information to justify the district court's enlarged order for restitution on remand. After all, if the higher restitution is upheld without such a showing, the rule from *Pearce* will have no meaning. *Grist*, 152 Idaho at 794.

The language in *Smith* also disproves the State's other argument on this issue – that, solely because the case is remanded with the intent for new information to be presented, *Pearce* will not apply regardless of what actually happens below. (*See* Resp. Br., pp.16-18.) The State reads *Smith* too broadly. The fundamental point in vindictive sentencing cases is that a harsher sentence must be justified by new information actually presented to the district court, such that the "the reasons for [the harsher penalty] must *affirmatively appear*," in the record. *Pearce*, 395 U.S. at 740 (emphasis added); *cf. Smith*, 490 U.S. at 802. Thus, the mere possibility that new information will be presented is insufficient to avoid the *Pearce* presumption; there must

actually be information which the district court did not have the first time around presented on the record.

However, in this case, despite the intent for a more extensive hearing, the prosecutor did not present any new information in support of the request for restitution after the remand. Instead, he presented the same information in a different form. (*Compare* R., p.25; *with* Tr., p.11, Ls.22-23.) In fact, the State concedes the substance of the prosecutor's request on remand was the same, in that "[t]he amount requested was the same." (Resp. Br., p.23.) Despite that concession, the State attempts to cast the prosecutor's repackaged, unsworn request, as "new" information. (*See, e.g.,* Resp. Br., p.23 ("[O]n remand, the state submitted an exhibit reflecting the basis for the state's request (Exhibit 1) . . . ."); Resp. Br., p.18 ("On remand, the only evidence presented was that the rate [of the prosecutor's pay] is $140.00 per hour. (Exhibit 1.)").)

The fact that prosecutor's representation was presented in a written document does not, *ipso facto*, give that representation the same effect as sworn testimony, and thus, does not make it actual evidence. In such cases, where a claim for restitution is not based upon actual evidence, such as *sworn* representations, "the prosecutor's unsupported representations cannot be relied upon as evidence of the existence of a contract [for restitution], even under the low evidentiary standards" that exist in restitution proceedings. *State v. Cheeney*, 144 Idaho 294, 299 (Ct. App. 2007) (rejecting the State's attempt to rely upon the unsworn statement of the purported victim). To that point, in Ms. Nelson's first appeal, the Court of Appeals held the prosecutor's representation was not enough to meet this burden: "The state failed to present *any* evidence supporting the amount requested." *Nelson* 2014 WL 708467, p.3.

Rather, this is an example of the long-recognized distinction between an attorney's arguments and actual, admissible evidence:

> The complaint was countered only by a terse, unverified answer containing a general denial by the debtor's attorney. The answer alleged no facts and contained no statement that the denial was based upon the attorney's personal knowledge of facts in the case. *Unsworn statements are entitled to no probative weight* in passing on motions for summary judgment. Moreover, mere denials unaccompanied by facts admissible in evidence, and affidavits of counsel based upon hearsay rather than upon personal knowledge are insufficient to raise genuine issues of material fact.

Camp v. Jiminez, 107 Idaho 878, 882 (Ct. App. 1984) (emphasis added). Thus, absent the prosecutor actually being sworn to the statement, the statement does not have probative weight, and so, does not constitute evidence in determining whether the State has met its threshold burden of proof. *See id.* The district court specifically noted Exhibit 1 was *not* sworn. (Tr., p.45, Ls.13-14.) Thus, the unsworn statement, despite being submitted as a written exhibit, does not constitute actual evidence.

Furthermore, the prosecutor's statement said, "I reviewed the time log in this case," and represented the time his entire office spent on the case based on the time log. (R., p.25.) Thus, his unsworn statement also is based upon hearsay – what the time log said based on the entries of an untold number of persons – and so, is further revealed to not be proper evidence under *Camp*. *See* I.R.E. 801(c) (defining such statements as hearsay); *Camp*, 107 Idaho at 882 (holding that "affidavits of counsel based upon hearsay rather than upon personal knowledge are insufficient to raise genuine issues of material fact"). This further reveals the State's assertion that the prosecutor's statement was evidence to be erroneous.

In fact, this sort of repackaging of information has been found to be insufficient to meet a similar fundamental burden of proof when the party bearing that burden is required to present new information – motions for leniency pursuant to I.C.R. 35. When making such motions, the defendant must support his request with new or additional information that had not been presented to the district court at sentencing. *State v. Huffman*, 144 Idaho 201, 203 (2007). However, information that was considered at the sentencing hearing and which is simply repackaged and presented in a different manner or under a different guise will not satisfy the *Huffman* standard. For example, "[t]he letters from family and friends [the defendant] submitted in support of her Rule 35 motion cannot be truly considered 'new' as they simply purport to provide additional information as to her mental health, a factor we have already determined adequately considered by the district court at sentencing." *State v. Quintana*, 155 Idaho 124, 133 (Ct. App. 2013). Similarly, "even though not all of this information was specifically mentioned by trial counsel at the sentencing hearing, [the defendant's] motion presented no new information for the district court to consider in reducing her sentences." *State v. Halbesleben*, 147 Idaho 161, 170 (Ct. App. 2009). Thus, just as the repackaged information in *Quintana* and *Halbesleben* was not "new" information under *Huffman*, the State's written request for restitution, which reiterated information it had already presented in regard to its previous request, did not constitute "new" information which would justify avoidance of the *Pearce* presumption.

For all those reasons, even though the prosecutor, as an attorney, is expected to be honest in his representations to the court, his unsworn statement does not constitute *evidence* which would support the claim for restitution. *See Cheeney*, 144 Idaho at 299;

Camp, 107 Idaho at 882; *see also State v. Fernandez*, 124 Idaho 381, 383 n.1 (1993) ("The prosecutor's questioning clearly did not constitute evidence."); *cf.* ICJI 202 (indicating the district court should instruct jurors, as a matter of law, that "[c]ertain things you have heard and seen are not evidence, including arguments and statements by lawyers. Lawyers are not witnesses."). Therefore, the fact that the information was presented in a written document does not make the information therein (the prosecutor's unsworn assertion of loss) any different than his original, oral, and unsworn representation. The State's argument to the contrary only serves to inappropriately exalt form over substance. *Compare, e.g., State v. Jakoski*, 139 Idaho 352, 355 (2003) (quoting *Dionne v. State*, 93 Idaho 235 237 (1969) (reiterating that such arguments are inappropriate because "'[s]ubstance not form governs'").

This same analysis disproves the State's assertion that, because the district court considered the transcript of the previous hearing to try and identify its error, there was new evidence. (*See* Resp. Br., pp.16, 21.) By its very nature, the information from a previous hearing is information that was presented to the district court the first time around. As such, it is not "new" information which could justify an increased sentence, particularly where, as here, the same judge presided over both hearings. (*See* Supp. R., p.244; R., p.24.)

Thus, despite the fact that the State was given the opportunity to present new evidence on remand, which might have justified a larger restitution order, it did not take advantage of that opportunity. Therefore, the district court ordered a more significant amount of restitution based on the same, repackaged information it considered prior to the first appeal. Because no new information affirmatively appears in the record to

justify the district court's harsher restitution order in this case, the *Pearce* presumption still applies. *Smith*, 490 U.S. at 802 ("[A]ny unexplained change in the sentence is therefore subject to a presumption of vindictiveness."); *Pearce*, 395 U.S. at 726 ("[W]e have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear."). As a result, this Court should vacate the restitution order entered in this case based on the presumption of vindictiveness.

b. Ms. Nelson Does Not Need To Prove Malicious Intent On The District Court's Part In Order To Make A Valid Claim Of Actual Vindictive

Even if this Court determines the *Pearce* presumption is not applicable in this case, Ms. Nelson has still shown actual vindictiveness in the district court's actions. To that point, the State erroneously contends that, to make such a claim, Ms. Nelson would need to show the district court acted with malice. (*See* Resp. Br., p.22 (going on to argue that, because the district court took the time to review the record to try and identify its error, its decision on remand was not malicious, and so, did not constitute vindictive sentencing).) However, the question of whether there was "actual vindictiveness" is an objective one: the defendant only needs to show that the district court's actions, viewed objectively, might cause a reasonable person in the defendant's situation to fear that a retaliatory motivation existed, and that apprehension would chill the reasonable person's exercise of a constitutional right. *See, e.g., Blackledge*, 417 U.S. at 28.

Thus, as the United States Supreme Court has made clear: "The question *is not whether the chilling effect is 'incidental' rather than intentional*; the question is whether

the effect is unnecessary and therefore excessive." *Jackson*, 390 U.S. at 582 (emphasis added). Therefore, as was best summarized in *Narin v. State*, 837 So.2d 519, 519 (Fla. Dist. Ct. App. 2003), the term "actual vindictiveness" is a term of art indicating that the record actually shows the decision to be vindictive, rather than the judge acted with malice. (Appellant's Brief, p.18 n.5 (quoting *Narin*'s summary of this point).) The district court's actions in this case, viewed objectively, have the prohibited effect, and therefore, are vindictive even if there was no malicious intent on the part of the district court judge.

Properly applying the objective review standard in this context, the courts look to the totality of the circumstances to determine if the district court's actions were vindictive. *See, e.g., State v. Baker*, 153 Idaho 692, 695 (Ct. App. 2012); *State v. Regester*, 106 Idaho 296, 300 (Ct. App. 1986). Because the State fails to appreciate this proper standard for reviewing a claim of vindictive sentencing, it also fails to appreciate the point Ms. Nelson made as to one of the relevant circumstances, namely the district court's statement, "Whenever I got the [C]ourt of [A]ppeals decision, I looked at it and thought good grief. What was it that I did?" (App. Br., p.19 (quoting Tr., p.40, Ls.12-14).) Ms. Nelson has not argued, as the State believes, that this statement shows the district court was actually malicious, or otherwise proves vindictiveness by itself. (*See* Resp. Br., p.22; *compare* App., Br., p.21 n.21 (acknowledging "[t]he judge's comments alone do not conclusively prove or disprove an assertion of vindictiveness").)

Rather, she has contended, and continues to contend, that statement speaks to one of the relevant factors in the totality the circumstances, specifically, whether the judge imposing the new sentence "ha[s] a stake in the prior conviction or any motivation

to discourage defendants from seeking appellate review." *Blackledge*, 417 U.S. at 27. The district court's statement evidences its desire to make decisions correctly the first time, and thus, reveals its stake in the upholding the validity of its prior decision. *Compare Colton v. Kentucky*, 407 U.S. 104, 116-17 (1972) (explaining that the court has a stake in the prior conviction if, on remand, "the court is asked to do over what it thought it had already done correctly"). Because the district court has an interest in not having its decisions overturned, and so, not have to "do over what it thought it had already done correctly," that fact, viewed objectively, indicates the higher restitution order on remand would discourage such appeals against its orders. As a result, it was "vindictive," even if the district court had no malicious intent. *See Jackson*, 390 U.S. at 582 (holding the important consideration is the effect, intentional or otherwise, of the district court's actions); *compare Colton*, 407 U.S. at 116-17.

In this regard, it is important to remember that the reason such orders are prohibited is that the unconstitutional impact is not limited to the defendant at bar, but extends to other defendants in future cases: "[T]he very threat inherent in the existence of such a punitive policy would, with respect to those still in prison, serve to 'chill the exercise of basic constitutional rights.'" *Pearce*, 395 U.S. at 724 (quoting *Jackson*, 390 U.S. at 581-82). That is all that is necessary to establish a claim of vindictive sentencing, and it is what Ms. Nelson has argued in this case. That argument, which is proper according to several decisions of the United States Supreme Court, is thus, not the "stretch" the State believes it to be. (Resp. Br., p.16.)

Rather, along with the other relevant factors in this case – such as the fact that the same judge continued to preside on this matter after remand, and the fact that the

prosecutor presented the same request for restitution (*i.e.*, no new information) (*see* App. Br., pp.16-19 (discussing these other factors in detail))[5] – the totality of the circumstances shows the district court's decision to order a larger award of credit on remand, viewed objectively, presents a reasonable apprehension that a retaliatory motivation existed in that order, such that the reasonable apprehension would chill the exercise of a constitutional right. Therefore, the district court's order for restitution should be vacated as actually vindictive regardless of whether the district court had actual malice in entering the higher restitution order.

C. The State Has Not Met Its Fundamental Burden To Prove Its Actual Economic Loss Attributable To The Conduct For Which Ms. Nelson Was Convicted, Meaning The Order For Restitution Is Improper

In regard to the arguments on the merits of the district court's decision, it is necessary to step back and return to the basic principles of restitution. Fundamentally, the State bears the burden to prove, by a preponderance of the evidence, that the actual, economic loss for which it is seeking restitution was caused by the conduct for which the defendant was actually convicted. *See, e.g., State v. Nienburg*, 153 Idaho 491, 495-96 (Ct. App. 2012). When the State has the opportunity to present sufficient evidence and fails to meet this burden, the resulting order for restitution should be vacated. *See, e.g., State v. McNeil*, 158 Idaho 280, 286 (Ct. App.2014) (vacating a

[5] The State has not challenged Ms. Nelson's arguments in regard to the fact that the same judge presided over the case on remand. (*See generally* Resp. Br.) Its arguments about whether the prosecutor presented the same information and request for restitution are not persuasive for the reasons discussed in detail in Section B(2)(b), *infra*.

restitution award and not allowing the State another chance to provide sufficient evidence to prove the award).

The State does not contest Ms. Nelson's claim that the order for restitution in this case improperly includes restitution for the time the prosecutor spent addressing the persistent violator charge alleged solely against Ms. Nelson's co-defendant. (Resp. Br., p.25 (arguing only about the appropriate remedy for an error in that regard).) Therefore, regardless of any other arguments, the restitution award in this case should be vacated because it includes restitution for a loss not attributable the conduct for which *Ms. Nelson* was convicted. *See Nienburg*, 153 Idaho at 495-96. Thus, because of that apparent concession of error, the only question is whether the case should be remanded to allow the State a third attempt to meet its burden.

The answer is "no" because, unlike the previous appeal, the State had the opportunity to meet its burden at a hearing, but failed to do so. (*See* App. Br., pp.32-33 (discussing in depth the precedent revealing this to be the proper remedy in such situations).) As discussed in depth in Section B(2)(b), *supra*, the State did not present any new evidence on remand. Rather, it repackaged the unsworn statement it had originally presented. That information has already been determined to be insufficient to meet the State's fundamental burden of proof by the Court of Appeals. *State v. Nelson*, 2014 Unpublished Opinion No.387, 2014 WL 708467, p.4 (Ct. App. 2014), *rev. denied.* Thus, proper application of the law of the case doctrine means that same information cannot be used to satisfy the State's fundamental burden of proof on remand. At any rate, there were two other reasons the information is not sufficient to meet the State's burden to prove its loss: the information in the prosecutor's unsworn, written statement

was inaccurate; and, it improperly included time attributable to charges (injury to a child) for which Ms. Nelson was not convicted, and on one charge, actually acquitted. In fact, restitution for that time was not authorized by the statute even if Ms. Nelson had been convicted on those charges. The State's arguments on each of those points is not persuasive.

Therefore since each of those reasons independently demonstrates why the State has failed to carry its fundamental burden at the restitution hearing, this Court should just vacate the restitution award and not remand to allow the State a third bite at the apple.

1. Proper Application Of The Law Of The Case Doctrine Means The Repackaged Unsworn Statement Upon Which The State Solely Relied Below Is Not Sufficient To Support The Restitution Award

The State does not contest Ms. Nelson's argument that, if the restitution order below were based on the same information the Court of Appeals found insufficient on the first appeal, the order would violate the law of the case doctrine. (*See* App. Br., pp.23-24; *see generally* Resp. Br., pp.20-26.) Rather, it tries to argue that the information presented on remand was not the same as the information presented prior to the first appeal because it presented its request in a written document.[6] (R., p.23.) However, as discussed in depth in Section B(2)(b), *supra*, the written statement did not

[6] The prosecutor did argue below that the document presented in Exhibit 1 had been part of the original presentence materials (PSI), and had been ignored in the initial appeal. (R., p.27 n.4.) However, that document is not in the PSI included in in the original record (of which, this Court took judicial notice in this appeal) nor is it in the addendum to that PSI included with the record in this appeal. (*See generally* PSI; Supp. PSI.) Thus, it appears the prosecutor is mistaken about whether Exhibit 1 was actually part of the PSI.

constitute new information; it simply repackaged the information that the State presented the first time around. And even if Exhibit 1 contained new information, it still failed to provide sufficient evidence to meet the State's fundamental burden of proof for the reason stated in the Court of Appeals' prior decision in this case. *See Nelson*, 2014 WL 708467, at p.3.

True, as the State points out, the Court of Appeals held in *State v. Weaver* that the prosecutor's certified statement was sufficient to support a restitution award. (*See* Resp. Br., pp.20-26 (citing *State v. Weaver*, 158 Idaho 167, 170-71 (Ct. App. 2014)).) However, the *Weaver* Court explained the reason the statement was sufficient in that case was it provided an actual accounting of the time the prosecutor spent working on that case: "The accounting parsed the prosecutor's time amongst eleven listed tasks accompanied by a brief description of each task and, in many cases, a date on which the task occurred." *Weaver*, 158 Idaho at 170-71. In addition, each task was accompanied by an indication of how many tenths of an hour were spent on the task. *Id.* at 170.

Exhibit 1 does not contain those same specific accountings as it does not identify the separate tasks performed, the date on which they were performed, or the specific amount of time each task took. (*See generally* R., p.25.) Therefore, this case is distinguishable from *Weaver*, and Exhibit 1 is not sufficient to support the request for restitution. As such, the information the State presented below was not sufficient to meet the prosecutor's burden of proof, if it was properly considered at all. Either way, this Court should vacate the restitution pursuant to the law of the case doctrine and consistent with the Court of Appeals' previous decision in this case.

2. Since The Information In Exhibit 1 Was Not Accurate, It Is Not Sufficient To Meet The State's Fundamental Burden Of Proof And Support The Restitution Order In This Case

Since the State bears the ultimate burden of proof, the information it submits must actually be sufficient to carry that burden. Obviously, if the information it presents is inaccurate, it will not be sufficient to meet that fundamental burden. In this case, the only information the State presented in support of the restitution request was the prosecutor's unsworn written statement of the time spent on this case and his rate of pay.

Ms. Nelson challenged the reliability of that information below, pointing out that, if it were reviewed mathematically, it would incorrectly mean the prosecutor's annual salary was nearly $300,000. (R., p.33.) The district court rejected that challenge because Ms. Nelson had not presented evidence proving the prosecutor's assertion wrong. (R., p.40.) Ms. Nelson contends this improperly shifted the burden of proof. (App. Br., pp.26-27.) The State responds, contending the district court acted appropriately by requiring Ms. Nelson to have presented evidence to contradict the prosecutor's unsworn representation. (Resp. Br., pp.24-25.) The State fails to appreciate two aspects of challenges to the reliability of evidence which demonstrate its position is erroneous.

First, it is directly contrary to Court of Appeals' precedent. As the Court of Appeals has explained, "[t]here is a distinction between a foundational challenge to the admission of unreliable evidence and an argument that the evidence which has been admitted is insufficiently reliable to prove a certain proposition." *State v. Yeoumans*, 144 Idaho 871, 873 (Ct. App. 2007). While the former challenge must be preserved by

a sufficient challenge below, the latter, as a "challenge to the sufficiency of the evidence to meet a party's burden of proof requires no specific action or argument below." *Id.* The effect of that rule can be seen in *State v. Smith*, 144 Idaho 687, 695 (Ct. App. 2007), where the victim's affidavit claimed that the defendant had stolen various items. *Id.* The defendant argued that, absent an invoice or some other evidence tying those items to the defendant, the State had failed to carry its burden to prove its claim for restitution for those items. *Id.* The defendant did not present any evidence tending to disprove the victim's affidavit. *See generally id.* Nevertheless, the Court of Appeals agreed with the defendant and reversed the restitution award for those items. *Id.*

Thus, a defendant may successfully challenge the reliability of the State's evidence in regard to whether it satisfies the fundamental burden of proof in the restitution context simply by asserting the State's evidence is insufficient; she does not need to affirmatively disprove the State's claim for that restitution. *See Yeomans*, 144 Idaho at 873; *Smith*, 144 Idaho at 695. Therefore, even though Ms. Nelson did not present evidence to prove the prosecutor's actual rate of pay, her argument that the State had failed to carry its burden to accurately prove the prosecutor's rate of pay was sufficient to challenge the reliability of the State's evidence. Thus, the State's argument, like the district court's decision before it, improperly flipped the burden of proof. (*See* App. Br., pp.26-27.)

Besides, the State's assertion in that regard is actually inaccurate; there was information in the documents considered by the district court – notably the transcripts of the prior discussion on restitution – which disproved the prosecutor's request. At the first hearing, the district court found, as a matter of fact, that "the loaded benefit rate of

an Ada County Prosecuting Attorney would come out at about $65 an hour."[7] (Tr., p.29, Ls.6-9.) That information in the record before the district court supported Ms. Nelson's contention that the claimed rate of pay – $140 an hour – was inaccurate. Therefore, there was information supporting Ms. Nelson's *prima facie* challenge to the reliability of the prosecutor's statement. That information, as well as Ms. Nelson's mathematical challenge, tended to show the prosecutor's request for $140 per hour was artificially inflated. Thus, the prosecutor, who bore the fundamental burden of proof to show the State was entitled to the credit it was claiming, bore the burden to present actual evidence in support of his claim for $140 per hour in this case. Since he did not, nor has the State tried to justify that claim on appeal (*see generally* Resp. Br.), the restitution award based on that claim should be vacated and the State should not be afforded a third opportunity to try and prove it on remand.

This is particularly true because Ms. Nelson confirmed the validity of her challenge to the $140-an-hour claim on appeal. *Compare Yeoumans*, 144 Idaho at 873 (holding that challenges to the sufficiency of the State's restitution evidence may be articulated on appeal without a challenge below). According to websites which actually track the relevant information, the prosecutor's claimed rate of pay was artificially inflated, as the prosecutor's claim of $140 per hour was five times higher than his actual rate of pay of $28 per hour. (*See* App. Br., p.25 (discussing this information in detail).)

[7] Ms. Nelson does not concede the district court's finding of $65 per hour was an accurate finding, since, as discussed *infra*, the prosecutor's actual rate of pay (*i.e.*, his regular salary) was only $28 per hour. (*See also* App. Br., pp.21-22.) However, the fact that the district court initially considered $65 an hour to be the accurate rate of pay is still information tending to disprove the prosecutor's request for a pay rate of $140 an hour.

Therefore, Ms. Nelson has at least made a sufficient challenge to the reliability of the prosecutor's statement on appeal, and that challenge is properly reviewed on its merits. *Yeoumans*, 144 Idaho at 873. The State has made no argument or presented any evidence contradicting the information identified on appeal. (*See generally* Resp. Br.) Thus, remembering that the State continues to bear the fundamental burden of proof in the restitution context, the restitution award based on that unreliable information regarding the prosecutor's rate of pay should be vacated.

3. Since Exhibit 1 Includes Requests For Restitution For Time Spent Prosecuting Other Charges For Which Ms. Nelson Was Not Convicted, And Which Would Not Fall Under The Scope Of I.C. § 37-2732(k) Even If She Had Been, The Restitution Award Based On Exhibit 1 Is Erroneous

The decision in *Weaver* belies the last of the State's arguments on appeal. The State attempted to refute Ms. Nelson's claim – that the restitution award was erroneous because it included time spent on the charges of injury to child for which Ms. Nelson was never convicted (App. Br., pp.28-30) – by arguing that requiring such an accounting is "unrealistic." (Resp. Br., p.25.) However, in *Weaver*, the Court of Appeals stated that is precisely the sort of accounting a defendant can expect in a restitution proceeding. *Weaver*, 158 Idaho at 170-71 ("The state's certified accounting of the time it spent prosecuting the case, even if only an estimate, constitutes substantial evidence . . . . *There is little more that Weaver could reasonably expect* as evidence in these circumstances.") (emphasis added). Therefore, the State's argument is contrary to precedent.

Furthermore, that sort of accounting is actually required by the plain language of I.C. § 37-2732(k) because that statute only authorizes restitution for convictions

resulting "under this chapter" (dealing specifically with controlled substances) and certain other, expressly-identified code sections. The injury to child charges alleged in this case do not fall under any of those code sections for which I.C. § 37-2732(k) authorizes restitution. (*See* Supp. R., pp.8-10, 34-35 (identifying the code sections relevant to the injury to child charges).) Since "[i]t is generally recognized that courts of criminal jurisdiction have no power or authority to direct reparations or restitution to a crime victim in the absence of a statutory provision to such effect," restitution for the time the prosecutor spent on the injury to child charges is improper. *State v. Richmond*, 137 Idaho 35, 38 (Ct. App. 2002). Thus, restitution for the prosecutor's time spent only on the injury to child charges was not authorized under the plain language of the statute, even if Ms. Nelson had been convicted of those charges. As the Court of Appeals has aptly summarized in this regard, "when a defendant has been charged with multiple crimes and pleads guilty to part of the charges in exchange for dismissal of the remainder, restitution is not ordinarily awardable for loss or injury actually and proximately caused only by the offenses for which the charges were dismissed." *Nienburg*, 153 Idaho at 495-96

For the State to suggest that the courts should ignore the scope of the relevant statutory authority just because it believes it is "unrealistic" for prosecutors to provide an accurate accounting of the time they spent prosecuting the offenses specifically identified in I.C. § 37-2732(k) is wholly improper. *See Verska*, 151 Idaho 893, 896 (holding where the statutory language is unambiguous, the courts give effect to the plain language regardless of potential absurdity of doing so). Thus, defendants can properly demand accurate accountings of time spent on these cases, particularly where

I.C. § 37-2732(k) only authorizes restitution for the time spent prosecuting some of the charges. *See Weaver*, 158 Idaho at 170-71; *Nienburg*, 153 Idaho at 495-96. Since the restitution award in this case demonstrably includes the time the prosecutor spent on the injury to child charges (*see* App. Br., pp.28-30), time for which restitution is not statutorily-authorized, the State failed to meet its fundamental burden of proof regarding its request for restitution. Therefore, the order for that restitution should still be vacated.

Since the State has already had two opportunities to meet its burden of proof and has failed both times, this Court should not remand to give it a third bite at the apple. (*See* App. Br., pp.32-33 (discussing in depth the precedent revealing this to be the proper remedy in cases such as this).)

CONCLUSION

Ms. Nelson respectfully requests that this Court vacate the order of restitution in this case.

DATED this 19th day of November, 2015.

BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 19th day of November, 2015, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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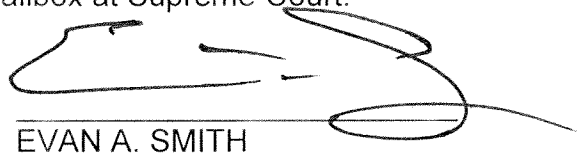

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